



IN THE SUPREME COURT OF BRITISH COLUMBIA

DENNIS JONES and SUSAN WILKINSON

Plaintiffs

AND:

ZIMMER GMBH, ZIMMER, INC., and
ZIMMER OF CANADA LIMITED

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

NOTICE OF APPLICATION

Name of Applicant: The Representative Plaintiff

To: The Defendants

TAKE NOTICE that this application will be made by the Applicant to the Honourable Mr. Justice Bowden at the courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia, on Friday, April 29, 2016, at 9:30 a.m., for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order scheduling a hearing (the "Approval Hearing") to approve a proposed settlement agreement and addendum (the "Settlement Agreement") in this certified class action.
2. An order approving the form, content and manner of notice to class members of that Approval Hearing as set out in the Settlement Agreement at Schedule B1, as modified by the addendum. For ease of reference, a copy of the form of notice (the

“Notice of Approval Hearing”) is attached as Schedule A to this Notice of Motion, and a copy of the accompanying press release is at Schedule B. As for the means of notice, these are as follows:

(a) Class Counsel shall send a copy of the Notice of Approval Hearing by mail or email to all class members who have contacted them, and those class members who have provided addresses to Class Counsel for the purposes of this litigation.

(b) Class Counsel shall post a copy of the Notice of Approval Hearing and the Settlement Agreement to their respective websites.

(c) Class Counsel shall forward a copy of the Notice of Approval Hearing to all counsel in Canada who, to Class Counsel’s knowledge, have filed litigation regarding the Zimmer Durom Cup.

(d) Class Counsel shall issue the media release attached to this Notice of Motion, and the media release will be distributed through Canada Newswire or Market Wired.

(e) Class Counsel shall publish Notice of Approval Hearing in all publications listed in Schedule K to the Settlement Agreement which are as follows:

- (i) Globe & Mail
- (ii) Vancouver Sun
- (iii) Edmonton Journal
- (iv) Calgary Herald
- (v) La Presse (FR)
- (vi) Montreal Gazette (ENG)
- (vii) Le Journal de Montreal (FR)
- (viii) Montreal Metro News
- (ix) The Star Phoenix (Saskatoon)
- (x) Regina Leader-Post
- (xi) Toronto Star
- (xii) Toronto Metro News
- (xiii) Sudbury Star
- (xiv) Hamilton Spectator
- (xv) Le Soleil
- (xvi) Le Journal de Quebec

3. Such further and other relief as counsel may advise and this Honourable Court may deem just.

Part 2: FACTUAL BASIS

4. This action was certified by this Honourable Court on September 2, 2011, and the appeal to the Court of Appeal was dismissed in January 22, 2013.

Jones v. Zimmer GMBH, 2011 BCSC 1198; affirmed 2013 BCCA
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5. By order dated June 26, 2013, notice of certification was published to the class. Over 1,000 class members from across Canada opted into this proceeding.

6. A companion class action was certified by Mr. Justice Perell in Ontario on September 24, 2014.

McSherry v. Zimmer GMBH et al, 2014 ONSC 5527

7. There are also proceedings in Quebec.

Major c. Wainberg, 2016 QCCS 902.

8. A settlement agreement was signed by the Defendants and by the Plaintiff in this action, and in the Ontario certified class action, as well as by all the provincial health insurers in November 2015.

9. The Merchant Law Group (“Merchant”) had filed a proposed, uncertified class action in Quebec on behalf of a Mr. Wainberg, and participated in the negotiation and drafting of the settlement agreement. Merchant sat on the settlement agreement for an extended period of many months. On March 7, 2016, Mr. Justice Gouin of the Quebec Superior Court removed Merchant’s client, the late Mr. Wainberg, who had passed away on December 8, 2015, as the class plaintiff in Quebec, and appointed a new plaintiff, Mr.

Major, and a new law firm, Trudel Johnston & Lesperance to represent a proposed Quebec class.

10. Accordingly, an addendum was signed in March, 2016, completing the settlement agreement, and amending the agreement consistent with Mr. Justice Gouin's decision.

11. The parties to the settlement now wish to co-ordinate and schedule Approval Hearings to approve the Settlement Agreement before the courts of British Columbia, Ontario and Quebec, and to provide notice to class members of those hearings.

12. The proposed notice provided in the Settlement Agreement is reasonable in the circumstances. Direct notice will be provided to over 1,000 class members who have already delivered opt-in requests in this litigation, as well as to all counsel in Canada known to have filed Zimmer Durom Cup related litigation. Furthermore, there will be substantial paid advertising in newspapers across the country, plus a press release, plus internet publication.

Part 3: LEGAL BASIS

13. The *Class Proceedings Act* ("CPA") does not specify the procedures to be used, or the test to be applied, when the court is asked to consider approval of a proposed settlement. The practice of issuing such notice has simply arisen through custom.

McCarthy v. Canadian Red Cross Society, [2007] O.J. No. 2314
(S.C.J.)

