

**CITATION:** Price v. Smith & Wesson Corp., 2023 ONSC 6062  
**COURT FILE NO.:** CV-19-00632915-00CP  
**DATE:** 20231026

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
<b>SAMANTHA PRICE, SKYE MCLEOD,</b>	)	
<b>KENNETH PRICE, CLAIRE SMITH,</b>	)	<i>Malcolm Ruby, Adam Bazak, Emily Oladosu,</i>
<b>PATRICK MCLEOD, AND JANE</b>	)	<i>Michel W. Drapeau, and Joshua Juneau for</i>
<b>MCLEOD</b>	)	<i>the Plaintiffs</i>
Plaintiffs	)	
- and -	)	
	)	
<b>SMITH &amp; WESSON CORP.</b>	)	<i>Scott Maidment, Jennifer Dent and Anthony</i>
Defendant	)	<i>Labib for the Defendant</i>
	)	
Proceeding under the <i>Class Proceedings</i>	)	<b>HEARD:</b> October 16, 2023
<i>Act, 1992</i>	)	
	)	

**PERELL, J.**

**A. Introduction**

[1] There are two motions before the Court in this action pursuant to the *Class Proceedings Act, 1992*.<sup>1</sup>

[2] In this proposed class action under the *Class Proceedings Act, 1992*,<sup>2</sup> the Plaintiffs are: (a) Samantha Price, (b) her mother, Claire Smith, (c) her father, Kenneth Price, (d) Skye McLeod, (e) her father, Patrick McLeod and (f) her mother, Jane McLeod.

[3] The Defendant is Smith & Wesson Corp., the manufacturer of the M&P@40 semi-automatic handgun.

[4] The tragic events giving rise to the proposed class action, which events have come to be known as the “Danforth Shooting,” were that a M&P@40 handgun, which does not utilize “authorized user” or “smart gun” technology was stolen. The M&P@40 came into the hands of one Faisal Hussain, who, during the evening of Sunday July 22, 2018, walked along Danforth Avenue in Toronto, Ontario and randomly shot and killed two persons (aged 10 and 18), shot and injured 13 others, and injured dozens that suffered injuries as they fled the active-shooter scene.

---

<sup>1</sup> S.O. 1992, c. 6.

<sup>2</sup> S.O. 1992, c. 6.

The Danforth Shooting ended when, after exchanging gunfire with police officers, Mr. Hussain used the M&P®40 to kill himself.

[5] There is a five-day Certification Motion scheduled for January 22, 2024.

[6] In the first motion now before the Court, the Plaintiffs seek an Order granting them leave to file the Third and Fourth Supplementary Affidavits of Dr. Jooyoung Lee for the pending Certification Motion.

[7] In the second motion, the Plaintiffs seek an Order compelling Smith & Wesson to provide answers and documents in response to questions taken under advisement or refused by Dorota Smolarz during her cross-examination on August 9, 2023.

[8] For the reasons that follow, the motions are dismissed with costs to Smith & Wesson in any event of the Certification Motion.

## **B. Procedural Background**

[9] On **December 16, 2019**, the Plaintiffs commenced this action.

[10] On **August 17, 2020**, the Plaintiffs delivered an Amended Statement of Claim. The Plaintiffs advanced causes of action against Smith & Wesson for: (a) negligent design, manufacturer, and/or distribution; (b) public nuisance; and (c) strict liability.

[11] The Amended Claim asserted that Smith & Wesson was negligent in failing to incorporate any kind of safety mechanism in the handgun that would prevent unauthorized users, like the gunman, from firing the weapon. Authorized user technology involves “personalized firearm safety” measures that prevent unauthorized users from firing lost or stolen weapons. The Amended Statement of Claim alleges that Smith & Wesson’s familiarity with authorized user technology is reflected in the Authorized User Technology Agreement with the U.S. government signed in 2000. The Amended Claim alleged that it was reasonably foreseeable that Smith & Wesson products without authorized user technology, like the handgun used in the Danforth Shooting, would, in the hands of unauthorized users, cause substantial harm to members of the public. In support of the contention, the Amended Claim cites published statistical information showing a high rate of illegal handgun diversion and use of illegally diverted handguns to harm innocent third parties.

[12] On **July 6, 2020**, I issued a File Direction Order bifurcating the Certification Motion. The first stage of the certification motion would determine the cause of action criterion of the certification test under the *Class Proceedings Act, 1992* and a Rule 21 motion by Smith & Wesson seeking to strike the action as not disclosing a reasonable cause of action. If the cause of action criterion was satisfied, then the second stage would address the remaining four certification criteria.

[13] On **August 20, 2020**, the Plaintiffs delivered an Amended Statement of Claim.

