

CANADA / JUDGMENT

Krishnan v. Jamieson Laboratories Inc.

2025 BCSC 1289

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 1289 Krishnan v. Jamieson Laboratories Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Krishnan v. Jamieson Laboratories Inc.,

2025 BCSC 1289

Date: 20250711

Docket: S199401

Registry: Vancouver

Between:

Uttra Kumari Krishnan and Tom Trottier

Plaintiffs

And

Jamieson Laboratories Ltd., WN Pharmaceuticals Ltd., Natural Factors Nutritional Products Limited, Sobeys Capital Incorporated, Rexall/Pharma Plus Pharmacies Ltd., Rexall/Pharma Plus Pharmacies (BC) Ltd., Rexall Pharmacy Group Ltd., Medicine Shoppe Canada Inc., Loblaw Companies Limited, Loblaws Inc., T&T Supermarket Inc., Shoppers Drug Mart Corporation, Shoppers Drug Mart Inc., Georgia Main Food Group Ltd., London Drugs Limited, Buy-Low Foods Limited Partnership, Buy-Low Foods Ltd., Choices Market Ltd., Save-On-Foods Limited Partnership, Save-On-Foods Ltd., Quality Foods Ltd., Pure Integrative Pharmacy, Pharmasave Drugs Ltd., Pharmasave Drugs (National) Ltd., Pharmasave Drugs (Pacific) Ltd., Pharmachoice Canada Inc., Costco Wholesale Canada Ltd., and Wal-Mart Canada Corp.

Defendants

Before: The Honourable Mr. Justice Branch

Reasons for Judgment on Expert Opinion Admissibility

Counsel for the Plaintiffs:

P. Chiswell

M.W. Mounteer

D.G. Jones

R.L. Coad

L. Manners

Counsel for the Defendant, Natural Factors and WN Pharmaceuticals:

G. Price

K. Ervin

C. Stokes

J. Heap

Counsel for the Defendant, Jamieson Laboratories Ltd.:

C. Hunter, K.C.

J. Roos

M. Evans

R. Au

Place and Date of Hearing:

Vancouver, B.C.

May 16, 2025

Place and Date of Judgment:

Vancouver, B.C.

July 11, 2025

I. INTRODUCTION

[1] These are my reasons for judgment on the admissibility of various expert opinions proffered by the parties during Phase 1 of the common issues trial in this certified class proceeding.

II. ANALYSIS

A. General Principles

- [2] Following refinement during oral argument, the key concern expressed by the parties at this stage of the trial is that various experts overstepped their bounds by interpreting and opining on the legal regime applicable to the sale of the implicated products. The parties reserved their rights to make further objections to each expert's qualifications at the time that each witness testifies. This includes a specific bias objection that the plaintiffs have in relation to the defendant Jamieson's expert, Dr. Vukotic.
- [3] The general principles applicable to the receipt of expert opinion are well known and are set out in *R. v. Mohan*, 1994 CanLII 80, [1994] 2 SCR 9 at p. 20. In *Mand v. Cheema*, 2024 BCSC 1701, Justice Blake summarized the general framework for the admissibility of such opinions as follows:
- [34] Expert evidence is presumptively inadmissible. The party tendering expert evidence must establish its admissibility on a balance of probabilities: *R v. Abbey*, 2009 ONCA 624 at para. 71 [Abbey]. The leading decision on the admissibility of expert evidence is the decision of the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 [White Burgess].
- [35] In *White Burgess*, Justice Cromwell set out a two-stage inquiry to determine the admissibility of expert opinion evidence. The first step is for the proponent of the expert opinion evidence to establish the following for the proposed expert opinion evidence to be admissible:
- a) relevance;
 - b) necessity in assisting the trier of fact;
 - c) absence of an exclusionary rule; and
 - d) existence of a properly qualified expert.
- [36] The second step is a discretionary gatekeeping one, wherein the trial judge must balance the potential risks and benefits of admitting the evidence and decide whether the potential benefits of admitting the evidence justify the risks.
- [4] In terms of the more specific principles relevant to the present matter, it is useful to examine the decision in *Walsh v. BDO Dunwoody LLP*, 2013 BCSC 1463. In that case, Justice Fitzpatrick was asked to consider the admissibility of an expert report from a retired judge regarding the "basic income tax issues" raised in a negligence case against an income tax advisor. She determined that the report should not be admitted. She began with a review of the analytical framework outlined above before ultimately concluding that the report should not be admitted:

