IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Krishnan v. Jamieson Laboratories Ltd.,* 2026 BCSC 56

Date: 20260116
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 Supermaket 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 Application to Admit Additional Evidence

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Place and Date of Hearing:	Vancouver, B.C. November 18, 2025
Place and Date of Judgment:	Vancouver, B.C. January 16, 2026

I. INTRODUCTION

[1] This certified class proceeding is (hopefully) in the closing stages of the first phase of the common issues trial (the "Phase 1 Trial"). Counsel originally estimated 14 days would be required. We have now reached 24 days. Two blocks have been reserved on January 20 and 23, 2026, to address further evidentiary issues. A 5-day block has been set aside for the completion of evidence from February 9–13, 2026. Then the (hopefully) final 5-day block has been reserved for oral argument from May 11–15, 2026.

[2] This is my ruling on the defendant Jamieson Laboratories Ltd.'s ("Jamieson") application to produce additional evidence not disclosed before trial. Specifically, Jamieson seeks:

> 1. An order that Jamieson is permitted to amend its trial brief to add Artur Baku to its witness list and that Mr. Baku may give his evidence at trial by video conference.
>
> 2. Alternatively, an order that if Jamieson is not permitted to call Mr. Baku at trial there can be no adverse inference sought or obtained arising from Jamieson's failure to call Mr. Baku as a witness at trial.
>
> 3. An order that Jamieson be permitted to amend its trial brief to add Mitchell Kiernan as [a witness, and] that Mr. Kiernan may give his evidence in chief by way of affidavit and attend at trial for cross-examination (if required) by video conference.

[3] The first two elements of the application regarding Mr. Baku were resolved on consent when (1) Jamieson confirmed that it would not argue that Mr. Baku's 2016 emails were not Jamieson documents, and (2) the plaintiffs confirmed they would not argue that an adverse inference should arise from Jamieson's decision not to call Mr. Baku. This left the final issue: the proposed new evidence from Mr. Kiernan.

II. FACTUAL BACKGROUND

[4] Mitchell Kiernan is an employee in Jamieson's regulatory affairs group. He has delegated authority to communicate on Jamieson's behalf with Health Canada. No party included Mr. Kiernan on their witness list prior to trial.

[5] During Jamieson's opening on May 14, 2025, a question was raised by the Court as to whether any of Jamieson's glucosamine sulfate products were licensed

outside of Health Canada's monograph "fast track" process, and what documents were provided to Health Canada in support of any those licensing applications:

> CNSL C. HUNTER: … But there -- and the files for all of these -- for all of these products have been produced, and I'm not sure I quite understood until just this moment when I got some instructions on it that a significant proportion of the applications are just regular applications, not fast track applications. So they don't include the monograph attestation. And those applications require Jamieson to provide the clinical studies that support the safety and efficacy of the product, the licence that's applied for.
>
> THE COURT: But are any of the products involved in this case under that group?
>
> CNSL C. HUNTER: Yes, yes. I understand more than half of the glucosamine sulfate products are not applied for under the fast track licence application.
>
> THE COURT: So that -- presumably, were big files of safety and efficacy data produced to get those through the -- Health Canada?
>
> CNSL C. HUNTER: I assume so. …. Mr. Doherty is going to be giving evidence about these issues….

[6] There are certain documents in the record reflecting that some of Jamieson's products using glucosamine sulphate supplied by Cargill Acidulants ("Cargill"), were licensed outside of Health Canada's "fast-track" monograph process. In these cases, it appears that Jamieson relied on Cargill's confidential master file (the "Master File") maintained by Health Canada in support of the applications.

[7] A question that arose at trial was whether Health Canada had received a Cargill flowchart (the "Flowchart") that, Jamieson argues, demonstrates that the Cargill product was a physical mixture of two separate materials. That question could not be answered with certainty at the time the question arose, as Health Canada's own files had never been produced in the litigation.

[8] There was a discussion between the Court, Jamieson and the plaintiffs on May 14, 2025, regarding the extent of the document production relating to communications with Health Canada:

> CNSL C. HUNTER: My instructions are that correspondence has been produced.
>
> CNSL D. JONES: With Health Canada including the full application package?

> CNSL. C. HUNTER: Well, what we -- what we have.
>
> CNSL D. JONES: Okay.
>
> CNSL C. HUNTER: …when you certify a claim that goes back to 2004, there are many records that are no longer available, but we have produced the red files, which I understand are the files that contain that correspondence, and that happened some time ago.

