

# SUPERIOR COURT

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

N° : 500-06-000555-116  
N° : 500-06-000543-104

DATE : April 4, 2012

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

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**RICHARD BRUNET** (500-06-000555-116)  
Petitioner

c.  
**ZIMMER OF CANADA LIMITED et al.**  
Respondents

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**BEN WAINBERG** (500-06-000543-104)  
Petitioner

c.  
**ZIMMER INC. et al.**  
Respondents

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## JUDGMENT

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[1] The Court is seized with a "Motion for a Stay of Proceedings" (the "**Motion**") presented by the Respondents (collectively "**Zimmer**") in the matters of *Richard Brunet v. Zimmer of Canada Limited et al.* (No. 500-06-000555-16) (the "**Brunet Matter**") and *Ben Wainberg v. Zimmer Inc. et al.* (No 500-06-0000543-104) (the "**Wainberg Matter**").

[2] Zimmer requests a stay of any and all proceedings related to the "Motions for Authorization to Institute a Class Action and to Obtain the Status of Representative" that were filed separately in the Brunet Matter and the Wainberg Matter, pending the outcome of Zimmer's appeal of the certification of a national class action in British Columbia in the matter of *Jones v. Zimmer GMBH*<sup>1</sup> (the "**Jones Matter**").

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<sup>1</sup> 2011 BCSC 1198, Exhibit "A".

[3] As in the Jones Matter, both the Brunet Matter and the Wainberg Matter involve Zimmer and hip implant surgeries, but they are still at the initial steps of the proceedings.

[4] The certification order<sup>2</sup> (the "**BC Order**") rendered in the Jones Matter on September 2, 2011, defines the class as follows :

"All persons who were implanted with the Durom acetabular hip implant in Canada".

[5] The BC Order has also determined the following common issues (the "**Common Issues**") :

- a. Was the Durom acetabular hip implant defective and/or unfit for its intended use?
- b. Did any of the defendants breach a duty of care owed to class members and, if so, when and how?
- c. Does the defendants' conduct warrant an award of punitive damages and, if so, to whom shall they be paid and in what amount?
- d. With respect to British Columbia residents, did any of the defendants breach a statutory duty under the *Business Practices and Consumer Protection Act* owed to class members who received the Duron acetabular hip implant in British Columbia and, if so, when and how?"

[6] Zimmer's appeal<sup>3</sup> of the BC Order is scheduled to proceed on May 29 and 30, 2012<sup>4</sup>.

### ZIMMER'S POSITION

[7] Essentially, Zimmer argues that the Brunet Matter and the Wainberg Matter duplicate the national class action as certified by the BC Order in the Jones Matter, and that they stand to be affected by the appeal of the BC Order.

[8] Furthermore, Zimmer maintains that any delay will not result in undue prejudice or inconvenience to the Petitioners in the Brunet Matter and the Wainberg Matter, and that a stay will even avoid confusion and reduce fees and costs.

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<sup>2</sup> Exhibit "B".

<sup>3</sup> Exhibit "C".

<sup>4</sup> Exhibit "D".

[9] Therefore, Zimmer requests that the Brunet Matter and the Wainberg Matter be stayed until, at least, the outcome of the appeal of the BC Order.

### CONTESTATION OF THE MOTION

[10] Both Richard Brunet and Ben Wainberg contest the Motion on the basis that the Jones Matter does not protect or serve their best interests.

[11] They argue that the "opt out" system of Quebec is preferable to the "opt in" system of British Columbia and, because their cause of action arises in Quebec, their right to invoke the laws of Quebec should be protected at all times.

### THE LAW

[12] In deciding on the Motion, the Court must exercise its discretion with a view to insure, *inter alia*, that the interests of any class members who underwent hip implant surgery in Quebec (the "**Quebec Members**") are adequately protected.<sup>5</sup>

[13] The Court is of the opinion that such protection must include the Quebec Members' right that the Common Issues be also analyzed and decided on the basis of applicable Quebec rules and legal principles.

### DISCUSSION

[14] From the outset, a simple reading of the Common Issues raises the following questions with respect to the Quebec Members : when deciding on those issues, will the Supreme Court of British Columbia (the "**BC Court**") take into consideration :

- a. any presumptions of defect provided under the *Civil Code of Québec* ("**CcQ**")?
- b. any presumptions of fault or liability provided under the CcQ?
- c. any duty of care provided under the CcQ?
- d. any punitive damages in virtue of the *Quebec Charter of Human Rights and Freedoms*<sup>6</sup>, as well as under the *Quebec Consumer Protection Act*<sup>7</sup>?

[15] Zimmer was not able to answer any of these questions. Rather, it maintained that the Quebec Members are only interested in the amount of money they may obtain under the Jones Matter, no matter the applicable rules or principles of law supporting

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<sup>5</sup> Article 3137 of the *Civil Code of Québec*; *Gardner c. Janssen-Ortho Inc.*, 2002 CanLII 15177 (S.C.); *Melley v. Toyota Canada Inc.*, 2011 QCCS 1229 (confirmed in 2011 QCCA 829); *Lebrasseur v. Hoffman-La Roche Limitée*, 2011 QCCS 5457.

<sup>6</sup> R.S.Q., c. C-12.

<sup>7</sup> R.S.Q., c. P-40.1.

any compensatory damages and that, in any event, if they are not satisfied with the final determination, they can then exercise any other recourses they may have.

[16] This is not in the best interests of the Quebec Members.

[17] To stress further this point, the Court brought to the attention of Zimmer that the fourth Common Issue dealing with the British Columbia *Business Practices and Consumer Protection Act*<sup>8</sup> is exclusive to British Columbia residents, with no equivalent for Quebec Members or for any other non-resident members.

[18] These are very serious concerns for this Court, and they will not be resolved by the appeal of the BC Order.

[19] The Court is of the opinion that the Quebec Members are not adequately protected by the Common Issues to be decided in the Jones Matter and, therefore, the Motion will be dismissed and the Brunet Matter and the Wainberg Matter will not be stayed.

[20] Moreover, the Court is also very concerned that, under the *British Columbia Class Proceedings Act*<sup>9</sup>, the Quebec Members must be proactive in "opting in" to belong to a class in the Jones Matter, and that they may have to be in a subclass, with a separate representative plaintiff.


[21] This means, *inter alia*, retaining counsel and experts, travelling to and from British Columbia, translating supporting documents, etc, and incurring substantial fees and expenses.

[22] This is not in the best interests of the Quebec Members.

**FOR THESE REASONS, THE COURT :**

[23] **DISMISSES** Zimmer's Motion for a stay of proceedings in the Brunet Matter and in the Wainberg Matter;

[24] **THE WHOLE** with costs against Zimmer in the Brunet Matter and in the Wainberg Matter.

  
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**LOUIS J. GOUIN, J.S.C.**

<sup>8</sup> [SBC 2004] c. 2.

<sup>9</sup> [RSBC 1996] c. 50, art. 6 and 16.

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Hearing date : March 30, 2012