

**THE SUPERIOR COURT OF JUSTICE**

BETWEEN:

**DIANE BISIGNANO**

Plaintiff

- and -

**LA CORPORATION INSTRUMENTARIUM INC.**

Defendant

Proceeding under the *Class Proceedings Act*, 1992

No. C954740  
**VANCOUVER REGISTRY**

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**BONITA JEAN SAWATZKY**

Plaintiffs

- and -

**SOCIETE CHIRURGICALE INSTRUMENTARIUM INC.  
INSTRUMENTARIUM SURGICAL CORP. INC.,  
177046 CANADA INC.,  
GESTION MICHELLE LAFERRIERE INC.,  
1041402 ONTARIO INC. and  
LA CORPORATION INSTRUMENTARIUM INC.  
INSTRUMENTARIUM CORP. INC.**

Defendants

Brought under the Class Proceedings Act

CANADA

SUPERIOR COURT  
(Class Action)

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PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

No: 500-06000019-964

CARLA LUTHER, resident and domiciled  
at 5563 Ashdale, Cote St.-Luc (Quebec)  
H4W 3A1

Petitioner

-vs-

LA CORPORATION INSTRUMENTARIUM INC,  
a legally incorporated body having its head  
office at 273 St.-Louis Street, Terrebonne  
(Quebec), district of Terrebonne

Respondent

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## SETTLEMENT AGREEMENT

### In re Distribution of Vitek TMJ Implants

**WHEREAS** Diane Bisignano, Bonita Jean Sawatzky, and Carla Luther, in their capacity as class representatives of their respective Settlement Classes in Ontario, British Columbia and Quebec (the "Plaintiffs"), and the Defendant, La Corporation Instrumentarium Inc. (the "Defendant") (collectively, "the Parties"), hereby enter into this Settlement Agreement (the "Agreement") providing for settlement of the Vitek TMJ Implant Actions described below, pursuant to the terms and conditions set forth below, subject to the approval of the Courts:

WHEREAS a class action has been certified against the Defendant in Ontario by Diane Bisignano on behalf of a group defined in the Ontario class action as:

- (A) All persons implanted in the Province of Ontario with one or more Vitek TMJ Implants distributed by the Defendant; and/or
- (B) All persons implanted with one or more Vitek TMJ Implants distributed by the Defendant, and who were residents in the Province of Ontario at any time up to or at the date of the certification of the Ontario class action; and/or
- (C) All persons who have or may have a claim against the Defendant pursuant to the *Family Law Act*, R.S.O. 1990, c. F 3.;

and in British Columbia by Bonita Jean Sawatzky on behalf of the following groups as defined in the British Columbia class action:

- (A) All persons implanted with one or more Vitek Temporomandibular Joint (TMJ) implants distributed by the Defendant, and who are resident in British Columbia at the date of the certification of this action who do not opt out of the B.C. class action within 60 days of notice of that class action; and/or
- (B) Any person with one or more Vitek TMJ implant distributed by the Defendant, who is resident outside British Columbia and opts into the B.C. class action within 90 days of the date of notice of that class action; and/or
- (C) All persons who have an independent or derivative claim against the Defendant, based on a relationship to an implant recipient class member described above, which implant recipient class member is resident in British Columbia and does not opt out of the B.C. class action within 60 days of the date of notice of that class action certification or, if not resident in British Columbia, is eligible and opts into the proceeding within 90 days of notice of that class action. The proper law to be applied to the

independent or derivative claims herein shall be the applicable law of the province where the Vitek implant was implanted;

and in Quebec by Carla Luther on behalf of a group defined in the Quebec class action as:

- (A) All persons with one or more Vitek Temporomandibular Joint (TMJ) Implants distributed by the Defendant, with the exception of those persons who are members of the Ontario Class or the British Columbia Class; and
- (B) All persons who have an independent or derivative claim against the Defendant, based on a relationship to an implant recipient class member described in paragraph A. The proper law to be applied to the independent or derivative claims herein shall be the applicable law of the province where the Vitek implant was implanted.

WHEREAS Class Counsel in Ontario, namely the firm of Siskind, Cromarty, Ivey & Dowler, Class Counsel in British Columbia, namely the firms of Klein, Lyons and Docken & Company, and Class Counsel in Quebec, namely the firm of Lauzon Belanger, have conducted extensive settlement negotiations with the Defendant and its Ontario counsel, namely the law firm of Cassels Brock & Blackwell, its British Columbia counsel, namely the law firm of Guild, Yule, Sullivan, Yule, Truscott & Slivinski, and its Quebec counsel, namely the law firm of Desmarais, Picard, Garceau & Pasquin;

WHEREAS the Defendant, notwithstanding its consent to this Agreement, has denied and continues to deny Plaintiffs' claims in these actions, has denied, and continues to deny any wrongdoing or liability of any kind and anywhere to Plaintiffs or members of the class actions, aforesaid (the "Settlement Class Members") they seek to represent, and has raised and will continue to raise numerous affirmative defences;

WHEREAS based upon an analysis of the facts and the law applicable to claims of the Settlement Class Members, taking into account the extensive burdens and expense of litigation, including the risks and uncertainties associated with protracted

trials and appeals, as well as the fair, cost effective and assured method of resolving claims of the Settlement Class Members provided in this Agreement and having diligently scrutinized the potential assets of the Defendant, including insurance proceeds, Plaintiffs and Plaintiffs' Counsel have concluded that, in the context of limited assets available from the Defendant, which the Parties recognize will not provide full compensation to the Settlement Class Members, this Agreement provides substantial benefits to the Settlement Class Members and is fair, reasonable, adequate and in their best interests;

