

**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*

**AFFIDAVIT OF GLORIA McSHERRY**

**I, GLORIA McSHERRY**, of the Town of Creemore, in the County of Simcoe, in the Province of Ontario, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am the court appointed representative plaintiff in this certified class action, and as such have knowledge of the facts stated in this affidavit. Where facts are not within my personal knowledge, I have stated the source of my information and I believe those facts to be true.

2. On August 1, 2007, I was implanted with a Durom Cup hip implant at Sunnybrook Hospital in Toronto. My implant failed and I suffered three years of pain and disability before finally undergoing revision surgery on June 29, 2010.

3. I first contacted Klein Lyons (now Klein Lawyers) on June 17, 2010 regarding my injuries. I understood that Klein Lawyers was already pursuing a class action against the manufacturers of the Durom Cup in British Columbia, but that no litigation as of yet, had been commenced anywhere else in Canada, including Ontario.

4. Klein Lawyers agreed to investigate my claim. I subsequently retained them, and commenced a proposed class action in Ontario. A copy of the retainer agreement, dated June 30, 2010, is attached as **Exhibit A** and a copy of the Statement of Claim, issued August 10, 2010, is attached as **Exhibit B**.

5. Thereafter my lawyers have kept me informed of their progress. We discussed the case on various occasions, by phone call, email and in-person, and my lawyers have provided me with various court documents which have explained the issues in the lawsuit, including mediation briefs. I understand that Mr. Justice Bowden certified the British Columbia proceeding, *Jones v. Zimmer*, on September 2, 2010, and that this decision was affirmed by the British Columbia Court of Appeal on January 22, 2013. I further understand that Mr. Justice Perell certified this Ontario proceeding on September 24, 2014.

6. In working with my lawyers, I understood that the British Columbia proceeding was more advanced, and that following certification, Mr. Justice Bowden had imposed a case planning order in the action setting out dates for documentary and oral discoveries, the exchange of expert reports, and trial. As such, the plan was to take the British Columbia proceeding to trial first with the view that it might contribute to a resolution of

this Ontario lawsuit as well. I concurred with this strategy, and I provided affidavits on November 8, 2010 and February 22, 2013 to assist in advancing the litigation.

7. I attended the first two mediations in this lawsuit, along with my husband, James McSherry. These mediations were on March 7, 2012 and July 30 and 31 2013. My husband attended the third mediation on July 4 and 5, 2014. I was not able to attend the third mediation, but I was available by phone, and both my husband and my lawyers kept me informed of its progress. All of the mediations were in Toronto before retired Ontario judge, Mr. George Adams. Ms. Wilkinson, the court appointed representative plaintiff from British Columbia attended the first two mediations with me, and was available at the third mediation by telephone. Mr. Glenn Emond, a class member and affiant in the Ontario proceeding attended the last two mediations. I appreciated the chance to meet these other class members. It was a chance to share experiences and it helped me to consider the settlement negotiations not just from my own perspective, but from the perspective of other class members.

8. The first two mediations were unsuccessful. Progress however was made at the third mediation, and an agreement-in-principle was reached. Further efforts and negotiations were necessary however to convert what were essentially bullet points on a white board into a formalized agreement. Ultimately, a formal agreement was executed and is attached to my affidavit as **Exhibit C**.

9. Lawyers for the Merchant Law Group also attended the second and third mediation on behalf of a proposed class action in Quebec, although their client, Mr. Wainberg did not. I understand that Mr. Wainberg passed away on December 8, 2015

without signing the settlement agreement, and that on March 7, 2016, Mr. Justice Gouin of the Quebec Superior Court removed Merchant as counsel, and the late Mr. Wainberg as proposed representative plaintiff in the Quebec proceedings and instead appointed the Montreal law firm of Trudel Johnston & Lesperance as Quebec class counsel, and Montreal resident, Michel Major, as the Quebec proposed representative plaintiff. An addendum to the settlement agreement was therefore executed, replacing Merchant/Wainberg with Trudel/Major, and completing the terms of the settlement by incorporating the Quebec proceedings. This addendum is attached as **Exhibit D**.

10. I have reviewed the settlement agreement with my lawyers and I believe that this agreement is in the best interest of the class as a whole. I ask that the courts in British Columbia, Ontario and Quebec approve it.

11. I appreciate the work that my lawyers have done for the class, and I request that the courts award them a class counsel fee.

12. I further request that the courts award payment of an honourarium to me for my service to the class. My lawyers have explained to me that the factors that the court will look at when deciding whether to award an honourarium are as follows:

- (a) active involvement in the initiation of the action and retainer of counsel;
- (b) genuine exposure to adverse costs award;
- (c) hardship or inconvenience in prosecuting the action;
- (d) contributions of time and effort;
- (e) communication and interaction with class members;

(f) participation during the various stages of the action including discovery, settlement negotiation, and trial.

13. With respect to (a), I actively sought out class counsel to initiate this action because I was concerned about what had happened to me, and that the health of other Canadians with Durom Cup implants might also have been impacted.

14. With respect to (b), my lawyers had agreed to indemnify me against any cost risks.

15. With respect to (c), traveling to and attending mediations away from my home was a hardship and inconvenience for my husband and me. We live in Creemore, Ontario. Attendance at the mediations required an overnight trip to Toronto. It required us to relive and recount the injuries we had suffered. While my husband and I were determined to fulfill our duties to the class, this was not an easy task.

16. Moreover, my responsibilities as representative plaintiff imposed certain costs on me which I would have preferred to have avoided, and which other class members, who do not come forward as representative plaintiffs, do avoid. In particular, I had to give up a degree of privacy by lending my name to this litigation. I was interviewed by the *Globe and Mail* about this lawsuit. See article attached as **Exhibit E**. The decision on whether or not to provide that interview was one I carefully weighed. On the one hand, I wanted other Canadians to know about problems with the Durom Cup so that they might take steps to safeguard their own health. This ultimately was the goal of my lawsuit. I was concerned that there might be other Canadians who had received Durom Cup

implants, and who were experiencing pain like me, but had not yet sought out medical treatment for their injuries. And I was concerned that there might be still other Canadians who were considering hip implant surgery, but who were unaware of potential problems with certain hip implant models. I wanted to help all of these people so that they did not suffer as I had. On the other hand, I did not want to be defined by my injuries, whether in the media, or otherwise. In balancing these concerns, I decided to provide the *Globe and Mail* with an interview, even at the cost of my own privacy, because I thought that it was more important to help my fellow class members.

17. With respect to (d), I have contributed my time and effort to help make this suit a success.

18. With respect to (e), I have met and communicated with other class members at the mediations.

19. With respect to (f), I have participated at various stages of the litigation, including the settlement negotiations.

20. Overall, this has been an interesting experience for my husband and me. We have worked with our lawyers to prosecute this litigation for nearly 6 years. We are hopeful that many Canadians will benefit from this settlement, and that the example provided by this lawsuit may help to improve the safety of medical products in Canada.

SWORN before me at the  
Town of Creemore,  
in the Province of Ontario,  
this 15<sup>th</sup> day of April, 2016.

)  
)  
)  
)  
)

Gloria McSherry  
Gloria McSherry



A Commissioner, etc.

Douglas Lennox

**RETAINER AND CONTINGENCY FEE AGREEMENT**

**TO: KLEIN, LYONS**

I, Gloria McSherry, retain Klein Lyons to act on my behalf with respect to a claim for injury arising from use of a Zimmer Hip Implant.

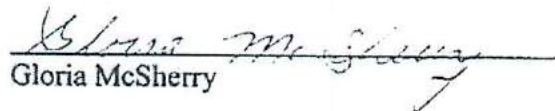
I authorize you to take all necessary steps, incur all reasonable expenses, and employ such agents and counsel as you consider necessary.

The legal fee paid to Klein Lyons will be one-third (33.33%) of the amount that I receive for damages, interest, and costs, plus disbursements, interest on disbursements and taxes with respect to my individual claim. Interest on disbursements will be calculated at the rate of 10% per annum, not compounded. The legal fee will be paid when I collect my damages award. The payment of legal fees, disbursements, interest and taxes to Klein Lyons shall be a first charge on the proceeds of any settlement or judgment.

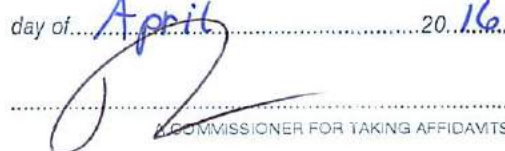
If I terminate the services of Klein Lyons before a settlement or judgement, they will have the right to a reasonable fee based on services rendered and time spent by the lawyers and paralegals.

I acknowledge receiving a copy of this retainer and contingency fee agreement.

Dated at Toronto on June 30, 2010

  
Gloria McSherry

This is Exhibit A referred to in the  
affidavit of Gloria McSherry  
sworn before me, this 15th  
day of April, 2016.

  
COMMISSIONER FOR TAKING AFFIDAVITS



AMENDED THIS October 12, 2012 PURSUANT TO  
MODIFIÉ CE ca CONFORMÉMENT À  
RÈGLE/RÈGLE 26.02

THE ORDER OF  
L'ORDONNANCE DU  
DATED / FAIT LE

REGISTRAR  
SUPERIOR COURT OF JUSTICE  
GREFFIER  
COUR SUPÉRIEURE DE JUSTICE

ONTARIO  
SUPERIOR COURT OF JUSTICE

Court File No. CV-10-408365000

BETWEEN:

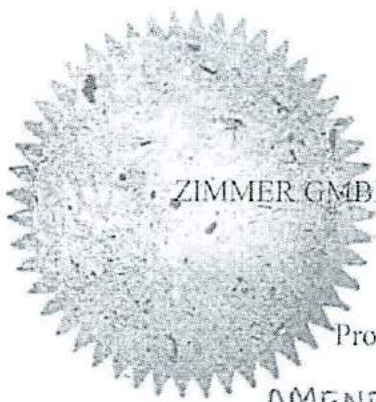
GLORIA McSHERRY

Plaintiff

-and-

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

Defendants



Proceeding under the *Class Proceedings Act, 1992*

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this Court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT WILL BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE

This is Exhibit B referred to in the  
affidavit of Gloria McSherry  
sworn before me, this 15th  
day of April 2015

UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU  
BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date of Issue: August 10 2010

Issued by:

*S. D. S. J. G.*  
Local Registrar

Address of court office:  
393 University Avenue,  
Toronto, Ontario  
M5G 1E6

*10<sup>th</sup> Flr.*

TO: Zimmer of Canada Limited  
2323 Argentinia Road  
Mississauga, ON  
L5N 5N3

AND TO: Zimmer GMBH  
Sulzer Allee 8  
Winterthur, SZ, CH, 8404

AND TO : Zimmer, Inc.  
P.O. Box 708  
1800 West Center Street  
Warsaw, IN  
46591-0708

## CLAIM

1. The Plaintiff claims:
  - (a) an order certifying this action as a class proceeding;
  - (b) general damages;
  - (c) special damages;
  - (d) punitive damages;
  - (e) pre-judgment and post-judgment interest;
  - (f) costs, including the costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes; and
  - (g) such further and other relief as this Honourable Court may deem just.

### The Parties

2. The Plaintiff, Gloria McSherry, is a resident of Toronto, Ontario.
3. The Plaintiff brings this action on her own behalf, and on behalf of a class defined as follows (the "Class"): ~~of persons resident in Ontario who were implanted with the Durom acetabular hip implant.~~

"All persons who were implanted with the Durom acetabular hip implant in Canada, excluding those persons who are members of the class certified by the British Columbia Supreme Court in *Jones et al. v. Zimmer GMBH et al.*, and

All persons who by reason of his or her relationship to a member of the Class are entitled to make claims under any of the Dependants Statutes in Canada as a result of the death or personal injury of such member of the Class (the "Family Class").

"Dependants Statutes means the *Family Law Act (Ontario)*, *Family Compensation Act (B.C.)*, *Fatal Accidents Act (Alberta)*, *Tort-Feasors Act (Alberta)*, *Fatal Accidents Act (Saskatchewan)*, *Fatal Accidents Act (Manitoba)*, *Code Civil*

(Quebec), Consumer Protection Act (Quebec), Fatal Accidents Act (New Brunswick), Fatal Accidents Act (P.E.I.), Fatal Injuries Act (Nova Scotia), Fatal Accidents Act (Newfoundland), Fatal Accidents Act (Nunavut), Fatal Accidents Act (Northwest Territories), and Fatal Accidents Act (Yukon).”

4. The Defendant, Zimmer, Inc. (“Zimmer US”), is incorporated in the State of Delaware with its principal place of business in Warsaw, Indiana. It is licensed by Health Canada as a manufacturer of medical devices.

5. The Defendant, Zimmer GMBH (“Zimmer Europe”), is a Swiss corporation with its principal place of business in Winterthur, Switzerland. It is licensed by Health Canada as a manufacturer of medical devices.

6. The Defendant, Zimmer of Canada Limited (“Zimmer Canada”), is incorporated in Ontario with a place of business at 2323 Argentia Road, Mississauga, Ontario. Zimmer Canada is a wholly owned subsidiary of Zimmer US. It imports and distributes into Canada medical devices manufactured by related Zimmer corporations.

#### **The Durom Cup Hip Implant**

7. The Defendants individually and collectively participated in one or more of the following: the manufacture, development, distribution, marketing, promotion and importation of a hip implant under the brand name “Durom Hip Resurfacing System”, (hereinafter referred to as the “Product”). This is a Class III medical device under the *Food and Drugs Act*, R.S.C. 1985, F-27. It may only be sold in Canada with the licence and approval of Health Canada. The Defendants obtained the license to sell the Product in Canada in April 2005.

8. The Plaintiff was implanted with the Product during hip surgery. The Product was defective. The Plaintiff required surgery to remove the Product and replace it with another hip implant. The Plaintiff has suffered personal injuries as a result.

9. The source of the Product's defect is one of its components, the Durom acetabular hip implant or Durom Cup. This was a non-cemented cup with a coating of titanium plasma spray. It is designed to act as an artificial joint socket and to allow the patient's bone to grow into or around it, thus keeping the cup or artificial socket in place.

10. The cup was defective in that it fails to properly heal or adhere to the surrounding bone. Instead, it remains loose, or separates from the bone, causing the patient excruciating pain. It must be removed, requiring the patient to undergo further hip surgery.

11. Problems with the Durom Cup first became publicly known in or about April 2008, when Lawrence Dorr, MD., a world-renowned orthopedic surgeon and Director of the Dorr Institute for Arthritis Research and Education, wrote a letter dated April 22, 2008 to his colleagues at the American Association of Hip and Knee Surgeons, warning of failures and defects associated with the Defendants' Durom Cup. Dr. Dorr wrote:

"This failure rate has occurred within the first two years. In the first year the x-rays looked perfect. We have revised four that did not have any radiolucent lines or migration (and John Moreland revised one). These early cups fooled us, but the symptoms were so classic for a loose implant that we operated the patients. When we hit the edge of the cup it would just pop free. As time goes by the cups begin developing radiolucent lines. We now have one cup at two years that has actually migrated a short distance. It has tilted into varus. We do not believe the fixation surface is good on these cups. Also there is a circular cutting surface on the periphery of the cup that we believe prevents the cup from fully seating. We stopped using the cup after the first revisions."

12. Prior to writing that letter, Dr. Dorr had communicated his concerns about the product to the Defendants in early 2008. The Defendants failed to initiate a timely investigation into these concerns. Instead, the Defendants took the position that surgical error was the cause of any problems with the Product, even though the concerns relayed to the Defendants were coming from a very highly experienced and respected surgeon.

13. Subsequent to the publication of Dr. Dorr's letter, the Defendants received many more complaints from orthopedic surgeons about the Product's failures. Finally, in late May 2008, the Defendants began an investigation into these complaints.

14. On July 22, 2008, the Defendants recalled the Product in the United States.

15. According to the Defendants own investigation, as of July 2008, some clinics using the Product in the United States experienced a failure of at least 5.7%.

16. A similarly high failure rate with the Product also occurred in Canada and in Europe.

17. The Defendants initially (and negligently) took the position that the Durom Cup sold in the United States was materially different from that sold in Canada and in Europe, and they did not promptly investigate problems with the Product outside of the United States, nor did they promptly initiate a recall of the Product in Canada or Europe.

18. Subsequently and belatedly, the Defendants did initiate a recall of the Product in Canada and Europe. An urgent field safety notice was sent by the Defendants to the United Kingdom Medicines and Healthcare Product Regulatory Agency by the Defendants on October 13, 2009. The Defendants filed a recall notice with Health Canada, under Recall Number 51631, with a start date of December 7, 2009.

19. The Canadian recall of the Product came nearly 16 months after the U.S. recall.

#### **Defendants' Negligence**

20. As the manufacturers, marketers, developers, distributors, and/or importers of the Product, the Defendants were in such a close and proximate relationship to the Plaintiff, and other class members, as to owe them a duty of care. They caused the Product to be introduced into the stream of commerce in Canada, and they knew that any defect in the Product would cause foreseeable injury to the Plaintiff and class members.

21. The Defendants were negligent in the research, development, testing, manufacture, distribution and sale of the Product. Effective adhesion of the Durom Cup to the patient's bone was critical to the safety and medical efficacy of the Product. The Defendants owed a duty to use all reasonable care and skill to ensure that the Product was effective at adhering to bone before marketing it, and to continually monitor its safety thereafter. The Defendants further owed a duty to warn the Plaintiffs, class members, their health care providers, and the regulator of any safety problems with the Product.

22. Particulars of the Defendants' negligence are:

- (a) manufacturing and/or marketing a device which they knew, or ought to have known, had an unreasonably high risk of loosening and of implant failure in patients;
- (b) failing to adequately test the safety and efficacy of the Product before bringing it to market;
- (c) failing to do follow-up studies on the safety and efficacy of the Product after bringing it market;
- (d) failing to monitor and follow up on reports of adverse reactions to the Product;
- (e) failing to promptly recall the Product, and indeed, failing to recall the Product in Canada until 16 months after the Product had been recalled in the United States;
- (f) failing to warn consumers, their health care providers, and Health Canada, of the increased risks of loosening and implant failure presented by the Product;
- (g) marketing a product which was unsafe, not fit for its intended purpose, and not of merchantable quantity;
- (h) designing, manufacturing and/or marketing a product which was not reasonably safe and effective in comparison with already available, alternative designs; and

- (i) incorrectly blaming failures of the Product on surgical error instead of properly and promptly investigating the Product's unreasonably high rate of failure as due to design defects.

23. The Defendants' common law duties are informed by the *Medical Devices Regulations*, SOR/92/82. Pursuant to s.1 of those regulations, each of the Defendants is a "manufacturer". They designed and assembled the Product, attached their trade name to it, labeled it and assigned it a purpose.

24. The regulations impose continuous obligations on the Defendants, commencing at licensing and continuing thereafter. They require the Defendants to ensure the safety of the Product before selling it, and to continuously monitor the safety of the Product thereafter, monitoring any complaints from doctors, hospitals and patients, keeping up with any new developments in the scientific literature, conducting further testing as necessary, and promptly taking corrective action, including issuing a warning or recall, if new information becomes available which alters the Product's risk profile.

25. Pursuant to s.9(2) of the *Medical Devices Regulations*, the Defendants were required to maintain objective evidence to establish the safety of the device. The Defendants breached this section. They failed to adequately obtain such information before licensing and they failed to promptly update such information thereafter.

26. Pursuant to s.10 of the *Medical Devices Regulations*, the Defendants were required to identify the risks of the device, to eliminate or reduce those risks if possible, and to provide safety information with the device concerning those risks which remain. The Defendants breached this section. They failed to eliminate the risk that the Product would loosen or fail and they failed to warn against this risk.

