Food and Supplement Class Actions

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Introduction

This paper reviews recent Canadian developments in relation to false labelling class actions in the food and beverage industry.

In theory, there are many reasons why this should be an active area of practice for plaintiffs' lawyers in Canada. There has been a significant volume of U.S. cases which have settled for sizeable amounts. Many Canadian plaintiffs' lawyers have informal or formal relationships with prominent U.S. plaintiff firms. There is a large influx of U.S. and foreign products into Canada. While damages in Canada are not generally as great as in the U.S., such cases could still provide substantial recovery to large groups of purchasers. Further, documentary discovery rights in Canada can occur in parallel with those in U.S. proceedings.

In reality, the experience has been markedly different. There have been far more U.S. class actions in these areas than in Canada. This is likely due in large part to the different regulatory environment in Canada. For example, Canadian legislation sets out the specific requirements for ingredients and health claims such as that foods are "natural." As in many other areas of class action litigation in Canada, copycat litigation based on previously filed and/or U.S. claims is significant. However, the Canadian false labelling class action experience is in its relative infancy.

This paper will conclude with consideration of some defensive strategies relevant to this sector.

A. The Canadian Statutory Framework

1. Class Action Legislation

By way of background, the following are some differences in the Canadian and U.S. class action procedures relating to certification.

The class actions process in Canada does not mirror the MDL system in the U.S. Virtually all actions are initiated in multiple provinces, pursuant to provincial class action statutes. The certification requirements in most provinces are similar.

Section 5 of Ontario's *Class Proceedings Act* (*Class Proceedings Act, 1992*, SO 1992, c 6) sets out the following five criteria for certification:

(a) the pleadings must disclose a cause of action;

(b) there must be an identifiable class of at least two persons;

(c) the claims must raise common issues;

(d) a class proceeding would be the preferred procedure; and

(e) the representative plaintiff would fairly represent the interest of the class, and has produced a plan to advance the proceedings.

It is important to note that there is no requirement in Canada that the common issues predominate over the individual issues.

The Supreme Court of Canada has held that where all of the requirements of section 5 of the *Class Proceedings Act* are met, the motions judge is required to grant certification. For the first requirement, i.e. whether the pleadings disclose a cause of action, the standard is whether it is plain and obvious that a given cause of action could not succeed. The burden of proof for the remaining four requirements has traditionally been considered easily met; all the plaintiffs need demonstrate is that there is "some basis in fact" for each (*Hollick v Toronto (City)*, 2001 SCC 68 (Can)). As a result, it is generally considered that it is relatively easy to certify class actions in Canada.

In the context of Canadian false labelling class actions, the claims of the class generally include claims under federal competition law and provincial consumer protection laws.

2. *Federal Competition Law*

The federal *Competition Act* (*Competition Act*, RSC 1985, c C-34) provides a comprehensive scheme for the regulation of business practices in Canada to ensure fairness and efficiency. Of particular

relevance in this context is section 52(1) of the *Competition Act*, which prohibits knowingly or recklessly making a representation to the public that is false or misleading in a material respect. Pursuant to this section, a person convicted is liable for a fine in the discretion of the Court and/or imprisonment for a term not exceeding fourteen years.

3. Provincial Consumer Protection Laws

Provincial consumer protection laws, such as the *Consumer Protection Act (Ontario)* (*Consumer Protection Act*, 2002, SO 2002, c 30, Sch A), the *Consumer Protection Act (Quebec)* (*Consumer Protection Act*, CQLR, c P-40.1), British Columbia's *Business Practices and Consumer Protection Act* (*Business Practices and Consumer Protection Act*, SBC 2004, c 2), and Alberta's *Fair Trading Act* (*Fair Trading Act*, RSA 2000, c F-2), are designed to protect the rights of consumers, as well as to ensure fair trade, competition, and accurate information in the marketplace. These statutes frequently form the basis of false labelling class actions claims.

Section 17 of the *Consumer Protection Act (Ontario)* prohibits any person from engaging in an "unfair practice" in respect of a consumer transaction in Ontario. Section 14 of the statute defines "unfair practice" to include making a false, misleading or deceptive representation, which includes making a "representation that the goods or services have ... performance characteristics, ... ingredients, benefits or qualities they do not have." Section 18 of the statute allows the consumer, if rescission is not available, to receive the amount of payment that exceeds the value of the goods or services and/or to recover damages, the latter of which can include exemplary or punitive damages. Section 18 further states that each person who engaged in an unfair practice is liable jointly and severally with other persons who entered into the agreement with the consumer.