WHEREAS the Defendant has similarly concluded that this Agreement is desirable in order to avoid the time, risk and expense of defending multiple and protracted litigation, and to resolve finally and completely the pending and potential claims related to its distribution of Vitek TMJ implants;

WHEREAS the Defendant intends by this Agreement to resolve all of the present and future claims against it for or relating in any way to its distribution of Vitek TMJ Implants;

WHEREAS the Defendant requires all class and individual actions and proceedings brought against it, including third party proceedings, to be resolved as a condition of any settlement of these class proceedings;

WHEREAS this Agreement includes documents to be submitted to the Courts for approval;

NOW THEREFORE, subject to the approval of the Courts of Ontario, British Columbia, and Quebec, this Agreement embodies the terms of the resolution of the three Class Actions brought against the Defendant in the provinces of Ontario, British Columbia, and Quebec, including all present and any potential and any future claims against the Defendant and Released Parties, relating to the implants defined in this Agreement:

1. **Definitions**

Unless the specific context of a particular section of this Agreement calls for another interpretation, the following terms, as used in this Agreement and its Exhibits, shall have the meanings set forth below. Terms used in the singular shall be deemed to include the plural, and vice versa. Feminine pronouns and female references shall be deemed to include the masculine, and vice versa, where appropriate:

(a) **"Agreement"** means this agreement, including any appendices hereto, except as modified by further written agreement among the Parties;

(b) **"British Columbia Class"** shall mean all persons implanted with one or more Vitek Temporomandibular Joint (TMJ) implants distributed by the Defendant, and who reside in British Columbia at the date of the certification of the Class Action, and any person with one or more Vitek TMJ implants distributed by the Defendant, who is resident outside British Columbia and opts into the British Columbia Class Action, and all persons who have an independent or derivative claim against the Defendant, based on a relationship to an implant recipient Class Member in the British Columbia Class Action with the proper law to be applied to the independent or derivative claims herein being the applicable law of the province where the Vitek implant was implanted;

(c) **"Claimants"** include the Plaintiffs and shall mean all Settlement Class Members who are recipients of Vitek TMJ Implants distributed by the Defendant or who are entitled to assert claims pursuant to the *Family Law Act*, R.S.O. 1990, c. F 3. under the Ontario Class, or who are entitled to assert independent or derivative claims under the Quebec or British Columbia Classes and who take those steps required under this Agreement to participate in the Settlement. The word "Claimants" includes a Claimant's personal representative or a Claimant's estate;

(d) **"Claims Administrator"** shall mean the person or persons appointed by the Courts as provided in Section 11 of this Agreement;

(e) **"Class"** and **"Classes"** means the Ontario, British Columbia and Quebec classes as defined herein;

(f) **"Class Actions"** shall mean the Motions and the class action proceedings certified in Ontario in the Superior Court of Justice in *Diane Bisignano v. La Corporation Instrumentarium Inc.* (File No. 22404/95), in British Columbia in the Supreme Court of British Columbia in *Bonita Jean Sawatzky v. La Corporation Instrumentarium Inc.*, (File No. C954740), and in Quebec in the Quebec Superior Court in *Carla Luther v. La Corporation Instrumentarium Inc.*, (File No. 500-06000019-964);

(g) **"Class Counsel"** shall mean: for all matters relevant to the Ontario Class the law firm of Siskind, Cromarty, Ivey & Dowler in London, Ontario; for all matters relevant to the British Columbia Classes the law firms of Klein, Lyons and Docken & Company; and for all matters relevant to the Quebec Class the law firm of Lauzon, Belanger, all of whom act on behalf of Plaintiffs and who conducted negotiations with the Defendant and Defendant's Counsel and who shall continue acting on behalf of Plaintiffs and who conducted negotiations with respect to all acts or consents pursuant to this Agreement;

(h) **"Courts"** shall mean the Ontario, British Columbia, and Quebec Courts that have jurisdiction over the Class Actions, namely:

In Ontario:	the Superior Court of Justice and the Honourable Mr. Justice Winkler, or his successor;
In British Columbia:	the Supreme Court of British Columbia and the Honourable Mr. Justice Brenner, or his successor;
In Quebec:	the Quebec Superior Court and the Honourable Mr. Justice Maughan, or his successor;

(i) **"Court Approval Date"** means the latest of the dates on which the order of the Superior Court of Justice, the Supreme Court of British Columbia, and the Quebec Superior Court approving the Agreement becomes final. For purposes of the

Agreement, an order becomes final when the time for appealing or seeking leave to appeal the order has expired without an appeal being taken or leave to appeal being sought or, in the event an appeal is taken or leave to appeal is sought, when such appeal or leave to appeal and such further appeals as may be taken have been disposed of and the time for further appeal, if any, has expired;

(j) **"Defendant"** shall mean La Corporation Instrumentarium Inc., a corporate body incorporated pursuant to the laws of the Province of Quebec, with its head office at 1273 Rue St. Louis, Terrebonne, Quebec;

(k) **"Defendant's Counsel"** shall mean: for all matters relevant to the Ontario Class the law firm of Cassels, Brock & Blackwell in Toronto, Ontario; for all matters relevant to the British Columbia Classes the law firm of Guild, Yule, Sullivan, Yule, Truscott & Slivinski; and for all matters relevant to the Quebec Class the law firm of Desmarais, Picard, Garceau & Pasquin, all of whom act on behalf of the Defendant and who conducted negotiations with Class Counsel with respect to all acts or consents pursuant to this Agreement;

(l) **"Designated Injuries"** shall mean such injuries as set forth in paragraph 5.1.1 to 5.1.5 of this Agreement;

