S.C.C. File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

B E T W E E N:

DAWN RAE DOWNTON

APPLICANT
Respondents

A N D:

ORGANIGRAM HOLDINGS INC. AND ORGANIGRAM INC.

RESPONDENTS
Appellants

APPLICATION FOR LEAVE TO APPEAL
(DAWN RAE DOWNTON, APPLICANT)
(Pursuant to s.40 of the *Supreme Court Act,* R.S.C. 1985, c.S-26)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. *Ensuring There is a Legal Mechanism to Allocate Consequences of Unknown Risk*

1. The most basic purpose of tort law is to hold tortfeasors to account for the consequences of their wrongful actions. As technology and mass production continue to advance across all sectors of Canadian enterprise, an increasingly urgent and critical question has emerged: How do we hold tortfeasors to account for inflicting novel harms with unstudied risks?

2. In short, we don't. Canadian law has no existing means of allocating the consequences of unknown risk. There is no legal mechanism to prevent tortfeasors from enjoying a form of common law immunity for wrongful conduct that inflicts novel harm.

3. This result is antithetical to the principles of tort law. It also runs counter to tenets of class actions: providing access to justice, efficiently using judicial resources, and sanctioning wrongdoers by modifying their behaviour.[1] Class actions are intended to provide a legal mechanism to hold tortfeasors accountable for the risks they take in furtherance of their own commercial interests at the expense of the safety interests of their customers and the public. Chief Justice McLachlin, as she then was, acknowledged the important role of class proceedings in today's world – characterized by mass production and mass consumption, technological advances, diversification of corporate ownership, and the dawn of the mega-corporation – to efficiently resolve disputes in a manner that is fair to all parties.[2] Yet, it is naïve to suggest that plaintiffs suffer no harm when defendants impose unpredictable risks and thus new forms of damage upon them, and it is fundamentally unfair to ask those impacted to bear the burden of such harms that were caused by the deliberate, or reckless, tortious acts of another.

4. This is not an abstract or hypothetical issue. Technology and methods of production continue to advance more quickly than our understanding of the associated health implications. Under our current law, those who cause presumptive but previously unstudied harms – such as those who use toxic and prohibited chemicals to improve agricultural production and thus profits – enjoy immunity in the absence of a clear rule for conceptualizing novel harm.

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[1] *Hollick v. Metropolitan Toronto (Municipality),* [2001] 3 S.C.R. 158, (S.C.C.) at para. 15 [*Hollick*].
[2] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 26 [*Dutton*].

5. This untenable legal omission requires a solution. In this case, the Defendants used prohibited pesticides in the cultivation of their certified organic medical cannabis and subjected a Class of therapeutic consumers to currently unknown risks. The Plaintiff advanced evidence describing common experiences accompanying consumption with the recalled cannabis – severe nausea, vomiting, and gastrointestinal issues. Expert evidence was adduced that the causative link and attendant harms can be studied, but – since human trials need not be performed on substances that are prohibited and known to be toxic – have not been conducted to date.

6. Yet, this "first case" scenario involving the unanticipated and unauthorized use of a prohibited product functioned to the Defendants' advantage. Their own wrongdoing eroded the Plaintiff's ability to prove general causation through existing legal tests and existing scientific knowledge. The Defendants chose to use dangerous pesticides that pose risks which – at the early stage of certification – are indefinable, potentially serious, and which cannot be anticipated and mitigated by the user. If this Nova Scotia Court of Appeal was correct in holding that this constitutes an impossibility of proof such that no personal injury claims can be certified, then the Defendants' choice to disobey the law and expose their customers to risk of harm was an economically wise one – and one which has far-reaching, and dangerous, implications in the era of legalized cannabis and mass agricultural production. The Defendants here had a choice regarding balancing safety versus profits; the law permitted them to safely choose the latter.

7. This test case asks this Honourable Court to provide much needed guidance on two legal issues that would bring coherence to the unsettled question of how to deal with novel harm. It provides an opportunity to: (i) resolve inconsistent approaches that have emerged across the country regarding the "workable methodology" standard in the class action context; and (ii) articulate a clear statement of law on the availability of drawing inferences of causation – particularly where the nature of a defendant's wrongdoing has undermined traditional methods of proving cause-in-fact. Together, these issues implicate fundamental principles of class actions and tort law that ought to be decided by this Honourable Court. Simply put, this proposed appeal asks whether unknown (but knowable) risks should be assumed by the wrongdoers who create them, or whether wrongdoers will continue, as under the existing law, to enjoy common law immunity for inflicting novel harm.

B. ***Statement of Facts***

8. On March 3, 2017, Dawn Rae Downton brought a proposed class action under the *Class Proceedings Act*[3] seeking damages on behalf of a putative Class of consumers who purchased medical cannabis that was the subject of a recall from the Defendants, OrganiGram Inc., a licensed producer of cannabis, and its parent company, OrganiGram Holdings Inc.