Section 219 of the *Consumer Protection Act (Quebec)* prohibits merchants, manufacturers and advertisers from making false or misleading representations to a consumer. Section 272 of this statute allows the consumer to rescind or set aside the contract, and to also claim punitive damages against the merchant, manufacturer, or advertiser. Further, under section 278 of this statute, a merchant, manufacturer, or advertiser may face a fine of $2,000 to $100,000 for the first infringement of the statute, and $4,000 to $200,000 for each subsequent infringement.

Section 5 of British Columbia's *Business Practices and Consumer Protection Act* prohibits a supplier of goods or services from committing or engaging in a "deceptive act or practice" in respect of a consumer transaction. Section 4 of the statute defines a "deceptive act or practice" to include "an oral, written, visual, descriptive or other representation by a supplier ... that has the capability, tendency or effect of deceiving or misleading a consumer." Under section 172 of this statute, an interim or permanent injunction restraining the supplier from contravening the statute is available. Further, this section also allows the Court to order that the supplier restore any money that was acquired due to the contravention of the statute. Section 190 of the statute states that any individual who commits an offence under the Act is liable to a fine of no more than $10,000 or imprisonment for no longer than 12 months, or to both. A corporation that commits an offence under this statute is liable to a fine of not more than $100,000. However, it is important to note that subsection (3) of section 190 states that "the court may increase a fine imposed under this section by an amount of up to 3 times the court's estimation of the amount of monetary benefit acquired or accrued as a result of the commission of the offence." Section 189(2)(a) lists the contravention of section 5(1), "deceptive act or practice," as an offence.

Under section 6 of Alberta's *Fair Trading Act*, it is an offence for a provider, producer, or supplier of a good or service to engage in an "unfair practice." The statute defines "unfair practice" as including "to use exaggeration, innuendo or ambiguity as to a material fact," "doing or saying anything that might reasonably deceive or mislead a consumer," and representing "that goods or services have ... characteristics, ... ingredients, ... uses, benefits or other attributes that they do not have." If a consumer has suffered damage or loss due to an unfair practice, under section 13 of the statute, the Court of Queen's Bench in Alberta may declare that the practice is an unfair practice, award damages for damage or loss suffered, award punitive or exemplary damages, make an order for specific performance/restitution of property or funds/rescission, grant an order in the nature of an injunction restraining the supplier from engaging in the unfair practice, or make any directions and grant any other relief the court considers proper. Under section 164(1) of this Act, any person who is convicted of an offence is liable to a fine of not more than $300,000 or three times the amount obtained by the defendant as a result of the offence, whichever is greater, or to imprisonment for no longer than two years, or both. Subsection (2) states that each day an offence continues constitutes a separate offence, with the total term of imprison-

ment imposed in respect of a continuing offence not exceeding two years. Section 161(a) lists contravention of section 6 as an offence.

4. Food Legislation

Canadian legislation is very detailed and specific in relation to "health-related" food claims.

Food and Drugs Act (RSC 1985, c F-27)

Pursuant to the *Food and Drugs Act*, section 5(1):

> No person shall [...] advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

Chapter 879 of Health Canada's *Guide to Food Labelling and Advertising* classes health claims into 4 categories: (i) disease risk reduction claims; (ii) therapeutic claims; (iii) function claims; and (iv) general health claims.

Disease risk reduction claims link a food to a reduced risk of developing a diet related disease. Four disease risk reduction claims are currently authorized by Health Canada: (i) sodium to reduce risk of hypertension; (ii) fruits, vegetables to reduce risk of cancer; (iii) calcium to reduce risk of osteoporosis; and (iv) saturated and trans fats to reduce the risk of coronary heart disease.

Therapeutic claims link a food to the treatment or mitigation of a disease or health related condition. Five therapeutic claims are currently authorized by Health Canada: (i) barley products and lowering blood cholesterol; (ii) unsaturated fat and lowering blood cholesterol; (iii) psyllium products and lowering blood cholesterol; (iv) oat products and lowering blood cholesterol; and (v) plant sterols and lowering blood cholesterol.

Function claims link a food to the benefits it has on normal growth, development and functions of the body. Three function claims are currently authorized by Health Canada: (i) coarse wheat bran and laxation; (ii) green tea and its antioxidant effect on blood; and (iii) psyllium and laxation.

For all of these, Health Canada helpfully provides specific language to manufacturers and suppliers.

