

Class action lawsuits: Looking south at pharmaceutical settlements

May 04, 2021

On April 16, 2021, the Ontario Superior Court of Justice released its decision in *Casseres v. Takeda Pharmaceutical Company*, [2021 ONSC 2846](#), regarding the approval of a settlement of two pharmaceutical class action lawsuits. The class actions alleged that three diabetes medications caused bladder cancer and that class members were not warned of this risk.

The proposed settlement amount, achieved through mediation, was \$25 million. The Court adjourned the initial settlement approval hearing after learning that actions in the United States in respect of the same medications were settled for a total of \$2.4 billion. **The Court noted that “using a per capita comparison, this would mean that a Canadian settlement in the range of \$240 million would be more appropriate.”** The Court questioned how, in light of the U.S. settlements, the proposed settlement amount could be fair and reasonable. It adjourned the settlement approval hearing to allow class counsel to file additional information to address this concern.

Class counsel submitted a supplementary affidavit explaining why the U.S. comparison was inappropriate and satisfying the Court that \$25 million was a fair and reasonable amount. Notably, class counsel explained to the Court that:

1. Four significant scientific studies published after the U.S. settlements raised significant questions as to any causal link between the medications and bladder cancer;
2. **Although Canada’s population is approximately 10 per cent of the U.S., its usage of the medication was significantly less (3 to 3.8 per cent of U.S. usage); and**
3. Significant differences in access to and pricing of the medications make the U.S. an inappropriate comparison.

Upon receiving this information, the Court approved the settlement. The Court did deny **class counsel’s request that the representative plaintiffs each receive a \$5,000 honorarium as part of the settlement.** The Court reiterated that it is only where a **representative plaintiff can demonstrate that their effort and involvement went “beyond what is normally expected and is truly extraordinary, or where there is evidence that they were financially harmed”** that an honorarium will be justified. No such evidence was

presented. It should also be noted that honoraria for representative plaintiffs are not available in Québec.

Takeaways

The Court's consideration of the U.S. settlements in assessing the fairness of the proposed Canadian settlement is significant given the number of Canadian class actions that mirror actions in the U.S. Where similar U.S. cases have settled, Canadian counsel will want to be in a position to explain why the Canadian experience is different. Such considerations may arise from differences in the legal/statutory regimes, relevant factual context or timing of the settlements.

By:

[Jeremy Ablaza](#), [David Elman](#)

Services:

[Disputes](#), [Class Actions](#), [Life Sciences](#)

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from

BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2023 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.