

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *McKinsey & Company, Inc. United States*
v. British Columbia,
2026 BCCA 284

Date: 20260625
Docket: CA50826

Between:

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

Appellants
(Defendants)

And

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

Respondent
(Plaintiff)

Before: The Honourable Justice Fisher
The Honourable Justice Iyer
The Honourable Justice Warren

On appeal from: An order of the Supreme Court of British Columbia, dated
June 13, 2025 (*British Columbia v. McKinsey & Company, Inc. United States*,
2025 BCSC 1094, Vancouver Docket S2111367).

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Place and Date of Hearing: Vancouver, British Columbia
January 22, 2026

Place and Date of Judgment: Vancouver, British Columbia
June 25, 2026

Written Reasons by:
The Honourable Justice Fisher

Concurred in by:
The Honourable Justice Iyer
The Honourable Justice Warren

Summary:

This appeal concerns class proceedings brought by the Province of British Columbia on behalf of itself and other governments in Canada against the appellant companies, who had provided marketing advice to manufacturers and distributors of opioid products. The issue involves the certification requirement that a plaintiff show “some basis in fact” that the claims of class members raise common issues, more particularly whether a plaintiff must adduce evidence to show not only that the issue is common but also that the common issue exists.

The appellants challenge the order certifying the action on the basis that the judge (1) applied an incorrect test in assessing whether the commonality requirement in s. 4(1)(c) of the Class Proceedings Act had been established, or (2) erred in his application of the test in concluding there was some basis in fact that the claims raise common issues.

Held: Appeal dismissed. The certification judge applied the correct test and made no palpable and overriding error in his assessment of the evidence in the record before him. The jurisprudence establishes a low evidentiary standard that requires some minimal evidence that supports the existence of the claim as relevant to commonality. The type and level of evidence required in each case is highly fact specific.

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Reasons for Judgment of the Honourable Justice Fisher:

Introduction

[1] This appeal concerns the requirement in s. 4(1)(c) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (*CPA*), that a plaintiff show “some basis in fact” that the claims of class members raise common issues. The question is whether a plaintiff must adduce evidence to show not only that the issue is common but also that the common issue exists.

[2] The class proceeding underlying this appeal is brought by His Majesty the King in Right of the Province of British Columbia (the Province) on behalf of itself and other federal, provincial and territorial governments against the defendants McKinsey & Company, Inc. United States and McKinsey & Company Canada (together McKinsey), who are consultants alleged to have provided marketing advice to opioid manufacturers and distributors of opioid-related products in Canada. The action seeks to recover healthcare, pharmaceutical and treatment costs related to opioids on behalf of the members of the class and a subclass of governments that have enacted legislation directed at recovering damages and healthcare costs arising from the opioid epidemic in Canada.

[3] This action is a companion proceeding to a class action brought by the Province against numerous pharmaceutical manufacturers, wholesalers and distributors alleged to have been involved in the manufacture, marketing, distribution and sale of opioid products in Canada (the Main action). In the Main action, the Province alleges the defendants, individually, as part of corporate families, and in common with other defendants, contributed to creating the opioid crisis by misrepresenting or failing to warn about the addictive characteristics of these drugs and promoting their use for conditions for which they are not suited. It alleges systemic and industry-wide conduct linked to the level of knowledge each group of defendants had about the attributes and effects of opioids and asserts actions under both common law and statute based on agency, common design and civil conspiracy. The statutory claims are brought under the *Opioid Damages and Health*

Care Costs Recovery Act, S.B.C. 2018, c. 35 (*ORA*), which provides the Province with a direct cause of action against a manufacturer, wholesaler, or consultant to recover the cost of health care benefits caused or contributed to by an “opioid-related wrong”. The Main action was certified by Justice Brundrett (as he then was), who was tasked with case managing both the Main Action and this proceeding. That decision was upheld by this Court: *British Columbia v. Apotex Inc.*, 2025 BCSC 92 [*Apotex BCSC*], aff’d *Noramco LLC v. British Columbia*, 2026 BCCA 272 [*Noramco*].

[4] The claims in this case allege that McKinsey provided advisory services to three pharmaceutical manufacturers, Purdue Pharma LP and its related companies in the United States and Canada (Purdue), Janssen Inc. and its parent company Johnson & Johnson (Janssen) and Endo Pharmaceuticals Inc. and its related companies (Endo), and one distributor, McKesson Canada Corporation and its parent company McKesson Corporation (McKesson), with respect to the promotion, marketing, sale or distribution of opioids in Canada. It is alleged that the businesses of the two McKinsey defendants are inextricably interwoven and McKinsey worked closely with Purdue, Janssen, Endo and McKesson (and others) by integrating itself into their organizations to increase the sale and distribution of opioids to consumers for unsuitable uses despite McKinsey’s knowledge that opioids are addictive.

[5] As in the Main action, the claims against McKinsey are brought under both common law and statute to recover health care costs associated with the opioid crisis in this country. The claims allege breach of s. 52 of the *Competition Act*, R.S.C. 1985, c. C-34, conspiracy and common design liability. The claims also allege “opioid-related wrongs” under the *ORA* that include conspiracy, negligent misrepresentation, negligent failure to warn, fraudulent misrepresentation and breach of s. 52 of the *Competition Act*.