In terms of other health claims, the legislation is explicit:

(a) Foods can be described as "nutritious," "wholesome," or "good for you" if they are a source (5%) of at least one nutrient;

(b) Foods can be described as "part of a healthy eating," a "healthy choice," or "better for you" if accompanied by a linking statement relating the food to a pattern of eating recommended in Health Canada's *Eating Well with Canada's Food Guide*; and

(c) Foods can be described as "natural" if they do not contain an added vitamin, mineral, artificial flavouring or additive, and have not been submitted to a process that has significantly altered its original physical, chemical or biological state.

Safe Food for Canadians Act, SC 2012, c 24 (SFCA) (not yet in force)

The *Safe Food for Canadians Act* consolidates four food-related federal statutes to improve oversight and enforcement of Canada's food safety system. These federal statutes are: the *Canada Agricultural Products Act* (RSC 1985, c 20 (4th Supp.)), *Fish Inspection Act* (RSC 1985, c F-12), *Meat Inspection Act* (RSC 1985, c 25 (1st Supp.)), and food related enforcement provisions of the *Consumer Packaging and Labelling Act* (RSC 1985, c C-38). It was enacted in November 2012, and is set to come into force "on a day to be fixed by order of the Governor in Council" (s 111). The SFCA will give the Canadian Food Inspection Agency (CFIA) broad administrative and enforcement powers to require licensing and a preventative control plan, block sales, and prohibit importation of unsafe products.

While the statute focuses on safety, section 6(1) of the Act specifically refers to food labelling:

> It is prohibited for a person to manufacture, prepare, package, label, sell, import or advertise a food commodity in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, quality, value, quantity, composition, merit, safety or origin or the method of its manufacture or preparation.

The Act sets out strict penalties for contravening provisions of the SFCA. Section 39(1) of the SFCA states:

> A person who contravenes a provision of this Act, other than sections 7 and 9, or a provision of the regulations – or fails to do anything the person was ordered to do by, or does anything the person was ordered not to do by, the Minister or an inspector under this Act other than subsection 32(1) – is guilty of an offence and is liable
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> (a) on conviction on indictment, to a fine of not more than $5,000,000 or to imprisonment for a term of not more than two years or to both; or
>
> (b) on summary conviction, for a first offence, to a fine of not more than $250,000 or to imprisonment for a term of not more than six months or to both and, for a subsequent offence, to a fine of not more than $500,000 or to imprisonment for a term of not more than 18 months or to both.

Upon coming into force, the food industry in Canada will be subject to two regulatory regimes: the *Food and Drugs Act* and the SFCA. As such, it will be imperative for manufacturers and suppliers to pay attention to when the SFCA comes into force such that they ensure their compliance with the provisions and regulations.

B. Copycat Cases

1. Food and Beverage Products

More often than not, Canadian food and beverage false labelling claims are copycat cases, based on previously filed class action lawsuits in the U.S. The following are some notable copycat class action claims in this area in Canada.

Vitaminwater®

A putative class action concerning Coca-Cola's Vitaminwater® product was filed in January, 2011 in British Columbia. The action was based on allegations of deceptive and unfair trade practice in the marketing of the Vitaminwater® product as a healthy beverage. The claim was that a standard 591 ml. bottle of Vitaminwater®, which

contained 32 grams of added sugar, could not be healthy. In March, 2011 a similar class action was filed in Quebec.

These class actions were filed after a similar U.S. class action, *Ackerman et al. v The Coca-Cola Company and Energy Brands Inc.*, was initiated in January 2009. In the U.S. class action, the presiding New York District Court Judge denied class certification, finding that "[p]roof that each class member paid a premium for Vitaminwater® over another beverage would not be susceptible to generalized proof" (EDNY, No. 09-00395 at 43).

The Canadian lawsuits were also denied certification.

In the Quebec lawsuit (*Wilkinson v Coca-Cola Ltd.*, 2014 QCCS 2631, the Court found that (i) the lawsuit contained unsupported hypotheses; (ii) the respondents' practices conformed with applicable laws and legislation; and, similar to the U.S. lawsuit, (iii) the class could not show that they suffered any prejudice. Further, the Court found that the class representative did not adequately represent the class.

