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Product Liability Update: Q3 2024

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Key Product Liability Cases: Q3 2024 Update

The Product Liability and Mass Torts Group at McCarthy Tétrault LLP is pleased to bring you our analysis of recent decisions for businesses manufacturing or selling products in Canada:

1. The Ontario Superior Court of Justice clarifies implications for limitations periods in class actions and product liability cases: ***Gilani v. BMO Investments Inc., 2024 ONSC 3674***

2. The Ontario Superior Court of Justice provides a helpful explanation of when reliance can be certified as a common issue: ***Mackinnon v. Volkswagen Group Canada Inc., et al., 2024 ONSC 4988***

3. The British Columbia Court of Appeal highlights the potential liability of consulting firms for advice provided to their clients: ***McKinsey & Company, Inc. United States v. British Columbia, 2024 BCCA 27***

4. The Court of Appeal of Quebec clarifies the scope of the duty to warn: ***Reckitt Benckiser (Canada) inc. c. Société d'assurance Beneva inc. (La Capitale Assurances Générales Inc.), 2024 QCCA 958***

**This publication is for general information only and is not intended to provide legal advice.*

The Ontario Superior Court of Justice clarifies implications for limitations periods in class actions and product liability cases: *Gilani v. BMO Investments Inc., 2024 ONSC 3674*

The Ontario Superior Court of Justice recently clarified the application of section 28 of the *Class Proceedings Act, 1992*[1] that will have implications for all class actions, including product liability matters: it does not suspend limitations periods for potential or putative class members.

Background

In 2021, a class of unitholders in mutual funds alleged that the defendants had improperly paid "trailing commissions" to their brokers. Because these commissions were still being paid as of the date of the certification hearing, the plaintiff argued that the class definition should include individuals who became holders even *after* the date of the certification order. Otherwise, some people might be arbitrarily excluded from the class because they started holding units only after the date of the certification order.

Ultimately, the certification judge disagreed and certified a class comprised of individuals who were unitholders as of the date of the certification order (May 18, 2021).

However, the court was alive to the possibility of new class members emerging after the date of the certification order, and the certification judge wrote that if the trailing commissions continued to be paid after the date of the certification order, the plaintiff could return to court with a new motion to certify. The court noted that the class definition was "without prejudice to the definition being amended from time to time by a new motion to certify, which, if granted, would be followed by a notice program.[2]"

Two years later, the plaintiff returned to court and sought to amend the class definition to include later unitholders. The defendants argued that these individuals' claims were statute-barred due to the expiry of the two-year limitation period.[3]

The plaintiff relied on section 28 of the *Class Proceedings Act*,[4] which suspends "in favour of a class member" any limitation period that would otherwise apply to a cause of action asserted in a class proceeding.

The question for the court was whether section 28 suspends limitations periods for *putative* class members, i.e., those people who would meet all the criteria for membership in the class proposed in the pleading, but who are not yet part of the class. Or, in the context of the case, those people who became unitholders after May 18, 2021.

Outcome

The court held that section 28 did *not* suspend the limitations periods of the later unitholders — the putative class members. Individuals who acquired units after May 18, 2021 were not "class members" within the meaning of section 28 because they did not meet the criteria for being class members at the time the claim was certified —

[1] *Class Proceedings Act*, 1992, S.O. 1992, c. 6 ("*Class Proceedings Act*").

[2] *Gilani v. BMO Investments Inc.*, 2024 ONSC 3674, at para 6.

[3] *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 4.

[4] The case dealt with a pre-2020 amendment version of section 28, but the version in force after 2020 contains essentially the same relevant language.

they did not hold their units prior to May 18, 2021. Given the definition of the class, they were "strangers to the action."[5] Section 28 did not apply, and their claims could conceivably be statute-barred.

Despite this potential limitations issue, the court nevertheless agreed to amend the class period to include the later unitholders. It noted that the predominant approach in Ontario is to address limitation period defences at individual issues trials — not at certification. Therefore, the putative class members would be allowed into the class, and the defendant would be free to raise the issue of their claims being statute-barred at individual issues trials.[6]

Key Takeaways

1. Section 28 of the *Class Proceedings Act* only suspends limitation periods for individuals who meet all the criteria for class membership set by the certification order. It does not suspend limitation periods for potential or putative class members.

2. The Superior Court confirmed that, in Ontario, limitation period issues in relation to class members should generally be resolved during individual issues trials, not at certification.

[5] *Gilani v. BMO Investments Inc* at para 40.

[6] Ibid at para 64.

The Ontario Superior Court of Justice provides a helpful explanation of when reliance can be certified as a common issue: *Mackinnon v. Volkswagen Group Canada Inc., et al.*, 2024 ONSC 4988

In June, the Ontario Superior Court of Justice partly certified a class proceeding against Volkswagen and Audi over allegations that their diesel-powered vehicles ("TDI vehicles") were designed to subvert automobile emission regulations. The proposed class included TDI vehicle owners and lessees who were not included in previous TDI settlements in Ontario.

