

Form 78.05

2017



Hfx. No. 460984

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

DAWN RAE DOWNTON

PLAINTIFF

- AND -

ORGANIGRAM HOLDINGS INC. and ORGANIGRAM INC.

DEFENDANTS



Proceeding under the *Class Proceedings Act*, S.N.S. 2007, c. 28

Order to Amend Certification Order

Before the Honourable Justice Ann E. Smith

WHEREAS the Honourable Justice Ann E. Smith released a decision, *Downton v. Organigram*, 2019 NSSC 4, on January 18, 2019, approving the Plaintiff's motion for certification;

AND WHEREAS the Defendants filed an Application for Leave to Appeal and Notice of Appeal with the Nova Scotia Court of Appeal on March 1, 2019;

AND WHEREAS the Nova Scotia Court of Appeal released its decision (the "Decision") and Order for Judgment on April 30, 2020, allowing the Defendants' appeal in part;

AND WHEREAS the Plaintiff sought leave to appeal the Decision and thereby filed an Application for Leave to Appeal with the Supreme Court of Canada on June 29, 2020;

AND WHEREAS the Supreme Court of Canada released its Judgment on November 5, 2020, denying the Plaintiff's Application for Leave to Appeal the Decision;

AND WHEREAS the Plaintiff has amended the Order for Certification issued by this Honourable Court on February 14, 2019 to comply with the Decision;

AND WHEREAS the Amended Order for Certification is attached hereto as Schedule "A";

AND WHEREAS the Defendants consent to this Order;

IT IS HEREBY ORDERED that the Amended Order for Certification, attached hereto as Schedule "A", be issued by and filed with this Honourable Court.

Issued at Halifax, Nova Scotia on January 12, 2021. ^{deu}

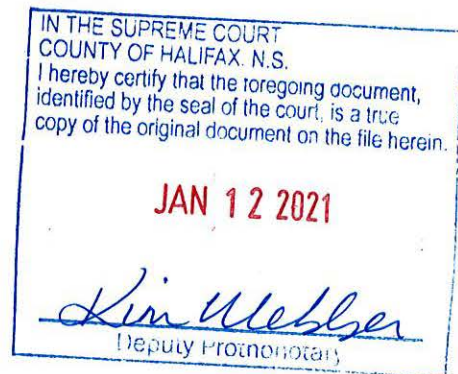
Kim Webber
Prothonotary

KIMBERLEY WEBBER
Deputy Prothonotary

Consented to as to form:

M. Carter
For: Raymond F. Wagner, Q.C. (Maddy Carter)
Solicitor for the Plaintiff
Wagners
1869 Upper Water Street
Suite PH301, Pontac House
Halifax, NS B3J 1S9

[Signature]
Jane O'Neill, Q.C. / Daniel Wallace
Solicitor for the Defendants
McInnes Cooper
1969 Upper Water Street
Suite 1300
Purdy's Wharf Tower II
Halifax, NS B3J 2V1



KIMBERLEY WEBBER
Deputy Prothonotary

SCHEDULE "A"

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Proceeding under the *Class Proceedings Act*, S.N.S. 2007, c. 28

Order for Certification

BEFORE THE HONOURABLE JUSTICE ANN E. SMITH IN CHAMBERS

THIS MOTION was made by the Plaintiff for an order certifying this proceeding as a class proceeding pursuant to sections 4(3) and 7 of the *Class Proceedings Act*, S.N.S. 2007, c. 28;

UPON READING the Notice of Motion, the evidence filed by the parties and the submissions of counsel;

AND UPON HEARING submissions on behalf of the parties;

AND UPON IT APPEARING that it is appropriate to certify the proceeding as a class proceeding, in that:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of two or more persons;
- (c) the claims raise common issues;
- (d) a class proceeding is the preferable procedure; and
- (e) there is a representative plaintiff who would fairly represent the Class, has produced a workable litigation plan and has no interest in conflict with the interests of other Class Members;

NOW UPON MOTION, IT IS HEREBY ORDERED:

1. That the action is hereby certified as a class proceeding pursuant to sections 4(3) and 7 of the *Class Proceedings Act*;

2. That the Class is defined as follows:

All persons and entities who purchased from OrganiGram cannabis for medical purposes that has been the subject of a voluntary or involuntary recall as of the date of the order certifying the action;

3. That Dawn Rae Downton (c/o Wagners Law Firm, 1869 Upper Water Street, Suite PH301, Pontac House, Halifax, NS, B3J 1S9) is appointed as the representative plaintiff of the Class;

4. That the common issues in the class proceeding are:

1. Negligent Design, Development and Testing

Did the Defendants owe Class Members a duty of care regarding the design, development and/or testing of the Affected Product?

