2016 ONSC 4400
Ontario Superior Court of Justice

Crider v. Nguyen

2016 CarswellOnt 10632, 2016 ONSC 4400, 268 A.C.W.S. (3d) 520

Heather Ann Crider and Adrian Wilson, Plaintiffs and Dr. Can D. Nguyen, Trillium Health Partners, Carrying on Business as Credit Valley Health Hospital, Zimmer GmbH, Zimmer, Inc. and Zimmer of Canada Limited, Defendants

Perell J.

Heard: June 15, 2016
Judgment: July 5, 2016
Docket: Milton 933/15

Counsel: Gordon A. Marsden, for Plaintiffs
Peter J. Pliszka, Zohaib I. Maladwala, for Defendants, Zimmer GmbH, Zimmer, Inc. and Zimmer of Canada Limited
Douglas Lennox, for Plaintiffs in McSherry v. Zimmer GmbH

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.c Conduct of class proceeding
V.2.c.ii Stay of other proceedings

Headnote

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Conduct of class proceeding — Stay of other proceedings
Plaintiff Ontario resident underwent hip replacement — Plaintiff experienced symptoms allegedly caused by elevated cobalt and chromium in her body from implanted device — Class action against defendant manufacturer was started in British Columbia — Companion action was started in Ontario — Plaintiff retain counsel for individual action in Ontario, and purported to revoke her decision to opt-in to B.C. class action — Manufacturer entered into agreement to settle class actions — Manufacturer brought motion to stay plaintiff's action — Motion dismissed — True issue was whether plaintiff should be allowed to opt out of Ontario class action — Plaintiff was technically class member of Ontario action, and had not opted-out — Plaintiff had to be taken to have received notice of Ontario class action — It was appropriate that plaintiff be relieved from being bound by settlements — Plaintiff's membership was merely technical because she always intended to opt out and believed she was entitled to pursue individual action — Plaintiff gave class counsel notice that she was not going to participate in class action, and there was no reason not to hold her to that decision — There was no unfairness or surprise to manufacturer with respect to plaintiff opting-out.

Table of Authorities

Cases considered by *Perell J.*:

Bywater v. Toronto Transit Commission (1999), 1999 CarswellOnt 1139, 43 O.R. (3d) 367, 28 C.P.C. (4th) 307, 83 O.T.C. 12 (Ont. Gen. Div.) — referred to

Harrington v. Dow Corning Corp. (2001), 2001 BCSC 221, 2001 CarswellBC 287, 84 B.C.L.R. (3d) 369, 84 B.C.L.R.

(3d) 368 (B.C. S.C. [In Chambers]) — referred to

Jones v. Zimmer GmbH (2011), 2011 BCSC 1198, 2011 CarswellBC 2307 (B.C. S.C.) — considered

Lépine c. Société Canadienne des postes (2009), 2009 SCC 16, 2009 CarswellQue 2490, 2009 CarswellQue 2491, 67 C.P.C. (6th) 201, (sub nom. *Canada Post Corp. v. Lépine)* 387 N.R. 91, (sub nom. *Société canadienne des postes v. Lépine)* 304 D.L.R. (4th) 539, (sub nom. *Canada Post Corp. v. Lépine)* [2009] 1 S.C.R. 549 (S.C.C.) — considered

Mangan v. Inco Ltd. (1998), 1998 CarswellOnt 801, 16 C.P.C. (4th) 165, 38 O.R. (3d) 703, 27 C.E.L.R. (N.S.) 141, 55 O.T.C. 161 (Ont. Gen. Div.) — referred to

McSherry v. Zimmer GmbH (2014), 2014 ONSC 5527, 2014 CarswellOnt 12988, 69 C.P.C. (7th) 399 (Ont. S.C.J.) — considered

Parsons v. McDonald's Restaurants of Canada Ltd. (2005), 2005 CarswellOnt 544, 7 C.P.C. (6th) 60, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.)* 250 D.L.R. (4th) 224, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.)* 195 O.A.C. 244, (sub nom. *Currie v. McDonald's Restaurants of Canada Ltd.)* 74 O.R. (3d) 321 (Ont. C.A.) — considered