In the British Columbia class action (*Clark v Energy Brands Inc.*, 2014 BCSC 1891), the plaintiff alleged the deceptive marketing of Vitaminwater® had inflated the price charged by the defendants to wholesalers and retailers, and thus the price paid by consumers. However, the Court found that there had been no clear pleading of a plausible and complete theory of loss or damage. Further, and similar to the finding in the Quebec class action, the Court found that the class representative did not adequately represent the class, as the claims "are inherently variable and individualistic both as to reliance and as to potential loss or damage" and the "management of such claims would be difficult if not impossible within the context of a class action" (at para 152).

Activia® and DanActive®

A class action concerning Danone's Activia® and DanActive® products was filed in Quebec in October 2009. The plaintiffs claimed that Danone made misrepresentations of the performance characteristics and benefits of the two products, namely that its proprietary strains of probiotic bacteria delivered unique or exclusive health benefits.

This class action followed a similar U.S. class action, *Gemelas v the Dannon Company, Inc.*, which was filed in November 2008, and settled in September 2009.

The Quebec class action was certified (*Sonego c Danone Inc.*, 2013 QCCS 2616), and ultimately settled on February 26, 2013. As part of the settlement, each class member received between $30 and $100, and Danone agreed to donate $500,000 worth of product to charity.

Vita Coco® Coconut Water

In February 2012, a class action was commenced in Quebec alleging that the labelling of All Market Inc.'s product Vita Coco® Coconut Water had misrepresented the characteristics of its sodium, magnesium, and potassium content and its ability to hydrate more effectively than less expensive sports drinks.

This class action came after the similar U.S. class action, *Fishbein v All Market Inc.*, Case No. 11-CV-05580, was filed in August 2011. All Market Inc. settled the U.S. class action lawsuit for an estimated USD $10 million, offering members of the class USD $25 in cash of $36 in product vouchers, and a donation of USD $3 million worth of products to various charitable institutions.

The Quebec Superior Court approved the Quebec settlement agreement in January 2013. As part of the settlement, All Market paid each class member between $6 and $25 each. Further, All Market agreed to modify the labels, advertising and communications relating to Vita Coco® coconut water sold in Canada.

Energy Drinks

On May 7, 2009, six Ontario class actions were brought against the Coca-Cola, Monster, Pepsi-Cola, Red Bull, Rockstar, and Wet Planet beverage companies by the same plaintiff. These claims concerned the lack of adverse reactions associated with the consumption of energy drinks identified on the labels of the energy drinks.

Although not a direct copycat case, these Ontario class actions mirrored various class actions currently being pursued in the U.S. concerning alleged fraudulent energy drink labelling, such as *Fisher*

v Monster Beverage Corp et al., Case No. 12-CV-02188, and *Adam Mirabella v Vital Pharmaceuticals*, Case No. 12-62086 (relating to the "Redline" energy drink).

There has been no subsequent activity in the six Ontario class actions since the filing of the statements of claim.

2. Natural Health Products/Supplements

Natural Health Products (NHPs) and other food supplements are an increasingly popular choice among Canadians. In a 2011 Natural Health Product survey conducted by Health Canada and published by Ipsos Reid, 73% of Canadians regularly take NHPs, equalling roughly twenty-five million people. The primary reasons given in the survey for taking NHPs included health maintenance, illness prevention, and that NHPs were healthier than pharmaceutical products.

Despite their popularity, there is a significant degree of skepticism among Canadians regarding the safety and efficacy of NHPs. According to the same 2011 survey, 39% of Canadians are concerned about the safety of NHPs, with 49% agreeing that health claims made by NHP manufacturers are unproven. Indeed, most Canadians preferred receiving information about NHPs through a physician or pharmacist, rather than NHP retailers or manufacturers, citing a lack of credibility among the latter.

Natural Health Products Regulations

Section 1(1) of the *Natural Health Products Regulations*, SOR/2003-196 defines the meaning of Natural Health Product. An NHP is:

> [...] a substance set out in Schedule 1 or a combination of substances in which all the medicinal ingredients are substances set out in Schedule 1, a homeopathic medicine or a traditional medicine, that is manufactured, sold or represented for use in
>
> (a) the diagnosis, treatment, mitigation or prevention of a disease, disorder or abnormal physical state or its symptoms in humans;
>
> (b) restoring or correcting organic functions in humans; or

(c) modifying organic functions in humans, such as modifying those functions in a manner that maintains or promotes health.

Schedule 1 lists the following substances as those that can be included in a Natural Health Product:

(1) a plant, algae, bacterium, fungus or non-human animal material, or an extract thereof,

(2) a vitamin,

(3) an amino acid,

(4) an essential fatty acid,

(5) a synthetic duplicate of any of the above,

(6) a mineral,

(7) a probiotic,

(8) a homeopathic or traditional medicine.

