No. VLC-S-S-230495
Vancouver Registry

In the Supreme Court of British Columbia

B E T W E E N :

DAVID SCOTT JAMIESON

Plaintiff

- and -

MCKINSEY & COMPANY CANADA and MCKINSEY & COMPANY, INC., UNITED STATES

Defendants

Proceeding commenced under the *Class Proceedings Act*, RSBC 1996, c 50

APPLICATION RESPONSE

Application response of: DAVID SCOTT JAMIESON

THIS IS A RESPONSE TO the notice of application of the Defendants, McKinsey & Company Inc. United States and McKinsey Company Canada/McKinsey & Compagnie Canada, filed May 16, 2024.

The application respondent estimates that the application will take 1 day.

PART I. ORDERS CONSENTED TO

The application respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: N/A.

PART II. ORDERS OPPOSED

The application respondent opposes the granting of the orders set out in paragraph 1 of Part 1 of the notice of application.

PART III. ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of the orders set out in paragraphs [nil] of Part 1 of the notice of application.

PART IV. FACTUAL BASIS

Settlement of the Purdue class actions

1. As set out in the defendants' Notice of Application, several proposed class actions were previously commenced against Purdue[1] on behalf of Canadian users of Purdue's opioid products. This multiplicity of actions was resolved through a settlement (the "Purdue Settlement") on behalf of various settlement classes altogether comprising every Canadian who, at any time between January 1, 1996, and February 28, 2017, was prescribed and ingested OxyContin® or OxyNEO®, and any of their family members with statutory derivative claims (the "Purdue Settlement Class").[2]

2. The Purdue Settlement stipulated that Purdue would pay $20 million, all-inclusive, to satisfy the claims of the Purdue Settlement Class. Of that settlement fund, class counsel fees and disbursements in the amount of approximately $5 million were deducted. A further $2 million was paid in respect of the claims of the provincial & territorial health insurers. After the accumulation of interest, only approximately $15.64 million remained to satisfy the costs of administering the settlement, honoraria awards to 11 plaintiffs, and the actual claims of the Purdue Settlement Class (including not only users of Purdue opioid products but also their family members).[3]

3. The plaintiff does not dispute that he is a member of the Purdue Settlement Class.

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[1] Purdue Frederick Inc., Purdue Pharma, Purdue Pharma Inc., Purdue Pharma LP, P.F. Laboratories, Inc., Purdue Pharma Company, Purdue Pharmaceuticals L.P., and The Purdue Frederick Company Inc. (collectively, "Purdue").
[2] Purdue Settlement Agreement at para 2, Affidavit #1 of Deanna Watters, sworn May 10, 2024 ("Watters Affidavit'), Exhibit "A".
[3] *Perdikaris v Purdue Pharma Inc*, 2017 SKQB 287 at para 26.

4. To give effect to the finality of the Purdue Settlement, the plaintiff has amended his Notice of Civil Claim 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:[4]

(a) the conduct of Purdue, as opposed to that of the defendants ("McKinsey") or any of their other co-conspirators;

(b) the consumption of OxyContin® or OxyNEO®, as opposed to any other opioid products; and

(c) conduct that occurred before April 15, 2016 (the plaintiff understands that the effective date of the Purdue Settlement is February 28, 2017, and undertakes to further amend his claim to indicate that the February date should be the operative cut-off date for the carve-out).

5. The plaintiff acknowledges that the text of the initial Purdue Settlement agreement states that the Purdue Settlement Class members released their claims against Purdue's consultants, whether those claims were:[5]

> known or unknown, asserted or unasserted[…]including and without limitation, claims that relate to the manufacture, distribution, prescription, dispensing, sale, payment, purchase, use, ingestion, clinical investigation, administration, regulatory approval, regulatory compliance, promotion, research, design, development, formulation, marketing, labelling and product monograph of OxyContin® and OxyNeo®, alone or in combination with any other substance.

6. The text of the initial agreement itself does not, however, constitute the entirety of the Purdue Settlement. Before the settlement received final court approval—and therefore before the settlement became binding and could take effect, and before any third-party beneficiary rights of McKinsey crystallized—the terms of the proposed settlement were clarified and supplemented.

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[4] Amended Notice of Civil Claim ("ANOCC") at para 149.

[5] Purdue Settlement Agreement at para 2 "Released Parties", "Settled Claims", Watters Affidavit, Exhibit "A".