27. Pursuant to s.11 of the *Medical Devices Regulations*, the Defendants were required to assess the risks of the Product against its benefits, and to not sell a product



whose risks outweigh its benefits. The Defendants breached this section. The risks of the Product outweighed its benefits.

28. Pursuant to s.12 of the *Medical Devices Regulations*, the Defendants were required to ensure that the product was effective for the uses for which it was represented. The Defendants breached this section. The Product was not effective.

### **Plaintiffs' Injuries**

29. The Plaintiff underwent hip surgery in August 1, 2007. She was implanted with the Product.

30. Her implant failed. She underwent revision surgery on June 29, 2010 to remove the defective Durom Cup.

31. The Plaintiff endured nearly three years of chronic pain as a result of the defective cup. Her implant never properly healed or adhered to the bone.

32. The Defendants' delay in admitting to a problem with the Product in Canada, and in initiating a recall in this country, exacerbated the Plaintiff's pain and suffering, and caused her delay in seeking appropriate medical treatment, and in having the defective cup finally removed.

### **Causation and Damages**

33. As a result of the Defendants' negligence, the Plaintiff and class members have suffered and will continue to suffer loss and damage. Such loss and damage was foreseeable by the Defendants. Particulars of the loss and damage suffered by the Plaintiffs and class members which were caused or materially contributed to by the aforementioned acts of the Defendants include:

- (a) pain, suffering, loss of quality and enjoyment of life;
- (b) damages for past and future loss of income; and
- (c) special damages and expenses including medical expenses.

34. The Defendants' conduct was reprehensible and departed to a marked degree from ordinary standards of decent behaviour. The Defendants' reckless disregard for public safety is deserving of punishment and condemnation by means of an award of punitive damages. The Defendants' failure to promptly initiate a recall in Canada, even after calling one in the United States, is particularly worrisome. This case raises issues of general deterrence. A punitive damage award in this case is necessary to express society's condemnation of conduct such as the Defendants', to advance public safety and to achieve the goal of both specific and general deterrence.

#### **Joint Enterprise**

35. The Defendants functioned as a joint enterprise for the promotion and sale of their brands of the Product within Canada. The Defendants dividing among themselves certain responsibilities for the manufacture and marketing of the Product, but each had an independent right and responsibility to ensure the safety of the Product. Within this joint enterprise, the Defendants individually and jointly researched, tested, developed, marketed, manufactured, imported, promoted, licensed, labeled, monitored adverse reactions to, and placed into the stream of commerce the Product for sale in Canada.

#### **Service Outside of Ontario**

36. The originating process may be served without court order outside Ontario because the claim is:

- (a) in respect of a tort committed in Ontario (Rule 17.02(g));
- (b) in respect of damages sustained in Ontario arising from a tort (Rule 17.02(h));

- (c) against a person outside Ontario who is a necessary and proper party to this proceeding properly brought against another person served in Ontario (Rule 17.02(o)); and
- (d) against a person carrying on business in Ontario (Rule 17.02(p)).

### Legislation

37. The Plaintiff pleads and relies upon the Dependents Statutes to assert derivative claims on behalf of members of the Family Class.

38. Class members have received insured medical services from provincial health insurers as a result of their injuries. Such provincial health insurers have subrogated claims for recovery of these health care costs from the Defendants. The Plaintiff pleads and relies upon the following health care statutes with respect to those subrogated claims of Class members:

- (a) Health Insurance Act, R.S.O. 1990, c. 11-6;
- (b) Health Care Cost Recovery Act, S.B.C. 2008, c.27
- (c) Alberta Health Care Insurance Act, R.S.A. 200, c.A-20;
- (d) Hospitals Act, R.S.A. 2000, c. 11;
- (e) Department of Health Act, R.S.S. 1978, D-17;
- (f) Health Services Insurance Act, C.C.S.M., C.1135;
- (g) Hospital Services Act, R.S.N.B. 1973, c.11-9
- (h) Health Services and Insurance Act, R.S.N.S. 1989, c.197;
- (i) Hospital and Diagnostic Services Insurance Act, R.S.P.E.I. 1988, c. H-8;
- (j) Hospital Insurance Agreement Act, R.S.N.I. 1990, c.11-7
- (k) Hospital Insurance and Health and Social Services Administration Act, R.S.N.W.T. 1988, c.T-3; and
- (l) Hospital Insurance Services Act, R.S.Y. 2002, c.112.

**Place of Trial**

39. The Plaintiff proposes that this action be tried at the City of Toronto in the Province of Ontario.

August 10, 2010

Klein Lyons  
Barristers & Solicitors  
100 King Street West, Suite 5600  
Toronto, ON M5X 1C9

Doug Lennox  
L.S.U.C. #40540A  
Tel: (416) 506-1944  
Fax: (416) 506-0601

Solicitors for the Plaintiff

**Gloria McSherry - and - Zimmer GMBH et al**  
**Plaintiffs**                      **Defendants**

---

Court File No.: CV-10-40836500 CP

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**PROCEEDINGS COMMENCED AT**  
**TORONTO**

---

**AMENDED**  
**STATEMENT OF CLAIM**

---

**KLEIN LYONS**  
Barristers & Solicitors  
100 King Street West  
Suite 5600  
Toronto, ON M5X 1C9

David A. Klein  
L.S.U.C. #20450N

Douglas Lennox  
L.S.U.C. #40540A

Tel: (416) 506-1944  
Fax: (416) 506-0601

Solicitors for the Plaintiff

**CANADIAN DUROM ACETABULAR HIP IMPLANT CLASS ACTION  
NATIONAL SETTLEMENT AGREEMENT**

Between

DENNIS JONES and SUSAN WILKINSON

(the "British Columbia Plaintiffs")

and

GLORIA MCSHERRY

(the "Ontario Plaintiff")

and

BEN WAINBERG

(the "Quebec Plaintiff")

and

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

(the "Defendants")

This is Exhibit.....<sup>C</sup>.....referred to in the  
affidavit of.....Gloria McSherry  
sworn before me, this...15<sup>th</sup>.....  
day of...April.....20.16..

  
A COMMISSIONER FOR TAKING AFFIDAVITS



**CANADIAN DUROM ACETABULAR HIP IMPLANT CLASS ACTION  
NATIONAL SETTLEMENT AGREEMENT**

**RECITALS**

- A. WHEREAS the British Columbia Plaintiffs commenced Action No. S095493 ("the BC Proceeding") in the British Columbia Court alleging that the Defendants marketed a defective hip implant known as the Durom Acetabular Component ("Durom Cup");
- B. AND WHEREAS Susan Wilkinson was appointed as representative plaintiff in the BC Proceeding;
- C. AND WHEREAS the Ontario Plaintiff commenced Action No. CV-10-40836500 CP ("the Ontario Proceeding") in the Ontario Court alleging that the Defendants marketed a defective hip implant known as the Durom Cup;
- D. AND WHEREAS, with the consent of the Defendants in relation to this Settlement Agreement, Gloria McSherry was appointed as representative plaintiff in the Ontario Proceeding;
- E. AND WHEREAS the Quebec Plaintiff commenced Action No. 500-06-000543-104 ("the Quebec Proceeding") in the Quebec Court alleging that the Defendants marketed a defective hip implant known as the Durom Cup;
- F. AND WHEREAS no representative plaintiff has been appointed in the Quebec Proceeding;
- G. AND WHEREAS the Defendants deny liability in respect of the claims alleged in the Proceedings, and believe that they have good and reasonable defences in respect of the merits in the Proceedings;
- H. AND WHEREAS the Defendants assert that they would actively pursue these defences in respect of the merits at trials if the British Columbia Plaintiff, the Ontario Plaintiff, or the Quebec Plaintiff continued the Proceedings against them;
- I. AND WHEREAS the Parties have negotiated and entered into this Settlement Agreement to avoid the further expense, inconvenience, and burden of this litigation, and to achieve final resolution of all claims asserted or that could have been asserted against the Defendants by the British Columbia Plaintiff on her own behalf and on behalf of the class she represents, the Ontario Plaintiff on her own behalf and on behalf of the class she represents, the Quebec Plaintiff on his own behalf and potentially on behalf of a Quebec-specific class (collectively, the "Plaintiffs") or the respective Provincial Health Insurers, and avoid the risks inherent in uncertain, complex, and protracted litigation, and thereby to put to rest this controversy;

- J. AND WHEREAS counsel for the Defendants and counsel for the Plaintiffs have engaged in extensive arms-length settlement discussions and negotiations in respect of this Settlement Agreement;
- K. AND WHEREAS as a result of these settlement discussions and negotiations, the Defendants, the Plaintiffs, and the Provincial Health Insurers have entered into this Settlement Agreement, which embodies all of the terms and conditions of the Settlement between the Defendants, the Plaintiffs, and the Provincial Health Insurers, subject to the approval of the British Columbia, Quebec, and Ontario Courts;
- L. AND WHEREAS the Plaintiffs and the Provincial Health Insurers have agreed to accept this Settlement, in part, because of the monetary payments to be provided by the Defendants under this Settlement Agreement, as well as the attendant risks of litigation in light of the potential defences that may be asserted by the Defendants;
- M. AND WHEREAS the Defendants do not admit through execution of this Settlement Agreement any of the conduct alleged in the Proceedings;
- N. AND WHEREAS the Plaintiffs, Class Counsel, the Provincial Health Insurers, the Provincial Health Insurers' Counsel, and Defendants agree that neither this Settlement Agreement nor any statement made in the negotiation thereof shall be deemed or construed to be an admission by or evidence against the Defendants or evidence of the truth of any of the Plaintiffs' or the Provincial Health Insurers' allegations against the Defendants;
- O. AND WHEREAS the Plaintiffs, the Provincial Health Insurers, and their counsel have reviewed and fully understand the terms of this Settlement Agreement and, based on their analyses of the facts and law applicable to the Plaintiffs and the Provincial Health Insurers, and having regard to the burdens and expense in prosecuting the Proceedings, including the risks and uncertainties associated with trials and appeals, the Plaintiffs, the Provincial Health Insurers, and their counsel have concluded that this Settlement Agreement is fair, reasonable, and in the best interests of the Plaintiffs, the Classes they seek to represent, and the Provincial Health Insurers;
- P. AND WHEREAS the Defendants are entering into this Settlement Agreement in order to achieve a final and nation-wide resolution of all claims in respect of the Durom Cup asserted or that could have been asserted against them by the Plaintiffs and the Provincial Health Insurers in the Proceedings or otherwise, and to avoid further expense, inconvenience, and the distraction of burdensome and protracted litigation;
- Q. AND WHEREAS the Parties therefore wish to, and hereby do, finally resolve on a national basis, without admission of liability, all of the Proceedings against the Defendants;
- R. AND WHEREAS the BC Proceeding was certified on November 22, 2011;



- S. AND WHEREAS the Ontario Proceeding was certified on September 24, 2014;
- T. AND WHEREAS Defendants have consented, or will consent, to the authorization of a class action in the Quebec Proceeding consisting only of Quebec residents who have not opted into the BC Proceeding; and
- U. AND WHEREAS for the purposes of settlement only and contingent on orders by the Courts as provided for in this Settlement Agreement, the Plaintiffs have consented to a dismissal of the Proceedings against the Releasees, as that term is defined in Section 1 below, and release of all claims that have been or could have been asserted against Releasees.

NOW THEREFORE, in consideration of the covenants, agreements, and releases set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, it is agreed by the Parties that the Proceedings be settled and dismissed on the merits with prejudice as to the Releasees, on the following terms and conditions:

#### SECTION 1 – DEFINITIONS

For the purpose of this Settlement Agreement only, including the Recitals and Schedules hereto:

- (1) *Account* means an interest-bearing trust account under the control of the Claims Administrator at a Schedule 1 chartered Canadian bank. All interest accrued will be added to the fund used to compensate Approved Claimants.
- (2) *Approved Claimant* means a Class Member or Derivative Member whose claim has been approved for payment by the Claims Administrator.
- (3) *Settlement Agreement* or *Settlement* means this Agreement, including the Recitals and Schedules hereto.
- (4) *Approval Hearings* means the hearings on the motions before the BC Court, Quebec Court, and the Ontario Court for the approval of the Settlement Agreement.
- (5) *BC Class Member* means a Class Member in the BC Proceeding. This includes Class Members resident in British Columbia who did not opt out of the BC Proceeding on or before the December 31, 2013 opt-out deadline set by the Supreme Court of British Columbia, and Class Members who are not resident in British Columbia who opted into the BC Proceeding on or before the opt-in deadline set by the Supreme Court of British Columbia.
- (6) *BC Court* means the Supreme Court of British Columbia.
- (7) *BC/Ontario Class Counsel* means Klein Lawyers LLP.

- (8) *BC Plaintiff* means Susan Wilkinson.
- (9) *BC Proceeding* means *Dennis Jones and Susan Wilkinson v. Zimmer GmbH et al.*, Action No. S095493, Vancouver Registry.
- (10) *Bilateral Revision* means that a Class Member had a Durom Cup implanted into both his/her left and right hips and has undergone surgery(ies) to remove both Durom Cups.
- (11) *Claimant Declaration* means the form attached as Schedule A.
- (12) *Claims Administrator* means the entity appointed to administer the Settlement pursuant to the terms of this Settlement Agreement.
- (13) *Claims Deadline* means the date that is 270 days after the date on which the Notice of Settlement Approval is disseminated.
- (14) *Claims Period* means the 270 day period after the date on which the Notice of Settlement Approval is disseminated.
- (15) *Class Counsel* means Klein Lawyers LLP in the BC Proceeding and the Ontario Proceeding, and Merchant Law Group LLP in the Quebec Proceeding.
- (16) *Class Counsel Fees* means the fees, costs, and other applicable taxes or charges of Class Counsel specified in Section 9 of this Settlement Agreement.
- (17) *Class* or *Class Members* means, for purposes of this settlement, all persons who were implanted with the Durom Cup in Canada, including their estates.
- (18) *Complication* means the medical conditions identified in Schedule L that occurred as a result of a Revision Surgery.
- (19) *Court(s)* means the BC Court, the Ontario Court, and the Quebec Court, as appropriate.
- (20) *Defendants* mean Zimmer GmbH, Zimmer, Inc., Zimmer Biomet Holdings, Inc. (formerly known as Zimmer Holdings, Inc.), and Zimmer of Canada Limited.
- (21) *Defendants' Counsel* means Fasken Martineau DuMoulin LLP.
- (22) *Derivative Claimant(s)* means all residents of Canada asserting the right to sue the Defendants independently or derivatively by reason of their familial relationship to a Class Member as defined herein, and shall mean for the purposes of this Settlement Agreement, either a Principal Caregiver who is a family member of a Class Member or Minor Child of a Class Member who has undergone a Single Revision or Bilateral Revision for the purpose of explanting a Durom Cup or is Medically Precluded from undergoing a Revision Surgery.

- (23) *Disbursements* means funds paid out by Class Counsel in connection with the BC Proceeding, the Ontario Proceeding, or the Quebec Proceeding.
- (24) *Durom Cup* means the device at issue in these Proceedings, which bears the lot and reference (sometimes referred to as "catalogue") numbers that were subject to and included in the November 9, 2009 Field Safety Notification.
- (25) *Effective Date* means the latest date on which any of the Final Orders in British Columbia, Ontario, or Quebec take effect.
- (26) *Eligibility Deadline* means September 1, 2015.
- (27) *Extraordinary Expense Pool* means the amount established by this Settlement Agreement to compensate Class Members who believe they have incurred extraordinary expenses. The Extraordinary Expense Pool totals \$50,000.00 (CAD).
- (28) *Final Order(s)* means the final orders entered by the Courts in respect of the approval of this Settlement Agreement once the time to appeal such order has expired without any appeal being taken, or if an appeal from a final order is taken, once there has been affirmation of the approval of this Settlement Agreement upon a final disposition of all appeals.
- (29) *Initial Deposit* means the sum of \$5 million paid by the Defendants into the Account.
- (30) *Medically Precluded* means that a Class Member for whom a Revision Surgery is necessary is unable to undergo a Revision Surgery due to the existence of a medical condition that is documented by a verified statement from the Class Member's treating physician.
- (31) *Minor Child* means the child of a Class Member who has undergone a Single Revision, Bilateral Revision, or is Medically Precluded from undergoing Revision Surgery who was less than eighteen years of age when the Class Member was implanted with his or her Durom Cup.
- (32) *Notice and Administration Costs* means all fees, costs, PST, GST, and HST taxes, and any other amounts incurred for the approval, implementation and operation of this Settlement Agreement, including the costs of notices, the costs of translation of the notice, and the fees and expenses of the Claims Administrator, but excluding Class Counsel Fees and Disbursements.
- (33) *Notice of Approval Hearing* means the form of notice agreed to by the Plaintiffs and the Defendants, as set forth in the attachments to Schedules B1, B2, and B3, or such other form as may be approved by the BC Court, the Ontario Court, or the Quebec Court, that informs the Class of the date and location of an Approval Hearing, the principal elements of this Settlement Agreement, and the process by which Class Members may object to the Settlement.
- (34) *Notice of Settlement Approval* means the form of notice, agreed to by the Plaintiffs and the Defendants, as set forth in Schedules H, I, and J, or such other form as may be approved by the BC Court, Quebec Court, or the Ontario Court, that informs the Class of the approval of this Settlement Agreement.

- (35) *Ontario Class Member* means a Class Member in the Ontario Proceeding. This includes Class Members who did not opt out of the Ontario Proceeding on or before December 17, 2014, excluding BC Class Members and Quebec Class Members.
- (36) *Ontario Court* means the Ontario Superior Court of Justice.
- (37) *Ontario Plaintiff* means Gloria McSherry.
- (38) *Ontario Proceeding* means *Gloria McSherry v. Zimmer GmbH, et al.*, Action No. CV-10-40836500 CP.
- (39) *Parties* means the parties to this Settlement Agreement, including Plaintiffs, the Provincial Health Insurers, and the Defendants.
- (40) *Plaintiffs* means the BC Plaintiff, the Ontario Plaintiff, and the Quebec Plaintiff.
- (41) *Principal Caregiver* means an immediate family member who provided care for a Class Member who underwent a Single Revision, Bilateral Revision, or is Medically Precluded from undergoing a Revision Surgery.
- (42) *Proceedings* mean the BC Proceeding, the Ontario Proceeding, and the Quebec Proceeding.
- (43) *Provincial Health Insurers* means all provincial and territorial Ministries of Health or equivalents, Provincial and Territorial Governments, and/or provincial and territorial plans funding medical services throughout Canada.
- (44) *Provincial Health Insurers' Counsel* means Klein Lawyers LLP.
- (45) *Quebec Class Counsel* means Merchant Law Group LLP.
- (46) *Quebec Class Member* means a Class Member resident in Quebec who has not opted out of the Quebec Proceeding on or before the opt out deadline set by the Quebec Court and who has not opted into the BC Proceeding.
- (47) *Quebec Court* means the Superior Court of Quebec.
- (48) *Quebec Plaintiff* means Ben Wainberg.
- (49) *Quebec Proceeding* means *Ben Wainberg v. Zimmer, Inc., et al.*, Action No. 500-06-00543-104.
- (50) *Released Claims* means any and all manner of claims, demands, actions, suits, civil law and statutory liabilities, and causes of action alleged or that could have been asserted in the Proceedings, whether direct or indirect, class, individual, or otherwise in nature, whether

personal or subrogated, damages whenever incurred, liabilities of any nature whatsoever, including interest, costs, expenses, penalties, and lawyers' fees that Releasors, or any one of them, whether directly, indirectly, representatively, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have against the Releasees, whether known or unknown, relating in any way to the Durom Cup, including but not limited to the use, purchase, implantation, or revision of the Durom Cup.