9. Although the Defendants held themselves out as producers of organic medical cannabis, it is uncontroversial that their products tested positive for myclobutanil and bifenazate – two pesticides prohibited for use on cannabis, and which are known to be toxic, particularly when combusted and inhaled.[4] After testing revealed the presence of these pesticides in the Defendants' cannabis, Health Canada initiated a Type II recall, which is defined as "a situation in which the use of, or exposure to, a product may cause temporary adverse health consequences or where the probability of serious adverse health consequences is remote."

10. Ms. Downton and approximately 5,000 other consumers purchased the Defendants' contaminated cannabis and were thereby exposed to myclobutanil (a fungicidal pesticide that converts to hydrogen cyanide when combusted) and bifenazate (a toxic insecticide known to act as a respiratory system irritant). The Plaintiff alleged that she and Class Members experienced a constellation of common symptoms – severe nausea, vomiting, and respiratory and gastrointestinal issues – which abated upon cessation of use. During the period of consumption, the Plaintiff herself lost thirty pounds due to nausea and vomiting and remained largely bedridden. However, since human trials are not typically conducted with prohibited substances, the full extent of harm inflicted on the Plaintiff and Class Members is currently unknown.

11. While there is no existing diagnosis for the adverse health consequences of exposure to these pesticides when consumed on cannabis, it is possible to establish a constellation of signs and symptoms for a given level of exposure to myclobutanil and/or bifenazate (a "toxidrome").

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[3] S.N.S. 2007, c. 28.

[4] Under the *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230, at the time of certification, licensed producers were permitted to use only the thirteen pest control products approved for use on cannabis under the *Pest Control Products Act*, S.C. 2002, c. 28.

To that end, the Plaintiff adduced expert evidence at certification to meet the minimalistic evidentiary burden which:

(i) describes the mechanism by which myclobutanil and/or bifenazate cause harm;

(ii) opines that the risk conferred by exposure to these chemicals, is presently indefinable, potentially serious, and cannot be anticipated and mitigated by the user;

(iii) opines that studies are feasible, and these risks can be evaluated, but simply have not been conducted to date; and

(iv) explains the methodology by which health risks can be inferred through conventional practice in toxicological risk assessment; specifically, by employing general principles and a body of observations and scientific studies on analogous situations to infer risk.

In essence, the toxidrome can be identified and a precise causal link to adverse health effects can be established once studies are carried out.

12. The certification hearing took place on June 19 and 20, 2018.[5] After considering both the Plaintiff's expert evidence that it was feasible to identify a toxidrome caused by consumption, and the Defendants' contention that it would be impossible to determine if an individual plaintiff's specific health condition is the result of myclobutanil or bifenazate,[6] the Motion Judge certified common issues. One common issue related to the pleaded personal injury claims and asked: "Are Class Members entitled to damages for personal injury caused by the Affected Product?"[7] Common issues were also certified in relation to statutory breaches, unjust enrichment, and waiver of tort.[8]

13. The Defendants appealed, effectively arguing that the novelty of the risks to which they exposed the Class had successfully undermined the Court's ability to assess general causation and thus no personal injury claims should proceed to adjudication at a common issues trial. In a judgment rendered on April 30, 2020, the Nova Scotia Court of Appeal allowed the appeal in

[5] *Downton v. Organigram Holdings Inc*., 2019 NSSC 4 [the "NSSC Decision"].
[6] *Ibid*., para. 67.
[7] *Ibid*., para. 289.
[8] *Ibid*., paras. 278-285.

part, holding that personal injury claims should not be certified in the absence of a pre-existing methodology for diagnosing the effects of exposure to the prohibited pesticides.[9]

14. Notwithstanding the evidence described above, and the deference owed the Motion Judge, the Court of Appeal determined that "there is no methodology for determining whether the symptoms complained of by Ms. Downton are – or even can be – related to the exposure of the impugned substances in this case," that "common causation cannot be established," and thus, there should be no liability for any such harms.[10] This reasoning was based in large part on the supposed overlap between the toxidrome identified by the Plaintiff and what the Court of Appeal factually determined were "side effects" of consuming even untainted cannabis.[11] The Court of Appeal further overturned the Motion Judge's preferability analysis for the adverse health consequence claims, on the basis that she had erred in making common issue findings.[12] In result, the Plaintiff's claims, brought on behalf of the Class, for personal injuries within the identified toxidrome were de-certified.

PART II – STATEMENT OF QUESTIONS IN ISSUE

15. This Application for Leave to Appeal raises the following issues of national and public importance:

(a) What is the proper approach to the "workable methodology" requirement in the context of tort and personal injury damages, and what are the threshold evidentiary requirements?

(b) Can an inference of causation be drawn on a motion for certification in the context of contaminants requiring novel methodologies of proof?

