SUPREME COURT OF CANADA

CITATION: Sanis Health Inc. *v.* British Columbia, 2024 SCC 40

APPEAL HEARD: May 23 and 24, 2024
JUDGMENT RENDERED: November 29, 2024
DOCKET: 40864

BETWEEN:

Sanis Health Inc., Shoppers Drug Mart Inc., Sandoz Canada Inc. and McKesson Canada Corporation
Appellants

and

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

- and -

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of Prince Edward Island, Attorney General of Saskatchewan, Attorney General of Alberta, Attorney General of the Northwest Territories, Attorney General of the Yukon Territory, Groupe Jean Coutu (PJC) inc. and Pro Doc Ltd.
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 110)	Karakatsanis J. (Wagner C.J. and Martin, Kasirer, O'Bonsawin and Moreau JJ. concurring)
DISSENTING REASONS: (paras. 111 to 208)	Côté J.

Sanis Health Inc., Shoppers Drug Mart Inc.,
Sandoz Canada Inc. and McKesson Canada Corporation *Appellants*

v.

His Majesty The King in Right of the Province of British Columbia *Respondent*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of Nova Scotia,
Attorney General of New Brunswick,
Attorney General of Manitoba,
Attorney General of Prince Edward Island,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Attorney General of the Northwest Territories,
Attorney General of the Yukon Territory,
Groupe Jean Coutu (PJC) inc. and Pro Doc Ltd. *Interveners*

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2024 SCC 40

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Present: Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Division of powers — Extraterritoriality — Limitation on provincial legislation — British Columbia applying for certification of class proceeding against manufacturers, marketers and distributors of opioid products for recovery of health care expenditures incurred in treating individuals exposed to those products — Provincial legislature adopting legislation that includes provision permitting British Columbia to act as representative plaintiff and to include other governments in Canada in proposed class unless they opt out of class proceeding pursuant to terms of certification order — Defendants challenging constitutional validity of provision — Whether provision ultra vires legislative assembly of British Columbia — Constitution Act, 1867, s. 92(13), (14) — Opioid Damages and Health Care Costs Recovery Act, S.B.C. 2018, c. 35, s. 11.

British Columbia commenced an action in the province's Supreme Court alleging that manufacturers, marketers, and distributors of opioid products committed common law torts and breaches of the *Competition Act*. The pleadings claim every province and territory in Canada has experienced high numbers of opioid-related addictions, illnesses and deaths due to the opioid epidemic and the defendants contributed to the epidemic by falsely marketing their products as being less addictive and less prone to abuse, tolerance, and withdrawal than other pain medications. British

Columbia sought certification of the action as a class proceeding with itself as the representative plaintiff and a class consisting of all federal, provincial, and territorial governments and agencies that paid healthcare, pharmaceutical and treatment costs related to opioids. A few months after the proceeding was commenced, the legislature of British Columbia enacted the *Opioid Damages and Health Care Costs Recovery Act* ("*ORA*") to create a direct, statutory cause of action in the litigation. Section 11 of the *ORA* authorizes British Columbia to bring an action on behalf of the class named in its proceeding but permits a class member to opt out of the proceeding under s. 16 of the province's *Class Proceedings Act*, in the manner specified in the order certifying the class proceeding. British Columbia changed its notice of civil claim to incorporate s. 11 of the *ORA* into its pleadings.

Several of the defendants, pharmaceutical companies which manufacture, market, and distribute opioid products throughout Canada, applied for an order striking s. 11 of the *ORA* as *ultra vires* the legislature of British Columbia and of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*. They argued it does not respect constitutional territorial limits on provincial legislative competence and it violates Canada's constitutional structure by undermining the sovereignty of other governments in Canada. The British Columbia Supreme Court dismissed the applications. It held that s. 11 of the *ORA* is a procedural mechanism to facilitate a process in which the substantive claims of extraterritorial governments may be litigated and therefore falls within s. 92(14) of the *Constitution Act, 1867*, under the province's authority to legislate regarding the administration of justice in the province. The applications judge

held that s. 11 respects the territorial limits of the *Constitution Act, 1867* since it only affects other governments once they consent to participate in the proceeding by either opting in or by declining to opt out. The Court of Appeal dismissed the defendants' appeal.

Held (Côté J. dissenting): The appeal should be dismissed.

Per Wagner C.J. and **Karakatsanis**, Martin, Kasirer, O'Bonsawin and Moreau JJ.: Section 11 of the *ORA* is *intra vires* the province of British Columbia. The courts below were correct in finding that the pith and substance of s. 11 is the creation of a procedural mechanism for the application of the *ORA* to the existing opioid-related proceeding. Section 11 does not deal with substantive rights, it is meaningfully connected to the province of British Columbia, and it respects the legislative sovereignty of other Canadian governments. It is properly classified under s. 92(14) of the *Constitution Act, 1867*, which grants the provinces the authority to legislate in relation to the administration of justice in the province. Under this head of power, provinces may enact laws and regulations pertaining to courts, rules of court and civil procedure. Section 11 presumptively authorizes British Columbia to act as a representative plaintiff on behalf of a class of other Canadian governments who choose to participate in this class proceeding.

The first stage of the framework set out in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, to determine the constitutional validity of legislation is to identify its pith and substance, that is, its main

thrust or dominant or most important characteristic. Courts look at the law's purpose and effects, examining both intrinsic and extrinsic evidence, and its legal and practical effects. The court will presume constitutionality, assuming that the legislature did not intend to exceed its authority, especially if the attorneys general of the jurisdictions affected by the law support its validity. The second stage of the framework determines whether the challenged legislation respects the territorial limits of provincial power found in both the opening words of s. 92 of the *Constitution Act, 1867* and the language of the heads of power themselves, by determining whether the legislation has a meaningful connection to the province and respects the sovereignty of other provinces. A meaningful connection is tested by assessing the law's connection to the enacting territory, to the subject matter of the law, and to those made subject to it.

The purpose of s. 11 of the *ORA* is to provide a procedural mechanism explaining how the rest of the *ORA* applies to British Columbia's ongoing class proceeding. The term "the Crown" can refer to either a personification of the state or the physical, natural person of His Majesty the King. As a plaintiff in litigation to enforce a common law or statutory cause of action, a Crown typically acts in its capacity as a natural person. Thus, the Crown in right of British Columbia is a person capable of being a representative plaintiff under the *Class Proceedings Act* and foreign Crowns may sue in any court having jurisdiction in the particular matter. Nothing in British Columbia's legislation prevents foreign Crowns from participating in a class action in British Columbia as a member of a class of persons. Section 11 of the *ORA* allows British Columbia to bring the class action at issue in the instant case under the

Class Proceedings Act, which is a purely procedural statute. The text of s. 11 strongly indicates that its purpose is to provide a procedural mechanism tightly oriented around the continued efficacy of British Columbia's class proceeding and the benefits which the *ORA* provide it. It also is clear from the entire context of the *ORA*, including its other provisions granting benefits to the proceeding, and from extrinsic evidence that the purpose of s. 11 of the *ORA* was not to create substantive rights for the Crown.

When an individual chooses to participate as a member in a class action, they necessarily give up some rights associated with litigation autonomy. This does not mean that s. 11 of the *ORA* is a substantive provision. A Crown's choice to litigate in a different jurisdiction and to subject itself to the procedural rules of that forum does not violate any constitutional principle. As a participant in a class action, a Crown sacrifices aspects of its litigation autonomy but only if it chooses to do so through the opt-in or opt-out mechanism, a procedural right that has been recognized as a primary protection for class members in the class proceeding process. The choice to participate by opting in or not opting out represents an exercise of litigation autonomy, although one which involves sacrificing other elements of autonomy. Many aspects of litigation autonomy will remain available through procedural protections offered to non-representative plaintiffs and under the court's general supervisory jurisdiction. It does not violate the Crown's autonomy for it to accept the consequences of its litigation choices and those consequences do not render s. 11 a provision dealing with substantive civil rights. The legal effects of s. 11 are to regulate how British Columbia's class proceeding will continue in a modified form after the *ORA* came into force. The

substantive rights of foreign Crowns remain unchanged. Section 11's practical effects are to require foreign Crowns to choose whether they accept the procedural benefits and burdens of the class action after considering the consequences that this choice may have on their rights.

Section 11 of the ORA maintains a meaningful connection to British Columbia, both through the nature of the class action, and through the choice of the foreign Crowns to participate in the proceeding. It concerns a single action with commonality of defendants, issues and claims. British Columbia's laws and courts do not reach outside the province unless the court is satisfied there are common issues between British Columbia and the class members and British Columbia is the proper venue for their resolution. Common issues establish a real and substantial connection for adjudicatory jurisdiction. Section 11 does not extend or change the court's jurisdiction; it merely provides procedural rules once jurisdiction is established. It is a legitimate exercise of power for a province to set the procedural rules for proceedings within its jurisdiction.

Section 11 of the ORA respects the legislative sovereignty of other Canadian governments. When a Crown participates as a non-representative plaintiff in a class action in another province, it will find itself subject to that province's procedural rules governing class actions. However, each Crown's causes of action occurred in their own jurisdiction and thus are subject to their own substantive law. Intergovernmental cooperation in Canada recognizes that legislative overlap is inevitable regarding

national issues like the opioid epidemic and that governments may legislate for their own valid purposes in areas of overlap. In the instant case, nearly every provincial and territorial government in Canada and the federal government intends to participate in the class action. A court should exercise considerable caution before it finds that this cooperation is unconstitutional. Courts in the Canadian federation demand the same level of faith in one another's judgments where jurisdiction has been properly exercised. These goals are met where governments cooperate to have their claims litigated efficiently in one action. Section 11 is an example of the important role that national class actions play, providing a mechanism to help multiple governments work toward the same goal. 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. National class actions, and in particular multi-Crown class actions, ensure that justice is not blocked by provincial borders. The opioid epidemic is a stark example of a crisis that should attract cooperation and comity.

Per **Côté** J. (dissenting): The appeal should be allowed. Sections 11(1)(b) and (2) of the *ORA* are *ultra vires* the legislature of British Columbia and should be severed from the Act. The legislature of British Columbia cannot authorize the province to initiate a class action to claim health care costs incurred by a foreign province on an opt-out basis, thereby compelling that province to take steps to avoid forced participation. 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. 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*. The legislature of British Columbia is attempting to aggregate civil rights in other provinces into a single class action, but its powers are limited to property and civil rights "in the Province". The effects of s. 11 are not merely incidental. Imposing membership in the class on other governments as the default position interferes with their litigation autonomy. These unconstitutional legal effects cannot be made valid by the fact that those foreign governments can choose to opt out of the class action. The pith and substance of s. 11 of the *ORA* does not respect the territorial limitations on the competence of the legislature of British Columbia. Though horizontal cooperation between the provincial and federal governments on common issues is a laudable goal, whatever method is used to achieve cooperation must be consistent with the structure of Canadian federalism. Section s. 11 of the *ORA* is not.

Where the validity of provincial legislation is challenged on the basis that it violates territorial limitations imposed on a provincial legislature, the assessment of its validity must be carried out in accordance with the framework established in *Imperial Tobacco*. The first step is to determine the pith and substance of the impugned legislation, which requires finding its essential character or dominant feature having

regard to its purpose and effect. Section 11 of the *ORA* engages and ultimately affects substantive rights held by foreign governments far beyond the procedural advantages of class proceedings legislation. It has serious impacts on the litigation autonomy of other governments. Its pith and substance is to legislate in respect of property and civil rights outside of the province. It permits British Columbia to seek certification of a class of governments asserting recovery rights for opioid-related health care costs, on an opt-out basis, such that by default, the provincial governments and the federal government are included in the class action. This creates a new substantive right because governments are not persons or members of a class of persons for the purposes of the *Class Proceedings Act*. Section 11 gives the province the ability to do something it could not before. Its effects are not simply limited to the application of the *ORA* to the extant class action.

Although s. 11 of the *ORA* is procedural in some respects, the placement of s. 11(1)(b) within procedural paragraphs does not mean that its effects are merely procedural. The main thrust of s. 11 is found in s. 11(1)(b) and (2). The opt-out regime provided for in s. 11(2) is central to the pith and substance of s. 11 as a whole. Section 11 cannot be construed as an opt-in regime; nothing indicates that other governments have a choice of opting in. British Columbia can commence a proceeding without any consultation with the other governments. By implementing an opt-out regime, the legislature of British Columbia is seeking to preserve substantive rights it has arrogated without the consent of the other governments. As well, the other governments do not have meaningful input on a host of important aspects of the

proceeding, including the choice of counsel, litigation strategy, the evidence to be tendered, or negotiation and settlement of the action. They lose their right to simultaneously commence proceedings in their own jurisdictions. They are necessarily put to a choice pursuant to the laws of British Columbia to opt out or lose their litigation autonomy. Opting out requires taking proactive steps in accordance with the certification order, meaning that British Columbia's provincial courts dictate how they may go about preserving their own rights. Further, s. 11 operates primarily and not incidentally with respect to litigants outside of British Columbia. The Crown however is not an ordinary litigant. Every province and Parliament has an attorney general with executive and judicial functions acting as its chief law officer. The effects of s. 11 on the important functions of other governments' attorneys general cannot be merely incidental.

The fact that governments can opt out does not change the legislation's *prima facie* encroachment upon property and civil rights in other provinces. Thus, it cannot be said that an opt-out regime is purely procedural given the real and substantial impacts that the legislation has on the litigation autonomy of class members. Because the pith and substance of s. 11(1)(b) and the opt-out context in which it operates is to legislate with respect to the substantive rights of other governments, it falls within "Property and Civil Rights" under s. 92(13) of the *Constitution Act, 1867*.

Common issues that might ground jurisdiction in a provincial superior court over multi-Crown class proceedings are irrelevant to the constitutional validity

of s. 11 of the *ORA*. A meaningful connection cannot be established between the enacting province, the legislative subject matter, and those made subject to it based on the real and substantial connection test applicable in determining whether a court has jurisdiction over a matter. Nor do the nature of the class action and the choice of the foreign Crowns to participate provide a meaningful connection; consent plays no role in deciding whether there is a meaningful connection. The assessment of a meaningful connection must be made with a view to the pith and substance of the impugned law. Section 11 of the *ORA* allows British Columbia to bring a class action on behalf of other governments across Canada. The fact that the subject matter of the law is, in pith and substance, related to the substantive rights of other governments necessarily means that it has no meaningful connection with British Columbia. As well, s. 11 serves a broader purpose than merely to establish a cause of action against defendants for wrongs in the province; its focus is on the other governments as plaintiffs and how their substantive rights operate in the context of the civil action. Even on a premise that s. 11 is procedural in nature and potentially falls under s. 92(14) of the *Constitution Act, 1867*, this logic would apply. For these reasons, it cannot be said that British Columbia has a meaningful connection with both the subject matter of s. 11 and those made subject to it. As a result, s. 11 does not respect the territorial limitations prescribed by s. 92 of the *Constitution Act, 1867*.

