NOVA SCOTIA COURT OF APPEAL

Citation: *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38

Date: 20200430
Docket: CA 485656
Registry: Halifax

Between:

Organigram Holdings Inc. and Organigram Inc.

Appellants

v.

Dawn Rae Downton

Respondent

Judges:	Farrar, Fichaud and Bryson, JJ.A.
Appeal Heard:	October 15, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed in part with costs, per reasons for judgment of Bryson, J.A.; Farrar and Fichaud, JJ.A. concurring
Counsel:	Jane O'Neill, QC and Daniel Wallace, for the appellants Raymond F. Wagner, QC, Madeleine Carter and Kate Boyle, for the respondent

IN THE NOVA SCOTIA
COURT OF APPEAL
I 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 30th day of April A.D., 2020
Deputy Registrar

Reasons for judgment:

Introduction

[1] Dawn Rae Downton successfully applied to certify an action against Organigram as a class proceeding arising out of her consumption of medical cannabis containing unauthorized pesticides she purchased from Organigram. Ms. Downton experienced symptoms of nausea and vomiting after first consuming Organigram's cannabis, which only stopped after she discontinued that use.

[2] Ms. Downton's action comprises two general categories of claim, characterized by Organigram as "consumer claims" and "adverse health consequences claims". The Statement of Claim has been twice amended, once on November 16, 2017 and a second time on February 12, 2019 following the certification hearing. At first, Ms. Downton did not seek damages for personal injuries and in fact pleaded that she was not seeking them. That changed and a personal injury claim first appeared in the Amended Statement of Claim dated November 16, 2017, and continues in the second Amended Statement of Claim. Because the November 16, 2017 Amended Statement of Claim was before the certification judge, it will be referred to throughout as the Statement of Claim or pleading unless otherwise indicated.

[3] To summarize s. 7 of the *Class Proceedings Act*, S.N.S. 2007, c. 28, an action may be successfully certified as a class proceeding if:

(a) the pleadings disclose 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 it 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 an appropriate representative party who would represent the interests of the class; has produced a plan setting out a workable method for advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding; and, whose

interests do not conflict regarding common issues with other members of the class.

[4] Other than the first criterion, Ms. Downton has the burden of establishing some basis in fact for the other criteria for certification. If each of the criteria are met, the Court "shall certify" the class proceeding (*Class Proceedings Act*, s. 7(1)).

[5] The Honourable Justice Ann E. Smith found that the criteria were satisfied and certified the class action (2019 NSSC 4). A copy of the certification order is attached as Schedule "A" to this decision. Organigram appeals the certification, alleging the judge erred in law:

1. by finding that the Statement of Claim disclosed causes of action for negligent design, development and testing, negligent distribution, marketing and sale, breach of the *Competition Act* and unjust enrichment;
2. by finding that Ms. Downton demonstrated a workable methodology to show that the cannabis was capable of causing adverse health effects on a class-wide basis;
3. by finding that a class action was the preferable procedure for the fair and efficient resolution of the adverse health claims.

[6] Organigram does not seek to quash certification of the action as a whole. Organigram does not challenge the decision to allow the consumer claims to be assessed as common issues (breach of contract, breach of *Consumer Protection Act*, breach of the *Sale Goods Act*, and remedies for statutory breach and restitution). Organigram only appeals those portions of the certification order that allow common issues to proceed on the adverse health consequences claims. Organigram submits that there is no evidence that its cannabis caused any adverse health effects nor is there any workable methodology for establishing any causal connection between its cannabis and the symptoms complained of in this case. Alternatively, Organigram argues that a class proceeding is not the preferable procedure for determination of the adverse health claims. Additionally, Organigram challenges certification of some of the causes of action.

[7] For reasons that follow, I would allow the appeal in part. There is no evidence that there is a workable methodology to determine that the proposed adverse health effects claims have a common cause. Proposed common issues for

those claims should not be certified. The claim for unjust enrichment is improperly pleaded and should be struck.

[8] After a review of the facts, the grounds of appeal will be addressed.

Background facts

[9] Organigram has been a federally approved producer of medical cannabis since April 14, 2014. Its office and production facilities are located in Moncton, New Brunswick. In October 2014, Organigram obtained organic certification recognized by the Canadian Food Inspection Agency.

[10] Dried cannabis can be consumed through ingestion, food items, combustion (smoking cannabis), and vaporization (inhaled without combustion).

[11] In late 2016, testing disclosed trace amounts in Organigram's cannabis of the pesticides bifenazate, malathion, and myclobutanil. Bifenazate is an insecticide which controls mite pests on crops. Myclobutanil is a fungicidal pesticide. Malathion controls insect pests on crops. In appropriate amounts all are authorized for agricultural use, but are not among the 14 pesticides authorized for use on cannabis plants under the *Pest Control Products Act*, S.C. 2002, c. 28.

[12] Organigram immediately notified Health Canada of the test results. In conjunction with Health Canada, Organigram initiated a voluntary recall of five lots of cannabis. Follow-up testing established trace amounts of bifenazate and/or myclobutanil in 21 of 69 lots produced between February 1, 2016 and December 16, 2016. These 69 additional lots of cannabis were subject to a Health Canada Type II recall which is defined as:

> ... a situation in which the use of, or exposure to, a recalled product may cause temporary adverse health consequences, or where the probability of serious adverse health consequences is remote.

In total, 74 lots were recalled. Fifty of those lots were not tested.

[13] In January 2017, Organigram instituted a refund and credit program for its customers.

[14] The cannabis purchased by Ms. Downton was included in the 69 lots of the Health Canada Type II recall.

[15] Whether cannabis containing small amounts of myclobutanil or bifenazate poses a health risk is unknown. In response to concerns raised by the Health Canada recall, Health Canada issued a "clarification" on March 9, 2017 which advised in part:

> ... 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 added]

[16] There is no further information concerning any potential risks of consuming cannabis containing myclobutanil or bifenazate. Health Canada describes no specific risks other than contained in the foregoing "clarification".

Did the judge err in certifying the impugned causes of action?

[17] Organigram says the judge was wrong to find that the pleadings disclosed a cause of action for:

1. Negligent design, development and testing;
2. Breach of the *Competition Act*; and,
3. Unjust enrichment.

[18] The *Class Proceedings Act* is procedural, not substantive. Pleadings survive judicial review unless it is "plain and obvious" the cause of action will fail. Assuming the pleaded facts to be true, do they disclose a cause of action? This is a question of law (*Nova Scotia (Health) v. Morrison Estate*, 2011 NSCA 68 at ¶11; *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143 at ¶51-52; *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at ¶57).

[19] Pleadings must be read generously to allow for any inadequacies arising from drafting frailties and lack of access to documents or discovery. The pleaded facts must support the underlying cause of action. As Chief Justice McLachlin emphasized in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at ¶24:

> [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.

[20] Failure to properly plead a cause of action usually results in striking it out. As this Court said in *(Canada (Attorney General) v. MacQueen*, 2013 NSCA 143:

> [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, 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), 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 added in original]

[21] Organigram concedes that Ms. Downton has correctly pleaded causes of action for:

- Negligent manufacturing;
- Breach of contract;
- Breach of *Consumer Protection Act*;
- Breach of *Sale of Goods Act*; and,
- Waiver of tort.

[22] Organigram challenges the pleadings regarding negligent design, development and testing; the *Competition Act*; and unjust enrichment.

Negligent design, development and testing

[23] In her Statement of Claim, Ms. Downton alleges:

> 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.

[24] Ms. Downton then lists particulars of inadequate quality control and testing in the "manufacture" of the cannabis.