2. Negligent Manufacturing

Did the Defendants owe Class Members a duty of care regarding the manufacturing of the Affected Product?

3. Negligent Distribution, Marketing and Sale

Did the Defendants owe Class Members a duty of care regarding the distribution, marketing and sale of the Affected Product?

4. Breach of Contract

a) What are the express and implied terms of Class Members' contracts with the Defendants governing their purchases of the Affected Product?

b) Did the Defendants breach any of the contractual terms? If so, how?

5. Breach of the *Competition Act*, R.S.C. c. C.-34

Did the Defendants breach section 52 of the *Competition Act* in the course of advertising, marketing and/or promoting the Affected Product to Class Members? If so, how?

6. Breach of the *Consumer Protection Act*, R.S.N.S 1989, c. 92 & Equivalent Consumer Protection Legislation

Did the Defendants breach section 26 or any part thereof of the *Consumer Protection Act* (and the equivalent provisions in the consumer protection legislation in the other provinces and territories) in its marketing and sale of the Affected Product to Class Members? If so, how?

7. Breach of the *Sale of Goods Act*, R.S.N.S. 1989, c. 408 & Equivalent Sale of Goods Legislation

Did the Defendants breach section 17 of the *Sale of Goods Act* (and the equivalent provisions in the Sale of Goods legislation in the other provinces and territories) in its marketing and sale of the Affected Product to Class Members? If so, how?

8. Remedies

- a) Are Class Members entitled to statutory relief for breaches of any of the legislation pleaded herein?
- b) Are Class Members entitled to restitution? If so, what is the quantum?

- 5. That the claims to be determined and the relief being sought are as per the Third Amended Statement of Claim;
- 6. That Class Members shall be given notice of the certification of this action as a class proceeding, in accordance with the form of the Notice of Certification, attached hereto as Schedule “A”, and in the manner set out in the Plaintiff’s Litigation Plan, attached hereto as Schedule “B”;
- 7. That the costs of distributing Notice of Certification to Class Members shall be paid for by the Defendants;
- 8. That the Notice of Certification and its distribution satisfy the requirements of s. 22(6) of the Act;
- 9. That the Litigation Plan, attached hereto as Schedule “B”, is a workable method of advancing the proceedings, subject to clarification and amendment if required now or as the proceedings progress;
- 10. That a Class Member may opt out of the class action by sending an Opt Out Form, attached hereto as Schedule “C”, signed by the Class Member, to Wagners on or before the deadline stipulated in the Opt Out Form;
- 11. That there shall be document production on all the common issues;
- 12. That the Defendants shall deliver their statements of defence no later than forty-five (45) days following the issuance of this Order, or no later than forty-five (45) days from the date of a decision from the Court of Appeal, if this Order is appealed; and

13. That the costs of this motion are to be paid by the Defendants less costs awarded by the Nova Scotia Court of Appeal and the Supreme Court of Canada.

, 2020.

Prothonotary

SCHEDULE “A”

NOTICE OF CERTIFICATION: ORGANIGRAM CLASS ACTION

To: All persons and entities who purchased from OrganiGram medical cannabis that has been the subject of a voluntary or involuntary recall as of [date Certification Order is issued] (“Class Members”).

Notice of Certification: A class action has been certified on your behalf. Certification means that the class action can proceed to trial. No determination of the outcome of the class action has been made yet.

Who is included?

On January 9, 2017, Organigram Inc., a licensed producer of cannabis for medical purposes in New Brunswick, began a recall of sixty-nine lots of product, in addition to 5 lots of product recalled on December 28, 2016. The products that are being recalled include dried marijuana and cannabis oil that were produced between **February 1, 2016 and December 16, 2016**.

“Class Members” are all persons and entities who purchased from OrganiGram cannabis for medical purposes that has been recalled as of [date Certification Order is issued]. If you are a Class Member you do not need to do anything at this point to get the benefit of any ruling on the common issues decided at trial.