[6] In reasons indexed as 2025 BCSC 1094 (the RFJ), Justice Brundrett certified the action, finding the Province had shown some basis in fact for each of the certification requirements in s. 4(1)(b)–(d) of the *CPA*. The cause of action

requirement in s. 4(1)(a) was not in issue, as Justice Brundrett had previously dismissed a motion by McKinsey to strike the Province's pleadings, and that decision was also upheld on appeal: *British Columbia v. McKinsey*, 2023 BCSC 1762, aff'd *McKinsey & Company, Inc. United States v. British Columbia*, 2024 BCCA 277.

[7] The judge described further detailed allegations in the Amended Notice of Civil Claim (AN OCC) as follows:

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

[8] McKinsey denies these claims and says the Province has not established some basis in fact that there are common issues against it for opioid-related work in Canada. In support of this position, McKinsey provided evidence that it was not involved in advising on marketing or sales strategies for opioid products in Canada or in the Canadian market. It says the judge relied on the pleadings and the Province's legal theory, not facts, to conclude that the claims raise common issues in accordance with s. 4(1)(c) of the CPA.

The claim against McKinsey

[9] Against the background of the Province's assertions about the opioid epidemic and the marketing and distribution of opioids in Canada, the claim against McKinsey is based on its alleged advisory services to opioid manufacturers and distributors in relation to the sale of these drugs in Canada. The allegedly false and

misleading representations about the safety and efficacy of opioids include the following “Opioid Misrepresentations”:

- a) patients using Opioids for pain would experience improvement to function and quality of life without adverse effects;
- b) patients using Opioids for pain generally would not become addicted and that doctors could use screening tools to exclude patients who might;
- c) withdrawal from Opioid use was easily managed;
- d) Opioid use relieved pain when used long-term without significant risk;
- e) there was little risk of adverse effects of Opioid use;
- f) certain long-acting Opioids provided 12 hours of pain relief;
- g) Opioids could be taken in higher and higher doses without increased risk to patients; and
- h) abuse-deterrent Opioid formulations were safer and lowered the potential of abuse.

[10] The Province alleges McKinsey “knew or ought to have known” the Opioid Misrepresentations were not supported by or were contrary to scientific evidence and it carried out “false, reckless, and deceptive marketing campaigns”. It says McKinsey played an instrumental role in working with manufacturers to develop and implement strategies to increase sales despite its knowledge that opioids were addictive. These strategies included targeting physicians who prescribed the most opioids, focusing on selling higher strength dosages, paying rebates to health insurers when patients overdosed, lobbying pharmacies to increase sales, establishing direct market sales to customers, and increasing sales quotas to sales representatives and awarding bonuses to motivate them.

[11] More specifically, the Province alleges McKinsey partnered with Purdue, Janssen and Endo to develop marketing strategies in Canada and asserts claims of unlawful common design and unlawful conspiracy to increase the market for opioid products in Canada.

[12] With respect to Purdue, the Province alleges that McKinsey worked with Purdue in the U.S. from 2004 to 2018, and the tactics McKinsey “developed,

recommended and implemented in the U.S. were also designed to be used, and were used, in Canada”. It alleges McKinsey knew or ought to have known that:

- a) Purdue US was related to Purdue Canada, as they shared overlapping directors and/or executives and were both privately owned by the Sackler family;
- b) Opioid prescription rates, Opioid-related deaths, and other harms related to Opioids had increased in Canada at similar rates to the US; and
- c) the Opioid marketing advice and strategies developed and implemented for Purdue US were intended for use by and would also be implemented by Purdue Canada.

[13] The allegations concerning Janssen are that McKinsey prepared a report for Johnson & Johnson in 2002 about the marketing of a drug called Duragesic to physicians who were prescribing high amounts of Oxycontin, which strategies were followed by Janssen in Canada. It alleges McKinsey knew or ought to have known:

- a) Janssen Inc. was a subsidiary of Johnson & Johnson;
- b) Opioid prescription rates, Opioid-related deaths, and other harms related to Opioids had increased in Canada at similar rates to the US; and
- c) the Opioid marketing advice and strategies that had been developed and implemented for Johnson & Johnson were intended for use by and would also be implemented by Janssen Inc.

[14] The claims concerning Endo are similar to those against Purdue and Janssen and include unlawful common design and conspiracy involving Endo and its related companies, including Paladin Labs, a Canadian company. The Province alleges McKinsey worked on behalf of Endo to market opioid products and the tactics recommended for sale in the U.S. were followed by Endo in marketing these products in Canada. It alleges McKinsey knew or ought to have known:

- a) the Endo entities were related;
- b) Opioid prescription rates, Opioid-related deaths, and other harms related to Opioids had increased in Canada at similar rates to the US; and
- c) the Opioid marketing advice and strategies that had been developed and implemented for Endo in the United States were intended for use by and would also be implemented in Canada.

[15] As for McKesson, the Province alleges McKinsey also provided advisory services to opioid distributors in relation to the distribution of opioids in Canada. It

alleges McKinsey was hired by McKesson to develop, recommend and implement strategies with respect to McKesson's interactions with other entities in the opioid supply chain to maximize sales of opioids, and the strategies recommended by McKinsey regarding the distribution of opioid products in the U.S. were also used by McKesson in its distribution of opioid products in Canada. It alleges McKinsey knew or ought to have known that:

- a) McKesson Canada was a subsidiary of McKesson Corporation;
- b) Opioid prescription rates, Opioid-related deaths, and other harms related to Opioids had increased in Canada at similar rates to the US; and
- c) the Opioid distribution advice and strategies that had been developed and implemented for McKesson Corporation were intended for use by and would also be implemented by McKesson Canada.

