

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia v. Apotex Inc.*,  
2026 BCSC 209

Date: 20260209  
Docket: S189395  
Registry: Vancouver

Between:

**His Majesty the King in Right of The Province of British Columbia**  
Plaintiff

And

**Apotex Inc., Apotex Pharmaceutical Holdings, Inc., Bristol-Myers Squibb Canada, Bristol-Myers Squibb Company, Paladin Labs, Endo Pharmaceuticals Inc., Endo International PLC, Endo Ventures Ltd., Ethypharm Inc., Janssen Inc., Johnson & Johnson, Pharmascience Inc., Joddes Limited, Pro Doc Limitee, The Jean Coutu Group (PJC) Inc., Mylan Pharmaceuticals ULC, Purdue Pharma Inc., Purdue Pharma L.P., The Purdue Frederick Company Inc., Purdue Frederick Inc., Ranbaxy Pharmaceuticals Canada Inc., Sun Pharmaceutical Industries Ltd., Hikma Labs Inc., Hikma Pharmaceuticals PLC, Roxane Laboratories Inc., Boehringer Ingelheim (Canada) Ltd. / Boehringer Ingelheim (Canada) LTEE., West-Ward Columbus Inc., Sanis Health Inc., Sandoz Canada Inc., Teva Canada Innovation G.P.-S.E.N.C., Teva Canada Limited, Teva Pharmaceuticals USA, Inc., Teva Pharmaceutical Industries Ltd., Actavis Pharma Company, Valeant Canada LP/Valeant Canada S.E.C., Bausch Health Companies Inc., Imperial Distributors Canada Inc., AmerisourceBergen Canada Corporation, Kohl & Frisch Limited, Kohl & Frisch Distribution Inc., McKesson Corporation, McKesson Canada Corporation, Nu-Quest Distribution Inc., United Pharmacists Manitoba Inc., Procuracy Inc., Procuracy Pharmacy Services Inc., Shoppers Drug Mart Inc., Unipharm Wholesale Drugs Ltd., LPG Inventory Solutions, and Noramco Inc.**

Defendants

Before: The Honourable Justice A. Ross

## Reasons for Judgment

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**Introduction**

[1] This action is a certified class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [CPA], wherein the plaintiffs claim for opioid-related health care costs under the *Opioid Damages and Health Care Costs Recovery Act*, S.B.C. 2018, c. 35 [ORA]. The plaintiffs also advance claims in unjust enrichment and under the *Competition Act*, R.S.C. 1985, c. C-34.

[2] The Province of British Columbia is the representative plaintiff in this class proceeding (the “Province”). The plaintiffs’ class members comprise the government of each province and territory, plus the government of Canada.

[3] The defendants are manufacturers and distributors of pharmaceuticals. More specifically, they are entities that manufactured or distributed opioid medications.

[4] These applications came before me for five days commencing October 6, 2025. They are, at their core, the defendants’ document requests from the representative plaintiff and the class members.

[5] The first application is brought by a pharmaceutical manufacturer, on behalf of all the manufacturer defendants (the “Manufacturer Defendants” or the “TR Defendants”), for production of documents from the representative plaintiff, the Province.

[6] The second application is brought by a pharmaceutical distributor on behalf of all the distributor defendants (the “Distributor Defendants” or the “McKesson Defendants”) for production of documents from the representative plaintiff.

[7] The third application is brought by a pharmaceutical manufacturer (“Janssen”) seeking production of documents from the class members (the “Application for Class Member Documents”).

[8] Each applicant applies as a representative of the other defendants of its ilk.

[9] This action was case managed by Justice Brundrett (as he then was) before his translation to the Court of Appeal. Justice Brundrett certified the action as a class proceeding on January 22, 2025, indexed at 2025 BCSC 92 (the “Brundrett Certification Decision”). That decision is under appeal.

[10] The matter is set for an 80-day trial, commencing February 22, 2028. By order of Brundrett J., initial document exchange is to be completed by February 27, 2026. Those dates provide some urgency to these applications. The case is enormous. The defendants advised me (often) that the claim, as presented, could range up to \$91 billion. Some defendants, including Purdue Pharma Inc., have settled with the plaintiffs.

[11] Given the size of the claims against them, it is not surprising that the defendants have made comprehensive document requests. I note, however, that the first stage of document production is not yet complete. I also note that the Province’s response to these applications declares a commitment to produce all relevant documents as required under the *Supreme Court Civil Rules*, the *CPA*, and the *ORA*. The Province notes that it has already agreed to produce documents that will be responsive to most of the defendants’ demands, to the extent they are in the Province’s possession or control (subject to any claims of privilege). As of the date of the hearing, the exact boundaries of the disputes between the parties on the scope of production were not clear.

[12] The main areas of dispute are as follows:

- a) The Province submits that the defendants’ document requests are overbroad and vague.
- b) The Province further says that the *ORA* provides for a trial that will proceed in three stages. At the first stage, the scope of relevant documents (and hence, the Province’s obligation to produce) is limited. The defendants do not accept that proposition.

c) The Province further submits that the application for document disclosure from the class members should fail for the same reasons outlined in a) and b) and because the defendants have not met the test set out in s. 17 of the *CPA*.

d) The Province's pleading asserts both *ORA*-based claims and non-*ORA*-based claims. The demands for each type of claim must be addressed separately.

[13] My consideration of these three applications is complicated by several factors.

[14] As noted, the action is certified as a class proceeding, but an appeal of that certification decision is pending. It is possible that the common issues may be amended, altered, or overturned.

[15] The parties have not yet completed the initial exchange of their lists of documents (*i.e.*, the documents each side agrees to produce or accept as sufficient).

[16] The defendants have made expansive requests for many categories of documents. The Province says it has agreed to produce most of those categories but opposes many others.

[17] The defendants have provided the Province with lists describing the types or classes of requested documents. Within those classes of documents, there is significant overlap between the types of documents that the Province agrees to produce and the documents the Province objects to producing. To some extent, the disputed areas could be described as a matter of semantics.

[18] The pleadings, in particular the notice of civil claim, are not yet finalized.

[19] To give further context to the scope of the defence document requests:

a) There are 44 certified common issues.

- b) The Province says that only four of those issues are relevant to the first stage of the litigation.
- c) The parties agreed to a consent order dated April 17, 2025, which addressed the document production protocol.

[20] For the application before me, the defendants prepared a Scott Schedule setting out the “streamlined” list of the document requests. Similarly, the plaintiff prepared a chart showing the document categories that were opposed by the Province.

[21] During the course of the hearing, the parties prepared joint schedules showing: the defence requests, the disputed demands, and the positions of the parties.

[22] The joint Scott Schedule for the manufacturer’s application from the Province:

- a) is 74 pages long;
- b) lists (including subparagraphs) more than 140 different “types” of documents that the defendants request and the Province dispute, either in whole or in part;
- c) lists each separate request and describes the asserted relevance of the document type to one or more of the 44 common issues and then lists the Province’s position.

[23] The Scott Schedule for the Application for Class Member Documents:

- a) is 34 pages long;
- b) lists (including subparagraphs) more than 230 different “types” of documents that the defendants request from the class members (*i.e.*, all of the provinces, territories and Federal government) and also lists the Province’s position.

[24] I consider the items listed above to be obvious practical roadblocks that prevent me from determining the individual answers to the massive swath of questions posed. Despite my feelings on the matter, all parties agreed that this application should proceed at this time. To some extent, I interpret that agreement as a tacit acknowledgement that the unsuccessful party will take this matter to the Court of Appeal.

[25] However, in my opinion, it is not the role of this Court to sift through broadly worded document requests and provide hypothetical and broadly worded directions requiring the Province to determine whether any of its thousands of employees or agents may be in possession of a document that may fit into the description provided in the defendants' list. As a result, my reasons below primarily focus on the larger procedural issues raised by the parties. Specifically, I focus on the main point of contention on this application which boils down to a dispute between the parties:

- a) The Province relies on the provisions of the *ORA* regarding the staging of the trial.
- b) The defence submits that the proper construction of the staging in the *ORA* has not yet been determined. Hence, any decision that accepts the Province's construction could significantly prejudice the defence.
- c) If the Province's position is correct, then document discovery will be limited at this stage. If the defence position is correct, then the scope of document discovery will be significantly wider.

[26] As set out below, I find that the Province's position on the interpretation and application of the *ORA* is the correct one. It follows that the Province's document disclosure obligations are significantly narrowed.

[27] Following the release of these reasons, and the expected appeal, I anticipate that the document production will proceed in the manner of an exchange of documents and positions. I am confident that experienced counsel will be able to

resolve many of the disputes and that any further document productions application(s) will be significantly narrower in scope.