[25] Organigram says that this plea is bad because the ubiquity of "negligence" in this pleading really reduces the claim to one of negligence: "the motion judge's description amounts to a claim of simple negligence, not negligent design".

[26] The judge acknowledged that the "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" (¶94).

[27] The judge summarized Ms. Downton's position on this plea:

> [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.

[28] She then referred to evidence that Organigram had changed its process after the recalls by testing for pesticides in every lot of product with a third party laboratory.

[29] Organigram criticizes the judge for incorrectly relying on evidence to sustain this pleading. Organigram is right that evidence cannot be relied upon to bolster inadequate pleadings. However, it is not obvious that the judge did so. What she appears to have done is infer a design defect from the presence of the impugned pesticides in Organigram's cannabis.

[30] At this stage of the lawsuit, one does not know how bifenazate and myclobutanil found their way into so many lots of Organigram's cannabis. Was it intentional or inadvertent? Apparently the presence of these pesticides was not detected prior to sale.

[31] The judge has read Ms. Downton's pleading very generously to resist Organigram's challenge. It seems likely that greater disclosure will resolve this issue. The judge erred on the side of liberality and caution. While not a model of good pleading, it is not plain and obvious that the allegations of negligent design, development and testing are unsustainable.

Breach of the *Competition Act*

[32] Section 52 of the *Competition Act*, R.S.C. 1985, c. C-34, prohibits knowingly or recklessly making false or misleading statements while promoting a product. Section 36 of the *Act* creates a statutory cause of action for losses incurred as the result of a breach of s. 52 of the *Act*.

[33] Ms. Downton alleges the following breaches of the *Competition Act* in her Statement of Claim:

> 48. OrganiGram knowingly or recklessly made false or misleading representations to the public. These representations include, but are not limited to, the following ("the representations"):
>
> a. stating that the Affected Product was organic and free of unauthorized pesticides;
>
> b. stating that the Affected Product was compliant with the *Access to Cannabis for Medical Purposes Regulations*; and

> c. presenting the Affected Product as a safe product for patients while failing to inform them of the human health risks associated with consumption of the Affected Product.
>
> 49. OrganiGram's Representations were material and affected the decisions of the Plaintiff and Class Members to purchase the purportedly organic Affected Product.

[34] The judge accepted Organigram's criticism of ¶48(c) that it was not a representation but rather an omission not proscribed by the *Act*, relying upon *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, affirming 2012 ONSC 4642, leave to appeal to SCC refused [2013] S.C.C.A. No. 498.

[35] The judge sustained the allegations in 48(a) and (b) of the Statement of Claim as misrepresentations, not omissions. Organigram's complaint that reliance was not pleaded was resolved in Ms. Downton's favour owing to ¶49 of the Statement of Claim, which the judge found was an effective plea of reliance.

[36] Organigram further argues that the claim is bad because material facts relating to "knowingly" or "recklessly" had to be specifically pleaded under *Civil Procedure Rule* 38.03(3) and the common law. Organigram says that the judge erred by not addressing this point. Organigram adds that Ms. Downton has not pleaded facts stating when, where, by whom, or to whom the impugned "representations" were made.

[37] Organigram's challenges to Ms. Downton's plea here must be placed in the business context of a course of dealing with her as a customer and member of the public over many months. We cannot expect the same precision of pleading as we would with a discrete malfeasance between individual parties at a particular time. As Ms. Downton alleges in her Amended Statement of Claim:

> 3. At the material times, OrganiGram advertised itself as a producer of solely organic medical cannabis. At the material times, OrganiGram marketed itself as providing safe and healthy products that were more stringently manufactured, tested and regulated than non-organic licensed medical cannabis producers. OrganiGram warranted to patients that its products were grown in regulated soil and organic fertilizers, and contained no banned pesticides or other chemicals.

[38] Reading these allegations in the context of the other pleas of negligent design, manufacture, and sale of cannabis containing unauthorized pesticides, ¶48 and ¶49 adequately describe alleged breaches of the *Competition Act* for pleading purposes and allow Organigram to join issue with Ms. Downton.

Unjust enrichment

[39] Organigram makes a strong argument that this is an untenable cause of action. They cite authority that unjust enrichment is unsustainable when a contract is present. Organigram begins its attack on the judge's ruling with a quotation from *Garland v. Consumers' Gas Co.*, 2004 SCC 25 which sets out the well-known tri-part test for unjust enrichment:

1. An enrichment of the defendant;
2. A corresponding deprivation of the plaintiff; and
3. An absence of juristic reason for the enrichment.

[40] Focusing on the third criterion, Organigram relies upon these comments in *Garland*:

> [44] ... 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. ... ***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.
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> [Emphasis added]

[41] Organigram criticizes the judge for failing to refer to binding and persuasive authority supporting its submission that a contract precludes a successful plea of unjust enrichment citing *Garland, supra; Evanoff Enterprises Ltd. v. Pioneer Hi-Bred Ltd.*, 2009 ABQB 223 at ¶63; *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075, aff'd 174 OAC 44; *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 at ¶232, aff'd 2012 ONSC 3692.

[42] The judge dismissed Organigram's argument because she accepted Ms. Downton's response that whether the contract provides a juristic reason for Organigram's alleged unjust enrichment involves a merits investigation into the terms of the contract, and in particular whether Organigram's reliance on the contract as providing a juristic reason for any enrichment was vitiated by failing to deliver the product contracted for.

[43] In her Statement of Claim Ms. Downton says:

60. The Plaintiff and Class Members did not receive a product of the quality, nature or fitness that had been represented by OrganiGram or that the Plaintiff and Class Members, as reasonable consumers and patients, expected.

61. OrganiGram failed to offer or provide a full and complete refund to only Class Members.

62. By reason of the wrongdoing described herein, there has been a deprivation of the Plaintiffs and Class Members and a corresponding enrichment of OrganiGram. This deprivation and corresponding enrichment is without juridical reason.

[44] Earlier Ms. Downton pleaded:

14. The Plaintiff states that there has been a deprivation of the Plaintiff and a corresponding enrichment of OrganiGram, by reason of the tortious conduct and statutory breaches and breaches of contract described herein. This deprivation and corresponding enrichment is without juridical reason.

15. The Plaintiff claims a remedy in restitution on the basis that the interest of the Plaintiff in the safety of medical cannabis she purchased makes it just and equitable that OrganiGram should retain no benefit from the misconduct pleaded.

[45] This is certainly a confused pleading. There is no attributed relation between the elements of unjust enrichment and "tortious conduct", "statutory breaches" or "breaches of contract".

[46] Ms. Downton never describes—except by implication—any benefit to Organigram. On the pleaded facts, the only discernible "benefit" claimed is the contractual price paid for the cannabis. No "merits analysis" is required to know that the remedial consequences for breach of contract are typically captured by the law of contract. Contract trumps unjust enrichment because the law favours parties autonomously allocating risks between themselves:

> Contract trumps unjust enrichment in several respects. Most obviously, restitutionary relief is not available if the claimant possess a right to contractual relief.
>
> (McInnes, *The Canadian Law of Unjust Enrichment*, (Toronto: LexisNexis, 2014) at p. 645)

[47] During oral argument, Ms. Downton suggested that unjust enrichment may be available if the contract is found void. She cites no law. The argument depends upon a breach of contract to sustain the claim of unjust enrichment. That is untenable. While pleas of breach of contract and unjust enrichment are inconsistent, that need not be fatal.

[48] One may plead facts and related legal consequences that are inconsistent, in the alternative (*Mahoney v. National Bank Financial Ltd.*, 2005 NSCA 139 at ¶15). But one cannot plead inconsistent causes of action from common facts. One needs to plead the facts material to the causes of action claimed (*Canada (Attorney General) v. MacQueen*, 2013 NSCA 143 at ¶55).