The Court provided a helpful explanation of when reliance — i.e., the question of whether class members actually relied on alleged misrepresentations about a product when deciding to buy or use it — can be certified as a common issue. The answer is: when the representations are "core," in the sense that they concern the product's core features. The level of emissions produced by TDI vehicles was not a sufficiently core feature of the vehicles to ground a "reliance" common issue.

Background

Since 2015, the TDI vehicles were the subject of criminal and regulatory fallout in both the U.S. and Canada. Volkswagen's German parent company admitted the use of "defeat devices" in U.S. criminal proceedings in 2015.

Ontario class proceedings were initiated in 2016 on behalf of some TDI vehicle owners and lessees. Those proceedings were settled in 2017 for $2.1 billion.

The excluded TDI vehicle owners and lessees then commenced a separate class proceeding, *Mackinnon v. Volkswagen*, in 2017.

Mackinnon has had a storied history through the Ontario courts. It was first denied certification in 2021, but was revived by an appellate decision in 2022 and sent back to the Superior Court for a re-hearing on all issues "apart from the question of whether the proposed class suffered harm and the question of whether there is a plausible methodology for measuring damages on a class-wide basis."

The common issues proposed in the revived version of *Mackinnon* related to negligent misrepresentation and deceit/fraud in respect of the emissions, breach of warranty, conspiracy, unjust enrichment, and breach of environmental, competition, and consumer protection statutes.

Outcome

The Court certified certain common issues and denied certification to others. Some of those issues denied certification were denied because they would have required the court to decide whether class members relied on alleged misrepresentations about the TDI defeat devices in deciding to use or purchase them.

Reliance is rarely a permissible common issue and, in this case, the question of whether any class member relied on representations about the level of emissions produced by a TDI vehicle was an individual issue, not a common one.

Normally, whether a purchaser relied on any given misrepresentation will depend on the individual history and proclivities of the purchaser. Different purchasers have different reasons for purchasing a product. Their reasons can only be determined individually, and so reliance cannot be a common issue.

However, the Court held that when plaintiffs allege that they purchased a product because the defendant misrepresented "core" parts of the product, their reliance on that misrepresentation might be a common issue.

A “core” misrepresentation is sufficiently important to all purchasers of the product that purchasers’ reliance on it can be dealt with in common. The TDI vehicles were represented to have features that might have been considered “core” to vehicles — they could drive occupants from place to place, for example. But those representations were not the basis of the class proceeding. Instead, the class proceeding was about misrepresentation about the level of emissions produced by a TDI vehicle. Emissions production is not sufficiently “core” to the vehicle to ground reliance as a common issue.[7] Since reliance could not be certified in common, any cause of action involving reliance could not be certified and, therefore, the court declined to certify a number of common issues dealing with misrepresentation and the consumer protection statutes of most provinces (although not Ontario or Manitoba).

The Court certified other issues that did not involve reliance.

Key Takeaway

1. A court may certify common issues dealing with reliance on “core” misrepresentations. Otherwise, whether plaintiffs actually relied on alleged misrepresentations will likely be an individual, not a common issue.

[7] *Mackinnon v. Volkswagen* at para 198.

The British Columbia Court of Appeal highlights the potential liability of consulting firms for advice provided to their clients: *McKinsey & Company, Inc. United States v. British Columbia*, 2024 BCCA 277

The British Columbia Court of Appeal refused to strike claims against entities under the McKinsey & Company banner ("McKinsey") in respect of marketing services and advice McKinsey provided to pharmaceutical clients.

Background

In 2021, British Columbia ("BC") commenced a claim against McKinsey relating to advice and services that McKinsey allegedly provided to pharmaceutical clients.

BC contended that McKinsey helped its clients disseminate misleading information about opioid medicines' risks and benefits, knowing that the information was misleading. BC likened McKinsey's role to that of a manufacturer or distributor of opioid medicines and alleged McKinsey's knowledge and close relationship with pharmaceutical companies meant that McKinsey owed a duty of care to end-users of opioid medicines.

BC's claim was brought under the *Opioid Damages and Health Care Costs Recovery Act*, S.B.C. 2018, c. 35 ("*ORA*"), which required BC to prove that McKinsey either committed a tort in BC or breached a common law, equitable, or statutory duty or obligation owed to persons in BC.[8]

McKinsey applied to strike the claims against it. McKinsey argued that it had simply advised its clients (the pharmaceutical companies). McKinsey argued that the clients, not McKinsey, owed the alleged duties of care and had made the alleged misrepresentations. Therefore, since McKinsey owed no duty of care and made no misrepresentations, it did not breach any duty or commit any tort, and was not liable under the *ORA*.

McKinsey's application to strike was dismissed by the Supreme Court of British Columbia in 2022. The Supreme Court noted that McKinsey was highly "integrated" with its pharmaceutical clients and had a high level of control over their promotion of opioids. Given this integration, it was not plain and obvious that McKinsey owed no duty of care to end-users of opioid medicines.

