Form 90.10

2019 C.A. No. 485656

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

ORGANIGRAM HOLDINGS INC. AND ORGANIGRAM INC.

APPELLANTS

- and -

DAWN RAE DOWNTON

RESPONDENT

NOTICE OF APPLICATION FOR LEAVE TO APPEAL AND NOTICE OF APPEAL (INTERLOCUTORY) CLASS PROCEEDINGS ACT, S. 39(3)(A)

To: **Raymond F. Wagner, Q.C.**
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Counsel to the Respondent

Appellants Appeal

The Appellants apply for leave to appeal and, if granted, will appeal from the decision rendered by the Honourable Justice Ann E. Smith on January 18, 2019 and the Order dated February 14, 2019 in the proceedings in the Supreme Court under the *Class Proceedings Act*, S.N.S. 2007, c. 28 showing court number Hfx. No. 460984.

Order or Decision Appealed From

The decision was rendered in written form on January 18, 2019. The Order is dated February 14, 2019. A copy of the written decision and the Order are attached.

Grounds of Appeal

The Grounds of Appeal are:

(1) In her consideration of paragraph 7(1)(c) of the *Class Proceedings Act*, the Chambers judge erred in law and principle by finding that the plaintiff demonstrated a workable methodology for demonstrating that the recalled product can cause adverse health effects on a class-wide basis;

(2) In her consideration of paragraph 7(1)(a) of the *Class Proceedings Act*, the Chambers judge erred in law by finding that the Statement of Claim discloses a cause of action for negligent design, development and testing, negligent distribution, marketing and sale, breach of the *Competition Act*, R.S.C. 1985, c. C-34 and unjust enrichment;

(3) In her consideration of paragraph 7(1)(d) of the *Class Proceedings Act*, the Chambers judge erred in law in finding that a class action is the preferable procedure for the fair and efficient resolution of the dispute.;

(4) Such other grounds as may appear.

Order Requested

The Appellants request that this Honourable Court grant Leave to Appeal, allow the Appeal, reverse the decision in the court below and set aside or modify the order. The Appellants also seek costs.

Motion for Date and Directions

The Application for Leave to Appeal and Appeal will be heard on a date to be set by a Judge. The Appellants will ask a Judge of the Court of Appeal to set a date and give directions at 10:00 AM on Thursday, the 14th day of March 2019 at The Law Courts, 1815 Upper Water Street in Halifax, Nova Scotia. You have the right to be present or be represented by Counsel. If you are not present or represented, the Judge may proceed without you.

Contact Information

The Appellants designate the following address:

c/o **Jane O'Neill, Q.C./Daniel Wallace**
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Documents delivered to this address will be considered received by the Appellants on delivery. Further contact information is available to each party through the Prothonotary.

Signature

Signed on March 1, 2019 at Halifax, Nova Scotia.

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Registrar's Certificate

I certify that this Notice of Appeal was filed with the Court on March 1, 2019.

Caroline McInnes
Registrar

SUPREME COURT OF NOVA SCOTIA
Citation: *Downton v. Organigram Holdings Inc.*, 2019 NSSC 4

Date: 20190118
Docket: Hfx No. 460984
Registry: Halifax

Between:

Dawn Rae Downton

Plaintiff

v.

Organigram Holdings Inc. and Organigram Inc.

Defendants

Judge:	The Honourable Justice Ann E. Smith
Heard:	June 19 and 20, 2018, in Halifax, Nova Scotia
Post-Trial Submissions:	January 4, 2019 (Defendants); January 9, 2019 (Plaintiff); January 11, 2019 (Defendants)
Counsel:	Raymond F. Wagner, QC, Maddy Carter, Kate Boyle; for the Plaintiff Jane O'Neill, QC, Daniel Wallace; for the Defendants

By the Court:

INTRODUCTION

[1] Dawn Rae Downton, the plaintiff in this proceeding, moves for an order certifying the within action as a class proceeding pursuant to ss. 4(3) and 7 of the *Class Proceedings Act*, S.N.S. 2007, c. 28 ("*CPA*") and appointing the plaintiff as representative plaintiff for the class. The action was commenced on March 3, 2017 by Notice of Action and Statement of Claim, and amended on November 16, 2017 "The Claim."

[2] Ms. Downton purchased and consumed medical cannabis from the defendants which was subject to a recall by Health Canada. The recall was initiated as a result of testing of the cannabis which revealed that it contained unauthorized pesticides (the "recalled cannabis").

[3] Ms. Downton has organized her claims against Organigram as:

(a) Negligence;

(b) Breach of contract;

(c) Statutory breaches;

(d) Unjust enrichment; and

(e) Waiver of tort.

[4] Ms. Downton claims that she suffered adverse health consequences as a result of consuming the recalled cannabis, and claims various remedies including general and punitive damages.

[5] Ms. Downton proposes to define the class as follows:

> All persons and entities who purchased from Organigram cannabis for medical purposes that has been the subject of a voluntary or involuntary recall as of the date of the order certifying the action.

[6] The defendant Organigram Inc. is a wholly-owned subsidiary of the defendant Organigram Holdings Inc. In this decision the two defendants will be

referred to as "Organigram." Organigram has been a federally-licensed producer of medical cannabis since April 14, 2014.

[7] Organigram opposes the certification on multiple grounds. It says that the Claim fails to disclose causes of action in negligent design, development and testing; negligent distribution, marketing and sale; breach of the *Competition* Act R.S.C. 1985, c. C-34;breach of the Nova Scotia *Consumer Protection Act* R.S.N.S. 1989, c. 92 and consumer protection legislation in other provinces and territories; breach of the Nova Scotia *Food and Drugs Act* R.S.C. 1985, c. F.-27 and unjust enrichment.

[8] Organigram also says that the class definition is too broad, and that Ms. Downton has not put forward any evidence to show commonality among the recalled cannabis purchased by members of the proposed class.

[9] Organigram further claims that Ms. Downton has not put forward evidence or methodology to show causation and that the proposed common issues are overly broad and will not advance the litigation.

[10] In sum, Organigram says that a class action is not the preferable procedure to advance the litigation of class members.

[11] Finally, Organigram says that Ms. Downton is not an appropriate representative plaintiff for various reasons.

[12] The issue on this motion is whether this action should be certified as a class proceeding pursuant to s. 7 of the *CPA*. For the reasons which follow, I find that it should be.

The Statutory Criteria for Certification

[13] The statutory criteria for deciding whether an action should be certified as a class proceeding are set out in s. 7(1) of the *CPA*:

> 7(1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
>
> (a) the pleadings disclose or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by a representative party;

> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and
>
> (e) there is a representative party who
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
> >
> > (iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.

[14] If each of these criteria is met, this Court "shall certify" the class proceeding.

[15] Other than the requirement that the pleadings disclose a cause of action, the plaintiff has the burden of establishing the remaining criteria on evidence. The burden on the plaintiff is to show "some basis in fact" for each of the criteria. A judge on a certification motion is not to assess or weigh the evidence. A defendant may choose to provide evidence, as did Organigram, to rebut that filed by the plaintiff. However, to defeat certification, the defendant must satisfy the Court that there is no basis in the evidence for one or more of the certification criteria.

BACKGROUND

[16] The *Canadian Marijuana for Medical Purposes Regulations* ("*MMPR*"), SOR/2013-119 [repealed, SOR/2016 – 230, s. 281] were enacted under the *Controlled Drugs and Substances Act S.C. 1996*, c. 19 and came into effect on April 1, 2014. The *MMPR* permitted companies to apply to Health Canada to become licensed producers of medical cannabis, thereby lawfully producing and distributing cannabis for medical purposes.

[17] On August 24, 2016, the *Access to Cannabis for Medical Purposes Regulations*, SOR/2016 – 230 ("*ACMPR*") came into effect, replacing the *MMPR*. Licenses granted under the *MMPR* continued under the *ACMPR*. The *ACMPR*

provide a mechanism for persons to access cannabis for medical purposes with the support and documentation from an authorized healthcare practitioner.

[18] Under the *ACMPR*, at the relevant time, licensed producers were permitted to use 14 pesticides approved for use on marijuana plants.

[19] Organigram is based in Moncton, New Brunswick. All of its operations including cannabis production, head office and client service department are located at its Moncton facility.

[20] Health Canada first licensed Organigram as a producer of medical cannabis in 2014. Organigram's license has been renewed with Health Canada since that time and was in place at the relevant time in this proceeding. Since becoming a licensed producer, Organigram has sold cannabis that it produces as well as cannabis that it obtains from other licensed producers.

[21] On October 10, 2014, Ecocert, a Quebec-based organic certification body recognized by the Canadian Food Inspection Agency, approved Organigram's organic certification.

[22] The undisputed evidence provides that cannabis refers to the dried flowers of the cannabis plant. The cannabis plant contains over 80 different cannabinoids (chemical compounds) including tetrahydrocannabinol (THC), the chemical compound in cannabis responsible for euphoria, and cannabidiol (CBD), a chemical compound which does not lead to euphoria, along with terpenes (oils) and flavonoids.

[23] At the relevant time, Organigram produced four different strains/types of cannabis. A strain is a specific variety of cannabis with a particular genetic make-up. The four strains and their marketed specific effects are as follows:

a. Sativa strains are suitable for daytime use and provide a functional, euphoric energetic and stimulant effect;

b. Indica strains are suitable for evening/night use due to a sedative, relaxing and analgesic effect;

c. Indica Hybrid strains represent characteristics of both Indica and Sativa strains; and,

d. CBD rich strains provide strong therapeutic potential without a debilitating psychoactive effect.

[24] The undisputed evidence also discloses that dried cannabis can be consumed in a variety of ways including through edibles (cookies, brownies, tea, candies), combustion (rolled cannabis cigarette-type or mixed with tobacco) and vaporization (inhaled through a vaporizer without combustion). Organigram also sells cannabis oils which can be placed in the mouth or on the tongue, or put into an edible for consumption.

[25] In 2016, clients of Organigram could purchase cannabis over the phone with a client service representative. Starting in September 2016, clients could also purchase cannabis through Organigram's website.

[26] In 2016, clients paid for their cannabis directly either personally, or through their insurer or Veterans Affairs Canada's benefit program.

[27] In order to purchase medical cannabis from Organigram, a client was required to complete a registration form and have their physician submit an original medical document to Organigram.

[28] In 2016, Organigram sold cannabis that was advertised and labeled as either organic or non-organic. The non-organic cannabis sold by Organigram was produced by other licensed producers.

The Health Canada Recalls

[29] According to the affidavit evidence of Denis Arsenault, who was the chief Executive Officer of Organigram Holdings Inc., 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 laboratory (Aurora Cannabis Inc. ("Aurora")) and showed trace amounts of the pesticides bifenazate and malathion.

[30] Organigram's evidence is that a "lot" is cannabis harvested from plants of the same strain grown in the same room. The plants are grown, harvested, dried and packaged together. Each lot is assigned a unique identification number. A maximum of four lots is produced in the same room at the same time.

[31] On December 2, 2016, the same wholesale recipient notified Organigram that two other lots had been tested by Aurora and tested positive for bifenazate and myclobutanil. These lots and the previous lot were returned to Organigram and held in quarantine.

[32] On December 5, 2016, Organigram notified Health Canada of the results of the Aurora testing.

[33] On December 5, 2016, Organigram, in conjunction with Health Canada, initiated a voluntary recall of five lots of cannabis (the "First Recall"):

(a) Two of the lots tested positive for myclobutanil, but not bifenazate;

(b) Two of the lots tested positive for bifenazate, but not myclobutanil; and,

(c) One lot tested positive for both myclobutanil and bifenazate.

[34] The evidence disclosed that malathion is an insecticide used on agricultural food crops to control insect pests. Bifenazate is an insecticide which controls mite pests on crops. Myclobutanil is a fungicidal pesticide authorized for use in agriculture for certain crops. Neither myclobutanil, bifenazate nor malathion are one of the 14 pesticides authorized for use on cannabis plants under the *Pest Control Products Act*, S.C. 2002, c. 28.

[35] Health Canada assigns a Health Risk classification to all recalls. This is a numerical designation to describe the relative risk to human health presented by the recalled product:

> Type I: a situation in which there is a reasonable probability that the use of, or exposure to, a product will cause serious adverse health consequences or death;
>
> Type II: a situation in which the use of, or exposure to, a product may cause temporary adverse health consequences or where the probability of serious adverse health consequences is remote;
>
> Type III: a situation in which the use of, or exposure to, a product is not likely to cause any adverse health consequences.

[36] Health Canada designated the First Recall as a Type III recall.

[37] Organigram hired a third-party laboratory to test 24 lots that it had produced and sold to its clients from February to December 2016. Fifty (50) of the lots produced during that timeframe were not tested.

[38] Of the 24 lots produced between February 1st and December 16th of 2016, 21 of the lots tested positive for bifenazate and/or myclobutanil. Based on those results, Health Canada informed Organigram that Health Canada's Pest Management Regulatory Agency's health risk assessment of the results determined

that all 69 lots produced between February 1, 2016 and December 16, 2016 would undergo a Type II recall as a precautionary measure (the "Second Recall").

[39] On January 9, 2017, Organigram recalled these 69 lots. It communicated the recall to class members via email with an attached form letter. In January 2017, Organigram's Ecocert organic certification was suspended. It is not clear to this Court whether, and if so when, the organic certification was reinstated.

[40] On March 9, 2017, in response to media reports, Health Canada issued a "Clarification" on the presence of myclobutanil in medical cannabis. The "Clarification" provided, in part, as follows:

> Recently, two licensed producers undertook voluntary recalls after it was found that they had used unauthorized pesticides, including myclobutanil.
>
> The regulations are clear – licensed producers are responsible for ensuring that their products comply with the regulations. Under the *ACMPR*, licensed producers are permitted to use only the 14 pesticides that are currently approved for use on cannabis under the *Pest Control Products Act*. The use of any other pesticides, at any stage of cannabis production, is prohibited.
>
> Health Canada has already outlined many of the known health risks of cannabis use, including risks from inhalation. However, recent media reports about these recalls have suggested that there was a significantly increased risk to the health of Canadians who inhaled the recalled cannabis products, due to the release of hydrogen cyanide.
>
> Here are the facts. When the cannabis plant is combusted, a number of compounds are produced, including very low amounts of hydrogen cyanide. Health Canada's analysis of the recalled cannabis products show that the trace levels of myclobutanil that were present would have produced a negligible amount of additional hydrogen cyanide upon combustion, in comparison to the levels already produced by marijuana alone. Specifically, the level of cyanide from the burning of myclobutanil found on the cannabis samples is more than 1000 times less than the cyanide in cannabis smoke alone, and is 500 times below the acceptable level established by the U.S. National Institute for Occupational Safety and Health. As such, the risk of serious adverse health consequences resulting from the inhalation of combusted myclobutanil in the recalled cannabis products was determined by Health Canada to be low.
>
> [emphasis that of Health Canada]

[41] Organigram advised Health Canada that 1105 clients were affected by the First Recall and 3811 clients were affected by the Second Recall.

[42] In an incident report prepared by Organigram after the recalls, the following is stated:

> ...records indicate Organigram was struggling with spider mite control in February and March of 2016. Slight improvement is evident in April with noticeable improvement to a manageable level by end of May. Slight decline is management noted through the summer months but returns to very manageable levels by the Fall. Given the marked improvement we have suspicion to believe that unregistered products may have come into contact with the plants during this time-frame.
>
> [emphasis added]

[43] The incident report does not explain how the product "may have come into contact with the plants."

Organigram's Refund and Credit Program

[44] In its January 9, 2017 letter to its clients advising of the recall, Organigram asked clients to contact their client service representative if the client was still in possession of the recalled cannabis. If the client contacted Organigram's client service, they were advised to return the cannabis to Organigram if it had not been opened in which case, the client was given a full refund for the quantity of cannabis returned.

[45] In its initial communications with its clients in January 2017, Organigram offered its clients a 20% discount on their next order. For the clients who had already received a 20% discount during the First Recall, they received another 20% discount in relation to the Second Recall.

[46] In March 2017, after this action was commenced, Organigram created a compensation program for its clients. Organigram advised its clients that they were entitled to a credit equal to the amount that they spent on the recalled cannabis less any credits already applied for returned product. Clients of Organigram who had passed away or were medically unable to consume cannabis were entitled to a refund of the amount that they spent on the recalled cannabis less any credits or discounts already received. These clients, or their family members if deceased, were asked to contact Organigram's client service and provide supporting documentation. This compensation plan was originally restricted to only uninsured clients, but it was later expanded to include Organigram's insured clients.

THE EVIDENCE

[47] The plaintiffs submitted affidavits of the following individuals:

(a) Dawn Rae Downton – the proposed representative plaintiff;

(b) Rhonda Daniels – a member of the proposed class;

(c) Dr. Tee Guidotti – proposed expert witness;

(d) Richard Crossman – paralegal at the law firm of plaintiff's counsel; and

(e) Anne Tomalin – proposed expert witness.

[48] The defendants submitted affidavits of the following individuals:

(f) Cathy Cyr – Client Service Supervisor at Organigram and proposed class member;

(g) Dr. Ronald Brecher – proposed expert witness; and

(h) Denis Arsenault – the Chairman and former CEO of Organigram Holdings Inc.

