SCC File No. 39234

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

DAWN RAE DOWNTON

Applicant
(Respondent)

- and -

ORGANIGRAM HOLDINGS INC. AND ORGANIGRAM INC.

Respondents
(Appellants)

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**RESPONSE TO APPLICATION FOR LEAVE TO APPEAL**
**(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada)***

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## PART I - OVERVIEW AND STATEMENT OF FACTS

### Overview

1. The Nova Scotia Court of Appeal's decision in *Organigram Holdings Inc. v. Downton* does not raise issues of national and public importance.[1] The Respondents, Organigram Holdings Inc. and Organigram Inc. ("Respondents") ask the Court to dismiss the application for leave to appeal, with costs.

2. Following a product recall, Dawn Rae Downton ("Applicant") sought certification of a class action against the Respondents for two types of claims: 1) consumer claims and 2) personal injury claims, described in the Statement of Claim as "adverse health effects". The motions judge certified common issues relating to both the consumer claims and the personal injury claims, even though the Applicant did not state what "adverse health effects" she alleged the proposed class members suffered and did not provide evidence of a methodology to demonstrate whether the recalled product could cause any harm either to her individually or to the proposed class members. The Respondents appealed the certification of the common issues relating to the personal injury claims to the Nova Scotia Court of Appeal.

3. The motions judge erred when she held that the Applicant's personal injury claims were suitable common issues.[2] The Court of Appeal corrected this error in principle, and a unanimous body of jurisprudence supports this correction.

4. A decision from this Court on the merits of this case would not respond to issues of national and public importance. There is no conflicting authority from courts across Canada suggesting the time is ripe for a review by this Court of any of the hypothetical questions the Applicant raises. Moreover, the issues the Applicant purports to raise do not arise on the record.

5. Simply put, the Applicant did not put forward the requisite evidence to show "some basis in fact" of a workable methodology for any court to determine whether the Respondents'

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[1] *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38 ("NSCA Decision").
[2] *Downton v. Organigram Holdings Inc.*, 2019 NSSC 4 ("Certification Decision").

product can cause harm to the Applicant or proposed class members, nor did she provide any evidence of what that harm may be.

6. Contrary to the Applicant's submissions, this Court has already established a "coherent legal test for the workable methodology standard."[3] It did so in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*,[4] a decision that has been consistently followed by our courts[5] and was reaffirmed by this Court as recently as July 2020.[6] The Nova Scotia Court of Appeal did not add "additional criteria" to the workable methodology requirement resulting in tortfeasors being "immunized from the harm they cause when it requires new methodologies of proof."[7]

7. Also contrary to the Applicant's submissions, the proposed appeal does not raise "an important question for the principled development of tort law in the context of mass toxic tort cases."[8] Rather, the proposed appeal, at most, raises the question of whether common issues relating to a personal injury claim can be certified without any evidence that a product is, in fact, toxic and without any evidence of what harm, if any, the product can cause. This Court recently reiterated the answer to that question (in the context of a claim for waiver in tort) by stating:[9]

> It is therefore important to consider what it is that makes a defendant's negligent conduct wrongful. As this Court has maintained, "[a] defendant in an action in negligence is not a wrongdoer at large: he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff" (Clements v. Clements, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 16). There is no right to

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[3] See Applicant's submissions at paras. 16-29.
[4] *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 ("*Pro-Sys*").
[5] *Kirsh v. Bristol-Myers Squibb*, 2020 ONSC 1499; *Bayer Inc. v Tluchak Estate*, 2019 SKCA 64, leave to appeal denied, 2020 CanLII 13139, *Richardson v. Samsung*, 2018 ONSC 6130 at paras. 65-67; *Charlton v. Abbott Laboratories*, 2015 BCCA 26 ("*Charlton*"); *Miller v. Merck Frosst Canada Ltd.*, 2015 BCCA 353 ("*Merck Frosst*"), leave to appeal dismissed 2016 CanLII 20439 (SCC); *Andriuk v Merrill Lynch Canada Inc.*, 2014 ABCA 177 ("*Andriuk*"); *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143 ("*MaQueen*"), leave to appeal dismissed 2015 CanLII 17890 (SCC).
[6] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 ("*Babstock*").
[7] See Applicant's submissions at paras. 33-34.
[8] See Applicant's submissions at paras. 38-54.
[9] *Babstock, supra* at para. 33.

