

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

DONALD D’HAENE, KEITH SANFORD,  
MARY SALMON, MICHAEL VETTESE,  
NIDHI PRASHAR, and JOSÉE GAULIN

Plaintiffs

- and -

BMW CANADA INC./BMW GROUP  
CANADA, BMW NORTH AMERICA,  
LLC, BMW MANUFACTURING CO.  
LLC, BMW AG, FORD MOTOR  
COMPANY OF CANADA LIMITED,  
GENERAL MOTORS COMPANY AND  
GENERAL MOTORS OF CANADA  
LIMITED, MITSUBISHI MOTOR SALES  
OF CANADA, INC., MERCEDES-BENZ  
CANADA INC., VW CREDIT CANADA,  
INC. and VOLKSWAGEN GROUP  
CANADA, INC.

Defendants

Proceeding under the *Class Proceedings Act*,  
1992

)  
)  
) *Harvey T. Strosberg, K.C., Justin Smith,*  
) *Michael J. Peerless, Sabrina Lombardi, Joel*  
) *P. Rochon, Won J. Kim, Megan B. McPhee,*  
) *E.F. Anthony Merchant, Jeff Orenstein,*  
) *Andrea Grass, K.S. Garcha, and Paul*  
) *Sanghe for the Plaintiffs*

)  
) *Peter J. Pliszka and Zohaib Maladwala for*  
) *the BMW Defendants*

)  
) *Cheryl Woodin and Michael C. Smith for the*  
) *General Motors Defendants*

)  
) *Hugh M. DesBrisay for the Ford Defendant*

)  
) *Sonia Bjorkquist for the VW Defendants*

)  
) **HEARD:** In Writing

PERELL, J.

REASONS FOR DECISION

**A. Introduction**

[1] This is a proposed class action pursuant to the *Class Proceedings Act, 1992*.<sup>1</sup> The action

---

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

has not been certified. This is a motion to discontinue the action with prejudice and without costs.

[2] For the reasons that follow the motion is granted.

## **B. Background and Procedural History**

[3] This action was commenced on **April 10, 2015** with Strosberg Sasso Sutts LLP, McKenzie Lake Lawyers LLP as lawyers of record.

[4] The proposed class was all persons resident in Canada, except excluded Persons, who own, owned, lease or leased one of the subject vehicles. The class action concerned automobile air bags that had been recalled because of a danger during deployment.

[5] There was a carriage motion, and on **January 12, 2016**, Strosberg Sasso Sutts LLP, McKenzie Lake Lawyers LLP, Kim Orr Spencer McPhee Barristers, Merchant Law Group, Consumer Law Group, and Rochon Genova LLP were appointed Class Counsel as a Consortium in *D'Haene et al v. Takata Corporation et al.*

[6] Strosberg and McKenzie Lake were appointed as Co-Lead Counsel.

[7] The Carriage Order also stayed four cases pending the outcome of this action: (a) *John Pham v. Takata Corporation, et al*, Court File No. CV-14-51719000CP; (b) *Bilal Khalid v. Takata Corporation, et al*, Court File No. CV-15-52967900CP; (c) *Michael Hayvren v. Takata Corporation, et al*, Court File No. 15-63216CP; and (d) *Nicolas Alafogiannis v. Takata Corp., et al*, Court File No. CV-15-530703 00CP. These four stayed actions have since been dismissed.

[8] After the carriage motion, between 2016 and 2020 Statements of Defence, Amended Statements of Defence and Cross-Claims have been filed by some, but not all defendants.

[9] In the years after the action was commenced, the law with respect to the compensation available for pure economic loss from the negligent supply of faulty goods came under review with the result that the litigation risk associated with the action greatly increased. The prospects of a substantial economic recovery for the class members greatly diminished.

[10] The Supreme Court of Canada clarified the law delimiting the recoveries for pure economic losses for dangerous defective products, establishing that: (a) apart from a few exceptions, tort law leaves pure economic losses to be addressed by the law of contract; (b) there is no right to compensation for a threat of injury unless the product defect presents an imminent threat; (c) the scope of recovery is limited to mitigating or averting the danger presented by the defective product; and, (d) to the extent that it is feasible for the plaintiff to simply discard the defective product, the danger to the plaintiff's economic rights as well as the basis for recovery fall away.<sup>2</sup>

[11] On **March 29, 2019**, the action was dismissed as against Takata Corporation and TK Holdings Inc.

[12] On **September 30, 2022**, in a companion action advancing similar pure economic loss claims, the motion for certification was dismissed.<sup>3</sup>

[13] On **October 20, 2022**, pursuant to section 29.1 of the *Class Proceedings Act, 1992*, the

<sup>2</sup> *Coles v. FCA Canada Inc.*, 2022 ONSC 5575; *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35; *Atlantic Lottery Corporation Inc. v. Babstock*, 2020 SCC 19.