On appeal, McKinsey argued again that it owed no duty of care to end-users of opioid medicines and had made no misrepresentations.

Outcome

The Court of Appeal dismissed McKinsey's appeal.

The Court held that BC had pleaded sufficient material facts to raise the issue of whether McKinsey was involved in making misrepresentations. BC alleged a close relationship between McKinsey and its clients that, in effect, meant that McKinsey was making the representations *together* with its clients. Whether BC's claims were true would need to be determined at trial; it would be premature to strike them.[9]

The Court also held that it was premature to conclude that McKinsey did not owe a duty of care to end-users of opioid medicines. BC alleged that McKinsey had played a role in promoting opioid medicines to end-user consumers. McKinsey allegedly advised its clients on how to make misrepresentations it knew or should have

[8] BC also brought claims for breach of the *Competition Act* and for group liability (conspiracy, common design, and joint liability) under the ORA, but these claims are not considered here.

[9] *McKinsey & Company, Inc. United States v. British Columbia* at para 33.

known would lead to injury. In the Court's view, the question of whether McKinsey actually owed a duty would depend on facts that would emerge at trial, including how closely it worked with its clients, and the degree to which it coached its clients to actually make the alleged misrepresentations.[10]

Key Takeaways

1. The case highlights the potential liability of consulting firms for advice provided to their clients, at least under BC's opioid cost-recovery legislation. While McKinsey did not directly manufacture or distribute opioid medicines, its role in advising pharmaceutical companies on marketing and promotion was found to create an arguable case that it owed the end-users a duty of care.

2. Consulting firms should develop effective risk management strategies to identify and mitigate potential risks associated with their work. This may involve conducting risk assessments, developing contingency plans, and monitoring the impact of their advice over time.

[10] *McKinsey & Company, Inc. United States v. British Columbia*, at para 52.

The Court of Appeal of Quebec clarifies the scope of the duty to warn: *Reckitt Benckiser (Canada) inc. c. Société d'assurance Beneva inc. (La Capitale Assurances Générales Inc.)*, 2024 QCCA 958

The Court of Appeal of Quebec has found that a product manufacturer's duty to warn under Quebec law requires it to warn of "common sense" safety risks.

Background

Two insured homeowners left a bottle of Lysol Advanced toilet bowl cleaner underneath their sink with the cap partially open, causing it to emanate chlorine fumes that corroded a flexible pipe and caused water damage to the home.

The company insuring the home, Beneva Insurance Company Inc., sued the manufacturer of Lysol Advanced, Reckitt Benckiser (Canada) Inc. ("Reckitt"), for failing to warn of the risks of Lysol Advance.[11]

The bottle for Lysol Advanced displayed the prominent warning: "Keep the container tightly closed in a cool, well-ventilated place."

At trial, the Superior Court of Quebec concluded that Reckitt failed to warn the public of the specific risks Lysol Advance posed to metals and the means of protecting against those risks. Reckitt appealed, arguing, among other things, that the insured homeowners failed to take the basic, common sense precautionary measure of closing the bottle, which they should have done even had there been no warnings on the bottle at all.

Outcome

The Court of Appeal dismissed the appeal.

The Court summarized the principles governing a manufacturer's duty to warn in Quebec, including that the manufacturer's obligation to warn "increases in intensity with the danger and risk associated with the product and with the severity of the possible consequences of the safety defect." Further, a manufacturer must inform both that a safety risk exists, and how to avoid it. The generalized Lysol Advanced warning about keeping the lid closed was not sufficient because it did not inform users of the specific risk of metal corrosion or how to avoid it.

The fact that it is "common sense" to close a container was not sufficient to satisfy the manufacturer's duty to warn in light of the dangerousness of Lysol Advanced. The Court averted to its earlier decision in *Imperial Tobacco*,[12] in which it held that "the victim who does not have the required information, which the manufacturer should have provided, cannot be blamed for having failed to take the precautions which would have been necessary if he had been duly informed."

Key Takeaway

1. Under Quebec law, product manufacturer cannot invoke "common sense" as an excuse to exonerate itself from liability for harm caused to users during the use of its product.

[11] The manufacturer of the pipe was also sued, but the findings against that manufacturer are not considered here.

[12] *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358, par. 361.

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About McCarthy Tétrault's Product Liability and Mass Torts Group

Product liability and mass tort claims are among the most serious challenges an organization can face. When the survival of a brand or a business hangs in the balance, the world's leading companies turn to McCarthy Tétrault. Our deep bench strength and expertise across Canada allows us to help our clients navigate their most complex product liability and mass tort challenges from start to finish. We act for companies in a wide range of matters and industries, including medical products and devices, consumer products and services, transportation and automotive products, toxic chemical and environmental matters, and catastrophic events. Our firm's integrated, industry-focused approach allows us to anticipate issues and help prevent and contain product liability and mass tort lawsuits before they begin.

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