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SCC rules B.C. law allowing multi-Crown class action to recover opioid-related costs is valid

By **Cristin Schmitz**

Law360 Canada (November 29, 2024, 5:28 PM EST) -- In a groundbreaking judgment that confirms that multi-governmental class actions that reach across provincial and territorial boundaries are possible under Canada's constitutional structure, the Supreme Court of Canada has ruled provinces have the constitutional competence to enact multi-Crown class action legislation.

On Nov. 29, 2024, the top court affirmed 6-1 (Côté J. dissenting) the constitutional validity of a provision in a British Columbia statute that allows that province, as a representative plaintiff, to bring a class action on behalf of multiple Canadian governments (and their health-care agencies) to recover costs and damages stemming from opioid harms allegedly caused or contributed to by 49 pharmaceutical manufacturers, marketers and distributors of opioid medications: *Sanis Health Inc. v. British Columbia*, 2024 SCC 40.

Supreme Court Justice Andromache Karakatsanis

For the six-judge majority, Justice Andromache Karakatsanis dismissed the appeal brought by four of those companies, Sanis Health Inc., Shoppers Drug Mart Inc., Sandoz Canada Inc. and McKesson Canada Corporation, from a decision of the B.C. Court of Appeal last year, which held that s. 11 of the 2018 *Opioid Damages and Health Care Costs Recovery Act* (ORA) is *intra vires* the legislature of B.C.

Section 11 authorizes the B.C. government to bring an action on behalf of a class consisting of the federal government and other provincial and territorial governments to recover their respective health care and other costs caused by alleged opioid-related torts and related wrongs, while also

providing that any of those governments may opt out.

Other Canadian jurisdictions have enacted similar provisions facilitating national multi-governmental class actions. This prompted the appellants to contend in their submissions to the Supreme Court that "although the model of s. 11 has yet to proliferate into areas beyond opioids-related litigation, the Court of Appeal's decision allows provincial legislatures to design multi-Crown class actions related to any subject matter" and that "absent this court's intervention, the Court of Appeal's decision establishes a nationwide template for future multi-billion-dollar claims against private parties initiated by a single province on behalf of all other Canadian governments."

In the B.C. courts below, the appellant urged unsuccessfully that s. 11 does not respect the territorial limits on provincial legislative competence within the *Constitution Act, 1867* and that the framework chosen by B.C. to facilitate co-operation and comity, through a law that allows for a national multi-governmental class action, violates the constitution by undermining the "litigation sovereignty" of other governments in Canada.

The Supreme Court of Canada disagreed.

"The ultimate question raised by their appeal is this: Can multiple Canadian governments join in a single class action, in one province, before one province's superior court, without unconstitutionally sacrificing their autonomy or sovereignty?" Justice Karakatsanis wrote for the majority. "Specifically, the appellants ask if one province can determine the rules of a class action that would bind other governments who choose to participate. Conversely, can a government agree to be bound by another province's rules, even if it may limit the powers of its legislature and its successors?"

Justice Karakatsanis endorsed the conclusion of the B.C. courts below.

"I do not accept the appellants' position that the legislation deals with substantive, rather than procedural, rights," Justice Karakatsanis explained. "The purpose and effect of the challenged provision is to create a procedural mechanism to promote litigation efficiency by joining the claims of consenting Canadian Crowns into a single proceeding while ensuring that each Crown's claims will be decided in accordance with their own substantive law."

Section 11 of the ORA, as a procedural mechanism, falls within the province's authority over the "administration of justice" under s. 92(14) of the *Constitution Act, 1867,* she held.

The provision "also properly respects the territorial limits under s.92(14), which requires that the province's legislative powers be exercised 'in the province.'"

Justice Karakatsanis reasoned that s. 11 "is meaningfully connected to B.C. by providing a procedural tool that only applies to one proceeding before B.C.'s courts and affects foreign Crowns only if they consent to have their common issues resolved together. Each of the other Crowns' substantive claims remain under the control of their own legislatures; their legislative sovereignty is respected."

Moreover, she observed that "in an increasingly complex modern world, where governments assume greater regulatory roles in multifaceted areas overlapping jurisdictional boundaries, there is a greater need for cooperation between governments and between courts that cross those borders."

"Our court has recognized this need in a more flexible approach to inter-jurisdictional co-operation," Justice Karakatsanis remarked. "It is reflected in the interpretative principle of 'co-operative federalism'; the respect and recognition of each province's adjudicative jurisdiction in the spirit of mutual comity; and the development of procedural frameworks to permit cross-border collective actions. It is reflected in the horizontal cooperation between governments for the public good."

Justice Karakatsanis said national class actions, and in particular multi-Crown class actions, represent the convergence of these ideas.

"Fifteen years ago, this court urged provincial legislatures to 'pay more attention to the framework for national class actions and the problems they present,'" the judge noted. "When products, people and problems cross jurisdictional boundaries, co-operation and comity are vital to ensure that justice is not blocked by provincial borders."