[14] In the first phase of the certification motion, by reasons for decision dated **February 11, 2021**, I struck out the claims for public nuisance and strict liability. I concluded that the Plaintiffs’ cause of action for negligence satisfies the cause of action criterion for the certification of their class action. I dismissed Smith & Wesson’s Rule 21 motion to strike the design negligence cause of action.<sup>3</sup>

---

<sup>3</sup> *Price v. Smith & Wesson Corp.*, 2021 ONSC 1114.

[15] On **June 30, 2021**, the Plaintiffs delivered their motion record for the completion of the certification motion. For the certification motion, the Plaintiffs proposed the following common issues:

1. Was the Defendant negligent in failing to incorporate authorized user technology in the Handgun used in the Danforth Shooting?
2. Did the Plaintiffs and the proposed Classes suffer compensable harm resulting from the use of the Handgun in the Danforth Shooting?
3. Is the Defendant liable to family members within the meaning of section 61 of the *Family Law Act*, R.S.O., 1990, c. F.3, of all persons in Classes 1 and 2?
4. Is this an appropriate case to award punitive damages against the Defendant?
5. Is this an appropriate case for the Court to order an aggregate assessment of damages under section 24 of the *Class Proceedings Act, 1992*?

[16] The Plaintiffs' Certification motion was supported by the 412-page affidavit of the Plaintiff Kenneth R. Price dated June 28, 2021.

[17] On **October 5, 2021**, Smith & Wesson brought a motion for an order striking out: (a) paragraphs 19 to 25, including Exhibits "C" to "I"; and (b) paragraphs 29 to 34, including Exhibits "K1" through "L", of Mr. Price's affidavit. The impugned evidence proffered by Mr. Price was comprised of:

- a. various documents about firearm-related crime statistics;
- b. statements regarding the development of "authorized user technology" for firearms, and the U.S. patent process;
- c. seven U.S. patents and one U.S. prosecution history; and
- d. a copy of the Authorized User Technology Agreement signed in 2000. The copy was obtained from public corporate filings maintained by the U.S. Securities and Exchange Commission ("SEC").

[18] On **November 28, 2021**, the Plaintiffs brought a cross-motion seeking leave to admit for the certification motion the affidavit of Mark A. Chapman dated November 26, 2021. Mr. Chapman is an expert in U.S. patent law, including U.S. patent litigation. The Plaintiffs sought to proffer Mr. Chapman's evidence to respond to any potential technical concerns regarding admitting U.S. patent documents through a lay witness.

[19] On **December 24, 2021**, I granted Smith & Wesson's motion to strike various paragraphs of Mr. Price's affidavit and I granted the Plaintiffs leave to file additional expert's or experts' opinions, as they may be advised, in addition to Mr. Chapman's affidavit, with respect to the design aspects of their negligence claim.<sup>4</sup> I said it shall be for the expert(s) to explain the relevance of the foreign patents and the other evidence as some basis in fact for the alleged design defects. In my reasons for decision, I stated:

---

<sup>4</sup> *Price v. Smith & Wesson Corp.*, 2021 ONSC 8471.

*Design Negligence, Patents, and Authorized User Technology for Firearms*

76. With the above background, it is now possible to address, Smith & Wesson's submissions that Mr. Price's evidence about design negligence, patents, and authorized user technology should be struck.

[...]

79. During, the argument of the motion to strike, the Plaintiffs' counsel conceded that should the action be certified, there would be an expert testimony about the design defect. However, Plaintiffs' counsel submitted that at this pre-certification stage of the action, Mr. Price's layperson's evidence about the existence of the patents establishes some basis in fact for the common issue that there was design negligence. However, as I noted in the introduction to the analysis and discussion portion of these Reasons for Decision, I cannot make a determination of whether the mere existence of the patents establishes some basis in fact for the common issue that there was design negligence.

80 Mr. Price's layperson's evidence is valuable only in proving that there are alternate designs for handguns some of which utilize authorized user technology. Although the existence of these patents might be relevant to the determination of whether there was design negligence in the manufacture of the M&P®40 handgun, Mr. Price's testimony does not and cannot carry the probative analysis into the territory for which he has something meaningfully say about design negligence. An allegation of design negligence involves much more than the availability of alternative designs. The risk-utility analysis of a design negligence case raises complex engineering issues beyond the experience and knowledge of a lay person.

81. In other words, in the immediate case, it has to be someone other than a layperson to provide the factual logic and theory to explain why Smith & Wesson's having seven patents that utilized authorized user technology is some basis in fact that there is a common issue about design negligence. In the immediate case, an expert is required to connect the some-basis-in-fact dots about the design negligence common issue.

82. In this last regard, I need to make it clear that although I conclude it has to be someone other than Mr. Price to be the medium to provide the evidence to explain why Smith & Wesson's having seven patents that utilized authorized user technology is some basis in fact for a common issue of design negligence, I am making no final conclusion as to whether Mr. Chapman's expertise in patents is the required expertise to show some basis in fact of design negligence.

