



Product Liability Handbook

The Canadian
Legal Landscape

BLG
Borden Ladner Gervais



Foreword

Regardless of how well a product is designed, manufactured or distributed, the threat of litigation is always present. Manufacturers and distributors often find themselves faced with allegations that a product was defectively designed or manufactured, or that warnings with regard to usage were inadequate, and sometimes a combination of these.

Separate from the financial exposure of a particular claim, litigation can be very detrimental to a product's reputation — and that of the company — and ultimately affect market value. This is why it is imperative that manufacturers and distributors understand how to best defend their products when faced with potential or actual lawsuits whether they be individual claims or class actions.

At Borden Ladner Gervais LLP, we have been successfully defending products in Canada for more than 50 years; acting on behalf of our clients' best interests and helping them to contain and minimize financial, reputational, and other damages. Based on this collective experience and unsurpassed legal expertise, we have written this Handbook for the benefit of manufacturers and distributors. Additionally, entities providing insurance coverage of products will also find the information to be of value to them.

While every effort has been made to ensure the currency of information contained in this Handbook, no two product liability claims are the same and the law constantly evolves. For this reason, please contact your solicitor or BLG before taking any action.

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1

Introduction

Product liability represents a complex area of Canadian law. This Handbook provides an overview of the legal process, and is a must read for any entity producing or selling goods in Canada. It includes specific guidance as to how a manufacturer or distributor may be held liable in contract and in tort and provides guidance on topics such as manufacturing defects, design defects, failure to warn, general negligence and contractual liability. Applicable legislation, general defences against allegations, product recalls and class actions are also discussed.

In addition, this Handbook provides guidance under both the common and civil law systems. Canada's legal system is based on a combination of two legal traditions: English common law, applied in nine provinces and three territories; and French civil law, applied in the Province of Québec only. Under the common law system, rules are created by a series of cases which create "precedents" to guide decisions in subsequent similar cases. In contrast, the civil law applied in Québec consists of a comprehensive set of rules that will be applied to the given circumstances. When applying civil law, courts will look to a civil code first, and then to prior decisions to ensure that the application of the rule will be consistent. Chapter 10 of this Handbook provides detailed information about Canada's legal system and Chapter 11 looks at multi-jurisdictional issues, be they across Canada or across borders.

Although important differences exist between the common law provinces, the general principles are usually portable. On the other hand, Québec's civil code is very different in its approach when compared with the common law systems in the rest of the country. This Handbook discusses how each legal system will impact the defence of a claim in Canada.

2

LIABILITY IN CONTRACT

A manufacturer can be held liable for damages arising from the breach of a condition or warranty contained in a contract. Certain conditions may be statutorily implied into a contract of sale.

A. TERMS IN A CONTRACT

(1) A Condition

A condition in a sales contract may be defined as a fundamental obligation imposed on either of the parties, the performance of which is vital to the contract. In contrast with a warranty, a condition is a stipulation in the contract which, if breached, may give rise to a right to treat the contract as repudiated or lead to the potential awarding of damages.

(2) A Warranty

A warranty is a promise or statement of fact about goods that is collateral to the main purpose of the contract of sale. A warranty may be express or implied. The scope and meaning of an express warranty will be determined by the actual words used by the seller in making his or her promise. The scope and meaning of an implied warranty will be determined by the circumstances of the case, including the conduct of the seller.

(3) Determining if a Term is a Condition or Warranty

Warranties must be distinguished from conditions in order to determine the potential remedies for a breach. A condition is key to the primary purpose of the agreement and, if breached, will permit a purchaser, in certain circumstances, to cancel or rescind the contract. A breach of warranty, on the other hand, gives rise to a claim for damages, but does not give the injured party the right to reject the goods and treat the contract as repudiated. In Québec, however, a breach of the legal or contractual warranty against latent defects can lead to the cancellation of the sale or a reduction in purchase price.



The courts have repeatedly held that the determination of whether a contractual term is a warranty or a condition is a substantive difference, meaning that the court decides how to classify the promise or term in a contract, not the parties. Therefore, parties cannot simply say: “*It is a warranty.*” Rather, the court examines the purpose of the contract and assesses whether the promise in question is central to that purpose, or collateral to it. This decision is critical in defining the potential remedies available to the injured party and may have an impact on the applicability of various disclaimers or limitations on liability.

B. SALE OF GOODS LEGISLATION

Sale of Goods legislation in the common law provinces implies specific conditions into most contracts of sale. The specific conditions that the seller must meet are: that the goods are fit for a specific purpose and that the goods are of merchantable quality. If a product is sold that does not meet these conditions, the seller will be held liable without the plaintiff having to prove fault or negligence. This is known as “*strict liability.*” The plaintiff may rely upon a breach of these conditions to repudiate the contract and/or claim damages.

(1) Application of Sale of Goods Legislation

To advance a claim under the Sale of Goods legislation, a party must establish “*privity of contract*” or a contractual relationship between two parties. In the common law provinces, a purchaser who buys a product from a retailer can sue the retailer under the legislation, but not the manufacturer (as there is no contract between the purchaser and the manufacturer). However, the retailer and every other party in the chain of distribution can rely on the legislation to sue the party from whom it directly purchased the product, ultimately leading back to the manufacturer. There is an exception: where the manufacturer’s promotional materials induced the purchaser to purchase a product, some courts have held that the requirement of an express contract between the parties was not necessary, and that the purchaser could rely on the Sale of Goods legislation to sue the manufacturer directly.

(2) Fitness for Purpose – Implied Condition

Sale of Goods legislation in the common law provinces typically provides that there are no implied warranties or conditions in a contract of sale as to quality or fitness of goods for any particular purpose, **except:**

- where the buyer either expressly or implicitly lets the seller know the particular purpose for which the goods are required, so as to show that the buyer relies on the seller’s skill or judgment; and
- when the goods are those normally supplied in the seller’s course of business.



If these two criteria are met, legislation implies into the contract of sale a condition that the goods be fit for the particular purpose for which they are required.

(3) Merchantable Quality – Implied Condition

Where goods are bought by description from a seller who deals with goods of that description, there is an implied condition that the goods will be of “*merchantable quality*.”

The concept of a seller “*who deals in goods of that description*” has been interpreted to mean a commercial seller. The rationale for this restriction is that in a commercial sale, the buyer expects that he or she is receiving the quality of goods customarily sold on the market under that description.

The legislation does not define “*merchantable quality*.” Generally, it means that the goods be commercially saleable under the description by which they are sold, or that the goods perform to the reasonable expectations of the average buyer. It does not require that the seller has any knowledge of the quality of the goods, and it applies even in cases where the seller has not seen the goods.

The implied condition of “*merchantable quality*” is subject to the proviso that if the buyer has actually examined the goods, there is no implied condition of merchantability in regard to defects that such examination *ought* to have revealed. Note that defects, which would have been revealed by a *reasonable* examination are not excluded, but only those defects that would have been revealed by an examination *actually* performed by the buyer. Where the buyer inspects the goods and the examination would not have revealed the defects in question (latent defects), the condition of “*merchantable quality*” still applies.

C. SALES OF GOODS UNDER THE CIVIL CODE OF QUÉBEC

The *Civil Code of Québec* governs all sales (be they commercial or private) made in Québec or otherwise stipulated by the *Civil Code*, or by contract to be governed by Québec law. It applies not only to manufacturers, but also to wholesalers, distributors, importers, suppliers, retailers and other merchants who sell products. In addition, the *Consumer Protection Act* of Québec provides supplemental rules when purchases are made by consumers.

The *Civil Code* implies conditions in sales contracts. As such, the general principles of civil contracts apply with a number of exceptions not found in the common law.

One notable exception is that privity of contract need not be established. The purchaser can sue, in contract, every participant up the distribution chain on the basis that the implied warranty to which every participant is bound follows the product.

The *Civil Code* specifically provides for a warranty at the time of sale against latent defects that render the product unfit for the use intended or which so diminish its usefulness that the purchaser would not have bought or paid so high a price if he or she had been made aware of the defect(s).

A defect is presumed to have existed at the time of a sale by a professional seller if the product malfunctions or deteriorates prematurely in comparison with similar products, except where the defect is due to improper use of the product by the purchaser.

Similar to the common law, there is no warranty in the *Civil Code* if the latent defect was known to the purchaser, or could have been noticed by a prudent and diligent purchaser without the help of an expert.

Furthermore, in Québec, under no circumstances whatsoever can a seller (or anybody else for that matter) limit or exclude their liability for bodily injury.

Damages are not codified in Québec. Instead, the damages which the purchaser can claim are similar to those in common law: any direct damage that a reasonable seller would have foreseen as a result of a breach.

Typically, a purchaser cannot sue in negligence, a recourse left to third-party users, except where the claim is based on the failure to honour a duty to warn or a duty to inform.

A claim in contract for breach of the warranty of quality gives the purchaser the benefit of a rebuttable presumption that the seller knew, or should have known, of the defect. If the presumption is not rebutted, the seller cannot limit or exclude liability.

D. BREACH OF CONDITIONS AND WARRANTIES

Unlike a claim of negligence, the plaintiff in a contract action need not prove that the product is “*defective*” or that the defendant failed to exercise reasonable care.

Rather, if a plaintiff proves that a condition or warranty was breached, a seller sued in contract is held to a strict liability standard.

(1) Breach of a Condition

To successfully bring a claim in contract, a plaintiff must prove that a contract exists and that a condition to the contract was breached which resulted in a loss.

(2) Damages for Breach of a Condition

Often a breach of a condition allows the innocent party to treat the contract as repudiated, and ultimately to rescind it. However, other damages are available which are beyond the scope of this Handbook.

(3) Breach of a Warranty

In all provinces (with the exception of Québec), a claim for the breach of a warranty can be brought when the plaintiff proves a contract exists and that it includes a warranty regarding the product. Negligence need not be established. The plaintiff need only show that the product did not perform in accordance with the warranty.

(4) Damages for Breach of Warranty

The most typical remedy sought by a plaintiff alleging a breach of warranty is the payment of damages. In contract, the court will attempt to place the parties in the position they would have been in had the warranty been fulfilled. This calculation can include consequential damages.

Sale of Goods legislation in the common law provinces has codified the calculation of damages for breach of warranty: a seller's liability extends to all consequential damage caused by the breach of warranty, but is limited by an objective test as to what a reasonable person would have foreseen as the likely consequence of the breach.

However, if the breaching party has actual knowledge that a breach is possible and likely to cause a greater loss than would be obvious to a reasonable person, the court will extend damages to include consequences beyond which the objective reasonable person would foresee.

(5) Limited Warranties

Many express warranties are limited by virtue of the wording of the provisions themselves. For example, it is common that a warranty be limited as to time. In other words, the quality or fitness for purpose of a particular product is warranted only for a particular length of time after purchase. The extent of the warranty is a matter of contractual interpretation. While less common, there is no reason why the warranty cannot be limited by other factors, such as the use to which the product is put, the degree of quality warranted and so forth.

An express warranty may also be limited by exclusions set out in the contract of sale, and the Supreme Court of Canada has indicated that exclusions of liability in contracts between commercial parties will generally be enforceable (except where they are unconscionable

or otherwise against public policy). Some consumer protection legislation, such as that in Québec, forbids such exclusionary clauses, and, therefore, renders them ineffective against certain types of purchasers. Also, such clauses are unenforceable – if the seller knows or is presumed to have known of the defect at the time of sale.

Absent such statutory barriers, however, exclusions properly set out in a contract can dramatically limit the scope of an express warranty. Exclusion clauses will be strictly construed against the party for whose benefit they are included in the contract, the manufacturer or distributor. However, a properly drafted exclusion clause (sometimes called an exemption clause) could eliminate all responsibility for warranties related to the quality or fitness of goods, or liability for their performance.

E. COLLATERAL WARRANTIES AT COMMON LAW

In the common law provinces, a manufacturer may be liable for breach of a warranty notwithstanding the absence of any contractual relationship with the person to whom the warranty is given. A court may find a collateral contract between a manufacturer and a purchaser if the manufacturer issued a “*warranty*” or “*guarantee*” with its product (either orally or in writing) that induced the purchaser to buy the product. If the purchaser relies on the manufacturer's warranty in purchasing the product, it becomes irrelevant that no direct privity of contract existed when the product was sold by another party. The test the court applies is: “Did the manufacturer's warranty or guarantee induce the purchaser to act on it and, if the purchaser relied on such statements, was it reasonable to rely upon them?”

F. CONTRACTUAL EXCLUSIONS OF LIABILITY

(1) General

A contract may contain terms which attempt to exclude or limit a contracting party's liability for negligence, implied warranties at common law or even the statutory implied conditions under Sale of Goods legislation. Such clauses, known as exclusions, exemptions or waiver clauses may serve as a complete defence to a claim in contract or in negligence. Consequently, contractual terms purporting to limit liability are scrutinized carefully by the court. Furthermore, the onus rests on the party relying on the exclusion to prove that the other party to the contract understood and agreed to the terms prior to entering into the agreement.

