COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sandoz Canada Inc. v. British Columbia,*
2023 BCCA 306

Date: 20230728
Dockets: CA48785; CA48786
CA48788; CA48790

Docket: CA48785

Between:

Sandoz Canada Inc.

Appellant
(Defendant)

And

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

Respondent
(Plaintiff)

And

**Paladin Labs Inc., Endo Pharmaceuticals Inc., Endo International plc,
Endo Ventures Ltd., McKesson Corporation, McKesson Canada Corporation,
Mylan Pharmaceuticals ULC, and Sanis Health Inc. and
Shoppers Drug Mart Inc.**

Respondents
(Defendants)

And

**Apotex Inc., Apotex Pharmaceutical Holdings, Inc.,
Bristol-Myers Squibb Canada, Bristol-Myers Squibb Company,
Ethypharm Inc., Janssen Inc., Johnson & Johnson, Pharmascience Inc.,
Joddes Limited, Pro Doc Limitee, The Jean Coutu Group (PJC) Inc.,
Purdue Pharma Inc., Purdue Pharma L.P., The Purdue Frederick Company Inc.,
Purdue Frederick Inc., Ranbaxy Pharmaceuticals Canada Inc.,
Sun Pharmaceutical Industries Ltd., Hikma Labs Inc.,
Hikma Pharmaceuticals PLC, Roxane Laboratories Inc.,
Boehringer Ingelheim (Canada) Ltd. / Boehringer Ingelheim (Canada) Ltée.,
West-Ward Columbus Inc., Teva Canada Innovation G.P.-S.E.N.C.,
Teva Canada Limited, Teva Pharmaceuticals USA, Inc.,
Teva Pharmaceutical Industries Ltd., Actavis Pharma Company,
Valeant Canada LP / Valeant Canada S.E.C., Bausch Health Companies Inc.,
Imperial Distributors Canada Inc., Amerisourcebergen Canada Corporation,
Kohl & Frisch Limited, Kohl & Frisch Distribution Inc.,
Nu-Quest Distribution Inc., United Pharmacists Manitoba Inc., Procurity Inc.,**

Procurity Pharmacy Services Inc., Unipharm Wholesale Drugs Ltd., LPG Inventory Solutions, and Noramco Inc.

Respondents
(Defendants)

– and –

Docket: CA48786

Between:

Sanis Health Inc. and Shoppers Drug Mart Inc.

Appellants
(Defendants)

And

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

Respondent
(Plaintiff)

And

Paladin Labs Inc., Endo Pharmaceuticals Inc., Endo International plc, Endo Ventures Ltd., McKesson Canada Corporation, Mylan Pharmaceuticals ULC, and Sandoz Canada Inc.

Respondents
(Defendants)

And

Apotex Inc., Apotex Pharmaceutical Holdings, Inc., Bristol-Myers Squibb Canada, Bristol-Myers Squibb Company, Ethypharm Inc., Janssen Inc., Johnson & Johnson, Pharmascience Inc., Joddes Limited, Pro Doc Limitee, The Jean Coutu Group (PJC) Inc., Purdue Pharma Inc., Purdue Pharma L.P., The Purdue Frederick Company Inc., Purdue Frederick Inc., Ranbaxy Pharmaceuticals Canada Inc., Sun Pharmaceutical Industries Ltd., Hikma Labs Inc., Hikma Pharmaceuticals PLC, Roxane Laboratories Inc., Boehringer Ingelheim (Canada) Ltd. / Boehringer Ingelheim (Canada) Ltée., West-Ward Columbus Inc., Teva Canada Innovation G.P.-S.E.N.C., Teva Canada Limited, Teva Pharmaceuticals USA, Inc., Teva Pharmaceutical Industries Ltd., Actavis Pharma Company, Valeant Canada LP / Valeant Canada S.E.C., Bausch Health Companies Inc., Imperial Distributors Canada Inc., Amerisourcebergen Canada Corporation, Kohl & Frisch Limited, Kohl & Frisch Distribution Inc., McKesson Corporation, Nu-Quest Distribution Inc., United Pharmacists Manitoba Inc., Procurity Inc., Procurity Pharmacy Services Inc., Unipharm Wholesale Drugs Ltd., LPG Inventory Solutions, and Noramco Inc.

Respondents

(Defendants)

– and –

Docket: CA48788

Between:

Mylan Pharmaceuticals ULC

Appellant
(Defendant)

And

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

Respondent
(Plaintiff)

And

Paladin Labs Inc., Endo Pharmaceuticals Inc., Endo International plc, Endo Ventures Ltd., McKesson Canada Corporation, Sanis Health Inc. and Shoppers Drug Mart Inc. and Sandoz Canada Inc.

Respondents
(Defendants)

And

Apotex Inc., Apotex Pharmaceutical Holdings, Inc., Bristol-Myers Squibb Canada, Bristol-Myers Squibb Company, Ethypharm Inc., Janssen Inc., Johnson & Johnson, Pharmascience Inc., Joddes Limited, Pro Doc Limitee, The Jean Coutu Group (PJC) Inc., Purdue Pharma Inc., Purdue Pharma L.P., The Purdue Frederick Company Inc., Purdue Frederick Inc., Ranbaxy Pharmaceuticals Canada Inc., Sun Pharmaceutical Industries Ltd., Hikma Labs Inc., Hikma Pharmaceuticals PLC, Roxane Laboratories Inc., Boehringer Ingelheim (Canada) Ltd. / Boehringer Ingelheim (Canada) Ltée., West-Ward Columbus Inc., Teva Canada Innovation G.P.-S.E.N.C., Teva Canada Limited, Teva Pharmaceuticals USA, Inc., Teva Pharmaceutical Industries Ltd., Actavis Pharma Company, Valeant Canada LP / Valeant Canada S.E.C., Bausch Health Companies Inc., Imperial Distributors Canada Inc., Amerisourcebergen Canada Corporation, Kohl & Frisch Limited, Kohl & Frisch Distribution Inc., McKesson Corporation, Nu-Quest Distribution Inc., United Pharmacists Manitoba Inc., Procurity Inc., Procurity Pharmacy Services Inc., Unipharm Wholesale Drugs Ltd., LPG Inventory Solutions, and Noramco Inc.

Respondents
(Defendants)

– and –

Docket: CA48790

Between:

McKesson Canada Corporation

Appellant
(Defendant)

And

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

Respondent
(Plaintiff)

And

Paladin Labs Inc., Endo Pharmaceuticals Inc., Endo International plc, Endo Ventures Ltd., Mylan Pharmaceuticals ULC, Sandoz Canada Inc., Sanis Health Inc. and Shoppers Drug Mart Inc.

Respondents
(Defendants)

And

Apotex Inc., Apotex Pharmaceutical Holdings, Inc., Bristol-Myers Squibb Canada, Bristol-Myers Squibb Company, Ethypharm Inc., Janssen Inc., Johnson & Johnson, Pharmascience Inc., Joddes Limited, Pro Doc Limitee, The Jean Coutu Group (PJC) Inc., Purdue Pharma Inc., Purdue Pharma L.P., The Purdue Frederick Company Inc., Purdue Frederick Inc., Ranbaxy Pharmaceuticals Canada Inc., Sun Pharmaceutical Industries Ltd., Hikma Labs Inc., Hikma Pharmaceuticals PLC, Roxane Laboratories Inc., Boehringer Ingelheim (Canada) Ltd. / Boehringer Ingelheim (Canada) Ltée., West-Ward Columbus Inc., Teva Canada Innovation G.P.-S.E.N.C., Teva Canada Limited, Teva Pharmaceuticals USA, Inc., Teva Pharmaceutical Industries Ltd., Actavis Pharma Company, Valeant Canada LP / Valeant Canada S.E.C., Bausch Health Companies Inc., Imperial Distributors Canada Inc., Amerisourcebergen Canada Corporation, Kohl & Frisch Limited, Kohl & Frisch Distribution Inc., McKesson Corporation, Nu-Quest Distribution Inc., United Pharmacists Manitoba Inc., Procurity Inc., Procurity Pharmacy Services Inc., Unipharm Wholesale Drugs Ltd., LPG Inventory Solutions, and Noramco Inc.

Respondents
(Defendants)

Corrected Judgment: The text of the judgment was corrected on the cover page on August 1 and 3, 2023.

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Fisher
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated December 8, 2022 (*British Columbia v. Apotex Inc.*, 2022 BCSC 2147, Vancouver Docket S189395).

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Place and Date of Hearing:	Vancouver, British Columbia May 8, 2023
Place and Date of Judgment:	Vancouver, British Columbia July 28, 2023

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Fisher
The Honourable Madam Justice Horsman

Summary:

Court below did not err in upholding constitutional validity of 'multi-Crown' class actions contemplated by s. 11 of the Opioid Health Care Costs Recovery Act. ("ORA"). It contemplates that as long as the Province of British Columbia has commenced its own proceeding for the recovery of health care costs (a direct cause of action conferred by the ORA), it may sue on behalf of the governments of Canada and other provinces for the recovery of their health care costs caused or contributed to by wrongs committed by the defendant manufacturers and distributors of opioid drugs. Provinces may "opt out" in accordanace with certification order when and if one is granted. The pleadings in this case indicate that the provinces' claims would be governed by the (substantive) laws of the other jurisdictions under their respective ORA counterparts.

The pith and substance of s. 11 was found to be the provision of a procedural mechanism to join with other provinces and thus to try the provinces' opiod claims in one or a few class actions rather than in separate class actions in each province. This is a procedural law, not a substantive one, and is intended to permit an action as close as possible to a truly "national" one in the Canadian federation. As such, s. 11 comes within the heading of the "Administration of Justice in the Province" in s. 92(14) of the Constitution Act, 1867. The fact that s. 11 uses an "opt-out" mechanism does not mean provinces are "compelled" or "coerced" to join in the acton in the Supreme Court of British Columbia. As found by the summary trial judge, their participation is consensual in "real world" terms.

Section 11 also meets the requirements of territoriality as set out in Imperial Tobacco (2005 SCC). The making of a choice to participate in a proceeding in B.C. supplies a sufficent connection between each participating province on the one hand, and on the other hand, British Columbia and its Supreme Court. A connection may also be supplied by the commonality of the causes of action to be pursued under the opiod recovery actions of the other provinces, on the authority of Harrington (BCCA 2000). Section 11 respects other provinces, which would be enforcing their own substantive laws in the B.C. proceeding.

Finally, the concept of sovereign immunity does not apply to preclude a government from taking a benefit (even with a burden attached.)

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] In 2018, the Province of British Columbia enacted the *Opioid Damages and Health Care Costs Recovery Act*, S.B.C. 2018, c. 35 (the "*ORA*"). The *ORA* is modelled in part on the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 (the "*TRA*"). That legislation was enacted to allow the Province to recover tobacco-related public health care costs directly from tobacco

manufacturers. The *ORA* seeks to accomplish a similar objective with respect to health care costs caused or contributed to by "opioid-related wrongs" allegedly committed by manufacturers and distributors of opioid drugs.

[2] Unlike the *TRA*, however, the *ORA* contains a provision, s. 11, allowing the bringing of "multi-Crown" class proceedings as an adjunct to British Columbia's own claims. Once the Province has commenced its class action under the *ORA* and as long as that action is ongoing, s. 11 contemplates that the Province may "bring an action" *on behalf of* a class consisting of one or more of the governments of Canada and the provinces or territories of Canada, presumably for the recovery of their respective opioid-related health care costs. Subsection 11(2) reserves the right of any participating government to opt out of the proceeding in accordance with s. 16 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*").

[3] Although multi-jurisdictional class proceedings (i.e., proceedings brought on behalf of a class that includes non-residents of the enacting province) have existed in Canada for some time, the multi-Crown provision in s. 11 represents a bold step, if not an experiment, in bringing government-led class litigation as close as possible to truly "national" proceedings in Canada's federal structure.[1] The question posed by this appeal is whether it was within the jurisdiction of the Province of British Columbia to enact such a provision. Although I understand that all the other common law provinces have now enacted legislation similar to s. 11, it appears that this court is the first appellate court to consider its constitutionality.