83. My tentative view, however, is that although Mr. Chapman's evidence may be relevant and helpful to the some-basis-in-fact determination, his expertise may be just ancillary to the expertise that is actually required for the certification of the action and that ultimately will be required if the action is certified. At first blush, it strikes me that while Mr. Chapman may be qualified to be an expert, he would not be qualified to be an expert about design defects and about the risk-benefit analysis associated with whether a manufacturer designed a product negligently. That analysis typically involves engineering expertise and some economic or commercialization expertise.

84. As already mentioned above, Plaintiffs' counsel conceded during argument that should the action be certified, then there would be expert testimony about the design defect at the common issues trial. I understood this concession to be an allusion to an expert in the design of handguns and not an expert in construing patents. If this action is certified it is already obvious that Mr. Chapman's evidence will not be the only word about design negligence.

85. During argument, Plaintiffs' counsel submitted that it was premature to retain an expert pre-certification and rather the expert would be briefed with the benefit of Smith & Wesson having made documentary discovery and having been examined for discovery.

86. I disagree with this submission. Pre-certification the plaintiff must meet the some-basis-in-fact standard, which is undoubtedly low, but as I noted in another case, it is not subterranean.<sup>5</sup> In the immediate case, there is nothing unfair and it is normative in class actions to have the plaintiff provide some expert's testimony to establish the some-basis-in-fact theory of the case and about whether the expert has a methodology to prove that theory.

87. It may take documentary discovery and examinations for discovery to provide the data to test the theory of the case. However, it is not asking too much of a plaintiff to demonstrate some scientific basis in fact for the theory of his or her class action as a prerequisite to certification of the common issues.

88. However, in saying that I disagree with the Plaintiffs' counsel submission in the immediate case, I hasten to add that I do not necessarily agree with Smith & Wesson's submissions as to what precisely is required in the immediate case to establish some basis in fact for a design negligence case.

89. In its factum, Smith & Wesson makes elaborate and lengthy submissions about, amongst other things, the evidentiary value, if any, of the existence of patents with a handgun design that differs from the design of the M&P<sup>®</sup>40 handgun to the risk-benefit analysis that underlies a design negligence case. Smith & Wesson's submissions will undoubtedly be repeated at the certification motion at which time it will be appropriate to decide whether the Plaintiffs have proffered the evidence they need to meet the some-basis-in-fact standard of proof.

90. Once again, this is not the time on this motion to give weight to the testimony; this is the time to determine whether the testimony is admissible, and in the immediate case, this involves an examination of the reliability of the witness to provide the evidence. In the immediate case, Mr. Price is reliable about many things relevant to certification; however, he does not have the expertise to help the court determine whether there is a common issue about design negligence.

91. In the result, I strike paragraphs 29 to 34 of Mr. Price's affidavit. I grant the Plaintiffs leave to file additional expert's or experts' opinions, as they may be advised, in addition to Mr. Chapman's affidavit, with respect to the design aspects of their negligence claim.

*Mark A. Chapman's Evidence*

92. Strictly speaking, I do not have to grant the Plaintiffs leave to deliver Mr. Chapman's late arriving affidavit. Smith & Wesson has not delivered any responding material for the certification motion and Mr. Chapman's affidavit is simply supplemental to Mr. Price's affidavit.

93. I have already provided above, my tentative view that Mr. Chapman's evidence is ancillary to the some-scientific-basis-in-fact evidence that the certification motion actually requires.

*The Evidence about Firearm-Related Crime Statistics*

94. For essentially the same reasons that I struck Mr. Price's evidence about the patents, I strike his evidence about firearm-related crime statistics. Mr. Price is not the person to give this hearsay evidence.

95. I leave it to the Plaintiffs to proffer the appropriate witness, if necessary.

96. I add the adverbial "if necessary" because for the purposes of the certification motion, the evidence about firearm-related crime statistics may be peripheral to the determination of the certification criteria.

---

<sup>5</sup> *Kuiper v. Cook (Canada) Inc.*, 2018 ONSC 6487 at para. 134, rev'd but not on this point, *Kuiper v. Cook (Canada) Inc.*, 2020 ONSC 128 at para. 27 (Div. Ct.)

97. The Plaintiffs submit in their factum that this evidence is relevant to the duty of care issues associated with Smith & Wesson having foreseen the harm of not designing the M&P<sup>®</sup>40 handgun with authorized user technology. Accepting for the sake of argument that that submission is correct, it seems preferable to simply ask one of Smith & Wesson's witnesses for the certification motion what Smith & Wesson actually knew about gun crime and its connection to authorized user technology.