Having found that there is no meaningful connection between the enacting province, the subject matter of the law, and those made subject to the law, the disposition of this appeal does not require determining whether s. 11 of the *ORA* pays

respect to the legislative sovereignty of the other provincial governments and the federal government. However, the fact that the other governments have endorsed the constitutional validity of the provision is of no moment. The support of the other governments is based on a misconstrued interpretation of s. 11 as an opt-in provision. In any event, the provinces cannot amend the Constitution by mutual consent.

The ancillary powers doctrine should not be applied to uphold the constitutional validity of s. 11. Section 11 is the only provision of the *ORA* related to causes of action of other provincial or territorial governments under their own substantive laws. Without s. 11, the *ORA* properly grounds and establishes a direct and distinct cause of action against the defendants. Section 11 is not needed to enforce the substantive aspects of the remainder of the *ORA*.

The appropriate remedy in the instant case is severance of ss. 11(1)(b) and (2) from the *ORA*. Severance should be employed when possible so that constitutional aspects of the legislation are preserved. Only partial invalidation of the law is necessary. The other provisions in s. 11 need not be disturbed and the balance of the statutory scheme can stand on its own.

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By Karakatsanis J.

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49, [2005] 2 S.C.R. 473; **referred to:** *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1 S.C.R. 175; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *R. v. Parranto*, 2021 SCC 46, [2021] 3 S.C.R. 366; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693; *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189; *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162; *Sharp v. Autorité des marchés financiers*, 2023 SCC 29; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, [2020] 2 S.C.R. 283; *Reference re Impact Assessment Act*, 2023 SCC 23; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *Attorney General of Quebec v. Labrecque*, [1980] 2 S.C.R. 1057; *Verreault (J.E.) & Fils Ltée v. Attorney General (Quebec)*, [1977] 1 S.C.R. 41; *Attorney General for Ontario v. Fatehi*, [1984] 2 S.C.R. 536; *R. v. Murray*, [1967] S.C.R. 262; *R. v. McColman*, 2023 SCC 8; *R. v. British*

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By Côté J. (dissenting)

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Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494; *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *Gauthier v. The King* (1918), 56 S.C.R. 176; *Sharp v. Autorité des marchés financiers*, 2023 SCC 29; *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015; *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225; *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321; *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549; *Turner v. Bell Mobility Inc.*, 2016 ABCA 21, 394 D.L.R. (4th) 325; *Gillis v. BCE Inc.*, 2015 NSCA 32, 358 N.S.R. (2d) 39; *Frey v. BCE Inc.*, 2013 SKCA 26, 409 Sask. R. 266; *Johnson v. Ontario*, 2021 ONCA 650, 158 O.R. (3d) 266; *Johnson v. Ontario*, 2022 ONCA 725, 164 O.R. (3d) 573; *Hamm v. Canada (Attorney General)*, 2021 ABCA 329, 32 Alta. L.R. (7th) 213; *Herold v. Wassermann*, 2022 SKCA 103, 473 D.L.R. (4th) 281; *Coburn and Watson's Metropolitan Home v. Home Depot of Canada Inc.*, 2019 BCCA 308, 438 D.L.R. (4th) 533; *Dubuc v. 1663066 Ontario Inc.*, 2009 ONCA 914, 99 O.R. (3d) 476; *In re Criminal Code* (1910), 43 S.C.R. 434; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, [2020] 1 S.C.R. 15; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572; *Hunt v. T&N plc*, [1993] 4

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Competition Act, R.S.C. 1985, c. C-34, s. 52.

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Fisher and Horsman JJ.A.), 2023 BCCA 306, 79 B.C.L.R. (6th) 1, 484 D.L.R. (4th) 512, [2024] 2 W.W.R. 436, [2023] B.C.J No. 1477 (Lexis), 2023 CarswellBC 2178 (WL), affirming a decision of Brundrett J., 2022 BCSC 2147, 77 B.C.L.R. (6th) 313, [2022] B.C.J. No. 2382 (Lexis), 2022 CarswellBC 3468 (WL).

Appeal dismissed, Côté J. dissenting.

W. David Rankin and *Ankita Gupta*, for the appellants Sanis Health Inc. and Shoppers Drug Mart Inc.

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Brooklyn LeClair, for the intervener the Attorney General of Alberta.

Written submissions only by *Mark Ishack* and *Thomas Wallwork*, for the intervener the Attorney General of the Northwest Territories.

Written submissions only by *I. H. Fraser*, for the intervener the Attorney General of the Yukon Territory.

Roger J. F. Lepage and *Fadi Amine*, for the interveners Groupe Jean Coutu (PJC) inc. and Pro Doc Ltd.

The judgment of Wagner C.J. and Karakatsanis, Martin, Kasirer, O'Bonsawin and Moreau JJ. was delivered by

KARAKATSANIS J. —

I. Introduction

[1] 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 interjurisdictional cooperation. It is reflected in the interpretative principle of "cooperative 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.

[2] National class actions in Canada, 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" (*Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, at para. 57). When products, people, and problems cross jurisdictional boundaries, cooperation and comity are vital to ensure that justice is not blocked by provincial borders.

[3] The opioid epidemic spanning our country is a stark example of a crisis which attracts this cooperation and comity. 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.

[4] The appellants, several pharmaceutical companies which manufacture, market, and distribute opioid products throughout Canada, challenge s. 11 of British Columbia's *Opioid Damages and Health Care Costs Recovery Act*, S.B.C. 2018, c. 35 (*ORA*). The provision authorizes the government of B.C. to bring an action on behalf of a class consisting of other provincial, territorial and federal governments in Canada to recover their respective health care costs caused by "opioid-related wrong[s]". The appellants say it does not respect the territorial limits on provincial legislative competence within the *Constitution Act, 1867*. They argue that the framework chosen by B.C. to facilitate cooperation and comity, through a law which allows for a national multi-governmental class action, violates our constitutional structure by undermining the sovereignty of other governments in Canada.

[5] 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?

[6] 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?

[7] The appellants say that the answer to these questions must be "no". They submit that B.C.'s class action framework in s. 11 is not possible under our Constitution, as it would enable the Province to take control over the substantive civil rights of other governments. As a representative plaintiff in a multi-Crown class action, the Province of B.C. could direct litigation on behalf of other sovereign provinces and territories, thereby binding those other governments to its decisions, infringing their litigation autonomy and violating their legislative sovereignty to enact potentially contradictory laws. The appellants argue that this cannot be reconciled with our Constitution, which restrains the territorial reach of provincial legislation to matters "[i]n each Province" (*Constitution Act, 1867*, s. 92).

[8] The courts in these proceedings have disagreed. They concluded s. 11 of the *ORA* creates a procedural mechanism which presumptively authorizes B.C. to act as a representative plaintiff in opioid-related proceedings on behalf of other Canadian governments who choose to participate. They held that this mechanism falls under the Province's authority over "[t]he Administration of Justice in the Province" (s. 92(14) of the *Constitution Act, 1867*), and is meaningfully connected to B.C. without undermining any other government's sovereignty.

[9] I agree with the courts below. As I shall explain, I do not accept the appellants' position that the legislation deals with substantive, rather than procedural, rights. 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 falls within the Province's authority over the "Administration of Justice" under s. 92(14) of the *Constitution Act, 1867*.

[10] Section 11 of the *ORA* also properly respects the territorial limits under s. 92(14), which requires that the Province's legislative powers be exercised "in the Province". It 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.

[11] I would dismiss the appeal.

II. Background

[12] The emergence of national class actions in Canada reflects the harmony struck by the chords of intergovernmental cooperation and interjurisdictional comity which run throughout our federation's constitutional structure. The three well-established goals underlying class actions — efficiency, access to justice and deterrence — recognized by this Court in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, *Hollick v. Toronto (City)*, 2001 SCC 68,

[2001] 3 S.C.R. 158, and *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, may, in some cases, require intergovernmental cooperation in a federalist system.

[13] Federalism is one of the central organizing themes of our Constitution (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 57). It is "a foundational principle" of our Constitution, meant "to reconcile diversity with unity" and to "foster cooperation between Parliament and the provincial legislatures for the common good" (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1 S.C.R. 175 (*GGPPA Reference*), at para. 48).

[14] Our Court has recognized that cooperation and comity are increasingly necessary to the operation of a federal society in the 21st century (see, e.g., *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 24). Different levels of government are encouraged to work together to establish interlocking and even overlapping regulatory regimes to solve interjurisdictional problems (see, e.g., *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at paras. 57-62). Courts are expected to give comity — or full faith and credit — to recognize one another's judgments on subjects which cross provincial boundaries (see, e.g., *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at p. 324). Anything less would "fly in the face of the obvious intention of the Constitution to create a single country" (*Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at p. 1099).

[15] The rise of national class actions is an example of this essential cooperation. While class actions have been available at common law since the 17th

century, class proceedings statutes were first enacted by provincial legislatures in the late 20th century, simplifying the aggregation, prosecution, and determination of these claims through a valuable set of procedural tools (*Dutton*, at paras. 19 and 26; *Hollick*, at para. 13). The lack of cooperation by governments and parties within these new procedural mechanisms, however, sometimes resulted in overlapping class actions in multiple provinces covering the same claims, the same defendants, and even the same plaintiffs.

[16] In response to these cross-jurisdictional problems, several provinces changed their class proceedings statutes to clarify that their superior courts could certify an action with a class of plaintiffs that included residents outside the province (see W. K. Branch and M. P. Good, *Class Actions in Canada* (2nd ed. (loose-leaf)), at §§ 12:2-12:9). Nearly all provinces now have legislation enabling non-resident plaintiffs to have their claims adjudicated efficiently in a single proceeding before one superior court, whose judgment will be respected and enforced by their "home" courts.

[17] These national class actions, facilitated by cooperative provincial legislative schemes and the judicial recognition of a superior court's judgments under the rules of private international law, help Canadians to deal with products, people, and problems that cross jurisdictional boundaries. Moreover, multi-Crown class actions are an example of horizontal intergovernmental coordination between provinces and the federal government in dealing with complex issues that cross jurisdictional borders.

[18] The opioid epidemic facing Canada is a tragic example of the border-crossing problems which engage such interjurisdictional cooperation and comity. The scale and scope of the opioid crisis are well known (see, e.g., *R. v. Parranto*, 2021 SCC 46, [2021] 3 S.C.R. 366, at paras. 93-97, per Moldaver J.; Special Advisory Committee on the Epidemic of Opioid Overdoses, *Opioid- and Stimulant-related Harms in Canada*, September 2024 (online)). Opioids are a powerful class of painkillers. While some opioids have become associated with the illicit drug trade, most have legitimate medical uses when properly administered. When used improperly, however, opioids can cause addiction.

[19] The pleadings claim Canada has experienced high numbers of opioid-related addictions, illnesses and deaths and that the epidemic has affected every province and territory in Canada, devastating communities, families and lives nationwide.

[20] Faced with the opioid epidemic, in 2018 B.C. brought a claim against 49 manufacturers, marketers, and distributors of opioid products, which it alleged had contributed to the opioid epidemic by falsely marketing their products as being less addictive and less prone to abuse, tolerance, and withdrawal than other pain medications. B.C. alleged the commission of several common law torts, including negligence, unjust enrichment, fraudulent misrepresentation, and breaches of s. 52 of the *Competition Act*, R.S.C. 1985, c. C-34.

[21] B.C. started this proceeding as a proposed class action under B.C.'s *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (*CPA*), seeking certification with itself as the representative plaintiff acting on behalf of a class consisting of all federal, provincial, and territorial governments and agencies that had paid healthcare, pharmaceutical and treatment costs related to opioids.

[22] Soon after, legislation was introduced to create a direct, statutory cause of action for B.C. in the litigation it had begun. It introduced new evidentiary rules and other procedural mechanisms modeled on B.C.'s former *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 (*TRA*), upheld by this Court in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 (see Legislative Assembly of British Columbia, *Official Report of Debates (Hansard)*, No. 150, 3rd Sess., 41st Parl., October 1, 2018, at pp. 5331-32 (Hon. David Eby)). For example, these rules allow statistical information as admissible evidence to prove causation (s. 5), relieve the government from proving the cause of any particular individual's opioid-related injuries (s. 2(5)(a)), and require the court to presume that those individuals would not have used opioids without the defendants' actions (s. 3(2)).

[23] Unlike the former *TRA*, however, s. 11(1)(b) of the *ORA* authorizes the government of B.C., in its existing proceeding, to "bring an action on behalf of a class consisting of" other provincial, territorial and federal governments in Canada and their healthcare agencies (as B.C. had already done), unless those governments opt out of the class under s. 16 of the *CPA*.

[24] The *ORA* came into force a few months after B.C. had started its proceeding based on the common law and *Competition Act* causes of action. B.C. then changed its notice of civil claim to incorporate s. 11 expressly into its pleadings. Its latest amended civil claim now also proposes two sub-classes of plaintiffs: one for all governments relying on the common law and *Competition Act* causes of action; and another for "governments that have legislation specifically directed at recovery of damages and healthcare costs arising from the Opioid Epidemic" (A.R., vol. IV, at p. 167; A.R., vol. VII, at p. 136).

[25] This second sub-class reflects the fact that nearly all provinces and territories in Canada have since enacted their *own* version of an opioid healthcare recovery statute similar to B.C.'s *ORA*.[1] Each statute has a provision that is substantially similar to s. 11 of B.C.'s *ORA* (see, e.g., *Opioid Damages and Health Care Costs Recovery Act*, S.A. 2019, c. O-8.5, s. 13; *Opioid Damages and Health Care Costs Recovery Act, 2019*, S.O. 2019, c. 17, Sch. 2, s. 12). Many have an additional provision stating that if a class action has been commenced by another province, the government's own claim is subject to that jurisdiction's procedural rules while maintaining the substantive rights within its own *ORA*-type legislation (see, e.g.,

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[1] *Opioid Damages and Health Care Costs Recovery Act*, S.A. 2019, c. O-8.5; *The Opioid Damages and Health Care Costs Recovery Act*, S.S. 2020, c. 32; *The Opioid Damages and Health Care Costs Recovery Act*, C.C.S.M., c. O55; *Opioid Damages and Health Care Costs Recovery Act, 2019*, S.O. 2019, c. 17, Sch. 2; *Opioid-related Damages and Health Care Costs Recovery Act*, CQLR, c. R-2.2.0.0.01; *Opioid Damages and Health Care Costs Recovery Act*, S.N.B. 2023, c. 28; *Opioid Damages and Health-care Costs Recovery Act*, S.N.S. 2020, c. 4; *Opioid Damages and Health Care Costs Recovery Act*, S.P.E.I. 2020, c. 77; *Opioid Damages and Health Care Costs Recovery Act*, S.N.W.T. 2023, c. 18; *Opioid Damages and Health Care Costs Recovery Act*, S. Nu. 2023, c. 19; *Opioid Damages and Health Care Costs Recovery Act*, S.N.L. 2019, c. O-6.2 (not yet in force).

