

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jamieson v. McKinsey & Company  
Canada,*  
2025 BCSC 141

Date: 20250129  
Docket: S230495  
Registry: Vancouver

Between:

**David Scott Jamieson**

Plaintiff

And

**McKinsey & Company Canada and McKinsey & Company, Inc., United States**  
Defendants

Before: The Honourable Justice Brundrett

## Reasons for Judgment

Counsel for the Plaintiff:

J. Brown  
T. Yang  
A. Abdulla

Counsel for the Defendant:

L. Rothstein  
P. Davis

Place and Date Hearing:

Vancouver, B.C.  
July 19, 2024

Place and Date of Judgment:

Vancouver, B.C.  
January 29, 2025

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**I. INTRODUCTION**

[1] This is an application by the defendants, McKinsey & Company Canada and McKinsey & Company Inc., United States (together, “McKinsey”), in this matter to strike out the amended notice of civil claim (“ANCC”) under R. 9-5(1)(d) of the *Supreme Court Civil Rules* (the “Rules”) as an abuse of process. The defendants submit that the putative class action claim by the Plaintiff, David Jamieson, is barred by an earlier 2017 settlement with Purdue-related entities in Canadian opioid-related class proceedings (the “Settlement Agreement”). While McKinsey was not a party to the settlement between Purdue and Canadian users of its opioid products, it submits it is entitled to rely on the Settlement Agreement as a third-party beneficiary.

[2] The underlying action is a consumer-led putative class proceeding. It involves claims for harm by the end-users of opioids (as defined in the ANCC) against McKinsey, which is alleged to be a consultant to various drug companies including Purdue-related companies.

[3] The issue between the parties turns to a significant extent on whether McKinsey is entitled to rely on the release included in the Settlement Agreement as a third-party beneficiary pursuant to *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 at paras. 31–38, 1999 CanLII 654 [*Fraser River*], and whether subsequent agreements by the settling parties had the effect of amending or interpreting the Settlement Agreement so as to deny McKinsey the benefit of the protection under the settlement.

[4] For the reasons that follow, I dismiss the application. I do so on the basis that an abuse of process under R. 9-5(1)(d) of the *Rules* has not been made out on the record before me. In coming to this result, I find that while there may or may not ultimately be some merit in one or more of McKinsey’s arguments, the record before me does not support a conclusion that the Plaintiff is 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 has not been established.

**II. CIRCUMSTANCES**

**A. The Plaintiff's Claim**

[5] The Plaintiff is put forward in the ANCC as the representative plaintiff. He is a logger residing in Campbell River, BC, who, after a severe knee injury in 2008, was prescribed OxyContin for pain after Percocet failed to control his pain. As a result, the ANCC alleges that he became addicted to opioids which led to disastrous personal and financial consequences.

[6] Mr. Jamieson claims against McKinsey's American company and its Canadian affiliate on his own behalf and on behalf of all resident Canadians who were prescribed and developed an addiction to opioids. McKinsey is alleged to be a global management consulting firm with over 30,000 employees and operations in more than 65 countries.

[7] The Plaintiff initially filed a notice of civil claim on January 20, 2023, to commence class proceedings against McKinsey. The Plaintiff filed his ANCC on December 19, 2023.

[8] In the ANCC, the Plaintiff seeks damages from McKinsey for its consulting work in relation to four groups of "co-conspirators" who manufacture, distribute and sell opioids in Canada. These are:

1) Endo International plc (Ireland corporation), Endo Pharmaceuticals Inc (Pennsylvania corporation), Endo Ventures Ltd (Ireland corporation), and Paladin Labs Inc. (CD-9282718) (collectively, "Endo");

2) Janssen Inc. (NS-3324007; ON-5008072), Janssen Pharmaceuticals, Inc. (New Jersey corporation), Johnson & Johnson Inc. (New Jersey corporation; CD-9556010; NS-3295677; PE-27114), and McNeil Consumer Healthcare (New Jersey corporation; NB-638143; NS-3228064; NT-312233; NU-403280; ON-180467052; SK-0101263125; YT-220864) (collectively, "Janssen");

3) Mallinckrodt Canada ULC (BC-C1264033; NS-3296793), Mallinckrodt Hospital Products Inc. (Delaware corporation), and Mallinckrodt Pharmaceuticals plc (Ireland corporation) (collectively, "Mallinckrodt"); and

4) Purdue Frederick Inc. (CD-2556057), Purdue Pharma (NB-687604; ON-941377053), Purdue Pharma Inc. (CD-2555379), Purdue Pharma LP (Delaware corporation), P.F. Laboratories, Inc. (New Jersey corporation), and The Purdue Frederick Company Inc. (New York corporation) (collectively, “Purdue”).