[4] The appellants contend that s. 11 is unconstitutional on the basis that in pith and substance, it is legislation in relation to the "substantive civil rights" of other provinces. They contend that that the *ORA*'s 'opt-out' approach fails to respect the territorial limits of provincial jurisdiction and that s. 11 trenches on the litigation autonomy of other provincial governments by "binding" them to a class proceeding in British Columbia. There is "*no connection*", they say, sufficient to validate a

[1] See Peter Hogg and S. Gordon McKee, "Are National Class Actions Constitutional?", (2010) 26 *N.J.C.L.* 279 at 283 for a brief explanation of the limitations of truly "national" class actions in the Federal Court of Canada.

province's being presumptively included in an action brought by another province, much less having its claims tried in the superior court of that other province.

[5] For its part, the Province contends that s. 11 properly falls within provincial jurisdiction because it relates to the "Administration of Justice in the Province" under s. 92(14) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3. In its submission, the pith and substance of s. 11 is the creation of a *procedural*, rather than substantive, mechanism through which the Province may bring actions on behalf of other governments. Subject to the terms of the certification order, provinces are not being coerced or forced to do anything beyond exercising their right to opt out. The Province submits that as with multi-jurisdictional proceedings, public policy reasons and the "procedural" nature of class proceedings legislation support the validity of the multi-Crown model.

[6] The summary trial judge, Mr. Justice Brundrett, agreed with the Province and dismissed the appellants' application for a declaration that s. 11 of the *ORA* is *ultra vires* the Legislature of British Columbia. For the reasons that follow, I would dismiss the appeal.

Imperial Tobacco and "Meaningful Connection"

[7] Since the *ORA* is intended in general terms to be similar to the *TRA*, it may be useful to refer briefly to the latter legislation and the decision of the Supreme Court of Canada in *British Columbia v. Imperial Tobacco Ltd.* 2005 SCC 49 upholding its constitutionality. This followed a ruling by the Supreme Court of British Columbia that an earlier version of the statute, the *Tobacco Damages Recovery Act*, S.B.C. 1997, c. 41, was *ultra vires* the Legislature: see *JTI-Macdonald Corp. v. British Columbia* 2000 BCSC 312. Unlike its predecessor, the second statute limited the definition of "tobacco-related wrongs" to torts *committed in the Province* or breaches of duty owed by tobacco manufacturers to *persons in the Province*. Many of the defendants were non-residents of British Columbia and were served *ex juris*. The Supreme Court of Canada ruled that the pith and substance of the *TRA* was

"the creation of a civil cause of action" and that that cause of action was "in the Province."

[8] The Court also concluded that the extension of the Province's action to defendants resident outside the Province did not exceed the territorial limits on provincial jurisdiction because the *TRA* met two conditions: the cause of action, an intangible right, had a "meaningful connection" to British Columbia and the statute respected the "legislative sovereignty of other territories" of Canada. (At para. 36.) In the words of Mr. Justice Major for the Court:[2]

> Here, the cause of action that is the pith and substance of the Act serves exclusively to make the persons ultimately responsible for tobacco-related disease suffered by British Columbians -- namely, the tobacco manufacturers who, through their wrongful acts, caused those British Columbians to be exposed to tobacco -- liable for the costs incurred by the government of British Columbia in treating that disease. There are thus strong relationships among the enacting territory (British Columbia), the subject matter of the law (compensation for the government of British Columbia's tobacco-related health care costs) and the persons made subject to it (the tobacco manufacturers ultimately responsible for those costs), such that the Act can easily be said to be meaningfully connected to the province.
>
> The Act respects the legislative sovereignty of other jurisdictions. Though the cause of action that is its pith and substance may capture, to some extent, activities occurring outside of British Columbia, no territory could possibly assert a stronger relationship to that cause of action than British Columbia. That is because there is at all times one critical connection to British Columbia exclusively: the recovery permitted by the action is in relation to expenditures by the government of British Columbia for the health care of British Columbians. [At paras. 37–8; emphasis added.]

The Court found that the *TRA* was legislation in relation to "Property and Civil Rights in the Province" within the meaning of s. 92(13) of the *Constitution Act, 1867*, and that the bounds of territoriality were respected.

[9] I note that the cause of action created by the *TRA* was not brought as a class proceeding, even though the *CPA* was in force when the action was brought. Now,

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[2] Although the Court did not use the phrase "real and substantial connection" that had emerged from cases such as *Morguard Investments Ltd. v. de Savoye* [1990] 3 S.C.R. 1077 and *Hunt v. T&N plc* [1993] 4 S.C.R. 63, I take from para. 27 and the reasons generally that Major J. intended to apply those authorities and not to vary the required analysis. The "real and substantial connection" approach to jurisdiction was later codified in the *Court Jurisdiction and Proceedings Transfer Acts* adopted in most provinces, including B.C.: see S.B.C. 2003, c. 28.

almost 20 years after *Imperial Tobacco*, “mass tort” claims generally take the form of class proceedings that are considerably more complex and ambitious than indicated by the early tobacco legislation. Various changes and refinements to class proceedings, many made at the urging of the Uniform Law Conference of Canada (“ULCC”), have been adopted by Canadian provinces in order to improve access to justice for both plaintiffs and defendants, to streamline class proceedings generally, and in more recent years, to avoid the “chaos and confusion” of multiple competing actions across the country. These developments have generally received the endorsement of Canadian trial and appellate courts. As will be seen below, their decisions have been based on two primary themes — that class action legislation such as the *CPA* is “merely procedural” and that strong policy and practical grounds favour the efficient resolution of mass tort claims, even on a “national” (or more correctly, “multi-jurisdictional”) level in our federal system.

[10] At the same time, since deciding *Imperial Tobacco,* the Supreme Court of Canada has been largely absent from the discussion of constitutional jurisdiction (sometimes called “direct” jurisdiction: see Janet Walker, “Are National Class Actions Constitutional?” (2010) 48 *Osgoode Hall L.J*. 95 at 115) and territoriality in the context of class proceedings. The Court has refused leave in some instances, but aside from its confirmation in *Club Resorts Ltd. v. Van Breda* 2012 SCC 17 that “real and substantial connection” is a constitutional principle as well as a rule of private international law, the Court has not expressed its views on the more specific issues raised by this appeal.

Legal Background

[11] To some degree at least, the idea of multi-Crown proceedings in mass tort cases rests on the shoulders of multi-jurisdictional proceedings and the jurisprudence underpinning them. Three developments over the last 20 years are relevant in this context — the inclusion of non-resident parties in class actions under statutes that were silent on the question; the subsequent enactment of “multi-jurisdictional” provisions that facilitated overlapping and competing class actions across Canada; and, of lesser significance in my view, the adoption of the

'opt-out' model of inclusion in plaintiff classes by most provinces. Through these developments the constitutional concepts of "pith and substance" and territoriality have been woven in as means of ensuring provinces keep within their legislative bounds, despite the interprovincial nature of mass torts.

[12] I propose to review these developments chronologically below, before addressing multi-Crown class proceedings and the reasons of the summary trial judge. In this chronology, I will also refer to the Supreme Court of Canada's decision in *Western Canadian Shopping Centres Inc. v. Dutton* 2001 SCC 46 ("*Dutton*") and to the role of the ULCC in seeking to improve the efficiency and extend the reach of class proceedings as a means of resolving claims against the makers and distributors of defective or dangerous products sold across Canada.

Non-Resident Plaintiffs

[13] Early class action statutes in Canada were silent about the inclusion of non-residents as parties and provided no mechanism for their identification as a class. The issue of whether, constitutionally speaking, non-resident plaintiffs could be included in a class was first raised squarely in *Nantais v. Teletronics Proprietary (Canada) Ltd*. [1995] O.J. No. 2592, 25 O.R. (3d) 331 (Gen. Div.), *leave to appeal to Div. Ct. dism'd* [1995] O.J. No. 3069. In that instance, the plaintiffs had been fitted with heart pacemakers, the leads to which were allegedly defective. Approximately 1125 residents of Canada had received the leads; only 700 of them resided in Ontario. The Court, *per* Brockenshire J., noted in particular *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077, *Hunt v. T&N plc* [1993] 4 S.C.R. 289 and the decision of the U.S. Supreme Court in *Phillips Petroleum Co. v. Shutts* 472 U.S. 797 (1985), and concluded that it was "eminently sensible … to have the questions of liability of these defendants determined as far as possible, once and for all, for all Canadians. There is nothing in the Act to prevent it." (At para. 79.)

[14] In *Carom v. Bre-X Minerals Ltd*. [1999] O.J. No. 281, 43 O.R. (3d) 441 (Gen. Div'n.), seven separate class proceedings arising out of the infamous stock fraud were before the Court. The plaintiff class in each was framed to include residents of

Canada who had purchased shares of Bre-X Minerals Ltd. (an Alberta company) on the Toronto Stock Exchange. Winkler J., as he then was, described the Ontario *Class Proceedings Act* as a "procedural statute replete with provisions guaranteeing order and fairness." He held that the proposed proceedings had as a matter of fact a real and substantial connection with Ontario, and that it was appropriate that they be heard by the Ontario court. He based his conclusion not only on the fact that non-resident plaintiffs were not expressly prohibited by the statute (see paras. 19–20), but also on the basis that "order and fairness" were not violated by the prospect of non-resident plaintiffs being included in a claim against residents and non-residents of the province. In his words:

> The plaintiffs allege a mass wrong against transcending provincial boundaries involving the promotion and sale of Bre-X shares in Canada largely in Ontario. The class definition including non-resident plaintiffs, as proposed by the plaintiffs, meets the aims of the [*Class Proceedings Act* of Ontario] of promoting access to justice, judicial economy and the modification of behaviour of wrongdoers. Accordingly, these class definitions are approved and the requirement of s. 5(1)(b) is met. [At para. 51.]

[15] The issue of non-resident parties was discussed at greater length in *Wilson v. Servier Canada Inc*. in two separate applications, the first ("No. 1") reported at (2000) 50 O.R. (3d) 219 (S.C.J.), *leave to appeal to Div. Ct. ref'd* (2000) 52 O.R. (3d) 20 *leave to appeal to SCC ref'd*, 28380 (September 6, 2011); and the other ("No. 3") reported at (2002) 59 O.R. (3d) 656 (S.C.J.) The plaintiff in *Wilson* had used a drug marketed in Canada by the defendant, a Canadian corporation that was a wholly-owned subsidiary of a French corporation. The plaintiff alleged negligence, failure to warn and breach of warranty against the defendant in a class proceeding. The class of potential plaintiffs numbered some 155,000 people across Canada, including some 56,000 residing in Ontario. In the first application, the defendant sought a stay on the grounds *inter alia* that the proposed plaintiff class members who resided outside Ontario had no connection to the province and that the relevant provisions of the Ontario *Class Proceedings Act* were *ultra vires* to the extent that the action purported to include them. (See para. 59.)

[16] Cumming J. rejected these arguments, characterizing the *Class Proceedings Act* as "procedural and remedial in nature". He continued:

> ... There is nothing in the CPA to prevent non-residents from being included in an Ontario class proceeding subject to constitutional requirements being met. On its face, the CPA authorizes the formation of classes unlimited by the territorial boundaries of Ontario.
>
> ...
>
> As already discussed, there is a real and substantial connection between the alleged cause of action in tort by Ontario residents against the defendants. In my view, this court's jurisdiction is well-founded in respect of the claims of Ontario residents. ...
>
> The CPA is merely a procedural statute. It affords the latitude to a court to establish a "national class" in a class proceeding. In my view, the CPA is not unconstitutional on the basis that the Ontario legislature is legislating extraterritorially. The CPA allows this court to include non-residents as parties in an action in which Ontario has unquestioned jurisdiction with respect to Ontario residents. [At paras. 63–6; emphasis added.]

[17] Cumming J. went on to describe the policy reasons supporting his conclusion that non-residents should be included in the plaintiff class:

> This approach is efficacious in extending the policy objectives underlying the CPA for the benefit of non-residents. If there are common issues for all Canadian claimants, this approach facilitates access to justice and judicial efficiency, and tends to inhibit potentially wrongful behaviour. This is to the advantage of all Canadians and to Canada as a federal state. This procedural flexibility serves in the nature of oil in the institutional and jurisdictional machinery of Canadian federalism. Courts in Australia and the United States, both federal states, have addressed similar issues in like manner: see generally *Femcare Ltd v. Bright*, [2000] FCA 512 (April 19, 2000) (Australia); [*Phillips Petroleum v*.] *Shutts, supra*.
>
> Mass torts and defective products do not respect provincial boundaries. Complex and costly litigation is not viable for individual claimants. The procedural latitude of the CPA recognizes the authority of all provinces and the rights of their individual residents. If a non-resident of Ontario wishes to commence an action in another province, that person can opt out of the Ontario action. If a class action is commenced and certified in either British Columbia or Quebec, that certified class proceeding will take precedence for the residents of that province. [At paras. 93–4; emphasis added.]

