S.C.C. File No. 39234

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

REPLY TO RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(DAWN RAE DOWNTON, APPLICANT)

(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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A. *The National Importance of a Principled Workable Methodology Standard*

1. Nearly two decades ago, Chief Justice McLachlin, as she then was, expressed concern with the rise of mass production and the increasing power of the "mega-corporation."[1] She recognized that, with the proliferation of technology and global patterns of consumption, tortfeasors gained an unprecedented ability to spread risk and harm. Class proceedings legislation – with objectives of promoting access to justice, redress for communal harms and modifying wrongdoers' behaviour – was identified as our most promising solution.

2. Industrial advancements have continued at an exponential rate since, and with each new product and mode of production, new and unpredictable risks are created – often much faster than our ability to study them. Against this backdrop, class actions are both more necessary than ever – in light of the sheer *scale* of harm that can be caused – and more conceptually difficult, as old modes of allocating risk must be refashioned to accommodate previously unimagined situations. One such mode of analysis – the "workable methodology" standard for certifying common issues of collective harm – has been stretched beyond its previous mandate in economic loss cases. It now requires clarification and modernization as an issue of national importance.

3. The evidential standard for certifying a common issue in respect of harm – for being *allowed* the recourse of a class action – matters to Canadians. It should be objective, consistent, and articulated in a manner that does not undermine the class action regime it serves. It is a threshold that impacts whether communities can harness economies of scale, litigate against powerful corporations, and which determines what harms our legal system can redress. If set too high, it will render the class vehicle out of reach in situations of novel harm, leaving litigants to either bring costly individual actions or suffer in silence. Canadians also care whether the workable methodology standard provides a free pass to tortfeasors who put their financial interests above the safety of their customers.

4. While the term "workable methodology" has been varyingly applied since *Pro-Sys Consultants Ltd. v. Microsoft Corp.*,[2] this Honourable Court has never considered whether a workable methodology must be one that exists and has been proven effective at the preliminary

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[1] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 26.
[2] *Pro-Sys Consultants Ltd. v. Microsoft Corp*., 2013 SCC 57 [*Pro-Sys*].

certification stage, or whether a prospective – but plausible – approach to assessing general causation should suffice.[3] The jurisprudence currently supports both propositions, with some courts preferring a merely credible prospective method,[4] other courts demanding an extant means of diagnosing the alleged injuries,[5] and others requiring something in between.[6] Despite the Respondents' best efforts to minimize these inconsistencies, Canadian courts currently have no authoritative guidance on whether the workable methodology standard requires a *tested* methodology of proof, or merely a *testable* one. Of the varying authority that exists in the secondary market and pharmaceutical contexts,[7] there is also a complete lack of jurisprudence regarding how this standard applies, and *should* apply, in situations of novel harm, which in our present world will continue to become increasingly common.

5. The inconsistent standards employed by Canadian courts in assessing the workability of a proffered method are imbued with value judgments and policy preferences. Arguments support preferring either a tested (and thus empirically verified) or a testable (and thus accessible in the context of novel harms) methodology. Without guidance from this Honourable Court, judicial reasoning in this realm will continue to render *ad hoc* and unpredictable results, especially when class proceedings are commenced in novel situations to redress previously unstudied mechanisms of injury. In result, the key question of "what it is that makes a defendant's negligent conduct wrongful" remains unanswered in the context of novel harm.[8]

6. The Respondents point to *Pro-Sys* as setting the workable methodology standard. Yet, this is precisely the problem: courts cite *Pro-Sys* noting that "the plaintiff must demonstrate … that there is a workable methodology," and then proceed to define workability in an inconsistent

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[3] In this case, the Applicant's expert opined that studies assessing the general causation alleged are feasible, and that the alleged risks can be evaluated, but simply have not yet been conducted.

[4] See e.g.: *Irving Paper Ltd. v. Atofina Chemicals Inc*., [2009] O.J. No. 4021 at paras. 143, 191.

[5] See e.g.: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575 at para. 139.

[6] See e.g.: *Sweetland v. GlaxoSmithKline Inc*., 2016 NSSC 18 at paras. 10-11, 53, 55-57.

[7] Pharmaceutical cases, specifically, benefit from market-based data from placebo-controlled trials and bodies of research. See e.g. *Merck Frosst Canada LTD. v. Wuttunee*, 2009 SKCA 43 at paras. 31-32.

[8] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 33.

manner.[9] As such, the Respondents' core argument – that it is "well established" that a plaintiff must demonstrate a workable methodology – misses the point. That a plaintiff must present some basis in fact for a workable methodology has never been disputed. The national importance of the within Application is not about what the standard is *called* but rather in determining *how* and *when* workability will be established – and by extension, what harms our law can redress.

7. The Respondents invoke case-by-case discretion as a panacea for an ill-defined workability standard. Irreconcilable decisions are explained away as "[c]ourts … simply applying the workable methodology standard to the particular facts presented by a plaintiff."[10] Even within the Respondents' brief, we see irreconcilable standards – "identify[ing] the mechanism" of harm[11] or simply demonstrating a plausible methodology for doing so[12] – without even the barest explanation of how one standard applies to such disparate ends. Do, or *should*, we favour unfettered contextual flexibility over certainty, consistency, and the principled application of an appropriate evidential standard?