Robinson v. Rochester Financial Ltd. (2010), 2010 ONSC 5116, 2010 CarswellOnt 7017 (Ont. S.C.J.) — referred to

Romanchuk v. Aimia Inc. (2014), 2014 BCPC 101, 2014 CarswellBC 1525 (B.C. Prov. Ct.) — referred to

Smith v. National Money Mart Co. (2007), 2007 CarswellOnt 2376 (Ont. S.C.J.) — referred to

Ward-Price v. Mariners Haven Inc. (2004), 2004 CarswellOnt 2238, 71 O.R. (3d) 664, 3 C.P.C. (6th) 116, [2004] O.T.C. 474 (Ont. S.C.J.) — referred to

1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd. (2002), 2002 CarswellOnt 4272, 28 C.P.C. (5th) 135, 62 O.R. (3d) 535 (Ont. S.C.J.) — referred to

1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd. (2003), 2003 CarswellOnt 998, 169 O.A.C. 343, 64 O.R. (3d) 42 (Ont. Div. Ct.) — referred to

1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd. (2004), 2004 CarswellOnt 945, 184 O.A.C. 298, 70 O.R. (3d) 182, 50 C.P.C. (5th) 25 (Ont. Div. Ct.) — referred to

Statutes considered:

Class Proceedings Act, R.S.B.C. 1996, c. 50
Generally — referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 9 — considered

s. 13 — considered

s. 27(1) — considered

s. 27(2) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 106 — considered

MOTION by defendant in class actions to stay plaintiff's individual action.

***Perell J.*:**

A. Introduction

1 The Plaintiffs Heather Ann Crider and Adrian Wilson might be class members of overlapping medical products liability class actions in British Columbia and Ontario brought against Zimmer GmbH, Zimmer, Inc. and Zimmer of Canada Limited (collectively "Zimmer"), the manufacturers of a hip implant device, known as the "Durom Cup." To be more precise, Ms. Crider and Mr. Wilson are currently class members of the Ontario action known as *McSherry v. Zimmer GmbH* [2014 CarswellOnt 12988 (Ont. S.C.J.)] and Ms. Crider might also be a class member in the British Columbia action known as *Jones v. Zimmer GmbH* [2011 CarswellBC 2307 (B.C. S.C.)].

2 In the action now before the court, Ms. Crider and Mr. Wilson sue Zimmer and also Dr. Can D. Nguyen, and Trillium Health Partners, which is a hospital ("Credit Valley Hospital").

3 Zimmer now moves for an order staying the Plaintiffs' action as against it.

4 For the reasons that follow, I dismiss the motion.

B. Factual and Procedural Background

5 On June 23, 2006, Ms. Crider, who is a resident of Ontario, underwent a total hip replacement in which she was implanted with the Durom Cup, which is manufactured and sold by Zimmer. The procedure was performed at Credit Valley Hospital by Dr. Can Nguyen.

6 In 2009, Ms. Crider began to experience rashes, lack of concentration, fatigue, memory difficulties, and seizures, amongst other symptoms. It is alleged that these symptoms were caused by elevated levels of cobalt and chromium in her body caused by the implantation of the Durom Cup.

7 On July 24, 2009, in British Columbia, Dennis Jones and Susan Wilkinson, residents of British Columbia, filed a proposed national *opt-in* class action against Zimmer. In the *Jones* Action, it is alleged that the Durom Cup is defective and that it fails to adhere to bone and separates from the hip socket necessitating that those implanted with the device receive remedial surgery. The *Jones* Action alleges, among other things, that Zimmer was negligent in the research, design, manufacture, distribution and sale of the Durom Cup in Canada. The *Jones* Action further alleges that Zimmer's negligence has caused the class members damages including pain, suffering, loss of quality and enjoyment of life, past and future loss of income and special damages.

