COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *McKinsey & Company, Inc. United States v. British Columbia,* 2024 BCCA 277

Date: 20240725
Docket: CA49470

Between:

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

Appellants
(Defendants)

And

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

Respondent
(Plaintiff)

Before: The Honourable Chief Justice Marchand
The Honourable Justice Griffin
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated October 12, 2023 (*British Columbia v. McKinsey*, 2023 BCSC 1762, Vancouver Docket S2111367).

Counsel for the Appellants:	L.R. Rothstein P. Davis
Counsel for the Respondent:	R.M. Mogerman, K.C. C.D. Hermanson A. Sharon
Place and Date of Hearing:	Vancouver, British Columbia May 3, 2024
Place and Date of Judgment:	Vancouver, British Columbia July 25, 2024

Written Reasons by:
The Honourable Justice Griffin

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Mr. Justice Grauer

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Summary:

The appellants appeal from a decision refusing to strike claims alleged against them, related to their role as consultants to pharmaceutical companies. They say as consultants, they were not in sufficient proximity to owe a duty of care to consumers of opioids, nor did they make misrepresentations, because any representations were made by their clients. Held: Appeal dismissed. The Amended Notice of Civil Claim alleges a very close relationship between the appellants and the pharmaceutical companies and that the appellants were responsible for designing the strategy that gave rise to the increased harmful spread of opioid use. The closeness of the relationship and the appellants' role with its clients arguably could give rise to findings that the appellants are responsible for misrepresentations to consumers and could give rise to a duty of care, depending on the evidence and findings at trial. It is not plain and obvious at the pleadings stage that these claims cannot succeed.

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Reasons for Judgment of the Honourable Justice Griffin:

Introduction

[1] This is an appeal from a decision of Justice Brundrett refusing to strike claims pleaded by the Province of BC against the appellants McKinsey & Company, Inc. United States, and McKinsey & Company Canada/McKinsey & Compagnie Canada (together the appellants or "McKinsey").

[2] The claims allege that McKinsey designed, recommended and implemented plans for its pharmaceutical company clients, manufacturers and distributors, to promote the sale and distribution of dangerous opioids to consumers for unsuitable uses, despite McKinsey having knowledge that opioids are addictive. The Amended Notice of Civil Claim ("ANOCC") alleges, among other things, that McKinsey designed aggressive campaigns that promoted the idea that pain was undertreated and should be made a higher priority by healthcare practitioners, and misrepresented the drugs as safe and not addictive or less addictive than other pain killers despite a lack of scientific evidence to support these claims. This conduct is said to have ultimately caused and contributed to over-prescription of these products and then to harming end users of the opioids.

[3] McKinsey says it never made any representations itself, it was simply a consultant. It submits where a claim is advanced for product liability, it is only viable

against the actual parties who directly manufactured and distributed the product, not against advisers to those parties.

[4] McKinsey submits the chambers judge failed to grapple with the problem that these novel claims are bound to fail. It says no matter how the evidence at trial might develop, it is plain and obvious as a consultant it did not owe a duty of care to end users and did not make representations to the public and therefore the judge failed to fulfill his role as gatekeeper.

[5] The Province submits there is a need to allow the evidence to develop at trial so that the failure or success of the claims can be judged in the appropriate factual context. It says McKinsey crafted the campaign that the pharmaceutical companies carried out, and McKinsey's role with the pharmaceutical companies was so close and unique, it did owe a duty of care to end users and is responsible for misrepresentations.

[6] For the reasons that follow, I would dismiss the appeal.

Background

[7] The Province is the plaintiff and respondent on appeal. In its ANOCC it seeks to bring the action as a class proceeding on behalf of itself and other provincial, territorial and federal governments that paid healthcare costs related to opioids.

1. The legislation

[8] Pursuant to s. 2(1) of the *Opioid Damages and Health Care Costs Recovery Act*, S.B.C. 2018, c. 35 [*ORA*], the Province is able to sue in its own right a manufacturer, wholesaler or consultant to recover the cost of health care benefits caused or contributed to by an opioid-related wrong. The legislation gives the Province the benefit of certain presumptions.

[9] An opioid-related wrong is defined in s. 1(1) as meaning:

> (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

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> (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;

[10] Initially the *ORA* only allowed claims against manufacturers and distributors, but it was amended on November 3, 2022 to include claims against consultants.

