

CANADA / JUDGMENT

British Columbia v. Paladin Labs Inc.

2022 BCCA 190

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 190 British Columbia v. Paladin Labs Inc. COURT OF APPEAL FOR BRITISH

COLUMBIA Citation: British Columbia v. Paladin Labs Inc., 2022 BCCA 190 Date: 20220519

Dockets: CA47416; CA47418; CA47423; CA47425; CA47426 CA47430; CA47440; CA48049; CA48050; CA48051 CA48052; CA48053; CA48054; CA48055; CA48056 CA48057; CA48058; CA48060; CA48062; CA48067 Docket: CA47416 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Paladin Labs Inc. and others Appellants (Defendants)

- and - Docket: CA47418 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Sandoz Canada Inc. Appellant (Defendant)
- and - Docket: CA47423 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And LPG Inventory Solutions Appellant (Defendant)
- and - Docket: CA47425 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Janssen Inc. Appellant (Defendant)
- and - Docket: CA47426 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Bristol-Myers Squibb Canada and another Appellants (Defendants)
- and - Docket: CA47430 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Amerisourcebergen Canada Corporation and others Appellants (Defendants)
- and - Docket: CA47440 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And McKesson Canada Corporation Appellant (Defendant)
- and - Docket: CA48049 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Valeant Canada LP/ Valeant Canada S.E.C. and another Appellants (Defendants)
- and - Docket: CA48050 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Noramco Inc. Appellant (Defendant)

- and - Docket: CA48051 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Janssen Inc. and another Appellants (Defendants)
- and - Docket: CA48052 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Mylan Pharmaceuticals ULC Appellant (Defendant)
- and - Docket: CA48053 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Paladin Labs and others Appellants (Defendants)
- and - Docket: CA48054 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Bristol-Myers Squibb Canada and another Appellants (Defendants)
- and - Docket: CA48055 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Sandoz Canada Inc. Appellant (Defendant)
- and - Docket: CA48056 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And McKesson Canada Corporation Appellant (Defendant)
- and - Docket: CA48057 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Teva Canada Limited and others Appellants (Defendants)
- and - Docket: CA48058 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Sanis Health Inc. and another Appellants (Defendants)
- and - Docket: CA48060 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Imperial Distributors Canada Inc. Appellant (Defendant)
- and - Docket: CA48062 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And Apotex Inc. Appellant (Defendant)
- and - Docket: CA8067 Between: Her Majesty the Queen in Right of the Province of British Columbia Respondent (Plaintiff) And LPG Inventory Solutions Appellant (Defendant) Before: The Honourable Mr. Justice Groberman (In Chambers) On appeal from: Orders of the Supreme Court of British Columbia, dated February 16, 2021 (British Columbia v. Apotex Inc., 2021 BCSC 346, Vancouver Docket S189395); and January 4, 2022 (British Columbia v. Apotex Inc., 2022 BCSC 1, Vancouver Docket S189395). Oral Reasons for Judgment Counsel for Her Majesty the Queen in Right of the Province of British Columbia (via videoconference): R. Mogerman, Q.C. K. Duke Counsel for Sandoz Canada Inc. (via videoconference): A. Borrell T.A. Posyniak Counsel for Mylan Pharmaceuticals ULC (via videoconference): J.S. Maidment J. Dent Counsel for Bristol-Myers Squibb Canada and Bristol-Myers Squibb Company (via videoconference): R. von Ruti Counsel for Teva Canada Limited, Sun Pharma Canada Inc. and Pharmascience Inc. (via videoconference): L.K. Fric Counsel for Janssen Inc. (via videoconference): J.A. Hutchinson Place and Date of Hearing: Vancouver, British Columbia May 19, 2022 Place and Date of Judgment: Vancouver, British

Columbia May 19, 2022 Summary: The Court is scheduled to hear twenty appeals arising out of two judgments in a proposed class proceeding. The appellants filed fourteen factums, dividing up the issues among them. None of the individual factums exceeds 30 pages in length, but the total length is over 225 pages. The parties filed a consent order allowing the respondent to file two factums, one of up to 30 pages and one of up to 90 pages. The Court required the parties to speak to the order. Held: In view of time constraints and the fact that the appellants' factums have already been filed, leave is granted to the respondent to file the two factums as requested. This order is an extraordinary one and is provisional; it will be open to the panel hearing the appeal to require that replacement factums of shorter length be filed if it considers that necessary. In litigation with multiple parties, if the total number of pages relied on by any party (whether in its own factum or that of another party) exceeds thirty, it should seek directions from the registrar or from a case management judge before filing.