[28] With that overview, I now explore the issues.

**ISSUES**

[29] The issues for me to decide on this application are:

- a) Are the Manufacturer Defendants (applicants) entitled to an order that the Province list and produce the documents listed in Appendix A to their notice of application or are those demands too broad?
- b) Is the Province correct in its construction of the “stages” prescribed in the *ORA*? If so, how does that affect the Province’s document production obligations?
- c) How do the answers to a) and b) affect the application of the Distributor Defendants?
- d) What documents are producible by the Province in relation to the claims in unjust enrichment and under the *Competition Act*?
- e) How do the answers to a) and b) affect the Application for Class Member Documents?

**Factual Background**

**The Nature of the Action**

[30] The Province brings this class proceeding to recover health care costs and damages arising from what the Province has called the “opioid epidemic”.

[31] Each federal, provincial, and territorial government class member (except Yukon) has passed legislation akin to the *ORA*. Each of those Acts creates a cause of action against a manufacturer or distributor to recover health care benefits caused or contributed to by an (asserted) Opioid-Related Wrong. These various Acts

provide that recovery can be in relation to an individual insured person, or upon an aggregate basis for a population of insured persons.

[32] The Brundrett Certification Decision certified this action as a class proceeding. The class is comprised of all federal, provincial, and territorial governments in Canada. Each government asserts that it paid health care, pharmaceutical, treatment, and other costs related to opioids during the class period.

[33] Justice Brundrett also certified a subclass “of federal, provincial, and territorial governments that have legislation specifically directed at recovery of damages and health care costs arising from an ‘opioid-related wrong’ as that term is defined in the relevant legislation” (the “ORA Subclass”). The ORA Subclass includes all provincial and territorial governments except Yukon.

[34] There are two main types of defendants:

- a) the “Manufacturer Defendants”, and
- b) the “Distributor Defendants”.

[35] In short, the Province alleges the Manufacturer Defendants, among other things, marketed and promoted opioids in Canada:

- a) as being less addictive than was actually known to the Manufacturer Defendants; and
- b) for conditions the Manufacturer Defendants knew the drugs were not effective in treating.

[36] The Province alleges that the Distributor Defendants, among other things, delivered opioids manufactured and marketed by the Manufacturer Defendants to pharmacies and hospitals in Canada in quantities that they knew or should have known exceeded any legitimate market.

[37] The Province advances various causes of action in relation to the defendants' alleged roles in the creation of the opioid epidemic.

**The History of the Litigation**

[38] On August 29, 2018, this action was commenced by notice of civil claim.

[39] On October 31, 2018, the *ORA* received Royal Assent.

[40] On June 20, 2019, the plaintiff filed the amended notice of civil claim.

[41] On March 29, 2021, the plaintiff filed the second amended notice of civil claim, adding various parties by consent.

[42] On March 29, 2021, the plaintiff filed an application to further amend its notice of civil claim. That application was heard on April 26–30, 2021, along with the defendants' motions to strike. Justice Brundrett issued his decision on January 4, 2022 (the "Pleadings Decision"):

- a) granting the plaintiff's application to amend;
- b) striking claims based on the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 [*HCCRA*];
- c) dismissing the remainder of the defendants' motions to strike.

[43] On April 25, 2022, the plaintiff filed the third amended notice of civil claim in accordance with the Pleadings Decision.

[44] On June 6–8, 2022, the Court of Appeal heard the defendants' appeal of the Pleadings Decision. On November 2, 2022, the Court of Appeal:

- a) struck the claim based on the tort of public nuisance;
- b) substantially dismissed the defendants' challenges to various causes of action in the plaintiff's claim.

(The “Pleadings Appeal Decision”.)

[45] On September 20–21, 2022, this Court heard constitutional challenges to the *ORA* by way of summary trial applications. On December 8, 2022, Brundrett J. dismissed the constitutional challenges brought by the defendants. An appeal of that decision was dismissed on July 28, 2023. On November 29, 2024, the Supreme Court of Canada dismissed a further appeal and thereby upheld the validity of s. 11 of the *ORA*.

[46] The Brundrett Certification Decision was released on January 22, 2025. The defendants’ remaining jurisdiction applications were dismissed. As noted, the Brundrett Certification Decision is currently under appeal. The litigation is not on hold pending that appeal, and the parties are taking all steps necessary to prepare for trial.

#### **Document Exchange Protocol**

[47] By a consent order dated April 17, 2025, the parties agreed that document production would be conducted in accordance with an agreed “Document Exchange Protocol”.

[48] Schedule B to the Document Exchange Protocol sets out certain categories of documents requested by the defendants for production from the Province (the “Schedule B Demands”).

[49] The Province has objected to production of certain categories of documents set out in the Schedule B Demands. However, all parties agree that the Schedule B Demands constitute a request for documents under Rule 7-1.

[50] Pursuant to an order of the case management judge dated April 17, 2025, the parties are required to make best efforts to substantially complete the first stage of document production by February 27, 2026. Document production has been underway between the parties, with tranches of documents being delivered every two months. However, document production is not complete.

[51] On June 13, 2025, the Province was granted leave to file the fourth amended notice of civil claim. As of the date of this hearing, the fourth amended notice of civil claim (“FANOCC”) has not yet been filed.

### **The ORA**

[52] As noted, the main issue for me to decide on this application is the proper interpretation of the *ORA*. For a description of that Act and its impact on this application, I rely on the following paragraphs of the Brundrett Certification Decision:

[152] The *ORA* is intended in general terms to be similar to the *TRA* [Tobacco Damages Recovery Act, S.B.C. 1997, c. 41] which created a civil cause of action to allow the Province to recover tobacco-related public health care costs directly from tobacco manufacturers for “tobacco-related wrongs”. The *ORA* seeks to accomplish a similar objective for health care costs caused or contributed to by “opioid-related wrongs” allegedly committed by manufacturers and distributors of Opioid Products: *Sandoz BCCA* at paras. 1 and 7.

[153] Section 2(1) of the *ORA* grants the government a “direct and distinct” action against a manufacturer, wholesaler, or consultant to recover the “cost of health care benefits” caused or contributed to by an “opioid-related wrong.” This statutory cause of action is provided to the British Columbia government and only in relation to torts committed in British Columbia or breaches of duty or obligation owed to persons in British Columbia.

[154] The *ORA* was enacted on October 31, 2018. It was recently amended by Bill 34, *Opioid Damages and Health Care Costs Recovery Amendment Act, 2022*, 42<sup>nd</sup> Parl., 3<sup>rd</sup> Sess., British Columbia, 2022 (assented to November 3, 2022), to include a right of action against a consultant in addition to a manufacturer or wholesaler.

[155] The *ORA* defines an “opioid-related wrong” in s. 1(1) as follows:

- (a) a tort that is committed in British Columbia by a manufacturer or wholesaler and that causes or contributes to opioid-related disease, injury or illness, or
- (b) [...] a breach, by a manufacturer or wholesaler, of a common law, equitable or statutory duty or obligation owed to persons in British Columbia who have used or been exposed to or might use or be exposed to an opioid product.

[53] Because the structure of the *ORA* is in issue, I do not propose to set out any interpretation of it here. Instead, I rely on the Court of Appeal’s decision in a prior decision in this action: *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 [*Valeant*]. The Court described the stages as follows:

[79] Where an action is brought to recover the cost of health care benefits on an aggregate basis, it is not necessary to identify particular individual insured persons (s. 2(5)(a)(i)), to prove the cause of opioid-related disease in any particular insured person (s. 2(5)(a)(ii)), or to prove the cost of healthcare benefits for any particular individual insured person (s. 2(5)(a)(iii)). Moreover, healthcare records of individuals are not compellable except to the extent relied on by an expert witness (s. 2(5)(b)), and individuals are not compellable to answer questions about individual insured persons (s. 2(5)(c)), although discovery of statistically meaningful samples of individual records may be ordered on terms (s. 2(5)(d) and (e)). In short, the *ORA* is structured to permit an aggregate action relying essentially on statistical analyses related to populations of individuals. The *ORA* needs to be interpreted in light of its purpose to address alleged mass torts that are thought to be impossible, practically, to prosecute under traditional individual tort principles.

[80] Section 3(1) provides that in an action brought on an aggregate basis, the government can benefit from certain presumptions if it shows that:

- (a) the defendant breached a common law, equitable or statutory duty or obligation owed to insured persons who have used or been exposed to or might use or be exposed to the type of opioid product,
- (b) using the type of opioid product can cause or contribute to disease, injury or illness, and
- (c) during all or part of the period of the breach referred to in paragraph (a) of this subsection, the type of opioid product, manufactured or promoted by the defendant, was offered for distribution or sale in British Columbia.

