

SUPERIOR COURT
(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT DE MONTREAL

No.: 500-06-000543-104

DATE: July 4, 2016

PRESIDING: THE HONOURABLE JUSTICE LOUIS J. GOUIN, J.S.C.

MICHEL MAJOR
Applicant

v.

ZIMMER INC.

and

ZIMMER GMBH

and

ZIMMER HOLDINGS INC.

and

ZIMMER CANADA LTD

Respondents

and

FONDS D'AIDE AUX ACTIONS COLLECTIVES

and

RÉGIE DE L'ASSURANCE-MALADIE DU QUÉBEC

Mis-en-cause

and

TRUDEL JOHNSTON & LESPÉRANCE

Applicant counsel

and

MERCHANT LAW GROUP LLP

Mis-en-cause counsel



JUDGMENT (approving the Transaction and creating a Reserve)

1. APPLICATIONS PRESENTED TO THE COURT

[1] Two applications have been made to the Court:

JG 2270

- a. an “Amended application to have a transaction [(the “**Transaction**”)]¹ approved and to set up a reserve [(the “**Reserve**”)] to pay the fees of class counsel” (the “**Application**”) under articles 590 and 598 of the *Code of Civil Procedure* (“**C.C.P.**”), presented by applicant counsel, Trudel Johnston & Lespérance (the “**Applicants**”); and
- b. in this context, an “Act of voluntary intervention” (the “**Intervention**”), presented by the mis-en-cause Fonds d'aide aux actions collectives (the “**Fonds**”).

[2] There is no objection or opposition to the Application with the exception of the Fonds, which, through the Intervention, asks the Court to:

“**DECLARE** the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives* [(the “**Regulation**”)]² to apply to all members residing in Quebec, including those who have opted into the British Columbia class action;

ORDER that a deduction [(the “**Deduction**”)] of 2%, 5% or 10% of each of the claims attributable to all the members of the class action residing in Quebec*, regardless of whether they have opted into the British Columbia class action, in accordance with article 1(3) of the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives*;

DECLARE that the court remains seized of the case until the closing judgment.”

[3] The interest of the Fonds in filing the Intervention was not disputed before the Court.

2. DECISION OF THE COURT

[4] The Application will be granted, since all the criteria that apply with regard to the approval of a transaction in settlement of a class action are met, and the Transaction is therefore fair, equitable and reasonable, and in the best interest of the members of the Quebec Group (defined below).

[5] However, the conclusions of the Intervention are rejected, since, essentially, Quebec residents who have opted into the British Columbia Class



¹ Exhibits P-1A and P-1B.

² CQLR, c. F-3.2.0.1.1, r.2.

* *Translator's note*: this clause appears to be missing a predicate in the original text.

Action (defined below) are expressly excluded from the Quebec Group of the Quebec Class Action, and furthermore, through the very terms of the OPT-IN Form (defined below) which they signed in order to join the British Columbia Group (defined below) of the British Columbia Class Action, these Quebec residents specifically waived their right to pursue any other proceedings for the same cause of action.

3. CLASS ACTIONS

[6] The Transaction settles three (3) class actions (the “**Class Actions**”) brought against the respondents Zimmer inc., Zimmer GmbH, Zimmer Holdings inc. and Zimmer Canada Ltd (collectively “Zimmer”) relating to the “Durom Cup” brand hip implant (the “Durom Cup”), namely:

- a. *Jones v. Zimmer* (Supreme Court of British Columbia No. S-095493) (the “**British Columbia Class Action**”);
- b. *McSherry v. Zimmer* (Ontario Superior Court of Justice No. CV-10-408365-00CP (the “**Ontario Class Action**”); and
- c. *Major v. Zimmer* (Superior Court of Quebec No. 500-06-000543-104 (the “**Quebec Class Action**”).