(m) **"Eligible Claimant"** shall mean a Claimant whose claim is approved for payment by the Claims Administrator;

(n) **"Eligible Claim"** shall mean those claims recognized in this Agreement as claims for which payment may be approved by the Claims Administrator;

(o) **"Implant"** refers to any implant intended to be inserted in the Temporomandibular Joint (TMJ), which is a Proplast implant or Teflon coated implant and was manufactured by Vitek, Inc., and distributed in Canada by or for the Defendant;

(p) **"Ontario Class"** shall mean all persons implanted in the Province of Ontario with one or more Vitek TMJ Implants distributed by the Defendant, and all persons implanted with one or more Vitek TMJ Implants distributed by the Defendant, and who were resident in the Province of Ontario at any time up to or at the date of the certification of the Ontario Class Action, and all persons who have or may have a claim against the Defendant pursuant to the *Family Law Act*, R.S.O. 1990, c. F 3.;

(q) **"Quebec Class"** shall mean all persons implanted with one or more Vitek TMJ Implants distributed by the Defendant, with the exception of those persons who are members of the Ontario or British Columbia Classes, and all persons who have an independent or derivative claim against the Defendant, Instrumentarium, based on a relationship to such implant recipient Class Member with the proper law to be applied to the independent or derivative claims being the applicable law of the province where the Vitek implant was implanted;

(r) **"Released Parties"** shall mean La Corporation Instrumentarium Inc., Gestion Michelle Laferriere Inc., 177046 Canada Inc., 1041402 Ontario Inc., Societe Chirurgicale Instrumentarium Inc., Instrumentarium Surgical Corp. Inc., Instrumentarium Corp. Inc., and the Guardian Insurance Company of Canada and all of their parent, affiliated or related corporations and all of their respective administrators, successors, assigns, servants, agents, employees, officers, and directors;

(s) **"Settlement"** shall mean this Agreement, if approved by the Courts;

(t) **"Settlement Amount"** shall mean all monies payable by the Defendant under this Agreement;

(u) **"Settlement Class"** or **"Settlement Class Member"** shall mean all persons in the Ontario Class of the British Columbia Class or the Quebec Class, except those persons who have exercised their right to opt out under the terms of this Agreement.

**2. Waiver of Limitation Defences**

2.1 Only for the purpose of making a claim under this Agreement, no Settlement Class Member shall be considered ineligible to receive any compensation set forth in this Agreement on the basis of any statute of limitation, prescription period or any other limitation or prescription defence.

2.2 Nothing in this Agreement shall constitute a waiver by the Defendant or Released Parties of defences based on statutes of limitations or repose, prescription periods or any other limitation or prescription defence with respect to any member of the Ontario, British Columbia or Quebec classes who opts out of this Settlement.

**3. Entitlement to Compensation**

Claimants who are implant recipients shall only be entitled to receive compensation in accordance with the provisions set out in Section 5.1 of this Agreement.

**4. Payment Schedule and Related Issues**

The Settlement Amount is \$9.385 million dollars, inclusive of prejudgment interest, party and party costs and costs of administration of the settlement. The Settlement Amount was paid into a interest bearing trust account on or about October 30, 1998, and is controlled jointly by the law firms of Siskind, Cromarty, Ivey & Dowler and Cassels Brock & Blackwell. The Settlement Amount, together with any accrued interest for the benefit of the Class Settlement, shall be payable following the hearing of any appeals of the approval of the settlement if any, or following the expiry of the time to appeal, whichever is later. The Settlement Amount shall be made payable to the Claims Administrator "in trust" for all claimants herein and shall be maintained in an interest bearing account or instrument in a Canadian chartered bank pending payment

to Eligible Claimants. The Settlement amount shall be administered by the Claims Administrator under the supervision of the Courts.

## **5. Settlement Fund**

The Settlement Fund shall consist of \$8.385 million dollars plus interest accrued thereon from October 30, 1998. Settlements shall be paid in accordance with the provisions of section 5.1 of this Agreement to Eligible Claimants in as expeditious and efficient a manner as possible in order to minimize transactional costs and maximize the payments to Eligible Claimants. *Family Law Act*, Independent or Derivative claimants who are entitled to assert a claim against the Defendant, Instrumentarium, based on a relationship to an implant recipient Class Member, shall not be eligible to assert claims against the Settlement Fund in the context of this limited fund settlement.

### **5.1.1 Settlement Fund Allocation - Implant Recipients**

The Settlement Fund shall be allocated based on a Point System, which is intended to reflect, as closely as possible, the relative merit and extent of each Eligible Claimant's potential tort claim. The Settlement Fund shall be distributed in relation to the points allocated to each Eligible Claimant following the appeal or expiration of appeal period for each Eligible Claimant as set out in Section 12 herein.

Points will be allocated for

1. Number of TMJ Surgeries and Type
2. Age at Implantation and Current Age
3. Documented Bone Resorption
4. Documented Granuloma

### **5.1.2. Number of TMJ Surgeries and Type**

Points will be allocated for each surgery beginning with the Claimant's first Vitek TMJ Implant that was distributed by the Defendant. One surgery is defined as a single

medical procedure to either the right or left Temporomandibular Joint. Bilateral TMJ surgery will qualify as two surgeries.

<u>Type of Surgery</u>	<u>Points</u>
Total or partial TMJ replacement	1
Meniscus replacement	1.5
Rib graft or similar invasive procedures	2

A maximum of 35 points will be allowed for number/type of surgeries

### 5.1.3. Age at Implantation

Points will be allocated based on the current age of the implant recipient under Section A and based on the age at the time of insertion of the first Vitek TMJ Implant distributed by the Defendant in the implant recipient under Section B.