Alberta's *Opioid Damages and Health Care Costs Recovery Act*, s. 12; Ontario's *Opioid Damages and Health Care Costs Recovery Act, 2019*, s. 11).

III. Judicial History

A. *Supreme Court of British Columbia, 2022 BCSC 2147, 77 B.C.L.R. (6th) 313 (Brundrett J.)*

[26] The appellant pharmaceutical companies brought an application for an order striking s. 11 of the *ORA* as being invalid because it is *ultra vires* the Legislative Assembly of B.C. They claimed that s. 11 was a provision respecting "Property and Civil Rights", but because it dealt with the civil rights of other governments, it was not "in the Province" and thus was not within the Legislature's competence under s. 92(13) of the *Constitution Act, 1867* (para. 4).

[27] Justice Brundrett instead characterized the provision as a "procedural mechanism to facilitate a process under the *ORA*, the *CPA* and the *Supreme Court Civil Rules* in which the substantive claims of extraterritorial governments may be litigated and pursued in a BC court" (para. 58). This procedural mechanism presumptively authorized B.C. to act on behalf of other governments in *ORA*-related proceedings, and fell within s. 92(14) of the *Constitution Act, 1867* under the Province's authority to legislate regarding "[t]he Administration of Justice in the Province" (para. 76).

[28] As for whether s. 11 respected the territorial limits of the Province, Brundrett J. found that the provision regulated a single proceeding brought in the courts of B.C., while providing a right of other governments to have their claims adjudicated in that proceeding if they chose to participate (para. 84). In that respect, even if s. 11 fell under s. 92(13), it still respected the territorial limits of the *Constitution Act, 1867*, since it would only affect other governments once they consented to participate in the proceeding by either opting in or by declining to opt out (paras. 81 and 87). Although the Province had applied for the class action to be certified on an "opt-in" basis, in contrast to the "opt-out" mechanism in s. 11(2) of the *ORA* and s. 16 of the *CPA*, it made "little real-world difference", because under either model the choice of other governments to participate negated any concerns that s. 11 trespassed on their legislative sovereignty (paras. 67 and 81). Justice Brundrett concluded that s. 11 was *intra vires* the B.C. Legislature.

B. *British Columbia Court of Appeal, 2023 BCCA 306, 79 B.C.L.R. (6th) 1 (Newbury J.A., Fisher and Horsman JJ.A. Concurring)*

[29] The Court of Appeal for B.C. unanimously dismissed the appeal. Justice Newbury, writing for the court, agreed that s. 11 of the *ORA* merely created a procedural mechanism to allow the Province to act on behalf of other Canadian governments in the proposed class action. Since the substantive claims of other governments would be dealt with according to their own substantive laws, including their own *ORA*-type legislation where available, s. 11 did not affect any substantive

civil rights of foreign Crowns. Like class proceedings statutes, s. 11 was simply a procedural mechanism which fell under s. 92(14) and did not fall under s. 92(13).

[30] Turning to the provision's territoriality, Newbury J.A. agreed with Brundrett J. that "in the real world" each participating government would choose whether to participate — either by opting in or declining to opt out — and that this constituted a "meaningful connection" between those governments' claims, the Province of B.C., and the Supreme Court of British Columbia (para. 97). Further, s. 11 did not affect the legislative sovereignty of other governments when they chose to consolidate their claims "to save the expense and inconvenience of many separate actions in Canada and thus ultimately to serve the public interest" (para. 100). Although s. 11 represented "a bold step, if not an experiment" in the realm of national class actions, Newbury J.A. held that it was *intra vires* the Province (para. 3).

IV. Issues and Positions of the Parties

[31] The fundamental issue in this appeal concerns whether s. 11 of the *ORA* is *ultra vires* because it falls outside the Province of B.C.'s territorial legislative competence, as established by s. 92 of the *Constitution Act, 1867*. If s. 11 is found to be unconstitutional, this Court must also consider whether it may be saved by the ancillary powers doctrine.

[32] The appellants challenge the validity of s. 11 on the basis that it fails to respect the territorial limits placed on the Province of B.C. by s. 92 of the *Constitution*

Act, 1867, and is thus of no force and effect under s. 52 of the *Constitution Act, 1982*. They allege that s. 11 permits the Crown in right of B.C. to take control of, and ultimately determine, the substantive civil rights of other governments. Thus, it must be classified under B.C.'s authority over "Property and Civil Rights" in s. 92(13) of the *Constitution Act, 1867*. Even if fell under s. 92(14), the appellants argue no province could have a meaningful connection to the substantive claims of other governments, whose sovereignty would be infringed if they cannot legislate respecting the litigation of those claims. Section 11 causes other Crowns to lose their right to control the litigation, which binds future governments and violates the principle of parliamentary sovereignty — all substantive effects which have no meaningful connection to B.C.

[33] For its part, B.C. contends that the dominant characteristic of s. 11 is the creation of a procedural mechanism through which it may prosecute an action in B.C on behalf of other consenting governments seeking recovery for their opioid-related expenses, and as such it should be classified under the Province's authority over "[t]he Administration of Justice" in s. 92(14). The territorial reach of s. 11 is meaningfully connected to B.C. as it regulates a single claim before the courts of B.C., which will affect other Crowns only if they choose to participate, and it preserves their right to have their individual claims determined in accordance with their own substantive laws. Other governments remain able to legislate regarding the substantive aspects of their causes of action.

V. Analysis

[34] Whether s. 11 properly relates to B.C.'s competence to legislate regarding matters "in the Province" is resolved by the two-part framework established by this Court in *Imperial Tobacco*. I must first characterize and classify the challenged provision, before determining whether it respects the other provinces' territoriality. The validity of the law enacted by B.C. ultimately depends on whether it is properly "in the Province", as s. 92 of the *Constitution Act, 1867* requires.

[35] The heart of the appellants' challenge concerns whether the framework which s. 11 establishes for a national, multi-Crown class action improperly reaches beyond B.C.'s borders, seizes the substantive civil rights of other Crowns, hales them before B.C.'s courts, and binds their governments to the outcome.

[36] I reject this challenge. I conclude that s. 11 is a valid procedural framework to facilitate intergovernmental cooperation and to respect interjurisdictional comity, empowering our federation to meet its modern challenges.

[37] This Court has long recognized that the "rigid, watertight compartments approach to the division of legislative power" risks hindering cooperative regulatory regimes undertaken in the public interest (see *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693 (*Quebec (Attorney General)*), at para. 17). Between the federal government and the provinces, this idea of cooperation arises in the principle of "cooperative federalism", an interpretative principle for approaching the division of powers (see *GGPPA Reference*, at para. 50). Horizontally, between provinces, valid cooperation can manifest as shared participation in

interprovincial trade agreements to ensure seamless regulatory schemes (see, e.g., *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292, at paras. 4 and 15), in cooperative capital market regulatory systems (see, e.g., *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at paras. 1-7, 19, 21-22 and 130), and in interlocking class proceedings mechanisms like those created by the *CPA* and its equivalents in other provinces.

[38] In addition to legislative and executive cooperation, this Court has stressed the need for adjudicative comity between the provinces' superior courts. A level of national cooperation between them is vital to serve the ends of justice for our federation in the 21st century (see, e.g., *Morguard*, at pp. 1099-1100; *Hunt*, at pp. 324-25; *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162, at paras. 4, 17 and 58). Given the comparable quality of justice offered by our courts, and the many aspects of modern life that transcend provincial borders, this Court held that full faith and credit between courts is a constitutional imperative whenever there is a real and substantial connection between the matter and the court's territory (*Hunt*, at p. 324; see also *Sharp v. Autorité des marchés financiers*, 2023 SCC 29, at paras. 110-22).

[39] An appropriate level of cooperation is therefore necessary between the legislative, executive, and judicial branches of government in our constitutional structure. In the analysis which follows, I explain why the mechanism chosen by the Province of B.C. to facilitate this cooperation is constitutionally valid.

A. *Relevant Statutory Provisions*

[40] Section 11 is the only provision of the *ORA* that the appellants challenge. It reads:

> **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*.

[41] Section 4 of the *CPA*, referenced in s. 11(1)(b) of the *ORA*, sets out the requirements for a court to certify a class action in subss. (1) and (2). Subsections (3)

and (4) deal specifically with the factors a court must consider to cooperate with class actions covering the same subjects being litigated in other provinces, including whether it would be preferable for the plaintiffs' common issues to be resolved in that other forum or in the courts of B.C.

[42] Section 16 of the *CPA*, referenced in s. 11(2) of the *ORA*, reads:

> **16** (1) A member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

B. *What Is the Correct Characterization of Section 11, Considering Its Purpose and Effects?*

[43] Turning to the first stage of the *Imperial Tobacco* framework, the "pith and substance" of s. 11 must be identified — that is, its "main thrust, or dominant or most important characteristic" (*GGPPA Reference*, at para. 51). The court must characterize the challenged law according to its "leading feature or true character" (*R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 481-83), doing so "as precisely as possible" without regard to its incidental or ancillary aspects (*GGPPA Reference*, at para. 52; see also *Imperial Tobacco*, at para. 28).

[44] In conducting this characterization, courts will look at the law's purpose and effects. A law's purpose can be determined by examining both intrinsic evidence — that is, the text of the law itself — and extrinsic evidence — including

legislative debates, minutes of parliamentary committees, and relevant government publications (*Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10, at para. 25). A law's effects can be found by considering both its legal effects — those which flow directly from the provisions of the statute itself — and its practical effects — those which flow from the application of the law (*Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, [2020] 2 S.C.R. 283, at para. 51). This is essentially an "interpretative exercise [which] is meant to be neither technical nor formalistic" (*Murray-Hall*, at para. 24).

[45] The court will approach the question of a law's validity under the interpretive presumption of constitutionality, assuming that the legislature did not intend to exceed its authority if the law can be read to limit it within its proper jurisdictional bounds (*Reference re Impact Assessment Act*, 2023 SCC 23, at para. 72). This presumption is especially strong when the attorneys general of the jurisdictions affected by the law support its validity (*Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 73; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, at para. 33; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at pp. 19-20). That said, the court's role is to adjudicate constitutional compliance and not simply defer to an Attorney General's opinion of a law's validity.

(1) <u>What Is the Purpose of Section 11?</u>

[46] The appellants urge this Court to find that the purpose of s. 11 is to create a cause of action for the Crown in right of B.C. to act as a representative plaintiff in a class action on behalf of a class of "foreign" Crowns, since it could not do so under the *CPA* alone. Because the Crown is not a "person" as that statute requires, it could not otherwise act as a plaintiff in a class action. The appellants argue that, since s. 29 of 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, both exclude the Crown from the definition of a "person", the purpose of s. 11 is to create substantive rights for the Crown in right of B.C. and the other provinces which they formerly lacked. This argument requires consideration of whether, without s. 11, a Crown is a "person" or "a class of persons" as ss. 2(1) and 4(1)(b) of the *CPA* require.

[47] I would not give effect to the appellants' submission on s. 11's purpose. In Canadian law, the term "the Crown" is used as both a personification of the state and in reference to the Sovereign, that is, the physical, natural person of His Majesty the King (*Attorney General of Quebec v. Labrecque*, [1980] 2 S.C.R. 1057, at p. 1082; *Verreault (J.E.) & Fils Ltée v. Attorney General (Quebec)*, [1977] 1 S.C.R. 41, at p. 47; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 12; see also M.-F. Fortin, "The King's Two Bodies and the Canadian Office of the Queen" (2021), 25 *Rev. Const. Stud.* 117). In this latter sense, as a natural person "the Crown" has many of the same common law powers as any other individual, unless those powers have been expressly narrowed by statute (*Attorney General for Ontario v. Fatehi*, [1984] 2 S.C.R. 536, at p. 551; see also K. Horsman and G. Morley,

Government Liability: Law and Practice (loose-leaf), at §§ 1:10-1:11). For example, the Crown as a natural person may hold property, enter into contracts, and spend money like any other person (see Hogg, Monahan and Wright, at p. 12).

[48] When the Crown participates as a plaintiff in litigation to enforce a common law or statutory cause of action, it is typically acting in this capacity as a natural person (*Fatehi*, at pp. 551-52; Hogg, Monahan and Wright, at p. 74). The Crown may sue for damage to its civil rights in the same way as any other person, without a statutory grant of authority to do so (*R. v. Murray*, [1967] S.C.R. 262; Horsman and Morley, at § 1:11).

[49] However, the Crown as a natural person is subject to its Parliament or its Legislature (see P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 10:13). So while the Crown has the right to sue to enforce its rights, this ability may be limited by a statute if, for example, the Crown is excluded from a particular right or procedure.

[50] The appellants argue that s. 29 of the *Interpretation Act* is such a limitation on the Crown's capacity to sue under the *CPA*. Section 29 of the *Interpretation Act* — which provides general statutory definitions applicable to all legislation in B.C. — defines a "person" as including "a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law". That same provision states that a "'corporation' . . . includes a corporation sole other than [His] Majesty". The appellants suggest that connecting

these phrases leads inevitably to the conclusion that a "corporation" is a "person" unless that corporation is "[His] Majesty".

[51] I am not persuaded these definitions exclude the Crown from being a "person" for the purposes of the *CPA* and s. 11 of the *ORA*. Section 29 of the *Interpretation Act* states that a "'person' includes a corporation" "other than [His] Majesty". The word "includes" typically functions as a legislative signal that these terms are offered as examples, not as exhaustive meanings (see *R. v. McColman*, 2023 SCC 8, at para. 38; R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 4.04). The non-exhaustive definition of a "person" in the *Interpretation Act* does not displace the ordinary meaning of this term, including the common law inclusion of the Crown as a natural person, capable of suing to enforce its rights (see *R. v. British Columbia*, [1992] 4 W.W.R. 490 (B.C.S.C.), at para. 17; Sullivan, at § 4.04). Nor does the exclusion of the Crown from laws applying to private corporations, which s. 29 effects, limit its ability to sue as a person.