14. Section 19 of the CPA requires the court to approve notice to the class following certification, and ss.20 and 35(5) requires the court to approve notice to the class following a resolution of the common issues, whether by settlement or judgment, but nowhere does the Act specifically require notice of an approval hearing. However, section 21(1) of the CPA provides the court with a broad discretion to issue notice "at any time" when necessary "to ensure the fair conduct of the proceeding". The section reads as follows:

“s.21 (1) At any time in a class proceeding, the court may order any party to give notice to the persons that the court considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.”

CPA, s.21(1)

15. The Ontario equivalent of s.21 of the CPA was considered by Mr. Justice Winkler (as he then was) in *McCarthy v. Canadian Red Cross Society*. He described the practice of providing notice of an approval hearing which has evolved in Ontario as follows:

“Although the *C.P.A.* does not expressly provide a process for receiving objections by class members, there is now a well-established practice of combining the settlement approval motion with a fairness hearing, on notice to the class, at which objections to the settlement are routinely received and considered by the court. The statutory authority for the receipt and consideration of objections is to be found in ss. 12 and 19(1) of the *C.P.A.*, which provide, respectively,

- 12. The court, on the motion of a party or class member, may make an order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

...

- 19(1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.”

McCarthy v. Canadian Red Cross Society, [2007] O.J. No. 2314
(S.C.J.) at para 9

16. The issue of notice of an approval hearing was also discussed by the Ontario court in *Kranjcec v. Ontario*. It held that such notice is not obligatory, and if given, perfection is not required. Rather, if notice of the hearing is provided to a reasonable proportion of class members, then it may anticipated that such persons will provide the

court with comments or objections to a proposed settlement that are broadly representative of the group as a whole. The Ontario court wrote:

“Notice of a fairness hearing is not obligatory under the CPA and, although it is invariably ordered, it is a safe assumption that the notice that was given reached far more class members than is usually the case with a class of this size. Insofar as the purpose of notice is, for the most part, to permit the court to hear concerns that the members might have about the settlement, and the fees of class counsel, there is no reason to believe that the representatives of the estates that had been excluded from the mailing would wish to raise objections, or make submissions, that would not be shared with the approximately 47,000 members who received notice.”

Kranjcec v. Ontario, [2006] O.J. NO. 3671 (S.C.J.) at para 2

17. The notice of hearing proposed under the Settlement Agreement is reasonable under the circumstances. It will reach a substantial number of class members. If there are any class members with objections to the Settlement Agreement, the notice will provide them with a reasonable opportunity to come forward and present their objections.

Part 4: MATERIAL TO BE RELIED ON

1. The affidavit of Anita Vergis sworn April 20 , 2016
2. The affidavit of Susan Gwen Wilkinson, sworn April 20, 2016
3. The affidavit of Dr. Thomas Turgeon, sworn April 8, 2015
4. The pleadings and proceedings herein; and
5. Such further and other material as counsel may advise and this Honourable Court may permit.

The applicant estimates that the application will take 20 minutes.

This matter is within the jurisdiction of a master.

This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must

- (a) file an application response in Form 33 within 5 days after the date of service of this notice of application or, if the application is brought under Rule 9-7 of the Supreme Court Civil Rules, within 11 days after the dates of service of this notice of application, and
- (b) at least 2 days before the date set for the hearing of the application, serve on the applicant 2 copies, and on every other party one copy, of a filed copy of the application response and the other documents referred to in Rule 9-7 (12) of the Supreme Court Civil Rules.

Date: April 22, 2016

A Vergis

 Signature of
 applicant lawyer for applicant

David Klein
 A. Anita Vergis

To be completed by the court only:

Order made
 in the terms requested in paragraphs of Part 1 of this notice of application

with the following variations and additional terms:

Date:.....[dd/mmm/yyyy].....

Signature of Judge Master

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- extend oral discovery

- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts
- other

Schedule "A": Notice of Approval Hearing

Were you, or a family member, implanted with a Zimmer Durom® Hip Implant in Canada?

This notice may affect your rights. Please read carefully.

Class action lawsuits were initiated in Canada regarding allegations that the Zimmer Durom hip implant was defective, and that it failed prematurely. Specifically, a class action was certified by the British Columbia court on September 2, 2011, in *Jones v. Zimmer GMBH et al.*, and by the Ontario court on September 24, 2014, in *McSherry v. Zimmer GMBH et al.* A proposed class action was also filed in Quebec as *Major v. Zimmer GMBH*, but it has not yet been authorized.

The Defendants, while not admitting liability, have agreed to a settlement of these lawsuits. The Defendants have also consented to the authorization of the Major Action as a class action, the Jones Action and McSherry Action already having been certified. For a copy of the settlement agreement, or for more information, please contact Class Counsel listed below.

Who is Eligible to Participate in the Settlement?

The settlement applies to all persons who were implanted with the Durom Cup in Canada who have not opted out of the settlement and/or affirmatively opted into the *Jones* action, and their estates and family members.

The Terms of Settlement

The settlement provides compensation to class members with certain injuries upon receipt of supporting medical documentation, less deductions for legal fees. Payments are also made to public health insurers. Please refer to actual settlement agreement for its terms in detail.