[81] If an opioid-related wrong is established, the court must presume that the opioid-related wrong caused the exposure and caused the injury. Then, the court must presume that the population of insured persons who used or were exposed to the type of opioid product manufactured or promoted by the defendant would not have used or been exposed to the product but for the breach (s. 3(2)(a)), and that the use or exposure caused or contributed to disease, injury or illness, or the risk thereof, in a portion of the population at issue (s. 3(2)(b)).

[82] When these presumptions apply, the court must determine on an aggregate basis the cost of health care benefits that were provided after the date of the breach, and that resulted from use or exposure to the type of opioid product (s. 3(3)(a)). Each liable defendant is then responsible for a proportion of the aggregate cost equal to its market share in the type of opioid product at issue (s. 3(3)(b)). A defendant may reduce its liability, or the proportions of liability can be readjusted, if it can show, on a balance of probabilities, that its breach did not cause or contribute to the exposure or the injury (s. 3(4)).

[83] Section 4(2) of *ORA* deems defendants jointly and severally liable for the cost of healthcare benefits, if, among other things, they would be held, at common law, in equity, or under an enactment to have (i) acted in concert in respect of the breach, or (ii) to have acted in a principal and agent relationship with respect to the breach.

[84] The *ORA* permits the Province to rely on population-based evidence to establish causation and quantification of health care costs (s. 5). Further, the *ORA* dispenses with limitations defences, so long as the action is brought within two years of the legislation coming into force (s. 6). The legislation has retroactive effect, and applies to proceedings in relation to opioid-related wrongs that the plaintiff has already commenced (ss. 10, 11). The *ORA* appends a schedule setting out an array of drugs that, if present in a product, make it an opioid product for the purposes of the *ORA*.

[85] It is evident, then, that the *ORA* significantly alters traditional substantive and procedural tort principles to address what the legislature has determined are, if breaches of duty can be established, mass tort(s) affecting large numbers of individuals.

[54] Crucially, the Province submits that the provisions of the *ORA* provide for three distinct stages in the litigation. These “stages” limit the scope of relevance at the first stage. I describe those stages below under the heading “Document Disclosure and the *ORA* Claims”. The Province says that these provisions set out the procedure to be followed in the steps or stages in this action. The defendants submit that the procedure and the steps have not been clearly delineated.

### **The FANOCC**

[55] To make out a breach of a common law, equitable or statutory duty (*i.e.*, Opioid-Related Wrongs) for the purpose of its *ORA* claims, the Province alleges (*inter alia*):

- a) failure to warn as against all defendants;
- b) negligent design;
- c) negligent misrepresentation;
- d) fraudulent misrepresentation;
- e) breach of the *Competition Act*, and
- f) breach of the *Food and Drugs Act*, R.S.C., 1985, c. F-27, as against the Manufacturer Defendants.

**The Common Issues**

[56] Justice Brundrett certified 44 common issues. A list of those issues is attached as Appendix “B” to the Brundrett Certification Decision.

[57] The Province submits that only four of the common issues will be relevant at the first stage of the trial, specifically, common issues 1, 2, 8, and 43. I address those issues below.

**The Defendants’ Applications**

[58] These three applications are brought by the applicants on behalf of two groups:

- a) On behalf of all of the Manufacturer Defendants: Teva Canada Innovation G.P.-S.E.N.C., Teva Canada Limited, Teva Pharmaceutical Industries Ltd., Teva Pharmaceuticals USA, Inc., Actavis Pharma Company, Ranbaxy Pharmaceuticals Canada Inc., and Sun Pharmaceutical Industries Ltd. (all of whom I have named the “TR Defendants”) apply for production of documents from the Province as representative plaintiff.
  
- b) On behalf of the Distributor Defendants: McKesson Canada Corporation (“McKesson Canada”) and McKesson Corporation (whom I have named the “McKesson Defendants”) apply for documents from the Province. The McKesson Defendants’ application is slightly different from the TR Defendants’ application due to the differences in the allegations against the distributors.
  
- c) On behalf of the Manufacturer Defendants: Janssen Inc. and Johnson & Johnson (the “Janssen Defendants”) apply for documents from the class members (being the governments of Canada, the provinces, and territories).

[59] As noted, the parties agree that the Schedule B Demands of the various defendants constitute demands for documents pursuant to Rule 7-1(10).

**Province's Obligation to Produce Documents**

[60] The originating position of the applicants (*i.e.*, leaving aside the Province's argument on the structure of the *ORA*) is that, pursuant to Rule 7-1(1), the Province is obligated to list all documents that are or have been in its possession or control and that could be used by any party at trial to prove or disprove a material fact. Based on that general principle, the defendants prepared their Schedule B Demands.

[61] Material facts are the elements that are essential to formulate a claim or defence. The applicants submit that the scope of Rule 7-1(1) is not restricted to documents which, in and of themselves, may prove or disprove a material fact. The scope includes evidence that could assist in proving or disproving a material fact: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at paras. 45–48.

[62] The applicants submit that in a certified class action, while the scope of document production is informed by the common issues, the matters of materiality and relevance remain the “animating principles”. The applicants rely on *Lewis v. WestJet Airlines Ltd.*, 2024 BCSC 2398 at para. 20. They also rely on Justice G.C. Weatherill in *Coburn and Watson's Metropolitan Home v. Bank of America Corporation*, 2017 BCSC 686:

[11] I recognize that unlike the courts in other provinces, including Ontario and Nova Scotia, British Columbia courts have determined that the scope of the parties' document production obligation in the context of a class action proceeding is broad and not limited by the common issues, although they are subject to the evidentiary principles of materiality and relevance as determined by the common issues: *Stanway v. Wyeth Canada Inc.*, 2013 BCSC 369, at para. 9, leave to appeal denied, 2013 BCCA 256. See also *Hemeon v. South West Nova District Health Authority*, 2015 NSSC 287, at paras. 5–17.

[63] The Province accepts that it is obligated to list all documents that are or have been in its possession or control and that could be used by any party at trial to prove or disprove a material fact. However, the Province takes issue with the defence

formulation of the test under Rule 7-1 in a class proceeding. The Province says materiality is measured by the common issues as informed by the pleadings.

[64] In addressing this issue, I consider the correct of enunciation of the test, was described by Justice Hughes in *Lewis*, which I interpret as less broad than the statement in *Coburn*:

[20] ... Materiality and relevance are the animating principles and will be governed by the certified common issues as informed by the pleadings and subject to the principles of proportionality that apply alongside the principles that given class action proceedings: *Jiang v. Peoples Trust Company*, 2021 BCSC 2193 at para. 22; *Stanway v. Wyeth Canada Inc.*, 2013 BCSC 369 at para. 26.

[65] I also take note of (and base this portion my decision on) G.C. Weatherill J.'s comments in *Coburn* which addressed the practical concerns to which I alluded above:

[12] In British Columbia, the document production rule, Rule 7-1 of the *Supreme Court Civil Rules*, contemplates a two-tier process involving:

- a) initial discovery that may be relatively narrow; and
- b) further discovery on the band of broader classes of documents.

See *Imperial Parking Canada Corp v. Anderson*, 2014 BCSC 989, at paras. 18–26.

[13] In my view, document disclosure and the volume thereof is not yet at the stage where enough is known about what is or may be in issue to allow the court to meaningfully weigh in and make rulings. Indeed, after almost a full day of hearing today, it remains unclear to me whether there actually is or may be a dispute, and, if so, what the nature of the dispute is. I agree with counsel for the defendants that the better approach at this stage is to permit the process to unfold as it has been unfolding and, once the core tier-one production has been made by the defendants, the plaintiffs will then have the ability to make a focused request for any additional documents that they seek.

[66] Returning to the specifics of these applications, the TR Defendants and the McKesson Defendants argue that the categories of documents set out in their Schedule B Demands pertain to material facts raised in the pleadings and underlying the common issues. They submit that the documents are needed to permit the TR Defendants and the McKesson Defendants to meaningfully understand and respond to the Province's claim.

[67] In response, the plaintiff argues that the majority of the requests

- a) are irrelevant, overbroad and vague,
- b) seek documents in the possession of other entities, and
- c) relate to documents that are in the possession of the defendants.

[68] To put the allegation of “overbroad and vague” into context, I set out here one representative example of the defence document requests:

Any documents related to the knowledge of any Defendant, the Province, doctors or pharmacists, or any association of doctors or pharmacists, with respect to the alleged behaviour of opioid users who became addicted to or dependent on any specific opioid product or on opioid products generally.

[69] In my opinion, that is a clear example of an overbroad request.