> be free from the prospect of damage; there is only a right not to suffer damage that results from exposure to unreasonable risk (E. J. Weinrib, The Idea of Private Law (rev. ed. 2012), at pp. 153 and 157-58; R. Stevens, Torts and Rights (2007), at pp. 44-45 and 99). In other words, negligence "in the air" — the mere creation of risk — is not wrongful conduct. […]

8. The Respondents request that this Court dismiss the application, with costs.

**Facts**

9. In late 2016, the Respondents discovered that some of its product contained trace amounts of the pesticides bifenazate and myclobutanil. In appropriate amounts both are authorized for agricultural use, but are not among the fourteen pesticides authorized for use on cannabis plants.

10. The Respondents immediately informed Health Canada of the finding and voluntarily recalled the product. In response to public concern about the recall, Health Canada issued a clarification on March 9, 2017 that stated:[10]

> … 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]

[10] NSCA Decision at para. 15.

11. The Applicant proposed a class action making two types of claims: 1) consumer claims; and 2) personal injury claims for what the Applicant vaguely described in her pleading as "adverse health effects". The issues related to the consumer claims were properly certified as common issues. The Certification Decision also purported to certify issues relating to "adverse health effects" as common issues.

12. In her affidavit, the Applicant described experiencing nausea and vomiting when she consumed the cannabis. Another proposed member of the class testified she experienced severe nausea, gastrointestinal issues, breathing difficulty and headaches after consuming the cannabis. The "adverse health effects" alleged by the Applicant and the other proposed class member are specifically included in Health Canada's list of common side effects of consuming cannabis in general:[11]

- 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]

[11] The side effects are reproduced in the NSCA Decision at para. 59.

13. The expert evidence offered by the Applicant described the risks conferred by exposure to bifanazate or myclobutenil as "indefinable". Further, the expert report did not provide any evidence of the mechanism by which the impugned substances (myclobutanil and bifenazate) can cause harm to the user, either by ingestion or inhalation.

14. Rather than providing evidence that there is a workable methodology for determining such issues on a class-wide basis, the Applicant's expert did the opposite. The Applicant's expert stated that the method of consumption (i.e. ingestion vs. inhalation) matters a great deal in determining the effects of a toxic chemical and that studies of toxicity by ingestion do not predict toxicity by inhalation. He went on to state that myclobutanil and bifenazate have not been studied for their toxicity if consumed through inhalation and did not identify any risk from inhalation.

14. Despite the absence of any evidence, the motions judge certified the issues relating to the personal injury claims as common issues, suitable for determination on a class-wide basis. The motions judge's decision contains errors in principle that were corrected by the Court of Appeal using existing, unanimous jurisprudence. The Applicant does not like the result, however, that is not a ground upon leave to appeal can be granted.

15. During oral argument the Court of Appeal pressed counsel for Ms. Downton to say exactly what harm his client was alleging had been caused by exposure to the impugned chemicals. Counsel 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 nausea, dizziness and headaches. These complaints describe general and vague symptoms with no attribution of a particular illness. They are commonly experienced for a variety of disparate reasons, including general cannabis use.

16. The Nova Scotia Court of Appeal overturned the motion judge's decision to certify any of the common issues relating to personal injury alleged to have been suffered by the Applicant on the basis that there was no evidence of any workable methodology to determine whether the Respondents' product was capable of causing any illness that was grounded in the facts of the case. The Court held that it is not possible to determine any

issues relating to personal injury claims in a manner that would benefit the class or in a manner that could be viewed as a preferable procedure for advancing the claims.

## PART II- STATEMENT OF THE QUESTIONS IN ISSUE

17. Has the Applicant raised issues of national or public importance sufficient to warrant granting leave to appeal?

## PART III - STATEMENT OF ARGUMENT

18. The Applicant is seeking to reargue issues the Court of Appeal decided correctly in a quest to get a different result from this Court.