(51) *Releasees* means, jointly and severally, the Defendants and their respective present and former parents, subsidiaries, affiliates, officers, directors, employees, insurers, agents, attorneys, servants, and representatives, and the successors, heirs, executors, administrators, trustees, and assigns of each of the foregoing, as well as any other person, corporation, or entity, including without limitation any health care professionals, health care providers, and hospitals or other health care facilities, against whom a Class Member asserted or could have asserted a claim relating in any way, directly or indirectly, to the Durom Cup.

(52) *Releasors* means, jointly and severally, individually and collectively, the Plaintiffs, Provincial Health Insurers, BC Class Members, Ontario Class Members, and Quebec Class Members, including all Derivative Claimants, and their respective successors, heirs, executors, administrators, trustees, and assigns, and their affiliated, predecessor, successor, and related companies or entities.

(53) *Revision Surgery* means an operation to remove a Durom Cup.

(54) *Settlement Amount* means the aggregate amount payable by the Defendants pursuant to Section 4 of this Settlement Agreement.

(55) *Single Revision* means Revision Surgery of one Durom Cup implanted into the hip of a Class Member.

(56) *Subsequent Deposit* means further amounts paid by the Defendants into the Account.

(57) *Unrevised* means that a Class Member has not undergone a Revision Surgery.

## **SECTION 2 - CALCULATION OF DEADLINES AND CONDITION PRECEDENT**

(1) If any deadline identified in the Settlement Agreement falls on a weekend or Canadian national holiday, the deadline shall occur on the following weekday that is not a Canadian national holiday.

(2) Subject to section 8.1 below, this Settlement Agreement shall be null and void and of no force or effect unless the BC Court, the Ontario Court, and the Quebec Court each approve this Settlement Agreement and the orders so made have become Final Orders and the Effective Date has occurred.

## **SECTION 3 – SETTLEMENT APPROVAL**

### **3.1 Best Efforts**

The Parties shall use their best efforts to effect this settlement and to secure the prompt, complete, and final dismissal with prejudice of the Proceedings against the Defendants.

### **3.2 Motion Approving Notice**

At a time mutually agreed to by the Parties after the Settlement Agreement is executed, (1) the BC Plaintiff shall bring a motion before the BC Court for an order in the form of Schedule B1 approving the Notice of the Approval Hearing, (2) the Ontario Plaintiff shall bring a motion before the Ontario Court for an order in the form of Schedule B2 approving the Notice of the Approval Hearing, and (3) the Quebec Plaintiff shall bring a motion before the Quebec Court for an order in the form of Schedule B3 approving the Notice of the Approval Hearing after the Quebec Court has authorized a proceeding as a class action.

### **3.3 Motion for Approval**

(1) The BC Plaintiff shall file a motion in the BC Court for an order approving this Settlement Agreement. The order shall be generally in accordance with the form attached at Schedule C.

(2) The Ontario Plaintiff shall file a motion in the Ontario Court for an order approving this Settlement Agreement. The order shall be generally in accordance with the form attached at Schedule D.

(3) After the Quebec Court has authorized the settlement class and subject to the requirements of section 3.4 of the Settlement Agreement, the Quebec Plaintiff shall file a motion in the Quebec Court for an order approving this Settlement Agreement. The order shall be generally in accordance with the form attached at Schedule E.

### **3.4 Sequence of Motions**

The Quebec Plaintiff shall not proceed with the motion described in section 3.3(3) until the BC Court and the Ontario Court approve the Settlement Agreement. The Defendants may agree to waive this provision.

### **3.5 Effect of Court's Approval**

(1) Subject to the Court's approval, the order or judgment of approval of this Agreement shall:

(a) Describe the group as all persons who are or may be members of the Class;



- (b) Ascribe the status of representative and/or designated person to the BC Plaintiff, the Ontario Plaintiff, and the Quebec Plaintiff;
  - (c) Approve this Agreement and order the Parties and all members of the Class to comply with it;
  - (d) Declare that this Agreement constitutes a "transaction" pursuant to Article 1025 of the Code of Civil Procedure, which is binding on the Parties and all Quebec Class Members;
  - (e) Declare that, subject to Article 1008 of the Code of Civil Procedure, any Quebec Class Member who has not opted out from the Class by \_\_\_\_\_ shall be bound by this Settlement Agreement and judgment of approval;
  - (f) Declare that this Agreement is reasonable, fair, adequate, and in the best interest of the Class;
  - (g) Order publication of the Notice of Settlement Approval as well as the form, contents, and method of its dissemination;
  - (h) Confirm the appointment of the Claims Administrator;
  - (i) Enter such other orders as are needed to effectuate the terms of the Settlement Agreement; and
  - (j) Enjoin all members of the Class (other than those who have validly opted out of the Class) entitled to benefits hereunder from asserting and/or continuing to prosecute claims against Defendants or any other Releasee, as well as any Released Claim that such Class member has, had, or may have in the future.
- (2) Subject to the Court's approval, the Parties agree that the Quebec Proceeding will be authorized only for the purpose of this Agreement.

### **3.6 Publication of Notice of Settlement Approval**

After the Settlement Agreement has been approved by the BC Court, Ontario Court, and Quebec Court, and the Class has been authorized pursuant to the Settlement Agreement, Class Counsel shall disseminate the Notice of Settlement Approval to the Class. Pursuant to Defendants' obligations in Paragraph 4.2(10) of the Settlement Agreement, Defendants will pay the cost of dissemination.



## SECTION 4 – SETTLEMENT BENEFITS

### 4.1 Applicable Currency

All monetary amounts provided herein, including all amounts due to Approved Claimants, are stated and payable in Canadian dollars. The parties agree that the Defendants shall make all payments to the Claims Administrator in U.S. dollars, and the Claims Administrator shall promptly convert the payment funds to Canadian dollars no later than one business day after receipt of the funds from Defendants.

### 4.2 Payment of Settlement Amount

- (1) An individual is eligible for recovery under this Settlement Agreement only if:
  - (a) He or she is a BC Class Member, an Ontario Class Member, or a Quebec Class Member; and
  - (b) He or she meets the eligibility requirements provided in Schedule N.
- (2) With the exception of the Provincial Health Insurers, which are entitled to compensation under this Settlement Agreement as provided in Paragraph 9 of this Section, only BC Class Members, Ontario Class Members, and Quebec Class Members who have submitted all necessary information to the Claims Administrator by the Claims Deadline shall be entitled to receive compensation under the Settlement Agreement. For all claimants, "necessary information" includes a completed Claimant Declaration (Schedule A) and the information described in Schedule N. As described below and in the Claimant Declaration, certain claimants will also be required to submit a completed Physician's Declaration (Schedule F).
- (3) The amount of recovery for any Class Member otherwise eligible for recovery under Sections 4.2(1) and (2) above shall be established according to the patient's status as of the Eligibility Deadline. If a Class Member has scheduled, but not undergone, a Revision Surgery before the Eligibility Deadline, he or she will be eligible to receive the compensation available to Approved Claimants who underwent a Revision Surgery under this Settlement Agreement, so long as the Class Member's Revision Surgery occurs before the Claims Deadline, and the Class Member submits a Physician's Declaration that provides confirmation of, and information relating to, the scheduling of the Revision Surgery by the Eligibility Deadline and the occurrence of the Revision Surgery on or before the Claims Deadline.
- (4) If a Class Member who indicated that he or she did not want to be part of the class by opting out of, or not opting into, the BC Proceeding, Ontario Proceeding, or Quebec Proceeding submits a Claimant Declaration under this Settlement Agreement prior to the Claims Deadline, the opt out or failure to opt in shall be deemed revoked, and such Class Member will be deemed to be a BC Class Member, Ontario Class Member, or Quebec Class Member, as determined by the Claims Administrator. However, this change in status does not impact Defendants' right of termination under Section 8.1(g) of the Settlement Agreement.





- (5) Any amount paid to an Approved Claimant under the Settlement Agreement has been paid as damages on account of alleged personal physical injuries or illness of the Approved Claimant, including physical injuries or illness resulting from alleged emotional harm.
- (6) The Defendants agree to pay amounts in accordance with this Settlement Agreement, in full satisfaction of all of the Released Claims against the Releasees, contingent on dismissal of the claims of the certified classes in British Columbia and Ontario, authorization of the proposed class in the Quebec Action, and subsequent dismissal of the claims of the authorized class in Quebec.
- (7) BC Class Members, Ontario Class Members, and Quebec Class Members shall be compensated as follows, less their respective pro rata share of any Class Counsel Fees that the Court may award to Class Counsel in accordance with section 9.1(3) of this Settlement Agreement:
- (a) BC Class Members, Ontario Class Members, and Quebec Class Members who are Unrevised and are not Medically Precluded from undergoing a Revision Surgery each receive \$600 (CAD);
  - (b) BC Class Members, Ontario Class Members, and Quebec Class Members who are Unrevised and are Medically Precluded from undergoing a Revision Surgery each receive \$40,000 (CAD) less pro rata Class Counsel Fees;
  - (c) Subject to paragraph (g), BC Class Members, Ontario Class Members, and Quebec Class Members who have undergone a Single Revision each receive \$70,000 (CAD) less pro rata Class Counsel Fee;
  - (d) Subject to paragraph (g), BC Class Members, Ontario Class Members, and Quebec Class Members who have undergone Bilateral Revision each receive \$90,000 (CAD) less pro rata Class Counsel Fees;
  - (e) Subject to paragraph (g), BC Class Members, Ontario Class Members, and Quebec Class Members who have undergone either a Single Revision or a Bilateral Revision and who have experienced a Complication will receive additional funds up to \$40,000 (CAD) less pro rata Class Counsel Fees. The amount to which a BC Class Member, Ontario Class Member, or Quebec Class Member may be entitled for a Complication sustained is identified in Schedule L;
  - (f) Any payment to a BC Class Member, Ontario Class Member, or Quebec Class Member who underwent either a Single Revision or Bilateral Revision and whose Durom Cup was *in vivo* for more than 6 years at the time of the Revision Surgery will be reduced by \$10,000 (CAD);
  - (g) BC Class Members, Ontario Class Members, and Quebec Class Members who underwent a revision surgery for a purpose other than explanting a Durom Cup are not entitled to the compensation provided in paragraphs (c), (d), (e), and (h).

(h) Subject to paragraph (g), BC Class Members, Ontario Class Members, and Quebec Class Members who have undergone either a Single Revision or a Bilateral Revision and who purchased the Durom Cup with their own funds will be reimbursed for the cost of the device, less pro rata Class Counsel Fees. This reimbursement is separate from the reimbursement for expenses described in section 4.2(7)(i) below. The Claims Administrator will be responsible for determining and subtracting any pro rata class counsel fees.

(i) BC Class Members, Ontario Class Members, and Quebec Class Members who underwent a Single Revision, a Bilateral Revision, or who are Medically Precluded from undergoing a Revision Surgery will be reimbursed for the expenses they incurred in connection with the Durom Cup, upon submission of all documentation required by Schedules A and G of this Settlement Agreement and approval for reimbursement from the Claims Administrator, as follows:

(i) BC Class Members, Ontario Class Members, and Quebec Class Members who do not have receipts to support their expenses will each receive up to \$750 (CAD), less pro rata Class Counsel Fees;

(ii) BC Class Members, Ontario Class Members, and Quebec Class Members who have receipts documenting their expenses will each receive the amount of those documented expenses, up to a cap of \$2,500 (CAD), less pro rata Class Counsel Fees; and

(iii) BC Class Members, Ontario Class Members, and Quebec Class Members who believe they have incurred extraordinary expenses in connection with their Durom Cup(s) may apply for reimbursement from the Extraordinary Expense Pool. Pro rata Class Counsel Fees will be deducted from any Extraordinary Expense Pool award. If the total amount of approved claims payable from the Extraordinary Expense Fund exceeds \$50,000 (CAD), each reimbursable claim will be reduced on a pro rata basis. If the total amount of approved disbursements payable from the Extraordinary Expense Fund is less than \$50,000 (CAD), the Claims Administrator shall refund the difference to Defendants.

(8) Derivative Claimants shall be compensated as follows:

(a) The Principal Caregiver is entitled to \$5,000 (CAD), less pro rata Class Counsel Fees;

(b) Up to two Minor Children are entitled to \$500 (CAD) each, less pro rata Class Counsel Fees.



(9) Provincial Health Insurers shall be compensated as follows:

(a) Each Provincial Health Insurer will receive \$15,000 (CAD) for each Revision Surgery that a Class Member who submits a proper and approved claim for recovery under this Settlement Agreement underwent in the Provincial Health Insurer's province.

(b) Upon approval from the Claims Administrator, each Provincial Health Insurer is permitted to recover \$15,000 for each Revision Surgery that a Class Member who does not submit a proper and approved claim for recovery under this Settlement Agreement underwent in the Provincial Health Insurer's province, provided that the Provincial Health Insurer properly completes all information pertaining to such Class Members required by Schedule M and submits Schedule M to the Claims Administrator no later than 90 days after the Claims Deadline. All requests for compensation submitted by Provincial Health Insurers that do not meet the requirements of Schedule M will be denied.

(10) Defendants will pay up to \$250,000 (CAD) in Notice and Administration Costs. All other Notice and Administration Costs shall be borne by Class Counsel, subject to the provisions of Section 9.1(2) of the Settlement Agreement.

(11) Within 30 days of the Effective Date, the Defendants shall pay the Initial Deposit into the Account.

(12) The Claims Administrator shall pay Class Counsel for Counsel Fees and Disbursements owing under sections 9.1(1) and (2) from the Account, and the Claims Administrator may draw upon the Account to pay the Notice and Administration Costs.

(13) The Claims Administrator shall make determinations as to the entitlement of Approved Claimants prescribed by sections 4.2(7)(a)-(i) and 4.2(8). It shall pay those entitlements to the Approved Claimants, or their legal representation or counsel, less each Approved Claimant's pro rata portion of Class Counsel Fees prescribed by section 9.1(3), from the Account.

(14) At the same time the Claims Administrator pays each Approved Claimant, the Claims Administrator shall also remit from the Account the pro rata Class Counsel Fees prescribed by sections 9.1(3) and 9.1(4) to BC/Ontario Class Counsel or to Quebec Class Counsel. Class Counsel Fees owing under sections 9.1(3) and 9.1(4) shall be remitted to BC/Ontario Class Counsel for Approved Claimants who are BC Class Members or Ontario Class Members or their estate representatives. Class Counsel Fees owing under sections 9.1(3) and 9.1(4) shall be remitted to Quebec Class Counsel for Approved Claimants who are Quebec Class Members or their estate representatives. The Claims Administrator determines to which class an Approved Claimant belongs.

(15) If the amount in the Account falls below \$500,000, the Defendants will forthwith make a Subsequent Deposit of \$1 million into the Account.



(16) Once the Claims Administrator determines that all amounts owing under this Settlement Agreement have been paid, the Claimants Administrator shall notify the Defendants and Class Counsel.

(17) The Claims Administrator will maintain the funds received pursuant to this Settlement Agreement in an Account. All interest accrued will be added to the funds used to compensate Approved Claimants.

(18) The Claims Administrator shall maintain the Account and shall not pay out funds from the Account in a manner inconsistent with the provisions of this Settlement Agreement except by Court order made on notice to, or on the consent of, the Defendants' Counsel and Class Counsel.

#### **4.3 Appointment and Role of Claims Administrator**

(1) The Parties will agree upon a Claims Administrator to be appointed by the BC Court for the purpose of administering the Settlement.

(2) The Claims Administrator shall make a determination as to whether each Class Member who seeks payment under the Settlement Agreement is an Approved Claimant. If such person is an Approved Claimant, the Claims Administrator shall determine the amount of funds due to the Approved Claimant under the Settlement Agreement. The Claims Administrator shall be subject to removal by the BC Court for cause.

(3) The Claims Administrator shall sign and adhere to a confidentiality statement, in a form satisfactory to the Parties, by which it agrees to keep confidential any information concerning Class Members or Defendants. Further, the Claims Administrator shall institute and maintain procedures to ensure that the identity of all Class Members and all information regarding any claims and submissions will be kept strictly confidential.

(4) The Claims Administrator shall administer all monies payable under the Settlement Agreement, except as specifically provided for herein, and process all claims of Class Members and Provincial Health Insurers in accordance with the terms of this Settlement Agreement.

(5) The funds payable under the Settlement Agreement that Defendants are required to submit to the Claims Administrator under the Settlement Agreement shall be held in an Account. The Claims Administrator shall distribute payments under the Settlement Agreement under the supervision of the BC Court, the Ontario Court, and the Quebec Court. Funds submitted to the Claims Administrator shall be maintained and invested in a manner consistent with that of a prudent and reasonable administrator.

(6) Defendants shall retain a reversionary interest in all funds provided to the Claims Administrator and interest earned on the funds. If any funds remain in the Claims Administrator's trust account 365 days after the Claims Deadline, those funds and any interest accrued shall be immediately returned to Defendants' Counsel upon written request to the Claims Administrator (copy to Class Counsel), less any funds that have been approved for payment to an Approved Claimant but have not yet been paid out.



- (7) The Claims Administrator shall offer its services in both English and French.
- (8) The Claims Administrator shall report monthly to Class Counsel and Defendants' Counsel on the number of claims received in that month and the decisions made by it in respect of any claim. Such reports will include the name of each Approved Claimant or approved Provincial Health Insurer, the category and amount of each payment from the Account, and whether the claim relates to a BC Class Member, Ontario Class Member, Quebec Class Member, or Provincial Health Insurer.
- (9) The Claims Administrator shall retain all records relating to each Class Member's or Provincial Health Insurer's claim. Defendants' Counsel, Defendants, and the Releasees, as well as their respective insurers, may, at their expense and upon providing seven days' written notice to Plaintiffs' Counsel, inspect the Claims Administrator's records. Any party inspecting the Claims Administrator's records under this paragraph shall maintain the confidentiality of the records to the extent necessary to protect the identity and privacy of Class Members.
- (10) All submissions, requests, or motions made by the Claims Administrator to the BC Court, the Ontario Court, or the Quebec Court must be served at least 15 days prior to the proposed date for the hearing of the request or motion.

#### 4.4 Claims and Claimants

- (1) In order to recover under this Settlement Agreement, BC Class Members, Ontario Class Members, and Quebec Class Members must hand-deliver, email, mail, or fax a properly executed Claimant Declaration in the form attached as Schedule A along with a Physician's Declaration (if applicable) in the form attached as Schedule F such that they are received by the Claims Administrator no later than 5:00 p.m. Eastern time on the Claims Deadline.
- (2) To recover from the Extraordinary Expense Pool, BC Class Members, Ontario Class Members, and Quebec Class Members must hand-deliver, email, mail, or fax a properly executed Extraordinary Expense Pool Claim Form in the form attached as Schedule G, and any supporting documentation, such that it is received by the Claims Administrator no later than 5:00 p.m. Eastern time on the Claims Deadline.
- (3) No later than 60 days from the date that the Claims Administrator receives a completed version of Schedule A to this Settlement Agreement from a Class Member or a completed version of Schedule M from a Provincial Health Insurer, the Claims Administrator shall notify the Class Member or Provincial Health Insurer about whether he, she, or it will receive payment under this Settlement Agreement, and if the Class Member or Provincial Health Insurer will not receive payment, the reason why the claim for compensation was rejected.
- (4) If the Claims Administrator determines that the materials submitted by a Class Member or Provincial Health Insurer are deficient, the Claims Administrator shall notify the Class Member or Provincial Health Insurer in writing of the deficiency and shall provide the Class Member or Provincial Health Insurer with 90 days to rectify the deficiency by delivering further or amended materials.