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[9] *Downton v. Organigram Holdings Inc*., 2020 NSCA 38 [the "Court of Appeal Decision"].
[10] *Ibid*., paras. 117, 136.
[11] *Ibid*., paras. 59, 93.
[12] *Ibid*., para. 135.

PART III – STATEMENT OF ARGUMENT

Issue No. 1: Consistency for the "Workable Methodology" Standard & Immunity from Inflicting Novel and Unstudied Harms

A. *There is No Coherent Legal Test for the Workable Methodology Standard*

16. The requirement that a proposed class representative must demonstrate a workable methodology for attributing harm to putative class members at a certification hearing appears sensible. For all the promise of class proceedings to effect access to justice, judicial economy, and behaviour modification, the methodologies of proof still need to work on a class-wide basis.[13] It is therefore both surprising and troubling that a unified approach to the "workable methodology" requirement remains elusive in Canadian law.

17. When the Supreme Court of British Columbia coined the phrase in the 2008 decision of *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*,[14] a "viable and workable methodology … capable of relating harm to Class Members" was sought in relation to a price-fixing scheme in which corrupt over-charging was allegedly passed on to both direct and indirect purchasers of electronics. Although it was admitted that the defendants had engaged in conspiratorial price-fixing, the Court denied certification on the basis that no workable methodology existed to establish that all purchasers were harmed by the scheme.[15] It was held that a proposed class representative must lead evidence to show that "the proposed methodology has been developed with some rigour and will be sufficiently robust to accomplish the stated task."[16]

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[13] These policy goals were discussed at length by this Honourable Court in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 27-29 ["*Dutton*"]:

> "First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. … Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. … Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public."

[14] 2008 BCSC 575.

[15] *Ibid*., paras. 1-9.

[16] *Ibid*., paras. 139, 145.

18. This approach to a workable methodology was reaffirmed in the subsequent decision of *Singer v. Schering-Plough Canada Inc.*,[17] in which another putative class of consumers sought to certify a common issue in relation to damages caused by the defendants' misrepresentations.[18] Relying upon the aforementioned *Infineon* decision, the Ontario Superior Court of Justice found that the relevant test requires "the plaintiff [to] demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis."[19] This oft-cited remark implies (1) the need for extant evidence of a workable methodology at the certification hearing, and (2) the presence – rather than the likelihood or possibility – of such a method.

19. Approximately one month after judgment was rendered in *Singer*, the *Infineon* decision which guided its reasoning was overturned on the basis that the motion judge had articulated an excessively high threshold for demonstrating a workable methodology.[20] The British Columbia Court of Appeal held that the appropriate standard requires a proposed class representative "to show only a credible or plausible methodology" to attribute harms on behalf of a putative class.[21] Both decisions – the appellate *Infineon* judgment and the Ontario *Singer* case – continue to attract judicial citations,[22] despite approaching the workable methodology threshold from incongruous positions. We have, as a result, forked paths in the Canadian approach to the workable methodology standard.

20. In the oft-cited 2013 decision of *Pro-Sys Consultants Ltd. v. Microsoft Corp.*,[23] this Honourable Court sought to resolve the conflicting workable methodology standards in the price-fixing case law that characterized its early development. In the context of alleged unlawful

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[17] 2010 ONSC 42.
[18] *Ibid*., paras. 15-16.
[19] *Ibid*., para. 140.
[20] *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 ("*Infineon BCCA"*).
[21] *Ibid*., para. 68.
[22] *Infineon BCCA*, *supra* cited by *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Minister of Agriculture and Lands)*, 2010 BCSC 1699 at para. 141; and *Miller v. Merck Frosst Canada Ltd*., 2015 BCCA 353 at paras. 5, 15, 29 ["*Miller BCCA*"]. *Singer ONSC* cited by *Stanway v. Wyeth Canada Inc*., 2012 BCCA 260 at para. 32; *Andriuk v. Merrill Lynch Canada Inc*., 2013 ABQB 422 at para. 153; *Sweetland v. GlaxoSmithKline Inc*., 2016 NSSC 18 at paras. 44, 48; *Tluchak Estate v. Bayer Inc*., 2018 SKQB 311 at para. 112; *Levac v. James*, 2019 ONSC 5092 at para. 20; the NSSC Decision, *supra*; and the Court of Appeal Decision, *supra*.
[23] 2013 SCC 57 ["*Pro-Sys*"].

necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so."[24] A more "robust" methodological standard was deemed "inappropriate at the certification stage," given the relative infancy of the litigation and absence of full disclosure when the certification motion is heard.[25]

21. Despite the principled approach articulated in *Pro-Sys*, courts across the country continue to apply varying standards, in varying contexts including *inter alia* price fixing, pharmaceutical and defective device actions, in determining whether the workable methodology threshold has been satisfied. There is little judicial agreement regarding the proper interpretation of whether a method is "capable" of demonstrating class-wide loss. In *Charlton v. Abbott Laboratories Ltd.*,[26] for instance, the British Columbia Court of Appeal applied the workable methodology standard in the pharmaceutical context, without apparent consideration of how this distinct factual context may affect workability. In result, the Court articulated a strict approach to this threshold question, holding that plaintiffs "must demonstrate (*with supporting evidence*) that there *is* a workable methodology" for determining cause-in-fact.[27]