What is the class action about?

The class action alleges that the Defendants’ sale of medical cannabis containing unauthorized pesticides to Class Members fell below the standard of care, was a breach of contract, and was in violation of legislation governing the purchases. A judgment on the common issues will bind all Class Members who do not opt out.

Do I have to pay anything to participate? How are the lawyers paid?

No you do not pay anything out of your pocket. Class counsel has agreed to act on the basis that they will not be paid any legal fees unless and until Class Members receive compensation. The Representative Plaintiff has entered into a Contingency Fee Agreement with class counsel. It provides for legal fees of 25% to 33 1/3% of a judgment or settlement, the percentage depending upon the stage in the litigation that the action resolves. Class counsel will apply to the Court at the conclusion of the case to have legal fees approved. Class counsel will pay for all case expenses incurred in advancing the case, and if the case is successful, class counsel will apply to the court to be reimbursed for these case expenses, in addition to legal fees. If the case is not successfully settled or tried, class counsel will not be paid or be reimbursed for any expenses.

What if I don’t want to participate in the class action?

If you do not want to participate, you must opt out by sending an opt out form to Wagners to be received on or before [insert opt out deadline]. If you opt out you will not be entitled to share in any recovery or take the benefit of any ruling in this case.

More information:

For more information visit the following website, www.wagners.co/current-class-actions, telephone 1-800-465-8794/902-425-7330, email classaction@wagners.co, or contact us by mail at:

Wagners
1869 Upper Water Street
Suite PH 301, Pontac House
Historic Properties
Halifax NS B3J 1S9

Representative Plaintiff: Dawn Rae Downton, c/o Wagners (address provided above)

This summary notice has been approved by the Supreme Court of Nova Scotia.

Do not Contact the Court about this Certification.

SCHEDULE “B” Litigation Plan

DEFINED TERMS

1. Capitalized terms that are not defined in this litigation plan (the “Plan”) have the meanings as particularized in the Amended Statement of Claim, as it may be further amended from time to time.

AMENDMENTS, FURTHER ORDERS CONCERNING THIS PLAN

2. This Plan may be amended from time to time by directions given at case management conferences or by further order of the Court.
3. All timelines are subject to any appeals throughout the litigation, including an appeal of certification and the outcome thereof.

CLASS COUNSEL

4. The Plaintiff has retained Wagners as class counsel (“Class Counsel”) to advance this class action. Class Counsel has the requisite knowledge, skill, experience, personnel and financial resources to prosecute the action to resolution. Class Counsel may collaborate with other counsel in advancing the class action.

THE COMPOSITION OF THE CLASS

5. The “Class” and “Class Members” are defined as:

All persons and entities who purchased from OrganiGram cannabis for medical purposes that has been the subject of a voluntary or involuntary recall as of the date of the order certifying the action.

NOTICE OF CERTIFICATION, NOTICE PLAN AND THE OPT-OUT PROCEDURE

6. The Plaintiff proposes that notification of certification, the opt-out deadline and means of opting out be provided via “Notice of Certification” in the form appended as Schedule “A” to the Order for Certification. Subject to approval of the Court, Notice of Certification will be distributed to the Class by the following means (referred to collectively as the “Notice Plan”):
 - a) Class Counsel will send Notice of Certification directly to Class Members by regular mail and/or electronic mail (electronic mail will be the primary method, where it is available) following receipt of a list of Class Member names and mailing/email addresses from the Defendants (to be held in confidence by Class Counsel and used strictly for the within purpose);
 - b) Class Counsel will post Notice of Certification and the Opt-Out Form on its website;
 - c) Class Counsel will issue a press release; and
 - d) Class Counsel will provide Notice of Certification to any person or entity who requests it.
7. The Plaintiff proposes that the opt-out deadline be sixty (60) days after the date of distribution of Notice of Certification to Class Members, or as otherwise agreed by counsel and approved by the Court (or, in the absence of any agreement of counsel, as directed by the Court).
8. The Plaintiff will ask the Court to order that the costs (as applicable) of distributing Notice of Certification in the above manner be paid by the Defendants.

REPORTING AND COMMUNICATION

9. Current information on the status of the action is posted and will be updated regularly on Class Counsel’s website at www.wagners.co. Copies of some of the publicly filed court documents, court decisions, notices and other information relating to the action are and will be accessible from the website.