4. THE BRITISH COLUMBIA CLASS ACTION GROUP

[7] As confirmed on January 22, 2013 by the British Columbia Court of Appeal, the group of members of the British Columbia Class Action (the “**British Columbia Group**”) is composed of the following persons:

“all persons who were implanted with the Durom acetabular hip implant [the Durom Cup] in Canada.”³

[8] In accordance with the opt-in procedure that exists in British Columbia, residents of Quebec could participate in the British Columbia Class Action and, to that end, they were required to sign a form⁴ (the “**OPT-IN Form**”) confirming that they consented:

- (a) to be bound by a judgment of the courts of British Columbia on the common issues in this class action, whether favourable or not. [...]
- (b) to not pursue other proceedings, other than this class action, against Zimmer GmbH, Zimmer, Inc. or Zimmer of



³ *Jones v. Zimmer GMBH et al.*, 2011 BCSC 1198 and 2013 BCCA 21.

⁴ Exhibit R-9.

Canada Limited, with respect to a claim for injuries relating to use of Durom® acetabular hip plant [the Durom Cup].”

(emphasis added)

[9] A notice had been sent by Quebec hospitals to their patients regarding the British Columbia Class Action, which included the following section:

“How do Persons Outside B.C. Participate?”

If you live outside British Columbia, and you want to be included in this class action, you must sign an Opt-In Form, and return it to Class Counsel no later than December 31, 2013. If you opt into this proceeding, you agree to be bound by the findings of the British Columbia court on the common issues, whether favourable or not, and you agree not to pursue related claims anywhere else. You can obtain a copy of the Form from Class Counsel or by visiting their website at www.kleinlyons.com/class/zimmerhip.”⁵

(emphasis added)

5. THE ONTARIO CLASS ACTION GROUP

[10] On September 24, 2014, the Ontario Class Action was certified, including the group of members composed of the following persons:

“All persons who were implanted with the Durom acetabular hip implant in Canada, excluding residents of British Columbia and Quebec, and those who opt into the class certified by the British Columbia Supreme Court in Jones et al. v. Zimmer GMBH et al. [...]”⁶

(emphasis added)

6. THE QUEBEC CLASS ACTION GROUP

[11] On May 6, 2016, the Court granted the “Consolidated Application for Authorization to Institute a Class Action for Settlement Purposes and to Approve a Notice to Class Members of a Settlement Approval Hearing” (the “**Judgment of May 6, 2016**”), and at that time, the Court scheduled the hearing of the Application for June 28, 2016.



⁵ Exhibit P-8.

⁶ *McSherry v. Zimmer GMBH et al.*, 2014 ONSC 5527.

[12] As part of the Judgment of May 6, 2016, the Court described the group of members (the “**Quebec Group**” referred to in the Quebec Class Action as follows:

“All persons residing in Quebec who were implanted with the Durom Cup in Canada and have not opted into the BC proceeding [the British Columbia Class Action], and their estates and family members.”

(emphasis added)

[13] The Judgment of May 6, 2016 is final.

7. TRANSACTION

[14] The Transaction⁷ entered into in order to settle the Class Actions was signed by the Applicants, among others, on April 13, 2016, and it provides for the individual recovery of the claims for the Quebec Group.

[15] The terms and conditions of the Transaction are clearly explained in the Application and, as stated earlier, the Court believes the rules that apply with regard to the approval of a transaction to settle a class action, established by case law⁸ and set out in the Application, have all been met, namely:

- a. the likelihood of success of the action;
- b. the extent and nature of the evidence to be administered;
- c. the terms of the transaction, including advantages and disadvantages for the members;
- d. the recommendation of counsel and their experience;
- e. the anticipated cost and likely duration of the litigation;
- f. the recommendation of a neutral third party, where necessary;
- g. the nature and number of objections to the transaction;
- h. the good faith of the parties; and
- i. the absence of collusion.



⁷ Exhibits P-1A and P-1B.

⁸ *Bouchard v. Abitibi Consolidated inc.*, J.E. 2004-1503 (C.S.); *Pellemans v. Lacroix*, 2011 QCCS 1345, par. [20]; *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2011 QCCS 4981, par. [48] - [50]; *Tremblay v. Lavoie*, 2014 QCCS 4955, par. [13].

[16] Under these circumstances, the Court believes that the Transaction is fair, equitable and reasonable, and in the best interest of the members of the Quebec Group.