[70] As I noted above, many of the issues regarding the scope of the requests have not been hashed out between the parties. The TR Defendants’ application constitutes a request that the court provide direction which will inform the parties on the scope of the Province’s disclosure obligations.

[71] In general, I accept the defence submission that the scope of the Province’s document production obligations is not limited to the Province’s theory of the case. The defendants are entitled to seek discovery of documents that could uncover evidence that could undermine the Province’s theory or that could support their defences (*Coburn* at para. 42). However, in my opinion, in this case, that general position is tempered by three significant factors:

- a) The Province retains its right to argue the issues of relevance, overbreadth, vagueness, and other issues affecting the Province’s obligation to produce.
- b) As set out by G.C. Weatherill J. in *Coburn*, the best approach is to permit the process to unfold as it has been unfolding with the Province making

disclosure, the defendants making follow-up demands, and the Province responding to those demands.

- c) Most importantly, that process must be governed in the light of my decision on the applicability of the three-stage process provided in the *ORA*.

[72] So, as a starting point in these reasons, I am declining to pursue the process sought by the TR Defendants and the McKesson Defendants. I will not be providing my opinion or direction on the relevance or materiality of the various types of documents in the Schedule B Demands. Nor will I address the Province's positions on those 170 requests. I consider those demands, and the Province's responses, to be too broad to allow meaningful court comment.

[73] As described in *Coburn*, I expect the parties to proceed with document disclosure in accordance with these reasons. That process should unfold as it has been unfolding with the defendants making specific demands and the Province responding to those demands.

[74] Having addressed the basic obligations under Rule 7-1, I now turn to the Province's main position, which overarches the entirety of the applications.

**Document Disclosure and the *ORA* Claims**

[75] The Province's main submission on this application relates to the structure of the *ORA*. The Province says the defendants misinterpret the structure and framework of the *ORA* based claims.

[76] The Province submits that the first stage of this action, the common issues trial, will only involve the issue of liability as prescribed by the *ORA*. Hence, a limited number of documents will be relevant.

[77] Looking at this application from a practical perspective:

a) If the Province is correct in its formulation of the staging of the *ORA* trials, then the Province's position in opposing the majority of the documents sought by the defendants is correct.

b) If the Province is incorrect on its formulation, or if it is too early to determine that issue, then the Province will have to reassess its position on the defendants' requests for documents (in accordance with my direction as outlined above).

[78] Although the Province is the respondent on these applications, I will address the Province's position on the *ORA* claims first, then move on to the defence position.

### **Province's Position on the Three Stages of Trial**

[79] The starting point for this analysis is the Brundrett Certification Decision. As noted above, Justice Brundrett certified 44 common issues.

[80] The defence document demands are linked to all of the 44 common issues. However, the Province submits that only four of those issues will be addressed at the first stage of the trial. Those are common issues 1, 2, 8, and 43.

[81] The province submits that the only issues to be decided at the first stage are:

1. Can use of or exposure to Opioid Products cause or contribute to disease, injury or illness?
2. What are the diseases, injuries or illnesses that can be caused or contributed to by use of or exposure to Opioid Products?
8. Did the conduct of the Manufacturer Defendants, in making the Opioids Misrepresentations, cause an increase in the prescription of Opioid Products in Canada?
43. If the answer to common issue #42 is yes, can using the Opioid Products cause or contribute to disease, injury or illness, pursuant to s.3(1)(b) of the *ORA*?

[82] The basis of the Province's position derives from their reading of the *ORA*. The Province submits that, pursuant to the *ORA*, the trial of this matter will proceed in three distinct stages:

- (i) The first stage (“Stage 1”) will be a liability trial based on the provisions of s. 3(1). At Stage 1 the Province has the onus to establish that, in respect of a type of opioid product:
  - a) the defendants breached a common law, equitable or statutory duty or obligation owed to insured persons who have used or been exposed to or might use or be exposed to the type of opioid product (the “Opioid-Related Wrong”);
  - b) using the type of opioid product can cause or contribute to disease, injury, or illness (Common Issues 1, 2, and 43); and
  - c) during all or part of the period of the breach referred to in (a) above, the type of opioid product, manufactured or promoted by the defendants, was offered for distribution or sale in British Columbia (or the respective Class Member jurisdiction) (common issue 8).
  
- (ii) If the Province establishes the elements required by s. 3(1), then s. 3(2) of the *ORA* states the court must presume that:
  - a) the population of insured persons who used or were exposed to the type of opioid product manufactured or promoted by the defendant would not have used or been exposed to the product but for the breach referred to in s.(3)(1)(a) (*i.e.*, the Opioid-Related Wrong), and
  - b) the use or exposure described in paragraph (a) caused or contributed to disease, injury or illness or the risk of disease, injury or illness in a portion of the population described in paragraph (a).

(Collectively, the “*ORA* Presumptions”).

[83] The Province submits that the next step (assuming the Province is successful at Stage 1) will be “Stage 2”, wherein

- a) the court must determine on an aggregate basis, the cost of health care benefits provided after the date of the breach (the Opioid-Related Wrong) resulting from use or exposure to the type of opioid product; and
- b) for each defendant to which the *ORA* Presumptions apply, the court must determine their respective proportion of the aggregate cost referred to above equal to their market share in the type of opioid product.

[84] Stage 2 will be followed by “Stage 3”. At Stage 3, each defendant can seek to rebut its proportionate liability (the “*ORA* Damages Rebuttal”). Section 3(4) of the *ORA* provides:

(4) The amount of a defendant's liability assessed under subsection (3) (b) may be reduced, or the proportions of liability assessed under subsection (3) (b) readjusted among the defendants, to the extent that a defendant proves, on a balance of probabilities, that the breach referred to in subsection (1) (a) did not cause or contribute to the use or exposure referred to in subsection (2) (a) or to the disease, injury or illness or risk of disease, injury or illness referred to in subsection (2)(b).

[85] Again, the Province submits that the defence document demands are linked to all of the 44 common issues. The Province submits that only four of those issues will be addressed as part of the Stage 1 trial (common issues 1, 2, 8, and 43). The Province argues that, at the Stage 1, any document requests that go beyond common issues 1, 2, 8, and 43 are not material and ought not to be produced.

[86] The Province says the *ORA* Presumptions offer a simplified track for establishing liability. Specifically, the Province does not need to establish that there was any actual harm caused to end-users of the opioid products. Nor does the plaintiff need to establish any harm was caused by the defendants' wrongful acts or omissions.

[87] Thus, when the Province relies on breaches of common law duties (e.g., misrepresentation, negligent failure to warn, and negligent design), the Province is not required to establish all of the elements of those common law torts. The *ORA* Presumptions remove the requirement of establishing reliance, causation or harm.

The Province submits that, at Stage 1, for all *ORA*-based claims, it only needs to prove material facts that if true would establish the existence of, and breach of, a duty. That is the essence of Stage 1.

[88] The Province further submits that Stage 1 will be followed by Stage 2 of the proceeding which constitutes the individual issues stage, where the Court will assess “individual” issues and damages. The “individuals” at this stage will be the class members (the provinces, territories, and Government of Canada). Only after Stage 2 are the defendants permitted to argue and present evidence relating to issues that would reduce their proportionate liability.

[89] The Province submits that the documents sought by the defendants on this application seek evidence and information that is only relevant to the issues of lack of reliance and causation. Hence, the Province says those types of documents are not material or relevant for the Stage 1. If the Province is successful at Stage 1, then the *ORA* Presumptions apply, and the common issues trial will be complete with regards to the *ORA* claim.

### **The Defence Position**

[90] This is, of course, the application of the defendants for production. In response to the Province’s submission, the defendants submit that the Province’s interpretation of the three *ORA* stages is overly narrow.

[91] The defendants argue that the scope document discovery should not be restricted at this stage in the proceeding. They note that this action is the first, and perhaps only, proceeding that will be commenced under the *ORA*. Hence, the proper interpretation of the framework of the *ORA* and the “stages” of the litigation must be undertaken carefully and at the appropriate moment. They submit that this document application is not the appropriate moment. Hence, accepting the Province’s formulation of the “stages” would severely prejudice their ability to defend this enormous claim.