[49] Here Ms. Downton has pleaded facts material to a breach of contract. Those facts cannot simultaneously sustain an unjust enrichment claim. Where Ms. Downton explicitly refers to unjust enrichment, she fails to plead facts material to that claim.

[50] The pleaded facts support a claim in contract, not unjust enrichment. The claim for unjust enrichment should be struck.

Did the judge err in finding that Ms. Downton had established a workable methodology for demonstrating that the recalled product can cause adverse health effects on a class-wide basis?

[51] Organigram argues that general causation is essential to Ms. Downton's claims resulting in an adverse health effect. Organigram says no methodology for determining general causation has been or could be proposed, and so all claims for adverse health effects cannot be certified.

[52] Organigram cites *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, approved by this court in *MacQueen* at ¶123, for a list of general propositions for determining whether common issues are present. Those propositions are reproduced here, without citations, with Organigram's emphasis on causation:

> [140] The following general propositions, which are by no means exhaustive, are supported by the authorities:
>
> > **A:** The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis.
> >
> > **B:** The common issue criterion is not a high legal hurdle, and 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.

C: There must be a basis in the evidence before the court to establish the existence of common issues [citations omitted]. As Cullity J. stated in *Dumoulin v. Ontario*, at para. 27, the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.

D: In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues.

E: The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim.

F: A common issue need not dispose of the litigation; 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.

G: With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.

H: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant.

I: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis.

J: Common issues should not be framed in overly broad terms: "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".

[Organigram's emphasis]

[53] In *Pioneer Corp.*, the Court referred to its earlier decision in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 regarding the applicable principles somewhat overlapping the foregoing:

> [104] In *Microsoft*, this Court reaffirmed the principles of "common issues" for the purpose of certification, as they were explained in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 108:
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> > In . . . *Dutton* . . . this Court addressed the commonality question, stating that "[t]he underlying question is whether allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:
> >
> > (1) The commonality question should be approached purposively.
> >
> > (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
> >
> > (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
> >
> > (4) It [is] not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify [a class proceeding]. The court will examine the significance of the common issues in relation to individual issues.
> >
> > (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[54] Organigram says that Ms. Downton has failed to demonstrate that there is a workable methodology for determining whether the impugned substances can cause harm, what that harm might be, or how it could be assessed on a class-wide basis. Relying on *Charlton v. Abbott Laboratories, Ltd.*, 2015 BCCA 26, Organigram reminds us that:

> [67] ... "There can be no finding of negligence applicable to the class if there is no prior finding that [the impugned substances] can cause a health risk on a class wide basis".

[55] Referring to *Miller v. Merck Frosst Canada Ltd.*, 2015 BCCA 353, Organigram argues the need to demonstrate a method of establishing general causation, prior to individual causation:

> [44] ***Related jurisprudence in the context of "toxic substances" suggests that to meet the methodology requirement, the plaintiff must, at a minimum, identify the mechanism by which the impugned substance causes disease and therefore harm.*** In *Charlton*, this Court stated:

> [95] The Court addressed the objection to certification by referring to the judgment of this Court in *Harrington v. Dow Corning Corp.*, 2000 BCCA 605 (B.C.C.A.), and an article by Patrick Hayes entitled *Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification*, 19 J. Env. L. & Prac. 190 at 195:
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> > ***Proving causation in the context of toxic substances, however, puts the added burden on plaintiffs to establish two types of causation, both general and specific.*** This is because, unlike the causal connection between being hit by a car and suffering a broken bone, for instance, the causal connection between a toxic substance and a disease is not as easy to decipher. Thus, a plaintiff must first prove "general" or "generic" causation — that a particular substance is capable of causing a particular illness. The issue must be addressed, whether explicitly or implicitly, in toxic torts litigation, since ***it is axiomatic that "an agent cannot be considered to cause the illness of a specific person unless it is recognized as a cause of that disease in general.***" Next, a plaintiff must prove "specific" or "individual" causation — that exposure to a particular toxic substance did, in fact, cause the plaintiff's illness.
>
> [Emphasis added]

[56] Organigram says the judge erred by not considering that a particular substance must be capable of causing a particular illness. Referring to the judge's conclusion that "there is some evidence by which general causation may be proven that is sufficient for certification", Organigram asks rhetorically "general causation of what harm?", adding "How can common impact be proven when it is not clear what that alleged particular impact may be?".

[57] In order to establish general causation:

(a) The symptoms described cannot be so vague and generic that they lack a plausible common cause;

(b) The methodology proposed must relate to the symptoms pleaded and in evidence.

Vague symptoms

[58] Ms. Downton's pleading complains that Organigram's cannabis is unsafe and harmful to her health and the health of class members. In her affidavit, Ms. Downton described experiencing nausea and vomiting which she attributed to her use of Organigram's cannabis. Another proposed member of the class, Rhonda

Daniels, experienced severe nausea, gastrointestinal issues, breathing difficulty and headaches after consuming the cannabis. In both cases, consumption included smoking and ingestion.

[59] According to Health Canada, the Downton-Daniels's complaints are included among the predicted side effects of consuming cannabis in general:

> - dizziness, drowsiness, feeling faint or lightheaded, fatigue, ***headache***;
> - impaired memory and disturbances in attention, concentration and ability to think and make decisions;
> - disorientation, confusion, feeling drunk, feeling abnormal or having abnormal thoughts, feeling "too high", feelings of unreality, feeling an extreme slowing of time;
> - suspiciousness, nervousness, episodes of anxiety resembling a panic attack, paranoia (loss of contact with reality), hallucinations (seeing or hearing things that do not exist);
> - impairments in motor skills and perception, altered bodily perceptions, loss of full control of bodily movements, falls;
> - ***dry mouth, throat irritation, coughing***;
> - worsening of seizures;
> - hypersensitivity reactions (contact dermatitis/hives);
> - higher or lower blood levels of certain medications;
> - ***nausea, vomiting***; and
> - fast heartbeat.
>
> [Emphasis added]

[60] During oral argument in the Court of Appeal, counsel for Ms. Downton was pressed on exactly what his client was alleging had been caused by exposure to the impugned chemicals. He conceded that his client was not seeking certification of a common cause related to a specific illness or disease. The claim was limited to asserting a common cause for the common and very transient foregoing conditions of nausea, dizziness, headaches and the like. Those complaints describe general and vague symptoms with no attribution of a particular illness. They are commonly experienced for a variety of disparate reasons. Vagueness and diversity of symptoms, having a myriad of potential causes, may be fatal to certification that depends upon general causation of illness.

[61] In *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, the Saskatchewan Court of Appeal declined certification of whether the drug Vioxx could exacerbate cardiovascular or gastrointestinal conditions because a single answer could not result from the array of effects alleged. The general character of this language offends the common impact methodology requirement for causation described by the Supreme Court in *Microsoft* (¶54 above).

[62] In *Martin v. Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744 (aff'd 2013 ONSC 1169), the Ontario Superior Court rejected certification of the question, "Can [the drug] Seroquel cause weight gain, diabetes and/or related metabolic disturbances as well as secondary injuries flowing therefrom?" The court criticized this question as follows:

> [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. Wuttunee*, 2009 SKCA 43 (CanLII), [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 ("*Wuttunee*").
>
> [234] Adding to the difficulty is the fact that ***this is not a case where the drug is alleged to have caused a unique harm.*** In contrast, ***Seroquel is alleged to cause weight gain and diabetes. These are two conditions that are ubiquitous in society.*** The evidence that has been provided shows that this general causation question is just the beginning of the inquiry and that its resolution is dependent upon individual findings of fact with respect to each claimant.
>
> [Emphasis added]

[63] In *Sweetland v. GlaxoSmithKline Inc.*, 2016 NSSC 18, the Nova Scotia Supreme Court refused to certify "adverse cardiovascular events" from the use of a diabetes medication AVANDIA, because it was too broad and vague, and not limited to the potential problems identified by the plaintiffs' experts. The Court narrowed the certified issues to heart failure, heart attack and stroke.