[11] A consultant is defined in s. 1(1) as follows:

> **"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…

[12] On August 29, 2018, prior to the present proceeding, the Province brought a claim against manufacturers and distributors of opioids (the "M & D Action"), alleging the defendants marketed and promoted opioids in Canada in a misleading way, promoted them as less addictive than they were and for treatments for which they were unsuitable, and failed to warn of the known risks of the drugs. The Province alleged several causes of action, including: negligent design; failure to warn; negligent or fraudulent misrepresentation; unjust enrichment; public nuisance; breach of s. 52 of the *Competition Act,* R.S.C. 1985, c. C-34; and breach of the *Food and Drugs Act*, R.S.C. 1985, c. F-27, the latter two grounding claims under the *ORA* that were based on breach of a statutory duty. The Province also brought an alternative claim under the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 [*HCCRA*], a statute providing for subrogated claims by the Province to recover health care costs as against wrongdoers and their insurers.

[13] The defendants in the M & D Action brought an application to strike the claims as not disclosing a cause of action. They were largely unsuccessful.
Justice Brundrett dismissed the application except with respect to the claim under the *HCCRA*, in reasons indexed *as British Columbia v. Apotex Inc.,* 2022 BCSC 1. On appeal, this Court agreed with the chambers judge as to all the claims he found arguable, except with respect to the claim in public nuisance which was struck: *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia,* 2022 BCCA 366 [*Valeant*].

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[14] This Court's decision in *Valeant* explains the structure of the *ORA* at paras. 77–103. I will not repeat this analysis as it is not the focus on this appeal.

[15] In order to establish an opioid-related wrong under s. 2(1) of the *ORA*, the Province must prove the consultant either committed a tort in BC or breached a common law, equitable, or statutory duty or obligation owed to persons in BC: *ORA* s. 3(1). This requires pleading material facts to establish a breach of a duty or obligation. However, the *ORA* creates rebuttable statutory presumptions regarding causation and damages: *Valeant*, para. 19.

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2. Pleadings

[16] There are three categories of claims advanced in the ANOCC against the appellants:

a) Common law claims in tort, for negligent misrepresentation and failure to warn, based on an alleged duty of care owed by the appellants to end users, and grounding the claim that the appellants committed an "opioid-related wrong" under the *ORA*;

b) Claims for breach of the *Competition Act*, based on alleged misrepresentations; and

c) Claims for group liability with the appellants' pharmaceutical clients, for conspiracy, common design, and joint liability under s. 4(1) of the *ORA*.

[17] In their application to strike the ANOCC pursuant to Rule 9-5(1) of the *Supreme Court Civil Rules*, the appellants challenged all three categories of claim as bound to fail. On appeal, they do not challenge the chambers judge's conclusion that a cause of action has been pleaded with respect to the third category of claim. However, the appellants say no cause of action has been pleaded against them for the first two categories because it owed no duty of care to end users of opioids and made no misrepresentations; it simply advised others who had the duty of care and allegedly made misrepresentations.

Chambers Judgment

[18] The chambers judge dismissed the appellants' application to strike the claim, in reasons indexed at 2023 BCSC 1762 ("Reasons"). In addressing the appellants' various arguments advanced in support of their application, the chambers judge made the following findings:

a) The Province had adequately pleaded material facts connecting the appellants to opioid misrepresentations to the public;

b) The Province had adequately pleaded the appellants' connection to BC;

c) Causes of action were adequately pleaded based on:

i. Sections 52 and 36(1) of the *Competition Act* (liability for misrepresentation);

ii. Civil conspiracy;

iii. Joint liability through common design; and

iv. Claims that the appellants committed an "opioid-related wrong" under the *ORA*, based on them owing a duty of care to end users of opioid products.

[19] Factored into the judge's analysis were the allegations in the ANOCC that McKinsey was "integrated" with its client organizations in promoting opioid sales, acted jointly with them and as a co-principal, and had a level of control due to its strategic planning and marketing efforts to promote and sell opioids: at paras. 98–99, 104, 112, 115–116. The pleadings alleged not only that McKinsey itself made misrepresentations to the public (Reasons, para. 61), but also that McKinsey was integrated with its clients sufficiently that its clients' misrepresentations to the end users were also McKinsey's misrepresentations: paras. 77, 112.

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[20] The chambers judge also felt it premature to decide the question of whether the appellants owe a duty of care to end users of opioids, given it was a novel duty, finding this question should be left to trial: paras. 119, 121. The judge held the claim based on such a duty of care was not bound to fail based on the lack of a relationship of proximity: para. 129.