[92] In support of this cautious view, the defendants note the care with which the Court of Appeal approached a similar issue when addressing a prior appeal in this action, the decision in *Valeant*. The defendants point to a passage wherein the Court of Appeal specifically declined to give a definitive interpretation of the *ORA*. In the *Valeant* decision, the Court of Appeal was addressing the defence (there, the appellants') attacks on the Province's pleadings (pre-certification). Justice Harris, for the court, wrote:

[100] I also do not purport to offer a definitive interpretation of the *ORA*. The argument advanced by the appellants is arguable; it is one among competing arguable interpretations. It would be unwise, in my view, at this stage in the proceedings, to purport to offer a definitive interpretation. This is tailored and targeted legislation intended to support a claim to recover in the aggregate, and on an industry-wide basis, the cost of healthcare benefits caused or contributed to by what is perceived to be systemic and coordinated wrongdoing in relation to a type of pharmaceutical product by a large number of defendants. Such targeted legislation has received the imprimatur of constitutional and reformist approval. It would not be appropriate for this Court, at this stage in the proceedings, to interpret either the *ORA* or the pleadings so as to frustrate the objective of the legislature, or prevent the claim from advancing. As the Supreme Court of Canada made clear in *Imperial Tobacco*, the fact that some defendants consider legislative initiatives of this kind to be fundamentally unfair is not a reason for courts to impede the progress of the claim.

[101] Additionally, a definitive interpretation of the necessary elements of, and defences to, the statutory cause of action is likely better left to trial or a time when the factual context for that interpretation is more fully developed. It is unwise to offer a definitive interpretation in a vacuum given the possible range of interpretations available. To do so could have unforeseeable consequences, not only risking undermining the scope of the claim, but also prejudicing the ability of defendants to raise or establish certain defences. It may be that some questions of interpretation will be ripe for and require early resolution, but I would not include in that class the specific issues raised here.

(Emphasis added.)

[93] The defendants say the Court of Appeal in *Valeant* shied away from, and warned against, a ruling that would work to definitively interpret the procedures under the *ORA*. Based on the underlined passages, the defendants submit that a definitive interpretation of the *ORA* should be left for trial.

[94] The defendants further argue that a decision that accepts the Province's formulation of the stages under the *ORA* would preclude the defendants from putting

forward a full defence to this massive claim. The defendants submit that such a staunching should not occur at all and, certainly, not at this early document production phase. They submit that accepting the Province’s submission would significantly prejudice their defence of this action.

[95] The defendants say that they have an “arguable case” about the interpretation of the framework and the “stages” under the *ORA*. The final determination of the procedure should be left to the trial judge. Hence, document production should not be limited at this early stage.

**Analysis**

[96] For the reasons described below, I do not accept the defence submission. I accept the Province’s description of the matters that are in issue at Stage 1 of this proceeding.

[97] In my opinion, the defendants read too much into the Court of Appeal’s decision in *Valeant*. As noted, the defendants rely on the statement at paras. 100–101 and submit that it would be “unwise to offer a definitive interpretation in a vacuum”.

[98] The Court of Appeal’s statement at para. 101 of *Valeant* must be taken in the larger context.

[99] First, I note that the Court of Appeal in *Valeant* took the step of describing the stages of an *ORA* claim. Paragraphs 79–85 are reproduced above at para. 53. Those paragraphs are, in some ways, a simple explanation or restating of the provisions of the *ORA*. However, they provide insight into the analysis of the Court of Appeal. I take from those passages the following:

[79] ...The *ORA* needs to be interpreted in light of its purpose to address alleged mass torts that are thought to be impossible, practically, to prosecute under traditional individual tort principles.

...

[85] It is evident, then, that the *ORA* significantly alters traditional substantive and procedural tort principles to address what the legislature has

determined are, if breaches of duty can be established, mass tort(s) affecting large numbers of individuals. ...

[100] These paragraphs make it clear that the procedure laid out by the legislation cannot be interpreted as describing the normal procedure for civil litigation. The legislation “significantly alters traditional substantive and procedural tort principles”.

[101] For this analysis I do not need to arrive at a definitive interpretation of the *ORA*. My interpretation of paras. 79–85 from *Valeant* is that they constitute the Court of Appeal describing the process that is clearly laid out in the text of the *ORA*. In my opinion, that procedure is not something that can be decided at trial. By definition, the staging process must be clear at the outset, so the parties know which issues will be addressed at which hearing. They cannot arrive on the first day of trial, unsure what issues will be addressed.

[102] Second, I return to the paragraphs of *Valeant* cited by the defence in support of this application (paras. 100–101). The Court of Appeal accepted that the defendants’ submission put forward an “arguable interpretation” of the *ORA*. However, the Court went on to say the following:

[100] ... This is tailored and targeted legislation intended to support a claim to recover in the aggregate, and on an industry-wide basis, the cost of healthcare benefits caused or contributed to by what is perceived to be systemic and coordinated wrongdoing in relation to a type of pharmaceutical product by a large number of defendants. It would not be appropriate for this Court, at this stage in the proceedings, to interpret either the *ORA* or the pleadings so as to frustrate the objective of the legislature, or prevent the claim from advancing. ...

[101] ... It may be that some questions of interpretation will be ripe for and require early resolution, but I would not include in that class the specific issues raised here.

[103] In my opinion, the documents disclosure issue is one that must be “ripe” for early resolution. Further, proceeding in the manner suggested by the defendants would “frustrate the objective of the legislation”.

[104] The defendants argue that there is an arguable case the “stages” are not set in concrete. They submit that the issue of the reduction in a defendant’s liability

(s.3(4)) could be raised at an earlier stage of the proceeding. Hence, the broader document disclosure is required.

[105] In my opinion, that position misreads the clear language of s. 3(4). My reading of s. 3(4) is consistent with the Province's submission in this case. It is also consistent with my reading of para. 82 of *Valeant*.

[106] The question on this application relates to the relevance and materiality of the document requests. In my opinion, the relevance and materiality of the defendants' requests must be interpreted within the confines of the three-stage process set out in the *ORA*.

[107] I accept the Province's submission that:

- a) The *ORA* creates presumptions that offer a simplified track for establishing liability.
- b) The Province does not need to prove that actual harm to end-users of the opioid products occurred or was caused by the defendants' wrongful acts or omissions.
- c) For claims pursued through the *ORA*, the Province is not required to establish all of the usual elements of common law torts.
- d) The *ORA* Presumptions remove the requirement of establishing harm, reliance or causation.
- e) The Province need only prove material facts that, if true, would establish the existence and breach of a duty.

[108] I further accept the Province's position that the majority of the types and classes of documents sought by the defendants are only relevant to the issues of lack of reliance and causation. That evidence is not material or relevant to common issues 1, 2, 8, or 43 which will be at play in the common issues trial (Stage 1).

[109] Hence, I find that the Province's position is correct. The documents sought on this application (as they relate to the *ORA* Claims) are not material or relevant at this stage of the proceeding. The only relevant documents are those related to Common Issues 1, 2, 8, and 43.

**McKesson Notice of Application**

[110] I now turn to the notice of application filed by McKesson on behalf of the distributor defendants. I note that the McKesson Defendants rely on and repeat the submissions of the TR Defendants which I have addressed above. I will not repeat my analysis here. I also note the McKesson Defendants acknowledge that they continue to engage in good faith discussions with the Province regarding document production.

[111] The McKesson Defendants seek an order requiring the province to list and produce all documents that are or have been in the possession or control of the Province and that are responsive to the document requests which are set out in Schedule 1 to the McKesson Defendants' notice of application. The McKesson Defendants' document requests are a subset of the TR Defendants' document request. McKesson's document requests, including subparagraphs, comprise approximately 55 classes of documents.

[112] In grand overview, the McKesson Defendants seek documents that are relevant to the following issues:

- a) The opioid epidemic and oversupply alleged in the claim;
- b) The Province's and end users' knowledge of the alleged risks, harms, or benefits of opioid medicines;
- c) Regulation of opioid medicines, as well as the sufficiency of warnings given to end users;

- d) The role of the Distributor Defendants in the opioid medicine market, their alleged relationships to end users, and relationships between defendants;
- e) When the alleged failure(s) to warn end users occurred.

[113] The McKesson Defendants’ application differs in one significant way from the Manufacturer Defendants’ application. McKesson submits that the notice of civil claim alleges a novel cause of action against the Distributor Defendants.

[114] McKesson submits that common issues 33–34 and 42–44 will require the court, at trial, to determine whether the Distributor Defendants owed (and breached) a duty to warn end users of opioid medicines about the “known risks of addiction, dependency, adverse side effects, and death” allegedly caused by opioids.

[115] Those common issues are:

33. Did the Distributors Defendants owe a duty to end users of Opioids to directly or through prescribing physicians warn of the known risks of addiction, dependency, adverse side effects, and death caused by the Opioids they distribute and sold during the Class Period? [#43 in Certification Reasons]

34. Did the Distributor Defendant breach their duty to warn by failing to warn prescribing physicians and end users of the known hazards and risks associated with Opioids? [#44 in Certification Reasons]

...

