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Consultants' Liability for Bad Advice: Just to Their Clients, or Does It Go Further?

Commercial disputes between professionals and their clients are routine. However, what is comparatively rare are disputes between the consultants (or other professionals) who advise a client and the client's customers who may be harmed in some way by that client's conduct. In those circumstances, there is generally no contractual relationship between the consultant and the client's customer, and most cases have held that there is no duty of care between a professional and a person injured by the professionals' client's conduct. Lawyers, for example, have been held to potentially owe duties of care to non-clients in only the most exceptional circumstances. However, the recent decision of the British Columbia Supreme Court in *British Columbia v McKinsey* has the potential to substantially expand the scope of claims brought against professionals by persons allegedly harmed by those professionals' clients' conduct.

That decision arises out of litigation brought by British Columbia to recover healthcare costs caused by the opioid crisis. British Columbia brought two separate proposed class proceedings on behalf of other provincial, territorial, and federal governments. The primary action is a claim against the manufacturers and distributors of opioids; the Defendants in that case were directly involved in the manufacturing, marketing, distribution, or sale of the opioids. British Columbia also brought a second proposed class action against the consulting firm McKinsey, which had provided advice to some of the manufacturer and distributor defendants. British Columbia alleged that, by virtue of consulting services it provided to some of those manufacturers and distributors, McKinsey was itself involved in the design, strategy, and the execution of marketing efforts to promote and sell addictive and harmful opioid products in Canada. British Columbia pleaded a number of claims against McKinsey, including claims for breaches of the *Competition Act* and civil conspiracy, as well as various opioid-related wrongs under the British Columbia *Opioid Damages and Health Care Costs Recovery Act*.

McKinsey moved to strike the Province's Amended Notice of Civil Claim against it, arguing that the pleadings did not disclose a reasonable cause of action. The British Columbia Supreme

Court dismissed McKinsey's motion and allowed all of the claims to proceed.

Being a motion to strike, the Court took the allegations in the ANOCC as true, and proceeded to consider whether it was plain and obvious that the Province's claim against McKinsey could not succeed. As such, the Court's decision is not a definitive conclusion as to the liability of consultants in these circumstances. However, as described below, the fact that the Court allowed the Province's claims to proceed shows the potential jeopardy that consultants may face going forward. The Court's expansive approach to McKinsey's potential liability for the various causes of action pleaded by the Province highlights the significant risk of litigation that consultants may face going forward.

For example, one of the claims pleaded by the Province in the ANOCC was that McKinsey had made material misrepresentations to the public contrary to s 52 of the *Competition Act*. The ANOCC did not plead material facts that McKinsey itself made any particular representations directly to the public, such as in any McKinsey marketing materials, press releases, or other McKinsey documents. In most cases, this would be fatal to a claim under s 52 of the *Competition Act*. However, the Court permitted the claim to proceed, based on the pleaded allegations in the ANOCC that McKinsey could be liable under this provision by virtue of preparing marketing strategies for its clients that it knew or ought to be known would be used by its clients in Canada. The ANOCC claimed that such representations, by virtue of McKinsey's alleged integration with its clients, were made by McKinsey itself. The Court permitted this claim to proceed, holding that "McKinsey's argument that any representations made 'through its consulting work' cannot be considered to have been made 'to the public' is better addressed at trial."

The Province also alleged in its ANOCC that McKinsey committed various opioid-related wrongs under the British Columbia *Opioid Damages and Health Care Costs Recovery Act*, which included negligent misrepresentation and negligent failure to warn. Under the relevant legislation, such a claim would only be tenable if McKinsey owed a duty of care to end consumers of opioids. This would have seemed to pose a problem: historically, while consultants may owe a duty of care to their clients, consultants have generally not been held to owe a duty of care to their client's customers or other stakeholders. As the Court noted in its decision, "McKinsey forcefully argues that no Canadian court has held that an adviser to a manufacturer or distributor owes a duty of care in negligence to

the end users of potentially dangerous products", and the Court did not cite any cases to the contrary in its decision. Indeed, McKinsey's position was broadly consistent with the Supreme Court of Canada's decision in *Livent* and *Maple Leaf Foods*, in which it was held that in claims involving the negligent provision of a service, a duty of care would generally only exist where the service provider had undertaken responsibility to the plaintiff and the plaintiff relied on that undertaking. Such an undertaking clearly did not exist here.

Notwithstanding these considerations, the Court rejected McKinsey's argument, holding that it was not plain and obvious that McKinsey did not owe a duty of care to end users of opioids. The Court noted that the Province had pleaded in the ANOCC "that McKinsey is a co-principal, integrated with its clients, in making false and misleading representations to members of the public". This, the Court held, was sufficient to ground a duty of care. The Court further noted that case law had held that a duty of care could be imposed on a party for products manufactured by another company where the party could control, qualify, or stop the latter's conduct. The Court held that:

> … the pleadings sufficiently allege that, by virtue of McKinsey's integrated and co-conspiratorial relationship with its clients and its strategic planning and marketing efforts to promote and sell opioid products in Canada, including in BC, McKinsey had the power to control or qualify the conduct of manufacturers and distributors with respect to their sale of opioids. This element of control gives rise to a duty of care between an advisor, like McKinsey, and end users of opioid products.

As such, the Court held that it was not plain and obvious that those opioid-related wrongs could not succeed against McKinsey.

The Court's decision, if followed, creates the potential for consultants to be exposed to significant litigation risk in claims by parties other than their clients, including their client's customers. As noted above, historically, companies were responsible to their customers for the products and services they provided, but their advisers were, absent exceptional circumstances, generally not exposed to potential liability to their client's customers in connection with such work. This decision creates the potential for significant additional liability for consultants that may be harder to control or manage. In a direct relationship between consultant and client, the parties can structure their contractual arrangements to allocate risk accordingly, including, if the parties so agree, to limit the

consultant's liability in various circumstances. By contrast, in claims brought by third-parties to that relationship, no such allocation of risk occurs. While a consultant might be able to seek an indemnity from its client for any liability it might face in claims by third-parties, the value of such an indemnity depends on the client being able to satisfy that indemnity. In many circumstances, that is by no means a given.

While the Court's decision is predicated on the allegation that McKinsey is heavily integrated with its clients such that McKinsey's conduct and its clients' conduct were indistinguishable, the allegations on this point in the ANOCC were largely boilerplate, unparticularized allegations that could be alleged against any consultant. As such, while many consultants would no doubt take issue with the notion that they are deeply integrated with their clients and instead view themselves as third-party service providers, similar boilerplate allegations could be made against virtually any third-party adviser. While such allegations might ultimately prove to be unsubstantiated following an adjudication on the merits, the fact that such relatively bare allegations could be sufficient to survive a motion to strike means that consultants will be exposed to such claims. As such, management consultants, and professionals of all type, should watch this case closely.