[52] As for s. 1 of the *Crown Proceeding Act*, it defines a "person" as not including "the government". However, that definition applies "[i]n this Act", unlike the general definitions in the *Interpretation Act*. The *Crown Proceeding Act* deals with when the Crown may be *sued* as a *defendant*. It is a statutory override of the common law position that the Crown is immune from liability, and as such does not speak to where the Crown is *suing* as a *plaintiff* (see *Nelson (City) v. Marchi*, 2021 SCC 41, [2021] 3 S.C.R. 55, at para. 38; Hogg and Wright, at § 10:12).

[53] I conclude the Crown in right of B.C. was already a "person" capable of enforcing its civil rights as either a representative or non-representative plaintiff under the *CPA*.

[54] The same conclusion applies to "foreign" Crowns. They may sue as a "person" under the *CPA*. As similarly natural persons, foreign Crowns "may sue in any Court having jurisdiction in the particular matter" (*McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654, at p. 660; see also Hogg, Monahan and Wright, at p. 493). "The Crown in right of a province (or the Dominion) has the power of a natural person . . . and is not subject to territorial restraints in exercising such common law powers" (Hogg and Wright, at § 13:8; see also Horsman and Morley, at § 1:11).

[55] Leaving aside the concerns raised about the effects of a multi-Crown class action on Crown autonomy or parliamentary sovereignty, there is nothing in the *CPA*, the *Interpretation Act*, or the *Crown Proceeding Act* that *prevents* either the Crown in right of B.C. or any "foreign" Crowns from satisfying the most basic requirement to participate in a class action: to be "a member of a class of persons" (*CPA*, s. 2(1)). When one or more Crowns sue as plaintiffs, their rights "are no different from those of the subject, and never were" (Horsman and Morley, at § 1:11).

[56] Further, s. 11 does not act on its own. Section 11(1)(b) allows B.C. to "bring an action" under the *CPA* — a purely procedural statute which this Court has held neither gives nor takes away substantive rights (see *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 133). As a result,

I reject the appellants' suggestion that the purpose of s. 11 was to give substantive rights to the Crown in right of B.C., or to take substantive rights from foreign Crowns.

[57] Rather, the intrinsic evidence from the text of s. 11 strongly indicates that its purpose is to provide a procedural mechanism explaining how the rest of the *ORA* — including the statutory cause of action it provides to B.C. and its various other unique evidentiary and procedural rules — applies to B.C.'s ongoing proceeding after the *ORA* came into force. The provision does not create a new proceeding. Instead, s. 11(1)(a), along with the preamble to the provision, identifies this proceeding as the subject of the *ORA*, and states that if it remained ongoing after the *ORA* came into force, it would continue in accordance with this Act. Section 11(1)(b) authorizes the government to bring its action on behalf of other Canadian governments and their health care agencies, confirming that the government's claim, brought under the mechanisms already available to it in the *CPA*, remained effective, while also placing boundaries around who the government may propose to include in the class. Section 11(1)(c) states that if the procedure was completed or a court order was made, it would continue to have effect unless inconsistent with the *ORA*. And finally, s. 11(2) states that the ability for proposed class members to opt out of the proceeding under s. 16 of the *CPA* remained unchanged. The text of s. 11 is tightly oriented around the continued efficacy of B.C.'s existing proceeding and the benefits which the *ORA* would provide it, including the increased efficiency that a multi-Crown class action would offer to everyone involved.

[58] This purpose of s. 11 is clear from the entire context of the *ORA*. While a court must characterize the challenged provisions rather than the entire law, the character of the provision must be assessed in the context of the larger statutory scheme. Its relationship to that larger scheme "may be an important consideration in determining its pith and substance" (*Quebec (Attorney General)*, at para. 30). Several provisions in the *ORA* grant benefits to the proceeding identified by s. 11. Most significant is the "direct and distinct action" that the *ORA* grants to B.C. (ss. 2 and 3). In addition, provisions permit a finding of joint liability between multiple defendants (ss. 4, 7 and 8) and the evidence a court may consider to establish causation and quantification of damages (s. 5). Others are simply meant to clarify what will happen when the statute comes into force, similar to s. 11 itself. For example, s. 6 extends any applicable limitations period, s. 10 provides for the retroactive effect of the legislation, and s. 12 states that any settlement would continue to have effect. In that context, s. 11 is meant to provide the mechanism through which these various substantive and procedural provisions apply to the proceeding already progressing before the court — a conclusion reinforced by s. 11's placement in the statute immediately following the retroactive effect created by s. 10.

[59] The extrinsic evidence supports this interpretation. When the government of B.C. announced it was beginning this litigation, its news release stated that it would soon introduce legislation "[t]o assist the court process" (BC Government News, *British Columbia files lawsuit against opioid industry*, August 29, 2018 (online)). When the *ORA* was later brought before the Legislative Assembly, the Attorney

General stated that the law was intended to "allow [the] government to proceed in its litigation with opioid manufacturers and wholesalers on a similar basis to that in the tobacco case" (*Official Report of Debates (Hansard)*, October 1, 2018, at p. 5331 (Hon. David Eby)). Acknowledging the ongoing proceeding, the Attorney General noted at the bill's second reading that "[t]he class action that has been commenced will be continued under this act, and this act will serve to extend the procedural rules included within it to the action in progress" (*Official Report of Debates (Hansard)*, No. 152, 3rd Sess., 41st Parl., October 2, 2018, at p. 5390 (Hon. David Eby)).

[60] I agree with B.C. and the courts below. I do not accept that the purpose of s. 11 of the *ORA* was to create substantive rights for the Crown by enabling it to engage in litigation under the *CPA* which it could not otherwise do. Based on both the intrinsic and extrinsic evidence, the purpose of s. 11 is to provide a procedural mechanism through which the broader provisions in the *ORA* could apply to B.C.'s existing, proposed multi-Crown class action.

(2) What Are the Effects of Section 11?

[61] The appellants submit that s. 11 impacts the substantive rights of foreign Crowns by forcing them to arrogate to the government of B.C. their "litigation autonomy" (a collection of substantive civil rights related to the Crown's sovereign ability to independently litigate their own causes of action and to control the conduct of that litigation) (A.F., at paras. 63-64). They say, it also forces foreign Crowns to make the unconstitutional choice about opting in or opting out of this class action.

[62] B.C. counters that Crowns must always sacrifice aspects of "litigation autonomy" when they litigate in courts outside their home jurisdiction. This does not violate any constitutional principle, even when Crowns participate through the procedural mechanisms provided by class proceedings statutes. The effect here is limited to this single proceeding which preserves the substantive rights of other participating governments in accordance with their own laws.

[63] An individual's "litigation autonomy" has been described as an important collection of rights, such as the right to appoint counsel of choice, the right to participate in developing litigation strategy, and the right to negotiate a settlement to the action (*Johnson v. Ontario*, 2022 ONCA 725, 475 D.L.R. (4th) 344, at para. 47; *Coburn and Watson's Metropolitan Home v. Home Depot of Canada Inc.*, 2019 BCCA 308, 438 D.L.R. (4th) 533, at para. 14). "Our society places a high premium on a person's ability to initiate and participate in litigation as an incident of personal autonomy" (*Johnson v. Ontario*, 2021 ONCA 650, 158 O.R. (3d) 266, at para. 16). When an individual chooses to participate as a member in a class action, they necessarily also choose to give up some of these rights as "the price paid to receive the benefit from a class proceeding" (*Coburn and Watson's Metropolitan Home*, at para. 14; M. H. Redish, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* (2009), at pp. 135-75).

[64] In multi-Crown class actions, this choice means that the government of the day may bind its successors to the choice of ceding some of its litigation rights. Does this force an unconstitutional sacrifice of substantive rights on foreign Crowns?

[65] My answer is "no". While participation in a class action involves some sacrifice of litigation autonomy, this does not mean that s. 11 is a substantive provision, or that it effects an unconstitutional sacrifice of substantive rights.

[66] Whenever a Crown chooses to engage in litigation to enforce its civil rights, including in its own territory, it loses aspects of litigation autonomy — a choice which may have binding consequences for its successors, while not necessarily forcing a sacrifice of substantive rights on them. As I have explained, a Crown has the same powers as an individual when acting as a litigant to enforce its civil rights. Like any other litigant, a Crown may not withdraw from or control proceedings once an independent court is seized with the claim and matters relating to its litigation autonomy are often at the court's discretion. For example, a judge is entitled to decline to enforce a settlement agreed to by the parties (see, e.g., *Wannan v. Hutchison*, 2020 BCSC 1233, 74 C.P.C. (8th) 222; *Milios v. Zagas* (1998), 38 O.R. (3d) 218 (C.A.)). A judge may also refuse to allow a plaintiff to withdraw or discontinue an action in certain circumstances (see, e.g., *DLC Holdings Corp. v. Payne*, 2021 BCCA 31, 456 D.L.R. (4th) 337; *Dubuc v. 1663066 Ontario Inc.*, 2009 ONCA 914, 99 O.R. (3d) 476; *Poffenroth Agri Ltd. v. Brown*, 2020 SKCA 121, 65 C.P.C. (8th) 348). Thus, the

consequences of many litigation choices deprive the parties of their freedom to act as they might wish.

[67] When a Crown chooses to litigate in a different jurisdiction, this choice will have even more significant, binding consequences. The Crown in right of Canada or a province can sue in whatever province has jurisdiction over the claim, but a Crown that chooses to litigate in another province must subject itself to the procedural rules of that forum (see *McNamara Construction*, at p. 660; Hogg, Monahan and Wright, at p. 493; Horsman and Morley, at § 13:14). Those procedural rules are controlled by that other province's legislature. As the appellants acknowledged during the hearing, a Crown's submission to the procedural rules of another jurisdiction in ordinary litigation does not violate any constitutional principle (transcript, day 1, at p. 6; see Hogg and Wright, at § 10:20). They argue, however, that the degree of abandonment of litigation autonomy that a multi-Crown class action would require goes too far and violates the Constitution.

[68] Granted, as a participant in a class action, a Crown would sacrifice more aspects of its litigation autonomy — but only if it chooses to do so through the opt-in or opt-out mechanism. That procedural right has been recognized as "[t]he primary protection for the absent class members in the class proceeding process" (*1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279, 362 D.L.R. (4th) 88, at para. 41, quoting *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), at para. 75). In choosing to participate by opting in

or not opting out, a class member, including a Crown, gains the benefits of class actions (such as cost savings and the avoidance of duplicative proceedings) in exchange for the burdens (such as being bound by the decisions of the representative plaintiff) (see *Coburn and Watson's Metropolitan Home*, at paras. 14-15). That is why the notice requirements associated with the opt-in/opt-out mechanism are such an important procedural protection, to make sure that a class member knows of the rights they would sacrifice through their participation (see *Lépine*, at paras. 42-43; *Dutton*, at para. 49; *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 250 D.L.R. (4th) 224 (Ont. C.A.), at para. 28; *Herold v. Wassermann*, 2022 SKCA 103, 473 D.L.R. (4th) 281, at para. 36). Once properly notified, the choice of a class member to participate represents an exercise of litigation autonomy, although one which involves sacrificing other elements of autonomy.

[69] Even at that point, many aspects of litigation autonomy remain available through the procedural protections offered to non-representative plaintiffs within class proceedings, including a foreign Crown. For example, a court keeps the discretion to allow a class member to opt in or out late, if they can show they were not aware of the proceeding or the harm they had suffered (see *CPA*, ss. 8(3) and 10; *Fitzsimmons v. Cie matériaux de construction BP Canada*, 2016 QCCS 1446; Branch and Good, at § 11:1). At any time, the court may permit a class member to participate in the proceeding as an intervener to make sure their interests are fairly and adequately represented (see *CPA*, ss. 12 and 15(1); see also *Tataskweyak Cree Nation v. Canada (A.G.)*, 2021 MBQB 153; Branch and Good, at § 16:6). Class members may apply to replace the

representative plaintiff if they believe they are not adequately representing the class (see *CPA*, ss. 8(3) and 10(1); *Logan v. Ontario (Minister of Health)* (2003), 36 C.P.C. (5th) 176 (Ont. S.C.J.); Branch and Good, at § 16:4). Class members may also object to a proposed settlement (see *CPA*, s. 35; *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (C.J. (Gen. Div.)); Branch and Good, at § 17:2). Class members can even apply for leave to act as a representative plaintiff to prosecute an appeal from an order made in a class proceeding where the representative plaintiff declines to act (see *CPA*, s. 36(2); *Leonard v. The Manufacturers Life Insurance Company*, 2022 BCCA 28, 75 B.C.L.R. (6th) 235, at para. 16; Branch and Good, at § 21:1). This is in addition to the court's general supervisory jurisdiction over the proceeding, which is triggered from the moment the proposed class action begins and obliges the court to make sure the interests of the class members are protected (see *CPA*, s. 12; *Coburn and Watson's Metropolitan Home*, at para. 14; W. K. Winkler et al., *The Law of Class Actions in Canada* (2014), at p. 20).

[70] These procedural protections, in class proceedings statutes and in the court's inherent jurisdiction, protect those aspects of a class member's litigation autonomy otherwise sacrificed when participating in a class action. Placing too high of a protective fence around the litigation autonomy of a class member, including a Crown, would likely extinguish many benefits that class proceedings statutes are intended to provide (see *Berry v. Pulley*, 2011 ONSC 1378, 106 O.R. (3d) 123, at para. 62; J. Cassels and C. Jones, *The Law of Large-Scale Claims: Product Liability, Mass Torts, and Complex Litigation in Canada* (2005), at pp. 434-38).

[71] Thus, participating in class proceedings involves both benefits and burdens for a participant's litigation autonomy. When a Crown takes the benefits of a class proceedings statute, it also accepts its burdens (*Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, at p. 284). It does not violate the Crown's autonomy for it to accept the consequences of its litigation choices as a plaintiff. Consequences are not substantive law.

[72] Nor do these consequences on the Crown's litigation choices render s. 11 of the *ORA* a provision dealing with substantive civil rights simply because those choices may affect the Crown's substantive rights. While participation as a class member undoubtedly *affects* substantive rights, the ability to participate in a class is only a procedural right (*AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 34). This Court has repeatedly affirmed that class proceedings legislation is procedural and does not change or create substantive rights (see, e.g., *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 17; *Pro-Sys Consultants*, at paras. 131-33; *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, at para. 116). The substantive rights of any foreign Crowns who choose to participate in this proceeding will still be determined in accordance with their own laws, which remain subject to change by their legislature and its successor governments.