8 In the *Jones* Action, Class Counsel is Klein Lyons, LLP, a British Columbia firm that also has a Toronto office.

9 It will be significant to note that under the British Columbia legislation, the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, class members from outside British Columbia participate in a class action by opting-in to the action within a prescribed time period. British Columbia residents are included in the class unless they opt out. In contrast, under Ontario's *Class Proceedings Act, 1992*, S.O. 1992, c. 6, all class members are included in the class unless they opt out of the action.

10 In 2010, Class Counsel in the *Jones* Action decided to commence a companion action in Ontario, and on August 10, 2010, Klein Lyons filed a proposed class action in Ontario against Zimmer. The allegations and claims for relief in the Ontario action were substantially the same as the allegations in the *Jones* Action in British Columbia.

11 The Ontario action was brought for all Canadian residents, except: (a) those that resided in British Columbia or in Québec; and, (b) those who had opted into the *Jones* Action. The proposed representative plaintiff was Gloria McSherry, and thus the *McSherry* Action got underway. Ms. Crider and Mr. Wilson are within the proposed class membership definitions in the *McSherry* Action.

12 Meanwhile, back in British Columbia, on September 2, 2011, Justice Bowden of the Supreme Court of British Columbia certified the *Jones* Action as a class action. The class was defined as: "all persons who were implanted with the Durom acetabular hip implant in Canada." As already noted above, under British Columbia's class action legislation, class members outside of British Columbia must take steps to opt into the action.

13 In accordance with Justice Bowden's order, notice of the certification of the action was provided across Canada. The notice included an opt-in form for class members outside of British Columbia. Pursuant to Justice Bowden's order, non-

residents had until December 31, 2013 to return the opt-in form. Ultimately, Klein Lyons LLP would receive over 1,100 opt-in forms from class members from outside of British Columbia.

14 During 2013 and until June 2014, Ms. Crider was not aware of the class action in British Columbia.

15 On June 17, 2014, Ms. Crider attended at the office of Dr. Kenneth Deichert, her family doctor, because of pain in her left hip. Dr. Deichert ordered blood tests to test for the presence of cobalt and chromium. It was around this time that Ms. Crider first learned about the class action in British Columbia. She did not know about the proposed class action in Ontario.

16 On July 8, 2014, Ms. Crider re-attended at Dr. Deichert's office and learned that her blood had elevated levels of cobalt and chromium. Later that day, she searched the internet and located the website for Klein Lyons LLP and briefly read about the class action in British Columbia. The website also contained information about the *McSherry* Action. Still later that day, Ms. Crider contacted Catherine Taylor of Klein Lyons LLP. She advised Ms. Taylor of the elevated levels of cobalt and chromium in her blood, and Ms. Crider also told Ms. Taylor that if she could *not* be properly included in the British Columbia class action, then she would retain her own counsel and commence a separate individual action against Zimmer.

17 Still on July 8, 2014, Ms. Taylor forwarded to Ms. Crider by email an 'opt-in' form to preserve Ms. Crider's right "to build a potential compensation claim in this action if applicable."

18 Although the opt-in form was out of time and although it was not clear whether Ms. Crider was actually a member of the class in British Columbia, she signed the opt-in form and mailed it to Klein Lyons LLP.

19 The next thing that Ms. Crider did was to retain Ontario lawyers. She retained Will Davidson LLP, and after consulting with these lawyers, Ms. Crider instructed the firm to commence an action. And, Ms. Crider instructed her lawyers to advise Klein Lyons LLP that she was not going to participate in the British Columbia *Jones* Action.

20 By letter dated July 17, 2014, Gary Will of Will Davidson LLP, sent a letter to Ms. Taylor at Klein Lyons LLP stating that he had been retained by Ms. Crider and that she was revoking her decision to opt into the *Jones* Action. Will Davidson LLP advised Ms. Taylor that Ms. Crider intended to pursue an individual action in Ontario.

21 By letter of the same date, Ms. Taylor confirmed that she had closed Ms. Crider's potential file. A few days later, there was an exchange of email between Ms. Crider and Ms. Taylor in which Ms. Taylor wished Ms. Crider well in pursuing her claim in Ontario.

