

# Blakes Bulletin

## Class Actions

### Important Developments in Class Action Law – Ontario Court Provides Relief from Burdens of Disgorgement and Punitive Damage Claims

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#### INTRODUCTION

On October 20, 2009, Justice Perell of the Ontario Superior Court released two decisions in class proceedings that provide some relief to defendants from the excessive burdens of class actions and that may signify a trend for future cases where a disgorgement remedy and punitive damages are claimed.

In *Peter et al. v. Medtronic et al.*, Justice Perell ordered bifurcation of the trial of a claim related to disgorgement of the company's revenues, so that the question of entitlement would be determined at the common issues trial, while a second trial would be held to determine quantum, if necessary. In *Robinson et al. v. Medtronic et al.*, released the same day, Justice Perell held that the question of entitlement to punitive damages should not be determined at the common issues trial, because the analysis of this question could not take place until after individual assessments of causation and compensatory damages had been made for each class member.

The primary consequence of the bifurcation order in *Peter et al. v. Medtronic et al.* is that the defendants can delay having to disclose confidential and commercially sensitive information related to the quantification issues until the plaintiffs have actually established entitlement. This should result in substantial savings of both time and cost for the defendants in these proceedings. Likewise, in cases where neither individual entitlement to compensatory damages or causation can be determined absent individual trials, based on *Robinson et al. v. Medtronic et al.*, defendants can argue that it is appropriate to delay both discovery and the determination of a claim to punitive damages until after these issues are resolved.

#### PETER ET AL. V. MEDTRONIC ET AL.

In *Peter et al. v. Medtronic et al.*, a class proceeding was previously certified against Medtronic based in negligence, conspiracy and waiver of tort in connection with an alleged defect in the batteries of defibrillators. The plaintiffs sought damages or, in the alternative, disgorgement of the defendants' revenue through waiver of tort. While six of the common issues certified related to the disgorgement remedy, two of those issues raised the question of quantification should entitlement to the remedy be found.

Following certification, Medtronic brought a motion to bifurcate, for purposes of discovery and the common issues trial, these common issues from those related to the question of entitlement to the remedy. In support of this claim, Medtronic argued that it would severely prejudice Medtronic to have these issues determined in advance of the determination of entitlement to the remedy.

At the time of Medtronic's motion, documentary disclosure had already begun. It was estimated that disclosure had already cost Medtronic C\$535,000 to date, and was likely to cost C\$300,000 more before disclosure was complete.

In the context of making document discovery, the plaintiffs had sought production from Medtronic of documents relevant to the quantification of the waiver of tort claim, including:

- financial statements for Medtronic Inc. and Medtronic of Canada Ltd., and any and all divisions of the above companies responsible for the design, development, marketing and sales of the devices
- detailed records regarding the sale of the devices, including sales figures and records of the distribution of sales throughout Canada
- documents detailing the allocated costs associated with the revenues and the basis for the allocation in respect of the devices, which may include research costs, raw material costs, overhead attributed to the devices, marketing and sales costs, and manufacturing costs, including labour costs and administrative costs

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- documents reflecting the source of sales revenues, including hospitals, insurance companies and revenues from each of the provincial health insurers.

In opposing these requests, Medtronic argued that the information sought was highly confidential, highly sensitive, and that disclosure would severely prejudice Medtronic's position in the marketplace if confidential information were disclosed to competitors and institutional authorities. Medtronic also retained a Canadian accounting firm, which provided evidence that the accounting of net revenue is a complex exercise that would require significant internal resources and the assistance of an external accounting expert, with an estimated cost in the range of C\$750,000 to C\$1.5-million in fees.

Despite the general rule that a multiplicity of proceedings should be avoided, Justice Perell found that this was one of those "extraordinary and rare" cases in which bifurcation would be fair and just. He granted Medtronic's motion and ordered that the discovery process and trial of the common issues related to quantification of the disgorgement remedy would not take place until after entitlement to the remedy was determined at trial.

Justice Perell found that the issues of entitlement and quantification could clearly be separated, that there were obvious advantages to all parties from having the entitlement issue determined first, that there would be a substantial saving of time and expense if bifurcation was granted, and that without divided discovery, the defendant was likely to suffer prejudice from the disclosure of confidential and commercially sensitive business information. He rejected the plaintiffs' arguments that Medtronic's interests in confidentiality would be adequately protected by the deemed undertaking rule and an interim confidentiality order.

It is also worth noting that Justice Perell rejected the plaintiffs' argument that Medtronic's motion constituted a collateral attack on the certification order of Justice Hoy. He characterized his decision to bifurcate the waiver of tort issue as consistent with the court's jurisdiction to revise the litigation plan in a class

proceeding, noting that the two common issues related to quantification would still be dealt with if the plaintiffs established entitlement to the remedy.

### **ROBINSON ET AL. V. MEDTRONIC ET AL.**

In *Robinson et al. v. Medtronic et al.*, the plaintiffs sought certification of a class action against Medtronic based in negligence, conspiracy and waiver of tort in connection with an alleged defect in defibrillator leads. While Justice Perell was prepared to partially and conditionally certify the action as a class action, he bifurcated the proposed common issues related to entitlement and quantification of waiver of tort for the reasons he set out in *Peter et al. v. Medtronic et al.*

Justice Perell also refused to certify as a common issue whether the defendants should pay punitive damages to the class, holding that such a determination could only be made after determination of both the common issue and individual trials. While Justice Perell accepted that the question of class entitlement to punitive damages has been certified in other class action cases, he held that the correct view of the law is that entitlement to and the quantification of punitive damages may only "...sometimes have the commonality necessary for a common issue." In this case, Justice Perell held that entitlement and quantification of punitive damages could not be done absent an appreciation of the extent of the harm caused by the defendants' conduct, if proven. Since neither individual causation nor entitlement to compensatory damages would be determined at the common issues trial, the pre-conditions necessary for determining entitlement to and the quantification of punitive damages were not met.

Justice Perell also held that the fact that class members may be found to be entitled to elect a disgorgement remedy at the common issues trial supported this analysis. If class members were found to be entitled to waive the tort, Justice Perell held that it may not be rational, proportionate or just to award punitive damages and, as such, it was appropriate to defer the determination of entitlement to punitive damages until after the common and individual trials had been held.

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### APPLICATION

These cases raise the possibility that other class action defendants facing disgorgement claims may seek bifurcation orders at a certification hearing which, depending on the circumstances, may significantly reduce disclosure costs and risks regarding the release of confidential information. It may also be possible to obtain such an order in an action that has already been certified, in light of the finding in *Peter et al. v. Medtronic et al.* that such a motion did not constitute a collateral attack on the certification decision.

The decision in *Robinson et al. v. Medtronic et al.* also raises the prospect of defendants arguing against the certification of punitive damages as a common issue in cases where neither individual causation nor entitlement to compensatory damages will be determined until after the individual issues phase of the action. It is hoped that both decisions signify a trend for future cases.

For further information on this matter, please contact any member of our national Class Actions Group listed below:

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