The Court dismissed the defendants' application for a stay.

[18] In *Wilson No. 3*, two new non-resident defendants argued that the existence of a so-called "national class" of plaintiffs (i.e., one that included non-residents of

Ontario) made the action invalid because the non-resident plaintiffs had no connection to the province. (See para. 17.) After reviewing *Morguard*, *Hunt*, *Nantais* and *Bre-X*, the Court found that there was a "real and substantial connection" between the subject matter of the action and Ontario, and that a "national class" could be created given the absence of any prohibition in the statute and given the policy reasons in favour. Again in Cumming J.'s analysis:

> ... There is such real and substantial connection in the case at hand because of the good arguable case of the representative plaintiff and Ontario class members that torts were committed in Ontario by the defendants through direct or indirect business activity in Ontario giving rise to damages on the part of the Ontario class members. The jurisdiction of the courts in civil matters long ago ceased to be a function of their capacity to order the arrest and detention of the parties. As La Forest J. held in *Morguard, supra*, "The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power" (at p. 1098 S.C.R.).
>
> Given such a sound basis for jurisdiction in respect of the class action coupled with the lack of restrictions imposed on the court by the *CPA* to include non-resident class members as a procedural matter, a "national class" can be constitutionally constituted. Such a determination with respect to the French defendants awaits the outcome of a certification motion in respect of the class action as against the French defendants. …
>
> At this point it is sufficient to say that a "national class" may be created through a successful certification motion. There is no constitutional impediment. Increasing demands for access to justice, litigation convenience and judicial economy, especially with the advent of multi-province class proceedings, provide a strong practical impetus and a sound reason to create a "national class" where appropriate in an Ontario class action. This is the sensible way to deal with the 'common issues' that arise with respect to the distribution of allegedly defective products and services throughout Canada. [At paras. 62–64; emphasis added.]

[19] In British Columbia, the original version of the *CPA* contemplated (as does the present version) that "one member of a class of *persons who are resident in British Columbia*" (my emphasis) may commence a proceeding on behalf of the members of a class. Under s. 16(1), members could *opt out* of a proceeding in the manner specified in the certification order. However, s. 16 also provided that a *non-resident* could '*opt in'*. In the words of the original provision:

> (2) Subject to subsection (4), a person who is not a resident of British Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if

> the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.
>
> (3) A person referred to in subsection (2) who opts in to a class proceeding is from that time a member of the class involved in the class proceeding for every purpose of this Act.
>
> (4) A person may not opt in to a class proceeding under subsection (2) unless the subclass of which the person is to become a member has or will have, at the time the person becomes a member, a representative plaintiff who satisfies the requirements of section 6 (1) (a), (b) and (c).

[20] In *Harrington v. Dow Corning Corp.* 2000 BCCA 605, *lve to appeal to S.C.C. dism'd*, 28367 (September 6, 2001), a majority of a five-judge division of this court ruled that jurisdiction was established in respect of non-resident plaintiffs who wished to participate with resident plaintiffs in a mass tort claim. The majority agreed that s. 16(2) of the then *CPA* permitted the non-residents to join, reasoning that *the common issue among all the plaintiffs* established the "real and substantial connection" necessary for jurisdiction. (At para. 100.) Speaking for the majority, Madam Justice Huddart reviewed developments in the law of jurisdiction in *Morguard, Moran v. Pyle* [1975] 1 S.C.R. 393 and *Amchem Products Inc. v. British Columbia (Workers Compensation Board)* [1993] 1 S.C.R. 897, and continued:

> ... Any manufacturer of breast implants would understand that any injury would follow the user in whom they were implanted into whatever jurisdiction the user might reside from time to time.
>
> It might be said that all women who suffer injury from breast implants may opt into the class proceeding because they would all come within the language of s. 16(2). But, as Mr. Justice Mackenzie noted, this procedural provision does not seek to extend the jurisdiction of British Columbia courts beyond their constitutionally recognized limits. Rather, it tells a court that the Legislature accepts, even encourages, a decision to include non-residents in class proceedings as a matter of public policy. This policy makes good sense. Section 16(2) may preclude the court from certifying a national class on an opting out basis, as was done in *Nantais, supra*. However, it accords with requirements of comity, and with the policy underlying the enactment of legislation enabling class actions to determine the liability of defendants for mass injury in one forum to the extent claimants may wish and fairness to the defendants may permit. [At paras. 84–5; emphasis added.]

She added at para. 99:

> New types of proceedings require reconsideration of old rules if the fundamental principles of order and fairness are to be respected. To permit what the appellants call "piggy backing" in a class proceeding is not to gut the

> foundation of conflict of laws principles. Rather, as I have tried to explain, it is to accommodate the values underlying those principles. To exclude those respondents who do not reside in British Columbia from this action because they have not used the product in British Columbia would, in these circumstances, contradict the principles of order and fairness that underlie the jurisdictional rules. By opting-in the non-resident class members are accepting that their claims are essentially the same as those of the resident class members. To the extent the appellants can establish they are not, they can be excluded by order of the case management or trial judge upon application. So can a class certified in another province, as the Dow Settlement Order in this proceeding illustrates. [Emphasis added.]

Although this decision has been criticized in some quarters, it still remains good law in this province (see *Chalmers v. AMO Canada Co*. 2010 BCCA 560 at para. 44) and is binding on this court.

Dutton

[21] The first major pronouncement of the Supreme Court of Canada concerning class proceedings came in a trilogy that included *Dutton*. At issue was an alleged breach of fiduciary duty owed by the defendants to a group of immigrant investors who were participants in the federal government's Business Immigration Program. The action was brought under the Rules of Court of Alberta, since the province at the time did not have a class proceedings statute. Speaking for the Court, Chief Justice McLachlin briefly reviewed the history of representative actions from the 17th century in the English courts of Equity (see paras. 19–25.) This history illustrated that in the absence of "comprehensive legislation", courts may use their "inherent power" to settle the rules of practice and "fill the void", as had occurred when R. 41 of the *Alberta Rules of Court* had been adopted.[3]

[22] The Chief Justice also endorsed the policy reasons underlying modern class actions in Canada:

> The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of

[3] On the significance of the suggestion that class actions, or something very close to them, may be created by courts through court rules, see Janet Walker (2010), *supra*, at 112-3.

> shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties. [At para. 26.]

At para. 44, she added:

> Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness. [Emphasis added.]

The Court did not refer to the fact that all the plaintiffs in *Dutton* were non-residents of Alberta, but that fact was no doubt apparent. (See also *Currie v. McDonald's Restaurants of Canada Ltd*. 2005 O.J. No. 506 (C.A.), which involved an *international* class action.)

ULCC Report

[23] Perhaps not surprisingly, overlapping class actions in different provinces began to spring up in the early years of this century, creating difficulties in the pursuit of accountability in mass tort cases. The "Baycol" litigation was a prime example. It involved individuals across Canada who alleged they had contracted a muscle disease after using a drug distributed in Canada by Bayer Inc. Separate class proceedings were brought by representative plaintiffs against the distributor in British Columbia (see *Bouchanskaia v. Bayer Inc.* 2003 BCSC 1306), Saskatchewan, Manitoba, Ontario, Quebec and Newfoundland and Labrador. In 2004, settlement agreements were reached in some jurisdictions but not others, and some courts delayed certification in "an attitude of respectful co-operation" with the Baycol proceedings in other provinces. (See *Pardy v. Bayer Inc.* 2004 NLSCTD 72 at para. 178.) In granting certification in Manitoba, the Court noted that virtually identical claims were being pursued in several jurisdictions and queried whether it was fair that the defendant "should have to defend essentially the same action in

more than one province." (See *Walls v. Bayer Inc.* 2005 MBQB 3 at para. 88.) It went on to note the lack of legislation that would permit a court to "take control of a class proceeding for all of Canada." (At para. 89.)

[24] The inefficiencies associated with parallel class proceedings across Canada were soon recognized by the ULCC. It established a "National Class Actions Project" to study the problem. A committee produced a report in 2005 entitled "Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Inter-Jurisdictional Issues: Background, Analysis and Recommendations". The Report discussed the historical evolution of opt-in vs. opt-out class action mechanisms in Canada and noted that:

> ... in British Columbia the opt-in requirement for non-resident class members came into being with little explanation of the rationale for its introduction, other than (one infers) that it could prevent Ontario and B.C. from having competing opt-out national classes, and (again, one infers) that it could give greater certainty to the preclusive effect of B.C. judgments on non-resident class members. [At para. 22.]

The Report suggested that the policy reasons supporting the opt-out model could now be accorded greater weight, especially in light of *Dutton* and *Currie*. (At para. 25.) It recommended that in order to involve as many claimants as possible, provinces adopt the Ontario model of permitting non-residents to opt *out* rather than requiring them to opt in.

[25] The main thrust of the ULCC's recommendations, however, was the creation of a streamlined interprovincial approach to multi-jurisdictional class proceedings — i.e., proceedings brought on behalf of a class of persons that includes non-residents of the enacting province. The ULCC described the policy reasons supporting this recommendation for a "national" proceeding:

> Just as the class action is generally superior to a series of individual actions, the national class action may be superior to a series of provincial class actions, even if the latter can be coordinated to a certain extent by plaintiff's counsel. The national class serves judicial economy by avoiding duplication of fact-finding, judicial analysis and pretrial procedures and eliminates the risk of inconsistent findings. It increases access to justice by spreading litigation costs across a larger group of claimants, thus reducing the litigation costs of each claim, increasing both settlement incentives and compensation

> per claim and increasing the likelihood that valid claims will be brought forward. This in turn serves the goal of behaviour modification, serving efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public.
>
> By comparison, multiple provincial class actions work against the interests of absent class members, who are the intended beneficiaries of class action legislation, and frustrate the efforts of class counsel, whose economic interests determine, to some degree, whether or not class actions are brought. Absent class members want quick and effective resolution to their claims. This outcome becomes less likely when there are thirteen overlapping actions with thirteen different counsel. [At paras. 17–18; emphasis added.]

Multi-Jurisdictional Proceedings

[26] The multi-jurisdictional model was adopted by Saskatchewan in 2007, by Alberta in 2010 and by Ontario in 2020.

[27] In *Thorpe v. Honda Canada, Inc.* 2011 SKQB 72, the constitutionality of multi-jurisdictional class proceedings was challenged in Saskatchewan. It had adopted the opt-out model. The defendant argued that as a result of the opt-out feature, any class description that did not contain limitations restricting class members to the territorial boundaries of the province would risk including individuals who lacked a real and substantial connection to the province and that s. 6.1 of the statute was therefore *ultra vires*. (At para. 113.)

[28] The Court noted the importance of public policy in addressing this question. In the words of Mr. Justice Popescul, as he then was:

> Although it is true that, generally speaking, residents of other provinces usually have their disputes adjudicated in the province where they live or where the cause of action arose, that does not mean, especially in the context of class action litigation, that residents of provinces outside of the province where a class action is certified cannot be bound by a decision from a Saskatchewan superior court. There are valid, constitutionally sound reasons for this. Also, to accept the argument of Honda Canada would lead to the untenable situation of extinguishing multi-jurisdictional class actions in Canada. The import of Honda Canada's submission is that no superior court in any province ought be able to certify a class action that extends beyond its borders.
>
> It is clear that there are numerous public policy reasons for continuing to permit multi-jurisdictional class actions to go forward in appropriate circumstances. Class actions have a social dimension that facilitates access

> to justice by citizens who share common problems and would otherwise have little incentive to seek redress for wrongdoing from the courts. In *Carom v. Bre-X Minerals Ltd.* … Winkler J. (as he then was) approved a multi-jurisdictional class definition and commented:
>
> > 51 The plaintiffs allege a mass wrong transcending provincial boundaries involving the promotion and sale of Bre-X shares in Canada largely in Ontario. The class definition including non-resident plaintiffs, as proposed by the plaintiffs, meets the aims of the [*Class Proceedings Act* of Ontario] of promoting access to justice, judicial economy and the modification of behaviour of wrongdoers. Accordingly, these class definitions are approved and the requirement of s. 5(1)(b) is met. [At paras. 115–6.]

