IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia v. McKinsey & Company, Inc. United States,* 2025 BCSC 1094

Date: 20250613
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 & Compagnie Canada

Defendants

Brought pursuant to the *Class Proceedings Act,* R.S.B.C. 1996, c. 50

Before: The Honourable Justice Brundrett

Reasons for Judgment on Certification Application

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Place and Date of Hearing:	Vancouver, B.C. November 4-6, 2024
Place and Date of Judgment:	Vancouver, B.C. June 13, 2025

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I. INTRODUCTION

[1] This proposed class proceeding is brought by the plaintiff, His Majesty the King in Right of the Province of British Columbia (the "Province"), on behalf of itself and other federal, provincial and territorial governments to recover opioid-related healthcare, pharmaceutical and treatment costs from 1996 onward. The defendants, McKinsey & Company, Inc. United States ("McKinsey US"), and McKinsey & Company Canada / McKinsey & Compagnie Canada ("McKinsey Canada," together with McKinsey US, "McKinsey"), are consultants who allegedly provided advice in the manufacture, marketing, distribution or sale of opioid-related products in Canada.

[2] This case (the "McKinsey Action") is a companion proceeding to that in *British Columbia v. Apotex Inc.*, 2025 BCSC 92 [*Apotex Certification Decision*] (the "Main Action") involving opioid manufacturers and distributors, which was recently certified. The Main Action targets numerous pharmaceutical manufacturers, wholesalers, and distributors alleged to have been involved in the manufacture, marketing, distribution, and sale of opioid products in Canada. The present application for certification in the McKinsey Action is similar, but not identical, to the application in the Main Action.

[3] The claims in the Amended Notice of Civil Claim ("ANOCC") at issue here allege that McKinsey provided advisory services to *inter alia* three pharmaceutical manufacturers (Purdue Pharma LP ("Purdue"), Janssen Inc., a Canadian subsidiary of the American company, Johnson & Johnson, (referred to collectively as "Janssen"), and Endo Pharmaceuticals Inc. ("Endo")) and one distributor (McKesson Corporation ("McKesson")) with respect to the promotion, marketing,

sale, or distribution of opioids in Canada. The ANOCC alleges that McKinsey worked closely with these and other opioid manufacturers and distributors to increase the sale and distribution of opioids to consumers for unsuitable uses despite McKinsey knowing that opioids were addictive.

[4] The ANOCC further alleges that McKinsey designed aggressive campaigns that promoted the idea that pain was undertreated and should be made a higher priority by healthcare practitioners. It also alleges that these campaigns misrepresented the drugs as safe and not addictive, or less addictive than other painkillers, despite a lack of scientific evidence to support these claims. The ANOCC alleges that through its consulting work, McKinsey, along with opioid manufacturers, made false and misleading representations ("Opioid Misrepresentation(s)") to medical professionals and members of the public. The Province alleges that this conduct ultimately caused and contributed to the over-prescription of these products and then to harming end users of the opioids. In short, it alleges McKinsey "turbocharged" some of the same misrepresentations that ground the Province's claims in the Main Action.

[5] McKinsey denies these claims. It argues it never made representations related to opioid products directed at Canadian consumers; it was simply a consultant. It submits that the Province has not established some basis in fact that there are common issues against McKinsey for opioid-related work in Canada. In fact, McKinsey states that it has provided affirmative evidence that it was not involved in advising on marketing or sales strategies for opioid products in Canada or the Canadian market. In addition, McKinsey submits that the Province has not established that a class action would represent a preferable procedure for resolution of the common issues because the proceeding would be enormously complex and resolve only some of the issues for some proposed class members. As a result, McKinsey invites the Court to exercise its gatekeeping function to prevent the unneeded expenditure of resources to defend a complex, time-consuming action which does not have the minimum evidentiary foundation necessary to proceed.

[6] The Province notes that McKinsey has acknowledged that it played a role in the opioid epidemic with respect to its past work with Purdue's American entities ("Purdue US"). However, McKinsey points to a previous Canada-wide settlement dated March 8, 2017, that arguably bars direct claims against Purdue-related

entities to the extent these claims are related to health care costs associated with Canadian residents who used OxyContin and OxyNEO (the “Purdue Settlement”). The Province submits that this issue is not appropriate for resolution at certification in the absence of a proper evidentiary record. McKinsey’s position on this issue evolved at the hearing, and it adopted the position that the scope and application of the Purdue Settlement should be a common issue if the case is otherwise certified.

[7] The Court of Appeal previously affirmed this Court’s decision that the ANOCC discloses reasonable causes of action: *McKinsey & Company, Inc. United States v. British Columbia,* 2024 BCCA 277 [*McKinsey BCCA*]. Hence, the cause of action requirement in s. 4(1)(a) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] is not an issue here. As well, McKinsey does not contest the suitability of the Province as a representative plaintiff under s. 4(1)(e) of the *CPA.* As a result, the issues to be determined revolve around whether the Province has met the remaining requirements for certification in ss. 4(1)(b) through (d) of the *CPA.*

[8] For the reasons that follow, I find that the Province has shown some basis in fact for each of the certification requirements in ss. 4(1)(b) through (d) of the *CPA.* With McKinsey’s concessions on the remaining requirements, this action is ordered to be certified.

II. BACKGROUND

A. General

[9] The Province alleges that it and federal, provincial and territorial governments spent billions of dollars each year from 1996 to the present (the “Class Period”) to fund health care services for Canadian residents, including medically necessary physician services, hospitalization, preventative treatment, and treatment for acute and chronic conditions (the “Class”). It seeks to bring the proposed class action on behalf of itself, members of the Class (the “Class Member(s)”) and a subclass of all federal, provincial and territorial governments that have legislation specifically directed at recovery of damages and healthcare costs arising from the opioid epidemic (the “*ORA* Subclass”) to recover healthcare, pharmaceutical and treatment costs related to opioids incurred during the Class Period and in the future.

B. Nature of Allegations

[10] The Province alleges that McKinsey integrates itself into client organizations by providing consulting services. McKinsey consultants allegedly analyze client organizations' sales performance and metrics, train sales staff, coach clients and develop strategies to increase their sales.

[11] The Province describes this action as concerning McKinsey's direct role in the design, strategy, and execution of marketing efforts to promote, sell and distribute addictive and harmful opioid drugs or opioid products (together, "Opioid Product(s)") in Canada thereby causing loss and damages to the proposed Class Members in the form of health care costs associated with the opioid crisis.

[12] Opioid Products are referred to in the ANOCC as products that contain any opioid drugs, and the term is used interchangeably throughout the claim with "opioids" (the same approach will be used in these Reasons).

[13] The Province alleges that as part of McKinsey's advisory services, McKinsey developed and implemented marketing strategies to promote opioids in Canada which were based on misrepresentations about their safety and efficacy. The same alleged Opioid Misrepresentations ground the Province's claims against drug manufacturers in the Main Action.

[14] The ANOCC asserts that McKinsey provided consulting services that included designing, recommending, and implementing plans to market and promote the sale and distribution of opioids in Canada. These consulting services were provided despite McKinsey's alleged knowledge that opioids were addictive and were being aggressively promoted to treat conditions that opioids are not effective in treating. The Province alleges that McKinsey's actions and advice resulted in an increase in the prescription, sale and use of opioids in Canada.

[15] As a result, the Province alleges that McKinsey has created or assisted in the creation of an epidemic of addiction in British Columbia and throughout every province and territory in Canada. It submits that 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.

C. Procedural History

[16] The McKinsey action was commenced by the Province on December 30, 2021.

[17] On February 7, 2023, the Province filed the ANOCC to add statutory causes of action pursuant to the *Opioid Damages and Health Care Costs Recovery Act*, S.B.C. 2018, c. 35 [*ORA*], which had been amended since the action was commenced.

[18] On October 12, 2023, this Court held that the ANOCC disclosed reasonable causes of action: *British Columbia v. McKinsey*, 2023 BCSC 1762 [*McKinsey BCSC*].

[19] On July 25, 2024, the British Columbia Court of Appeal affirmed this Court's decision on the causes of action: *McKinsey BCCA*.

[20] On January 22, 2025, this Court certified the Main Action against numerous opioid manufacturers and distributors: *Apotex Certification Decision*. Numerous appeals from that judgment remain outstanding.

D. The ANOCC and the Causes of Action

[21] The ANOCC is summarized in *McKinsey BCSC* at paras. 34-47, and I would adopt that summary here. This Court and the Court of Appeal in *McKinsey BCCA* have concluded that the pleadings disclose the following causes of action:

> (a) section 36 of the *Competition Act*, R.S.C. 1985, c. C-34, based on a breach of s. 52 of the *Competition Act*;
>
> (b) conspiracy; and
>
> (c) statutory causes of action on behalf of an *ORA* Subclass:
>
> (i) negligent misrepresentation;
>
> (ii) negligent failure to warn;
>
> (iii) fraudulent misrepresentation and deceit; and
>
> (iv) breach of s. 52 of the *Competition Act*.

[22] Accordingly, the cause of action requirement under s. 4(1)(a) of the *CPA* is not at issue in this application. McKinsey does not contest the suitability of the Province as a representative plaintiff under s. 4(1)(e) of the *CPA.* These reasons

will thus deal with the balance of the certification requirements under ss. 4(1)(b)-(d) of the *CPA*.

[23] The Province has two theories of liability based on two classes of putative plaintiffs:

> (a) On behalf of the entire proposed Class of governments, the Province asserts causes of action against McKinsey for breach of the *Competition Act*, conspiracy, and "common design" (the "Direct Claims").
>
> (b) **On behalf of the proposed ORA Subclass, the Province asserts a statutory cause of action under ss. 2(1) and 2.1 the *ORA* for "opioid-related wrongs". The ANOCC alleges "opioid-related wrongs" of conspiracy, negligent misrepresentation, negligent failure to warn, fraudulent misrepresentation, and breach of the *Competition Act* (the "*ORA* Claims").**

[24] The ANOCC alleges in para. 46 that, during the Class Period, 1996 to present, McKinsey promoted opioids by working with opioid manufacturers to develop and implement strategies to increase sales of opioids 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 overdoses 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 the 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.

[25] The ANOCC asserts that McKinsey acted "at every level of the opioid supply chain, from their manufacture to their distribution and through to their sale to Canadians."

E. The Defendants

[26] The Province alleges that the defendants are part of the McKinsey group that operates globally in 65 countries and 130 cities.

[27] McKinsey is a management consulting firm. It is owned and governed by its partners worldwide. Its role is to advise clients on how to address business challenges. Many of McKinsey's clients are large pharmaceutical corporations.

[28] McKinsey denied it provided consulting or advisory services in respect of opioids in Canada. It concedes that McKinsey US was periodically engaged by Purdue in the United States between 2004 and 2019 with respect to opioid sales, that it was twice engaged by an affiliate of Janssen respecting Duragesic in the United States, that McKinsey US was periodically engaged to perform work for Endo between 2006-2016, but that McKinsey never performed engagements for McKesson in Canada, the United States, or elsewhere. It submits that any work product that McKinsey US prepared for use in the United States could not have been taken by a client and adopted in Canada without such significant modification that it could no longer be said to be McKinsey US's work product.

III. ORDERS SOUGHT

[29] The Province seeks the following orders as set out in the ANOCC:

1. An order certifying this action as a class proceeding pursuant to the *Class Proceedings Act*, RSBC 1996, c 50 (the "*CPA*").
2. An order defining:
    (a) a class of all federal, provincial and territorial governments that, during the period from 1996 to the present (the "Class Period"), paid healthcare, pharmaceutical, treatment and other costs related to Opioids (the "Class") and
    (b) a subclass of all federal, provincial and territorial governments that have legislation specifically directed at recovery of damages and healthcare costs arising from the Opioid Epidemic as defined below (the "ORA Subclass").
3. An order appointing BC as the representative plaintiff of the Class and the ORA Subclass.
4. An order stating the nature of the claims asserted on behalf of the Class to be:
    (a) breach of s. 52 of the *Competition Act,* RSC 1985, c C-34;
    (b) conspiracy; and
    (c) common design liability.

5. An order stating the nature of the claims asserted on behalf of the ORA Subclass to be statutory causes of action under ss. 2(1) and 2.1 of the *Opioid Damages and Health Care Costs Recovery Act*, SBC 2018, c. 35 (the "*ORA*") with joint and several liability under s. 4 of the *ORA* based on the following opioid-related wrongs:
    (a) negligent misrepresentation;
    (b) negligent failure to warn;
    (c) fraudulent misrepresentation/deceit; and
    (d) breach of s. 52 of the *Competition Act*.
6. An order stating the relief sought by the Class to be the relief set out in paragraph 103 of the Amended Notice of Civil Claim (the "ANOCC").
7. An order approving the proposed litigation plan set out in **Schedule "A"** to this Notice of Application.
8. An order that the proceeding be certified on the basis of the common issues set out in **Schedule "B"** to this Notice of Application.
9. An order setting the form and content of the notice program for the certification of this action, as set out in the proposed Litigation Plan.
10. An order that:
    (a) members of the Class may opt-in to this class proceeding by sending a written election by email or regular mail to class counsel within 14 days after certification of this action on a final basis (the "Opt-In Date");
    (b) members of the Class who do not send a written election on or before the Opt-In Date will be deemed to have opted-out of the class proceeding;
    (c) no person may opt-in to this class proceeding after the Opt-In Date;

    and

    (d) within 30 days from the Opt-In Date, class counsel will report to the Court with the names of the entities who have opted-in to this class proceeding.

IV. THE *ORA*

[30] The *ORA* came into force on October 31, 2018. It is modelled after the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30. The *ORA* creates a direct, statutory cause of action for the Province as well as new evidentiary rules and other procedural mechanisms that apply to certain causes of action.