[17] Moreover, the Court would point out that no provision of the Transaction refers to the Deduction to which the Fonds claims to be entitled under the Regulation.

8. FEES AND RESERVE

[18] During a telephone conference with the undersigned, held before the hearing of the Application, it was decided to postpone to a later date the discussion of the fees and disbursements of the lawyers involved, and this explains the Reserve created for this purpose by the present judgment.

[19] On that occasion, it will also be decided, after the determination and the payment of the fees and disbursements of the lawyers involved, what is to happen to the balance of the Reserve, should there be any.

9. THE DEDUCTION OF THE FONDS

[20] The Fonds claims that it is entitled to the Deduction provided for in article 1. (3) of the *Regulation*, for all residents of Quebec who are members of the Quebec Group or members of the British Columbia Group, after signing the OPT-IN Form relating to the British Columbia Class Action.

[21] To that end, among other things, the Fonds refers the Court to articles 7 and 42 of the *Act respecting the Fonds d'aide aux actions collectives*⁹, which provide that:

7. The object of the Fonds is to ensure the financing of class actions in the manner provided for by this title and to disseminate information respecting the exercise of such actions.

42. In the case of a collective recovery of the claims, the Fonds shall withhold a percentage fixed by regulation of the Government on the balance established under articles 596 and 597 of the Code of Civil Procedure (chapter C-25.01); in other cases, the Fonds shall withhold a percentage fixed by regulation of the Government on every liquidated claim.

[22] In the latter case, article 1. (3) of the *Regulation* provides that:

1. For the purposes of section 42 of the Act respecting the Fonds d'aide aux actions collectives (chapter F-3.2.0.1.1), the percentage



⁹ RLRQ, c. F-3.2.0.1.1.

withheld by the Fonds d'aide aux actions collectives from the balance or from a liquidated claim shall be as follows:

[...]

(3) on any other liquidated claim under article 592 of the Code of Civil Procedure:

(a) 2% from any liquidated claim less than \$2,000;

(b) 5% from any liquidated claim exceeding \$2,000 but less than \$5,000;

(c) 10% from any liquidated claim exceeding \$5,000.

[23] According to the Fonds, the 756 Quebec residents who opted into the British Columbia Class Action, who are thus members of the British Columbia Group, are not deemed to have opted out of the Quebec Class Action in the meaning of the second paragraph of article 580 *C.C.P.*, so that the Deduction provided for in article 1. (3) of the *Regulation* applies to them, just as it applies to the members of the Quebec Group.

[24] Article 580 *C.C.P.* provides that:

580. A class member who wishes to opt out of the class or a subclass is required to so inform the court clerk before the time limit for doing so has expired. A person who has opted out is not bound by any judgment on the representative plaintiff's application.

A class member who does not discontinue an originating application having the same subject matter as the class action before the time for opting out has expired is deemed to have opted out.

(emphasis added)

[25] The Fonds argues that the British Columbia Class Action in which a Quebec resident who has signed the OPT-IN Form is participating does not constitute an individual action taken by that Quebec resident in the meaning of the second paragraph of article 580 *C.C.P.*, and therefore, for the purposes of the Deduction, that Quebec resident has not opted out of the Quebec Class Action.

[26] Further, according to the Fonds, the concept of “opting in” does not exist in Quebec, and consequently, the exercise of the right to “opt in” in British Columbia has no effect in Quebec.

[27] The Fonds maintains that it is important not to create two categories of Quebec residents making claims for the same cause of action: those of the Quebec Group of the Quebec Class Action, and those of the British Columbia Group of the British Columbia Class Action.



[28] In any event, the Fonds concludes, the Class Actions constitute a whole. This is evidenced by the fact that they are all settled by the Transaction and, consequently, the Fonds is entitled to apply the Deduction to a Quebec resident who is participating in the British Columbia Class Action just as if they were participating in the Quebec Class Action.

[29] In fact, the Fonds is asking the Court to break new ground and thereby broaden its funding base, despite the composition of the Quebec Group as determined by the Judgment of May 6, 2016.

