Canadian product liability class actions – Case highlights

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There have been several significant new developments in product-related class actions in Canada in the past two years. These decisions, arising from Ontario, Saskatchewan, and British Columbia provide important insights into how courts are deciding product liability class actions, particularly at the certification motion, and the court's authority to dismiss putative class actions for delay. This article highlights key trends that have developed from the product liability class action jurisprudence of the last two years.

Overview of class action certifications in Canada

We begin with a primer on the general certification process for class proceedings in Canada. To be certified, a plaintiff must prove their proposed class action satisfies five statutory criteria. While the specific language of these criteria differs slightly across the provinces, the following general conditions must be met for a class action to be certified:

1. There must be a **valid cause of action**;
2. There must be an **identifiable class** of two or more persons with a cause of action against the defendant;
3. There must be **common issues** raised in the class member claims;
4. The class proceeding must be the **preferable procedure** for resolving the common issue; and
5. There must be a **representative plaintiff** who would fairly and adequately represent the class interests and does not have a conflict of interest with the other class members.

Actual and demonstrable harm for certification

Several recent decisions involving product liability claims have confirmed that plaintiffs must allege and demonstrate actual harm or loss to meet the test for certification.

- In *Palmer v Teva*, 2024 ONCA 220, the Ontario Court of Appeal (ONCA) upheld a dismissal decision from a motion to certify a class action regarding alleged

carcinogens in Valsartan – a blood-pressure drug manufactured by the defendant pharmaceutical company.

- In *Dussiaume v Sandoz Canada Inc.*, 2023 BCSC 795, the court granted the defendant's motion and struck the plaintiff's putative class action, brought on behalf of a class of those who purchased one or more of the drugs distributed by the defendants containing ranitidine – a histamine H2-receptor antagonist.
- In *Tress v FCA*, 2023 SKKB 186, the Saskatchewan King's Bench dismissed the plaintiff's putative class action, which alleged the automotive manufacturer misrepresented the emissions performance of certain diesel vehicles and that the vehicles were equipped with auxiliary emissions control devices ("AECDs" or "defeat devices") that caused them to produce exhaust emissions above the regulatory limits.

In both *Palmer* and *Dussiaume*, the court found the representative plaintiffs had not demonstrated an injury (physical or psychological) that was compensable for the purposes of certification. In *Tress*, the defendants offered an update to address the emissions issues free of charge to purchasers and lessees of the class vehicles before the certification application. The court in *Tress* found that the plaintiffs did not establish the minimum evidentiary basis for compensable harm, and that "the absence of evidence of a compensable loss cannot be simply overlooked when considering the pre-requisites to certification." In affirming this decision, the Saskatchewan Court of Appeal found that jurisprudence in Saskatchewan and other provinces confirms that class certification requires evidence of compensable harm or loss.

Factors which may lead to class actions no longer being a preferable procedure

Recent decisions in the products class actions space offer key insights into how courts assess the preferable procedure requirement for class certification. Courts may find that a class proceeding is not the preferable procedure where it fails to meet the goals of "justice, behavior modification, or judicial economy." Recent cases indicate that courts may look favorably at a manufacturer who takes reasonable steps to alleviate product defects at no cost to the consumer.

For instance, in *Coles v FCA Canada Inc.*, 2022 ONSC 5575, the defendant automobile manufacturer, before the certification motion, had issued a recall and provided free replacements of defective airbags designed by Takata. While the court noted that the proposed class action would be otherwise certifiable, it did not satisfy the preferable procedure requirement. The court referred to the plaintiff's delay in bringing the certification motion, finding that the proposed class action was no longer preferable to the existing recall. The court also described the current law on pure economic loss, citing recent Supreme Court of Canada (SCC) decisions (*Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19, and *1688782 Ontario Inc. v Maple Leaf Foods Inc.*, 2020 SCC 35) which affirmed that the scope of recovery for a product defect is limited to mitigating or averting the danger. Although other automotive manufacturers in the related class actions had agreed to settlements, the court found the recall by the defendant seemed to "cover off its responsibility to pay compensatory damages for its liability for manufacturing and distributing vehicles with a dangerous automotive part." The court specifically found that, considering the recent SCC decisions on pure economic loss, the earlier resolutions for the settled national class actions were "overachievements"

compared to what was recoverable in this case, which was not preferable to the recall program.

Similarly, in *Larsen v ZF TRW Automotive Holdings Corp.*, 2023 BCSC 1471, the court dismissed an application to certify a class action for negligently designed and/or manufactured airbag control modules (ACUs) installed in vehicles manufactured, distributed, and sold by several large automotive companies. The court found that the focus of the claim was pure economic loss for negligent design and/or manufacturing. Several vehicles included in the proposed class were subject to voluntary recalls in the U.S. and Canada for alleged airbag deployment malfunctions. Notwithstanding the issued recall, the court held that the plaintiff was still required to provide some proof that the alleged defect still existed in the recalled and repaired vehicles. However, in this case, the plaintiff could not demonstrate that the alleged defect existed in either the unrecalled vehicles or those that were recalled and repaired. As a result, the court agreed with the decision in *Coles*. It held that a class action was not the appropriate procedure to address the defects in the remaining unrepaired recalled vehicles, or to compensate those who have had their vehicles repaired through recall (which was offered free of charge).

