IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia v. McKinsey,*
2023 BCSC 1762

Date: 20231012
Docket: S2111367
Registry: Vancouver

Between:

His Majesty the King in Right of the Province of British Columbia

Plaintiff

And

McKinsey & Company, Inc. United States, and McKinsey & Company Canada/ McKinsey and Compagnie Canada

Defendants

Before: The Honourable Mr. Justice Brundrett

Reasons for Judgment

Counsel for Plaintiff:	C. D. Hermanson L. Brasil R. Mogerman, K.C.
Counsel for Defendant:	L. Rothstein P. Davis
Place and Date of Trial:	Vancouver, B.C. March 30-31, 2023
Place and Date of Judgment:	Vancouver, B.C. October 12, 2023

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INTRODUCTION

[1] These reasons address an application to strike initiating pleadings in an action brought as a proposed national class proceeding by the representative plaintiff, being His Majesty the King in Right of the Province of British Columbia (the "Province"), on behalf of itself and other provincial, territorial and federal governments of Canada as part of their efforts to recover opioid-related health care costs and damages. The Province's effort to recover drug costs comprises two sets of actions, the second of which is in issue here.

[2] The main action involving manufacturers and distributors (*British Columbia v. Apotex et al.*, S.C.B.C. Action No. S189395, Vancouver Registry [the "M&D Action"]) was brought by the Province under the *Opioid Damages and Health Care Costs Recovery Act*, S.B.C. 2018, c. 35 [*ORA*] and the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] against defendants who were allegedly involved in the manufacturing, marketing, distribution or sale of opioid drugs and products. That matter is proceeding toward a certification hearing in late 2023.

[3] This more recently initiated parallel proceeding (the "McKinsey Action") relates to the actions of consultants, being the defendants McKinsey & Company Inc. United States and McKinsey & Company Canada/McKinsey & Compagnie Canada (together, "McKinsey"). The Province alleges that, by providing consulting services, McKinsey was involved in the design, strategy and execution of marketing efforts to promote and sell addictive and harmful opioid products in Canada, thereby causing loss and damages to the Province and proposed class members in the form of health care costs associated with a resulting "opioid epidemic." A certification hearing in the McKinsey Action is scheduled for February 2024.

[4] Presently, I am dealing with McKinsey's application to strike various claims made in the Amended Notice of Civil Claim ("ANOCC") in the McKinsey Action. While the defendants in the M&D Action were unsuccessful on an application to strike the Province's claims against them on similar grounds (in reasons indexed at 2022 BCSC 1 [*Apotex BCSC*], aff'd in part *Valeant Canada LP/Valeant Canada*

S.E.C. v. British Columbia, 2022 BCCA 366 [*Valeant BCCA*], leave to appeal to SCC ref'd, 40556 (25 May 2023)), McKinsey submits that its claims stand on a different footing and that the causes pleaded against it are fatally flawed. McKinsey argues that not only has the Province failed to provide sufficient detail about the alleged wrongdoing (i.e., about the alleged "Opioids Misrepresentations," as defined below and in the ANOCC), but also that the Province has failed altogether to plead the material facts necessary to connect (a) McKinsey to the alleged wrongdoing and (b) McKinsey's impugned conduct to British Columbia. McKinsey says there is no meaningful connection between itself and the "opioid crisis" in Canada, as defined in the ANOCC.

[5] Broadly, the Province's theory of liability, as set out in the ANOCC, rests upon: (1) standalone causes of action for alleged breaches of the *Competition Act* and civil conspiracy, and (2) statutorily enabled causes of action for "opioid-related wrongs" under the *ORA* based on breaches of common law or statutory duties. In relation to both classes of claims, the Province alleges McKinsey was engaged in a common design with three drug manufacturers (Purdue, Johnson & Johnson or Janssen, and Endo, all as defined in the ANOCC) and one drug distributor (McKesson, as defined in the ANOCC), all of which are named in the M&D Action.

[6] The issue to decide on this application is whether all or part of the claims against McKinsey should be struck under Rule 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 on the basis that it is plain and obvious that they disclose no reasonable cause of action. McKinsey argues that the various claims are not effectively pleaded and are bound to fail because they disclose insufficient material facts to support the necessary elements of a proper cause of action. The Province resists these arguments and submits that the application to strike the various claims should be dismissed.

BACKGROUND FACTS

[7] In 2018, the Province commenced the M&D Action as a proposed national class action against various opioid manufacturers and distributors to recover health

care and other public costs incurred in connection with the opioid epidemic. The structure of the pleadings in the McKinsey Action is similar to that of the pleadings in the M&D Action.

[8] The defendants in the M&D Action sought to strike all causes of action put forward by the Province. Those applications were unsuccessful before this Court and the Court of Appeal, with the exception of two causes of action that are not advanced against McKinsey (public nuisance and claims based on the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27).

[9] On December 30, 2021, the Province filed a Notice of Civil Claim to commence a proposed national class proceeding against McKinsey on behalf of itself and other provincial, territorial and federal governments of Canada.

[10] On November 4, 2022, the Province served the ANOCC.

[11] On December 14, 2022, McKinsey served a demand for particulars regarding allegations in the ANOCC.

[12] On December 16, 2022, this Court approved, in reasons indexed at 2022 BCSC 2288, a settlement of claims by the Province against Purdue in the M&D Action. McKinsey argues that the settlement approval order prevents the Province from seeking joint liability from McKinsey in this proceeding in respect of relief pertaining to Purdue.

[13] On January 20, 2023, McKinsey served a response to the ANOCC.

[14] On January 23, 2023, the Province served a response to the December 14 demand for particulars, advising that McKinsey's demand sought specificity beyond what is required under the *Supreme Court Civil Rules*. The response did not provide any further particulars of the allegations in the ANOCC, and, to date, McKinsey has not brought an application pursuant to Rule 3-7(22) for an order requiring the Province to provide further and better particulars.

[15] On February 3, 2023, the Province served a reply to the response to the ANOCC.

[16] On February 6, 2023, the Province served an updated ANOCC.

[17] On February 7, 2023, the Province filed the ANOCC to add statutory causes of action pursuant to the *ORA*.

[18] On February 10, 2023, McKinsey filed this application to strike the ANOCC.

[19] The Province filed its application response on March 3, 2023, to which McKinsey filed a reply on March 22, 2023.

[20] A certification hearing in the companion M&D Action is set to begin on November 27, 2023 for four weeks.

[21] A certification hearing in the McKinsey Action is set to begin on February 6, 2024 for four days.

THE *ORA*

[22] The *ORA* is modelled after the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30, which survived constitutional challenge before the Supreme Court of Canada: *British Columbia v. Imperial Tobacco Canada Ltd*., 2005 SCC 49; *Valeant BCCA* at para. 77.

[23] The *ORA* came into force on October 31, 2018. It was later amended by Bill 34, *Opioid Damages and Health Care Costs Recovery Amendment Act, 2022*, 42nd Parl., 3rd Sess., British Columbia, 2022 (assented to November 3, 2022) to include, *inter alia*, a right of action by the Province and the Government of Canada against a consultant in addition to a manufacturer or wholesaler/distributor.

[24] As noted above, after the above amendments to the *ORA* had been passed, the Province amended its claim to add statutory causes of action against McKinsey based on the *ORA*.

[25] Section 2(1) of the *ORA* provides the Province with a direct and distinct cause of action against a manufacturer, wholesaler or consultant to recover the cost of health care benefits caused or contributed to by an “opioid-related wrong”. Such an action is not a subrogated action: s. 2(2).