[9] On May 15, 2025, during the trial, Mitchell Kiernan, regulatory affairs supervisor at Jamieson, made a direct request of Health Canada for "all documents in the possession of Health Canada contained within the Master File for Cargill Regenasure Glucosamine Sulfate". During his examination on September 25, 2025, Jamieson's witness John Doherty confirmed that Jamieson had requested, but had yet to receive, Cargill's master file from Health Canada.

[10] Class counsel objected to a suggestion made by Jamieson's counsel to Mr. Doherty during his examination in chief that the Flowchart was likely in the Master File:

> Q: And what is -- do you recognize this document?
>
> A: Yes. This is an authorization that the master file holder granted Jamieson access to reference their master file and all its contents for safety and efficacy through the course of the amendment in this case.
>
> Q: And do you know what the Regenasure glucosamine sulfate is?
>
> A: Regenasure glucosamine sulfate is a very specific brand produced by Cargill of glucosamine sulfate that is derived from aspergillus niger that is fed corn.
>
> Q: And is this the same raw material that was the subject of the product supply agreement with Cargill that we reviewed earlier today?
>
> A: Yes, it is.
>
> Q: Did Jamieson use Cargill's raw glucosamine sulfate sourced from aspergillus niger in other glucosamine sulfate products at issue in this litigation?
>
> A: Yes, we did.
>
> Q: In the case of those other products, did Jamieson rely on this Cargill authorization letter in support of the safety and efficacy of glucosamine sulfate?
>
> A: Yes, we did…
>
> Q: Did Cargill provide Jamieson with a copy of the master file?
>
> A: They did not.

> Q: And has Jamieson been able to -- has Jamieson taken any steps to try to obtain a copy of the master file?
>
> A: Since the commencement of this litigation, we've reached out to Cargill to try to get them to provide that information to us. They have not got back to us. And we also filed an access to information with Health Canada to try to get the information from them as found, and that has not yet been completed.
>
> Q: Based on your experience in the industry, including as chief science and innovation officer of Jamieson, what information is typically included in a master file?
>
> CNSL D. JONES: That is inviting the witness to speculate. They have tried to get a copy of it, and to now say what is in there, Cargill would have put in its own proprietary information…
>
> CNSL C. HUNTER: Exhibit 41.
>
> Q: Mr. Doherty, do you recognize the document at Exhibit 41?
>
> A: Yes.
>
> Q: You were asked some questions about it in your examination for discovery. Do you recall that?
>
> A: I do.
>
> Q: And what is it?
>
> A: This is a technical data sheet regarding the Regenasure glucosamine.
>
> Q: And if I can ask you to turn over to the second page, 02 at the bottom, can you describe what is shown here on this flowchart?
>
> A: This is --
>
> CNSL D. JONES: Justice, that's asking for an opinion about a chemical process. And so I think he can identify the existence of the document that they have in their possession, but this is apparently a patented process that Cargill yesterday we heard has in a special protected file at Health Canada. Presumably there's some chemistry involved.

[11] On November 4, 2025, Jamieson received documents from Health Canada in response to its May 15, 2025 request and produced them to the plaintiffs later that day. The documents appear to confirm that the Flowchart had indeed been provided to Health Canada.

[12] The new affidavit of Mr. Kiernan, proposed to be introduced as his evidence in chief if this application is granted, attaches the correspondence with Health Canada and the documents received (the “Documents”).

III. LEGAL PRINCIPLES

[13] If an opposing party does not consent to a party's amendment to its trial brief to add witnesses, the court's leave is required pursuant to *Supreme Court Civil Rules* Rules 12-1.1(2) and 12-5(28). Rule 12-5(28) states:

> Unless the court otherwise orders, a party must not, at trial, lead evidence from a witness unless that witness is listed in the witness list set out in a party's trial brief.

[14] Where a party learns their witness list is inaccurate or incomplete, *Supreme Court Civil Rules* R. 12-1.1(6) is engaged:

> If a party of record who has provided a witness list in a trial brief later learns that the witness list is inaccurate or incomplete, the party must promptly
>
> (a) file an amended witness list, and
>
> (b) serve a copy of the filed amended witness list on all parties of record.

[15] The purpose sought to be achieved by these provisions was explained by Justice Griffin, as she then was, in *Fu v. Zhu*, 2017 BCSC 749:

> [20] The Rules are also meant to bring home to parties that trial by ambush will not be condoned. Rather, there must be full disclosure of the documents and witnesses parties intend to rely on at trial, well before trial. This is part of what allows opposing parties to be prepared for trial and to be ready to meet and challenge the other side's case. It also allows for the efficient conduct of civil trials, all of which contributes to the fair administration of justice.