[31] The structure of the *ORA* was comprehensively summarized in *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia,* 2022 BCCA 366 at paras. 77-103. Other decisions, including *McKinsey BCCA* at paras. 8-15, the *Apotex Certification Decision* at paras. 152-165 and *Sanis Health Inc. v. British Columbia,* 2024 SCC 40 at paras. 22-25 [*Sanis*], have also set out the relevant structure of the *ORA*. I will highlight a few provisions relevant to this action.

[32] The *ORA* was amended by Bill 34, *Opioid Damages and Health Care Costs Recovery Amendment Act, 2022*, 3rd Sess., 42nd Parl., 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.

[33] 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).

[34] 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…

[35] 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…

[36] 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).

[37] If an action is brought on an aggregate basis, the Province benefits from certain presumptions under s. 3(2) as to factual and legal causation.

V. THE PARTIES' FACTUAL EVIDENCE

[38] The Province's factual evidence is primarily based on four affidavits from Conall Kelly, a paralegal with counsel for the Province, that attach various documents from publicly accessible sources. The admissibility of Mr. Kelly's evidence was the subject of argument in the Main Action but not pressed in oral argument before me on the present application related to McKinsey. In any case, the objections concerning the admissibility of the exhibits appended to Mr. Kelly's affidavits (for instance, Mr. Kelly's failure to indicate the URL from which he accessed some documents) arise only in relation to a few documents which would not impact the conclusions I reach below. If necessary, however, I would rely upon the findings in the *Apotex Certification Decision* at paras. 166-208 respecting the Province's ability to rely on hearsay and non-hearsay evidence and documents such as public documents admissible under an exception to the hearsay rule.

[39] Mr. Kelly's evidence establishes some basis for several broad propositions in relation to the opioid epidemic in Canada and the role of prescription opioids in it. At a general level, McKinsey does not dispute that it provided advisory services to various clients. However, it submits that the Province has not established that it offered advisory services or made Opioid Misrepresentations in Canada or in the United States directed at a Canadian consumer. It therefore submits that it was not involved in making representations that may have ultimately led opioid users to harm. McKinsey has filed evidence from Michael Silber, a senior partner at McKinsey until December 2023, which is relied upon in part to show that McKinsey has searched but not found any documents that might indicate a connection between McKinsey and opioid representations in Canada.

A. The Opioid Epidemic in Canada

[40] The Province submits, and I accept at a general level, that there is an opioid epidemic in Canada that has impacted every province and territory. McKinsey issued statements (quoted below) in 2019 and 2020 acknowledging the tragic and devasting impact of opioid abuse and addiction in Canada.

[41] The courts have taken judicial notice of the opioid epidemic in Canada: see, for instance, *R. v. Parranto,* 2021 SCC 46 at paras. 59, 93-96, 98; *R. v. Smith,* 2017 BCCA 112 at para. 44; *R. v. Ellis,* 2022 BCCA 278 at para. 149; *R. v Campagna,* 2025 BCSC 349 at para. 48; *R. v Kim*, 2022 BCSC 518 at para. 45. As noted in *Sanis*:

> [18] …. The scale and scope of the opioid crisis are well known …. Opioids are a powerful class of painkillers. While some opioids have become associated with the illicit drug trade, most have legitimate medical uses when properly administered. When used improperly, however, opioids can cause addiction.

[42] In dissent, Côté J. commented in *Sanis* that "[t]he seriousness of the opioid crisis across Canada cannot be understated and the crisis continues to persist without slowing down": at para. 111.

[43] Prescription opioids have played a role in the opioid epidemic. More specifically, I accept that there has been a considerable increase in the use of prescription opioids since the 1980s. Increased prescription use was followed by more reports of harms associated with prescription opioid use and an increased rate in the use of non-prescription opioids: Library of Parliament Hill Studies, Laura Hatt, *The Opioid Crisis in Canada*, (Ottawa: Parliamentary Information, Education and Research Services, 2022) at 94.

B. McKinsey's Alleged Integrated Structure

[44] The Province submits that McKinsey has an integrated structure involving ongoing relationships with clients and that its actions and advice were consistent across the United States and Canada.

[45] The Province has provided excerpts from McKinsey's website that states, "Our offices in more than 65 countries are led by a group of senior partners across six regions . . . these leaders ensure the best of our global firm reaches our local clients and communities" and that "[o]ur firm is designed to operate as one – a single global partnership united by a strong set of values." The website indicates that "we partner with clients to help them innovate more sustainably, achieve lasting gains in performance, and build workforces that will thrive for this generation and the next." In terms of marketing, the McKinsey promotional documents indicate "[w]e

support clients in creating high-impact strategies that maximize value, using customized tools."

[46] The Province submits that McKinsey is part of a cohesive group of companies led by global management and subject to a global code of conduct. The McKinsey group of companies are said to work in coordination to implement common international strategies for clients.

C. McKinsey's Advice to American Manufacturers and Distributors

[47] The factual record contains evidence indicating that McKinsey provided advisory services to opioid manufacturers and distributors. Most of this evidence originates from a repository of documents in the United States known as the Opioid Industry Documents Archive (the "OID Archive"), which was created by the University of California, San Francisco, and Johns Hopkins University to provide court-authorized public access to corporate documents released in opioid litigation. Various McKinsey documents in the record reference McKinsey's work with Purdue, Janssen, and Endo in the United States. As the defendants note, the Province's summary of the evidence relating to McKinsey's work is focused on McKinsey US's conduct in the United States. McKinsey disputes that such materials provide any basis in fact for common issues pertaining to the manufacturing, sale, distribution or promotion of opioids in or for Canada.

[48] McKinsey's partners are alleged to include Purdue, Janssen, Endo and McKesson. However, in the ANOCC and during submissions, the Province reserved the right to provide further particulars of McKinsey's conduct as it becomes known.

1. Purdue US

[49] With respect to McKinsey's alleged collaboration with Purdue US in the marketing and sale of opioids, the Province filed documentary evidence from McKinsey referencing OxyContin, which provides details on "driving growth through stronger brand loyalty" and "[i]dentifying granular growth opportunities for OxyContin." For instance, one presentation by McKinsey to Purdue US at a Steering Committee Meeting on October 26, 2009, refers to tactics to increase OxyContin sales including an overview of physician segments and opportunities, a review of what drives loyalty towards OxyContin and competitor brands, a

discussion of strategy, messages and tactics to drive loyalty for OxyContin, a path towards implementation, and agreement on next steps. A McKinsey “progress update” from August 20, 2013, discusses access to OxyContin being challenging, a “need to take action,” and five key pillars that should be addressed for “turbocharging the sales engine” concerning OxyContin for Purdue US in the United States.

[50] The various documents support an inference that McKinsey advised Purdue US on how to increase prescription opioid sales, even after Purdue US pleaded guilty to fraudulently marketing OxyContin in the United States by claiming the drug was less harmful than it actually was.

[51] On May 23, 2019, McKinsey announced its decision to cease all opioid-related business. It noted:

> Opioid abuse and addiction are having a tragic and devastating impact on our communities. We are no longer advising clients on any opioid-specific business and are continuing to support key stakeholders working to combat the crisis.

[52] In another announcement on December 5, 2020, McKinsey acknowledged it had played a role in Purdue’s opioid-related work in a written statement entitled, “Statement Regarding Past Work with Purdue Pharma.” The statement says:

> As we look back at our client service during the opioid crisis, we recognize that we did not adequately acknowledge the epidemic unfolding in our communities or the terrible impact of opioid misuse and addiction on millions of families across the country. That is why last year we stopped doing any work on opioid-specific business, anywhere in the world.
>
> Our work with Purdue was designed to support the legal prescription and use of opioids for patients with legitimate medical needs, and any suggestion that our work sought to increase overdoses or misuse and worsen a public health crisis is wrong. That said, we recognize that we have a responsibility to take into account the broader context and implications of the work that we do. Our work for Purdue fell short of that standard.
>
> We have been undertaking a full review of the work in question, including into the 2018 email exchange which referenced potential deletion of documents. We continue to cooperate fully with the authorities investigating these matters.

2. Janssen

[53] Respecting McKinsey's alleged collaboration with Janssen (being Janssen Inc. and Johnson & Johnson) related to opioid-related consulting services, the Province filed evidence that McKinsey employees had sales-related communications with Johnson & Johnson employees. The Province submits that McKinsey knew or ought to have known that the marketing advice and strategies that had been developed and implemented for Johnson & Johnson were intended for use by and would also be implemented by Janssen Inc. in Canada. The Province points to McKinsey's communications to Johnson & Johnson in 2008 and 2011 that deal with strategic options to increase the value of the latter's portfolio of opioid drugs and active pharmaceutical ingredients, as well as how to "turbocharge" sales of Nucynta, an Opioid Product.

3. Endo

[54] Regarding McKinsey's alleged provision of consulting services for Endo, the Province points to a complaint filed by the trustee in American bankruptcy proceedings involving Endo in which the trustee claims that McKinsey's consulting work in relation to opioids resulted in the destruction of billions of dollars of value for Endo. It further alleges that McKinsey is a "principal architect" of the opioid crisis, that it embedded itself with Endo and other large opioid manufacturers, and that it knowingly assisted in implementing aggressive and deceptive sales practices to ensure opioids were prescribed regardless of the risk of abuse and addiction. The Province also points to McKinsey's work with Endo on a "Sales Force Blitz" project to increase sales for an Endo Opioid Product called Belbuca.

4. McKesson

[55] With respect to McKinsey's alleged collaboration with McKesson for opioid-related consulting services, the Province points to a 2007 email from a McKinsey associate who identifies themselves as "in the McKesson CST" (client services team) asking for information about Purdue's organization. The defendants point out that there is no indication the email was responded to or that McKinsey performed any work for McKesson specific to opioids. The defendants submit that there is nothing in this email to indicate that it relates to the sale or marketing of opioids or that any engagement with McKesson was related to Canada.

[56] The Province also points to an Endo trustee complaint that alleges that McKinsey worked with opioid distributors, including McKesson, to provide advice on opioid distribution practices and regulatory compliance. McKinsey argues that the fact that a complaint has been commenced against McKinsey US by the trustee in bankruptcy for Endo in the United States is not evidence that McKinsey acted improperly in the United States or that it provided consulting services pertaining to Canada.

D. McKinsey's Advice to Canadian Manufacturers and Distributors

[57] The Province points to various examples of McKinsey providing advisory services related to Canada and strategies and documents devised by McKinsey for the American market being made available to clients in Canada.

1. Purdue Canada

[58] With respect to Purdue's Canadian entities ("Purdue Canada"), the Province filed documents referencing *inter alia* McKinsey's attempt to do work for Purdue Canada including identifying growth opportunities, addressing physician prescribing and the growth potential of hydromorphone, and addressing the decline in the overall pain market and the market for OxyNEO in Canada. McKinsey references its "long history of partnership with Purdue" and its ability to "leverage our understanding of your business." Numerous documents appear to link McKinsey with Purdue Canada and engagements in North America, including those concerning product lunches in the pain category, market strategies, etc.

[59] McKinsey submits these documents are of limited relevance. While it concedes there is no question that McKinsey made a "pitch" to Purdue Canada in 2013 to engage in work with it in Canada, including Oxycontin-related work, it says the pitch failed. Ultimately, it says McKinsey did not end up working for Purdue Canada and points to Mr. Silber's evidence supporting the lack of such engagement. As such, McKinsey submits the documents the Province relies upon do not establish the Province's theory of their case that McKinsey was the architect for Purdue Canada's opioid-related work or that they implemented the marketing strategies they offered to Purdue Canada.

2. Janssen Canada

[60] The Province points to various documents, such as correspondence, presentations, and meeting agendas, linking McKinsey and Janssen that suggest McKinsey's consulting services were either directly provided for the Canadian market and/or that its American advice was implemented in Canada as well.

3. Endo Canada

[61] The Province also points to various documents that indicate McKinsey's consulting services to Endo were either directly provided for the Canadian market and/or that its American market advice was implemented across Canada. These include a slide deck referencing McKinsey's engagement with Endo and listing key Canadian products of Paladin Labs, a Canadian company acquired by Endo. McKinsey is said to have provided advice to Endo in relation to its acquisition of Paladin Labs, including a detailed review of its opioid portfolio.

4. McKesson Canada

[62] The ANOCC alleges that McKinsey was hired by McKesson to develop, recommend and implement strategies with respect to McKesson's interactions with other entities in the opioid supply chain including manufacturers, pharmacies and insurers. The purpose was to maximize the sales of opioids. It alleges that strategies recommended by McKinsey regarding the distribution of Opioid Products in the United States were also used by McKesson in its distribution of Opioid Products in Canada.

[63] McKinsey denies performing any engagements for McKesson, whether in Canada or elsewhere in the world, that was specific to opioids. Mr. Silber denied McKinsey did work for McKesson at any time. However, the Province notes that much of McKesson's work was related to opioids. The Province suggests that Mr. Silber's evidence is limited in that it makes assumptions and offers inconclusive denials of limited value (e.g. "*I have not seen* any evidence that McKinsey was ever engaged by Purdue, Janssen, Endo or McKesson … to provide advice to enhance the sales and marketing of opioid products in Canada"). The Province notes that McKinsey was not required to produce documents related to McKesson for the OID Archive, although it points to a 2007 email between McKinsey employees and an associate with McKesson, as well as an Endo trustee complaint

that alleges McKinsey worked with opioid distributors, including McKesson. This evidence is not admissible for its truth but does offer some indication of a possible link between McKesson and McKinsey.

E. The Province's Expert Evidence

1. Legal Context

[64] Expert evidence is often put forward in class proceedings to assist the court in assessing the commonality of certain causation or loss-related issues between the proposed class members. The Province is required to show some basis in fact that there is a plausible and credible methodology that could be employed later in the proceedings, with the benefit of full discovery, to determine the proposed issues on a class-wide basis: *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57 at paras. 117-119 [*Pro-Sys*]. In *Pro-Sys,* the Court rejected Microsoft's call to hold expert evidence to a more robust standard at the certification stage.