(Collectively, the “Co-Conspirators”)

[9] The Plaintiff alleges that from 2002 onward, McKinsey worked in conjunction with and became integrated with the Co-Conspirators who manufacture, market, distribute and sell opioids in Canada.

[10] McKinsey and the Co-Conspirators are alleged to have acted pursuant to a common design to increase the market for opioids in Canada and the United States, extract more profits, and increase McKinsey’s consulting fees. The Plaintiff says that an opioid epidemic arose from the opioid manufacturers’ deliberately deceptive marketing strategy to expand opioid use. McKinsey helped orchestrate that strategy, supervised it, and coordinated it with its opioid manufacturer clients, including the Co-Conspirators, in exchange for a steady stream of lucrative consultancy fees.

[11] The Plaintiff asserts that McKinsey is both directly and jointly liable with its alleged clients for various causes of action, including: common law conspiracy; conspiracy to maintain prices contrary to ss. 45 and 46 of the *Competition Act*, R.S.C. 1985, c. C-34 [*Competition Act*]; misrepresentation contrary to ss. 36 and 52 of the *Competition Act*; negligence; unjust enrichment; and breaches of the *Quebec Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 and the *Civil Code of Quebec*, S.Q. 1991, c. 64. It alleges that McKinsey was a primary actor in an unlawful conspiracy that integrated itself into the day-to-day operations of the Co-Conspirators with the goal of addicting tens of thousands of vulnerable Canadians to opioids.

[12] The Plaintiff further alleges that he and the other putative class members suffered damages as a result of McKinsey’s alleged consulting work for manufacturers of opioids, including Purdue-related entities involved in the manufacture, marketing or sale of opioids in Canada.

[13] In his ANCC, the Plaintiff states that he does not seek damages concerning the portion of his losses or that of the proposed class which is: (a) attributable to the conduct of Purdue, as opposed to that of McKinsey or any of the other Co-Conspirators; (b) attributable to the consumption of OxyContin or OxyNEO, as opposed to any of the other opioids; and (c) attributable to conduct that occurred before April 15, 2016.

[14] The Plaintiff seeks to certify this action on behalf of all persons resident in Canada who were prescribed opioids and subsequently developed an addiction to opioids between 2002 and the date of certification of this action.

[15] McKinsey's response to the amended civil claim ("Response") denies all allegations in the ANCC (paras. 1–3) and says certain facts are outside its knowledge (para. 4).

[16] While on this application, McKinsey admitted that it provides advice to clients concerning their businesses, McKinsey says in para. 9 of its Response it never offered any consulting or advisory services in respect of opioid sales and marketing: (a) in Canada, for any of the "Co-Conspirators" alleged in the ANCC or any other person or entity; (b) in another country that were for the purpose of being used in Canada; (c) in another country that McKinsey authorized to be used in Canada; (d) in another country that McKinsey knew, understood, expected, or contemplated would or could be used in Canada; (e) in another country that was capable of being used in Canada without such material modification that the work ceased meaningfully to be the work of McKinsey; or (f) in another country that were ever, in fact, used in Canada.

[17] McKinsey therefore effectively denies the allegations in the ANCC that it was retained to work for Co-Conspirators, including the Purdue-related entities that signed the settlement agreement in 2017.

**B. The Settlement Agreement**

[18] Between 2007 and 2012, several class actions were commenced against Purdue on behalf of Canadian residents who developed an addiction to OxyContin and OxyNEO (as well as their family members who suffered a loss as a result) for common law and statutory breaches by Purdue in the distribution, sale, regulatory approval, regulatory compliance, and marketing of those drugs.