22. This departure from the guidance provided in *Pro-Sys* did not mark a transition to a uniform, albeit stricter, standard. Rather, in the same year that *Charlton* was decided, the British Columbia Court of Appeal rendered judgment in *Miller v. Merck Frosst Canada Ltd.*,[28] in which the motion judge's decision was affirmed, such that a "biologically plausible" but "unproven" methodology was deemed workable and class-wide causation could be determined at the common issues trial.[29] Notably, the British Columbia Court of Appeal attempted to explain away the disconnect between this holding and their recent pronouncement in *Charlton*, stating that: "the type of evidence required to overcome the common issue methodology hurdle will be different in every factual scenario."[30] If this is so, how can a plaintiff ever know what cases to

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[24] *Ibid*., para. 115.
[25] *Ibid*., para. 119.
[26] 2015 BCCA 26.
[27] *Ibid*., para. 90 [emphasis added].
[28] 2015 BCCA 353 ["*Miller BCCA*"].
[29] *Miller v. Merck Frosst Canada Ltd*., 2013 BCSC 544 at para. 158.
[30] *Miller BCCA*, *supra* at para. 48.

pursue (*are novel harms precluded from redress?*), or what evidence to adduce (*a methodology that has been, or can be, studied?*), to get over the methodology hurdle?

23. Inconsistent approaches continue to be applied to the workable methodology standard in courts across the country. The recent decision of *Mancinelli v. Royal Bank of Canada* exemplifies the variable nature of the evidential threshold plaintiffs must satisfy to prove that their methods are workable.[31] In a certification motion regarding alleged price-fixing perpetrated by financial institutions in the foreign currency market, the Ontario Superior Court of Justice acknowledged that "the law about commonality is subtle and complex because [a] common question can exist even if the answer given to the question might vary from one member of the class to another."[32] This gave rise to a determination that a pre-existing method "is not a *sine qua non* for the certification of every class action"[33] – a result which is fundamentally incongruous with the Court of Appeal decision at issue in the within Application.

24. Was the "workable methodology" in the certification analysis intended to stand for a prescribed and existing methodology that plaintiffs must adduce to certify the commonality of causation questions, per *Charlton*? Or, does it refer to "whether there is any plausible way in which the plaintiff can legally establish the general causation issue embedded in his or her claim," per *Miller*?[34] In this case, involving a novel and untested risk of harm, the Court of Appeal required an extant method to demonstrate causal attribution to unstudied contaminants.

25. The present state of uncertainty is particularly troubling given its contravention of the underlying efficiency and economy goals of class actions. Whatever the proper test, the meaning of "workable methodology" must reflect the policy objectives of class actions to promote access to justice and the fair and efficient resolution of common issues.[35]

26. As a result of these conflicting decisions, Canadians who seek access to justice through class proceedings face considerable methodological uncertainty. Broadly speaking, three incongruous standards have emerged with respect to the workable methodology standard, each

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[31] 2020 ONSC 1646.
[32] *Ibid*., para. 219.
[33] *Ibid*., para. 234.
[34] *Miller BCCA*, *supra* at para. 33.
[35] *Ibid.,* at paras. 33-34.

26. As a result of these conflicting decisions, Canadians who seek access to justice through class proceedings face considerable methodological uncertainty. Broadly speaking, three incongruous standards have emerged with respect to the workable methodology standard, each with judicial support. Proposed class representatives must demonstrate methodological workability on one of the following three standards, with little chance of predicting the requisite threshold a Court will apply in advance:

(1) there is a credible or plausible method that could be used to determine general causation;[36]

(2) there is an existing method that has, at the time of certification, produced positive evidence of general causation;[37] or

(3) there is a credible or plausible methodology, which is accompanied by existing proof to support the likelihood of proving causation on class-wide basis (a hybrid between the foregoing two standards).[38]

27. These are fundamental, irreconcilable differences – namely, whether a plaintiff at certification needs evidence of a tested, or merely a *testable*, method of determining general causation for the putative class.

28. It is worth noting that determinations of workable methodology are assessed at certification on the low evidential threshold of "some basis in fact," which requires only "some

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[36] See for example: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at paras. 65-68; *Irving Paper Ltd. v. Atofina Chemicals Inc.,* [2009] O.J. No. 4021 at paras. 143, 191 A.C.W.S. (3d) 44 (Ont. S.C.); *Andriuk v. Merrill Lynch Canada Inc*., 2014 ABCA 177 at paras. 10-11; *Tluchak Estate v. Bayer Inc*., 2018 SKQB 311 at paras. 114-116, 136; *Downton v. Organigram Holdings Inc.*, 2019 NSSC 4 at paras. 212-217; *Levac v. James*, 2019 ONSC 5092 at paras. 52-53; and *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646 at paras. 230-232.