[65] The Province submits that its expert evidence includes: a) a methodology to estimate the impact of the marketing and promotional activities of opioid manufacturers and distributors in expanding the sales of their Opioid Products and, therefore, opioid use in Canada; and b) a methodology that can be used to assess the relationship between an increase in the use of opioids in Canada since 1995 and the incidence and prevalence of opioid-related harms or illnesses on a population-wide basis.

[66] The applicability of the *ORA* in this case impacts the role of a causation methodology in the *ORA* Claims. Pursuant to s. 3(1) of the *ORA*, in an action for the recovery of health care benefits costs brought on an aggregate basis (as is the case here), the court must make certain factual and legal causation presumptions where the following is established by the plaintiff:

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.

[67] If those three points are established, the court must presume for *ORA*-related claims that (a) the persons who used or were exposed to the opioid product would not have used the product but for the breaches, and (b) that the use or exposure caused or contributed to disease, injury or illness in a portion of the population: *ORA*, s. 3(2).

[68] The court must then determine on an aggregate basis the cost of health care benefits provided after the breach resulting from use or exposure of the type of opioid product. The liability for the proportion of the aggregate cost accorded to each defendant to which the presumptions apply is calculated based on their respective market share: *ORA*, s. 3(3).

[69] These presumptions set out in s. 3(2) of the *ORA* could remove the need for a methodology to prove causation. However, a plausible causation methodology is still required to support any non-*ORA* claims and to account for the possibility that the Province may not prove the requirements to invoke the presumptions or the defendants may rebut the presumptions.

2. Dr. Virani

[70] Dr. Hakique Virani is an Associate Clinical Professor in the Faculty of Medicine & Dentistry at the University of Alberta, a Royal College specialist in Public Health and Preventive Medicine, and a Diplomate of the American Board of Addictions Medicine.

[71] Dr. Virani was asked to opine on the following:

a) An overview of the history of opioid usage;

b) Whether it is possible to answer the following two questions on a common basis, without conducting individual inquiries either at a product level or at a user level:

i. Can use of or exposure to Opioid Products cause or contribute to disease, injury or illness?

ii. If so, what are the diseases, injuries or illnesses that can be caused or contributed to by use or exposure to Opioid Products (the “Opioid-Related Disease, Injury or Illness”)?

[72] Dr. Virani’s answers to these questions are the same as those in the Main Action, where his evidence on these points was also tendered by the Province.

[73] Dr. Virani’s opines that opioids have generally been indicated for short-term treatment (three to seven days) of moderate to severe pain that is not expected to respond to non-opioid medication and for pain control in terminal conditions such as cancer. In the 1990s, the diversity of pain conditions for which opioids were used expanded to include chronic non-cancer pain conditions for longer durations. These conditions included chronic joint and muscle pain conditions, back pain and headache. Opioids also began to be used to treat minor acute pain from dental cases, joint dislocations, sprains and strains.

[74] Dr. Virani writes that a considerable change in the prescription of opioids began in the late 1990s as prescriptions for oxycodone and other high-potency opioids increased. Long-term opioid therapy for chronic pain became more common through the 1990s and until the mid-2010s, and the quantities of opioids prescribed in the Canadian population increased during this time. From 2015 to 2018, there was a decreasing trend in the proportion of people being prescribed opioids, and there was a decrease in the doses of opioids being prescribed to people with chronic pain. During this period, more people on long-term opioid therapy discontinued their use of this medication.

[75] Dr. Virani states that opioid therapy is known to have a variety of side effects, including the following: dry mouth; excessive sweating; itchiness; sedation; weakness; constipation; nausea and vomiting; overdose (resulting from depression of central respiratory drive); exacerbation of sleep-disordered breathing (sleep apnea) which can increase the risk of adverse cardiovascular

events; hormonal dysregulation; gastrointestinal issues; and immunosuppressant effects.

[76] Particularly with chronic opioid therapy, physicians must also be concerned with the development of disordered use (addiction). The risk of addiction in patients receiving opioid therapy is estimated to be 5.5% in the 2017 Canadian Guideline for Opioids in Chronic Non-Cancer Pain. Substance use disorder is associated with significant health and social morbidity.

[77] Dr. Virani states that all of these outcomes should be understood in the context that opioid therapy may result in little or no difference in pain or function when compared to non-opioid medications.

[78] In Dr. Virani's view, it is possible to assess on a common basis what harms have resulted from chronic opioid exposure, and such an assessment would not require analysis at the level of every affected individual. In coming to that conclusion, Dr. Virani points to:

a) the fact that systemic review of available studies to inform guidelines on safe and effective use of opioid have produced population-level estimates for the proportion of people exposed to chronic opioid therapy who experience particular opioid-related diseases, illnesses and injuries;

b) large data sets such as those held by some medical regulatory bodies or drug benefits plan administrators can be used to characterize opioid dispensation in a population as well as identify classes of individuals exposed to chronic opioid therapy; and

c) diagnostic codes in health services utilization data from provincial health insurance claims can be used to estimate the incidence of and prevalence of opioid-related diseases, illnesses and injuries.

3. Dr. Mohr

[79] Dr. Jakki Mohr is a research professor of marketing at the University of Montana. She was asked to explain pharmaceutical marketing by manufacturers and distributors and in particular, to set out the role that management consultants play in such marketing. Dr. Mohr was further asked to provide her expert opinion on:

a) whether any significant differences would be expected between marketing and/or sales strategies used in Canada compared to the United States;

b) whether it was possible to determine whether opioid manufacturers and distributors have to follow basic standards in their marketing or the creation of sales incentive programs; and

c) whether a relationship can be established to demonstrate that the marketing and sales incentive programs of manufacturers and distributors are linked to the sales of opioids in Canada from 1996 to the present.

[80] Dr. Mohr's report explains the various tactics used by pharmaceutical companies to capture market share and expand the overall size of the market for their products. These include detailing, sponsoring medical research, continuing medical education, using key opinion leaders, peer-to-peer marketing and physician payments, ads in medical journals, and branded and unbranded marketing. Dr. Mohr states that all players in the pharmaceutical industry are highly sophisticated in their understanding of marketing strategies.

[81] Dr. Mohr's opinion is that multinational companies tend to have a consistent "look and feel" in their marketing strategies. With respect to the pharmaceutical industry specifically, Dr. Mohr describes the common process used to develop a marketing plan. She notes that while there can be nuance due to local customs, regulations or standards, marketing principles are universally applied, regardless of geographic differences. Dr. Mohr also explains the many areas in which management consultants play a role in pharmaceutical marketing, including strategic planning, market research, and detailing training, as well as work for distributors.

[82] Dr. Mohr's report states that the application of marketing principles and theories by the pharmaceutical industry do not significantly differ between Canada and the United States.

[83] Dr. Mohr says that because opioids involve serious safety consequences, including the potential for addiction, pharmaceutical marketers are expected to put patient welfare first and provide accurate information about the products they sell. Dr. Mohr notes that this heightened duty to ensure public safety is codified in regulatory requirements and other expectations established by government entities, as well as by industry trade associations that articulate voluntary codes of conduct for members.

[84] Dr. Mohr's opinion is that it is possible to establish whether marketing is linked to the sale of opioids in Canada. Dr. Mohr proposes a qualitative and quantitative research approach to provide a complete analysis of the impact of marketing on the distribution and sale of Opioid Products. This methodology is accepted and commonly used in marketing and business scholarship.

4. Dr. Tamblyn

[85] Dr. Robyn Tamblyn is a professor in the Department of Medicine and the Department of Epidemiology, Biostatistics and Occupational Health at McGill University and a Distinguished James McGill Chair. She is also a medical scientist at the McGill University Health Centre and is the director of the Division of Clinical Epidemiology.

[86] Dr. Tamblyn was asked to provide her opinion on whether there is a methodology that can be used to assess the relationship between an increase in the use of opioids in Canada since 1995 and the incidence and prevalence of opioid-related harms or illnesses on a population-wide basis.

[87] Dr. Tamblyn was also asked to answer the same questions in the Main Action. As her answers to both sets of questions are the same, she relies on her report in the Main Action.

[88] Dr. Tamblyn's opinion is that there are a variety of methodological approaches that could be used to evaluate the association between increased use and prevalence of opioid-related harms. This would require a two-step approach. First, the risk of potential harm (adverse health outcomes) from the use of opioids is estimated. There are two primary observational design approaches that could be used to make this estimate: 1) a cohort study; or 2) a case-control study. Nested case-control studies (a type of case-control study) within a defined cohort and case-cohort studies provide the advantages of both approaches. The second step is measuring the population-attributable risk ("PAR"), which combines the risk of adverse outcomes with the prevalence of opioid use (or a change in the prevalence of opioid use). The PAR estimates the proportion of adverse events (or number of adverse outcomes per unit of time) that are attributable to opioid use.

[89] Dr. Tamblyn notes that there is a substantial body of literature that has used observational studies to estimate the harms of opioid use, including studies that

have used electronic health records or healthcare administrative databases to assemble cohorts and studies that have used other observational study approaches – time series and geographic variation studies – to assess the association between rates of opioid use and rates of adverse events related to opioids.

[90] In the Main Action, Dr. Tamblyn swore a second affidavit which attaches a reply report responding to opposing expert reports filed by the defendants in that case. That reply report was also tendered in the present case in that it was attached to Affidavit #1 of Deanna Watters, a senior law clerk with counsel for McKinsey. McKinsey did not otherwise file any expert reports in response to Dr. Tamblyn's opinion.

[91] In her reply report, Dr. Tamblyn clarifies the PAR estimate calculation in relation to opioid-related harm would initially be calculated at the provincial/territorial level because the prevalence of opioid use, and possibly risk, varies by jurisdiction. Each provincial/territorial PAR estimate, coupled with the incidence of adverse events, could be used to provide an estimate of the excess number of cases of opioid-related harm. Provincial/territorial estimates could then be tallied to provide a national total.

[92] Dr. Tamblyn opines that a separate methodology for each jurisdiction is not justified and would make it impossible to directly evaluate whether the risk of opioid harms varied by province or territory.

[93] In support of this conclusion, Dr. Tamblyn states that under the modern approach to estimating risk in relation to pharmaceuticals, a common protocol-based study is designed and conducted in multiple jurisdictions through distributed pharmacoepidemiology networks (i.e., the Canadian Network for Observational Drug Effect Studies) that look at the effects of drugs on health-related outcomes.

[94] As for differences in the comprehensiveness of provincial and territorial data sources in Canada, Dr. Tamblyn's evidence, as set out in her reply affidavit as follows, is that there are more commonalities than differences between jurisdictions:

a) Nationally standardized data are collected on all hospitalizations in each province and are reported and available through the Canadian Institute of

Health Information (CIHI). Quebec collects the same data but does not provide it to CIHI.

b) All births and deaths are recorded in provincial vital statistic registries and are available through the Statistics Canada Canadian Research Data Centre Network.

c) All essential medical care provided to Canadian residents is documented by provincial health insurance agencies including the date and location of the visit, the name and health care number of the recipient, the service provided, the diagnostic code related to the visit, and the amount of remuneration received by the physician.

d) Each province in Canada, with the exception of Ontario, has a provincial pharmanet providing comprehensive information on all drugs dispensed to provincial residents.

[95] With respect to differences in the prevalence of different types of opioids used in the various provinces and territories, Dr. Tamblyn states that these differences can be readily accommodated by measuring and estimating the risk of opioid use by individual drugs, typically modelled using time-dependent exposures.

5. Dr. Ward

[96] Dr. Bryce Ward is the former Associate Director of Health Care Research at the University of Montana's Bureau of Business and Economic Research and the founder of ABMJ Consulting. Dr. Ward has a doctoral degree in economics from Harvard University.

[97] Dr. Ward was asked to provide his expert opinion regarding the following questions:

a) if there is a methodology that can be used to determine whether manufacturers' and distributors' marketing and promotion of prescription opioids since 1995 was a substantial contributing factor in causing an increase in the use of opioids in Canada;

b) if there is a methodology that can be used to determine whether the increase in the use of prescription opioids in Canada since 1995 would have occurred were it not for, i.e., "but for," the allegedly unlawful marketing and promotion of these products; and

c) if there is a methodology that can be used to determine the quantum of increase in the use of prescription opioids in Canada that resulted from

> manufacturers' and distributors' marketing and promotion of prescription opioids since 1995.

[98] It is Dr. Ward's opinion that there are methodologies that address all three questions about the impact of marketing and promotion on opioid use.

[99] On the first question posed, Dr. Ward states that there are appropriate methodologies to assess the impact of marketing and promotion on opioid prescription/use. Multiple American studies have already established that high-quality methods can demonstrate a link between marketing and opioid use.

[100] Dr. Ward says that if the factors shaping opioid prescription in Canada are similar to those in the United States during the relevant time frame, then the actual findings from the United States studies can inform marketing effects in Canada as well. Alternatively, Dr. Ward says the same types of analysis conducted in the United States can be done using Canadian data.

[101] On the second question posed, with respect to a methodology to assess whether the rise in opioid use would have occurred "but for" the alleged unlawful marketing and promotion of opioids, Dr. Ward says this will be informed by what the Court decides is unlawful. Dr. Ward states that it is possible to use levels and trends of use from the period prior to the alleged unlawful marketing in order to assess the extent to which the marketing and promotion contributed to the rise in the use of opioids.

[102] Alternatively, Dr. Ward states it is also possible to use levels based on current guidelines for the accepted use of opioids to construct a plausible range of trends in use without unlawful marketing. This range can be evaluated against the magnitude of effects found by the methods linking marketing and promotion to increases in opioid use, as described above, and by identifying situations or contexts that resemble the situation the Court deems lawful, and comparing the outcomes. In Dr. Ward's view, the pre-1996 baseline approach described above, coupled with the current guideline approach, likely describes a reasonable range for opioid use "but for" unlawful marketing.