[73] I agree with the courts below, therefore, that the legal effects of s. 11 are to regulate how B.C.'s existing proceeding, and the procedural mechanisms from the *CPA* which apply to that proceeding, would continue in a modified form after the *ORA* came into force. Section 11 authorizes the government of B.C. to bring this proposed class action, on behalf of those potential class members in s. 11(1)(b). Section 11 also extends to this proceeding the additional substantive rights and remedies that the *ORA* provides exclusively to B.C., while the substantive rights of foreign Crowns who choose to participate under these procedural rules remain unchanged.

[74] Its practical effects are similarly constrained: it merely requires foreign Crowns to choose whether they wish to accept the procedural benefits and burdens of the class action that s. 11 authorizes the Crown in right of B.C. to bring on their behalf, after considering the consequences that this may have on their rights. Far from offering Crowns an "unconstitutional choice", as the appellants describe it (A.F., at paras. 3 and 77), s. 11 lets Crowns exercise their autonomy and choose whether it is in their best interests to seek recovery for their opioid-related harms in a single, consolidated proceeding, or to opt out and go it alone. As the Attorneys General for the Northwest Territories and Prince Edward Island point out, the existence of this choice may be the only way that smaller jurisdictions could achieve recovery (I.F., Attorney General of the Northwest Territories, at paras. 11-22; I.F., Attorney General of Prince Edward Island, at para. 18). The appellants' arguments, if accepted, would prevent the Crowns from exercising their autonomy to efficiently pursue their claims collectively by telling them that this is not a choice they can make. I conclude that a government can agree to

be bound by another province's rules in a class action proceeding, even if the consequences may limit the powers of its legislature and its successors to avoid the consequences of that choice.

(3) What Is Section 11's Pith and Substance?

[75] In sum, the purpose and effect of s. 11 deal with the promotion of litigation efficiency by joining the claims of consenting Crowns into the single proceeding already before the courts of B.C., so their individual claims can benefit from the efficiency and consistency that class actions and the *ORA* provide.

[76] The courts below were correct in finding that the pith and substance of s. 11 is the creation of a procedural mechanism for the application of the *ORA* to the existing opioid-related proceeding, that the Province of B.C. is authorized to continue as a representative plaintiff on behalf of other Canadian governments who choose to participate.

C. *Is Section 11 Classified Under Section 92(13), "Property and Civil Rights", or Under Section 92(14), "The Administration of Justice"?*

[77] After determining a law's pith and substance, it must be "classified" by assigning it to one of the legislative heads of power within ss. 91 and 92 of the *Constitution Act, 1867* (*Quebec (Attorney General)*, at para. 32).

[78] First, I have concluded that s. 11 is procedural and does not deal with substantive rights. Accordingly, s. 11 does not fall under s. 92(13), as the pith and substance of s. 11 does not deal with "Property and Civil Rights".

[79] Instead, I conclude that s. 11 is properly classified under s. 92(14) of the *Constitution Act, 1867*, which grants the provinces the authority to legislate in relation to "[t]he Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts." This language is intentionally broad, since "[b]efore Confederation, the Provinces exercised untrammeled powers in respect of the Administration of Justice, both civil and criminal" (*Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152, at p. 204). Hence, this provision provides a non-exhaustive list of examples that the provinces may legislate in relation to, without limiting the provinces' authority to those matters alone (pp. 204-5).

[80] Under this head of power, the provinces may "enact laws and adopt regulations pertaining to courts, rules of court and civil procedure" (*Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 33; see also *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at para. 79). A law will generally fall under s. 92(14) when it applies to the administrative functioning of a province's courts or to the procedural functioning of actions taking place before the province's courts (*Castillo v. Castillo*, 2005 SCC 83, [2005] 3 S.C.R. 870, at para. 37,

per Bastarache J., concurring; see also *Criminal Lawyers' Association of Ontario*, at para. 33).

[81] Section 11 of the *ORA* is a procedural mechanism which operates with the purely procedural *CPA* and presumptively authorizes the government of B.C. to act on behalf of a class of consenting Canadian governments. Like all procedural rules, s. 11 will play a role in the resolution of substantive rights and affects them to some extent, but s. 11 neither creates nor changes substantive rights. Rather, s. 11 helps Crowns to cooperate in a collective pursuit of their individual claims, and assists B.C.'s courts in presiding over that pursuit.

D. *Is Section 11 Improperly Extraterritorial?*

[82] Turning to the second stage of the *Imperial Tobacco* framework, the question is whether the challenged legislation respects the territorial limits of provincial power. These limits are found in both the opening words of s. 92, which state that provincial legislatures may exclusively make laws in relation to the listed subjects "In each Province", and by the language of several heads of power themselves, which requires that the laws be in relation to matters "in the Province" (e.g., s. 92(8), (12), (13), (14) and (16)).

[83] The territorial limitations on provincial powers "reflect the requirements of order and fairness underlying Canadian federal arrangements" (*Imperial Tobacco*, at para. 27; see also *Reference re Upper Churchill Water Rights Reversion Act*, [1984]

1 S.C.R. 297 (*Churchill Falls*), at p. 328; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, at para. 31). They serve two purposes: they ensure provincial legislation has a meaningful connection to the province, and that it pays respect to the sovereignty of other provinces within their respective legislative spheres (*Imperial Tobacco*, at para. 27). Where the pith and substance of the law relates to something intangible, as it does here, the court must ask if the law would respect the dual purposes of the territorial limits in s. 92: does it have a meaningful connection to the enacting province; and does it respect the legislative sovereignty of other territories (para. 36)? If so, the legislation is valid.

(1) Is There a Meaningful Connection Between Section 11 and the Territory of B.C., the Subject Matter of the Provision, and the Parties Who Are Made Subject to It?

[84] The requirement, within the *Imperial Tobacco* framework, that a law must have a "meaningful connection" to the enacting jurisdiction (para. 27), is based on the concern that state power be exercised legitimately (see *Van Breda*, at para. 31). A "family of tests" has arisen to assess whether a connection exists between the branch of the state trying to exercise power and the subject over whom the state seeks to exercise power (*Sharp*, at para. 118). The particular test that applies to the assessment will vary depending on the context, though some factors will inevitably overlap since the underlying purpose behind each test remains the same (para. 118; see also paras. 119-22).

[85] When assessing the constitutional *validity* of legislation, a "meaningful connection" is tested by assessing the law's connection to the enacting territory, to the subject matter of the law, and to those made subject to it (*Imperial Tobacco*, at para. 36). While "strong relationships" among these factors will allow a court to "easily" find a meaningful connection to the province, the search remains one for a "meaningful connection", and not a connection *with no* extraterritorial effects (para. 37). Incidental effects outside the province "will not disturb the constitutionality of an otherwise *intra vires* law" (*Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 23; see also *Imperial Tobacco*, at para. 28). Some intrusions on the powers of other governments "are proper and to be expected" in a federation where intergovernmental cooperation on cross-border issues is essential (*Canadian Western Bank*, at para. 28).

[86] Section 11 concerns a single class action in B.C.'s courts, involving the government of B.C. and defendants who have conducted business in the province and allegedly caused opioid-related harms there.

[87] However, the appellants' objections to s. 11 require us to consider its meaningful connection to B.C. when foreign Crowns would be affected. The appellants say that s. 11 enables a class action where the substantive claims of *foreign* Crowns, for alleged wrongs occurring in *foreign* provinces and territories, according to *foreign* law, will be prosecuted by the government of B.C. and decided by a B.C. court. They

contend this eliminates any meaningful connection which s. 11 might otherwise have had.

[88] I disagree. Section 11 maintains a meaningful connection to B.C. both through the nature of the class action, and through the choice of the foreign Crowns to participate in the proceeding. The provision concerns a single action with commonality of defendants, issues and claims.

[89] Section 11 is consistent with how courts establish jurisdiction over out-of-province class members. Nothing in s. 11 changes that process. A court must still find a real and substantial connection between B.C. and the class as a whole in order to establish jurisdiction, and therefore B.C.'s legislature can only impose its procedural rules on foreign Crowns if the court is first satisfied that a real and substantial connection between B.C. and the class is present. In the proceeding that s. 11 empowers, B.C.'s laws and courts do not reach outside the province unless the court is satisfied there are common issues between the government of B.C. and the proposed class members, and deems that B.C. is the proper venue for their resolution (see *CPA*, ss. 4(1) and 4.1(1)(a); *ORA*, s. 11(1)(b)).

[90] This Court and many others across Canada have endorsed the idea that the common issues shared between the non-resident class plaintiffs and the resident representative plaintiff suffice to establish a real and substantial connection for adjudicatory jurisdiction over the class (see, e.g., *Dutton*, at paras. 52-54; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at paras. 61-63; *Endean*,

at paras. 6, 17 and 58; *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792, 417 D.L.R. (4th) 467, at para. 107; *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, 193 D.L.R. (4th) 67, at para. 96; *Meeking v. Cash Store Inc.*, 2013 MBCA 81, 367 D.L.R. (4th) 684, at para. 97; *Thorpe v. Honda Canada Inc.*, 2011 SKQB 72, [2011] 8 W.W.R. 529, at para. 135; *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.); see also C. Jones, "The Case for the National Class" (2004), 1 *C.C.A.R.* 29, at pp. 46-47; T. J. Monestier, "Personal Jurisdiction over Non-Resident Class Members: Have We Gone Down the Wrong Road?" (2010), 45 *Tex. Int'l L.J.* 537, at pp. 546-48; J. Walker, *Canadian Conflict of Laws* (7th ed. (loose-leaf)), at § 4.03). Section 11 of the *ORA* and the relevant provisions of the *CPA* do not extend or change the court's jurisdiction over these extraterritorial plaintiffs or issues. This jurisdiction arises from the court's plenary authority, anchored by the real and substantial connection from the plaintiffs' common issues (*Dutton*, at paras. 19-24, 33-34 and 39; *Meeking*, at paras. 92-97; *Thorpe*, at paras. 119 and 135; Jones, at pp. 46-47; Walker, at § 4.03). Section 11 of the *ORA* and the relevant provisions of the *CPA* merely provide the procedural rules for the court once jurisdiction is established. It is a legitimate exercise of power for a province to set the procedural rules for proceedings within its jurisdiction.

[91] Thus, s. 11 authorizes the government of B.C. to bring an action that maintains a meaningful connection to B.C. through the common issues within the B.C. litigation, the court's jurisdiction over those issues, and the consent of all participating Crowns. The provision will affect foreign Crowns only if they do not opt out of the proceeding (*ORA*, s. 11(2); *CPA*, s. 16). No governments are compelled to participate

against their will, and the opt-out mechanism lets them make informed and voluntary decisions about whether to subject themselves to B.C.'s courts and procedural rules (*Lépine*, at paras. 42-43). If they choose to participate, they consent to the court's jurisdiction to preside over the resolution of the common issues which they accept are essentially the same as those of the representative plaintiff, further linking their independent claims and the province of B.C. (see *Harrington*, at para. 99; see also *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, at para. 37; *Morguard*, at pp. 1103-4; *Van Breda*, at para. 79; Walker, at § 2.02). And if they do not consent to participate, that is the end of the matter.

[92] The appellants' argument that the foreign nature of the Crowns' claims negates a meaningful connection is also flawed. Superior courts often adjudicate cases with claims arising elsewhere or requiring the application of foreign law (see, e.g., *Van Breda*). Applying foreign law to a foreign party does not necessarily destroy a "real and substantial connection" for the court's jurisdiction over the claim; nor does it undermine the "meaningful connection" between the procedural law facilitating that action and the province which enacted it. Neither test demands the complete absence of all connections to other provinces (see *Imperial Tobacco*, at paras. 37-38).

[93] Accepting the appellants' arguments on this point would contradict decades of established jurisprudence affirming that superior courts can preside over class actions that are national in scope. When courts preside over these claims, they must follow their home province's procedural rules, while often applying the

substantive laws from other provinces to each class members' individual claims. This Court has endorsed national class actions in several decisions (see, e.g., *Dutton*; *Vivendi Canada Inc.*; *Endean*). They are increasingly an important vehicle for many Canadians to access justice in the modern world.

[94] The subject matter of s. 11 is, therefore, a proceeding brought by the government of B.C. in the Supreme Court of British Columbia. Before certification, only B.C. and the defendants are subject to it. Post-certification, only consenting foreign Crowns with common issues with the government of B.C. are subject to it. Thus, a meaningful connection exists between B.C.'s Legislative Assembly, a provision which deals with its courts' procedures, and parties who choose to participate in such proceedings where their common issues will be resolved collectively.

(2) Does Section 11 Respect the Legislative Sovereignty of Other Canadian Governments?

[95] The appellants argue that s. 11 fails to respect the legislative sovereignty of other Canadian governments by forcing them to either opt out of the proceeding, or else opt in and fetter their sovereignty by giving away their ability to legislate regarding their substantive opioid-related healthcare cost recovery rights or their litigation autonomy over those rights. They say that the support of the other governments for this legislation is irrelevant.

[96] As I have explained, the appellants' concerns about the binding effects on another province's litigation autonomy does not undermine its sovereignty. Litigation involves consequences and those consequences may be inescapable, especially when they occur in jurisdictions beyond the control of a government's legislature. There is no constitutional principle against this. The appellants' arguments blur the distinction between legislative and executive authority. The legislature of one level of government cannot transfer its primary authority to legislate to another level of government (*Reference re Pan-Canadian Securities Regulation*, at paras. 75-76). However, no such rule applies to the executive delegation of litigation conduct.

[97] Of course, a government cannot displace existing laws through executive action and the "legislature is entitled to enact legislation inconsistent with the government's commitments under a prior agreement" (*Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63, [2019] 4 S.C.R. 559, at para. 92). Thus, as a general constitutional principle, neither the executive, nor the legislature itself, can bind a future legislature in its exercise of authority (*Reference re Pan-Canadian Securities Regulation*, at paras. 54-59; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 37; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 560).

