CITATION: McSherry v. Zimmer GMBH 2010 ONSC 4113
COURT FILE NO.: 10-CV-408365CP
COURT FILE NO.: 10-CV-413110CP
DATE: July 13, 2012

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Gloria McSherry

Plaintiff

- and -

Zimmer GMBH, Zimmer, Inc. and Zimmer of Canada Limited

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AND BETWEEN:

Eric Kenneth Mets and Karen Griffiths

Plaintiffs

- and -

Zimmer Holdings Inc., Zimmer, Inc., Zimmer GMBH, and Zimmer of Canada Limited

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

- David A. Klein, Douglas Lennox and Robert Kugler for the plaintiffs in *McSherry v. Zimmer GMBH*
- Vincent Genova and Sakie Tambakos for the plaintiffs in *Mets v. Zimmer Holdings Inc.*
- Peter J. Pliszka for the defendants.

HEARING DATE: July 5, 2012

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] There are 4 Ontario, 2 Québec, 1 Alberta, 1 British Columbia, 1 New Brunswick, and 1 Nova Scotia class action that are in play, 10 in all. There was also a Québec action, now discontinued. Now before the court are carriage and stay motions under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6. These motions require an analysis of the problematic of multiple class actions across Canada.

[2] The motions explore the problem of how to determine the carriage of an Ontario class action when there are concurrent class actions in several provinces, some of them cohort class actions, some of them rival class actions, some of them regional class actions, some of them national class actions, some of them opt-in class actions, some of them opt-out class actions, some of them active class actions, and some of them dormant claim-staking class actions. Of particular importance to the motions now before the court is the difference between opt-out class actions and opt-in class actions. Also important is the role of consortiums comprised of class counsel to the problematic of multiple class actions across the country.

[3] Gloria McSherry, the plaintiff in *McSherry v. Zimmer et al.*, which is a proposed regional Ontario class action and which is in cohort with *Jones et al. v. Zimmer GMGH et al.*, a certified British Columbia national opt-in class action, moves for an order staying three proposed national Ontario class actions; namely: *Mets et al. v. Zimmer GMBH et al*, *D'Anna v. Zimmer GMBH et al,* and *Ducharme et al. v. Zimmer Inc.* and for an order granting carriage to *McSherry*, whose lawyers of record are Klein Lyons, a British Columbia firm with an Ontario office.

[4] Eric Kenneth Mets and Karen Griffiths, the plaintiffs in *Mets* (one of the targets of Mrs. McSherry's motion) move for an order staying *McSherry* and for an order granting carriage to *Mets*, whose lawyers of record are Rochon Genova LLP, who are members of a consortium of four Ontario law firms and one Saskatchewan law firm with an Ontario office. Mr. Mets and Ms. Griffiths submit that *Mets,* their proposed national class action, should <u>not</u> give way to the cohort of *Jones* and *McSherry* and should be granted carriage with *McSherry, D'Anna* and *Ducharme* being stayed.

[5] Mr. Mets and Ms. Griffiths submit that *Mets,* their Ontario national class action, has advantages over the cohort of *Jones* and *McSherry*, including the features that: (a) *Mets* is in a national action; (b) *Mets* is an opt-out class action, which, it is submitted, better protects class members from across the country; (c) *Mets* includes valuable causes of action egregiously missing from *Jones* and *McSherry*; (d) *Mets* is much further advanced than *McSherry* and not that far behind the defective *Jones*; and (e) *Mets* is supported by a consortium of law firms, some of whom have started the other proposed class actions across the country.

[6] The defendants Zimmer GMBH, Zimmer, Inc., Zimmer of Canada Limited and Zimmer Holdings Inc. (collectively "Zimmer") attended the carriage and stay motions.

They did not take sides in the contest between Klein Lyons and Rochon Genova LLP, but the Zimmer defendants did make three requests. The first request is the sensible request that the court should grant carriage to only one Ontario action and should stay the other Ontario actions. The second request is that the Ontario court should make a suggestion to other courts across the country to stop the piling on of class actions against Zimmer. (I take this request with a grain of salt because Zimmer is opposing certification of any class actions against it.) The third request is that if the Ontario court grants carriage to *Mets,* it should not attempt joint case management with the British Columbia court managing *Jones*, because joint management would be inefficient given that there is no cooperative arrangement between Klein Lyons and Rochon Genova LLP, on the plaintiffs' side of the cases. However, Zimmer would have no objection to a joint case management of *Jones* and *McSherry* given the common denominator of one law firm, Klein Lyons, representing the plaintiffs' side of the actions.

[7] As the discussion below will reveal, on the carriage and the stay motions, the parties' evidence and arguments ranged over the broad territory of the problematic of multiple class actions and the factors that the court may or should consider when deciding whether to award carriage to one action over others.

[8] For the reasons that follow, I stay *Mets*, *D'Anna,* and *Ducharme* and I grant carriage to *McSherry.*

B. EVIDENTIARY BACKGROUND

[9] Mrs. McSherry supported her motion with her own affidavit and with affidavits from Mark Lyons. Mr. Mets and Ms. Griffiths supported their motion with affidavits from Eric Mets, Karen Griffiths, Steven Aldred, Frank Cristo, and Sonya Diesberger.

[10] Mrs. McSherry of Toronto, Ontario, is the proposed representative plaintiff in *McSherry v. Zimmer et al.* Mark Lyons is a partner of Klein Lyons, the lawyer of record in Ontario's *McSherry* and British Columbia's *Jones.*

[11] Eric Mets of Etobicoke, Ontario, is a proposed representative plaintiff in *Mets.* Karen Griffiths of Etobicoke, Ontario, is a proposed representative plaintiff in *Mets.* Steven Aldred of Etobicoke, Ontario, is a proposed additional representative plaintiff for *Mets.* Frank Cristo of Sudbury, Ontario, is a putative class member in *Mets.* Sonya Diesberger is an associate lawyer at Rochon Genova LLP, the lawyer of record in *Mets.*

C. DRAMATIS PERSONAE

[12] Zimmer Holdings Inc. is a Delaware corporation and holding company with its principal place of business in Warsaw, Indiana.

[13] Zimmer Inc. is a Delaware corporation with its principal place of business in Warsaw, Indiana, where it manufacturers the Metasul Durom Acetabular, a component part of a hip implant known as the Durom Cup. It is licenced by Health Canada as a manufacturer of medical devices.

[14] Zimmer GMBH is a Swiss Corporation with its principal place of business in Winterhur, Switzerland, where it manufactures the Durom Cup. It is licenced by Health Canada, as a manufacturer of medical devices.

[15] Zimmer of Canada Limited is an Ontario Corporation with its head office in Mississauga, Ontario. It distributes the Durom cup and other Zimmer products.

[16] Dennis Jones, a resident of British Columbia, is a proposed representative plaintiff in *Jones*. He was implanted with the Durom Cup.

[17] Susan Wilkinson, a resident of British Columbia, is a proposed representative plaintiff in *Jones*. She was implanted with the Durom Cup.

[18] Gloria McSherry, a resident of Ontario, is a proposed representative plaintiff in *McSherry*. She was implanted with the Durom Cup.

[19] Eric Kenneth Mets, a resident of Ontario, is a proposed representative plaintiff in *Mets*. He was implanted with the Durom Cup.

[20] Karen Griffiths, a resident of Ontario, is a proposed representative plaintiff in *Mets*. She is the common law partner of Mr. Mets, and she would represent the class of family members with claims under the *Family Law Act*, R.S.O. 1990, c. F.3 and comparable provincial and territorial statutes.

[21] Klein Lyons is a litigation firm focusing on class actions. The firm is based in Vancouver but also has a Toronto office. It is one of the pioneers and veterans of class action litigation in Canada.

[22] Rochon Genova LLP is a litigation firm focusing on class actions. The firm is based in Toronto, Ontario. It is one of the pioneers and veterans of class action litigation in Canada.