Pursuant to section 5 of the *Regulations*, in order for a product to classify as a Natural Health Product, an application for a product licence must be submitted to the Minister, and must include "recommended conditions for use." These recommended conditions for use are defined in the *Regulations* as the product's purpose; dosage form; route of administration; duration of use; and risk information, including cautions, warnings, contraindications and known adverse reactions. Once the product licence is approved and issued by Health Canada, these "recommended conditions for use" become the Terms of Market Authorization (TMA). The TMA are the measuring stick against which promotional claims will be assessed. Any advertising claims that are inconsistent with the TMA may be considered to be misleading. As such, any "recommended conditions for use" submitted with the product licence application should be crafted with product claims in mind.

Food and Drugs Act Advertising Prohibition

The *Food and Drugs Act* contains two sections, s 3(1) and s 9(1) that directly relate to the advertising of Natural Health Products.

> s. 3(1) No person shall advertise any [...] drug to the general public as a treatment, preventative or cure for any of the diseases, disorders or abnormal physical states referred to in Schedule A.

Schedule A lists twenty-nine conditions, which include acute anxiety; asthma; cancer; depression; and obesity. Under the NHP *Regulations*, NHPs are exempt from this provision insofar as preventative claims for these conditions are permitted.

> s. 9(1) No person shall advertise any [...] drug in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

Health Canada has issued the *Consumer Advertising Guidelines for Marketed Health Products (for Non-prescription Drugs including Natural Health Products)* as a guidance document for the advertising of Natural Health Products. This document sets out Health Canada's rules relating to over thirty types of product claims and risk disclosures. While the *Advertising Guidelines* is not law, it is an indication of how Health Canada applies the threshold test of creating "an erroneous impression." All advertising claims made against a Natural Health Product are measured against the specific NHP's Terms of Market Authorization.

3. Natural Health Product Class Actions

Hydroxycut®

In May 2009, an Ontario class action concerning the Hydroxycut® product was filed against Iovate Health Sciences Inc. and HDM Formulations Inc. This class action alleged the defendants made misleading representations about the Hydroxycut® product's ability to act as a weight loss supplement, and the defendant's failure to list possible adverse reactions on the labelling of the product.

This class action was similar to the U.S. class action *In Re Hydroxycut Marketing & Sales Practices Lit.* filed in December 2009. The U.S. class action settlement agreement was approved by the Court in November 2014. Class members received either a cash payment ranging from $15 to double the value of their Hydroxycut® product, or an alternative product worth at least $25.

The settlement of the Ontario class action was approved by the Ontario Superior Court of Justice on October 7, 2015. As part of the settlement, eligible class members are able to make a claim, depending on their losses, for up to $250,000, plus $50,000 per spouse and minor child. The defendants were ordered to pay $2 million to satisfy the claims.

Oscillo®

In April 2012, a Quebec class action concerning the product Oscillococcinum or Oscillo was launched against Boiron Inc. The class action concerned statements made by Boiron Inc. that "Oscillo reduces the severity and duration of flu-like symptoms," and alleged that Oscillo contains no active ingredients, and has no effect on flus, colds or their symptoms.

This class action was filed after a similar U.S. class action, *Gonzales v Boiron Inc., et al.*, was filed in August 2011. Another U.S. class action concerning similar claims against Boiron Inc., *Gallucci v Boiron Inc., et al.*, had been filed in September 2011, and was settled in October 2012. As part of the *Gallucci* settlement each class member received USD $10 to $100, to a maximum of USD $5 million.

The court of first instance in the Quebec class action rejected certification. However, this ruling was set aside on appeal (*Charles v Boiron Canada Inc.*, 2015 QCCS 312). The Court of Appeal found that the trial judge made two errors in refusing to certify. First, the reliance on compliance with a regulatory regime (approval by Health Canada) could not be used in and of itself to exempt the defendant from liability for false and/or misleading advertising. Second, the Court of Appeal found that any determination of efficacy of the product need not be made before trial, and that such determination was unnecessary at the class action certification stage. Both points underline the settled Canadian doctrine that it is premature at certification to make any determination on the arguable issues of the case; allegations contained in the class action must be taken as true at this stage unless contradicted by the evidence.

Children's Cough Syrup

While not a Natural Health Product, the class action regarding children's cough syrup that was filed in British Columbia in February

2010 is an interesting example of false labelling claims in this industry.