[16] The approach to be taken by the court in the exercise of its discretion under these rules was also explained in *Fu*:

> [50] In summary, I conclude that the factors to consider in exercising discretion under the Rules to allow a party to call a witness not previously disclosed on a witness list in accordance with the time requirements of the Rules are:
>
> (a) Will there be prejudice to the opposing party due to the lack of notice?
>
> (b) Is there a reasonable explanation for the failure to give notice? For example, is the lack of notice due to something new learned during trial or was the witness known to the party before trial and a strategic decision was initially made by that party to not call the witness?

> (c) Will precluding the witness being called prevent determination of an issue in the case on the merits?
>
> (d) Should the party be permitted to call the witness in the interests of justice?

[17] There was some debate as to whether certain factors on this list were mandatory, particularly the requirement for a "reasonable explanation". In my view, the factors must be considered globally, particularly given the implications of the use of the term "factors" and the inclusion of a broad "interests of justice" consideration.

[18] The plaintiffs also suggested that a stricter test be applied to the admission of new documents. They argued that the documents test requires the Court to find a reasonable excuse for the late delivery, citing *Houston v. Kine*, 2011 BCCA 358 at para. 16. I find no material difference between the discretion to be exercised in deciding whether to admit new witnesses or new documents. This is clear when a broader view of the decision in *Houston* is adopted*,* rather than isolating particular words in para. 16: see *Houston*, paras. 12–19; see also *Diaz v. Nowack*, 2020 BCSC 112 at para. 5*; Tran v. Kim Le Holdings Ltd.,* 2011 BCSC 1463 at para. 19.

IV. ANALYSIS

[19] I begin by assessing whether Jamieson has provided a reasonable explanation for the failure to give notice of this evidence at an earlier stage of the proceeding. Jamieson certainly did not already have the documents from Health Canada in its possession. But it is still relevant whether Jamieson should have collected them earlier.

[20] Jamieson suggests that it was only during the trial that it came to appreciate the importance of understanding what was in Health Canada's records. This appreciation is said to have arisen from the questions from the Court and from the class counsel's interjection regarding the document disclosure issues.

[21] I do not accept that this is a reasonable explanation. For several years, Jamieson has made clear its intention to rely on Health Canada's approval of its products to support its position on many of the certified common issues, including

those at issue in this Phase 1 Trial. It should have been clear that the information Health Canada possessed when granting such approvals would be relevant.

[22] That said, the lack of a reasonable explanation is not fatal in and of itself. The other factors must still be considered; see, e.g., *Devathasan v. Devathasan*, 2019 BCSC 1559 at paras. 17–23.

[23] In terms of the question as to whether precluding the proposed witness from being called may prevent proper determination of an issue on the merits, this weighs in favour of admission. The Flowchart was in fact in Health Canada's files. Jamieson may be able to argue that, based on the Flowchart, Health Canada was made aware of Cargill's formulation and nevertheless approved Jamieson's products.

[24] Admittedly, it is not entirely clear how Jamieson's argument in this respect falls within the scope of the certified common issues. Nonetheless, I am reluctant to risk leaving this issue "under briefed". At a minimum, the fact that Health Canada already had the Flowchart may be relevant to the fraudulent concealment issues.

[25] It will be difficult for the Court to adjudicate on the sufficiency of the material in Health Canada's file in the absence of a complete record of what was actually provided to Health Canada.

[26] The plaintiffs also suggested that they were prepared to amend Common Issue #44 regarding fraudulent concealment to remove any reference to Health Canada, but I am concerned about adjusting the common issues at such a late date.[1]

[27] In terms of the prejudice to the plaintiffs from the admission of the new evidence, I find little. The Documents' relevance is muted, given that Jamieson confirmed they will not seek to argue that the words in the Documents are true, but

[1] Common Issue #44 states: "If the Defendant Manufacturers learned that the Defendant Manufacturers' Glucosamine Sulfate Products did not contain Glucosamine Sulfate prior to August 23, 2017: a) did the Defendant Manufacturers take any steps to inform Class members, the Defendant Retailers, or Health Canada; and b) did the Defendant Manufacturers continue to label and sell the Defendants' Glucosamine Sulfate Products as containing Glucosamine Sulfate?"

only that the Documents existed in Health Canada's files. This reduces the additional evidentiary burden the plaintiffs will face arising from admission. Jamieson's limitation should reduce the plaintiffs' need to respond regarding the scientific underpinnings of the Documents, although I am not necessarily foreclosing that possibility. The concession also eases the plaintiffs' concern that Jamieson is seeking to "back door" expert opinion.