[64] In the recent decision of *Bayer Inc. v. Tluchak Estate*, 2019 SKCA 64, the Saskatchewan Court of Appeal referred to *Sweetland* and *Astrazeneca* amongst others when warning against overly broad common issues:

> [38] The following are examples of where a common issue has been dismissed or amended for being too broadly worded:
>
> (a) *R v Brooks*, 2009 SKQB 509, [2010] 6 WWR 81 (leave to appeal to Sask CA refused, 2010 SKCA 55): "'Adverse health effects' is vague and infinite and not proscribed in any way." (at para 163) (dismissed);
>
> (b) *Martin v Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744, 27 CPC (7th) 32 (aff'd 2013 ONSC 1169 (Div Ct)): "related metabolic disturbances as well as secondary injuries flowing therefrom." (at para 221) (dismissed);
>
> (c) *Schroeder v DJO Canada Inc.*, 2010 SKQB 125, [2010] 10 WWR 324 (aff'd 2011 SKCA 106): "serious adverse effects" (at para 93) amended to whether the device in question caused "chrondrolysis when placed in the synovial cavity of a knee or shoulder following surgery" (at para 94);
>
> (d) *Sweetland v GlaxoSmithKline Inc.*, 2016 NSSC 18, 369 NSR (2d) 229: "adverse cardiovascular events" (at para 60) was amended to limit the common issue to "heart failure, heart attack and stroke" (at para 62).

[65] Ms. Downton's Statement of Claim asks for damages for "adverse health consequences"—a question rejected in *Brooks* and *Sweetland*.

[66] Organigram notes that Ms. Downton has not alleged a particular illness caused by either myclobutanil or bifenazate. Both are very different substances but the judge does not address those differences.

[67] Ms. Downton is unable to say that exposure to the impugned substances can be linked to any specific illness. The best she can do is allege that it may cause the transient symptoms she describes.

[68] Citing *Miller* and *Microsoft*, the judge correctly identified the methodology at the certification stage need not quantify damages but must be able to prove "common impact" (*Decision* at ¶204). But the judge never describes that common impact in this case. She simply adopts the enigmatic claims of "adverse health consequences" or "risks", alleged in the Statement of Claim (*Decision* at ¶214 and 216).

[69] The general character of this language offends the "common impact" methodology requirement for causation described by the Supreme Court in *Microsoft*. As the Saskatchewan Court of Appeal said in *Wuttunee*:

> [146] ... The appellants do not exaggerate, in my view, when they assert that this issue would require the court to determine and evaluate all of the effects that Vioxx may have on all of the gastrointestinal and cardiovascular body systems. ...

[70] The judge erred in principle in certifying a claim with a generic heading of damage of "adverse health consequences", not susceptible to a common causation determination. The wide array of common, generic and transient symptoms described by Ms. Downton are not capable of a common cause determination.

Methodology

[71] Organigram also points out that class action plaintiffs need to establish some evidentiary support for a methodology of proving general causation, which must be more than theoretical, citing *Microsoft*:

> [115] ... ***It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so.*** ...
>
> ...
>
> [118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that ***the methodology must offer a realistic prospect of establishing loss on a class-wide basis*** so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). ***The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question.*** There must be some evidence of the availability of the data to which the methodology is to be applied.
>
> [Emphasis added]

[72] Ms. Downton replies that she has offered such evidence, through Dr. Guidotti. The judge agreed:

> [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.

[73] Respectfully, the judge erred in two respects here:

(a) Virtually all the potential harms described by Dr. Guidotti do not correspond to the symptoms complained of;

(b) The methodology proposed by Dr. Guidotti fails to address the facts in this case.

[74] Ms. Downton would augment her potential harm submissions by relying upon Health Canada's recall of the contaminated cannabis in this case. The recall was what is known as a "Type II" recall and describes "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".

[75] The basis for Health Canada's Type II recall is not explained except by a clarification quoted above and repeated here for convenience:

> [40] ...
>
> 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 added]

[76] Observing as the judge does that "obviously, there was a rationale for the recall" (¶208), does not dispense with Ms. Downton's obligation to show a methodology that has a reasonable prospect of establishing general causation.

[77] Both myclobutanil and bifenzanate are approved for agricultural use. For that reason, Dr. Guidotti's concern is primarily focused on the potential health risks of inhalation of cannabis containing these substances.

[78] Dr. Guidotti says that potential harm from ingestion cannot be used to infer harm from combustion and inhalation because of the products produced by combustion of cannabis and the more directly efficient absorption of those products through the lungs.

[79] To fill the gap in our knowledge, Dr. Guidotti offers:

> It would be possible to perform toxicological studies on these two chemicals and their combustion products by the inhalation route, although such studies are difficult and expensive, and to perform risk assessment using this information. It would probably not be feasible to conduct epidemiological studies because of the small number of people known to have been exposed to contaminated marijuana.

[80] Dr. Guidotti's hopeful expectation of risk assessment from novel toxicological studies identifies no risks of inhalation. His concerns are about potential risk. Crucially, he does not associate any potentially serious adverse health consequences with the reported symptoms of Ms. Downton or Ms. Daniels.

[81] Summarizing whether myclobutanil may cause "serious adverse health consequences" Dr. Guidotti says:

> The balance of probabilities favours the conclusion that myclobutanil-contaminated medical cannabis inhaled by the combustion route causes in the short term a risk of cyanide induced acute heart and central nervous system damage, and increases the risk of heart attacks, liver disease, endocrine disorders (including fertility) and birth defects.

[82] Regarding the potentially serious adverse health consequences of exposure to bifenazate, Dr. Guidotti concludes:

> Exposure to bifenazate therefore increases the risk of reproductive health effects on children born relatively soon after use (with and without concomitant exposure to myclobutanil) anemia and chronic irritation of airways and mucus membranes.

In cross-examination Dr. Guidotti conceded that smoking cannabis itself would be irritating to the lungs.

[83] In summary, he concludes, "It is my considered opinion that the risk conferred by exposure to these chemicals is indefinable, potentially serious and cannot be anticipated or mitigated by the user".

[84] Nothing about nausea, vomiting, dizziness, breathing difficulties or headaches—the things described by the class plaintiffs here. Not only is there a disconnect between Dr. Guidotti's hypothetical serious adverse health effects and the Downton-Daniels's evidence, his hypothesis presents an insurmountable common causation challenge.