42. Did the Defendants breach any common law, statutory or equitable duties owed to insured persons who have used or been exposed to or might use or be exposed to an Opioid Product pursuant to s.3(1)(a) of the ORA? [#52 in Certification Reasons]

43. If the answer to common issue #42 is yes, can using the Opioid Product cause or contribute to disease, injury or illness, pursuant to s.3(1)(b) of the ORA? [#53 in Certification Reasons]

44. If the answer to common issue #43 is yes, was the Opioid Product that was manufactured or promoted by the Defendant offered for sale in Canada during all or part of the breach, pursuant to s.3(1)(c) of the ORA? [#54 in Certification Reasons]

[116] The McKesson Defendants point to the Brundrett Certification Decision, which discusses the imposition of a duty to warn on the Distributor Defendants and says it would be “somewhat novel”:

[625] Finally, the Distributor Defendants argue that absent from the authorities are cases where pharmaceutical distributors are defendants, and the only claim against them is failure to warn. I agree that the claims against the distributors are somewhat novel in this context. Nevertheless, the claims against the distributors have survived a pleadings challenge, the evidentiary record supports some basis in fact that these issues are common to all class members, and the law dictates that novel but arguable claims should be permitted: *Finkel* at para. 17; *Atlantic Lottery* at para. 19, citing *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 21. I cannot find that the claim against the Distributor Defendants is doomed to fail or that there is no evidence of the existence of such a claim being common to all Class Members.

[Emphasis added.]

[117] The McKesson Defendants submit that the Supreme Court of Canada has similarly recognized that “the tort of failure to warn requires evidence of a positive duty towards the plaintiff”: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 108.

[118] McKesson says that positive duties in tort law are the exception rather than the rule” (*Imperial Tobacco* at para. 108). It submits that the imposition of a duty on distributors in this case would be unprecedented. In saying that, the McKesson Defendants concede that there are cases in which a distributor has been found liable for breach of a duty to warn an end user. However, none of those cases arose in the highly regulated pharmaceutical industry.

[119] On that basis the McKesson Defendants argue that, at the common issues trial, the court will be required to assess several familiar factors to determine the existence of a duty to warn, as alleged against them. Those factors include:

- a) the foreseeability of harm;
- b) the proximity between end users (that is, patients) and the Distributor Defendants; and

- c) any residual policy considerations that inform the analysis of whether the alleged duty was owed and breached, including whether the plaintiff has offered evidence that the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged.

[120] The proximity assessment requires consideration of the particular relationship at issue in each case and all relevant factors arising from the relationship between the plaintiff and the defendant. Those considerations include expectations, representations, reliance, and the property or other interests involved.

[121] Any residual policy assessment raises questions relating to the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally, such as:

- a) Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class?
- b) Are there other reasons of broad policy that suggest that the duty of care should not be recognized?

[122] The McKesson Defendants submit that that these questions inform the document disclosure obligations. On that basis, the McKesson Defendants say that the documents it has requested are relevant.

[123] The province's main response to the McKesson application repeats, to a large extent, its response to the TR Defendants' application. The province says the McKesson Defendants' requests are overbroad. I have set out above my decision wherein I have declined to give directions on broad document requests (or refusals).

[124] I have also addressed above, and accepted, the Province's position regarding the structure of the *ORA*.

[125] With respect to a number of the McKesson Defendants' requests, in its application response, the Province has indicated its agreement to producing the documents (subject to some conditions). I repeat my direction that the parties should

proceed with the steps in the document disclosure regime, subject to my ruling on overbreadth and the staging of the *ORA*.

[126] Hence, my reasoning above deals with the majority of McKesson Defendants' requests.

[127] The distinguishing issue on this application relates to the distributors' position that the claims against the Distributor Defendants raise a novel duty of care.

[128] In answer to that position, the Province notes that the only cause of action advanced directly against the Distributor Defendants is the statutory claim under the *ORA* based on a breach of the duty to warn. (The fourth amended notice of civil claim also pleads allegations of common design that involve the Manufacturer Defendants and the Distributor Defendants, not as an independent cause of action, but as a form of joint or concerted action liability that provides a pathway to liability for other claims.)

[129] The Province submits that it is well established in Canadian law that distributors owe a duty of care to warn of inherent dangers with respect to the products they distribute or sell. Hence, the Province submits, there is nothing novel about the distributors' duty of care asserted in this class action.

[130] On this specific issue, the Province points to the *Valeant* decision. Again, that was an appeal by all defendants of the decision of Brundrett J. which dismissed the defence application to strike the notice of civil claim. The Court of Appeal noted the position taken by the Province regarding the existence of a duty:

[108] Regarding existence of the duty, the Province argues that both manufacturers and distributors fall into already recognized categories that hold a duty to warn end users: see *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 at paras. 20–21 [*Hollis*] (regarding the manufacturer's duty to warn). See also *Walford v. Jacuzzi Canada Ltd.*, 2007 ONCA 729 at para. 34:

... it is clear that both the distributor and retailer have a duty to warn the consumer of inherent dangers with respect to the products they distribute or sell. ...

[109] See also *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189 [*Rivtow*], where both a manufacturer and a distributor had a

“clear duty” to “warn the appellant”. Although in *Rivtow*, the second respondent was not merely a distributor, but also a representative of the manufacturer. And the Supreme Court of Canada has referred to “the positive and *continuing* duty of manufacturers or transferors of goods to warn of inherently dangerous products or dangerous uses of safe products”: *Childs v. Desormeaux*, 2006 SCC 18. In Linden et al., *Canadian Tort Law*, 12th ed. (Toronto: LexisNexis, 2022), the existence of the duty is summarized (at 298):

[P]roduct manufacturers and distributors owe a duty to warn of inherently dangerous products or dangerous uses of safe products. The duty arises when the defendant becomes aware or ought to have become aware of the danger, including dangers it discovers after sale. Significantly, the duty arises even when the danger was not caused by any fault on the part of the defendant.

[110] The Province clearly pleads that the defendants are either manufacturers or distributors, bringing them within the categories that it argues are previously established.

[Emphasis added.]

[131] The Court of Appeal addressed the existence of existing categories of duty as follows:

[129] The appellants suggest that the existence of a duty not to make negligent misstatements requires foreseeability of reasonable reliance on any representation, and in the absence of pleading material facts in support of that reliance, a statutory cause of action is not made out. I took it, too, that in oral argument the appellants also suggested that material facts would need to be pleaded to avoid negating a *prima facie* duty.

[130] I think there is no merit in those suggestions. The principles relied on may have application in circumstances where a novel category of claim is under consideration. Here, though, I do not think that the duty of a drug manufacturer or distributor not to make negligent false statements can be regarded as anything other than an established category of duty. It is intimately and inextricably connected with the duty to warn. Commonly, a negligent misstatement will simultaneously be a breach of a duty to warn. Given the nature of pharmaceuticals, and the asymmetry of information about their properties and risks, it is surely obvious that statements made to consumers are, without more, reasonably intended to induce reliance, and reliance on them is reasonable.

[Emphasis added.]

[132] I concede that there may be some basis to argue that the underlined sentence in para. 130 has somewhat diminished application to the argument I am addressing (the existence of a distributor’s duty of care). Paragraph 130 is taken from the part of the *Valeant* decision entitled, “*The ORA claim against*

*the manufacturer defendants based on negligent and fraudulent misrepresentation*” (Emphasis in original). Hence, one might suggest that the reference to distributors is *obiter*. However, I am confident that the Court of Appeal would not have written those words unless it intended them to be relied upon.

[133] For that reason, in my opinion, it is clear that the claim against the Distributor Defendants does not raise a novel duty of care.

[134] It follows that I do not accept the submission that there are distinct issues relating to the Distributor Defendants. It further follows that the Distributor Defendants’ document requests are too broad and seek documents related to issues that will not be addressed at Stage 1.

[135] Hence, for the same reasons that I dismissed the TR Defendants’ application, I dismiss the McKesson Defendants’ application.

**Document Production Related to the Province’s Direct Claims (Unjust Enrichment and the *Competition Act*)**

[136] My decision above only applies to the *ORA* claims brought by the Province. They do not apply to the Province’s claims based upon unjust enrichment and the *Competition Act*.

[137] The direct statutory cause of action under s. 36 of the *Competition Act* based upon a breach of s. 52 of the *Competition Act* (*i.e.*, “knowingly or recklessly make a representation to the public that is false or misleading in a material respect”).

[138] I note that the Province is advancing the unjust enrichment and *Competition Act* claims only against the Manufacturer Defendants, and on the basis that they made the “Opioid Misrepresentations”, as that term is defined in the FANOCC.