[37] See for example: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575 at para. 139; *Andriuk v. Merrill Lynch Canada Inc.*, 2013 ABQB 422 at para. 133; *Dembrowski v. Bayer Inc*., 2015 SKQB 286 at paras. 81-84; *Charlton v. Abbott Laboratories Ltd.*, 2015 BCCA 26 at paras. 84-99; *O'Brien v. Bard Canada Inc*., 2015 ONSC 2470 at paras. 128, 198, 203.

[38] See for example: *Sweetland v. GlaxoSmithKline Inc*., 2016 NSSC 18 at paras. 10-11, 53, 55-57; *Kirsh v. Bristol-Myers Squibb*, 2020 ONSC 1499 at paras. 45, 64; *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38 at paras. 88, 91.

inquire into the extent of proof that can reasonably be demanded at certification to cohere with this minimalistic evidentiary burden.

29. Beyond the unsatisfactory analytical state of the law in this area, there are significant implications for the principled development of Canadian class actions. The evidential standard for certifying questions of causation as common issues must be certain and ascertainable to provide access to justice and avoid the wasteful expenditure of scarce legal resources. It is antithetical to the efficiency and economy goals of class actions to maintain an uncertain standard for whether a putative class will be certified in their efforts to obtain compensation for commonly suffered harms. Moreover, the nature of the question at issue – whether harm must *already* have been tested to be certifiable as a common issue – implicates the very redistributive goals of private law generally. As our methods of mass production continue to advance and people are exposed to increasingly novel risks and contaminants, the question of whether a workable methodology must be a *tested* hypothesis requires an answer.

B. *The Conundrum: Should Tortfeasors Enjoy Legal Immunity from Inflicting Novel and Unstudied Harms?*

30. Since various standards exist for establishing a workable methodology, the Court of Appeal was faced not with a legal test but with a policy consideration: What types of harm should be compensable on a class-wide basis? Relying upon their preferred line of authority, the Court adopted the principle that "the plaintiff must, at a minimum, identify the mechanism by which the impugned substance causes disease and therefore harm."[41] As the Defendants subjected consumers to unknown risks when they used prohibited pesticides for their own financial gain, such a mechanism was impossible to determine at the time of certification.

31. The underlying action concerns harm which is testable but not yet tested. It was, in the Court of Appeal's view, insufficient that the plaintiff "is able to prove at the common issues trial that inhalation of myclobutanil and bifenazate at the minimum levels found in the Affected Product cause a fixed and consistent pattern of symptoms and signs ('toxidrome')".[42] Instead, the

[41] Court of Appeal Decision, *supra* at para. 55 quoting *Miller*, *supra*.
[42] *Ibid.,* at para. 87.

Court demanded "a unique harm," identified in advance, to ground a workable methodology.[43] In effect, a policy decision was made to foreclose a common issues trial in respect of personal injury claims where the methodology has not already been tested, and thus where a unique diagnosis is also not yet ascertainable or advanced.

32. Whether or not such a threshold serves its designated purpose requires careful consideration, particularly in situations like the one at issue where defendants create novel risk. If the Court of Appeal is correct, then the consequences of that risk will be borne by those exposed to risk and not by the tortfeasors. The workable methodology threshold must be clearly defined, as it implicates the underlying principles and values of tort law and class actions; i.e., how should the consequences of risk be efficiently allocated? If a methodology for proving general causation must exist before the time of certification, then defendants will be incentivized to risk public health in unpredictable ways. Under such a regime, prohibited compounds will seldom give rise to a successful cause of action on behalf of a class of consumers.

33. In the absence of a clear and accessible legal test, objective analyses give way to implicit value judgments. In the present case, the Court imposed numerous additional requirements on the workability standard without consideration to the policy goals of class actions those requirements defeat.[44] Without explanation, additional criteria were read into the analysis, including "attribution of a particular illness"[45] and a "link" between the prohibited pesticides and a diagnosable disease[46] – thus rendering it virtually impossible for claimants who have suffered novel harm to find legal redress.

34. This issue is not simply about doctrinal tidiness; rather, a coherent articulation of the workable methodology standard is required to ensure that tortfeasors are not immunized from the harm they cause when it requires new methodologies of proof. In the proposed appeal, the Plaintiff has adduced expert evidence that a toxidrome can be ascertained in relation to the

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[43] *Ibid*., para. 62 quoting *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744 at para. 233.
[44] Court of Appeal Decision, *supra* at para. 5.
[45] *Ibid*., para. 60.
[46] *Ibid*., para. 67.

contaminated cannabis, and a consistent set of symptoms can be attributed to that exposure.[47] In rejecting such evidence of a workable methodology, the Court of Appeal found that, because the symptoms described by the Plaintiff are "general"[48] – such as severe nausea, gastrointestinal issues, and respiratory difficulties – they cannot be attributed to the Defendants wrongdoing.