[85] Referring again to the Saskatchewan Court of Appeal, in *Wuttenee*, a class action involving the drug Vioxx, the Court noted the diversity of unrelated conditions as fatal to common cause:

> [150] In the instant case, however, the fact that members of the subclasses, and even within subclasses, raise a wide range of varied and distinct allegations, the common benefit of a question such as that approved in Harrington is lost. For example, ***should the answer to the question, so interpreted, be affirmative in relation to the propensity of Vioxx to cause adverse thrombotic cardiovascular events, that finding would be irrelevant to those claiming adverse gastrointestinal conditions or injuries, or unrelated cardiovascular events or conditions.***
>
> ...
>
> [152] However, even ***assuming that each of these allegations can be viewed in this way, it is clear that this issue, like the previous ones, is not really one question at all, but a myriad of questions, susceptible to different answers in relation to each of the risks or defects of Vioxx alleged, each of which is relevant to only a portion of the class certified.***
>
> (*Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43)
>
> [Emphasis added]

[86] Earlier in *Wuttunee*, the Saskatchewan Court of Appeal also noted the disparate answers that precluded resolving a question of general causation:

> [142] Further still, it is argued, the issue is also not susceptible to a single answer at a more abstract level, for it must be separately asked and answered across the broad array of cardiovascular and gastrointestinal effects alleged by the plaintiffs. ***Clearly, the question of whether Vioxx "can" cause adverse cardiovascular conditions is distinct from the question of whether it "can" cause adverse gastrointestinal effects. Whether it can cause high blood pressure is different from whether it can cause blood clotting.***

...

> [145] However, the wide diversity of complaints to which this issue is addressed was not considered below. In my respectful view, this diversity is fatal to consideration of this issue as a "common" issue. Clearly it is not susceptible to a single answer that would apply to the claims of all members of the class. ***Thus, while it is conceivable that proof that Vioxx significantly increased the risk of, for example, high blood pressure, might support the claims of the induced or purchaser subclasses (and I am by no means certain that it would), it would be irrelevant to those who claim other unrelated adverse conditions or injuries.***
>
> [Emphasis added]

[87] Ms. Downton counters that there is no insurmountable task with respect to general causation. She submits:

> If, using the general toxicological principles described by Dr. Guidotti, the respondent is able to prove at the common issues trial that ***inhalation of myclobutanil and bifenazate at the minimum levels found in the Affected Product*** cause a fixed and consistent pattern of symptoms and signs ("toxidrome"), consisting for example of nausea, headaches, vomiting, dizziness, and irregular heartbeat, then resolution of this in favour of the Class Members
>
> would permit them, after the common issues trial to attempt to show specific causation of and to obtain compensation for harm they've experienced ...
>
> [Emphasis added]

[88] The emphasized words are key. Dr. Guidotti never gives any opinion that common causation can be proved "at the minimum levels found in the Affected Product". He simply says that generic testing can be done from which inferences typically can be made. In contrast, Organigram led evidence from toxicologist, Dr. Ronald Brecher, who explained how the test hoped for in the foregoing quotation at ¶79 cannot prove general causation. Dr. Guidotti was never asked to address Dr. Brecher's opinion and never contradicted it. There is no contradictory evidence on this point. The evidence is that a general causation test involving "minimum levels found in the Affected Product" is not possible.

[89] Ms. Downton rejoins that Dr. Guidotti's description of the effects of inhaling combusted myclobutanil "coincide" with the symptoms described by Ms. Downton and Rhonda Daniels. Dr. Guidotti was not so unequivocal. He said that in his opinion "myclobutanil-contaminated ... cannabis inhaled by combustion ... causes a ***short-term risk*** of acute cyanide toxicity and of gastrointestinal symptoms and increases the risk of heart attacks". [Emphasis added] Dr. Guidotti did not mention

that hydrogen cyanide is a normal by-product of smoking cannabis until that was put to him in cross-examination when he responded, somewhat defensively:

> **Q.** Right. So cannabis on it [*sic*] own can be classified as toxic when combusted?
>
> **A.** Well, toxic is not an arbitrary -- or not. It's a continual. And the question then becomes is it on the low side or the high side.
>
> **Q.** Maybe to be more specific, Dr. Guidotti, you do know that hydrogen cyanide is a -- contained in all cannabis when combusted?
>
> **A.** ***Small amounts*** of it are released. They -- cyanide is released where there is particular evidence of nitrogen containing organic materials.
>
> **Q.** Right. But it is a feature of all cannabis that it produces hydrogen ---
>
> **A.** I'm told that it can be found. I believe that comes from the Health Canada data.
>
> **Q.** And have you ever studied the amounts of hydrogen cyanide in cannabis that is -- results when smoking cannabis?
>
> **A.** No, as I said before, I don't appropriate myself as a -- or I don't present myself as an analytic chemist.
>
> [Emphasis added]

[90] In fact, we know from the Health Canada "clarification" and Dr. Brecher's own study that combusted myclobutanil produces a tiny fraction of the hydrogen cyanide which cannabis itself ordinarily produces when combusted; in Health Canada's estimation, 1/1000th of the amount produced by cannabis alone. The amount of hydrogen cyanide produced by myclobutanil is obviously infinitesimal compared to the amount produced by smoking cannabis in the ordinary way.

[91] The only commonality between Dr. Guidotti's potential "short-term" risks and the complaints of Ms. Downton and Ms. Daniels were "gastrointestinal symptoms". Even so, there must be a workable methodology establishing some general causal connection between the symptoms complained of and the product consumed.

[92] A workable methodology must be grounded in the facts of the case. The generic testing described by Dr. Guidotti does not meet the "workable methodology" requirement of the jurisprudence. To reiterate, from *Microsoft*:

> [118] ... the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of

> the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). ***The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question.*** There must be some evidence of the availability of the data to which the methodology is to be applied.
>
> [Emphasis added]

[93] But in this case, Dr. Guidotti did not know the facts because he was not told what they were:

> Q. And ***were you provided with any of the Affidavits that have been filed in this proceeding***, beyond your own Affidavit?
>
> A. ***I don't believe so.*** I'm just scanning to kind of refresh my memory, and ---
>
> Q. Well, I'll go through them ---
>
> A. Yeah.
>
> Q. --- specifically so that ---
>
> A. Yeah.
>
> Q. --- may be helpful. The Affidavit of Richard Crossman?
>
> A. No.
>
> Q. ***The Affidavit of Dawn Rae Downton***?
>
> A. ***No.***
>
> Q. The Affidavit of Rhonda Marie Daniels?
>
> A. That name sounds familiar, but I don't think that I received an Affidavit.
>
> Q. And that name sounds familiar because? Did you have a discussion with counsel for the Plaintiff about specifics about Rhonda Daniels?
>
> A. ***No.***
>
> Q. The Affidavit of Anne Tomalin?
>
> A. ***No.***
>
> Q. The Affidavit of Denis Arsenault?
>
> A. ***No.***
>
> Q. The Affidavit of Cathy Cyr?
>
> A. ***No.***
>
> Q. The Affidavit of Dr. Ron Brecher?
>
> A. ***No.***
>
> ...

Q. That's right but ***none of your opinions are based on estimating how much exposure to these particular contaminants there are. Would you agree with that?***

A. ***I think that's fair.*** That's a big unknown. And one of the specific areas in which I have been focusing is the high levels of uncertainty.

Q. And when you say high levels of uncertainty, what do you mean by that?

A. I mean that there is a great deal that is not known about, for example, levels of exposure, metabolism, and effects of these chemicals. And these uncertainties in and of themselves are significant.

Q. Right. But ***you were not provided with the actual levels of myclobutanil and bifenazate found in this cannabis, were you?***

A. In this cannabis the -- my recollection is that ***I did not receive information on the levels specific to this cannabis***, at least in the sample that I had a chain of custody. It was represented to me as being from this source.

Q. I'm not sure I understood your answer. You were -- what were you provided with?

A. Oh, I'm not sure that I was provided with anything specific, but I do recall looking at analytical chemical levels that were not specifically tied to -- my understanding was that they're not specifically tied to the Organigram case. For example, that were evaluated by Health Canada.