[26] An opioid-related wrong is defined as follows in s. 1 of the *ORA*:

> **"opioid-related wrong"** means
>
> (a) a tort that is committed in British Columbia by a manufacturer, wholesaler or consultant and that causes or contributes to opioid-related disease, injury or illness, or
>
> (b) in an action under section 2 (1) or 2.1 (1), a breach, by a manufacturer, wholesaler or consultant, 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…

[27] The *ORA* defines a consultant as follows in s. 1:

> **"consultant"** means a person who provides advisory services
>
> (a) to a wholesaler in relation to the distribution, sale or offering for sale of opioid products, or
>
> (b) to a manufacturer in relation to the sale of active ingredients or opioid products…

[28] The *ORA* permits recovery in relation to a particular individual insured person or on an aggregate basis for a population of insured persons: s. 2(4).

[29] If an action is brought on an aggregate basis, the plaintiff benefits from certain presumptions under s. 3(2) as to factual and legal causation if it proves the following under s. 3(1):

> **3** (1) In an action under section 2 (1) or 2.1 (1) for the recovery of the cost of health care benefits on an aggregate basis, subsection (2) of this section applies if the government, or the government of Canada, as the case may be, proves, on a balance of probabilities, that, in respect of a type of opioid product, (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.

[30] The effect of these provisions is further explained in *Valeant BCCA* as follows:

> [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)).

[31] As for joint and several liability, s. 4(2) of the *ORA* deems two or more manufacturers, wholesalers or consultants, whether or not they are defendants in the action, to have "jointly breached a duty or obligation in the definition of an 'opioid-related wrong'" if

> (a) one or more of those manufacturers, wholesalers or consultants are held to have breached the duty or obligation, and
>
> (b) at common law, in equity or under an enactment, those manufacturers, wholesalers or consultants would be held
>
> (i) to have conspired or acted in concert with respect to the breach, [or]
>
> (ii) to have acted in a principal and agent relationship with each other with respect to the breach…

[32] As summarized in *Valeant BCCA*:

> [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. It shifts the cost of healthcare benefits, which might otherwise not be recoverable, onto manufacturers and distributors. The *ORA* has to be interpreted in light of its purpose. As the Minister put it (see British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 41-3, No. 152 (2 October 2018) at 5390 (Hon. David Eby)):
>
> > Recovery is permitted in respect of opioid-related disease, injury or illness. The bill will permit government to proceed by way of an aggregate action, which does not require government to meet the burden to establish the extent and magnitude of damages suffered by each insured person individually. It will not be necessary to identify particular individuals or to prove the cause of opioid-related disease, injury or illness for any particular individual. Evidence will not be required to be presented by government on an individual basis.
> >
> > This bill will allow government to accurately prove its claim, relying on population-based evidence, and enable litigation to proceed as efficiently as possible while preserving fairness. Recovery on an aggregate basis will be facilitated by establishing presumptions with respect to use and causation and shifting the burden to the defendants to prove their activities did not increase use and their products did not cause harm.

[33] As to the intent of the 2022 amendments, the Honourable Minister of Health, Mr. Dix, stated the following when the amendments were in committee (see British Columbia, Legislative Assembly, Committee of the Whole House, *Proceedings in the Douglas Fir Room*, 42nd Parl., 3rd Sess. (31 October 2022)):

> **Hon. A. Dix:** The purpose, I think, is to include and bring into the scope of the act those parties who worked with a manufacturer or wholesaler by assisting in designing, recommending and implementing strategies to increase sales of opioid products. This has been brought in to the act here. That is the purpose of it. You see, with respect to the case from December of '21, an example of that. So that's the purpose of it. Obviously, it's our view that some people hold some accountability there, who are under those circumstances, and that's why we've included consultant[s] in this question.
>
> …
>
> **M. de Jong:** And is it the government's view and submission to the committee that the passage of this amendment strengthens the case it is pursuing against McKinsey specifically and any other consultant that it might identify?
>
> **Hon. A. Dix:** Yes.
>
> [Emphasis added.]

THE AMENDED NOTICE OF CIVIL CLAIM

[34] As noted, the ANOCC in this action was filed on February 7, 2023. It relies in part on recently enacted amendments to the *ORA* that authorize proceedings against consultants (in addition to manufacturers and wholesalers) to recover opioid-related health care costs.

[35] The ANOCC provides in para. 4 that the Province brings its claim on behalf of itself and other provincial and federal entities "to recover opioid-related healthcare costs, as well as the costs of addressing and abating a crisis of Opioid dependency and addiction." The bases for the action are then set out as:

> a) breach of s. 52 of the *Competition Act*, R.S.C. 1985, c. C-34;
> b) conspiracy;
> c) common design liability; and
> d) statutory causes of action on behalf of *ORA* Subclass Members under sections 2(1) and 2.1 of the *ORA* with joint and several liability under s. 4 of the ORA based on the following opioid-related wrongs:
> i. conspiracy;
> ii. negligent misrepresentation;
> iii. negligent failure to warn;
> iv. fraudulent misrepresentation / deceit; and
> v. breach of s. 52 of the *Competition Act*.

[36] The Province's application response indicates that the inclusion of conspiracy in the list above of opioid-related wrongs is a "typographical [error] and will be amended." I deal with this point below.

[37] Paragraph 14 of the ANOCC indicates that at all material times, including from 1996 to present (the "Class Period"), McKinsey acted pursuant to a common design to develop and implement marketing plans and strategies, in partnership with opioid manufacturers and distributors, in order to increase opioid sales in Canada.

[38] Under the heading "McKinsey's [W]ork with Opioid Manufacturers," the ANOCC alleges that McKinsey provided advisory services to opioid manufacturers in relation to the sale of its opioids, and, as part of those services, worked with those

manufacturers to develop and implement marketing strategies built around a pattern of false and misleading representations regarding the safety and efficacy of opioids.

[39] The ANOCC alleges at para. 43 that, through its consulting work, McKinsey, along with opioid manufacturers, made false and misleading representations to medical professionals and members of the public, including representations that:

- patients using opioids for pain would experience improvement in function and quality of life without adverse effects;
- patients using opioids for pain generally would not become addicted;
- withdrawal from opioid use was easily managed; and
- abuse-deterrent opioid formulations were safer and lowered the potential of abuse (collectively, the "Opioids Misrepresentations").

[40] The ANOCC alleges that McKinsey knew or ought to have known that the Opioids Misrepresentations were not supported by or were contrary to scientific evidence. McKinsey knew that doctors and patients rely heavily on educational materials such as treatment guidelines, continuing medical education seminars, articles, and websites to inform their treatment decisions. The same Opioids Misrepresentations ground the Province's claims against the defendants in the M&D Action.

[41] In para. 46, the ANOCC alleges that, during the class period, McKinsey promoted opioids by working with opioid manufacturers to develop and implement strategies to increase sales by, *inter alia*:

a) targeting physicians who prescribed the most Opioids with marketing calls;
b) focusing on selling higher strength dosages of Opioids;
c) paying rebates to health insurers when a patient overdosed on Opioids;
d) marketing Opioids based on the Opioids Misrepresentations;
e) encouraging patients to lobby physicians for Opioid prescriptions;
f) lobbying pharmacies to increase sales;

g) establishing direct-mail sales to circumvent pharmacies and sell directly to customers;

h) distributing Opioids savings cards to encourage use of Opioids;

i) increasing sales quotas for sales representatives;

j) awarding lucrative bonuses to motivate sales representatives; and

k) decreasing training hours for sales representatives so they could devote more time to calling on physicians.