(5) The Claims Administrator shall determine and certify, in its sole discretion, whether a claim for compensation under Schedule A or Schedule M to this Settlement Agreement has been properly made. The decision of the Claims Administrator regarding a Class Member's or Provincial Health Insurer's eligibility to recover under this Settlement Agreement shall be final and not subject to review. All other decisions made by the Claims Administrator in connection with a Class Member's recovery under this Settlement Agreement may be appealed by a Class Member or Defendants within the time frame and by following the Appeal Protocol outlined in Schedule O. A Claims Administrator's decision will be deemed received seven days after it is mailed to a Class Member. All appeals will be decided by The Honourable Marion J. Allan, The Honourable Andre Forget, or such other person upon whom Class Counsel and Defendants' Counsel agree in writing, for decision based only on written submissions from the parties involved. All decisions rendered by The Honourable Marion J. Allan, The Honourable Andre Forget, or such other person upon whom Class Counsel and counsel for Defendants agree in writing shall be final and not subject to further review or appeal.

(6) After approving a claim for payment made by a Provincial Health Insurer, BC Class Member, Ontario Class Member, or Quebec Class Member, the Claims Administrator shall promptly pay the Provincial Health Insurer, Approved Claimant or the Approved Claimant's legal representatives or counsel. However, payment under the Settlement Agreement shall not be made to an Approved Claimant until the Approved Claimant satisfies the requirements of Section 4.4, paragraph 8, and Schedule N.

(7) Class Members and Class Counsel agree to secure all authorizations from Provincial Health Insurers necessary to facilitate settlement under the Settlement Agreement.

(8) Within 30 days after receiving notice that he or she will receive payment under the Settlement Agreement, a Class Member is required to return his or her explanted Durom Cup, if the Durom Cup is in his or her possession, custody, or control, to Defendants' Counsel at the address below, or take all actions necessary for a third-party to return the explanted Durom Cup to Defendants' Counsel.

## **SECTION 5 – DISTRIBUTION OF THE SETTLEMENT AMOUNT AND ACCRUED INTEREST**

### **5.1 Settlement Distribution**

Any Settlement Amounts held by the Claims Administrator shall be held in trust for the benefit of Class Members and Provincial Health Insurers, and after the Effective Date, shall only be paid in accordance with the provisions of this Settlement Agreement.



## 5.2 Monies in the Account

In no event shall the Defendants have any responsibility, financial obligations, or liability whatsoever with respect to the investment, distribution, use, or administration of monies in the Account, including, but not limited to, the costs and expenses of such investment, distribution, use and administration, Administration Expenses, and Class Counsel Fees, except as otherwise provided for in sections 4 and 9.1 of this Settlement Agreement.

## 5.3 Taxes and Interest

- (1) All interest earned on funds in the Account shall become and remain part of the Account.
- (2) Plaintiffs, Class Counsel, and Provincial Health Insurers' Counsel shall bear all risks related to investment of the funds in the Account.
- (3) All funds held by the Claims Administrator shall be deemed and considered to be *in custodia legis* of the BC Court and shall remain subject to the jurisdiction of the BC Court until such time as such funds are distributed pursuant to the Settlement Agreement and/or further order of the BC Court.
- (4) All taxes payable on any interest that accrues on the funds in the Account shall be the responsibility of the Class. The Claims Administrator, in consultation with Class Counsel, shall be solely responsible to fulfill all tax reporting and payment requirements arising from the Settlement Amount in the Account, including any obligation to report taxable income and make tax payments. All taxes (including interest and penalties) due with respect to the income earned by the Settlement Amount shall be paid from the Account.
- (5) The Defendants shall have no responsibility to make any tax filings relating to the Account and shall have no responsibility to pay tax on any income earned by the funds in the Account or pay any taxes on the monies in the Account.

## SECTION 6 – OBJECTIONS

### 6.1 Procedure to Object

- (1) A Class Member may object to the approval of the Settlement by sending a written objection by pre-paid mail, courier, fax, or email to Class Counsel. Class Counsel is required to forward all objections to Defendants' Counsel within 48 hours after receiving an objection.
- (2) Objections must be received before 5:00 p.m. Eastern time on a date that is five days before the date of the Approval Hearing applicable to the Class Member's claim.
- (3) A Class Member who wishes to object to the approval of the Settlement shall state in his/her objection:



- (a) The full name, current mailing address, fax number, telephone number, and email address of the person who is objecting;
  - (b) A brief statement of the nature and reasons for the objection;
  - (c) A declaration that the person believes he or she is a member of the Class and the reason for that belief including, if available, the reference/catalogue and lot numbers of his/her Durom Cup;
  - (d) Whether the person intends to appear at the relevant Approval Hearing or intends to appear by counsel, and, if by counsel, the name, address, telephone number, fax number, and email address of counsel; and
  - (e) A declaration under the penalty of perjury that the foregoing information is true and correct.
- (4) Class Counsel shall, no later than three days before the date of the relevant Approval Hearing, report to the Court, by affidavit, with a copy to counsel for the Defendants, the names of persons who objected and copies of any objections.

## **SECTION 7 – RELEASES AND DISMISSALS**

### **7.1 Release of Releasees**

- (1) Upon the Effective Date, and in consideration of the payment of the Settlement Amount and for other valuable consideration set forth in the Settlement Agreement, the Releasers forever and absolutely release the Releasees from the Released Claims, including all claims, actions, causes of action, suits, debts, duties, accounts, bonds, covenants, contracts, and demands whatsoever that were asserted, or could have been asserted, in the litigation that is the subject of this Settlement Agreement. For the consideration provided herein, the Releasers agree not to make any claim or take or continue any proceedings arising out of or relating to the subject matter of the Released Claims against any other person, corporation, or entity (including, without limitation, any health care professionals, health care providers, and hospitals or other health care facilities) that might claim damages and/or contribution and indemnity and/or other relief under the provisions of the *Negligence Act* or other comparable provincial legislation and any amendments thereto, the common law, equity, Quebec civil law, or any other statute, for any relief whatsoever, including relief of a monetary, declaratory, or injunctive nature, from one or more of the Releasees.
- (2) Without limiting any other provisions herein, each Class Member who does not affirmatively opt out of the Proceedings or who has affirmatively opted into the BC Proceeding, and the Provincial Health Insurers, whether or not he, she, or it submits a claim or otherwise receives an award, will be deemed by this Settlement Agreement completely and unconditionally to have released and forever discharged the Releasees from any and all Released Claims, including all claims, actions, causes of action, suits, debts, duties, accounts, bonds, covenants,





contracts, and demands whatsoever that were asserted, or could have been asserted, in the litigation that is the subject of this Settlement Agreement.

(3) Each Class Member who does not affirmatively opt out of the Proceedings, or who affirmatively opted into the BC Proceeding, and the Provincial Health Insurers, whether or not he, she, or it submits a claim or otherwise receives an award, will be forever barred and enjoined from continuing, commencing, instituting, or prosecuting any action, litigation, investigation, or other proceeding in any court of law or equity, arbitration, tribunal, proceeding, governmental forum, administrative forum, or any other forum, directly, representatively or derivatively, asserting against any of the Defendants or Releasees any claims that relate to or constitute any Released Claims covered by this Settlement Agreement.

## **7.2 No Further Claims**

The Releasors shall not now or hereafter institute, continue, maintain, or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other person, any action, suit, cause of action, claim, or demand against any Releasees, or against any other person who may claim contribution or indemnity from any Releasees in respect of any Released Claim or any matter related thereto. The Parties agree that no Class Members shall recover, directly or indirectly, any sum from Defendants or Releasees other than those authorized under the Settlement Agreement in connection with the Durom Cup.

## **7.3 Dismissal of the Proceedings**

(a) The Proceedings shall be dismissed with prejudice and without costs as against the Defendants.

(b) All lawsuits relating to the Durom Cup in which clients of the Merchant Law Firm seek class certification will be dismissed on consent by the Merchant Law Firm.

## **SECTION 8 - TERMINATION OF SETTLEMENT AGREEMENT**

### **8.1 Right of Termination**

(1) The Defendants shall have the right to terminate this Settlement Agreement if:

- (a) The BC Court, Quebec Court, or the Ontario Court declines to approve this Settlement Agreement or any term or part thereof deemed material by Defendants;
- (b) Any order approving the Settlement Agreement does not become a Final Order;
- (c) The Quebec Court declines to authorize the proposed class in the Quebec Action;
- (d) Any order dismissing the Quebec Proceeding does not become a Final Order;



(e) The form and content of any of the Final Orders approved by the BC Court, the Ontario Court, or the Quebec Court do not comply with the terms of this Settlement agreement;

(f) The Provincial Health Insurers do not accept this Settlement Agreement or any material term or part thereof; or

(g) More than 200 Class Members opt out.

(2) To exercise a right of termination, the Defendants shall deliver a written notice of termination to Class Counsel and Provincial Health Insurers' Counsel. Upon delivery of such a written notice, this Settlement Agreement shall be terminated and, except as provided for in sections 8.2 and 8.3, it shall be null and void and have no further force or effect, shall not be binding on the Parties, and shall not be used as evidence or otherwise in any litigation.

### **8.2 If Settlement Agreement is Terminated**

(1) If this Settlement Agreement is not approved by the BC Court, the Ontario Court, or the Quebec Court, is terminated in accordance with its terms, or otherwise fails to take effect for any reason:

(a) Any order approving this Settlement Agreement shall be set aside and declared null and void and of no force or effect, and anyone shall be estopped from asserting otherwise;

(b) All negotiations, statements, and proceedings relating to the settlement and the Settlement Agreement shall be deemed to be without prejudice to the rights of the Parties, and the Parties shall be deemed to be restored to their respective positions existing immediately before it was executed;

(c) All funds in the Account (including accrued interest) shall be returned to Defendants' Counsel within 10 days after the date of termination; and

(d) Authorization of the Quebec Proceeding will be reversed and/or set aside.

### **8.3 Survival of Provisions after Termination**

If this Settlement Agreement is not approved by the BC Court, the Ontario Court, or the Quebec Court, is terminated in accordance with its terms, or otherwise fails to take effect for any reason, the provisions of this section and sections 8.2, 12.2, and the Recitals, Definitions, and Schedules applicable thereto shall survive the termination and continue in full force and effect. In addition, the Parties agree that termination of the Settlement Agreement warrants class authorization through ordinary procedures, and nothing shall prevent Defendants and the Releasees from contesting or opposing class authorization in this action or any other action for any purpose.



## **SECTION 9 – LEGAL FEES AND DISBURSEMENTS**

### **9.1 Class Counsel Fees**

Class Counsel will be compensated as follows:

- (1) \$500,000 (CAD) in Class Counsel Fees payable by the Defendants;
- (2) Up to \$500,000 (CAD) in Disbursements payable by the Defendants. Any unused Disbursement monies shall be used to pay Notice and Administration Costs exceeding \$250,000 (CAD). If unused Disbursement monies remain after satisfying Notice and Administration Costs, the remaining unused monies will revert to the Defendants;
- (3) Additional Class Counsel fees payable by Class Members, which may be determined and approved by the BC Court, the Ontario Court, and/or the Quebec Court.
- (4) The amounts payable under sections 9.1(1) and (2) will be allocated as between BC/Ontario Class Counsel and Quebec Class Counsel as agreed by them or as directed by the Courts. The amounts payable under sections 9.1(3) in respect of Approved Claimants whose claims related to BC Class Members or Ontario Class Members will be paid to BC/Ontario Class Counsel. The amounts payable under sections 9.1(3) in respect of Approved Claimants whose claims relate to Quebec Class Members will be paid to Quebec Class Counsel.

### **9.2 Procedure**

- (1) Class Counsel will bring motions, with notice to Defendants' Counsel, to the BC Court, the Quebec Court, and/or the Ontario Court for determination and approval of Class Counsel Fees and Disbursements payable by the Class Members in accordance with sections 9.1(3) and (4). In any such Court application, Class Counsel shall serve and file documentation that itemizes and supports the amount of Class Counsel Fees claimed.
- (2) Class Counsel Fees and Disbursements payable pursuant to sections 9.1(1) and (2) may be paid out of the Account only after Class Counsel obtains the approval of the BC Court, the Ontario Court, and the Quebec Court. Payment of Additional Class Counsel Fees under sections 9.1(3) in respect of BC Class Members is subject to approval of the BC Court. Payment of Additional Class Counsel Fees under sections 9.1(3) in respect of Ontario Class Members are subject to approval of the Ontario Court. Payment of Additional Class Counsel Fees under sections 9.1(3) in respect of Quebec Class Members are subject to approval of the Quebec Court. Class Counsel Fees and Disbursements shall be paid in the manner prescribed by sections 4.2(7), (12) and (14).
- (3) Class Members who have retained, or in the process of making a claim do retain, lawyers to assist them in making their individual claims in this Settlement shall be responsible for the legal fees and expenses of such lawyers.



- (4) For the purposes of allocating fees payable under section 9.1(3) as between BC/Ontario Class Counsel and Quebec Class Counsel, where an Approved Claimant's Claimant Declaration has been filed by BC/Ontario Class Counsel, then that Approved Claimant's claim shall be deemed to relate to the BC Class Members or Ontario Class Members, and where an Approved Claimant's Claimant Declaration has been filed by Quebec Class Counsel, then that Approved Claimant's claim shall be deemed to relate to the Quebec Class Members.

### 9.3 Payment of Appeal-Related Fees and Costs

Payment of all fees and costs charged by The Honourable Marion J. Allan, The Honourable Andre Forget, or other such person who will serve as the appeal adjudicator by written agreement of Class Counsel and Defendants' Counsel in connection with any appeal initiated by a Class Member or Defendants, will be made as specified in Schedule O.

## SECTION 10 – ADMINISTRATION AND IMPLEMENTATION

### 10.1 Mechanics of Administration

Except to the extent provided for in this Settlement Agreement, the mechanics of the implementation and administration of this Settlement Agreement shall be determined by the BC Court on motion brought by the Parties, or any one of them.

### 10.2 Notices Required

- (1) Each Class Member shall be given notice of:
- (a) The hearing applicable to the Class Member's claim at which the BC Court, the Ontario Court, or the Quebec Court will be asked to approve the Settlement Agreement; and
  - (b) Settlement approval, if applicable.
- (2) Class Counsel and Defendants' Counsel will jointly prepare such Notices as may be required, substantially in the form attached in Schedules H, I, and J, respectively, as well as a plan for dissemination of the Notices (Schedule K). Counsel acknowledge that all Notices and the plan for dissemination of Notices must be approved by the BC Court, the Ontario Court, and the Quebec Court. No notices shall be disseminated until such time as they are approved by the BC Court, the Ontario Court, and the Quebec Court.

## SECTION 11 – NO ADMISSION OF LIABILITY

The Parties agree that whether or not this Settlement Agreement is approved by the BC Court, the Ontario Court, or the Quebec Court, or is terminated, this Settlement Agreement and anything contained herein, and any and all negotiations, documents, discussions, and



proceedings associated with this Settlement Agreement, and any action taken to carry out this Settlement Agreement, shall not be deemed, construed, or interpreted to be an admission of any violation of any statute or law, or of any wrongdoing of liability by the Releasees, or of the truth of any of the claims or allegations made in the Proceeding or in any other pleading filed by the Plaintiffs.

The Parties further agree that whether or not this Settlement Agreement is approved by the BC Court, the Ontario Court, or the Quebec Court, or is terminated, neither this Settlement nor any document relating to it shall be offered in evidence in any action or proceeding in any court, agency, or tribunal, except to seek court approval of this Settlement Agreement or to give effect to and enforce the provisions of this Settlement Agreement.

## **SECTION 12 – MISCELLANEOUS**

### **12.1 Motions for Directions**

- (1) The BC Plaintiff, Ontario Plaintiff, Quebec Plaintiff, Class Counsel, the Claims Administrator, the Provincial Health Insurers, or the Defendants may apply to the BC Court for directions in respect of the implementation and administration of this Settlement Agreement.
- (2) All motions contemplated by this Settlement Agreement, including applications to the BC Court for directions, shall be on notice to the Parties.

### **12.2 Releasees Have No Liability for Administration**

The Releasees shall have no responsibility for and no liability whatsoever with respect to the administration of the Settlement Agreement.

### **12.3 Headings, etc.**

In this Settlement Agreement, the division of the Settlement Agreement into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Settlement Agreement. The terms "this Settlement Agreement," "the Settlement Agreement," "hereof," "hereunder," "herein," "hereto," and similar expressions refer to this Settlement Agreement and not to any particular section or portion of this Settlement Agreement.

### **12.4 Ongoing Jurisdiction**

The BC Court shall retain exclusive jurisdiction over all matters relating to the implementation and enforcement of this Settlement Agreement.



## **12.5 Governing Law**

This Settlement Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of British Columbia.

## **12.6 Entire Agreement**

This Settlement Agreement and the Schedules attached hereto constitute the entire agreement among the Parties, and supersede any and all prior and contemporaneous understandings, undertakings, negotiations, representations, communications, promises, agreements, agreements in principle, and memoranda of understanding in connection herewith. The Parties agree that they have not received or relied on any agreements, representations, or promises other than as contained in this Settlement Agreement. None of the Parties shall be bound by any prior obligations, conditions, or representations with respect to the subject matter of this Settlement Agreement, unless expressly incorporated herein. This Settlement Agreement may not be modified or amended except in writing and on consent of all Parties hereto, and any such modification or amendment must be approved by the BC Court, the Ontario Court, and the Quebec Court.

## **12.7 Survival**

The representations and warranties contained in this Settlement Agreement shall survive its execution and implementation.

## **12.8 Counterparts**

This Settlement Agreement may be executed in counterparts, all of which taken together will be deemed to constitute one and the same agreement, and a facsimile signature shall be deemed an original signature for purposes of executing this Settlement Agreement. This Settlement Agreement may be delivered and is fully enforceable in either original, faxed, or other electronic form provided that it is duly executed.

## **12.9 Negotiated Agreement**

This Settlement Agreement has been the subject of negotiations and discussion among the Parties, each of which has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Settlement Agreement shall have no force and effect. The Parties further agree that the language contained or not contained in previous drafts of this Settlement Agreement, or any agreement in principle, shall have no bearing upon the proper interpretation of this Settlement Agreement.



#### **12.10 Language**

The Parties acknowledge that they have required and consented that this Settlement Agreement and all related documents be prepared in English; les parties reconnaissent avoir exigé que la present convention et tous les documents connexes soient rédigés en anglais.

#### **12.11 Dates**

Dates referred to in this Settlement Agreement may be altered with the written consent of the Parties and with the approval of the BC Court, the Ontario Court, and the Quebec Court.

#### **12.12 French Translation**

The Parties acknowledge that they have required that the Settlement Agreement, including Schedules, be prepared in English and French. The English version of the Settlement Agreement is authoritative in British Columbia and Ontario (and is authoritative as to all Class Members in any province or territory of Canada except Quebec), and the French and English versions of the Settlement Agreement have equal force in Quebec (and are authoritative as to all Class Members who reside in Quebec). A French translation of the settlement agreement and all notices pursuant to this Settlement Agreement shall be paid for by the Defendants.

#### **12.13 Confidentiality**

The Parties agree that no public statements shall be made regarding these Proceedings or their settlement that are in any way inconsistent with the terms of the Settlement Agreement.

In particular, the Parties agree that any public statements regarding these Proceedings will indicate only that the settlement has been negotiated and agreed by the parties and approved by the BC Court, Quebec Court, and the Ontario Court without any admissions or findings of liability or wrongdoing and without any admissions or conclusions as to the truth of any of the facts alleged in the Proceedings, all of which are specifically denied.