[21] Because the Province had reached a settlement with one of the appellants' clients, Purdue Pharma Inc., the chambers judge gave the Province leave to amend the ANOCC to seek several liability against the appellants in respect of Purdue (as opposed to joint and several liability): para. 138.

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Grounds of Appeal

[22] On appeal, as mentioned, the appellants no longer challenge the pleading of claims based on group liability, whether based on conspiracy, common design or joint liability under the *ORA*.

[23] The appellants advance two arguments which they say undermine the remaining claims pleaded against them such that they are bound to fail. They say the judge erred in reaching the following conclusions:

a) there was an arguable claim that they owed a duty of care to end users of opioids; and

b) there was an arguable claim that they made misrepresentations to the public.

[24] The Province submits that:

a) while the duty of care alleged is novel, it is arguable based on the pleadings and so the judge was correct in not striking it; and

b) the judge was correct in finding that the ANOCC sufficiently pleads that the appellants made misrepresentations, directly and in combination with their clients.

[25] Whether it is plain and obvious no duty of care exists and the appellants made no misrepresentations to the public are questions of law reviewable on a standard of correctness: *Valeant,* paras. 47, 103. I will address the two issues in reverse order.

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Analysis

[26] The approach to the pleading issues raised on this appeal involve application of the "plain and obvious" test, namely, assuming the pleaded facts are true, is it plain and obvious the claim discloses no cause of action, or to put it another way, has no reasonable prospect of success: *Valeant*, para. 42. This Court in *Valeant* addressed the balance between a generous approach to the pleadings and the gatekeeper role of the court as follows:

> [43] Courts are to read pleadings generously, including the degree to which any deficiency in pleadings may be remedied by amendments. Moreover, courts should not be too quick to strike claims simply because they are novel. Such novel but arguable claims should be permitted to proceed to trial: [*Nevsun Resources Ltd. v. Araya*, 2020 SCC 5] at para. 66; [*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42] at para. 21. At the same time, motions to strike fulfil an important gatekeeper role in preventing cases that are doomed to fail from proceeding, and unnecessarily consuming the resources of defendants and the justice system.

1. Is it plain and obvious that the appellants made no misrepresentations?

[27] Some of the causes of action pleaded against the appellants, particularly those based on the *Competition Act*, are based on alleged misrepresentations made to medical professionals and members of the public about the safety and utility of opioids. The appellants submit that when closely examined, the allegations are not that it made the misrepresentations, but that it participated in the misrepresentations of its clients. Therefore, the appellants submit it is plain and obvious the pleading that it made misrepresentations is simply conclusory, cannot succeed, and all claims based on them making misrepresentations should be struck.

[28] The Province advances claims based on ss. 36 and 52 of the *Competition Act*. Section 36 permits a civil claim to be brought for certain conduct that is contrary to provisions of the *Act*, including conduct contrary to s. 52. Section 52 provides:

> 52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that
>
> (a) any person was deceived or misled;
>
> (b) any member of the public to whom the representation was made was within Canada; or
>
> (c) the representation was made in a place to which the public had access.
>
> (1.2) For greater certainty, in this section and in sections 52.01, 52.1, 74.01, 74.011 and 74.02, the making or sending of a representation includes permitting a representation to be made or sent.
>
> [Emphasis added.]

[29] The appellants submit that the chambers judge erred in holding that the allegations in the ANOCC support a viable claim against the appellants pursuant to ss. 36 and 52. The appellants submit that s. 52 requires the defendant to have made a representation, and the ANOCC does not allege sufficient material facts to support such a claim against the appellants.

[30] The Province submits that precedent regarding another misrepresentation provision in the *Competition Act*, s. 74, supports the notion that more than one person may be responsible for making misrepresentations, including not just the person who said the words, but also a broad interpretation given to the meaning of making a representation to the public: *Matoni v. C.B.S. Interactive Multimedia Inc. (Canadian Business College)*, 2008 CanLII 1539 (Ont. S.C.J.) at paras. 78–79; *Commissioner of Competition v. Gestion Lebski inc.*, 2006 CACT 32*;* *Canada (Commissioner of Competition) v. Premier Career Management Group Corp.*, 2009 FCA 295 at para. 66. Further, there is no clear precedent that would preclude the application of s. 52 in the circumstances alleged in the ANOCC.

[31] The appellants say the cases cited by the Province do not support the Province's arguments.

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[32] In my view, it is not necessary to decide the full scope of s. 52.

[33] Whether or not the appellants made misrepresentations within the meaning of s. 52 of the *Competition Act* will depend on the findings at trial. I agree with the chambers judge that the pleadings are sufficient to support such a claim being advanced.