[42] Paragraph 69 provides that "[a]t all material times, including during the Class Period, McKinsey and Purdue acted pursuant to a common design to increase the market for Opioid products in Canada."

[43] With respect to Janssen, para. 76 states the following:

> At all material times, including during the Class Period, McKinsey and Janssen acted pursuant to a common design to market and sell Opioid Products. The arrangements and activities included but are not limited to making false and misleading representations, including the Opioid[s] Misrepresentations, which were intended to and did cause an increase in the prescription and sale of Opioids in Canada.

[44] With respect to distributors, the ANOCC alleges in para. 85 that McKinsey provided advisory services to opioid distributors in relation to the distribution, sale or offering for sale of opioids in Canada, with the goal of maximizing the volume of opioids distributed.

[45] Paragraph 90 provides that:

> At all material times, including during the Class Period, McKinsey and McKesson acted pursuant to a common design to maximize the volume of Opioid Products distributed in Canada. The arrangements and activities included but are not limited to strategies intended to unlawfully increase the volume of Opioids distributed, despite McKinsey and McKesson's knowledge that Opioids are addictive and not appropriate for long-term use or the treatment of chronic pain conditions.

[46] In the "Damages" section of the ANOCC, the Province alleges that:

> 100. As a result of McKinsey's conduct described above, which constitutes an "opioid-related wrong" for the purposes of the *ORA*, the [Province] and the Class Members have suffered damage in the amount of the substantial expense in paying for excess Opioid prescriptions and other health care costs related to the use of Opioids, including expenditures made directly or through one or more agents or other intermediate bodies, for programs, services,

> benefits or similar expenses associated with Opioid-related disease, injury or illness, all of which are recoverable "health care benefits" for the purposes of the *ORA*.

The Province also seeks punitive damages on the basis of, *inter alia,* high-handed conduct.

[47] The Province then goes on to seek various orders for relief on its own behalf and on behalf of the proposed class members.

LEGAL PRINCIPLES

[48] In assessing the relevant legal principles impacting McKinsey's application to strike the ANOCC, I would adopt my earlier rendition of such principles in *Apotex BCSC* at paras. 38–60, aff'd *Valeant BCCA* at para. 44.

[49] Applications to strike pleadings are considered under R. 9-5(1) of the *Supreme Court Civil Rules*:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[50] Pursuant to R. 9-5(2), no evidence is admissible on an application under R. 9-5(1)(a). However, applications under R. 9-5(1)(b)–(d) are contextually driven. They permit, and arguably require, external facts or evidence: *Krist v. British Columbia*, 2017 BCCA 78 at para. 24.

[51] A pleading will only be struck under R. 9-5(1)(a) if, assuming the facts as pleaded are true, it is plain and obvious that the pleading discloses no reasonable cause of action. When considering an application to strike under this provision, the facts as pleaded are assumed to be true unless they are "manifestly incapable of being proven": *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 64 [*Nevsun*]; *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42 at paras. 17, 22 [*Imperial Tobacco 2011*].

[52] I note that s. 4(1)(a) of the *CPA* also requires that the pleadings disclose a cause of action. This question is assessed on the same standard as an application to strike pleadings under R. 9-5(1)(a): namely, assuming the facts as pleaded are true, whether it is plain and obvious that the claim has no reasonable prospect of success (*Service v. University of Victoria*, 2019 BCCA 474 at para. 55, citing *Pro-Sys Consultants Ltd. v. Microsoft Corp*., 2013 SCC 57 at para. 63 [*Pro-Sys*]). In its application response, the Province notes that the parties agree "the Court's decision on this application would be determinative for the purposes of s. 4(1)(a) of the *CPA*."

[53] A pleading is "unnecessary" or "vexatious" as described in R. 9-5(1)(b) if it does not go to establishing the plaintiff's cause of action, does not advance any claim known in law, is without *bona fides*, is hopelessly oppressive, or causes the other party anxiety, trouble or expense: *Simon v. Canada (Attorney General)*, 2017 BCSC 1438 at para. 50.

[54] An "embarrassing" pleading described in R. 9-5(1)(c) is a pleading that is irrelevant to the claims and issues before the court and would involve needless expense and delay: *Simon* at para. 52.

[55] In *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61 at para. 45, the Court held that it is important to bear in mind the "high onus" that must be met before a cause of action may be struck under R. 9-5.

[56] In assessing pleadings under R. 9-5(1), the court must read the pleadings generously and consider the claims as pleaded or as they may reasonably be

amended: *British Columbia/Yukon Association of Drug War Survivors v. Abbotsford (City)*, 2015 BCCA 142 at para. 15. The court will be generous and will err on the side of permitting a novel but arguable claim to proceed to trial: *Nevsun* at para. 66; *Imperial Tobacco 2011* at para. 21. However, no special consideration is given for class actions; each claim must stand or fall on the pleadings: *Scott v. Canada (Attorney General)*, 2013 BCSC 1651 at para. 21, rev'd on other grounds 2017 BCCA 422, leave to appeal to SCC ref'd, 37930 (30 August 2018).

[57] In both *Imperial Tobacco 2011* (at paras. 19–20) and *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 (at para. 18), the Court pointed to the need to strike out "hopeless claims" that "have no reasonable chance of success" as a "valuable housekeeping measure."

DISCUSSION

A. Whether the Province has Adequately Pleaded Material Facts Connecting McKinsey to Opioids Misrepresentations Made to the Public

[58] McKinsey argues that the ANOCC is deficient in that it contains no indication that McKinsey made representations to the public. McKinsey does not dispute that it provided advice to various clients, but it strongly disputes that it was involved in making representations that may have ultimately led opioid users to harm. McKinsey therefore submits that it did not have sufficient proximity to the end users of opioids to give rise to a duty of care.

[59] McKinsey argues that its role was limited to providing advice to its clients. Its clients decided whether and to what extent to adopt that advice; they are responsible for their own decisions and conduct. It submits that the Province seeks to extend the duty of care to an unacceptable degree.

[60] I note that the defendants in the M&D Action took a similar position, which the Court of Appeal rejected: *Valeant BCCA* at para. 139.

[61] Insofar as McKinsey takes issue with the adequacy of the pleadings, para. 43 of the ANOCC clearly sets out that "[t]hrough its consulting work, McKinsey, along with Opioid manufacturers, made false and misleading misrepresentations to medical professionals and members of the public" [emphasis added]. It appears the ANOCC does, therefore, allege that McKinsey made representations to the public, either directly or through its client organizations.

[62] Moreover, the Province alleges that McKinsey is unlike other consulting firms in that it integrates itself into its clients; its clients' representations may be considered its own. The ANOCC provides:

> 9. In providing consulting services, McKinsey integrates itself into client organizations. McKinsey consultants train sales staff and work directly within client organizations to provide coaching and develop strategies to increase sales.
>
> ...
>
> 12. McKinsey's consulting services involved designing, recommending and implementing plans to market and promote the sale and distribution of Opioids in Canada, despite McKinsey's knowledge that Opioids were addictive and were being aggressively promoted to treat conditions that Opioids are not effective in treating. McKinsey's advice and marketing and promotion efforts resulted in an increase in the prescription, sale and use of Opioids in Canada.
>
> [Emphasis added.]