The opioid epidemic across Canada is "a stark example of a crisis which attracts this co-operation and comity," Justice Karakatsanis observed. "National in scope, it highlights the role a national class action can play in achieving efficiency, consistency and access to justice for all those who have experienced harm, regardless of geographic boundaries."

The judge pointed out that nearly every provincial and territorial government has chosen to co-operate to achieve those ends by enacting virtually identical statutes, indicating their intent to participate as class members and intervening in the appeal in support of B.C. The federal government also indicated last year its intention to participate in B.C.'s opioid class action.

"This multi-Crown participation is in harmony with our court's approach to intergovernmental co-operation on national issues, where collaboration between the executives and legislatures of both provincial and federal governments is vital," Justice Karakatsanis remarked. "Especially given the presumption of constitutionality of legislation, a court should exercise considerable caution before it finds that this cooperation between multiple executive and legislative branches is unconstitutional."

Supreme Court Justice Suzanne Côté

For her part, Justice Suzanne Côté acknowledged the seriousness of the ongoing opioid crisis across Canada and its "profound impact on Canadians."

Yet "the severity of the circumstances does not allow our court to amend the Constitution," Justice Côté wrote in her dissent. "Enhancing access to justice and facilitating intergovernmental co-operation are laudable objectives, but they must be accomplished without conflicting with the fundamental structure of Canadian federalism," she cautioned.

Justice Côté noted that s. 11 allows the B.C. Crown, as the representative plaintiff, to bind other governments to the class proceeding — unless they take positive steps to opt out and do so in accordance with the terms of the certification order from a B.C. court.

"Binding other governments to the class proceeding unless they take positive steps to opt out in accordance with the certification order means that British Columbia's provincial courts get to dictate how other provinces and the federal government go about preserving their own rights," she said. "The legislature of a province does not have the authority to legislate in a manner that interferes with the rights and prerogatives of other provincial governments and the federal government. The pith and substance of s.11 is to legislate in respect of property and civil rights outside the province,

contrary to the territorial limitations imposed by s. 92 of the *Constitution Act, 1867*."

Justice Côté would have severed s. 11(1)(b) and (2) — which she determined to be constitutionally invalid — from the rest of the ORA.

B.C. Premier David Eby

Following the top court's decision on Nov. 29, B.C. Premier David Eby wrote on the social media platform X that "the opioid crisis has taken thousands of lives and devastated families across BC and Canada. Today's Supreme Court ruling allows us to hold opioid manufacturers accountable on behalf of all Canadians, for perpetuating this crisis."

"We will continue this fight," vowed Eby, who was provincial attorney general at the inception of the lawsuit and related legislation.

B.C. Deputy Premier and Attorney General Niki Sharma added in a statement that "we took this action to recover health-care costs of treating opioid-related disease to hold manufacturers and distributors accountable for their part in allegedly engaging in deceptive marketing tactics to increase sales, which led to increased rates of addiction and overdose."

B.C. Attorney General Niki Sharma

"Today marks a significant victory in our fight against the opioid manufacturers and distributors as B.C. can now proceed on behalf of the federal, provincial and territorial governments to recover the cost of treating opioid-related disease allegedly caused by the industry's wrongful conduct following the Supreme Court of Canada ruling," Sharma said. "Our government will continue this fight on behalf of its citizens and all people of Canada until a final resolution is reached and encourage the defendants to consider their role in the ongoing opioid crisis and to work collaboratively with the Government of B.C. to make amends."

Ya'ara Saks, the federal Minister of Mental Health and Addictions and Associate Minister of Health, wrote on X that "Canada intends to join this suit should it be certified."

"I am pleased by the Supreme Court decision affirming our right to hold pharmaceutical companies to account," Saks said. "We've taken action to crack down on the predatory practices of the pharmaceutical industry — & we won't stop now."

Counsel for the defendants were not immediately reached prior to press time.

In its lawsuit, B.C. claims against the defendants in negligence, unjust enrichment and fraudulent misrepresentation and also alleges breaches of s. 52 of the *Competition Act*.

B.C. and the appellants, who are named as defendants in the proposed multi-Crown class proceeding, agreed to litigate the constitutional validity of s. 11 before a B.C. court determines whether the proposed class action may be certified.

By way of summary trial below, the appellants sought an order striking s. 11 as *ultra vires* the legislative assembly of B.C. They argued that s. 11 does not respect the territorial limits of provincial power by allowing the province to legislate rights beyond its borders, thereby infringing on, or not respecting, the litigation autonomy of foreign Crowns.

In response, the province argued the impugned provision was within B.C.'s legislative competence because it relates to the administration of justice in British Columbia and the geographic scope of a provincial legislature's authority under s. 92(14) of the *Constitution Act, 1867*.

The summary trial judge agreed in a decision unanimously affirmed by the B.C. Court of Appeal.

Photo of Justice Andromache Karakatsanis by Jessica Deeks Photography: SCC collection

If you have any information, story ideas or news tips for Law360 Canada, please contact Cristin Schmitz at cristin.schmitz@lexisnexis.ca or call 613-820-2794.