The Plaintiff's Evidence

Dawn Rae Downton

[49] Ms. Downton's affidavit recites that she was prescribed medical cannabis by her physician in March 2016. In January, 2017 Organigram notified her that she purchased, and may have consumed, medical marihuana that tested positive for pesticides not registered for use on marihuana under the *Pest Control Products Act.*

[50] Ms. Downton says that she suffered adverse health consequences as a result of consuming the recalled cannabis. Ms. Downtown states that she consumed the recalled cannabis from March to October of 2016. She says she is prepared to act as a representative plaintiff and accepts the responsibilities associated with that status.

Rhonda Marie Daniels

[51] Ms. Daniels' affidavit recites that she was prescribed organic cannabis by her physician in June, 2014. In January, 2017 she received a letter from

Organigram advising that she had been identified as a client who may have consumed cannabis that tested positive for bifenazate and/or myclobutanil.

Richard Crossman

[52] Mr. Crossman indicates that he is a paralegal employed by the law firm of Wagners and Associates, counsel for the plaintiff and proposed class members. His affidavit states that the law firm has been contacted by one hundred and twenty-nine (129) individuals "expressing interest in this action."

Dr. Tee Guidotti

[53] Dr. Guidotti is a physician, resident in Washington, D.C., who is qualified as a board-certified specialist in internal medicine, pulmonary medicine and occupational medicine in the United States. Dr. Guidotti holds equivalent certification in occupational medicine in Canada and the United Kingdom. Dr. Guidotti is a Diplomate of the American Board of Toxicology and holds the Qualified Environmental Professional credential with a specialization in air quality from the Institute for Professional Environmental Practice.

[54] From 1999 to 2008, Dr. Guidotti was a tenured Professor of Occupational and Environmental Medicine at George Washington University in Washington, D.C. In 2015, Dr. Guidotti was a Fulbright Visiting Chair in Environmental Studies, University of Ottawa (Canada), Institute of Science, Society and Policy (six-month appointment). Since 2015, Dr. Guidotti has been a consultant in occupational and environmental health and medicine.

[55] Attached to Dr. Guidotti's affidavit is a report he prepared. Dr. Guidotti opines that the use of marihuana containing myclobutanil and bifenazate is "indefinable, potentially serious, and cannot be anticipated and mitigated by the user."

[56] Dr. Guidotti was cross-examined out of court and a transcript of his testimony was filed.

[57] Dr. Guidotti admitted on cross-examination that myclobutanil-free cannabis releases cyanide when combusted. However, he added that,

> It's a matter of degree. It's a matter of additional exposure on top of background as a matter of whether some of the cyanides are organic cyanides that might have

different patterns of restriction and distribution. There is a lot of unknowns, and that's why it is concerning.

Anne Tomalin

[58] Ms. Tomalin's affidavit indicates that she holds a B.Sc. degree in chemistry from York University (1980). She holds a Regulatory Affairs Certification from the Regulatory Affairs Professional Society for U.S. Regulatory Affairs (1997), European Regulatory Affairs (2001) and Canadian Regulatory Affairs (2005). She is the president of Therapeutics Products Inc. (TPIreg), a regulatory affairs consulting company she founded in 2013. TPIreg provides regulatory consulting to Health Canada in relation to new and supplemental drug submissions, product monograph updates and changes.

[59] Attached to Ms. Tomalin's affidavit is a report she prepared. Ms. Tomalin's report describes the health risk hazard classifications for Health Canada recalls and the process for evaluating risk when assigning classifications.

The Defendant's Evidence

Cathy Cyr

[60] Ms. Cyr was the client service supervisor at Organigram at the relevant time and Organigram's client case manager at the time of swearing her affidavit on March 8, 2018. Ms. Cyr was cross-examined out of court on her affidavit. Ms. Cyr is also a proposed class member.

[61] Ms. Cyr's affidavit describes Organigram's sale of medical cannabis beginning in 2016. Ms. Cyr's affidavit also attaches, as exhibits, Organigram's promotional material for clients and physicians and copies of various emails sent to Organigram's clients in January and February, 2017.

[62] Ms. Cyr indicates that Organigram tracked all client reports of adverse reactions from its cannabis. She outlines Organigram's "credit and refund program" for clients who had purchased recalled cannabis.

[63] Ms. Cyr describes the cannabis Ms. Downton and Ms. Daniels purchased from Organigram by reference to date of purchase, amount (grams), description, lot number and whether the cannabis was organic or non-organic.

[64] Ms. Cyr states that she had a medical cannabis prescription and was affected by the recall as a client. She states she had consumed a portion of the recalled cannabis prior to the recall and continued to consume the cannabis as she experienced no adverse reaction. She provides the same information about the cannabis she purchased as she did for the cannabis purchased by Ms. Downton and Ms. Daniels.

Dr. Ronald Brecher

[65] Dr. Brecher holds a Ph.D. from the University of Sussex (1981) and a B.Sc. (Honours Biochemistry) from Carleton University (1981). Dr. Brecher describes himself as a consultant in toxicology, risk assessment and risk communication. Dr. Brecher's toxicology practice focuses on:

> assessing the potential for exposure to chemicals to cause adverse effects in humans based on toxicology and related information published in scientific literature, summaries of same..., evaluation of chemicals completed by regulators (for example, Health Canada) and international bodies (for example, the International Agency for Research in Cancer).

[66] Dr. Brecher's affidavit attaches a report in which he describes how a person consumes dried cannabis, how a person consumes cannabis oil, and the factors to be considered in determining whether an individual's specific health condition is the result of myclobutanil and/or bifenazate. Dr. Brecher also provides comments on Dr. Guidotti's report.

[67] Dr. Brecher opines that it is not possible to determine if an individual plaintiff's specific health condition is the result of myclobutanil or bifenazate. He lists eight separate reasons for this opinion.

[68] Dr. Brecher says that exposure to a chemical can be estimated and the result compared to toxicity-based benchmarks (Acceptable Daily Intakes or ADI) established by the Pest Management Regulatory Agency or other agencies.

[69] Dr. Brecher says that a commonly-used method of assessing exposure to chemicals in comparison to the ADI is to calculate a "Hazard Quotient" (HQ) by dividing the estimated dose by the ADI.

[70] Dr. Brecher estimated exposure to myclobutanil and bifenazate and calculated associated HQs associated with ingestion of up to 3 grams per day of

cannabis containing up to 160 mg/kg of myclobutanil and up to 94 mg/kg of bifenazate.

[71] Dr. Brecher concludes that exposure to these substances in cannabis at the levels he evaluated is "unlikely to cause adverse effects." Dr. Brecher was cross-examined out of court on his affidavit.

Denis Arsenault

[72] Denis Arsenault is the chairperson of Organigram Holdings Inc. From March 1, 2014 to March 13, 2017 Mr. Arsenault was the chief executive officer of Organigram Holdings Inc.

[73] Mr. Arsenault's affidavit outlines the regulation of cannabis in Canada, with reference to the *MMPR* and the *ACMPR* for granting of licenses by Health Canada for the production of medical cannabis.

[74] Mr. Arsenault describes Organigram's approach to growing cannabis and outlines the circumstances leading to the First and Second Recalls. He describes the testing carried out by a third party of some of the recalled cannabis and the results of that testing.

[75] Mr. Arsenault also describes Organigram's financial results during the period of recall and what he describes as Organigram's implementation of precautionary measures taken as a result of the recalls.

ANALYSIS OF THE CERTIFICATION CRITERIA

[76] The issues for this Court to determine are as follows:

Issue 1: Do the pleadings disclose a cause of action? (s. 7(1)(a))

Issue 2: Is there an identifiable class of two or more persons that would be represented by a representative party? (s.7(1)(b))

Issue 3: Do the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members? (s.7(1)(c))

Issue 4: Would a class proceeding be the preferable procedure for the fair and efficient resolution of the dispute? (s.7(1)(d))

Issue 5: Is there a representative party who:

(i) would fairly and adequately represent the interests of the class?

(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceedings?

(iii)does not have, with respect to the common issues, an interest in conflict with the interests of other class members? (s. 7(1)(e)).

ISSUE 1:
Do the pleadings disclose a cause of action as required by s. 7(1)(a) of the *CPA*?

Certification Generally

[77] The jurisprudence clearly establishes that the *CPA* should be construed generously. In *Hollick v. Toronto (City)*, 2001 SCC 68, McLachlin C.J.C. (as she then was) described three important advantages of class actions at para. 15:

> First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.

[78] The focus at the certification stage is the form of the action, i.e., whether the matter is appropriately prosecuted as a class action, not whether the claim is likely to succeed: *Hollick* at para. 16.

[79] The plaintiff in a proposed class proceeding must show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading discloses a cause of action: *Hollick* at para. 25.

[80] The class representative must adduce sufficient evidence to support certification, and the opposing party may respond with evidence of its own to challenge certification: *Hollick* at para. 22.

[81] This Court must determine whether the pleadings disclose a cause of action, as required by s. 7(1)(a), based solely on the Claim.

[82] For the purposes of certification, it is only necessary to disclose a single cause of action to satisfy s. 7(1)(a). However, a certification judge should evaluate all of the causes of action pleaded as determination of which causes of actions are bound to fail based on the "plain and obvious" test, will necessarily determine the scope of the common issues to be certified: *Morrison Estate v. Nova Scotia (Attorney General)*, 2011 NSCA 68 (N.S.C.A.) at para. 40.

[83] This Court is to assume all facts pleaded to be true, and give the claim a generous interpretation in light of the fact that deficiencies may be addressed by amendments (*MacQueen v. Sydney Steel Corp.*, 2013 NSCA 143 (N.S.C.A.)).

[84] In *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143, the Nova Scotia Court of Appeal confirmed that the *CPA* is procedural, not substantive:

> [53] The CPA is procedural not substantive. It does not relax the standard that pleadings must disclose a cause of action on their face. The test is not onerous. Pleadings are adequate provided that it is not "plain and obvious" that the cause of action will fail, … .

...

> [54] The respondents rightly argue that pleadings must be read generously to allow for inadequacies owing to drafting frailties and the respondents' lack of access to documents and discovery... . But two cautionary notes warrant mention here. First, the Statement of Claim has already been amended numerous times and ample opportunity has been afforded the respondents to plead correctly. Second, the generosity of interpretation counselled by *Hunt* ([1990] 2 S.C.R. 959 at p. 980) does not overcome pleaded facts inconsistent with the underlying cause of action and cannot supply factual omissions in such pleadings. For example, in *Imperial Tobacco* (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC), Chief Justice McLachlin emphasised the need to plead facts necessary to a cause of action:
>
> > [24] This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action it is asserting. If new developments raise new possibilities – as they sometimes do – the remedy is to amend the pleadings to plead new facts at that time.

[85] Organigram does not dispute that the following pleaded causes of action are viable:

(a) Negligent manufacturing;

(b) Breach of contract;

(c) Breach of the *Consumer Protection Act*;

(d) Breach of the *Sale of Goods Act*;

(e) Waiver of tort.

[86] However, Organigram argues that the Claim does not disclose a cause of action for negligent design, development and testing; negligent distribution, marketing and sale; breach of the *Competition Act* and unjust enrichment.

[87] I note that the Claim contains a cause of action for breach of the *Food and Drugs Act*, R.S.C. 1985 c. F-27. However, in submissions on the motion, the plaintiff's counsel asked this Court for leave to amend the Claim to remove this cause of action. Leave is granted.

[88] In *Canada (Attorney General) v. MacQueen*, (*supra*) the Nova Scotia Court of Appeal noted that the failure to plead facts material to a cause of action, may well result in the pleading being struck:

> [55] The failure to plead all facts material to a cause of action will usually result in a striking out of the pleading. In *3021386 Nova Scotia Ltd. v. Barrington (District)*, 2010 NSSC 173 (CanLII), Justice Duncan cited English and Canadian authorities:
>
> > [15] The defendants have submitted legal authority as to the consequences of the failure to plead a material fact, which is central to certain of their arguments. In *Bruce v. Odhams Press Ltd.*, [1936] 1 K.B. 697, at pp. 712-713, 1 All E.R. 287 at pp. 294-295, Scott, L. J. wrote:
> >
> > > The cardinal provision in rule 4 is that the statement of claim must state the material facts. ***The word "material" means necessary for the purpose of formulating a complete cause of action; and if any one "material" statement is omitted, the statement of claim is bad***; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under RSC Ord XXV, r 4 (see Philipps v Philipps); or a further and better statement of claim may be ordered under rule 7.
> >
> > [16] The defendants rely on the decision of Rosenberg J. in *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 1990 CanLII 6761 (ON SC), 12 O. R. (3d) 750, at para. 5, where he held that:
> >
> > > Under rule 25.06, the plaintiff must plead all material facts on which it relies and must plead all of the facts which it must prove to establish a cause of action which is legally complete. ***If any material fact is omitted, the statement of claim is bad and the remedy is the motion to strike the pleading, not a motion for particulars.*** [emphasis of the Court of Appeal]

[89] I will address each of the causes of action which Organigram says are not properly pleaded in turn:

(a) Negligent design, development and testing;

(b) Negligent distribution, marketing and sale;

(c) Breach of s. 52 of the *Competition Act*;

(d) Unjust enrichment.

(a) Negligent design, development and testing

[90] At para. 38 of the Claim, the plaintiff pleads as follows:

> 38. Organigram owed a duty of care to the Plaintiff and the Class to use reasonable care in designing, developing and testing the Affected Product. Organigram breached the applicable standard of care by negligently designing, developing and testing the Affected Product.

[91] Paragraph 38 pleads that Organigram's negligence includes establishing inadequate controls within its facility to ensure that unauthorized pest control products were not used; inadequately developing or implementing, or failure to develop or implement, quality control measures to ensure that the components used in the manufacture of Organigram's organic products corresponded with their description and were free of any prohibited contaminants or substances. The plaintiff also pleads that Organigram inadequately developed or implemented, or failed to develop or implement, reasonable testing or screening procedures to ensure prompt detection in its products of any prohibited pesticides, contaminants or substances.

[92] Organigram says that insufficient facts were pleaded to support a duty of care in negligent design, development and testing.

[93] Organigram refers to the decision of Horkins J. of the Ontario Court of Justice, in *Martin v. Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744. Horkins J. found that the plaintiff had failed to plead the necessary elements of the tort of negligent design, development and testing:

> [136] Aside from the problem that this is a vague and bare pleading, it lacks important elements that are necessary for such a claim to survive. The plaintiffs do not identify the alleged design defect, nor do they plead that a safer and economically feasible alternative to Seroquel would have been adopted but for the defendants' negligence. Indeed, they do not even plead that a safer and economically feasible alternative to Seroquel exists. Instead, the plaintiffs simply plead that the risk associated with Seroquel for the "new onset of diabetes is 3.34 times higher than older drugs used to treat schizophrenia such as "Haldol." There is no pleading of any alternative medicine that is safer and economically feasible to manufacture.

> [137] These deficiencies are fatal. The statement of claim does not disclose sufficient material facts to sustain a cause of action for negligent design. The essential elements of this cause of action are set out in *Kreutner v. Waterloo Oxford Co-operative Inc.* (2000), 2000 CanLII 16813 (ON CA), 50 O.R. (3d) 140 (C.A.) at para. 8 as follows:
>
> > For the purpose of this appeal, it is unnecessary to state definitively the ingredients of a claim based on the defective design of a product. However, to succeed in this case the plaintiffs are required to identify the design defect in Sherwood's valve, establish that the defect created a substantial likelihood of harm and that there exists an alternative design that is safer and economically feasible to manufacture: *Rentway Canada Ltd. v. Laidlaw Transport Ltd.* (1989), 49 C.C.L.T. 150, 16 M.V.R. (2d) 86 (Ont. H.C.J.), affirmed [1994] O.J. No. 50 (C.A.).
> >
> > [138] Liability for negligent "development" and "testing" also requires the plaintiff to plead that a safer alternative to Seroquel would have resulted but for the defendants' negligence. However, no such facts are pled in the statement of claim. This point is stated in *Baker v. Suzuki Motor Co.*, [1993] A.J. No. 605 (Q.B.) at para. 75 as follows:
> >
> > However, the absence of testing alone cannot be proof of negligence unless the tests, had they been done, would have enabled the manufacturer to design the motorcycle in such a way that the fire would not have occurred. Without this type of evidence, this allegation of negligence must fail.
>
> [emphasis added]

[94] The negligence allegations in this case do not easily match with the circumstances of most negligent design cases. Design defect is not a manufacturing error, but an error in the design of the product. The question is often whether a different design ought to have been used by the manufacturer.

[95] The plaintiff says that the design defect is the presence of the unauthorized pesticides in the recalled cannabis and that the safer alternative is a product that does not contain unlawful pesticides.

[96] I note that Mr. Arsenault's evidence provided that after the recalls Organigram commenced testing for pesticides on every lot of product with a third-party laboratory.

[97] Reading these allegations generously, it is not plain and obvious that the claim in negligent design, development and testing will fail. The pleading discloses a cause of action.

(b) Negligent distribution, marketing and sale

[98] Paragraphs 41 and 42 of the Claim plead a cause of action in negligent distribution, marketing and sale. The plaintiff alleges that Organigram owed a duty of care to her and class members to only distribute, market and sell medical cannabis that was compliant with the *ACMPR* and free from unauthorized pesticides. The plaintiff also pleads that Organigram had a duty to inform class members in a transparent and timely manner that the recalled cannabis was not compliant and that its consumption may have exposed them to physical harm.