10. Class Counsel will inform known Class Members about material updates in the litigation via regular mail and/or electronic mail (electronic mail will be the primary method, where it is available).

CASE MANAGEMENT CONFERENCES

11. The Plaintiff proposes that case management conferences be conducted before a case management judge as necessary and at the request of the parties, and as otherwise directed by the Court.
12. The Plaintiff proposes that a case management conference be held within forty-five (45) days of the release of the Court's decision certifying the action, the primary purpose being to seek the direction of the Court on any outstanding issues and determine the litigation schedule.
13. The Plaintiff proposes the following schedule for the remaining steps in the action:
 - (a) Within forty-five (45) days from the date the Order for Certification has been issued by the Court, or within forty-five (45) days from the date of a decision from the Court of Appeal, if the Order for Certification is appealed, the Defendants shall deliver their Statements of Defence;
 - (b) Within six (6) months following the delivery of the Statements of Defence and/or Reply, the parties will exchange their Affidavits of Documents;
 - (c) Within six (6) months following the exchange of the Affidavits of Documents, the parties will complete their examinations for discovery, which shall be confined to the certified common issues; and
 - (d) Within six (6) months after all examinations for discovery have been concluded, the parties will exchange expert reports.
14. The *Civil Procedure Rules* will apply to the scheduling of any appeals brought in the action.

DISCOVERY

15. The Plaintiff proposes that counsel for the parties meet following certification to discuss ways to efficiently disclose documents to one another utilizing computer database software so that, as much as possible, documents may be produced and shared between the parties and be made available to the Court in electronic format.
16. The Plaintiff proposes that a conference of all counsel be held following the completion of the discovery stage in order to address, *inter alia*, refinement of the common issues for trial (including, if necessary, the addition or removal of common issues, and upon the approval of the Court as necessary) and the schedule for the common issues trial.

MEDIATION

17. The Plaintiff will participate in mediation before a mutually acceptable mediator if the Defendants are prepared to do so.

INTERLOCUTORY MOTIONS

18. Unless a particular motion is a matter of urgency, all interlocutory motions will be heard by the case management judge.
19. The scheduling of and any directions in relation to any interlocutory motions will be addressed at a case management conference. If the need for an interlocutory motion should arise in a more time-sensitive manner, a request for dates and directions can be delivered to the case management judge as need be. Unless otherwise agreed to or directed by the case management judge, the filing deadlines for any such interlocutory motions will be governed by Rule 23 of the *Civil Procedure Rules*.

COMMON ISSUES RESOLUTION

20. The Plaintiff proposes to resolve as many of the common issues as possible before the case management judge by way of Notices to Admit, or interlocutory motions for a preliminary determination of law or fact.

MANNER OF PROOF AT TRIAL

21. At trial, the Plaintiff expects to rely on the following to prove the facts underlying the causes of action:

- (a) admissions made in the pleadings;
- (b) admissions made in discovery or in interrogatories;
- (c) admissions made through Request for Admissions (in accordance with rule 20.03);
- (d) evidence from witnesses; and
- (e) expert evidence.

NOTICE OF RESOLUTION OF THE COMMON ISSUES

22. Assuming that the common issues are resolved in favour of the Plaintiff, the Court will be asked:

- (a) to settle the form and content of the notice of resolution of the common issues (the “Notice of Resolution”);
- (b) to prescribe the information required from Class Members in order to make an individual claim based on the judgment on the common issues, if necessary;
- (c) to declare the facts Class Members must establish to succeed in individual claims, if any; and
- (d) to set a date by which Class Members will be required to file an individual claim.

23. The Plaintiff proposes that the Notice of Resolution include the following information:

- (a) A description of the Class;

- (b) A description of the common issues and the nature of the claims asserted;
- (c) The common issues on which the Plaintiff was successful;
- (d) The nature of any class-wide remedies granted in the judgment on the common issues;
- (e) What steps a Class Member must take to assert a claim and what facts a Class Member must prove to succeed on such a claim;
- (f) How to obtain further information; and
- (g) That their claims in relation to the matters raised in the pleadings will be deemed to have been finally adjudicated whether or not they participate in the individual stage of the proceeding.

