

Jordana Sanft
416-596-1083
jsanft@litigate.com



Andrew Moeser
416-649-1815
amoeser@litigate.com

November 3, 2022

Better Together – or Maybe Not

Some things just go better together and probably always will, as Luke Combs sings in ‘Better Together’. Like a cup of coffee and a sunrise; Sunday drives and time to kill. Multiple section 8 actions however have not made the cut. According to the recent decision of Justice Southcott in *Apotex Inc v Janssen Inc*, multiple actions for section 8 damages should not have common issues heard together.

Issue

On this motion before Justice Southcott, the issue was whether the Court should grant an order under the *Federal Courts Rules* Rule 105(a) (“Rule 105”) directing that portions of the trials in three separate actions commenced under section 8 of the *Patented Medicines (Notice of Compliance) Regulations (“PMNOC Regulations”)* be heard together.

Discussion

It is generally understood that Rule 105(a) allows for consolidation of all or part of two or more proceedings. The purpose of this Rule is to avoid multiplicity of proceedings, find efficiencies and result in more expeditious and less expensive proceedings. Factors to be considered in assessing whether consolidation is appropriate include commonality of parties, issues, facts, and relief requested as well as potential prejudice.

In the recent decision of *Apotex Inc v Bayer Inc* (“*Bayer FCA*”) the Federal Court of Appeal (“FCA”) overturned decisions of Justice Pentney in *Bayer Inc v Teva Canada Limited* (“*Bayer FC* ”), in which Pentney J. had ordered a trial on common issues across three infringement actions under section 6 of the *PMNOC Regulations*. In *Bayer FCA*, the Court considered Rules 3 and 105, as they were considered in the Court below. Ultimately however the FCA held that there was a prohibition of joinder imposed by section 6.02 of the *PMNOC Regulations* that prevented consolidation, including the hearing of common issues, in actions under section 6 of the *PMNOC Regulations*.

Bayer FCA clearly addressed consolidation in section 6 actions. However, section 8 of the *PMNOC Regulations* does not have a corollary provision to section 6.02. The question of consolidation in section 8 actions was before Southcott J. on this motion. More particularly, the defendant sought to have evidence on common issues in different actions heard together. By way of background, section 8 permits a successful generic

pharmaceutical litigant to seek damages for lost sales during the period of time when it would have entered the market but for the operation of the *PMNOC Regulations*.

Key Findings

Commonality

Southcott J. considered at length the issue of commonality of parties, issues, facts, and remedies. In sum the Court held:

- **Parties:** Although there is a common defendant across the section 8 actions, each action has different plaintiffs.
- **Issues and facts:** As a matter of law, the Court will be required to assess different factual aspects of the But For World ("BFW"). The Court accepted this argument but also stated that Rule 105 does not require identical questions of fact or law.
- **Remedies:** The differences as to the BFW were most compelling to Southcott J.. These differences involve a combination of different time periods and different product dosages. The impact of hypothetical notices of compliance for each plaintiff is also a factor to be considered in the BFWs. There may also be an impact on evidence of non-parties because of the different factual parameters of each action and the BFWs. These factors favoured the plaintiffs' position.
  Although the defendant argued that there may be some commonality on its part as to real world activities and other facts and issues, the Court found there was insufficient evidence supporting commonality.

The Court was not satisfied that the level of commonality justifies ordering a common trial.

Prejudice

Southcott J. considered 4 main assertions of prejudice raised by the defendant:

- Evidence of several non-parties needs to be tendered in all three actions at different times
- Inconsistent burdens of proof in different actions addressing the same facts
- Expense of having the same witnesses testify on multiple occasions
- The risk of inconsistent findings

After considering the submissions of the plaintiffs and the defendant, the Court held that prejudice did not weigh in favour

of granting the defendant's motion.

The Court was persuaded by the plaintiffs' submissions that each of them would suffer prejudice as a result of the other two plaintiffs' involvement in the examination of witnesses at a common trial. The Court stated that in its view, loss of tactical advantage can represent prejudice for the purpose of a Rule 105 analysis. The Court further stated that planning and controlling its approach to litigation including avoiding the negative impact upon that approach caused by others may actually be a more fundamental aspect of the administration of justice than a mere tactical advantage. In either case, Southcott J. was of the view it represents prejudice that can be considered in a Rule 105 analysis.

The Court further held that consolidating witnesses' testimony may be inefficient because of resulting confusion on the part of the Court and witnesses. Complexity associated with consolidation may lead to paralysis and roadblocks rather than hoped for efficiencies. In coming to this conclusion the Court considered the decision of Justice Snider in *Sanofi-Aventis Canada Inc v Novopharm Limited* (“*Ramipril”)*.

There was also a particular concern of prejudice involving Pharmascience. The Pharmascience action was commenced later and is expected to be on a path to trial that differs from the other two actions by over a year.

Key Takeaways

Consolidation of section 8 actions is to be determined on the basis of Rule 105 and its relevant factors and purpose. Demonstrating sufficient commonality and prejudice are likely to dictate the outcome. The analysis is case specific and as such the door remains open for section 8 actions to be heard together. However, if this decision is any indication, it may be challenging to be successful on such a motion. We are unlikely to find ourselves in a world where hearing common issues together in section 8 actions is always one of those things that is better together. But if not always, maybe sometimes.