[34] Among other things, the ANOCC alleges the appellants:

a) made the misrepresentations together with opioid manufacturers and distributors: para. 43;

b) knew or ought to have known the misrepresentations were not supported by or were contrary to scientific evidence: para. 44;

c) created false, reckless, and deceptive marketing campaigns, and created and distributed marketing and educational materials containing the misrepresentations: para. 45;

d) advised manufacturers of multiple ways to spread the misrepresentations, through medical journals and advocacy groups: para. 45;

e) participated directly in training of pharmaceutical sales representatives to convey the misrepresentations and facilitated presentations containing the misrepresentations: para. 45; and

f) developed and implemented marketing strategies based on the misrepresentations: paras. 46, 71.

[35] I acknowledge the appellants' argument that the judge described McKinsey as being "a co-principal, integrated with its clients" in the colloquial sense, and this does not necessarily overcome the distinct legal personalities of advisor and client as separate corporations. However, in my view that does not answer the pleaded allegations that by its very close relationship with its clients and its own conduct, McKinsey was effectively making the misrepresentations together with its clients.

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What is described in the ANOCC is not a simple case of one misrepresentation stated orally by a defendant to a plaintiff, for which it could not be said a third person in any way participated. What is described is an entire scheme to misrepresent the properties of opioids to a broad audience of health care professionals and end users, through a variety of means—a scheme designed by the appellants which they helped their clients implement.

[36] In my view, if misrepresentations were made, the question of who made the misrepresentations—the appellants' clients alone, or the appellants together with their clients—is a live issue raised by the ANOCC and should be determined in the context of evidence at trial.

[37] I would therefore not accede to this ground of appeal.

2. Is it plain and obvious that the appellants owed no duty of care to end users of opioids because of a lack of proximity?

[38] The appellants submit it is plain and obvious they owe no duty of care to consumers.

[39] It is accepted the duty of care alleged in this case is novel.

[40] The approach to determining if a novel duty of care exists is the two-stage approach known as the *Anns/Cooper* test, referring to *Anns v. Merton London Borough Council*, [1978] A.C. 728, and *Cooper v. Hobart*, 2001 SCC 79, articulated by the Supreme Court of Canada in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 39:

> At the first stage of this test, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized.

[41] The proximity analysis is the focus of the appellants' submissions here: they submit it is plain and obvious the relationship between McKinsey as consultant, and

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consumers of goods manufactured and distributed by McKinsey's clients, is not proximate.

[42] In *Provost v. Dueck Downtown Chevrolet Buick GMC Limited*, 2020 BCCA 86, this Court explained that it is not possible to identify a unifying theme in finding proximity. The analysis varies case to case and requires examining the relationship between the plaintiff and defendant, considering all the factors related to the relationship and concluding whether it would be fair in the circumstances to impose a duty of care:

> [72] As the Court stressed in [*Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19], the first branch of the *Anns/Cooper* test seeks to link the impugned act to the harm suffered and asks whether the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged or injured: at paras. 24-25. However, foreseeability alone is not sufficient to establish a duty of care. A proximity analysis must be undertaken to consider "whether the parties are sufficiently 'close and direct' such that the defendant is under an obligation to be mindful of the plaintiff's interests" and whether it is just and fair to impose a duty: at para. 23. At the first stage of the *Anns* test, the proximity analysis "focuses on factors arising from the relationship between the plaintiff and the defendant": *Cooper* at para. 30 (emphasis added).
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> [73] In *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, Chief Justice McLachlin explained that the proximity analysis is carried out to determine whether the relationship between the plaintiff and defendant is sufficiently close to give rise to a duty of care. It is not possible to identify a unifying theme or characteristic as a finding of proximity must be made on the basis of diverse factors that will vary from case to case:
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> > [23] However, as acknowledged in [*Donoghue v. Stevenson*, [1932] A.C. 562] and affirmed by this Court in *Cooper*, foreseeability alone is not enough to establish the required relationship. To impose a duty of care "there must also be a close and direct relationship of proximity or neighbourhood": *Cooper*, at para. 22. The proximity inquiry asks whether the case discloses factors which show that the relationship between the plaintiff and the defendant was sufficiently close to give rise to a legal duty of care. The focus is on the relationship between alleged wrongdoer and victim: is the relationship one where the imposition of legal liability for the wrongdoer's actions is appropriate?
> >
> > [24] Generally speaking, the proximity analysis involves examining the relationship at issue, considering factors such as expectations, representations, reliance and property or other interests involved: *Cooper*, at para. 34. Different relationships raise different considerations. "The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case.