[99] Organigram says that the plaintiff's pleading of the tort of negligent distribution, marketing and sale is deficient, "as it does not include material facts establishing that the critical element that the alleged defect in the cannabis outweighed the value of its use." Organigram also says that much of the claim framed as negligent distribution, marketing and sale is effectively a claim for negligent misrepresentation, which it says has not been properly pleaded.

[100] Once again, Organigram relies upon the decision of Horkins J. of the Ontario Superior Court of Justice in *Martin v. Astrazeneca Pharmaceuticals Plc* (*supra*), where Horkins J. found that the plaintiff had failed to properly plead the essential elements of a claim in negligent design, development and testing.

[101] *Martin v. Astrazeneca Pharmaceuticals Plc* concerned the design of the drug, seroquel. On the certification motion, Horkins J. determined that it was inappropriate in describing the cause of action to join allegations of negligent design and negligent manufacture into a single claim of negligence:

> The statement of claim does not distinguish between these different negligence claims. Rather, it lumps them all together as negligence and provides particulars for this broad group. The plaintiffs wrongly assume that these distinct activities are identical and can be thrown into one single cause of action. As I explain below, these different forms of negligence are not the same. Therefore, to allege one cause of action is a flawed approach. (para. 130)

[102] In the within case, the plaintiff has distinguished between, and independently pleaded, the different negligence claims.

[103] The plaintiff's claim in negligent distribution, marketing and sale alleges what Organigram's marketing materials stated to clients, what warranties were made and says that they were inaccurate. (paras. 3, 4, 6, 7, 8, and 10 of the Claim). The plaintiff has pleaded that the recalled cannabis contained unauthorized pesticides and was unsafe and harmful to the health of the plaintiff and class members (paras. 12, 41 and 42 of the Claim). The plaintiff also pleaded that Organigram made representations as to the safety and fitness of its medical cannabis, when it knew or ought to have known that these representations were false (para. 42). The Claim also alleges a causal connection between Organigram's negligence and the alleged damages (paras. 19 and 13).

[104] Organigram, relying on the decision of Horkins J. in *Martin v. Astrazeneca Pharmaceuticals PLC*, says that the plaintiff has not pleaded that the recalled cannabis's propensity to injure outweighed the value of its use and that this is a critical element of any negligent distribution, marketing and sale claim.

[105] In *Martin v. Astrazeneca Pharmaceuticals Plc*, Horkins J. refers to the decision of the British Columbia Court of Appeal in *Harrington v. Dow Corning Corp.*, 2000 BCCA 605 at paras. 42-43 and 45, (leave to appeal to S.C.C. refused, [2001] S.C.C.A. No 21) as follows:

> At the risk of oversimplifying a complex decision-path, I venture to suggest the first step in every products liability case alleging negligent design, manufacture, or marketing is the determination of whether the product is defective under ordinary use or, although non-defective, has a propensity to injure. Some American authorities refer to this step as "general causation", whether a product is capable of causing the harm alleged in its ordinary use.
>
> The second step is the assessment of the state of the manufacturer's knowledge of the dangerousness of its product to determine whether the manufacturer's duty was not to manufacture and distribute, or to distribute only with an appropriate warning. It may be prudent to refer to this as an assessment of the state of the art; it may be that a manufacturer did not but should have known of its product's propensity for harm.
>
> If the value of the product's use outweighed its propensity to injure such that distribution with a warning was appropriate, the third step will be an assessment of the reasonableness of the warning (whether direct or by a learned intermediary) given the state of the art and the extent of the risks inherent in the product's use.

[106] The sole authorities that Organigram points to as supporting its contention that the plaintiff did not properly plead the tort of negligent distribution, marketing

and sale are *Martin v. Astrazeneca Pharmaceuticals Plc* and *Harrington v. Dow Corning Corp.*

[107] In *Harrington v. Dow Corning Corp.* the plaintiffs proposed the certification of a class action against the manufacturer and supplier of silicone breast implants. The claim alleged that these implants caused complications and systemic disease and that given the risks of the implementation of these devices, they should not be manufactured or marketed for use in the human body. Alternatively, the plaintiffs claimed that the manufacturer and distributer were under a duty to warn potential customers of the harm inherent in the use of the implants.

[108] The kind of risk-benefit analysis conducted by the Courts in those cases, simply does not apply to the facts before this Court. It is not necessary for the plaintiff to plead material facts establishing the medical cannabis containing pesticides "outweighed the value of its use." The pesticides were unauthorized and contrary to the *ACMPR* and should not have been present.

[109] Reading the pleading generously, I find that the plaintiff has pleaded the material facts required to allege a cause of action in negligent distribution, marketing and sale.

(c) Breach of s. 52 of the *Competition Act*

[110] Section 52 of the *Competition Act* provides as follows:

> 52(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

[111] At paras. 48-52 of the Claim, the plaintiff pleads that Organigram knowingly or recklessly made false and misleading representations to class members.

[112] The plaintiff pleads that these representations include stating that the recalled product was free from unauthorized pesticides, compliant with the *ACMPR*, and a safe product for patients while "failing to inform them of the human health risks" associated with consumption of the recalled product (para. 48).

[113] The plaintiff pleads that Organigram's representations were material and affected the decisions of the plaintiff and class members to purchase the "purportedly organic" cannabis.

[114] The plaintiff pleads that the plaintiff and class members have suffered damages as a result of the above-noted representations.

[115] Section 52 is contained in Part VI of the *Competition Act* (Offences in Relation to Competition).

[116] Subsection 36(1) creates a statutory cause of action for any person who has suffered loss or damages for breach of s. 52(1):

> 36(1) Any person who has suffered loss or damage as a result of conduct that is contrary to any provision of Part VI, or the failure of any person to comply with an order of the Tribunal or another court under this Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

[117] Organigram argues that s. 52 of the *Competition Act* only applies to representations, not omissions or inferences.

[118] In *Arora v. Whirlpool Canada LP.*, 2013 ONCA 657, aff'g 2012 ONSC 4642, leave to appeal to the S.C.C. refused, [2000] 2 S.C.R. 860, the plaintiffs alleged that Whirlpool breached s. 52 of the *Competition Act* because it allegedly made false and misleading representations. The plaintiffs alleged that Whirlpool's failure to advise consumers of a washing machine's inability to adequately self-clean constituted a misrepresentation by omission and that Whirlpool violated ss. 36 and 52 of the *Competition Act*. The plaintiffs also pleaded that they relied on the misrepresentations and would not have purchased the washing machines but for the misrepresentations.

[119] The motions judge noted that the appellants relied on a representation by omission. The motions judge acknowledged that to be actionable, a representation need not be verbal. At para. 195 Perell J. noted:

> [195] In some circumstances, silence is communicative of meaning, but as a general rule, however, silence is not a representation, unless there is a duty of care, a statutory duty to disclose, or a fiduciary duty to speak…

[120] Perell J. referred to, and agreed with, the decision of Strathy, J. in *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 (aff'd on other grounds 2012 ONSC 3692). In *Williams*, the court held that there was no violation of s. 52 of the *Competition Act* because s. 52 required that there be a "representation", and the failure to disclose cannot be a "representation" (para. 227).

[121] Hoy A.C.J.O. upheld the decision of Perell J. in *Arora v. Whirlpool Canada* determining that the failure to disclose the alleged defect in the washing machines was not a "representation" for the purpose of s. 52 of the *Competition Act*.

[122] Paragraph 48(c) of the Claim refers to Organigram's failure to inform members of the public of the human health risks associated with consumption of the recalled cannabis. I agree that this is a claimed omission on Organigram's part. It is not a representation for the purpose of s. 52 of the *Competition Act* and cannot succeed.

[123] However, paras. 48(a) and (b) of the Claim contain allegations relating to misrepresentations, not to omissions.

[124] Organigram also says that, in addition, it is well established that the plaintiff is required to prove reliance in order to recover under s. 36 of the *Competition Act.*

[125] The plaintiff's counsel agreed in submissions on the motion that reliance is a required element under s. 36. However, she notes that while the word "reliance" is not used explicitly in relation to the pleading, para. 49 of the Claim effectively pleads reliance:

> 49. Organigram's representations were material and affected the decisions of the Plaintiff and class members to purchase the purportedly organic Affected Product.

[126] This Court agrees that reliance has, in effect, been pleaded. However, if I am wrong in that regard, I will permit the plaintiff to amend the Claim to specifically plead reliance in connection with the alleged breach of the *Competition Act.*

[127] The plaintiff also pleaded that Organigram's alleged misrepresentations were in breach of s. 52(1.1) of the *Competition Act.*

[128] Organigram says that section 52(1.1) of the *Competition Act* does not apply to civil claims. However, in *Go Travel Direct Inc. v. Maritime Travel Inc.*, 2009

NSCA 42, the Nova Scotia Court of Appeal held that s. 52(1.1) applies to civil claims under s. 36 of the *Competition Act* (para. 64).

[129] With the amendment that I have allowed to plead reliance, I find that the material facts required to allege a breach of the *Competition Act* have been pleaded.

(d) Unjust Enrichment

[130] The parties agree that the established requirements for unjust enrichment were set out by the Supreme Court of Canada in *Garland v. Consumers Gas Co.*, 2004 SCC 25:

> [30] As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pettkus v. Becker*, 1980 CanLII 22 (SCC), [1980] 2 S.C.R. 834, at p. 848; *Peel (Regional Municipality) v. Canada*, 1992 CanLII 21 (SCC), [1992] 3 S.C.R. 762, at p. 784).

[131] The Court in *Garland* went on to list the established categories of juristic reasons:

> [44] The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> [emphasis added]

[132] The plaintiff pleads unjust enrichment at paras. 61-62 of the Claim. Organigram says that the claim is not viable as there was a contract between Ms. Downton and Organigram.

[133] The Claim pleads that Ms. Downton and the class members paid money for purportedly compliant medical cannabis and Organigram sold them the recalled cannabis containing unauthorized pesticides. The plaintiff pleads that Organigram obtained the enrichment through its own wrongdoing and that there is no juristic reason, contract, disposition or other justification for the enrichment since the recalled cannabis was not authorized to be sold to class members.

[134] Counsel for the plaintiff submits that the facts and necessary elements to support a claim of unjust enrichment have been pleaded. Plaintiff's counsel says that whether or not a contract provides a juristic reason for Organigram's alleged unjust enrichment involves a merits investigation into the terms of the contract, i.e., whether the contract was valid and whether Organigram's reliance on the contract as providing a juristic reason is vitiated by failing to deliver the product the plaintiff and class members contracted to receive. Plaintiff's counsel says that that kind of assessment of the merits cannot be performed at the certification motion.

[135] I decline to take the restrictive approach proposed by Organigram which would mean that the merits of its contention that there was a juristic reason (contract) for the alleged enrichment of Organigram would be determined on the merits in this motion for certification.

[136] I find that the pleadings disclose a cause of action for unjust enrichment.

CONCLUSIONS ON ISSUE 1

[137] The pleadings disclose a cause of action in negligent design, development, and testing; negligent distribution, marketing and sale; and, in unjust enrichment. Organigram has agreed that the following pleaded causes of action are viable: negligent manufacturing; breach of contract; breach of the *Consumer Protection Act*; breach of the *Sale of Goods Act;* and, waiver of tort.

[138] The plaintiff may amend the Claim to delete the applicable pleadings alleging a breach of the *Food and Drugs Act* and may amend the Claim to specifically plead reliance in connection with the alleged breach of the *Competition Act.*

ISSUE 2:
Is there an identifiable class of two or more persons that would be represented by a representative party? (*CPA* s. 7(1)(b))

[139] There is no dispute that there are two potential class members, Ms. Downton and Ms. Daniels.

[140] As noted earlier in this decision, the plaintiff proposes to define the class as follows:

> All persons and entities who purchased Organigram cannabis for medical purposes that has been the subject of a voluntary or involuntary recall as at the date of the order certifying the action.

[141] The standard of proof required with respect to the issue of an identifiable class was confirmed by Rothstein J. in *Pro-Sys-Consultants* at para. 99:

> 99 . . . the class representative must show some basis in fact for each of the certification requirements set out in . . . the Act, other than the requirement that the pleadings disclose a cause of action . . .
>
> [emphasis in original]

[142] The defendants say that the proposed class definition is problematic for two reasons: (1) it is too broad; and (2) the plaintiff has failed to put forward any evidence to show commonality among the recalled cannabis purchased by members of the proposed class.

[143] The purpose of the class definition is threefold: (a) it identifies those persons who have a claim for relief against a defendant; (b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and lastly, (c) it describes who is entitled to notice pursuant to the *CPA*: *Bywater v. Toronto Commission*, [1998] O.J. No. 4913, (Ont. Gen. Div.) at para 10.

[144] The plaintiff notes that there is no distinction in the class definition between the purchasers who paid 100% out of their own pockets, or those who may have been reimbursed by Veteran Affairs Canada or private insurers for their purchases.

[145] The requirements of s. 7(1)(b), i.e., that "there is an identifiable class of two or more persons that would be represented by a representative party" were

discussed by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38:

> While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: ...
>
> [emphasis added]

[146] The Supreme Court of Canada in *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.), determined that the plaintiff must show a "rational relationship" between the class and the common issues (para. 18).

[147] In *Hollick*, the claim was against the City of Toronto for damages arising from noise and pollution. The proposed class contained 30,000 residents who lived in a defined geographic area, in the vicinity of a landfill owned and operated by the city.

[148] In terms of whether the proposed class met the requirement that there be a rational relationship between the proposed class and the common issues, McLachlin C.J.C., as she then was, stated:

> 20 The respondent is of course correct to state that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues. Little has been said about this requirement because, in the usual case, the relationship is clear from the facts. In a single-incident mass tort case (for example, an airplane crash), the scope of the appropriate class is not usually in dispute. The same is true in product liability actions (where the class is usually composed of those who purchased the product), or securities fraud actions (where the class is usually composed of those who owned the stock). In a case such as this, however, the appropriate scope of the class is not so obvious. It falls to the putative representative to show that the class is defined sufficiently narrowly.
>
> 21 The requirement is not an onerous one. The representative need not show that *everyone in the class shares the same interest in the resolution of the asserted*

> *common issue*. There must be some showing, however, that the class is not *unnecessarily* broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended: see W. K. Branch, *Class Actions in Canada* (1998) § 4.205; *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (Ont. S.C.J.) (claim for compensation for wrongful dismissal; class definition overbroad because included those who could be proven to have been terminated for just cause); *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.)) (claim against school for misrepresentations about marketability of students after graduation; class definition overinclusive because included students who had found work after graduation).
>
> [emphasis (underlining) added]

[149] In oral submissions before this Court, the plaintiff's counsel submitted that based on the recall of the cannabis, there were 4,000 to 5,000 potential class members.

[150] Organigram produced evidence that of the 74 recalled lots of cannabis product, it had tested 24 of the 74 lots, i.e., 50 lots were not tested. Of the 24 lots that were tested, four (4) lots had no detectable levels of myclobutanil or bifenazate; three (3) lots had "trace amounts" of myclobutanil, but no detectable levels of bifenazate; six (6) lots had "trace amounts" of bifenazate, but no detectable levels of myclobutanil; and eleven (11) lots had "trace amounts" of both bifenazate and myclobutanil.

[151] Organigram says that this shows that there was not commonality among the 74 lots of recalled cannabis and therefore, there is not a clear relationship between the proposed class and the common issues.

[152] Organigram says that the proposed class definition could include clients who purchased the recalled cannabis, but that cannabis did not contain either myclobutanil or bifenazate or, included one at trace levels but not the other at all. The client may also have purchased and consumed recalled cannabis that was not tested.

[153] These arguments, in my view, are without merit at this stage. It may well be the case that not all class members stand to recover damages, including because the cannabis they purchased and consumed was one of the four (4) lots tested which was found to contain no detectable levels of myclobutanil or bifenazate. However,

that does not detract from the objective criteria set forth in the proposed class definition.

[154] The issue raised by Organigram with respect to the likelihood that the proposed class definition would include individuals who consumed the cannabis using different methods – ingestion, smoking, vaping and possibly other methods and therefore there is not a clear relationship between the proposed class and the common issues is, in my view, an argument better aimed at whether the plaintiff has satisfied the common issues criterion.

[155] Further, if during the course of the litigation, the method of the consumption, i.e., ingestion versus inhalation becomes relevant, subclasses could be formed. Section 16 of the *CPA* provides the Court with a wide latitude to address issues such as the formation of subclasses.

[156] Further, the method of consumption is not relevant to the plaintiff's consumer claims. Compensation for personal injury arising from consumption of the recalled product is only one of the various remedies sought by the plaintiff.

[157] I find that the proposed definition is objective and can be established by the records of Organigram. The definition clearly allows for the identification of individuals with potential claims. I agree with the submission of the plaintiff's counsel that it can be ascertained whether or not an individual is a class member independent of the outcomes of any substantive issues in the litigation.

[158] There is a rational relationship between the criteria and the common issues asserted by all class members.

[159] I agree with counsel for the plaintiff that any concern that the definition may capture an unrelated recall occurring prior to certification is hypothetical at this stage. If the concern materializes as a result of a further, unrelated recall, it can be addressed, including by way of a clarifying amendment.