[139] I start my consideration with a recital of the certified common issues related to these claims. The common issues relating to Unjust Enrichment (as set out in the Brundrett Certification Decision) are:

35. Were the Manufacturer Defendants enriched as a result of making one or more of the Opioids Misrepresentations?
36. If yes, what was the amount of the enrichment, and did the class members suffer a corresponding deprivation?
37. If yes, was there a juristic reason for the defendants' enrichment?

[140] The common issue relating to the *Competition Act* (as set out in the Brundrett Certification Decision) is:

38. If the Court determines that any of the Manufacturers Defendants made any false or misleading Opioid Misrepresentations, did those Manufacturer Defendants breach duties owed pursuant to s. 52 of the *Competition Act*?

[141] The TR Defendants submit that the incidence and prevalence of the use of opioid products and the causes of that use, go directly to the common issues relating to unjust enrichment (common issues 25–27). Further, they argue that the Province must establish that Opioid Misrepresentations were made. Hence, it must establish that the defendants' statements were false.

[142] The TR Defendants submit common issues trial will determine all elements of the Province's unjust enrichment claim:

- a) whether the Manufacturer Defendants were enriched as a result of the Opioid Misrepresentations (common issue 25);
- b) whether the class members suffered any deprivation corresponding to the Manufacturer Defendants' alleged enrichment (common issue 26); and
- c) whether there was a juristic reason for that enrichment (common issue 27).

[143] The TR Defendants tacitly concede that they were enriched by the sale of opioids. They submit that their demands in this category relate to the issues of "corresponding deprivation" and the "juristic reason".

[144] On the *Competition Act* claim, the TR Defendants submit that the plaintiff must establish that representations were untrue.

[145] Summarized, the TR Defendants' document requests on these areas are:

- a) all documents related to the purchase of opioid medicines by the Province from any party or non-party, including but not limited to purchases by and contracts or agreements with the Province Health Service Authority, regional health authorities or through another entity that provides healthcare services to insured persons;
- b) all documents that identify, quantify, describe or show any loss or amount related to any opioid medicines for which the Province or any other class member seeks restitution from any defendant;
- c) all documents that identify, describe, discuss or otherwise relate to circumstances in which use of an opioid medicine by an insured person is considered to be not Medically Necessary, not reasonably required or otherwise inappropriate for the treatment of pain;
- d) all documents that identify, describe, discuss, quantify, show or otherwise relate to claims for reimbursement of a prescription of an opioid medicine by insured persons that the Province asserts were not Medically Necessary, not reasonably required or otherwise inappropriate for the treatment of pain;
- e) all documents that identify, describe, discuss, quantify, show or otherwise relate to claims for reimbursement of a prescription of an opioid medicine by insured persons that were disputed, denied or otherwise refused for payment by the Province.

[146] I have underlined paragraphs a) and c) for reasons described below.

[147] The defendants submit the proper consideration of this issue must address whether there was a clinical benefit to insured persons, thereby requiring an evaluation of the opioid prescriptions reimbursed by the class members and any benefit derived therefrom. This analysis may also be in the form of an economic

benefit received by the class members, thereby requiring an evaluation of the costs associated with the opioid prescriptions relative to the costs of alternative medicines and pain treatments.

[148] In response, the Province points to the Certification Decision addressing the common issues relating to unjust enrichment:

[641] The proposed questions relate to amounts, if any, the defendants received from making improper representations about Opioid Products and the absence of a juristic reason for the enrichment. These questions will yield answers that will be substantially the same for all the members of the Class. In my view, these elements of the unjust enrichment claim can be determined on a group basis. The proposed questions will significantly advance the litigation. I find that the above proposed common issues are appropriate to determine as common issues.

[149] The Province's position is that the alleged wrongful and unlawful actions breaching certain duties or obligations would render any contracts or agreements for the sale of said products illegal or void.

[150] The Province submits that, to the extent the defendants are relying on contracts or agreements as the juristic reason for the enrichment, the Province intends to establish that any contracts or agreements are vitiated (or voided) by the Opioid Misrepresentations.

[151] Thus, the Province submits that the only material evidence required at the common issues trial with respect to the unjust enrichment claim would be evidence related to:

- a) whether the Manufacturer Defendants manufactured and sold opioid products in Canada (common issues 3 and 4);
- b) whether the Manufacturer Defendants made the Opioid Misrepresentations which were false or misleading (common issues 6 and 7);
- c) whether the Opioid Misrepresentations constitute a breach of s. 52 of the *Competition Act* (common issues 28 and 30);

- d) whether conduct of the Manufacturer Defendants, in making the Opioids Misrepresentations, caused an increase in the prescription of opioid products in Canada (common issue 8); and
- e) the amount the Manufacturer Defendants received for the opioid products sold in Canada (common issue 26).

[152] Hence, the Province submits, the unjust enrichment common issues do not entitle the Manufacturer Defendants to documents that relate to causation of harms or loss or to damages. Nor do they require production of documents relating to the quantum of the claim. Quantum is an issue for the individual claims stage.

### **Analysis**

[153] On this issue, I do not accept the Province's submission.

[154] Put in the simplest terms, if the Province was an individual plaintiff suing an opioid manufacturer in unjust enrichment, the Province would have the onus of establishing:

- a) the Manufacturer Defendants made misrepresentations about the products;
- b) the products had no therapeutic benefits;
- c) the Manufacturer Defendants were enriched as a result of the Opioid Misrepresentations (common issue 25);
- d) the plaintiff suffered a deprivation corresponding to the Defendants' alleged enrichment (common issue 26); and,
- e) that there was no juristic reason for that enrichment (common issue 27).

[155] First, the Province would have to prove that the representations were not factual at the time they were made. In my opinion, documents and the Province's

possession within the relevant date parameters, are producible on the issue of the standard of knowledge at the time. Those documents could assist the defence in defending against the allegations that the representations were not truthful.

[156] Second, the Province submits that it is an indisputable fact that the Province and class members fund drug benefit plans, and that fact alone is proof there was corresponding detriment. I do not agree. The Province, in this same capacity, purchases many pharmaceutical products. Those purchases are not a “detriment” the Province if the drugs have a therapeutic effect on the patients to whom they are administered. Hence, documents relating to the therapeutic effect of the drugs are relevant.

[157] With that said, I do accept the Province’s submission that the amount of the deprivation does not form part of the common issues and will be determined only at the later individual issues stage.

[158] However, it follows that, in my opinion, the Province is obligated to disclose to the Manufacturer Defendants the documents in the Province’s possession which go to the state of the Province’s knowledge of the effectiveness and potential side effects of the opioid products in question.

[159] Returning to the types of documents listed above, I find that there is no obligation for the Province to disclose the documents described in paragraphs b), d), and e) namely:

b) all documents that identify, quantify, describe or show any loss or amount related to any opioid medicines for which the Province or any other class member seeks restitution from any defendant;

d) all documents that identify, describe, discuss, quantify, show or otherwise relate to claims for reimbursement of a prescription of an opioid medicine by insured persons that the Province asserts were not Medically Necessary, not reasonably required or otherwise inappropriate for the treatment of pain;

e) all documents that identify, describe, discuss, quantify, show or otherwise relate to claims for reimbursement of a prescription of an opioid medicine by insured persons that were disputed, denied or otherwise refused for payment by the Province.

[160] In my opinion, those classes of documents all go to the quantum of the claims, which is an individual issue (*i.e.*, an issue for each province, territory, and the Federal Government to establish).

[161] It follows that there is an obligation to produce the following classes, which are in the possession or control of the Province:

- a) all documents related to the purchase of opioid medicines by the Province from any party or non-party, including but not limited to purchases by and contracts or agreements with the Province Health Service Authority, regional health authorities or through another entity that provides healthcare services to insured persons;
- b) all documents that identify, describe, discuss or otherwise relate to circumstances in which use of an opioid medicine by an insured person is considered to be not medically necessary, not reasonably required or otherwise inappropriate for the treatment of pain.

**Janssen’s Application for Class Member Documents**

[162] The third application is brought by the defendant Janssen, on behalf of manufacturer defendants. I pause to note that the distributor, McKesson, brought a similar application but reached an agreement and a consent order with the Province mid-hearing.

[163] Janssen’s notice of application seeks orders to the following effect:

- a) requiring the listing and production of all documents that are or have been in the possession or control of any of the Class Members and that are

responsive to the document requests set out in Appendix “A” to the notice of application (the “Class Member Documents”);

- b) that delivery of lists of documents and production of Class Member Documents will commence within 45 days of this Order, will continue thereafter on a monthly basis and, subject to further directions of the Court, will substantially complete by February 26, 2026;
- c) granting the Janssen Defendants leave to seek further discovery and production of documents from Class Members pursuant to Rule 7-1 of the *Supreme Court Civil Rules*, including but not limited to rights under Rule 7-1(10)–(13) with respect to Class Member Documents.