(2) Enforcement of Exclusions

The general principle of interpretation of exclusionary clauses is that they will generally be enforced according to their terms in contracts involving commercial parties.

Exclusion clauses will, however, be strictly construed against the party in whose favour they are expressed. Several different grounds have been developed by the courts and legislatures to restrict the application of these clauses. They are: lack of adequate notice, misrepresentation, strict interpretation and unconscionability.

(a) Lack of Adequate Notice

Notice of an unusual or onerous clause must be brought to the attention of a weaker party when there is an inequality of bargaining power, especially where the clause is buried in a long, standard form agreement. Even with adequate time to read the contract, some courts have held that standard form contracts are not meant to be read. The average (or even sophisticated) consumer could spend hours reading the contract and not understand the implication of most of the terms. Any significant limitations or exclusions of liability must be brought to the attention of the purchaser prior to the sale.

(b) Misrepresentation

If there is a misrepresentation as to the effect of the exemption clause, the clause will not apply.

(c) Strict Interpretation

The wording of the exclusionary clauses must be clear, direct, unambiguous and must not be inconsistent with any other provisions in the contract. For example, an express exclusion of “*implied warranties*” has been found to be insufficient to exclude the statutory implied conditions under the Sale of Goods legislation. Similarly, the use of the term “*negligence*” on its own, without further explanation of the conduct that would qualify as negligence, may be insufficient to waive liability for not taking reasonable care.

(d) Unconscionability

The Supreme Court of Canada continues to endorse the policy that a court may exercise its discretion in refusing to enforce exclusion clauses if they are unconscionable, unfair, unreasonable or otherwise contrary to public policy.

In general, if the parties are of equal bargaining power, the court will enforce the agreement made by the parties.

(3) Statutory Restrictions on Exclusions

In addition to the general contractual principles set out above, there are also statutory restrictions in many provinces governing the validity of exclusion clauses. For example, Ontario’s *Consumer Protection Act* (CPA) provides that the implied conditions and warranties found in the *Sale of Goods Act* cannot be varied or excluded if the contract involves a “consumer sale” as defined by the CPA. In addition, there are restrictions imposed on “executory contracts,” between a purchaser and a seller in which delivery of the goods, performance of the services, or payment in full of the consideration are not made at the time the contract is entered into.

Finally, a court may refuse to enforce an exclusion clause that is considered to be an unfair business practice or, in Québec, is deemed abusive, as set out in the governing legislation.

G. INDEMNITIES

A quite different approach is for one party to take responsibility for the liability or harm for which another party might by law be held responsible. These clauses are known as “*indemnity*”, “*hold-harmless*”, or “*save harmless*” clauses. They are frequently found in agreements between manufacturers and retailers.

When a consumer purchases a product from a retailer, a contract is created and the implied warranties and conditions under Sale of Goods legislation and/or at common law or civil law come into play. As a result, a purchaser may sue a retailer for contractual breach for harm caused by a design or manufacturing defect. It is open to the manufacturer and the retailer to agree, by way of an indemnity clause in the supply contract, to have the manufacturer provide a defence to such a claim and/or indemnify the retailer for any amount the retailer may be held liable for. The circumstances which trigger the clause and the scope of the manufacturer’s obligations to the retailer are governed by the terms of the indemnity clause.

Such clauses, when properly drafted, can be of benefit to the manufacturer and the retailer. The retailer relies on the clause to avoid exposure to the damages claimed by the plaintiff. The manufacturer also benefits in circumstances in which it is, or could have been, sued. By taking over the defence of the retailer, hiring one lawyer and providing a common defence to allegations of manufacturing defect or design defect, the manufacturer reduces its exposure to the potential legal costs of the retailer and can ensure a consistent defence.



3

LIABILITY IN NEGLIGENCE

A. THE BASIS FOR LIABILITY

(1) General Liability

Many product liability claims are founded in negligence rather than in contract.

In order to succeed in a negligence action, a plaintiff must prove – on the balance of probabilities – that the defendant was negligent. To prove negligence, the plaintiff must establish that:

- the defendant owed a duty of care to the plaintiff;
- the defendant breached the requisite standard of care associated with the duty; and
- the defendant's breach caused the plaintiff's damages.

(2) Manufacturer's Liability

Manufacturers represent the most common class of defendants in product liability cases. The term manufacturer is used broadly to describe everyone involved in the production of a product including sub-manufacturers, assemblers, installers and fabricators. Generally, a manufacturer will be named either as a defendant in a product liability lawsuit or will be added to the lawsuit as a third party by one of the named defendants. There usually is no contract between a manufacturer and the purchaser of a product, so a plaintiff will have to establish that the manufacturer was negligent in either the design or the manufacture of the product at issue, or that it failed to warn of a danger associated with the product. (See further below for an explanation of manufacturing defects, design defects and failure to warn).

Claims against manufacturers will generally be based on one or more of the following:

- a defect that has arisen in the manufacturing and/or assembly process resulting in a product which is inconsistent with its design;
- a product whose design falls below the applicable standard of care, including the design of an unnecessarily dangerous product; and/or
- a failure to adequately warn of reasonably foreseeable dangers associated with a product.

A manufacturer is also liable for negligence by the suppliers of component parts. A manufacturer is obliged to take reasonable steps in selecting its suppliers and to take reasonable steps to test or inspect the component parts. A manufacturer may be found liable for the negligence of suppliers of component parts, notwithstanding that the manufacturer itself has not committed any independent act of negligence.

B. DUTY OF CARE

(1) General Duty of Care

For a plaintiff to be successful, he or she must prove that the defendant had a legal obligation to take care not to cause harm. In order to prove there was a legal obligation, or duty, the plaintiff must establish that a relationship of proximity existed between the two parties. Such a relationship would arise if the defendant's conduct created a *foreseeable risk of harm* to the plaintiff. If the duty suggested by the plaintiff is one not previously recognized by the courts, the defendant must show that there are policy or other valid reasons to reject or limit this proposed new duty of care.

(2) Manufacturer's Duty of Care

There is a proximate relationship between the purchaser of a product and the manufacturer of the product that creates a duty of care. However, there is an additional special duty of care owed by a manufacturer to take reasonable care to ensure that its products will not result in personal injury or property damage, at least within the scope of the product's foreseeable uses. This duty is owed to all people who could reasonably be in a position to be harmed by the product's use. This duty has arisen because it is more realistic for the manufacturer to obtain the necessary information and expertise to properly assess the safety of its products, than for the general public to do so.

In addition to the duty of care that products will not cause injury or economic loss, a manufacturer has a further duty to warn purchasers of potential harm in the use of its products.

C. STANDARD OF CARE

(1) General Standard of Care

Courts use the standard of care to determine whether the duty of care owed to the plaintiff has been discharged. Generally, the law requires a defendant to meet the standard of care that would have been exercised by a reasonable person in all the same circumstances of the case.

However, there is a higher standard for professionals and for manufacturers – that which a reasonable professional of similar training and expertise would do in the circumstances.

(2) Manufacturer's Standard of Care

A manufacturer is held to a standard of care and skill expected from a manufacturer of the product in question. Under Canadian law, a manufacturer of a product owes a duty to users of the product to take reasonable care to ensure that the product is *reasonably safe for its foreseeable use*. Where a product is not manufactured in accordance with the specifications that the manufacturer intended, it may be said to be defective. A manufacturer which has failed to take reasonable care to ensure that a product sold to consumers is not defective will be held responsible for any harm caused by the use of the defective product. The standard of care must also be commensurate with the potential harm that may arise from a defect or failure to warn. For example, manufacturers of potentially dangerous or technically complex products will be held to a higher standard.



D. SPECIFIC TYPES OF LIABILITY

(1) Negligence in the Manufacturing Process

(i) *The Test*

A plaintiff alleging that a product was negligently manufactured must prove that:

- the product in question was defective in that it was not manufactured in accordance with the specifications that the manufacturer intended;
- the defect arose as a result of the manufacturer's failure to take reasonable care; and
- the plaintiff sustained harm that was caused by the defective condition of the product.

The plaintiff must prove all of the above elements for the manufacturer to be found liable.

The law does not impose strict liability on manufacturers such that they are liable for all harm caused without proof of negligence. As such, the law does not require a manufacturer to produce products that are accident proof.

(ii) *Proof of Defect*

Proof of a defect in a product is a threshold issue: Unless a defect is established, it is unnecessary to consider the other elements of negligence. Court decisions in Canada in the area of product liability generally require actual – not circumstantial – proof of a defect. Where the presence or absence of a defect can be definitively determined by scientific analysis and testing, the courts have required plaintiffs to produce such proof. Thus, the plaintiff must retain an expert to examine the product and provide expert evidence that establishes the presence of a defect. Without such proof, a plaintiff's claim should fail.

However, in circumstances where it is impossible to physically produce the proof, courts may still infer the presence of a defect where there is sufficient circumstantial evidence to prove, on a balance of probabilities, that a manufacturing defect was present in the product. To satisfy this test, a plaintiff will generally have to establish the absence of any other reasonable explanation for what happened. The courts have found that a trier of fact can draw an inference of proof of defect where the cause of the defect is unknown.

For goods supplied under a service contract, a court will consider whether a defect existed at the time the defendant installed the allegedly defective product.

(iii) *Proof of Negligence*

Even when a defect in the product can be shown, the plaintiff must additionally show that the defect arose as a result of some lack of care by the manufacturer. However, this is a fairly easy requirement for plaintiffs to satisfy: Proof that the product was allowed to leave

the manufacturer's plant in a defective condition is usually sufficient to prove that there was some lack of care.

For all intents and purposes, where the product in question has been shown to be defective, the manufacturer bears an evidentiary burden to prove the defect was not the result of its failure to take reasonable care. Courts have imposed liability on manufacturers for having faulty assembly, faulty fabrication and/or failing to have in place proper systems of inspection, quality assurance and quality control. Even where near-perfect systems have been devised, the possibility of human error remains.

Accordingly, in defending a negligent manufactured product case, a manufacturer will have to show that it had proper procedures and protocols in respect of employee training, inspection and quality control.

(2) Negligence in Design

The courts have not clearly defined the law of negligent design. However, much like in a negligent manufacturing case, the plaintiff must first prove that a product was defective in order to establish liability on the part of the designer. It is generally thought that a design defect arises when the product is manufactured as intended, but the design gives rise to malfunction or creates an unreasonable risk of harm that could have been reduced or avoided through the adoption of a reasonable alternative design.

(i) *The Test*

In determining whether the design defect creates an unreasonable risk of harm, courts generally apply a risk-utility test: "*Was there a reasonable alternative design that was safer?*" Generally, the fact that a manufacturer took post-loss remedial measures to address an issue is not an admission of negligence.

This analysis necessarily involves a determination of the state of the knowledge and technology in the industry responsible for the design of the allegedly defective product at the time it was designed.

(ii) *Factors to be Considered*

In assessing whether there was, at the relevant time, a reasonable alternative design, the court will consider many factors, including:

- (a) the utility of the product in question to the public as a whole and to the individual user. (This is to be contrasted against the product with the alternative design);

- (b) the likelihood the product will cause harm in its intended use;
- (c) the severity or magnitude of the harm that may be caused by the product. (The court will be more critical of the design of a product with the potential to cause very severe injuries);
- (d) the availability and consequences of adopting the alternative design;
- (e) the probability and severity of harm that may be present in an alternative design. (The overall safety of the product must be assessed);
- (f) the effects of the alternative design on the product's function and cost;
- (g) the manufacturer's ability to spread any costs related to improving the safety of the design; and
- (h) whether the product was adequately tested for risks of harm before being sold to the public. (A manufacturer must take steps to identify foreseeable risks involved in the use of its product and cannot use its own lack of testing to argue that the harm was not foreseeable.)

Although they are not factors which address the risk-utility test, the court will also consider the following additional factors:

- (a) whether the design complied with any applicable statutory, regulatory or industry standards. (Showing that a product complied with a particular standard will not absolve liability, but it will, however, greatly assist in showing that the design was reasonable); and
- (b) the ability of the plaintiff to have avoided injury by careful use of the product. (If the manufacturer is able to point to the plaintiff's misuse of its product to establish that its design was not defective, or it can use this evidence to establish contributory negligence on the part of the plaintiff).

None of these factors alone are determinative of whether there is a design defect. They are not given the same weight, but are considered together and balanced by the court to reach a conclusion.

(3) Failure to Warn

If a manufacturer knows, or ought to know, of a danger associated with the use of its product, the manufacturer has a duty to warn all consumers of the potential danger.

By the same token, users of products have a duty to read-and heed-warnings and instructions supplied with a product, or bear the consequences of any resulting injuries. All

warnings must be reasonably communicated. Therefore, manufacturers are urged to use pictorial warnings in addition to appropriate written ones. As well, manufacturers are well advised to consult experts and lawyers to ensure that any warnings supplied with a product are visible, permanent, clear and unambiguous.