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> One searches in vain for a single unifying characteristic": *Cooper*, at para. 35. No single rule, factor or definitive list of factors can be applied in every case. "Proximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (*Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1151, cited in *Cooper*, at para. 35).
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> [74] In [*Childs v. Desmoreaux,* 2006 SCC 18], the Court explained that sometimes foreseeability is an "element of proximity" but sometimes the two are seen as separate elements at the first stage of the analysis: at para. 12. In *Bergen v. Guliker*, 2015 BCCA 283, Justice Smith succinctly summed up the proximity inquiry:
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> > [72] Thus, reasonable foreseeability and sufficient proximity are independent inquiries. A finding of reasonable foreseeability does not necessarily establish sufficient proximity.
> >
> > [73] The proximity inquiry is concerned with the quality of the relationship that makes it fair to impose "an obligation [on the defendant] to be mindful of the plaintiff's legitimate interests in conducting his or her affairs" (*Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 24). The inquiry focuses on whether the relationship between the plaintiff and the defendant was sufficiently close and direct to make the imposition of a private law duty of care fair and just. Evaluating the closeness of a relationship may involve looking at factors such as "expectations, representations, reliance, and the property or other interests involved ... to determine whether it is just and fair having regard to that relationship to impose a duty of care" (*Cooper* at para. 34).
>
> [Emphasis added.]

[43] In *Centurion Apartment Properties Limited Partnership v. Sorenson Trilogy Engineering*, 2024 BCCA 25, this Court cited Professor Klar on duty of care and proximity as follows:

> [44] Questions remained, the most relevant for our purposes being: 'Yes, but what is meant by "proximity", and how do you assess it?' As Professor Klar discussed in his article "Duty of Care for Negligent Misrepresentation - and Beyond?" (2018), 48 Advoc Q 235 ("*Klar 48*"), cited with approval by Justices Brown and Martin for the majority in *Maple Leaf Foods* at para 60, the majority of the Supreme Court clarified this and other ambiguities arising from *Cooper* in *Deloitte & Touche v Livent Inc*, 2017 SCC 63 ("*Livent*") a case involving a claim for negligent misrepresentation. Nevertheless, the professor observed (*Klar 48* at p 242):
>
> > Describing what proximity entails has always been and still remains an elusive task. The best that judges have been able to do is to recite a series of words, in themselves vague, to explain it. ... Since the particular relationship and circumstances of the parties are critical to proximity, and no two cases can ever share the identical facts, even

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> relying on past judgments is not very helpful. Proximity exists when the courts consider it to be "just and fair" to recognize it. Like art, judges know it when they see it.
>
> [Emphasis added in *Centurion*.]

[44] When a novel duty of care is alleged, the parties and courts may look to analogous relationships for guidance: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, [*Maple Leaf Foods*] at para. 65.

[45] The appellants compare their position as consultant to that of a lawyer or auditor, and submit that only in cases where it is alleged that the non-client third party knew of and relied on the advisor's negligent misrepresentation, to the advisor's knowledge, has liability been imposed on the advisor. They say end users would not have known of the appellants' role or relied on them.

[46] Respectfully, the allegations in this case are not necessarily analogous to cases involving negligent misrepresentation causing pure economic loss such as *Maple Leaf Foods*; *Deloitte & Touche v. Livent Inc. (Receiver of),* 2017 SCC 63 [*Livent*]; *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399; and *Lavender v. Miller Bernstein LLP*, 2018 ONCA 729, leave to appeal to SCC ref'd [2018] S.C.C.A. No. 488.

[47] The pleadings allege that the appellants' actions in developing tactics to market and promote opioids in Canada have caused deaths and serious and long-lasting injury to public peace, health, order and safety.

[48] In addition, the Province pleads that the appellants knew more than the end users about the injurious qualities of the opioid products.

[49] The appellants' advisory role in promoting a dangerous product in Canada, despite its knowledge that opioids were addictive and the reasonably foreseeable outcome that end users would experience physical harm, could potentially be seen as more akin to the relationship between manufacturers/distributors and consumers of their goods. In the manufacturer and distributor liability cases, there is clearly a duty of care to warn consumers and others about the dangerous properties of a

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product to protect against reasonably foreseeable personal injury, since the manufacturers know more than the consumers about the dangers of the products: *Valeant* at paras. 125, 230, citing *Hollis v. Dow Corning Corp*., [1995] 4 S.C.R. 634 at paras. 20–21, 1995 CanLII 55. Reliance in these relationships must be reasonable and can be inferred: *Valeant* at para. 131.