At the preferability stage, defendant manufacturers who implement a free recall and repair program may point to that recall program as a reason to resist a class action certification motion. However, manufacturers are cautioned against referring to ongoing individual actions that address similar issues as an argument that a class proceeding is not the preferable procedure. In *DeBlock v Monsanto Canada ULC*, 2023 ONSC 6954, the court granted an application, certifying some of the plaintiffs' claims for a class action against the defendants for their respective roles in producing, distributing, and selling herbicide products which contained the allegedly carcinogenic compound "glyphosate." While noting that individual actions related to glyphosate were ongoing, the court determined that a class proceeding would provide easier access to justice and be more economical than pursuing individual claims. As noted by the court, a successful class action would "generate a more forceful message than one emanating from one or more individual actions." Therefore, manufacturers facing a putative class action may not find much sympathy from courts in pointing to ongoing individual claims when arguing preferability at a class action certification motion.

Common issues cannot be overbroad

Recent product liability class proceeding decisions have affirmed that plaintiffs seeking to certify class actions must ensure their proposed common issues (PCIs) are neither too generalized such that they cannot apply to all class members nor too narrow that they become individual issues better addressed by individual actions. Otherwise, courts may deny certification on this issue.

For example, in *Price v Lundbeck A/S*, 2022 ONSC 7160 (affirmed in *Price v Lundbeck A/S*, 2024 ONSC 845), the court dismissed a class action certification motion where the representative plaintiffs alleged that Celexa–an anti-depressant drug–is a teratogen and can cause congenital malformations. The court found that the plaintiffs' PCIs were too individual and could not be resolved in common for the entire class. As such, the court refused to certify the putative class proceeding.

On the PCI of general causation, the plaintiffs led no evidence of a methodology to establish, on a class-wide basis, that Celexa may cause any particular congenital malformation. Also, there was no evidence that would enable the court to limit the proposed class definition or the proposed causation issue. The plaintiffs also failed to establish a PCI of duty to warn since they could not establish general causation without individual trials on each class members' alleged congenital malformation(s). In addition, the PCIs could not be established based on a failure to warn of teratogenicity in general, as it required a warning for a specific risk.

Further discussion on Ontario's mandatory delay provisions

Several recent product liability decisions also addressed the mandatory dismissal for delay provisions under Ontario's *Class Proceedings Act* (CPA). The CPA was amended in October 2020 to include changes generally considered to make the test for certification test more strict, as well as the introduction of sections 29.1 and 39. Section 29.1 gives courts authority, on a motion, to dismiss a class proceeding for delay. Section 39 is a transitional provision that stipulates, amongst other things, that the pre-amendment CPA would apply to the plaintiff's class action commenced before the amendment (the "Bright Line Rule").

Since introducing these changes, Ontario courts have provided helpful commentary on how the amendments are interpreted and applied. For example, in *Adkin v Janssen-Ortho Inc.*, 2022 ONSC 6670, the court granted the defendant's motion under section 29.1 of the CPA to dismiss a proposed class action against three pharmaceutical companies. While the action was commenced in October 2011, it had been dormant since May 2012. In assessing the factors under section 29.1, the court noted that the plaintiffs never served or filed a complete motion record for certification, proposed a timetable for any next step, or asked the court to establish a timetable for completion of any other necessary steps to advance the proceeding. Therefore, the court determined that section 29.1 required it to dismiss the action for delay as the evidence indicated no steps were taken in line with the sub-sections of section 29.1(1).

Similarly, the court in *D'Haene v BMW Canada Inc.*, 2022 ONSC 5973 dismissed the putative class action against the two defendant automotive manufacturers after the defendants brought a motion under section 29.1. However, the dismissal order was subject to being set aside if the plaintiffs filed a final and complete motion record in the motion for certification within thirty days (colloquially termed a "Phoenix Order" that could be revived should the plaintiffs meet certain conditions). The court noted it had discretion to use its initiative to make such an order under section 12 of the CPA. However, the impact and acceptance of this decision remains to be seen. The court in *Tataryn v Diamond & Diamond*, 2023 ONSC 6165 considered the "Phoenix Order" in *D'Haene* and remarked that section 29.1 would not address the problem it was intended to resolve if such orders could be made.

Lastly, in *Martin v Wright Medical Technology Canada Ltd.*, 2024 ONCA 1, the Ontario Court of Appeal affirmed that the text, legislative history, and case law on section 39 draws a "bright line" between actions commenced under the "old" CPA, and those commenced under the amended Act. As such, for actions commenced after October 1,

2020, the stricter certification test and the mandatory dismissal for delay requirements will apply.

Conclusion

The cases discussed above offer important insights into trends emerging from recent Canadian product liability class actions law. While the unique facts of each case will give rise to specific defence strategies, manufacturers and counsel should be vigilant of these trends when considering the strategic handling of product liability class actions in Canada.

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