[16] The proposed common issues include questions of fact as to whether McKinsey:

- provided advisory services to a manufacturer or a wholesaler in relation to the distribution or sale of opioid products, and if so, which manufacturer(s) or wholesaler(s);
- made one or more of the Opioid Misrepresentations;
- knew about the risks and benefits of opioid use;
- acted pursuant to a common design or conspired with Purdue, Janssen, Endo and/or McKesson;
- knowingly or recklessly made false or misleading representations for the purpose of promoting the supply or use of the product.

[17] They also include questions of law as to whether McKinsey owed any common law, statutory or equitable duties to end users of opioids. Attached as Appendix A to these reasons is the list of common issues approved by the judge (with leave to make amendments relating to a release by Purdue and to clarify an

allegation of joint participation by the McKinsey defendants in making the Opioid Misrepresentations).

Certification requirements

[18] The *CPA*, in s. 4(1), sets out five requirements for certification, all of which must be met. This appeal concerns only s. 4(1)(c):

- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

[19] Common issues are defined in s. 1 as:

- (a) common but not necessarily identical issues of fact, or
- (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; ...

[20] A common issue is one where its resolution is necessary to the resolution of each class member's claim but it is not essential that the class members be identically situated as against the defendants. Success for one class member must mean success for all, but again, it is not necessary that the success be to the same extent for all members: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 39–40 [*Dutton*].

[21] The focus of certification is on the appropriate form of the action, not the merits. The plaintiff, who bears the onus of establishing the requirements, must show “some basis in fact” that the claims raise common issues. This is a low threshold, which I discuss more fully below, as it is the meaning of this standard that is in issue in this appeal.

The decision below

[22] As the “some basis in fact” threshold applies to the common issues requirement in s. 4(1)(c) of the *CPA*, the certification judge focused much of his analysis on the factual evidence provided by each party. Before doing so, however, he summarized the applicable legal principles.

Legal principles

[23] The judge noted that the certification stage is not meant to be a test of the merits of the action but rather is “concerned with the form of the action and whether it can properly proceed as a class action”: RFJ at para. 151, citing *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16 [*Hollick*] and *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 99 [*Pro-Sys*]. He identified the “commonality threshold” as low and as stated by this Court in *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 22 [*Finkel*], “a triable factual or legal issue which advances the litigation when determined will be sufficient”: RFJ at para. 151. He referred to the summary of principles set out in *Pro-Sys* at para. 108 and adopted his reasoning in *Apotex BCSC* at paras. 580–593, which included an analysis of the “some basis in fact” standard as follows:

[583] In analyzing whether there is some basis in fact for a common issue, the court must consider the language of the common issue that is proposed and whether there is some evidence that supports the argument that it is a common issue across members of the class. This is a low threshold. The purpose of the requirement is to ensure there is a minimum evidentiary foundation to support the certification order: *Nissan* at paras. 133-134. A pleading, legislation or legal principles can support the existence of an issue, and together with some evidence of commonality, will meet the certification test, but merely pleading an issue does not make it common: *Bowman* at para. 136.

[24] As in the Main action, the parties disagreed on the proper approach to commonality, the appellant arguing that a two-step approach, which asks first whether there is some basis in fact that the issue exists, and second whether the issue is common, is required. This approach has been applied in various decisions across the country, including *Jensen v. Samsung Electronics Co. Ltd.*, 2023 FCA 89 (affirming 2021 FC 1185) [*Jensen*].

[25] In *Apotex BCSC*, as adopted in the decision below, the judge observed that the courts in British Columbia have generally not found a two-step approach to be useful, citing *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338 [*Nissan*], *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127, and several trial level decisions. He did not find it useful to focus on whether the approach should involve one step or two

and focused instead to ensure his analysis was not “out of step with applicable principles in the guiding authorities” that included *Dutton*; *Hollick*; *Pro-Sys*; *Harrington v. Dow Corning Corp.*, 2000 BCCA 605 at para. 20; *Watson v. Bank of America*, 2015 BCCA 362 at para. 152; *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 104 [*Ewert*]; *LaSante v. Kirk*, 2023 BCCA 28 at para. 61; *Rorison v. Insurance Corporation of British Columbia*, 2023 BCCA 474 at paras. 111–112; *Nissan and Mentor Worldwide LLC: Apotex BCSC* at paras. 591–592. He adopted the same conclusion set out in *Apotex BCSC*:

[593] These authorities provide that for the commonality test in s. 4(1)(c) of the *CPA*, the court must consider the language of the common issue that is proposed, and whether there is some basis in fact, as opposed to no basis in fact, that supports the argument that the issue is a common across members of the class: *Nissan* at para. 132; *Mentor Worldwide LLC* at para. 33. The underlying question is whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis: *Pro-Sys* at paras. 108, 110.

The parties’ positions

[26] McKinsey’s position before the certification judge was the same as before this Court: the Province has not established “some basis in fact” that common issues exist as against McKinsey for opioid-related work in Canada. It submitted that any work product McKinsey U.S. prepared for use in the U.S. could not have been taken by a client and adopted in Canada without significant modification to the extent it could no longer be said to be McKinsey’s work product.