35. The absence of predictability in this area of law is perhaps best exemplified in the Court of Appeal's misapplication of this Honourable Court's guidance in *Pro-Sys*, as discussed above. Despite a cursory citation to that decision, it was held that a "theoretical" methodology was insufficient for certifying the Plaintiff's personal injury claims on behalf of the Class.[49] Given that this Honourable Court did not further define the "capable" criterion for a workable methodology, the Court of Appeal – and courts across the Country – have enjoyed considerable flexibility in applying this criterion in reaching conclusions on the (non)viability of actions designed to provide access to justice and judicial economy.

36. Why should a distinction be drawn between a theoretical method capable of determining general causation and a method which has already been used at the time of certification? If a theoretical method flounders in practice, then general causation is simply not proved and the alleged harms are not attributed to the tortfeasor's acts or omissions. Indeed, at certification, nothing substantive has been decided. Why, then, should a plaintiff be faced with a considerable evidential hurdle to demonstrate that a workable methodology *already* exists? A poisoned plaintiff must either fund novel scientific research at the outset or be denied certification.

37. With the impugned Court of Appeal decision imposing additional, seemingly *ad hoc* requirements in the workable methodology analysis, the law in this area appears likely to continue its divergence in unpredictable ways from that intended when first articulated. Courts have struggled to apply the words of this Honourable Court – that "the methodology must offer a realistic prospect of establishing loss on a class-wide basis,"[50] Guidance on what, exactly, is required to satisfy the "realistic prospect" threshold is required to bring both certainty and principled reasoning to this area of law.

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[47] Court of Appeal Decision, *supra* at para. 87.
[48] *Ibid*., para. 60.
[49] *Ibid.,* at para. 71.
[50] *Pro-Sys*, *supra* at para. 118.

Issue No. 2: Test for Inferred Causation & Allocating Unpredictable Harm in Mass Toxic Tort Cases

A. *The Principled Development of Tort Law Requires a Test for Inferred Causation*

38. There is currently no unified statement of law on whether (and, if so, when) decision-makers may draw an inference that a defendant's negligence caused the plaintiff's injuries. As new situations continue to arise in the context of mass production, agricultural industrialization, and the recent rise of cannabis as a legalized but untested therapeutic product, this legal omission has become increasingly problematic. Simply put, when defendants cause novel harm in the furtherance of their business interests and impose unpredictable risks on consumers, we have no clear rule to ensure that civil immunity is not granted on the basis that the plaintiff cannot, by the very nature of the defendant's dangerous conduct, positively adduce proof of causation. However, the unifying principles of tort law expressed by this Honourable Court in the preceding two decades provide a foundation for the articulation of a clear legal test for inferring cause-in-fact.

39. After years of piecemeal development in the law of causation, the 2012 decision of this Honourable Court in *Clements v. Clements*, clarified a difficult and contentious area of law.[51] Faced with irresolvable causative uncertainty after a motorcycle crash was preceded by (tortious) excessive speed and a (non-tortious) tire puncture from an errant nail, the majority held that, in some situations, "common sense inferences from the facts may suffice" to ground causation.[52] As with its jurisprudential predecessors – for instance, where a man was shot by one of two hunters who fired in his direction simultaneously, such that neither was responsible, on balance, for his injuries[53] – *Clements* articulated an approach to causation rooted in the principles of tort law: fairness to the parties and the furtherance of corrective justice to deter future wrongdoers.[54]

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[51] 2012 SCC 32 ["*Clements*"].
[52] *Ibid*., para. 38.
[53] *Cook v. Lewis*, [1951] S.C.R. 830 ["*Cook*"].
[54] Similarly, as this Honourable Court held in *Athey v. Leonati*, [1996] 3 S.C.R. 458, there is no derogation of liability where evidence can be adduced to show that the negligence was not "the sole cause" of the impugned harms. In that decision, it was uncertain whether pre-existing back problems may have played a role in the disc herniation that manifested following motor vehicle

40. Such landmark decisions regarding cause-in-fact have traditionally arisen in highly specific circumstances. In result, the law on causal inferences has developed in confined settings where flexibility was required to achieve fairness between the parties. In *Walker Estate v. York Finch General Hospital*,[55] for instance, this Honourable Court was confronted with tainted blood and a negligent screening protocol that made it impossible to know whether appropriate testing would have caught the bloodborne disease before the plaintiff received the transfusion.[56] Under such circumstances, should the plaintiff be denied recovery because causation cannot be proven? While the answer may seem obvious – that evidence-destroying negligence must still be actionable – courts have applied inconsistent methods to effect justice on a case-by-case basis.[57]

41. As this Honourable Court stated in *Clements*: "new situations will … raise new considerations. I leave for another day, for example, the scenario that might arise in mass toxic tort litigation with multiple plaintiffs."[58] Has this new day come? The subject matter of this test case provides a stark interpretation of a classic, unresolved problem: the plaintiff has consumed novel toxicants, experienced symptoms of illness associated with use, and cannot, as yet, proffer a diagnosis of harm based on the very fact that the defendants exposed her to compounds which have not been studied for human consumption or combustion. Should she be denied recovery for her personal injuries and those of the Class Members she represents?