#### **12.14 Recitals**

The recitals to this Settlement Agreement are true and form part of the Settlement Agreement.

#### **12.15 Schedules**

The Schedules annexed hereto form part of this Settlement Agreement and are:

- Schedule A – Claimant Declaration
- Schedule B1 – Order on Notice of Approval Hearing (BC Court)
- Schedule B2 – Order on Notice of Approval Hearing (Ontario Court)



- Schedule B3 – Order on Notice of Approval Hearing (Quebec Court)
- Schedule C – Order on Approval of Settlement Agreement (BC Court)
- Schedule D – Order on Approval of Settlement Agreement (Ontario Court)
- Schedule E – Order on Approval of Settlement Agreement (Quebec Court)
- Schedule F – Physician's Declaration
- Schedule G – Extraordinary Expense Pool Claim Form
- Schedule H – Notice to BC Action Class Members
- Schedule I – Notice to Ontario Action Class Members
- Schedule J – Notice to Quebec Action Class Members
- Schedule K – Plan for Dissemination of Class Notices
- Schedule L – List of Complications and Corresponding Payment Amounts
- Schedule M – Health Insurer Claim Form
- Schedule N – Eligibility Requirements
- Schedule O – Appeal Protocol

#### **12.16 Acknowledgements**

Each of the Parties hereby affirms and acknowledges that:

- (1) He, she, or a representative of the Party with the authority to bind the Party with respect to the matters set forth herein has read and understood the Settlement Agreement;
- (2) The terms of this Settlement Agreement and the effects thereof have been fully explained to him, her, or the Party's representative by his, her, or its counsel;
- (3) He, she, or the Party's representative fully understands each term of the Settlement Agreement and its effect; and
- (4) No Party has relied upon any statement, representation, or inducement (whether material, false, negligently made, or otherwise) of any other Party with respect to the first Party's decision to execute this Settlement Agreement.





### **12.17 Authorized Signature**

Each of the undersigned represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Settlement Agreement.

### **12.18 Notice**

Where this Settlement Agreement requires a Party to provide notice or any other communication or document to another, such notice, communication, or document shall be provided by email, facsimile, or letter by overnight delivery to the representatives for the Party to whom notice is being provided, as identified below:

For Plaintiffs, Provincial Health Insurers, Class Counsel, and Provincial Health Insurers' Counsel:

David Klein  
Klein Lawyers LLP  
Suite 400  
1385 West 8<sup>th</sup> Avenue  
Vancouver, BC V6H 3V9  
Telephone: 604-874-7171  
Facsimile: 604-874-7180  
Email: [dklein@callkleinlawyers.com](mailto:dklein@callkleinlawyers.com)

Daniel Chung  
Merchant Law Group LLP  
200 - 10 Notre-Dame E.  
Montréal, Québec H2Y 1B7  
Telephone: 514-248-7777  
Facsimile: 514-842-6687  
Email: [dchung@merchantlaw.com](mailto:dchung@merchantlaw.com)

For Defendants and Defendants' Counsel:

Peter Pliszka  
Fasken Martineau DuMoulin LLP  
Suite 2400  
333 Bay Street  
Toronto, ON M5H 2T6  
Telephone: 416-868-3336  
Facsimile: 416-364-7813  
Email: [ppliszka@fasken.com](mailto:ppliszka@fasken.com)



The Parties have executed this Settlement Agreement on the dates provided below.

CLASS COUNSEL:

Klein Lawyers LLP

Date: November 24, 2015

By: [Signature]

Printed: David Klein

TRUDEL JOHNSON LESPERANCE  
Merchant Law Group LLP

Date: April 13, 2016

By: [Signature]

Printed: PHILIPPE TRUDEL

PROVINCIAL HEALTH INSURERS:

Date: November 24, 2015

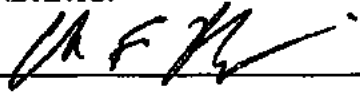
By: [Signature]

Printed: David Klein

Its: Solicitor

Date: November 23, 2015

DEFENDANTS:

By: 

Printed: Chad F. Phipps

**Senior Vice President,**

Its: General Counsel & Secretary



**Section B: Personal Representative**

Are you completing this form as someone with the legal capacity to act on behalf of the Claimant (*i.e.*, an individual with power of attorney, an estate representative, etc.)?

Yes  No

If "Yes," please complete the remainder of Section B with information about yourself. If "No," skip to Section C.

\_\_\_\_\_  
First Name Middle Last Name

\_\_\_\_\_  
Date of Birth (mm/dd/yyyy)

\_\_\_\_\_  
Address

\_\_\_\_\_  
City Province/Territory Postal Code

\_\_\_\_\_  
Email Date of Death of the Claimant (if applicable) (mm/dd/yyyy)

\_\_\_\_\_  
Daytime Phone Number Cellular Phone Number

**Relationship to Claimant:**

Please attach the documents that grant you the legal authority to act on behalf of the Claimant to this form (*i.e.* Power of Attorney, Last Will and Testament, Letters of Administration, etc.). If the Claimant is deceased, please also attach a copy of the Claimant's death certificate to this form.

- Power of Attorney
- Certificate of Incapacity
- Letters of Administration
- Will
- Death Certificate
- Grant of Probate
- Other. Please explain \_\_\_\_\_

**Section C: Lawyer Information (if applicable)**

\_\_\_\_\_  
Lawyer Last Name Lawyer First Name

\_\_\_\_\_  
Name of Law Firm

\_\_\_\_\_  
Address

\_\_\_\_\_  
Phone Number Email

**Section D: Durom Cup Implant Information**

Location of the Durom Implant:  Right  Left  Bilateral

Implant Date (Right) \_\_\_\_\_  
(mm/dd/yyyy)

Name of Hospital \_\_\_\_\_

Surgeon \_\_\_\_\_

Implant Date (Left) \_\_\_\_\_  
(mm/dd/yyyy)

Name of Hospital \_\_\_\_\_

Surgeon \_\_\_\_\_

**Identification stickers and operative report(s) for your Durom Cup(s) must be submitted with this Claimant Declaration.**

**Section E: Revision Information**

Has the Claimant undergone a revision surgery or surgeries to remove the Durom Cup(s)?

Yes  No

If you checked "No," please skip to Section F below.

Location of Revision:  Right  Left  Bilateral

Implant Revision Date (Right) \_\_\_\_\_  
(mm/dd/yyyy)

Name of Hospital \_\_\_\_\_

Surgeon \_\_\_\_\_

Implant Revision Date (Left) \_\_\_\_\_  
(mm/dd/yyyy)

Name of Hospital \_\_\_\_\_

Surgeon \_\_\_\_\_



Did the Claimant have children under the age of 18 who lived with him/her on the date of his/her revision surgery to implant the Durom Cup?

Yes  No

If you checked "Yes," list the names and dates of birth of up to two children only:

\_\_\_\_\_  
Name DOB: (mm/dd/yyyy)

\_\_\_\_\_  
Name DOB: (mm/dd/yyyy)

**If the Claimant is medically contraindicated from undergoing a revision surgery, please answer the following:**

Did an immediate adult family member provide the Claimant with care to assist in the Claimant's recovery after his/her surgery or surgeries to implant the Durom Cup(s)?

Yes  No

If you checked "Yes," list the family member's name and his/her relationship to the Claimant:

\_\_\_\_\_  
Name of Family Member Relationship to Claimant

Did the Claimant have children under the age of 18 who lived with him/her on the date of his/her surgery to implant the Durom Cup(s)?

Yes  No

If you checked "Yes," list the names and dates of birth of up to two children only:

\_\_\_\_\_  
Name DOB: (mm/dd/yyyy)

\_\_\_\_\_  
Name DOB: (mm/dd/yyyy)



**Section H: Post-Revision Complications**

Did the Claimant's revision surgery or surgeries cause any of the following? If so, state the date on which the complication occurred.

	<b>Date (mm/dd/yyyy)</b>
Second Revision (Right)	
Second Revision (Left)	_____
Third Revision (Right)	_____
Third Revision (Left)	_____
Stroke	_____
Blood Clot	_____
Infection	_____
Permanent nerve damage	_____
Death	_____
	_____

**If you claimed above that the Claimant experienced a blood clot, infection, and/or permanent nerve damage, you must submit a completed Physician's Declaration with this form. If you claimed above that the Claimant suffered from a second revision, a third revision, death, or a stroke, you must submit hospital records (including revision operative reports) relating to each complication, or a Physician's Declaration documenting each complication, with this form.**

## Section I: Out-of-Pocket Expenses

Complete this section only if the Claimant had a revision surgery or is medically precluded from undergoing revision surgery.

- Check here if the Claimant purchased his or her Durom Cup(s) with his or her own funds (*i.e.*, the cost of the implant was not paid by an insurer). If you checked the box, attach all receipts or other documentation reflecting the amount paid by the Claimant for the Durom Cup(s) to this form.

Did the Claimant (who has been revised or is medically precluded from undergoing a revision) incur any other out-of-pocket expenses in connection with a revision surgery, post-revision complications, or medical treatment?

- Yes  No

If you checked "No," skip to Section J. If you checked "Yes," please answer the following:

Are these claimed out-of-pocket expenses \$2,500 or less?

- Yes  No

If you checked "No," and you wish to seek reimbursement for the expenses you incurred that are greater than \$2,500, you may complete and submit the Extraordinary Expense Pool Claim Form. Please note that you are required to provide receipts substantiating all of your out-of-pocket expenses if you seek reimbursement totaling more than \$2,500. If you choose to complete the Extraordinary Expense Pool Claim Form, please attach the receipts substantiating the expenses you seek to recover up to \$2,500 to this Claimant Declaration and attach the receipts substantiating any additional expenses you seek to recover to the Extraordinary Expense Pool Claim Form.

If you checked "Yes" above, or you seek to recover no more than \$2,500 in out-of-pocket expenses, do you have receipts to substantiate the expenses you incurred?

- Yes  No

If "Yes," please attach your receipts to this form. If "No," please state the approximate total of the expenses you incurred: \$\_\_\_\_\_.

**Section J: Declaration**

I solemnly declare that:

The Claimant was implanted with one or more Durom Cup acetabular component(s) ("Durom Cup").

The Claimant wishes to make a claim for compensation in this class action.

Attached are copies of the Claimant's implant and revision (if applicable) operative reports and documentation identifying the catalogue and lot numbers of the Claimant's Durom Cup.

If I am not submitting the Claimant's Durom Cup peel-and-stick labels as product identification, it is because the hospital at which the Claimant's implant surgery occurred could not provide me with the labels because they are not in the Claimant's hospital medical records.

If I am not submitting a photograph of the Claimant's Durom Cup in lieu of the Claimant's Durom Cup peel-and-stick labels, I cannot submit a photograph because the Claimant's Durom Cup is not within the Claimant's or my possession, custody, or control.

**I make this declaration believing it to be true, and knowing that it is of the same legal force and effect as if it were made under oath.**

\_\_\_\_\_  
Signature of Claimant or Representative

\_\_\_\_\_  
Date

**Please note: All pages of this Declaration and supporting documents must be submitted to the Claims Administrator on or before the Claims Deadline.**

**SCHEDULE B1 – BC ORDER PROVIDING NOTICE OF APPROVAL HEARING**

No. S095493  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

DENNIS JONES and SUSAN WILKINSON

AND:

Plaintiffs

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

Defendants

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

**ORDER MADE AFTER APPLICATION**

BEFORE THE HONOURABLE ) this th day of  
MR. JUSTICE BOWDEN )  
)  
)

**ON THE APPLICATION** of the Plaintiffs for an order approving the form of notice that will advise class members of the hearing to approve the proposed settlement, as well as the manner of publication of such notice coming on for hearing at the Courthouse at 800 Smithe Street, Vancouver, British Columbia on the \_\_\_ day of \_\_\_\_\_, 2015, with the consent of the Defendants and on hearing counsel for the parties and reading the materials filed including the settlement agreement and the exhibits thereto that are attached to this Order as Schedule “1” (“Settlement Agreement”);

**THIS COURT ORDERS** that:

1. For the purposes of this Order, the definitions set out in the Settlement Agreement apply to and are incorporated into this Order.
2. The motion for settlement approval for this proceeding shall be heard on [date] at the Court House, 800 Smithe Street, Vancouver, British Columbia (the “Approval Hearing”).

3. The form and content of the hearing notice, substantially in the form attached as Schedule "2", is approved (the "Hearing Notice"). The Hearing Notice shall be available in both English and French.
4. The proposed manner of publishing the Hearing Notice as described in Schedule "3", is approved (the "Notice Plan").
5. The Hearing Notice and the Notice Plan constitute fair and reasonable notice of the class of the Approval Hearing.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS NOTED ABOVE:

\_\_\_\_\_  
Signature of  
 party  lawyer for the Plaintiffs  
David A. Klein

\_\_\_\_\_  
Signature of  
 party  lawyer for the Defendants  
Andrew Borrell

By the Court.

\_\_\_\_\_  
Registrar

**Schedule "1": Settlement Agreement**

## Schedule “2”: Notice of Approval Hearing

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

**This notice may affect your rights. Please read carefully.**

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

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

### **Who is Eligible to Participate in the Settlement?**

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

### **The Terms of Settlement**

The settlement provides compensation to class members who timely submit all forms and documentation required under the Settlement Agreement, less deductions for legal fees. The settlement also provides for payment to public health insurers. Please refer to the settlement agreement for specific terms and conditions.

### **Court Hearings and Your Right to Participate**

Motions to approve the settlement agreement are scheduled to be heard by the British Columbia Court in Vancouver on [date] and the Ontario Court in Toronto on [date]. A motion to approve the settlement, and a motion to authorize the class action in *Wainberg* will be heard by the Quebec Court in Montreal on [date]. Class Counsel will also ask the courts to approve an award of fees and disbursements for their work in connection with *Jones*, *McSherry*, and *Wainberg* during the hearings.

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

- (a) The full name, current mailing address, fax number, telephone number, and email address of the person who is objecting;
- (b) A brief statement of the nature and reasons for the objection;

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

**For Québec Residents Only: Excluding Yourself from the Class Action**

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

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

Daniel Chung  
 Merchant Law Group LLP  
 10, Notre-Dame East  
 Suite 200  
 Montreal (Québec) H2Y 1B7

**For Additional Information and a Copy of the Settlement Agreement:**

Class Counsel in *Jones* and *McSherry* Actions

**Klein Lawyers LLP**  
 Suite 400  
 1385 West 8<sup>th</sup> Avenue  
 Vancouver, BC V6H 3V9  
 Telephone: 604-874-7171  
 Facsimile: 604-874-7180  
[www.kleinlyons.com](http://www.kleinlyons.com)

Class Counsel in *Wainberg* Action:

**Merchant Law Group LLP**  
 2401 Saskatchewan Drive  
 Regina, Saskatchewan  
 S4P 4H8  
 Phone: 306-359-7777  
 Fax: 306-522-3299  
[www.merchantlawgroup.com](http://www.merchantlawgroup.com)



### **Schedule “3” – Notice Plan**

The Notice of Approval Hearing shall be disseminated by the following means:

1. Class Counsel shall send a copy of the Notice of Approval Hearing by mail or email to all class members who have contacted them, and those class members who have provided addresses to Class Counsel for the purposes of this litigation.
2. Class Counsel shall post a copy of the Notice of Approval Hearing and the Settlement Agreement to their respective websites.
3. Class Counsel shall forward a copy of the Notice of Approval Hearing to all counsel in Canada who, to Class Counsel’s knowledge, have filed litigation regarding the Zimmer Durom Cup.
4. Class Counsel shall issue the media release attached hereto as Schedule “4” with the Notice of Approval Hearing, and the media release will be distributed through Canada Newswire or Market Wired.
5. Class Counsel shall publish Notice of Approval Hearing in all publications listed in Schedule K to the Settlement Agreement.

## Schedule "4"—Media Release

### Zimmer Durom Cup Hip Implant Class Action Settlement

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

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

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

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

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

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

Class Counsel in *Jones* and *McSherry* Actions

**Klein Lawyers LLP**  
Suite 400  
1385 West 8<sup>th</sup> Avenue  
Vancouver, BC V6H 3V9  
Telephone: 604-874-7171  
Facsimile: 604-874-7180  
[www.callkleinlawyers.com](http://www.callkleinlawyers.com)

Class Counsel in *Wainberg* Action:

**Merchant Law Group LLP**  
2401 Saskatchewan Drive  
Regina, Saskatchewan  
S4P 4H8  
Phone: 306-359-7777  
Fax: 306-522-3299  
[www.merchantlawgroup.com](http://www.merchantlawgroup.com)

**SCHEDULE B2 – ONTARIO ORDER PROVIDING NOTICE OF APPROVAL HEARING**

Court File No. CV-10-40836500 CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE )  
JUSTICE PERELL )  
)

DAY, THE  
DAY OF ,  
2015

BETWEEN:

GLORIA McSHERRY

Plaintiff

-and-

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**ORDER**

**THIS MOTION** by the Plaintiff for an order approving the form of notice that will advise class members of the hearing to approve the proposed settlement, as well as the manner of publicizing such notice, was heard in Toronto.

**UPON BEING ADVISED** that the Plaintiff and the Defendants have entered into the Settlement Agreement attached hereto as Schedule "1" and that the Defendants have consented to the terms of this Order, **THIS COURT ORDERS** that:

1. For the purposes of this Order, the definitions set out in the Settlement Agreement apply to and are incorporated into this Order.
2. The motion for approval of settlement in this proceeding shall be heard on [date] at the Osgoode Hall, 130 Queen Street West, Toronto, Ontario (the "Approval Hearing").

3. The form and content of the hearing notice, substantially in the form attached hereto as Schedule "2", is approved (the "Hearing Notice"). The Hearing Notice shall be available in both English and French.
4. The proposed manner of publicizing the Hearing Notice as described in Schedule "3", is approved (the "Notice Plan").
5. The Hearing Notice and the Notice Plan constitute fair and reasonable notice to the class of the Approval Hearing.

---

Registrar

**Schedule "1": Settlement Agreement**

## Schedule “2”: Notice of Approval Hearing

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

**This notice may affect your rights. Please read carefully.**

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

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

### **Who is Eligible to Participate in the Settlement?**

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

### **The Terms of Settlement**

The settlement provides compensation to class members who timely submit all forms and documentation required under the Settlement Agreement, less deductions for legal fees. The settlement also provides for payment to public health insurers. Please refer to the settlement agreement for specific terms and conditions.

### **Court Hearings and Your Right to Participate**

Motions to approve the settlement agreement are scheduled to be heard by the British Columbia Court in Vancouver on [date] and the Ontario Court in Toronto on [date]. A motion to approve the settlement, and a motion to authorize the class action in *Wainberg* will be heard by the Quebec Court in Montreal on [date]. Class Counsel will also ask the courts to approve an award of fees and disbursements for their work in connection with *Jones*, *McSherry*, and *Wainberg* during the hearings.