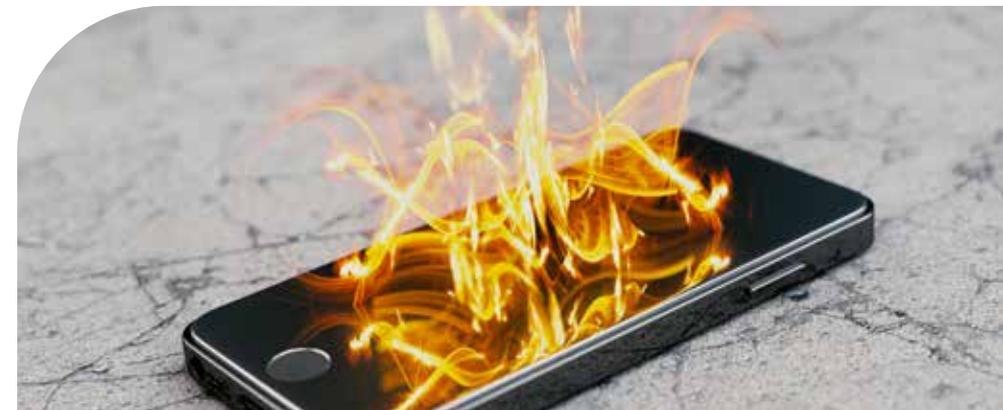
The manufacturer or distributor must also warn of any foreseeable misuse of the product. Where a danger is obvious, such as the sharp blade of a knife, a manufacturer has no duty to warn of the danger of injury. Likewise, if a product is only designed for use by a skilled person, rather than the general public, there is no need to warn against the danger that should be obvious to such a skilled person.

The duty to warn and the level of warning must be commensurate with the risk of harm and the complexity of use.

Where a manufacturer or distributor becomes aware of a danger in the use of the product, the courts have imposed a very high standard upon them to devise a program to alert owners about the potential danger. Generally, post-sale warnings to customers about defects must contain clear language bringing the danger to the customer's attention and must clearly advise the customer to stop using the product.

Manufacturers and distributors not only have an ongoing duty to inform users of all known defects or dangers associated with a product, but they must also warn them where there is *reason to suspect* that there is a danger associated with the use of the product. Accordingly, failure to act early in initiating a public warning campaign could result in the manufacturer or the distributor being liable for any injuries caused as a result of the suspected defect.

The *Canada Consumer Product Safety Act* makes it an offence to label or package a consumer product in a manner that creates "*an erroneous impression regarding the fact that the product is not a danger to human health or safety*", or that is misleading as to safety certification or compliance with applicable standards. It is also an offence to advertise or sell such a product.





4

DAMAGES

Damages are generally compensatory in nature. Punitive and exemplary damages are available, but both are exceptional and relatively modest when compared to American practices.

In 1978, the Supreme Court of Canada imposed a \$100,000 inflation-indexed “cap” in damages for pain and suffering. In today’s dollars, the amount is about \$370,000. This maximum is reserved for the most catastrophic cases. As a result, the greatest component of a personal injury damage award in Canada will often be amounts awarded for loss of income and/or cost of care.

Recently, however, courts have expressed a willingness to depart from the cap for “intentional torts” – cases where a defendant is alleged to have caused damage or harm on purpose.

A. DUTY TO MITIGATE

A claim in breach of warranty, as with most claims in either contract or tort, imposes a duty on the plaintiff to take reasonable steps to mitigate his or her losses. For example, if the purchase of a substituted item would lessen the damage, the plaintiff can recover the expenses associated with the purchase of the substituted item, as long as the substitute is of comparable quality. Where a plaintiff fails to take reasonable steps to mitigate, the court will often assess damages as if the plaintiff had taken those reasonable steps.



5

MISREPRESENTATION

In product liability cases, liability for misrepresentation usually arises when something is said about a product that is later found to be untrue. Liability for misrepresentation can arise in the laws of contract and negligence. Examples of misrepresentation might include failure of the product to perform as effectively or efficiently as represented. Damages could include actual physical damage to a person or to property, or the cost of obtaining and repeating work with a substitute product.

A. IN CONTRACT

Generally, for there to be liability for misrepresentation in the law of contract, there must be a contract between the plaintiff and defendant. This may seem obvious but, as has been noted, in most distributor situations, no contract exists between the manufacturer of the product and the purchaser. Typically, there is a contract between the manufacturer and the distributor, as well as between the retailer and the purchaser. This relatively simple concept has become complicated because, frequently, a manufacturer's warranty flows through to the purchaser.

If the misrepresentation is "*material*" such that it goes to the root of the contractual obligations, the plaintiff may be entitled to rescind the contract. This means that the contract is undone, and the parties are put back in exactly the same position as they would have been had there been no contract.

In Québec, there is a positive duty on the seller to fully inform the purchaser. Failure to inform, or providing false, incorrect, incomplete or misleading information can give rise to damages and prevent the seller from the protection of a limitation of liability clause.

B. NEGLIGENT MISREPRESENTATION

A party may be held liable for any loss that results from a plaintiff's reliance on an oral or written statement; this is known as negligent misrepresentation. To establish negligent misrepresentation, the plaintiff must prove that:

- there is a duty of care based on a "*special relationship*" between the representor and the plaintiff;
- the representation in question must be untrue, inaccurate or misleading;
- the representor must have acted negligently in making the representation;
- the plaintiff must have relied, in a reasonable manner, on the negligent misrepresentation; and
- the reliance must have been detrimental to the plaintiff, such that damages resulted.

As with any negligence action, the plaintiff must, in addition, prove causation and damages resulting from the negligent misrepresentation.



6

DEFENCES

There are many general defences that may apply to a product liability claim. The most common are:

- compliance with requisite standards
- contributory negligence
- assumption of risk
- intervening causes
- misuse of products, and
- learned intermediaries and limitation periods.

A. COMPLIANCE WITH STATUTORY AND OTHER STANDARDS

Compliance with a statutory standard is not a complete defence. It is merely one factor to be considered in determining, based on common law or civil law principles, whether there has been negligence.

Even when a manufacturer issues a warning that complies with regulatory standards, there may still be a claim for negligence. Where manufacturers are faced with competing industry standards, the Canadian-specific standards should be followed.

B. CONTRIBUTORY NEGLIGENCE

“Negligence on the part of the plaintiff is not a complete defence but, if proved, will reduce the award of damages in proportion to the degree to which the plaintiff is found to have been at fault”. In order for a plaintiff to be found contributorily negligent, the defendant must prove on a balance of probabilities, that the plaintiff breached the standard of care required of the plaintiff. Namely, whether the plaintiff acted reasonably in all the circumstances of the case.

C. ASSUMPTION OF RISK

While often raised, the defence that the plaintiff voluntarily assumed the risk of loss or damage rarely succeeds. The courts are instead more willing to find contributory negligence and apportion the loss between the plaintiff and defendant rather than absolve the defendant of liability.



The defence of voluntary assumption of risk will only be available when the defendant can discharge its burden by proving that the plaintiff was aware of the defect in the product and had fully appreciated and consented to all risks, including legal risks, inherent in the continued use of the defective product.

D. INTERVENING CAUSES

A manufacturer may successfully avoid liability when a separate and intervening act of negligence occurred so as to break the chain of causation between the negligent manufacturer and the injured plaintiff. The intervening act must have been responsible, at least in part, for the damages claimed. Similar to the voluntary assumption of risk, this defence rarely succeeds, but usually results in apportioning negligence to another negligent party.

E. MISUSE OF PRODUCTS

Where a plaintiff sustains injury through the use of a product in a manner that was neither intended nor reasonably expected, such misuse may absolve the manufacturer of any liability. The test is whether the misuse was so unlikely that it was not reasonably foreseeable to the manufacturer.

Where a *foreseeable* misuse of the product creates a potential danger, it is incumbent upon the manufacturer to warn the user of that danger.

F. LEARNED INTERMEDIARY

When a manufacturer sells a product to a professional (learned intermediary) who then dispenses the product to the public, the manufacturer may be able to avoid liability – if the professional misrepresents the product, or fails to determine if the product is appropriate for the customer. This defence is most commonly used by manufacturers of prescription drugs or medical devices. A manufacturer, nevertheless, is obliged to warn the professional of possible problems and side-effects associated with the use of the product. If the manufacturer advises the professional, who then improperly prescribes the use of the product, the professional, not the manufacturer, will be held responsible for the inappropriate use of the product.

G. OBVIOUS DANGERS

The nature and scope of a manufacturer's *duty to warn* depends on the level of danger involved in the ordinary use of the product and the obviousness of the risk. There is no duty for a manufacturer to warn of dangers associated with the use of its product when the dangers are obvious, or avoidable by the exercise of common sense. Moreover, when

it can be shown that the plaintiff was already aware of the dangers associated with using the product, then the accident cannot be said to have been caused by any failure of the manufacturer to warn of such dangers.

H. LIABILITY EXCLUDED BY CONTRACT

See Chapter 2, (F) Contractual Exclusions of Liability.

I. LIMITATION PERIODS

The law relating to limitation periods can be complex. In general, the various common law provinces require that a tort or contract action must be commenced within either **two or six years** of the date that the plaintiff reasonably became aware of the claim. In Québec, the action must be commenced within **three years**. While the time limit normally begins from the date of the loss, it could be later, depending on when the plaintiff became aware of the facts that could reasonably lead him or her to become aware of the claim. Usually, if a claim is not commenced before the limitation period, a court will not allow it; however, numerous exceptions may apply to extend the otherwise applicable limitation period. One common exception is when the injured plaintiff is a minor.

Most jurisdictions, including Québec, have also passed legislation providing that when an action has been commenced against a tortfeasor (defendant) within the prescribed limitation period, a proceeding for contribution and indemnity against a joint tortfeasor will not be defeated by the expiry of the limitation period. A separate limitation period applicable to the claim between tortfeasors will start to run from the date the original tortfeasor was served with the claim, subject to discoverability principles.

In Québec, the limitation period starts running when judgement is rendered against the original tortfeasor.



7

EVIDENTIARY ISSUES

While the rules of evidence in a product liability case are not different from any other negligence case, careful consideration must be given to the following issues: burden of proof, causation, expert evidence and spoliation.

A. BURDEN OF PROOF

The plaintiff generally bears the burden of proving, on a balance of probabilities, each and every element of the cause of action. As noted, in a negligent manufacturing case, where the *Civil Code* provides for the presumption of a product defect, **in all provinces**, the plaintiff must prove that:

- the product was defective;
- that the defect arose as a result of the defendant's negligence; and
- that the defect caused the damage or injury complained of.

If the plaintiff fails to provide sufficient evidence to prove any of the elements of the cause of action, then the claim must fail. In Québec, the *Civil Code* provides for the presumption of a product defect when the product malfunctions or deteriorates prematurely in comparison with identical property of the same type.

B. CAUSATION

The plaintiff must prove on the balance of probabilities that the negligent conduct of the defendant caused or contributed to the damages of the plaintiff. Causation is a practical question of fact.

The default rule for causation is the “*but for*” test: but for the defendant breaching the standard of care, the plaintiff would not have suffered the loss. An alternative test of *material contribution* to the plaintiff's injuries may be applied, but is generally to be confined to circumstances in which there are multiple potential tortfeasors and it is not possible to determine causation by any one of them on the “*but for*” analysis. Under the material contribution test, it is not necessary to prove that the defendant's conduct was

the sole cause of the injury. Rather, a plaintiff need only prove that the defendant's breach materially contributed to his or her loss or damage. Therefore, if a defendant is part of the cause of the injury or loss, even if the defendant's action alone could not create the injury or loss, the defendant is liable. However, the defendant is not liable for all injuries flowing from his or her negligence, rather, only the losses or injuries that were *foreseeable*. Any loss that was not foreseeable to the defendant as a result of his or her conduct is considered to be too remote by the courts.

Where the conduct of two or more independent tortfeasors combines to bring about an indivisible harm, the court will determine whether each defendant's conduct was a contributory factor in bringing about the plaintiff's injury. If so, each negligent defendant then becomes jointly and severally liable to the plaintiff for 100 percent of the plaintiff's loss, but each may seek reimbursement from the other negligent parties according to their respective degrees of fault.

Proof of causation with scientific certainty is often difficult, but the Supreme Court of Canada has indicated that this level of precision is typically not required. Accordingly, the courts will often infer causation from circumstantial evidence where it is proved that the defendant's negligence could have caused the harm complained of, and where there is no cogent evidence of any other explanation for how the harm *could* have been caused. However, merely recognizing an association between products and the alleged events will not satisfy a court that causation can be inferred.

C. EXPERT EVIDENCE AT TRIAL

Experts play a very important role in the courtroom in product liability cases, and the selection of experienced and well-qualified experts is crucial to a litigant's success. The Supreme Court of Canada has identified four prerequisites for the admission of expert evidence:

- 1) necessity in assisting the court;
- 2) relevance;
- 3) absence of any exclusionary rule; and
- 4) the requirement that the expert is properly qualified to give his or her opinion.