19. The Court of Appeal corrected the motions judge's error using settled law. Appellate and lower courts in Canada agree on the following two propositions:[12]

A) In a proposed class proceeding, the plaintiff has the burden of demonstrating a workable methodology that is grounded in the facts of the case, for deciding proposed common issues on a class-wide basis. In presenting a methodology based on expert evidence, a plaintiff does not have to demonstrate that all expert opinion aligns in their favour. Rather, for certification they must demonstrate that they have some evidence on which their methodology is based and with which to work.

B) On a motion for certification of a products liability class action, a plaintiff must provide some basis in fact that a product is capable of causing the adverse health consequences commonly complained of by the class. It is not enough to simply allege that a product contains something that is not authorized to be in the product without some evidence that the unauthorized substance, in the levels found, can cause harm. The first step, known as the general causation step, determines whether the product is capable of causing harm.

20. The Applicant did not have any evidence grounded in the facts of this case for any court to answer either of these two propositions in their favour.

21. There are no competing decisions for this Court to reconcile. Notwithstanding the motions judge's failure to interpret and apply the settled jurisprudence, the Respondents are not aware of any case law in Canada in which common issues relating to personal injury claims have been certified without any evidence that a defendant's alleged negligence caused a common type of harm. It is not a matter of public importance for this Court to reconsider issues on which Canadian courts agree.

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[12] See case law cited *supra* at fn 5.

22. This Court has held that, although the merits of the claim are not determined on a certification application, the motions judge performs an important gatekeeping role by screening out those claims destined to founder at the merits stage of the proceeding. The threshold for certification is low, but mere symbolic scrutiny of the claim will not suffice.[13] The NSCA simply corrected the motion judge's failure to fulfill that role.

***The "workable methodology" standard is consistent***

23. It is a well established that "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".[14] In *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, this Court held that the plaintiff was required to present some type of actual, rather than theoretical, method "grounded in the facts of the particular case" for establishing loss on a class-wide basis.[15]

24. The workable methodology standard is clear and this Court has directed how it is to be applied. In *Pro-Sys Consultants*, this Court explained:[16]

> In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the CPA not having been met.

25. The NSCA Decision properly identified the standard and applied it to the evidence put forward by the Applicant.

26. The NSCA found that none of the theoretical harms the Applicant's expert described corresponded to the Applicant's symptoms and the expert's potential (yet not yet tested)

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[13] *Pro-Sys Consultants*, *supra* at paras. 103–104.
[14] *Andriuk*, *supra* at para. 10.
[15] *Pro-Sys Consultants*, *supra* at para. 118.
[16] Ibid at para. 104.

methodology did not and could not address the facts of the case. The Court of Appeal explained: [17]

> 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.
>
> […]
>
> 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.
>
> 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.
>
> 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.
> >
> > […]
>
> 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.

[17] NSCA Decision at paras 77, 80, 81, 82, 84, 88.

> […]
>
> […] 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.

27. The NSCA Decision is consistent with other appellate decisions. In *Andriuk*, the plaintiff failed to lead evidence of methodology to prove economic loss on a class-wide basis. Like the expert called by the Respondents in current case, Merrill Lynch's expert testified that a methodology to prove general causation was unavailable. The Alberta Court of Appeal concluded:[18]

> 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.

28. In *Charlton*, based on its finding that there was no methodology for proving general causation, the British Columbia Court of Appeal held that the common issues with breach of the duty of care should not have been certified. The British Columbia Court of Appeal stated 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".[19]

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[18] *Andriuk*, *supra* at para. 11.
[19] *Charlton*, *supra* at para. 115.

29. Similarly in *Merck Frosst*, the Court of Appeal explained the need to demonstrate a method of establishing general causation, prior to individual causation:[20]

> [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:
> >
> > > 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.