[27] The Province’s position was also the same: it has established “some basis in fact” that the proposed common issues are common, in that their resolution will advance the claims as a whole, and McKinsey’s position is inconsistent with the governing authorities that say the merits are not to be considered. The Province submitted it has met its burden whether the analysis requires one step or two. It also submitted that even if McKinsey was not retained to consult on opioid marketing in Canada, it should have known the advice it gave in the U.S. would be used in Canada.

The evidence

[28] The Province's evidence before the certification judge consisted primarily of documents from publicly accessible sources about the opioid crisis in Canada and the U.S., McKinsey's business structure and consulting work relating to the opioid crisis, U.S. opioid litigation against McKinsey, a U.S. investigation into McKinsey's consulting services, and an extensive collection from the U.S. Opioid Industry Documents Archive (OID Archive) related to McKinsey's opioid work for various pharmaceutical companies including Purdue, Endo and Johnson & Johnson. These documents were appended to the affidavit of a paralegal at the office of counsel for the Province.

[29] The judge accepted that this evidence established some basis for several broad propositions about the opioid epidemic in Canada and the role played by prescription opioids. This was not in dispute. He identified the issue raised by McKinsey as whether the Province established that McKinsey had "offered advisory services or made Opioid Misrepresentations in Canada or in the United States directed at a Canadian consumer". To address this, he considered the following evidence adduced by the Province:

- McKinsey's description that it is "designed to operate as one – a single global partnership united by a strong set of values";
- McKinsey's work in the U.S. with Purdue, Janssen and Endo as disclosed in the OID Archive, including:
 - McKinsey's acknowledgement it had played a role in Purdue's opioid-related work in the U.S.;
 - McKinsey's attempt to do work for Purdue Canada, including a "pitch" made in 2013 that addressed growth opportunities for hydromorphone, physician prescribing, and the decline in the market for OxyNEO in Canada and information that appeared to link McKinsey with Purdue Canada such as engagements in North America;

- McKinsey's communications with Janssen in 2008 and 2011 about strategic options to increase Janssen's portfolio of opioid drugs and how to "turbocharge" sales of Nucynta, an opioid product;
- Correspondence, presentations and meeting agendas linking McKinsey and Janssen that suggested McKinsey's consulting services were either directly provided for the Canadian market or its U.S. advice was implemented in Canada;
- A complaint made by a trustee in U.S. bankruptcy proceedings involving Endo that alleged McKinsey was a "principal architect" of the opioid crisis, having embedded itself with Endo (and other large manufacturers) and "knowingly assisted in implementing aggressive and deceptive sales practices to ensure opioids were prescribed regardless of the risk of abuse and addiction";
- McKinsey's work with Endo on a "Sales Force Blitz" to increase sales for an Endo opioid product known as Belbuca;
- Information that indicated McKinsey's consulting services for Endo were either directly provided for the Canadian market or its U.S. advice was implemented in Canada;
- A slide deck that referred to McKinsey's engagement with Endo and listed key Canadian products of Paladin Labs (a Canadian company acquired by Endo);
- A reference by a McKinsey associate in a 2007 email as being "in the McKesson CST" (client services team) and asking for information about Purdue's organization.

[30] The judge also considered the evidence adduced by McKinsey to show that McKinsey was not engaged by any of these companies or their affiliates to provide advice to enhance opioid sales in Canada. This evidence was from Michael Silber,

formerly a senior partner of McKinsey and head of its Pharmaceutical Medical Product – Americas group between 2009 and 2014. Mr. Silber’s evidence was based on his own direct knowledge from working at McKinsey as well as his review of numerous documents, including McKinsey’s records of engagements, the pleadings, the documents contained in the Province’s evidence and discussions with others within McKinsey.

[31] The judge next assessed the expert evidence adduced by both sides. Much of this analysis is not pertinent to the issue raised in this appeal but one issue of some import relates to whether marketing principles and theories by the pharmaceutical industry differ significantly between Canada and the U.S. The Province’s experts opine that marketing principles are universally applied, regardless of geographic differences, and there are more commonalities than differences between the Canadian and American jurisdictions. These opinions are geared to establishing a methodology for addressing questions about the impact of marketing and promotion on opioid use. McKinsey’s expert identified differences in the opioid markets across Canada that undermine the assumption that studies about opioid use in the U.S. can be applied in the Canadian context.

Assessment of the evidence

[32] The judge found some merit in McKinsey’s argument that the evidence of the opioid settlements in the U.S. in relation to its work for American opioid manufacturers was “not a proxy for misconduct in Canada”: RFJ at para. 169. However, he recognized that the Province’s case is based on “more expansive allegations of agency, common design and civil conspiracy” that include allegations that the tactics McKinsey developed, recommended and implemented in the U.S. were also designed to be used, and were used, in Canada: RFJ at paras. 170, 172. He considered McKinsey’s denial of wrongdoing or direct engagement in marketing opioids in Canada to be a merits issue for trial: RFJ at para. 172. He also considered questions about McKinsey’s “corporate integration or corporate parent liability” in relation to “group enterprise liability” and whether McKinsey provided services directly within Canada to be merits issues for trial: RFJ at para. 174.

[33] The judge's assessment of the lay evidence is set out in these passages of his reasons:

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

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

[177] Nothing substantive has been definitively proven at this point, but there are numerous tenable links in the evidence between McKinsey's American and Canadian affiliates in relation to its opioid work and the possibility of McKinsey building on its American work product to make progress on behalf of client drug companies in the Canadian opioid market. McKinsey has raised real issues with respect to its involvement with Purdue Canada and the extent to which its actions promoted prescription opioid use in Canada. Again, however, these are issues to be resolved at trial after the benefit of full discovery. ...