D. FACTUAL AND PROCEDURAL BACKGROUND TO THE CLASS ACTIONS AGAINST ZIMMER

[23] In the various class actions that are the subject of the motions now before the court, it is alleged that the Durom Cup is defective and that if fails to adhere to bone and separates from the hip socket necessitating that those implanted with the device receive remedial surgery. I understand that approximately 5,000 persons from across Canada have been implanted with the Durom Cup.

[24] On April 15, 2009, in British Columbia, Mr. Jones, who had hip replacement surgery with a Durom Cup, retained Klein Lyons about a products liability class action against Zimmer. For this action, Klein Lyons came to be retained by the Ontario Ministry of Health and Long Term Care and by the British Columbia Ministry of Health. Klein Lyons has been retained by 48 class members who received Zimmer Durom Cup hip implants. The clients are from across Canada, Alberta-1, Québec-1, and Ontario-4, including Mrs. McSherry, but the bulk of them, 42, are from British Columbia.

[25] On July 24, 2009, in British Columbia, with Klein Lyons as lawyer of record, Mr. Jones and Ms. Wilkinson filed a proposed national opt-in class action against Zimmer GMBH, Zimmer, Inc. and Zimmer of Canada Limited. It will be significant to note that under the *British Columbia* legislation, the *Class Proceedings Act, 1992*, R.S.B.C. 1996, c. 50, class members from outside British Columbia participate in a class action by opting-in to it within a prescribed time period. Claimants from outside the province must take an active step to participate in the class action.

[26] In *Jones*, Mr. Jones and Ms. Wilkinson advance products liability negligence claims against the defendants with respect to the Durom Cup. As presently drafted, the class members in *Jones* are persons in Canada implanted with the Durom Cup. There, however, are no derivative claims advanced for family members whose lives have been adversely affected by what has happened to the class members. There is no waiver of tort claim and Zimmer Holdings is not a named defendant.

[27] Klein Lyons registered the *Jones* statement of claim with the Canadian Bar Association National Database in accordance with the practice direction established by the Canadian Judicial Council and the Uniform Law Conference of Canada. The practice direction was designed as a means to reduce the problems of multiple class actions about the same wrongdoing by giving public notice of the commencement of a class action. Notice of the *Jones* action was also posted to Klein Lyons' firm website.

[28] On January 14, 2010, Justice Bowden of the British Columbia Superior Court was appointed to case manage *Jones*. As will be seen below, Justice Bowden has been an attentive and effective manager, and the litigation in British Columbia has made considerable progress.

[29] Meanwhile in Ontario, on August 10, 2010, Klein Lyons filed an action for Mrs. McSherry for a proposed products liability class action for Ontario residents with respect to the Durom Cup. *McSherry* is a regional opt-out class action, and it seems to have been commenced out of an abundance of caution. Klein Lyons' focus of attention has been on advancing *Jones* in British Columbia. It appears that the plan of Klein Lyons was to use *Jones* as the main vehicle to pursue the Zimmer defendants and to utilize *McSherry* as an adjunct class action to be activated as and if necessary.

[30] On October 27, 2010, with Rochon Genova LLP as lawyer of record, Mr. Mets and Ms. Griffiths commenced a proposed national opt-out class action against Zimmer Holdings Inc., Zimmer Inc., Zimmer GMBH and Zimmer of Canada Limited. In this class action, Mr. Mets would represent those class members implanted with the Durom Cup and Ms. Griffiths would represent family members with derivative claims. Recently, Rochon Genvoa has decided to add Steven Aldred, who was also implanted with a Durom Cup, as a co-plaintiff and as another representative plaintiff.

[31] The statement of claim in *Mets* was not posted on the CBA National Database nor was it posted on the Rochon Genova LLP web page.

[32] In *Mets*, the proposed class definitions for the national classes are:

> All persons resident in Canada, excluding residents in British Columbia and persons who opt into the Jones Action, who were implanted with the Durom Acetabular Component of the Durom System (the "Class" or "Class Members").
>
> All persons who on account of a personal relationship to a Class Member are entitled to assert a derivative claim for damages pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended, and comparable provincial and territorial legislation. ("Family Class" or "Family Class Members").

[33] In *Mets*, Mr. Mets and Ms. Griffiths advance claims of negligence, conspiracy, and waiver of tort. As may be noted from the class definition above, there is also a derivative claim for damages pursuant to the *Family Law Act*, and related legislation in other provinces. Zimmer Holdings, the parent corporation, of the other Zimmer defendants is a named defendant. Rochon Genova LLP submits that the inventory of causes of action in *Mets* is far superior to the causes of action found in *Jones* and *McSherry*.

[34] On November 22, 2010, with the Merchant Law Group as lawyer of record, Peggy D'Anna commenced in St. Catherines, Ontario, a proposed class action against Depuy International Ltd., Depuy Orthopaedics Inc., Johnson & Johnson Corporation, Johnson & Johnson Inc. Zimmer Inc., Zimmer GMBH, Zimmer Holdings Inc., Zimmer of Canada Limited, Stryker Canada LP, Stryker Canada Corp. Stryker Corporation, Stryker Canadian Management Inc., and Howmedica Osteonics Corporation.

[35] Ms. D'Anna was implanted with a Stryker Trident Ceramic Acetabular System and sues on behalf of similarly affected persons who were implanted with the Stryker, Depuy, or Zimmer hip implant systems referred to in the statement of claim.

[36] The *D'Anna* action is proposed to be a national class action. As part of a consortium agreement, mentioned below, Merchant Law Group will agree to stay, discontinue, or consolidate *D'Anna* with *Mets*.

[37] The statement of claim in *D'Anna* was not posted to the National Database, nor was notice of it posted on the Merchant Law Group's firm website. There is no evidence that any progress has been made in prosecuting the action.

[38] I pause here in the chronology to say that a great deal of waste of time and money would have been avoided for all concerned if any of Klein Lyons, Rochon Genova LLP, or the Merchant Law Group had not waited two years before asking that a case management judge be appointed for the Ontario actions. Both the successful party and the unsuccessful party on these carriage and stay motions will suffer for their failure to bring the matter of the carriage of the Ontario actions to the attention of the court sooner. They have only themselves to blame for the consequences of this oversight.

[39] Returning to the chronology, by the end of 2009, there was the *Jones* action in British Columbia coupled with the *McSherry* action in Ontario and the *Mets, and D'Anna* actions in Ontario. For the better part of the next two years, these actions carried on like litigation ships passing unnoticed in the dark night. Klein Lyons' focus

of attention was on *Jones*, and it was apparently unaware or uninterested in what was happening in *Mets* and *D'Anna* in Ontario.

[40] By the end of 2009, it was manifest that Klein Lyons was busy suing Zimmer in British Columbia with a proposed national class action, and in the context of this carriage motion, Klein Lyons submits that, in contrast, Rochon Genova LLP was doing next to nothing in advancing *Mets*, the rival national proposed class action, apart from attempting to negotiate the consortium agreement, which is discussed further below.

[41] As a factual matter, I find this criticism of Rochon Genova LLP to be inaccurate and extreme. It does appear that during 2010 and 2011, Rochon Genova LLP was focusing its attention on avoiding a carriage fight with the Merchant Law Group, but Rochon Genova LLP was not doing nothing to advance *Mets*. The firm was marshalling its evidentiary forces, and, behind the scenes, so to speak, it was preparing to go on stage with its certification motion material for the *Mets* action, which it eventually did deliver in early 2012.

[42] I was provided with no evidence about what the Merchant Law Group was doing to advance *D'Anna* between 2010 and 2012.

[43] The progress in British Columbia was manifest. On May 11, 2010, Justice Bowden held the first case management conference in *Jones*, and there have been numerous attendances since then, including an attendance on June 25, 2010, when he established a timetable for a certification motion, to be heard within a year.

[44] The certification motion in *Jones* was argued in February 2011 (3 days) and April 2011 (1 day).