8. The within Application seeks coherence and predictability in the workable methodology standard – a crucial threshold question for certifying common issues of harm – or failing that, guidance for a framework for assessing novel exposures and harm, if the standards applied in the secondary market and pharmaceutical contexts are inappropriate. A uniform standard of workability is a matter of national importance, not only for the modernization of the law (including class actions doctrine) to the realities of the time, but also for the principled allocation of risk in the era of expanded markets and the mega-corporation. At its core, the workable

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[9] See e.g: *Andriuk v. Merill Lynch Canada Inc.*, 2014 ABCA 177 at para. 10 [*Andriuk*]; Compare *Miller v. Merck Frosst Canada Ltd.,* 2015 BCCA 353 at paras. 33-38 [*Miller*]: "it refers to whether there is <u>any plausible way</u> in which the plaintiff can legally establish the general causation issue embedded in his or her claim," versus *Martin v. Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744 at para. 233 [*Martin*], requiring "<u>compelling epidemiological or statistical evidence</u>".

[10] Response to Application for Leave to Appeal at para. 30.

[11] *Miller v. Merck Frosst Canada Ltd*., 2015 BCCA 353 at para. 44.

[12] *Andriuk*, *supra* at para. 11.

methodology standard asks which alleged harms can be collectively litigated and which forms and wrongdoing and harms should be immunized from the reach of class proceedings.

B. *A Law of Causal Inferences is Required for the Modernization of Torts*

9. Determining whether X negligence caused Y harm is fundamentally a question of tort theory; that is, when should tortfeasors be held to account for the consequences of their wrongdoing? Intuitively, when X negligence precedes and coincides with Y harm, we draw a causal inference. Causation does not require proof of scientific certainty;[13] instead, because complete evidentiary knowledge is impossible, courts employ "common sense inferences" where necessary to effect redistributive justice.[14] Legal fact-finding would grind to a halt were it to operate in isolation from human judgment.[15] Though inference-drawing is inherent in the causal analysis, we do not currently have a clear legal statement on the law of causal inferences, especially so in the class action context at the preliminary certification stage.

10. The prevailing approach by some lines of authority is impractical. For instance, in *Martin v. Astrazeneca Pharmaceuticals Plc*, the Court held that "[t]here is a problem with a general causation question when there is no evidence that 'compelling epidemiological or statistical evidence might be sufficient to establish individual causation or go a long way to doing so.'"[16] This requirement – at *certification* – for epidemiology and statistics is not only incongruent with other cases (for instance, requiring instead "any plausible way" to legally establish general causation[17]), but one which is also fundamentally inconsistent with both the proper legal approach to causation and the evidentiary standard at certification.

11. The Respondents' analogy is designed to downplay the significance of the gap in our current law. They ask, legally, what should be done about a cola manufactured with an unlawful amount of caffeine?[18] While this hypothetical is, interestingly, left unanswered, if there were no studies on the effects of such consumption (a reasonable presumption, especially if the added

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[13] *Snell v. Farrell*, [1990] 2 SCR 311.
[14] *Clements v. Clements*, 2012 SCC 32 at para. 38.
[15] Russell Brown, "The Possibility of 'Inference Causation': Inferring Cause-in-fact and the Nature of Legal Factfinding" (2010) 55:1 *McGill LJ* 1.
[16] *Martin v. Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744 at para. 233.
[17] *Miller, supra* at paras. 49-52.
[18] Response to Application for Leave to Appeal at para. 36.

substance were prohibited), Canadian law is currently *incapable* of providing a reasoned answer to the foregoing with reference to settled precedent. This becomes an issue of public and national importance when the *non*-hypothetical question is posed: how does our law treat causation at the certification stage in the context of a product designed for human consumption that is manufactured with prohibited, toxic chemicals? Right now, and even with evidence of harm concurrent with consumption and a government-issued recall based on a risk to human health, our law provides the manufacturer a free pass.

12. The Respondents close: "[t]he mere creation of a potential … risk is not wrongful conduct,"[19] employing the same faulty reasoning that proliferates in the absence of clear guidance on the status of causal inferences in class proceedings. Conflating potential risk and actual harm ignores the redistributive purposes of tort law by immunizing wrongdoers who prioritize profits over safety, so long as they do so in a sufficiently novel manner. Just because the harm is not fully understood, or empirically studied *yet*, does not render it a mere potentiality. There should be a legal response for the imposition of actual, though unstudied, harm.

13. Since *Cook v. Lewis*, the law of causation has grown in a manner consistent with the demands of equity. Tortfeasors do not enjoy immunity when they fire blindly into the woods with a hunting companion.[20] Why should it be otherwise when corporations subject consumers to banned chemicals and novel risks in their prioritization of profits over safety? If existing empirical evidence of diagnosed harm is required to meet the "some basis in fact" evidentiary hurdle for general causation – to even be *allowed* the recourse of a class action (let alone hold such wrongdoing to account) – harmed Canadians are left with no means of redress.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of September 2020.

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[19] Response to Application for Leave to Appeal at para. 42.
[20] *Cook v. Lewis*, [1951] S.C.R. 830.

PART VI – TABLE OF AUTHORITIES