*The Authorized User Technology Agreement Signed in 2000*

98. Lastly, for much the same reasons that I struck Mr. Price's evidence about firearm-related statistics, I strike his evidence about the Authorized User Technology Agreement signed in 2000. This topic is better addressed by directly asking Smith & Wesson's witnesses during cross-examinations relevant questions about the Authorized User Technology Agreement.

99. I appreciate that Smith & Wesson may refuse to answer, but if it does refuse to answer, then the merits of its refusal in the context of a certification motion can be appropriately dealt with on a refusals motion.

100. At the present time, what I can properly decide is that Mr. Price is not the one to give hearsay evidence about the Authorized User Technology Agreement and he is not the person to establish the relevance of this agreement to the design negligence common issues.

[20] On **March 31, 2022**, the Plaintiffs delivered a Supplementary Motion Record (488 pages) comprised of:

a. The affidavit dated March 29, 2022 of **Najma Ahmed**. Dr. Ahmed has a B.Sc (1988) in Physiology from WesteRn University, a Ph.D. (1991) and a M.D.C.M. (1992) from McGill University. From 2001, she has been a Trauma Surgeon at St. Michael's Hospital in Toronto, and she is now Surgeon-in-Chief at the hospital. She has held various academic positions at the University of Toronto. She has considerable experience and scholarship in the treatment of the victims of gun violence, including the treatment of victims of the shooting that occurred on July 22, 2018 on Danforth Avenue in Toronto. She has co-authored three peer-reviewed articles relating to the study, treatment, and prevention of gunshot wounds. She has made presentations and spoken about gun violence before bodies like the American College of Surgeons and the American Surgical Association.

b. The affidavit dated March 30, 2022 of **Ralph Blake Brown**. Professor Brown, of Halifax, Nova Scotia is a Professor of History at Saint Mary's University, and an adjunct professor at the Schulich School of Law at Dalhousie University. He has a BA (Hon.) in History from Acadia University, a MA in History from York University, a MA in Criminology from the University of Toronto, a LLB from the University of Toronto, and a Ph.D. in History from Dalhousie University. His main field of research is Canadian legal history. He has authored numerous articles about guns and gun control in Canada and was an author or co-authored: *A Trying Question: The Jury in Nineteenth-Century Canada* (2009); *Arming and Disarming: A History of Gun Control in Canada* (2012); and *A History of Law in Canada, Volume 1: Beginnings to 1866* (2018). A major subject of his academic research is firearm regulation in Canada. He taught a course at Saint Mary's University on the history of firearm use and regulation entitled "Guns, Violence and the Law." In a recent article he surveyed the gun control policies of Prime Minister Justin Trudeau: "The Ghost of the Long-Gun Registry: Prime Minister Justin Trudeau and Gun Control in Canada, 2015-2019," *Études canadiennes / Canadian Studies*, 89 (2020): 125-

149. In a forthcoming article in *Ontario History*, he describes the history of gun retailing in Canada (“‘The Largest Stock of Guns in Canada’: Charles Stark and Firearm Retailing in Late-Nineteenth Century Toronto,” *Ontario History*, forthcoming). He has published articles addressing the history of gun control and firearm policy in the *Globe and Mail*, *Toronto Star*, *National Post*, *Halifax Chronicle Herald*, *Policy Options*, *Ottawa Citizen*, *Vancouver Sun*, and *The Province*. He has been interviewed or cited by the *New York Times*, *Time*, *Christian Science Monitor*, *Globe and Mail*, *CBC News on-line*, *Toronto Star*, *CBC’s The Current*, *Montreal Gazette*, *Halifax Chronicle Herald*, and *Edmonton Journal*. He is a member of the Royal Society of Canada.

c. The affidavit dated November 26, 2021 of **Mark A Chapman**. Mr. Chapman is a U.S. lawyer whose practice focuses on patent infringement lawsuits. He has a B.Sc. in Engineering Physics (1991) from Queen’s University, a LL.B and a B.C.L. (1995) from McGill University. He has been called to the bar in Ontario and in New York State. He clerked for Justice Major in the Supreme Court of Canada. In the U.S. he has worked with Sullivan & Cromwell, Kenyon & Kenyon and he joined his current firm Haug Partners in 2021.

d. The affidavit dated March 29, 2022 of **Peter Edmonson**. Dr. Edmonson is an Electrical Engineer. He has a diploma in electronics technology from Mohawk College and between 1975 and 1995 he received BEng., MEng., and PhD degrees, all in Electrical Engineering, from McMaster University. He is a Member of the Professional Engineers of Ontario and a Senior Member of the Institute of Electrical and Electronic Engineers. He has contributed to 30 patents granted in the United States. The subject-matter of the patents includes mobile telecommunications techniques, small antenna design, detection methods, and biosensor and RFID designs. He has been a faculty member with the Department of Electrical Technology at Mohawk College and also a lecturer in Electrical and Computer Engineering at McMaster University. In 1994, he joined Research in Motion Limited (“RIM”) and developed applications incorporated into BlackBerry devices. From 2005 to 2016, he was employed in both a Canadian manufacturing company and a U.S. biotechnology biosensor company.