[45] On September 2, 2011, Justice Bowden released his reasons and certified *Jones* as a national opt-in class action. See *Jones* v. *Zimmer GMBH et al.*, 2011 BCSC 1198. The class definition for *Jones* is: "All persons who were implanted with the Durom acetabular hip implant in Canada." Justice Bowden's reasons at para. 45 indicate that Zimmer did not dispute that if the case was certified. then a national class was appropriate to allow non-residents of British Columbia to participate in the class action.

[46] The Zimmer defendants in the British Columbia action appealed to the British Columbia Court of Appeal, but this did not stop the progress of the *Jones* action, which was not stayed pending the appeal. Under the British Columbia practice, the action is moving forward with mandatory mediation and preparations for discovery. Justice Bowden has established a schedule for discoveries, exchange of expert reports, and trial. The trial has been set for October 2014.

[47] In the late summer of 2011, with *Jones* having been certified, Klein Lyons decided to give some attention to the parked *McSherry*. On September 7, 2011, Doug Lennox of Klein Lyons wrote me (I am the team leader for class actions in Toronto) requesting that a case management judge be appointed for *McSherry*. Mr. Lennox advised me that *Jones* had been certified and that there were rival class actions to *McSherry* in Ontario. Klein Lyons wished directions with respect to the Ontario actions.

[48] On September 13, 2011, I wrote Mr. Lennox and advised him that I would be case managing the matter. I suggested that a case conference be arranged. Mr. Lennox sent a copy of my letter to Rochon Genova.

[49] Meanwhile, on September 16, 2011, under British Columbia's mandatory mediation rules, A Notice to Mediate was delivered in *Jones.* The parties began discussions to select a mediator.

[50] In Ontario, there were communications between Klein Lyons and Rochon Genova during the remaining months of 2011, but no case conference was arranged.

[51] On February 16, 2012, Rochon Genova wrote Justice Strathy, another member of Toronto's Class Action team, and requested that a case conference judge be appointed for *Mets*, and on February 17, 2012, Mr. Mets and Ms. Griffiths delivered their certification motion record.

[52] Having received a copy of the letter to Justice Strathy, Klein Lyons reminded Rochon Genova LLP that I was already the case management judge. Arrangements were then made for a case conference, but, in the meanwhile, there continued to be activity in *Jones*, some of it taking place in Ontario.

[53] On March 7, 2012, in Toronto, Ontario, the Honourable Mr. George Adams presided at a mediation session in *Jones.* Ms. Wilkinson travelled from British Columbia and Mrs. McSherry and her husband James attended. The mediation was adjourned after one day, apparently because of questions about whether Rochon Genova LLP should also be participating in the settlement negotiations.

[54] On April 23, 2003, Justice Bowden established a schedule for litigation. Under the timetable, the mediation is scheduled to recommence before October 31, 2012, unless carriage issues have not been resolved by that time.

[55] On May 22, 2012, Rochon Genova LLP, Stevenson LLP, Teplitsky Colson LLP, Kim Orr LLP, and Merchant Law Group signed a consortium agreement with respect to litigation against Zimmer and others. The members of the consortium had been contacted by 255 class members, 236 of whom reside outside of British Columbia.

[56] The consortium agreement was not filed with the court, although several of its provisions were disclosed for the motions now before the court. The consortium agreement apparently covers claims for clients with claims arising from the Durom Cup and also with respect to the claims against Depuy and Styker, who are Zimmer competitors that manufacture a similarly designed hip implant component. I assume that the consortium members have negotiated a scheme for allocating work and sharing fees among the members of the consortium.

[57] Also on May 22, 2012, with the Merchant Law Group as lawyer of record, Gilles and Iris Ducharme commenced another proposed national class action against Zimmer Inc., Zimmer Holdings, Inc. Zimmer GMBH, and Zimmer of Canada Ltd. The statement of claim in *Ducharme v. Zimmer Inc.* has not been served on the defendants. By the *Ducharme* action, it would appear that the Merchant Group was hedging its bets

on the consortium agreement and circumventing the problem that Ms. D'Anna does not have a claim against Zimmer having been implanted with a Stryker implant. If carriage is granted to *Rochon Genova LLP* and the consortium, *Merchant Law Group* has agreed to discontinue or stay *Ducharme*.

[58] On May 23, 2012, there was a case conference in Toronto, Ontario. A certification motion was not scheduled; all I could accomplish was to set a schedule for the carriage and stay motions that are now before the court.

[59] On May 29 and 30, 2012, the British Columbia Court of Appeal heard the argument in the appeal in *Jones*. The court reserved judgment.

[60] In the run-up to the carriage motion, there apparently were unsuccessful negotiations about Klein Lyons joining the Rochon Genova LLP led consortium. It seems that Klein Lyons was prepared to consider partnering with some but not all of the consortium members. In any event, there were disagreements about what euphemistically was called the politics of class counsel consortiums and so no agreement was reached.

[61] Before completing the factual background, it is necessary to mention a few things about the other actions against Zimmer with respect to the Durom Cup and, in particular, it is necessary to make some observations about the situation in Québec.

[62] The Merchant Law Group has commenced proceedings in Alberta, New Brunswick, and Nova Scotia and two actions in Québec, one of which was discontinued.

[63] On November 26, 2010, in Québec, the Merchant Law Group commenced an action against Zimmer and other manufacturers. This action has been discontinued for reasons that were not disclosed to me.

[64] On December 10, 2010, in Québec, the Merchant Law Group commenced *Wainberg v. Zimmer Inc.,* an action by Ben Wainberg against Zimmer Inc., Zimmer GMBH, Zimmer Holdings Inc., and Zimmer of Canada Limited.

[65] In addition to the two Merchant Law Group's actions, there is one other Québec action. Klein Lyons is working in collaboration with Kugler Kandestin, an experienced class action firm, which is the lawyer of record in *Richard Brunet* c. *Zimmer Inc. et al.* There is a pending carriage motion between Kugler Kandestin and the Merchant Law Group scheduled in Montreal for August 15, 2012. Justice Gouin is case managing the Québec actions.

[66] On April 4, 2012, the Zimmer defendants in Québec moved for a stay of *Brunet* pending the outcome of the appeal in *Jones* in British Columbia. Justice Gouin dismissed the motion. See *Brunet* c. *Zimmer of Canada Ltd.*, 2012 QCCS 1461. Justice Gouin concluded that it was not in the best interests of the Québec claimants to stay the action. In paragraphs 18 to 22 of his reasons he stated:

> 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 Québec 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*, 1992, 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 Québec Members.

[67] To conclude this part of my reasons, it should be noted that under the consortium agreement, if *Mets* is granted carriage and ultimately certified as a national class with the exception of a Québec action, no other actions against Zimmer will be prosecuted by the consortium. Thus, if *Mets* is granted carriage, there will be active parallel actions against Zimmer in British Columbia (*Jones*), Québec (*Wainberg* or *Brunet*) and Ontario (*Mets)*.

[68] Finally, if *Mets* is not granted carriage, there apparently will be parallel actions against Zimmer in British Columbia (*Jones*), Québec (*Wainberg* or *Brunet*), Ontario (*McSherry)*, Alberta, New Brunswick, and Nova Scotia.

E. THE COMPETING CARRIAGE SUBMISSIONS

1. Introduction

[69] Relying on various factors that courts may consider when determining a carriage or stay motion, which I will discuss in some detail below, Klein Lyons and Rochon Genova LLP respectively advance arguments to justify granting carriage exclusively to their clients' proposed Ontario class action.

[70] In this section of my Reasons for Decision, I will summarize the competing arguments for carriage.

2. The Rochon Genova LLP Argument for Carriage

[71] Rochon Genova LLP submit that it should be granted carriage because *Mets* has claims for waiver of tort and conspiracy and derivative claims for family members, and because *Mets* joins Zimmer Holdings as a defendant. Rochon Genova LLP submits the design of its class action is far superior to *McSherry* and *Jones*, which want for these various claims.