[34] He therefore found McKinsey had not established the lack of a basis in fact for certification due to McKinsey's lack of Canadian involvement, and concluded:

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

Issues on appeal and the standard of review

[35] McKinsey raises one ground of appeal: the certification judge erred in concluding that the action met the commonality requirement in s. 4(1)(c) of the *CPA*. It contends the judge erred by allowing the Province to rely on allegations alone to establish “some basis in fact” that the claims of the class members raise common issues and in doing so, committed a reversible error in principle. McKinsey contends there is no basis in fact to establish that it performed work to promote opioids in Canada.

[36] The Province contends this appeal rests largely on the faulty premise that it is required to provide merit-based evidence at certification to establish that McKinsey performed consulting work in Canada. It says s. 4(1)(c) requires a search for commonality in the issues raised by the pleadings, not a merits-focused, pre-discovery evaluation of whether the acts McKinsey is alleged to have done actually occurred. The Province says in any event, this is not a case that was certified on allegations alone, as there is evidence linking McKinsey to opioid promotion in Canada.

[37] This appeal raises two issues: (1) whether the judge applied the correct test in assessing the “some basis in fact” requirement in s. 4(1)(c); and (2) whether the judge erred in his application of the test in concluding that there was some basis in fact that the claims raise common issues.

[38] The first issue is a question of law reviewable on the standard of correctness. The second issue, which involves the judge’s application of the correct test and his assessment of the evidence on the commonality criterion, is reviewable on the standard of palpable and overriding error: *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 94; *Nissan* at para. 36.

[39] More broadly, while a certification judge must certify a proceeding if the criteria in s. 4(1) are satisfied, the judge has discretion in applying the criteria. In that exercise of discretion, appellate intervention is justified only where the judge erred in law, erred in principle or was “clearly wrong”. This highly deferential standard of

review is especially important where the certification order is made by a case management judge: *Charlton v. Abbott Laboratories, Ltd.*, 2015 BCCA 26 at para. 108; *Finkel* at para. 56; *Good Guys Recycling Inc. v. 676083 BC Ltd.*, 2023 BCCA 128 at para. 27; *Noramco* at paras. 102–104.

Analysis

[40] It is my opinion that the certification judge applied the correct test in assessing whether the Province had established some basis in fact that the claims raise common issues and made no palpable and overriding error in his assessment of the evidence in the record before him. His decision is entitled to a high degree of deference and I see no basis for appellate intervention.

[41] Before addressing the issues, I wish to emphasize that McKinsey does not dispute that the common issues certified by the judge are “common”. As I understand its position, it simply says there is no basis in fact to establish that the common issues exist as against McKinsey. My analysis is therefore focused only on this aspect of the evidentiary requirement under s. 4(1)(c) of the *CPA*.

1. The “some basis in fact” test

[42] The same question of law was raised by the defendants in the Main action. In *Noramco*, this Court found no error in Justice Brundrett’s interpretation of the jurisprudence on the “some basis in fact” requirement or in his analysis of the law in British Columbia. I agree with the following general principles discussed in *Noramco* at paras. 4–5:

- The commonality requirement should be a relatively straightforward inquiry to determine as a procedural matter whether there is some basis in fact to conclude the claims raise issues that can be decided commonly so as to avoid duplication of fact finding or legal analysis;
- The screening of cases through this lens should be functional and pragmatic, designed not as a concealed merits test, but as a means of ensuring that a case will not founder at the merits stage due to a lack of commonality; and

- It is time to return to basics, and to encourage parties as well as certification judges to focus on the procedural issues engaged in assessing the commonality requirement.

[43] These principles are entirely consistent with well-settled jurisprudence. The Supreme Court of Canada has emphasized that the certification stage focuses on the *form* of the action. The question on a certification application is not whether the claim is likely to succeed but whether the action can properly proceed as a class action. The question underlying commonality is whether allowing the action to proceed as a class action will avoid duplication of fact-finding and legal analysis: *Dutton* at para. 39; *Hollick* at paras. 16, 18.

[44] The “some basis in fact” standard was first defined by Chief Justice McLachlin in *Hollick* as requiring the representative plaintiff to show some basis in fact to support the certification order. Importantly, this standard was defined to address the certification requirements with a focus on form: whether *each of the class members* has a claim (or at least a “colourable claim”) against the defendant, or whether there is a rational connection *between the class as defined and the asserted common issues*: at para. 19. As I read *Hollick*, the evidence required for certification is to focus on the certification criteria, not the factual basis for the claim: see para. 25.

[45] In *Pro-Sys*, Justice Rothstein (for the Court) reinforced this focus on form and reaffirmed the importance of certification as a meaningful screening device:

[100] The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. McLachlin C.J. did, however, note in *Hollick* that evidence has a role to play in the certification process. She observed that “the Report of the Attorney General’s Advisory Committee on Class Action Reform clearly contemplates that the class representative will have to establish an evidentiary basis for certification” (para. 25).

...

[102] ... The “some basis in fact” standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage “the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight” ... The certification stage does not

involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; “rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding” ...

[Emphasis added.]

[46] Justice Rothstein considered there was limited utility in attempting to define “some basis in fact” in the abstract and recognized that each case must be decided on its own facts. He explained only that there must be sufficient facts to satisfy the court “that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met”, or more specifically, because the issues are not truly common: *Pro-Sys* at para. 104; *Noramco* at paras. 35–36.

