

A Joint Effort: Nova Scotia Court Certifies Canada's First Ever Cannabis Product Liability Class Action

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With the legalization of medical and recreational cannabis in Canada, product liability litigation was almost certain to follow. Recently, the Nova Scotia Supreme Court certified the first ever Canadian product liability class action against a licensed cannabis producer in *Downton v Organigram Inc.*¹ This certification decision signals that Canadian cannabis producers will not be immune to the emerging trend seen in the United States, where the decriminalization of cannabis in certain states has spurred the growth of product liability class actions in the industry. The *Downton* decision does provide some hints as to how the Canadian plaintiffs' bar will frame and approach such actions and how cannabis producers can implement strategies to avoid and mitigate the risk of litigation arising from their products.

Background to the Case

Like many product liability class actions, *Downton* arises from a recall and the product manufacturer's alleged failure to comply with regulatory requirements applicable to its products.

On August 24, 2016, the federal *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230 (the ACMPR), came into effect, replacing the previous regime. Similar to the *Marihuana for Medical Purposes Regulations*, the ACMPR provided a mechanism for persons to access cannabis for medical purposes with support from an authorized healthcare practitioner. Under the ACMPR, licensed producers were permitted to use 14 pesticides approved for use on marijuana plants.

The defendant, Organigram Inc. (Organigram), is a licensed medical cannabis producer based in Moncton, New Brunswick. On November 28, 2016, Organigram was notified by one of its wholesale recipients that one of its cannabis lots had been tested by a third-party lab and showed trace amounts of pesticides which were not authorized for use under the ACMPR. In response, Organigram, in conjunction with Health Canada, initiated a voluntary recall of five lots of medical cannabis products and instituted a refund and credit program.

The plaintiff, Ms. Downton, had purchased and consumed medical cannabis from Organigram which was subject to the recall. Ms. Downton claimed that she suffered adverse health consequences as a result of consuming the recalled cannabis, and commenced a proposed class action before the Nova Scotia Supreme Court, seeking to certify a product liability class proceeding under Nova Scotia's *Class Proceedings Act* against Organigram on behalf of all persons who purchased cannabis from Organigram

subject to the recall, and appointing herself as the representative plaintiff for the class.

The Certification Decision

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 a common issues trial under Nova Scotia's class proceedings regime.

In order to certify an action as a class proceeding, Nova Scotia's *Class Proceedings Act* requires the plaintiff to establish that:

- a) The pleadings disclose a reasonable cause of action;
- b) There is an identifiable class of two or more persons;
- c) The class members' claims raise one or more "common issues";
- d) A class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and
- e) The proposed representative plaintiff will fairly and adequately represent the interests of the class, has a workable litigation plan and does not have any conflict of interest with the other class members.

Ultimately, the Court found that all elements of this test were satisfied, and permitted the class action to be certified on the basis of a number of common issues among the class.

The primary common issues that were certified related to the plaintiff's allegations of "negligent design, manufacture and distribution" of the recalled cannabis. While Organigram argued that the plaintiff had failed to demonstrate, with supporting evidence, that there was a workable methodology for determining questions relating to causation and damages on a class-wide basis, the Court rejected this argument, finding that the fact-finding and legal analysis central to a determination of the negligence issues were common among all class members. The Court also found additional common issues related to breach of contract, breach of the *Competition Act*, breach of provincial consumer protection legislation, breach of the *Sale of Goods Act*, unjust enrichment, and the availability of remedies. The Court concluded that the resolution of all of these common issues would substantially advance each proposed class members' claim, and therefore the issues met the certification criterion. Notably, the causes of action advanced and case law relied upon in *Downton* appears to draw heavily from class proceedings in the pharmaceutical industry, which may forecast that the development of similar actions in the cannabis industry is likely to follow the same blueprint.

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The Court further held that a class proceeding would be a preferable procedure for the fair and efficient resolution of the dispute. Organigram argued that if the action was certified, the resulting procedure would involve extensive individual trials to determine liability because each class member's claim would involve individual considerations, including their duration of use, method of consumption, age, metabolism, interactions with other medications, genetically-conferred susceptibility and underlying medical conditions. However, the Court rejected this argument, holding that the determination of the common issues would be a significant enough component of each proposed member's claim to make a class proceeding preferable to requiring each class member to sue individually.

Key Takeaway Principles

The certification of Canada's first-ever cannabis product liability class action should likely be seen as a harbinger of things to come. The recent legalization of recreational cannabis in Canada, and the ensuing growth in the market of available products to a wider group of customers, will likely create additional opportunities for plaintiffs' counsel to pursue similar claims against cannabis producers. While certification is a strictly procedural hurdle, and the merits of the underlying action in *Downton* remain to be decided, the decision can be taken to show, at the very least, Canadian courts' willingness to allow such cases to proceed on a class basis along similar lines to the product liability class actions in the pharmaceutical and food industries.

Canadian cannabis producers should therefore be prepared to safeguard against potential product liability class actions through the adoption of proactive risk mitigation strategies in consultation with legal and business advisors. As we recently noted in our firm's Product Liability newsletter, the successful implementation of proactive risk mitigation strategies after discovering a product issue can reduce or even eliminate class action risks and avoid certification altogether. Where class actions are certified, a cannabis producer's ability to react in a reasonable manner that reduces risks to consumers will feature prominently in determining potential liability. In *Downton*, the Court noted that primary focus in a cannabis product liability action arising from a recall will likely be the conduct of the cannabis producer leading up to the recall.

The decision in *Downton v. Organigram* is available [here](#).

We Can Help

If you have any questions about this decision, its implications, or for more information about product liability law or how Cassels Brock can proactively assist your cannabis business, please contact Chris Horkins, Suhuyini Abudulai or any other member of the Cassels Product Liability Group.

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¹ Downtown v. Organigram, 2019 NSSC 4 <<http://canlii.ca/t/hx4fk>>

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