[Emphasis added]

[94] Dr. Guidotti did not even know of the reported adverse effects in this case:

Q. And you haven't been provided with, say, for example, a list of reported adverse effects of this particular cannabis?

A. ***I have not been provided with a list of reported adverse effects for this particular cannabis.***

[Emphasis added]

[95] Dr. Brecher opined that it was not possible to ascertain whether the impugned chemicals in Organigram's cannabis caused the adverse effects claimed for a number of reasons, including that the effects described were already known to be associated with smoking cannabis without those chemicals:

25. ***It is not possible to ascertain the contribution, if any, of MB and/or BF in cannabis to any adverse effects reported from exposure via inhalation***, for several reasons.

a. Compared to ingestion, there is little information concerning the toxicity of BF and MB following inhalation exposures.

b. When considering inhalation exposures, it is necessary to consider effects on the lung ('portal of entry' type effects) as well as systemic effects.

c. Insufficient testing has been done to establish whether MB and/or BF cause adverse portal of entry effects in the respiratory system following inhalation of cannabis containing these substances.

d. However, cannabis smoke, with or without tobacco or other materials such as paper, MB or BF, contains substances that are well known to cause adverse effects on the respiratory system, including NOX and particulate matter.

e. Factors such as use of tobacco, indoor and outdoor air quality, and respiratory health (e.g. asthma, COPD, emphysema, allergies, etc.) can all influence a person's sensitivity to exposure to cannabis smoke (or any other chemical) via inhalation.

f. Taken together, these factors make it impossible to determine the precise chemical cause of any adverse effect on the lung associated with inhalation of cannabis smoke, regardless of the presence of MB or BF ***at the levels report in the Affected Product.***

[Emphasis added]

[96] The judge dismissed Dr. Brecher's evidence because in her view, it addressed specific as opposed to general causation. Of the six factors Dr. Brecher lists, only (e) could relate to specific causation. But cross-examination clarified that Dr. Brecher was speaking of general causation—that is *anyone* who experienced *the minimal exposure* of Ms. Downton and Ms. Daniels:

Q. And you say, "A plaintiff's specific health condition." That's obviously very broad, so I just want to make sure I understand. You're saying ***your opinion is that there is no health condition that could be determined to be the result of, or your other word you said is related to, myclobutanil or bifenazate exposure?***

A. ***Not in this case.***

Q. No, but I'm not asking about this case. You say broadly that it's not possible to determine if an individual's -- "Individual plaintiff's specific health condition is the result of," and I – correct me if I'm wrong ---

A. But I was talking about the plaintiffs here, and therefore, ***I was making that statement in context of the plaintiffs' exposure.***

Q. So you're talking about the two individuals ---

A. I'm -- yeah, I'm talking about the information that I reviewed. Like so if you had -- suppose that you had a person that was occupationally exposed to a large amount of this pesticide, of one of these pesticides, and that person got sick, in that situation you might be able to relate the exposure to the affect. ***But in the context of the way the plaintiffs said that they were exposed, and in the context of my exposure calculations, which are in exhibit M, no, I don't think it's possible to relate any individual plaintiff's condition to their exposure to these two pesticides.***

Q. Okay. So you are talking in the context of this case and specifically Dawn Rae Downton and Rhonda Daniels whose Affidavits you reviewed?

A. Yes, but more specifically I'm talking about the -- so it's not just what they said. It's also what levels were reported to be in the affected product.

Q. Right. I understand. So you're talking about this case ---

A. Correct.

Q. --- and those individuals?

A. ***Yeah, but it doesn't ---***

Q. ***I'm not ---***

A. ***--- have to be those two people.***

Q. ***Anyone affected ---***

A. ***I've used those ---***

Q. ***--- in this case?***

A. ***Sorry, let me finish. I used the information from their Affidavits to characterize exposure.***

[Emphasis added]

[97] Dr. Brecher was not confining his opinion to Ms. Downton and Ms. Daniels but to any individual who experienced the described minimal exposure to myclobutanil and bifenazate.

[98] The judge incorrectly discarded Dr. Brecher's evidence as describing specific causation. The only "specific" factor that Dr. Brecher quantified was the level of exposure—something which *Microsoft* requires for a workable methodology because it captures the facts of the particular case.

[99] The judge was concerned not to weigh competing expert opinion. But respectfully, there is no need to weigh the opinions of Dr. Guidotti and Dr. Brecher, because they do not conflict. Unlike Dr. Brecher, Dr. Guidotti fails to

address the facts in this case, which the highlighted portions of Dr. Brecher's opinion do.

[100] Dr. Guidotti's evidence agreed with (a) through (e) of Dr. Brecher's opinion. He did not make a comment similar to (f)—addressing the trace amounts of myclobutanil and bifenazate in Organigram's cannabis—because he did not know what the levels of the impugned chemicals were in Organigram's cannabis. For his part, Dr. Brecher generally agreed with Dr. Guidotti's "general concepts" but faulted him because his "... report provides little context relevant to the current evaluation, for example, consideration of estimated exposure levels to myclobutanil and bifenazate, or the constituents of cannabis smoke".

[101] Importantly, Dr. Guidotti never confronts:

(a) the reported levels of myclobutanil and bifenazate in Organigram's cannabis;

(b) the symptoms described in the evidence on behalf of the proposed class.

[102] One does not have to weigh competing expert evidence if there is no competition.

[103] The causation question is not, as Dr. Guidotti would have it, whether these chemicals, combusted in cannabis, may in principle pose adverse health risks. The question is whether the chemicals present in Organigram's cannabis may in principle cause the adverse health effects described or pleaded by Ms. Downton.

[104] Ms. Downton counters Organigram's methodology argument by relying on *Miller*, a preference shared by the certification judge who cited *Miller*:

> 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).

[105] In *Miller*, the class applicants offered an expert medical opinion that the medical condition feared—sexual dysfunction that survived discontinuance of the Merck products in question—was biologically plausible in some of the patients taking those drugs. No such evidence exists in this case. The representative plaintiff in *Miller* gave evidence of that disfunction. In *Miller*, there were

scientific studies warning of such potential side effects. Although far from perfect, the court accepted Ms. Miller's evidence as a "plausible way" of proving general causation, adding:

> 52 Of course a defendant ***manufacturer has an enormous informational advantage over an injured plaintiff***. At the certification stage, an injured plaintiff has no discovery as of right of the defendant and is in no position to challenge evidence that relates to ***matters exclusively within the defendant's specialized knowledge***: *Lambert v. Guidant Corp.* (2009), 72 C.P.C. (6th) 120, 2009 CanLII 23379 at para. 71 (Ont. S.C.J.).
>
> 53 With all this in mind - the recent guidance from the Supreme Court in *Microsoft* and the subsequent decision of this court in *Charlton*, the objectives of class proceedings, ***the information asymmetry*** embedded in this type of action, and the arguments put forth by both parties at trial and on this appeal - I find that there is a plausible way in which the plaintiff might establish, on a balance of probabilities, that finasteride caused the persistent sexual dysfunction common to the class as a whole. Although a more detailed, explicit methodology might be preferable, what has been produced is sufficient, in light of the available data to meet the low threshold at this early stage.
>
> [Emphasis added]

[106] In *Miller*, there was some scientific evidence demonstrating a connection between the impugned drug and the compromised condition of members of the Class. The Court also favoured certification because of Merck's enormous informational advantage, and the proposed method was acceptable in light of the "available data". Ms. Downton's situation is quite different. Organigram has no informational advantage regarding the potential risks of consuming its cannabis. Ms. Downton's expert, Dr. Guidotti, had the same information available to him as Organigram. But as we have seen, Dr. Guidotti ignored that information when providing his general opinion on "toxicological testing".

[107] The methodological shortcomings of Dr. Guidotti's generic opinion become more apparent by reviewing other common cause decisions, which demonstrate the "modest gatekeeper" function of a certification judge.

