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2025 Product Liability Roundtable – International Update

*Certification Hurdles and Limits on Recoverable Losses:
An Update on Ontario Product Liability Class Actions*

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I. Introduction

Product liability and class action developments in Ontario, Canada’s biggest market, are of particular interest to companies who sell or manufacture products here. In this paper, we first provide a brief procedural overview of class action litigation across Canadian jurisdictions. We then outline two recent legal developments affecting prospective product liability class action defendants in Ontario: (1) amendments to Ontario’s class action legislation,² which have raised the standard for certification; and (2) Ontario appellate case law refusing certification in product liability disputes where the claimed losses did not meet the requisite legal or evidentiary standards.

II. Overview of Canadian class action procedure

Canada is a federalist country with provincial/territorial and federal jurisdictions. Because of the rules governing federal jurisdiction, product liability class actions are generally litigated in provincial superior courts. Unfortunately, class action procedure in Canada is not harmonized across the provinces and there are important distinctions between different jurisdictions. Additionally, there is no formal, centralized mechanism for coordinating multijurisdictional class actions. As a result, plaintiffs are motivated to be strategic about where they commence prospective class actions, and defendants regularly face a frustrating collection of overlapping proceedings across the country with different timelines and different underlying procedural schemes.

While it is beyond the scope of this paper to canvass all jurisdictional differences affecting prospective class action defendants in Canada, here we briefly overview three such differences in order to provide context for the Ontario-focussed discussion that follows.

- **National classes.** Some provinces, like Ontario and British Columbia, permit the certification of national classes that include extra-provincial residents on an opt-out basis.³ Plaintiffs thus commonly commence proposed national class actions in Ontario or British Columbia (or both), and a separate class action in Québec on behalf of Québec residents.

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² *Class Proceedings Act, 1992*, S.O. 1992, c. 6 [**Ontario Class Proceedings Act**].

³ In addition to Ontario and British Columbia, Alberta, Saskatchewan, Manitoba, Québec, and Nova Scotia all follow the opt-out model for extra-provincial residents. New Brunswick and Newfoundland and Labrador have different regimes for provincial and extra-provincial residents.

- **Certification test.** The test for class certification and the procedure followed on certification varies across Canadian jurisdictions. For example, as discussed further below, recent amendments to Ontario’s class actions legislation, as interpreted in the case law, suggest that Ontario may be a more favourable forum for prospective class action defendants. By contrast, Québec (a civil law jurisdiction, where certification is called “authorization”), is generally viewed as having a plaintiff-friendly regime.
- **Adverse costs.** Rules relating to costs in class proceedings also vary significantly across jurisdictions. Ontario and Québec, for example, have a “loser-pays” costs system in civil proceedings, which also applies in class actions at the certification and authorization stage, respectively. In Ontario, we have seen significant costs awards both for and against defendants at the certification stage,⁴ and this costs regime may act as a deterrent to some plaintiffs. In Québec, by contrast, the amounts awarded have generally been much more modest. British Columbia has a no-costs model for certification, which in turn makes the province an attractive forum for prospective class action plaintiffs.

Because of these jurisdictional differences and the lack of any centralized, coordinating mechanism, class action defence counsel in Canada must be able to leverage all applicable procedural schemes and their accompanying case law. With that in mind, we turn to two recent developments in Ontario.

III. Ontario’s stricter certification test

Class action certification in Ontario is governed by the *Class Proceedings Act, 1992*.⁵ Under this legislation, a plaintiff must meet five certification criteria, and, in general terms, must show “some basis in fact” for all of them, excluding the requirement that the pleadings disclose a cause of action:⁶

- (1) The pleadings must disclose a cause of action
- (2) There must be an identifiable class of two or more persons;
- (3) The claims of the class members must raise common issues;

⁴ See e.g. *Hughes v. Liquor Control Board of Ontario*, 2018 ONSC 4862 (Cad\$2,374,497.13 in combined costs to the defendants); *Fairview Donut Inc. v. TDL Group Corp.*, 2014 ONSC 776 (Cad\$1,850,000 in combined costs to the defendants).