Expert evidence is necessary when it provides information that is beyond the experience and knowledge of a judge or jury. In order to be relevant, the evidence must be related to the issues before the court. Expertise is achieved when the expert possesses special knowledge and experience. In general, the expert must have sufficient background in the area of expertise, whether from experience or from formal training and study. Courts will often

exclude witnesses who do not satisfy this threshold, although some courts will admit the evidence, provided the witness is generally qualified. However, such evidence is not given as much weight as that from a more qualified expert.

Expert witnesses are not allowed to usurp the function and duties of the trier-of-fact by determining the facts of a case, or stating conclusions of law. The evidence given by expert witnesses must be only within the scope of their expertise. If the expert goes beyond his or her expertise, that evidence will be excluded or given little or no weight by the court.

Experts are also subject to the common law duties of independence and impartiality. An expert is required to be neutral, objective and unbiased. An expert will not be properly qualified to provide an opinion where he or she is not independent and impartial.

The trier-of-fact does not have to accept the evidence of an expert, even if unchallenged, but does have a duty to monitor the scope of an expert's evidence throughout a trial. However, courts state that expert evidence that is not contradicted should be seriously considered. When two or more experts testify, the trier-of-fact must decide which testimony to accept. Where competing experts are equally qualified and credible, the trier-of-fact must adopt the theory that best coincides with all other evidence accepted in the case. While rarely done, the court may also appoint its own expert to help in resolving technical issues.

D. SPOILIATION OF EVIDENCE

In some product liability cases, the allegedly defective product is altered, lost or destroyed (whether intentionally or accidentally) before the other party has an opportunity to examine it. A party who alters or destroys evidence denies the opposing party the opportunity to fully investigate or defend a claim. Such destruction of evidence is known as spoliation.

In Canadian courts, the destruction of evidence may give rise to the inference that the evidence would have been unfavourable to the party responsible for its destruction. This presumption can be rebutted by independent evidence of the actual post-accident condition of a product. The Canadian law of spoliation is still evolving but currently requires proof that the party intentionally destroyed evidence for the purpose of gaining an advantage in the litigation; a very high threshold. Québec law, however, specifically provides that a buyer who ascertains that a product is defective shall give notice in writing of the defect

to the seller within reasonable time after discovering it and a defendant must be given the opportunity to inspect the product. Failure to provide notice can lead to the dismissal of a claim. Moreover, the parties are duty bound to make sure that relevant evidence is preserved. It is likely that failure to do so will result in a negative inference against the party who disposed of the product or failed to preserve it in its post-accident state.

In any event, it is important to preserve the allegedly defective product in its immediate post-accident state. A party that does not control the product should, nevertheless, take immediate steps to secure its preservation. First, the person in possession should be notified in writing, as soon as possible, that the product should be preserved. Second, an inspection of the product should be arranged at an early stage, so that its condition can be photographed and documented. Counsel often co-operate and no court order is required to preserve the product, as it is recognized that destruction or loss of evidence may cause serious problems for all parties to the action, especially the party responsible for the destruction or loss. Nevertheless, in some cases, a party may not be willing to co-operate, and a court order must be pursued.

E. ELECTRONIC DISCOVERY

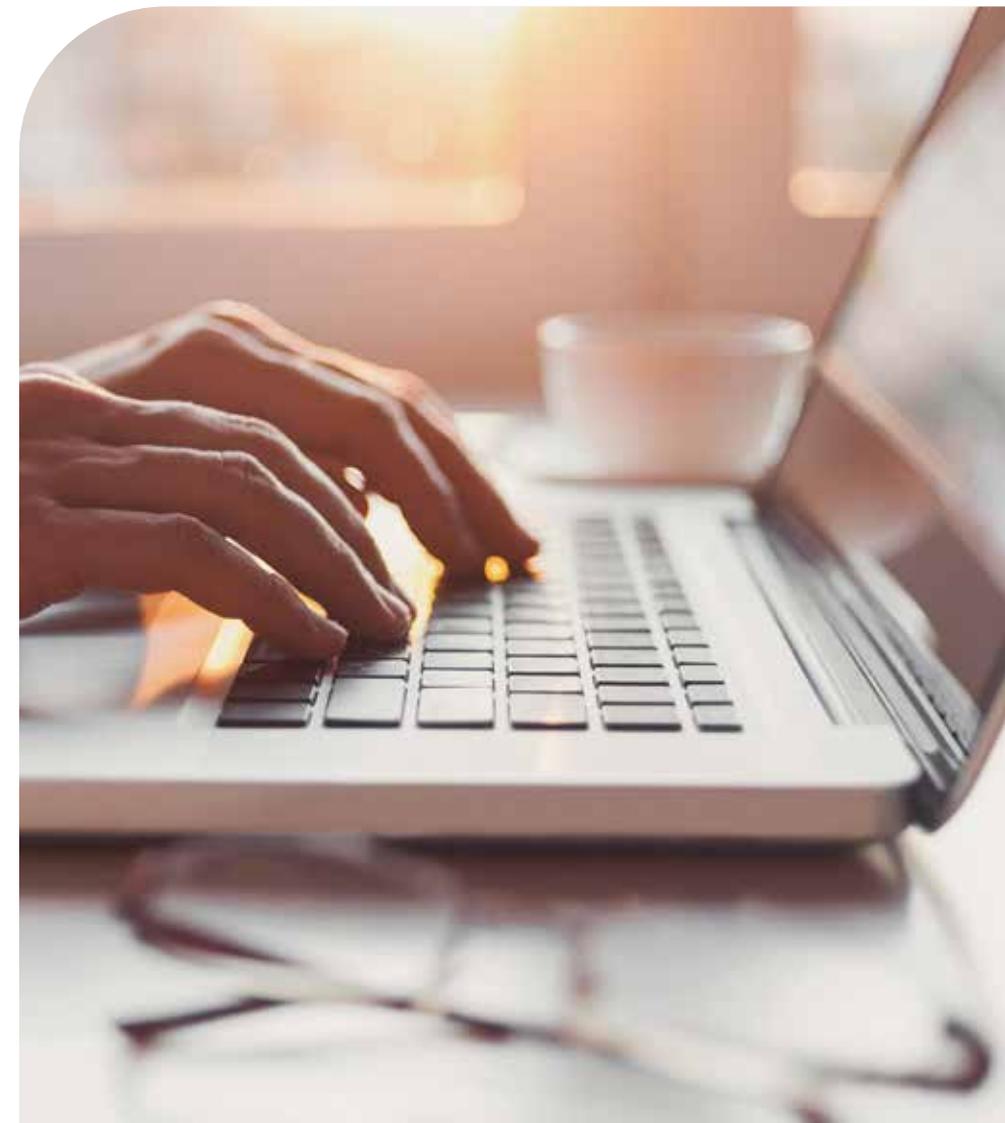
As in most jurisdictions, there is an awareness in Canada of obligations to disclose electronically stored information and data, consistent with the “*Sedona Canada Principles*” on electronic discovery. In Ontario, parties to litigation are required to agree to a written discovery plan and to update it as necessary, failing which a plan may be imposed by the court. Disclosure obligations extend to stored documents, emails and metadata. Canadian courts will, on application:

- require parties to preserve electronically stored information including voicemail and email;
- order parties to have a mirror image created of information stored on servers, hard drives and PDAs;
- order production of a party’s document retention policy; and
- suspend or interrupt document retention policy as it relates to the automatic deletion of information.

Parties can apply for such orders even before litigation has actually commenced.

In determining the effort which a party will be required to expend to preserve and produce electronic documents, the courts will attempt to balance the need for discovery of the information in question, given the particular circumstances of the case, against the burden imposed on the party by the preservation and production requirements. The guiding principle will be proportionality, which seeks to strike a balance between full disclosure and imposing

an undue burden in requiring production of a large volume of electronic documents. The courts can order that the party requesting preservation and production of electronically stored information bear the costs associated with such efforts on an interim or permanent basis, if the fairness of the case dictates such a result.



8

PRODUCT RECALL

Recalling a product is a planned action that is either voluntarily initiated by a manufacturer or mandated by a government agency. Manufacturers, importers, distributors, consumers and those persons/entities that repair products are all impacted by a product recall.

A. WHY RECALL A PRODUCT?

Companies involved in the business of manufacturing and distributing consumer products may be subject to mandatory recalls as required by law and/or initiated by government regulatory agencies.

Manufacturers and distributors may initiate voluntary recalls to remove unsafe products from the market quickly and efficiently regardless of whether they are subject to recall legislation.

Most corporations do not have insurance coverage for the costs, expenses and losses arising from a product recall. Voluntary recalls are typically initiated to protect the health and safety of users of products, to maintain corporate trust and reputational integrity and to avoid or limit potential litigation – especially class actions. A decision to voluntarily recall a product should take all of these factors into account.

B. PRODUCT RECALLS AND REGULATED INDUSTRIES

(1) *Canada Consumer Product Safety Act*

The current *Canada Consumer Product Safety Act* (CCPSA) came into force on June 20, 2011. It gives the federal Minister of Health a number of broad coercive powers to ensure the safety of consumer products, including powers to inspect premises, to order testing, to seize goods and to order the immediate recall of a consumer product that is believed to be “a danger to human health or safety”. The CCPSA applies to a very broad range of consumer products. However, notable exceptions include cars, food, drugs, cosmetics, boats, and aircraft which are governed by other legislation.



Under the *CCPSA*, there are also strict requirements on the part of manufacturers, importers and sellers to immediately report incidents involving consumer products to Health Canada.

A recall under the *CCPSA* can apply to a manufacturer, importer or retailer of goods for commercial purposes (even where the retailer may have nothing to do with the product defect).

Retailers should ensure that supply agreements expressly allow recovery of recall expenses from distributors and manufacturers and that there is sufficient security for such expenses.

(2) The Automobile Industry

The federal *Motor Vehicle Safety Act* requires a manufacturer or importer of automobiles (which includes cars, trucks, buses, trailers, motorcycles and snowmobiles), and related equipment to notify owners, dealers and Transport Canada of any defects in the design, construction or functioning of the vehicle or equipment that affects or is likely to affect the safety of any person.

Once dealers have been notified, they are responsible for correcting the problem according to the vehicle manufacturer's instructions. The statutory duty is to warn through a notice of defect when there is a defect in the design, construction or function of an automobile or one or more of its component parts. This duty does not extend to recalling the product. However, if there is a recall, Transport Canada may analyze the proposed corrective action by the manufacturer by auditing the success of the recall using such metrics as the number of vehicles corrected, technical adequacy of the repair, method used to contact owners and the systems employed by the manufacturer to provide reliable data as required under the *Motor Vehicle Safety Act*. Transport Canada has the authority to enforce compliance mechanisms, including the denial of importation, the detention of non-complying vehicles or equipment and the recommendation for provincial action to remove vehicle registration privileges.

Recent legislation has made significant amendments to the *Motor Vehicle Safety Act*. The stated purpose of the amendments is to bring the Canadian regime into greater harmony with the parallel legislation in the United States. The legislation significantly expands the powers of the Minister of Transportation, including the power to issue recalls, issue monetary penalties and increase motor vehicle inspection powers.

(3) Food

The Canadian Food Inspection Agency is responsible for the enforcement of the federal *Consumer Packaging and Labelling Act* and the *Food and Drugs Act (FDA)* as it relates to food as defined in the *FDA*. Food is broadly defined as including any article manufactured or sold for human consumption or use. This includes all beverages and any ingredient that may be mixed with food for any purpose whatsoever.

If a product is unsafe or violates the *FDA*, an involved party may voluntarily recall a product or may be ordered to do so as a mandatory recall under the *Canadian Food Inspection Agency Act*.

There are three food recall classifications (Class I, II or III) which are assigned by the Office of Food Safety to indicate the relative degree of health risk. For example, the most serious is Class I, which is a “*health hazard situation where there is a reasonable probability that the use of the product will cause serious adverse health consequences or death.*”

(4) Drugs and Medical Devices

The *FDA* and the regulations thereunder empower the federal government to regulate the manufacture, importation, advertising, labelling, packaging and distribution of drugs and medical devices. Health Canada has jurisdiction which it exercises through the Health Products and Food Branch (HPFB) and its Inspectorate. The regulations contain recall provisions, but do not specify when a recall must be done. HPFB may require a drug or medical device recall under its general licensing power, or a manufacturer or distributor may voluntarily institute a recall for their own reasons.

The regulations contain recall provisions, but do not specify when a recall must be done. HPFB may require a drug or medical device recall under its general licensing power, or a manufacturer or distributor may voluntarily institute a recall for their own reasons.

When a drug recall is commenced, the manufacturer or distributor must provide information to the HPFB, including the name of the drug, the manufacturer or the importer, the quantity of the drug manufactured or imported, the quantity distributed, the quantity of the drug remaining on the premises, the reason for the recall and the description of any action taken by the manufacturer or importer with respect to the recall. HPFB then becomes involved in monitoring the recall.

Similar regulations apply with respect to medical devices.

HPFB maintains a “*Product Recall Procedure*” that provides detailed guidelines on what a manufacturer or distributor must tell HPFB; what sort of evaluation they must perform; what recall implementation strategy they might apply; and what role the HPFB Inspectorate plays.