<sup>3</sup> *Coles v. FCA Canada Inc.*, 2022 ONSC 5575.

action as against Mitsubishi Motor Sales of Canada Inc. and Mercedes-Benz Canada Inc. was dismissed.

[14] In light of the developments in the case law, and the significantly diminished prospects for certification and given the diminished economic value of the pure economic loss claim, the Consortium of Class Counsel are no longer prepared to take on the risks of prosecuting the action.

[15] A shift in litigation risk is a factor that a court may consider when a request for leave to discontinue a proposed class action is considered.<sup>4</sup>

[16] The Plaintiffs have instructed counsel to discontinue this action.

[17] The Defendants consent to the motion and to the Orders being requested.

### **C. Discussion and Analysis**

[18] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, dismissal or settlement of a proceeding commenced under the Act. Section 29 states:

*Discontinuance, abandonment and settlement*

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

*Settlement without court approval not binding*

(2) A settlement of a class proceeding is not binding unless approved by the court.

*Effect of settlement*

(3) A settlement of a class proceeding that is approved by the court binds all class members.

*Notice: dismissal, discontinuance, abandonment or settlement*

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

[19] A motion for discontinuance or abandonment should be carefully scrutinized, and the court should consider, among other things: whether the proceeding was commenced for an improper purpose; whether, if necessary, there is a viable replacement party so that putative class members are not prejudiced; or whether the defendant will be prejudiced.<sup>5</sup>

<sup>4</sup> *Johnson v. North American Palladium Ltd.*, 2021 ONSC 3346.

<sup>5</sup> *Green v. The Hospital for Sick Children*, 2021 ONSC 8237; *Batten v. Boehringer Ingelheim*, 2021 ONSC 6606; *Johnson v. North American Palladium Ltd.*, 2021 ONSC 3346; *Bardoul v. Novartis Pharmaceuticals Canada Inc.*, 2021 ONSC 2261; *Winter v. C.R. Bard*, 2020 ONSC 3532; *Naylor v. Coloplast Canada Corporation*, 2016 ONSC

[20] Pursuant to s 28(1) of the *Class Proceedings Act, 1992*, the limitation periods applicable to the causes of action asserted in this proposed class action have been suspended in favour of the proposed Class since the commencement of this Action and will remain suspended until this Action is discontinued; therefore, any putative Class Members who wish to commence an individual action are not prejudiced by the elapsed time in this present Action.<sup>6</sup>

[21] I am satisfied that the action was commenced for a proper purpose and the test for a discontinuance has been satisfied in the immediate case. The putative class members are not prejudiced by the discontinuance and the proposed notice to them is adequate in all the circumstances.

[22] I am satisfied that the proposed notice and notice plan is satisfactory for the circumstances of the immediate case.

#### **D. Conclusion**

[23] For the above reasons, the motion is granted.

Perell, J.

Released: November 16, 2023

---

1294; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2012 ONSC 5288; *Frank v. Farlie, Turner & Co, LLC*, 2011 ONSC 7137; *Hudson v Austin*, 2010 ONSC 2789; *Sollen v. Pfizer*, [2008] O.J. No 4787 (C.A.), aff'g [2008] O.J. No. 866 (S.C.J.); *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (S.C.J.), aff'd (2004), 71 O.R. (3d) 451 (C.A.).

<sup>6</sup> *Chopik v. Mitsubishi Paper Mills Ltd*, 2003 CanLII 23605 at para. 13 (Ont. S.C.J.).

**CITATION:** D'Haene v. BMW Canada Inc., 2023 ONSC 6434  
**COURT FILE NO.:** CV-16-543766-00CP  
**DATE:** 20231116

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**DONALD D'HAENE, KEITH SANFORD, MARY  
SALMON, MICHAEL VETTESE, NIDHI  
PRASHAR, and JOSÉE GAULIN**  
Plaintiffs

**- and -**

**BMW CANADA INC./BMW GROUP CANADA,  
BMW NORTH AMERICA, LLC, BMW  
MANUFACTURING CO. LLC, BMW AG, FORD  
MOTOR COMPANY OF CANADA LIMITED,  
GENERAL MOTORS COMPANY AND GENERAL  
MOTORS OF CANADA LIMITED, MITSUBISHI  
MOTOR SALES OF CANADA, INC.,  
MERCEDES-BENZ CANADA INC., VW CREDIT  
CANADA, INC. and VOLKSWAGEN GROUP  
CANADA, INC.**

Defendants

---

**REASONS FOR DECISION**

---

PERELL J.

**Released:** November 16, 2023.