- [1] GROBERMAN J.A.: This hearing was convened to determine whether the respondent, Her Majesty the Queen in Right of the Province of British Columbia, should be allowed to file two factums--one of up to 30 pages and one of up to 90 pages--in response to several appeals that are scheduled to be heard together on June 6-8, 2022.
- [2] The appeals are from orders made in a proposed class proceeding brought by British Columbia against manufacturers and distributors of opioid drugs. The action alleges various causes of action and claims damages for healthcare and other costs associated with what has been termed the "opioid epidemic".
- [3] There are two sets of appeals. The first set (referred to by the parties as the "Purdue Stay Appeals") is comprised of seven appeals brought from an order pronounced in the Supreme Court on February 16, 2021.
- [4] The background of the Purdue Stay Appeals is that Purdue Pharma L.P. and related entities were involved in bankruptcy proceedings in the United States. A broad proposal was made in those proceedings to settle litigation both in the United States and abroad. On December 30, 2019, in proceedings under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, the Ontario Superior Court of Justice issued an order staying all proceedings in Canada against certain Canadian entities associated with Purdue Pharma L.P. (Purdue Pharma L.P., Re., 2019 ONSC 7042). Some of the defendants took the view that the order, unless and until it was varied, precluded British Columbia from proceeding with the proposed class proceeding. They asked the case management judge to order that British Columbia not proceed with the action unless and until a variation in the Companies' Creditors Arrangement Act order allowed it to do so.

- [5] In reasons indexed as *British Columbia v. Apotex Inc.*, 2021 BCSC 346, the case management judge declined to grant that relief, and declared that, given that particular safeguards were either in place or could be established, the proceedings were not affected by the order under the Companies' Creditors Arrangement Act order. Nine appeals were taken from that judgment, but two have been formally abandoned.
- [6] The second set of appeals is referred to by the parties as the "Pleadings Appeals". These appeals arise from an order made by the case management judge on January 4, 2022. The issues before the judge arose out of applications by British Columbia to amend its pleadings and applications by various defendants to strike out portions of the existing pleadings. The judge's reasons are indexed as *British Columbia v. Apotex Inc.*, 2022 BCSC 1. Thirteen appeals were brought from that order.
- [7] On June 30, 2021, an application was filed with this Court by the appellants in one of the Purdue Stay Appeals for an order that a joint set of materials be filed in those appeals. The order was granted by a judge in chambers on July 9, 2021. The order provided for a joint set of materials to be filed on the appeals, and for the appeals to be heard at the same time. The order also extended the time for filing materials to a date 60 days after the pronouncement of judgment by the Supreme Court in respect of the pleadings matters. That deadline has since been extended.
- [8] As I have indicated, the judgment in the pleadings matters was pronounced on January 4, 2022, and thirteen appeals were filed. On March 1, 2022, counsel for one of the appellants, with the consent of counsel for all the parties to the Purdue Stay Appeals and the Pleadings Appeals wrote to the Registrar to update him on discussions concerning case management. He reported that the parties were agreed that the Pleadings Appeals and the Purdue Stay Appeals should be heard together. He further advised that the parties wished to file a single appeal record in the Pleadings Appeals, and that the appellants would file a joint appeal book in those appeals. There was further agreement that the appeal records and appeal books filed in the Purdue Stay Appeals and in the Pleadings Appeals could be used in both sets of appeals. The agreement also provided that parties could file joint factums addressing both appeals.
- [9] The letter, finally, proposed dates for a case management conference in the event that the Court considered one to be necessary.
- [10] The Registrar responded on March 3, 2022, advising that a case management conference was not necessary, given the steps that counsel had taken to organize and streamline the appeal. He also added the following suggestion: Your letter also alludes to the use of joint factums, addressing both appeals. To the extent possible, the duplication of similar arguments across factums should be avoided as much as possible. Though not required, parties with similar issues might consider writing factums jointly or dividing issues between factums in advance.