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

- (a) The full name, current mailing address, fax number, telephone number, and email address of the person who is objecting;
- (b) A brief statement of the nature and reasons for the objection;

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

**To Exclude Yourself from the Class Actions**

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

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

Daniel Chung  
 Merchant Law Group LLP  
 10, Notre-Dame East  
 Suite 200  
 Montreal (Québec) H2Y 1B7

**For Additional Information and a Copy of the Settlement Agreement:**

Class Counsel in *Jones* and *McSherry* Actions

**Klein Lawyers LLP**  
 Suite 400  
 1385 West 8<sup>th</sup> Avenue  
 Vancouver, BC V6H 3V9  
 Telephone: 604-874-7171  
 Facsimile: 604-874-7180  
[www.kleinlyons.com](http://www.kleinlyons.com)

Class Counsel in *Wainberg* Action:

**Merchant Law Group LLP**  
 2401 Saskatchewan Drive  
 Regina, Saskatchewan  
 S4P 4H8  
 Phone: 306-359-7777  
 Fax: 306-522-3299  
[www.merchantlawgroup.com](http://www.merchantlawgroup.com)

### **Schedule “3” – Notice Plan**

The Notice of Approval Hearing shall be disseminated by the following means:

1. Class Counsel shall send a copy of the Notice of Approval Hearing by mail or email to all class members who have contacted them, and those class members who have provided addresses to Class Counsel for the purposes of this litigation.
2. Class Counsel shall post a copy of the Notice of Approval Hearing and the Settlement Agreement to their respective websites.
3. Class Counsel shall forward a copy of the Notice of Approval Hearing to all counsel in Canada who, to Class Counsel’s knowledge, have filed litigation regarding the Zimmer Durom Cup.
4. Class Counsel shall issue the media release attached hereto as Schedule 4 with the Notice of Approval Hearing, and the media release will be distributed through Canada Newswire or Market Wired.
5. Class Counsel shall publish Notice of Approval Hearing in all publications listed in Schedule K to the Settlement Agreement.



## Schedule "4"—Media Release

### Zimmer Durom Cup Hip Implant Class Action Settlement

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

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

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

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

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

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

Class Counsel in *Jones* and *McSherry* Actions

**Klein Lawyers LLP**  
Suite 400  
1385 West 8<sup>th</sup> Avenue  
Vancouver, BC V6H 3V9  
Telephone: 604-874-7171  
Facsimile: 604-874-7180  
[www.callkleinlawyers.com](http://www.callkleinlawyers.com)

Class Counsel in *Wainberg* Action:

**Merchant Law Group LLP**  
2401 Saskatchewan Drive  
Regina, Saskatchewan  
S4P 4H8  
Phone: 306-359-7777  
Fax: 306-522-3299  
[www.merchantlawgroup.com](http://www.merchantlawgroup.com)

**SCHEDULE B3 – QUEBEC ORDER PROVIDING NOTICE OF APPROVAL HEARING**

**SUPERIOR COURT**

**CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL**

**No.: 500-06-000543-104**

Ben Wainberg

Plaintiff

v.

Zimmer Inc.  
Zimmer GmbH  
Zimmer Holdings, Inc.  
Zimmer of Canada Limited

Defendants

**JUDGMENT**

1. The Plaintiff has filed a motion seeking authorization to institute a class action for the purpose of settlement and for approval of the notice that will advise class members of the hearing to approve the proposed settlement of this matter, as well as the approval of the manner of publication of the notice.
2. On reading the materials filed, and on hearing the submissions of counsel for the Plaintiff and the Defendants:
3. **THE COURT HEREBY:**
4. **GRANTS** Plaintiff's motion for authorization to institute a class action for settlement purposes and for approval of the form of notice that will advise class members of the hearing to approve the proposed settlement.
5. **DECLARES** that for the purposes of this Judgment, the definitions set out in the Settlement Agreement attached hereto as Schedule "1" apply to and are incorporated into this Judgment.
6. **AUTHORISES** the exercise of a class action against Defendants for the purposes of settlement only and subject to the conditions of the Settlement Agreement.

7. **ORDERS** that, for the purposes of the settlement, the Quebec Class Members are defined as all persons residing in Quebec who were implanted with the Durom Cup in Canada and who have not opted out of the Quebec Proceeding on or before the opt-out deadline set by the Quebec Court and who have not opted into the BC Proceeding, and their estates and family members.

8. **DESIGNATES** the Petitioner, Ben Wainberg, as the representative of the Quebec Class Members for the sole purpose of settlement.

9. **ORDERS** that Plaintiff's motion for settlement approval in this proceeding shall be heard on [date] at the Court House, Montreal, Quebec (the "Approval Hearing").

10. **APPROVES** the form and content of the Notice of Approval Hearing substantially in the form attached hereto as Schedule "2." The Notice of Approval Hearing shall be available in both English and French.

11. **APPROVES** the proposed manner of publishing the Notice of Approval Hearing described in the Notice Plan attached hereto as Schedule "3."

12. **DECLARES** that the Notice of Approval Hearing and dissemination thereof through the Notice Plan constitute fair and reasonable notice to the Quebec Class Members of the hearing to approve settlement in this action.

13. **DECLARES** that Quebec Class Members who wish to exclude themselves from this lawsuit and the settlement thereof may do so by delivering a written notice confirming that intention that includes their name, address, telephone number, and signature, to the Clerk of the Superior Court and Class Counsel at the following addresses on or before [date]:

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

Daniel Chung  
Merchant Law Group LLP  
10, Notre-Dame East  
Suite 200  
Montreal (Québec) H2Y 1B7

By the Court.

---

Registrar

**Schedule "1": Settlement Agreement**

## Schedule “2”: Notice of Approval Hearing

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

**This notice may affect your rights. Please read carefully.**

Class action lawsuits were initiated in Canada regarding allegations that the Zimmer Durom hip implant, or “Durom Cup,” was defective, and that it failed prematurely. Specifically, a class action was certified by the British Columbia court on September 2, 2011 in *Jones v. Zimmer GMBH et al.*, and by the Ontario court on September 24, 2014 in *McSherry v. Zimmer GMBH et al.* A proposed class action was also filed in Quebec as *Wainberg v. Zimmer GMBH*, and was authorized for settlement purposes on [date].

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

### **Who is Eligible to Participate in the Settlement?**

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

### **The Terms of Settlement**

The settlement provides compensation to class members who timely submit all forms and documentation required under the Settlement Agreement, less deductions for legal fees. The settlement also provides for payment to public health insurers. Please refer to the settlement agreement for specific terms and conditions.

### **Court Hearings and Your Right to Participate**

Motions to approve the settlement agreement are scheduled to be heard by the British Columbia Court in Vancouver on [date] and the Ontario Court in Toronto on [date]. A motion to approve the settlement, and a motion to authorize the class action in *Wainberg* will be heard by the Quebec Court in Montreal on [date]. Class Counsel will also ask the courts to approve an award of fees and disbursements for their work in connection with *Jones*, *McSherry*, and *Wainberg* during the hearings.

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

- (a) The full name, current mailing address, fax number, telephone number, and email address of the person who is objecting;
- (b) A brief statement of the nature and reasons for the objection;

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

**For Québec Residents Only: Excluding Yourself from the Class Action**

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

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

Daniel Chung  
 Merchant Law Group LLP  
 10, Notre-Dame East  
 Suite 200  
 Montreal (Québec) H2Y 1B7

**For Additional Information and a Copy of the Settlement Agreement:**

Class Counsel in *Jones* and *McSherry* Actions

**Klein Lawyers LLP**  
 Suite 400  
 1385 West 8<sup>th</sup> Avenue  
 Vancouver, BC V6H 3V9  
 Telephone: 604-874-7171  
 Facsimile: 604-874-7180  
[www.kleinlyons.com](http://www.kleinlyons.com)

Class Counsel in *Wainberg* Action:

**Merchant Law Group LLP**  
 2401 Saskatchewan Drive  
 Regina, Saskatchewan  
 S4P 4H8  
 Phone: 306-359-7777  
 Fax: 306-522-3299  
[www.merchantlawgroup.com](http://www.merchantlawgroup.com)

### **Schedule “3” – Notice Plan**

The Notice of Approval Hearing shall be disseminated by the following means:

1. Class Counsel shall send a copy of the Notice of Approval Hearing by mail or email to all class members who have contacted them, and those class members who have provided addresses to Class Counsel for the purposes of this litigation.
2. Class Counsel shall post a copy of the Notice of Approval Hearing and the Settlement Agreement to their respective websites.
3. Class Counsel shall forward a copy of the Notice of Approval Hearing to all counsel in Canada who, to Class Counsel’s knowledge, have filed litigation regarding the Zimmer Durom Cup.
4. Class Counsel shall issue the media release attached hereto as Schedule 4 with the Notice of Approval Hearing, and the media release will be distributed through Canada Newswire or Market Wired.
5. Class Counsel shall publish Notice of Approval Hearing in all publications listed in Schedule K to the Settlement Agreement.



**Schedule “4”—Media Release**

**Zimmer Durom Cup Hip Implant Class Action Settlement**

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

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

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

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

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

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

Class Counsel in *Jones* and *McSherry* Actions

**Klein Lawyers LLP**  
Suite 400  
1385 West 8<sup>th</sup> Avenue  
Vancouver, BC V6H 3V9  
Telephone: 604-874-7171  
Facsimile: 604-874-7180  
[www.callkleinlawyers.com](http://www.callkleinlawyers.com)

Class Counsel in *Wainberg* Action:

**Merchant Law Group LLP**  
2401 Saskatchewan Drive  
Regina, Saskatchewan  
S4P 4H8  
Phone: 306-359-7777  
Fax: 306-522-3299  
[www.merchantlawgroup.com](http://www.merchantlawgroup.com)

**SCHEDULE C – BC ORDER ON APPROVAL OF SETTLEMENT**

No. S095493  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

DENNIS JONES and SUSAN WILKINSON

Plaintiffs

AND:

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

Defendants

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

**ORDER MADE AFTER APPLICATION**

BEFORE THE HONOURABLE ) day, the th day of  
MR. JUSTICE BOWDEN )  
)  
)

**THE APPLICATION OF** the representative Plaintiff for approval of the settlement of this action pursuant to s.35 of the *Class Proceedings Act*, in accordance with the terms of the Settlement Agreement was heard this day in Vancouver, British Columbia.

**UPON READING** the representative Plaintiff's application record, and upon hearing the submissions of counsel for the representative Plaintiff, \_\_\_\_\_, and counsel for the Defendants, \_\_\_\_\_, and upon being advised that the parties consent to this order,

**THIS COURT ORDERS AND DECLARES** that:

1. The definitions set out in the Settlement Agreement, which is attached as Schedule "A", apply to and are incorporated into this Order.
2. The settlement of action, as set out in the Settlement Agreement, is fair and reasonable and in the best interests of the BC Class Members, and is hereby approved.
3. The Defendants shall pay the amounts required under the Settlement Agreement subject to the rights of termination in Section 8 of the Settlement Agreement.
4. The form and content of the Notice of Approval of Settlement to BC Class Members shall be substantially in the form which appears at Schedule "H" to the Settlement Agreement.
5. The BC Class Members shall be given notice of this order in accordance with the plan attached as Schedule "K" to the Settlement Agreement.
6. The notification plan described in paragraphs 4 and 5 of this Order satisfies the requirements of s. 19 of the *Class Proceedings Act*.
7. The Settlement Agreement and this Order are binding upon each BC Class Member, whether or not such person receives or claims compensation, including persons who are minors or are mentally incapable.
8. Crawford Class Action Services is hereby appointed as Claims Administrator.
9. Upon the Effective Date, the Releasees are forever and absolutely released by the Releasors from the Released Claims. The Releasors are barred from making any claim or taking or continuing any proceedings arising out of or relating to the Released Claims against any other person, corporation, or entity (including, without limitation, any health care professionals, health care providers, or health care facilities) that might claim damages and/or contribution and indemnity and/or other relief under the provisions of the *Negligence Act* or other comparable provincial legislation and any amendments thereto, the common law, Quebec civil law, or any other statute, for any relief whatsoever,

including relief of a monetary, declaratory, or injunctive nature, from one or more of the Releasees.

10. This Court shall have continuing jurisdiction over the implementation and enforcement of the Settlement Agreement.

11. This action is dismissed without costs and with prejudice.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

\_\_\_\_\_  
Signature of  
 party  lawyer for the Plaintiffs  
David A. Klein

\_\_\_\_\_  
Signature of  
 party  lawyer for the Defendants  
Andrew Borrell

By the Court.

\_\_\_\_\_  
Registrar

**SCHEDULE D- ONTARIO ORDER ON APPROVAL OF SETTLEMENT**

Court File No. CV-10-40836500 CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE )  
JUSTICE PERELL )  
)

DAY, THE  
DAY OF ,  
2015

**B E T W E E N:**

**GLORIA McSHERRY**

Plaintiff

-and-

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**ORDER**

**THIS MOTION**, made by the representative Plaintiff for approval of the settlement of this action pursuant to s.29 of the *Class Proceedings Act*, in accordance with the terms of the Settlement Agreement was heard this day in Toronto.

**UPON READING** the Representative Plaintiff's motion record, and upon hearing the submissions of counsel for the representative Plaintiff and counsel for the Defendants, and upon being advised that the parties consent to this order,

**THIS COURT ORDERS AND DECLARES** that:

1. The definitions set out in the Settlement Agreement, which is attached as Schedule A, apply to and are incorporated into this Order.

2. The settlement of action, as set out in the Settlement Agreement, is fair, reasonable, and in the best interests of the Ontario Class Members, and is hereby approved.
3. The Defendants shall pay the amounts required under the Settlement Agreement, subject to the Right of Termination set out in Section 8 of the Settlement Agreement.
4. The form and content of the Notice of Approval of Settlement to Ontario Class Members shall be substantially in the form which appears at Schedule H to the Settlement Agreement.
5. The Ontario Class Members shall be given notice of this order in accordance with the plan attached as Schedule K to the Settlement Agreement.
6. The notification plan described in paragraphs 4 and 5 of this order satisfies the requirements of s. 17 of the *Class Proceedings Act*.
7. The Settlement Agreement and this Order are binding upon each Ontario Class Member, whether or not such person receives or claims compensation, including persons who are minor or are mentally incapable.
8. Crawford Class Action Services is hereby appointed as Claims Administrator.
9. Upon the Effective Date, the Releasees are forever and absolutely released by the Releasers from the Released Claims. The Releasers are barred from making any claim or taking or continuing any proceedings arising out of or relating to the Released Claims against any other person, corporation, or entity (including, without limitation, any health care professionals, health care providers, or health care facilities) that might claim damages and/or contribution and indemnity and/or other relief under the provisions of the *Negligence Act* or other comparable provincial legislation and any amendments thereto, the common law, Quebec civil law, or any other statute, for any relief whatsoever, including relief of a monetary, declaratory, or injunctive nature, from one or more of the Releasees.
10. This Court shall have continuing jurisdiction over the implementation and enforcement of the Settlement Agreement.
11. This action is hereby dismissed without costs and with prejudice.

Registrar

---

**SCHEDULE E – QUEBEC ORDER ON APPROVAL OF SETTLEMENT**

**SUPERIOR COURT**

**CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL**

**No.: 500-06-000543-104**

Ben Wainberg

Plaintiff

v.

Zimmer Inc.  
Zimmer GmbH  
Zimmer Holdings, Inc.  
Zimmer of Canada Limited

Defendants

**JUDGMENT**

1. The Plaintiff has filed a motion seeking approval of the settlement reached in this proceeding, together with a motion authorizing this proceeding as a class action.
2. On reading the materials filed and hearing the submissions of counsel for the Plaintiff and the Defendants:

**FOR THESE REASONS, THE COURT:**

3. **DECLARES** that the definitions set out in the Settlement Agreement, attached as Schedule A, apply to and are incorporated into this Judgment.
4. **DECLARES** that the settlement of action, as set out in the Settlement Agreement, is fair, reasonable, and in the best interest of the Quebec Class Members, and accordingly, the Settlement Agreement is hereby approved pursuant to section 1025 of the *Code of Civil Procedure*, R.S.Q., c.C-25.
5. **DECLARES** that the Settlement Agreement constitutes a “transaction” pursuant to Article 1025 of the Code of Civil Procedure, which is binding on the parties and the Quebec Class Members.



6. **DECLARES** that subject to Article 1008 of the Code of Civil Procedure, any Quebec Class Member who has not opted out of the Quebec Class by the Opt-Out Deadline shall be bound by the Settlement Agreement and this Judgment.
7. **ORDERS** that the Defendants shall pay the amounts required under the Settlement Agreement subject to the Right of Termination set out in Section 8.1 of the Settlement Agreement.
8. **ORDERS** that the form and content of the Notice of Approval of Settlement to the Quebec Class Members shall be in the form attached as Schedule J to the Settlement Agreement. The Notice of Approval of Settlement to Quebec Class Members shall be available in both French and English.
9. **ORDERS** that Class Members shall be given notice of this Judgment in accordance with the plan attached as Schedule K to the Settlement Agreement.
10. **DECLARES** that this Judgment, including the Settlement Agreement, is binding upon each Quebec Class Member, including minors and persons who are mentally incapacitated, whether or not such person receives or claims compensation under the Settlement Agreement.
11. **DECLARES** that Crawford Class Action Services shall serve as the Claims Administrator.
12. **DECLARES** that upon the Effective Date, the Releasors forever and absolutely release the Releasees from the Released Claims. And for the consideration provided in the Settlement Agreement, the Releasors agree not to make any claim or take or continue any proceedings arising out of or relating to the subject matter of the Released Claims against any other person, corporation, or entity (including, without limitation, any health care professionals, health care providers, or health care facilities) that might claim damages and/or contribution and indemnity and/or other relief under the provisions of the *Negligence Act* or other comparable provincial legislation and any amendments thereto, the common law, Quebec civil law, or any other statute, for any relief whatsoever, including relief of a monetary, declaratory, or injunctive nature, from one or more of the Releasees.
13. **ORDERS** that this action is hereby dismissed without costs and with prejudice.

By the Court.

\_\_\_\_\_  
Registrar



Are you one of the patient's treating physicians?

Yes  No

If "Yes," state your role in the patient's medical care and treatment relative to his/her Durom Cup implant:

---

---

### 3. IMPLANT INFORMATION

State the reference and catalog numbers that correspond to the patient's Durom Acetabular Cup ("Durom Cup")

Date of Implantation (Right) \_\_\_\_\_  
(MM/DD/YYYY)

Implant Reference/Catalogue Numbers \_\_\_\_\_  
(if available)

Implant Lot Number \_\_\_\_\_  
(if available)

Date of Implantation (Left) \_\_\_\_\_  
(MM/DD/YYYY)

Implant Reference/ Catalogue Numbers \_\_\_\_\_  
(if available)

### 4. REVISED PATIENT

Has the patient been diagnosed as requiring a revision surgery to replace the Durom Cup?

Yes  No

If "Yes," please answer the remaining questions in section 4. If "No," please skip to section 8.

Date of the diagnosis: \_\_\_\_\_  
(MM/DD/YYYY)

Has a revision surgery been scheduled?  Yes  No

If "Yes," date on which the surgery was scheduled: \_\_\_\_\_

(MM/DD/YYYY)

Has the surgery occurred?  Yes  No

If "Yes," date on which the revision surgery took place: \_\_\_\_\_  
(MM/DD/YYYY)

Describe all reason(s) a revision surgery for the Durom Cup has been diagnosed and identify all testing or films taken and the results that support this diagnosis:

---

---

---

#### 5. UNREVISED PATIENT WHERE REVISION SURGERY IS CONTRAINDICATED

If a revision surgery has not been scheduled or will not take place, is there a medical condition that prevents the patient from undergoing a revision surgery ("Contraindication")?  Yes  No

If "Yes," describe the Contraindication(s) that prevent(s) replacement of the Durom Cup, and state whether the Contraindication(s) is/are temporary or permanent:

---

---

---

Provide the date on which you determined that a revision surgery for the patient was Contraindicated:

\_\_\_\_\_  
(MM/DD/YYYY)

#### 6. COMPLICATIONS RESULTING FROM REVISION SURGERY

Check here if the patient underwent a revision surgery or surgeries to remove his/her Durom Cup(s).