22 However, on July 22, 2014, despite the exchange of correspondence with Ms. Crider and with Will Davidson LLP, Ms. Taylor inadvertently added Ms. Crider's opt-in form to a database that listed those class members who had opted into the British Columbia *Jones* Action.

23 Ms. Crider did not immediately commence her action in Ontario, and, as noted above, she was unaware that there was a proposed class action in Ontario that was moving forward to a certification motion.

24 On September 24, 2014, in Ontario, I certified the *McSherry* Action as a class action. Class membership was defined as follows:

> All persons who were implanted with the Durom acetabular hip implant in Canada, excluding residents of British Columbia and Quebec, and those persons who opt into the class certified by the British Columbia Supreme Court in [the *Jones* Class Action] (the "Class"), 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 Dependant Statutes in Canada as a result of the death or personal injury of such member of the Class (the "Family Class").

25 The common issues (which are the same as the first three common issues in the *Jones* Action) that were certified were:

> 1. Was the Durom acetabular hip implant defective and/or unfit for its intended use?
>
> 2. Did any of the defendants breach a duty of care owed to class members and, if so, when and how?; and
>
> 3. Does the defendants' conduct warrant an award of punitive damages and, if so, to whom shall they be paid and in

what amount?

26 On September 24, 2014, I also approved the notice and the notice plan for class members. In my Reasons for Decision, about notice, I stated:

> Regarding notice, it is proposed that notice of certification in this action be limited to publication on the internet and to direct notice to counsel with clients who have already brought individual claims as against the Defendants. In the circumstances of this case, I am satisfied with the adequacy of this notice plan.

27 The certification order in paragraphs 7 and 8 provided for notice as follows:

> 7. (a) Class counsel shall post the Notice on its website, and shall provide a copy of **it** to anyone who requests it; and,
>
> (b) the Defendants shall mail the Notice to any counsel in Canada who has contacted the Defendants on behalf of a client or clients purporting to have injuries related to the Zimmer Durom Cup.
>
> 8. Class members may opt out of this proceeding by delivering a written request to do so, providing their name and address, to Class Counsel by no later than 84 days [December 17, 2014] from the date of this order.

28 Notice of the certification of the *McSherry* Action was disseminated in accordance with the terms of Court order. The notice was not mailed to Will Davidson LLP because the firm had not contacted Zimmer on behalf of a client with injuries related to the Durom Cup. The date by which class members could opt out of the *McSherry* Action was December 17, 2014. Ms. Crider did not opt out by that date. Ms. Crider submits that had she been aware of the certification of the *McSherry* Action she would have opted out.

29 On January 13, 2015, Ms. Crider underwent a revision left total hip arthroplasty with removal of the resurfacing of the Durum Cup and conversion to a total hip arthroplasty.

30 On February 17, 2015, Ms. Crider commenced an individual action against Zimmer, Dr. Nguyen, and Credit Valley Hospital.

31 In her Statement of Claim, Ms. Crider alleges that the Durom Cup is defective in that it fails to properly adhere to the surrounding bone and also that its 'metal-on-metal' system caused elevated levels of cobalt and chromium in her blood and other damage.

32 Meanwhile back in British Columbia, by Order dated May 29, 2015, Justice Bowden extended the deadline to opt into the *Jones* Action to June 8, 2015.

33 On November 23 and 24, 2015, Zimmer entered into an agreement to settle the *Jones* Action and the *McSherry* Action. Ms. Crider submits that given the additional allegations in her individual action, she would not be reasonably or fairly compensated under the settlement.

34 The motion for approval of the settlement agreement in the *McSherry* Action is scheduled for July 14, 2016.

C. Discussion and Analysis

35 At first blush, it would appear that the issue to be determined on this motion is whether the court should exercise its jurisdiction to stay an action pursuant to s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that: "On motion by any person, the court may stay any proceeding in the court on such terms as are considered just" or stay the action pursuant to s. 13 of the *Class Proceedings Act, 1992*, which provides that "The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate."