(A)	<u>Age</u>	<u>Points</u>
	Under 25	12
	25-34 Years	10
	35-44 Years	8
	45-54 Years	6
	55-64 Years	4
	65 or older	2

(B)	<u>Age</u>	<u>Points</u>
	Under 25	12
	25-34 Years	10
	35-44 Years	8
	45-54 Years	6
	55-64 Years	4
	65 or older	2

#### **5.1.4. Documented Bone Resorption**

Implant recipients with documented bone resorption in or around the Temporomandibular Joint as a result of Proplast from a Vitek TMJ Implant distributed by the Defendant will receive 15 points. Documentation must be shown through medical records, x-rays, tomograms or MRI's with appropriate radiographic report from a radiologist. Documented resorption of the glenoid fossa resulting in entry into the cranial cavity will receive the maximum of 25 points for bone resorption.

#### **5.1.5. Granuloma**

Granuloma or foreign body reaction as a result of Proplast from a Vitek TMJ Implant distributed by the Defendant in the Temporomandibular Joint and surrounding area will receive 10 points. Documentation must be shown through medical records, including but not limited to pathology reports, x-rays, tomograms or MRI's.

### **6. Reserve Fund**

A Reserve Fund shall be established in order to provide subsequent, but not preferential, payments to plaintiffs who would otherwise be entitled to assert a claim in accordance with the provisions of this Settlement Agreement and who institute judicial proceedings against the Defendant relating to the implantation of Vitek TMJ Implants. Such plaintiffs may only make a claim against the Reserve Fund to the extent that such plaintiffs would be entitled to obtain monies pursuant to the terms and conditions of Section 5 of the Settlement Agreement herein, but may not assert claims in excess of such amount. In the event there are insufficient funds remaining in the Reserve Fund at the time of making such claim, the Reserve Fund shall be allocated amongst the competing plaintiffs on a pro rata basis. Where a plaintiff has opted out of this Settlement Agreement and subsequently asserts a claim against the Reserve Fund, or where a plaintiff has otherwise been unable to assert a claim against the Settlement Fund and determines and is subsequently able to assert a claim against the Reserve

Fund, such plaintiff, as a precondition to accepting monies from the Reserve Fund, shall be deemed to have released and forever discharged La Corporation Instrumentarium Inc., Gestion Michelle Laferriere Inc., 177046 Canada Inc., 1041402 Ontario Inc., Societe Chirurgicale Instrumentarium Inc., Instrumentarium Surgical Corp. Inc. Instrumentarium Corp. Inc., and the Guardian Insurance Company of Canada and all of their parent, affiliated or related corporations (the "Releasees") and all of their respective administrators, successors, assigns, servants, agents, employees, officers, and directors (as the case may be) and from any and all manner of actions, causes of action, suits, debts, contracts, claims, demands, damages, sums of money, dues, liabilities, expenses, fees and costs, which such plaintiff ever had, now has, or which may later appear or accrue, for any losses, injuries, or damages, cause, matter or thing whatsoever, whether at law or in equity, or under any statute, whether anticipated or unanticipated, resulting from, arising out of, or connected directly or indirectly with the distribution and insertion of a Vitek Proplast TMJ implant, including all claims for general, special, exemplary, punitive, aggravated, consequential damage and costs, interest and additional indemnity.

The Reserve Fund shall initially be in the amount of \$1 million dollars, plus interest accrued thereon from October 30, 1998. In the event that more than ten Claimants opt out of the Settlement in a timely fashion, the Defendant may bring a motion to the Ontario Court to transfer up to \$100,000.00 per additional opt out from the Settlement Fund to the Reserve Fund. The Defendant shall bring such motion within 60 days of the Defendant's receipt of the Claims Administrator's report concerning opt outs from the Class Proceedings. Class Counsel shall not unreasonably withhold their consent to such a motion.

The Reserve Fund shall be maintained for a period of three years from the Court Approval Date, at which point, subject to any prior order of the Court in the Province of Ontario, the sum of \$500,000.00, plus any additional funds which were transferred pursuant to this section, plus interest accrued thereon, less any payments which may otherwise have been made out of the Reserve Fund, shall be transferred to the

Settlement Fund for distribution to Eligible Claimants. The remaining sum of \$500,000.00, plus interest accrued thereon shall be maintained in the Reserve Fund for a further period of three years at which time, subject to any payments which may otherwise have to be made out of the Reserve Fund, the balance of the remaining Reserve Fund shall be transferred to the Settlement Fund for distribution to Eligible Claimants.

**7. Power to Transfer**

The Ontario Court will retain ongoing jurisdiction and authority, on consent of Settlement Class Counsel in other jurisdictions, upon motion of Settlement Class Counsel or the Claims Administrator, to transfer amounts between the Reserve Fund and the Settlement Fund depending upon the actual costs of administering this Settlement.

**8. Appointment of Claims Administrator/Establishment of Claims Facility**

8.1 Class Counsel and the Defendant will propose a Claims Administration Facility and a Claims Administrator or Claims Administrators to be appointed by the Courts for the purpose of processing and classifying the Claim Forms, and paying Eligible Claims as provided in this Agreement and under the authority of the Courts. The Claims Administrator shall prepare and submit to the Courts, for approval, budgets for the organization and operation of the Claims Facility.

8.2 The Claims Administrator and any Claims Officer appointed by the Claims Administrator to assist in the processing of claims must sign a confidentiality statement by which they shall keep confidential any information concerning Settlement Class Members, and shall institute procedures to ensure that the identity of all Settlement Class Members, and all information regarding their claims, will be kept confidential and not be provided to any person except as may otherwise be provided in this Agreement.