[29] Despite the strong policy reasons he described, Popescul J. examined the law carefully "in order to ensure that there is a logical and sound legal justification for the practice that has developed." After noting that the *Constitution Act, 1867* did not *create* the judicial authority of superior courts but *affirmed* it, the Court observed that the amendments recognizing multi-jurisdictional proceedings in Saskatchewan had been intended to "address some of the difficult issues that were arising with increasing frequency relating to overlapping multi-jurisdictional class action proceedings in different jurisdictions." Echoing *Harrington*, he described the purpose and effect of the amendment as "not to extend jurisdiction to the courts that would otherwise not exist but rather, to promote efficient litigation by limiting the overlapping of class action litigation." (At paras. 125–6.)

[30] The Court went on to consider more specifically the juridical basis for a provincial superior court's granting a multi-jurisdictional certification order that purports to bind plaintiffs in another province. This was said to require a balancing of values by certifying courts:

> The difficult problem is to balance the utilitarian virtues of permitting national class actions in a federation that has different provinces exercising territorial legislative jurisdiction with the "real and substantial connection test" endorsed by the Supreme Court of Canada in *Morguard* [citation omitted]*, Hunt* [citation omitted], and *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416 [At para. 129.]

Adopting the reasoning in *Wilson (No. 1)* and *Harrington*, the Court concluded:

> ... This Court has unquestionable jurisdiction to adjudicate upon the issues as between the representative plaintiff and Honda Canada by virtue of the fact that the representative plaintiff resides in this province and her cause of action arose here.
>
> This accords with the principles set forth in *Morguard …*, which are now substantially codified in the *CJPTA*. Given that this Court has jurisdiction over the litigation, this Court can as well, assume jurisdiction over the other Canadian non-resident class members by applying the Act and the *CJPTA* and by relying upon the overreaching authority conferred upon superior courts by virtue of s. 129 of the *Constitution Act, 1867*.
>
> In other words, this Court does have jurisdiction *simpliciter* to certify a national class action. Other considerations, not applicable in the circumstances of this case, may come into play as to whether the Court should assume jurisdiction if there is a similar class action commenced elsewhere (s. 6(2)) or if, for some other reason the Court determines that it is more appropriate for the class action to proceed in another jurisdiction (s. 6.1). The issue of *forum non conveniens* or of similar conflicting class actions in other jurisdictions is not at issue in this case. [At paras. 138–40; emphasis added.]

[31] Next on the subject of multi-jurisdictional class actions, I note *Meeking v. Cash Store Inc.* 2013 MBCA 81, in which the Court dealt both with jurisdiction in the constitutional sense and the enforceability in Manitoba of a settlement order made by an Ontario court. It purported to bind (as plaintiffs) persons resident in Canada other than in British Columbia and Alberta. The Ontario court's certification order had required class members to 'opt in' by a given date, failing which they would be barred from sharing in the settlement amount. Mr. Meeking, a resident of Manitoba, did not opt in or opt out and indeed said he had not even been aware of the Ontario action. He filed his own statement of claim in Manitoba. The defendant quickly sought an order of the court in Manitoba recognizing the settlement judgment in that province and precluding Mr. Meeking from 're-litigating' the claims that were the subject of the settlement.

[32] The Manitoba Court of Appeal ultimately found that the notice given to Manitoba customers of the defendant had been inadequate, so that the Ontario settlement order was not enforceable in Manitoba. However, in the course of its reasons, the Court of Appeal discussed issues of constitutionality and territoriality at

some length. With respect to the “real and substantial connection test,” Madam Justice Cameron for the Court noted a “line of jurisprudence that has been slowly developing, wherein provincial superior courts have certified multi-jurisdictional class actions involving non-resident class members." This concept had been neatly summarized by Winkler J. in *Baxter v. Canada (Attorney General)* [2005] O.T.C. 391 (S.C.):

> The thrust of *Harrington* and *Wilson*, in relation to the jurisdiction determination, is that where a class action involving intra-provincial plaintiffs could be certified, and the common issues forming the basis for the certification are shared by both the resident class and extra-provincial non-residents against the defendant, the existence of such common issues provides a "real and substantial connection" of the non-residents to the forum in relation to the action. [At para. 12.]

[33] The Court in *Meeking* noted that Hogg and McKee, *supra*, had opined that the “expansion” of the “real and substantial connection” test in *Harrington* and *Thorpe* was territorially unconstitutional. In their words:

> The Superior Court of the province only has jurisdiction inside the boundaries of the province. And the provincial Legislature lacks jurisdiction to enact laws with the effect outside the boundaries of the province, so that the Legislature cannot expand the jurisdiction of its courts outside the boundaries of the province, which of course, is territory exclusively occupied by the courts of the other provinces (foreign countries). [At para. 79; emphasis added.]

[34] On the other hand, the Court noted there was support for the view that the jurisdiction of superior courts is not necessarily restricted by the territorial limits on the legislative jurisdiction of provinces. Cameron J.A. continued:

> This position was summarized by Winkler C.J.O. in the recent case of *Parsons v. The Canadian Red Cross Society*, 2013 ONSC 3053 In that case, the court was tasked with determining whether it had jurisdiction to sit in another province to hear a motion concerning a pan-Canadian settlement agreement of class actions involving various provinces. In holding that the court did have jurisdiction, he stated (at paras. 26-27):
>
> > AG Ontario further submits that Ontario courts historically could not hold hearings outside Ontario. However, it did not point to any constitutional or statutory limitation on the geographical location where the provincial superior courts may sit in order to adjudicate on the issues raised in a proceeding.
> >
> > Professor Janet Walker observes in her article, “Are National Class Actions Constitutional? – A Reply to Hogg and McKee” (2010) 48

> *Osgoode Hall L.J*. 95, at pp. 105-108, that there is no provision in the *Constitution Act, 1867* ... that addresses or could be said to confine the superior courts' jurisdiction to adjudicate within territorial boundaries. Equally, there is no provision of the Constitution that speaks to the physical location where the superior courts must sit. [At para. 83; emphasis added.]

[35] Like the Supreme Court in *Dutton*, the Court in *Meeking* reviewed the historical development of class or representative actions, beginning in the English courts of Chancery. Importantly, those courts did not depend on the presence of the defendant in England to take jurisdiction. As observed by R.W. White in "Equitable Obligations In Private International Law: The Choice Of Law" (1986) 11 *Sydney L. Rev*. 92, jurisdiction in Chancery "depended upon the residence or domicile of the defendant within England, or on the cause of action arising, or the subject matter of the suit being situated, in England." (At 96.) These tests could be equated to the modern "real and substantial connection" test enunciated in *Morguard,* and although Professor White's article dealt with private international law rather than constitutional law, "the parallel manner in which the two areas of law have evolved, and their interconnectivity, cannot be ignored." (At para. 91.) The Court in *Meeking* ruled on this point:

> The Canadian jurisprudence to which I have referred that would allow for common issues to be considered as a presumptive connecting factor in the real and substantial connection test is persuasive. Fairness to non-resident plaintiffs is achieved through the notification process and opt-out provisions, while, at the same time, the policy considerations favouring class actions described by McLachlin C.J.C. in *Western Canadian Shopping* are fulfilled. Further, the constitutional principle of federalism is respected. [At para. 93; emphasis added.]

[36] Finally, I note the lengthy reasons of the Ontario Court of Appeal in *Airia Brands Inc. v. Air Canada* 2017 ONCA 792. There the Court reviewed much of the jurisprudence relating to jurisdiction over "AFCs" ("absent foreign claimants"). The Court observed that two very different approaches to jurisdiction had emerged in the jurisprudence, one "expansive" and the other more restrictive. Into the first category, it placed *Meeking* and *Harrington* and noted that their approach had been criticized by Hogg and McKee, *supra* at 293, on the basis that it "conflate[d] certification (which requires common issues) and the test for jurisdiction". (*Airia* at para. 74.) The

more restrictive approach was exemplified by cases such as *HSBC v. Hocking* 2008 QCCA 800, where the Court stated that a "shared interest in the common issues was *not* sufficient to establish a "real and substantial connection" where there was no other connection to the jurisdiction. (At para. 79.) This restrictive approach had also been criticized on the basis that, in the words of T.J. Monestier in "Personal Jurisdiction Over Non-Resident Class Members: Have I Gone Down the Wrong Road?" (2010) 45 *Tex Int'l LJ* 537, it "essentially undercuts the ability of the class action to act as a vehicle for the resolution of issues that transcend provincial borders and are perhaps best suited to being addressed in class form." (At 551–2, quoted in *Airia* at para. 80.)

[37] In *Airia* itself, the Court of Appeal found that the chambers judge had permitted "foreign law governing *recognition*" (my emphasis) to dominate her analysis of *jurisdiction*, to the exclusion of all other relevant factors. (At para. 106.) She had also erred in ruling that jurisdiction existed only if the AFCs were present in Ontario or consented to the Ontario court's jurisdiction. (At para. 8). The Ontario court was found to have jurisdiction over the AFCs; however, the Court of Appeal declined to decide the defendants' alternative argument challenging the constitutional applicability of the "real and substantial connection" test to the *Class Proceedings Act* of Ontario. (See para. 138.)

Multi-jurisdictional Legislation in British Columbia

[38] In April 2018, the Attorney General of British Columbia proposed amendments to the *CPA* to incorporate expressly the concept of multi-jurisdictional class actions — i.e., the inclusion of non-residents in a class of plaintiffs. Speaking in the Legislature, the Attorney described the objective of the amending bill, Bill 21, as follows:

> To provide a more effective way for as many potential claimants to be included as class members, the bill will change the class proceedings framework as it relates to persons who do not reside in the province. Rather than non-residents having to take steps to opt in to a class proceeding in British Columbia, they will be included as a class member unless they choose to opt out. [British Columbia, *Official Report of the Debates of the Legislative Assembly* (Hansard), 41–3, No. 122 (23 April 2018) at 4120.]

On second reading, the Attorney told the Legislature that the amendments were intended to "ensure the inclusion of as many potential claimants to be included as class members … unless they choose to opt out." (British Columbia, *Official Report of the Debates of the Legislative Assembly* (Hansard), 41–3, No. 122 (23 April 2018) at 4120.)

[39] The Legislature duly enacted the *Class Proceedings Amendment Act*, S.B.C. 2018, c. 16 to add the concept of multi-jurisdictional class proceedings. The amended *CPA* defined that phrase to mean proceedings brought on behalf of a class of persons that includes persons who do not reside in the Province. Under s. 4(2) the Court was authorized to divide "the class" in a multi-jurisdictional proceeding into resident and non-resident subclasses. Subsections 4(3) and (4) were added as follows:

> (3) If a multi-jurisdictional class proceeding or a proposed multi-jurisdictional class proceeding has been commenced elsewhere in Canada and involves the same or similar subject matter to that of the proceeding being considered for certification, the court must determine whether it would be preferable for some or all of the claims of the proposed class members, or some or all of the common issues raised by those claims, to be resolved in the proceeding commenced elsewhere.
>
> (4) When making a determination under subsection (3), the court must
>
> (a) be guided by the following objectives:
>
> (i) to ensure that the interests of all parties in each of the relevant jurisdictions are given due consideration;
>
> (ii) to ensure that the ends of justice are served;
>
> (iii) to avoid irreconcilable judgments, if possible;
>
> (iv) to promote judicial economy, and
>
> (b) consider relevant factors, including the following:
>
> (i) the alleged basis of liability, including the applicable laws;
>
> (ii) the stage that each of the proceedings has reached;
>
> (iii) the plan for the proposed multi-jurisdictional class proceeding, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the proposed class;
>
> (iv) the location of class members and representative plaintiffs in each of the proceedings, including the ability of representative

> plaintiffs to participate in the proceedings and to represent the interests of class members;
>
> (v) the location of evidence and witnesses.

Sections 16(2)–(5) were repealed, with the result that both residents and non-residents could opt out. The manner of doing so was again to be specified in the certification order.