Compliance mechanisms available to HPFB include: the issuance of a warning letter; the ordering of the cessation of the sale of the product, or

seizure of the product or any part of the manufacturing facility that is not in compliance with the regulations; suspending or revoking a license or drug identification number; and/or prosecution under the *Food and Drugs Act*.

If there is an imminent health hazard associated with the product, the HPFB Inspectorate may issue a public advisory/warning about the danger, accompanied by letters to the industry and health care professionals, via their professional associations, warning of the problem.

(5) Canadian Manufacturers Distributing in the U.S.

Canadian manufacturers distributing products in the U.S. should be aware of their obligations to the Consumer Product Safety Commission (CPSC). Indeed, a Canadian manufacturer must notify the CPSC immediately if a defective consumer product is distributed in the U.S.

Given the global marketplace in which consumer products are now sold, there is increasing cooperation internationally among consumer protection entities. In this context, the CPSC, Health Canada, the Consumer Protection Federal Agency of the United Mexican States (PROFECO) and, in some circumstances, the European Commission Directorate General for Justice and Consumers (pursuant to the General Product Safety Directive) frequently share information and work closely together in addressing consumer product safety issues, including the issuance of joint recalls.

C. HAZARDOUS AND DANGEROUS PRODUCTS

Under the *Hazardous Products Act*, it is illegal to sell or import a “hazardous product” that is intended for use, handling or storage in a workplace in Canada unless a supplier meets certain regulatory requirements. The supplier must obtain or prepare a safety data sheet for the “hazardous product”, and must also ensure that the label affixed to the hazardous product meets the requirements set out in the regulations.

The *Hazardous Products Act* defines a hazardous product as any product, mixture, material or substance that is classified into a hazard class in accordance with the regulations. Examples of physical hazard class categories include explosives, flammable materials, oxidizing materials, and corrosive materials. Examples of health hazard class categories include acutely toxic products, carcinogenic materials, and biohazardous infectious materials.

While there is no formal product recall procedure under the *Hazardous Products Act*, the federal government may issue an order for a supplier to take measures necessary to remedy non-compliance with the Act, including stopping the sale or importation of the hazardous product.

Companies involved in the business of manufacturing, distributing and selling hazardous products to consumers will also need to familiarize themselves with the *Canadian Consumer*

Chemicals and Containers Regulations. Promulgated under the CCPSA, these regulations require that the manufacturer or importer of certain chemical products must determine:

- (1) the hazard category of the chemical product
- (2) the type of container required for the product, and
- (3) the information required to be displayed on the container.

Prescribed chemical products include toxic products, corrosive products, flammable products, and quick skin-bonding adhesives.

Failure of a manufacturer or importer to comply with the classification and labelling requirements can lead to penalties, including a recall, under the CCPSA.

D. RECALL CHECKLIST

The following suggestions are intended to help develop a plan for dealing with a product recall.

✓ **A manufacturer should assemble a recall management team and develop a product recall plan in advance of any recall.**

The team should be comprised of senior management responsible for product design, quality control and marketing; a senior financial officer; a government relations person; a public relations consultant; and legal counsel. Public safety is the governing principle.

✓ **All relevant information regarding the background giving rise to a potential product recall should be considered before developing a finite action plan.**

This should include determining: how many defective products there are in the marketplace; how many purchasers/customers of the potentially defective product must be notified; where the products are located; what is the most effective way to locate and communicate a recall to those customers/purchasers; how long it will take; how much it will cost; and which personnel and processes within the company or outside the company can be best utilized to communicate and co-ordinate the product recall.

✓ **A recall team leader should co-ordinate all aspects of the recall and be given appropriate authority by management to do so.**

✓ **The action plan should be developed on three timelines: immediate; short-term and long-term.**

A product recall may be initiated at any of these stages and usually involves the drafting and distribution of notices, warnings and related information to affected persons.

✓ **Draft the recall notice in consultation with legal counsel.**

This should include: a clear and accurate description as to what the problem is that has been ascertained; what must be done to correct the defect; and what the consequences are if the recommended recall procedures are not followed, especially where the failure to follow the recommended recall procedure could result in serious injury or death, or damage to property. Several attempts at communicating the recall or following up may be required to properly communicate a recall: Once may not be enough. Consider utilization of a 1-800 number, a website, trade publications, and other social media to effectively communicate with customers and others to whom the recall must be directed.

✓ **Notify those affected. These persons may include: Suppliers; certifying agencies; distributors/dealers/sales agents; employees; customers/purchasers; and insurance brokers or insurers.**

If the recall is of a regulated product or in a regulated industry, you must comply with required processes and procedures.

✓ **Keep accurate and complete records of advice given and actions taken to track and deal with customer complaints and concerns, and verify the effectiveness of the recall.**

✓ **Record and document all losses and expenses incurred as a result of the recall.**

These may be presented to an insurer if there is some or limited coverage for these types of losses and expenses. Alternatively, this documentation may form the basis of evidence in actions against others for reimbursement, contribution or indemnity.

E. INSURANCE CONSIDERATIONS

Generally speaking, there is no insurance coverage under standard form comprehensive general liability policies for losses and expenses associated with product recalls. There are typical exclusions in these policies that may apply including: contractual liability; work performed; damaged product or product itself; and “performance” exclusions.

Product recall insurance or limited forms of it, however, can be purchased. Larger companies with broader product liability risks may wish to engage the services of a sophisticated insurance broker to canvass the possible purchase of coverage or endorsements to negate these standard exclusions. Coverage may be available, for example, to cover loss of sales; product recall expenses; brand rehabilitation expenses (for advertising and marketing to re-establish the product in the marketplace); and certain extra expenses, such as hiring crisis management consultants and public relations firms to handle adverse publicity.

These difficulties notwithstanding, in every case of a potential or actual product recall, the company’s insurance policy should be carefully reviewed with the broker and with legal counsel to determine: notice and investigation provisions; what losses and expenses are covered or excluded; and whether there are provisions prohibiting the company from making any settlement, or assuming any obligation or expense in response to a claim, without the consent of the insurer.





9

CHAIN OF LIABILITY

Plaintiffs have the right to select which parties are named as defendants in a lawsuit. For their part, defendants have a right to sue other parties that they believe are ultimately responsible or share responsibility for any damages sustained by the plaintiff. A defendant sues another party through a Third Party Claim. In Québec, one accomplishes the equivalent by means of a forced intervention or an action in warranty.

A Third Party has a right to defend the claim against it from the defendant and also to defend the main action (the plaintiff's claim).

Third Party Claims occur frequently in product liability cases, depending upon the nature and complexity of the product distribution chain. For instance, if a plaintiff issues a claim only against the retailer from whom it purchased an allegedly defective product, the retailer will normally issue a Third Party Claim against the company from whom it purchased the product and, likely, the manufacturer of the product on the basis that these entities are ultimately responsible for any defects in the product.

In Québec, a plaintiff can sue every participant in the distribution chain in contract or in negligence. In the common law provinces, privity of contract must exist for a plaintiff to sue in contract.

Retailers, importers, wholesalers and distributors of products will often be named as defendants in product liability claims, notwithstanding that they may have played no role whatsoever in the manufacture or design of the allegedly defective product. These claims may be based either on breach of contract or negligence, depending on the role played by the target defendant.

Although manufacturers are generally liable where their own negligent acts or omissions cause harm, there are circumstances where manufacturers may find themselves liable for the negligent acts of others. For instance, a manufacturer may be liable for defects in parts supplied by others which have been integrated into the manufacturer's own product.

In cases where the plaintiff has a direct contractual relationship (for instance, a claim against the retailer from whom the product was purchased), a claim will likely be based on a breach of the express and/or implied terms of the contract for sale. As outlined below, retailers will often claim contribution and indemnity from the manufacturer of the allegedly defective product and/or other players in the distribution chain.

Usually all of the necessary players will ultimately be added as parties to a product liability claim. Of note is that if one defendant is found negligent (in design, for example), often all defendants can be jointly and severally liable for the damages awarded to the plaintiff.

There are significant differences in the practical and legal positions of the different players on the distribution chain. For example, a retailer is most likely to have a direct contract with the purchaser and, therefore, is most likely to be subject to liability arising out of an express warranty. The apparent relative immunity – on a contractual basis – of the manufacturer and the distributor has attracted some adverse judicial comment given that, as one court noted, the damage was caused by the product and not by the act of sale itself.

On the other hand, in a claim based on tort, manufacturers are arguably held to the most rigorous standard of care: The duty to manufacture reasonably safe products and to take care that products cause no harm to anyone that a product might foreseeably injure. Still, that duty has not been elevated to one of strict liability as it has in some jurisdictions outside Canada.



10

THE LITIGATION PROCESS IN CANADA

A. THE COURTS IN CANADA

The provincial Superior Courts are courts of record with jurisdiction over the provinces in which they sit. The judges of these “provincial” courts are, in fact, appointed by the federal Minister of Justice. The provincial Superior Courts are courts of plenary and inherent jurisdiction. Except where their jurisdiction has been specifically curtailed by statute, they have jurisdiction to hear all *in personam* claims in tort, contract, etc.

Either party may request a jury trial in most civil trials before the provincial Superior Courts, except in Québec where no jury trials exist in civil matters. Appeals from the provincial Superior Courts generally go to the provincial Court of Appeal and, with leave, to the Supreme Court of Canada.

Canada does have a Federal Court, but it is a creature of statute. Accordingly, there must be a particular statutory grant of jurisdiction for it to adjudicate a claim. Further, in many areas where the Federal Court enjoys jurisdiction, the provincial courts enjoy concurrent jurisdiction, and proceedings can be brought in either court. Some of the Federal Court’s jurisdiction is exclusive; however, the Superior Court’s jurisdiction overlaps with the Federal Court’s in other areas, and proceedings can be brought in either court. Note that there are no jury trials in the Federal Court.

As a practical matter, the vast majority of product liability claims are brought before the provincial Superior Courts of the various provinces and, therefore, this chapter will not deal with the particularities of Federal Court practice and procedure. Also, a detailed overview of the civil law litigation process in Québec is beyond the scope of this chapter.

B. STEPS IN A PROCEEDING

Generally, litigation takes the following steps: pleadings, documentary discovery, oral discovery, motions, pre-trial conferences, pre-trial requests to admit, expert reports, trial and appeals.



(1) Pleadings

The pleadings consist of:

- the plaintiff's allegations (generally the "*Statement of Claim*" or the "*Originating Application to Institute Proceedings*" in Québec);
- the defendant's response (the "*Statement of Defence*") in Québec which will either be filed with the court in written or oral form;
- and sometimes, the plaintiff's response (the "reply" except in Québec where there is no reply).

Mechanisms also exist for the defendant to assert counterclaims against the plaintiff (a cross-application in Québec), as well as for one defendant to assert a claim against another defendant (a cross claim), or a related claim against someone not already a party to the litigation (a Third Party Claim). These last two are dealt with by "*application in warranty*" in Québec.

Once a claim is served on a defendant, the defendant has a limited amount of time to file the responding pleading. The Rules that govern the civil procedure for each province dictate the amount of time allowed. Service of a responding pleading within the applicable time limit is crucial to avoid a default judgment. Once a claim is received, Canadian counsel should be retained to advise and file the necessary documents without delay.

A party need not be named in the original proceeding in order to incur liability. A defendant initially named in the Statement of Claim may commence, by way of a Third Party Claim, an action against any other appropriate party not originally named in the Statement of Claim, seeking contribution and indemnity.

In a negligence action, there is a statutory right to claim contribution against joint tortfeasors. The court can and will determine the degree of fault against each tortfeasor. Each at-fault party is responsible for the full amount of damages awarded, even if the judge determines he or she is only one percent liable. Each at-fault party may then seek contribution and indemnity from other at-fault parties.

A Third Party Claim can be commenced by a defendant to an existing suit where that defendant alleges that a party not currently named as a defendant is wholly or partially responsible for causing or contributing to the plaintiff's damages. As well, Third Party Claims can be brought to enforce indemnity agreements in existence between two contracting parties, or pursuant to Sale of Goods legislation, to involve the defendant's supplier.

(2) Documentary Discovery

In the common law provinces, litigants are generally under a duty to disclose documents in their possession or control that are relevant to the issue in the proceedings. Disclosure is typically made through some form of an Affidavit of Records, Affidavit of Documents or a list of Documents, depending on where the litigation takes place.

Some provinces require a sworn statement containing a list of documents over which no privilege is claimed, a list of privileged documents and a list of documents known to exist but which are no longer in the party's possession or control. The documents over which no privilege is claimed must be made available to the other side. Motions may be brought to challenge a claim of privilege and compel the production of documents over which privilege is claimed, or for further and better disclosure if the initial list is shown to be inadequate. In certain provinces, various sanctions can result from failure to disclose a relevant document.