[47] Justice Rothstein made it clear that the outcome of a certification application will not be predictive of the success of the trial of the common issues. He also recognized that an action may be decertified if it is subsequently found that the conditions for certification are no longer met: at para. 105. If this was not clear enough, he added:

[110] ... In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.

[Emphasis added.]

[48] These principles, reiterated in *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 39–42, have been followed in this Court: see, for example, *Charlton*; *Ewert*; *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22; *Nissan*; *Mentor Worldwide LLC*; *Syngenta AG v. Van Wijngaarden*, 2025 BCCA 334; and most recently in *Noramco* at paras. 41–49.

[49] To more clearly define the evidentiary threshold, in *Ewert*, Justice Hunter helpfully contrasted “some” basis in fact with “no” basis in fact. The issue there — as in many of these cases — was whether the loss claimed could be established as a

common issue. He held that the “some basis in fact” standard requires the plaintiff to provide “some evidence that there is a plausible and realistic methodology to establish loss on a class-wide basis” and information to support the methodology will be available: at para. 104. He considered this consistent with Rothstein J.’s discussion of the standard in *Pro-Sys* at paras. 118 and 124 as it applies to the question of the evidence required to establish loss as a common issue.

[50] McKinsey’s submission on the two-step approach to common issues relies on cases such as *Jensen, Lilleyman v. Bumble Foods LLC*, 2024 ONCA 606 [*Lilleyman*], and *O’Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371 [*O’Connor*].

[51] In *Jensen*, the Federal Court of Appeal interpreted the some basis in fact standard in *Hollick* to have a dual component: (1) some minimal evidence supporting the existence of a claim, and (2) some evidence that the common issue is such that its resolution is necessary to the resolution of each class member’s claim: at para. 78. The court endorsed the two-step approach as “the only one consistent with the underlying rationale and purpose of the certification process ... to root out unfounded and frivolous claims”: at para. 80.

[52] Certification was denied in *Lilleyman* because the certification judge found no basis in fact for the plaintiffs’ claim of conspiracy. In affirming the judge’s order, the Ontario Court of Appeal described the test as requiring some basis in the evidence that the impugned act “could or might have occurred”: at para. 71. It considered this to be a minimal but necessary requirement as “a matter of logic and common sense”:

[72] ... if there is no basis in fact to suppose that a conspiracy with attendant harm actually occurred, it necessarily follows that there is no basis to suppose that such a nonexistent conspiracy could have caused harm across members of the proposed class. ...

[53] The court agreed with *Jensen* on this point but considered the question of a one- or two-step approach to be beside the point given that a “key rationale and

purpose of the certification process is to root out frivolous and unfounded claims”: at paras. 72–73.

[54] In *O’Connor*, Chief Justice Hinkson recognized there was uncertainty in the caselaw regarding the evidence required to meet the commonality requirement of the certification test. He referred to numerous cases in this province and elsewhere that applied the two-step approach but considered the plaintiff’s burden to be the same whether the test involves one or two steps, and stated:

[263] I struggle to see how the plaintiff can meet his burden of showing that an issue can be proven in common for the class without providing some basis in fact that there is a common issue in the first place. ...

[55] I agree with the observations in *Lilleyman* and *O’Connor* that describing the some basis in fact requirement as involving one step or two does not assist in the analysis. The two-step approach has not been endorsed by this Court. Most recently, in *Noramco*, the Court rejected it as unhelpful, stating “there is no utility in chambers judges in this province continuing to evaluate whether a two-part test is the test or is satisfied”: at para. 86. The approach in British Columbia is a functional one that does not require two distinct categories of evidence but simply requires a minimum evidentiary foundation supporting the existence of a common issue: see *Nissan* at paras. 132–134. The “existence” of the common issue is often implicit in the pleaded cause of action and to that extent, evidence that the impugned conduct could or might have occurred is relevant to commonality. *Lilleyman* and *O’Connor* are examples of this. I respectfully depart from the endorsement of the two-step test in *Jensen*.

[56] *Nissan* provides an illustration of the interrelationship between the existence of an issue and its commonality. The central claim alleged a defect in the design of the timing chain mechanism in the engines of certain vehicles. The defendants asserted that the plaintiffs were required to establish some basis in fact that the alleged defect was dangerous as well as common to the vehicles purchased by the class. This Court rejected the notion that the evidentiary support for a common issue in a product liability claim requires evidence that the alleged defect was dangerous.

Instead, it considered whether there was sufficient evidence to support the common issues *related to the question of whether there was an engine defect*: at paras. 132, 140.

[57] As I read *Nissan*, evidence was not required to establish that the defect existed *per se* (a merits inquiry); rather, evidence was required as to the nature of the alleged defect in order for the certification judge to assess whether it was common across the class (a some basis in fact inquiry). The same evidence supported both the existence of the defect and its commonality. It included affidavits from two plaintiffs about the problems they experienced with their vehicles, an expert opinion about problems related to timing chain mechanisms and bulletins issued by Nissan relating to these mechanisms. This was sufficient to establish some basis in fact that the issues were common concerning the existence of the alleged defect: see *Nissan* at para. 147.

