Cassels

Canada's First Cannabis Product Liability Class Action Snuffed Out on Appeal

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Canada's first ever cannabis product liability class action has been snuffed out – at least in part. As previously reported in this newsletter, the Nova Scotia Supreme Court's certification of *Downton v Organigram Inc.*, a product liability class action against a New Brunswick based medical cannabis producer, was a historic first. Now, just over a year later, the Nova Scotia Court of Appeal has substantially limited the plaintiff's claims on appeal and reduced the defendant cannabis producer's potential exposure to damages considerably.

On appeal, the Nova Scotia Court of Appeal held that common causation could not be established for the personal injury claims advanced in the proposed class action, and that the damages for those claims should not be certified as a common issue. The claim for unjust enrichment was also struck for being improperly pleaded. The Court left only the common issues based on breach of contract and regulatory violations intact. This will limit Organigram's exposure to damages considerably, making it a major win for the company.

Background to the Case: Pesticide Traces Spark Recall and Ignite Class Action

The proposed class action is based on 2016 product recalls that occurred when some of Organigram's medical cannabis products were found to contain traces of pesticides not authorized for use on cannabis. The representative plaintiff, Ms. Downton, had purchased and consumed medical cannabis from Organigram that was subject to the recall. Ms. Downton claimed that she suffered adverse health consequences as a result.

On January 19, 2019, the Supreme Court of Nova Scotia certified Ms. Downton's action as a class proceeding and ordered that a number of common issues among the proposed class proceed to trial under Nova Scotia's class proceedings regime.

Commonality Crumbles on Appeal: Adverse Health Claims Cannot be Proven on a Common Basis

Organigram appealed the portions of the certification order addressing claims associated with adverse health consequences. Ms. Downton's symptoms included very general complaints such as nausea and vomiting, while other class members complained of difficulty breathing and headaches. The Court noted that the majority of these symptoms are considered by Health Canada as being associated side effects of cannabis consumption in general. Further, the proposed methodology was based on the report of an expert witness, yet very few of the potential harms outlined in the report matched the vague and general symptoms of the class members.

The Court of Appeal found, as a result, that causation for the alleged "adverse health claims" suffered by the class could not be made out on a common basis. The plaintiffs failed to show that there was a workable methodology for establishing general causation of the wide range of symptoms. In any event, a class action was not the preferable procedure for resolving the highly individualized claims of the proposed class.

What's Left: Just the Butt

While the Court of Appeal's decision largely left intact the various causes of action relied on by Ms. Downton, the list of common issues was all but extinguished leaving little substance for the class action going forward.

At the certification stage, a plaintiff only needs to establish that it is not plain and obvious that its claim cannot succeed on the causes of action pleaded. The claims for negligent design, development and testing, and breach of the *Competition Act* were adequately pleaded, the Court of Appeal held. But the Court struck the claim for unjust enrichment, holding that the pleaded facts could a claim in contract, but not unjust enrichment.

Despite leaving the pleadings largely intact, the Court of Appeal gutted the list of common issues. What remains are questions about whether Organigram owed duties of care to the class, but the applicable standard of care and whether Organigram breached that standard were struck as common issues. Similarly, while the Court left in a common issue as to whether Organigram breached the *Competition Act* by making false or misleading statements while promoting a product, whether Organigram's customers relied on the alleged misrepresentations was never a common issue, and the only common issue relating to damages was struck.

As well, the recent decision of the Supreme Court of Canada in *Babstock v Atlantic Lottery Corporation*, holding waiver of tort is not available as a cause of action, will almost certainly result in Ms. Downton's claim for restitution being struck.[1]

In the result, the surviving class action effectively encompasses only the breach of contract claim and claims based on implied conditions and warranties provided for in the *Consumer Protection Act* and the *Sale of*

Goods Act. This reduces the potential damages significantly. All remaining claims will require individual trials to determine both liability and damages, which is likely impractical.

In an attempt to reignite some of the common issues the plaintiffs have sought leave to appeal the decision to the Supreme Court of Canada.

Key Takeaway Principles: Prevention is Still the Best Medicine

This case provides good illustration of the uphill battle faced by plaintiffs proposing class actions that allege personal injury from defects in products that are meant for human consumption, such as cannabis, pharmaceutical products, and food.

While this is good news for producers of these products, this case is also a good reminder that a plan to avoid risks, but also to respond when issues occur, is essential. The best defence is always to avoid recalls for defects or contamination in the first place. In addition to complying with all regulations governing the particular product, producers should identify risks that can lead to contamination or other defects and implement measures to guard against those risks.

Having proactive risk mitigation strategies and properly implementing them after discovering a product issue can reduce or even eliminate class action risks and guard against reputational damage. Organigram had offered refunds, but they were limited to customers who returned the product and met restrictive criteria. If Organigram had refunded all customers who purchased the recalled product, the court may have concluded that refunds were a better deal for the class than a class action.

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1 See our recent article: Babstock, Class Actions, and the “End” of Waiver of Tort for more on this decision and its impact on class actions in Canada.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.