[160] Finally, I note that the fact that the proposed class may include persons who ultimately will not have a claim against the defendants is not fatal. As noted by MacDonald J. in *Boulanger v. Johnson & Johnson Corp.* 2007 CanLII 735 (ONSC), this principle was affirmed by Winkler J. in *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para. 10. Macdonald, J. stated as follows at para. 22:

> In *Bywater*, Winkler J. accepted a proposed class that included people who suffered no damage and would therefore be unable to establish liability against the defendant. This leads me to the conclusion that, at this stage of the class proceeding, the court should not place undue emphasis on the fact that some or many members of the proposed class will be unable to establish liability against the defendants.
>
> [emphasis added]

[161] I conclude that there is an identifiable class of two or more persons that would be represented by a representative party.

ISSUE 3:
Do the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting individual class members? (s. 7(1)(c) of the *CPA*)

The Relevant *CPA* Provisions

[162] The *CPA* defines "common issues":

> **Interpretation**
>
> 2 In this Act,
>
> ...
>
> (e) "common issues" means
>
> (i) common but not necessarily identical issues of fact, or
>
> (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[163] Section 10 of the *CPA* provides further direction:

> **Certain matters not bar to certification**
>
> 10 The court shall not refuse to certify a proceeding as a class proceeding by reason only that
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;

(d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable; or

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members. 2007, c. 28, s. 10.

General Principles Relating to Common Issues

[164] The essential question in assessing whether the Claim raises common issues is whether certifying the class will avoid duplication of fact finding or legal analysis.

[165] The Supreme Court of Canada in *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, elaborated on principles governing proposed common issues at paras. 44-46. The Court concluded that:

> (a) the question can be common even if the answer given to the question might vary from one member of the class to another;
>
> (b) the question will be considered common if it advances the resolution of every class member's claim, although a "varied and nuanced" answer may be required based on the circumstances of each class member; and
>
> (c) a common question does not require an identical answer for all members of the class or even that the answer benefits each of them to the same extent. It is sufficient that the answer to the question does not give rise to conflicting interest among class members.

[166] In this case, Ms. Downton and Ms. Daniels provided affidavits describing certain common experiences with the recalled cannabis.

[167] As noted by the Nova Scotia Court of Appeal in *Capital District Health Authority v. Murray*, 2017 NSCA 28 at para. 43, "Sections 14, 30 and 31 [of the *CPA]* provide that the common issues be determined together, with individual or other issues to be determined later by separate trials if necessary."

[168] The Court of Appeal in *Capital District Health* (paras. 47) endorsed the following summary provided by Winkler, *The Law of Class Actions in Canada*, pp. 109-11as to the common issue requirement:

> [47] The underlying critical ingredient of a common issue is whether the resolution of the common issue will avoid duplication of fact-finding or legal analysis. It is not necessary that all or even a majority of the questions of law or fact of the class members be identical, similar or related. What is required is that the claims of the members raise some questions of law or fact that are sufficiently similar or sufficiently related that their resolution will advance the interests of the class, leaving individual issues to be litigated later in separate trials, if necessary. It is generally appropriate to include possible defences among the common issues only when they rise to the level of making a subclass necessary.
>
> ...
>
> A common issue need not dispose of the litigation, nor does it need to be one that is determinative of liability. It is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class. Further, an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. The number of individual issues compared to common issues is not a consideration in the commonality inquiry, although it is a factor in preferability assessment. ...
>
> ...
>
> For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim. The focus of the analysis is not on how many individual issues there might be, but on whether there are issues the resolution of which would be necessary to resolve each class member's claim.
>
> [emphasis added]

[169] The Court of Appeal cautioned, however, (para. 48) that the "nature and prolixity of individual issues may defeat the guiding objective to avoid duplication. Then pragmatism will not avail and a class proceeding is inexpedient." In that regard, the Court of Appeal referred to the decision of the Supreme Court of Canada in *Rumley v. British Columbia*, 2001 SCC 69 where Chief Justice McLachlin stated:

> 29 There is clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms. As I discussed in *Western Canadian Shopping Centres, supra*, at para. 39, the guiding question should be the practical one of "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual

> proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.

[170] The Supreme Court of Canada has said that the common issues requirement is not a high legal hurdle, but a plaintiff must advance some evidence to show that there is a basis in fact that issues are common: *Hollick* at para. 25.

[171] With that review of the law, I turn to the arguments advanced by the parties.

Commonality Alleged by The Plaintiff

[172] The plaintiff groups the proposed common issues as "Liability Common Issues" and "Remedy Common Issues."

[173] The plaintiff says that the element of commonality of issues is evident. She contends that the common issues arise from the Recalls of the medical cannabis, uniformly experienced by all class members. A large focus of the plaintiff's common issues is the conduct and alleged liability of Organigram which she says will be determined at a trial independent of findings of fact relating to individual class members. The plaintiff says that the determination of the common issues will not require the evidence of individual class members and resolving these issues will significantly advance the litigation for all class members, thus avoiding duplication of fact-finding and legal analysis.

[174] The plaintiff says that the factual and legal issues outlined in the Liability Common Issues are necessarily identical for each class member and are rooted in Organigram's knowledge and conduct. She says that the conduct of Organigram was uniform and indistinguishable in relation to each class member.

[175] The plaintiff says that no class member can prevail without resolving the proposed common issues relating to Organigram's liability.

[176] The plaintiff allows that if these common liability issues are resolved in her favour, there may remain a specific causation issue in relation to the issue of damages for personal injury (being but one form of compensation sought in the action). The plaintiff says that the potential for remaining individual issues, after the resolution of the Common Liability Issues, does not detract from the commonality of the liability issues and thus the utility of a class action. The plaintiff refers to the decision of the Supreme Court of Canada in *Dutton* (*supra*)

where the Court noted that a key principle of class actions is that resolution of the common issues need not be determinative of each class member's claim (para. 39).

[177] As detailed earlier in this decision, the plaintiff says that Organigram was negligent, resulting in three proposed common issues relating to (a) negligent design, development and testing; (b) negligent manufacturing; and (c) negligent distribution, marketing and sale.

[178] The Defendants strenuously argue that the commonality criterion has not been met. They rely on *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 (Ont. S.C.J.).

[179] In *Williams*, Strathy J. held that there were no common issues as there was no evidence that an alleged defect in a camera was common among some 20 different camera models manufactured by the defendant Canon:

> [262] The obstacle to certification of the proceeding is the absence of admissible evidence to show that the plaintiffs' claims give rise [*sic*] common issues of fact. As I have noted, there is no evidence to show that the E18 error message displayed by the plaintiffs' cameras is caused by a defect. Nor is there evidence to show that the answer to this question can be extrapolated from the plaintiffs' cameras to the Cameras of the class in such a way as to advance resolution of very class member's claim.
>
> ...
>
> [264] Moreover, there is no evidence that liability for the defect, if there is one, in the twenty Canon PowerShot models referred to in the statement of claim, can be determined on a common basis. The evidence of Mr. Hieber is that while there is a similarity in the basic design of the PowerShot cameras and the cameras have some common features, there are differences in their design and construction. There is no evidence to show that the similarities are such that the causes of the E18 Error can be determined on a common basis.
>
> [emphasis added]

[180] Organigram also refers to *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (B.C.C.A.). That case dealt with a large number of gas tanks that were allegedly improperly positioned on many different kinds of trucks and models over a number of years. Certification was denied on the basis of a lack of commonality.

[181] This Court notes that these cases are easily distinguished from the facts before this Court which deal with the recall of cannabis, for the same reason, over

a short period of time. The products at issues in the *Williams v. Canada* and *Ernewein v. General Motors* decision did not share that commonality.

Liability Common Issues

[182] Common issues 1-8 focus on Organigram's knowledge and conduct which the plaintiff says was indistinguishable in relation to each class member. The plaintiff says that no class member can prevail if these common issues are not resolved in their favour.

Proposed Common Issues 1-3 – Negligence

[183] Common Issues 1-3 raise issues of negligence. The plaintiff alleges that Organigram was negligent, resulting in proposed common issues relating to:

1. Negligent design, development and testing;
2. Negligent manufacturing; and
3. Negligent distribution, marketing and sale of the recalled cannabis.

[184] In order to be successful in a claim of negligence, the plaintiff will have to establish the following:

1. Organigram owed her a duty of care;
2. The alleged negligent acts or omissions of Organigram;
3. That Organigram's conduct breached the requisite standard of care; and
4. That she suffered loss or damage as a result.

[185] A resolution of these common negligence issues could substantially advance the proceeding for all class members.

General Causation

[186] Organigram focuses on the question of general causation. It contends that although the plaintiff has not proposed general causation as a common issue, causation is nonetheless embedded as an essential element in the common issues which the plaintiff has proposed.

[187] The plaintiff emphasizes that her claim and the claims of class members includes a claim for damages for personal injury but says that that is just one aspect of the claim.

[188] In terms of general causation, the plaintiff says that the resolution of the general causation question – whether myclobutanil and/or bifenazate are capable of causing temporary and/or serious adverse health consequences when consumed on medical marihuana, will resolve but one aspect of the claims of class members – Proposed Remedy Common Issue 9(d). [This Court renumbered Common Issue 7 (breach of consumer protection legislation) as 6, Common Issue 8 (breach of sale of goods legislation) as 7, Common Issue 9 (unjust enrichment) as 8, and Common Issue 10 (remedies) as 9 with the withdrawal of former Common Issue 6 (breach of the *Food and Drugs Act.*] Causation is not part of the claims alleging statutory breaches or the Claim in unjust enrichment.

[189] The plaintiff says that resolution in favour of the class members would permit them, after the common issues trial, to show specific causation of, and obtain compensation for, harm they have experienced caused by their consumption of the recalled cannabis.

[190] On the other hand, the plaintiff acknowledges that if general causation is not proven on a balance of probabilities at the common issues trial, it brings the plaintiff and class members' claims for compensation for personal injury to an end, leaving the consumer claims for economic damages and/or restitution to remain to be determined.

[191] Certification is not the forum to resolve conflicts in the evidence or to engage in assessing evidentiary weight.

[192] This was clearly stated by the Nova Scotia Court of Appeal in *Wright Medical Technology Canada Ltd. v. Taylor*, 2015 NSCA 68 at para. 47:

> Judges faced with certification applications must be very careful in their assessment of the evidence called by either the proposed plaintiff or the proposed defendant. Obviously the factual assertions presented by each side must be fairly considered in order to decide whether the plaintiff has met the burden of showing some basis in fact for each of the statutory criteria under the Act.. That evaluation by the judge needs to be more than a mere perfunctory exercise. It must rise above a superficial analysis amounting to little more than symbolic scrutiny. However, the judge must not veer into an evaluation of the merits of the claim, or the probative weight of the evidence said to support it, or the potential for success. To

> me, obliging a motions judge to embark upon such a detailed, comparative analysis would run afoul of Justice Rothstein's very clear directions in *Pro-Sys* which prohibit "the finely calibrated assessments of evidentiary weight". See as well, *Dell'Aniello c. Vivendi Canada Inc.*, 2014 SCC 1 (CanLII), at 69-70.

[193] In *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260 (B.C.C.A.), the British Columbia Court of Appeal dismissed an appeal from the motion's judge decision to certify a class action. The case involved whether estrogen-progestin therapy could be said to cause or contribute to breast cancer. The Court of Appeal noted that a plaintiff's proving that a medical treatment has a causal connection with damages is unlike being hit by a car and suffering a broken bone, because in the case of medical treatments, the plaintiff must first prove general or generic causation, i.e., that the drug or device has the potential to cause harm and then the plaintiff must prove specific or individual caution; i.e., that the potential for harm was actualized.

[194] Organigram argues that there is no evidence to permit this Court on certification to access whether the question of a breach of a duty of care can be answered on a class-wide basis. It refers to the decision of Wood J. of the Nova Scotia Supreme Court in *Sweetland v. GlaxoSmithKline Inc.* 2016 NSSC 18. In that case, the plaintiffs alleged that the defendants were negligent in the design, manufacture and marketing of a medication, AVANDIA, used in the treatment of diabetes. They sought certification as a class proceeding under the *CPA*. The defendants opposed certification.

[195] The certification as a class proceeding failed, in part, because the plaintiffs did not provide the evidence necessary for Wood J. to conclude that there were two or more class members interested in pursuing claims through a class action.

[196] The causes of action advanced by the plaintiffs in *Sweetland* were primarily based in negligence. The nature of the alleged damage resulted from ingesting AVANDIA was noted to be congestive heart failure, heart attack or stroke. The defendants argued that no member of the class (there were two proposed classes) could recover damages without proof that they suffered from one of those health events and that it was caused by the medication.

[197] The evidence before Wood J. established that AVANDIA was prescribed for Type 2 diabetes and people with that disease are at a higher risk of suffering heart failure, heart attack or stroke. The defendants argued that there was no way to determine whether a particular "cardiovascular event" was caused by a patient's

underlying medical condition or AVANDIA. The defendants also argued that any consideration of individual causation required a detailed assessment of the patient and all of their risk factors. For those reasons, the defendants argued that the proposed common issues framed in negligence were not common to the proposed class and would not significantly advance the claims in negligence.

[198] One of the proposed common issues in *Sweetland* was, "Did the defendants breach a duty of care owed to class members by designing, developing, fabricating, manufacturing, selling, importing, distributing, marketing or otherwise placing AVANDIA into the stream of commerce in Canada."

[199] Wood J. noted that the evidence filed by the plaintiffs on the certification motion identified an issue with respect to the alleged increased risks of heart failure, heart attack and stroke resulting from the use of AVANDIA. The evidence before Wood J. also raised a question about whether the defendants adequately disclosed the nature and extent of those risks. Wood J. determined that the plaintiffs had shown the basis for a common issue "which examines whether the product is unfit due to the potential risks outweighing the benefits." Wood J. determined that the alleged breaches of duty raised by the plaintiffs' certification evidence were adequately covered in other common issues. Accordingly, he found that there was no purpose to certify the common issue relating to breach of a duty of care. Wood J. stated:

> [76] This proposed common issues is extremely broad and could apply to any potential duty of care. It provides no guidance as to the evidence to be called or the question which needs to be answered at the common issues trial. In any negligence action, whether a defendant breached a duty of care is a crucial issue to be decided. In a class proceeding, if breach of duty is to be a common issue, there must be evidence to permit the certification judge to assess whether the question of breach can be answered on a class-wide basis and will advance the individual claims of class members.
>
> [emphasis added]

[200] Where a plaintiff seeks to address questions of causation on a class-wide basis as the foundation for her class action, there must be some evidence of a methodology that will enable the plaintiff to prove causation on a class wide basis: *Charlton v. Abbott Laboratories Ltd.*, 2015 BCCA 26 (B.C.C.A.).

[201] If no such methodology is put forward by the plaintiff there will not be sufficient evidence before the court to show that the resolution of the proposed general causation common issues will efficiently advance the claim.

A Workable Methodology

[202] Organigram says that the plaintiff has failed to demonstrate, with supporting evidence, that there is a workable methodology for determining questions relating to causation and damages on a class wide basis.

[203] Without such methodology, Organigram says that the Court will be unable to determine the issue of general causation on a class wide basis, and accordingly the issue of general causation cannot be certified as a common issue.

[204] Organigram's focus on "methodology" must be considered in its proper context. At the certification stage, the plaintiff must establish some kind of method for testing the common issues. However, the "methodology" requirement must be considered in light of the policy objectives of class actions. I refer to the decision of the British Columbia Court of Appeal in *Miller v. Merck Frosst Canada Ltd.*, 2015 BCCA 353 where Savage J.A. stated:

> 33 In my opinion, however, "methodology" in this context is not, and should not be, confused with a prescribed scientific or economic methodology. Instead, it refers to whether there is *any* plausible way in which the plaintiff can legally establish the general causation issue embedded in his or her claim. As noted in *Andriuk*, not every case will require expert evidence (para. 11).
>
> 34 The methodology requirement must also be considered in light of the policy objectives of class actions: the object is to promote fair and efficient resolution of the common issues. If there is no way that the common issues could realistically be established in a class action proceeding, then these goals would not be achieved and a class action should not be certified. It is that concept which underpins the methodology requirement described in *Microsoft*.
>
> 35 The appellants point to the Court's statement in *Microsoft* that "the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement" (para.118). But that statement must be read in context with the rest of the decision.
>
> 36 *Microsoft* was not a case about one agent causing a common type of reaction in some consumers. It was about whether "indirect purchasers", namely "ultimate consumers who acquired Microsoft products from re-sellers, re-sellers who themselves purchased the products either directly or indirectly from Microsoft or from other re-sellers higher up the chain of distribution" (para. 5),

experienced a common type of harm or loss due to Microsoft's overcharging. The class was massive and diffuse, and involved separate instances of wrongdoing over multiple decades with nearly 20 products. As the court noted:

> [110] The multitude of variables involved in indirect purchaser actions may well present a significant challenge at the merits stage.
> ...
>
> [114] ... In order to determine if the loss-related issues meet the "some basis in fact" standard, some assurance is required that the questions are capable of resolution on a common basis. In indirect purchaser actions, plaintiffs generally seek to satisfy this requirement through the use of expert evidence in the form of economic models and methodologies.
>
> [115] The role of expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole (see *Chadha*, at para. 31). The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove "common impact" ... In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain.
>
> ...
>
> 38 **Although a methodology may include a prescribed scientific or economic methodology, the methodology requirement as contemplated in *Microsoft* encompasses a broader category of methods: "the critical element that the methodology must establish is the ability to prove common impact"** (para. 115). In other words, to overcome the certification hurdle, plaintiffs are required to show how their common issue could be established at a common issues trial, remembering that the threshold, at this stage, is not an onerous one.
>
> [emphasis (underlining) of the Court of Appeal, bolding of this Court]

[205] The Court of Appeal's reference to "*Microsoft*" is to the decision of the Supreme Court of Canada in *Pro-Sys v. Microsoft Corporation*, (*supra*).