[19] All class member claims in the class actions across Canada were settled under the Settlement Agreement between Purdue Canada, Purdue USA, and all of the classes dated March 8, 2017. The Settlement Agreement 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 “Purdue Class Members”). The Settlement Agreement finally resolved all of the claims against Purdue pertaining to OxyContin and OxyNEO and serves as the exclusive remedy for all Purdue Class Members.

[20] There is no dispute that the Plaintiff in this case was a Purdue Class Member under the Settlement Agreement and that he did not opt out of the Agreement.

[21] Clause 16.2 of the Settlement Agreement contains a release under which each Purdue Class Member “shall be deemed by this Settlement Agreement to have completely and unconditionally released, forever discharged, and acquitted the Released Parties from any and all claims relating to the matters raised or which could have been raised in the Proceedings.”

[22] The Settlement Agreement defines the “Released Parties” as the Purdue Defendants “as well as”:

their respective predecessors, successors, parents, subsidiaries, affiliates, associated companies and divisions, and each of their respective current and former shareholders, officers, directors, employees, lawyers, attorneys, agents, insurers, trustees, assigns, owners, consultants, suppliers, distributors and partners.

[Emphasis added.]

[23] McKinsey submits that the definition of Released Parties is broad and includes not only all Purdue corporate entities but also parties who could have conceivably acted alongside Purdue in its sale and marketing of opioids in Canada.

[24] The Settlement Agreement provides that it shall operate “conclusively as an estoppel in the event of any claim, action, complaint or proceeding which might be brought in the future by such Class Member [...] with respect to the matters covered herein.”

[25] The Settlement Agreement was subject to court approval in Ontario, Nova Scotia, Quebec, and Saskatchewan. The Court of King’s Bench for Saskatchewan was the last court to approve the Settlement Agreement on September 23, 2022, per the Judgment of Chief Justice Popescul: *Carruthers v. Purdue Pharma*, 2022 SKKB 214.

### **C. The Subsequent Agreements**

[26] The Plaintiff points to three subsequent agreements that it says are relevant to the interpretation of the Settlement Agreement:

- a) An Agreement re Interpretation of Settlement Agreement (the “Interpretation Agreement”), dated July 13, 2022, which stipulates that the parties to the Settlement Agreement did not intend the settlement to include: (a) Purdue’s proportion of liability for harms, losses, or damages caused in Canada by opioids other than OxyContin® or OxyNEO®; or (b) other opioid manufacturers or distributors or suppliers’ proportion of liability for harms, losses or damages caused in Canada by opioids.
- b) A Waiver of Rights Agreement, dated August 4, 2022, stipulates that Purdue Canada has irrevocably and intentionally waived the right to assert that the Settlement Agreement releases several liability claims that any Settlement Agreement Class member has in Canada for harms, losses, or damages caused by opioids against Canada, against the McKinsey

entities who are defendants in the within action (provided there is no claim over against Purdue Canada, as is the case in the within action). The Waiver of Rights Agreement contains an undertaking from Purdue Canada not to preclude any Settlement Agreement Class member's several liability claims against McKinsey in Canada for harms, losses or damages caused by opioids in Canada.

- c) A Cooperation Agreement executed by Purdue Canada and Mr. Charlie (the plaintiff in the predecessor action to the within action) dated August 16, 2022. The Cooperation Agreement stipulates that in order to resolve Mr. Charlie's objection to the approval of the Settlement Agreement in Saskatchewan, for good and valuable consideration, Purdue Canada agrees to produce certain documents, including those produced by it in other litigation against McKinsey arising from the opioid epidemic, to plaintiff's counsel.

[27] The Plaintiff contends that these subsequent agreements were all entered into before the effective date for the Settlement Agreement (defined as the date on which all of the approval orders and dismissal orders have become final orders) and can therefore be considered in interpreting that settlement.

[28] By contrast, McKinsey argues that the subsequent agreements should only be resorted to if the Settlement Agreement is ambiguous, which it submits it is not.