[103] On the final question, Dr. Ward opines that available studies that inform the methodologies described above provide sufficient information to determine the quantum of increase in opioid use in Canada resulting from marketing and

promotion. According to Dr. Ward, calculating the difference between actual use and the range projected by pre-period trends or current guidelines/use also reasonably quantifies the full potential effects of marketing and promotion of opioids during the proposed class period. This entails using the “indirect” and “simulation” approaches described above to estimate the “but-for” world. Dr. Ward says that by combining various analyses, one can achieve a reasonable range of likely outcomes.

[104] McKinsey filed a report from Dr. Erin Trish commenting on the methodologies proposed by Dr. Ward. Dr. Ward prepared a reply report that responds to Dr. Trish’s criticisms. Overall, Dr. Ward says Dr. Trish’s criticisms generally consist of claims that he did not describe how he would deal with some hypothetical concern that may impact how to interpret or use some analysis. Dr. Ward states that his report and proposed methodology address the issues she raises, while other concerns raised by Dr. Trish are unwarranted or highly speculative. Ultimately, Dr. Ward concludes that Dr. Trish has failed to demonstrate that the methods he proposed cannot be successfully applied.

[105] McKinsey submits that Dr. Ward’s reports take a “scattershot approach” of suggesting numerous potential analyses and methodologies. When confronted with legitimate critiques of those methodologies, McKinsey says he shifts to rely on other potential methodologies, none of which he specifically opines will work in this case.

6. Data Availability

[106] The Province’s experts propose to rely on data from a number of different sources including existing scientific literature, provincial pharmanet/health insurer databases, medical regulatory databases, population and vital statistics data, IQVIA (a healthcare data analytics provider), and the defendants’ data and documents.

F. The Defendant’s Evidence

1. Michael Silber

[107] McKinsey filed evidence from Michael Silber, the head of McKinsey’s Pharmaceutical Medical Product – Americas group (“PMP Group”) between 2009 and 2014, and subsequently, McKinsey’s Chief Financial Officer.

[108] Mr. Silber provides evidence about the engagements McKinsey did and did not perform for Purdue, Janssen affiliates, Endo, and McKesson. These facts are informed not only by Mr. Silber's direct knowledge gained from working at McKinsey but also by his review of McKinsey's records of client engagements, the pleadings, and the documents included in the affidavit of Mr. Kelly, as well as his discussions with other individuals at McKinsey knowledgeable about McKinsey's pharmaceutical engagements.

[109] Mr. Silber's evidence indicates that McKinsey was not engaged by Purdue, Janssen, Endo, or McKesson (or their affiliates) to provide advice to enhance the sales of Opioid Products in Canada.

[110] Mr. Silber's affidavit sets out the basis upon which he confirmed that McKinsey did not perform opioid consulting work in Canada, which includes his review of McKinsey's client engagement tracking. Mr. Silber also provides evidence as to the context for each document relied on by the Province in an attempt to show that the proffered documents do not provide some basis in fact for the issues in this case.

2. Dr. Trish's Report and Sur-Reply Report

[111] McKinsey tendered evidence from Dr. Erin Trish, a health economist and professor at the University of Southern California, who reviews Dr. Ward's report and proposed methodologies.

[112] McKinsey argues that Dr. Trish's evidence set out in her first report establishes two points: (1) the methodologies outlined by Dr. Ward are not reliable and are not capable of determining whether an increase in the use of prescription opioids in Canada since 1995 was associated with the marketing of those products by manufacturers and distributors; and (2) those methodologies cannot reliably address whether such an increase would not have occurred "but for" the allegedly unlawful marketing and promotion of those products.

a) Dr. Trish's View of the Plausibility of Dr. Ward's Methodologies

[113] Dr. Trish opines that the methodologies proposed by Dr. Ward to determine whether the allegedly unlawful marketing and promotion by manufacturers and distributors caused an increase in the use of opioids in Canada (i.e., to determine

"but for" causation) do not account for the requisite substantial complexities in modelling his proposed "but for" world.

[114] In December 2017, 46 actions filed in numerous jurisdictions in the United States regarding alleged improper marketing of and inappropriate distribution of various prescription opiate medications were transferred to the Northern District of Ohio: *In Re: National Prescription Opiate Litigation*, MDL No. 2804 [*Opioid MDL*]. There are now more than 2,600 actions commenced by counties, municipalities, cities, and hospital districts, among others, consolidated in the *Opioid MDL*. As noted, Dr. Ward's opinion discusses a series of models proffered by expert witnesses in the *Opioid MDL* and in the Main Action, as well as his assertion that these models may be replicated in this case to varying degrees.

[115] Dr. Ward opines that the actual findings from the studies proffered in the *Opioid MDL* can inform marketing effects in Canada and asserts that he would hypothetically replicate the American models as part of his analysis, "making adjustments as deemed necessary by Canadian medical experts."

[116] Dr. Trish points out that Dr. Ward has not outlined his proposed methodology for how he would study whether the alleged Opioid Misrepresentations caused an increase in the prescription of opioids in Canada. She asserts that "making adjustments" to American models is not the same as proposing an actual methodology that is capable of assessing causation between an alleged misrepresentation (i.e., unlawful marketing) and an increase in the prescription of opioids.

[117] Additionally, Dr. Trish identifies several differences in the prescription opioid markets across Canadian provinces and territories that impact the effect that the promotion (whether lawful or unlawful) of Opioid Products would have on opioid prescription rates in different jurisdictions. The jurisdictional differences Dr. Trish identifies include whether prescription opioids were covered by a jurisdiction's public drug programs, whether prescription opioid dispensing was tracked by that jurisdiction and differences in opioid prescription guidelines. She says these differences undermine Dr. Ward's assumption that studies about opioid use in the United States can be applied to the Canadian context.

[118] According to Dr. Trish, Dr. Ward's proposed methodology does not account for these differences, nor does he address how the models from the United States could be adjusted to address them. The result is that the "but for" world of each Class Member may be different and cannot be modelled on a common basis, as Dr. Ward suggests.

[119] Dr. Trish alleges that Dr. Ward's proposed methodologies are inconsistent with the evidence of the Province's other experts. In support of this, Dr. Trish points to Dr. Mohr's opinion, tendered by the Province, in which Dr. Mohr purports to state that isolating the impact of allegedly unlawful marketing is impossible:

> In light of the many players involved in pharmaceutical marketing, the complicated healthcare ecosystem, and the sophistication of the marketing strategies used, [her] proposed method cannot isolate the impact of any one tool or any one company's efforts. The industry collectively functions like a well-oiled machine, firing on all cylinders in synchronicity to gain synergies collectively for the financial benefit of all those involved. [Emphasis added by Dr. Trish.]

[120] This opinion about isolating the impact of unlawful marketing conflicts with what Dr. Ward says is plausible through his proposed analyses.

[121] To determine whether an increase in the prescription of opioids would have occurred "but for" the conduct of McKinsey requires isolating the impact of marketing undertaken by McKinsey and/or its clients that is found to be unlawful.

[122] Ultimately, McKinsey relies on Dr. Trish's evidence to argue that Dr. Ward does not explain how he would go about isolating the impact of marketing found to be unlawful by the Court.

b) Dr. Trish's Opinion on Dr. Ward's Reply

[123] As noted, the Province filed a reply report from Dr. Ward in which he comments on Dr. Trish's evidence. With respect to the variability in opioid use across different Canadian jurisdictions and points in time, Dr. Ward acknowledges that variation exists. However, he suggests that "variation" supports his methodology; he maintains that he can "exploit" variation in opioid use and marketing to support an analysis of whether marketing and promotion caused increases in opioid use.

[124] McKinsey filed a further reply from Dr. Trish (in lieu of cross-examination) that addresses this issue of the impact of "variation"; specifically, can a "but for" world of each Class Member be modelled on a common basis as Dr. Ward suggests, despite jurisdictional differences in opioid use, marketing, and prescription during the proposed 30-year Class Period?

[125] Dr. Trish accepts that "variation" can help economists identify a cause-and-effect relationship but explains that not all "variation" is useful. Here, the jurisdictional differences identified (variation in regulations, formulary coverage, and marketing across provinces and territories) suggest that the answer of whether opioid marketing impacts opioid use and whether that impact would have occurred "but for" unlawful marketing, will be different for each Class Member.

[126] Dr. Trish's reply argues that the kind of approaches that Dr. Ward proposes (e.g., aggregating all provinces and territories into a single model) would obscure variation across provinces and potentially erroneously find a relationship between unlawful marketing and opioid use in provinces where it does not exist.

VI. THE LEGAL REQUIREMENTS FOR CERTIFICATION

[127] A resident of British Columbia who is a member of a class of persons may commence a court proceeding on behalf of the members of that class: *CPA*, s. 2.

[128] Section 4(1) of the *CPA* sets out the requirements for certification:

> 4 (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of

> the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[129] The plaintiff bears the onus of satisfying each of the certification requirements.

[130] "Common issues" are defined in s. 1 of the *CPA* as follows:

> "common issues" means
>
> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; …

[131] The court is required to certify an action as a class proceeding where the requirements of s. 4(1) of the *CPA* are met: *Pro-Sys* at para. 107.

[132] Certification does not involve an assessment of the merits and is not a pronouncement on the viability or strength of the action. The outcome of certification is not predictive of the outcome of the common issues at trial. The focus at this stage is not on the merits or the weight of the evidence but rather on the appropriate form of the action. That said, certification is important as a meaningful screening device: *Pro-Sys* at paras. 99, 102-103 105; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 19–20.

[133] For each of the certification requirements in ss. 4(b) through 4(e), the Province must show "some basis in fact" to support the requisite certification elements: *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 24–25. This evidentiary standard does not require the court to resolve conflicting facts or evidence. The test reflects the fact that, at certification, the court is ill-equipped to resolve conflicts in the evidence or engage in finely calibrated assessments of evidentiary weight: *Pro-Sys* at paras. 99–102. The certification stage is decidedly not meant to be a preliminary test of the merits of the action: *Hollick* at para. 16.

[134] The "some basis in fact" threshold is low. It is not a burden to prove anything on the balance of probabilities: *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338 at paras. 134-136 [*Nissan*]. When expert evidence conflicts as to matters that may affect whether a proposed common issue can be resolved on a

class-wide basis, the plaintiff's evidence need not prove its case nor be preferred over the conflicting evidence: *Rebuck v. Ford Motor Company,* 2018 ONSC 7405 at para. 26, citing *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641, 2006 CanLII 913 at para. 76.

[135] The threshold is deliberately low because the evidence has not been through the trial laboratory. The low threshold anticipates that the evidence will be more developed at trial, and the findings of fact may well be different: *Bowman v. Kimberly-Clark Corporation,* 2023 BCSC 1495 at para. 74. However, the Province cannot rely upon allegations alone—the standard for assessing evidence at certification involves more than "symbolic scrutiny" or "a superficial level of analysis into the sufficiency of the evidence": *Pro-Sys* at para. 103.

VII. WHETHER THE PROVINCE HAS SATISFIED THE REQUIREMENTS FOR CERTIFICATION

[136] The principal issues in this application are whether the Province has satisfied the requirements of ss. 4(1)(c) and 4(1)(d) of the *CPA,* being the common issues and preferability criteria. The cause of action requirement in s. 4(1)(a) has been determined, and McKinsey does not contest the suitability of the Province to act as a representative plaintiff under s. 4(1)(e) of the *CPA*.

A. Whether the Pleadings Disclose a Cause of Action (s. 4(1)(a))

[137] The dismissal of the application to strike the ANOCC is determinative of the cause of action requirement in s. 4(1)(a) of the *CPA.* As a result, this criterion is not in issue.

B. Whether there is an Identifiable Class of Two or More Persons (s. 4(1)(b))

[138] Section 4(1)(b) of the *CPA* requires the Province to establish that there is an identifiable class of two or more persons. The class must be defined with reference to objective criteria that do not depend on the merits of the claim. The class definition must bear a rational relationship to the common issues: *Watson v. Bank of America Corporation*, 2014 BCSC 532 at paras. 63 and 64, rev'd in part, 2015 BCCA 362; *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82 [*Jiang #1*].

[139] In *Western Canadian Shopping Centers Inc. v. Dutton,* 2001 SCC 46 [*Dutton*], the Court held that to meet the definition in s. 4(1)(b), “the class must be capable of a clear definition”: at para. 38. The Court commented as follows:

> [38] … Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person’s claim to membership in the class be determinable by stated, objective criteria.

[140] In the present case, all members of the proposed classes are known, and the inclusion of each government in the class or subclass can be met by objective criteria. Nevertheless, McKinsey raises two issues.

1. Whether a Rational Connection Exists between the *ORA* Subclass and *ORA* Claims

[141] McKinsey argues that there is no rational connection between the *ORA* Claims and all members of the proposed *ORA* Subclass, as not all members have *ORA*-equivalent legislation that provides for claims against "consultants."

[142] However, the Province has specifically defined the *ORA* Subclass to exclude jurisdictions without *ORA*-equivalent legislation that addresses consultants. The Province proposes limiting the *ORA* Subclass as follows:

> All federal, provincial, and territorial governments that have legislation specifically directed at recovery of damages and healthcare costs from consultants arising from an "opioid-related wrong" as that term is defined in the relevant legislation (the "ORA Subclass").

[143] In my view, this definition adequately deals with McKinsey’s concerns on this point. There is a rational connection between the *ORA* Subclass identified by the Province and the proposed common issues.

2. Conflict Among the Proposed Class Members

[144] McKinsey submits that to succeed under s. 4(1)(b), a proposed class definition must not create actual or potential conflicts within the class, citing *Jiang #1* at para. 73, which cites para. 83 of *Dutton* excerpted above.