[108] In *Capital District Health Authority v. Murray*, 2017 NSCA 28, this Court quoted from Winkler, *The Law of Class Actions in Canada* (Toronto: Thomson Rogers Canada Limited, 2014), pp. 29-30 regarding what "some basis in fact" means:

> ... Although the evidentiary threshold for meeting the statutory criteria is low, ***the court has a modest gatekeeper function and must consider the evidence adduced by both the moving party and the respondent in light of the statutory criteria.*** ... The standard of "some basis in fact" does not "involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny."
>
> [Emphasis added]

[109] A review of some of the caselaw bears out this standard.

[110] *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260, involved alleged harm from hormone replacement therapy drugs. Very significant scientific evidence was led at the certification stage, including evidence on behalf of the plaintiff that showed a connection between estrogen-progestin therapy and an increased risk of breast cancer. The plaintiff tendered evidence of a number of studies including a significant one involving 17,000 women which linked the use of hormone therapy to an increased risk of breast cancer. It was not necessary to prove that the hormone therapy in question caused breast cancer—simply to provide evidence a methodology existed for resolving that as a general causation question.

[111] In *Stanway*, certification involved a battle of the experts in which Wyeth maintained that the Court should weigh the competing differences of opinion between the experts—an invitation that the certification judge and Court of Appeal rejected. Having established that there was some evidence which, if accepted at trial of the common issues, could answer the question whether there was a causal connection between hormone therapy and breast cancer, both levels of court were prepared to go no further. The Court was satisfied that the evidence met the test referred to in its earlier decision of *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540:

> [33] ... In each instance, ***the question must be determined "contextually"*** - i.e., not on the basis of a blanket assumption regarding product liability cases but ***in light of all the evidence concerning the specific case before the court.*** In the case at bar, the plaintiffs failed to establish an evidentiary basis; i.e., to adduce admissible evidence, for the proposition that the determination of the real common issues ... would advance the litigation in a meaningful way. ...
>
> [Emphasis added]

[112] In *Wright Medical Technology Canada Ltd. v. Taylor*, 2015 NSCA 68, this Court was asked to overturn a certification order involving an allegedly defective hip transplant system. The plaintiff adduced expert evidence from a biomechanist,

a mechanical engineer and an orthopaedic surgeon who opined that Wright's product was subject to premature failures due to either manufacturing or design issues. Wright filed competing expert opinions including one from another biomechanical engineer. The certification judge rightly declined to weigh the evidence and was satisfied that there was some basis in fact that would provide a method for establishing general causation. This Court declined to intervene.

[113] In *Andriuk v. Merrill Lynch Canada Inc.*, 2014 ABCA 177, the plaintiff failed to lead evidence of methodology to prove economic loss on a class-wide basis. Like Dr. Brecher, Merrill Lynch's expert testified that a methodology to prove general causation was unavailable:

> [11] Here, the certification judge found that the appellants had failed to demonstrate a methodology to determine causation. ***The respondent's expert testified that he was unaware of any such methodology.*** The appellants did not adduce expert evidence on the issue. They argued on appeal that there was no need for expert evidence at the certification stage. We do not read the certification judge's reasons as insisting on expert evidence at this stage. It seems to us that the need for expert evidence would depend upon the nature of the case and the determination of the common issues. What the certification judge did say was that ***it was the appellants' burden to demonstrate a methodology and they had failed to do so.***
>
> [Emphasis added]

Certification was denied.

[114] In each certified medical case cited by the parties, the methodology offered by the successful plaintiffs accorded with the symptoms pleaded and the specific exposure experienced; not so here.

[115] Certification of a common cause has the policy purpose of a reasonable prospect of advancing the litigation. Answering the generic question of whether myclobutanil and bifenazate can cause adverse health effects does nothing to advance the litigation if it ignores exposure (equivalent in the drug cases to a prescribed amount) of the class plaintiffs. Those plaintiffs would still have to prove that exposure to trace amounts of myclobutanil and bifenazate may in general cause the symptoms they describe, and specifically did so in their case.

[116] Unlike the experts' evidence in the foregoing jurisprudence, Dr. Guidotti's methodology for determining general causation did not address the facts.

[117] On the basis of the evidentiary record, the submissions of the parties, the pleadings and the law, there is no methodology for determining whether the symptoms complained of by Ms. Downton are—or even can be—related to the exposure to the impugned substances in this case. The judge erred in law in certifying a claim for personal injury for "adverse health effects". She made clear and material errors of fact regarding whether the Guidotti methodology was capable of establishing general causation at trial.

[118] Having no workable methodology for establishing general causation compromises the claims for personal injuries. To succeed in a product liability claim the plaintiff must establish that:

- the defendant owed a legal duty of care to the plaintiff;
- the defendant's impugned actions failed to meet a reasonable standard of care;
- the defendant's actions were both factual and proximate cause of the plaintiff's injuries; and
- the plaintiff suffered damages as a result of the defendant's actions.

[119] Standard of care requires the consideration of reasonable foreseeability of harm or injury to the defendant. Because we don't know whether the trace exposure in this case could harm the class plaintiffs, we cannot say that Organigram failed to reasonably foresee any harm.

[120] Resorting again to *Charlton*:

> [114] The appellants say that if the general causation question cannot be answered on a class-wide basis, no other questions are likely to advance the litigation. Further, they say a class action is not the preferable means of addressing the remaining questions.
>
> [115] The question whether the defendants breached a duty of care owed to the class in the testing, marketing, selling or distributing of sibutramine can only be answered in relation to the allegation that it poses a health risk to the population for whom it was supposed to be prescribed. As mentioned above, the appellants say, with respect to common issue no. 2, that ***there can be no finding of negligence applicable to the class if there is no prior finding that Meridia can cause a health risk on a class-wide basis.*** I agree with this submission.
>
> [Emphasis added]

[121] Accordingly, the common issues of standard of care and breach of that standard dealing with negligent design, development and testing, negligent manufacturing, negligent distribution, marketing and sale all fail as common causes.

Did the judge err in finding that a class action is the preferable procedure?

[122] Organigram concedes that a class action is preferable for determination of the consumer claims. The parties join issue regarding the preferability of a class action for the "adverse health consequence claims".

[123] Preferability need not be considered if there are no common issues. Nevertheless, some cases consider preferability in the alternative, which often shows some coincidence with the common issue analysis.

[124] When determining whether a class proceeding would be preferable, the Court has to consider the factors described in 7(2) of the *Act*:

> In determining whether a class proceeding would be the preferable procedure for 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.

[125] In *AIC Limited v. Fischer*, 2013 SCC 69, the Supreme Court of Canada described the preferability burden on a plaintiff:

> [48] The party seeking certification of a class action bears the burden of showing some basis in fact for every certification criterion: *Hollick*, at para. 25. ***In the context of the preferability requirement, this requires the representative***

> ***plaintiff to show (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim***, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims: *Hollick*, at paras. 28 and 31. A defendant can lead evidence "to rebut the inference of some basis in fact raised by the plaintiff's evidence": M. Cullity, "Certification in Class Proceedings — The Curious Requirement of 'Some Basis in Fact'" (2011), 51 *Can. Bus. L.J.* 407, at p. 417.
>
> [Emphasis added]

[126] Simply because there may be a number of individual claims requiring resolution following determination of a common issue, does not mean that a class action is not the preferable procedure. Section 10 of the *Act* says:

> 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.