**8.3** The fees of the Claims Administrator shall be paid from the Settlement Fund in accordance with such accounts and in such amounts as may be approved by the Ontario Court from time to time. Upon the exhaustion of the Settlement Fund the fees of the Claims Administrator shall be paid from the Reserve Fund in accordance with such accounts and in such amounts as may be approved by the Ontario Court from time to time.

**8.4** The Claims Facility, the Claims Administrator and any Claims Officer shall be subject to removal by the Ontario Court.

**9. Procedures and Deadlines for Exclusion, Registration and Claims**

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**9.1 Procedures and Deadlines for Claims**

In order to make a claim from the Settlement, a Claimant must mail to the Claims Administrator, postmarked no later than four months after receipt of Notice advising Class Members of the Courts' approval of this Agreement or such other time period as may be approved by the Courts, a completed and executed copy of the Individual Claim Form (Exhibit "A") together with the Supporting Documents specified in Section 9.3 of this Agreement. Claimants who do not submit these documents within the time period specified in this section shall, subject to the discretion of the Courts, forever forfeit their rights to make a claim from the Settlement, and will be precluded from ever bringing an action against the Defendant and anyone to whom a release is provided, unless they have previously excluded themselves from this Settlement in accordance with Section 15.1.

**9.2 Claim Form**

Subject to the approval of the Courts, the Claim Form shall be in the form attached hereto as Exhibit "A".

(i) Information Requirements

Subject to the approval of the Courts, the Individual Claim Form shall be in the form attached hereto as Exhibit "A". The Individual Claim Form shall be accompanied by Product Identification documentation sufficient to establish that the Settlement Class Member received a Vitek TMJ implant distributed by the Defendant, as provided in Section 9.1 (ii).

(ii) Product Identification Requirements

Whether or not a particular claimant can prove that his or her implant was distributed by the Defendant, Product Identification documentation shall be deemed sufficient to establish that the Settlement Class Member's TMJ implant is a Vitek TMJ Implant distributed by the Defendant if:

- (a) the implant was inserted at one of the following hospitals, or by one of the following surgeons who purchased the subject implants from the Defendant and the implant was inserted after the first purchase from the Defendant:

<u>Facility</u>	<u>Date of First Purchase</u>
A.P. Pike & Associates	February 9, 1984
Aberdeen Hospital Commission	July 10, 1986
Calgary General Hospital	August 30, 1988
Centre Hospitalier St. Vincent de Paul	June 23, 1987
CFB Halifax	January 8, 1986
Charles Camsell General	September 25, 1994
Chedoke McMaster	July 24, 1984
Colonel Belcher	April 9, 1985
Credit Valley	February 28, 1986
Delta	February 24, 1984
Doctors Hospital	January 16, 1989
Dr. Goldstein	September 14, 1984
Dr. Pikes	August 24, 1984
Dr. Sandy James Pritchard	July 2, 1985
Dr. Wittenberg	June 15, 1984
Dr. Yip	April 25, 1984
Grace General	June 26, 1984
Halifax Infirmary	September 26, 1983

Hamilton Civic	May 16, 1988
Health Sciences Centre (UBC)	February 24, 1984
Health Sciences Centre (MB)	November 23, 1983
Hopital Enfant Jesus	April 18, 1988
Hopital Sacre-Coeur	March 11, 1986
Hopital Notre Dame	May 9, 1983.
Hotel Dieu Kingston	September 21, 1985
Hotel Dieu Sherbrooke	January 20, 1985
Joseph Brant Memorial Hospital	November 22, 1989
McKellar General	February 27, 1984
Metropolitan General	August 27, 1987
Montfort	October 31, 1985
Montreal General	June 21, 1984
Mount Saint Joseph	June 13, 1985
Nanaimo General Hospital	January 29, 1985
Northwestern General	October 30, 1986
Oakville Trafalgar Memorial	May 16, 1985
Oshawa General	November 23, 1987
Port Arthur General	December 12, 1984
Red Deer Regional Hospital Centre	May 27, 1988
Riverside	May 24, 1985
Royal Columbian	December 14, 1987
Samcar	January 23, 1986
Shaughnessy	November 25, 1986
St. Joseph's General	November 8, 1983
St. Mary's (B.C.)	July 6, 1984
St. Mary's (QUE)	October 30, 1984
St. Michael's	August 27, 1986
St. Paul's	June 12, 1986
St. Thomas-Elgin	September 12, 1983
Sunnybrook Medical Centre	August 19, 1986
The Izaak Walton Killam Hospital	August 11, 1983
Toronto General	February 28, 1986
University Hospital of Edmonton	October 26, 1983
University Hospital (SASK.)	September 3, 1986
University of Alberta	November 4, 1983
University of Guelph Dept of Pathology	June 19, 1984
Valley Health Service Assoc.	April 16, 1983
Vancouver General	December 1, 1986
Victoria General (BC)	December 29, 1986
Victoria Hospital Corporation	August 27, 1985
Victoria General (NS)	September 29, 1983

and;

- (b) the operative report from the surgery during which the implant was implanted or explanted refers to a Vitek implant or a teflon implant or a Proplast implant or, where the surgical records are not available despite reasonable efforts or the surgical records do not specify the type of implant, the Claimant may swear an affidavit which establishes the measures taken to obtain medical records, and includes as an exhibit a signed letter from the implanting or explaining surgeon indicating that the subject implant was a Vitek Proplast TMJ Implant; or
- (c) where (a) and (b) above are not met, such other product identification as is deemed acceptable by the Claims Administrator.