e. The affidavit dated March 29, 2022 of **Pamela Goode**. Ms. Goode is a retired lawyer, who during her thirty-year career worked for the Ministry of the Attorney General. Amongst other things, she was a member of the Ministry’s Guns & Gangs Initiative and legal counsel to the Chief Firearms Officer of Ontario providing legal advice respecting the *Firearms Act*, and the firearms and weapons provisions of the *Criminal Code*. She was a co-author of four editions of the *Annotated Firearms Act & Related Legislation* published by Butterworths and LexisNexis.

f. The affidavit dated March 28, 2022 of **Joshua C. Harrison**. Dr. Harrison has a B.Sc. in Mechanical Engineering from the University of Southern California (1987) and a MSc. (1989) and a Ph.D. (1992) in Mechanical Engineering from the University of California. He worked as a practising professional engineer and as a tenure-track academic at the Dept. of Mechanical Engineering of the University of Queensland. He is the inventor of ten U.S. patents. In 2002, he graduated with a J.D. from Stanford Law School and was admitted to practise before the United States Patent & Trademark Office as a patent attorney. He was member of the U.S. Marine Corps and was a commissioned officer in the U.S. Army Reserve. He is certified by the National Rifle Association as a

pistol instructor, was formerly certified by the California Dept. of Justice as a firearms safety instructor and is licensed to carry a concealed handgun in the State of California since 2014.

g. The affidavit dated March 24, 2022 of **Dennis Henigen**. Mr. Henigan is a U.S. lawyer who formerly worked for the NGO, the Center to Prevent Handgun Violence. He was called to give evidence as a witness to the signing of a settlement agreement dated March 17, 2000 between several U.S. cities and Smith and Wesson Ltd. and other firearm manufacturers.

h. The affidavit dated March 31, 2022 of **Jooyoung Kim Lee**. Mr Lee is an Associate Professor of Sociology at the Munk School of Global Affairs at the University of Toronto. He is also a fellow at the Yale University, Urban Ethnography Project. Since 2018, he is an International Scholar at the Penn Injury Science Center at the University of Pennsylvania. He has a B.A. in Political Science from the University of California at Berkeley (2003), and a MA (2006) and a Ph.D. (2009) in sociology from the University of California at Los Angeles. A focus of Dr. Lee’s writing, and teaching, is gun violence, particularly within ethnic urban communities in the United States. He is currently writing a book on wounded gunshot victims in Philadelphia and has previously written about gunshot victims and gun violence more broadly in South Central Los Angeles. He has published articles about gun violence in various media outlets, including the *New York Times*, *Philadelphia Inquirer*, *VICE*, *Globe and Mail*, *Maclean’s Magazine*, and the *Toronto Star*. He has been the recipient of several grants that relate to the study of gun violence and the medical treatment of gunshot victims in Canada. Dr. Lee’s affidavit provides statistics concerning crime gun tracing and lost and stolen guns.

[21] In **July 2022**, the Plaintiffs delivered supplementary affidavits dated July 5, 2022 (6 pages) and July 29, 2022 (24 pages) from Dr. Edmonson.

[22] In **October 2022**, the Plaintiffs delivered a supplementary affidavit (70 pages) dated October 17, 2022 from Dr. Lee. For this affidavit, the Plaintiffs’ Counsel provided Dr. Lee with previous unavailable information that they had obtained from the RCMP pursuant to the federal *Access to Information Act* and from the Solicitor General pursuant to the provincial *Freedom of Information Act*. The statistical information was about crime gun tracing and stolen firearms.

[23] Also in October 2022, the Plaintiffs delivered an affidavit dated October 5, 2022 from **Ernst Mauch** of Dunningen, Germany. Mr. Mauch has a Mechanical Engineering degree (1978) from Furtwangen University. In 1978, he joined Heckler & Koch GmbH (“H&K”) as a Design Engineer and Assistant to the Director of Research and Development. In 1983, he was promoted to the Head of Production Design. In 1991, he became Director of Research & Development and from 1995 to 2003, he was the Managing Director of R&D. During his employment, he was responsible for researching, designing, developing, producing, and marketing various small arms, including the H&K USP40 Compact-LEM Pistol, the P8 Pistol, and the MK23 handgun. He is the inventor of 12 H&K patents including a patent for electronic authorized user technology. In 2006, he became CEO of Armatix GmbH, a small German startup that was developing radio-frequency identification (“RFID”) smart technology for handguns. He remained with Armatix until retirement in 2015. While at Armatix, he was involved in the research, design, development, and sale of the Armatix iP1, a .22 caliber semi-automatic pistol that could be fired only if the user was wearing a wristband with a wireless RFID connection to the handgun. He is the inventor on two



Armatix patents relating to authorized user technology devices.