[206] Organigram says that there is no certainty that all of the 74 recalled lots of product contained the same amount of unauthorized pesticides (if any). This is because not every lot was tested.

[207] In my view, at the certification stage, a consideration of whether the recalled cannabis contained the same amount of unauthorized pesticides is a merits-based assessment which has no place on a certification motion.

[208] However, there is in fact, commonality to the recalled cannabis. The Claim attaches as Schedule "A" a list of all the recalled lots. The parameters of the recall were determined by Health Canada, upon review of information provided by Organigram to Health Canada. Obviously, there was a rationale for the recall.

[209] I agree with the plaintiff's counsel that the evidence establishes that there were two recalls closely together in time and for related reasons concerning the same medical cannabis produced during a relatively discrete timeframe and sharing the same marketing and promotional material.

[210] Organigram also argues that the plaintiff has failed to identify the mechanism by which the pesticides cause disease and therefore harm. Organigram says that the plaintiff has not even identified the disease or harm allegedly cause by the pesticides.

[211] Organigram again refers to the Ontario Superior Court of Justice decision of Horkins J. in *Martin v. Astrazeneca Pharmaceuticals Plc.* The Court held that there is a problem with a general causation question when there is no evidence to show that this issue is capable of being addressed in common:

> 232 Common issue 1 is a general causation question. This means that if it was accepted as a common issue, an individual trial would be required to determine if Seroquel caused each class member to gain weight and/or develop diabetes. This common issue alone would not determine liability.
>
> 233 The plaintiffs have offered no evidence to show that this issue is capable of being assessed in common. It is not susceptible to a single answer at this abstract level. Asking in the abstract if Seroquel can cause weight gain and diabetes is only the beginning of the inquiry. There is a problem with a general causation question when there is no evidence that "compelling epidemiological or statistical evidence might be sufficient to establish individual causation or go a long way to doing so". *Merck Frosst Canada Ltd. v. Wutunee*, 2009 S.J. No. 179 at para. 144 (Sask. C.A.), leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512 ("*Wutunee*").
>
> [emphasis added]

[212] I note that Dr. Guidotti opines that the risk conferred by exposure to myclobutanil and bifenazate "at present, is indefinable, potentially serious, and cannot be anticipated and mitigated by the user." Organigram says that this is evidence from the plaintiff's own expert that there is no methodology by which general causation could be proven at trial.

[213] Dr. Guidotti also stated in his report that the toxicity of myclobutanil and bifenazate have not yet been studied in the context of inhalation. The reason is obvious. At least in Canada, these pesticides are prohibited for use on marihuana plants.

[214] This Court agrees with the plaintiff that uncertainty around the causal connection between the consumption of these unauthorized pesticides and adverse health consequences cannot be used to Organigram's advantage.

[215] Dr. Guidotti's evidence is that studies are feasible and the risk to human health by the consumption of the pesticides on medical cannabis can be evaluated, but these studies simply have not been conducted to date.

[216] Dr. Guidotti provides a method by which health risk can be assessed on a common, class-wide level. He explains the methodology by which health risks can be inferred through conventional practice in toxicological risk assessment, which he says employs general principles and a body of observations and scientific studies on analogous situations to infer risk.

[217] In his report, Dr. Guidotti says that chemicals are more toxic by the inhalation route. He describes inhalation as an exceptional route of exposure in that it delivers higher exposure levels, is absorbed into the body at much higher efficiency, bypasses the metabolism mechanisms that detoxify the chemical, and its most intense effect on the lung which, which he says is a fragile organ which nonetheless bears the brunt of the exposure.

[218] Organigram's expert, Dr. Brecher, disagrees with much of Dr. Guidotti's report. He states in his report that "It is not possible to determine if an individual plaintiff's specific health condition is the result of MB (myclobutanil) or BF (bifenazate)" for various reasons which he addresses. However, Dr. Brecher's focus is largely on the difficulties presented by determining specific causation given the variables arising from the different health conditions of the plaintiffs, how they used the cannabis, etc.

[219] On a certification motion, the court is not to weigh competing expert evidence.

[220] I conclude that there is some evidence by which general causation may be proven that is sufficient for certification.

[221] The fact that there is not yet a conclusive answer to the general causation question one way or the other means that the determination of it will be significant to all class members.

[222] I conclude that there is some basis in fact to conclude that Organigram owed a duty of care to class members with respect to its design, development, testing, manufacturing, distribution, marketing and sale of the recalled cannabis.

[223] I find that there is also some basis in fact to conclude that Organigram breached the standard of care owed to its customers by selling approximately ten months' worth of medical cannabis that was recalled by Health Canada.

[224] Organigram held out to customers that its product was "certified organic", met "stringent quality assurance criteria" and contained "no harmful pesticides." These assurances are found in the promotional material that Organigram provided to customers and physicians which are exhibits to the affidavit of Cathy Cyr.

[225] This Court is satisfied that the fact-finding and legal analysis central to a determination of the negligence common issues are common among all class members. The focus at the common issues trial will be the conduct of Organigram. The positions of class members are identical, i.e., each purchased cannabis for medical purposes that was subsequently recalled at the instance of Health Canada and with the cooperation of Organigram due to the risk that cannabis contained unauthorized pesticides.

Proposed Common Issue 4 – Breach of Contract

[226] A determination of Common Issue 4 involves an assessment of the express and implied terms of class members' contracts governing their purchases of recalled product from Organigram and whether Organigram breached any contractual terms.

[227] The plaintiff says that the purchase and sale transactions are identical for each class member: the same products were sold, using the same promotional material. The plaintiff says that the failings of Organigram are also the same, because the recalled product did not live up to the terms of the contract entered into by each class member. The plaintiff says that Organigram warranted to the plaintiff and the class that its organic medical cannabis products were of merchantable quality and fit for use.

[228] Organigram's informational materials provided to clients upon registration referenced a secure and regulated source of organically grown medical marijuana for patients that it "certified as organic", "non-irradiated", "subject to strict controls", "safe", "consistent" and "reliable."

[229] Organigram says that the plaintiff did not adduce any evidence to support the claim that "the purchase and sale transactions were identical" for each member of the class.

[230] Organigram also points to para. 44 of the Claim where the plaintiff pleads that Organigram breached its contracts by selling them cannabis that was not organic and was dangerous to the class. It says that the plaintiff has not adduced any evidence that the issues of whether (1) there was a contract with each class member that the cannabis would be organic and (2) the cannabis was organic and/or dangerous can be determined on a class-wide basis.

[231] I do not find Organigram's arguments concerning the lack of commonality on the breach of contract issue to be persuasive.

[232] Clearly Organigram entered into contracts with each person or entity to whom it sold the medical cannabis. Those contracts would have express and implied terms.

[233] Organigram sold 74 lots of medical cannabis to Canadians which were recalled by Health Canada due to the risk that they contained unauthorized pesticides. It chose, for reasons not before this Court, to only test 24 of the recalled lots. Twenty of those lots contained unauthorized pesticides.

[234] To now argue before this Court that the "same products" were not sold based upon its decision to not test 50 lots and the fact that 20 of the 24 lots had different levels of the unauthorized pesticides myclobutanil and/or bifenazate is highly unpersuasive.

[235] The evidence before this Court demonstrated that bifenazate and myclobutanil are prohibited for use on medical cannabis, whether organic or non-organic. My reading of the pleadings relating to the alleged breach of contract is that it is the presence of the unauthorized pesticides which the plaintiffs contend leads to the various allegations of breach of contract, not whether the product was organic or non-organic.

[236] There is some basis in fact to indicate that Organigram breached express and implied terms of its contracts with class members.

[237] I find that the resolution of Common Issue 4 will substantially advance each class member's claim.

Proposed Common Issue 5 – Breach of the *Competition Act*

[238] Common issue 5 requires a determination of whether Organigram breached section 52 of the *Competition Act* in the course of advertising, marketing and/or promoting the recalled cannabis to class members. The plaintiff has pleaded that she and class members have suffered damages as a result of misrepresentations Organigram made concerning the recalled cannabis, including that it was free of unauthorized pesticides, compliant with the *ACMPR*, etc. The plaintiff says that she and class members therefore have a statutory cause of action pursuant to s. 36 of the *Competition Act* to recover the amount equal to the loss of damage proved to have been suffered.

[239] The plaintiff says that this common issue is particularly appropriate for certification: "the representations of Organigram were made in documentary form, were uniform in their nature, were provided to all class members and were designed to impact the decision-making of class members."

[240] Organigram says that this proposed common issue should not be certified because various kinds of cannabis were recalled and individual reliance of class members would still have to be proven. It relies on the decision of the British Columbia Court of Appeal in *Charlton v. Abbott Laboratories, Ltd.*, 2015 BCCA 26 (B.C.C.A.).

[241] In *Charlton*, the British Columbia Court of Appeal held that a common proposed issue alleging a breach of the *Competition Act* should not have been certified by the motions judge. Wilcock J.A., speaking for a unanimous Court stated:

> [124] The question whether the defendants' marketing and sale of sibutramine breached s. 52 of the *Competition Act* also requires consideration of whether the defendants, for the purpose of promoting the use of sibutramine, "knowingly or recklessly made a representation to the public that is false or misleading in a material respect". Such an inquiry necessitates a determination of whether the drug causes or contributes to heart attacks, strokes, and arrhythmnia. If there is

> no methodology of addressing that question it ought not to have been certified. Posing the question is unlikely to advance the action.

[242] Organigram also refers to the decision of Strathy J. in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 (Ont. S.C.J.). In *Singer* the Court refused to certify a common issue on the breach of section 52 of the *Competition Act* because it would require an examination of a wide range of products and a variety of representations. It would also not advance the litigation because individual reliance and loss would still have to be proved. Organigram set forth the following paragraph of Strathy J.'s decision in their written submissions:

> [182] The answer to this question, on its own, does nothing to advance the plaintiff's claim, because s. 52 of the *Competition Act* does not create a civil cause of action. The answer might advance the resolution of a claim under s. 36 of the *Competition Act*, since a breach of section 52 is a necessary prerequisite to such a claim. Answering the question would require an examination of a wide range of products and a variety of representations concerning each product, over a lengthy time period. The answer to this question would not, however, advance the resolution of the claims of class members, because a court would have to find that the plaintiff suffered a loss caused by the breach and this could only be accomplished on an individual basis.

[243] *Singer* involved two proposed class actions each of which would involve some three million class members. The case concerned sunscreen. The plaintiff in *Singer* sought to be appointed a representative on behalf of two classes of Canadian consumers of the defendants' products. He alleged that the defendant manufacturers engaged in an advertising and labeling program that misrepresented the effectiveness of their sunscreen products. One manufacturer produced and marketed 60 sun-protection products; the other 66. Each company marketed different product lines with multiple products in a line. The products were sold over a two-year period.

[244] The products offered different levels of SPF protection, with differing product characteristics and contained multiple active ingredients in varying quantities.

[245] At para. 205 of the Court's decision, Strathy J notes that "the multiplicity of products, product ingredients and advertising and labeling claims would make the resolution of the common issues extraordinarily complex." On that basis (and others) Strathy J. found that a class proceeding was decidedly not a preferable procedure.

[246] The facts before Strathy J. are contrasted with the facts before this Court. Here the recalled cannabis was marketed to each class member with the same promotional material and with the same uniform representations.

[247] I note that Strathy J. certified a common issue based on negligent misrepresentation in *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019 (Ont. S.C.J.). In that case, the plaintiff brought a class action against the college alleging that course calendar material misrepresented the benefits of an international business management program and falsely stated that the program would enable them to obtain certain industry designations.

[248] At para. 101 of the Court's decision, Strathy J. notes that the plaintiff relied on a single misrepresentation in written form (the calendar and on the web). He stated that the statement was likely communicated to every member of the class. He also stated that "most students would read the calendar description."

[249] Strathy J. found that the representation common issue was a substantial ingredient of each class member's claim and its resolution would advance the claims of all members of the class. However, he stated:

> [103] While I expect that each Class Member would have to establish that he or she was aware of the alleged misrepresentation and relied on it in enrolling in the Program, as a condition of recovery under this cause of action, the importance of the calendar as a contractual document, and of the Industry Designations to most students enrolling in the Program, could give rise to a presumption of reasonable reliance. For this reason, and because the same representation was made to all Class Members, this case is at the positive end of the spectrum of misrepresentation cases that are appropriate for certification. As Cullity J. noted in *Murphy v. BDO Dunwoody LLP* (2006), 32 C.P.C. (6th) 358, [2006] O.J. No. 2729, single misrepresentations will be more amendable to certification than those in which there are multiple statements made in different forms over a lengthy time period. This case is not dissimilar to *Lewis v. Cantertrot Investments Ltd.* (2005), 24 C.P.C. (6th) 40, [2005] O.J. No. 3535 (S.C.J.) in which Cullity J. certified a class action brought on behalf of some 120 condominium unit owners, alleging that the condominium declaration, the budget and a sales flyer provided to buyers prior to purchase contained misrepresentations about monthly assessment and maintenance fees. It was acknowledged that the questions of reasonable reliance would have to be dealt with on an individual basis, but that did not detract from the fact that the resolution of the common issues would advance the claim of every class member. Here, as in that case, the representations were made in documentary form, were uniform in their nature, were likely provided to all Class

> Members, and were of a kind that were likely to have had some impact on the decision-making of the Class Members. These circumstances make this case particularly appropriate for certification.
>
> [emphasis added]

[250] Strathy J. acknowledged that some students may have obtained information about the industry designations from other sources. However, he noted that it is not necessary that a common issue resolves the class members' claims, provided it advances the litigation (para. 104).

[251] I find that Common Issue 5 concerning alleged breaches of the *Competition Act* are appropriate for certification. Resolution of these issues will advance the litigation for all class members.

Common Issue 6 – Breach of Consumer Protection Legislation

[252] The plaintiff alleges that Organigram breached subsections 26(3)(d)(e)(f) and (h) of the *Nova Scotia Consumer Protection Act*, R.S.N.S. 1989, c. 92, as amended (the "*Act*") and other similar provisions in similar consumer protection legislation across Canada.

[253] The plaintiff has pleaded that Organigram is a "seller" within the meaning of s. 3 of the *Act* and that the plaintiff and class members are "buyers" within the meaning of s. 2 and "purchasers" within the meaning of s. 26(2). The plaintiff says that in selling the recalled cannabis to the plaintiff in the manner they allege, Organigram breached the conditions or warranties implied by s. 26(3)(d), (e), (f) and (h) of the *Act*.

[254] The plaintiffs say that a common ingredient of each class member's claim is whether Organigram made an implied warranty of quality or fitness and/or an implied condition of merchantable quality with respect to the recalled cannabis. The plaintiff also says that a further common ingredient is whether Organigram was in breach of any such warranties or implied conditions.

[255] Organigram opposes certification of the common issue of breach of the *Act,* primarily on the basis that 74 lots of cannabis are involved. It says that a breach of section 26(3)(d) requires a finding that the goods do not correspond with the description. Organigram says that it is impossible to make a class-wide finding as it would require a consideration of each of the 74 lots.

[256] In post-hearing submissions, counsel for Organigram advised that it has retained 38 of the 50 lots it did not test. There was no evidence before this Court as to whether productive testing can be carried out on these 38 lots. Counsel advised that Organigram complied with s-s. 76 of the *ACMPR* by retaining all samples for a period of one year. After that time period samples were disposed of until counsel met with Organigram personnel and no further samples were destroyed. As noted previously in this decision, Organigram's decision not to test all of the recalled lots was its decision to make, but it cannot use that decision to frustrate the plaintiff's proposed common issue of breach of the *Act,* by saying that the lots are all different.

[257] What the evidence does disclose is that of the 24 lots tested, only 4 lots did not contain unauthorized pesticides. The question of whether the recalled cannabis was of merchantable quality may not be answered identically for each recalled lot, but certainly a high percentage of the lots tested contained unauthorized pesticides.

[258] In this case, the evidence of Cathy Cyr and Rhonda Daniels clearly shows that they made a direct purchase of the recalled cannabis.

[259] Organigram also argues that although some of the recalled lots were purchased by individuals, other lots were purchased by insurance companies and Veterans Affairs Canada ("VAC") and therefore not for an individual's consumption and use within the meaning of the legislation. At para. 11 of her Affidavit, Cathy Cyr stated:

> In 2016 and continuing today, clients of Organigram paid for their cannabis either personally, through direct billing their insurer or through Veterans Affairs Canada's benefit program, which was administered by Blue Cross.