[30] Thus, none of the judgments submitted by the Fonds specifically deals with a case resembling the present case. Rather, they are cases involving a single national or multiterritorial class action, for example, or cases dealing with the Deduction and its collection specifically provided for in the settlement transaction, or cases dealing with different outcomes proposed to members of the same group.

10. CHALLENGE BY THE APPLICANTS

[31] The Applicants challenge the arguments raised by the Fonds, essentially because the Fonds is thus attempting to modify the composition of the Quebec Group, which was clearly established by the Judgment of May 6, 2016.

[32] Furthermore, the Applicants reminded the court that the Quebec residents who signed the OPT-IN Form thereby expressly waived their right to participate in the Quebec Class Action, which constitutes a voluntary exclusion.

[33] The respondents share the position of the Applicants.

11. CONCLUSION

[34] The Court is of the opinion that the composition of the Quebec Group settles the question raised by the claim of the Fonds.

[35] Indeed, the Court decided, by the Judgment of May 6, 2016, which is final, that the Quebec Group excludes Quebec residents who decided to participate in the British Columbia Class Action: “All persons residing in Quebec who were implanted with the Durom Cup in Canada and have not opted into the BC proceeding [The British Columbia Class Action], and their estates and family members.”

[36] Thus, when determining the composition of the Quebec Group, the Court recognized the legal effect of the signing of the OPT-IN Form. In order to do this, it was not necessary for an equivalent to exist in Quebec; to claim otherwise would be to totally disregard the rights that the Quebec residents may legitimately exercise outside Quebec.



[37] In fact, the Fonds is asking the Court today to change the composition of the Quebec Group for the sole purpose of the calculation of the Deduction, through a very narrow *a contrario* interpretation of the text of the second paragraph of article 580 *C.C.P.*

[38] The Court completely disagrees with the interpretation of this second paragraph of article 580 *C.C.P.* put forward by the Fonds.

[39] The aim of the lawmakers was certainly not that the Fonds either seek or be able to collect the Deduction throughout Canada, simply because there is a Quebec resident who has a claim against the respondents relating to the Durom Cup, without any consideration of the clear text of the judgments defining the composition of the groups of the Class Actions, and specifically that of the Quebec Group, defined by the Judgment of May 6, 2016.

[40] After specifically excluding from the Quebec Group those Quebec residents who decided to participate in the British Columbia Class Action, how can the Court tell them today that they are also considered to be members of the Quebec Group, but only for the purpose of allowing the Fonds to calculate and deduct the Deduction from the amount of the Transaction they will receive as members of the British Columbia Group?

[41] A judgment cannot for one moment say the opposite of what it expressly says. No rule of interpretation will allow this. It would undermine the stability of all judgments.

[42] Moreover, the very text of the OPT-IN Form leaves no doubt: by participating in the British Columbia Class Action, a Quebec resident waives their right to pursue any other proceedings for the same cause of action, which, in the opinion of the Court, includes not only an individual proceeding but also the Quebec Class Action.

[43] This is a case of the voluntary exclusion of a Quebec resident, confirmed by the Judgment of May 6, 2016.

[44] The tortuous interpretation of the second paragraph of article 580 *C.C.P.* put forward by the Fonds amounts to asking or requiring a Quebec resident to opt out of the Quebec Class Action when they are not included in it – in fact, they are specifically excluded – failing which, they will be included for the purposes of the Deduction!

[45] Such a proposal defies understanding.

[46] Furthermore, the Court does not share the argument put forward by the Fonds that the Class Actions constitute a whole simply because they are collectively settled by the Transaction, thus allowing the Fonds to collect the Deduction from all Quebec residents with a claim against the respondents in relation to the Durom Cup.



[47] It is the Court's opinion that the Transaction settles three (3) distinct class actions, and the fact that they are settled in the same Transaction document does not make them the same class action with no distinction as to the composition of their respective groups and existing court judgments in that regard.

[48] Each of the Class Actions retains its own identity and group, subject to the laws of the province in which it was introduced and the judgments relating to it.

[49] Would the Fonds have put forward this argument if three (3) transaction documents had been signed? The Court finds it doubtful that it would.