[63] In addition, as discussed below, the ANOCC makes allegations that McKinsey engaged in a common design as between McKinsey Canada and McKinsey USA, and as between McKinsey and each of Purdue, Janssen, Endo and McKesson, which further supports McKinsey's connection to the wrongdoing. Pursuant to the joint liability provisions of s. 4 of the *ORA*, McKinsey may be held liable for the actions of manufacturers and wholesalers if certain requirements are met, which the Province alleges to be the case.

[64] I therefore cannot agree with McKinsey that the Province has failed to plead sufficient material facts to connect McKinsey to the alleged wrongdoing for any of its claims. I find it is not plain and obvious that the pleadings would fail on this basis.

B. Whether the Province has Adequately Pleaded McKinsey's Connection to British Columbia

[65] McKinsey also emphasizes how thin its alleged connection to BC is in the ANOCC. McKinsey maintains that all of its work was done in the United States and that this work was never intended to be shared in Canada. It submits that the ANOCC fails to allege material facts that establish a sufficient connection to BC.

[66] To date, McKinsey has not filed a jurisdictional objection.

[67] The ANOCC provides as follows in para. 10:

> During the Class Period, McKinsey provided consulting advisory services to pharmaceutical manufacturers and distributors aimed at increasing their distribution, sales or offering for sale of Opioid Drugs or Opioid Products in Canada, including in British Columbia, and was a "consultant" for the purposes of the *ORA*.
>
> [Emphasis added.]

[68] Paragraph 49 of the ANOCC also provides:

> McKinsey has created or assisted in the creation of an epidemic of addiction in British Columbia and throughout every province and territory in Canada. The actions of McKinsey have caused deaths and serious and long-lasting injury to public peace, health, order and safety, significantly harming the [Province] and impacting its ability to deliver health care to the citizens of British Columbia.
>
> [Emphasis added.]

[69] This Court is entitled to assume jurisdiction over the Province's tort claims if the alleged tort was "committed in the province," both presumptively at common law and pursuant to subsection (a) of the definition of an "opioid-related wrong": *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 90 [*Van Breda*]; s. 1 of the *ORA*. For many torts, "sustaining damage completes the commission of the tort and often tends to locate the tort in the jurisdiction where the damage is sustained," particularly where, as here, both the injury and the pain and inconvenience resulting from it occurred in the same jurisdiction: *Van Breda* at para. 89.

[70] Moreover, the ANOCC alleges that McKinsey knew or ought to have known that the marketing or distribution strategies it produced in the US were being

implemented in Canada, forming a possible factual basis for establishing the requisite foreseeability and proximity to ground a duty of care between McKinsey and opioid consumers in BC.

[71] Additionally, the common design and conspiracy allegations involving clients who carried on business in BC, as well as the joint liability provisions of the *ORA*, further support McKinsey's connection to BC. The tort of conspiracy, for example, is committed in the jurisdiction where harm occurs, "but harm can occur in markets manipulated or affected by the conspiracy even where the specific defendant member of the conspiracy does not operate in that market": *Ewert v. Höegh Autoliners AS*, 2020 BCCA 181 at para. 89.

[72] I see no merit in McKinsey's submissions on this point. I find that the Province has pleaded material facts regarding McKinsey's connection to BC in respect of all its claims. It is not plain and obvious that the pleadings would fail on this basis.

C. Whether the Causes of Action are Adequately Pleaded

[73] The Province's claims may be divided into three categories:

a) representation claims under the *Competition Act,*

b) group liability claims based on conspiracy and common design, and

c) duty-based common law claims (based on negligent misrepresentation and failure to warn).

1. The *Competition Act*

[74] Section 52 of the *Competition Act* makes it an offence to provide false or misleading representations:

> **52 (1)** No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

[75] Section 36(1) of the *Competition Act* makes offences under Part VI, including s. 52, civilly actionable.

[76] McKinsey argues that *Competition Act*-based claims must fail because the *Act* does not create constructive or joint liability for representations made by others, and, in any event, McKinsey did not engage in conduct that could permit the Court to impose constructive or joint liability for any representation made by its clients.

[77] However, as the Province points out, this argument ignores that the ANOCC expressly pleads that McKinsey itself made the Opioids Misrepresentations to the public (at para. 43). As discussed above, while McKinsey claims that these misrepresentations are not alleged to have been made to Canadians, the Province has pleaded adequate facts to connect these misrepresentations to the Canadian public by suggesting that McKinsey knew or ought to know that its marketing strategies were "designed to be used, and were used, in Canada" (ANOCC at paras. 53–54, 74–75, 80–81, and 88–89). McKinsey's argument that any representations made "through its consulting work" cannot be considered to have been made "to the public" is better addressed at trial.

[78] Moreover, the Province also grounds its claims in allegations of party liability or joint liability pursuant to a common design, discussed further below.

[79] McKinsey argues that it cannot be found to have made representations indirectly "as part of a group", as s. 52 does not prohibit persons from directly or indirectly "making false and misleading representations", but rather from directly or indirectly "promoting the supply or use of a business product." McKinsey further alleges that the specific circumstances in which another person can be held liable for the representations of another that are set out in s. 52 cannot apply to its conduct.

[80] These arguments concern matters of statutory interpretation that do not have a "plain and obvious" conclusion. While I accept McKinsey's submission that the phrase "directly or indirectly" in s. 52 can be read as modifying the act of "promoting" rather than the act of "[making] false and misleading representations", I do not

accept that this prevents s. 52 from capturing McKinsey's conduct. I cannot find it "plain and obvious" that ss. 52(1.2) and 52(3), which extend liability to indirect representors in specific situations, were intended to foreclose the circumstances in which parties acting together or making indirect representations could be held responsible; on the contrary, it could be argued that these subsections demonstrate that s. 52 was not intended to apply only to direct action. Further, McKinsey's conduct could arguably be captured under s. 52(1.2), which states that "the making or sending of a representation includes permitting a representation to be made or sent."

[81] Additionally, s. 36 allows an action to be brought against "the person who engaged in the conduct", which may arguably concern a group of actors.

[82] Moreover, s. 34(2) of the *Interpretation Act* provides that:

> All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that *Code* relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

The Province argues that this provision makes the party provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 (e.g. s. 21(1) (parties) and s. 22(1) (counselling)) applicable to the *Competition Act*. The possible application of these provisions undermines McKinsey's submission that its actions do not attract liability under the *Competition Act*.

[83] In *Coburn and Watson's Metropolitan Home v. Bank of America Corporation*, 2017 BCCA 202 at para. 38, leave to appeal to SCC ref'd, 37709 (8 February 2018), the Court of Appeal affirmed that the aiding and abetting provisions of the *Criminal Code* apply to conspiracy charges, including s. 45 of the *Competition Act*. In that case, the Court of Appeal considered whether the trial judge erred in refusing to amend the pleadings to include an allegation that the parties counseled, aided or abetted other parties in committing an offence under ss. 45, 49 and 61 of the *Competition Act* contrary to ss. 21 and 22 of the *Criminal Code*. The Court dismissed the appeal because there was an absence of facts to support the claims, but it

accepted that the party provisions of the *Code* applied to the *Competition Act*: see also *R. v. J.F.,* 2013 SCC 12 at paras. 23–26; *R. v. Greyeyes,* [1997] 2 S.C.R. 825. I can discern no reason why the party liability provisions of the *Code* would not similarly apply to s. 52 of the *Competition Act*.