[28] As the plaintiffs fully recognized at the hearing, the Documents do not interfere with the plaintiffs' primary argument that the products were (improperly) a physical mixture. Rather, the plaintiffs' need to confirm "what Health Canada knew and when they knew it" relates more to the plaintiffs' reply to Jamieson's argument that the fact that Health Canada knew what Jamieson was doing immunizes them from liability.

[29] Any prejudice is also mitigated by the fact that the weight to be attributed to the Documents will remain a live issue for discussion in the course of final argument. For example, the plaintiffs will still be able to argue that:

a) there is no evidence that a qualified chemist at Health Canada reviewed the Documents to determine whether the products were a physical mixture; and

b) Health Canada did not have sufficient evidence to determine whether Jamieson's products constituted a physical mixture.

[30] Jamieson also notes that there is already some expert evidence in the record that could assist the Court in assessing the sufficiency of the Health Canada disclosures through the plaintiffs' expert, Dr. Velasquez.

[31] Even if the Documents were not admitted, the plaintiffs would be precluded from averring facts they now know to be untrue, specifically that Health Canada did not have the Flowchart: *Code of Professional Conduct for British Columbia*, Rule 2.1-2(c). Indeed, the plaintiffs confirmed on the record that they would not make that submission if the new documents were excluded. They also confirmed that they

would not be in a position to state that there was no evidence in Health Canada's files regarding whether the products were a physical mixture.

[32] Under the final "interests of justice" consideration, I do have some concern about the potential for trial delay in a case that is already six and a half years old. This weighs in the plaintiffs' favour. There is a risk that admission of the Documents may necessitate the provision of rebuttal evidence. Indeed, Jamieson indicated that it was amenable to the admission of rebuttal evidence to ensure that the Court was presented with a full understanding of the Documents.

[33] It should be noted under this factor that the plaintiffs were also in a position to seek court orders or statutory access to information in order to obtain a more complete production from Health Canada and/or Cargill. Indeed, it appears that the plaintiffs made an access to information request to Health Canada. It is not entirely clear why the Documents were not included in Health Canada's response. The plaintiffs did not push the production issue further with Health Canada.

[34] The plaintiffs suggested that a more traditional authenticity objection also arises in relation to the admission of the Documents through Mr. Kiernan, given that they are not his documents. However, in *Éthier v. Canada (RCMP Commissioner) (C.A.),* [1993] 2 F.C. 659,1993 CanLII 2935 (FCA), the Court found that documents produced in response to an access to information request to a government agency were inherently reliable.

[35] I find that the Documents are at least what they appear to be. In the Court's view, they meet the reliability and necessity threshold necessary to clear the basic admissibility hurdle. As Jamieson points out, many other documents have been admitted in this trial on a similar basis, i.e. through witnesses with no direct personal control over the documents. These were generally admitted to simply establish (as proposed here) that the documents existed on the Internet or elsewhere. Their necessity is established through the points raised above in my discussion of the need to ensure a proper determination of the issues on the merits. I conclude that the manner in which they were obtained does make them authentic, reliable and

necessary for the limited purpose proposed by Jamieson, i.e that they were in Health Canada's files.

[36] In terms of the limited effect of the admission on trial fairness, Jamieson is likely to rely on admissible evidence from its employee witnesses to support any further inferences. The fact that the Flowchart was submitted to Health Canada is merely the final evidentiary piece of a larger puzzle.

[37] The plaintiffs express concern that (1) Jamieson did not accept that their products were all physical mixtures until very late in the day, and (2) Jamieson was insufficiently forthcoming in their discovery responses to allow the plaintiffs to proceed with confidence that this was the case. This may be true, but this is a matter that is more relevant to the determination of a costs award, given that it relates more to litigation conduct than to the Court's present focus on ensuring a fair trial yielding a proper result. The plaintiffs have already signalled their intention to advance such a costs request.

[38] At the end of the day, I find that:

a) the pure authenticity/hearsay concerns are overcome, particularly given the limited use that is sought to be made of the Documents; and

b) factors (c) and (d) from *Fu* weigh more heavily in favour of admission than factors (a) and (b) weigh against.

[39] Paragraph 3 of Jamieson's application is granted.

"The Honourable Mr. Justice Branch"