[145] McKinsey argues that the proposed Class includes the federal government which cannot be said to be similarly situated to the other Class Members with respect to the common issues. Further, it argues that Health Canada (which sets standards for health product advertising) acts as an agent of the federal government. As such, this creates a significant conflict for the federal government with respect to the proposed common issues.

[146] In my view, these concerns are overstated. All Class and *ORA* Subclass members have a common interest in determining whether McKinsey played a role in the alleged improper marketing and distribution of Opioid Products. If any conflicts arise, they can be addressed at subsequent stages of the proceeding.

3. Conclusion on s. 4(1)(b)

[147] The Province has promulgated class definitions that will assist in identifying those government entities who have potential claims, defining the parameters of the lawsuit, and describing who is entitled to notice: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 57. I find that the Province has met this criterion.

C. Whether the Proposed Claims Raise Common Issues (s. 4(1)(c))

1. Legal Principles Applicable to the Analysis of Common Issues

[148] The Province's proposed common issues are set out in its Schedule A – Further Revised Common Issues (reproduced as Appendix A to these Reasons).

[149] Section 4(1)(c) of the *CPA* requires that "the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members."

[150] Section 1 of the CPA defines "common issues" as issues that are (a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[151] As noted, the certification stage is not meant to be a test of the merits of the action: see *CPA*, s. 5(7). Rather, this stage is concerned with the form of the action and whether it can properly proceed as a class action: *Hollick* at para. 16; *Pro-Sys*

at para. 99. The Court of Appeal has held that "[t]he commonality threshold is low; a triable factual or legal issue which advances the litigation when determined will be sufficient": *Finkel* at para. 22.

[152] The Court in *Pro-Sys* offered the following helpful summary of applicable principles at para. 108:

> In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:
>
> > (1) The commonality question should be approached purposively.
> >
> > (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
> >
> > (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
> >
> > (4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
> >
> > (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[153] Other legal principles impacting the s. 4(1)(c) analysis were discussed in the *Apotex Certification Decision* at paras. 580-593, and I would adopt that analysis here.

2. Positions of the Parties

[154] McKinsey submits that the Province has not met its burden of establishing a minimal evidentiary foundation for the proposed common issues. It argues the Province has not established "some basis in fact" that there are common issues against McKinsey for opioids-related work in Canada. McKinsey points to evidence it provided that it was not engaged to advise on marketing or sales strategies for Opioid Products in Canada or for the Canadian market.

[155] By contrast, the Province submits that it has established some basis in fact that the proposed common issues are common, meaning that they will advance

the claims as a whole. It submits that McKinsey's position is inconsistent with the governing authorities that hold that certification does not address the merits of the litigation. It argues that there is clear evidence that McKinsey provided consulting services to several opioid manufacturers and at least one distributor and that those companies, or their corporate affiliates, sold or distributed opioids across Canada. Whether or not McKinsey directly or indirectly made representations, as well as whether those representations were wrongful, are matters for trial.

3. Preliminary Issues

i. The Impact of the Purdue Release on Direct Claims

[156] The Province advances two categories of claims against McKinsey: the *ORA* Claims, based on statutory causes of action under the *ORA*, and the Direct Claims which do not depend upon the *ORA.* In relation to the *ORA* Claims, McKinsey submits that the ability for provincial and territorial health insurers to claim health care costs in relation to residents who used OxyContin and OxyNEO (Purdue products) was released in the Purdue Settlement.

[157] The Purdue Settlement applies to all persons in Canada who, at any time between January 1, 1996, and February 28, 2017, were prescribed in Canada and ingested OxyContin and/or OxyNEO manufactured, marketed, and/or sold or otherwise placed into the stream of commerce in Canada by Purdue. The claims settled by the Purdue Settlement expressly include any and all claims of provincial health insurers (i.e., the Province and many of the other proposed Class Members) for the cost of medical services provided.

[158] The Purdue Settlement contemplates a payment to "Provincial Health Insurers" to satisfy their claims, which payment "shall be in full and final satisfaction of Medical Services provided for and to be provided for Class Members, and the Provincial Health Insurers shall have no other claim." The Agreement states that it is the "exclusive remedy for the Provincial Health Insurers."

[159] McKinsey submits that as an alleged "consultant" to Purdue, it is a "Released Party" under the Purdue Settlement as a third-party beneficiary according to the line of authority arising from *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*., [1999] 3 S.C.R. 108 at paras. 31–38, 1999 CanLII 654

(SCC). As a result, the Province and the proposed Class Members are arguably barred from pursuing claims against Purdue's "consultants," including McKinsey, for the costs of medical services pertaining to Purdue's products between January 1, 1996 and February 28, 2017.

[160] McKinsey's position on the issue of the release contained in the Purdue Settlement underwent further refinement at the certification hearing. During submissions, counsel for McKinsey indicated that it was not asking this Court to make a decision on the scope of the release in the Purdue Settlement. Rather, if the action was otherwise certified, counsel suggested that the nature of the release should be a common issue for the purposes of the certification application. It was careful to point out, however, that this issue alone is not sufficient for the case to be certified. I am in substantial agreement with McKinsey's position on this point.

[161] The Province points out that the Purdue Settlement does not bar the *ORA* Claims because s. 12 of the *ORA* (and similar provisions in *ORA*-equivalent legislation in other jurisdictions) provides that prior agreements do not bar the Province from commencing or continuing a proceeding in relation to an opioid-related wrong. The parties disagree as to the effect of s. 12.

[162] The Province submits that the application and effect of the Purdue Settlement on this proceeding is not an issue that can or should be decided at certification. In order to decide this issue, the Province argues that this Court will have to interpret ss. 1 (definition of opioid-related wrong), 2(1), 11 and 12 of the *ORA*. The Court of Appeal stated in *McKinsey BCCA* that "where there is no precedent and the statutory interpretation question that is engaged by the claim is nuanced and arguable, the courts should not engage in analysis of the merits of the claim based on pleadings alone": at para. 57. That analysis applies similarly in this context, where McKinsey is urging the court to interpret the *ORA* (at the certification stage) in a manner that would result in certain of the Province's claims being struck. The Province therefore argues that whether the release in the Purdue Settlement operates as a defence to bar any of the claims asserted in the action is a merits issue for trial.

[163] A similar issue arose in *Jamieson v. McKinsey & Company Canada,* 2025 BCSC 141, a consumer-led putative class proceeding involving some of the same

opioid-related complaints against McKinsey as in the present government-led proceeding. In *Jamieson,* McKinsey applied to strike as an abuse of process the amended notice of civil claim on the basis that the putative class action claims by Mr. Jamieson were barred by the Purdue Settlement. I held in *Jamieson* that while there may or may not ultimately be some merit in one or more of McKinsey's arguments that the Purdue Settlement barred the action in that case, the record did not support a conclusion that the plaintiff was plainly and obviously attempting to relitigate a claim which has already been determined. The requisite degree of inconsistency in the pleadings and degree of injustice to strike the pleadings as an abuse of process had not been established.

[164] Although the context is different, I would take a similar approach here, given the positions of the parties. In the present context, there are various layers to the issue of whether and how the Purdue Settlement might apply. With the benefit of McKinsey's enlightened position, I do not find it necessary at this stage to attempt to resolve these questions, which I find are merits-based determinations to be made on a full evidentiary record.

[165] I would identify the application and effect of the Purdue Settlement as an issue to be decided at the certification hearing of this matter. Counsel agreed that if the case is otherwise certified, the release issue should be a common issue for the purposes of the certification application. I would provide leave to the Province to add this issue as a common issue in a form agreed upon by the parties.

a) Necessity to Show McKinsey's Opioid-Related Work in Canada

[166] The parties disagree on the extent to which the Province must show some basis in fact that McKinsey was engaged to advise on marketing or sales strategies for Opioid Products in Canada. This issue raises a significant point of divergence between the parties' positions.

[167] McKinsey says the Province has failed to provide evidence that it was engaged in marketing or sales strategies for Opioid Products in Canada or for the Canadian market. It argues that any work product that McKinsey US prepared for use in the United States could not have been taken by a client and adopted in Canada without such significant modification that it could no longer be said to be McKinsey US's work product.

[168] The Province submits that even if McKinsey was not retained specifically to consult on opioid marketing in Canada, it should have known that the advice it provided in the United States would be used in Canada. The Province submits that its claims persist, whether McKinsey did work in Canada or not.

[169] There may be some merit in McKinsey's argument that the *Opioid MDL* and settlements there with various governments and other entities in relation to work for American opioid manufacturers are not a proxy for misconduct in Canada. McKinsey points out that the OID Archive, relied upon by the Province, contains a repository of American documents that generally do not, on their face, indicate that advisory services were provided by McKinsey in Canada. I also take note of Mr. Silber's evidence regarding the differences between the American and Canadian pharmaceutical industries and markets, as well as the limitations on the Purdue-related documents, which McKinsey characterizes as merely a pitch for work in Canada.

[170] Nevertheless, it must be recalled that the Province bases its case upon more expansive allegations of agency, common design and civil conspiracy. As counsel for the Province rhetorically summarized in oral argument, the case against McKinsey is based on the Rasputin-like "liability of the whisperer" (or perhaps more aptly, a group of interconnected corporate whisperers), a description which certainly oversimplifies the requirements for joint liability: see *McKinsey BCSC* at paras. 87-96; *Valeant* at paras. 143-167.

[171] Paragraphs 14 and 15 of the ANOCC alleges the following:

> 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.
>
> 15. The acts alleged in this claim to have been done by each Defendant were authorized, ordered, and done by each Defendant's officers, directors, agents, employees, or representatives while engaged in the management, direction, control, or transaction of its business affairs.
>
> [Emphasis added.]

[172] In paragraphs 53 and 80, the ANOCC alleges that the tactics McKinsey developed, recommended and implemented in the United States were also designed to be used, and were used, in Canada. Certainly, McKinsey appears to have been heavily involved with Purdue US in promoting Oxycontin sales activity, and its American arm appears to have had considerable institutional knowledge of how to implement growth strategies to increase opioid sales. The fact that it denies wrongdoing or direct engagement in the marketing of opioids in Canada is a merits issue for trial.

[173] Despite the fact that parent and subsidiary corporations have separate legal personas with separate liability for acts and omissions, the law may not always shield a Canadian-domiciled subsidiary or foreign parent from liability for the other's actions where harm is caused in the home jurisdiction. Section 4 of the *ORA* may assist the Province in this regard with respect to the *ORA* Claims: see *Valeant* at para. 83 ("Section 4(2) of ORA deems defendants jointly and severally liable … if … they would be held … to have (i) acted in concert … or (ii) to have acted in a principal and agent relationship …"). In *Muhnchkin v. Angelcare*, 2024 FCA 156 at paras. 71-72, the Court held that while patent infringement activity must take place in Canada, a person cannot avoid liability by setting up outside Canada and making arrangements from there that result in infringement of a patent in Canada: see also, *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, 28 O.R. (3d) 423, 1996 CanLII 7979 (ONSC).

[174] The allegations against McKinsey are joint allegations which raise the prospect of McKinsey entities being drawn into liability in Canada due to corporate integration or corporate parent liability in relation to the provision of consulting services that were either directly provided for the Canadian market and/or advice provided for the American market that was implemented across Canada. McKinsey denies such integration and common design in its North American

operations, but that issue has already survived a pleadings challenge. In *Valeant*, on the issue of common design and agency, the Court held that it was not appropriate to cut off the Province's claims at the certification stage because the Province has limited information about intercorporate relationships and how different companies within a corporate family may have undertaken various aspects of conduct alleged to be wrongful: at para. 167. Further exploration of group enterprise liability and whether McKinsey provided services directly within Canada are merits issues for trial.

[175] The Province has pointed to links in the evidence between McKinsey's work in the United States and Canada. For instance, McKinsey previously authored a 2014 memo to Mr. Landau, the former head of Purdue Canada, called "Identifying Growth Opportunities in Canada" based on the American "Evolve to Excellence" program developed by McKinsey for Purdue in the U.S. Further, the Province quotes from McKinsey's website which describes itself as "a global firm … designed to operate as one – a single global partnership." Another passage from McKinsey's website entitled "Commercial," retrieved on April 19, 2023, indicates that they "help clients reach their full sales potential … Our efforts span the entire organization—we can help train and restructure sales forces, work directly in the field … develop strategies to accelerate short-term sales, and assist with company-wide commercial transformations." There are discussions in some of the documents about the sharing of insights with Purdue Canada of McKinsey's American experience, discussions of how the Canadian growth proposal would be very similar to how United States growth started, references to meetings between McKinsey and Purdue Canada between 2014 and 2018, and references to engagements "Worldwide" or in "North America." In addition, Dr. Ward's evidence suggests exploration of similarities in opioid marketing in the United States and Canada is worthy of further exploration.

[176] McKinsey relies on Mr. Silber's evidence in support of McKinsey not performing work in Canada. Nevertheless, Mr. Silber's evidence has limits in terms of his personal knowledge and experience, his reliance on hearsay, and the unclear extent of the document review he conducted given that he appears to rely on some documents not appended to his affidavit. I would not treat his evidence as definitive on this point on the limited record before me.

[177] Nothing substantive has been definitively proven at this point, but there are numerous tenable links in the evidence between McKinsey's American and Canadian affiliates in relation to its opioid work and the possibility of McKinsey building on its American work product to make progress on behalf of client drug companies in the Canadian opioid market. McKinsey has raised real issues with respect to its involvement with Purdue Canada and the extent to which its actions promoted prescription opioid use in Canada. Again, however, these are issues to be resolved at trial after the benefit of full discovery. McKinsey has not established the lack of a basis in fact for certification due to McKinsey's lack of Canadian involvement.