[84] Additionally, with respect to the Province's claim that the defendant's alleged breach of the *Competition Act* constitutes an "opioid-related wrong," I find that s. 4 of the *ORA* may bring the principles of joint liability at common law or under an enactment into application for claims under the *Competition Act*. Section 4(2) states that manufacturers, wholesalers or consultants are deemed to have jointly breached a duty or obligation if:

> (a) one or more of those manufacturers, wholesalers or consultants are held to have breached the duty or obligation, and
>
> (b) at common law, in equity or under an enactment, those manufacturers, wholesalers or consultants would be held
>
> > (i) to have conspired or acted in concert with respect to the breach,
> >
> > (ii) to have acted in a principal and agent relationship with each other with respect to the breach, or
> >
> > (iii) to be jointly or vicariously liable for the breach if damages would have been awarded to a person who suffered damages as a consequence of the breach.

[85] The *ORA* may therefore render parties jointly and severally liable for a breach of s. 52 of the *Competition Act* committed through common design, as alleged in the ANOCC.

[86] Accordingly, I would not give effect to the defendants' argument on this ground. I find it is not plain and obvious that the Province's pleadings fail to disclose a cause of action with respect to the *Competition Act,* both as a direct cause of action and as an "opioid-related wrong" under the *ORA*.

2. Conspiracy

[87] The defendants next argue that the ANOCC contains no tenable claim in conspiracy. They submit that a plaintiff alleging conspiracy must provide the factual

basis for each element and plead the material facts with a "heightened particularity": *Ontario Consumers Home Services v. Enercare Inc*., 2014 ONSC 4154 at para. 25 [*Enercare*]; *Gong v. O'Neill*, 2022 BCSC 2119 at para. 66. In addition, the defendants submit that the ANOCC contains no material facts to suggest that the impugned conduct was directed at the Province, a necessary element of an "unlawful means" conspiracy: *Enercare* at para. 19.

[88] The Province is pursuing a claim of conspiracy at common law. In addition, it has pleaded conspiracy as a pathway to liability under the joint tortfeasor provisions of the *ORA*, which render manufacturers, wholesalers, or consultants jointly liable if they have "conspired or acted in concert" with respect to any party's breach of a common law, equitable, or statutory duty or obligation: s. 4(2). However, the Province does not claim conspiracy as an "opioid-related wrong" under the *ORA*. The ANOCC provides as follows:

> 93. The Defendants conspired with Opioid manufacturers to unlawfully increase prescriptions and sales of Opioids in Canada by making false and misleading representations, including the Opioid[s] Misrepresentations.
>
> 94. The Defendants conspired with Opioid distributors to unlawfully increase the volume of Opioids distributed in Canada.
>
> 95. The actions of the Defendants and the Opioid manufacturers and distributors were directed at the [Province] and Class Members who were purchasers of the Opioid Products manufactured, sold and distributed by the conspirators. The Defendants and their co-conspirators specifically considered the costs borne by health insurers as a result of increasing Opioid prescriptions.
>
> 96. McKinsey and its co-conspirators knew that their unlawful conspiracies would increase Opioid prescriptions and sales. McKinsey and its co-conspirators were aware of the dangers of Opioids and that people were dying and addicted to Opioids. McKinsey and its co-conspirators knew or should have known that the [Province] and Class Members would be injured as a result of their actions.
>
> 97. The actions of McKinsey and its co-conspirators has caused and will cause ongoing loss to the [Province] and Class Members in the form of health care costs.

[89] To claim "unlawful means" conspiracy at common law, a plaintiff must plead that: (a) two or more parties acted in combination, (b) their conduct was unlawful, (c) their conduct was directed towards the plaintiff, (d) the parties should know that

injury to the plaintiff was likely to result, and (e) their conduct caused injury to the plaintiff: *Pro-Sys* at para. 80.

[90] Regarding the first requirement, the ANOCC alleges that two or more parties acted in concert. Specifically in paras. 51–92, it alleges that McKinsey acted in concert with opioid manufacturers and distributors, in particular the Purdue, Janssen, Endo and McKesson entities.

[91] The second requirement is that the defendants' conduct be unlawful. Under the Conspiracy heading, the ANOCC states that McKinsey conspired with Opioid manufacturers to "unlawfully increase prescriptions and sales of Opioids by making false and misleading representations" and with distributors to "unlawfully increase the volume of Opioids distributed" (at paras. 93–94). Though this section does not describe the details of this allegedly unlawful conduct, other sections of the ANOCC plead material facts giving rise to breaches of statute, including the *Competition Act* (see above). Such breaches have been found to constitute "unlawful means" that can give rise to a conspiracy claim: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12 at paras. 63–64; *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at paras. 83–84. In addition, breaches of tortious duties that can constitute "unlawful means" are alleged and sufficiently described elsewhere in the pleadings: fraudulent misrepresentation (deceit), negligent misrepresentation and failure to warn.

[92] The third requirement is for the conduct to be directed toward the plaintiff. As the Province does not plead conspiracy as an "opioid-related wrong," it is neither necessary nor sufficient for the conduct to be directed at persons in British Columbia. In *Cement LaFarge v. B.C. Lightweight Aggregate*, 1983 CanLII 23, [1983] 1 S.C.R. 452 at 472, the Court held that the conspiracy in question was directed toward the "purchasers of the products of the conspirators." The ANOCC likewise pleads that the alleged conspiracy was directed at the Province and other Canadian governments as purchasers of opioids, since McKinsey "specifically considered the costs borne by health insurers as a result of increasing Opioid prescriptions" [emphasis added].

[93] Regarding the fourth requirement, as held in *Cement LaFarge* at 472, the requisite intent is constructive intent. The Court of Appeal has interpreted "constructive intent" to mean more than simply knowing there is "a greater than 50% chance that injury to the plaintiff will occur"; rather, the defendant must have a "clear expectation" that injury will result: *Golden Capital Securities Limited v. Rempel et. al.*, 2004 BCCA 565 at para. 56. Again, the ANOCC pleads that McKinsey knew or ought to have known harm to the Province was likely—McKinsey "specifically considered the costs borne by health insurers as a result of increasing Opioids Prescriptions" [emphasis added].

[94] The last requirement is that the conduct caused injury or loss to the plaintiff. At para. 100, the ANOCC pleads that the Province and other government class members have suffered a number of specific damages as a result of McKinsey's conduct.

[95] The nature of the conspiracy alleged here is an unlawful means conspiracy based on a breach of statutory and common law duties. This claim must be considered in the context of the pleadings as a whole: the underlying unlawful conduct that forms the basis of this claim is well set out elsewhere in the pleadings. As the Court of Appeal noted in the M&D Action, "issues such as the adequacy of the pleadings need to be approached cautiously, and to some degree functionally, to accommodate the needs of the case" in an action of this breadth and scale: *Valeant BCCA* at para. 11. Given the level of specificity in the ANOCC, I would decline to strike the claim for failure to provide particulars, a matter which, if necessary, could be the subject of a motion for further particulars.

[96] In all the circumstances, I would dismiss the defendants' argument on this ground. It is not plain and obvious the pleadings disclose no reasonable cause of action in civil conspiracy.

3. Common Design

[97] The defendants further argue that the ANOCC lacks a tenable claim of joint liability through common design. I agree with McKinsey that common design is not a

separate cause of action *per se*; however, I cannot agree that the ANOCC lacks a tenable claim of common design as a path to establishing joint liability.