Court Hearings and Your Right to Participate

Motions to approve the settlement agreement are scheduled to be heard by the British Columbia Court in Vancouver on [date] and the Ontario Court in Toronto on [date]. A motion to approve the settlement, and to also authorize the class action in Major Action will be heard by the Quebec Court in Montreal on [date]. Class Counsel will also be asking the courts to approve an award of fees and disbursements for their work in this case.

Class members who do not oppose the settlement need not appear at the hearings or take any other action at this time to indicate their desire to participate in the settlement. All class members have the right to present arguments to the courts as regards the settlement, or to object to the settlement, by delivering a written submission to Class Counsel on or before [date]. A class member who wishes to object to the settlement shall provide in his or her objection:

- (a) The full name, current mailing address, fax number, telephone number, and email address of the person who is objecting;
- (b) A brief statement of the nature and reasons for the objection;
- (c) A declaration that the person believes he or she is a member of the Class and the reason for that belief, including, if available, the catalogue and lot numbers of his/her Durom Cup;
- (d) Whether the person intends to appear at the relevant Approval Hearing or intends to appear by counsel, and, if by counsel, the name, address, telephone number, fax number, and email address of counsel; and
- (e) A declaration under the penalty of perjury that the foregoing information is true and correct.

To Exclude Yourself from the Class Actions

If you are a resident of Quebec who has not already opted into the *Jones* action and you wish to exclude yourself from the *Major* action, you must deliver a written submission declaring your intention to opt out of the class action to the Clerk of the Superior Court of Quebec and Class Counsel by registered or certified mail at the addresses below on or before [date]. Your submission must include your name and address. If you exclude yourself from the class action, you will not be entitled to receive compensation under the settlement agreement. If you previously opted into the class in the *Jones* action, you are entitled to compensation in connection with your Durom Cup only as provided in the settlement agreement. For all other class members, the deadline for you to have excluded yourself from these lawsuits has already expired.

Montréal Courthouse
 Clerk of the Superior Court of Québec
 Court file number: 500-17-081863-147
 1, Notre-Dame East
 Montréal (Québec) H2Y 1B6

Trudel Johnston & Lespérance
 750, Côte de la Place d'Armes
 Bureau 90
 Montréal QC H2Y 2X8

For Additional Information and a Copy of the Settlement Agreement:

Class Counsel in Jones and McSherry Actions

Klein Lawyers LLP
 Suite 400
 1385 West 8th Avenue
 Vancouver, BC V6H 3V9
 Telephone: 604-874-7171
 Facsimile: 604-874-7180
www.kleinlyons.com

Class Counsel in Major Action:

Trudel Johnston & Lespérance
 750, Côte de la Place d'Armes
 Bureau 90
 Montréal QC H2Y 2X8
 Phone: Telephone: 514-871-0800
 Fax: : 514 871-8800
www.trudeljohnston.com

Schedule "B"—Media Release

Zimmer Durom Cup Hip Implant Class Action Settlement

Subject to court approval, a settlement has been reached in the certified class actions involving Canadians who were implanted with the Zimmer Durom Cup hip implant. Class actions have been certified in British Columbia (*Jones v. Zimmer*) and Ontario (*McSherry v. Zimmer*). Certification is pending in a proposed class action filed in Quebec (*Major v. Zimmer*), and the parties have consented to certification of that action.

The settlement applies to "all persons who were implanted with the Durom Cup in Canada" and their estates and family members.

The defendants to the three actions do not admit liability, but have agreed to a settlement providing compensation to class members with certain injuries upon approval after receipt of supporting documentation, less deductions for legal fees. Public health insurers are also entitled to compensation under the settlement agreement. Please refer to the settlement agreement for compensation details.

Motions to approve the settlement agreement will be heard by the Supreme Court of British Columbia in Vancouver on [date] and the Ontario Superior Court of Justice in Toronto on [date]. A motion to approve the settlement and to authorize the class action in *Major* will be heard by the Quebec Superior Court in Montreal on [date]. At the hearings, Class Counsel will also ask the courts to approve payment of its fees and disbursements for its work in connection with the three actions.

Class members who do not oppose the settlement do not need to appear at the hearings to indicate their desire to participate in the settlement. Class members who oppose the settlement have the right to present arguments to the courts or to object to the settlement by delivering a written submission to Class Counsel on or before [date]. A class member who wishes to object to the settlement shall provide in his or her objection the following information: (a) the full name, current mailing address, fax number, telephone number, and email address of the person objecting; (b) a brief statement of the reasons for the objection; (c) a declaration that the person believes he or she is a member of the Class, and the reason for that belief, including, if available, the catalogue and lot numbers of his/her Durom Cup(s); (d) whether the person intends to appear at the relevant approval hearing or intends to appear by counsel, and, if by counsel, the name, address, telephone number, fax number, and email address of his or her counsel; and (e) a declaration under the penalty of perjury that the foregoing information is true and correct.

For additional information and a copy of the settlement agreement, contact:

Class Counsel in the *Jones and McSherry* Actions Class Counsel in the *Major* Action:

Klein Lawyers LLP
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1385 West 8th Avenue
Vancouver, BC V6H 3V9
Telephone: 604-874-7171
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