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Nova Scotia Court of Appeal Decision a Big Interim Win for Organigram

By Matt Maurer

Last week the Nova Scotia Court of Appeal partially overturned the certification of a class action lawsuit against Organigram Inc. and its parent company, Organigram Holdings Inc. (collectively, “**Organigram**”), the result of which is a significant reduction in the scope of the lawsuit against Organigram.

Background

Organigram is a federally approved producer of medical cannabis based in Moncton, New Brunswick.

In late 2016, Organigram conducted testing which disclosed trace amounts of the pesticides bifentazate, malathion and myclobutanil in its cannabis. These pesticides were not among those authorized for use on cannabis plants under the *Pest Control Products Act*, S.C. 2002, c. 28. Upon discovering the pesticides, Organigram notified Health Canada and initiated a voluntary recall of five lots of its cannabis. Health Canada later issued a Type II recall on 69 additional lots of Organigram’s cannabis.

Commencement of the Class Action Lawsuit

Dawn Rae Downton had purchased medical cannabis from one of the lots later subject to the Health Canada recall. On consuming the cannabis, she allegedly experienced nausea and vomiting. These symptoms subsided once she discontinued her consumption.

Ms. Downton applied to the Nova Scotia Supreme Court to certify a class proceeding against Organigram on behalf of all consumers who purchased cannabis from Organigram that was later subject to recall (the “**Recalled Cannabis**”).

The proposed class action included claims arising from breach of contract; statutory breaches; negligent design, development and testing; negligent manufacturing; negligent distribution, marketing and sale; waiver of tort and unjust enrichment. Among other forms of relief, Ms. Downton sought general damages

related to “adverse health consequences” from consuming the Recalled Cannabis. Ms. Downton succeeded in her application and, in February 2019, the Nova Scotia Supreme Court issued an order certifying the class action and thereby allowed it to proceed.

Organigram’s Appeal

Organigram appealed the portions of the certification order addressing claims associated with adverse health consequences (the “**Adverse Health Claims**”). Specifically, Organigram argued that common issues concerning the Adverse Health Claims should not have been certified because Ms. Downton had failed to demonstrate a workable methodology to show that the Recalled Cannabis was capable of causing adverse health consequences on a class-wide basis. In the alternative, Organigram argued that a class action was not the preferable procedure for the fair and efficient resolution of the Adverse Health Claims. Organigram also argued that Ms. Downton had improperly pleaded certain causes of action in her Statement of Claim and that they should have been struck on that basis.

The Decision

Justice Bryson, with Justices Farrar and Fichaud concurring, allowed Organigram’s appeal in part.

Justice Bryson agreed with Organigram’s argument concerning the insufficiency of Ms. Downton’s methodology for determining causation. He began his analysis by noting that in order to establish general causation in a class action proceeding:

- (a) The symptoms described cannot be so vague and generic that they lack a plausible common cause; and
- (b) The methodology proposed must relate to the symptoms pleaded and in evidence.

With respect to the symptoms, Justice Bryson held that the “wide array of common, generic and transient symptoms” described by Ms. Downton as adverse health consequences, including nausea, dizziness, difficulty breathing and headaches, were too vague to be capable of a common cause determination. Likewise, he found that the phrase “adverse health consequences” was too general to serve as a description of damages.

Similarly, Justice Bryson held that the proposed methodology did not relate to the symptoms pleaded. Ms. Downton grounded her proposed methodology on a report written by her expert witness. However, nearly all of the potential harms described in the expert report did not correspond with the symptoms complained of by the class members.

Further, Justice Bryson found that the proposed methodology failed to address the facts of the case and thereby could not be considered “workable” as required by the applicable law. Ms. Downton’s expert was not properly informed of the actual levels of myclobutanil and bifentazate found in the Recalled Cannabis and was not provided with a list of adverse effects reported by the class members. His report addressed whether the presence of the pesticides at issue in cannabis could lead to adverse health effects, when the material question was whether the presence of those chemicals in the Recalled Cannabis could cause the effects pleaded by Ms. Downton. Ms. Downton’s methodology was further challenged by the evidence of Organigram’s expert, who opined that it was impossible to determine whether the Recalled Cannabis caused the symptoms at issue. Organigram’s expert provided a number of reasons in support of this position, including that the reported symptoms were associated with smoking cannabis even without the pesticides present.

Since Ms. Downton did not advance a workable methodology for explaining causation, Justice Bryson held that common issues with respect to the Adverse Health Claims could not be certified. Without an explanation of general causation, there could be no common issues regarding the standard of care owed by Organigram to the class members or the breach of that standard. Likewise, there could be no common issue concerning personal injury damages for the class members.

Justice Bryson found that even if the standard of care and breach of that standard could be certified as

common issues, a class action was not a preferable procedure. Questions of causation and quantum of damages were too individualized to lend themselves to a common resolution.

Further, Justice Bryson struck Ms. Downton's claim for unjust enrichment on the basis that it was not properly pleaded, as she relied on facts relevant to breach of contract to advance a claim for unjust enrichment. Justice Bryson upheld the other causes of action as adequately pleaded.

Outcome

As a result of this decision, class members in the Organigram class action will no longer be able to bring claims seeking damages for any personal injuries incurred as a result of consuming the Recalled Cannabis. The class action will nevertheless continue, albeit on the limited grounds of breach of contract and the statutory violations pleaded. Individuals could, in theory, launch their own lawsuits against Organigram alleging personal injury as a result of consuming the Recalled Cannabis, however the fact that this cannot be done as part of the class proceeding has eliminated a portion of the proceeding which could have potentially resulted in a very large damage award against Organigram if the plaintiffs were ultimately successful at trial.

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