Interpreting the Purdue Settlement

7. The Purdue Settlement was executed on March 8, 2017, following which approval of the proposed settlement was sought before the courts of Ontario, Nova Scotia, Québec and Saskatchewan.

8. The first court approval of the Purdue Settlement was granted in the Ontario action in July 2017.[6] For a variety of reasons, however, the Purdue Settlement did not become a binding agreement until over five years later, when court approval was granted in the Saskatchewan action in September 2022.[7]

9. Because the settlement was multi-jurisdictional, the text of the Purdue Settlement was frozen at the time of the Ontario approval. The settlement remained legally only a proposal until all four court approvals were granted, but it was necessary for each court to consider and approve the same settlement. As a result, the text of the proposed settlement, including the wording of the class members' release of claims, could not be formally amended after July 2017, without the onerous task of restarting the entire court approval process and further delaying compensation for class members.

10. Since no formal amendments could be made to the Purdue Settlement, the only recourse available to memorialize the parties' intentions was to execute additional agreements relating to the proposed settlement.

11. The first of these agreements was the Interpretation Agreement, dated July 13, 2022, which stipulates that the parties to the Purdue Settlement did not intend the settlement to include:[8] (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.

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[6] *Perdikaris v Purdue Pharma Inc*, 2017 SKQB 287 at para 29.
[7] *Carruthers v Purdue Pharma*, 2022 SKKB 214 at paras 8-9, 118; *The Class Actions Act*, SS 2001, c c12, ss 38(1), (3).
[8] Agreement re Interpretation of Settlement Agreement, dated July 13, 2022 ("Interpretation Agreement"), Watters Affidavit, Exhibit "B".

12. McKinsey's Notice of Application refers to Purdue Canada's counsel expressing the view that the term "consultants" in the list of released parties in the Purdue Settlement includes McKinsey. This view is expressed in a December 10, 2021, letter from Purdue Canada's counsel to plaintiff's counsel in the within action,[9] and an affidavit of Purdue Canada's in-house counsel, sworn July 15, 2022.[10] These documents both predate, and are superseded by, the subsequent definitive expressions of Purdue Canada's position, as described below.

13. The Waiver of Rights Agreement, dated August 4, 2022, stipulates that Purdue Canada has irrevocably and *intentionally* waived the right to assert that the Purdue Settlement releases several liability claims that any Purdue Settlement 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).[11]

14. The Waiver of Rights Agreement also contains Purdue Canada's explicit undertaking not to preclude any Purdue Settlement Class member's several liability claims against McKinsey in Canada for harms, losses, or damages caused by opioids in Canada.[12]

15. Taken altogether, the undeniable effect of the Waiver of Rights Agreement is that Purdue Canada will not take the position, and, in fact, is estopped from taking the position, that the plaintiff and proposed Class' several liability claims against McKinsey in the within action are released by the Purdue Settlement.

16. Finally, Purdue Canada and Mr. Charlie (the plaintiff in the predecessor action to the within action, represented by the same counsel) executed a limited cooperation agreement (the "Cooperation Agreement"), dated August 16, 2022. The Cooperation Agreement stipulates that, in order to resolve Mr. Charlie's objection to the approval of

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[9] Letter from Cindy D. Clarke to David Sterns, dated December 10, 2021, Watters Affidavit, Exhibit "G".
[10] Affidavit of David Blais (without Exhibits), sworn July 15, 2022, Watters Affidavit, Exhibit "E".
[11] Waiver of Purdue Canada Rights Under Settlement Agreement, dated August 4, 2022 ("Waiver of Rights Agreement") at preamble, paras 1-2, Watters Affidavit, Exhibit "C".
[12] Waiver of Rights Agreement at para 3, Watters Affidavit, Exhibit "C".

the Purdue Settlement in Saskatchewan, for good and valuable consideration, Purdue Canada agreed to produce certain documents, including those produced by it in other litigation against McKinsey arising from the opioid epidemic, to plaintiff's counsel.[13]

17. In other words, prior to the Purdue Settlement becoming legally binding, Purdue Canada explicitly stated its intentions regarding the scope of the release. This included carving out any and all several claims against McKinsey. Purdue Canada then further specifically agreed to assist with the prosecution of the plaintiff and proposed Class members' claims as against McKinsey.