### **III. APPLICABLE LEGAL PRINCIPLES**

#### **A. Application to Strike**

[29] The application is brought pursuant to R. 9-5(1)(d) of the *Rules* which enables the Court to strike a pleading where it constitutes an abuse of the court's process, including where a plaintiff seeks to relitigate issues previously decided.

[30] In *Chapman v. Canada*, 2003 BCCA 665, the Court of Appeal set out the criteria for applications brought under the then R. 19(24), which is the predecessor to R. 9-5(1):

[12] The criteria for application of all provisions of Rule 19(24) are established in authorities considered by the chambers judge: *Hunt v. Carey Can. Inc.*, [1990] 2 S.C.R. 959; *Berscheid v. Ensign*, [1999] B.C.J. No. 1172 (B.C.S.C.); *Babavic v. Babowech*, [1993] B.C.J. No. 1802, *World Wide Treasure Adventures Inc. v. Trivia Games Inc.* (1996), 17 B.C.L.R. (3d) 187 (B.C.C.A.), and *Kripps v. Touche Ross & Co.* (1990), 48 B.C.L.R. (2d) 171 (B.C.C.A.). The test is whether it is plain and obvious that the impugned pleading has the fault alleged. Otherwise the party whose pleading is challenged is entitled to a trial of the issue.

[13] The orders in this case were made under Rule 19(24)(a) and (d). Thus in order to succeed the applicant is required to establish that it is plain and obvious that the pleadings disclose no cause of action (Rule 19(24)(a)) or that the proceedings are an abuse of process (Rule 19(24)(d)). Otherwise the litigation will be allowed to proceed.

[Emphasis added.]

[31] Fundamentally, to strike a pleading under R. 9-5(1), it must be plain and obvious that the impugned pleading has the fault alleged: *Jensen v. Ross*, 2014 BCCA 173 at para. 39.

## **B. Abuse of Process**

[32] The defendants apply pursuant to R. 9-5(1)(d) of the *Rules* which provides as follows:

### **Scandalous, frivolous or vexatious matters**

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that [...]

(d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[33] As noted in *Jensen*, in *Babavic v. Babowech*, [1993] B.C.J. No. 1802, 1993 CarswellBC 2950 (S.C.), Justice Baker commented on the principle of abuse of process in an oft-cited passage:

[17] ... The principle of abuse of process is somewhat amorphous. The discretion afforded courts to dismiss actions on the ground of abuse of process extends to any circumstance in which the court process is used for an improper purpose. ...

[18] The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression.

[34] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, the majority described abuse of process in the context of determining whether relitigating would be detrimental to the adjudicative process:

[37] In the context that interests us here, the doctrine of abuse of process engages “the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute” (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute....

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

[Emphasis in original.]

[35] In *Willow v. Chong*, 2013 BCSC 1083, Justice Fisher (as she then was) described the circumstances under which a pleading will be struck under R. 9-5(1)(d):

[21] Abuse of process under Rule 9-5(1)(d) or the court’s inherent discretion is a flexible doctrine. It allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice. A claim may be struck where it is a collateral attack on an administrative decision that is subject to appeal or judicial review: *Cimaco International Sales Inc. v British Columbia*, 2010 BCCA 342; *Stephen v HMTQ*, 2008 BCSC 1656; *Varzeliotis v British Columbia*, 2007 BCSC 620; *Gemex Developments Corp. v City of Coquitlam*, 2002 BCSC 412; *Berscheid v Ensign*, [1999] BCJ No. 1172 (SC). A claim may also be struck as an abuse of process where it is an attempt to re-litigate an issue that has already been decided: *Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79*, 2003 SCC 63.

[Emphasis added.]

[36] More recently in *Keltic (Brighthouse) Development Ltd. v. Yi Teng Investment Inc.*, 2023 BCCA 375, Justice Saunders, writing for Justice Marchand (as he then was) and Justice Horsman, held that “[a] finding of abuse of process requires more than a finding of inconsistency... It needs, in the least, an aspect of diametric opposition in the pleadings and a degree of injustice”: para. 42.