42. In overturning the Motion Judge's certification of the Plaintiff's personal injury claims, the Court of Appeal was cognizant of the fact that "[the Plaintiff] experienced symptoms of

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accidents. As the defendants' fault played a significant role in the creation of harm, causation was established through a "robust" application of existing doctrine.

[55] 2001 SCC 23.

[56] *Ibid*. at paras. 85-86. Notably, after finding enough for a presumptive attribution of cause-in-fact, it was held that "[t]he law of torts may, from time to time, reflect policy considerations which can impact, in part, on the burden of proof in a negligence action."

[57] There is no analytical framework for inference-drawing on cause-in-fact. The current patchwork approach may or may not require an informational advantage to impel a reversed onus (*Snell v. Farrell*, [1990] 2 S.C.R. 311), or could be constrained to circumstances where positive proof of causation has been rendered impossible (*Cook*, *supra*).

[58] *Clements*, *supra* at para. 44.

nausea and vomiting after first consuming Organigram's cannabis, which only stopped after she discontinued that use."[59] It is uncontroversial that the threshold of "some basis in fact" was satisfied regarding the Plaintiff's consumption of later recalled cannabis and ensuing symptoms of illness, which abated when use was discontinued.[60] Moreover, the very fact of a Type II recall in relation to the impugned products necessarily implies adverse health effects – as ascertained by Health Canada – leaving a clear basis in fact for attributing the harms to the Defendants.

43. However, prior to the commencement of the underlying action, there was no reason to study the health consequences of combusting and inhaling prohibited pesticides. As such, there is currently no existing diagnosis as a shorthand for the harms inflicted by the Defendants' reckless disregard for consumers' safety and use of unsafe pesticides to increase profits. The Plaintiff's evidence was that a toxidrome can be established and subsequently evaluated in relation to the contaminants and harms alleged against the Defendants.

44. These facts give rise to an important question for the principled development of tort law in the context of mass toxic torts; namely, whether an inference can be drawn when a defendant exposes consumers to a toxic substance and subjects them to unknown risks. While the novelty of the harm can be no valid defence to an action in principle, Canada does not currently have a legal mechanism to prevent this result. This proposed appeal arises from a pronouncement from the Court of Appeal that "a general causation test … is not possible,"[61] since there was no need to study the precise dangers of inhaling prohibited pesticides until the Defendants deliberately used them to increase the profitability of their medical marijuana enterprise.

45. A decision on the legal status of causal inferences would be particularly instructive in the context of a certification motion, where the evidential burden remains one of "some basis in fact." This relaxed burden of proof – which does not permit decision-makers to delve into the merits of an action – is analytically ideal for a determination of whether, in barest terms, causation *can* be inferred in these circumstances.

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[59] Court of Appeal Decision, *supra* at para. 1.
[60] *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 at para. 16 ["*Hollick*"]. For a more recent explanation of this evidential burden, see: *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718.
[61] Court of Appeal Decision, *supra* at para. 88.

46. In the class action context, a causal inference for general causation at the certification stage would not absolve class members of the eventual requirement to prove harm and individual causation. Similarly, in an individual action, a mere inference of causation is, by its very definition, rebuttable if the tortfeasor has acted reasonably.

47. The Court of Appeal, citing *Charlton*, perpetuates an outdated and unprincipled notion of legal causation. It found that there was no causative issue based on the Defendants' argument that it is not possible to ascertain the contribution to harm from combusting and ingesting prohibited pesticides. The Court's finding is indicative of a widespread legal problem, in which causation has become a rote, mechanical analysis rather than a means of assessing whether a given set of harms should be allocated at the expense of the tortfeasor.[62]

48. This reasoning is particularly jarring in the context of this Honourable Court's recent articulation of a principled approach to compensable harm. In *Saadati v. Moorhead*, a unanimous bench held that, whatever their therapeutic value, diagnoses are legally insignificant; instead, decision-makers should be concerned with "symptoms and their effects."[63] This disentanglement of tort damages and "diagnostic classification schemes" was advanced to provide compensation for the actual consequences of negligence, rather than a diagnosis or definition thereof.

49. It is therefore untenable and inconsistent to sustain appellate authority to the effect that the absence of present-day diagnostic certainty should immunize a tortfeasor from the consequences of their actions. This Court of Appeal emphasizes that the Plaintiff's symptoms are "general and vague … with no attribution of a particular illness"[64] as a fatal flaw in their assessment of whether the "some basis in fact" standard was met, and their causal attribution to the inhalation of dangerous compounds. There is no principled reason why recovery should be denied when a tortfeasor causes "general" harm beyond the *de minimis* range. This policy concern is particularly acute in the class actions context, which stands as the sole civil ballast against those who cause less severe but widespread harm to a group of people, such that individual actions could not reasonably be maintained.