[98] But this general principle hits its limit when a Crown exercises its civil rights, in its capacity as a natural person, in areas where its legislature has no authority to enact laws. Aside from effects on a Crown's desire to litigate as they wish in foreign

territory, when Crowns act in their capacity as a natural person in other jurisdictions they may also have to accept legal consequences that fall outside their legislative competence, such as the creation of private rights and duties in other provinces. For example, when a Crown enters into a contract in another province, that contract will fall under the legislative competence of that *other* province's authority over "Property and Civil Rights in the Province" (s. 92(13) of the *Constitution Act, 1867*). The contracting Crown's legislature could not enact a law to cancel those extra-provincial contractual rights, and it will be bound by that contractual obligation in the same way as an individual (see *Churchill Falls*, at pp. 332-33; see also *Bank of Montreal v. Attorney General (Quebec)*, [1979] 1 S.C.R. 565, at p. 574).

[99] So when a Crown exercises the same civil rights as an individual, it will be bound by the consequences of its actions undertaken in another province when those actions fall under that other province's legislative sovereignty. Despite being sovereign in its own territory over these subject matters, a Crown cannot legislate itself out of situations it might have controlled at home. Nothing forces one province to engage in activities elsewhere, but when they do, they must abide by the laws of that other province (see D. Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969), 47 *Can. Bar Rev.* 40, at p. 60; Hogg and Wright, at § 10:20).

[100] This is the case when a Crown exercises its civil rights by participating as a non-representative plaintiff in a class action in another province. It will find itself subject to that province's procedural rules governing class actions, including

procedural rules relating to the binding nature of the court's judgments or any settlements negotiated by the parties (*CPA*, ss. 26 and 35).

[101] However, the application of those *procedural* rules to the foreign, participating Crowns does not determine which *substantive* laws will apply to those Crowns (see *Wilson*, at para. 83; *Thorpe*, at para. 135; Walker, at § 4.03). Here, the harms underlying each Crown's causes of action occurred in their own jurisdictions and thus are subject to their own substantive law (see *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at pp. 1050 and 1064-65; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63, at paras. 25 and 80; *Van Breda*, at para. 37; Walker, at § 1.02[2][e]). That substantive law remains subject to each legislature's sovereignty, including their own *ORA*-type legislation to establish their causes of action.

[102] I also do not agree that s. 11 fails to respect the sovereignty of other governments because of the potential for overlap and conflict between their various *ORA*-type statutes and the litigation they authorize. Multi-jurisdictional legislative overlap is normal in a federation; so long as it occurs within the proper legislative authority of the enacting governments, it is not problematic (see *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 62; *Canadian Western Bank*, at paras. 36-37). Multi-Crown participation in a national class action, where each is authorized by its own law, represents cooperation between different governments and comity between the courts.

[103] Intergovernmental cooperation in Canada recognizes that some amount of overlap is inevitable regarding national issues like the opioid epidemic, and that "governments should be permitted to legislate for their own valid purposes in these areas of overlap" (*PHS Community Services Society*, at para. 62). While the courts remain the ultimate arbiters of the constitutionality of governments' efforts to regulate nationwide issues like these, the day-to-day task of maintaining the balance of powers regarding cooperative legislative schemes "falls primarily to governments" (*Canadian Western Bank*, at para. 24).

[104] Here, nearly every provincial and territorial government in Canada has chosen to cooperate by enacting virtually identical statutes, by indicating their intent to participate as class members, and by intervening in this appeal supporting B.C. The federal government, which also intervened in support of the respondent, has indicated its intent to participate in the class action as well (*House of Commons Debates*, vol. 151, No. 216, 1st Sess., 44th Parl., June 19, 2023, at p. 16247 (Hon. Carolyn Bennett)). This multi-Crown participation is in harmony with our Court's approach to intergovernmental cooperation on national issues, where collaboration between the executives and legislatures of both provincial and federal governments is vital. 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 (see *Murray-Hall*, at paras. 79 and 82; *Reference re Impact Assessment Act*, at para. 69; *Kitkatla*, at paras. 72-73; *OPSEU*, at pp. 19-20).

[105] As for the judicial branch of government, this Court has recognized that "[g]reater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe" (*Hunt*, at p. 292). The courts in our federation provide a comparable quality of justice, and so demand the same level of faith in one another's judgments where jurisdiction has been properly exercised (*Morguard*, at p. 1099). If overlapping litigation arises, courts acting in respect of one another have the tools to prevent any abuse of process (see, e.g., *CPA*, ss. 4(3) to 4.1). Comity between our federation's courts helps with access to justice in a world where people and problems cross borders without heed for which legislature or court has authority over them.

[106] This is true in class actions, whose "purpose is to facilitate access to justice for citizens who share common problems and would otherwise have little incentive to apply to the courts on an individual basis to assert their rights" (*Bisaillon*, at para. 16). This Court has noted that class actions serve judicial economy, promote access to justice, and modify the behaviour of wrongdoers who might otherwise escape accountability for their actions (*Dutton*, at paras. 27-29; *Hollick*, at para. 15). These goals are met where governments cooperate with one another to have their claims litigated efficiently, in one action, before one province's superior court, whose proceedings and judgment will be respected through the principle of comity in the other courts of our federation.

[107] Section 11 of the *ORA* therefore respects the legislative sovereignty of foreign Crowns. It is an example of the important role that national class actions play in matters which span the country, by providing a mechanism to help multiple governments cooperate while working toward the same goal.

(3) Conclusion on Territoriality

[108] Section 11 is meaningfully connected to the Province of B.C. and respects the legislative sovereignty of other Canadian governments. Any extraterritorial effects on foreign Crowns' substantive rights are incidental and do not affect its validity.

VI. Conclusion

[109] Section 11 of the *ORA* is a procedural mechanism through which the claims of consenting foreign Crowns can be determined in a single proceeding before the courts of B.C., with the government of B.C. acting as the representative plaintiff. This procedural mechanism falls within the Province's authority over the "Administration of Justice in the Province" under s. 92(14). It is meaningfully connected to the province and respects the legislative sovereignty of other governments. As a result, s. 11 is *intra vires* the province, and it is unnecessary to consider the ancillary powers doctrine.

[110] I would dismiss the appeal with costs.

The following are the reasons delivered by

CÔTÉ J. —

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I. Introduction

[111] The seriousness of the opioid crisis across Canada cannot be understated and the crisis continues to persist without slowing down (see *R. v. Parranto*, 2021 SCC 46, [2021] 3 S.C.R. 366, at para. 96, per Moldaver J.). While I recognize and do not in

any way dismiss the seriousness of the situation involving opioids and its profound impact on Canadians (*R. v. Smith*, 2019 SKCA 100, 382 C.C.C. (3d) 455, at para. 90, citing *R. v. Fyfe*, 2017 SKQB 5, at paras. 157-63), the severity of the circumstances does not allow our Court to amend the Constitution. Enhancing access to justice and facilitating intergovernmental cooperation are laudable objectives, but they must be accomplished without conflicting with the fundamental structure of Canadian federalism.

[112] This appeal raises the question of whether s. 11 of the *Opioid Damages and Health Care Costs Recovery Act*, S.B.C. 2018, c. 35 ("*ORA*"), is *ultra vires* the legislature of British Columbia. In particular, can the legislature of British Columbia authorize the Province to initiate a class action to claim health care costs incurred by a foreign province on an opt-out basis, thereby compelling that province to take steps to avoid that forced participation in the given proceeding? In addition to the core issue, this appeal has important ramifications for the pith and substance analysis and the proper balance that must be struck between legal and practical effects in determining the dominant purpose of an impugned law.

[113] I do not question the fact that the legislative scheme of the *ORA* is constitutionally valid as far as it mirrors that of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 ("*TRA*"), the constitutional validity of which was upheld by our Court in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473. Unlike the *TRA*, however, the *ORA* contains a provision

that allows the Crown in right of British Columbia, as the representative plaintiff, to bring a multi-Crown class action lawsuit on behalf of other provincial governments and the federal government and bind these governments to the class proceeding, unless they take the positive steps to opt out. Moreover, the decision to opt out must be made in accordance with the certification order, meaning that British Columbia's provincial courts get to dictate how other provinces and the federal government go about preserving their own rights. In my view, the relevant and related question is whether the legislature of a province has the authority to legislate in a manner that interferes with the rights and prerogatives of other provincial governments and the federal government. The answer must be no.

[114] The appellants, which are named as defendants in the action at the heart of this case, challenge the constitutional validity of s. 11 of the *ORA*. They suggest that s. 11, in pith and substance, engages substantive rights and falls outside the jurisdictional (or territorial) boundaries and legislative competence of British Columbia. They submit that s. 11 is an unprecedented affront to established constitutional principles. The respondent, His Majesty the King in right of the Province of British Columbia, maintains that the pith and substance of the provision is to legislate in respect of the procedural powers of the Province and respects the territorial limitations imposed by the *Constitution Act, 1867*.

[115] I am of the view that the pith and substance of s. 11 of the *ORA* is to legislate in respect of property and civil rights outside the province, contrary to the

territorial limitations necessarily imposed on provincial legislatures by operation of s. 92 of the *Constitution Act, 1867*. Through s. 11, the legislature of British Columbia is attempting to aggregate civil rights in other provinces into a single class action, but its powers are limited to property and civil rights "in the Province" pursuant to s. 92. The effects of s. 11 on the substantive rights of the other provincial governments and the federal government are not merely incidental. Rather, membership in the class is imposed on the other governments; that is, the provision's default position would, in pith and substance, interfere with their litigation autonomy. I do not claim that s. 11 of the *ORA creates* substantive rights, but rather that it *affects* the substantive rights of governments outside British Columbia in a non-incidental way. As I explain in these reasons, these unconstitutional legal effects cannot be made valid by the fact that those foreign governments can choose to opt out of the class action commenced by British Columbia.

[116] I acknowledge that a certification order is required for the provision to take effect. In this regard, I would highlight and agree with the points made by counsel for the appellants, who, during oral argument, accepted that certification is required, but contended that the dominant purpose of s. 11 of the *ORA* ultimately relates to what happens once the class action is certified. The very crux of the provision contemplates certification, and a court cannot certify the given class action without the existence of s. 11. Of course, if the class action proposed by British Columbia were not certified, the present debate would be rendered meaningless.

[117] I conclude that the pith and substance of s. 11 of the *ORA* is to legislate with respect to the substantive rights of other governments to litigate for the recovery of health care costs. I would therefore classify the provision as falling within the scope of s. 92(13) of the *Constitution Act, 1867*. The provision does not respect the territorial limitations on the competence of the legislature of British Columbia and therefore its pith and substance is not "in the Province" for the purposes of s. 92. More specifically, there is no meaningful connection between the enacting territory, the subject matter of the law, and those made subject to it. I would reach this same conclusion even if the provision's pith and substance were to be classified under s. 92(14). As I note later in these reasons, I would also voice serious concerns about the impact that such a provision would have on the legislative sovereignty of other provinces.

[118] I do not disagree with my colleague that horizontal cooperation between the provincial and federal governments on common issues is a laudable goal. However, whatever method the provinces and federal government craft to achieve cooperation *must* be consistent with the structure of Canadian federalism, no matter how advantageous it may be to encroach on the jurisdiction of other governments in any given case. Governments could decide, for example, subject to jurisdictional issues, to join their actions in a single province. This would allow them to share some of the costs of the actions, thereby promoting efficiency and deterrence without infringing on the ability of other provinces to make an active choice about whether to participate and how to carry out litigation. The opt-out structure of the *ORA* does not allow for this active choice. Section 11 imposes participation by default, and this participation

requires other provinces to submit to the litigation decisions of the Province of British Columbia.

[119] The appellants also made submissions to the effect that s. 11 would be unconstitutional even if it created an opt-in, rather than an opt-out, regime for multi-Crown class actions. Nevertheless, I find that it is unnecessary for me to express a view on this in the present circumstances, as the issue before us is about the constitutionality of s. 11 in its current form.

[120] For the reasons that follow, I would allow the appeal.

II. Analysis

[121] I agree with my colleague that where the validity of provincial legislation is challenged on the basis that it violates territorial limitations imposed on a provincial legislature, the assessment of its validity must be carried out in accordance with the two-part framework established by our Court in *Imperial Tobacco*.

[122] The first step is to determine the pith and substance of the impugned legislation, which requires finding "its essential character or dominant feature" having regard to its purpose and effect (*Imperial Tobacco*, at para. 29). Thereafter, courts are tasked with classifying the provincial legislation's pith and substance under an appropriate head of power pursuant to s. 92 of the *Constitution Act, 1867*. The second step requires courts to determine whether the pith and substance of the impugned

legislation "respects the territorial limitations on that head of power — i.e., whether it is in the province" (para. 36). In this regard, the legislation must have a meaningful connection to the enacting province and must respect the legislative sovereignty of the other provinces.

[123] At the outset, I wish to offer a few remarks to provide appropriate context for these reasons. First, I recognize that the constitutional analysis regarding the pith and substance of an impugned law focuses on the dominant thrust of the law and permits extra-provincial effects that are incidental or ancillary. Ever since our Court's decision in *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at p. 332, it has been well established that extraterritorial effects that are merely incidental do not impact the constitutional validity of otherwise *intra vires* legislation. Our Court has affirmed this point on many occasions (see, e.g., *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 23; *Imperial Tobacco*, at para. 28). That being said, I would emphasize the words of McIntyre J. in *Upper Churchill*, at p. 332, where he wrote that if "the pith and substance of the provincial enactment is the derogation from or elimination of extra-provincial rights then . . . it will be *ultra vires*" (see also *Global Securities Corp.*, at para. 24).

[124] Second, I acknowledge our Court's recent pronouncement that in the context of aggregate damages provisions, the "advantages conferred by class proceeding legislation are purely procedural, and . . . they do not confer substantive

rights" (*Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, at para. 116; see also *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 46). While this is true, in my view, the impugned provision engages and ultimately affects substantive *rights* that go far beyond the procedural *advantages* flowing from class proceedings legislation. Indeed, it has serious impacts on the litigation autonomy of other governments.

[125] My analysis proceeds in two parts. In the first part, I discuss how the default position of s. 11 of the *ORA* is such that, in pith and substance, the provision's purpose and effects are substantive in nature. I conclude that the pith and substance of the provision is to legislate in respect of property and civil rights outside of the province and therefore falls within the purview of s. 92(13) of the *Constitution Act, 1867*. In the second part, I conclude, however, that regardless of whether s. 11 falls within the scope of s. 92(13) or, if my analysis were incorrect, whether it instead falls within the scope of s. 92(14), the provision is still *ultra vires* the legislature of British Columbia, as it does not respect the territorial limitations imposed by the Constitution. There is no meaningful connection between the enacting territory, the subject matter of the law, and those made subject to it. More specifically, there is no meaningful connection between British Columbia and the other governments named in the class action, the claims of these governments, and the subject matter of s. 11. Aside from British Columbia's own claim, all other claims belong to an emanation of the Crown outside of British Columbia.