- [87] I conclude that Mr. Ryer's opinion is not "necessary" in the circumstances of this case. It does not assist the court in arriving at a decision. I say this both in terms of determining the applicable law and applying that law to the facts which might be found at trial. It is not outside the competence of judges of this Court to determine the applicable domestic law and apply it.
- [88] In my view, the authorities cited above which have rejected this type of evidence, while not necessarily expressing it in this fashion, have all impliedly addressed the matter within the "cost/benefit" analysis that arises from Mohan and Abbey. In that respect, the evidence has been rejected as unnecessary or superfluous, since the judges of those courts were well able to determine the law and decide the issues.
- [89] In my view, there is no blanket exclusionary rule against such evidence. As Doherty J.A. notes in Abbey, each case is unique; different trial judges may exercise their discretion differently: para. 79. Nevertheless, I consider that the issues that arise in relation to this type of evidence will inevitably dictate that the circumstances where such evidence is appropriate will be rare. That conclusion is consistent with the statement in Mohan at p. 25, concerning the strict application of the principles in relation to evidence such as this.
- [5] More recently, in *The Owners, Strata Plan 4249 v. Travelers Insurance Company of Canada*, 2018 BCSC 114, Justice Adair spoke to the limitations on an expert's ability to speak to the proper interpretation of law:
- [45] It is well established that, to be admissible, expert evidence must satisfy four threshold requirements: relevance; necessity in assisting the trier of fact; the absence of any exclusionary rule; and a properly qualified expert. The evidence must be necessary to enable the trier of fact to appreciate the matters in issue by providing information outside of the experience and knowledge of the trier of fact, and must be assessed in light of its potential to distort the fact-finding process (see Mohan, at pp. 23-25). To satisfy the necessity criterion, the evidence must be more than merely helpful.
- [46] I would not admit either report into evidence as opinion evidence. In my view, both reports fail to satisfy the necessity requirement.
- [47] In his report, Mr. Singh notes the separate definitions of "plumbing system" and "sprinkler system" in the Building Code and states as a conclusion that:
- PLUMBING SYSTEM is a totally different system than FIRE SUPPRESSION/FIRE SPRINKLER SYSTEM. The two systems are independent of one another. To reiterate, a "fire suppression sprinkler system" is NOT a part of a building's "plumbing" system.
- [48] Reduced to essentials (and I intend no disrespect to Mr. Singh in this regard), Mr. Singh's opinion appears to be that a plumbing system and a sprinkler system are different, separate and independent because the Building Code treats them that way.

- [49] However, I can read the definitions and other parts of the Building Code, and (with the assistance of counsel in argument) I can draw my own conclusions about what they mean in the context of the interpretation issues in this case.
- [50] Both Mr. Singh and Mr. Steer mention that the letter of assurance required under the Building Code for a building permit has separate line items for "plumbing" and "fire suppression systems." Mr. Steer (like Mr. Singh) mentions the different definitions in the Building Code for "plumbing system" and "sprinkler system," and mentions other parts of the Building Code where distinctions are made between the two systems. Mr. Steer also says that there are separate guidelines published by the Engineers and Geoscientists of B.C. for "Fire Protection Engineering Services" (including sprinkler design) and "Mechanical Engineering Services" (including plumbing). However, in the context of what I am called on to decide in this summary trial, I am not persuaded that an expert is needed to tell me how these documents should be interpreted or what conclusions should be drawn based on them.
- [52] Although I conclude that the reports of Mr. Singh and Mr. Steer are not admissible as expert reports for the purpose sought by counsel for Travelers, I would admit the reports for the limited purposes of: setting out the relevant definitions and other relevant parts from the Building Code; to illustrate the form of letter of assurance required under the Building Code; and to show that the Engineers and Geoscientists of B.C. publish the separate guidelines identified by Mr. Steer in his report.
- [6] There was little disagreement among the parties as to the principles applicable to the admission of the expert reports. Rather, the objections primarily related to the application of such principles.