[24] In **December 2, 2022**, the Plaintiffs delivered a second supplementary affidavit (11 pages) dated December 2, 2022 from Dr. Lee. Once again, for this affidavit, the Plaintiffs' Counsel provided Dr. Lee with previous unavailable information that they had obtained from the RCMP pursuant to the federal *Access to Information Act* and from the Solicitor General pursuant to the provincial *Freedom of Information Act*. The statistical information was about crime gun tracing and stolen firearms.

[25] In **March 2023**, Smith & Wesson delivered affidavits dated March 15, 2023 and March 21, 2023 from Dorota Smolarz. Ms. Smolarz was then a law clerk at McMillan LLP, counsel for Smith & Wesson. She is no longer an employee of McMillan LLP. Her affidavits attach the following documents without comment: (a) news articles and a YouTube video; (b) corporate documents of German arms maker Armatix GmbH; (c) a report by the Attorney General of New Jersey; and (d) excerpts from two versions of the Manual of Patent Examining Procedure published by the United States Patent and Trademark Office. Smith & Wesson's counsel intends to use these documents in cross-examining Mr. Ernst Mauch (firearms design expert) and Mark Chapman (U.S. patent law expert).

[26] In **May 2023**, the Plaintiffs delivered an affidavit dated May 12, 2023 (29 pages), the third supplementary affidavit of Dr. Lee. This affidavit, which is not proper reply, was delivered a few days before the deadline for the delivery of reply material. The information in this supplementary affidavit is similar to information in the other supplementary affidavits in that it reports statistical information on crime guns and lost and stolen firearms received by Plaintiffs' counsel in late 2022 and early 2023 from responses to ATI and FOI requests submitted.

[27] No other reply material was delivered by the Plaintiffs.

[28] Smith & Wesson elected not to cross-examine Dr. Lee on any of his four affidavits but will cross-examine Mr. Mauch, after the formalities of a Letter of Request are finalized.

[29] On **July 31, 2023**, Smith & Wesson cross-examined Mr. Chapman and Ms. Goode.

[30] On **August 1, 2023**, Smith & Wesson cross-examined Dr. Harrison.

[31] On **August 9, 2023**, Smith & Wesson cross-examined Dr. Edmonson, and the Plaintiffs cross-examined Ms. Smolarz. Below are the Refusals Charts from that cross-examination.

<b>QUESTIONS TAKEN UNDER ADVISEMENT</b>		
	<b>Question</b>	<b>Defendant's Position</b>
Q.12, p.3	Undertake to ask Smith & Wesson if the document entitled "Smith & Wesson Clarification," dated March 17, 2000, is a document that was previously posted on Smith & Wesson's website	Not relevant to certification motion.
Q.14, p. 4	Undertake to confirm that Patent Number US 7,600,340 B2, dated October 13th, 2009, is a Smith & Wesson patent for a mechanical lock that was actually relied on by Smith & Wesson in relation to the M&P series of handguns.	Not relevant to certification motion.

Q. 16, p. 7	Undertake to provide copies of all materials and all information conveyed by Smith & Wesson to the RCMP in relation to the Firearms Reference Table.	Not relevant to certification motion.
-------------	--	---------------------------------------

- 2 -

<b>REFUSALS</b>		
	<b>Question</b>	<b>Defendant's Position</b>
Q. 17, p. 8	Refusal Undertake to provide all tracing and/or other requests for information received by Smith & Wesson from Canadian government or police authorities and/or from the ATF relating to Smith & Wesson handguns recovered in Canada by a Canadian government or police authority between 1998 and 2022.	Not relevant to certification motion.
Q. 18, p. 9	18 9 Refusal Undertake to provide information about the model, calibre, and serial number for each Smith & Wesson handgun that was the subject of a trace request made either directly by any Canadian police or public authority or the ATF between 1998 and 2022.	Not relevant to certification motion.
Q. 19, p. 9	19 9 Refusal Undertake to provide information from Smith & Wesson relating to their knowledge of any handgun recovered in Canada that was associated or suspected of being associated with the commission of crimes in Canada between 1998 and 2022.	Not relevant to certification motion.
Q. 20, p. 10	Refusal Undertake to provide feasibility studies, engineering reports, research and development reports, sales and marketing studies or related materials that were prepared, obtained, or considered by Smith & Wesson regarding Smith & Wesson's internal locking devices or authorized user technology described in Paragraphs 1(c) and 1(d) of the Clarification document, dated 17 March 2000, now Exhibit 1 to the examination.	Not relevant to certification motion.
Q. 21, p. 11	5. 21 11 Refusal Undertake to provide any information relating to the statement found in paragraph 1(c) of the Clarification document (Exhibit "1"): "There are several types of 'Internal Locking Devices' that can be	Not relevant to Certification motion.