[260] Organigram says that this evidence shows that lots were purchased directly by Veterans Affairs Canada and not by individuals. The plaintiff disagrees and says that what Cathy Cyr is referring to in her Affidavit is reimbursement by an insurance company or VAC after a purchaser purchases the medical cannabis. It says that these questions are not capable of extrapolation, in the same manner, to each member of the class.

[261] The evidence is unclear. Ms. Cyr does not provide the source of her information concerning VAC or the basis of her belief. I will not refuse to certify the common issue of the breach of the *Act* based upon Ms. Cyr's evidence. If, as

the litigation progresses, it becomes clear that insurance companies and VAC made direct purchases of the recalled cannabis, then that can be addressed.

[262] To be entitled to damages for alleged statutory breach of the *Act,* an individual class member may have to demonstrate reliance upon the warranty or condition in question.

[263] However, this does not detract from the commonality of common issues related to implied warranties of quality or fitness and/or an implied condition of merchantable quality. The common issue criterion may be satisfied even in cases where many individual issues remain to be decided after resolution of the common issues. The common issues will move the resolution along notwithstanding that an individual issue may remain.

[264] The common issue with respect to breach of consumer protection legislation is proposed on a national basis. The plaintiff's counsel says that consumer protection legislation is substantially similar across the country but provided this Court with no confirmation that that is the case. I expect, however, that he is correct.

[265] At this stage, it is unknown where class members reside. If it turns out that class members reside in different provinces with consumer protection legislation that is substantially dissimilar from the Nova Scotia *Act,* then it is possible for subclasses to be established. If there are nuances in the wording of the relevant legislation, these can also be accounted for in subclasses.

[266] I find that Common Issue 6 concerning breaches of consumer protection legislation is appropriate for certification. Resolution of these issues will advance the litigation for all class members.

Common Issue 7 – Breach of Sale of Goods Legislation

[267] As noted earlier in this decision, Organigram does not dispute that the cause of action pleaded as breach of the *Sale of Goods Act* is viable. It argues, however, that the plaintiff did not provide any evidence or legal basis to establish the presence of equivalent legislation throughout Canada.

[268] Organigram makes the same arguments in contesting this common issue as it did with respect to the common issue relating to breach of consumer protection legislation.

[269] Organigram relies upon the decision of Wood J. of this Court in *Taylor v. Wright Medical Technology Canada Ltd.*, 2014 NSSC 89 (aff'd 2015 NSCA 68). In *Wright*, Wood J. refused to certify a common issue regarding the Nova Scotia *Sale of Goods Act* on a national basis, primarily because there was no evidence as to how members of the proposed class came to acquire a hip prosthesis product. There was no evidence indicating how the plaintiff or any class members acquired the product. The hip prosthesis was placed in the human body by surgeons in hospitals. There was simply no evidence of a purchase agreement between a plaintiff consumer and the defendant to ground a common issue in breach of the *Consumer Protection Act.*

[270] I find that Common Issue 7 concerning the breach of the *Sale of Goods Act* and breach of related legislation throughout Canada, is a common issue which will advance the litigation. If it is necessary to consider similar legislation in other provinces, the flexibility of the class proceeding can accommodate subclasses if needed.

Common Issue 8 – Unjust Enrichment

[271] The plaintiff proposes the following sub-issues for unjust enrichment:

(a) Were the Defendants enriched by their conduct in relation to the Affected Product, including without limitation by failing to provide full refunds of the purchase price of the Affected Product to Class Members?

(b) If the answer to common issue (a) is yes, did the Class suffer a corresponding deprivation?

(c) Was there any juristic reason for the Defendants' enrichment?

[272] Organigram says that although the plaintiff refers to a failure to "provide full refunds" as Organigram's alleged enrichment, that enrichment is not contained in the unjust enrichment pleading in the Claim at paras. 61-62. That is correct.

[273] I will allow the plaintiff to amend the Claim to specifically plead the failure of Organigram to provide a full refund in its unjust enrichment pleading.

[274] Organigram also says that sub-issue 8(b) is not common among the class because some members received full refunds and some members such as the plaintiff received credits. I will also allow the plaintiff to amend sub-issue 8(b) to allow for different forms of deprivation falling to class members to be pleaded.

[275] Organigram also says that there was a juristic reason for Organigram's enrichment in the form of a contract. I have already ruled that I will not determine that issue on the certification motion.

[276] Common Issue 8 meets the certification criterion.

Proposed Common Issue 9 – Remedies

[277] The plaintiff raises 5 sub-issues related to remedy.

Common Issue 9(a) - Are Class Members entitled to statutory relief for breaches of any legislation pleaded herein?

[278] Organigram says that this is an overly-broad question which will not assist the trier of fact or the parties on the common issues trial.

[279] While the issue is broadly framed, I agree with the plaintiff's counsel that common issues can be refined as the litigation progresses. This is particularly the case when dealing with remedies which may be revisited as a result of the outcome of the liability common issues which will be decided first.

[280] Common Issue 9(a) meets the certification criterion.

Common Issue 9(b) - Are Class Members entitled to restitution, due to unjust enrichment and/or waiver of tort? If so, what is the quantum?

[281] Once again, Organigram opposes this common issue on the basis that the issue is too broadly framed.

[282] In *Sweetland v. GlaxoSmithKline* (*supra*) Wood J. of this Court certified a very similar question, but not the question on quantum:

> [82] This proposed common issue seeks a remedy in restitution. There is considerable judicial debate as to whether waiver of tort requires proof of wrongdoing before compensation can be awarded. A useful discussion of this issue is found in the Supreme Court of Canada decision in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 (CanLII), at paras. 93-97.
>
> [83] Claims for restitutionary remedies based upon unjust enrichment require a determination of whether the defendants were enriched to the deprivation of the plaintiffs, and if so, to what extent. In the circumstances of this class proceeding the calculation of enrichment and deprivation would be a massive undertaking. It

> would necessitate disclosure of financial records over a period in excess of fifteen years which would have to be interpreted by expert witnesses. It is obvious to me that the availability of a restitutionary remedy such as proposed by this common issue is very much a live question. Rather than burden the common issues trial with the additional complexities arising out of the quantification issues I believe the most efficient approach is to ask the general question as to whether relief based on unjust enrichment or waiver of tort is even available to class members.
>
> [emphasis added]

[283] Unlike the facts before Wood, J., Organigram can easily, through its own business records, determine quantification. Offsets can easily be made for full refunds already provided to class members without conducting the kind of individual assessments referred to by Wood J. The records cover a relatively short period of time, not the 15-year period in *Sweetland.*

[284] On the evidence before this Court, there is no suggestion that there will be complexities relating to the restitutionary quantification issue which will have the effect of burdening the common trial.

[285] Common Issue 9(b) meets the certification criterion.

Common Issue 9(c) - Are the Defendants required to fund, or otherwise compensate Class Members for, the costs of operating and administrating an adequate system for health monitoring relating to the consumption of the Affected Product? If yes, what is the quantum?

[286] During oral argument before this Court, the plaintiff's counsel advised that the plaintiff is willing to remove Common Issue 9(c).

Common Issue 9(d) - Are Class Members entitled to damages for personal injury caused by the Affected Product? If the answer is yes, can such damages be assessed on an aggregate basis, pursuant to s. 32 of the Act, for all or part of the Class?

[287] During oral argument before this Court, the plaintiff's counsel advised that the plaintiff is willing to remove the second part of Common Issue 9(d) relating to an aggregate assessment of damages for personal injury.

[288] In terms of the first part of Common Issue 9(d) relating to "causation" for personal injury, the parties made the same arguments they made relating to proving general causation in the negligence common issues. I will not repeat them here.

[289] I will certify a common question which asks, "Are Class Members entitled to damages for personal injury caused by the Affected Product?"

Common Issue 9(e) - Is the Class entitled to exemplary or punitive damages based upon the Defendants' conduct? If yes, can these damages be determined on an aggregate basis?

[290] The plaintiff says that Organigram's conduct involved a prolonged and unauthorized use of prohibited pesticides on cannabis for its own financial gain. The plaintiff says, with reference to Organigram's "Incident Report" referred to earlier in this decision, that there is some basis in fact to suggest that Organigram used the unauthorized pesticides to control spider mites which it was struggling with in February and March, 2016.

[291] It is true, as submitted by the plaintiff, that all class members share an interest in determining whether Organigram ought to pay punitive or exemplary damages. However, that alone is an insufficient reason for certifying this proposed common issue. I refer once again to the decision of Wood J. in *Sweetland*:

> [93] Punitive damages are awarded to reflect misconduct on the part of a defendant. In order to make such an award the court must first find the defendant liable to the plaintiff on the basis of a cause of action asserted in the statement of claim. The quantification of punitive damages cannot be done without knowing what compensatory damages have been awarded and to whom.
>
> [94] Punitive damages have been certified as a common issue in class proceedings, however each case is decided on its own facts. Here the defendants will not be liable to the plaintiffs until proof of individual loss following the common issues trial. The trial judge will not have the necessary evidence to decide either liability or quantum of punitive damages. I endorse the following comments from the divisional court in *Medtronic*, upholding the trial judge's refusal to certify punitive damages as a common issue:
>
> > 37 The motion judge reasonably held that a trial judge would be unable to rationally and appropriately consider punitive damages without knowing the amount of compensatory damages as well as the degree of misconduct, the harm caused, and the availability of other remedies. This is consistent with what the Supreme Court said above at para. 94 of its reasons, as well as at para. 123. In this class proceeding, causation, liability and the quantum of compensatory damages will not be determined at the common issues trial. Therefore, the motion judge correctly concluded that entitlement to punitive damages cannot be determined at the common issues trial.

> 38 Counsel for the appellants asserts that the present decision departs from a large number of cases in which entitlement to punitive damages has been included in the common issues, arguing that this case is having a "profound impact" on class proceedings. However, it is apparent that each case turns on its own facts. In *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591 (CanLII), [2010] O.J. No. 1057, 2010 CarswellOnt 1460 (S.C.J.), the issue of punitive damages was held to be a common issue, while in *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019 (CanLII), [2010] O.J. No. 1411 (S.C.J.), entitlement to punitive damages was not a common issue. In contrast, in *Anderson v. St. Jude Medical Inc.*, 2010 ONSC 77 (CanLII), [2010] O.J. No. 8 (S.C.J.), the trial judge ordered bifurcation of the issues of liability for and quantification of punitive damages. However, the following common issue is to be determined in the common issues trial: "Does the defendants' conduct merit an award of punitive damages?"
>
> 39 I note that Chief Justice McLachlin in *Rumley v. British Columbia*, 2001 SCC 69 (CanLII), [2001] 3 S.C.R. 184 observed that "the appropriateness and amount of punitive damages will not always be amenable to determination as a common issue" (at para. 34). In that case, liability was based on allegations of systemic negligence. Therefore, the issue of punitive damages was appropriately a common issue.
>
> 40 In the present case, liability to class members in negligence or conspiracy will not be determined until the trials to determine the individual issues. The motion judge correctly applied the principles from Whiten when he concluded that entitlement to punitive damages could not be determined until after the individual trials to determine causation and the quantum of compensatory damages. Therefore, he made no error in principle in rejecting punitive damages as a common issue.

[95] The *Whiten* principles referred to in this passage were recently applied by the Nova Scotia Court of Appeal in *Industrial Alliance Insurance and Financial Services Inc. v. Brine*, 2015 NSCA 104 (CanLII). This decision confirms my conclusion that neither entitlement to nor quantification of punitive damages can be determined until after a finding of liability and assessment of individual harm.

[96] I will not certify punitive damages as a common issue in this case.

[292] For the same reasons expressed by Wood J., I will not certify punitive or exemplary damages as a common issue in this case. The entitlement to, or quantification of punitive or exemplary damages cannot be determined until after a finding of liability and an assessment of individual harm has been conducted.

ISSUE 4:
Would a class proceeding be the preferable procedure for the fair and efficient resolution of the dispute? (*CPA* s.7(1)(d))

[293] Section 7(1)(d) of the *CPA* requires the plaintiff to adduce evidence that "a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute."

[294] Section 7(2) provides factors for the Court to consider in making this determination:

> (2) In determining whether a class proceeding would be the preferable procedure of the fair and efficient resolution of the dispute, the court shall consider
>
> (a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;
>
> (c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and
>
> (f) any other matter the court considers relevant.

[295] The parties disagree as to whether a class action is the preferred procedure for the resolution of the common issues. Organigram argues that the common questions do not meet the preferable procedure criterion. Organigram says that if the action is certified, the resulting procedure would potentially involve many individual trials on causation and damages which would undermine two of the key goals of a class action – judicial economy and access to justice.

[296] The assessment of this criterion involves a comparison of the alternatives. The only alternative procedures proposed by the defendants are individual claims brought in either small claims or superior courts and Organigram's refund and credit program.

[297] The decision of the Supreme Court of Canada in *Hollick* confirms that there must be some basis in fact for the claim that a class proceeding is the preferable procedure to resolve the class members' claims. This requires the representative plaintiff to show that 1) a class proceeding would be a fair, efficient and manageable method of advancing the claim; and 2) a class proceeding would be preferable to any other reasonably available class members' claims (paras. 28 and 31).

[298] In addition, s. 10 of the *CPA* instructs that the Court shall not refuse to certify a proceeding by reason only that:

> (a) The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
>
> (b) The relief claimed relates to separate contracts involving different class members.
>
> (c) Different remedies are sought for different class members.
>
> (d) The number of class members or the identity of each class member is not known.
>
> (e) The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

[299] Organigram contends that if the action is certified, the resulting procedure would involve extensive individual trials to determine liability. They say that in a claim of this nature, each class member's experience is idiosyncratic.

[300] Organigram says that in order to establish liability for personal injury, it will be necessary to determine specific causation (assuming general causation can be established on a class-wide basis) and damages. They point to various kinds of assessments which would involve individual consideration (with reference to the affidavit of Dr. Brecher), such as an individual's duration of use, method of consumption (ingest, combust, or vape), age, metabolism, interactions with other medications, genetically-conferred susceptibility and underlying medical conditions.

[301] Establishing some basis in fact for the preference procedure criterion does not involve the court considering whether the claim is likely to succeed. Rather, the court must determine whether the claim should proceed as a class action, because that procedure would promote the goals of class proceedings – judicial economy, behaviour modification and access to justice: *AIC Limited v. Fischer*,

[2013] 3 SCR 949, 2013 SCC 69 (S.C.C.) ("*Fischer*") and *Hollick* (*supra*) at para. 27.

[302] It is not necessary to prove that the class action will actually achieve these goals: *Fischer* at para. 22. Instead, the Court must consider the common issues in the context of the action as a whole and, when undertaking the analysis required by the preferability criterion, "focus on the statutory requirement of preferability and not impose on the representative plaintiff the burden of proving that all the beneficial effects of the class procedure will in fact be realized": *Fischer* at paras. 21-22.

[303] In *Fischer*, at para. 25 the Court says that the correct approach to the preferability inquiry must include both substantive and procedural aspects in relation to access to justice. The Court must consider the following questions in order to determine whether a class proceeding will facilitate access to justice:

1. What are the barriers to justice?
2. What is the potential of the class proceedings to address those barriers?
3. What are the alternatives to class proceedings?
4. To what extent do the alternatives address the relevant barriers to access to justice?
5. How do the two proceedings compare?

(*Fischer*, at paras. 27-38)

[304] The Court in *Fischer* said that these questions must be answered "within the confines of the certification process; the court cannot engage in a detailed assessment of the merits or likely outcome of the class action or any alternatives to it" (paras. 39-44).

[305] Success on the common issues will not resolve the plaintiff's claims. Further hearings will be necessary to quantify specific causation and damages. This assessment will depend on the particular circumstances of the individual. The factors the defendants point to as affecting the idiosyncrasies of each plaintiff's assessment are matters which need to be considered in deciding whether a class proceeding is the preferable procedural route for resolution of the class members' claims.

[306] I am satisfied that the plaintiff has shown some basis in fact for its contention that a class proceeding is the preferable procedure. The determination of the common issues will be a significant component of each class member's claim.

[307] A determination of whether the defendants breached statutory or common law duties of care will involve expert evidence. It would not be an efficient use of the resources of the parties, or the court to have these issues litigated in individual trials. Rather, there would be a clear advantage in having them decided in a single hearing, with the result binding on Organigram and all class members. The potential sharing of costs and resources across the class would be an advantage.

[308] While there may well be individual causation issues, at this stage it is unknown the extent to which individual issues may arise. I am satisfied that, at this early stage in the proceeding, any individual causation issues which might exist are insufficient to overwhelm the common issues this Court has certified.

[309] This Court agrees with the plaintiff's counsel that Organigram's refund and credit program is not a viable alternative to a class proceeding. As plaintiff's counsel points out, only those class members who returned the recalled cannabis to Organigram and who met its criteria, received a refund for the returned product. As set forth in the affidavit of Cathy Cyr, Organigram's clients were not entitled to a monetary refund for their purchase of the recalled cannabis unless they had a family member who had passed away or they could show they were medically unable to consume the cannabis (e.g., they were diagnosed with cannabinoid hyperemesis syndrome).

[310] In *Fischer* (*supra*), the Supreme Court of Canada held that in actions where individual claims are not large enough to support individual actions, "access to justice requires access to a process that has the potential to provide in an economically feasible manner just compensation for the class members' individual economic claims" (para. 50).