B. Application

- [7] I will begin with a review of the plaintiffs' objections to the defendants' experts. This sequence is the most logical given that the only remaining defendant objection generally rises or falls with the result of my ruling on the plaintiffs' objections.
1. Defendant WN's Expert Dr. Fakreddin Jamali
- [8] Dr. Jamali provided a primary report dated February 12, 2025 (the "Jamali Report") and a reply report dated April 13, 2025 (the "Jamali Reply Report").
- [9] The defendants agreed to strike two specific extracts of concern from the reports. This left only a more general relevance objection.
- [10] I find that the reports are relevant:

1. WN intends to argue that the mixture they put in the bottle breaks down after ingestion such that it can fairly be treated as consistent with the final description of the product on the bottle. I find that Dr. Jamali's reports offer some potential assistance in considering this argument.
2. The reports also provide some potentially helpful evidence on the question of whether the defendant's products were being "held out" as containing the specific chemical formula used in the product's Health Canada monograph through the specific words used on their bottles. This conclusion applies equally to many of the other challenged extracts I have allowed to remain in the other reports discussed below.

2. Defendant WN's Expert Dr. Colin Barrow

- [11] Dr. Barrow provided a primary report dated February 14, 2025 (the "Barrow Report") and a reply report dated April 8, 2025 (the "Barrow Reply Report").
- [12] In the Barrow Report, the plaintiffs object to certain extracts that I find do support the intended argument above, i.e. that the mixture in the bottles has properties consistent with the product's description on the bottle.
- [13] Other aspects objected to simply review Dr. Barrow's regulatory experience, which I find is relevant, if only to support Dr. Barrow's qualifications.
- [14] The plaintiffs objected on the grounds of relevancy to certain portions discussing the effectiveness of glucosamine in treating joint pain. I find that these portions are relevant to support an available argument as to how the defendants could arrive at a conclusion that the mixture used qualified as a product consistent with the product's label.
- [15] What follows is the only aspect of the Barrow Report that I find goes too far in effectively putting Dr. Barrow in the position of a judge or regulator interpreting governing legislation:

Based on my experience with both NHPD and the ACCM, I believe that the monograph would apply to variations of glucosamine sulphate (common name) which include both glucosamine and sulphate in a formulation. For example, a formulation could be a blend of glucosamine hydrochloride and potassium sulfate but would be considered glucosamine sulfate from a regulatory standpoint since both glucosamine and sulfate are both present.

- [16] The defendants defend this paragraph on the basis that the product monograph issued by Health Canada is not a statutory instrument, but rather a guidance document outlining what Health Canada requires to permit the distribution of natural health products. However, satisfaction of the terms of the monograph does allow any applicant to use what was referred to during the hearing as a "fast track" to regulatory approval. Given that it is the right and role of the regulator to decide how and when a product manufacturer should be placed on their "fast track," I find that the impugned paragraph goes too far in terms of putting the expert in the shoes of the regulator.

- [17] I appreciate that experts need to be able to provide some "context" for their opinions. As such, I have allowed for some limited reference to the regulatory regime in other paragraphs objected to. However, the extract noted above goes too far in terms of moving beyond the provision of "context" into the advancement of a positive view on how the right to the "fast track" regulatory approval should or would be interpreted by the regulator.
- [18] In the Barrow Reply Report, the plaintiffs' first objection is to two paragraphs that describe the regulatory framework generally. I find that these paragraphs are appropriate and helpful in terms of describing the context in which the defendants operate. However, I agree with the plaintiffs in relation to the following element of the second paragraph:

In my view NNHPD would want an applicant to show that both glucosamine and sulfate are present in the correct amounts to be consistent with the glucosamine sulfate monograph and so additional methods are not required. In the case of the Velazquez FTIR, powder x-ray diffraction analysis, and LCMS, these methods have similar limitations to the USP methods and would not be mandated by regulators even if they were requiring specific methods to be used, which they don't.

- [19] This crosses the line I have drawn above.

- [20] On the following four pages (unfortunately, the pages were not numbered), I find that the following extracts also step too far in terms of the putting the expert in the regulator's or Court's shoes:

1. "and the product will be compliant";
2. "Therefore, in my view a mixture of glucosamine hydrochloride and potassium sulfate is glucosamine sulfate under the definition of the monograph";
3. "for Health Canada purposes";
4. "for two reasons. Firstly, these two materials are both acceptable under the Health Canada monograph, and secondly";
5. "This is consistent with my view that the NNHPD monograph for glucosamine sulfate, which relies on the USP and PH. Eur methods and associated reference standards does not require pure glucosamine sulfate potassium chloride and in fact a mixture of glucosamine hydrochloride with potassium sulfate, where the glucosamine and sulfate are both present in the correct ratio, is considered glucosamine sulfate for monograph purposes".