	incorporated in our designs over the next 24 months.”	
Q. 22, p. 12	Refusal Undertake to provide all information relating to work done on authorized user technology for the years up to 17 March 2000 including reports, studies, marketing studies, etc.	Not relevant to Certification motion and improper scope of cross-examination to conduct discovery
Q. 23, p. 13	Refusal Undertake to provide all studies, reports, analyses, or related material relating to incorporation by Smith & Wesson, by March 2002 of built-in, on-board locking systems, by which the firearm can only be operated with a key or combination or other mechanism unique to the Smith & Wesson handgun.	Not relevant to Certification motion and improper scope of cross-examination to conduct discovery
Q. 24, p.14	24 14 Refusal Undertake to provide all reports, studies, analyses, or related material relating to the incorporation of authorized user technology in Smith & Wesson handguns by March of 2003.	Not relevant to Certification motion and improper scope of cross-examination to conduct discovery
Q. 25, p. 15	Refusal Undertake to provide any research, feasibility studies, sales or marketing studies, or related materials regarding the sale of Smith & Wesson handguns with internal locking devices or authorized user technology in Canada between 1998 and 2022.	Not relevant to Certification motion and improper scope of cross-examination to conduct discovery
Q. 26, p. 15	Refusal Undertake to provide copies of any studies, including any feasibility studies or research reports, relating to the private commercial non-police sale of Smith & Wesson handguns in Canada between 1998 and 2022. The studies would include a safety assessment relating to commercial non-police sales of handguns in Canada to private Canadian buyers as opposed to law enforcement or military buyers.	Not relevant to Certification motion and improper scope of cross-examination to conduct discovery

[32] On **October 2, 2023**, Dr. Lee affirmed another affidavit (140 pages). The information in the fourth supplementary affidavit derives from a report released in early 2023 by the United States Bureau of Alcohol, Firearms, Tobacco, and Explosives that Dr. Lee only became aware of in August 2023.

[33] Also on October 2, 2023, the Plaintiffs brought motions for: (a) an Order granting them leave to file the Third and Fourth Supplementary Affidavits of Dr. Jooyoung Lee dated May 12, 2023 and October 2, 2023; and (b) for an Order that the Defendant Smith & Wesson provide answers and documents in response to questions taken under advisement or refused by Ms.

Smolarz during her cross-examination on August 9, 2023.

[34] The motions were supported by the affidavit dated October 2, 2023 of Kathie Mackie. Ms. Mackie is a legal assistant at Gowling WLG (Canada) LLP, counsel to the Plaintiffs.

### **C. The Plaintiffs' Submissions**

[35] The Plaintiffs submit that the Court should admit the Third and Fourth Supplementary affidavits of Dr. Lee. They point out that the third affidavit was delivered before the scheduled deadline for reply evidence and while the fourth Affidavit was delivered after the commencement of cross-examinations, cross-examinations are not complete because of the pending cross-examination of Mr. Mauch. The Plaintiffs submit that there is no prejudice to the Defendant in admitting Dr. Lee's third and fourth supplementary affidavits.

[36] With respect to Ms. Smolarz's cross-examination, the Plaintiffs submit that the refused questions are highly relevant to, and some basis in fact for, the proposed common issues of negligence and punitive damages. Further, the Plaintiffs submit that the refused questions are also relevant to the behaviour modification element of the preferable procedure criterion. Moreover, they submit that Smith & Wesson has had notice for more than a year that the Plaintiffs would be requesting the information. The Plaintiffs assert that in the evidentiary void left by the absence of any meaningful responding affidavit material from Smith & Wesson, it is appropriate to order that the questions be answered and the documents be produced.

### **D. Smith & Wesson's Submissions**

[37] Although I do not agree with all of Smith & Wesson's submissions, I do agree with several of their arguments, and I am persuaded for the reasons that follow that the Plaintiffs' two motions should be dismissed.

[38] Smith & Wesson's arguments that I do agree with are incorporated in the discussion and analysis that follows.

### **E. Discussion and Analysis**

[39] Putting aside the technical arguments about the untimeliness of Dr. Lee's third and fourth supplementary affidavits, I agree with Smith & Wesson's argument that Dr. Lee's affidavits should not be admitted into evidence.

[40] Dr. Lee's additional evidence may be relevant to the substantive legal and factual issues to be argued at the common issues trials, but his additional evidence is not relevant to the certification criteria and even if the evidence was relevant, principles of proportionality stand against admitting the third and the fourth of Dr. Lee's affidavits.