The class action was filed against a number of manufacturers, including Johnson & Johnson, McNeil Consumer Healthcare, Novartis Consumer Healthcare, Wyeth Consumer Healthcare, Pfizer, Trillium Health Care, Vita Health Products, and Proctor & Gamble. The suit alleged that the manufacturers had misrepresented their respective children's cough syrup products by omitting that they were not effective in children under the age of six.

Certification of the class action was granted at first instance (*Wakelam v Johnson & Johnson*, 2011 BCSC 1765), but was set aside on appeal (*Wakelam v Wyeth Consumer Healthcare*, 2014 BCCA 36).

The British Columbia Court of Appeal found that restitutionary remedies were not available under the *Business Practices and Consumer Protection Act* or the *Competition Act*. The Court held that section 36 of the *Competition Act* referred only to "the loss or damage proved to have been suffered" by the plaintiff.

The Court of Appeal also found that the plaintiff's pleadings were not sufficient to establish a causal connection between alleged deceptive acts and the loss or damages suffered by the plaintiff, as required when pleading a cause of action pursuant to section 52 of the *Competition Act*.

While the Court of Appeal did find that the pleadings requesting a declaration that the defendants had contravened the *Business Practices and Consumer Protection Act* and an injunction prohibiting further contravention under section 172 of the *Business Practices and Consumer Protection Act* were acceptable, this was not sufficient to certify the class action. Leave to appeal to the Supreme Court of Canada was denied.

Conclusion

Compared to the volume of U.S. class actions in this area, the Canadian jurisprudence is very limited. Relatively few cases have been brought and even fewer have proceeded to certification. As a result, there is no established judicial record of contested certification in Canada relating to false labelling claims in these industries.

What accounts for this low level of activity? A key difference is that, unlike the U.S. experience, the Canadian labelling regulatory regime is statutorily driven. While in the U.S. terms such as "healthy" are undefined and therefore the ambiguity serves as a catalyst for litigation, the Canadian legislative landscape is specific in terms of items such as permitted ingredients and health claims.

What do manufacturers and suppliers need to be warned about? Clients must be sure to focus their attention and have accurate information on the ingredients in their products and where they come from (including have done their due diligence on suppliers). Of course, it is imperative that labels and advertising be in strict compliance with all statutory and regulatory requirements. However, it is also important to note the recent case of *Infineon Technologies AG c Option consommateurs*, 2013 CSC 59, which affirmed that compliance with a statutory norm does not exempt a party from liability for a civil fault. Labelling and claims about products should accord with a "common sense" point of view, in terms of the expectations of reasonable consumers. Of course, it is imperative that companies ensure that they are completely accurate with consumers about ingredients, nutritional value, and mode of manufacture.

What lessons have been learned from these cases by counsel defending these class actions? It is clear that Canadian courts are carefully scrutinizing the pleadings, and errors or gaps have proven fatal to certification for many claims. Accordingly, attacks based on lack of clarity of the pleadings, with a focus on the specific alleged misrepresentation, the precise statutory breaches, and the connection between alleged acts and the damages caused, are of key importance. As well, class certification criteria should be carefully considered, and defense counsel must scrutinize whether, in addition to demonstrating a cause of action, the claims raise common issues amongst the class that will advance the litigation. Other potential areas of argument are that the representative plaintiff is inadequate; the claims are variable and individualistic in terms of reliance; and the difficulty in managing the claims of the class members, and in showing loss or damages.

Common law causes of action can pose difficulties in terms of certification, since they involve individual determinations of reliance and causation, as evidenced in the Ontario case of *Singer v Schering-Plough* (2010 ONSC 42) which related to the mislabelling of sunscreen products. As well, the British Columbia case of *Wakelam v*

Johnson & Johnson (2011 BCSC 1765) which related to misrepresentations made about children's cough syrup, suggests that consumer protection legislation claims may be easier to certify than common law claims. It may also be that, based on the limited experience to date, Ontario courts are stricter on certification than British Columbia courts. On the other hand, British Columbia courts may find restitutionary remedies (such as waiver of tort, unjust enrichment, disgorgement and constructive trust) to be unavailable in situations where there has been a breach of the *Business Practices and Consumer Protection Act* or the *Competition Act*.

Manufacturers and suppliers in this area will always need to be vigilant about their labelling and marketing claims. However, it will be interesting to see whether false labelling claims achieve a greater prominence in Canada in the coming years than they have to date.

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