If you checked the box above, and the patient sustained any of the following complications during our after his/her revision surgery, please state the date on which the complication(s) occurred:

DATE  
(MM/DD/YYYY)

- (a) A second revision (Right)  
    A second revision (Left) \_\_\_\_\_
- (b) A third revision (Right)  
    A third revision (Left) \_\_\_\_\_
- (c) Stroke that occurred within 72 hours after a  
    revision surgery to remove a Durom Cup as a result of  
    that surgery \_\_\_\_\_
- (d) Blood clot that occurred within 72 hours after a  
    revision surgery to remove a Durom Cup as a result of  
    that surgery \_\_\_\_\_
- (e) Infection in the revised hip that was diagnosed within 30  
    days after a revision surgery to remove a Durom Cup  
    and was caused by that surgery \_\_\_\_\_
- (f) Permanent nerve damage resulting from a revision  
    surgery to remove a Durom Cup \_\_\_\_\_
- (g) Death within 72 hours after a revision surgery  
    to remove a Durom Cup that resulted from that surgery \_\_\_\_\_

**Please attach medical records to this form that confirm that the complication(s) noted above occurred. Such medical records may include, but are not limited to, operative reports, pathology reports, office records, and/or discharge summaries.**

**7. DECLARATION**

I affirm that the foregoing representations are true and correct.

Executed on \_\_\_\_\_, 201\_\_.

By: \_\_\_\_\_  
Signature of Physician

\_\_\_\_\_  
Print Name

**SCHEDULE G - EXTRAORDINARY EXPENSE FORM**

**Zimmer Durom Cup Hip Implant Class Action**

The Settlement Agreement provides for the potential reimbursement of out-of-pocket expenses in excess of \$2,500 in connection with a revision surgery, post-revision complications, or medical treatment for claimants who have undergone a revision surgery or are medically precluded from undergoing a revision surgery.

**If you have undergone a revision or are medically precluded from undergoing a revision and you wish to seek reimbursement for the out-of-pocket expenses you incurred that exceed \$2,500, please complete this form, attach the required receipts, and submit it along with your Claimant Declaration.**

Please provide information below relating to each out-of-pocket expense you incurred, the total of which exceeds \$2,500. For each expense described below, please attach a receipt reflecting the expense to this form. Unsubstantiated expenses will not be considered for reimbursement. Please note:

1. The total extraordinary expense fund under the Settlement Agreement ("Extraordinary Expense Pool") is \$50,000;
2. If the total amount of approved claims payable from the fund exceeds \$50,000, then each approved claim will be reduced on a pro-rata basis; and
3. Payments will not be made to claimants who are approved to receive payment from the Extraordinary Expense Pool until after all requests for reimbursement from the Extraordinary Expense Pool have been analyzed.

Date	Paid To	Type of Expense	Amount


Total Amount Claimed: \$ \_\_\_\_\_



## SCHEDULE H – NOTICE TO BC CLASS MEMBERS

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

**This notice may affect your rights. Please read carefully.**

Class action lawsuits were initiated in Canada regarding allegations that the Zimmer Durom hip implant, or “Durom Cup,” was defective, and that it failed prematurely. Specifically, a class action was certified by the British Columbia court on September 2, 2011, in *Jones v. Zimmer GMBH et al*, and by the Ontario court on September 24, 2014, in *McSherry v. Zimmer GMBH et al*, and was authorized by the Quebec court on [date] in *Wainberg v. Zimmer GMBH*.

These actions have now been settled, and the courts have approved the settlement. For a copy of the settlement agreement, please contact Class Counsel or the Claims Administrator at the address below.

### **Who is Eligible to Participate in the Settlement?**

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

### **The Terms of Settlement**

The settlement provides compensation to class members who timely submit all forms and documentation required under the Settlement Agreement, less deductions for legal fees. The settlement also provides for payment to public health insurers. Please refer to the settlement agreement for specific terms and conditions.

### **To Make a Claim**

To be entitled to a payment pursuant to the settlement agreement, class members must submit all required forms and documentation to the Claims Administrator on or before [deadline].

### **For More Information or to Obtain a Claim Form**

Please contact Class Counsel or the Claims Administrator at the address below:

Class Counsel in *Jones* and *McSherry* Actions:

Class Counsel in *Wainberg* Action:

#### **Klein Lawyers LLP**

Suite 400  
1385 West 8<sup>th</sup> Avenue  
Vancouver, BC V6H 3V9  
Telephone: 604-874-7171  
Facsimile: 604-874-7180  
[www.kleinlyons.com](http://www.kleinlyons.com)

#### **Merchant Law Group LLP**

2401 Saskatchewan Drive  
Regina, Saskatchewan  
S4P 4H8  
Phone: 306-359-7777  
Fax: 306-522-3299  
[www.merchantlawgroup.com](http://www.merchantlawgroup.com)

Claims Administrator:

**Crawford Class Action Services**

180 King Street S.

Waterloo, ON N2J 1P8

Telephone: 519-578-4053

## SCHEDULE I – NOTICE TO ONTARIO CLASS MEMBERS

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

**This notice may affect your rights. Please read carefully.**

Class action lawsuits were initiated in Canada regarding allegations that the Zimmer Durom hip implant, or “Durom Cup,” was defective, and that it failed prematurely. Specifically, a class action was certified by the British Columbia court on September 2, 2011, in *Jones v. Zimmer GMBH et al*, and by the Ontario court on September 24, 2014, in *McSherry v. Zimmer GMBH et al*, and was authorized by the Quebec court on [date] in *Wainberg v. Zimmer GMBH*.

These actions have now been settled, and the courts have approved the settlement. For a copy of the settlement agreement, please contact Class Counsel or the Claims Administrator at the address below.

### **Who is Eligible to Participate in the Settlement?**

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

### **The Terms of Settlement**

The settlement provides compensation to class members who timely submit all forms and documentation required under the Settlement Agreement, less deductions for legal fees. The settlement also provides for payment to public health insurers. Please refer to the settlement agreement for specific terms and conditions.

### **To Make a Claim**

To be entitled to a payment pursuant to this Settlement Agreement, class members must file a claim with the Claims Administrator on or before [deadline].

### **For More Information or to Obtain a Claim Form**

Please contact Class Counsel or the Claims Administrator at the address below:

Class Counsel in *Jones* and *McSherry* Actions:

Class Counsel in *Wainberg* Action:

**Klein Lawyers LLP**  
Suite 400  
1385 West 8<sup>th</sup> Avenue  
Vancouver, BC V6H 3V9  
Telephone: 604-874-7171  
Facsimile: 604-874-7180  
[www.kleinlyons.com](http://www.kleinlyons.com)

**Merchant Law Group LLP**  
2401 Saskatchewan Drive  
Regina, Saskatchewan  
S4P 4H8  
Phone: 306-359-7777  
Fax: 306-522-3299  
[www.merchantlawgroup.com](http://www.merchantlawgroup.com)

Claims Administrator:

**Crawford Class Action Services**

180 King Street S.

Waterloo, ON N2J 1P8

Telephone: 519-578-4053

## SCHEDULE J – NOTICE TO QUEBEC CLASS MEMBERS

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

**This notice may affect your rights. Please read carefully.**

Class action lawsuits were initiated in Canada regarding allegations that the Zimmer Durom hip implant, or “Durom Cup,” was defective, and that it failed prematurely. Specifically, a class action was certified by the British Columbia court on September 2, 2011, in *Jones v. Zimmer GMBH et al*, and by the Ontario court on September 24, 2014, in *McSherry v. Zimmer GMBH et al*, and was authorized by the Quebec court on [date] in *Wainberg v. Zimmer GMBH*.

These actions have now been settled, and the courts have approved the settlement. For a copy of the settlement agreement, please contact Class Counsel or the Claims Administrator at the address below.

### **Who is Eligible to Participate in the Settlement?**

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

### **The Terms of Settlement**

The settlement provides compensation to class members who timely submit all forms and documentation required under the Settlement Agreement, less deductions for legal fees. The settlement also provides for payment to public health insurers. Please refer to the settlement agreement for specific terms and conditions.

### **To Make a Claim**

To be entitled to a payment pursuant to this Settlement Agreement, class members must file a claim with the Claims Administrator on or before [deadline].

### **For More Information or to Obtain a Claim Form**

Please contact Class Counsel or the Claims Administrator at the address below:

Class Counsel in *Jones* and *McSherry* Actions:

Class Counsel in *Wainberg* Action:

**Klein Lawyers LLP**  
Suite 400  
1385 West 8<sup>th</sup> Avenue  
Vancouver, BC V6H 3V9  
Telephone: 604-874-7171  
Facsimile: 604-874-7180  
[www.kleinlyons.com](http://www.kleinlyons.com)

**Merchant Law Group LLP**  
2401 Saskatchewan Drive  
Regina, Saskatchewan  
S4P 4H8  
Phone: 306-359-7777  
Fax: 306-522-3299  
[www.merchantlawgroup.com](http://www.merchantlawgroup.com)

Claims Administrator:

**Crawford Class Action Services**

180 King Street S.

Waterloo, ON N2J 1P8

Telephone: 519-578-4053

## **SCHEDULE K – PLAN FOR DISSEMINATION OF CLASS NOTICES**

The Notices of Approval Hearing and the Notices of Settlement Approval (“Notices”) shall be disseminated by the following means:

1. Class Counsel shall send copies of the Notices by mail or email to all class members who have contacted Class Counsel regarding this action and provided their contact information.
2. Class Counsel shall post copies of the Notices to their respective websites.
3. Class Counsel shall forward copies of the Notices to all counsel in Canada who, to Class Counsel’s knowledge, have filed actions on behalf of their clients relating to the Zimmer Durom Cup.
4. Class Counsel shall arrange for publication of the Notices in the following publications (single insertion, ¼ panel), with such publication to occur as soon as reasonably feasible following the date of the Final Orders:
  - (a) Globe & Mail
  - (b) Vancouver Sun
  - (c) Edmonton Journal
  - (d) Calgary Herald
  - (e) La Presse (FR)
  - (f) Montreal Gazette (ENG)
  - (g) Le Journal de Montreal (FR)
  - (h) Montreal Metro News
  - (i) The Star Phoenix (Saskatoon)
  - (j) Regina Leader-Post
  - (k) Toronto Star
  - (l) Toronto Metro News
  - (m) Sudbury Star

- (n) Hamilton Spectator
- (o) Le Soleil
- (p) Le Journal de Quebec



## **SCHEDULE L—LIST OF COMPLICATIONS AND CORRESPONDING PAYMENT AMOUNTS**

### **SECTION 1: DEFINITIONS**

In this Schedule, the following is a Complication:

- (1) “Blood Clot” means a diagnosis made within 72 hours of a Revision Surgery of pulmonary embolism or deep vein thrombosis that resulted from a Revision Surgery.
- (2) “Death” means the class member died within 72 hours after a Revision Surgery as a result of the Revision Surgery.
- (3) “Permanent Nerve Damage” means nerve damage resulting from a Revision Surgery that has been declared permanent by the medical professional who signed the Physician’s Declaration.
- (4) “Infection” means any infection in the revised hip that is diagnosed within 30 days after a Revision Surgery and determined to have been caused by the Revision Surgery.
- (5) “Second Revision” means a surgery to remove a replacement hip implant that had been installed as part of a Revision Surgery because the replacement hip implant failed.
- (6) “Stroke” means a cerebrovascular incident or insult occurring within 72 hours of a Revision Surgery.
- (7) “Third Revision” means a surgery to remove a replacement hip implant that had been installed as part of a Second Revision because the replacement hip implant failed.

### **SECTION 2: CORRESPONDING PAYMENT AMOUNTS**

2.1 The amounts payable under s. 4.2(4)(e) of the Settlement Agreement to Class Members who have suffered a Complication are as follows, but in no event shall a Class Member be awarded more than \$40,000 for all Complications sustained:

<b>Complication</b>	<b>Payment</b>
Infection	\$10,000 (CAD)
Permanent Nerve Damage	\$20,000 (CAD)

Second Revision	\$20,000 (CAD)
Blood Clot	\$10,000 (CAD)
Stroke	\$40,000 (CAD)
Third Revision	\$40,000 (CAD)
Death	\$40,000 (CAD)

2.2 The amounts payable at paragraph 2.1 of Schedule L are cumulative, but in no event shall more than \$40,000 be payable to a Class Member for Complications under this Schedule. Thus, regardless of the number of Complications a Class Member has, the Class member can recover only up to a total of \$40,000 for all Complications.

2.3 Only a Complication diagnosed on or before the Eligibility Deadline is compensable under this Settlement Agreement.

**SCHEDULE M – HEALTH INSURER CLAIM FORM**  
**Zimmer Durom Cup Hip Implant Class Action**

**1. Entitlement to Reimbursement**

The Settlement Agreement provides for the potential reimbursement of \$15,000 (CAD) per Revision Surgery undergone by each BC Class Member, Ontario Class Member and Quebec Class Member in a Provincial Health Insurer's province, regardless of whether the BC Class Member, Ontario Class Member or Quebec Class Member seeks compensation under this Settlement Agreement.

**2. Information Required for Reimbursement**

Each Provincial Health Insurer will receive \$15,000 (CAD) for each Revision Surgery that a Class Member who submits a proper and approved claim for recovery under this Settlement Agreement underwent in the Provincial Health Insurer's province. Upon approval from the Claims Administrator, each Provincial Health Insurer is permitted to recover \$15,000 for each Revision Surgery that a Class Member who does not submit a proper and approved claim for recovery under this Settlement Agreement underwent in the Provincial Health Insurer's province, provided that the Provincial Health Insurer properly completes all information pertaining to such Class Members required by Schedule M and submits Schedule M to the Claims Administrator no later than 90 days after the Claims Deadline. All requests for compensation submitted by Provincial Health Insurers that do not meet the requirements of Schedule M will be denied.

**3. Verification**

- A. I, \_\_\_\_\_ (*name of individual completing verification*) submit this request for reimbursement on behalf of \_\_\_\_\_  
\_\_\_\_\_ (*name of Provincial Health Insurer*) (hereafter “Provincial Health Insurer”). I affirm that I am a duly authorized representative of this Provincial Health Insurer and that the information provided herein, including the information in Table M1, was obtained from the business records maintained by Provincial Health Insurer.
- B. The complete list of individuals who underwent at least one Revision Surgery in the Provincial Health Insurer’s province but who did not properly submit a claim for compensation under the Settlement Agreement for whom Provincial Health Insurer seeks reimbursement, along with the required information relating to those individuals, is attached at Table M1. The total amount that the Provincial Health Insurer is claiming for reimbursement for these individuals is \$ \_\_\_\_\_ (CAD).
- C. I affirm under the penalties of perjury that the information submitted in this verification and in Table M1 is true and correct.
- D. I affirm under the penalties of perjury that the claims identified in Table M1 are not duplicative and that the Provincial Health Insurer did not receive compensation in the past from Defendants in connection with any of those claims.

\_\_\_\_\_  
Name

\_\_\_\_\_  
Date

\_\_\_\_\_  
Position

\_\_\_\_\_  
Provincial Health Insurer



## SCHEDULE N – ELIGIBILITY REQUIREMENTS

### Who is eligible to participate in the Settlement Class?

If you received a Durom Acetabular Component (“Durom Cup”) in Canada, then you are eligible to participate in the settlement.

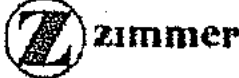
The compensation that you are eligible to receive as a member of the settlement class will be determined based on your status on September 1, 2015. This is referred to as the “Eligibility Deadline.” You are required to submit your claim and the documentation required elsewhere in this Settlement Agreement on or before ~~insert claims deadline date~~. This is referred to as the “Claims Deadline.”

### How is eligibility determined?


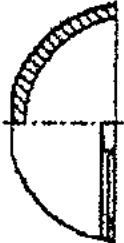
In order to participate, you must provide Product Identification that confirms the reference number (sometimes referred to as “catalogue number”) and lot number of the device that was implanted, in addition to other documents required by the Settlement Agreement. Product Identification confirms that you were implanted with a Durom Cup. Product Identification can be found on the peel-and-stick label (the “Label”) from the Durom Cup that should be affixed to the medical record from your implant surgery (sometimes called the implant operative report). You can obtain your implant surgery medical record from the hospital where your implant surgery occurred or from your physician. To be eligible for settlement, the reference/catalogue number on the Label must be one of the following:

01.00214.044  
01.00214.046  
01.00214.048  
01.00214.050  
01.00214.052  
01.00214.054  
01.00214.056  
01.00214.058  
01.00214.060  
01.00214.062  
01.00214.064  
01.00214.066

The image below is an *example* of Product Identification. Please note that not all product labels are identical to the example provided below, but they are all similar to it. This example is provided to help you identify the location of the reference and lot numbers of your device so that you can confirm that you are eligible for settlement.

<b>REF</b> 01.00214.050	EDI: 0100214050	
<b>LOT</b> 2420836	2013-03 Qty: 001	

Metasul® Durom® Acetabular Component uncemented 50/ 44 Code J  
 CoCrMo (Protasul®-21WF) ISO 5832-12  
 C.P. Titanium (Protasul®-Ti) ISO 5832-2

\*+H84401002140501/1309024208360585\*

Zimmer GmbH, CH-8404 Winterthur, Switzerland / www.zimmer.com 25855v02 - LB1v02

If, and only if, you are unable to obtain the Label because the implant surgery hospital could not locate it in your hospital medical records, then you may provide the following to prove that you received a Durom Cup:

- a. If the Durom Cup has been explanted from your body and it still exists, you must provide (1) a color photograph of the Durom Cup that shows the identification numbers on the edge of the Durom Cup, and (2) a Physician Declaration confirming that you were implanted with a Durom Cup and the date of the implantation;

OR

- b. If you cannot obtain a photograph because your Durom Cup is not within your possession, custody, or control, you must provide (1) a copy of your implant surgery operative report from the hospital where you were implanted, in which your surgeon confirms that you were implanted with a Durom Cup, and (2) a Physician Declaration confirming that you were implanted with a Durom Cup and the date of implantation.

**Important Note:** Failure to provide Product Identification in the manner stated above by the Claims Deadline [insert date] will render you ineligible to recover under this Settlement Agreement.

**When will my status under the Settlement Agreement be determined? What if I have scheduled a revision surgery, but the revision surgery will not occur before the Eligibility Deadline?**

The Eligibility Deadline is an absolute deadline unless, as of the Eligibility Deadline, you have a Scheduled Revision Surgery. A "Scheduled Revision Surgery" means that you have selected and confirmed a date with a surgeon on which you will undergo a surgery to remove the Durom Cup that was implanted in your hip (referred to as a "Revision Surgery"), but that date will occur after

the Eligibility Deadline. Note that a Scheduled Revision Surgery refers only to a surgery to remove the Durom Cup, and does not include revision surgeries performed for other reasons.

If you have a Scheduled Revision Surgery as of the Eligibility Deadline, then the determination of the compensation owed to you will be postponed until the Scheduled Revision Surgery occurs, provided that you submit a Physician Declaration by the Claims Deadline that confirms:

- a. That the physician signing the declaration determined that a revision surgery is required;
- b. The date on which your need for a Revision Surgery was diagnosed; and
- c. The date on which your revision surgery took place.

No compensation will be provided to you unless and until the revision surgery occurs.

#### **What if I decide not to have a Scheduled Revision Surgery?**

If the surgery is cancelled and not rescheduled because you have decided not to have the Scheduled Revision Surgery, you may receive compensation under the Settlement Agreement as an unrevised claimant. In that case, you will submit a Claimant Declaration on or before the Claims Deadline denoting that you are unrevised, and any compensation to which you are entitled will be determined accordingly.