30. Contrary to the Applicant's submissions, courts across the country have not been applying varying standards of what is necessary to demonstrate a workable methodology grounded in the facts of the case. Courts are simply applying the workable methodology standard to the particular facts presented by a plaintiff. In the present one, the plaintiff did not offer

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[20] *Merck Frosst*, *supra* at para. 44.

any methodology, whether credible, plausible, theoretical, testable, existing or otherwise, grounded in the facts of the case.

***The proposed appeal does not raise a novel causation issue***

31. The Applicant argues there is a gap in the law of causation raised in the current case that this Court should fill. The Applicant argues that when defendants cause novel harm and cause unpredictable risks the law needs a test to infer causation. The Respondents submit that there is no such gap and even if there were, the question of filling it does not arise on this record.

32. First, the Applicant did not lead any evidence that the trace amounts of pesticides not approved for use in cannabis found in the Respondents product can cause ANY harm. More importantly, in the class action context, the Applicant did not lead any evidence that the Respondents' product is capable of causing a harm common to the proposed class members. It is not possible on an individual basis or a class wide basis, to find liability based on theoretical risk or vague descriptions of potential harm.

33. The motions judge certified common issues relating to personal injury on the Applicant's vague assertions of "adverse health effects". The Applicant did not plead any specific health consequences from the ingestion or vaping of the product. Rather, the Amended Statement of Claim provides a non-exhaustive laundry list of varied health consequences for hydrogen cyanide created by the combustion of myclobutanil, with no reference to the relatively minuscule amount of hydrogen cyanide that could have been caused by the unauthorized substance in the Respondents' product.

34. In argument, the Court of Appeal pressed Applicant's counsel to identify the health effects she was alleging were suffered by the class. Counsel abandoned the theoretical risks put forward in the Statement of Claim such as seizures and death and said instead that the Applicant was alleging the potential class members had short-term effects such as headaches, nausea and dizziness, not attributable to any particular illness.[21]

[21] NSCA Decision at para. 60.

35. The NSCA relied on unanimous case law for the principle that when seeking to certify common issues relating to personal injury in a products liability claim, along with providing a workable methodology for dealing with general causation, a plaintiff must specify the illness alleged to have been caused by the product.

36. On a motion for certification, a plaintiff must provide some basis in fact that a product is capable of causing a particular type of adverse health consequence. It is not enough to simply allege that a product contains something that is not authorized to be in the product. There must be a factual basis that it can be established on a class-wide basis that the unauthorized substance can cause a particular type of harm. As an analogy, consider a cola that contains more caffeine than is permitted by law. A class action for damages for personal injury cannot be certified without providing some basis in fact and a workable methodology for determining that caffeine at the level found can cause a particular injury to the proposed class members.

37. In *Merck Frosst Canada Ltd. v. Wuttunee*, the plaintiff sought to certify a common issue of whether Vioxx could cause or exacerbate "cardiovascular or gastrointestinal conditions". The Court of Appeal held that the question was not succesptible to a single answer stating: "[c]learly, 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."[22]

38. In *Martin v. Astrazeneca Pharmaceuticals Plc*,[23] 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:

> 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

[22] *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at para. 142,
[23] *Martin v. Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744 at paras. 233-234 (aff'd 2013 ONSC 1169).

> 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").
>
> 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.

39. Similarly, in the current case, not only are nausea, vomiting and dizziness ubiquitous in society, they are listed among the common side effects of using cannabis that does not contain any pesticides.

40. In *Sweetland v. GlaxoSmithKline Inc.,* the plaintiff proposed the following common issue on general causation: "Can AVANDIA cause, or contribute to, adverse cardiovascular events including heart failure, heart attacks, and strokes? If so, what is the magnitude of this increased risk?" The Nova Scotia Supreme Court followed *Martin* and *Wuttunee* and held that the term "adverse cardiovascular events" should be removed because it was too broad and left too much uncertainty about what might be included.