Multi-Crown Proceedings in British Columbia

[40] A few months after the enactment of the multi-jurisdictional amendments to the *CPA*, the Province enacted the *ORA*. This was 'tobacco-type' legislation in that it created a direct cause of action in the Province against manufacturers and distributors of opioid drugs and included the various provisions regarding onus, causation, 'population-based' evidence, joint and several liability and the aggregation of claims that were designed to facilitate proof of the plaintiff's case. These features had been upheld as constitutional by the Supreme Court of Canada in *Imperial Tobacco* (2005).

[41] However, the *ORA* took multi-jurisdictional class actions two steps further. In addition to providing *Canada* with a cause of action "in its own right and not on the basis of a subrogated claim" against opioid manufacturers and related entities (see s. 2.1), the *ORA* provides that once the Province has commenced an opioid-related proceeding,[4] it may also bring an action *on behalf of* a class consisting of the government of Canada and the governments of one or more jurisdictions in Canada — a phrase obviously intended to include provincial and territorial governments.

[42] In introducing the *ORA* in the Legislature, the Attorney General referred to the earlier tobacco legislation:

> The legislation was tested repeatedly in the courts. And while it was found to be extraterritorial in its reach, the underlying principles of the act were found to be constitutionally sound. ...

[4] The Province itself may sue only in respect of an "opioid-related wrong", defined to mean a tort committed in the Province or a breach of duty or obligation owed to persons in British Columbia. Canada's direct claim is also restricted to "opioid-related wrongs" as defined: see s. 2.1(1).

> As I indicated on August 29, government is introducing this legislation to allow the government to proceed in its litigation with opioid manufacturers and wholesalers on a similar basis to that in the tobacco case, which has been governed by rules set out in the *Tobacco Damages and Health Care Costs Recovery Act*, as it is now known. Like the existing *Tobacco Damages and Health Care Costs Recovery Act*, this bill will establish the new statutory tort of an opioid-related wrong and establish that government has a direct cause of action to recover the health care costs, the cost of health care benefits, from those who have committed an opioid-related wrong as defined. [British Columbia, *Official Report of the Debates of the Legislative Assembly* (Hansard), 41–3, No. 152 (2 October 2018) at 5389–90.]

[43] No mention was made, and no question was raised in the Legislature, concerning the proposed ability of the Province to bring proceedings on behalf of other provinces, but this authority was conferred by s. 11 of the *ORA*. It states:

> 11 (1) If the government has commenced a proceeding in relation to an opioid-related wrong and the proceeding is ongoing as of the date this section comes into force,
>
> (a) the proceeding continues in accordance with this Act,
>
> (b) for the purposes of section 4 of the *Class Proceedings Act*, the government may bring an action on behalf of a class consisting of
>
> (i) one or more of the government of Canada and the government of a jurisdiction within Canada, and
>
> (ii) a federal or provincial government payment agency that makes reimbursement for the cost of services that are in the nature of health care benefits within the meaning of this Act,
>
> (c) a procedure completed, and an order made, before this section comes into force continues to have effect unless
>
> (i) it would be inconsistent with this Act, or
>
> (ii) the court orders otherwise, and
>
> (d) a procedure that began but was not completed before this section comes into force must be completed in accordance with this Act.
>
> (2) Nothing in subsection (1) (b) of this section prevents a member of the class described in that provision from opting out of the proceeding in accordance with section 16 of the *Class Proceedings Act*.
>
> [Emphasis added.]

It is the constitutional validity of this section, and this section only, that is the subject of this appeal.

[44] As I read s. 11, it transformed the Province's class action commenced under the *CPA* into an action under the *ORA*, such that all "procedures" arising in the action were henceforth to be carried out under the framework of the *ORA.* The appellants contend that the reason for this 'continuation' is that the plaintiff, the King in Right of the Province, cannot be said to be a "member of a class of persons who are resident in British Columbia" for purposes of s. 2(1) of the *CPA* and therefore could not commence an action under that statute. I will return to this issue below.

[45] It is worth emphasizing here, however, that s. 11 of the *ORA* does not purport to "*create*" a direct cause of action for the 'foreign' (in private international law terms) governments described therein (and it is very unlikely that a provincial government *could* do so for other provinces). Further, while *on its face*, the types of action that may be brought and the type of relief that may be sought on behalf of other governments in Canada appear to be unlimited, s. 11 refers to s. 4 of the *CPA*. Section 4 in turn sets out conditions for the certification of class proceedings and s. 4.1 imposes additional conditions applicable to multi-jurisdictional class proceedings. Presumably, no court would certify an action brought by another province unless it related to opioid products and could be tried conveniently with British Columbia's own claims.

The ORA Proceeding

[46] Against this background, I turn at last to the case at bar. The Province of British Columbia commenced this proceeding *under the CPA* in August 2018, i.e., prior to the enactment of the *ORA*. The third amended pleading (the "NOCC") continues to state that the action is brought under the *CPA,* but now the Province sues not only on its own behalf but also on behalf of "a class of other provincial and

federal entities", as contemplated by s. 11 of the *ORA*. Paragraph 116 of the pleading describes the plaintiff Class and Subclass:

> (a) all federal, provincial, and territorial governments that, during the period from 1996 to the present (the "Class Period"), paid healthcare, pharmaceutical, treatment and other costs related to Opioids (the "Class"); and
>
> (b) all federal, provincial, and territorial governments that have legislation specifically directed at recovery of damages and healthcare costs arising from the Opioid Epidemic as defined below (the "ORA Subclass").

[47] On its own behalf and on behalf of all Class members, the Province asserts public nuisance against all defendants and unjust enrichment and breach of s. 5(2) of the *Competition Act*, R.S.C. 1985, c. C-34 against the "Manufacturer Defendants". On behalf of the Subclass members, it also asserts at para. 231:

> (b) statutory causes of action on behalf of ORA Subclass Members under s. 2(1) of the ORA with joint and several liability under s. 4 of the ORA based on the following opioid-related wrongs:
>
> (i) as against all Defendants:
>
> A. negligent failure to warn;
>
> (ii) as against the manufacturer Defendants:
>
> A. Negligent design;
>
> B. Negligent misrepresentation;
>
> C. Fraudulent misrepresentation/deceit;
>
> D. Breach of s. 52 of the *Competition Act*; and
>
> E. Breach of s. 9 of the *Food and Drugs Act*….

(I note the suggestion in para. (b) above that the statutory causes of action asserted on behalf of Subclass members (i.e., provinces other than British Columbia) are causes arising under ss. *2 and 4 of the ORA*. Counsel for the Province has confirmed that this is erroneous and that instead the subparagraph should refer to causes arising under the other provinces' counterparts to those sections in their respective opioid-recovery statutes. I assume an appropriate amendment to the pleading will be made in due course.)

[48] Consistent with the foregoing, the NOCC states under the heading "Damages" that the action is brought "pursuant to the provisions of statutes

including, but not limited to, the *ORA and its various counterparts in Alberta, Saskatchewan, Manitoba, Ontario, Newfoundland Labrador, Nova Scotia and Prince Edward Island, and parallel legislation in other provinces and territories*". (My emphasis.) In addition, under "Relief Sought", British Columbia seeks certain relief on its own behalf and on behalf of the Class Members, including various declarations pertaining to alleged breaches of duty; and on behalf of the Subclass, the present value of the estimated total expenditures incurred by the Subclass for "healthcare benefits that could reasonably be expected to be provided for their respective residents resulting from Opioid use, side effects and/or addiction", and general damages suffered as a result of conduct contrary to Part VI of the *Competition Act*.

[49] Finally, under the heading "Jurisdiction" and in an endorsement attached to the NOCC for purposes of service *ex juris*, the Province also invokes the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 (the "*CJPTA*"):

> There is a real and substantial connection between British Columbia and the facts alleged in this proceeding. The plaintiff and the Class members plead and rely upon the *CJPTA* in respect of the Defendants. Without limiting the generality of the foregoing, a real and substantial connection between British Columbia and the facts alleged in this proceeding exists pursuant to sections 10 (f) – (i) of the *CJPTA* because this proceeding:
>
> (a) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia;
>
> (b) concerns a tort committed in British Columbia;
>
> (c) concerns a business carried on in British Columbia; and
>
> (d) is a claim for an injunction ordering a party to do or refrain from doing anything in British Columbia. [Emphasis added.]

The Applications

[50] In 2020, the defendants Sandoz Canada Inc., Sanis Health Inc. and Shoppers Drug Mart Inc., Mylan Pharmaceuticals ULC, McKesson Canada Corporation, Paladin Labs Inc., Endo Pharmaceuticals Inc., Endo International plc and Endo Ventures Ltd. (collectively the "appellants") filed applications in the Supreme Court of British Columbia. They sought a declaration that s. 11 of the *ORA*

is *ultra vires* the Legislature of British Columbia and therefore of no force or effect, and an order that the applications were suitable for summary trial under R. 9-7 of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009.

[51] The matter came before Mr. Justice Brundrett in September 2022. His reasons, dated December 8, 2022 are indexed as 2022 BCSC 2147.

The Summary Trial Judge's Reasons

[52] The summary trial judge summarized the parties' respective positions concisely at the start of his reasons:

> The Applicants jointly argue that s. 11 is *ultra vires* the Legislature as being legislation that has the dominant characteristic, in pith and substance, of legislating in respect of property and civil rights outside of British Columbia, contrary to the territorial limits on the legislative competence of the Legislature pursuant to s. 92 of the *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. More specifically, s. 11 is argued to be: (a) contrary to the opening words of s. 92, which limit the legislative competence of the provincial legislatures to matters "[i]n each Province"; and (b) contrary to s. 92(13), which limits the legislative competence of the Legislature in respect of property and civil rights to such matters "in the Province".
>
> In other words, the Applicants argue that s. 11 of the *ORA* does not respect the territorial limits of provincial power by allowing the Province to legislate rights beyond its borders, thereby infringing on the litigation autonomy of foreign governments. In essence, they argue that s. 11 does not respect the "litigation autonomy" of foreign Crowns.
>
> The Province maintains that s. 11(1) of the *ORA* is within its legislative competence under s. 92(14) of the *Constitution Act, 1867* because it relates to the administration of justice in British Columbia. It submits the geographic scope of a provincial legislature's authority under s. 92(14) is as broad as the territorial jurisdiction of the courts within that province. Since provincial superior courts can consider causes of action in other jurisdictions in adjudicating common issues with a sufficient connection to British Columbia, s. 11 is constitutional. In addition, the Province points to the ability of other governments to opt out of a class proceeding under s. 16(1) the *CPA* in the manner and time specified in a certification order. [At paras. 4–6; emphasis added.]

He found that the matter was suitable for summary trial given that the record consisted mainly of unchallenged legislative facts.

[53] The judge began by addressing the opt-out 'mechanisms' in the *ORA* and *CPA* and their "binding" effects. He emphasized the wide discretion given to courts by s. 16 of the *CPA* to "fashion a certification order which would result in provincial governments being able to opt out of the proceedings." Where a member has not opted out, s. 26 of the *CPA* states that a judgment on the common issues is binding on that member, just as any settlement is also binding under s. 35. If a member does opt out, the limitation period resumes running as against it under s. 39(1)(a). Brundrett J. noted the change in the *CPA* in 2018 to an 'opt-out' model, which the Attorney had told the Legislature would promote access to justice by ensuring as many potential claimants as possible could be included as class members in class proceedings. (At para. 17.)

[54] In this case, of course, the identity of all potential Subclass members is known. According to the litigation plan filed by British Columbia, class counsel in this case would provide notice to each provincial Subclass member within 14 days of the certification order, if granted. Each member would then have 30 days to determine whether it wishes to opt *in* to the proceeding. (At para. 15.) However, the Province informed the Court that it would seek a term in the certification order that governments that did not "positively *opt in*" to the action would be deemed to have *opted out*: see para. 15. If this was a concession intended to 'save' the constitutionality of s. 11, it was in my view misconceived; the constitutionality of a provision must surely be decided on the basis of its actual wording.