[72] Indeed, Rochon Genova LLP submits that the missing elements in *Jones* and *McSherry are* egregious oversights. And Rochon Genova LLP submits that for the purposes of awarding carriage, the court should judge *McSherry* and *Jones* in their

current state and without regard to Klein Lyons' intentions to improve the litigation design of *McSherry* by adding a waiver of tort claim and claims for family members. Simply put, Rochon Genova LLP submit that their proposed class action is superior to *McSherry* and *Jones*.

[73] Further, Rochon Genova LLP submits that *Jones* as an opt-in national class is far inferior in protecting extra-provincial class members and in being fair to defendants than is *Mets,* its national opt-out class action. Rochon Genova LLP submits that opt-in regimes are inherently inferior to opt-out regimes, because an opt-in regime requires affirmative action by class members, who may not know that they must act or who, because of practical or psychological reasons, may fail to take the required affirmative act of opting-in, which is not required in a more inclusive and protective opt-out regime.

[74] Put succinctly, Rochon Genova LLP submits that many claimants will miss access to justice if they must opt into the British Columbia action. Opt-out regimes are fairer to defendants because they are more efficient in resolving claims and particularly effective for settlements where more releases become available. Once again, Rochon Genova LLP submit that *Mets*, their proposed class action, is superior to *McSherry* and *Jones*.

[75] Moreover, Rochon Genova LLP submits that in terms of progress, *Mets* is further advanced than *McSherry* and not significantly behind the inferior *Jones*. Further, it submits that there is good reason to believe that Klein Lyons will not actively prosecute *McSherry,* because, so far, it has exclusively advanced *Jones* and let *McSherry* languish. Therefore, Rochon Genova LLP submits that *Mets* should be granted carriage.

[76] Rochon Genova LLP submits that if it is granted carriage, it will be able to cooperate with Klein Lyons in facilitating the case management of their respective actions and in participating in settlement negotiations with Zimmer. Rochon Genova LLP submits that the harmonious and simultaneous prosecution of class actions in more than one jurisdiction has become common place and is feasible. It submits that "global peace" can be achieved if and only if its consortium is at the bargaining table.

[77] If a settlement proves illusive, Rochon Genova LLP extols the advantages of being part of a consortium because of the combined resources and expertise and experience of the members of its consortium, who have extensive experience in medical and pharmaceutical products liability class actions.

3. The Klein Lyons Argument for Carriage

[78] Klein Lyons submits *McSherry* should be awarded carriage because *McSherry* when coupled with *Jones* is much further advanced than *Mets* and manifest progress has been made on both the litigation track, which is at the discovery stage with doctors and medical experts briefed and ready to go, and also on the settlement track, where *McSherry* and *Jones* is ready for the resumption of the mediation before Mr. Adams.

[79] Klein Lyons submits that, in contrast, Rochon Genova LLP has achieved very little with *Mets* other than negotiating a consortium agreement and that granting carriage to *Mets* will obstruct the progress of its cohort of *Jones* and *McSherry.* Klein Lyons says that its *Jones* action should not be held back by granting carriage to *Mets* and, practically speaking, joint case management with *Mets* would not work because Klein Lyons is not interested in partnering with the consortium and because confidentiality orders already granted by Justice Bowden make joint case management impractical.

[80] Klein Lyons submits that if it is granted carriage, it will fix any deficiencies in its pleading of claims by adding a waiver of tort claim and claims for family members, and it will, if necessary, make *McSherry* a national class action to address any deficiencies in the difference between opt-in and opt-out regimes. Alternatively, it says that any deficiencies in the pleading of claims can be ameliorated by amending the pleadings in *Jones*. Once this housekeeping is done, Klein Lyons says that it will reconvene the mediation before Mr. Adams and attempt to settle the litigation, failing which it will move the *Jones* action to a common issues trial in British Columbia.

[81] If there is no settlement, then Klein Lyons will ramp up the *Jones* litigation. It submits that British Columbia is the convenient forum for the main class action because there is good reason to believe that the class members are concentrated in British Columbia. (This last point, which I need not decide, is strenuously contested by Rochon Genova LLP, which insists that class membership is not concentrated in British Columbia).

[82] Klein Lyons also submits that the "politics of consortium formation" in class actions has gotten out of hand and that these carriage motions provide the court with an opportunity to fix the problems by not granting carriage to *Mets*. Klein Lyons submits that there is an unjustified expectation in the class action bar that if a law firm files an action in one province and does no work or simply duplicate another's work, then it will be entitled to participate and claim a fee and a share of the global settlement. It submits that the court should discourage such conduct.

[83] Putting it another way, Klein Lyons submits that the court should do something to discourage law firms from filing a class action lawsuit, doing nothing with it, and then reviving it when settlement talks begin in order to cash in on the settlement.

[84] Klein Lyons main arguments, however, remains that it has earned the right to be assigned carriage of *McSherry* and the consortium has not made a contribution and granting carriage to it is unnecessary and detrimental to the progress that has been and will be made in *McSherry* and *Jones*.

F. ANALYSIS

1. Introduction

[85] In order to decide the stay and carriage motions of the case at bar, it is necessary first to say something about the problematic of multiple class actions across the country.

In the first section of the analysis, I will discuss some general aspects of the problems that arise when a defendant harms many and more than one class action follows, as has occurred in the case at bar. I will focus my attention on how legislatures and courts have approached the general circumstance of multiple class actions for a mass wrongdoing. In the second section of the analysis, I will discuss the significance to the problematic of multiple class actions of the difference between opt-in class actions and opt-out class actions, both of which type of class actions are present in the case at bar. In the third section of the analysis, I will discuss the law of carriage and stay motions in the context of the problematic of multiple class actions. In the fourth section of the analysis, I will explain my reasons for awarding carriage to Klein Lyons in the case at bar.

2. The Problematic of Multiple Class Actions

[86] How should legislatures and courts respond to the circumstances that there may be multiple class actions within a province about the same alleged mass wrongdoing? How should legislatures and courts respond to circumstances, like the case at bar, that there are multiple class actions across the country about the same alleged mass wrongdoing?

[87] In its seminal report on class actions, *Report on Class Actions* (Ministry of the Attorney General, Ontario, 1982), the Ontario Law Reform Commission, appreciated that in the circumstances of a mass wrong, there might be more than one class action that would follow. The Commission, however, thought that it was not necessary to address expressly any problems about multiple class actions, because the court's power to stay litigation was already available to resolve any problems associated with multiple class actions. The Commission stated at p. 455 of its report:

> In the case of a mass wrong, it is easy to envisage that more than one class action, seeking similar relief, may be commenced. It is also possible that members of the class may commence individual actions against the defendant, either before a class action is brought or in ignorance of the existence of a class action on their behalf. The question that arises is whether the proposed *Class Actions Act* should contain a specific provision empowering the court to stay other class actions for the same relief or individual actions claiming similar relief. In our opinion, such an express provision is unnecessary, since a court today is able to coordinate related actions under its power to stay litigation pursuant to section 18.6 of the *Judicature Act*, R.S.O. 1980, c. 223.

[88] The Ontario Legislature, however, decided that the co-ordination of class actions was worthy of some express treatment. Along with the authority provided by the *Courts of Justice Act*, R.S.O. 1995, c. 45 and the *Rules of Civil Procedure*, the Ontario Legislature enacted sections 12 and 13 of the *Class Proceedings Act, 1992*. Thus, the Legislature conferred on the Superior Court a broad discretion to manage class actions, including the power to stay actions and to grant carriage to one proposed class action and to stay other actions. The Legislatures in other provinces have provided similar powers to their courts.

[89] In Ontario, s. 38 of the *Courts of Justice Act*, R.S.O. 1990, c. 43 directs that "as far as possible, multiplicity of legal proceedings shall be avoided." The obvious

underlying policy is that multiple legal proceedings are inefficient, uneconomical, and embarrassing when different courts reach inconsistent outcomes and thus more than one action for the same wrongdoing should be avoided. Section 106 of the Act states: "a court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just."