[58] This reflects the low evidentiary standard that does not involve proof that the facts actually occurred but simply requires minimal evidence that the issue exists to the extent it is relevant to the assessment of commonality. I see this as an accurate description of the meaning of “some basis in fact” in relation to the statutory requirement in s. 4(1)(c) of the *CPA*, which requires the court to assess “whether the claims raise common issues”.

[59] As much of the case law demonstrates, the level of evidence required is highly fact specific. In many cases, plaintiffs will be constrained in their ability to provide evidence that is in a defendant’s knowledge or possession given the early stage of a certification application. This is particularly important in a case like this, which advances allegations of corporate integration or corporate parent liability and group enterprise liability. Similar allegations grounded the Main action: see *Noramco* at para. 100.

[60] To avoid confusion, I would not define “some basis in fact” in relation to a legislative purpose of rooting out “frivolous and unfounded claims” as discussed in *Jensen* and *Lilleyman*. These terms have particular meaning in other contexts where

judges are called on to assess the merits of a claim, such as applications to strike a claim. While I agree that the certification process is a screening exercise, the focus of that process under the *CPA*, consistent with the jurisprudence stemming from *Hollick*, is on the form of the action, not its merits.

[61] Similarly, I would also avoid equating the standard with requiring a “triable issue” as in summary judgment. It is sufficient that there be a factual or legal issue, or “colourable claim”, that advances the litigation. I agree with the certification judge’s conclusion, following *Bowman v. Kimberly Clark Corporation*, 2023 BCSC 1495 at para. 136, that “a pleading, legislation or legal principles can support the ‘existence’ of an issue, and together with some evidence of commonality, will meet the certification test”. Mere pleading of an issue is not enough.

[62] In the context of the Province’s claims against McKinsey based on what the judge accurately described as “expansive allegations of agency, common design and civil conspiracy”, the “some basis in fact” standard as applied to the commonality criterion requires the Province to provide some minimal evidence of the nature of the conduct and its relationship to the alleged industry-wide conduct of the manufacturers and distributors in respect of the Canadian market.

2. Application of the test and assessment of the evidence

[63] As noted above, McKinsey does not challenge the judge’s conclusion that the common issues are “common”. This appeal rests on one factual issue: whether there is some basis in fact to tie the common issues to McKinsey at all. It submits the judge erred in his application of the evidentiary standard because there is no basis in fact that McKinsey was involved in the promotion of opioids in or for Canada.

[64] In my view, McKinsey takes too narrow an approach to the nature of the claims against it. Whether or not McKinsey performed opioid-marketing services in Canada, the claims against it rely on joint allegations which, as the judge explained, “raise the prospect of McKinsey entities being drawn into liability in Canada due to corporate integration or corporate parent liability in relation to the provision of consulting services that were either directly provided for the Canadian market and/or

advice provided for the American market that was implemented across Canada”: RFJ at para. 174. In this context, I do not agree with McKinsey that the judge failed to analyze the evidence to determine if it established a basis in fact, as was the case in *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111. I see no reversible error in the judge’s assessment of the evidence here as being sufficient to meet the “some basis in fact” standard.

[65] I accept McKinsey’s submission that a plaintiff must do more than point to evidence that occurred in one jurisdiction and plead that the same thing happened in Canada, or had effects in Canada, but this misapprehends the difference between “some basis in fact” and “no basis in fact”.

[66] *Lilleyman* is an example where there was no basis in fact to establish that a price-fixing conspiracy that occurred in the U.S. could or might have occurred in Canada. While the claim failed because it did not disclose a cause of action, the certification judge also found the claim did not raise common issues because the evidence relied on by the plaintiff had nothing to do with Canada; it concerned only conduct that occurred in the U.S., which had an entirely separate market for the impugned product (tuna).

[67] Similarly, in *Hyundai Auto Canada Corp. v. Engen*, 2023 ABCA 85, in relation to a claim of misrepresentation, the record disclosed no basis in fact that the defendant had made any misrepresentations as alleged. There was therefore no basis on which common issues arising from this claim could be evaluated.

[68] In contrast to *Lilleyman* and *Hyundai*, the Province’s claims in this case are based on what the judge accurately described as “more expansive allegations of agency, common design and civil conspiracy”, which as noted above, include allegations that McKinsey developed, recommended and implemented tactics in the U.S. that were also designed to be used, and were used, in Canada: RFJ at paras. 170–172. As the Province submits, these allegations concern McKinsey’s background role in developing the strategies and messages behind the alleged misrepresentations. In this context, the Province is not required to provide evidence

specific to McKinsey's work with manufacturers or distributors. Rather, expert evidence that marketing strategies are unlikely to differ between the U.S. and Canada, illustrative of this more general claim, is sufficient to satisfy the evidentiary requirement: see *Noramco* at para. 78.

[69] I also accept that the evidence linking McKinsey to Janssen, Endo, and especially McKesson, was scant. However, the judge's conclusion (at RFJ para. 177) that there were "tenable links" between McKinsey's U.S. and Canadian affiliates relating to its opioid work and the possibility that it built on its U.S. work product "on behalf of client drug companies" in the Canadian market is reflected in the record. There is clearly some basis in fact to support the Province's allegations in relation to McKinsey's role with Purdue (a matter counsel for McKinsey candidly conceded may be sufficient), which the judge described at RFJ para. 175. Whether the allegations in relation to any of these other companies can be sustained will depend on how the litigation proceeds. Importantly, the judge was cognizant of the limited information available to the Province at the certification stage about "intercorporate relationships" and was satisfied that further exploration of "group enterprise liability" and whether McKinsey provided services directly within Canada were merits issues for trial: RFJ at para. 174. In my opinion, the judge did far more than conduct a "symbolic scrutiny" of the evidence or rely only on allegations in the pleadings, as asserted by McKinsey.