[98] As noted above, the Province submits that its pleadings allege that McKinsey is not just an advisory firm but one that is integrated with its client organizations in promoting opioid sales. For instance, the ANOCC alleges as follows:

> 9. In providing consulting services, McKinsey integrates itself into client organizations. McKinsey consultants train sales staff and work directly within client organizations to provide coaching and develop strategies to increase sales.
>
> 10. During the Class Period, McKinsey provided consulting advisory services to pharmaceutical manufacturers and distributors aimed at increasing their distribution, sales or offering for sale of Opioid Drugs or Opioid Products in Canada, including in British Columbia, and was a "consultant" for the purposes of the ORA.
> …
>
> 12. McKinsey's consulting services involved designing, recommending and implementing plans to market and promote the sale and distribution of Opioids in Canada, …
>
> 14. At all material times, including during the Class Period, McKinsey US and McKinsey Canada acted pursuant to a common design to develop and implement marketing plans and strategies, in partnership with Opioid manufacturers and distributors, in order to increase sales of Opioids in Canada. These arrangements and activities include but are not limited to:
>
> > (a) McKinsey US and McKinsey Canada are part of the integrated McKinsey group of companies, which includes global and North American management structures;
> >
> > (b) McKinsey US and McKinsey Canada were led globally by the McKinsey group's managing partner, an elected board of directors and a global leadership team;
> >
> > (c) the McKinsey group of companies, including McKinsey US and McKinsey Canada, were subject to a global Code of Conduct which applied to operations in Canada and includes pharmaceutical compliance as a "higher risk client service situation"; and
> >
> > (d) McKinsey US and McKinsey Canada collaborated on the design and implementation of international strategies for pharmaceutical clients, including for the marketing and sale of Opioids.
>
> …
>
> 25. Purdue and other manufacturers of Opioids, along with McKinsey, subsequently developed and aggressively promoted a narrative that pain was undertreated and should be made a higher priority by healthcare practitioners. McKinsey began working with Opioid manufacturers to vigorously market long-acting Opioids as less addictive, less subject to abuse and diversion and less likely to cause tolerance and

> withdrawal than other pain medications - despite a lack of scientific evidence to support these claims. Individually, and in concert, McKinsey and the Opioid manufacturers promoted these opioids as safe, effective and appropriate for long-term use for routine pain conditions.

[99] Subsequently, in paras. 43–50, the ANOCC provides further detail as to how McKinsey acted pursuant to a common design with each of its manufacturer clients to increase the market for opioids in Canada or to market and sell opioids by making false and misleading representations. In paras. 85–92, the ANOCC provides further detail as to how McKinsey provided advisory services to opioid distributors with the goal of maximizing the volume of opioid products distributed in Canada. In particular, the ANOCC alleges that McKinsey acted pursuant to a common design with McKesson in this regard.

[100] As noted above, s. 4 of the *ORA* will impact the Province's common design claims:

> **4** (1) Two or more defendants in an action under section 2 (1) or 2.1 (1) are jointly and severally liable for the cost of health care benefits if
>
> (a) those defendants jointly breached a duty or obligation described in the definition of "opioid-related wrong" in section 1 (1), and
>
> (b) as a consequence of the breach described in paragraph (a) of this subsection, at least one of those defendants is held liable in the action under section 2 (1) or 2.1 (1) for the cost of those health care benefits.
>
> (2) For purposes of an action under section 2 (1) or 2.1 (1), 2 or more manufacturers, wholesalers or consultants, whether or not they are defendants in the action, are deemed to have jointly breached a duty or obligation described in the definition of "opioid-related wrong" in section 1 (1) if
>
> (a) one or more of those manufacturers, wholesalers or consultants are held to have breached the duty or obligation, and
>
> (b) at common law, in equity or under an enactment, those manufacturers, wholesalers or consultants would be held
>
> (i) to have conspired or acted in concert with respect to the breach,
>
> (ii) to have acted in a principal and agent relationship with each other with respect to the breach, or
>
> (iii)to be jointly or vicariously liable for the breach if damages would have been awarded to a person who suffered damages as a consequence of the breach.

[Emphasis added.]

[101] There are three pathways to joint liability at common law: agency, vicarious liability, and concerted action: *Valeant BCCA* at para. 155. Parties are said to have "acted in concert," as appears in s. 4(2)(b)(i), when they act in furtherance of a common design; these terms are legally equivalent: *Valeant BCCA* at para. 155.

[102] To establish joint liability on the basis of having "acted in concert" under s. 4(2) of the *ORA* or at common law, the Province must plead the essential elements of common design at common law.

[103] In *Valeant BCCA* at para. 163*,* the Court rejected a requirement that there must be a "primary tortfeasor" in relation to a common design allegation. The Court otherwise assessed that the pleadings in the M&D Action "adequately plead material facts to support the other elements of a common-design pleading," which are substantial assistance, an unlawful object, and an underlying alleged tort: *Valeant BCCA* at para. 164. The ANOCC in the present case similarly appears to contain these elements. I note that, for claims brought under the *ORA*, an "opioid-related wrong" (such as a breach of the *Competition Act*) is arguably sufficient to satisfy the underlying predicate tort requirement. The ANOCC otherwise makes numerous allegations of substantial assistance and pursuit of unlawful objects.

[104] McKinsey submits that none of the alleged unlawful acts it is said to have committed pursuant to a common design are supported by material facts. However, given my findings above and below, I find that this submission is without merit. The Court must apply a "flexible and functional" approach that furthers, rather than frustrates, the objectives of the rules of pleading: *Valeant BCCA* at para. 72. Throughout the ANOCC, the Province lists activities it claims McKinsey jointly engaged in with the entities with whom they allegedly formed a common design. The ANOCC links these activities to various "opioid-related wrongs" that could satisfy the "underlying alleged tort" requirement, such as conspiracy, negligent failure to warn, negligent misrepresentation, fraudulent misrepresentation (deceit), and a breach of s. 52 of the *Competition Act*.

[105] For these reasons, and in light of the Court of Appeal's interpretation of the *ORA* and the common design allegations in the M&D Action (*Valeant BCCA* at paras. 100, 143–167), I do not find it plain and obvious that the pleadings are bound to fail, insofar as they allege that McKinsey might be jointly liable for the conduct of the manufacturers and distributors.

4. The *ORA* Claims

[106] In order for the Province's claims under the *ORA* to disclose a reasonable cause of action, the ANOCC must allege material facts that, if true, would establish that McKinsey committed an "opioid-related wrong." The sufficiency of the *ORA*-based claims, which are based on the "opioid-related wrongs" of negligent misrepresentation, negligent failure to warn, fraudulent misrepresentation (deceit), and breach of s. 52 of the *Competition Act*, was dealt with in *Valeant BCCA* at paras. 104–140. The Court of Appeal found that sufficient material facts had been pled in support of these claims. The Court held that only the elements up to and including the "breach" in a cause of action must be pled, as the *ORA* provides its own causation regime: *Valeant BCCA* at para. 123.

[107] However, McKinsey argues that more is required to establish the *ORA*-based claims in this action. McKinsey claims that, as a consultant, it is further removed from the conduct that forms the basis of the alleged "opioid-related wrongs." In particular, McKinsey forcefully argues that no Canadian court has held that an adviser to a manufacturer or distributor owes a duty of care in negligence to the end users of potentially dangerous products.