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[62] Court of Appeal Decision, *supra* at para. 120 citing *Charlton*, *supra*.
[63] 2017 SCC 28 at para. 31.
[64] Court of Appeal Decision, *supra* at para. 60.

50. The fact the Court of Appeal conflates the character of damage with the question of factual causation exemplifies the confusion in this unsettled area of law. When stretched to extremes, the unsustainable nature of the Court of Appeal's reasoning is obvious – if several Class Members in this action had died after consuming the affected product, would *that* be enough to infer causal attribution to the Defendants' use of prohibited pesticides? If so, how can statements about the "general" nature of the Plaintiff's symptoms be squared with such a finding, given that death, like nausea, is a common occurrence across a wide enough sample size? Dying to make a point; that's not the point.

51. Beginning with *Cooper v. Hobart* in 2001, a coherent theory of Canadian tort law has been developed and fostered by this Honourable Court.[65] We now know when a novel duty of care will emerge, and – with the decisions in *Clements* and *Saadati* – parties are on notice that there is a singular test for cause-in-fact in ordinary cases, which must be assessed in relation to the effects, rather than the diagnosis, of compensable harm. What remains unsettled – and what the within Application seeks to clarify – is whether, as a point of law, causation can be inferred, even on the lowest evidential standard of "some basis in fact," when a defendant exposes the plaintiff to unknown risks. Without such guidance, the progress of *Saadati* – in distilling the nature of compensable damages – remains inaccessible where proof of causation is destroyed by the nature of a defendant's wrongful acts or omissions.

B. *The Day has Come to Allocate Unpredictable Harm in Mass Toxic Torts*

52. In the most famous examples cited above, it is difficult to suggest that this Honourable Court failed to effect justice between the parties.[66] However, in the absence of a clear statement of law, difficult causal circumstances will continue to perpetuate injustice and undermine the redistributive goals of tort law. The jurisprudential foundation has already been built for a principled approach to causal inferences. In *Clements*, this Honourable Court noted, in *obiter*,

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[65] 2001 SCC 79.

[66] For example, in *Cook*, *supra,* the two men who recklessly shot in the direction of their hunting companion were found liable, in equal measure, for the risk they collectively caused; in *Clements*, *supra*, the errant nail in Mr. Clements' tire did not preclude recovery for his seriously injured passenger and wife.

that a line of English authority in "toxic agent cases" has identified a material contribution to risk approach that can ground liability in appropriate cases where a tortfeasor exposes a plaintiff to risk and the consequences of that risk materialize.[67] What is needed now is an application or an elaboration of such a test to bring the law of causation in line with the emerging unified doctrine of Canadian tort law.

53. This is not an isolated inquiry. This proposed appeal provides factual context for the articulation of a principled approach to inferring causation in a society that continues to see an exponential "rise of mass production."[68] There can be no reasonable debate that a tortfeasor should not enjoy immunity from the consequences of their wrongdoing when they subject plaintiffs to novel risks; however, the current piecemeal approach to effecting *ad hoc* causative justice is unsustainable in our current epoch of "the mega-corporation."[69] The result in the current case is that the Defendants continue to produce and sell cannabis to consumers in the absence of legal sanctions for their dangerous disregard for consumers' health. Given the proliferation of corporations producing and selling cannabis in our post-legalization Canadian landscape, the Court of Appeal's reasoning requires correction.

54. The Court of Appeal did not find that Ms. Downton and the Class did not suffer harm when they ingested tainted cannabis; instead, it was held that, as the toxidrome is (and must be) novel given the unpredictability of inhaling prohibited pesticides, she and the Class cannot recover. This result is unjust and untenable. The within Application seeks more than simply reversing an erroneous decision. Sustaining appellate authority to the effect that novel harm is effectively non-actionable will not only create a perverse incentive for prospective tortfeasors; it will also forestall the principled developments in the area of tort law that have been building a set of coherent legal principles for nearly two decades.

PART IV – SUBMISSION ON COSTS

55. The Applicant submits that she should be awarded the costs of this Application, payable in the cause.

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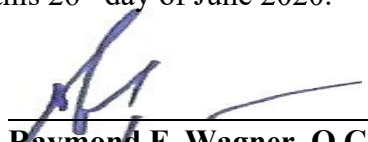
[67] *Clements, supra* at para. 29.
[68] *Dutton*, *supra* at para. 26.
[69] *Ibid.*

PART V – ORDER SOUGHT

56. The Applicant respectfully requests that leave to appeal be granted with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of June 2020.



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PART VI – TABLE OF AUTHORITIES

Cases **at paragraph(s)**

STATUTES, REGULATIONS, ETC.