A. *Pith and Substance*

[126] I turn now to the pith and substance of the impugned provision. I reproduce the entirety of s. 11 of the *ORA* here for convenience:

> **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*.

[127] My colleague's conclusion on the pith and substance of s. 11 of the *ORA* mirrors the conclusions of the courts below:

> . . . the pith and substance of s. 11 is the creation of a procedural mechanism for the application of the *ORA* to the existing opioid-related proceeding, that the Province of B.C. is authorized to continue as a representative plaintiff on behalf of other Canadian governments who choose to participate. [para. 76]
>
> (See also 2022 BCSC 2147, 77 B.C.L.R. (6th) 313, at para. 73; 2023 BCCA 306, 79 B.C.L.R. (6th) 1, at paras. 54 and 85.)

[128] At the outset, I agree with the appellants that the purpose of s. 11 is to permit the Province of British Columbia to seek certification of a class of governments asserting recovery rights for opioid-related health care costs. Tied to this purpose is the Province's ability to seek certification on an opt-out basis such that, by default, the provincial governments and the federal government are included in the class action if British Columbia so chooses. While the respondent's submission that s. 11 provides for the procedural impacts of the *ORA* coming into force on the opioid-related action is not inaccurate *per se*, I suggest that, in effect, it impacts substantive rights held by the foreign governments.

(1) Purpose: Seeking Certification of a Class of Governments Asserting Recovery Rights for Opioid-Related Health Care Costs

[129] I begin by assessing the purpose of s. 11 of the *ORA*. My colleague suggests that the Crown in right of British Columbia was already a "person" capable of commencing an action on behalf of a class of persons, including those who do not

reside in British Columbia. She suggests that, therefore, s. 11 does not create a power that the Province did not have before. As a result, according to her, creating new rights for the Crown in right of British Columbia and other provinces is not the purpose of the provision. The first instance judge considered it a "collateral issue" (para. 62), and the Court of Appeal determined that because the challenge was directed at the validity of the provision, and not at the proceedings themselves, the question was not relevant (paras. 82-83).

[130] It may well be that the Province of British Columbia is a "person" for the purposes of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*"), and as a result can commence a class action under this regime. Even so, I agree with the courts below that it is not necessary to resolve this question in the present appeal. The important question is whether, as a matter of statutory interpretation, the Crown in right of the *other* provinces and the federal Crown fall within the definition of "person" for the purposes of a multi-jurisdictional class proceeding under the *CPA* (see, e.g., *CPA*, ss. 1, 2(1), 4.1 and 44). If they do not fall within this definition, then s. 11 creates a new substantive right to bring a class action on behalf of other governments. The fact that the Crown in right of a province can submit to the jurisdiction of courts in other provinces, or that its common law powers are not subject to territorial restraints, is in no way determinative in this interpretive exercise.

[131] Leaving aside the question of whether this would be constitutionally permissible, it cannot be said that the legislature of British Columbia intended for other

provincial governments and the federal government to be members of a class for the purposes of the *CPA*. It is a well-established principle that "the Crown is not bound by statute except by express words or necessary implication. What this means is that general language in a statute, such as 'person' . . ., will be interpreted as not including the Crown" (P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 398; see also H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at para. IX-86; K. Horsman and G. Morley, *Government Liability: Law and Practice* (loose-leaf), at § 1.15). This principle is referred to as Crown immunity.

[132] Even where the language of a provincial statute is said to include the Crown, it will not by this very fact include other sovereign emanations of the Crown. As Anglin J. wrote in *Gauthier v. The King* (1918), 56 S.C.R. 176, at p. 194, it is a "safe rule of construction that a reference to the Crown in a provincial statute shall be taken to be to the Crown in right of the province only, unless the statute in express terms or by necessary intendment makes it clear that the reference is to the Crown in some other sense" (emphasis added). In that case, the Court determined that a provision applying the terms of a provincial statute to His Majesty ought not to be taken as subjecting the federal Crown to the restrictions of that statute.

[133] This reasoning should apply with even greater force with respect to the Crown in right of other provinces, given the territorial limitations on provincial power imposed by s. 92 of the *Constitution Act, 1867*. Legislation should be interpreted in a

manner consistent with those territorial limitations (see *Sharp v. Autorité des marchés financiers*, 2023 SCC 29, at paras. 113-14; P.-A. Côté and M. Devinat, *Interprétation des lois* (5th éd. 2021), at paras. 779-82; R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at pp. 807 and 815).

[134] It is true, as the respondent argues, that the Crown may take advantage of a statutory regime by which it would otherwise not be bound and waive its immunity. For instance, if the Crown brings an action to which certain limitations attach, it will be bound by such limitations (see *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015, at p. 1027; *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, at pp. 284-86). Such an exception to Crown immunity is a narrow one, and not one that is adapted to the present context. This is because, by operation of Crown immunity, the Crown in right of other provinces and the federal Crown are presumably excluded from the word "persons" in the *CPA*. A legislature cannot force the Crown of another province or the state (e.g., through an opt-out regime) to take advantage of a statutory regime it has enacted; it cannot force a Crown to waive its immunity. In the present context, I cannot accept the respondent's argument that foreign governments are "persons" or "members of a class of persons" for the purposes of the *CPA*.

[135] Since s. 11 of the *ORA* gives the Province of British Columbia the ability to do something it could not before, I therefore find that the purpose of the provision is to allow the Province of British Columbia to seek certification of a class of

governments asserting recovery rights for opioid-related health care costs. Contrary to the respondent's argument, it is significant to the constitutional analysis that the *CPA* in British Columbia does not authorize multi-Crown class actions. As a result, the effects of s. 11 are not simply limited to the application of the *ORA*'s provisions to the extant class action, but are instead far more extensive.

(2) Effects: Automatic Inclusion of Foreign Governments

(a) *The Opt-out Regime: Substantive Rights and Effects*

[136] I turn now to the effects of the impugned provision. I do not question the fact that s. 11 of the *ORA* is procedural in some respects. For example, s. 11(1)(a) provides that pre-existing proceedings regarding opioid-related wrongs continue in accordance with the *ORA*. Any such proceedings based on other causes of action commenced before the coming into force of the *ORA* therefore fall within the direct and distinct cause of action under the *ORA*. Accordingly, the record reflects that British Columbia appropriately amended its civil claim in the present appeal to ground it within the authority of the *ORA*. Likewise, s. 11(1)(c) provides that procedures completed or orders made prior to the *ORA*'s coming into force continue to have effect unless they are inconsistent with the *ORA*. Section 11(1)(d) provides that if not completed, a procedure that began before the *ORA*'s coming into force must be completed in accordance with the *ORA*.

[137] The placement of s. 11(1)(b) within these procedural paragraphs does not mean that its effects are merely procedural. Nor is it determinative of the pith and substance of s. 11 as a whole. In fact, I share the view of the courts below that the main thrust of s. 11 is to be found in s. 11(1)(b) and (2). Indeed, the Court of Appeal spoke of the importance of the manner in which s. 11(2) qualifies s. 11(1)(b); standing alone, the latter provision would be "of doubtful validity" (para. 76).

[138] In addition to the placement of s. 11(1)(b) between procedural paragraphs, my colleague also points to the placement of s. 11 as a whole, immediately following the retroactive effect created by s. 10, as reinforcing its procedural nature (para. 58). However, the fact that the section is placed there or that s. 11 has some procedural *aspects* does not make the section procedural as a whole. The impact of s. 11 is substantive.

[139] The opt-out regime provided for in s. 11(2) of the *ORA* is central to the assessment of the pith and substance of s. 11 as a whole. Section 11(2) necessarily operates alongside s. 11(1)(b), which codifies and provides a foundation for a direct and distinct cause of action authorizing the Province of British Columbia to sue manufacturers, wholesalers, or consultants on behalf of other governments. At first glance, these provisions may appear to have only a procedural impact, as they relate to class proceedings and afford the advantages related to such proceedings. Read together, however, s. 11(1)(b) and (2) interfere with the property and civil rights in other provinces. In my view, in respect of the rights of other governments, these substantive

effects cannot be said to be merely incidental; instead, they go to the pith and substance of the provision.

[140] Section 11(2) of the *ORA* provides that, in accordance with s. 16 of the *CPA*, a member of the class can opt out of the class action despite having been included in the proceeding by virtue of s. 11(1)(b) of the *ORA*. Relatedly, s. 16 of the *CPA* indicates that "[a] member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order." Therefore, it is not surprising that s. 11(2) of the *ORA* expressly preserves a government's ability to opt out as it exists in the *CPA*.

[141] I agree with my colleague that s. 11 of the *ORA* cannot be construed as featuring an opt-in regime but must instead be interpreted as providing governments with the ability to opt out. Nothing in the wording of the *ORA* or the *CPA* indicates that other provincial governments or the federal government would have the choice of opting in the class action. Section 11(1)(b)(i) of the *ORA* grants British Columbia the power to, at the very least, *commence* an action of its own volition on behalf of a class consisting of other governments. In other words, the Province can commence the proceeding without any consultation with the other governments and without their consent. Consequently, the Court of Appeal was correct in determining that any conclusion that the provision can be viewed as authorizing an "opt-in" regime is unavailable simply by reason of the wording of s. 11 (para. 54).

[142] While my colleague and I both agree that s. 11 of the *ORA* is an opt-out regime, we part ways on the impact of this finding. Throughout her reasons, my colleague does not seem to make any sort of distinction between the effects of opting in or opting out — both are, in her view, a choice about whether or not to participate in a class proceeding. With respect, I cannot agree that the effects are the same. An opt-out regime automatically binds other provinces and the federal government to the law of British Columbia if nothing is done to prevent its operation.

[143] An opt-out regime has long been used in cases involving class proceedings. Proponents of such a regime emphasize its ability to afford procedural protection to unnamed plaintiffs (see *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (C.A.), at para. 28; see also W. K. Winkler et al., *The Law of Class Actions in Canada* (2014), at p. 213). An opt-out provision preserves the ability of typically out-of-province claimants (or non-residents) to pursue their claims in their own provinces and to avoid being bound by the forum province's *adjudicative* jurisdiction over the class proceeding. That being said, judgments are binding only where a class member is "notified of the suit and is given an opportunity to exclude himself or herself from the proceeding" (*Western Canadian Shopping Centres*, at para. 49). In other words, the procedure of giving adequate notice of the ability to opt out of the class proceeding is crucial to maintaining the function of the provision (see *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, at para. 42; see also *Western Canadian Shopping Centres*, at para. 49). Indeed, an opt-out regime is

beneficial for those who would not ordinarily engage in any such litigation, as they are automatically deemed to be prospective class members in the class litigation.

[144] On the other hand, an opt-out regime can be restrictive and can present challenges for those made subject to it. In essence, the existence of an opt-out provision first necessitates that claimants automatically be deemed prospective class members unless they ultimately choose to exercise their right to opt out and exclude themselves from the class action (see *Turner v. Bell Mobility Inc.*, 2016 ABCA 21, 394 D.L.R. (4th) 325, at para. 11). If a person falls within the definition of a class member for the purposes of the commenced class action, they become "part of the plaintiff class unless they opt-out" (*Gillis v. BCE Inc.*, 2015 NSCA 32, 358 N.S.R. (2d) 39, at para. 8; see also *Frey v. BCE Inc.*, 2013 SKCA 26, 409 Sask. R. 266). In this way, they "will generally be bound by the result of the certified class proceeding unless they take the step of opting out" (J. Walker, H. M. Rosenberg and J. Kalajdzic, *Class Actions in Canada: Cases, Notes, and Materials* (3rd ed. 2024), at p. 35). The dynamics of an opt-out regime are unlike those of an opt-in regime; the latter grants non-class members the authority to take proactive and positive steps to *become* class members in the class proceeding (p. 229). Non-class members are therefore not automatically deemed to be prospective class members in the class action.

[145] In my view, the legislature of British Columbia's decision to impose an opt-out as opposed to an opt-in regime has important legal impacts on class members' substantive litigation rights. The legislature of British Columbia has chosen to permit

the Province of British Columbia to commence a class action while automatically including other governments in the action. While there is some case law describing the opt-out regime itself as a procedural protection (see *Currie*, at para. 28), I agree with the appellants that the effects of imposing such a regime are properly characterized as substantive and non-incidental (transcript, day 1, at p. 28). By implementing such a regime, the legislature of British Columbia is seeking to preserve the substantive rights it has arrogated by automatically imposing a class action upon other governments. It is commencing an action without the consent of the other governments (see C.A. reasons, at para. 76).

[146] In this sense, I would agree with the Court of Appeal for Ontario in *Johnson v. Ontario*, 2021 ONCA 650, 158 O.R. (3d) 266, at para. 15, where Lauwers J.A. referred to "the right to opt out as itself a substantive right". In that case, the court concluded that the litigant "lost substantive rights of significant importance when his motion for an extension of time within which to opt out of the class action was denied" (para. 26). The loss of significant substantive rights flowed from being automatically deemed a prospective class member. As Lauwers J.A. wrote, at para. 16:

> Our society places a high premium on a person's ability to initiate and participate in litigation as an incident of personal autonomy. Along with it goes the right to appoint counsel of one's choice, the right to participate meaningfully in the development of litigation strategy, to participate in settlement negotiations, and to settle the action. The legislative right to opt out of a class proceeding recognizes these significant rights.

[147] As I stated earlier, a consequence of an opt-out regime (as opposed to allowing claimants to "opt in" as class members) is that defined class members are automatically deemed to be in the class action unless they take proactive steps to opt out. Aside from the representative plaintiff, no class member can provide any meaningful input on a host of important aspects of the proceeding, including but not limited to the choice of counsel, litigation strategy, the evidence to be tendered, participation in negotiation discussions, and, ultimately, the settlement of the action (see A.F., at para. 49). As the Court of Appeal for Ontario has pointed out, the choice of opting out "gives a class member the opportunity to privilege their own litigation autonomy — to develop their own strategy, retain their own counsel, settle, or litigate as they decide — over the benefits of the class proceeding that is conducted for their benefit, but outside their control" (*Johnson v. Ontario*, 2022 ONCA 725, 164 O.R. (3d) 573, at para. 47, citing *Johnson* (2021), at para. 16).