36 However, upon analysis, the outcome of this motion is more aptly governed by the law associated with s. 27 (2) of the *Class Proceedings Act, 1992* and not by s. 106 of the *Courts of Justice Act* or by s. 13 of the *Class Proceedings Act, 1992*.

37 Pursuant to s. 27 (1) of the *Class Proceedings Act, 1992*, a judgment on the common issues binds class members, and

although it needs to be made manifest and transparent, the pivotal, and critical legal element for Zimmer's motion for a stay of Ms. Crider's Action is s. 27 (2) of the *Class Proceedings Act, 1992*, and the comparable provision under British Columbia's legislation, which neutralizes the effect of s. 27 (1). Section 27 (2) of Ontario's *Act* states:

> (2) A judgment on common issues of a class or subclass does not bind,
>
> (a) a person who has opted out of the class proceeding; or
>
> (b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a).

38 Although it needs to be made manifest, the true issue to be decided on this motion is not whether Ms. Crider's Action against Zimmer should be stayed, but rather the issue to be decided is whether Ms. Crider should be allowed at this juncture to opt out of the *McSherry* Action. In other words, the true rationale or motivation for Zimmer's motion is not to avoid a multiplicity of proceedings; rather, the true rationale is that Zimmer wishes to rely on s. 27 (2) of the *Class Proceedings Act, 1992* to establish a *res judicata* or released claim defence to respond to Ms. Crider's individual action.

39 The fact that Zimmer has brought a motion for a stay of Ms. Crider's Action against it actually obscures or disguises Ms. Crider's genuine legal problem in responding to Zimmer's motion, which is that unless she is allowed at this juncture to opt out of the*McSherry* Action, then she will be bound by the judgment in the *McSherry* Action and assuming that the court approves the settlement in the *McSherry* Action, Zimmer will have a *res judicata* defence or a defence that Ms. Crider released her claim as part of the settlement in the *McSherry* Action.

40 As the factual background reveals, there is no doubt that Ms. Crider technically is a class member in the *McSherry*Action, and there is no doubt that she has not formally opted out of that action. Therefore, unless she is allowed to opt out of the *McSherry* Action despite the deadline for opting out having passed and assuming the settlement is approved by the court, s. 27 (2) of the *Class Proceedings Act, 1992* applies to bar her claim against Zimmer.

41 As it happens, Ms. Crider confronts the same legal problem if she is a class member of the *Jones* Action in British Columbia.

42 At the time of the argument of Zimmer's motion, I expressed the view that the events in British Columbia were just part of the background factual narrative to the motion in Ontario and that from a legal perspective, I could not address whether Ms. Crider was an opt-in member of the class in British Columbia. At that time, I thought that the matter of Ms. Crider's status in the *Jones* Action was a matter for the British Columbia court to decide; however, having rethought the matter, while it remains the case that I cannot decide a matter within the jurisdiction of the British Columbia court, ultimately, as a conflict of law problem, an Ontario court would be asked to enforce the British Columbia judgment, and, thus, in a roundabout sort of way, it would appear that I do have to consider whether Ms. Crider is a class member in the *Jones* Action.

43 Regardless of what the British Columbia court might decide, in these circumstances, an Ontario court would have to decide whether to enforce the British Columbia's order as a conflict of law problem. See: *Parsons v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (Ont. C.A.); *Lépine c. Société Canadienne des postes*, 2009 SCC 16 (S.C.C.). In this regard, I conclude that with respect to Ms. Crider an Ontario court would not enforce a judgment made in the *Jones* Action as against her because it is only by happenstance that she has been added to the list of class members in the *Jones* Action. My conclusion is that Ms. Crider is not a class member in the *Jones* Action. Based on the factual background described above, Ms. Crider's membership happened by clerical misadventure and contrary to the assurances given by Class Counsel's staff in British Columbia.

44 Thus, coming full circle, the issue to be decided in the immediate case is whether Ms. Crider should be permitted to opt out of the *McSherry* Action.