[127] Preferability is determined by considering the three goals of class actions: access to justice, judicial economy, and behaviour modification. The importance of the common issues must be considered with respect to the claim as a whole, including the individual issues (*Hollick v. Toronto (City), 2001 SCC 68* at ¶27-28; *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at ¶69 cited in *MacQueen* at ¶176).

[128] While class action preferability is not defeated by the presence of substantial individual issues, the common issues must not be overwhelmed or subsumed by the individual issues.

[129] Organigram faults the judge for failing to consider whether a class proceeding would be fair, efficient and manageable. Organigram again refers us to *Wuttunee* which found that the number and range of gastrointestinal and cardiovascular conditions claimed by the proposed class made the case too

complex. To refresh, *Wuttunee* involved a claim that the drug Vioxx caused a variety of conditions. The court observed:

> [162] In my respectful view, even if a very liberal notion of "common issue" were adopted, (to admit as a common issue what is in fact a complex array of issues, each common only to a portion of the members of the class as a whole, but none common across the entire class), this very complexity would in this case defeat the requirement that a class action be a fair, efficient and manageable method of advancing the claims of the class members.

[130] Organigram claims that:

> In the present case, there are unlimited health claims. The "indefinable" and "cannot be anticipated" risk -- to use the words of Dr. Guidotti -- in the current case demonstrates a complexity and unmanageability even greater than in *Wuttunee*.

[131] In *Wuttunee*, the complexity of the case turned on the wide variety of conditions alleged which precluded general causation as a common issue. That also drove, alternatively, the preferability analysis.

[132] The common issues certified by the judge in this case include duty of care, standard of care, and breach of that standard. With respect to standard of care and its breach, the certification judge said:

> [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.

[133] Citing *AIC*, Ms. Downton rightly reminds us that the judge's preferability assessment is discretionary and entitled to deference. But that deference does not extend to errors in principle:

> [65] I recognize that a decision by a certification judge is entitled to substantial deference: see e.g. *Pearson*, at para. 43; *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 33. Specifically, "[t]he decision as to

> preferable procedure is . . . entitled to special deference because it involves weighing and balancing a number of factors": *Pearson*, at para. 43. ***However, I conclude that deference does not protect the decision against review for errors in principle which are directly relevant to the conclusion reached such as, in my view, occurred here***: see e.g. *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 23, leave to appeal refused, [2008] 1 S.C.R. xiv; *Markson*, at para. 33; *Cloud*, at para. 39.
>
> [Emphasis added]

[134] Even if standard of care and breach of that standard were certified as common issues, they would collapse into individual trials in which both causation and quantum would have to be established by each plaintiff in relation to the particular symptoms of which he or she complains. In this respect, the observation of the trial judge in *Astrazeneca* is apt:

> [357] The preferable procedure requirement can be met even when there are substantial individual issues. However, ***a class proceeding will not satisfy the preferable procedure requirement when the common issues are overwhelmed or subsumed by the individual issues, such that the resolution of the common issues will not be the end of the liability inquiry but only the beginning.***
>
> [358] In this case there is no single common issue that will significantly advance the litigation for the class. Consider what is left having reviewed each of the common issues: there is some evidence that common issue 1 exists. There is no benefit to certifying this common issue because the defendants concede that Seroquel can cause weight gain and diabetes. This point is obvious since the product monographs warn of these risks. Such a concession does nothing to move the class members' claims ahead. There is no commonality to the question. ***An individual inquiry is required to decide if Seroquel caused weight gain and/or diabetes for each class member.***
>
> [359] The rest of the liability common issues collapse because they do not have a basis in fact and lack commonality. As well, the conspiracy common issues only deal with two elements of this cause of action and in any event fail to satisfy the some evidence test. The remaining elements are left for individual trials.
>
> [Underlined emphasis in original; bold emphasis added)

[135] The judge's preferability finding assumed that general causation, standard of care, and breach could all be established as common issues. Since she erred in her consideration of the evidence when making her common issue findings, her conclusion on preferability is similarly impaired. The preferability challenges approximate those described in *Astrazeneca* and *Charlton*.

Conclusion

[136] Because common causation cannot be established for the personal injury claims, the damages for those claims should not be certified as a common issue. The claim for unjust enrichment is not properly pleaded and should be struck. Standard of care and breach of that standard cannot be common issues. Accordingly, the following clauses contained in the certification order should be deleted: 1(b) and (c); 2(b) and (c); 3(b) and (c); 8(a), (b), (c) dealing with unjust enrichment; 9(c) dealing with personal injury damages; and, the words "unjust enrichment" should be struck from clause 9(b).

[137] Since reference to health risks (s. 48(c) of the Statement of Claim) has been struck, personal injury damages are not in issue with respect to alleged breach of s. 52 of the *Competition Act*.

[138] I would allow the appeal in part with costs of $3,000.

Bryson, J.A.

Concurred in:

Farrar, J.A.

Fichaud, J.A.

Form 78.05

SCHEDULE "A"

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 19th, 2019.

Prothonotary ANA CODY
Deputy Prothonotary

NOVA SCOTIA COURT OF APPEAL

Citation: *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38

Date: 20200430
Docket: CA 485656
Registry: Halifax

Between:

Organigram Holdings Inc. and Organigram Inc.

Appellants

v.

Dawn Rae Downton

Respondent

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	October 15, 2019, in Halifax, Nova Scotia
Subject:	Civil Procedure – Class Actions; Certification; Common Issues; Workable Methodology for Determining General Causation; *Class Proceedings Act*, S.N.S. 2007, c. 28
Summary:	Dawn Rae Downton purchased medical cannabis from Organigram. Organigram discovered that some of the cannabis purchased by Ms. Downton and others contained myclobutanil and bifenazate pesticides authorized for agricultural use, but not for cannabis. Organigram notified Health Canada and the cannabis was recalled. Ms. Downton experienced nausea and vomiting which subsided after she discontinued consuming Organigram's cannabis. She applied to certify a class action for negligent design, development and testing; negligent manufacturing; negligent distribution, marketing and sale; breach of contract; breach of the *Competition Act*, R.S.C. 1985, c. 34; breach of the *Food and Drugs Act*, R.S.C. 1985, c. F-27; breach of the *Sale of Goods Act*, R.S.N.S. 1989, c. 408; waiver of Tort; unjust enrichment. Among other forms of relief, Ms. Downton claimed general damages for "adverse health effects".

Certification was granted (2019 NSSC 4).

Issues:

Organigram appealed, alleging the certification judge erred:

1. By certifying causes not made out in the Statement of Claim regarding:

   a) negligent design, development and testing;
   b) breach of the *Competition Act*;
   c) unjust enrichment;

2. By finding that Ms. Downton demonstrated a workable methodology for demonstrating that the recalled product can cause adverse health effects on a class-wide basis;

3. Alternatively by finding that a class action was the preferable procedure for fair and efficient resolution of the adverse health effects claims.

Organigram only appealed certification of common issues related to the "adverse health consequences" claims. Organigram did not challenge certification of the "consumer claims" (breach of contract, breach of the *Competition Act*, breach of the *Sale of Goods Act*).

Result:

Appeal allowed in part. The causes of action were adequately pleaded with the exception of unjust enrichment. The material facts pleaded did not sustain unjust enrichment. Ms. Downton failed to lead some evidence of a workable methodology that could establish general causation on which the personal injury claims depended. The "adverse health claims" were too generic. The methodology proposed by Ms. Downton's expert did not address the facts of the case as required by the Supreme Court in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, ¶115-118. Alternatively, a class action was not the preferable procedure for fairly and efficiently resolving the highly individualized claims of the proposed class. Unjust

enrichment was struck from the Statement of Claim. Certification of the claims for personal injury damages were set aside.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 38 pages.