[164] The legal basis for Janssen’s application, which grants me the discretion to make the above orders, is found in s.17(3) of the *CPA*:

17 (1) Parties to a class proceeding have the same rights of discovery under the Supreme Court Civil Rules against one another as they would have in any other proceeding.

(2) After discovery of the representative plaintiff or, in a proceeding referred to in section 6, one or more of the representative plaintiffs, a defendant may, with leave of the court, discover other class members (3) In deciding whether to grant a defendant leave to discover other class members, the court must consider the following:

- (a) the stage of the class proceeding and the issues to be determined at that stage;
- (b) the presence of subclasses;
- (c) whether the discovery is necessary in view of the defences of the party seeking leave;
- (d) the approximate monetary value of individual claims, if any;
- (e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered;
- (f) any other matter the court considers relevant.

(4) A class member is subject to the same sanctions under the Supreme Court Civil Rules as a party for failure to submit to discovery.

[165] Section 17 of the *CPA* requires me to perform a balancing exercise while exercising my discretion. The goals of judicial efficiency and economy must be balanced against the substantive and procedural rights of the defendants.

[166] For the reasons set out below, I dismiss Janssen’s application.

**Janssen’s Position**

[167] Janssen argues that the Class Members, as provincial, territorial, and federal governments in Canada, are sophisticated, well-resourced litigants who have made an affirmative election to opt in to this litigation. Janssen submits that, given the nature of pharmacological regulation, each class member is in possession of key documents that are material to the 44 common issues. Hence, the document order is necessary, considering the claims being made and defences asserted.

[168] Janssen again notes the monetary value of the claims being advanced. It submits that these requests will not cause undue burden or expense for the Class Members. In that regard, Janssen submits that, if each class member brought its own claim, each would have an independent obligation to disclose the documents requested. Each of these class members would have also had an obligation to disclose relevant documents if they had pursued their claims as individual actions filed in the courts of their respective jurisdictions. Janssen submits I should order the Class Member Documents to be disclosed as a matter of fairness, so that the defendants are not prejudiced by the governments’ choice to pursue their claims by the procedural vehicle of a class action.

[169] In addition to the *CPA*, s. 17(3) considerations, Janssen points out the following exceptional circumstances:

- a) The necessity of the Class Member Documents in view of the defendants’ defences. Janssen notes, *inter alia*, that Canada’s regulatory approval and compliance will be relevant evidence as to whether the defendants met the applicable standards of care.

- b) The availability of the Class Member Documents under access to information statutes.
- c) It would be unfair and against natural justice to deny the defendants access to the Class Member Documents for the trial of this unique proceeding.

[170] The defendants acknowledge that “[c]ases where individual discovery is required of all class members are the exception rather than the rule” (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 59–60). However, they submit that this is a case where it is reasonably necessary for the resolution of the common issues and a proper balancing of efficiency and economy against the legitimate substantive and procedural rights of the defendants militate in favour of production of the Class Member Documents.

### **The Province’s Position**

[171] The Province’s response to Janssen’s application is as follows:

- a) The Province consents to the production of documents by the class member, Canada, on a limited basis that is described in the application response.
- b) The Province opposes class member discovery as against the remaining class members (provinces and territories).
- c) The Province repeats its position regarding the “stages” provided by the *ORA* (which I have determined above).
- d) The Province submits that, if I do not accept the “stages” argument, then the document requests from the defendants are vague and overbroad. The Province’s application response describes them as “shocking in both the content and breadth”.

[172] In support of its position, the Province notes the obvious: class members are not parties to this action. The general rule is that only the representative plaintiff, and not the class members, are subject to discovery.

**Analysis**

[173] As foreshadowed above, I find that this application must be dismissed for the same reasons set out in the TR defendant’s application. Further, I exercise my discretion against ordering production based on s. 17 of the *CPA*.

[174] I break my ruling into the following headings:

- a) Vague and Overbroad
- b) Effect of “Stages” Ruling
- c) Document Production from Canada
- d) Considerations of *CPA*, s. 17 Provisions

***Vague and Overbroad***

[175] First, I note that the table of Janssen’s request is 34 pages long and describes (including subparagraphs) more than 230 different “types” of documents.

[176] Above at para. 72-73, I indicated that I was declining to pursue the process sought by the TR Defendants and the McKesson Defendants in relation to the request for the Province’s documents. I considered those demands, and the Province’s responses, to be too broad to allow meaningful court comment.

[177] That finding applies *a fortiori* to the application for Class Member Documents. In my opinion, the McKesson requests are also overbroad.

***Effect of “Stages” Ruling***

[178] Further, and more importantly, I have accepted the Province’s position regarding the process and “staging” of the claims under the *ORA*.

[179] As a result of that ruling, the issues to be determined at the Stage 1 trial are significantly narrowed. The common issues are related to liability as set out in *ORA*. Hence, the first stage will not include any assessment of damages on a class wide basis.

[180] On that basis, I dismiss Janssen’s application.

***Documents Production from Canada***

[181] As noted, in relation to the class member Canada, the Province has agreed that in recognition of its unique role in this litigation, Canada (being the primary regulator) will provide document disclosure subject to specific conditions (set out in the application response). I am also informed by the Province that Canada has been working for many months to develop a comprehensive plan to identify, review, and process documents.

[182] Given that position, and the stage of the proceeding, I am not inclined to make any order regarding or compelling document disclosure from Canada.

***Considerations of CPA, s. 17 Provisions***

[183] Finally, in the event that I am wrong in my assessment of the *ORA* “stages” above, I set out below my analysis of this issue pursuant to the provisions of s. 17 of the *CPA*.

[184] As noted, the *CPA*, s. 17, requires me to perform a balancing exercise. The goals of judicial efficiency and economy must be balanced against the substantive and procedural rights of the defendants.

[185] I address the s. 17 considerations below.

***The Stage of the Class Proceedings and Issues To Be Determined***

[186] This action is certified (subject to appeal). It will proceed to the common issues trial in 2028.

[187] I am pursuing this (s. 17) analysis on the hypothetical scenario wherein the Court of Appeal has determined that my decision on the “stages” of the litigation is wrong. Hence, I proceed on the theory that all of the common issues are in play throughout the litigation.

[188] That being said, this is still an action wherein British Columbia is the representative plaintiff. The claims of the other provinces and territories will be decided after the common issues trial involving British Columbia.

[189] In my opinion, this factor favours the Province’s position.

***The Presence of Subclasses***

[190] As outlined above, class members are comprised of all territorial, provincial, and federal governments. The only subclass is the one that excludes Yukon Territory on the basis that it does not have legislation similar to the *ORA*.

[191] In my opinion, the remaining class members are not materially different for the purposes of the common issues trial or discovery. This factor does not assist the applicant.

***Necessity of the Class Member Documents***

[192] Again, in my opinion, the documents sought by Janssen from the class members are not necessary for the resolution of the issues at the common issues stage. They may well become relevant at the individual claims stage.

***The Approximate Monetary Value of the Individual Claims***

[193] I accept that the monetary value of the claims is significant. This factor weighs in favour of the applicant.

***Whether Discovery Would Result in Oppression or in Undue Annoyance, Burden or Expense for the Class Members Sought to be Discovered***

[194] The Province submits that the class members are all different sizes with different resources available to them.

[195] In my opinion, this is a minor factor in the total consideration. However, the amount of the claim weighs in favour of the applicant.

***Summary of CPA, s. 17 Analysis***

[196] Having weighed and considered all of the factors listed under s. 17, I am of the opinion that they do not support the Janssen application. My primary consideration relates to the stage (being the common issues trial) of the litigation. The defendants' request for the Class Member Documents may become relevant at the individual claims stage. In my opinion, that factor tips the balance against disclosure.

[197] On that basis, I exercise my discretion against granting the application sought by McKesson. Document production from the class members is not warranted at this time.

**Summary**

[198] In summary:

- a) I dismiss the application brought by the TR Defendants for production of documents from the representative plaintiff (Province) except as the requests relate to the unjust enrichment claims, and then, only on the requests described as follows:
  - i. all documents related to the purchase of opioid medicines by the Province from any party or non-party, including but not limited to purchases by and contracts or agreements with the Province Health Service Authority, regional health authorities or through another entity that provides healthcare services to insured persons;
  - ii. all documents that identify, describe, discuss or otherwise relate to circumstances in which use of an opioid medicine by an insured person is considered to be not Medically Necessary, not reasonably required or otherwise inappropriate for the treatment of pain.

- b) I dismiss the application brought by the McKesson Defendants for production of documents from the representative plaintiff.
- c) I dismiss the application of the Jensson Defendants seeking production of documents from the class members.

“A. Ross J.”