24. The Plaintiff will ask the Court to order that the Notice of Resolution be distributed substantially in accordance with the procedure outlined above in the Notice Plan for the Notice of Certification.

ADJUDICATION OF REMAINING / INDIVIDUAL ISSUES

25. If the common issues are resolved in favour of the Plaintiff, the Plaintiff proposes the following process for the resolution of any remaining issues: (i) subsequent to resolution of the common issues and determination of the availability of aggregate and punitive damages, the quantum of aggregate damages will be determined; (ii) subsequently, and to the extent necessary, individual causation and damages will be assessed pursuant to the below individual claims procedure; and (iii) subsequently, the quantum of punitive damages will be determined.

Individual Claims Procedure

26. The Plaintiff proposes the following process for the resolution of the individual claims following resolution of the common issues trial.

27. The parties will select, by agreement, one or more referees or evaluators. The Court must approve the selection(s). If the parties are unable to agree, the parties may ask the Court to appoint one or more referees or evaluators with such rights, powers and duties as the Court

directs, to conduct hearings with respect to any individual issues that remain outstanding in order for individual Class Members to obtain relief, pursuant to *Civil Procedure Rule 11*. Those references will be conducted in accordance with the directions of the trial judge in the order approving the appointment of the referees/evaluators.

28. The Court will be asked to set a deadline (the “Claims Deadline”) by which Class Members must file their claims with a designated person or the Court.
29. The evidence necessary to succeed on an individual claim may depend on the extent of the Plaintiff’s success with respect to the common issues and the evidence relied upon at the common issues trial. The process proposed for determining such claims is outlined below. Pursuant to section 30 of the *Class Proceedings Act*, S.N.S. 2007, c. 28, the Court will be asked to give directions relating to the individual claims assessments that result in the least expensive and most expeditious method of determining the individual issues, including dispensing with any procedural step that it considers unnecessary.

Claims (Under \$100,000) – Simplified Procedure

30. Class Members willing to cap the value of his/her individual claim at \$100,000 will be required to file only affidavit evidence with a referee/evaluator, setting out the evidence relating to the individual issues remaining to be proven. If the Defendants wish, they may cross examine an affiant on his/her affidavit out of court, should they wish to challenge the evidence. The referee/evaluator will then make a report and recommendation to the Court with respect to the Class Member’s claim on the basis of the affidavit and transcript evidence. The report will be provided to all parties. The Court will be asked by way of application to incorporate the report and recommendation of the referee/evaluator into a judgment. There will be no right of appeal of the Court judgment.

Claims (Over \$100,000)

31. Class Members submitting claims in excess of \$100,000 will be required to:
 - (a) Serve on the Defendants an affidavit of documents prepared in accordance with Rule 15; and
 - (b) Attend for an oral examination for discovery (in accordance with Rule 18), if the Defendants require.

32. The referee/evaluator may, in his or her discretion, make a report and recommendation as to the Class Member's entitlement, if any, based on the documentary and transcript evidence, or conduct a trial of such claims. The Court will be asked by way of application to incorporate the report and recommendation into a judgment. There will be no right of appeal of the Court judgment.

EFFECT OF THIS PLAN

33. This Plan, as it may be revised by order of the Court from time to time, shall be binding on all Class Members whether or not they make a claim under the Plan.

SCHEDULE "C"

2017

Hfx. No. 460984

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

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PLAINTIFF

- AND -

ORGANIGRAM HOLDINGS INC. and ORGANIGRAM INC.

DEFENDANTS

Proceeding pursuant to the *Class Proceedings Act*, S.N.S. 2007, c. 28

OPT OUT FORM

DEADLINE - MUST BE RECEIVED BY: _____

I, _____, do not want to be included in the class action against the above-named Defendants with respect to the recall of cannabis for medical purposes (dried marijuana and cannabis oil) that was produced by the Defendants between February 1, 2016 and December 16, 2016.

I understand that if I opt out of the class action, I will not be entitled to share in any recovery or take any benefit of any ruling in this case, but I will be free to bring my own claim if I wish. I understand that if I opt out of the class action and wish to bring my own claim, my own claim may be subject to a limitation period. I understand this Opt Out Form must be received by class counsel by _____.

Please complete Class Member information:

Class Member Name: _____

Telephone: _____

Address: _____

Email address: _____

Date: _____

City: _____

Province: _____

Signature: _____