- [11] Unfortunately, neither the Registrar nor the parties addressed the question of how such a division would affect the length of factums or the manner in which the respondent responded to them.
- [12] On April 6, 2022, a judge of the Court endorsed a consent order addressing most of the matters set out in the March 1, 2022 letter. The order provided that: • The Purdue Stay Appeals and the Pleadings Appeals would be heard at the same time; • A single joint appeal record would be filed; • A single joint appeal book would be filed by the appellants; and • Parties were entitled to file a single factum addressing both the Purdue Stay Appeals and the Pleadings Appeals, and they were entitled to file factums jointly with other appellants if they wished.
- [13] The order also set out timelines for filing and service of factums and books of authorities. The order did not address the Registrar's suggestion that issues be divided between the various appellants' factums, but it is evident that the parties did not see that issue as requiring an order.
- [14] On April 8, 2022, counsel for one appellant wrote to the Registrar on behalf of all the appellants indicating that eight factums divided up major issues on the appeal that concerned all the appellants. Each of those factums is 30 or fewer pages in length, so they were readily accepted by the registry. In total, however, the eight factums are 185 pages. Even with minor overlaps among the factums (for instance in the orders sought) that is a great deal of material for what is, in essence, two appeals.
- [15] There is also additional material from the appellants beyond that contained in the eight major factums. Another six appellants filed individual factums. Four of them are between four and seven pages, and one is a single page. These all deal with issues of particular concern to individual appellants, and adopt, in the main, the submissions in the eight main factums. The sixth individual factum is rather lengthy, coming in at 21 pages.
- [16] On May 13, 2022, I received a draft desk order consented to by all parties, which would allow the Crown to file two factums, one of 90 pages and one of 30 pages. The Court had no prior notice that the Crown would be seeking leave to file such lengthy factums, nor that the parties had agreed to them. I accept the point made by counsel for the Crown that it was probably open to the Crown to file 14 separate response factums.
- [17] The Court Rules provide for factums to be a maximum of 30 pages, and leave to exceed that length is given sparingly, and the additional space granted is typically very limited (I recently reviewed the jurisprudence on this issue in *R. v. Handlen*, 2021 BCCA 484).
- [18] Occasionally, the court has seen attempts to get around the page limit. Sometimes, for example, counsel have reproduced trial arguments in their appeal books, and then incorporated them by reference in their factums. The Court does not tolerate such practices.

- [19] What was done in this case was not an attempt to skirt the Rules. It is not uncommon, in appeals with multiple parties, to see a party adopting, in its factum, an argument that is fully articulated in another party's factum. That is sensible, as it avoids repetition. Indeed, as I have indicated, the Registrar suggested that the appellants might wish to do so in this case.
- [20] The difficulty is that, particularly where there are numerous parties to an appeal, the volume of material that the panel must read in preparation for the appeal becomes massive. That is particularly a problem in a case like the present one, which has been expedited, and in which the final factums will be filed only a week before the hearing. In the likely event that one or more members of the panel is sitting for that entire week, they will have little opportunity to read the material and prepare for the appeal.
- [21] Where a party wishes to file a factum exceeding 30 pages in length, it must obtain leave of a judge in chambers to do so. I would suggest that where multiple parties intend to divide arguments between their factums, and where that division will result in any party relying on arguments that exceed 30 pages in total (whether in their own factums or in that of other parties), they should seek the approval of the Registrar or a case management judge for the arrangement. That will prevent the volume of material from becoming oppressive.
- [22] It is understandable, in this case, that the appellants proceeded as they did, and I do not suggest that they had ulterior motives for doing so. Indeed, I expect that they were motivated by a desire to present their arguments efficiently. In light of the evident good faith of the parties in proceeding as they have, and in view of the short timelines available, I do not think it would be fair to the parties to deny the Crown the opportunity to file factums of 30 and 90 pages, respectively, on the Pleadings Appeals and the Purdue Stay Appeals.
- [23] I would caution the parties, however, that the amount of material filed will almost certainly be burdensome for the panel hearing the appeal, and my order should be seen as a provisional one. It is open to the panel hearing the appeal to decline to proceed without the filing of more concise factums.
- [24] Finally, I will address a suggestion that arose in the course of argument that the parties may wish to file a joint reply factum. I encourage them to do so, but given the shortness of time, I do not insist on it. If they file separate factums, they should keep their reply factums brief and avoid repetition. Should the parties wish to file joint reply factums and require some relaxation of the ordinary page limit in order to do so, I will be willing to entertain an informal request in writing to the registry to that effect. "The Honourable Mr. Justice Groberman"

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