3. Defendant WN's Expert Dr. Stephen Andruski

- [21] Dr. Andruski provided a primary report dated February 19, 2025 (the "Andruski Report") and a reply report dated April 14, 2025 (the "Andruski Reply Report").

- [22] Similar objections to those noted above were made in relation to certain passages in the Andruski Reports.

[23] In the Andruski Report, I find that Dr. Andruski is putting himself in the shoes of the defendants rather than in the shoes of the regulator or the Court in the following sentences:

The reasons for reporting the result as Glucosamine Sulfate is based on the common name "Glucosamine Sulfate" in the Health Canada monograph for which this product is required to comply.

Natural Factors has decided to report the amount of Glucosamine as Glucosamine Sulfate because they are required to comply with the Health Canada monograph for Glucosamine Sulfate as explained above.

[24] In the Andruski Reply Report, most aspects objected to relate more to the product's chemical composition. However, the above principles call for the exclusion of the following extracts:

Again, it is my opinion based on my experience at USP that the NHPID does not define such a requirement.

Note that, in my experience this would not constitute non compliance with the Health Canada Glucosamine Sulfate product monograph, since [1]

4. Plaintiffs' Expert Dr. Carlos Martinez Velazquez

[25] Dr. Velazquez provided a primary report dated March 7, 2025 (the "Velazquez Report") and a reply report dated April 22, 2025 (the "Velazquez Reply Report").

[26] In light of my findings above, my findings on the defendant WN's objections to the evidence of Dr. Velazquez, can be briefly stated.

[27] WN accepted that the plaintiffs' objections and their own were closely tied together:

[The] position of WN Pharmaceuticals Ltd. and Natural Factors Nutritional Products Limited (the WN Defendants) is that all of the expert reports tendered in this matter should be admitted in their entirety, subject to the Court's discretion to assign weight to the reports.

It is important to point out that the Plaintiffs have challenged the WN Defendants' expert reports, in part, on the basis that the reports improperly interpret regulatory instruments. If the Plaintiffs are successful in that challenge, then portions of one of the Plaintiffs' expert reports are similarly inadmissible.

[28] I find that, consistent with the findings I made above regarding WN's proffered reports, Dr. Velazquez has generally not assumed the role of the regulator or the Court in responding to the plaintiffs' questions. Rather, his evidence is intended to provide the Court with some assistance on how a specialist in chemistry would receive the words in the product's monograph. However, there is one portion of the Velazquez Reply Report that I find should be struck to maintain consistency with my findings above:

In my opinion, this interpretation is inconsistent with the NHPID entry for glucosamine sulfate[2]

[29] Admittedly, the formulation of the questions put to Dr. Velasquez by plaintiffs' counsel was somewhat awkward, in that the questions appear to ask Dr. Velasquez to interpret the language of the Natural Health Product Database. However, I find that Dr. Velasquez's answers properly "stay in his lane", in terms of explaining how someone with his expertise would apply the language to derive the testing necessary to meet the formal requirements. I will treat the questions posed by the plaintiffs to be preceded by the qualifier, "From the perspective of an individual with expertise in chemistry " to emphasize that point. With that limitation, I find that the evidence would be helpful to the Court. Dr. Velazquez clearly has adequate expertise to opine on such matters. The assistance gained from his reports exceeds any possible prejudice to the defendants, or detriment to the process more generally.

III. CONCLUSION

[30] The expert reports should be modified in accordance with my directions above. Any remaining expert opinion issues not addressed on May 16, 2025, will be addressed at the time that each expert testifies.

"The Honourable Mr. Justice Branch"

[1] I will read the remaining portion as "The monograph indicates "

[2] I will treat the remainder of the sentence as reading "The NHPID entry for glucosamine sulphate specifically identifies 2-amino-2-deoxy-D-glucose sulfate (CAS 29031-19-4) as a distinct, isolated chemical substance."

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