[108] To be clear, there is no need to establish a duty of care between the defendants and the Province for negligence-type claims brought under the *ORA*. The *ORA* grants the Province and the Government of Canada the right to bring a direct action against a consultant for torts committed in British Columbia or breaches of duties owed to persons in British Columbia: *ORA* ss. 1(1), 2, 2.1. It is therefore sufficient that a defendant owed a duty of care to end users of opioid products in BC: *Valeant BCCA* at para. 20.

[109] McKinsey claims that foreseeability alone is not sufficient to ground a duty of care, relying on *Cooper v. Hobart*, 2001 SCC 79 at para. 21 and *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 at paras. 23–30 [*Livent*]; there must also be a close and direct relationship of proximity or neighbourhood: *Cooper* at para. 22. McKinsey submits that there are no material facts to support the existence of a close and direct relationship between McKinsey and end users of the impugned opioids in BC.

[110] McKinsey argues that the Province has not pleaded material facts to support allegations that McKinsey made the Opioids Misrepresentations directly to any health care professional in Canada or to members of the Canadian public, or that it had any client engagements relating to the sale or distribution of opioids in Canada. It submits that this is the difference between *Livent* and the present case; in *Livent*, a relationship of proximity was found to exist because the adviser had expressly approved the transaction that was the basis for the undertaking.

[111] I cannot accept McKinsey's position on this issue.

[112] First, as noted above, the ANOCC alleges that McKinsey is a co-principal, integrated with its clients, in making false and misleading representations to members of the public. I find the pleadings sufficiently allege that the misrepresentations made by its clients to end users were also McKinsey's misrepresentations. In that sense, the ANOCC sufficiently alleges that McKinsey owes a duty of care to end users of opioids.

[113] Second, the Province has made allegations of common design and conspiracy that arguably overcome any lack of a proximate relationship between McKinsey and end users of opioids. In this context, a relationship of proximity by another manufacturer may give rise to liability for McKinsey if the elements of joint liability are established.

[114] In *Felker v. Teva Branded Pharmaceutical Products R*, 2022 BCSC 1813, the Court held the following regarding whether consultants owe a duty of care to end users of drug products:

> [50] A defendant owes no duty of care to users in relation to products manufactured and sold by another company absent allegations that the former can control, qualify, or stop the latter's conduct: …. Teva observes that the plaintiffs do not allege that either it or BNPI could control the conduct of the other entities who sold Elmiron in Canada.
>
> [Emphasis added.]

[115] In my view, the pleadings sufficiently allege that, by virtue of McKinsey's integrated and co-conspiratorial relationship with its clients and its strategic planning and marketing efforts to promote and sell opioid products in Canada, including in BC, McKinsey had the power to control or qualify the conduct of manufacturers and distributors with respect to their sale of opioids. This element of control gives rise to a duty of care between an advisor, like McKinsey, and end users of opioid products.

[116] Further, the joint liability provisions of the *ORA* are very much operative in this case. Those provisions assist in deeming defendants jointly and severally liable for the cost of health care benefits if they "acted in concert" with respect to a breach or "acted in a principal and agent relationship" with respect to a breach: s. 4(2) of the *ORA*; *Valeant BCCA* at para. 83. This liability-extending provision does not exist in the cases cited to me.

[117] The Court of Appeal commented as follows in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398 with regard to a similarly worded provision:

> [36] The action against the foreign defendants who did not manufacture cigarettes sold in British Columbia (the "joint breach defendants") is brought pursuant to s. 4 of the *Act*. Section 4 provides that defendants may be found jointly and severally liable if they jointly participated or conspired in the breach, or would otherwise be liable for the consequences that flowed from it.
>
> [37] Under s. 4, defendants can only be held liable where, at common law, they would be liable for wrongs committed within British Columbia. In the Supreme Court of Canada, Major J., at para. 13, referred to the liability described in s. 4 as one for a "joint breach of duty", suggesting acceptance of

> the following interpretation placed on the section found in the reasons of Rowles J.A. at para. 161 of this Court's earlier decision:
>
> > The effect of s. 4(2) is to provide that whether a joint breach under s. 4(1) has occurred will depend on common law, equitable or statutory rules that exist independently of the *Act*.
>
> [39] In its statement of claim, the Government alleges that all the joint breach defendants conspired or acted in concert with the manufacturers who sold cigarettes in British Columbia, to prevent consumers in British Columbia from acquiring knowledge of the harmful nature and addictive properties of cigarettes. The Government alleges that pursuant to the conspiracy or common design, the defendants who manufactured cigarettes sold in British Columbia carried out the alleged breaches of duty in British Columbia. The Government further alleges that those defendants who did sell cigarettes in British Columbia in violation of their duties owed in the province were acting as agents for the joint breach defendants. Thus all of the foreign defendants who did not manufacture cigarettes sold in British Columbia are implicated in a "joint breach" of duties owed to British Columbians. As such, all the activities alleged against the joint breach defendants are all wrongs whose *locus* is in British Columbia.
>
> [Emphasis added.]

[118] In my view, this reasoning leads inevitably to a rejection of McKinsey's submissions on the absence of a duty of care owed to end users of opioid products. McKinsey may be liable based upon the joint breach of duties owed by opioid manufacturers and distributors to British Columbians: see also *Ontario v. Rothmans Inc.*, 2013 ONCA 353 at paras. 39–43, leave to appeal to SCC ref'd, 35497 (19 December 2013). The torts and tortious conduct on which the action is founded all occurred in British Columbia. McKinsey is alleged to have conspired or acted in a common design with other domestic and foreign defendants, with resulting damage in British Columbia. The ANOCC is sufficient in this regard to ground an arguable claim.

[119] Finally, I find that it is premature in any event to decide the question of whether a duty of care exists between McKinsey and opioid users in BC.

[120] In *Beazley v. Suzuki Motor Corporation*, 2008 BCSC 13, Goepel J.A. (as he then was) held that whether a novel duty exists should not be decided summarily:

> [46] This case raises for determination the question of whether a consultant to a manufacturer of a mass produced complex product owes a duty of care to the end

> user of the product and, if such a duty of care is owed, whether it is limited to the advice given to the manufacturer, or extends to include a duty to warn the end user of the product that the product may be defective. While there may be some similarities between this situation and decided cases, there are also significant differences. A building is a single structure. An automobile is a mass produced product. No cases have been cited to me in relation to the obligations of a consultant in such circumstances.
>
> …
>
> [48] On the facts and submissions before me, I find that the duties of care which the plaintiffs seek to impose on Lotus are novel and the determination of the existence of a duty of care requires a full *Anns* analysis.
>
> [49] Accepting that the two claims are novel, the question for determination on this application is whether it can be said at this point in time that they are certain to fail. I am unable to reach such a conclusion.
>
> [50] The case raises important issues concerning the obligations of those who provide advice to manufacturers of products. If a duty of care is found to arise, the finding may have significant commercial implications.
>
> [51] These are, in my view, not questions that should be determined summarily at this stage. Important and novel questions of law should not be decided absent a factual record: ***Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.***, 2002 BCCA 138. A full evidentiary record will allow the court to fully explore the competing policy interests which need to be considered in determining whether a duty of care should be extended to this situation. Important and novel questions of law should not be determined in an evidentiary vacuum.
>
> [Emphasis added.]