Determining Constitutional Validity

[55] After a review of the *ORA* itself and the history of the pleadings in this case, Brundrett J. turned to the principles applicable to constitutional challenges such as this. He noted at para. 37 that where statutory language is open to competing plausible interpretations, "courts presume constitutional legislative intent and choose an interpretation that supports" the validity of the law. (Citing *Holland v. British Columbia (Attorney General)* 2020 BCCA 304 at para. 29 and *Siemens v. Manitoba (Attorney General)* 2003 SCC 3 at para. 33.) As well, he noted at para. 44 that a legislating body is presumed to intend to confine itself to its own sphere: see

Canadian Broadcasting Corp. v. Quebec (Police Commission) [1979] 2 S.C.R. 618 at 641 and *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.* 2019 SCC 58 at para. 28. Last, where a specific provision of a statute (as opposed to the entire statute) is challenged, he suggested that a court will generally first look to characterize the provisions that are challenged rather than the entire statutory scheme. This characterization must be as precise as possible. (Citing *Reference re Genetic Non-Discrimination Act* 2020 SCC 17 at paras. 30–2.) I would add that at the same time, the impugned provision should not be considered in isolation: see *General Motors of Canada Ltd. v. City National Leasing* [1989] 1 S.C.R. 641 at 665, *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)* 2002 SCC 31 at paras. 55–8 and *Murray-Hall v. Québec (Attorney-General)* 2023 SCC 10 at para. 37.

[56] The judge set out the well-known test for the determination of constitutional validity — the first step being to determine the pith and substance of the legislation and the second to identify a provincial head of power, or "matter', under which it falls in s. 91 or 92 of the *Constitution Act*, *1867*. This process was recently confirmed in *References re Greenhouse Gas Pollution Pricing Act* 2021 SCC 11, from which the judge quoted at para. 39 of his reasons. In the same vein, he cited para. 36 of *Imperial Tobacco* (2005), where Major J. had observed that where the pith and substance of a statute is intangible:

> … the Court must look to the relationships among the enacting territory, the subject matter of the legislation and the persons made subject to it, in order to determine whether the legislation, if allowed to stand, will respect the dual purposes of the territorial limitations in s. 92 (namely, to ensure that provincial legislation has a meaningful connection to the enacting province and pays respect to the legislative sovereignty of other territories). If it would, the pith and substance of the legislation should be regarded as situated in the province. [Quoted at para. 40 of the summary trial judge's reasons.]

[57] Beginning at para. 46, Brundrett J. described the parties' submissions at greater length. Part of the appellants' argument was the result of the reversal of the earlier "opt-in" feature of the *CPA*: the appellants contended that the effect of s. 11 of the *ORA* was to "bind" the litigation choices of provincial Crowns or the federal government if they do not opt out of the proceeding. The purpose of that provision

must, the appellants said, be to "allow the Crown of one province to prosecute causes of action on behalf of sovereign powers of other territories in relation to their health care costs." In the appellants' submission, this created an "unconstitutional choice":

> ... they [other provinces] must either opt out of this class action or be bound by its terms. Requiring another government to make this decision arrogates to British Columbia the extraterritorial authority — which it does not have — to force other equal sovereign members of the federation to determine their litigation strategy on British Columbia's timetable. British Columbia cannot reach into other provinces, force their governments to determine a litigation strategy, and arrogate civil rights belonging to other Crowns without any connection to British Columbia. This violates the territorial limitations on provincial power and undermines the equal sovereignty of the other provinces and federal government. Section 11 therefore ought to be declared of no force and effect. [At para. 47; emphasis added.]

[58] The Province responded that the pith and substance of s. 11 relates to the Administration of Justice in the Province, which includes procedure in civil matters in provincial courts. It characterized the effect of the opt-out provisions as "merely procedural" and stressed that no Canadian province or territory has sought to challenge s. 11. (Indeed as mentioned earlier, all the other common law provinces have now enacted their own opioid-recovery statutes, including opt out mechanisms, that are similar, if not identical, to that in the *ORA*.) Further, the Province argued:

> ... It [the *ORA*] does not alter the substantive rights or violate the sovereignty of any foreign government. Further, the *ORA* is directed at impacts within British Columbia, and any extraterritorial impacts are incidental or ancillary to this valid provincial purpose.
>
> The Province submits that the scheme can be interpreted and applied in a way that is constitutional; that being an opt-in model. It submits that the *CPA* already permits the Province to bring an action on behalf of other governments and for other governments to elect to participate in the action.… The Province argues that the courts should be cautions about invalidating laws when no other government contests their validity. ... [At paras. 48–9.]

[59] The judge emphasized that the applications before him did not raise issues under s. 96 of the *Constitution Act, 1867*, nor the constitutionality of "national" (or multi-jurisdictional) class actions — a question that had been determined in *Harrington* and *Thorpe*. Counsel in this court confirmed that the constitutional

validity of multi-jurisdictional proceedings is *not* challenged in this case. Thus the judge characterized the issue before him as:

> ... whether s. 11 of the *ORA* is *ultra vires* the Legislature under s. 92 of the *Constitution Act, 1867* because it permits the Legislature to infringe upon the litigation-related rights of other governments. [At para. 53.]

[60] With respect to the purpose and effects of s. 11 — the first step in determining its pith and substance — the summary trial judge found that the purpose of s. 11(1)(b) was to "provide a *procedural mechanism* to presumptively authorize the Province to act on behalf of governmental parties in this putative class action." (My emphasis.) This purpose, he said, was compatible with the goals of facilitating consistency and clarity in the certification of multi-jurisdictional class proceedings and ensuring that as many potential claimants as possible are included as class members. He had used the word "presumptive" because while the provision expressly includes other governments as class members, s. 11(2) does preserve the ability of a class member to opt out in accordance with the certification order (if and when it is granted). In his view, the choice of other provincial governments (which he described as "sophisticated entities") to participate or not in the action was preserved by means of "the discretion of the court to make orders impacting the manner in which members may opt in or opt out of the proceeding." (At para. 57.) The judge later added at para. 81 that whether the scheme was an opt-in or opt-out one, the "litigation choice" of other provincial governments to participate in the action was preserved.

[61] Brundrett J. regarded s. 11 as procedural because by itself, it "had no substantive effect on the claims of other provinces." Instead, he said, it provides a mechanism to "facilitate a process under the *ORA*, the *CPA*, and the *Supreme Court Civil Rules*" in which the claims of other provincial governments may be pursued in a British Columbia court. The Supreme Court of Canada and many other courts had confirmed that class action legislation is "purely procedural". (Citing *Pioneer Corp. v. Godfrey* 2019 SCC 42 at para. 116; *Pro-Sys Consultants Ltd. v. Microsoft Corporation* 2013 SCC 57 at paras. 101–02, 131–33; see also *Bisaillon v. Concordia University* 2006 SCC 19 at para. 17; and *Kwicksutaineuk/Ah-Kwa-Mish First Nation*

v. Canada (Attorney General) 2012 BCCA 193 at para. 70.) Similarly, the right to opt out of a class proceeding had often been described as a "procedural protection". (Citing *Currie* at para. 28; *Airia* at paras. 90–92; and *3113736 Canada Ltd. v. Cozy Corner Bedding Inc.* 2019 ONSC 2249 at para. 67.) Other aspects of s. 11 also addressed purely procedural matters.

[62] The judge did not find it necessary to resolve the question of whether s. 11(1)(b) had been *necessitated* by a concern that the *CPA* does not itself authorize a multi-Crown class action because a provincial Crown — i.e., His Majesty the King in right of the Province — is not a "person resident in the Province" for purposes of the *CPA*. (See the definitions of "person" and "corporation" in the *Interpretation Act*, R.S.B.C. 1996, c. 238, and s. 1 of the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89.) The dominant purpose of s. 11 could be decided without ruling on the 'personhood' of the Crown.

[63] As for the *effect* of s. 11(1)(b), Brundrett J. characterized it thus:

> The effect of s. 11(1)(b) is to authorize the executive branch of the Province as the representative plaintiff in a class proceeding to efficiently pursue the collective claims of all Canadian governments in one proceeding. The language is permissive. The Province "may" pursue this putative class proceeding on behalf of a class comprising the following government entities:
>
> (i) one or more of the government of Canada and the government of a jurisdiction within Canada, and
>
> (ii) a federal or provincial government payment agency that makes reimbursement for the cost of services that are in the nature of health care benefits within the meaning of [the *ORA*]. [At para. 63; emphasis added.]

He drew an analogy between s. 11(1)(b) and situations in which other provincial governments sue as plaintiffs in British Columbia. In those cases, the 'foreign' plaintiff must, under conflict of laws rules, abide by the procedural rules of the forum (*lex fori*) to advance its claims. Conversely, the laws of British Columbia, including its conflicts of law rules, are applied to determine the substantive law properly applicable to each cause of action.

[64] In practical terms, the effects of s. 11 were limited to this proceeding, since it was the only proceeding in relation to opioid-related wrongs that had been commenced by the Province by the time s. 11 came into force. The judge observed that s. 11 "formalizes the class members in relation to the present putative proceeding only." Obviously, it did not preclude other governments from pursuing causes of action in their own home jurisdictions. (At para. 65.) In the "real world", the fact that governments might find it necessary to take the positive step of opting out was of little importance; the other provinces were "all fully capable of exercising their option at certification."

[65] Brundrett J. also rejected the appellants' argument that the other provincial or territorial governments were being put to an "unconstitutional choice" between opting out of the action or being bound by it. Given the ability to opt out, s. 11(1)(b) could not be said to have such a "coercive" effect. In any event, no substantive rights of putative class members were being affected prior to certification. (Citing *Das v. George Weston Limited* 2017 ONSC 4129 at para. 168.)

[66] The judge ultimately characterized the pith and substance of s. 11 as follows:

> The purpose and effect of s. 11 extends to promoting litigation efficiency by presumptively joining the plaintiff class in one grouping to facilitate the conduct of similar claims in a single proceeding in British Columbia. It does not extend substantive rights that would otherwise not exist.
>
> In light of the above, I find that the pith and substance or dominant feature of s. 11 of the *ORA* is the creation of a procedural mechanism to presumptively authorize the Province to act as a plaintiff in *ORA*-related proceedings on behalf of other Canadian governments. This procedural mechanism is crafted in a way so as to preserve the ability of other Canadian governments to opt out of the litigation at certification pursuant to s. 16 of the *CPA*. [At paras. 72–73; emphasis added.]

Classification

[67] The judge then had little difficulty in building upon the finding that s. 11 of the *ORA* was mainly "procedural", to classify the provision as falling within the Province's authority to legislate with respect to "the Administration of Justice in the Province" including "Procedure in Civil Matters". (At para. 76.) Alternatively, he

reasoned, the provision would fall under “Property and Civil Rights in the Province, including causes of action.” However, he preferred the “Administration of Justice” heading, given that s. 11 did not affect the “substantive litigation autonomy” of foreign governments. (At para. 77.)

Territorial Limitations Respected?

[68] As mentioned earlier, where the pith and substance of a provision is intangible, *Imperial Tobacco* and related cases require that the legislation meet two conditions if it is to respect the “dual purposes of the territorial limitations” in s. 92 of the *Constitution Act, 1867*. First, it must have a meaningful connection to the enacting province. The appellants argued below that there was *no such connection* in this case and that the pith and substance of s. 11 of the *ORA* is to “arrogate to British Columbia rights properly belonging to other sovereign governments.”

[69] The summary trial judge disagreed, emphasizing the following points:

1. the proceeding commenced by the Province under the *ORA* would have no legal impact on other governments unless and until it is certified as a class proceeding under the *CPA*;

2. if and when it is certified, the other governments would have a choice as to whether they wish to opt in or opt out of the proceeding (the distinction between the two is insignificant at least in the circumstances of this case, given the sophistication of the various provincial governments); and

3. any government that chose to remain in the proceeding would be subject to British Columbia procedural law in the same manner as if it had begun litigation in British Columbia of its own accord.

[70] At the end of the day, Brundrett J. concluded that while the *ORA* might have substantive *effects* on the “litigation options” of other governments in relation to opioid-related wrongs, that fact did not undermine the *substantive* rights of those governments to pursue the causes of action they wished to pursue. It merely

provided *an additional right* to elect to participate in the adjudication of those claims in the Supreme Court of British Columbia. The judge regarded any extraterritorial effects on the jurisdiction of other governments as incidental to this valid purpose of s. 11 and found that such effects did not raise sufficient concerns to justify a conclusion that s. 11 was *ultra vires*. (At para. 84.) Any remaining concerns could be dealt with through the discretion of the trial court at certification "to draft appropriate orders that respect the legislative authority and participatory choices of other governments." (Citing *British Columbia v. Imperial Tobacco Canada Ltd.* 2006 BCCA 398 at paras. 46–51, *lve to app. dism'd* 31719 (April 5, 2006).)