[70] As for Mr. Silber's evidence, I do not agree with McKinsey that the Province was required to cross-examine him or tender evidence in response, nor do I agree that the judge improperly discounted his evidence. As he noted, Mr. Silber's evidence was limited by his personal knowledge and experience, reliance on hearsay, and a document review, the extent of which was not clearly defined: RFJ at para. 176.

[71] In his affidavit, Mr. Silber concluded from his review of McKinsey's database of client engagements that he had "not seen any evidence that McKinsey was ever engaged by Purdue, J&J, Endo, or McKesson (or their affiliates) to provide advice to

enhance the sales and marketing of opioid products in Canada”. He also provided his opinion that “opioid promotion strategies developed for the United States cannot be and were not taken and redeployed in Canada”.

[72] In my view, the judge’s refusal to treat Mr. Silber’s evidence as definitive was entirely appropriate. The fact that Mr. Silber had not seen any evidence of engagements for marketing advice in Canada does not answer the circumstantial evidence proffered by the Province, and his opinion that strategies developed for the U.S. cannot be redeployed in Canada conflicts with some of the expert evidence that marketing strategies are unlikely to differ between the U.S. and Canada. These are clearly factual issues in dispute and the judge’s role at certification is not to weigh conflicts in the evidence.

[73] In this context, I see no error in the judge’s conclusion that the Province had established some basis in fact that the claims of the class members raise common issues. The evidence proffered by McKinsey denying its involvement in the Canadian opioid market was insufficient to show there was no basis in fact and effectively raised a merits issue.

Conclusion

[74] For these reasons, I conclude that the certification judge made no reviewable error in his analysis of the commonality requirement under s. 4(1)(c) of the *CPA*.

[75] I would dismiss the appeal, with thanks to all counsel for their able submissions.

“The Honourable Justice Fisher”

I AGREE:

“The Honourable Justice Iyer”

I AGREE:

“The Honourable Justice Warren”

Appendix A — Common Issues Approved by the Judge**Appendix A [to 2025 BCSC 1094]****Further Revised Common Issues****A. Opioid Related Disease, Injury or Illness**

1. What is an Opioid Product?
2. Can use of or exposure to Opioid Products cause or contribute to disease, injury or illness?
 - (a) If so, what are the diseases, injuries or illnesses that can be caused or contributed to by use of or exposure to Opioid Products?

B. The Defendants and their Advisory Services

3. During the Class Period, did the defendants provide advisory services to a manufacturer in relation to the distribution, sale or offering for sale of Opioid Products, as defined in the *ORA*?
 - (a) If so, which manufacturer(s), and in relation to which Opioid Products?
4. During the Class Period, did the defendants provide advisory services to a wholesaler in relation to the distribution, sale or offering for sale of opioid products, as defined in the *ORA*?
 - (a) If so, which wholesaler(s), and in relation to which Opioid Products?
5. What is the relationship between the defendants? Is the relationship such that each is the agent of the other for the purposes of providing advisory services to wholesalers and/or manufacturers with respect to Opioid Products in Canada?

C. The Defendants' Opioid Misrepresentations

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

D. The Defendants' Knowledge

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

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

E. Common Design

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

DIRECT CLAIMS**F. Breach of the *Competition Act***

20. Did the defendants:

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

G. Conspiracy with Purdue

- 21. During the Class Period, did the defendants and Purdue conspire to harm Class Members?
- 22. Did the defendants act in furtherance of the conspiracy?
- 23. Did the conspiracy involve unlawful acts?
- 24. Did the defendants know or ought they have known that the conspiracy was likely to cause injury to the Class Members?

H. Conspiracy with Janssen

- 25. During the Class Period, did the defendants and Janssen conspire to harm Class Members?
- 26. Did the defendants act in furtherance of the conspiracy?
- 27. Did the conspiracy involve unlawful acts?
- 28. Did the defendants know or ought they have known that the conspiracy was likely to cause injury to the Class Members?

I. Conspiracy with Endo

- 29. During the Class Period, did the defendants and Endo conspire to harm Class Members?
- 30. Did the defendants act in furtherance of the conspiracy?
- 31. Did the conspiracy involve unlawful acts?
- 32. Did the defendants know or ought they have known that the conspiracy was likely to cause injury to the Class Members?

J. Conspiracy with McKesson

- 33. During the Class Period, did the defendants and McKesson conspire to harm Class Members?
- 34. Did the defendants act in furtherance of the conspiracy?
- 35. Did the conspiracy involve unlawful acts?
- 36. Did the defendants know or ought they have known that the conspiracy was likely to cause injury to the Class Members?

ORA CLAIMS ADVANCED ON BEHALF OF ORA SUBCLASS MEMBERS

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

Negligent Failure to Warn

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

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

Negligent Misrepresentation

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

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

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

Fraudulent Misrepresentation/Deceit

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

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

K. ORA Claims

45. Did the defendants breach any common law, statutory or equitable duties owed to insured persons who have used or been exposed to or might use or be exposed to an Opioid Product pursuant to s. 3(1)(a) of the *ORA*?

46. If so,

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

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

PUNITIVE DAMAGES

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

FRAUDULENT CONCEALMENT

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