[41] The Plaintiffs' assertion of relevance to the common issues of negligence and punitive damages, and the behaviour modification aspect of the threshold issue of preferable procedure does not establish relevance for the certification motion which is **NOT** a merits motion. I have already determined that it is **not** plain and obvious that the Plaintiffs **do not** have a reasonable cause of action for negligence based on the pleadings. Without the double negative, they have satisfied the cause of action criterion. The critical matters for the balance of the Certification Motion will be about the commonality of the proposed common issues and about whether the

Plaintiffs' action satisfies the preferable procedure criterion. Dr. Lee's first two affidavits along with the six other expert witnesses' affidavits and twelve reports proffered by the Plaintiffs are all that is necessary to address fairly the certification criteria.

[42] There is no merit to the Plaintiffs' arguments based on the alleged failure of Smith & Wesson to deliver responding materials to the seven expert reports delivered by the Plaintiffs. A defendant has no obligation to assist a plaintiff in meeting the onus of showing some basis in fact for the four evidentiary certification criteria (class definition, common issues, preferable procedure, and a representative plaintiff).

[43] Smith & Wesson was obviously aware that the Certification Motion is not a motion about the merits of the Plaintiffs' claim nor is it the time to marshal all the evidence necessary for the common issues trial assuming the action is certified. The evidentiary playing field for a Certification Motion is a downhill glide for a plaintiff and a Rocky Mountain climb for the Defendant. This is emphatically true with respect to competing expert evidence which is not to be resolved at the Certification Motion in the crucible of the low standard of some basis in fact.

[44] Evidence tendered on a Certification Motion must meet the usual criteria for admissibility. Evidence that is not relevant to the issues to be determined on the Certification Motion should be excluded. Even relevant evidence may be excluded if its probative value is overborne by its prejudicial effect, including the tendencies: to yield irrational conclusions; to confuse, mislead, or distract the trier of fact's attention from the main issues; to unduly occupy the trier of fact's time; and to surprise the opponent unfairly and to impair a fair hearing.<sup>6</sup>

[45] Turning to the matter of the cross-examination of Ms. Smolarz, with one exception, all undertakings requested during her cross-examination relate to one of two topics: (1) crime gun tracing; or (2) authorized user technology. The exception, the third topic, is (3) an undertaking to provide "all studies", "feasibility studies," "research reports" and "safety assessments" relating to the sale of Smith & Wesson handguns to non-police or non-military buyers in Canada between 1998 and 2022.

[46] The first two topics are primarily merits inquiries irrelevant to the four remaining certification criteria and the third topic is a fishing expedition. It was quite proper for Smith & Wesson to refuse to answer these questions. The questions were not proper because the documents being requested are not relevant to the Certification Motion criteria and the requests are disproportionate to the needs of the certification motion.<sup>7</sup>

[47] In class actions in Ontario, courts limit or restrict pre-certification discovery and require the production of documents and examinations to be focused on the criteria for certification. The law in Ontario is that pre-certification, there should be a focused and limited production of those documents that are shown to be relevant to the issues on certification. The law in Ontario for pre-certification discovery is that the onus is on the party seeking documents for the certification motion to explain why the requested documents are relevant to the issues on certification.<sup>8</sup> Pre-certification discovery is only available where the moving party shows that the discovery is

<sup>6</sup> *Price v. Smith & Wesson Corp.*, 2021 ONSC 8471, para 57.

<sup>7</sup> *Del Giudice v Thompson*, 2021 ONSC 2015; *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, 2019 ONSC 5958; *Kaplan v. Casino Rama Services Inc.*, 2018 ONSC 3545,

<sup>8</sup> *Kaplan v. Casino Rama Services Inc.*, 2018 ONSC 3545 at paras.34-36; *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 87 at para. 41; *Brown v. Janssen Inc.*, 2015 ONSC 1434; *Dine v. Biomet Inc.*, 2015 ONSC 1911; *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2015 ONSC 7821.

necessary to inform the certification process.<sup>9</sup> In the immediate case, the Plaintiffs have failed to satisfy this test.

**F. Conclusion**

[48] For the above reasons, the motions are dismissed with costs to the Defendant in any event of the Certification Motion.

Perell, J.

Released: October 26, 2023.

---

<sup>9</sup> *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 87 at para. 41; *Tetefsky v. General Motors Corp.*, 2010 ONSC 1675, affd [2011] O.J. No. 1390 (C.A.).

**CITATION:** Price v. Smith & Wesson Corp., 2023 ONSC 6062  
**COURT FILE NO.:** CV-19-00632915-00CP  
**DATE:** 20231026

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**SAMANTHA PRICE, SKYE MCLEOD, KENNETH  
PRICE, CLAIRE SMITH, PATRICK MCLEOD,  
AND JANE MCLEOD**

Plaintiffs

- and -

**SMITH & WESSON CORP.**

Defendant

---

**REASONS FOR DECISION**

---

PERELL J.

**Released:** October 26, 2023