[50] Further, despite what the Fonds suggests, it is not a question of creating two categories of Quebec residents, but rather of applying the clear text of the Judgment of May 6, 2016 regarding the composition of the Quebec Group, based on the clear text of the OPT-IN Form.

[51] In short, as stated at the beginning of this judgment, the Court believes that the Deduction cannot apply to Quebec residents who are not included in the Quebec Group, and consequently, not part of the Quebec Class Action.

[52] Moreover, the Deduction cannot apply to Quebec residents who expressly waived their right to any action against Zimmer in connection with the Durom Cup by strictly limiting their action to the British Columbia Class Action.

[53] The conclusions sought by the Fonds in the Intervention are therefore rejected.

FOR THESE REASONS, THE COURT:

[54] **GRANTS** the "Amended application to have a transaction approved and to set up a reserve to pay the fees of class counsel" presented by applicant counsel, Trudel Johnston & Lespérance;

[55] **REJECTS** the conclusions of the "Act of voluntary intervention" presented by the Fonds d'aide aux actions collectives;

[56] **DECLARES** that in addition to the definitions set out in the present judgment, the definitions given in the Transaction (Exhibits P-1A and P-1B) apply to the present judgment and are incorporated into it by reference;



- [57] **DECLARES** that the Transaction is fair, equitable and reasonable, and in the best interest of the members of the Quebec Group;
- [58] **APPROVES** the Transaction accordingly;
- [59] **DECLARES** the Transaction to be binding on the parties and the members of the Quebec Group;
- [60] **DECLARES** that any member of the Quebec Group who has not opted out of the Quebec Class Action by the opt-out deadline is bound by the Transaction and the present judgment;
- [61] **ORDERS** the respondents to pay the amounts required under the Transaction, subject to the right of cancellation set out in article 8.1 of the Transaction;
- [62] **ORDERS** that the notice regarding the approval of the Transaction sent to the members of the Quebec Group take the form suggested in Schedule “J” of the Transaction;
- [63] **ORDERS** that the members of the Quebec Group receive notice of the present judgment in accordance with the dissemination plan suggested in Schedule “K” of the Transaction;
- [64] **DECLARES** the present judgment and the Transaction to be binding on each member of the Quebec Group, including minor persons who are without legal capacity, regardless of whether such persons receive or claim compensation under the terms of the Transaction;
- [65] **APPOINTS** Crawford Class Action Services as administrator of the claims;
- [66] **DECLARES** that on the effective date, members of the Quebec Group who have not opted out shall be deemed to have granted full and final discharge to the respondents for any claim relating to the “Durom Cup” and to that end, **CONFIRMS** the discharges and waivers set out in the Transaction;
- [67] **ORDERS** Crawford Class Action Services to withhold from each admissible claim of the members of the Quebec Group, and to pay to the Fonds d'aide aux actions collectives, the applicable percentage under the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives*, art. 1. (3);
- [68] **ORDERS** the Régie de l'assurance-maladie du Québec (the “RAMQ”) to send to counsel for the Applicant, in a sealed envelope marked “Confidential,” the names and



- contact information of all persons identified by the RAMQ as persons who were implanted with a Durom Cup;
- [69] **ORDERS** counsel for the Applicant to explain, in their first correspondence with the members whose names and contact information are sent to them by the RAMQ, that these persons may at any time indicate that they do not give their consent for the Applicant to retain their names and contact information and consequently, **ORDERS** counsel for the Applicant to remove from all their records the names and contact information of any persons who indicate such a wish to them;
- [70] **ORDERS** that the names and contact information of all persons identified by the RAMQ as persons who were implanted with a Durom Cup not be entered into the Court record without the latter's express authorization;
- [71] **ORDERS** Crawford Class Action Services to constitute a reserve equivalent to 33.33%, plus applicable tax, of each amount paid to the members of the Quebec Group with replacement surgery and medically contra-indicated, to pay the fees of the Applicant's lawyers and/or any other lawyer whose fees are approved by the Court;
- [72] **THE WHOLE** without legal costs.

[signed]
LOUIS J. GUIN, J.C.S.

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Date of hearing: June 28, 2016