[121] The appropriate approach, at this stage, is to err on the side of permitting an arguable claim to proceed to trial: *Imperial Tobacco 2011* at para. 21. “Courts should not be too quick to strike claims simply because they are novel”: *Valeant BCCA* at para. 43. The existence of an established framework for establishing novel duties of care suggests that novelty alone does not mean such claims are doomed to fail: see e.g. *1688782 Ontario Inc. v. Maple Leaf Foods Inc*., 2020 SCC 35 [*Maple Leaf Foods*]. Whether the duty of care alleged in this case is novel, and whether such a novel duty can be established, are arguable issues best left to trial.

[122] McKinsey argues that, in *Beazley*, Goepel J.A. made only a cursory analysis of the *Anns* test for recognizing a novel duty of care. In the 15 years since *Beazley* was decided, McKinsey submits, it has not been applied in any other case, and the

Supreme Court has reaffirmed that a rigorous *Anns* analysis should be performed even at the pleadings stage. It relies on two cases to support this argument: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 [*Maple Leaf Foods*] and *Arora v. Whirlpool Canada LP*, 2013 ONCA 657 [*Arora*].

[123] *Maple Leaf Foods* involved a summary judgment decision rather than a pleadings application. Thus, the issue before the Supreme Court of Canada was whether the defendant Maple Leaf Foods actually owed the plaintiffs a duty of care: a much higher threshold than whether it is plain and obvious that a duty of care claim is bound to fail.

[124] The plaintiffs in *Arora* sought to establish a novel duty of care against a washing machine manufacturer for pure economic losses, in contrast to the bodily harm that BC opioid users are alleged to have suffered. The losses in *Arora* were alleged to have been caused by negligent defects, which, unlike in the present case, were not dangerous to consumers. The court in *Arora* described this proposed duty of care as a "quantum leap" in the law of negligence, which was bound to fail regardless of what evidence or further facts could be adduced: at para. 97.

[125] In my view, the relationship alleged between McKinsey and BC opioid users is more akin to the relationships of sufficient proximity described in *Livent* and *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399.

[126] In *Livent*, an auditing firm that issued unqualified audit opinions after negligently failing to detect rampant corporate fraud was found to owe a duty of care to the company's investors, who had relied on the firm's opinion but with whom the firm had no contractual relationship, for the additional diminution in the value of the company as a result of the fraud being permitted to continue.

[127] In *Cannon*, the Court considered whether a lawyer who provides an opinion concerning the tax compliance of a charitable donation program owes a duty of care to donors who have not received or read the opinion but who have been informed that the opinion is available for review by their financial advisors without

responsibility on the part of the lawyer. The Court held that the lawyer had put himself in a close and direct relationship with every donor by permitting himself (including his photograph and biography) and his comfort letters to be used to market the donation program: at para. 536. It was reasonably foreseeable that, if the lawyer was negligent in his advice regarding the tax implications of the program, donors would suffer: at para. 541. The Court held that the facts raised a genuine issue, requiring a trial, concerning the existence of a duty of care owed by the lawyer to the donors: at para. 540.

[128] Both *Livent* and *Cannon* involved advisors that publicly approved of a program or transaction that ultimately caused harm to those who donated or invested. I note that McKinsey's "stamp of approval" was perhaps not as obvious to end users as that of the press releases and comfort letters issued by the advisors in *Cannon* and *Livent*. However, such arguments are best left for trial, with the benefit of a full factual record.

[129] I am satisfied that the Province's *ORA*-based claims are not bound to fail on the basis of a lack of a relationship of proximity between McKinsey and end users of opioids.

[130] McKinsey challenges the *ORA* claim for fraudulent misrepresentation on the same grounds as the claim for breach of s. 52 of the *Competition Act*: namely, that the ANOCC does not support that McKinsey itself made representations to the public. For the reasons discussed earlier in this judgment, it is not plain and obvious that these claims are bound to fail.

[131] I would add that the very clear legislative intent behind the 2022 amendments to the *ORA* was to bring consultants like McKinsey under the purview of the legislation and to "strengthen the case" against McKinsey in particular. The *ORA* was amended specifically for the purpose of pursuing the *ORA*-based claims against McKinsey. As the Court of Appeal stated in *Valeant BCCA* at para. 10, "it would be a surprising result if we were to conclude that it is plain and obvious that an action rooted in the enabling statute did not disclose a reasonable cause of action."

[132] The Province concedes that conspiracy was included in the list of *ORA* claims in the ANOCC at paras. 4(d) and 106(d) in error and is to be amended. Indeed, the pleadings regarding the *ORA* claims do not allege that conspiracy grounds any statutory claim under the *ORA* (though the conspiracy allegation grounds a claim of joint and several liability under s. 4 of the *ORA*). I grant leave to the Province to amend its claim in this regard.

JOINT LIABILITY WITH PURDUE

[133] McKinsey notes that this Court approved a settlement between the Province and Purdue in the M&D Action: *British Columbia v. Purdue Pharma Inc.*, 2022 BCSC 2288. The settlement approval is currently the subject of an appeal by a proposed intervenor. McKinsey submits the Province's request to seek Purdue's joint liability from McKinsey should be struck from the ANOCC because the settlement prevents the Province from seeking any relief beyond McKinsey's several liability in matters pertaining to Purdue.

[134] The order approving the Purdue settlement (the "Settlement Order") declares that this settlement will have no effect on the continued prosecution of the McKinsey action: at para. 16 of the Settlement Order. However, the settlement requires the Province and the proposed class members in this action to forego recovering from McKinsey any portion of their loss that would have otherwise been apportioned to Purdue: at para. 23 of the Settlement Order. This ensures that McKinsey is neither unduly prejudiced nor advanced by the settlement.

[135] This type of settlement is commonly referred to in British Columbia as a *BC Ferry* settlement, named after *British Columbia Ferry Corp. v. T & N*, (1995), 1995 CanLII 1810 (BC CA), 16 B.C.L.R. (3d) 115 (C.A.). In the United States and elsewhere in Canada, it is known as a *Pierringer* agreement: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at paras. 21–26. *BC Ferry* settlements extinguish joint liability between settling and non-settling parties, but preserve the non-settling parties' several liability: *Sable Offshore Energy Inc.* at para. 26. Non-settling defendants remain jointly and severally liable: *The Owners of*

Strata Plan KAS3204 v. Navigator Development Corporation, 2020 BCSC 1954 at paras. 7, 35.

[136] Consequently, the Settlement Order allows the Province and the proposed class members to continue their action against McKinsey for conduct involving Purdue. However, recovery will be limited to the percentage of fault attributable to the non-settling defendants: see paras. 14, 20, and 23 of the Settlement Order. In turn, McKinsey cannot seek contribution or indemnity from Purdue for damages awarded against it: Settlement Order at para. 22.

[137] The Province agrees with McKinsey that, as a result of the settlement, it can only seek several liability against McKinsey in respect of matters pertaining to Purdue. The Province submits that it will amend the ANOCC accordingly, provided that the Settlement Order withstands the present appeal. As the appeal of the settlement remains outstanding and the Province seeks to amend this aspect of its claim, I would not give effect to McKinsey's application to strike the Province's claim for joint liability against Purdue at this juncture.

[138] I would provide leave to the Province to amend its claim in this regard. If necessary, the issue can be readdressed at the certification hearing.

CONCLUSION

[139] The motion to strike the ANOCC is dismissed.

[140] Leave is given to the Province to amend its claim consistent with the reasons above.

"Brundrett J."