In Québec, there is no compulsory disclosure of documents. A party can disclose and file only what it wants to. Generally, the opposing party can only obtain further information from documents through oral examination on discovery of the opposite party's witnesses or through examining third-party witnesses. However, the parties are duty-bound to inform one another of the facts on which their contentions are based and of the evidence they intend to produce. The court may also, on request by the concerned party, order non-parties within the jurisdiction to produce documents relevant to the litigation.

(3) Oral Discovery

An oral examination for discovery is the Canadian equivalent to the American Deposition. At an "examination for discovery" or "questioning", each party to the litigation is generally entitled to ask an opposing party (or if they are a corporation, a representative of the opposing party) who is under oath, questions relating to the issue in the litigation. In common law provinces, this occurs after the parties have exchanged documents. In the case of a corporation, generally only one representative may be examined and that representative must inform him or herself about the issues relevant to the litigation.

However, in Québec, more than one representative can be examined if:

- that person does not have first-hand knowledge of all the facts, or
- other representatives have been involved in the circumstances leading up to the dispute.

Further, the defendant is entitled to examine the plaintiff or his/her representative(s) before or after filing the Statement of Defence, and the Plaintiff can examine the defendant before or after the Statement of Defence has been filed.

An important Canadian distinction is that non-parties, additional corporate representatives and experts may be examined only as a result of a court order. This is exceptional in Canada, and such an order will generally only be granted if it can be shown that the information is otherwise unavailable, that it would be unfair to proceed in the absence of the testimony and that no unfairness would result from the proposed examination. Such orders will be obtained in Québec subject to the conditions to be determined by the court. Given that examinations for discovery generally only involve questioning of the actual parties, the process is much shorter than that for depositions in the U.S.

During examination for discovery, the scope of the permitted questions is very broad. The witness (or, more often, his or her counsel) can refuse to answer an improper question, but the questioning party can subsequently bring a motion to compel an answer. If successful, a subsequent attendance by the witness may be required, although in practice counsel often agrees to provide such answers in writing.

Balanced against these broad discovery rights is an implied undertaking that prohibits a party from using evidence or information obtained through the discovery process (oral or documentary) for any purpose other than for the proceeding in which the information was obtained. The rule does not apply to evidence that is filed in open court, or that is otherwise part of the court record.

(4) Motions

A motion is a request for some form of interlocutory or interim relief.

Typically, motions are heard by way of an oral hearing. Motions are generally supported by affidavit evidence, and the affiants thereof can be subject to cross-examination in advance of the oral hearing. Third parties may also be summoned to give evidence in advance of the oral hearing so that a transcript of their evidence can be relied upon in support of the motion.

The most common substantive motions are for summary judgment (e.g., summary judgment may be available to a defendant in a product liability case where the plaintiff alleges a design defect, but neglects to proffer the necessary expert evidence regarding the nature of the

alleged defect). Motions for summary judgment are not available in Québec, but motions to dismiss are available when arguing *res judicata lis pendens*, incapacity to act, lack of interest, or that a claim or a defence is unfounded in law. For example, an application for latent defect can be dismissed in the absence of notice of the defect to the defendant or if the right of action is prescribed.

Procedural motions include those relating to defects in the pleadings, for security for costs, to compel further documentary or oral discovery and with respect to trial procedure.

Confidentiality or protective orders – providing that certain evidence be sealed and not form part of the public record – may also be obtained by way of motion. A case must be made that public disclosure of the information would result in a competitive disadvantage or some other detriment to the party making the disclosure. Confidentiality orders can relate to all information exchanged between the parties, including information exchanged in the discovery process. However, this information is already protected by the implied undertaking rule that holds that parties may not use information obtained through the discovery process for ulterior purposes.

(5) Pre-Trial Conference

After one party indicates to the court that the matter is ready to be scheduled for trial, the parties will be summoned for a pre-trial conference, which is presided over by a judge who will provide an impartial assessment of the issues in an effort to facilitate settlement. Depending on the jurisdiction, the conference can be entirely, or partially, for settlement and/or determining matters of conduct at trial. If a settlement conference is presided over by a judge, that judge is not permitted to preside over the trial.

(6) Pre-Trial Requests to Admit

These allow a party to request an adverse party to admit the truth of certain facts or the authenticity of certain documents for the purposes of the trial. They are useful tools for simplifying the proof of certain facts and shortening trials.

(7) Submission of Expert Reports

Typically, if a party wishes to call an expert to testify at trial, the expert's report must be disclosed to the other side in advance of a trial (each province's Rules regarding Civil Procedure will dictate how long before trial). In the common law provinces, an opposing party's expert is not generally liable to be deposed before the trial. However, in Québec experts may be deposed before trial on the nature of the facts and the documents they relied on, but not on the opinions they expressed.

Note that in Québec, the use of joint experts is encouraged. The *Code of Civil Procedure* also limits the parties to filing one expert opinion per matter, unless authorized otherwise by the court. These provisions seek to promote the notion of proportionality without jeopardizing the parties' right to a full and comprehensive defense.

(8) Trial

In most common law jurisdictions, a trial will commence with opening addresses by each party, followed by the plaintiff's evidence, the defendant's evidence, reply evidence from the plaintiff and closing arguments from the plaintiff and the defendant.

However, in Québec there are generally no opening addresses. While civil trials may be heard with a jury in Canada, the vast majority of civil trials are decided by a judge alone.

Facts are generally proven by the oral testimony of witnesses in open court, by admission or by reading in the discovery transcript of an adverse party. Witnesses are generally examined "*in chief*" by the party calling them, are then cross-examined by the adverse parties and may be re-examined by the party calling them to deal with any points raised for the first time in cross-examination.

Canadian courts have the capacity to conduct trials in French as well as in English. English is the norm for the common law provinces; however, in Québec all judges are bilingual. It is not uncommon in Québec to see civil trials being conducted in both French and English, depending on the preferred language of the parties, the witnesses and the experts.

(9) Appeals

Appeals are generally available with respect to the adjudication of both final and interlocutory adjudications. The court's permission often is required before an interlocutory matter can be appealed. An appeal may not necessarily function as an automatic stay of the adjudication under appeal.

There are, of course, special procedures that may be applicable in a given locality by virtue of Practice Directions or local custom. In addition, the provincial authorities may experiment with procedural reform in certain centres.

C. COSTS

An important difference between Canadian and U.S. civil litigation is that, as a general matter, Canadian courts follow the "*loser pays*" rule. This means that the unsuccessful party must partially or substantially indemnify the successful party for what Americans would call

attorneys' fees and what Canadians call costs - that is, the legal fees and disbursements incurred in the proceeding. In Canadian litigation, cost awards are made on virtually every motion, trial and appeal.

Although the relevant statutes routinely provide that any award of costs is wholly in the court's discretion, both regulations and precedent structure the way that this broad discretion is exercised. In a typical matter, the successful party is awarded some portion of its costs. The amount recovered varies widely by jurisdiction. Only in exceptional situations (where the other party's conduct is so egregious) is it possible for a party to recover an amount approaching full indemnity.

One of the factors that is closely considered in deciding the issue of costs is pre-existing offers to settle. Some provinces have formulated procedural rules that provide for direct cost consequences of certain offers to settle, the purpose of which is to encourage settlement. For example, in Ontario when a defendant makes a settlement offer before trial and, subsequently, the plaintiff obtains a judgment as favourable or less favourable than the defendant's offer, the regularly expected entitlement of a successful plaintiff to costs is reversed. From the date of the defendant's offer, the defendant is now entitled to partial indemnity for his or her costs, notwithstanding that a plaintiff's verdict was obtained at trial.

A similar Ontario rule applies to a plaintiff's offer: If the plaintiff bests his or her own pre-trial settlement offer, the plaintiff should expect to receive a higher level of recovery for costs from the date of the offer. No such rules apply in Québec, where costs are determined by the *Code of Civil Procedure*.

If a plaintiff is resident outside the jurisdiction, or is a shell corporation, such plaintiff may be ordered to post security sufficient to cover a portion of the costs to which the defendant would normally be entitled if the defendant was successful in defending the action. Each jurisdiction has rules to govern the circumstances where a plaintiff must post security for a defendant's costs.

D. MEDIATION

Alternative Dispute Resolution has become a preferable way for many clients to resolve their litigation issues. It is cost effective and confidential. As well, in many jurisdictions mediation at some point before trial is mandatory.

Since product liability claims can be quite technical and complicated, the choice of the appropriate mediator is paramount. Therefore, it is wise for all parties involved in a product liability claim to ensure that they agree upon a mediator who has the requisite experience to understand and deal with the issues.

Once a mediator has been selected, all parties attend with their counsel. During the mediation, the parties are invited to state their position and participate in dialogue towards resolving the claims and/or clarifying the issues. Usually, the parties will separate into different rooms and the mediator will liaise between them. However, it is possible to convey information to the mediator that he or she does not share with the other side. This can help facilitate a faster settlement as the mediator has all the information to help strike a deal, without either side losing face.

All discussions are on a “*without prejudice*” basis. Therefore, anything said during the mediation is confidential and cannot be used in court should the action go to trial.

As this is a non-binding process, which either party can stop at any time, there is often not much to lose, – and, in fact, much to gain, by attending a mediation.

E. ARBITRATION

In an arbitration process, the parties enter into an agreement to have their dispute decided by *binding* arbitration. This agreement may come about at the time the dispute arises or as a result of a mandatory arbitration provision contained in a prior agreement. Arbitration may take the form of an informal proceeding before a single arbitrator or a panel of arbitrators to whom the parties may make submissions. In a different form of arbitration, the parties may agree to have their case tried by an arbitrator, frequently a retired judge, who presides in what may be described as a private court. Again, the arbitrator’s decision is binding and final unless the arbitration agreement provides for an appeal. Private trial has a number of advantages, including the opportunity to choose a judge acceptable to all parties and to select an early trial date convenient to all parties.

Most provinces have arbitration legislation that can provide or supplement those rules the parties have not and cannot agree upon as to the constitution of the arbitration panel and the conduct of the proceedings. These rules also provide for the enforcement of an arbitration decision. Although most provinces have defined themselves as pro-arbitration jurisdictions, consumer protection legislation will sometimes take priority over the existence of an arbitration clause in a contract.

Note that Québec’s *Consumer Protection Act* provides that any stipulation obliging the consumer to refer a dispute to arbitration is prohibited, and that consumers may agree to refer a dispute to arbitration only after a contract has been entered into.



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MULTI-JURISDICTIONAL ISSUES

A. JURISDICTION

Generally, in Canada's common law provinces jurisdiction is a two-step process. The first step is that the plaintiff commences an action in an appropriate province.

In product liability cases, that is typically where the plaintiff resides or where the accident, which is alleged to have arisen as a result of a defective product, took place, or where the defendant carries on business or resides.

If an accident occurred outside of the jurisdiction and the defendant is outside as well, then the courts require that there be "*a real and substantial connection*" between the claim and the province selected by the plaintiff. This connection may be presumed from the fact that (i) the defendant is resident or domiciled in the province, (ii) the defendant carries on business in the province, (iii) a tort was committed in the province or (iv) a contract connected with the dispute was made in the province. Other factors giving rise to jurisdiction may develop in the case law over time.

Once the plaintiff chooses a jurisdiction, the second (and distinct) question is whether it is a convenient forum. In answering, the courts will consider a number of factors, the most important being the applicable law and whether the plaintiff would lose a significant legal advantage if the case were to be tried in another jurisdiction with a substantial connection to the claim.

In the event jurisdiction is contested, it is important that the defendant not attorn to a jurisdiction by formally defending the action. Filing a Notice of Intent to Defend may be deemed acceptance of the jurisdiction. The proper course is to contest jurisdiction by bringing motion for an order setting aside service of the pleadings and an order staying the proceeding.



As described above, there are three ways in which Canadian courts assert jurisdiction against an out-of-province defendant:

- (a) Presence-based jurisdiction;
- (b) Consent-based jurisdiction; and
- (c) Assumed jurisdiction.

Presence-based jurisdiction allows jurisdiction over an extra-provincial defendant who is physically present within the territory of the court.

Consent-based jurisdiction permits jurisdiction over an extra-provincial defendant who either:

- 1) consents by voluntary submission;
- 2) attorns to the jurisdiction through appearance and/or defence; or
- 3) through prior agreement consented to submit disputes to the courts of that jurisdiction. A number of provinces have prohibited foreign jurisdiction in arbitration clauses in their consumer legislation.

Assumed jurisdiction is based on the common law “*real and substantial connection*” test. In Québec, the *Civil Code* has specifically prescribed those factors which give Québec courts jurisdiction, including those listed above but also whether a fault was committed in Québec, damages were suffered or an injurious act occurred in Québec, one of the obligations arising from a contract was to be performed in Québec, or a consumer contract was entered into with a consumer residing in Québec.

Provincial civil procedure rules allow service to be initiated on foreign defendants via *service ex juris*, often without prior court approval. Such service, even if permitted under the applicable rules, must still comply with one of the three jurisdictional tests.

When more than one forum is capable of assuming jurisdiction, it is necessary to determine where the action should be litigated. The most appropriate forum is determined through the *forum non conveniens* doctrine.