⁵ *Ontario Class Proceedings Act*, *supra* note 2.

⁶ *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25; *Pro-sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 99-105. In general terms, “some basis in fact” is a relatively low evidentiary standard. With respect to the requirement that class members’ claims raise common issues, Ontario appellate courts have confirmed that a plaintiff must show “some basis in fact” that (1) the common issue actually exists, and (2) the common issue can be answered in common across the entire class (see *Kuiper v. Cook (Canada Inc.)*, 2020 ONSC 128 (Div. Ct.); *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606).

- (4) A class proceeding must be the preferable procedure for the resolution of the common issues; and
- (5) There must be a suitable representative plaintiff.⁷

Prior to 2020, Canada’s common law provinces were largely uniform in their legislated certification requirements. In 2020, however, Ontario’s *Class Proceedings Act, 1992* was amended to include a new provision modifying the “preferable procedure” requirement for certification.⁸ Under this new provision, a class proceeding is the “preferable procedure” only where it is “superior” to other dispute resolution mechanisms and the common issues “predominate” over individual ones.

These amendments, which are facially similar to US federal class action procedure, were controversial at the time they were introduced, and there was uncertainty as to how they would be interpreted. While the case law on this point is still developing in Ontario, some case law suggests that the certification standard has indeed been heightened through these amendments.

The first case to substantively consider the new “preferable procedure” requirements was *Banman v. Ontario*,⁹ a 2023 decision from Justice Perell of the Ontario Superior Court of Justice. In *Banman*, the plaintiffs sought to certify a class proceeding on behalf of 429 patients who had been treated in the forensic psychiatric unit of an Ontario hospital,¹⁰ alleging, among other things, breaches of fiduciary duty, negligence, vicarious liability, and non-delegable duty by the Ontario government. Justice Perell was satisfied that the first three criteria of the certification test had been met,¹¹ and focussed his analysis on the new “preferable procedure” provision.

Importantly, Justice Perell found that the new provision was intended to “raise the threshold”, “heighten the barrier”, or “make more rigorous” the “preferable procedure” criterion, and that the new test was accordingly “stricter” than its predecessor.¹² In finding that the common issues in *Banman* predominated over the individual issues, and that a class proceeding was the superior method of adjudication, Justice Perell considered the preferability analysis through the “lenses” of judicial economy, behaviour modification, and access to justice.¹³ Justice Perell placed considerable emphasis on access to justice for members of the prospective class, finding that, for many individuals, a class action was the only viable means of accessing a legal remedy.¹⁴ Further, in considering the class as a whole, Justice Perell found that a class action would provide better access to justice than pursuing joinder or individual actions.¹⁵ Justice Perell ultimately determined that the preferable procedure criterion was met, certifying the class to proceed to the merits.

⁷ Ontario *Class Proceedings Act*, *supra* note 2 at s. 5(1).

⁸ *Ibid* at s. 5(1.1).

⁹ 2023 ONSC 6187.

¹⁰ *Ibid* at para. 6.

¹¹ *Ibid* at paras. 200-309.

¹² *Ibid* at paras. 317-318.

¹³ *Ibid* at paras. 329-334.

¹⁴ *Ibid* at para. 337.

¹⁵ *Ibid* at paras. 353-357.

Justice Perell's analysis has been endorsed by other judges of the Ontario Superior Court of Justice, but has not been confirmed by an appellate court.¹⁶

The case law on the new “preferable procedure” test is still developing, and has not yet been subject to substantive interpretation by an appellate court. Presently, there are two main takeaways for prospective class action defendants in Ontario arising from *Banman*: (1) the new “preferable procedure” test is indeed stricter than its predecessor, and (2) courts are likely to continue applying this test through the “lens” of class actions’ objectives, which introduces an element of analytical uncertainty. There are a number of cases currently before the Ontario Superior Court of Justice that may provide more insight on how the new “preferable procedure” test operates in the context of a less vulnerable plaintiff class, or in the context of a proposed product liability, medical device, or pharmaceutical class action.