[37] Evidence is admissible on an application to strike pursuant to R. 9-5(1)(d): *Boyd v. Cook*, 2016 BCCA 424 at para. 16. Abuse of process is a flexible doctrine, allowing the court to dismiss claims if the court's process is being used for improper purposes. It is a flexible doctrine “unencumbered by specific requirements”: *Ajvazi v. Century 21 Prudential Estates (RMD) Ltd.*, 2024 BCSC 276 at para. 51, citing *Krist v. British Columbia*, 2017 BCCA 78 at para. 52.

[38] In *A.M. v. Dr. F.*, 2021 BCSC 32 at para. 63, the Court held that courts should only strike pleadings as an abuse of process in the clearest of cases.

### C. Contractual Interpretation and Releases

[39] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Court summarized the law applicable to the interpretation of contracts as follows:

[47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine “the intent of the parties and the scope of their understanding” (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn

presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, per Lord Wilberforce)

[40] In *Corner Brook (City) v. Bailey*, 2021 SCC 29, the Court made clear that no special rules of contractual interpretation apply to releases. A release is a contract, and the general principles of contractual interpretation apply. At para. 35, the Court held that releases tend to have certain features that “may give rise to careful interpretations.” Quoting the BC Court of Appeal in *Strata Plan BCS 327, Owners v. IPEX Inc.*, 2014 BCCA 237, the Court held that while releases signed in the course of a settlement of a dispute are often worded in a broad and general fashion, appearing to cover the end of the world, they must be considered in the context of the dispute: para. 36. This context can serve as a limiting factor to the breadth of wording found in a release. The Court added the following:

[38] For these reasons, releases may tend to lead to dissonance between the words of the agreement on their face and what the parties seem to have objectively intended based on the surrounding circumstances, with greater regularity than other types of contracts: see Cass, at p. 89. In resolving this tension, courts can be persuaded to interpret releases narrowly more so than other types of contracts, not because there is any special rule of interpretation that applies to releases, but simply because the broad wording of releases can conflict with the circumstances, especially for claims not in contemplation at the time of the release. The broader the wording of the release, the more likely this is to be so.

[Emphasis added.]

[41] As to the relevance of subsequent conduct in interpreting the Settlement Agreement, evidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and factual matrix: *Wade v. Duck*, 2018 BCCA 176 at para. 31, citing *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 at para. 46. In *Shewchuk*, the Court cautioned that evidence of subsequent conduct has greater potential to undermine certainty in contractual interpretation and override the meaning of a contract’s written language: para. 42.

#### D. Third-Party Beneficiaries

[42] Assuming the Settlement Agreement is operative on the basis of the Plaintiff's claim, McKinsey submits that it is a third-party beneficiary to the Settlement Agreement and entitled to the benefit of it.

[43] In *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 SCR 299, 1992 CanLII 41 [*London Drugs*], the Court recognized the existence of common law exceptions to the doctrine of privity of contract. The Court in *London Drugs* described the exception recognized in that case as "a very specific and limited exception to privity" permitting employees who qualify as third-party beneficiaries to use their employer's limitation of liability clauses as shields in actions brought against them when the damage they caused was done in the course of employment and while they were carrying on the contracted services.

[44] In *Fraser River*, the Supreme Court affirmed a principled exception to the general doctrine of privity, which states that a contract can neither confer rights nor impose obligations on third parties. The exception is dependent upon the intention of the contracting parties. Specifically, the Court states:

[31] ... the determination in general terms is made on the basis of two critical and cumulative factors: (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

[45] In *Fraser River*, the Court found that both requirements were satisfied, and thus the defendant in an action for alleged marine negligence could rely on a clause under which the plaintiff's insurer had expressly waived any right of subrogation against "charterers" — a term that included the defendant.

[46] The parties have pointed to applications of *Fraser River* in British Columbia, including *Daum v. Borsuk*, 2020 BCSC 2013 at para. 56.

**IV. POSITION OF THE PARTIES**

**A. McKinsey's Position**

[47] McKinsey argues that Jamieson's claims only relate to Purdue, not the other defendants. It argues that Jamieson's claims are restricted to his facts, in that he was prescribed oxycodone which was manufactured by Purdue. This has a bearing on the remedy he is able to advance. McKinsey says that it clearly falls within the language of the Settlement Agreement. As Jamieson's claim only relates to McKinsey for its sales and marketing conduct as a consultant to Purdue, McKinsey submits that his claim is barred by the Settlement Agreement to which he was a party.