[71] With respect to the second requirement for territoriality, the judge found that the "procedural mechanism" in s. 11 did respect the limits of provincial legislative power under either s. 92(14) or s. 92(13) of the *Constitution Act, 1867*.

[72] The Court dismissed the appellants' application for a declaration that s. 11 of the *ORA* was constitutionally invalid.

On Appeal

[73] In this court, the appellants assert the following grounds of appeal:

> (a) Error #1: The court below incorrectly held that the pith and substance of s. 11 is the creation of a "procedural mechanism to presumptively authorize the [B.C. Government] to act on behalf of other Canadian governments in the Action";
>
> (b) Error #2: The court below incorrectly held that s. 11 falls under s. 92(14) of the 1867 Act (the authority of provinces to legislate with respect to the administration of justice); and
>
> (c) Error #3: The court below incorrectly held that s. 11 respects the territorial limits of provincial legislative power in s. 92.

These are obviously interrelated and I will address them as such.

[74] I also note that in their factum, the appellants asserted provincial sovereign immunity in arguing that a province "cannot bind other sovereign Crowns to a particular forum through the *ORA* and the opt-out model of the *CPA*. This is constitutionally impermissible." (Citing Hogg, Monahan and Wright, *Liability of the*

Crown (4th ed, 2011) at 486–6.) This was not included in the grounds of appeal but I propose to address the matter of sovereign immunity near the end of my reasons.

[75] I return first, however, to the point that s. 11(1)(b) does not on its face qualify the type of action that may be brought by the Province on behalf of one or more provincial governments. The appellants indeed contend that as s. 11 stands, there would be nothing to prevent the government of British Columbia from extending the proposition that it may "bind" other provincial governments in different legal contexts. As the appellants state in their factum:

> For example, once it is accepted that a province can unilaterally bind other provinces and the federal Crown to a particular forum and judicial process, what would limit a province from unilaterally conferring on its own superior courts authority to hear intergovernmental disputes? Such a forum would compete with the *actually* cooperative scheme already set up by nearly all Canadian governments to have their disputes adjudicated in the Federal Court, a scheme which addresses and respects the constitutional principle of sovereign immunity through coordinate legislation. Put simply, upholding s. 11 carries with it broader and problematic implications beyond this case for foundational aspects of the Canadian constitutional system. [Emphasis added.]

[76] I agree that if one were to attempt to construe s. 11(1)(b) in isolation, such that it authorized the government of British Columbia simply "to bring an action" on behalf of another Canadian government, the provision would be of doubtful validity. Certainly if British Columbia were asserting a cause of action that *did not exist in the other province* — i.e., if British Columbia were attempting to "create" or confer a cause of action on another province — the effect would be substantive and obviously *ultra vires*. As Rinfret J. observed in *Alberta (Attorney General) v. Atlas Lumber Co.* [1941] S.C.R. 87, "the right to bring an action is not procedure; it is a substantive right" (at 97); see also Hon. Bora Laskin, *The British Tradition in Canadian Law* (1969) at 115; Ruth Sullivan, *Dreidger on the Construction of* Statutes (3rd ed., 1995) at 545; and *Frederick v. Aviation & General Insurance Co. Ltd*. [1996] 2 O.R. 356 (ONCA) at 361. Even if British Columbia were relying on an existing cause of action of another province but without its consent, it would also be acting beyond its territorial limits in the sense described in *Imperial Tobacco* (2005).

[77] However, it is trite law that in determining the constitutionality of legislation, a court may consider both intrinsic and extrinsic evidence, including Hansard and, I would suggest in this case, reports such as the 2005 ULCC Report; as well as the practical effects flowing from the application of the impugned legislation. (See the *References Re Greenhouse Gas* at para. 51, citing *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)* 2002 SCC 31 at para. 53, *Canadian Western Bank v. Alberta* 2007 SCC 22 at para. 27 and *R. v. Morgentaler* [1993] 3 S.C.R. 463 at 480.) In the case at bar, the extrinsic evidence adds a great deal to the necessary constitutional analysis and was correctly considered by the summary trial judge.

[78] Further, in the opioid-recovery actions created by the 'foreign' statutes listed in the Appendix to the NOCC, each enacting jurisdiction would be asserting causes of action that exist in its own jurisdiction and each province's claim would be adjudicated *subject to and in accordance with its own statute*. This "context" is a crucial part of the constitutional assessment of s. 11 of the *ORA*.

Pith and Substance

[79] The appellants acknowledge at the outset that the appropriate legal framework for determining the constitutional validity of s. 11 of the *ORA* is the well-known two-step analysis pithily described by Major J. in *Imperial Tobacco* (2005):

> ... The first step is to determine the pith and substance, or dominant feature, of the impugned legislation, and to identify a provincial head of power under which it might fall. Assuming a suitable head of power can be found, the second step is to determine whether the pith and substance respects the territorial limitations on that head of power — i.e., whether it is in the province. [At para. 36.]

As we have seen, Major J. went on to add the additional analysis of territoriality that is required when the "pith and substance" is intangible.

[80] The appellants submit that Brundrett J. erred at both stages of this framework. First, it is said he erred in describing the pith and substance of s. 11 as

"the creation of a procedural mechanism to presumptively authorize the Province to act as a plaintiff in *ORA*-related proceedings on behalf of other Canadian governments." (At para. 73.) Instead, the appellants say, the pith and substance of s. 11 is to "legislate with respect to the *substantive civil rights* of other provinces" by means of a multi-Crown class proceeding.

[81] In support, the appellants rely on two propositions. First, they note (correctly) that the *CPA* specifies that a class proceeding may be brought only by a "resident of British Columbia who is a member of a class of persons". Second, they submit that the word "persons" does not include His Majesty in right of the Province, nor in right of any other province. If this is correct, they say, then s. 11 of the *ORA* permits the Province to apply for certification of a multi-Crown proceeding and is "what grounds this Action. …Section 11 is the very basis on which the B.C. Government brings this multi-Crown class proceeding."

[82] Although it may well be that the plaintiff in this case is not a "person" for purposes of the *CPA*, it is s. *2 of the ORA* that provides the "government" (defined in the *Interpretation Act* to mean the government of British Columbia) with a "direct and distinct action" to recover health care costs caused or contributed to by an "opioid-related wrong". The present proceeding was commenced as a class proceeding prior to the enactment of the *ORA*, but the *CPA* (as procedural legislation) did not itself create that (direct) cause of action or confer it on the Province.

[83] I do not understand the appellants to be challenging the validity of *this proceeding*, at least since its continuation under the *ORA*. Nor did they contend that s 11(1)(a) is a 'colourable' attempt to achieve some unspoken objective on the part of the Province. Given this, the argument that s. 11 is the basis of the Province's bringing this proceeding ignores the fact that as far as British Columbia is concerned, it is s. *2* of the *ORA* that "grounds" its claim, contrary to the appellants' submission.

[84] As far as the authority given to the Province by s. 11 to sue on behalf of other provinces is concerned, both the context and extrinsic evidence discussed earlier support the contention that the "dominant purpose" of the provision was to further the policy objectives discussed in the caselaw and in the ULCC Report — to permit mass torts asserted by provincial governments and territories to be adjudicated in one or only a few jurisdictions rather than in every Canadian province and territory, and thus to bring about a more efficient and less expensive process. Again, the causes of action pleaded for the benefit of the Subclass are causes that exist under, or were created by, the laws of those other territories in their respective opioid-recovery statutes or at common law. The *ORA* does not "create" the causes of action (or "civil rights," as the appellants describe them) of the other governments. It assumes they have the authority under their respective laws to bring those causes and merely allows the Province as representative plaintiff to do so in the Supreme Court of British Columbia *on their behalf*.

[85] I am therefore unable to agree that the pith and substance of s. 11 is to legislate with respect to the "substantive civil rights of other provinces". Rather, I find that the judge was correct in describing the dominant purpose of s. 11 as to provide a "procedural mechanism to presumptively authorize the Province to act on behalf of other governments in this putative class action." (At para. 56.) The fact that none of the other provinces has sought to challenge the validity of s. 11 suggests that they concur with this characterization. Indeed, as noted earlier, all the other common law provinces have enacted provisions similar to s. 11.

[86] Of course, even if it is upheld, many questions will arise concerning *forum non conveniens,* choice of law, recognition, preclusion, enforcement, etc. on which I make no comment. Each participating province will want to have a judgment at the end of the proceeding that will be recognized and enforceable in other jurisdictions. A competition among provinces would, one hopes, be avoided by prior agreement. Failing agreement, courts would also have to develop new ways of assessing preferability as between jurisdictions under ss. 4(3) and 4.1(1)(b) or (c) of the *CPA*. Time will tell if multi-Crown proceedings will in fact be more efficient and less

expensive — for plaintiffs and defendants — than several separate proceedings across the country.

[87] The appellants contend in their factum that as the (assumed) representative plaintiff, the government of British Columbia, will have the right to "make binding decisions in the action without consulting any other Canadian governments within the class, including deciding how to proceed, what evidence to tender, what legal arguments to advance, and which concessions to make." On this point, they note the broad description of the authority of representative plaintiffs described by this court in *Coburn and Watson's Metropolitan Home v. Home Depot of Canada Inc.* 2019 BCCA 308, *lve to appeal to S.C.C. dism'd*, 38872 (March 26, 2020):

> The structure of the *CPA* draws important distinctions between the status of a representative plaintiff and class members. The representative plaintiff, on certification of the proceeding by court order, is the party with authority to conduct and control the litigation on behalf of the class. Class members, subject to defined rights and protections built into the *CPA*, including the right to opt out of the proceeding, are bound by the decisions the representative plaintiff makes up to and including termination of the class proceeding by settlement or trial. Class members who do not opt out lose what has been described as "litigation autonomy" — the price paid to receive the benefit from a class proceeding. Generally speaking, the interests of class members are protected by the overall supervisory jurisdiction of the court. For example, a proposed settlement requires court approval.
>
> Class proceedings involve trade-offs of benefits and burdens to create a balance between fairness and efficiency. Class members gain benefits such as access to justice, cost savings, and the ability to avoid duplicative proceedings and, in exchange, assume burdens including the loss of litigation autonomy if they do not opt out. ... [At paras. 14–15; emphasis added.]

[88] The Court in *Coburn* was of course discussing an ordinary class action between private parties under the *CPA*. As we have seen, the present action was originally brought under the *CPA* but was then 'continued' under s. 11(1)(a) of the *ORA*. We have also seen that there are references in the *ORA* to class proceedings and to the *CPA* generally. However, there is no wholesale importation of all the provisions regarding certification, notification, the binding nature of judgment on common issues, settlement, abandonment, the role of the representative plaintiff generally, etc. It may be that the Province expects that these *CPA* procedures are,

or remain, applicable without more; or that agreements will be reached, or have been reached, with the other provinces on issues of this kind. In any case, the authority given to representative plaintiffs by the *CPA* (subject to the supervisory jurisdiction of the Supreme Court of British Columbia) is, as this court stated in *Coburn*, the "price paid to receive the benefit" of a class proceeding.

[89] This brings us back to the 'opt-out' provision found at s. 11(2) of the *ORA*. As seen earlier, the summary trial judge found that the practical effect of the fact that provincial governments might be required to take a "positive step" to opt *out* of the proceeding rather than opting *in*, made "little real-world difference". In his analysis:

> Practically speaking, the opt-out provisions of the *CPA* which are incorporated by reference into the *ORA*, will effectively preserve the choice of foreign governments to participate or not participate in the BC proceeding. The Legislature has created a procedure within this putative class proceeding in which other governments can choose whether or not to participate. I reject the Applicants' characterization that other governments are put to an "unconstitutional choice" of either opting out of the action or being bound by its terms. The combined effect of the *ORA* incorporating the opt-out ability in the *CPA* substantially negates the Applicants' stated concern about the forced participation of other governments in violation of the division of powers. I find that s. 11(1)(b) does not have the coercive effect ascribed to it by the Applicants. [At para. 68.]