IV. Limits on claimed losses in prospective product liability class actions

Two recent appellate decisions in Ontario have confirmed common law doctrine on the scope of recoverable losses in products liability cases. These cases are notable for prospective product liability class action defendants, because they demonstrate that a robust, doctrinal defence can defeat certification.

The first case, *Palmer v. Teva Canada Limited*,¹⁷ involved a proposed class action against several pharmaceutical companies, where the plaintiffs alleged negligent manufacturing of an antihypertension drug.¹⁸ The plaintiffs pleaded that certain lots of the drug contained alleged carcinogens. The plaintiffs did *not* claim compensation on behalf of any class member who had allegedly developed cancer; instead, the plaintiffs claimed damages for an alleged increased risk of possibly developing cancer in the future, and for alleged psychological harm suffered upon learning of the recall. Sitting as motion judge, Justice Perell denied certification, finding that “the law provides remedies for concrete injuries not abstract or speculative ones”,¹⁹ and the plaintiffs appealed.

The Ontario Court of Appeal dismissed the plaintiffs’ appeal, confirming that “[c]ompensable damage is an essential component to recovery”.²⁰ The Court of Appeal rejected the plaintiffs’ argument that there was an injury sustained from alleged molecular changes as a result of exposure to the drug, finding that “[a] physical change with no perceptible effect upon one’s health is not compensable in negligence”.²¹ The Court of Appeal also rejected the plaintiffs’ appeal in relation to alleged psychological injuries, finding that these injuries, as pleaded, did not meet the common law test for recoverability. Finally, the Court of Appeal rejected the plaintiffs’

¹⁶ See e.g., *Richard v. The Attorney General of Canada*, 2024 ONSC 3800; see also *Grozelle v. Corby Spirit and Wine Limited*, 2023 ONSC 7212 (finding that a class action was *not* the “preferable procedure”).

¹⁷ 2024 ONCA 220 [*Palmer*]. Fasken acted for the successful defendants Sandoz Canada Inc., Pro Doc Limitée, Sanis Health Inc., and Sivem Pharmaceuticals ULC.

¹⁸ *Ibid* at paras. 2-3.

¹⁹ *Palmer v. Teva Canada Ltd.*, 2022 ONSC 4690 at para. 11.

²⁰ *Palmer*, *supra* note 17 at para. 1.

²¹ *Ibid* at para. 52.

claims for costs of medical expenses incurred in relation to the drug, finding that the claimed costs were purely economic and did not meet the requirements for recoverability under negligence law.

The Ontario Court of Appeal also enforced doctrinal limits on compensable recovery in *North v. Bayerische Motoren Werke AG*,²² a case released earlier this year and which is currently the subject of an application for leave to appeal to the Supreme Court of Canada. In the *North* case, the plaintiffs brought a proposed class action against BMW in relation to alleged “timing chain system” defects in certain BMW vehicle engines. Sitting as motion judge, Justice Morgan found that the plaintiffs’ claim was for pure economic loss, and thus subject to strict common law restrictions on recoverability.²³ Justice Morgan declined to certify most of the plaintiffs’ claims, but narrowly certified claims for recovery of costs incurred to repair alleged damage to vehicle engines. Both sides appealed this result.

On appeal, the plaintiffs argued that the alleged timing chain system defects had caused damage to certain vehicle engines, and that the alleged damage was therefore not purely economic and, accordingly, not subject to that doctrine’s severe restrictions on recovery. The Court of Appeal rejected this argument based on Supreme Court of Canada precedent. The Court of Appeal then allowed BMW’s cross-appeal in relation to partial certification, finding that a cost to replace or repair an allegedly defective product is not a recoverable “pure economic loss” because it is incurred to gain continued use of the product, and not to avert an imminent real and substantial danger.

The key takeaway from *Palmer* and *North* for product liability and class actions defendants and their counsel is that certification may be defeated where a plaintiff claims losses that are not legally recoverable or which are insufficiently substantiated. In such cases, defence counsel must draw on their experience and facility with the doctrines underpinning product liability cases.

²² 2025 ONCA 340. Fasken acted for the successful defendants in this matter.

²³ *Rego v. Bayerische Motoren Werke AG*, 2023 ONSC 5244.