[311] If general and specific causation are eventually proven, damage awards to class members may not be large in quantum. It would be inefficient and costly to require each class member to advance his own claim.

[312] For some of the plaintiffs a denial of certification could result in the claims never being litigated with the result that access to justice would be denied.

[313] Organigram argues that a purchaser like VAC is well able to financially advance its own litigation. As noted previously in this decision, the evidence before me did not establish that VAC was a direct purchaser of the cannabis, nor a high-volume purchaser, as suggested by Organigram's counsel in submissions on this motion.

[314] Section 7(2)(a) of the *CPA* directs the court to consider the importance of the common issues in relation to the claims as a whole (i.e., whether questions of fact or law common to the class members predominate over any questions affecting only individual members).

[315] I find that a class proceeding will assist individual class members to have access to justice in a way that requiring each member to separately litigate what could be financially modest claims requiring the expense of generating expert evidence would not. The alternatives proposed by Organigram (individual claims and its refund and credit program) do not address barriers to justice that individual claim members may experience.

[316] As is evident from my rulings on the common issues, I find that the determination of the common issues will dispose of a significant portion of the litigation.

[317] This Court must also consider whether a class action is preferable in light of the three goals of class proceedings: behaviour modification, access to justice, and judicial economy.

Behavior Modification

[318] In terms of behaviour modification, Organigram says that the remedial steps it took after the recalls and its cooperation with Health Canada in the recall process minimizes the importance of behaviour modification in this case.

[319] I do not agree. Litigation, on the evidence before this Court, better achieves the goal of behaviour modification, than allowing Organigram to, after the fact, initiate pesticide testing and other safety measures without exposing itself to the rigour that a lawsuit will bring.

Access to Justice

[320] The objective of access to justice is furthered by certifying this class for reasons I have already articulated.

Judicial Economy

[321] Judicial economy is also served by certification of this class. Time and resources are best served in this action by a common issues trial that would resolve many common evidentiary and legal issues for all class members.

[322] I find that a class proceeding represents a fair, efficient and manageable method for advancing the claims of class members and that there is no more preferable procedure to resolve the action.

ISSUE 5: Is there a representative party who:

(i) would fairly and adequately represent the interests of the class?

(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceedings?

(iii) does not have, with respect to the common issues, an interest in conflict with the interests of other class members? (CPA s.7(1)(e))

[323] Organigram argues that Ms. Downton is not an appropriate representative plaintiff on the basis that "she will not vigorously or capably represent the interests of the class and she has credibility issues."

[324] Organigram also submits that Ms. Downton has not submitted a litigation plan that is a workable method of advancing the class proceeding.

[325] Organigram acknowledges that Ms. Downton does not have a conflict of interest with the other class members.

Ms. Downton as representative

[326] In *Western Canadian Shopping Centres v. Dutton*, (*supra*) at para. 41, the Supreme Court of Canada held that a representative plaintiff must satisfy the court that they can represent the interests of the class "vigorously and capably":

> [41] ...In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative plaintiff need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class [...]

[327] Ms. Downton's affidavit states that she is prepared to act as a representative plaintiff in this action if it is certified. She outlines the major steps in the class action as explained to her by her lawyers and details the responsibilities that her lawyers have explained to her that she will take on as a representative plaintiff.

[328] Organigram refers to the decision of the Alberta Court of Queen's Bench in *Sullivan v. Golden Intercapital (GIC) Investments Corp.*, 2014 ABQB 212 where the court refused to certify a class action on the basis that none of the proposed representative plaintiffs were capable of prosecuting the action or vigorously representing the interests of the class.

[329] In *Sullivan v. Golden Intercapital (GIC) Investments Corp.*, Thomas J. considered whether two proposed representatives met the criteria of s. 5(1)(e) of the Alberta *Class Proceedings Act*, SA 2003, c. C-16.5 (identical to s. 7 (1)(e) of the *CPA*).

[330] The proposed representative plaintiffs in *Sullivan* were cross-examined on their affidavits. Neither could articulate their understanding of the role of a representative plaintiff.

[331] Organigram has not pointed this Court to any such similar evidence and indeed, Ms. Downton's evidence is that she has been advised by counsel as to her responsibilities as representative plaintiff.

[332] Although this Court must be satisfied that Ms. Downton is a genuine plaintiff who will vigorously and capably prosecute the interests of the class, I also note that she will have the advice of competent counsel.

[333] As noted by Perell J. in *Shah v. LG Chem, Ltd.*, 2015 ONSC 3257 (S.C.J.) at para. 27:

> [27] Adequacy of representation depends upon such factors as: (a) the representative plaintiff's motivation to prosecute the claim; (b) the plaintiff's ability to bear the costs of the litigation; and (c) the competence of their counsel to prosecute the claim. The motivation of the representative plaintiff is determined by examining all of the circumstances; no one factor is determinative; *Western Canadian Shopping Centres v. Dutton*, *supra*. However, because the plaintiff will have the advice of competent counsel, one should not expect too much or be too demanding in evaluating whether a person can properly serve as a representative plaintiff, and the court will be sceptical of the defendant's arguments based on the personality of the candidate: *Frey v. BCE Inc.*, 2007 SKQB 328 (CanLII) at para. 7; *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596 (CanLII) at para. 158, aff'd 2012 ONCA 108 (CanLII).
>
> [emphasis added]

[334] Organigram contends that Ms. Downton "admitted (on cross-examination) that she was not interested in Organigram's refund program."

[335] This Court's review of the transcript of Ms. Downton's cross-examination shows that Ms. Downton said that she "couldn't recall" if she was aware that she was entitled to a full refund of the Organigram product that she purchased. She said she "really wasn't that interested in it." When asked whether she was aware that she was "still entitled to a full refund of product" she purchased from Organigram, she replied, "Haven't thought of it. I guess I am now if you're telling me."

[336] Ms. Downton did not give evidence that she wasn't interested at all in Organigram's refund program nor that she was uninterested in the other remedies sought in the claim.

[337] I am not prepared, on this scant evidence of supposed disinterest, to conclude that Ms. Downton is not an appropriate representative plaintiff.

[338] Organigram also says that Ms. Downton is not credible. Organigram refers to *Shaw v. B.C.E.*, [2003] O.J. No. 2695 (S.C.J.) where Farley J. stated at para. 25:

> [...] it appears to me that a member of the class would likely be unhappy with being represented by someone who has been caught out on his testimony and therefore has a credibility problem of some magnitude.
>
> [emphasis added]

[339] Mr. Shaw had admitted during cross-examination, contrary to what was stated in his affidavit, that he did not receive or read a copy of documents alleged to contain misrepresentations by one of the defendants. The proposed class action claimed relief on the part of shareholders of the defendants on the basis of negligent misrepresentation and oppression.

[340] It was in that context that Farley J. concluded that Mr. Shaw had no ability to advance a claim on behalf of other shareholders for alleged misrepresentations in those documents.

[341] In addition, as set forth above, Farley J. noted that other members of the class would be unhappy with being represented by someone who had a credibility problem of "some magnitude."

[342] Organigram says that Ms. Downton provided inconsistent evidence about (1) her method of consuming the recalled cannabis, (2) her alleged diagnosis of cannabinoid hyperemesis syndrome, (3) the amount of cannabis she consumed, and (4) whether she chose to purchase the product from Organigram because she did not want to consume non-organic cannabis.

[343] In terms of the alleged inconsistency in Ms. Downton's evidence of her method of consumption, I note that in her affidavit Ms. Downton said that she consumed the product through combustion (smoking) and ingestion. She said that she consumed approximately 50% through combustion and approximately 50% through ingestion.

[344] In cross-examination on her affidavit, counsel for Organigram put a transcript of an interview Ms. Downton gave to Don Connolly of 'CBC Maritimes Information Morning' on November 16, 2016.

[345] Counsel suggested to Ms. Downton that in the CBC interview she stated that she was ingesting the cannabis with edibles and not smoking it.

[346] Plaintiff's counsel points out that Ms. Downton explained in cross-examination that while she did not recall the exact conversation with the interviewer, the transcript was not a live-to-air recording, had been edited down, and thus did not capture the entirety of her conversation with the interviewer.

[347] I note that at no point in the "transcript" does Ms. Downton state that she did not smoke medical cannabis. I am not prepared on this meagre evidence to determine that Ms. Downton is not credible.

[348] In terms of Ms. Downton's alleged diagnosis of cannabinoid hyperemesis syndrome, Organigram refers to an October 17, 2016 email from Ms. Downton to Cathy Cyr, which states as follows:

> As I told you, when in a few weeks I have a note from the gastroenterologist who diagnosed me, I'll send a copy to you. I'll expect the return packaging and paperwork you mentioned in a few days. I would expect to see media exposure in several weeks.

[349] When cross-examined on her affidavit, Ms. Downton stated that her doctor did not diagnose her with cannabinoid hyperemesis syndrome:

> Q. Now, the last day we were here, you said that on September 26th, 2016 you saw a physician who diagnosed you with cannabinoid ---
>
> A. Hyperemesis syndrome.
>
> Q. Right. That was September 26th, I think you told us?
>
> A. I told you I saw a physician on September 26th. I didn't say that he had diagnosed me with cannabinoid hyperemesis syndrome.
>
> Q. When did he diagnose you with it?
>
> A. He didn't.

[350] Organigram's counsel cites the above excerpts in their motion brief. However, other relevant evidence Ms. Downton gave in cross-examination about the "diagnosis" of cannabinoid hyperemesis syndrome, not referred to in Organigram's brief, is as follows:

> Q. And was it you that discovered the cannabinoid -- and I -- the second word is --
> -
>
> A. Oh, hyperemesis syndrome.
>
> Q. Yes.
>
> A. No, it wasn't me who discovered it. I had to wait eight months to see a gastroenterologist, and when he saw me, he ordered an endoscopy. He described to me a syndrome called cannabinoid hyperemesis syndrome, and he said maybe you've got that. But then when he examined me further and talked with me further he said, no, you don't have that. I wasn't fitting the profile of the standard cannabinoid hyperemesis victim. I don't know what you call it. And so he sort

> of, I guess, withheld judgment. He wanted to – he was unable to complete the endoscopy. He wanted to do it again. I wasn't really keen on it. We did talk again later, and by that time, he had seen the news from Organigram. Did not make a statement on it in any way, other than to write me a note that I then passed onto Organigram saying she's my patient, she has been – kind of seen it recently. Sorry, she is my patient. She has been on your cannabis. She seems better off and I recommend that she come off and be refunded. That was all he said.

[351] I interpret this evidence as showing uncertainty as to whether or not Ms. Downton's symptoms fit with a diagnosis of cannabinoid hyperemesis syndrome.

[352] I do not find any lack of credibility on Ms. Downton's part in this regard.

[353] Finally, on the issue of Ms. Downton's alleged lack of credibility, Organigram says that she provided inconsistent evidence as to whether she chose to purchase cannabis from Organigram because she did not want to consume non-organic cannabis.

[354] Organigram points to the Affidavit of Cathy Cyr who states that on August 2, 2016, Ms. Downton called Organigram's client service department and ordered 10 grams of Cabot. Ms. Cyr states, "At the time of her order, she was advised by the Organigram representative that this product was non-organic." Notes of the client service representative are attached as an exhibit to the affidavit. The notes record, "Aware of non-organic."

[355] During cross-examination, Ms. Downton was asked whether she was advised that Cabot was non-organic. She replied that she was not told that Cabot was non-organic and that she assumed that everything was organic because "somewhere on the website there was a declaration about how Organigram had organic product."

[356] I am not prepared to find that Ms. Downton lacks credibility of the basis of notes made by someone else.

[357] Further, this Court notes that in *Fresco v. Canadian Imperial Bank of Commerce*, 2009 CanLII 31177 (ONSC), Lax J. of the Ontario Superior Court of Justice stated that credibility could not or should not be assessed on a certification motion:

> [101] As to the first reason, CIBC relies on the decision of Farley J. in *Shaw v. BCE Inc.*, [2003] O.J. No. 2695 (S.C.J.). In that case, Justice Farley appears to

> have found that the court is able on a motion for certification to reject a proposed representative plaintiff where his credibility is in question and his claims are, on the basis of the evidence in the record, without merit. In *Markson v. MBNA Canada Bank*, 2004 CanLII 6214 (ON SC), [2004] O.J. No. 3226 (S.C.J.), Justice Cullity considered the proposition advanced in *Shaw* in a lengthy passage at paras. 83 to 89. He concluded that as the evidence on motions for certification is not properly directed at the merits of a plaintiff's claim, a finding such as that made in *Shaw* should be confined to very clear cases. I agree with Justice Cullity. With great respect to Justice Farley, I do not think credibility can or should be assessed on a certification motion.
>
> [emphasis added]

[358] While the decision of Lax J. to certify the class was overturned by the Ontario Court of Appeal [2012 ONCA 444], his observations about credibility were not.

[359] I am satisfied that Ms. Downton is a suitable representative plaintiff.

Has the Plaintiff produced a workable Litigation Plan?

[360] The plaintiff's proposed litigation plan is attached as Schedule "B" to the draft certification order. It outlines a plan for the following:

(a) dissemination of notice of certification and the opt-out procedure;

(b) ongoing reporting and communication to the class;

(c) exchange and management of documents produced by all parties;

(d) timing of case management conferences to manage the litigation, including a schedule for remaining steps in the action involving document disclosure, discovery, and exchange of expert reports;

(e) intended process for discoveries, including a conference call post-discovery to address, *inter alia*, refinement of the common issues;

(f) the need for, and use of, expert evidence to prove facts at trial;

(g) the intended plan, at this early stage of the litigation, of resolving the common issues; and,

(h) the process and timing by which individual claims will be made, and how many remaining or individual issues will be adjudicated.

[361] Paragraph 37 of the litigation plan states, "The evidence necessary to succeed on an individual claim may depend on the extent of the plaintiff's success with respect to the common issues and the evidence relied upon at the common issues trial."

[362] Organigram says that the plaintiff has not produced a workable litigation plan.

[363] It says that the litigation plan fails to provide sufficient detail, and that it contains boiler plate language around the common issues.

[364] The litigation plan is required to set out the expected procedural steps, a timeline, and a discussion of the proposed case management program. The plaintiff's litigation plan addresses all of these matters.

[365] The purpose of a litigation plan was explained by Gerow J. in *Fakhri, et al. v. Alfalfa's Canada Inc. cba Capers*, 2003 BCSC 1717 (CanLII):

> [77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members.

[366] In my view, the plaintiff's litigation plan sufficiently addresses the required issues and demonstrates that the plaintiff and class counsel have thought through the process of the proceeding. It is not cursory. While a deficient litigation plan can show that the action is unmanageable and is therefore not the preferable procedure, I do not consider this litigation plan to be deficient.

[367] I find that Ms. Downton is a representative party who will fairly and adequately represent the interests of the class and has produced a workable litigation plan.

CONCLUSION

[368] For the above reasons, and subject to the amendments to the Claim I have allowed the plaintiff to make, this action is certified as a class proceeding.

[369] Ms. Downton is appointed representative plaintiff for the class.

[370] Plaintiff's counsel shall prepare a revised form of order. If counsel are unable to agree on the form of the order, a case conference may be arranged. If the parties are unable to agree on costs of the motion, written submissions may be provided to me within 30 calendar days of this decision.

Smith, J.

Form 78.05

2017 Hfx. No. 460984

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

DAWN RAE DOWNTON

PLAINTIFF

– AND –

ORGANIGRAM HOLDINGS INC. and ORGANIGRAM INC.

DEFENDANTS

Proceeding under the *Class Proceedings Act*, S.N.S. 2007, c. 28

Order for Certification

BEFORE THE HONOURABLE JUSTICE ANN E. SMITH IN CHAMBERS

THIS MOTION was made by the Plaintiff for an order certifying this proceeding as a class proceeding pursuant to sections 4(3) and 7 of the *Class Proceedings Act*, S.N.S. 2007, c. 28;

UPON READING the Notice of Motion, the evidence filed by the parties and the submissions of counsel;

AND UPON HEARING submissions on behalf of the parties;

AND UPON IT APPEARING that it is appropriate to certify the proceeding as a class proceeding, in that:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims raise common issues;

(d) a class proceeding is the preferable procedure; and

(e) there is a representative plaintiff who would fairly represent the Class, has produced a workable litigation plan and has no interest in conflict with the interests of other Class Members;

NOW UPON MOTION, IT IS HEREBY ORDERED:

1. That the action is hereby certified as a class proceeding pursuant to sections 4(3) and 7 of the *Class Proceedings Act*;

2. That the Class is defined as follows:

> All persons and entities who purchased from OrganiGram cannabis for medical purposes that has been the subject of a voluntary or involuntary recall as of the date of the order certifying the action;

3. That Dawn Rae Downton (c/o Wagners Law Firm, 1869 Upper Water Street, Suite PH301, Pontac House, Halifax, NS, B3J 1S9) is appointed as the representative plaintiff of the Class;

4. That the common issues in the class proceeding are:

1. Negligent Design, Development and Testing

a) Did the Defendants owe Class Members a duty of care regarding the design, development and/or testing of the Affected Product?

b) If the answer to 1(a) is yes, what is the applicable standard of care?

c) Did the Defendants breach the foregoing standard of care? If so, how?