[178] Leaving aside other arguments with respect to the adequacy of the proposed common issues, I assess that the evidence is sufficient to establish some basis in fact for the existence of common issues across members of the proposed classes based on McKinsey's marketing and promotional work (whether it occurred in the United States or Canada) attracting liability in Canada due to consulting services being conducted here, harm being caused here or by virtue of common design liability.

4. Analysis of Proposed Common Issues

[179] There are similarities in the structure of the proposed common issues in this action with those in the Main Action. All of the proposed common issues in the Main Action passed scrutiny at certification: *Apotex Certification Decision* at paras. 594-696. There are, however, differences in the present context, including conspiracy as a cause of action and the allegation that McKinsey was a consultant or advisor working in common with opioid manufacturers and distributors. I turn now more specifically to the proposed common issues.

i. Common Issues 1-5 (Nature of Opioid Products and Defendants' Activities)

[180] Common Issues 1-5 are issues of fact tied to the nature of Opioid Products and their potential harms, as well as the defendants' activities in providing advisory services to manufacturers and distributors and relationships among the defendants:

A. Opioid Related Disease, Injury or Illness

1. What is an Opioid Product?

2. Can use of or exposure to Opioid Products cause or contribute to disease, injury or illness?

(a) If so, what are the diseases, injuries or illnesses that can be caused or contributed to by use of or exposure to Opioid Products?

B. The Defendants and their Advisory Services

3. During the Class Period, did the defendants provide advisory services to a manufacturer in relation to the distribution, sale or offering for sale of Opioid Products, as defined in the ORA?

(a) If so, which manufacturer(s), and in relation to which Opioid Products?

4. During the Class Period, did the defendants provide advisory services to a wholesaler in relation to the distribution, sale or offering for sale of opioid products, as defined in the ORA?

(a) If so, which wholesaler(s), and in relation to which Opioid Products?

5. What is the relationship between the defendants? Is the relationship such that each is the agent of the other for the purposes of providing advisory services to wholesalers and/or manufacturers with respect to Opioid Products in Canada?

[181] These proposed common issues are foundational questions which are linked to the context of the claims in the ANOCC, the nature of and harms caused by Opioid Products, and the advisory services provided by McKinsey. The answers will assist in answering other common issues by determining McKinsey's role and the degree to which it assisted its clients in providing opioid-related services.

[182] In relation to these questions, I take note of Dr. Virani's evidence that opioids (as a class of drugs) are known to be associated with a wide variety of adverse outcomes or side effects and that it is possible to assess on a common basis what harms have resulted from chronic opioid exposure. As in the Main Action, I find the evidence here supports some basis in fact that opioids can be dealt with as a class of drugs that causes or contributes to the same diseases, injuries or illnesses.

[183] To the extent that the parties agree that the answer to common issue 1 (What is an Opioid Product?) is found in the *ORA*, that issue may not ultimately need to be addressed. Question 2 appears to be a general causation issue sometimes seen in pharmaceutical class action cases: see, for instance, *Miller v. Merck Frosst Canada Ltd*., 2015 BCCA 353 at paras. 68-72.

[184] The answers to these questions are necessary to resolve each Class Member's claim because they will determine the scope of healthcare costs that are recoverable by identifying the diseases, injuries or illnesses that opioids cause or contribute to. The answers will not vary among the Class Members.

[185] The Province has provided some basis in fact that these proposed common issues exist and that the issues extend across the members of the proposed Class and *ORA* Subclass.

a) Common Issues 6 & 7 (Defendants' Involvement in Misrepresentations)

[186] Common issues 6 and 7 ask whether the defendants made one or more of the alleged Opioid Misrepresentations, and if so, inquire as to the details of McKinsey's conduct in relation to the alleged misrepresentations:

> 6. Did the defendants make one or more of the Opioids Misrepresentations?
>
> 7. If so:
>
> (a) in relation to which Opioid Products?
> (b) were any of the Opioid Misrepresentations made by the defendants untrue, inaccurate or misleading?
> (c) were any of the Opioid Misrepresentations made by the defendants false?
> (d) did the conduct of the defendants in making the Opioids Misrepresentations cause an increase in the prescription of Opioid Products in Canada?

[187] Except for question 7(d), which is dealt with further below, these questions are primarily issues of fact concerning McKinsey's work for opioid manufacturers and distributors and the nature of any misrepresentations it was involved with. In other words, these are mostly factual issues concerning McKinsey's conduct.

[188] McKinsey submits that the Province has provided no basis in fact for common issues 6 and 7 being common among Class Members or that McKinsey

made or participated in making representations made in Canada. It submits that there is nothing in the record to establish that McKinsey provided consulting services to Purdue, Janssen, Endo, or McKesson regarding the promotion of opioids across Canada. In fact, it says there is nothing in the record about McKinsey's involvement in misrepresentations at all.

[189] As I understand the allegations, McKinsey's liability arises from its alleged consulting work for client organizations. For instance, the ANOCC alleges that "[t]hrough its consulting work, McKinsey, along with opioid manufacturers, made false and misleading misrepresentations to medical professionals and members of the public." As such, the essence of the allegation is that McKinsey promoted and/or participated in making representations. This understanding of the allegations as including joint liability is consistent with the common design allegations in the ANOCC. At the certification hearing, counsel for McKinsey submitted that her argument did not depend on whether a certain representation "has McKinsey's name on it." In other words, McKinsey accepted that the Province alleged that McKinsey was effectively, not literally, the author of the misrepresentations.

[190] Given the above, where the ANOCC refers to McKinsey having "made" impugned misrepresentations, I interpret such references as including an allegation of joint liability. In other words, McKinsey's actions are alleged to attract joint liability through common design in the promotion of opioid sales through integration with client organizations. To make this clear, I would grant leave to the Province to modify the wording in common issues to clarify that McKinsey is alleged to have jointly made or participated in making, directly or indirectly, the impugned representations.

[191] McKinsey next submits that because the Opioid Misrepresentations are a foundational element to find McKinsey liable for each of the causes of action asserted against it, the flaws with common issues 6 and 7 pervade the other proposed common issues relating to whether McKinsey is liable to the Class and *ORA* Subclass members (in tort or under a statute). It submits that even if a basis in fact for these issues was established (which it says is not), issues 6 and 7 are not issues capable of being addressed in common given differences among or between the provinces and territories including variation in public drug benefit

coverage of opioids and the type and extent of marketing strategies deployed by pharmaceutical companies.

[192] I cannot agree with McKinsey's submission that these proposed common issues will inevitably break down into individual issues. Dr. Mohr's report indicates the following:

a) participants in the pharmaceutical industry use recognized marketing strategies, such as strategic planning and SWOT analysis, market research, segmentation and value proposition design, marketing to physicians, and unbranded marketing;

b) multi-national companies tend to have consistent "look and feel" in their business and marketing strategies. There may be some nuances due to local customs, regulations, standards, etc.; however, marketing theories and principles are universally applied, regardless of geographic context;

c) pharmaceutical companies, including manufacturers and distributors, frequently rely on consultants as part of their marketing efforts;

d) drug advertising is governed by a federal regulatory framework;

e) pharmaceutical marketing involves national and international codes of conduct; and

f) marketing strategies in Canada would not be expected to appreciably differ from those in the United States.

[193] This evidence, including Dr. Mohr's report, provides some basis in fact that these impugned questions related to McKinsey's involvement are amenable to common resolution. I need not resolve or conduct a detailed weighing of conflicts in the evidence at this stage. I assess that these common issues have utility in advancing the proceeding, will avoid duplicate fact-finding and legal analysis and are necessary to the resolution of each Class Member's claim.

b) Common Issue 7(d) (Causation)

[194] Common issue 7(d) asks whether McKinsey's conduct in making the Opioid Misrepresentations caused an increase in the prescription of Opioid Products in Canada. There is no damages-related causation issue since health care costs are conceded to require individual inputs from each jurisdiction. And, as noted, certain provisions in the *ORA* assist the Province with rebuttable presumptions on the issue of causation.

[195] McKinsey argues that the Province has failed to establish that there is a plausible or credible methodology to demonstrate that causation between an alleged misrepresentation tied to McKinsey and an increase in the prescription of opioids can be determined on a common basis. It submits that the methodologies employed by Dr. Ward are not plausible or credible. It submits that if causation cannot be determined on a common basis, the resulting individual issue trials would be enormously complex.

[196] Dr. Ward concludes that the impact of marketing and promotional activities in expanding sales of opioids can be estimated and that “there is a method that can determine whether the marketing and promotion of opioids was a substantial factor in the increase in opioid use.” Dr. Trish is critical of Dr. Ward’s opinions for not accounting for differences across provinces and territories due, for instance, to variations in regulations, formulary coverage and marketing. Dr. Ward's opinion is that variation across place and time does not undermine his methodology. Ultimately, he says that the methodological toolkit for answering causation questions is extensive and has a strong basis in the published literature and prior testimony.

[197] Dr. Mohr’s evidence assists the Province in offering a workable methodology to establish whether marketing is linked to the sale of opioids in Canada. It supports the inference that the application of marketing principles does not significantly differ between Canada and the United States. McKinsey offered little to contradict Dr. Mohr’s opinions regarding similarities in the Canadian and American markets.

[198] At this stage, I would not subject Dr. Ward’s proposed methodology to a "robust or rigorous standard": *Pro-Sys* at paras. 117-119. Nor would I attempt to resolve competing expert evidence on this point. Dr. Ward's approach to answering the questions posed to him offers a realistic prospect of establishing general causation, which in turn would advance the claims of all Class Members. Based on his work, even with the criticisms of Dr. Trish, the Province has established a sufficiently plausible method to test causation-related common issues at trial. There is some basis in fact that issue 7(d) is common to the class.

c) Common Issues 8-12 (Defendants' Knowledge)

[199] Common issues 8 through 12 ask about the state of defendants' knowledge with respect to opioids:

> **The Defendants' Knowledge**
>
> 8. At all material times, what was the state of knowledge of the medical and pharmaceutical community regarding the risks and benefits of opioid use?
>
> 9. At all material times, what knowledge did the defendants have of the risks and benefits of opioid use?
>
> 10. What data and/or knowledge did the defendants have in relation to the distribution and sale of Opioid Products, including:
>
> (a) volume of Opioid Products sold;
>
> (b) location of purchase;
>
> (c) prescribing doctor; and
>
> (d) dispensing pharmacy.
>
> 11. At all material times, what knowledge did the defendants have in relation to the behaviour of users who become addicted to or dependent on Opioid Products, including whether users would:
>
> (a) purchase opioids on the illicit market;
>
> (b) seek out multiple healthcare providers to write prescriptions;
>
> (c) seek prescriptions for higher dosages;
>
> (d) seek prescriptions for higher quantities; and/or
>
> (e) seek out pharmacies that would fill opioid prescriptions on a "no questions asked basis."
>
> 12. At all material times, were the defendants aware that their advisory services with respect to promotion, marketing, sale and distribution of Opioid Products could cause an increase in the consumption of Opioid Products?

[200] The issue of knowledge is relevant to and is a substantial ingredient for McKinsey's liability for misrepresentations. The ANOCC alleges that McKinsey provided consulting services 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 were not effective in treating.

[201] Common issue 8 addresses the state of knowledge of the medical and pharmaceutical community regarding the risks and benefits of opioids. McKinsey submits that this question is unconnected to the claims against McKinsey and far

too vague. I disagree. I assess that this is a factual inquiry common to all Class Members' claims, the answer to which will be the same for each Class Member.

[202] Common issues 9-11 address McKinsey's knowledge and conduct. McKinsey submits that common issue 10 will not advance the resolution of Class Members' claims because questions containing no further specifications about which products are at issue are not rationally connected to the claims asserted. I disagree with this argument. In my view, the answers to these questions will advance the litigation. I conclude that common issues 9-11 are factual inquiries common to all Class Members' claims, the answer to which will be the same for each Class Member.

[203] Common issue 12 deals with whether the defendants knew that providing their advisory services could cause an increase in the consumption of Opioid Products. Again, this is an issue common to all Class Members that will advance the claims on behalf of all the proposed Class Members.

[204] I find there is some basis in fact that these issues are common across members of the class and that their resolution will advance the litigation forward. Dr. Ward's affidavit provides some basis in fact for a plausible methodology to determine whether the marketing and promotion of prescription opioids since 1995 was a substantial contributing factor in causing an increase in the use of opioids in Canada and whether or not such an increase would have occurred but for the alleged unlawful marketing and promotion. Dr. Ward's affidavit also provides some basis in fact that there is a plausible methodology to quantify any increase in the use of prescription opioids in Canada resulting from the manufacturers' and distributors' marketing and promotion of prescription opioids since 1995. In addition, Dr. Mohr's affidavit provides some basis in fact as to a methodology to determine whether there is a relationship between the marketing and sales of opioids in Canada.

d) Common Issues 13-19 (Common Design)

[205] Common issues 13-19 deal with questions in support of the "common design" claim:

> **Common Design**
>
> 13. Did the defendants act pursuant to a common design to develop and implement marketing plans and strategies, in partnership with

Opioid manufacturers and distributors, to increase the market for Opioid Products in Canada?

14. Did the defendants act pursuant to a common design with Purdue to increase the market for Opioid Products in Canada?
15. Did the defendants act pursuant to a common design with Janssen to increase the market for Opioid Products in Canada?
16. Did the defendants act pursuant to a common design with Endo to increase the market for Opioid Products in Canada?
17. Did the defendants act pursuant to a common design with McKesson to maximize the volume of Opioid Products distributed in Canada?
18. Are the defendants jointly and severally liable for any damage caused by their common design?
19. Are the defendants jointly and severally liable with Purdue, Janssen, Endo and/or McKesson for any damage caused by their common designs?

[206] McKinsey submits that these questions: (a) sweep disparate elements of common design into an overall inquiry; (b) fail to advance the claims of the Class because they do not address a common object that was unlawful; and (c) will not advance the litigation as the questions focus on increased marketing instead of unlawful activities.

