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ARTICLE

## Appellate Court Upholds Decision not to Certify Proposed Motherisk

In R.G. v. The Hospital for Sick Children, the Divisional Court upheld Justice Perell's decision not to certify a proposed class action relating to the Motherisk Drug Testing Laboratory (MDTL). The Court's decision is focused on whether a class action proceeding is the preferable procedure for litigating the claims of class members who allege that they were harmed by MDTL's hair tests. The Divisional Court agreed with the motion judge, Perell J., and found that it was not.

This case is about MDTL's hair tests, which were used to test for the presence of drugs and alcohol in an individual's hair. The hair tests results were used for multiple purposes, including in clinical settings, in child protection case management and proceedings, and in criminal proceedings. The plaintiff, R.G., alleged that the defendants (the hospital, as well as MDTL's director and manager) were negligent in their operation of the lab and produced unreliable test results, which caused the class members harm, including the loss of custody of their children, impaired ability to participate in normal family affairs, and pain and suffering.

The Divisional Court found that the motion judge considered and applied the *Class Proceedings Act* and the case law correctly, and that he did not make an error of law. The Court concluded that the motion judge appropriately exercised his discretion in considering the evidence and weighing the factors relevant to the preferable procedure analysis, and he was therefore entitled to deference.

In upholding the motion judge's decision, the Court reiterated the principle that the preferable procedure analysis requires a balancing of the importance of the common issues as against the remaining individual issues in a plaintiff's claim. The question to be asked is whether the resolution of the common issues would significantly advance the action. The Divisional Court found that this balancing is an exercise in judicial discretion, which is owed deference.

The Court agreed with the motion judge's finding that the plaintiff's strategic decision to root the proposed class action in systemic negligence left many individual issues to be answered by each proposed class member, making a class proceeding not the preferable procedure. The Court also stated that by narrowing the proposed class action to several liability as against the three named defendants, individual class members would be required to quantify the relative liability of each defendant as well as the relative liability of non-parties. This analysis would increase the complexity of each class member's individual trial.

Lastly, the Court found that the motion judge correctly considered and applied AIC Limited v Fischer, a decision of the Supreme Court of Canada and the leading case on how the preferability analysis is to be conducted.

Borden Ladner Gervais represents two of the defendants in the case.

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