[90] Section 13 of the *Class Proceedings Act, 1992,* authorizes the court to "stay any proceeding related to the class proceeding," and s. 12 of the Act authorizes the court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination." Sections 12 and 13 of the *Class Proceedings Act, 1992* state:

> *Court may determine conduct of proceeding*
>
> 12. The court, on the motion of a party or class member, may make any 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.
>
> *Court may stay any other proceeding*
>
> 13. The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

[91] The courts in Ontario have used these powers to stay Ontario actions and to assign carriage to one class action. Where two or more class proceedings are brought with respect to the same subject matter, a proposed representative plaintiff in one action may bring a carriage motion to stay all other present or future class proceedings relating to the same subject matter: *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.) at paras. 9-11; *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (S.C.J.); *Simmonds v. Armtec Infrastructure Inc.*, 2012 ONSC 44.

[92] There should not be two or more class actions that proceed in respect of the same putative class asserting the same cause(s) of action, and one action must be selected: *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) at para. 14. See also *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2001] O.J. No. 3682 (S.C.J.), aff'd [2002] O.J. No. 2010 (C.A.). The commencement of multiple class actions in the same or other jurisdictions may be an abuse of process and a multiplicitous class action may be stayed as an abuse of process: *Duzan v. Glaxosmithkline, Inc.* 2011 SKQB 118. When counsel have not agreed to consolidate and coordinate their actions, the courts will usually select one for carriage and stay the other actions: *Lau v. Bayview Landmark*, [2004] O.J. No. 2788 (S.C.J.) at para. 19.

[93] I will have more to say about the law of carriage and of stay motions below.

[94] However, the powers provided to the court by the *Courts of Justice Act,* the *Rules of Civil Procedure* and the *Class Proceedings Act, 1992* - as useful as they may be to address the situation of more than one class action seeking similar relief - are in

the main designed to address the problem of more than one Ontario action. Neither the Ontario Law Reform Commission nor the Ontario Legislature appear to have envisioned the problems that might emerge if the duplicative class actions were outside of Ontario.

[95] The Ontario Legislature did not foresee the situation of the case at bar, now common in Ontario and other provinces, where there are multiple class actions across the country and the prospect of claimants from many provinces being class members. The *Class Proceedings Act, 1992* does not address multiple class actions across the country, and, unlike the British Columbia statute, it does not provide any special treatment for non-resident class members. In British Columbia, non-resident class members may opt into the class action. In Ontario, resident and non-resident class members are treated the same when a national class action is certified.

[96] The circumstance of multiple class actions across the country would appear to be an intense version of the problem that a multiplicity of proceedings should be avoided. Defendants are confronted with defending essentially the same action in more than one province, class members may be included in more than one class action, class counsel and the defendant may be uncertain as to the size and composition of the class, there may be inconsistent determinations, and it may be difficult to determine with certainty which class members will be bound by which result.

[97] The Uniform Law Conference of Canada Civil Law Section, *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis and Recommendations* (Vancouver, B.C., March 9, 2005) described the problematic in paras. 17 and 18 of its report as follows:

> 17. Just as the class action is generally superior to a series of individual actions, the national class action may be superior to a series of provincial class actions, even if the latter can be coordinated to a certain extent by plaintiff's counsel. The national class serves judicial economy by avoiding duplication of fact-finding, judicial analysis and pre-trial procedures and eliminates the risk of inconsistent findings. It increases access to justice by spreading litigation costs across a larger group of claimants, thus reducing the litigation costs of each claim, increasing both settlement incentives and compensation per claim and increasing the likelihood that valid claims will be brought forward. This in turn serves the goal of behaviour modification, serving efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public.
>
> By comparison, multiple provincial class actions work against the interests of absent class members, who are the intended beneficiaries of class action legislation, and frustrate the efforts of class counsel, whose economic interests determine, to some degree, whether or not class actions are brought. Absent class members want quick and effective resolution to their claims. This outcome becomes less likely when there are thirteen overlapping actions with thirteen different counsel. The uncertainty created by the potential for multiple actions may also mean that fewer class actions will be brought, since (1) class counsel in any given jurisdiction will not know the scope of the class that he or she will eventually be granted authority to represent; and (2) this in turn will make some class actions less economically viable, since counsel will have to enter into financial

> arrangements with multiple counsel, thus reducing both the expected fee and potential compensation to class members.

[98] However, the problem is more complex because in the class action context, a multiplicity of class actions across the country may be unavoidable because, as a Canadian constitutional law matter, the legislative power of the provinces is limited to legislating within the province and the courts of one province cannot be empowered to stop class actions in the courts of another province or territory even, if that litigation is redundant, duplicative, or unnecessary. As a matter of constitutional law, it is also very doubtful whether the federal government could impose on the provinces a supervisory tribunal to decide which province should have exclusive jurisdiction when there was more than one class action.

[99] Moreover, there is also the argument that legislation to address multiple class actions across the country is, in any event, unnecessary. When the principles of the law of *res judicata* and of issue estoppel and the principles of conflicts of law, including the law of jurisdiction *simpliciter, forum conveniens* and the recognition of foreign judgments are added to the mix, the provincial courts may have all the authority they need to address any problems of multiple class actions. This approach was the recommendation of the Uniform Law Conference of Canada Civil Law Section, which stated in para 32 of its report, *supra.*

> 32. .... Finally, it may be possible to resolve the conflicts between competing class actions simply by using the existing structures and adapting the current rules governing jurisdiction to the national class problem. This latter approach, which we recommend, would require some modification of existing class proceedings legislation, including with respect to certification processes, and the development of a central class action registry.

[100] Further still, apart from constitutional infeasibility precluding a meaningful statutory approach, it may be better for the provincial courts using the principles of comity between courts to address the problems with multiple class actions, because the situations of class actions are multifarious and one solution will not fit every case. Once again, the Uniform Law Conference of Canada Civil Law Section makes the point. It stated at para. 53 of its report:

> 53. While the Canadian jurisprudence on appropriate forum is well developed, its application to class actions is still emerging. However, courts have begun to consider those factors that are relevant to adjudicative efficacy and administrative efficiency in the class actions context. Some of these factors have been identified in decisions on carriage and venue motions. We expect that future decisions will further clarify the special considerations that arise in multijurisdictional situations. There will, for example, be situations in which the law in a particular province creates a cause of action that is not available in other provinces; in that case, it may be appropriate to define the class to exclude that group. There may be occasions when the interests of class members are better served through multiple coordinated proceedings than they would be served through unification in a single proceeding. There may also be competing class actions in different forums, requiring the court to choose the most appropriate forum along the traditional lines often undertaken in non-class litigation. Finally, in cases where a national class would raise so many complicating issues as to render the action impossible to resolve, the court has the residual power under legislation to simply refuse to certify the class action at all.

[101] Perhaps the best that the Ontario Legislature can do was what it did; i.e., empower the Ontario Superior Court with s. 106 of the *Courts of Justice Act* and with sections 12 and 13 of the *Class Proceedings Act, 1992,* and then leave it to the court to develop incrementally the law to address any problems associated with a proliferation of class actions in more than one jurisdiction. The argument is that the courts across the country have the tools of the law of carriage motions, the law of *res judicata* and issue estoppel, the conflicts of law principles about jurisdiction *simpliciter*, *forum conveniens,* and the enforcement of foreign judgments to fashion flexible solutions to the problems of multiple class actions in more than one jurisdiction.

[102] That the leave-it-to-the-courts-approach may be the best approach may be demonstrated by an illustration from the case at bar. Thus, for example, in the case at bar, Justice Gouin was in the best position to decide that it was undesirable to have a Québec class action against Zimmer stand down because of the British Columbia action. He rejected the idea that *Jones,* the British Columbia action, should be the exclusive means for Québec class members to obtain access to justice for their claims against Zimmer. If, however, in contrast, the Québec class members had claims only for the cost of purchasing a defective product, it might have been quite appropriate, in effect, to make the Québec class members opt-in to the British Columbia action and wait for a judgment to be distributed.