### 9.3 Supporting and Release Documentation

Together with a completed and executed Claim Form, each Claimant must mail to the Claims Administrator, postmarked by the requisite date, the following Supporting Documentation;

- (i) appropriate medical records documenting each injury for which the Claimant has claimed for compensation; or, if the individual has previously made an application to the *Backstrom v. Methodist Hospital* class action settlement in Houston, Texas a copy of the claim review form(s) evaluating the Claimant in that class action as well as medical records documenting each injury which was not documented at the time of the application to the *Backstrom v. Methodist Hospital* class action settlement;
- (ii) a photocopy of the Claimant's Birth Certificate or other acceptable proof of the Claimant's date of birth; and
- (iii) an Authorization to Provide Medical Records in the form attached hereto as Exhibit "B"; and

**10. Administration**

**10.1** The Claims Administrator shall process the claims in a cost effective and timely manner.

**10.2** The Claims Administrator shall provide Class Counsel, the Defendant and the Courts, a report within 10 days following the deadline for opting out of the class proceeding identifying the names of all Eligible Claimants who have opted out of the class proceeding together with a copy of their completed Opt Out Form (Exhibit "D").

**10.3** The Claims Administrator shall provide Class Counsel, the Defendant and the Courts, a report within 10 days following the deadline for filing of the Registration/Opt In Form (Exhibit "A"), identifying the names of all Eligible Claimants.

**10.4** The Claims Administrator shall provide Class Counsel, the Defendant and the Courts, such further reports as may from time to time be reasonably required.

**10.5** Within fourteen days after a claim has been reviewed, the Claimant(s) or the Claimant(s)' counsel shall be notified in writing as to the points ascribed to their claim or the rejection of their claim.

After the conclusion of the administration of all claims, the hearing of all appeals, and the expiration of all appeal periods, the Claims Administrator shall promptly make arrangements to pay Eligible Claims.

**10.6** Should the appeals filed pursuant to Section 12 not be decided promptly, the Claims Administrator may, after consultation with Settlement Class Counsel and with leave of the Courts, make partial payment to Eligible Claimants who have not filed such appeals.

**10.7** At such time as all payments have been made, the Claims Administrator shall provide to the Courts a final accounting and report of the Administration process,

including the total number of claims made, the total amount paid out to Eligible Claimants, the administration costs incurred, and such other information as the Court may require.

## **11. Fraudulent Claims/Rejection of Claim/Technical Deficiencies**

### **11.1 Fraudulent Claims**

If the Claims Administrator has a reasonable basis to believe that a claim is fraudulent, he/she shall bring the claim to a Court with jurisdiction over the Claimant for resolution.

### **11.2 Rejection of Claims**

If a Claimant fails to submit materials necessary to establish that he/she is an Eligible Claimant from the Settlement, the Claims Administrator shall reject the claim.

### **11.3 Technical Deficiencies**

If a Claimant provides substantially all of the material and support to establish that he/she is an Eligible Claimant from the Settlement, including product identification and all other medical records, but fails to provide all of the materials and/or supporting documentation required, he/she shall be given thirty days to correct the technical deficiencies which exist, failing which the claim shall be rejected.

## **12. Appeal of Claims**

### **12.1 Procedure**

The Claims Administrator shall notify Claimants of the disposition of their claims via registered mail. Claimants will be granted a thirty (30) day period from the date they

receive such notification to appeal their respective point totals pursuant to the Settlement, or the rejection of their claim to the Ontario Court, the Quebec Court or the British Columbia Court as selected by the Class Member on the Registration/Opt In Form by filing a Notice of Appeal with the Court (Exhibit "F"). Such appeal will be on the basis of written submissions, supported only by the original documentation provided to the Claims Administrator. The Class Member shall provide the Claims Administrator with a copy of the appeal as filed with the Court. The Claims Administrator shall, within (20) twenty days of receipt of the appeal, provide the Court and the Class Member with a written response.

## **12.2 Final Decision**

The judgment of the Courts respecting any appeal from the Claims Administrator's decision is final and binding and shall not be subject to any further appeal or revision whatsoever.

## **13. Retention of Records / Right of Review**

The Claims Administrator shall retain all records relating to the payment of claims. The Defendant and the Defendant's insurer may, at their expense, and pursuant to procedures approved by the Courts, inspect Claims office records, including Claimants' medical records, upon reasonable notice to the Claims Administrator. The Defendant and the Defendant's insurer shall maintain the confidentiality of claims information to the extent necessary to protect the identity and privacy of individual Claimants. Such a review of records shall not constitute or be deemed to constitute a waiver of any claimant's physician-patient privilege for any other purpose or as to any other communication or documents and shall not affect the eligibility of any claims.

**14. Submissions to the Courts by the Claims Administrator**

All submissions, requests or motions made to the Courts by the Claims Administrator shall be served upon Class Counsel and Defendant's Counsel no less than fifteen (15) days prior to the date of hearing.

**15. Opting Out/Opting In**

**15.1** Settlement Class Members who wish to exclude themselves from this Agreement must do so within sixty (60) days of:

- i) mailing to the Settlement Class Member of their Notice of Agreement Approval; or
- ii) publication of Notice of Agreement Approval in the national news media,

whichever is earlier by completing the Opt Out Form and returning the Opt Out Form to Class Counsel. The Notice of Agreement Approval is attached as Exhibit "C" to this Agreement. The Opt Out Form is attached as Exhibit "D" to this Agreement.