[48] McKinsey submits that the way the ANCC is structured is that McKinsey is a consultant. Essentially, the allegation is that McKinsey was the "hand in the glove" for Purdue.

[49] McKinsey argues that while it was not a party to the Settlement Agreement, it is entitled to rely on the release in the Settlement Agreement as a third-party beneficiary. It submits that it does not deny that it is a consultant, but does deny that it provided any consulting or advisory services to Purdue Canada. Regardless, the Settlement Agreement deals with both Purdue Canada and Purdue USA. As such, it falls within the terms of the release without the need to import extrinsic evidence into the record.

[50] McKinsey argues that the Settlement Agreement must be looked at objectively. The three documents that Jamieson points to were created long after the Settlement Agreement was made, and they are not part of the surrounding circumstances at the time the Settlement Agreement was entered into. Conceptually, such extrinsic evidence is not admissible unless there is ambiguity in the Settlement Agreement, which McKinsey submits there is not. McKinsey submits that the post-contractual conduct, including the Interpretation Agreement, the Waiver of Rights Agreement, and the Cooperation Agreement, do not vary the intent of the parties at

the time of the formation of the Settlement Agreement in part because those subsequent agreements were not signed by all parties to the Settlement Agreement.

[51] While there may be other class members based on McKinsey's work with other entities, McKinsey argues that Jamieson cannot bring those claims because his personal claim is only with respect to Purdue. As such, McKinsey seeks a final order striking out the ANCC as an abuse of process or alternatively a period of time for the claim to be adjusted.

**B. Jamieson's Position**

[52] The Plaintiff characterizes his claim in wider terms than McKinsey. He submits he has brought his action against McKinsey on behalf of individuals who consumed opioids. McKinsey has never negotiated or paid a settlement in Canada for its alleged conduct. Jamieson submits that the class members should have their day in court with respect to McKinsey's conduct.

[53] The Plaintiff argues that this is not a case that warrants the application of the abuse of process doctrine. He argues that 1) the nature of the allegations is that McKinsey was not just a consultant but a co-conspirator; 2) the Plaintiff has pleaded the several liability of McKinsey and does not seek to relitigate the Settlement Agreement; 3) the high threshold for abuse of process is not met here; and 4) McKinsey cannot rely upon the Settlement Agreement for the release of third parties.

[54] In making these arguments, the Plaintiff points out that McKinsey has filed no evidence supporting its abuse of process application. The Plaintiff says that it has structured his claim so that Purdue will be kept out of it. In this regard, he points to the carveout respecting Purdue in the ANCC.

[55] The Plaintiff submits that this provision limits its claims to several liability, and its ANCC does not seek to relitigate Purdue-related matters. It says that its claim respects the Settlement Agreement and that it has not and cannot add Purdue as a third party. Rather, its pleading is more expansive than the characterization offered

by McKinsey. He submits that it would be premature to decide the claim based on the abuse of process doctrine at this stage.

[56] The Plaintiff submits that even if the Settlement Agreement is found to apply, its claims cannot be struck as an abuse of process because he advances numerous claims against co-conspirators which are unrelated to those purportedly released in the Settlement Agreement.

**V. DISCUSSION**

[57] The fundamental difference between the parties turns on the scope of the Settlement Agreement and the extent to which that Agreement nullifies the Plaintiff's claims. These questions come before me in the context of an application to strike on the basis of an abuse of process in relation to the ANCC.

[58] In this context, I agree with the Plaintiff on several points that are sufficient to dispose of this application.

[59] First, I find that the record is not adequate to grant the order sought.

[60] Was McKinsey a consultant, partner, or other entity contemplated by the Settlement Agreement? I have no evidence on this question. The only evidence I have comes in the form of an affidavit from a senior law clerk, Deanna Watters, appending the various documents in issue. However, Ms. Watters offers no evidence of McKinsey's status or operations.