41. The NSCA Decision is consistent with all of these decisions. [24]

42. For any products liability claim to succeed, there must be an allegation of an actual harm linked with a product and in the case of a class action, a workable methodology for determining, on a class-wide basis, that the product is capable of causing the harm that is alleged. Removing the requirement to allege or show harm (as suggested by the Applicant) would amount to "negligence in the air". The mere creation of a potential (and in this case theoretical) risk is not wrongful conduct.[25]

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[24] *Sweetland v. GlaxoSmithKline Inc.*, 2016 NSSC 18 at paras. 55, 58, 59.
[25] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 33. See also *Perrault v. McNeil PDI Inc.*, 2012 QCCA 713 where the Court refused to certify a class action on behalf of a mother

43. The application for leave to appeal should be dismissed.

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who had given her children over-the-counter cold medicine that was removed from shelves after Health Canada stated that they should include a warning that they are not recommended for children under 6 years old. The plaintiff had not provided any basis in fact that any harm was caused, what that harm might be, or how this question could be assessed on a class-wide basis.

## PART IV - SUBMISSIONS RESPECTING COSTS

44. The Respondents request this Honourable Court award costs of this Application.

## PART V - ORDER SOUGHT

45. The Respondents request this Honourable Court dismiss this Application for leave to appeal with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this day of August 2020.

Jane O'Neill, Q.C.

Daniel Wallace

Counsel for the Respondents

## PART VI - TABLE OF AUTHORITIES

| No. | AUTHORITIES | Cited in Paragraphs |
|---|---|---|
| 1. | *Andriuk v Merrill Lynch Canada Inc.*, 2014 ABCA 177 | 6, 23, 27 |
| 2. | *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 | 6, 7, 42 |
| 3. | *Bayer Inc. v Tluchak Estate*, 2019 SKCA 64, leave to appeal, 2020 CanLII 13139, | 6 |
| 4. | *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143, leave to appeal, 2015 CanLII 17890 (SCC) | 6 |
| 5. | *Charlton v. Abbott Laboratories*, 2015 BCCA 26 | 6, 28 |
| 6. | *Downton v. Organigram Holdings Inc.*, 2019 NSSC 4 | 3 |
| 7. | *Kirsh v. Bristol-Myers Squibb*, 2020 ONSC 1499 | 6 |
| 8. | *Martin v. Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744 (aff'd 2013 ONSC 1169) | 38, 40 |
| 9. | *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 | 37, 40 |
| 10. | *Miller v. Merck Frosst Canada Ltd.*, 2015 BCCA 353, leave to appeal 2016 CanLII 20439 (SCC) | 6, 29, 37 |
| 11. | *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38 | 1, 12, 21, 22, 25, 26, 27, 35, 41 |
| 12. | *Perrault v. McNeil PDI Inc.*, 2012 QCCA 713 | 42 |
| 13. | *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 | 6, 22, 23, 24 |
| 14. | *Richardson v. Samsung*, 2018 ONSC 6130 | 6 |
| 15. | *Sweetland v. GlaxoSmithKline Inc.*, 2016 NSSC 18 | 40 |

| | STATUTORY PROVISIONS | Cited in paragraphs |
|---|---|---|
| 1. | *Class Proceedings Act*, SNS 2007, c 28<br><br>**Section 7:**<br><br>7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,<br><br>(a) the pleadings disclose or the notice of application discloses a cause of action;<br><br>(b) there is an identifiable class of two or more persons that would be represented by a representative party;<br><br>(c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;<br><br>(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and<br><br>(e) there is a representative party who<br><br>(i) would fairly and adequately represent the interests of the class,<br><br>(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and<br><br>(iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.<br><br>(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider<br><br>(a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;<br><br>(b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings; | |

| | STATUTORY PROVISIONS | Cited in paragraphs |
|---|---|---|
| | (c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;<br><br>(d) whether other means of resolving the claims are less practical or less efficient;<br><br>(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<br><br>(f) any other matter the court considers relevant.<br><br>(3) Notwithstanding subsection (1), where an application is made to certify a proceeding as a class proceeding in order that a settlement will bind the members of a settlement class, the court shall not certify the proceeding as a class proceeding unless the court approves the settlement. 2007, c. 28, s. 7.<br><br>(7) Unless otherwise ordered by the court making a direction under clause (1)(c), a determination of issues made in accordance with that clause is deemed to be an order of the court. 2007, c. 28, s. 30. | |