**15.2** Settlement Class Members who reside outside of British Columbia and wish to opt into the British Columbia Class shall be deemed to have opted into the British Columbia Class by indicating on the Individual Claim Form their desire to have any written appeal dealt with before the Court in British Columbia. Any Quebec or Ontario residents who choose to opt into the British Columbia Class will be deemed to have opted out of the Quebec or Ontario Class.

**16. Legal Fees and Costs**

Party and party costs, inclusive of disbursements and any individual claim for costs asserted against the Defendant or any of its related companies, in the amount of \$350,000.00 (three hundred and fifty thousand dollars), have been paid by the

Defendant and are part of the Settlement Amount. Class Counsel in each jurisdiction shall make application to the courts for solicitor and client legal fees to be divided amongst counsel in accordance with any agreement that they may make amongst themselves to be paid from the Settlement Fund.

**17. Releases/Third Party Claims**

**17.1 Releases of Claims Against Defendants and Released Parties**

Upon expiration of the time to appeal, if an appeal lies, from the Orders or Judgments granting certification and approving this Agreement, or on the date which all appeals have been exhausted and the Settlement approved, and upon payment by the Defendant of the Settlement Amount, Settlement Class Members shall be deemed to have released and forever discharged La Corporation Instrumentarium Inc., Gestion Michelle Laferriere Inc., 177046 Canada Inc., 1041402 Ontario Inc., Societe Chirurgicale Instrumentarium Inc., Instrumentarium Surgical Corp. Inc., Instrumentarium Corp. Inc., and the Guardian Insurance Company of Canada and all of their parent, affiliated or related corporations (the "Releasees") and all of their respective administrators, successors, assigns, servants, agents, employees, officers, and directors (as the case may be) and from any and all manner of actions, causes of action, suits, debts, contracts, claims, demands, damages, sums of money, dues, liabilities, expenses, fees and costs, which the Settlement Class Members ever had, now have, or which may later appear or accrue, for any losses, injuries, or damages, cause, matter or thing whatsoever, whether at law or in equity, or under any statute, whether anticipated or unanticipated, resulting from, arising out of, or connected directly or indirectly with the distribution and insertion of a Vitek Proplast TMJ implant, including all claims for general, special, exemplary, punitive, aggravated, consequential damage and costs, interest and additional indemnity.

## **17.2 Reservation of Rights/Third Party Claims**

Except as otherwise provided herein, nothing in this Settlement Agreement shall prejudice or in any way interfere with the rights of the Settlement Class Members to pursue all of their other rights and remedies against persons and/or entities other than the Defendant and Released Parties. Nevertheless, Settlement Class Members further agree that in the event the Settlement Class Member commences or continues litigation or pursues a claim or makes a claim against any person or entity arising from, arising out of, or connected directly or indirectly with the distribution and insertion of a Vitek Proplast TMJ implant, including all claims for non-pecuniary, punitive, aggravated, and consequential damages, then the Settlement Class Member expressly agrees not to include in respect of any such claim any right to recover from such person or entity any such amounts as have been paid under the terms of this Settlement Agreement to the Settlement Class Member or Settlement Class Members.

## **18. Court Approval**

The terms of the Agreement are subject to and conditional upon a final judgment or Court approval in Ontario, British Columbia and Quebec. Unless so approved by all three Courts the Agreement is of no force and effect.

On the Court Approval Date, the Agreement shall be binding on all Class Members except those Class Members who opt out as provided in this Agreement.

## **19. Effect of Non-Approval**

If the Agreement is not approved as set out in Section 20:

- (a) the Agreement shall be null and void and shall have no force or effect, and no party to the Agreement shall be bound by any of its terms, except for the terms of this Section and Section 1;

- (b) the Agreement, and all of its provisions, and all negotiations, statements and proceedings relating to it shall be without prejudice to the rights of the Defendant, the British Columbia Class, the Ontario Class, the Quebec Class and Class Counsel, all of whom shall be restored to their respective positions existing immediately before the Agreement; and
- (c) the Agreement, the fact of its negotiation and execution, the certification of the British Columbia, Ontario, and/or Quebec Class and any approval of the Agreement by any Court shall not constitute any admission by the Defendant or be used as evidence against the Defendant of liability or damages or otherwise be referred to for any other purpose in any action, claim, hearing or proceeding.

**20. The Order or Judgment Approving this Agreement**

20.1 This Agreement is subject to and conditional upon the approval of the Courts, following a hearing pursuant to Section 29(2) of the *Ontario Class Proceedings Act*, 1992, section 35 of the *British Columbia Class Proceedings Act*, and Article 1025 of the *Code of Civil Procedure* of the Province of Quebec. The Order or Judgment of approval of this Agreement shall:

- (i) describe the group as all persons who are or may be members of the Ontario, Quebec, and British Columbia Classes;
- (ii) approve this Agreement and Order the Parties and all Settlement Class Members to comply with it;
- (iii) declare that this Agreement constitutes a "transaction" which is binding upon the parties and upon all Settlement Class Members;

- (iv) declare that this Agreement is reasonable, fair and adequate, and in the best interest of the Settlement Class; and
- (v) order that Notice of the approval of this Agreement be mailed to Class Members and published in accordance with Section 21 of this Agreement.
- (vi) order that all further proceedings against the Releasees under this Agreement be barred, to the extent necessary, except as otherwise permitted pursuant to the terms of this Agreement.