[103] To further complicate these considerations about whether one or more than one class action is appropriate or perhaps necessary, there is the yet unmentioned feature that class actions may involve a bifurcated trial process with a common issues trial followed by individual issues trials. It may be that Justice Gouin had this feature in mind when he decided *Brunet* c. *Zimmer of Canada Ltd., supra,* because he identified certain matters that would be better decided in Québec and not in British Columbia. There was thus another good reason to reject having the regional action stand down and give way to a national action.

[104] Viewed globally, i.e., from a pan-Canadian perspective, fewer class actions for the same relief may be better in terms of efficiency, judicial economy, and fairness to defendants, but they are not categorically better, because fewer class actions may not be the best way to provide access to justice for the class members of any particular province and the efficiencies of fewer class actions will dissipate if individual issues trials are necessary throughout the country or if different regions provide different remedies and causes of action for a particular wrongdoing.

[105] My main point here is that the circumstances of each class action will be different, and the courts across the country may be in the best position to decide what is in the best interests of those litigants subject to the particular court's jurisdiction. I will return to this point, which is really about comity between courts, when I discuss the virtues respectively of *Jones* as a national opt-in class action, *McSherry* as a regional opt-out class action, and *Mets* as a national opt-out class action.

[106] I move on to my next point about the problematic of multiple class actions, which is to highlight the role of class size. Class definition, which will determine the

size of the class, is a very important factor in encouraging class counsel to prosecute class actions and a factor in determining whether more than one class action is desirable or necessary. Where a defendant wrongs persons across the country, a law firm considering a retainer for a class action will consider whether a regional action with a smaller class size is sufficient or a national class action with a much larger class is necessary to justify taking on the risk of such litigation. The problematic of multiple class actions, thus, includes the problem that a court's decision about staying actions or granting carriage may affect the viability of class actions in any jurisdiction.

[107] Using the case at bar as an illustration, it would appear that only Kugler Kandestin is satisfied with a regional class action. In contrast, both Klein Lyons and Rochon Genova LLP have designs on national class actions. In other cases, class counsel may be content to prosecute a regional action.

[108] Sometimes, class counsel from across the country arrive at their own solutions, including the formation of consortiums in which one or more class actions are prosecuted sometimes to different degrees. Thus, a common pattern for medical device products liability class actions is for certification to be pursued both in Québec for a regional class action and also in a common law province for a national class that does not include Québec members. Another pattern, which was common in the criminal interest rate class actions, is that there is no national class but discrete regional class actions in the provinces in which the defendant carries on business. For the present purposes of the carriage and stay motions involving actions against Zimmer, the contest for carriage involves the problematic of balancing access to justice elements, including class size, with judicial efficiency elements.

[109] Some of these factors and features of the problematic of multiple class actions are engaged in the case at bar and underlie the questions that the court must address in deciding the carriage and stay motions of Klein Lyons and Rochon Genova LLP.

3. Opt-in and Opt-out Class Actions and Multiple Class Actions

[110] One more feature of the problematic of multiple class actions and a factor that requires special treatment because of the arguments in the case at bar is the difference between opt-in and opt-out national class actions.

[111] With the passage of time since the enactment of the *Class Proceedings Act, 1992*, it may now be forgotten that the former Rule 75 of the *Rules of Practice* was that: "Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all. In its essence, this is a rule of compulsory joinder, and if the court recognized the action as a representative action under Rule 75, the parties having the same interest were bound by the outcome without the right to opt-out.

[112] It was in the context of this approach to representative actions that the Ontario Law Reform Commission in Chapter 12 of its *Report on Class Actions*, *supra,* discussed whether to recommend an opt-out or an opt-in regime for Ontario.

[113] The Commissioners ultimately recommended against a regime where class members would have to opt-in to a class action after certification. The major problem with an opt-in regime is that it is inconsistent with the access to justice rationale that was the basic justification for class action legislation. Class members, particular those with small claims that were not economical to litigate, might not know that they had the opportunity to participate and thus they would not take the positive step of opting-in. Moreover, class members with notice of the class action option might not participate (to quote the Report at p. 468) because of "the operation of the ... social and psychological factors that inhibit persons from taking action to redress their injuries."

[114] In other words, class members with claims worthy of access to justice would through ignorance, inertia, or apathy fail to take the active steps necessary to participate in a class action. Thus, the Commissioners did not favour an opt-in regime.

[115] The Commissioners favoured an opt-out regime. However, they recommended that the legislation provide the court with discretion to determine whether class members should be permitted to opt-out. The factors that a court would be directed to consider in exercising its discretion to permit opting-out favoured permitting a class member to opt-out, but, in appropriate circumstances, a court would have the discretion to deny a right to opt-out.

[116] The Ontario Legislature did not adopt the recommendation of the Law Reform Commission. It agreed that Ontario should not adopt an opt-in regime, but it enacted an opt-out regime where class members had an absolute right to opt out. In Ontario, the court does not have a discretion to deny class members the right to opt-out. See: *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (S.C.J.); *Sauer v. Canada (Attorney General)*, [2010] O.J. No. 3381 (S.C.J); *Paramount Pictures (Canada) Inc. v. Dillon*, [2006] O.J. No. 236 (S.C.J.).

[117] The *Report of the [Ontario] Attorney General's Advisory Committee on Class Actions* (February, 1992) described the merits of an opt-out regime. The report stated:

> The value of such a model is that defendants to class proceedings are assured that they face all potential claimants in one lawsuit. Those who opt-out can be specifically identified and dealt with on that basis. The opt-out model also increases the effectiveness of a class proceeding by not requiring potential litigants to take steps to be in the suit. This is particularly so in cases involving individual claims that are relatively small.

[118] An opt-out regime maximizes class member participation in a class action. It is somewhat paternalistic or protectionist because class members are protected from ignorance, inertia, or apathy in pursuing their worthy claims and in achieving the behaviour management of defendants that is another aim of class actions. Opt-out regimes, in turn, maximize class size, which, as already noted above, is a factor in whether class action counsel will take on the risk associated with a class action retainer. Thus, opt-out regimes directly and indirectly facilitate access to justice and encourage class counsel to take on class action retainers.

[119] Once again, however, it would appear that the decision made by the Ontario Legislature in favour of an opt-out regime did not contemplate the circumstances that

class members might reside outside Ontario. The British Columbia Legislature, apparently because of jurisdictional concerns, did put its mind to the difference between resident and non-resident class members, and it enacted an opt-out regime for its residents and an opt-in regime for non-residents. Section 16 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 states:

> *Opting-out and Opting-in*
>
> 16 (1) A member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.
>
> (2) Subject to subsection (4), a person who is not a resident of British Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt-in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.
>
> (3) A person referred to in subsection (2) who opts in to a class proceeding is from that time a member of the class involved in the class proceeding for every purpose of this Act.
>
> (4) A person may not opt-in to a class proceeding under subsection (2) unless the subclass of which the person is to become a member has or will have, at the time the person becomes a member, a representative plaintiff who satisfies the requirements of section 6 (1) (a), (b) and (c).
>
> (5) If a subclass is created as a result of persons opting-in to a class proceeding under subsection (2), the representative plaintiff for that subclass must ensure that the certification order for the class proceeding is amended, if necessary, to comply with section 8 (2).