B. FORUM NON CONVENIENS

In Canada, the courts have developed a list of non-exhaustive factors that they will consider in determining the most appropriate forum for an action. They include:

- (a) the location of the majority of the parties;
- (b) the location of key witnesses and evidence;

- (c) contractual provisions that specify applicable law or designate jurisdiction;
- (d) the desire to avoid a multiplicity of proceedings;
- (e) the applicable law and its weight in comparison to the factual questions to be decided;
- (f) geographical factors suggesting the natural forum; and
- (g) whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in that court.

It should be noted that first instance courts sometimes confuse the real and substantial connection test that grants jurisdiction to a court with the test for *forum non conveniens*. The real and substantial connection test simply prevents a court from taking jurisdiction over matters in which the forum in question has little interest. The *forum non conveniens* test allows a court to decline jurisdiction where it does have a substantial interest, but determines that there is a more convenient or appropriate forum elsewhere to hear the issues in question. While parties may rely upon forum selection clauses, courts retain the jurisdiction to decline to enforce these clauses if strong reason exist for doing so (for example, unequal bargaining power of the parties). In Québec, the other jurisdiction must be in a better position to decide the dispute and there must be exceptional circumstances. The substantial connection test requires only a real and substantial connection, not the *most* real and substantial connection.

C. CHOICE OF LAW

After the decision has been made as to which court will hear the claim, the court must then decide which law it will apply. This is called the choice of law process.

The Supreme Court of Canada has ruled that the law that will govern the choice of law is the law where the tort occurred. In product liability cases, the tort or wrong is not established until damage has occurred; therefore, the tort law of the jurisdiction in which the accident took place will apply to the accident. In Québec, however, there are a number of exceptions to this rule:

- (a) in the case of manufacturers, the governing law is one of the two following, at the option of the injured party:
 - (i) the law where the manufacturer has its establishment or residence, or
 - (ii) the law where the moveable property was acquired.

- (b) if the injurious act occurs in one jurisdiction and the injury in another, the law of the latter will apply if the manufacturer/seller/distributor should have foreseen that the damage would occur in the latter jurisdiction;
- (c) if the manufacturer/seller/distributor and the injured party are domiciled or reside in the same jurisdiction, the law of that jurisdiction will apply.

In Canada's common law provinces, the law with respect to product liability is for all practical purposes the same. Therefore, whether the law of one or another province applies is typically not of any importance (unless the accident took place in Québec). The law may, however, differ substantially if the accident occurs outside of Canada.

The courts will only apply foreign law if one of the parties specifically pleads that foreign law should apply. If a party does not plead this, the courts will automatically apply their jurisdiction's tort law. Accordingly, when an accident takes place outside of the jurisdiction where a claim will be heard, it would be prudent to obtain a legal opinion to determine if the differences in the substantive tort law of that jurisdiction and the jurisdiction hearing the case are significant. If it is determined that the law in that jurisdiction would be advantageous for the defendant, then it would be prudent to plead that the foreign law should apply. Foreign law is then introduced through expert evidence regarding the tort law of that jurisdiction.

The choice of law process only imports the substantive law of the foreign jurisdiction. It does not import the procedural law of that jurisdiction. The procedural law remains the procedural law of the forum hearing the claim.

D. FOREIGN JUDGMENTS

The Supreme Court of Canada has confirmed that Canadian courts should take a generous and liberal approach to the recognition and enforcement of foreign judgments.

As a result of the judgment, there is no need for the applicant to prove a real and substantial connection between the Canadian province where the foreign judgment is sought to be registered and the original underlying dispute that led to the foreign judgment, or between the Canadian province and the judgment debtor/defendant. So long as a real and substantial connection existed between the foreign court and the original action, and so long as the defendants were properly served with the original claim, the enforcing Canadian court has jurisdiction to recognize and enforce a foreign judgment.



12

CLASS ACTIONS IN CANADA

A growing number of product liability class actions are being commenced across Canada. Nine provinces have enacted class action legislation: Québec, Ontario, British Columbia, Saskatchewan, Alberta, Manitoba, Newfoundland /Labrador, New Brunswick and Nova Scotia. The Supreme Court of Canada has ruled that class actions are available even in provinces or territories that have not enacted class action legislation.

The purpose of this section is to explore some unique issues raised by class actions in Canada, specifically in the context of product liability.

A. CERTIFICATION MOTION

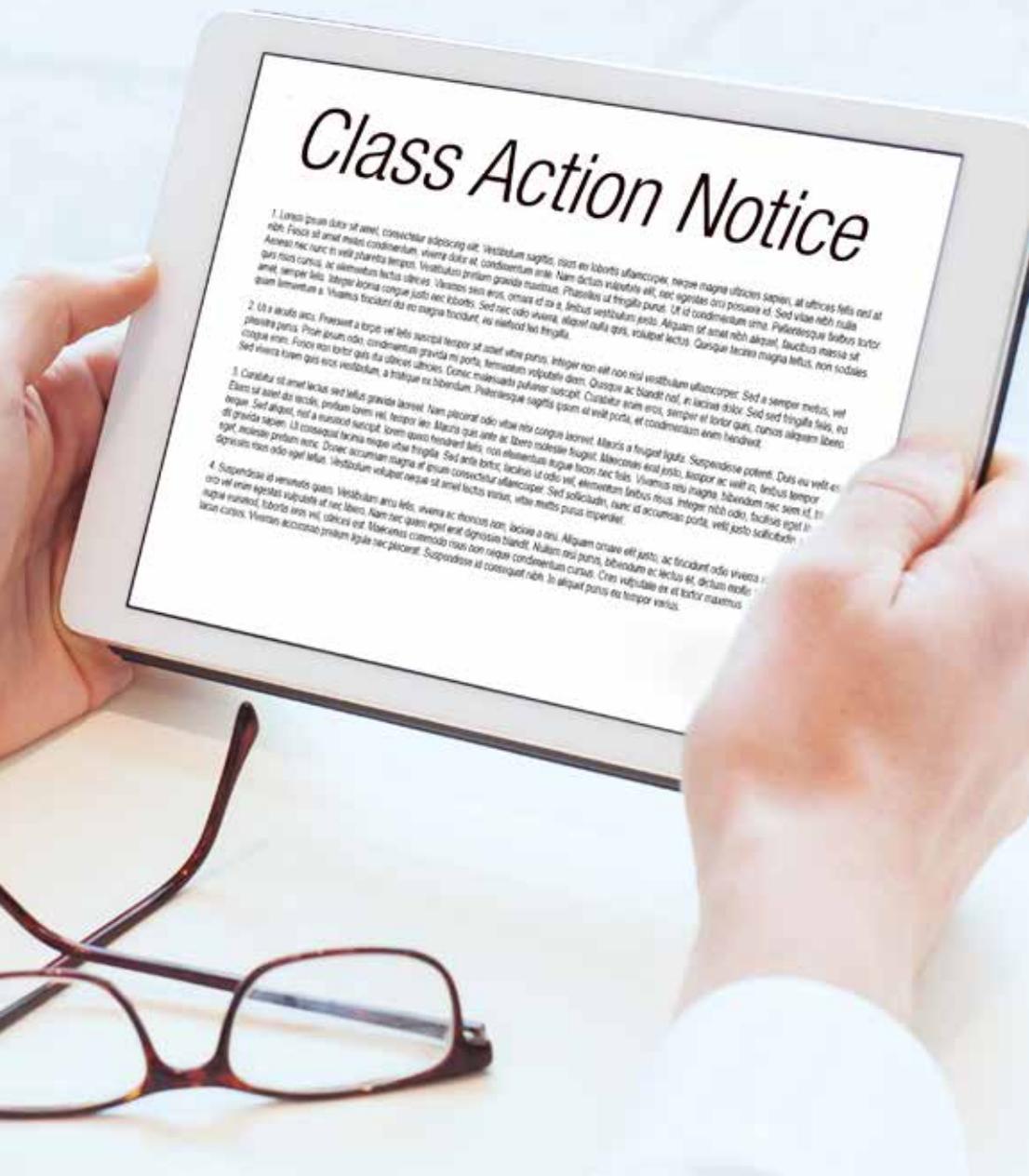
Unlike a regular action, a proposed class action must be certified before it may proceed. In Ontario, a suit is filed with a view toward having it certified as a class action.

In Québec, an application for authorization is filed and, if authorized (certified), the plaintiff files a class action lawsuit.

At a certification motion, a judge determines whether a proposed class action is suitable to be certified as a class proceeding. The defendant is given an opportunity to attack the suitability of the action as a proposed class action before it is certified. Accordingly, lawyer and client must work together closely early in the class action process to develop a strategy, share information about the nature of the product, deal with all technical issues, retain experts, identify any design issues, assemble relevant documents, interview witnesses and conduct other research.

Canadian courts in the common law provinces generally apply a five-branch test for certification:

1. the pleadings must disclose a cause of action;
2. there must be an identifiable class of two or more persons;
3. the claims of the class members must raise common issues;



4. the class proceeding must be the preferable procedure for the resolution of the common issues; and
5. there must be a representative plaintiff that would fairly and adequately represent the interests of the class and who has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class. This representative plaintiff must notify class members of the proceeding and must not have a conflicting interest with the interests of other class members regarding the common issues for the class.

In Québec, the criteria for authorization are set out in section 575 of the *Code of Civil Procedure*. Some differences with the common law provinces include that there is no preferability rule, and that there is no requirement to produce a workable plan. Québec courts will grant authorization to institute a class action in cases in which the court is of the opinion that:

1. the claims of the members of the class raise identical, similar or related issues of law or fact;
2. the facts alleged appear to justify the conclusions sought;
3. the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and
4. the class member appointed as representative plaintiff is in a position to properly represent the class members.

If an application for authorization is granted by the Québec court, the certified claim for the class action must be filed within three months.

Mandatory language is used in Canadian class proceedings legislation to indicate that a court shall grant certification in the event that all five branches of the test are satisfied. The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions – providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification.

The pleadings must disclose a cause of action

Class proceedings legislation is generally procedural in nature and does not create any new cause of action. The court is not to make findings of fact for the purposes of determining the merits of the action. In determining whether the pleadings disclose a cause of action, the

courts consider whether it is “*plain and obvious*” that the facts alleged in the statement of claim, if proved, would not give rise to a tenable cause of action.

The claims of the class must raise common issues

Individual issues in product liability class actions can overwhelm the common issues, particularly issues of causation and/or reliance, thereby defeating the purpose of class proceedings legislation - efficiency. In order to satisfy the commonality requirement, the plaintiff only needs to adduce evidence sufficient to establish some basis in fact, i.e. some evidence that there are issues that can be answered in common across the entire class. Accordingly, the defendant must carefully consider whether a class action will be the effective procedural vehicle to handle mass tort claims based on allegedly defective products where the plaintiffs have been exposed to the product (or different products) at various points in time. Québec courts view this issue more liberally and often certify cases of exposure over time (e.g. cigarettes, medication) and only require that one substantive issue exists (e.g. whether or not the product was defective).

B. IDENTIFIABLE CLASS

Typically, the representative plaintiff’s counsel will attempt to define the broadest possible class to maximize the case value as a larger aggregation of claims yields substantial fees. However, a large and heterogeneous or overbroad class is also a basis on which to defeat certification as issues may not be common, and the litigation may become unmanageable. Depending on the case, defendants may prefer a larger or smaller class. A larger class may increase a defendant’s exposure, but also allows the defendant to defend and potentially settle a larger number of claims at one time, allowing for greater efficiency and certainty.

C. PREFERABLE PROCEDURE

Canadian courts outside Québec apply both an *absolute* and a *relative* test to determine whether there is a preferable alternative to a class action. A class proceeding must be a fair, efficient and manageable method of advancing the claim as a whole. This determination is made on a non-comparative basis. Assuming that a class proceeding is a fair, efficient and manageable method of advancing the claim, it must also be preferable to other methods of advancing the claim, such as joinder of actions, test cases and consolidation of actions. In considering *relative* preferability courts consider other means of resolution including settlement proposals made by defendants prior to certification.

A strong argument against certification can be made in recall cases based on a preferable procedure already being in place: a voluntary or government mandated recall. It is important for a manufacturer to consider whether its “*recall letter*” is probative of a defect or an unreasonable danger that could expose it to liability.

Alternatively, some defendants have chosen to offer unilateral remedies to their customers, pre-certification, in exchange for a release of their claims which would otherwise be pursued in the course of a class action.

However, evidence that some products of the same type appear to, or may, contain a defect does not demonstrate that the subject product was defective.

D. REPRESENTATIVE PLAINTIFF

The adequacy of representative plaintiffs is now routinely questioned and challenged by the courts in Canada.

When assessing the adequacy of a proposed representative plaintiff, the courts consider the motivation of the representative plaintiff, the competence of the representative plaintiff’s counsel and the capacity of the representative plaintiff to advance the action and provide instructions to class counsel that best serve the overall interests of the class. A representative plaintiff must also have at least a basic understanding of the case to be advanced and their role in the proceeding.