[50] The common law more readily finds a duty of care based on reasonable foreseeability of harm where the defendant's actions caused bodily injury: *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 at para. 23; *Childs v. Desormeaux,* 2006 SCC 18 at para. 31; *Maple Leaf Foods* at paras. 17–19.

[51] The appellants' self-description as mere consultants akin to a lawyer or auditor does not answer the question of whether they will be found to owe a duty of care. I am unaware of a reported decision where a lawyer or auditor is alleged to have become closely aligned, or "integrated", with their manufacturer client, advising the client's employees how to make systemic misrepresentations they knew or should have known would lead to personal injury, which is the essence of the conduct alleged against the appellants here. There is no precedent that establishes such a claim is bound to fail because the relationship between the defendant and plaintiff is not sufficiently proximate. It is not plain and obvious the imposition of legal liability for the appellants' actions, as pleaded, would be inappropriate. I consider it to be at least arguable, depending on how the facts come out at trial, that the appellants' relationship with end users was sufficiently proximate to make it "just and fair" to impose a duty of care.

[52] In my view, the question of the proximity of the appellants' relationship to end users could depend on the evidence at trial regarding how closely, or not, the appellants worked with the manufacturer/distributor clients, and the degree to which it coached those clients in ways to increase the harmful spread of opioid use; including its knowledge or constructive knowledge that the techniques it was coaching the clients to use included misrepresentations that could lead to personal harm. Evidence of the closeness of the relationship between the appellants and the manufacturer/distributors, and the appellants' conduct, will inform the findings

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regarding the closeness of the relationship between the appellants and the end users of the opioids, which is central to the proximity analysis.

[53] I therefore agree with the chambers judge's conclusion at para. 119 that it is premature to decide whether there is a sufficiently proximate relationship between the appellants and end users to be the foundation of a duty of care.

[54] The appellants further submit that the chambers judge erred in reasoning that they may be liable based upon allegations of joint breach of duties owed by opioid manufacturers and distributors: Reasons para. 118. The appellants submit that this circumvents the proximity analysis, because the Province needs to establish that the appellants owed a distinct duty of care to end users of opioids, separate from any duty of care owed by their clients.

[55] The appellants' argument raises this question: if Person A knows its conduct will enable Person B to physically harm Person C, and knows Person B owes a duty of care to Person C, can it be said definitively at the pleadings stage, without evidence of the relevant circumstances, that Person A does not owe a duty of care to Person C? Again, this issue did not arise in the professional advisor cases involving pure economic loss. In my view, it is not plain and obvious Person A will not be sufficiently proximate to owe a duty of care to Person C in such circumstances. Trial evidence as to the nature of Person A's conduct and knowledge could impact findings as to the proximity of its relationship to Person C.

[56] Further, it is at least arguable that s. 4 of the *ORA* includes a basis for joint liability that does not require establishing a separate duty of care, and simply requires establishing the appellants acted in concert with the manufacturers and distributors, as held by the chambers judge at paras. 116–118.

[57] Given that the present case involves, in part, a novel cause of action in context of a claim based on statute, this Court ought to be cautious in striking a claim before there is a full evidentiary record developed at trial: *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22 at paras. 44–46. As noted in *Trotman*, generally speaking, where there is case law squarely on point or the statutory interpretation

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exercise is quite straightforward, it might be appropriate to decide whether a statutory cause of action exists based on the pleadings alone. But where there is no precedent and the statutory interpretation question that is engaged by the claim is nuanced and is arguable, the courts should not engage in analysis of the merits of the claim based on pleadings alone. This cautious approach applies to claims arising under the framework of the *ORA* and *Competition Act* in this case.

[58] In conclusion, based on the ANOCC allegations against the appellants, it is not plain and obvious they owed no duty of care to end users of opioids.

Disposition

[59] In my view it is not plain and obvious that the fact McKinsey was a consultant to the manufacturers and distributors distances it from liability so that the claims pleaded against it are bound to fail. It may depend on what actions McKinsey took and what knowledge it had, and how close its relationship was with the manufacturers and distributors, all of which will depend on the evidence and findings at trial. A sufficiently close relationship between McKinsey and the manufacturers and distributors is pleaded such that it is not plain and obvious McKinsey cannot be found either to owe a duty of care to end users or be directly liable for misrepresentations.

[60] I would therefore dismiss the appeal.

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Mr. Justice Grauer"

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