[61] McKinsey invites me to decide this issue on the basis of the pleadings and the limited evidence filed by the Plaintiff. However, I assess that the issue of whether McKinsey is a consultant or other entity contemplated by the Settlement Agreement is one that must be determined on a proper evidentiary foundation.

[62] Further, McKinsey has not tendered evidence on the critical factors identified in *Fraser River* at para. 31, namely:

- a) Whether the parties to the Settlement Agreement *intended* to extend the benefit of the release to McKinsey; and
- b) Whether McKinsey’s activities vis-à-vis Purdue in Canada come within the scope of the Settlement Agreement release, as determined by reference to the intention of the parties.

[63] While McKinsey argues the Settlement Agreement is unambiguous and it is unnecessary to resort to extrinsic evidence of intention, I am not satisfied that this is plainly and obviously so in light of the *dicta* in the caselaw above that suggests the context is important. The questions of intent and context are important questions which are directly relevant to the potential application of the third-party beneficiary protections enunciated in *Fraser River*.

[64] McKinsey denies that it was a consultant at all for Purdue in Canada or that it ever provided any consulting or advisory services in respect of opioid sales and marketing. I am told that no court has previously determined the nature or liability of McKinsey in Canadian opioid-related class proceedings litigation.

[65] McKinsey’s argument attempts to address whether “consultants” were released. It may ultimately be that all, some, or none of McKinsey’s activities fall within the scope of the Settlement Agreement. However, even taking the Settlement Agreement at face value as McKinsey asks me to do, I am left with an insufficient basis to decide the role, extent and nature of McKinsey’s activities and the extent to which it may be covered by the Settlement Agreement for the purposes of its abuse of process application.

[66] McKinsey may or may not ultimately be successful with its argument that the Settlement Agreement ought to apply in these circumstances. Based upon the pleadings alone and the limited evidence provided by the Plaintiff, it is not plain and obvious to me that allowing the Plaintiff’s claim to proceed would amount to an abuse of process such that the claim should be struck on this basis.

[67] Second, I find that the Plaintiff advances numerous claims that are arguably unrelated to those purportedly released by the Settlement Agreement.

[68] The ANCC includes elements of common design and conspiracy to increase the market for opioids. As well, the ANCC contains allegations against McKinsey that arguably go beyond the scope of a consultant's role, specifically that:

- a) McKinsey was integral to providing the North American conspiratorial strategy to boost the consumption of opioids;
- b) McKinsey's conduct went beyond advice and guidance and included supervision of the overall strategy to increase North American opioid sales;
- c) McKinsey's conduct was not a one-time involvement, but a years-long engagement with the opioid industry at large, including with multiple producers and regulatory bodies, with the primary goal of increasing opioid consumption;
- d) McKinsey's work for Purdue went far beyond the role of the traditional consultant by effectively dictating and overseeing corporate strategy; and
- e) McKinsey is alleged to have integrated itself into the day-to-day operations of the co-conspirators.

[69] McKinsey submits that the Plaintiff's claims arise out of the sale and marketing of Purdue-related opioids, and he has no other claim against McKinsey other than Purdue-related claims. However, given the manner in which the claim is framed, I am not convinced that the Plaintiff's claims in the ANCC are confined only to McKinsey's Purdue-related conduct covered by the Settlement Agreement.

[70] Third, the Plaintiff's amended pleadings expressly limit the damages sought from McKinsey to those based on McKinsey's several liability, which is arguably outside the Settlement Agreement. As noted in *The Owners of Strata Plan KAS3204 v. Navigator Development Corporation*, 2020 BCSC 1954 at para. 29, a plaintiff can

prevent a defendant from seeking contribution from another party by circumscribing the pleadings by only seeking damages attributable to the defendant's fault.

Similarly, a plaintiff can prevent a defendant from seeking contribution or indemnity from a particular party by expressly waiving any right to recover any portion of the loss ultimately attributed to that party's fault.

[71] As noted, to give effect to the finality of the Settlement Agreement, the Plaintiff has amended his ANCC to plead that he does not seek damages with respect to the portion of his losses or the proposed class members' losses that are attributable to the conduct of Purdue, the consumption of oxycontin or OxyNEO, and conduct that occurred before April 15, 2016.