45 I can begin the discussion of this issue by noting that: (a) s. 9 of the *Class Proceedings Act, 1992* allows class members to "opt out of the proceeding in the manner and within the time specified in the certification order"; and, (b) courts will take steps to ensure that a person's right to opt out of a class action is meaningful and not interfered with including, in appropriate circumstances, extending the deadline for opting out; see: *Mangan v. Inco Ltd.* (1998), 38 O.R. (3d) 703 (Ont. Gen. Div.); *Bywater v. Toronto Transit Commission* (1999), 43 O.R. (3d) 367 (Ont. Gen. Div.); *Harrington v. Dow Corning Corp.*, 2001 BCSC 221 (B.C. S.C. [In Chambers]); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.), leave to appeal granted, (2003), 64 O.R. (3d) 42 (Ont. Div. Ct.), aff'd (2004), 70 O.R. (3d) 182 (Ont.

Div. Ct.); *Ward-Price v. Mariners Haven Inc.* (2004), 71 O.R. (3d) 664 (Ont. S.C.J.); *Smith v. National Money Mart Co.*, [2007] O.J. No. 1507 (Ont. S.C.J.); *Robinson v. Rochester Financial Ltd.*, 2010 ONSC 5116 (Ont. S.C.J.).

46 Ms. Cruder submits that she should not be included as a class member in the *McSherry* Action because she did not receive actual notice of her right to opt out of the action and she did not know that she had to opt out in order to preserve the right to pursue an individual action against Zimmer.

47 In the immediate case, Class Counsel in the *McSherry* Action complied with the court order, and, thus, Ms. Crider must be taken to have received notice. I accept her evidence that she subjectively did not know that she had to take steps to opt out, but the absence of actual subjective awareness of the need to opt out is not a reason to exclude her from class membership.

48 Undoubtedly, the right to opt out is a fundamental procedural right under the *Class Proceedings Act, 1992*. Indeed, as revealed by s. 27 (2), the operative principle of a class proceeding that a class member will be bound by the judgment or be bound to the settlement of an action that he or she did not initiate and indeed may not even know about until long after commencement depends upon the putative class member having the right to opt out of the action.

49 In the civil procedure theory that underlies how it is that an action can be brought on behalf of defined but unnamed persons, the meaningful right to opt out plays a crucial role. In *Parsons v. McDonald's Restaurants of Canada Ltd.*, *supra*, Justice Sharpe stated at para. 28:

> 28. The right to opt out is an important procedural protection afforded to unnamed class action plaintiffs. Taking appropriate steps to opt out and remove themselves from the action allows un-named class action plaintiffs to preserve legal rights that would otherwise be determined or compromised in the class proceeding. Although she was not referring to inter-jurisdictional issues, in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 49, McLachlin C.J.C. identified the importance of notice as it relates to the right to opt out: "A judgment is binding on a class member only if the class member is notified of the suit and given an opportunity to exclude himself or herself from the proceeding." The right afforded to plaintiff class members to opt out has been found to provide some protection to out-of-province claimants who would prefer to litigate their claims elsewhere: *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 at 404 (S.C.J.). It is obvious, however, that if the right to opt out is to be meaningful, the unnamed plaintiff must know about it and that, in turn, implicates the adequacy of the notice afforded to the unnamed plaintiff.

50 However, in protecting the right to opt out, a court need not ensure that the person with the right to opt out has actual notice of the right to opt out. Practically speaking, the only way to ensure that a person has notice that his or her legal rights could be affected is by some form of personal service on the person or his or her lawyer or agent. Short of requiring personal delivery, the chosen notification process may not be effective in every case. Moreover, depending on class size and the ability to identify and locate class members, personal service is not practical and may not even be feasible.