[120] In British Columbia, opting-in is seen as having the advantage of indicating that the non-resident accepts the jurisdiction of the court such that they would be precluded by the doctrine of *res judicata* from later suing or benefiting from a suit brought in another jurisdiction: *Harrington v. Dow Corning Corp.*, [2000] B.C.J. No. 2237 (C.A.) at para. 74, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

[121] In the case at bar, in advancing its argument in favour of Ontario's *Mets* over the coupled *Jones* and *McSherry*, Rochon Genova LLP, without going so far as to criticize British Columbia's opt-in approach for non-residents, extolled the virtues of *Mets* as encouraging and facilitating access to justice for class members not only in Ontario but across the country because it is a national opt-out class action. My own opinion is that national opt out class actions, generally speaking, are much better for access to justice than national opt-in class actions; however, in any given case, the superiority of a national opt-out class action over a national opt-in class action may be overstated or negligible.

[122] The circumstances of Mr. Cristo, who is a putative class member of the *Mets* action in the case at bar may be used to demonstrate that from the perspective of access to justice, the difference between a national opt-in class action and a national opt out class action may be negligible.

[123] Mr. Cristo now knows about the *Jones* action, and it provides him with a vehicle for access to justice. Provided that adequate notice is given to other putative class

members, they too will be able to participate in the *Jones* action. It is not likely that many class members with serious claims will miss out on access to justice.

[124] Conversely, assuming, that Mr. Cristo does not opt into the certified *Jones* and does not opt-out of a certified *Mets*, he likely would still have to take a positive step to participate in the opt-out class action because assuming that the representative plaintiff is successful at the common issues trial, Mr. Cristo would have to submit a claim form in a settlement or undertake an individual issues trial. Thus, practically speaking, from an access to justice perspective, the difference to Mr. Cristo of being a member of the opt-in *Jones* and the opt-out *Mets* may be negligible. In either case, he must eventually take a positive step in order to participate in the class action.

[125] Thus, the point is that the superiority of an opt-out regime over an opt-in regime will depend on variables such as awareness of the class actions, the ability to locate class members to give them notice, the effectiveness of notice programs for the class action, class size, and the nature of the wrongdoing; visualize, in the case at bar, given the seriousness the alleged injuries, class members may be more motivated to opt-in or to submit claims in settlements of opt-out actions.

4. Carriage and Stay Motions as Solutions for the Problematic of Multiple Class Actions

[126] In my opinion, the above analysis yields three general conclusions about the problematic of multiple class actions across the country. First, if there are problems with multiple class actions, those problems will be complex problems involving numerous factors, forces, and variables that will have to be balanced to find a solution. Second, the presence of multiple class actions is not always a problem or a serious problem. Third, if multiple class actions for a single wrongdoing are a problem, then the best and perhaps only approach is the one that has already evolved; i.e. to leave it to the courts to use carriage, stay, and certification motions along with developed and developing principles of comity to make decisions about what court is the appropriate venue for a national or multijurisdictional class proceeding.

[127] Informed by these general conclusions and the identification of some of the factors, forces, and variables at work, this brings the discussion again to the law for carriage and stay motions.

[128] The primary consideration on a class action carriage motion is arriving at a solution that is in the best interests of all putative class members, is fair to the defendants, and consistent with the policy objectives of the *Class Proceedings Act, 1992*: *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) at para. 48; *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (S.C.J.); *Gorecki v. Canada (Attorney General)*, [2004] O.J. No. 1315 (S.C.J.); *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.); *Sharma v. Timminco Ltd.*, [2009] O.J. No. 4511 (S.C.J.);

Smith v. Sino-Forest Corp., 2012 ONSC 24; *Simmonds v. Armtec Infrastructure Inc.*, 2012 ONSC 44.

[129] In determining who should be appointed as lawyer of record in a class action, the court may consider, among other things: (a) the nature and scope of the causes of action advanced; (b) the theories advanced by counsel as being supportive of the claims advanced; (c) the state of each class action, including preparation; (d) the number, size and extent of involvement of the proposed representative plaintiffs; (e) the relative priority of commencing the class actions; (f) the resources and experience of counsel; (g) the presence of any conflicts of interest; (h) funding; (i) definition of class membership; (j) definition of class period; (k) joinder of defendants; (l) the correlation between plaintiffs and defendants; and (m) prospects of certification: *Smith v. Sino-Forest Corp.*, 2012 ONSC 24 at paras. 17-18; *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 and [2001] O.J. No. 3673 (S.C.J.); *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (S.C.J.); *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.); *Whiting v. Menu Foods Operating Limited Partnership*, [2007] O.J. No. 3996 (S.C.J.); *Genier v. CCI Capital Canada Ltd.*, [2005] O.J. No. 1135 (S.C.J); *Simmonds v. Armtec Infrastructure Inc.*, 2012 ONSC 44.

[130] It is interesting and informative that in its report at para. 3, the Uniform Law Conference of Canada Civil Law Section recommended that in deciding whether a class action in another jurisdiction might be preferable for the resolution of the claims of all or some class members; i.e. in deciding whether to defer a class action in one jurisdiction to another jurisdiction's class action, the courts across the country should consider the list of facts that had been developed for carriage motions including: (1) the nature and the scope of the causes of actions advanced, including any variation in the cause of actions available in the various jurisdictions; (2) the theories offered by counsel in support of the claims; (3) the state of preparation of the various class actions; (4) the number and extent of involvement of the proposed representative plaintiffs; (5) the order in which the class actions were commenced; (6)the resources and experience of counsel; (7) the location of class members, defendants and witnesses; and (8) the location of any act underlying the cause of action;

[131] It should be noted that all of the factors identified above are just manifestations of what might be relevant to what is the central question on a carriage motion or stay motion; i.e. what is in the best interests of the putative class members in the particular circumstances of each case. The determination of carriage or of a stay will be the fact specific to the circumstances of each particular case.

5. Application of the Law

[132] Applying the above law to the facts of this case, I grant carriage to *McSherry* and not to *Mets.* I do so because this choice is in his best interests of the class members, is fair to Zimmer, and is consistent with the policy objectives of the *Class Proceedings*

Act, 1992. At this juncture, I do not think it is a close call. In my opinion, the relevant and active factors overwhelmingly favour granting carriage to *McSherry*.

[133] The outcome might or might not have been different two and half years ago when the choice was: (1) between an uncertified *Jones/McSherry* on the one side and an uncertified *Mets* on the other side; or (2) between an uncertified *Jones/McSheery* on the one side and a consortium with *Mets* and other uncertified cases on the other side. But determining what the outcome might or might have been two years ago serves no useful purpose and might rub salt into the self-inflicted wound caused by Rochon Genova LLP and the consortium waiting two and half years before seeking case management and bringing a carriage motion.

[134] I will, once again, use the circumstances of Mr. Cristo, who is a putative class member of the *Mets* action, to explain my reasons, for granting carriage to *McSherry* and not to *Mets*.

[135] At this juncture, by granting carriage to *Jones/McSherry,* Mr. Cristo (or Mr. Mets for that matter) has the benefit of being a class member of a certified class action, which he can opt into. And, he has the failsafe of the uncertified *McSherry* action should the British Columbia Court of Appeal overturn the certification of the action. Assuming the certification decision is not overturned, it is enormously beneficial and advantageous to class members to have a certified class action. This is obvious, Mr. Cristo has moved from being a putative class member to being an actual one.

[136] Rochon Genova LLP argue, however, that *Jones* is an egregiously flawed class action because of the absence of a waiver and tort claim, the absence of derivate claims for family members, and the non-joinder of Zimmer Holdings and, therefore, its certification is to be discounted. That argument, however, only has traction if these flaws cannot be corrected. But, the flaws can be corrected, and then the certification of *Jones* with the failsafe of *McSherry* will be optimized.

[137] Rochon Genova LLP then argues that although the flaws of *Jones/McSherry* can be remedied, for the purposes of deciding the carriage contest, I should still discount *Jones/Sherry* and fault Klein Lyons for not getting it right in the first place. I reject this argument because the primary consideration in awarding carriage is what is in the best interests of class members not what is in the best interests of class counsel attempting to win a carriage fight. I agree that the omission of family member claims is an error, but this error can be fixed, Klein Lyons plans to do so, and, it is in the best interests of class members to allow it to do so.