18. By contrast to Mr. Charlie's approach, McKinsey took no steps to confirm its rights before the Purdue Settlement took effect, or to engage with the Saskatchewan court approval process. As Mr. Charlie advised in his submissions before the Saskatchewan Court, his counsel wrote to counsel for McKinsey on four occasions in February and March 2022, regarding the possibility that the Purdue Settlement could, once approved, bar claims against McKinsey. Counsel for McKinsey declined to answer.[14]

19. Although the Purdue Settlement was approved by the court in Saskatchewan without amendment—and, indeed, McKinsey in its Notice of Application acknowledges that amendment would not have been possible without undertaking the burden of re-obtaining settlement approval from the other three courts—McKinsey's claim that "[p]laintiff's counsel abandoned the objection to the approval of the Purdue Settlement" is incorrect. Rather, as was made explicit in the correspondence, Mr. Charlie (through his counsel) considered his objection to be resolved due to the effect of the Waiver of Rights Agreement and the Cooperation Agreement.[15]

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[13] Agreement – Mr. Charlie and Purdue Canada, dated August 16, 2022 ("Cooperation Agreement"), as attached to the Letter from David Sterns to Bev McDonald, dated August 16, 2022, Watters Affidavit, Exhibit "I".
[14] Written Submissions of Sotos LLP and Goldblatt Partners LLP in their capacity as counsel for the objector, Jordan Francis Charlie, at paras 43-44, Watters Affidavit, Exhibit "H".
[15] Letter from David Sterns to Bev McDonald, dated August 16, 2022, Exhibit "I" to the Watters Affidavit.

PART V. LEGAL BASIS

20. The defendants are correct to assert that, as non-contracting parties, they might nevertheless be third party beneficiaries of the Purdue Settlement. Their application cannot succeed, however, because they have failed to prove either element of the test for entitlement to third party beneficiary status:[16]

(a) McKinsey has not proved that the parties to the Purdue Settlement intended to extend the benefit of the release to McKinsey; and

(b) McKinsey has not proved that its activities vis-à-vis Purdue in Canada are activities contemplated as coming within the scope of the Purdue Settlement release, as determined by reference to the intention of the parties.

21. Even if the Purdue Settlement release is found to apply, in full, to McKinsey, this action cannot be struck as an abuse of process because it advances numerous claims which are unrelated to those purportedly released in the Purdue Settlement.

It is premature to determine the release's applicability

22. It is premature to determine whether this action is an abuse of process, given the plaintiff alleges that McKinsey was more than a "consultant" and McKinsey denies it was a "consultant" at all.[17] No court has previously determined the nature or liability of McKinsey in the Canadian opioid crisis.

23. The defendants' evidence on this application attempts to address only whether "consultants" were released, not what McKinsey's conduct was nor whether McKinsey was a "consultant".[18] Based on the affidavit filed, pleadings, and live dispute regarding the quality of McKinsey's conduct, the defendants have not adduced any evidentiary basis on which to ground the determination on abuse of process that they seek.

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[16] *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108 at para 31.
[17] Response to the Amended Notice of Civil Claim, dated March 20, 2024 ("Response to Civil Claim"), at para 9.
[18] No representative of any of the McKinsey entities swore an affidavit on the motion.

24. The plaintiff pleads that the defendants, McKinsey & Company Canada and McKinsey & Company, Inc., United States, operated as a single global entity, and that McKinsey is a "truly global firm".[19] The plaintiff pleads further that McKinsey is unlike other consultants due to its integration into client companies, its comprehensive North American strategy to boost the sale of opioids, and its role as an active co-conspirator in the opioid epidemic.[20]

25. The Amended Notice of Civil Claim contains allegations against McKinsey that are beyond the scope of a consultant, specifically:

(a) McKinsey was integral to providing the North American conspiratorial strategy to boost the consumption of opioids;[21]

(b) McKinsey's conduct went beyond advice and guidance and included supervision of the overall strategy to increase North American opioid sales;[22]

(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; and[23]

(d) "McKinsey's work for Purdue went far beyond the role of the traditional consultant. McKinsey partners effectively dictated and oversaw corporate strategy. McKinsey was an active co-conspirator."[24]

26. McKinsey's response to the above allegations is to deny that they were ever a consultant, yet still insist on receiving the benefit of being a "consultant". In its own Response to the Amended Notice of Civil Claim, dated March 20, 2024, McKinsey pleads:[25]

> 9. McKinsey never provided any consulting or advisory services in respect of opioid sales and marketing:

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[19] ANOCC at para 10.
[20] ANOCC at paras 11, 12, 71 and 101.
[21] ANOCC at paras 29-30.
[22] ANOCC at para 31.
[23] ANOCC at para 52.
[24] ANOCC at paras 71 and 101.
[25] Response to Civil Claim at para 9.