[207] I do not agree with McKinsey that these criticisms of the common design issues bar these questions from certification. McKinsey's objection that the Province has not disaggregated the elements of common design, or that it has not identified a common object that is unlawful, relate to elements of a common design claim and whether it has been properly pleaded, which are issues that have already been decided: *McKinsey BCCA*. In the pleadings appeal, McKinsey did not challenge the pleading claims based on group liability: *McKinsey BCCA* at para. 22.

[208] As discussed in *Valeant* at para. 155 and *Valley Traffic Systems Inc. v. Malak,* 2024 BCCA 370 at paras. 18, there are three paths to joint liability at common law: agency, vicarious liability and concerted action. Concerted action liability may be imposed when the wrongdoers acted in furtherance of a common design. As noted above, the evidence of possible joint liability (between McKinsey entities as well as between McKinsey and its clients) allows the Province's claims to withstand McKinsey's argument that the claim for certification fails for lack of proof of the targeting of Canadian opioid consumers.

[209] In the present context, the common design questions posed are central to the Province's theory of liability in relation to McKinsey's consulting work for client organizations. These common issues will substantially advance the question of whether the defendants engaged in a common design with each other and/or manufacturers and/or distributors of Opioid Products and whether the McKinsey entities are jointly and severally liable for those common designs.

[210] The ANOCC alleges that McKinsey was integrated with client organizations in promoting opioids, acted jointly with them, and had a high level of influence over the promotion of opioids to its strategic planning and marketing work. The Court of Appeal has held that the question of who made the representations – McKinsey alone or McKinsey together with its clients – is a live issue raised by the ANOCC to be determined on the evidence at trial: *McKinsey BCCA* at para. 36.

[211] There is some basis in fact for the existence of the aforementioned common issues. I conclude that the resolution of these common issues will advance each Class Members' claim and represent inquiries that are common to all Class Members' claims.

e) Common Issues 20-36 (Direct Claims)

[212] Common issue 20 addresses whether McKinsey breached the *Competition Act.* This common issue, which does not rely on the *ORA*, reads as follows:

> 20. Did the defendants:
>
> (a) knowingly or recklessly make a representation that was false or misleading in a material respect?
>
> (b) was the representation made to the public?
>
> (c) was the representation made for the purpose of promoting, directly or indirectly, the supply or use of a product, or any business interest?

[213] McKinsey objects to this question on the basis that the Province has not established some basis in fact that McKinsey made an opioid-related misrepresentation to prescribing physicians or members of the public. It also submits that the Province has not established that causation for this issue can be determined on a class-wide basis.

[214] With the modifications I contemplate above to the wording of this issue, I cannot accept these submissions. McKinsey's involvement in the alleged misrepresentations is a live issue. Determination of issues related to misrepresentations can be made on a class-wide basis, and the language of these common issues advances the question of liability under the *Competition Act*.

[215] With respect to proximity, this issue was dealt with extensively in the pleadings appeal: *McKinsey BCCA* at paras. 38-58. The Court concluded that the question of the proximity of the appellants' relationship to end users could depend on the evidence at trial regarding how closely the appellants worked with the manufacturer/distributor clients, as well as the degree to which it may have coached those clients in ways to increase the harmful spread of opioid use: *McKinsey BCCA* at para. 52. That is an issue for trial.

[216] As for causation, the Province, as noted, has offered through Drs. Ward, Mohr and Tamblyn an expert methodology that I find has a realistic prospect of determining whether McKinsey's conduct caused an increase in the sale and/or use of opioids in Canada and quantifying that loss on a class-wide basis. The common issues will be tested at trial with the aid of such evidence.

[217] Common issues 21-36 relate to the Province's conspiracy claims. These questions ask the same questions in relation to each of Purdue, Janssen, Endo, and McKesson, which are alleged in the ANOCC to be McKinsey's large pharmaceutical clients:

> **G. Conspiracy with Purdue**
>
> 21. During the Class Period, did the defendants and Purdue conspire to harm Class Members?
>
> 22. Did the defendants act in furtherance of the conspiracy?
>
> 23. Did the conspiracy involve unlawful acts?
>
> 24. Did the defendants know or ought they have known that the conspiracy was likely to cause injury to the Class Members?
>
> **H. Conspiracy with Janssen**
>
> 25. During the Class Period, did the defendants and Janssen conspire to harm Class Members?
>
> 26. Did the defendants act in furtherance of the conspiracy?
>
> 27. Did the conspiracy involve unlawful acts?
>
> 28. Did the defendants know or ought they have known that the conspiracy was likely to cause injury to the Class Members?

I. Conspiracy with Endo

29. During the Class Period, did the defendants and Endo conspire to harm Class Members?

30. Did the defendants act in furtherance of the conspiracy?

31. Did the conspiracy involve unlawful acts?

32. Did the defendants know or ought they have known that the conspiracy was likely to cause injury to the Class Members?

J. Conspiracy with McKesson

33. During the Class Period, did the defendants and McKesson conspire to harm Class Members?

34. Did the defendants act in furtherance of the conspiracy?

35. Did the conspiracy involve unlawful acts?

36. Did the defendants know or ought they have known that the conspiracy was likely to cause injury to the Class Members?

[218] Unlike any conspiracy alleged in the Main Action, the conspiracy alleged here is a stand-alone claim for liability for the tort of civil conspiracy. These claims have passed the challenge to the pleadings: *McKinsey BCCA*. These common issues directly relate to whether the defendants engaged in conspiracies with certain opioid manufacturers and/or distributors.

[219] As noted in *McKinsey BCSC* at para. 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.

[220] The questions above relate to substantial requisite ingredients to establish civil conspiracy. These proposed common issues also fit with the Province’s theory of liability and its causes of action, which rest upon McKinsey being the effective “hand in the glove” for the improper promotion of opioid manufacturing and distributing by turbocharging various Opioid Misrepresentations that client organizations are alleged to have cooperatively engaged in. As noted above regarding common design, the Province bases its conspiracy allegations on evidence that arguably indicates McKinsey had close relationships (and indeed was integrated) with its clients in making the alleged false and misleading representations to the public.

[221] As well, the expert reports from Drs. Ward and Mohr provide some basis in fact that there is a methodology that can be used to determine whether the defendants' conduct caused an increase in the sale and/or use of opioids in Canada and to quantify that increase. Dr. Tamblyn's report provides some basis in fact that there is a methodology that can be used to assess the relationship between an increase in the use of opioids in Canada since 1995 and the incidence and prevalence of opioid-related harms or illnesses on a population-wide basis.

[222] I find that there is some basis in fact to show that these common issues exist and are common to all Class Members. The resolution of these issues will advance the litigation.

f) Common Issues 37-46 (*ORA* Claims)

[223] Common issues 37-46 deal with claims advanced on behalf of the *ORA* Subclass and read as follows:

> **ORA CLAIMS ADVANCED ON BEHALF OF ORA SUBCLASS MEMBERS**
>
> 37. Are each of the defendants a "consultant", as defined in the ORA?
>
> **Negligent Failure to Warn**
>
> 38. Did the defendants owe a duty to directly, or through prescribing physicians, warn end users of Opioids of the risks of addiction, dependency, adverse side effects, and death attendant upon using Opioid Products?
>
> 39. Did the defendants breach their duty to warn by failing to make reasonable efforts to communicate the risks and dangers of using Opioid Products to prescribing physicians and end users?
>
> **Negligent Misrepresentation**
>
> 40. Did the defendants owe a duty of care to persons who have used or been exposed to or might use or be exposed to an Opioid Product?
>
> 41. Did the defendants know, or ought they have known, that the Opioid Misrepresentations were untrue, inaccurate or misleading?
>
> 42. Did the defendants act negligently in making the Opioid Misrepresentations?
>
> **Fraudulent Misrepresentation/Deceit**
>
> 43. Did the defendants make the Opioid Misrepresentations knowing them to be untrue, or without belief in their truth?
>
> 44. Were the defendants reckless as to whether the Opioid Misrepresentations were true or false?
>
> **K. ORA Claims**

45. 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?

46. If so,

    a) can using the Opioid Product cause or contribute to disease, injury or illness, pursuant to s.3(1)(b) of the ORA?

    b) was the Opioid Product that the defendants provided advisory services in respect to offered for sale in Canada during all or part of the breach, pursuant to s.3(1)(c) of the ORA?

[224] These proposed common issues address the elements of the various *ORA*-related claims brought on behalf of each *ORA* Subclass member.

[225] Common issues 37-45 focus on McKinsey's status, conduct and knowledge, the duties owed by the defendants and whether those duties were breached.

[226] Common issues 45 and 46 address the elements of the *ORA* Claims advanced on behalf of the *ORA* Subclass Members. Common issue 46(a) posits whether the use of a particular Opioid Product can cause or contribute to disease, injury or illness. In this regard, the Dr. Virani report provides some basis in fact that it is possible to assess on a common basis what harms have resulted from chronic opioid exposure and that such an assessment would not require analysis at the level of every affected individual.

[227] I find that the Province has shown some basis in fact that these proposed common issues are necessary to the resolution of each *ORA* Subclass member's claim. The issues raised are common to the subclass. Resolution of these claims in the class proceeding will avoid duplication of fact-finding and legal analysis.

g) Common Issues 47-48 (Fraudulent Concealment)

[228] The Province has asked issue 47 (related to punitive damages) be deleted. I accept this submission.

[229] Common issue 48 deals with whether the defendants fraudulently concealed their conduct:

48. Did the defendants take affirmative or fraudulent steps to conceal their conduct?

[230] All Class Members face this issue, and resolving these questions will advance the potential claim of every Class Member. The answers to this question will not differ from Class Member to Class Member.

5. Summary of Common Issue Findings

[231] I find that the proposed common issues are common issues of fact or law within the meaning of s. 1 of the *CPA.* Resolution of these issues will advance the litigation and is necessary for the resolution of each Class Member's claim. All members of the proposed Class and *ORA* Subclass will benefit from the resolution of the common issues, though success for one member of the Class may not necessarily mean success for all the members. Success for one member will not result in failure for another.

[232] Where required, the Province has shown some basis in fact that there is a sufficiently plausible and credible methodology that could be employed later in the proceedings, with the benefit of full discovery, in order to determine the proposed issues on a common basis.

D. Whether a Class Proceeding is the Preferable Procedure (s. 4(1)(d))

[233] I will borrow from my outline of the principles surrounding the preferable procedure criterion outlined in the *Apotex Certification Decision* at paras. 697-702.

[234] A class proceeding must be the "preferable procedure for the fair and efficient resolution of the common issues": *CPA*, s. 4(1)(d). In *AIC Limited v. Fischer*, 2013 SCC 69 at para. 48, the Court held that to do so, the plaintiff must show some basis in fact that: "(1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims."

[235] I must consider all relevant matters, including the enumerated factors set out in s. 4(2) of the *CPA*, which provides as follows:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> (d) whether other means of resolving the claims are less practical or less efficient;
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[236] In assessing preferability, I start my analysis bearing in mind the goals of class proceedings including improving access to justice, enhancing judicial economy, and encouraging behaviour modification: *Hollick* at para. 27; *Pro-Sys SCC* at para. 137. This is a comparative exercise. In *Finkel* at para. 25*,* the Court of Appeal confirmed that when comparing a class proceeding to other realistically available means for resolving the claims, a practical cost-benefit approach applies. The ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve the goals of class proceedings: *Fischer* at paras. 22-23.

[237] In *Jiang v. Vancouver City Savings Credit Union,* 2019 BCCA 149 at para. 33, the Court commented that the focus of a preferability analysis is "on comparing the procedure of a class proceeding with any alternative means to resolve the claims of the class members." The possible need for individualized inquiries is a relevant factor when considering whether other means of resolving the claims are less practical or less efficient: *Jiang #1* at para. 105.

[238] McKinsey submits that a class proceeding is not the preferable procedure for the fair and efficient resolution of common issues.

[239] I would turn to the factors in s. 4(2) to assess the preferable procedure in the present context. These factors were assessed in the *Apotex Certification Decision* at paras. 703-742, and my analysis here will be similar to that in the Main Action.

1. Whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members (s. 4(2)(a))

[240] While I accept that there are important individual issues apart from the common issues, the nature, number and relative importance of the common issues are all significant. The common issues address critical factual findings relevant to the Class Members' and *ORA* Subclass members' claims, such as the knowledge held by the defendants about the risks and benefits of opioid use, their participation in a common design to develop opioid-related marketing strategies, and their participation in making Opioid Misrepresentations. The common issues also address important legal issues, such as whether the defendants are a "consultant" as defined in the *ORA* and whether they owe a duty of care to users of Opioid Products.

[241] I find that the common issues here are central and predominant over any questions affecting only individual members. While I expect that some individual issues will remain following the resolution of the common issues, resolution of common issues will significantly advance the litigation, and the *CPA* provides case management tools in ss. 12, 27, and 28 to help manage any complexities arising from individual issues: see *Jiang #1* at para. 112.

[242] I find that the common issues here are at the heart of the claims advanced. I assess that this factor favours the proposed class proceeding.

2. Whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions (s. 4(2)(b))

[243] I note that none of the Class Members have filed their own claim in another jurisdiction. All of the proposed Class Members, except Yukon and the federal government, have passed *ORA*-equivalent legislation that supports their participation in the present proceedings. There is no evidence that any Class Members have expressed an interest in controlling the prosecution of separate actions. In fact, the evidence indicates that all of the Class Members are supportive of the class proceeding.

[244] I find that this factor weighs in favour of a class proceeding.

3. Whether the class proceeding would involve claims that are or have been the subject of any other proceedings (s. 4(2)(c))

[245] The claims for health care cost recovery in the ANOCC are not the subject of any other proceeding. I find that this factor favours the proposed class proceeding.