[90] The appellants contend that this reasoning "misses the point". In their submission, the practical effect of s. 11 is to "force" the governments of other provinces to *consider whether to remain a party* in an action referred to in s. 11 or to opt out. Put another way, they say the other provinces must take positive steps to "preserve their legal rights or lose their autonomy." This is said to implicate their substantive rights, in contrast to 'ordinary' litigation to which foreign governments may be parties. In those cases, they retain counsel and control how their positions are put before the court.

[91] With respect, I cannot agree with the appellants' characterization of the position of the Subclass. It is true that an *opt-in* mechanism would leave no doubt concerning a province's having consented to the jurisdiction of the British Columbia court. As noted by Hogg and McKee, *supra*, a non-resident class member who has

opted in to a proceeding in the forum province has clearly consented, or attorned, to the court's jurisdiction and will therefore be bound by the outcome. Writing prior to British Columbia's change to an opt-out mechanism, the authors explained:

> ... although consent does not always grant jurisdiction, even if the forum court did not have a real and substantial connection to the non-resident class members, the non- resident class members would surely be estopped from repudiating the judgment in the proceedings that they had deliberately joined, and commencing new proceedings in another province. So it is safe to assume that those provinces which, like British Columbia, require non - resident class members to opt into the class have successfully avoided any constitutional issue about the recognition elsewhere in Canada of their courts' judgments in national class actions. [At 287.]

[92] Even in an opt-out scheme, however, the "litigation autonomy" of each province will be retained by virtue of the *existence of a choice,* which in my view may exist before, and certainly will exist after, certification. No *substantive* right of a member of the Subclass is affected, and obviously, all the potential members of the Subclass are known in this instance. On this point, I endorse the comment of Cumming J. in *Wilson No. 3:*

> ... the question of opt-out is not relevant to the asserted constitutional issue, and need not be addressed further. While the ability to opt-out has been regarded as important in determinations of the constitutionality of national classes in the United States jurisprudence (e.g., in *Phillips Petroleum Company v. Shutts, supra*), those determinations were based on the specific requirements of the due process clause of the United States Constitution. [At para. 52.]

I also note the Court's comment in *Johnson v. Ontario* 2021 ONCA 650 that a person's ability to initiate and participate in litigation, which includes the right to appoint counsel, to participate meaningfully in the development of litigation strategy and to participate in settlement negotiations, is an "incident of personal autonomy." The legislative right to opt out of a class proceeding, the Court stated, recognizes (and I would add, protects) these significant rights. (At para. 16.)

Administration of Justice in the Province

[93] Given that s. 11 does not create causes of action but merely offers other provincial governments the opportunity to have their own causes of action, created

under their own statutes, tried in a British Columbia court, I agree with the summary trial judge that the pith and substance of s. 11 is the creation of a procedural mechanism to authorize the Province to act as plaintiff in *ORA*-related proceedings on behalf of other consenting Canadian governments. As well, I agree that this "dominant purpose" properly falls within s. 92(14) of the *Constitution Act, 1867*, namely the "Administration of Justice in the Province". I do *not* agree that alternatively, it may be said to fall under "Property and Civil Rights in the Province".

Territoriality

[94] The final ground of appeal asserted by the appellants is that s. 11 of the *ORA* does not respect the doctrine of territoriality. On this point, the appellants again cite the reasoning of the Court in *Imperial Tobacco* (2005) that where the pith and substance of the impugned legislation is intangible, provincial legislation must have a "meaningful connection to the enacting province and [pay] respect to the legislative sovereignty of other territories". (At para. 36.) As we have seen, this "test" has been applied in a "flexible" way. Indeed, Sharpe J.A. noted in *Currie* in 2005 that the relevant "connection" had been variously described in *Morguard* as:

> ... a connection "between the subject-matter of the action and the territory where the action is brought", "between the jurisdiction and the wrongdoing", "between the damages suffered and the jurisdiction", "between the defendant and the forum province", "with the transaction or the parties", and "with the action". The real and substantial connection test is a flexible one, "a term not yet fully defined" (*Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110, at p. 1049 S.C.R.), and there is no strict or rigid test to be applied …
>
> *Morguard* dealt with the recognition and enforcement of inter-provincial judgments. In *Beals* [*v. Saldanha* [2003] 3 S.C.R. 416], those same principles were adapted and applied to international judgments. Writing for the majority, at para. 37, Major J. described real and substantial connection as "the overriding factor in the determination of jurisdiction". He stated at para. 32:
>
> > The "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one. [At paras. 11–12; emphasis added.]

At para. 30, the Court in *Currie* cited *Hunt*, where LaForest J. had said that the exact limits of what constitutes a "reasonable assumption of jurisdiction cannot be rigidly defined" and that "no test can perhaps ever be rigidly applied."

[95] In the appellants' submission, there is "*no relationship*" between British Columbia and the other governments named in the Province's NOCC; nor between British Columbia and the claims or causes of action of those governments; nor between British Columbia and the subject-matter of s. 11. In the words of the appellants' factum:

> ... The Legislature is attempting to aggregate the civil rights of governments outside the province into a single class action. Other than the claims of the BC Government for its own health care cost recovery, all of the other claims asserted in the Action belong to an emanation of the Crown outside of the province. British Columbia cannot assert a stronger relationship to those claims than the Crowns that possess them. [Emphasis added.]

The underlined sentence may refer back to Major J.'s comment in *Imperial Tobacco* (2005) that:

> Though the cause of action that is its pith and substance may capture, to some extent, activities occurring outside of British Columbia, no territory could possibly assert a stronger relationship to that cause of action than British Columbia. That is because there is at all times one critical connection to British Columbia exclusively: the recovery permitted by the action is in relation to expenditures by the government of British Columbia for the health care of British Columbians. [At para. 38; emphasis added.]

[96] I do not read this passage as suggesting that territoriality in this context depends on which province has the "***strongest"*** connection with the cause of action — although that factor would likely be significant for purposes of *forum conveniens*, recognition or enforceability. More importantly, there are significant differences between the facts of this case and the facts of *Imperial Tobacco*. The Court there found that the pith and substance of the *Tobacco Damages and Health Care Costs Recovery Act* enacted in 2000 was the "creation of a civil cause of action" — a substantive matter. (See para. 32.) The same may be said of the cause of action created by s. *2* of the *ORA*. But again, the pith and substance of s. *11*, the provision challenged in this case*,* is not to "legislate with respect to the substantive civil rights

of other provinces" as the appellants suggest. Rather, it is to provide a *procedural mechanism* authorizing the Province to act on behalf of other *consenting* provincial governments in *ORA*-related proceedings. Each province's claim would be determined in accordance with *its own substantive laws,* including conflicts rules. And, paraphrasing from para. 38 of *Imperial Tobacco*, the recovery permitted by each action would relate to expenditures by the *respective foreign government* for health care costs of persons *in each respective jurisdiction*. At the end of the day, the causes of action of participating foreign provinces will not be affected in a *substantive* way by the application of the *Civil Rules* of the Supreme Court of British Columbia to their claims.[5]

[97] In my view, the fact that "in the real world", each participating province will make the choice — either by opting in or deciding not to opt out — to take part in British Columbia's proceeding under the *ORA* constitutes a "meaningful connection" between each Subclass member's cause(s) of action on one hand, and on the other hand, the Province as the representative plaintiff and the Supreme Court of British Columbia as adjudicator. *Harrington* suggests that the mere commonality of the issues raised in each proceeding would also constitute a sufficient "connection." For the same reasons, s. 11 does not in my opinion 'disrespect' the substantive authority of participating provinces to create and pursue direct actions against opioid drug manufacturers and distributors. To the contrary, it provides an opportunity to bring about the consolidation of multiple proceedings that might have arisen in every province and territory in Canada, into one or a few proceedings, avoiding the necessity for multiple counsel and attendances in multiple courts.

Sovereign Immunity

[98] Finally, a more general argument was advanced by the appellants in their factum (although not as a ground of appeal) to the effect that s. 11 is unconstitutional because it impinges on the sovereignty of the Crown. As

[5] The appellants did not contend that the residents of a province have a substantive right to have their claims heard by a superior court judge *resident in that province* and I express no opinion on that issue.

I understand this argument, it is that a provincial legislature cannot as a matter of constitutional principle enact legislation that purports to bind another Crown, federal or provincial. The only relevant authority cited by the appellants in support of such an immunity was *Gauthier v. The King* [1918] 56 S.C.R. 176. It is difficult to draw a *ratio* from *Gauthier*: three opinions were written, and only two purported to touch upon what Professor Hogg called an "alleged constitutional principle" that a province was incompetent to make its legislation binding on the federal Crown. (See *Constitutional Law of Canada* (5th ed, 2021, loose-leaf) at §10:19.) A different result was reached by the Privy Council in *Dominion Building Corp. v. The King* [1933] A.C. 533, where it was decided that general language in an Ontario statute expressed to be binding on the Crown or Her Majesty, was applicable to the federal Crown despite the absence of express words or a necessary implication to that effect.

[99] Hogg writes that the two inconsistent decisions have "left in doubt" the question of whether provincial legislatures have the constitutional power to enact statutes binding on the *federal* Crown. He suggests there should be no such immunity and that "In general, where the federal Crown is engaging in activity which is regulated by provincial law, it should be bound by the law." (At § 10:19.) As for the authority of a province to bind *another province*, the author writes that the issue appears never to have been explicitly decided, but that the Crown in right of a province can carry on activities in another province. In such circumstances there is no constitutional rule that would exempt the Crown's activities from the laws of that other province (at §10.9), and most provinces have now substantially modified, if not completely revoked, the historical immunity of the Crown from suit. In the case at bar, of course, the Province of British Columbia has legislated only with respect to a *proceeding in the courts* of the Province and has not purported to affect the sovereignty of other provincial Crowns.

[100] Even if one were to assume the survival of some degree of sovereign immunity at the federal or provincial level, it is undoubtedly open to the federal and provincial Crowns to waive it and accept the benefits and burdens of a statute. As

Hogg notes at §10.8, one class of statutes that are exempt from immunity are those that are *beneficial to the Crown* (although they may also contain provisions that are "burdensome".) As I have suggested, the right to choose to participate in a multi-Crown proceeding in British Columbia represents a benefit that is intended to save the expense and inconvenience of many separate actions in Canada and thus ultimately to serve the public interest. The governments that are potential members of the Subclass have not invoked immunity in the Supreme Court or in this court, and are likely to consent to their inclusion in the class action by not opting out in accordance with the terms of the certification order, if and when granted.

Summary

[101] In summary, the "procedural mechanism" that is the pith and substance of s. 11 has a "meaningful connection to the enacting province" by virtue of the fact that the foreign provinces are *given the opportunity*, a benefit, to have their opioid-related actions tried in the Supreme Court of British Columbia as part of a multi-Crown proceeding and in conjunction with the Province's own claims. Section 11 respects the legislative sovereignty of the 'foreign' governments. It is their substantive law that will apply to claims in respect of torts allegedly committed in those provinces or breaches of duty owed to persons resident in those provinces. The fact that proceedings conducted under s. 11 will be matters of *choice* for the foreign governments means that the Province is not "unilaterally binding" other governments to a particular forum, judicial process or substantive law. The existence of sovereign immunity as a bar to the validity of s. 11 is doubtful and in any event would not have the effect of precluding a Crown from deciding to accept an advantage or benefit offered by another province.

[102] I agree, then, with the summary trial judge that s. 11 merely provides an additional means by which the other provinces' respective health care recovery claims *may* — or may not — be pursued. The multi-Crown proceeding represents an innovative response to the expense, time and inefficiencies involved in several separate actions. It represents a major step towards what in Canada may not be possible in the full sense — a truly *national* class proceeding. The caselaw favours a

generous and flexible approach to innovations of this kind, provided the substantive rights and authority of each province are respected. The policy reasons underlying class actions — which the appellants did not challenge by means of any statistical or economic evidence — fully support the goals of multi-Crown proceedings.

Disposition

[103] It follows that in my opinion, the summary trial judge did not err in upholding the constitutional validity of s. 11 as legislation relating to the Administration of Justice in the Province. Although I disagree with the summary trial judge's suggestion that in the alternative, s. 11 may be legislation in respect of Property and Civil Rights, this was not reflected in his order. In the result, I would dismiss the appeal.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice Fisher"

I agree:

"The Honourable Madam Justice Horsman"