[72] The Plaintiff only alleges the several liability of McKinsey and the damages attributable to McKinsey's conduct. By seeking only several liability in this manner, the Plaintiff has diminished concern over the extent to which its present claim amounts to an abuse of process.

[73] Finally, I agree with the Plaintiff that the subsequent agreements may be relevant to the question of the intention of the parties. In *Fraser River*, the Court offered the following guidance:

[35] Having concluded that the parties intended to extend the benefit of the waiver of subrogation clause to third parties such as Can-Dive, it is necessary to address Fraser River's argument that its agreement with the insurers to pursue legal action against Can-Dive nonetheless effectively deleted the third-party benefit from the contract. A significant concern with relaxing the doctrine of privity is the potential restrictions on freedom of contract which could result if the interests of a third-party beneficiary must be taken into account by the parties to the initial agreement before any adjustment to the contract could occur. It is important to note, however, that the agreement in question was concluded subsequent to the point at which what might be termed Can-Dive's inchoate right under the contract crystallized into an actual benefit in the form of a defence against an action in negligence by Fraser River's insurers. Having contracted in favour of Can-Dive as within the class of potential third-party beneficiaries, Fraser River and the insurers cannot revoke unilaterally Can-Dive's rights once they have developed into an actual benefit. At the point at which Can-Dive's rights crystallized, it became for all intents and purposes a party to the initial contract for the limited purposes of relying on the waiver of subrogation clause. Any subsequent alteration of the waiver provision is subject to further negotiation and agreement among all of the parties involved, including Can-Dive.

[36] I am mindful, however, that the principle of freedom of contract must not be dismissed lightly. Accordingly, nothing in these reasons concerning the ability of the initial parties to amend contractual provisions subsequently should be taken as applying other than to the limited situation of a third-party's seeking to rely on a benefit conferred by the contract to defend against an action initiated by one of the parties, and only then in circumstances where the inchoate contractual right has crystallized prior to any purported amendment. Within this narrow exception, however, the doctrine of privity presents no obstacle to contractual rights conferred on third party beneficiaries.

[Emphasis added.]

[74] As noted in *Corner Brook (City)* at para. 36, the context may provide an important limiting factor on the breadth of an otherwise wide-ranging release. In this case, McKinsey relies on the fact that the Settlement Agreement was executed in March of 2017. However, that Agreement came into force on its effective date, which was the date on which all of the approval orders and dismissal orders became final orders.

[75] By extension, the point at which McKinsey's rights materialized was arguably the point at which approval for the Settlement Agreement occurred, which was the effective date of the contract when all court approvals were granted. The Plaintiff submits and I accept that final approval of the Settlement Agreement was not granted until approved by the Court of King's Bench for Saskatchewan on September 23, 2022.

[76] This action was not commenced until January 20, 2023, which is after the Settlement Agreement came into effect. I do not propose to definitely decide the impact of the subsequent agreements at this stage. However, the context (which allows the subsequent agreements to become relevant on the issue of intent) and the "carveout" in the ANCC related to Purdue-related conduct undermine McKinsey's argument that court intervention is warranted to prevent unfairness in the circumstances.

[77] On the record before me, I cannot find that this is a clear case of the Plaintiff's claim in essence constituting an attempt to relitigate a claim that has already been determined by the Settlement Agreement.

**VI. CONCLUSION**

[78] This is an abuse of process application. It not been advanced on the basis that the claims have no prospect of success or on the basis of a complete evidentiary record. Rather, it is argued on the basis that it is plain and obvious that allowing the claim to proceed would violate the principles of judicial economy, consistency, finality and the integrity of the administration of justice.

[79] I find that that standard has not been shown here because the necessary degree of injustice in allowing the claim to proceed, over and above any apparent inconsistency, is lacking. I therefore decline to exercise my discretion to strike the Plaintiff's pleadings on the basis of an abuse of process.

[80] Despite the capable submissions of counsel for the defendant, the application is dismissed.

“Brundrett J.”