> (a) in Canada, for any of the "Co-Conspirators" alleged in the ANOCC 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.

27. Rule 9-5(1)(d) permits the Court to strike out or amend the whole, or any part of a pleading, because it is an abuse of the court's process. There is a "high bar" set for the applicants: the test to be satisfied under Rule 9-5 is "whether 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".[26]

28. The defendants do not meet the high bar of Rule 9-5(1)(d).

29. The true nature and legal implications of McKinsey's alleged conduct are live issues in this proceeding. Whether McKinsey was a "consultant" within the meaning of the release is a key question that is not ripe for determination, as made clear in the Amended Notice of Civil Claim and Response to Civil Claim.

30. Allowing the plaintiff's claim to proceed would not be manifestly unfair nor would it bring the administration of justice into disrepute.[27] Conversely, striking the claim would undermine the administration of justice. McKinsey seeks to simultaneously deny any role as a consultant in the opioid epidemic, yet still benefit as a third party to a release given to Purdue Canada that names "consultants".

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[26] See *e.g. 311165 BC Ltd v Canada (Attorney General)*, 2016 BCSC 2068 at para 90; *Willow v Chong*, 2013 BCSC 1083 at para 21.
[27] See also *Sumas Remediation Services Ltd v Crowe MacKay LLP*, 2018 BCSC 782, and cases cited therein, a decision of this Court holding that determination of a similar issue regarding applicability of a release to a purported third party beneficiary was not even suitable for determination by way of summary trial.

The parties to the Purdue Settlement did not intend to release McKinsey

31. Even if the determination of this issue is not premature, as noted above, the defendants have wholly failed to prove that the release of all claims against them was the intention of the contracting parties, which is required to fit within this "narrow exception" to privity of contract.[28]

32. The defendants state baldly that McKinsey's inclusion in the Purdue Settlement as a "consultant" is clear and unambiguous, and that there is an objective intention from the parties to release McKinsey from the plaintiff and proposed Class' claims. While the text of the Purdue Settlement does include consultants as a category of released parties, the specific inclusion of the McKinsey entities as releasees is anything but clear and unambiguous.

33. Despite being unable to formally amend the text of the Purdue Settlement agreement for practical, procedural reasons, Purdue Canada nevertheless took clear steps to demonstrate that it had no intention of conferring the benefit of the release on McKinsey.

34. The Waiver of Rights Agreement establishes that Purdue Canada does not intend to avail itself of key benefits of the release that it negotiated and paid for, insofar as McKinsey is concerned. To conclude that Purdue Canada intended to allow McKinsey the full benefit of a broad release (for free), while Purdue Canada is itself estopped from relying on the full benefit of said broad release (despite paying for it) defies logic. A wholly illogical result cannot be assessed to be the objective intent of a sophisticated commercial entity in full possession of its bargaining power.

35. The Cooperation Agreement requires that Purdue Canada assist, at least in some limited fashion, with the prosecution of the plaintiff and proposed Class members' claims as against McKinsey. This, too, is incompatible with a finding that Purdue Canada

[28] *Holmes v United Furniture Warehouse GP*, 2012 BCCA 227 at para 19.

objectively intended to release McKinsey from those very same claims with which it will be assisting.

36. Further, the text of the Cooperation Agreement establishes that Purdue Canada intentionally bargained with Mr. Charlie, a Purdue Settlement Class member, in order to obtain the benefit of the withdrawal of his objection and further its goal of obtaining approval of the Purdue Settlement. Purdue Canada's explicit, freely made bargain with Mr. Charlie and his counsel is much stronger evidence of objective intention than silence regarding McKinsey as a "consultant".

37. The defendants' reliance on certain outdated statements from Purdue Canada is misplaced. As confirmed by the Supreme Court in *Fraser River Pile & Dredge Ltd. v. Can-Drive Services Ltd.*, [1993] 3 SCR 108, which remains the leading authority on this point, the operative time is when the "inchoate contractual right has crystallized"[29] – which, in this case, would be when the Purdue Settlement received final court approval and came into effect.

38. The defendants state in their Notice of Application that Purdue Canada "had no unilateral authority to amend the Purdue Settlement by waiving or otherwise circumscribing the rights of third-party beneficiaries". What they fail to apprehend is that any purported third-party beneficiaries had no rights as at the time of the signing of the Waiver of Rights Agreement, and all parties to the Purdue Settlement were free to vary their intent regarding the conferring of benefits on potential third parties. It was not until court approval was complete in September 2022 that all interested parties' rights crystallized as a result of the terms of the Purdue Settlement becoming binding.