2. Negligent Manufacturing

a) Did the Defendants owe Class Members a duty of care regarding the manufacturing of the Affected Product?

b) If the answer to 2(a) is yes, what is the applicable standard of care?

c) Did the Defendants breach the foregoing standard of care? If so, how?

3. Negligent Distribution, Marketing and Sale

a) Did the Defendants owe Class Members a duty of care regarding the distribution, marketing and sale of the Affected Product?

b) If the answer to 3(a) is yes, what is the applicable standard of care?

c) Did the Defendants breach the foregoing standard of care? If so, how?

4. Breach of Contract

a) What are the express and implied terms of Class Members' contracts with the Defendants governing their purchases of the Affected Product?

b) Did the Defendants breach any of the contractual terms? If so, how?

5. Breach of the *Competition Act*, R.S.C. c. C.-34

a) Did the Defendants breach section 52 of the *Competition Act* in the course of advertising, marketing and/or promoting the Affected Product to Class Members? If so, how?

6. Breach of the *Consumer Protection Act*, R.S.N.S 1989, c. 92 & Equivalent Consumer Protection Legislation

a) Did the Defendants breach section 26 or any part thereof of the *Consumer Protection Act* (and the equivalent provisions in the consumer protection legislation in the other provinces and territories) in its marketing and sale of the Affected Product to Class Members? If so, how?

7. Breach of the *Sale of Goods Act*, R.S.N.S. 1989, c. 408 & Equivalent Sale of Goods Legislation

a) Did the Defendants breach section 17 of the *Sale of Goods Act* (and the equivalent provisions in the Sale of Goods legislation in the other provinces and territories) in its marketing and sale of the Affected Product to Class Members? If so, how?

8. Unjust Enrichment

a) Were the Defendants enriched by their conduct in relation to the Affected Product, including without limitation by failing to provide full refunds of the purchase price of the Affected Product to some Class Members?

b) If the answer to common issue 8(a) is yes, did the Class suffer a corresponding deprivation?

c) Was there any juristic reason for the Defendants' enrichment?

9. Remedies

a) Are Class Members entitled to statutory relief for breaches of any of the legislation pleaded herein?

b) Are Class Members entitled to restitution, due to unjust enrichment and/or waiver of tort? If so, what is the quantum?

c) Are Class Members entitled to damages for personal injury caused by the Affected Product?

5. That the claims to be determined and the relief being sought are as per the Second Amended Statement of Claim;

6. That Class Members shall be given notice of the certification of this action as a class proceeding, in accordance with the form of the Notice of Certification, attached hereto as Schedule "A", and in the manner set out in the Plaintiff's Litigation Plan, attached hereto as Schedule "B";

7. That the costs of distributing Notice of Certification to Class Members shall be paid for by the Defendants;

8. That the Notice of Certification and its distribution satisfy the requirements of s. 22(6) of the Act;

9. That the Litigation Plan, attached hereto as Schedule "B", is a workable method of advancing the proceedings, subject to clarification and amendment if required now or as the proceedings progress;

10. That a Class Member may opt out of the class action by sending an Opt Out Form, attached hereto as Schedule "C", signed by the Class Member, to Wagners on or before the deadline stipulated in the Opt Out Form;

11. That there shall be document production on all the common issues;

12. That the Defendants shall deliver their statements of defence no later than forty-five (45) days following the issuance of this Order, or no later than forty-five (45) days from the date of a decision from the Court of Appeal, if this Order is appealed; and

13. That the costs of this motion are to be paid by the Defendants.

February 14th, 2019.

Prothonotary TARA CODY
Deputy Prothonotary

THE SUPREME COURT OF NOVA SCOTIA
hereby certify that the foregoing document,
identified by the Seal of the Court is a true
copy of the original document on file herein.
Dated the 14th day of February A.D., 2019

Deputy Prothonotary
TARA CODY
Deputy Prothonotary

SCHEDULE "A"

NOTICE OF CERTIFICATION: ORGANIGRAM CLASS ACTION

To: All persons and entities who purchased from OrganiGram medical cannabis that has been the subject of a voluntary or involuntary recall as of [date Certification Order is issued] ("Class Members").

Notice of Certification: A class action has been certified on your behalf. Certification means that the class action can proceed to trial. No determination of the outcome of the class action has been made yet.

Who is included?

On January 9, 2017, Organigram Inc., a licensed producer of cannabis for medical purposes in New Brunswick, began a recall of sixty-nine lots of product, in addition to 5 lots of product recalled on December 28, 2016. The products that are being recalled include dried marijuana and cannabis oil that were produced between **February 1, 2016 and December 16, 2016.**

"Class Members" are all persons and entities who purchased from OrganiGram cannabis for medical purposes that has been recalled as of [date Certification Order is issued]. If you are a Class Member you do not need to do anything at this point to get the benefit of any ruling on the common issues decided at trial.

What is the class action about?

The class action alleges that the Defendants' sale of medical cannabis containing unauthorized pesticides to Class Members fell below the standard of care, was a breach of contract, and was in violation of legislation governing the purchases. A judgment on the common issues will bind all Class Members who do not opt out.

Do I have to pay anything to participate? How are the lawyers paid?

No you do not pay anything out of your pocket. Class counsel has agreed to act on the basis that they will not be paid any legal fees unless and until Class Members receive compensation. The Representative Plaintiff has entered into a Contingency Fee Agreement with class counsel. It provides for legal fees of 25% to 33 1/3% of a judgment or settlement, the percentage depending upon the stage in the litigation that the action resolves. Class counsel will apply to the Court at the conclusion of the case to have legal fees approved. Class counsel will pay for all case expenses incurred in advancing the case, and if the case is successful, class counsel will apply to the court to be reimbursed for these case expenses, in addition to legal fees. If the case is not successfully settled or tried, class counsel will not be paid or be reimbursed for any expenses.

What if I don't want to participate in the class action?

If you do not want to participate, you must opt out by sending an opt out form to Wagners to be received on or before [insert opt out deadline]. If you opt out you will not be entitled to share in any recovery or take the benefit of any ruling in this case.

More information:

For more information visit the following website, www.wagners.co/current-class-actions, telephone 1-800-465-8794/902-425-7330, email classaction@wagners.co, or contact us by mail at:

Wagners
1869 Upper Water Street
Suite PH 301, Pontac House
Historic Properties
Halifax NS B3J 1S9

Representative Plaintiff: Dawn Rae Downton, c/o Wagners (address provided above)

This summary notice has been approved by the Supreme Court of Nova Scotia.

Do not Contact the Court about this Certification.

SCHEDULE "B"

SCHEDULE "B"
Litigation Plan

DEFINED TERMS

1. Capitalized terms that are not defined in this litigation plan (the "Plan") have the meanings as particularized in the Amended Statement of Claim, as it may be further amended from time to time.

AMENDMENTS, FURTHER ORDERS CONCERNING THIS PLAN

2. This Plan may be amended from time to time by directions given at case management conferences or by further order of the Court.

3. All timelines are subject to any appeals throughout the litigation, including an appeal of certification and the outcome thereof.

CLASS COUNSEL

4. The Plaintiff has retained Wagners as class counsel ("Class Counsel") to advance this class action. Class Counsel has the requisite knowledge, skill, experience, personnel and financial resources to prosecute the action to resolution. Class Counsel may collaborate with other counsel in advancing the class action.

THE COMPOSITION OF THE CLASS

5. The "Class" and "Class Members" are defined as:

> All persons and entities who purchased from OrganiGram cannabis for medical purposes that has been the subject of a voluntary or involuntary recall as of the date of the order certifying the action.

NOTICE OF CERTIFICATION, NOTICE PLAN AND THE OPT-OUT PROCEDURE

6. The Plaintiff proposes that notification of certification, the opt-out deadline and means of opting out be provided via "Notice of Certification" in the form appended as Schedule "A" to the Order for Certification. Subject to approval of the Court, Notice of Certification will be distributed to the Class by the following means (referred to collectively as the "Notice Plan"):

a) Class Counsel will send Notice of Certification directly to Class Members by regular mail and/or electronic mail (electronic mail will be the primary method, where it is available) following receipt of a list of Class Member names and mailing/email addresses from the Defendants (to be held in confidence by Class Counsel and used strictly for the within purpose);

b) Class Counsel will post Notice of Certification and the Opt-Out Form on its website;

c) Class Counsel will issue a press release; and

d) Class Counsel will provide Notice of Certification to any person or entity who requests it.

7. The Plaintiff proposes that the opt-out deadline be sixty (60) days after the date of distribution of Notice of Certification to Class Members, or as otherwise agreed by counsel and approved by the Court (or, in the absence of any agreement of counsel, as directed by the Court).

8. The Plaintiff will ask the Court to order that the costs (as applicable) of distributing Notice of Certification in the above manner be paid by the Defendants.

REPORTING AND COMMUNICATION

9. Current information on the status of the action is posted and will be updated regularly on Class Counsel's website at www.wagners.co. Copies of some of the publicly filed court documents, court decisions, notices and other information relating to the action are and will be accessible from the website.

10. Class Counsel will inform known Class Members about material updates in the litigation via regular mail and/or electronic mail (electronic mail will be the primary method, where it is available).

CASE MANAGEMENT CONFERENCES

11. The Plaintiff proposes that case management conferences be conducted before a case management judge as necessary and at the request of the parties, and as otherwise directed by the Court.

12. The Plaintiff proposes that a case management conference be held within forty-five (45) days of the release of the Court's decision certifying the action, the primary purpose being to seek the direction of the Court on any outstanding issues and determine the litigation schedule.

13. The Plaintiff proposes the following schedule for the remaining steps in the action:

    (a) Within forty-five (45) days from the date the Order for Certification has been issued by the Court, or within forty-five (45) days from the date of a decision from the Court of Appeal, if the Order for Certification is appealed, the Defendants shall deliver their Statements of Defence;

    (b) Within six (6) months following the delivery of the Statements of Defence and/or Reply, the parties will exchange their Affidavits of Documents;

    (c) Within six (6) months following the exchange of the Affidavits of Documents, the parties will complete their examinations for discovery, which shall be confined to the certified common issues; and

    (d) Within six (6) months after all examinations for discovery have been concluded, the parties will exchange expert reports.

14. The *Civil Procedure Rules* will apply to the scheduling of any appeals brought in the action.

DISCOVERY

15. The Plaintiff proposes that counsel for the parties meet following certification to discuss ways to efficiently disclose documents to one another utilizing computer database software so that, as much as possible, documents may be produced and shared between the parties and be made available to the Court in electronic format.

16. The Plaintiff proposes that a conference of all counsel be held following the completion of the discovery stage in order to address, *inter alia*, refinement of the common issues for trial (including, if necessary, the addition or removal of common issues, and upon the approval of the Court as necessary) and the schedule for the common issues trial.

MEDIATION

17. The Plaintiff will participate in mediation before a mutually acceptable mediator if the Defendants are prepared to do so.

INTERLOCUTORY MOTIONS

18. Unless a particular motion is a matter of urgency, all interlocutory motions will be heard by the case management judge.

19. The scheduling of and any directions in relation to any interlocutory motions will be addressed at a case management conference. If the need for an interlocutory motion should arise in a more time-sensitive manner, a request for dates and directions can be delivered to the case management judge as need be. Unless otherwise agreed to or directed by the case management judge, the filing deadlines for any such interlocutory motions will be governed by Rule 23 of the *Civil Procedure Rules*.

COMMON ISSUES RESOLUTION

20. The Plaintiff proposes to resolve as many of the common issues as possible before the case management judge by way of Notices to Admit, or interlocutory motions for a preliminary determination of law or fact.

MANNER OF PROOF AT TRIAL

21. At trial, the Plaintiff expects to rely on the following to prove the facts underlying the causes of action:

(a) admissions made in the pleadings;

(b) admissions made in discovery or in interrogatories;

(c) admissions made through Request for Admissions (in accordance with rule 20.03);

(d) evidence from witnesses; and

(e) expert evidence.

NOTICE OF RESOLUTION OF THE COMMON ISSUES

22. Assuming that the common issues are resolved in favour of the Plaintiff, the Court will be asked:

(a) to settle the form and content of the notice of resolution of the common issues (the "Notice of Resolution");

(b) to prescribe the information required from Class Members in order to make an individual claim based on the judgment on the common issues, if necessary;

(c) to declare the facts Class Members must establish to succeed in individual claims, if any; and

(d) to set a date by which Class Members will be required to file an individual claim.

23. The Plaintiff proposes that the Notice of Resolution include the following information:

(a) A description of the Class;

(b) A description of the common issues and the nature of the claims asserted;

(c) The common issues on which the Plaintiff was successful;

(d) The nature of any class-wide remedies granted in the judgment on the common issues;

(e) What steps a Class Member must take to assert a claim and what facts a Class Member must prove to succeed on such a claim;

(f) How to obtain further information; and

(g) That their claims in relation to the matters raised in the pleadings will be deemed to have been finally adjudicated whether or not they participate in the individual stage of the proceeding.

24. The Plaintiff will ask the Court to order that the Notice of Resolution be distributed substantially in accordance with the procedure outlined above in the Notice Plan for the Notice of Certification.

ADJUDICATION OF REMAINING / INDIVIDUAL ISSUES

25. If the common issues are resolved in favour of the Plaintiff, the Plaintiff proposes the following process for the resolution of any remaining issues: (i) subsequent to resolution of the common issues and determination of the availability of aggregate and punitive damages, the quantum of aggregate damages will be determined; (ii) subsequently, and to the extent necessary, individual causation and damages will be assessed pursuant to the below individual claims procedure; and (iii) subsequently, the quantum of punitive damages will be determined.

Individual Claims Procedure

26. The Plaintiff proposes the following process for the resolution of the individual claims following resolution of the common issues trial.

27. The parties will select, by agreement, one or more referees or evaluators. The Court must approve the selection(s). If the parties are unable to agree, the parties may ask the Court to appoint one or more referees or evaluators with such rights, powers and duties as the Court

directs, to conduct hearings with respect to any individual issues that remain outstanding in order for individual Class Members to obtain relief, pursuant to *Civil Procedure Rule* 11. Those references will be conducted in accordance with the directions of the trial judge in the order approving the appointment of the referees/evaluators.

28. The Court will be asked to set a deadline (the "Claims Deadline") by which Class Members must file their claims with a designated person or the Court.

29. The evidence necessary to succeed on an individual claim may depend on the extent of the Plaintiff's success with respect to the common issues and the evidence relied upon at the common issues trial. The process proposed for determining such claims is outlined below. Pursuant to section 30 of the *Class Proceedings Act*, S.N.S. 2007, c. 28, the Court will be asked to give directions relating to the individual claims assessments that result in the least expensive and most expeditious method of determining the individual issues, including dispensing with any procedural step that it considers unnecessary.

Claims (Under $100,000) – Simplified Procedure

30. Class Members willing to cap the value of his/her individual claim at $100,000 will be required to file only affidavit evidence with a referee/evaluator, setting out the evidence relating to the individual issues remaining to be proven. If the Defendants wish, they may cross examine an affiant on his/her affidavit out of court, should they wish to challenge the evidence. The referee/evaluator will then make a report and recommendation to the Court with respect to the Class Member's claim on the basis of the affidavit and transcript evidence. The report will be provided to all parties. The Court will be asked by way of application to incorporate the report and recommendation of the referee/evaluator into a judgment. There will be no right of appeal of the Court judgment.

Claims (Over $100,000)

31. Class Members submitting claims in excess of $100,000 will be required to:

(a) Serve on the Defendants an affidavit of documents prepared in accordance with Rule 15; and

(b) Attend for an oral examination for discovery (in accordance with Rule 18), if the Defendants require.

32. The referee/evaluator may, in his or her discretion, make a report and recommendation as to the Class Member's entitlement, if any, based on the documentary and transcript evidence, or conduct a trial of such claims. The Court will be asked by way of application to incorporate the report and recommendation into a judgment. There will be no right of appeal of the Court judgment.

EFFECT OF THIS PLAN

33. This Plan, as it may be revised by order of the Court from time to time, shall be binding on all Class Members whether or not they make a claim under the Plan.

SCHEDULE "C"

SCHEDULE "C"

2017 **Hfx. No. 460984**

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

DAWN RAE DOWNTON

PLAINTIFF

- AND –

ORGANIGRAM HOLDINGS INC. and ORGANIGRAM INC.

DEFENDANTS

Proceeding pursuant to the *Class Proceedings Act*, S.N.S. 2007, c. 28

OPT OUT FORM

DEADLINE - MUST BE RECEIVED BY: _____

I, _____, do not want to be included in the class action against the above-named Defendants with respect to the recall of cannabis for medical purposes (dried marijuana and cannabis oil) that was produced by the Defendants between February 1, 2016 and December 16, 2016.

I understand that if I opt out of the class action, I will not be entitled to share in any recovery or take any benefit of any ruling in this case, but I will be free to bring my own claim if I wish. I understand that if I opt out of the class action and wish to bring my own claim, my own claim may be subject to a limitation period. I understand this Opt Out Form must be received by class counsel by _____.

Please complete Class Member information:

Class Member Name:	_____	Telephone:	_____
Address:	_____	Email address:	_____
	_____	Date:	_____
City:	_____		
Province:	_____	Signature:	_____