The courts have been taking a harder look at whether a representative plaintiff has a conflict of interest with other class members. The test for conflict of interest may arise under other branches of the test for certification, such as when it is argued that the existence of common issues and the interests of persons falling within the class definition diverge to such an extent that certification would be inappropriate.

Ontario courts have held that for any given defendant there must be at least one representative plaintiff who has a reasonable cause of action. In Québec law, the representative plaintiff is not required to have a personal cause of action against each defendant. This requirement may form the basis of an attack on the plaintiff’s pleading in a product liability case involving both retailers and manufacturers as codefendants. Courts in British Columbia have also held that a plaintiff may be able to sue defendants in the same industry without having a cause of action against each of them.

E. THE AVAILABILITY OF NATIONAL CLASS ACTIONS IN CANADA

The distribution of products is not limited by provincial borders, and it would make sense, in terms of promoting the objectives of class proceedings, to be able to easily and effectively resolve mass tort claims with national scope by way of one national proceeding. Proceeding

by way of national class action is difficult, however, in Canada. The difficulty arises from the fact that there are no national class action statutes, only provincial statutes. This problem is magnified by the fact that the provincial statutes are not uniform. Moreover, because the Federal Court of Canada has very limited jurisdiction over very specific subject matter, the vast majority of class actions proceed in provincial courts. For the most part, the provincial courts have shown a willingness to work together on related class proceedings. However, once a forum for a class action has been selected, there is no entitlement to revive the action in another province (except in Québec) if, for example, the action is not proceeding expeditiously in the chosen forum.

Some provincial courts, most notably the Ontario courts, have shown a willingness to certify national classes, even where claims are advanced on behalf of non-resident members based on transactions which occurred outside of Ontario. The trick, however, is not in the certification of the class, but in settling the claim and enforcing any judgment. Some provincial courts, most notably Québec, have declined to enforce settlements reached in other jurisdictions that purport to bind residents of their jurisdiction, especially where there are similar class proceedings already pending in their jurisdiction or where the Québec class is not provided sufficient protection (for example, in terms of notices or rights to appeal denials of claims in Québec).

The validity of national classes and national class proceedings has not yet been dealt with by the Supreme Court of Canada.

F. TRADITIONAL PROCEDURAL TOOLS AND CLASS ACTIONS

Traditional procedural tools are available in a class proceeding, including a motion to strike out the claim as disclosing no reasonable cause of action, or motions to determine issues of law or for summary judgment to both eliminate and narrow claims. These motions can, with leave of the Court, be heard contemporaneously with, the motion for certification. While the court may also allow such motions to be brought prior to certification, the general approach of the court is that the certification motion should be the first step in the litigation. Success in either of these respects may terminate the proceeding before the certification stage – a highly desirable result for a defendant faced with the burden not only of the costs in dollars, but also the opportunity cost of institutional time and resources, as well as the reputational risk associated with an ongoing class action. In Québec, pre-authorization procedural tools available include motions to adduce evidence and to examine class representatives. Motions based on jurisdictional issues or *lis pendens* can also be presented in specific circumstances.

Although common law courts have held that an intended class proceeding may be dismissed at the pre-certification stage on grounds personal to the representative plaintiff, such a dismissal will not be a barrier to reassertion of the claim by a different proposed

representative plaintiff. Accordingly, a motion for summary judgment on a basis personal to the representative plaintiff is unlikely to be sufficient to result in the proceeding being dismissed. Nevertheless, if no alternative representative plaintiffs are available, the court may order decertification or possibly dismissal of the action.

Unlike a motion to strike, a motion for summary judgment may also be brought after certification, in which case the determination would, if dispositive of the issues in the litigation, be binding on all class members who have not opted out of the class proceeding. Accordingly, defence counsel must consider the strategic ramifications of moving for summary judgment before, or after, the certification motion.

Often, defendants will seek the production of certain documents, including medical records. Documentary production will only be ordered prior to certification if there is a focused and limited request and if the defendant is able to show that the documents are relevant to one or more issues on certification.

G. CLASS ACTIONS – AN EFFECTIVE MEANS TO MANAGE LIABILITIES

In contrast with regular actions, Canadian class proceedings legislation lays the foundation for a binding settlement approval process. It may be to a defendant's advantage to settle real liabilities, potentially even to settle small claims of doubtful merit. A binding settlement can be effected that will give the defendant protection from future suits. Therefore, the defendant's objective may be to use the resolution of a class action as an effective avenue for settling in a way that precludes future litigation.

To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.

The plaintiff and defendant will have a common interest in achieving a binding settlement. The defendant is interested in accomplishing a settlement that gives that defendant *res judicata* protection going forward, and that will survive objections in the settlement approval process.

A national product liability class action may be initiated when a product is sold or distributed in different provinces. Class proceedings have differing provisions addressing the subject. For example, Ontario courts have held that where there is a "*real and substantial connection with the subject matter of the action, and it accords with order and fairness to assume jurisdiction,*" an Ontario decision should bind the national class, including non-residents of Ontario. This can be good news for a defendant with an allegedly defective product - the promise of closure on a national level.

However, it is important to be aware that a motion granting certification only binds those who do not opt out of the class from future litigation on the issue. That is, if a class member does not wish to participate in the proceedings, he or she must opt out within a court approved short period after certification, failing which they will be deemed to have opted in. For provinces whose legislation addresses the inclusion of non-resident class members by opt-in, the class action will only bind those non-resident class members who choose to participate in the litigation by opting in to the class.

Closure is also enhanced when the decision granting certification and settlement includes an order barring future actions. Class proceedings legislation in Canada does not expressly allow for granting such orders. However, courts in Ontario, British Columbia and Québec have interpreted their respective statutes as contemplating the possibility that the presiding judge in a class proceeding may need to make an order not contemplated in the specific wording of the legislation. Therefore, because the courts have the statutory discretion to issue such an order, they may, on appropriate terms, do so in class actions.

In circumstances where a class is less numerous than originally anticipated, one option available is to move to discontinue a class proceeding and convert a class action into an individual action. In these circumstances, court approval is required. The court must be satisfied that the interests of the class will not be prejudiced.

H. CONCLUSION

Product liability class action litigation is increasing across Canada and will likely continue to increase in the future. The objective in defending any class proceeding is always to minimize the risk at the least possible cost. To achieve this goal, manufacturers and retailers of products must understand the complex and subtle nature of the law governing Canadian class actions.

Top Differences Between Canada and U.S. Product Liability Litigation

TOPIC

CANADA

Depositions of corporations

Generally, (except for Québec) only one corporate representative may be deposed (examined) and that representative must inform him or herself about the issues relevant to the litigation. Where the deponent does not know the answer, an “undertaking” is given to ask the appropriate person and answer in writing.

Strict Liability in Negligence

The courts have not imposed strict liability (absent contract) and it is up to the plaintiff to prove all elements of negligence.

Damages

The Supreme Court of Canada has imposed an indexed “cap” on nonpecuniary damages for pain and suffering which, in 2019, is approximately \$370,000.00. Further, punitive damages, while generally available, are rarely awarded. Awards are designed to punish and deter; are modest, and are based on proportionality, not a ratio or formula.

Attorney’s Fees

Canada, except for Québec, generally follows the “loser pays” rule whereby an unsuccessful litigant may be required to pay a portion of the successful litigant’s attorney’s fees.

Experts

In most jurisdictions, except for Québec, parties are not permitted to depose experts. Experts deliver a written report in advance of trial setting out their qualifications, findings, opinions and conclusions.

Jury Trials

While jury trials for products liability claims are generally available, except for Québec, such trials usually proceed in Canada with a judge alone.

Class Actions

The Canadian courts have generally shown a willingness to certify classes asserting personal injury based claims, so long as the general conditions for certification are met.

Regulatory Negligence

Government regulators can be sued for negligence in the regulation of a product where it can be shown that a government regulator was negligent in the implementation of a policy in respect of the regulation of a product.

Daubert Challenge

“Daubert” challenges are rare and can only be brought at trial as the trial judge is usually not assigned until just prior to the trial.

Spoilation

The Canadian courts have rarely considered the concept of spoliation and, currently, only limited evidentiary sanctions have been imposed.

Management of Multi-Jurisdictional Claims

There is no federal civil jurisdiction of significance in Canada, and any class action of significance will proceed in one or more provincial courts. The management of multiple proceedings is subject to the common law approaches to jurisdiction and *forum conveniens*.



Product Liability

Clients trust BLG to deliver excellence in service. They look to our Product Liability Group to apply astute legal insights and to effectively and proactively defend against claims by leveraging our distinguished experience in crisis management, product recalls, regulatory issues, product disputes and class actions. Our Product Liability lawyers provide deep legal expertise together with comprehensive knowledge of production processes, industry standards, and various disciplines, including engineering, medicine, and technology.

Class Actions

Confronted with the possibility of a class action, clients turn to specialized lawyers at BLG for strategic and innovative approaches that will help them mitigate the adverse impacts on: brand reputation and a variety of stakeholder relationships; revenues and expenses; and the ability to operate “*business as usual*”.

Given our depth of experience across industry sectors and strength in substantive areas of litigation, clients rely on us to guide them through the procedural complexities of class actions and related certifications, and to defend their best interests – be that avoiding the class action, settling, or going to trial.

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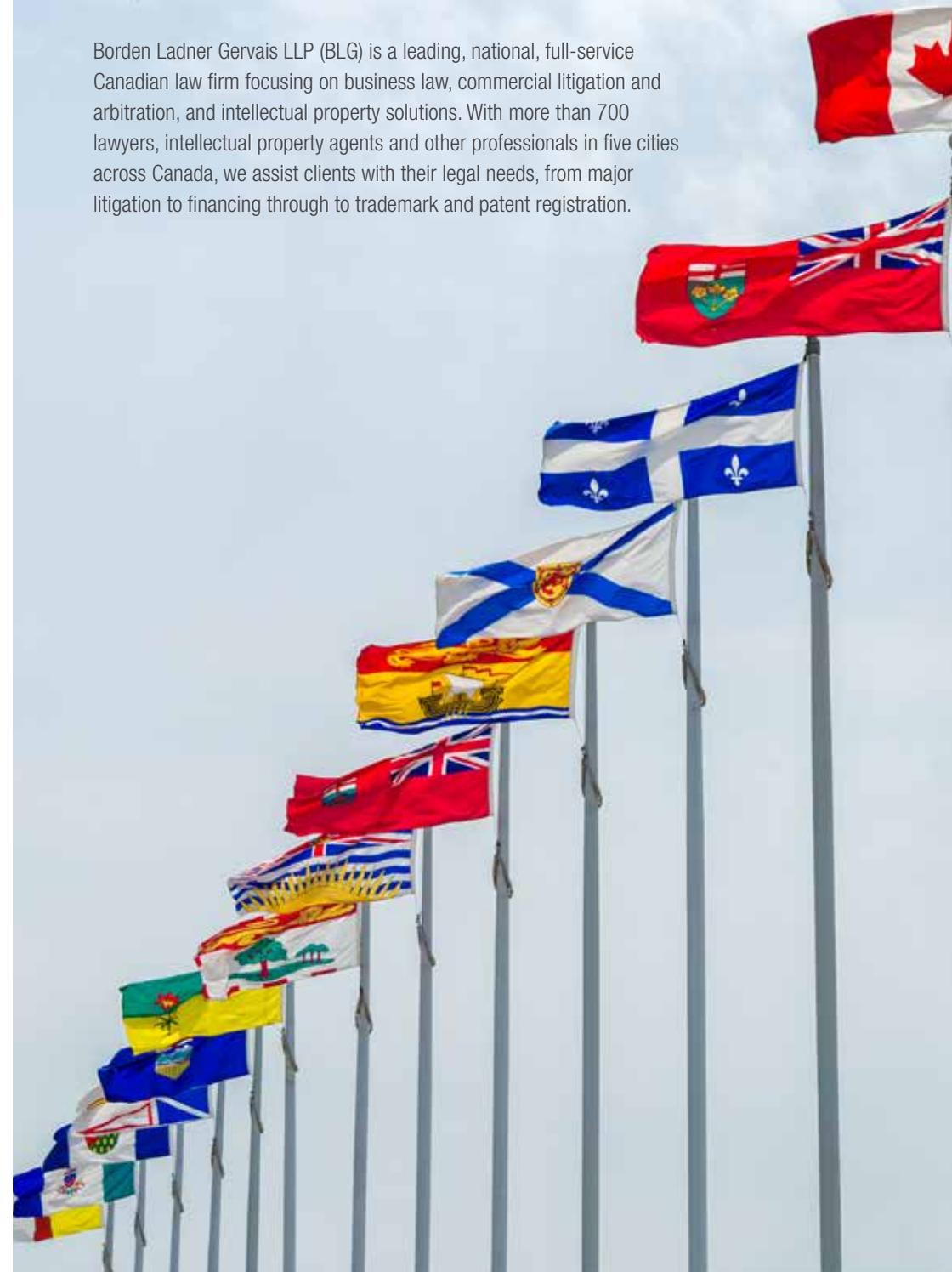
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