39. The defendants in their Notice of Application do not reference the intent of the plaintiffs named in the Purdue Settlement, or the Purdue Settlement Class. The plaintiffs party to the Purdue Settlement are all members of the proposed Class in the within action, and their objective intentions must be examined accordingly.

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[29] *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108 at para 35.

40. Since the claims in the within action are limited to McKinsey's several liability, and Purdue Canada has signed the Waiver of Rights Agreement, there is no benefit, and there is substantial potential cost or loss to relinquishing these potential claims against McKinsey. Here, again, a wholly illogical result cannot be assessed to be the objective intent of the entire collective.

41. To the extent that there is ambiguity or uncertainty regarding whether the general term "consultants" was intended by the Purdue Settlement parties to release McKinsey specifically, *contra proferentem* operates to require that ambiguity regarding a limitation of liability provision must be construed against the parties seeking to rely on the provision.[30] This is particularly apt when considering that this form of collective release, where individual class members have no bargaining power, is akin to a contract of adhesion for them.

Allegation of several liability prevents an abuse of process

42. The principle of finality is central to this application. In respect of Purdue, the plaintiff alleges only the several liability of McKinsey and the damages attributable to McKinsey's conduct.[31] Purdue's settlement and the finality it bought is left intact and there is no mischief in allowing the claim to continue.

43. McKinsey has never entered into any settlement in Canada and the plaintiff's claim does not offend any final settlement to which McKinsey is a party. The structure of the plaintiff's claim for several liability ensures that the finality of the Purdue Settlement is

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[30] *Bauer v The Bank of Montreal*, [1980] 2 SCR 102 at p 108; see also *e.g. Felty v Ernst & Young LLP*, 2013 BCSC 815 at para 153, wherein this Court confirmed that any ambiguity with regard to a limitation of liability clause must be resolved in favour of the party seeking to avoid its application; and *Smeland v Montgomery*, 2013 BCSC 789 at para 30, citing *Consolidated-Bathurst v Mutual Boiler* (1979), [1980] 1 SCR 888, pp 888-89, linking this issue back to the overarching principle that the true intention of the parties is what governs contractual interpretation. Note also that the test for implying intent is restrictive and requires that the "other" contracting party (*i.e.* the plaintiffs party to the Purdue Settlement) could be taken to know that the services to be provided would be performed by the unnamed party (*i.e.* McKinsey), which McKinsey has also failed to prove: *Strata Plan VR 2213 v Schappert*, 2023 BCSC 2080 at paras 62-64; *Orange Julius Canada Ltd v Surrey (City of)*, 2000 BCCA 467.

[31] ANOCC at para 149.

respected and there is no ability for McKinsey to claim over against Purdue Canada.[32] To date, McKinsey has also not sought to claim over as against Purdue.

44. Striking the plaintiff's claim would be, by far, the greater interference with the administration of justice, by denying a large, vulnerable class their day in court as against defendants who have never paid for, or negotiated for, a release of claims.

The plaintiff's claim should not be struck in its entirety

45. In the alternative to the above, if this Court finds that the defendants are third-party beneficiaries and the claim is an abuse, striking the entire claim is too broad of a remedy.

46. The Interpretation Agreement confirmed that "Settled Claims" released in the Purdue Settlement did not include the Released Parties' proportion of liability for harms, losses, or damages caused in Canada by released parties' opioids other than OxyContin® or OxyNEO®, or in respect of individuals who were prescribed and ingested opioids after February 28, 2017.[33] McKinsey conduct in respect of other Opioids, as defined in the Amended Notice of Civil Claim, and/or the post-February 2017 Class members' harms, losses, or damages, is not covered by the "Settled Claims" in the Purdue Settlement.

47. If the defendants are entirely successful on their Application, the appropriate remedy is an amendment to the claim to carve-out only claims arising from those harms, losses, or damages actually forming part of the "Settled Claims" in the Purdue Settlement.

PART VI. MATERIAL TO BE RELIED ON

1. Affidavit #1 of Deanna Watters, sworn May 10, 2024

2. Pleadings filed in the within action

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[32] *JK v Ontario*, 2017 ONCA 902 at paras 32-34; Waiver of Rights Agreement, Watters Affidavit, Exhibit "C".
[33] Interpretation Agreement, at para 2(b), Watters Affidavit, Exhibit "B".

The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Date: 26 June, 2024

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Signature of
lawyer for applicant(s)

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