[138] I add here that for what it is worth that, in the particular circumstances of this case, which involves serious personal injury claims, that it is doubtful that it would be appropriate or in the interests of class members to waive the tort assuming the doctrine of waiver of tort applies in the circumstances of a products liability case, which itself remains a matter of uncertainty. Similarly, in the circumstances of this case, it is debatable whether anything is to be gained in terms of defendant liability or defendant solvency by joining Zimmer Holdings or in advancing a conspiracy claim.

[139] Rochon Genova LLP submits that *Mets* is to be favoured because it is further advanced than *McSherry*, and it submits that Mrs. McSherry is, in truth, not interested in advancing *McSherry* because of her allegiance and support of the *Jones* action in British Columbia. I am not impressed by this submission.

[140] In my opinion, it was quite appropriate in the circumstances of this case for Klein Lyons to commence both *Jones* and *McSherry* and then to focus its attention on *Jones*. In my experience, this approach is not uncommon in class action practice where there are multiple class actions. It is frequently the situation that class actions are commenced in more than one jurisdiction and then class counsel and sometimes consortiums of class counsel agree to drive one of the class actions and park the others. This approach explains why it is common to see a series of consent certifications for settlement purposes involving one national class action and one or two regional class actions.

[141] This is not to say that it will always be appropriate when there is more than one class action to park or temporarily or permanently stay one or more of the class actions. In *Pollack v. Advanced Medical Optics*, 2011 ONSC 1966, on the certification motion, Justice Strathy declined to park an Ontario action where a national class action had already been certified in British Columbia. The national class action for Ontario in *Pollack* excluded residents of Québec and British Columbia and any persons who opted into the British Columbia action.

[142] Justice Strathy said there is a superficial attractiveness in terms of judicial economy and fairness to defendants who confront more than one class action to park an uncertified class action to wait for the outcome of a certified class action. He concluded, however, that upon analysis, it would not be just to stay the Ontario action and that doing so would not promote judicial economy and the fair and expeditious determination of all the issues. In *Pollack,* Justice Strathy thought that economy and fairness would be promoted by allowing both actions to proceed subject to judicious case management. Justice Strathy, however, was not being categorical, and in other situations, the attractiveness of parking one or more class actions to achieve efficiencies and judicial economy may be real and substantial and not superficial.

[143] I mention the *Pollack* judgment mainly because Rochon Genova LLP relied on it heavily in support of its request for carriage. The *Pollack* judgment, however, does not help it. In granting carriage to *McSherry*, it is not being parked. Whatever action is selected for Ontario may benefit by the certification of the *Jones* action. Klein Lyons is in the best position to maximize this benefit. If the national class action does not settle or if the British Columbia Court of Appeal reverses certification, Klein Lyons can ramp up *McSherry*. Try as it might, Rochon Genova LLP cannot depreciate the value to class members, including the putative class members of *McSherry or Mets,* of the certification of a class action against Zimmer in British Columbia. Usually in a carriage contest, an important and operative factor is the prospects of certification. With *Jones* having been certified, this factor weighs heavily in favour of Klein Lyons because, save for the outstanding appeal, the prospects of certification are a certainty.

[144] In deciding to award carriage to Klein Lyons for *Jones/McSherry*, I reflected on the fact that Rochon Genova LLP attempted to have Klein Lyons join the consortium. I also noted that Rochon Genova LLP were at pains to emphasize that it had successfully worked together with Klein Lyons and they would be able to work together again if *Mets* was granted carriage. There was no suggestion that the certification of *Jones* would be regarded as a trifling matter. The certification of *Jones* as a national class action is an important achievement for class members and putative class members. If Klein Lyons had joined the consortium or if Rochon Genova LLP had been granted carriage and a *defacto* court-ordered consortium achieved, I have no doubt that the certification of *Jones* would have been optimized and utilized and not undervalued.

[145] From the perspective of what is in the best interests of class members, there is an air of unreality in the argument that *McSherry* is not sufficiently advanced in comparison to *Mets* or that Mrs. McSherry is not sufficiently loyal to her own class action. Apparently, Mr. Adams is waiting to attempt to mediate a settlement of whatever class action emanates out of Ontario, and for the purposes of negotiating a settlement, there is no difference between *Mets* and *McSherry,* save for who is at the bargaining table. Both actions are sufficiently advanced for the purposes of settlement negotiations that may be productive for class members in Ontario.

[146] In the circumstances of the case at bar, I do not regard the fact that *Jones* is an opt-in national class action as a reason for awarding carriage to *Mets*. The dangers of Ontario residents being left out of *Jones* are sufficiently addressed by the regional *McSherry*. The interests of Québec residents are addressed by the regional *Wainberg* or *Brunet.* The interests of British Columbia residents are addressed by *Jones*, and the interests of class members in other provinces can be protected by a robust notice program in *Jones* or perhaps by the class actions that have been commenced in those other provinces.

[147] In certifying national class actions, Ontario courts may be taken to be concerned about the rights of residents of other provinces, but in the circumstances of the case at bar, it would be narcissistic and arrogant to think that an Ontario national opt-out class action is better than *Jones* in protecting the class members of other provinces.

[148] In reaching my decision to award carriage to Klein Lyons for *Jones/McSherry,* I focused on what was in the best interests of class members. I do not see how carriage motions can be used to regulate the so-called politics of class counsel consortiums. Just as war may be described as failed diplomacy, a carriage contest typically follows failed negotiations to arrive at an agreement to share remuneration and the burden and cost of the litigation. But it is not the court's role to fashion or force a consortium. See *Setterington v. Merck Frost Canada Ltd.*, *supra.*

[149] Partnerships and joint ventures of various sorts inherently present the problem of finding a measure for sharing the benefits and burdens of the partnership, but I do not see how or why the court should use the occasion of a carriage contest to regulate sharing in the marketplace of class action litigation.

[150] If it is true that some law firms file a class action lawsuit, do nothing with it, and then purport to revive it when settlement talks begin to cash in on the settlement, then the deterrent against the poaching is to earn carriage by advancing the interests of the putative class members and winning the carriage contest. The "no-sweat-no-sweet" principle is already a factor in the calculus of factors the courts may consider.

[151] In making my last comments, I am not to be taken, even by inference, to suggest that Rochon Genova LLP or any of its consortium partners are poaching on the work of Klein Lyons. As noted above, I am satisfied that Rochon Genova LLP was studying and preparing to go on stage with its class action. Rochon Genova LLP is well qualified to be granted carriage, and it did enough to be awarded carriage. Klein Lyons, however, did more and is in a better position to do more still.

[152] In all the circumstances, it is in the best interests of class members to grant carriage to Klein Lyons for *McSherry*. I stay *Mets*, *D'Anna* and *Ducharme*. I declare that no other action may be commenced in Ontario on behalf of individuals implanted with the Durom Cup with respect to the subject matter of *McSherry* or *Jones* without leave of the court.

G. CONCLUSION

[153] For the above Reasons, I grant carriage to Klein Lyons for the *McSherry* action.

[154] The convention is that costs are not awarded in a carriage contest. However, if the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Klein Lyons' submissions within 20 days of the release of these Reasons for Decision followed by Rochon Genova's LLP submissions within a further 20 days.

Perell, J.

Released: July 13, 2012

CITATION: McSherry v. Zimmer GMBH 2010 ONSC 4113
COURT FILE NO.: 10-CV-408365CP
COURT FILE NO.: 10-CV-413110CP
DATE: July 13, 2012

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Gloria McSherry

Plaintiff

- and -

Zimmer GMBH, Zimmer, Inc. and Zimmer of Canada Limited

Defendants

AND BETWEEN:

Eric Kenneth Mets and Karen Griffiths

Plaintiff

- and -

Zimmer Holdings Inc., Zimmer Inc., Zimmer GMBH and Zimmer of Canada Limited

Defendants

REASONS FOR DECISION

Perell, J.

Released: July 13, 2012.