**20.2** The Defendant and Class Counsel on behalf of the British Columbia Class, Ontario Class and Quebec Class will jointly submit proposed final judgments approving the Agreement. The proposed final judgments will each provide that subject to the terms of the Agreement, the judgment constitutes:

- (a) the full and final resolution of all claims and causes of action that have or could have been raised by Class Members or their representatives in these proceedings; and
- (b) a release by the Class Members that fully discharges La Corporation Instrumentarium Inc., Gestion Michelle Laferriere Inc., 177046 Canada Inc., 1041402 Ontario Inc., Societe Chirurgicale Instrumentarium Inc., Instrumentarium Surgical Corp. Inc., Instrumentarium Corp. Inc., and the Guardian Insurance Company of Canada and all of their parent, affiliated or related corporations (the "Releasees") and all of their respective administrators, successors, assigns, servants, agents, employees, officers, and directors from any liability or damages for any and actual or alleged representations, omissions or other conduct by the aforementioned Releasees, individuals, and corporations.

**20.3** The Defendant and Class Counsel agree not to issue and enter final judgments until such time as the Agreement is approved by the Courts before which the British

Columbia, Ontario and Quebec proceedings which are the subject of the Agreement were commenced.

**21. Notice of the Settlement Approval**

21.1 The form and contents of the Notice advising the Settlement Class Members of the Courts' approval of this Agreement ("Notice of the Settlement Approval") shall be as described as Exhibit "C" to this Agreement. The Information Package referred to in the Notice of the Settlement Approval shall be as described in Exhibit "E" to this Agreement.

21.2 Settlement Class Members whose identity is known to Class Counsel and/or the Defendant will receive Notice of the Settlement Approval and the Information Package by ordinary mail from the Claims Administrator. Class Counsel and the Defendant shall provide to the Claims Administrator their list of Settlement Class Members whose identity and last known address is known to them.

21.3 For the purposes of this Agreement the Notice of Agreement Approval shall be deemed to have been mailed to the Settlement Class Member if sent by ordinary mail to a Settlement Class Member at the Settlement Class Member's last known address as shown on the records filed with the Courts in Ontario, Quebec and British Columbia.

21.4 Published Notice of the Settlement Approval shall be made in the publications and the number of times set forth in Appendix "A" to this Settlement Agreement, as well as on the websites of Class Counsel. The Defendant shall pay the cost of publication of Notice of the Settlement Approval.

**22. Conditions of Settlement**

**22.1** This Agreement is subject to and conditional upon fulfillment of the following conditions, which are inserted for the sole benefit of the Defendant, any or all of which may at any time be waived in writing by the Defendant:

1. All individual plaintiffs who have instituted individual actions or proceedings in any province or Territory in Canada before the date of execution of this Settlement Agreement, must give assurances in writing to the Defendant to participate in the settlement.
2. All defendants in existing individual actions or proceedings in any province or Territory in Canada, as of the date of execution of this Settlement Agreement, must agree to waive any claims against La Corporation Instrumentarium Inc. and any of its related companies, including any third party proceedings and other claims or claims over for contribution or indemnity, on a without costs basis, and agree to discontinue or dismiss any such proceedings without costs, or such claims or claims over must be barred by order of the Court.
3. All individual claims against La Corporation Instrumentarium Inc. and its related companies, as of the date of execution of this Settlement Agreement, must be, subject to approval of this Settlement Agreement, dismissed or discontinued without costs and with prejudice, and the existing claims against related companies to La Corporation Instrumentarium Inc. in the British Columbia Class Proceeding must be dismissed with prejudice and without costs.

**22.2** In the event the conditions of Section 22.1 are not fulfilled, and unless such conditions are completely or partially waived, in the sole discretion of the Defendant,

the provisions of Section 19 shall apply as if this Settlement Agreement had not received approval of the Courts.

**23. Miscellaneous Provisions**

**23.1** The Parties shall cooperate, assist and undertake all reasonable actions in order to accomplish the above on a timely basis.

**23.2 Ongoing Authority**

The Courts shall retain exclusive and continuing jurisdiction over the Class Actions and all parties named or described therein, including all Settlement Class Members and the Defendant and over this Agreement, to ensure that all disbursements are properly made and to interpret and enforce this Agreement's terms, conditions and obligations.

**23.3 Entire Agreement**

This Agreement, including all Exhibits attached hereto, constitutes the entire agreement by and among the Parties with regard to the subject of this Agreement and shall supersede any previous Agreements and understandings between the Parties with respect to the subject matter of this Agreement. This Agreement may not be modified or amended except in writing signed by all Parties and subject to the Courts' approval.

**23.4 Other Originals**

This Agreement may be executed in one or more counterparts, each of which will be deemed an original but all of which together shall constitute one and the same instrument.

### **23.5 Notification**

Any notification, request, instruction or other document to be given by any party to this Agreement to any other party to this Agreement (other than class notification) shall be in writing and delivered personally or sent by registered mail, postage prepaid, if to the Defendant, to the attention of their counsel, and to Settlement Class Counsel on behalf of Settlement Class Members, or to other recipients as the Courts may Order.

### **24. French Version**

The Agreement in terms identical to the English version must also be executed in French at the same time as the English version. In the event of a difference in the interpretation of the English and French version of this Agreement, the English version shall prevail.

The parties have expressly requested that this Agreement and any related Exhibits be drafted in the English language.

Les parties ont expressément convenu que la présente entente ainsi que tous les Exhibits ou documents s'y rapportant soit rédigé en Anglais.

Dates referred to in this Agreement may only be altered with the consent of the parties or with the approval of the Courts.

This Agreement is made on June 15<sup>th</sup>, 1999.

Siskind, Cromarty, Ivey & Dowler

Klein Lyons

Docken & Company

Lauzon Belanger

La Corporation Instrumentarium Inc.

Cassels Brock & Blackwell

Guild, Yule, Sullivan, Yule, Truscott, Slivinski

Desmarais, Picard, Garceau, Pasquin