51 In *Lépine c. Société Canadienne des postes*, *supra* at para. 43, in the context of considering whether an Ontario judgment in a class action would be recognized and enforced in Québec, Justice LeBel made the point that the legitimacy of a class proceeding in binding class members to the outcome does not depend upon showing that each class member was actually informed; he stated:

> The Ontario Court of Appeal stressed the importance of notice to members in a case involving an application for recognition of a judgment rendered in Illinois, in the United States. It emphasized the vital importance of clear notices and an adequate mode of publication (*Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321, at paras. 38-40). In a class action, it is important to be able to convey the necessary information to members. Although it does not have to be shown that each member was actually informed, the way the notice procedure is designed must make it likely that the information will reach the intended recipients. The wording of the notice must take account of the context in which it will be published and, in particular, the situation of the recipients. In some situations, it may be necessary to word the notice more precisely or provide more complete information to enable the members of the class to fully understand how the action affects their rights.

52 In the immediate case, at the time of the certification motion, and having regard to the information that had been provided to the class because of the *Jones* Action, I concluded that personal service of the notice of certification was not necessary in the *McSherry* Action and that posting a notice on an internet website and giving direct notice to the few lawyers who had contacted Zimmer was sufficient to give notice to class members of their right to opt out.

53 I, therefore, disagree with Ms. Crider's submission that she should be permitted to opt out simply because she did not

receive actual notice of her right to do so. I shall rather treat her as receiving notice of her right to opt out, and thus technically she is a member of the class. See *Romanchuk v. Aimia Inc.*, [2014] B.C.J. No. 1090 (B.C. Prov. Ct.).

54 Thus, the question again becomes whether at this juncture there is any other justification for permitting Ms. Crider to opt out of the *McSherry* Action. Ms. Crider advances two related justifications for allowing her to opt out. First, she says that the nature of her claims and her damages is different than other class members and she should be allowed to pursue these claims. Second, she says that there are co-defendants in her individual action and she should be allowed to pursue all her claims. I disagree that these two circumstances justify permitting Ms. Crider to opt out of the *McSherry* Action.

55 If Ms. Crider remains a class member and the settlement in the *McSherry* Action is approved, then, she would participate in the settlement and be unable to pursue a claim against Zimmer, but she would still be able to proceed with her action against Dr. Nguyen, and Credit Valley Hospital. Assuming that she proved these co-defendants liable, then it would be a matter for the trial judge to quantify her damages taking into account what she recovered in the *McSherry* Action settlement. Settling with one defendant in a tort action and pursuing the co-defendants is not an unusual situation and thus the pending settlement in the class action is not a justification for permitting Ms. Crider to opt out. The fact that she thinks that she will achieve a better outcome in an individual action than from participating in the settlement is also not a justification for permitting her to opt out of the *McSherry* Action.

56 There is, however, a justification for relieving Ms. Crider from being bound by the pending settlements in British Columbia and more importantly in Ontario. Remarkably, the reason is that in the circumstances of this case, she has already opted out. Here, membership is just technical because she always intended to opt out and indeed she believed that she was entitled to pursue an individual action.

57 Back in 2014, she notified Class Counsel that she was going her own way, which is to say that she was going to eschew the benefits of a class action to take on the considerable risks of individual litigation against a formidable adversary. She gave Class Counsel notice that she was not going to participate in the class action, and I see no reason not to hold her to that decision. Class Counsel is neutral about having her as a class member, and in the circumstances of this case, her informal advance notice of opting out ought to suffice for her to preserve her litigation autonomy.

58 I see no unfairness to Zimmer in allowing Ms. Crider to opt out. Zimmer was aware that there were going to be a few individual actions to defend, and but for the late timing of the formality of Ms. Crider's opt out, her decision to opt out comes as no surprise. It must marshal a defence to the other actions and it may have additional individual defences to her claim. Thus, in my opinion, the fairest thing to do in the circumstances of this case is to hold Ms. Crider to her decision to opt out with all the potential risks and benefits that decision entails.

59 It follows that Zimmer's motion for a stay should be dismissed.

D. Conclusion

60 For the above reasons, the motion for a stay is dismissed. If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Ms. Crider's submissions within 20 days of the release of these Reasons for Decision followed by Zimmer's submissions within a further 20 days.

Motion dismissed.