4. Whether other means of resolving the claims are less practical or less efficient and whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means (s. 4(2)(d))

[246] Other means of resolving the claims, such as individual actions in multiple provinces and territories, would be far less practical and efficient. Parallel proceedings by different governments in different courts would result in duplicative fact-finding and legal analysis and potentially inconsistent verdicts.

[247] I assess that other means of resolving the claims would create many greater difficulties than an omnibus class proceeding. I find that this factor favours the proposed class proceeding.

5. Whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means (s. 4(2)(e))

[248] Again, “other means” of pursuing relief would likely involve parallel proceedings in multiple provinces and territories. The administration of duplicative parallel proceedings against McKinsey would create significant legal, factual and logistical difficulties. I assess that the administration of the class proceeding would be far easier than the pursuit of relief through parallel proceedings.

[249] I therefore find that this factor favours the proposed British Columbia-based omnibus class proceeding.

6. Other Factors

[250] I would next consider the preferability issue by reference to the goals of class proceedings, including access to justice, judicial economy, and behaviour modification.

[251] McKinsey submits that: (a) there are no access to justice concerns in this case as the Class Members could pursue justice on their own; (b) no judicial economy will be achieved by adjudicating the claims at a common issues trial; and (c) behaviour modification is not a concern because McKinsey has already announced in 2019 that it will no longer advise clients on any opioid-specific business, other than in pursuit of combatting the opioid crisis.

[252] Access to justice involves consideration of the class members' access to a fair process to resolve their claims and whether the class members will receive a just and effective remedy for their claims if established: *Fischer* at para. 24. I agree with the defendants that access to justice concerns do not favour a class proceeding. Although they vary in size and recourses, the Class Member governments are all sophisticated entities capable of litigating their claims on their own initiative and achieving, if successful, an appropriate remedy through the courts in their home jurisdiction. I would consider concerns over efficiency and duplication in the process under the judicial economy criterion.

[253] With respect to behaviour modification, the Court in *Finkel* held that "[b]ehaviour modification is facilitated by encouraging actual and potential wrongdoers to take full account of the harm they cause or might cause to the public": at para. 13. Some progress toward this goal has been achieved by McKinsey's statement eschewing involvement in further opioids-related marketing. However, as noted in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 73*,* class action proceedings also serve to deter potential wrongdoers who might otherwise ignore their obligations to the public. I therefore assess that a class proceeding will provide some general behaviour modification benefits.

[254] Finally, I find that judicial economy will unquestionably be well-served by a class proceeding with adjudicating the claims against McKinsey. McKinsey argues that no judicial economy will be achieved by a common issues trial. It submits that each Class Member has a complex claim that turns on the individual facts and circumstances that are specific to its own jurisdiction.

[255] While I acknowledge the importance of individual issues, I nevertheless assess that the joint litigation of the proposed common issues will significantly advance judicial economy. As noted in *Sandoz Canada Inc. v. British*

Columbia, 2023 BCCA 306 at para. 97*,* the *ORA* provides an opportunity to consolidate multiple proceedings that might otherwise arise in every province and territory into one or a few proceedings, thus avoiding the necessity of duplicative proceedings.

[256] As noted in *Sanis* at para. 106 in relation to the Main Action, the goals of class proceedings are met where governments cooperate with one another to have their claims litigated efficiently, in one action, before one province's superior court, whose proceedings and judgment will be respected through the principle of comity in the other courts of our federation. I agree with these comments on the nature of the Main Action and would apply them in this context to the claims against McKinsey.

[257] Finally, I note that there are case management options under ss. 12, 27 and 28 of the *CPA* to deal with individual issues. These judicial tools will assist in addressing individual issues in a timely and practical manner in ways that promote the underlying objectives of class proceedings, including judicial economy: *Jiang #1* at para. 112.

7. Conclusion on s. 4(1)(d)

[258] I find that the Province has met the requirements of s. 4(1)(d) of the *CPA*, in reference to the considerations in s. 4(2) and the goals of class proceedings. A class proceeding is by far the preferable procedure for the fair and efficient resolution of the proposed common issues.

[259] As well, a class proceeding is preferable for the resolution of the claims compared with other realistically available means for their resolution.

E. Representative Plaintiff and the Litigation Plan (s. 4(1)(e))

[260] As noted, McKinsey does not contest the suitability of the Province to act as a representative plaintiff under s. 4(1)(e) of the *CPA*.

[261] The Province has put forward a litigation plan appended to its Notice of Application for certification. The plan provides a workable method for advancing the litigation, including a notice program that offers a reasonable method for notifying Class Members of certification and their ability to opt into the proceedings. The litigation plan contemplates the resolution of individual issues

and sets out next steps in the event of success on certain common issues. It also refers to the simplified damages procedures set out in the *ORA*. The plan contemplates amendment from time to time and would appear to allow for coordination with proceedings in the Main Action.

[262] I find that the Province has met this requirement.

VIII. CONCLUSION

[263] An order for certification is made consistent with the reasons above. Specifically, I order the following:

1. This action is certified as a class proceeding pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*].

2. The classes are defined as follows:

   (a) a class of all federal, provincial and territorial governments that, during the period from 1996 to the present (the “Class Period”), paid healthcare, pharmaceutical, treatment and other costs related to Opioids (the “Class”) and

   (b) a subclass of all federal, provincial and territorial governments that have legislation specifically directed at recovery of damages and healthcare costs from consultants arising from an "opioid-related wrong" as that term is defined in the relevant legislation (the "ORA Subclass").

3. The Province is appointed as the representative plaintiff of the Class and the ORA Subclass.

4. The nature of the claims asserted on behalf of the Class are:

   (a) breach of s. 52 of the *Competition Act,* R.S.C. 1985, c. C-34;

   (b) conspiracy; and

   (c) common design liability.

5. The nature of the claims asserted on behalf of the ORA Subclass are statutory causes of action under ss. 2(1) and 2.1 of the *Opioid Damages and Health Care Costs Recovery Act*, S.B.C. 2018, c. 35 [*ORA*] with joint and several liability under s. 4 of the *ORA* based on the following opioid-related wrongs:

   (a) negligent misrepresentation;

   (b) negligent failure to warn;

   (c) fraudulent misrepresentation/deceit; and

   (d) breach of s. 52 of the *Competition Act*.

6. The relief sought by the Class is the relief set out in paragraph 103 of the Amended Notice of Civil Claim.

7. The proposed Litigation Plan set out in **Schedule "A"** to the Notice of Application is approved.

8. The proceeding be certified on the basis of the common issues set out in **Schedule "B"** to the Notice of Application. Leave is provided to the Province to add the Purdue release issue as a common issue and to amend common issues related to opioid misrepresentations to clarify the allegation that the defendants jointly made or participated, directly or indirectly, in making the impugned representations.

9. The form and content of the notice program for the certification of this action is that set out in the proposed Litigation Plan.

10. In terms of opt-in decisions by Class Members:

(a) members of the Class may opt-in to this class proceeding by sending a written election by email or regular mail to class counsel within 30 days after certification of this action on a final basis (the "Opt-In Date");

(b) members of the Class who do not send a written election on or before the Opt-In Date will be deemed to have opted-out of the class proceeding;

(c) no person may opt-in to this class proceeding after the Opt-In Date; and

(d) after the Opt-In Date, class counsel will as soon as reasonably possible report to the Court with the names of the entities who have opted-in to this class proceeding.

[264] I wish to express my appreciation to all counsel for their capable assistance in helping this Court reach determinations on the many issues in this matter.

"Brundrett J."

Appendix A

Further Revised Common Issues

A. Opioid Related Disease, Injury or Illness

1. What is an Opioid Product?

2. Can use of or exposure to Opioid Products cause or contribute to disease, injury or illness?

(a) If so, what are the diseases, injuries or illnesses that can be caused or contributed to by use of or exposure to Opioid Products?

B. The Defendants and their Advisory Services

3. During the Class Period, did the defendants provide advisory services to a manufacturer in relation to the distribution, sale or offering for sale of Opioid Products, as defined in the ORA?

(a) If so, which manufacturer(s), and in relation to which Opioid Products?

4. During the Class Period, did the defendants provide advisory services to a wholesaler in relation to the distribution, sale or offering for sale of opioid products, as defined in the ORA?

(a) If so, which wholesaler(s), and in relation to which Opioid Products?

5. What is the relationship between the defendants? Is the relationship such that each is the agent of the other for the purposes of providing advisory services to wholesalers and/or manufacturers with respect to Opioid Products in Canada?

C. The Defendants' Opioid Misrepresentations

6. Did the defendants make one or more of the Opioids Misrepresentations?

7. If so:

(a) in relation to which Opioid Products?

(b) were any of the Opioid Misrepresentations made by the defendants untrue, inaccurate or misleading?

(c) were any of the Opioid Misrepresentations made by the defendants false?

(d) did the conduct of the defendants in making the Opioids Misrepresentations cause an increase in the prescription of Opioid Products in Canada?

D. The Defendants' Knowledge

8. At all material times, what was the state of knowledge of the medical and pharmaceutical community regarding the risks and benefits of opioid use?

9. At all material times, what knowledge did the defendants have of the risks and benefits of opioid use?

10. What data and/or knowledge did the defendants have in relation to the distribution and sale of Opioid Products, including:

(a) volume of Opioid Products sold;

(b) location of purchase;

(c) prescribing doctor; and

(d) dispensing pharmacy.

11. At all material times, what knowledge did the defendants have in relation to the behaviour of users who become addicted to or dependent on Opioid Products, including whether users would:

(a) purchase opioids on the illicit market;

(b) seek out multiple healthcare providers to write prescriptions;

(c) seek prescriptions for higher dosages;

(d) seek prescriptions for higher quantities; and/or

(e) seek out pharmacies that would fill opioid prescriptions on a "no questions asked basis."

12. At all material times, were the defendants aware that their advisory services with respect to promotion, marketing, sale and distribution of Opioid Products could cause an increase in the consumption of Opioid Products?

E. Common Design

13. Did the defendants act pursuant to a common design to develop and implement marketing plans and strategies, in partnership with Opioid manufacturers and distributors, to increase the market for Opioid Products in Canada?

14. Did the defendants act pursuant to a common design with Purdue to increase the market for Opioid Products in Canada?

15. Did the defendants act pursuant to a common design with Janssen to increase the market for Opioid Products in Canada?

16. Did the defendants act pursuant to a common design with Endo to increase the market for Opioid Products in Canada?

17. Did the defendants act pursuant to a common design with McKesson to maximize the volume of Opioid Products distributed in Canada?

18. Are the defendants jointly and severally liable for any damage caused by their common design?

19. Are the defendants jointly and severally liable with Purdue, Janssen, Endo and/or McKesson for any damage caused by their common designs?

DIRECT CLAIMS

F. Breach of the Competition Act

20. Did the defendants:

(a) knowingly or recklessly make a representation that was false or misleading in a material respect?

(b) was the representation made to the public?

(c) was the representation made for the purpose of promoting, directly or indirectly,

the supply or use of a product, or any business interest?

G. Conspiracy with Purdue

21. During the Class Period, did the defendants and Purdue conspire to harm Class Members?

22. Did the defendants act in furtherance of the conspiracy?

23. Did the conspiracy involve unlawful acts?

24. Did the defendants know or ought they have known that the conspiracy was likely to cause injury to the Class Members?

H. Conspiracy with Janssen

25. During the Class Period, did the defendants and Janssen conspire to harm Class Members?

26. Did the defendants act in furtherance of the conspiracy?

27. Did the conspiracy involve unlawful acts?

28. Did the defendants know or ought they have known that the conspiracy was likely to cause injury to the Class Members?

I. Conspiracy with Endo

29. During the Class Period, did the defendants and Endo conspire to harm Class Members?

30. Did the defendants act in furtherance of the conspiracy?

31. Did the conspiracy involve unlawful acts?

32. Did the defendants know or ought they have known that the conspiracy was likely to cause injury to the Class Members?

J. Conspiracy with McKesson

33. During the Class Period, did the defendants and McKesson conspire to harm Class Members?

34. Did the defendants act in furtherance of the conspiracy?

35. Did the conspiracy involve unlawful acts?

36. Did the defendants know or ought they have known that the conspiracy was likely to cause injury to the Class Members?

ORA CLAIMS ADVANCED ON BEHALF OF ORA SUBCLASS MEMBERS

37. Are each of the defendants a “consultant”, as defined in the ORA?

Negligent Failure to Warn

38. Did the defendants owe a duty to directly, or through prescribing physicians, warn end users of Opioids of the risks of addiction, dependency, adverse side effects, and death attendant upon using Opioid Products?

39. Did the defendants breach their duty to warn by failing to make reasonable efforts to communicate the risks and dangers of using Opioid Products to prescribing physicians and end users?

Negligent Misrepresentation

40. Did the defendants owe a duty of care to persons who have used or been exposed to or might use or be exposed to an Opioid Product?

41. Did the defendants know, or ought they have known, that the Opioid Misrepresentations were untrue, inaccurate or misleading?

42. Did the defendants act negligently in making the Opioid Misrepresentations?

Fraudulent Misrepresentation/Deceit

43. Did the defendants make the Opioid Misrepresentations knowing them to be untrue, or without belief in their truth?

44. Were the defendants reckless as to whether the Opioid Misrepresentations were true or false?

K. ORA Claims

45. 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?

46. If so,

(a) can using the Opioid Product cause or contribute to disease, injury or illness, pursuant to s.3(1)(b) of the ORA?

(b) was the Opioid Product that the defendants provided advisory services in respect to offered for sale in Canada during all or part of the breach, pursuant to s.3(1)(c) of the ORA?

PUNITIVE DAMAGES

47. ~~Are the defendants liable to pay punitive damages having regard to the nature of their conduct? If so, how much should the defendants pay?~~

FRAUDULENT CONCEALMENT

48. Did the defendants take affirmative or fraudulent steps to conceal their conduct?