#### **What if I must cancel a Scheduled Revision Surgery because I am medically unable to proceed?**

If the Scheduled Revision Surgery cannot occur due to a realistic medical risk to your life or health, as defined elsewhere in the Settlement Agreement, you may receive compensation under the Settlement Agreement as an unrevised claimant for whom revision is medically precluded. In that case, you will submit the appropriate documentation that reflects this status (as defined in the Settlement Agreement) on or before the Claims Deadline and your compensation will be determined accordingly.

**Important note:** The Eligibility Deadline is an absolute deadline for the determination of compensable injuries in all cases except for those individuals who have a properly documented Scheduled Revision Surgery. No other exceptions will be made.

#### **Can the Claims Deadline be extended for any reason?**

No, the Claims Deadline is an absolute deadline for which there are no exceptions.



## SCHEDULE O - APPEAL PROTOCOL

The following procedure shall apply to appeals of decisions by the Claims Administrator that may be brought by a Class Member or the Defendants pursuant to section 4.4(5) of the Settlement Agreement (“Appealable Decisions”):

1. The party who seeks to appeal an Appealable Decision (the “Appellant”) shall submit to the Claims Administrator a written statement setting out the nature of, and the reasons for, the appeal (the “Appeal Statement”). The time for submitting an Appeal Statement is as follows:
  - (a) for a Class Member—within 30 days after the Appellant was deemed to have received the Class Administrator’s decision that is the subject of the Appeal Statement; and
  - (b) for Defendants—within 30 days after receiving notice of the Class Administrator’s decision under Section 4.3(8) of the Settlement Agreement.
2. Upon receipt of the Appeal Statement, the Claims Administrator shall send a copy of the Appeal Statement to the Defendants (c/o their counsel, where a Class Member is the Appellant) or to the affected Class Member (where the Defendants are the Appellant) (the “Respondent”) for review and consideration. The Respondent shall inform the Claims Administrator of whether it agrees or disagrees with the Appellant’s Appeal Statement within 30 days following the Respondent’s receipt of the Appeal Statement. If the Respondent agrees with the Appellant’s Appeal Statement, the Claims Administrator shall accept the Appellant’s position and change the decision accordingly.
3. If the Respondent disagrees with the Appellant’s Appeal Statement, then the Appellant shall have a right to appeal the Claims Administrator’s decision to one of the following private arbitrators (the “Arbitrator”):
  - (a) for all Class Members who reside outside of the Province of Quebec, the Honourable Marion J. Allan; or
  - (b) for all Class Members who reside in the Province of Quebec, The Honourable Marion J. Allan or The Honourable André Forget.
4. The Claims Administrator shall contact the applicable Arbitrator and ask the Arbitrator to provide a pre-estimate of its fee for conducting the appeal. As a pre-condition to submitting an appeal to the Arbitrator, the Appellant shall provide to the Claims Administrator (for forwarding to the Arbitrator) a cheque payable to the Arbitrator in an amount representing 50% of the Arbitrator’s pre-estimated fee for conducting the appeal.
5. The Claims Administrator shall send the Respondent a copy of the Appellant’s Appeal Statement and confirmation that the Appellant has provided payment of the Arbitrator’s fee. Within 30 days after receiving the Appeal Statement and notice of payment of the Arbitrator’s fee, the Respondent shall provide to the Claims Administrator a statement of

its position in response to the appeal (the "Responding Statement") and a cheque payable to the Arbitrator in an amount representing the remaining 50% of the Arbitrator's pre-estimated fee for conducting the appeal.

6. If the Respondent fails to provide the Claims Administrator with both its Responding Statement and 50% portion of the estimated Arbitrator's fee within 30 days after the Respondent has received the Appeal Statement, the Appellant's appeal shall be deemed to have been allowed.
7. Upon receipt of the Respondent's Responding Statement and Arbitrator's fee, the Claims Administrator shall send to the Arbitrator the Appeal Statement, the Responding Statement, and the two cheques respecting the Arbitrator's fee.
8. The appeal shall be conducted entirely in writing. There will be no oral hearing of any appeal.
9. The Arbitrator shall consider the appeal and render a decision within 45 days following the Arbitrator's receipt of the appeal material from the Claims Administrator. The Arbitrator shall provide the Appellant and the Respondent with written reasons in support of the appeal decision.
10. If the appeal is allowed, the Arbitrator shall order the Respondent to pay to the Appellant within 30 days following release of the appeal decision the entire amount of the arbitration fee that the Appellant had paid. If the appeal is dismissed, the Arbitrator shall order the Appellant to pay to the Respondent the entire amount of the Arbitrator's fee which the Respondent had paid.
11. If the Arbitrator determines that success on the appeal was divided relatively equally between the Appellant and the Defendants, then the Arbitrator shall order that neither party shall have to reimburse the other for any portion of the Arbitrator's fee which it had paid in advance of the appeal.
12. If the Arbitrator's fee exceeds the amount of the pre-estimated fees that were paid by the Appellant and the Respondent in advance of the appeal, then the Arbitrator shall order the party that was unsuccessful on the appeal to pay the additional amount of the Arbitrator's fee within 30 days after the date of release of the Arbitrator's decision. If the Arbitrator determines that the success on the appeal was divided between the two parties relatively equally, then the Arbitrator shall order any additional fee to be paid in equal 50% portions by each of the Appellant and the Respondent within 30 days after the date of the Arbitrator's decision.
13. The Arbitrator's decision shall be final and binding. There shall be no right of appeal from the Arbitrator's decision.

This is Exhibit 10 referred to in the  
affidavit of Arlia McSherry  
sworn before me, this 15th  
day of April 2016  
  
A COMMISSIONER FOR TAKING AFFIDAVITS

**ADDENDUM TO CANADIAN DUROM ACETABULAR  
HIP IMPLANT CLASS ACTION NATIONAL SETTLEMENT AGREEMENT**

**RECITALS**

- A. Whereas the Defendants, the BC Plaintiff, the Ontario Plaintiff, BC/Ontario Class Counsel and the Provincial Health Insurers have signed the Canadian Durom Acetabular Hip Implant Class Action National Settlement Agreement on November 23 and 24, 2015, respectively (the "Settlement Agreement");
- B. And Whereas the plaintiff in the Quebec Proceeding, Ben Wainberg, died on December 8, 2015 without he or his counsel signing the Settlement Agreement;
- C. And Whereas, by order of Mr. Justice Gouin in the Quebec Action, dated March 7, 2016, Ben Wainberg has been replaced as the representative plaintiff by Michel Major;
- D. The parties to this Addendum have signed this Addendum to modify and amend the Settlement Agreement so that they can complete the terms of the Settlement Agreement.

**AMENDMENTS TO THE SETTLEMENT AGREEMENT**

- 1.1 All references to "Ben Wainberg" or "Wainberg" in the Settlement Agreement are struck, and are replaced with "Michel Major" or "Major". The Quebec Plaintiff in the Settlement Agreement is therefore Michel Major.
- 1.2 All references in the Settlement Agreement to the "Merchant Law Group LLP" in the Settlement Agreement are struck, and are replaced with "Trudel Johnston & Lesperance". The Quebec Class Counsel in the Settlement Agreement is therefore Trudel Johnston & Lesperance.
- 1.3 Section 7.3(b) of the Settlement Agreement is struck.
- 1.4 The parties to the Addendum may make such amendments to the Schedules to the Settlement Agreement as they may agree upon, or as the Courts may direct, to conform to this Addendum.
- 1.5 The parties to this Addendum have executed it on the dates provided below.

BC/ONTARIO CLASS COUNSEL:

Klein Lawyers LLP

Date: April 8, 2016

By: 

Printed: DOUGLAS LENNON

QUEBEC CLASS COUNSEL:

Date: 13 AVRIL 2016

Trudel Johnston & Lesperance

By: 

Printed: PHILIPPE TRUDEL

DEFENDANTS' COUNSEL:

Date: April 11, 2016

Fasken Martineau DuMoulin LLP

By: 

Printed: Peter Pliszka

PROVINCIAL HEALTH INSURERS:

Date: April 8, 2016

By: 

Printed: DOUGLAS LENNOX

Its: COUNSEL

Advertisement



Connect education and opportunities in Ryerson University's vibrant urban location.



The enhanced UCCB could end up costing you at tax time



20 Mysterious Photos That Cannot Be Explained

**THE GLOBE AND MAIL**

This is Exhibit E referred to in the affidavit of Gloria McSherry sworn before me, this 15th day of April 2016

A COMMISSIONER FOR TAKING AFFIDAVITS

March 2, 2013

# The nightmare of Margaret Wenté's miracle artificial hips

By Margaret Wenté

## *Implant manufacturers are facing big class-action lawsuits*

Eight years ago, I sat in a surgeon's office as he showed me X-rays of my deteriorating hips. He told me they were finished. I was only in my 50s, but I wasn't surprised. By the time I saw him, I could scarcely walk. I had skied and hiked and led a reasonably active life, but now I was a cripple. Sometimes I had to use the railings to drag myself hand over hand up the stairs.

Artificial hip replacements are among the great blessings of modern medicine. They have restored mobility to millions of people. Hip surgery is generally low-risk and highly successful. For aging boomers, that's the good news. For me, the bad news was that I would have to spend a long time disabled and in pain before having the surgery. The backlog in Ontario was much bigger than now. I would have to wait about a year for my first hip and another year for the second. After that, I'd have to be careful. No tennis, no yoga, no skiing.

The other problem was that the new joints wouldn't last forever; I would need replacements when they wore out. I hobbled back to my car and cried. Then I did what modern patients do: I consulted Dr. Google.

Soon I found some more good news. A top orthopedic surgeon in Montreal was doing a newer procedure called hip resurfacing, specifically targeted at younger, active people. Resurfacing, which is an alternative to total hip replacement, had been popular in Europe for years. The advantage was that, after surgery, you could do everything again. There was also another innovation on the market – all-metal implants that promised to last much longer than the standard metal-and-plastic devices that had been in use for years. My crumbling arthritic joints would be replaced by a shiny ball and socket made of cobalt and chromium – a miracle of medical engineering.

The waiting list in Montreal was short. Within months, I had two new metal hips made by DePuy Orthopaedics Inc., which started out making splints for Indiana farmers in 1895. I even wrote about them in The Globe and Mail. Readers across the country asked for my advice. Many of them wound up getting the same type of implant.

I also heard from orthopedic surgeons. One or two were surprisingly vitriolic. They didn't trust the new devices. They warned me that bad things would happen to my hips. That was when I learned that medical opinion, to put it mildly, was sharply divided.

Today, the miracle has turned into a nightmare.

With the aging of baby boomers, joint replacement is big business – about 40,000 Canadians will receive one this year alone. But metal-on-metal hip devices, including the kind I have, have failed in thousands of patients, with several models taken off the market and leading companies facing massive litigation.

Many of the half-million people to receive metal implants worry about the future, warned by lawyers that they may feel fine, but tiny fragments may leach into their bodies and poison them.

I have always been skeptical of medical scare stories. I know that litigation lawyers are paid to make the worst of things, and the pharmaceutical industry is a ripe target. The high cost of medical litigation drives up the cost of medicine for us all, and may even slow the pace of innovation. In many cases, the biggest winners are lawyers, not patients.

Yet, my faith in medicine and Big Pharma – DePuy is a division of Johnson & Johnson, the biggest pharmaceutical company in the world – has been well and truly shaken. Sometimes the latest shiny product is not so great. Things can go wrong, even if you are an educated consumer.

Gloria McSherry was an educated consumer – the active wife of a successful business executive and once a keen runner. Now a resident of Dunedin, Ont., about an hour's drive north of Toronto, she was in her early 50s when she was diagnosed with arthritis in her hip.

In 2007, she was given a Zimmer Durom Cup. "The surgeon praised it highly," she says. It was supposed to make her more mobile than other implants, and to last longer.

It was a catastrophe. After receiving the new hip, she says, "I just could not get well. I got these incredible episodes of pain where I felt as if it would exit my body." A year after her surgery, walking was still difficult and painful. The implant scraped and jammed. Even though her X-rays looked fine, she wasn't functioning. Her surgeon had no answers and neither did anybody else. The wear and tear on her personal and family life was profound.

More than 2 1/2 years after her initial surgery, she and her husband consulted a U.S. hip surgeon. He told them the implant had proved problematic, and the only solution was to have it taken out. She had it removed by a second Toronto surgeon, who found that the bone had never adhered to the cup, as it was supposed to. He replaced it with another device, and she immediately felt better.

Problems with the Durom Cup were well known in the United States, but nobody in Canada seemed on top of things. (There is a registry to track joint replacements but participation is voluntary.) In 2011, the product was withdrawn from the Canadian market after about 5,000 had been sold here. Today, Ms. McSherry is one of the plaintiffs in a Canadian class-action suit alleging that Zimmer (founded by a disgruntled DePuy employee, it, too, is based in Warsaw, Ind.) was negligent in its development and manufacture. Klein Lyons, the law firm that represents her, has received certification for the action, and says it has been contacted by about 70 Canadians eager to participate.

Patients here also have joined suits against DePuy and Stryker, another manufacturer with implant woes, but the real action is in the United States, where product-liability lawsuits are a true bonanza. Tort lawyers troll aggressively for clients, and settlements can run into the billions. Johnson & Johnson is the richest target of all – it had sales of \$65-billion, and profits of \$9.7-billion in 2011 – and currently faces more than 10,000 lawsuits. The legal documents run to 50 million pages.

DePuy alone had revenues of \$5.8-billion, and has sold 93,000 of its metal-on-metal implants worldwide (about 1,400 in Canada). The first trial over those implants began in California late in January, and is being watched closely as a sign of things to come.

Plaintiff lawyers have put company executives through the wringer. Their strategy is to persuade the jury that greedy business people recklessly sacrificed safety for profits. They say DePuy knew that its design was flawed but kept selling the product anyway. The company argues that it behaved responsibly and acted promptly when adverse information came to light. By 2010, the data were so clearly bad that it issued a recall.

Thanks to aging boomers, the market for medical devices is lucrative, and huge. Not only will 40,000 Canadians receive an artificial joint this year, about 2.5 per cent of us all will get one at some point, and suppliers compete aggressively. Conflicts of interest – such as fat "consulting" fees to doctors – are common in the United States. In 2007, several leading device makers, including Johnson & Johnson, were fined \$311-million to settle claims that they had paid hundreds of millions to surgeons to use their products exclusively.

When the new metal-on-metal models were introduced, they quickly gained a big share of the market. The U.S. Food and Drug Administration allowed DePuy to sell one version of its device – for total hip replacement – without testing it on humans, because it was similar to products already available. The FDA wanted more data on the version for hip resurfacing (the one I was given), but both models were approved in Canada and other countries.

DePuy Canada representative Jennifer Goode says the company conducted "more than 60 tests on the devices, including lab tests, wear tests, torque testing and many others," including use in "hip simulators that ran five million cycles of motion, representing 2 1/2 years of use by a patient."

She contends that DePuy "exceeded the international standard," and "will defend itself against the allegations raised in the litigation."

The implants did work fine in the lab. But the real world turned out to be another matter. For reasons still not clearly understood, different surgeons and even different countries had wildly varying results. The magic number for hip "revisions" (surgeries that have to be redone) is 1 per cent per year. Anything higher is deemed unacceptable.

Failure rates in Britain and Australia reached 35 to 40 per cent after five years, while in the United States, the figure is 12 to 13 per cent (according to the company) or nearly 40 per cent (according to some media reports).

The overall rate in Canada is unclear, but most of the DePuy implants were performed by my own surgeon, Dr. John Antoniou, who says his record meets the benchmark standard of 1 per cent per year. But some of his patients have joined the lawsuits, and he declines to comment further on the situation.

Why the discrepancies in results? Los Angeles surgeon Thomas Schmalzried, the lead designer for the implant, says one reason is surgical skill. Because of its size and design, the device had to be installed with great precision. Surgeons who did only a few procedures a year had bad outcomes – but then so did a few who did lots, and Dr. Schmalzried testified last week that he wouldn't have put the device out had he known it would fail so often.

Patient selection was another factor. The device I got worked extremely well in younger men with good bones, but not so well in women, and terribly in the old. And then there's the plaintiff lawyers' argument: It was just badly engineered.

But the biggest potential problem may be metallosis: Tiny particles of metal can rub off, causing pain and swelling around the joint. Depending on whom you ask, it is either a rare complication or a major life-threatening hazard.

"Even if you don't feel any discomfort, you may be experiencing cobalt and chromium poisoning," says Regina lawyer Evatt Merchant of Merchant Law Group, a leading class-action firm (founded by his father, Tony) that he says has been contacted by about 500 unhappy patients.

"And that is a dangerous medical health problem because it gets into the bloodstream. It's carcinogenic – that's the fear."

The trouble is that metallosis is a murky subject. Everyone with metal hips is supposed to have blood tests. But no one can agree what metal levels are problematic. Some people are so frightened that they insist on having their implants removed even though they feel fine and there is no evidence so far that particles from hip implants cause cancer.

I can almost see why they worry, given the truth, half-truth and scare stories on the Web: I have learned that I could develop aseptic lymphocyte-dominated vasculitis, silent soft-tissue pathology, and "pseudo tumours" (I have no idea what these conditions are, but I'm sure they're deeply unpleasant). I have even read of surgeons opening up patients to find that the tissue around their implants has been destroyed.

As for me, I'm fine. Although my hips aren't perfect, they are very good. I can't hike the way I used to, and hard city pavement quickly wears me out. But I can bike and ride a horse and bend and stretch as well as ever. I have my life back.

The people at DePuy are being very nice. They will pick up all my hip-related medical bills, including blood tests for metal levels, travel costs to Montreal for follow-ups, and costs connected to revision surgery, if I ever need it. They are hoping very much that I don't sue them.

Gloria McSherry is not so lucky. "My life will never be the same," she says. "I never dreamed that I could ever have anything like that happen to me."

She doesn't need the money, but says that "we decided to sue because we couldn't believe the injustice of it all. They are supposed to be in business to improve lives."

If I had gone through what she has, I would sue too. And yet I'm not sure the hip debacle is the incredible disaster the litigation industry says it is. All medical devices and procedures can fail. And despite the terrible publicity, some surgeons still use metal-on-metal implants. In the right hands, they say, the technology works well for certain patients.

In the world of high-tech medicine and high-stakes litigation, we patients are largely on our own. No matter how diligent regulators are, they will never protect us all. It's up to us to figure out whom to trust. Dr. Google doesn't have all the answers.

As the trial in California grinds on, insiders say that J&J is negotiating to settle the 10,750 U.S. cases for around \$2-billion, a sum that will barely dent its profits.

As for me, I've decided to stop worrying. What else can I do? It seems foolish to be consumed by fear of hypothetical harm. With luck, my hips will be buried with the rest of me, far in the future.

But I have learned a lot. I am much more skeptical of the wondrous new offerings from Big Pharma. I'm sorry I wrote that piece in the paper, and I worry about the people I encouraged. I hope they're all okay. From now on, I will offer only two pieces of advice to people whose hips are shot. Pick a good surgeon. And caveat emptor.

The Globe and Mail, Inc.



The Globe and Mail Inc. All Rights Reserved. Permission granted for up to 5 copies. All rights reserved.

You may forward this article or get additional permissions by typing [http://license.icopyright.net/3.8425?icx\\_id=9235946](http://license.icopyright.net/3.8425?icx_id=9235946) into any web browser. The Globe and Mail, Inc. and The Globe and Mail logos are registered trademarks of The Globe and Mail, Inc. The iCopyright logo is a registered trademark of iCopyright, Inc.