[148] Equally important is the fact that under an opt-out regime, class members who fall within the definition of the class lose their right to simultaneously commence proceedings in their own jurisdictions. For example, if another province, such as Ontario, commenced a class action in its own province and arising from its own legislation (see, e.g., *Opioid Damages and Health Care Costs Recovery Act, 2019*, S.O. 2019, c. 17, Sch. 2, s. 12(1)) and automatically included the Province of British Columbia as a class member, the latter would not be able to implement or enforce its own legislature's enactment in its own province. In other words, the Province of British Columbia would not be able to commence its claim in its own courts in British

Columbia. This potential conflict could in effect preclude the operation of a statute enacted by Parliament or other provincial legislatures.

[149] My colleague suggests that in the context of the current class action, each province's claim would be determined in accordance with its own substantive laws. With great respect, this fact has no bearing on the constitutional analysis. It is not an effect of s. 11 of the *ORA* itself, nor is it a necessary consequence of its operation. Rather, it stems from the Province of British Columbia's litigation strategy to ensure that the British Columbia Supreme Court's adjudicative jurisdiction can be established in respect of all other provincial claims and a potential outcome resulting from the application of choice of law rules.

[150] Moreover, once a class proceeding is commenced in British Columbia, the other governments also become subject to the adjudicative jurisdiction of the forum province without having taken any steps to opt in (*Hamm v. Canada (Attorney General)*, 2021 ABCA 329, 32 Alta. L.R. (7th) 213, at para. 15). The other governments are necessarily put to a choice pursuant to the laws of British Columbia — in this case the *ORA*. Thus, if a class member does not opt out of the class proceeding, it loses its litigation autonomy (*Herold v. Wassermann*, 2022 SKCA 103, 473 D.L.R. (4th) 281, at para. 39). As the British Columbia Court of Appeal wrote in *Coburn and Watson's Metropolitan Home v. Home Depot of Canada Inc.*, 2019 BCCA 308, 438 D.L.R. (4th) 533, at para. 14, this is "the price paid to receive the benefit from a class proceeding".

[151] I hasten to add that this situation is unlike one where governments appear in other provincial jurisdictions as litigants or interveners. In those cases, the foreign governments nevertheless maintain autonomy and authority over their decision-making and can "settle or abandon [their] participation" in the forum province's court (A.R.F., at para. 8). They maintain their decision-making with respect to all substantive aspects of their cases, irrespective of the fact that they are subject to the forum province's rules of civil procedure. My colleague cites certain cases to suggest that some decision-making power in the context of litigation can be limited by foreign courts in other cases. These are cases where a court refused a plaintiff's application to withdraw or discontinue an action. With great respect, these cases do not assist in the present context. They involve particular circumstances in which plaintiffs attempted to circumvent important rules of litigation, such as rules for assessing and paying costs (see, e.g., *Dubuc v. 1663066 Ontario Inc.*, 2009 ONCA 914, 99 O.R. (3d) 476). These are examples where courts took away some individual rights belonging to litigants because of exceptional circumstances. Meanwhile, the effect of s. 11 is to *presumptively* remove virtually *all* decision-making power in litigation.

[152] The effects of the provision challenged in this appeal reflect the complete opposite of litigation autonomy. The fact that s. 11 of the *ORA* operates within the context of an opt-out regime necessarily means that, by default, the other provincial governments and the federal government are included in the class proceeding. Having been automatically included pursuant to s. 11(1)(b)(i), the governments are stripped of their litigation autonomy if they do not take proactive steps to opt out of the action.

These steps must be taken in accordance with the certification order, meaning that British Columbia's provincial courts get to dictate how other provinces and the federal government go about preserving their own rights. Indeed, their decision to opt out is formal and must be filed with the court (see W. K. Branch and M. P. Good, *Class Actions in Canada* (2nd ed. (loose-leaf)), at § 11:1).

[153] It is noteworthy that in their letters of support (or acknowledgment letters), each of the governments characterized s. 11 as an "opt-in" regime granting them the ability to join the class proceeding after taking positive steps. Their understanding of s. 11 is different than what s. 11 specifically provides for. It is also noteworthy, as the Court of Appeal below recognized, that the Province of British Columbia's litigation strategy involved "seek[ing] a term in the certification order that governments that did not 'positively *opt in*' to the action would be deemed to have *opted out*" (para. 54 (emphasis in original)). Again, this is not what s. 11 provides for. In determining whether s. 11 is constitutional, our Court must consider what s. 11 actually authorizes British Columbia to do, not the province's attempt to narrow the unconstitutional effects of the provision by seeking an opt-in provision in the actual certification order.

[154] Once again, I recognize that the crux of the provision contemplates certification; but the dominant purpose of s. 11 is ascertained only by reference to what ultimately happens in the class action after certification. In the instant case, the provinces would, as each of them has recognized, be bound by orders in the class action. They would yield all of their litigation autonomy (transcript, day 1, at p. 29). In this

way, the impugned provision permits the legislature of British Columbia to interfere with and impose upon the rights and prerogatives of the other provincial governments and the federal government.

(b) *The Effects Are Not Merely Incidental*

[155] With respect, I cannot accept my colleague's conclusion that the effects of s. 11 on the litigation autonomy of foreign governments are incidental. While the effects that flow from automatically or presumptively interfering with the substantive rights of litigants outside the province may be incidental in some circumstances (although I would refrain from ruling on this matter), that is not so in the context of s. 11 of the *ORA*. Let me explain.

[156] First, s. 11 operates *primarily* — and not incidentally — with respect to litigants outside the legislating province. Its core operation is directed not at class members who are inside the province, but rather those who are outside the province, namely other provincial governments and the federal government.

[157] Second, the Crown is not an ordinary litigant. This is because each provincial legislature and Parliament has granted to their own attorney general the authority and responsibility to conduct litigation for or against the Crown (*Department of Justice Act*, R.S.C. 1985, c. J-2, s. 5; *Government Organization Act*, R.S.A. 2000, c. G-10, Sch. 9, s. 2; *The Department of Justice Act*, C.C.S.M. c. J35, ss. 2 and 2.1; *An Act Respecting the Role of the Attorney General*, R.S.N.B. 2011, c. 116, s. 2; *Public*

Service Act, R.S.N.S. 1989, c. 376, s. 29; *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17, s. 5; *Act respecting the Ministère de la Justice*, CQLR, c. M-19, s. 4; *The Justice and Attorney General Act*, S.S. 1983, c. J-4.3, s. 10; *Executive Council Act*, S.N.L. 1995, c. E-16.1, s. 4(4); *Department of Justice Act*, R.S.N.W.T. (Nu.) 1988, c. 97 (Supp.), s. 5; *Judicature Act*, R.S.P.E.I. 1988, c. J-2.1, s. 36; *Department of Justice Act*, R.S.Y. 2002, c. 55, s. 7).

[158] The appellants are correct to assert that the responsibilities and powers of attorneys general to direct litigation for their governments have constitutional dimensions that are grounded in "custom, tradition and constitutional usage" (see *In re Criminal Code* (1910), 43 S.C.R. 434, at p. 443, per Idington J.). The office of attorney general is expressly recognized in Part V of the *Constitution Act, 1867* as part of the constitutions of the provinces. Moreover, attorneys general have both executive and judicial functions. Indeed, as chief law officers of the Crown, attorneys general act on behalf of the executive pursuant to the provinces' responsibility under s. 92(14) of the *Constitution Act, 1867* (see *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, at paras. 24-27; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 34-35). The effects of s. 11 on these important functions cannot be merely incidental.

(c) *Balancing Legal and Practical Effects*

[159] For the purposes of the pith and substance analysis, it is true that these legal effects will operate together with the practical effects that flow from the impugned

provision. I acknowledge that in this case, the central practical effect is that the other provincial governments and the federal government have the choice of opting out of the class action pursuant to s. 11(2) of the *ORA*. My colleague asserts that this means that the governments can ultimately maintain their litigation autonomy by withdrawing from the class action to be able to pursue their own claims in their own provinces. It is allegedly not until they have officially chosen not to opt out that their litigation autonomy is impacted.

[160] With respect, this perspective construes the true effect of s. 11 of the *ORA* far too narrowly. In my opinion, a proper assessment of the pith and substance of s. 11 requires the Court to give appropriate weight to the fundamental consideration at issue: that is, s. 11 permits the legislature of British Columbia to legislate automatically (or by default) in respect of the property and civil rights of other provincial governments and the federal government. While it is true that those governments can opt out of the class action, that does not change the legislation's *prima facie* interference with other governments. The significant legal effect is that the Province of British Columbia is capable of encroaching upon the property and civil rights of other governments.

[161] The practical ability to opt out does not avoid the automatic or default result of s. 11. Rather, the effect is that an opt-out regime "force[s] a decision" on the other provincial governments and the federal government about whether to subject their claims to the jurisdiction of British Columbia (see A.F., at para. 62). I would also suggest that, by mitigating the very significant legal effects of a provision through the

practical components of the provision, a legislature can change or cloak the dominant thrust of its legislation. This is because the foreign governments' membership in the class action is automatically presumed, meaning that the provision's default position would, in pith and substance, interfere with their litigation autonomy. These unconstitutional effects cannot be made valid by the fact that the other provincial governments and the federal government can choose to opt out of the proceedings.

[162] Thus, it cannot be said that an opt-out regime is purely procedural. With respect, such a pretention is an attempt to sidestep the real and substantial impacts that the legislation has on the litigation autonomy of class members. It would appear that the respondent is aware of this complexity, as it argues that if s. 11 of the *ORA* is found to be *ultra vires* the provincial legislature, the availability of an opt-in regime should be read into s. 11(2) of the *ORA* (see R.F., at paras. 33 and 118-27). I agree with the Court of Appeal below that this concession, which is intended to save the constitutionality of s. 11, is misconceived (para. 54). Without commenting on whether an opt-in regime would, in fact, fix the unconstitutionality of s. 11, I conclude that the text of s. 11(2) of the *ORA* and s. 16 of the *CPA* cannot support the respondent's interpretation.

(3) Conclusion on Pith and Substance

[163] Having regard to the default position of s. 11(1)(b) of the *ORA* and the opt-out context in which s. 11 operates, I conclude that the pith and substance of the provision is to legislate with respect to the substantive rights of other governments to

litigate for the recovery of health care costs. As a result, I would agree with the appellants and find that s. 11 of the *ORA* falls within "Property and Civil Rights" under s. 92(13) of the *Constitution Act, 1867*.

B. *Territorial Limitations*

[164] Given that the pith and substance in this case relates to an intangible matter, I turn now to whether the impugned provision "respect[s] the dual purposes of the territorial limitations in s. 92" of the *Constitution Act, 1867* (*Imperial Tobacco*, at para. 36). Even if I were wrong about the classification of s. 11 of the *ORA* under s. 92(13) and it instead falls under s. 92(14), I find that s. 11 exceeds the territorial limitations on the legislative jurisdiction of British Columbia. In my view, the enacting province does not have a meaningful connection with both the impugned legislation and those made subject to it. I would also voice serious concerns about the potential impact of s. 11 on the legislative sovereignty of the other provinces.

(1) Meaningful Connection

[165] In the result, I find that the respondent has failed to establish a meaningful connection in this case. Having concluded that s. 11 of the *ORA*, in pith and substance, is substantive in nature, thereby falling within the scope of s. 92(13) of the *Constitution Act, 1867*, I conclude that the enacting legislature does not have a meaningful connection with *both* the subject matter of the law and those made subject to it. However, even if I were to proceed on the premise that the provision, in pith and

substance, is procedural and therefore falls within the scope of s. 92(14), I would still find no meaningful connection between the enacting legislature and those made subject to s. 11.

[166] First, the fact that the subject matter of the law, in pith and substance, affects the substantive rights of other governments necessarily means that it has no meaningful connection with the enacting province. Second, those "made subject to" s. 11 of the *ORA* are the other provincial governments and the federal government, all of which have no meaningful connection with the enacting province. While it is the defendants who are made subject to the *ORA* as a whole — much like it was the defendants who were made subject to the *TRA* considered in *Imperial Tobacco* — those made subject to s. 11, in particular, are other governments. They are the ones on whose behalf the class action is commenced. I will return to this point later in these reasons.

(a) *Legislative and Adjudicative Jurisdiction*

[167] Before I proceed with my analysis on the issue of meaningful connection, I pause to comment on my colleague's reliance on the real and substantial connection test to support her conclusion that, given the common issues at play, s. 11 of the *ORA* has a meaningful connection to British Columbia. I feel it necessary to highlight, in an effort to circumscribe the scope of this appeal, what I believe is confusion between the prescriptive legislative jurisdiction of the legislature of British Columbia and the adjudicative jurisdiction of British Columbia courts.

[168] The present appeal turns on the constitutional validity of s. 11 of the *ORA*, not on whether the presence of common issues can ground jurisdiction in a provincial superior court over multi-Crown class proceedings or multi-jurisdictional class proceedings in general. The constitutional validity of national class actions is irrelevant to the constitutional validity of s. 11 of the *ORA* because it involves different considerations. The former is concerned with the adjudicative jurisdiction of the British Columbia courts, while the latter is concerned with the territorial limitations imposed on the legislative authority of the legislature of British Columbia. In this sense, I share the view expressed by our Court in *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, [2020] 1 S.C.R. 15, at para. 16, that "it is important not to conflate the adjudicative competence of provincial superior courts with the legislative competence of the province".

[169] My colleague states that s. 11 is "consistent with how courts establish jurisdiction over out-of-province class members" (para. 89). With respect, this is a perfect example of how her analysis confuses the adjudicative competence of courts with the legislative competence of the province.

[170] The territorial limitations on the scope of the provincial legislative authority granted by s. 92 of the *Constitution Act, 1867* prevent *both* the enactment of legislation whose pith and substance is outside the province and the application of a law of a province to matters not connected to that province. The validity of an enactment requires a "meaningful connection" to be established between the enacting

province, the legislative subject matter, and those made subject to it (*Imperial Tobacco*, at para. 36). In contrast, courts can apply a valid enactment to extraterritorial subjects where a "'sufficient' connection" is established (*Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63, at para. 56; *Sharp*, at para. 112).

[171] These tests are not to be confused with the "real and substantial connection" test applicable in determining whether the court of a province will assume jurisdiction over a matter or whether the conflicts rules are inconsistent with the territorial limitations imposed by s. 92 of the *Constitution Act, 1867* (see *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, at paras. 21-34). In *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at p. 325, La Forest J. stated that the real and substantial connection test "was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction". In this respect, I fully agree with Bastarache J. that "[t]he real and substantial connection necessary for the courts of a province to take jurisdiction over a claim constitutes a lower threshold than the meaningful connection required for a province to legislate with respect to the rights at issue" (*Castillo v. Castillo*, 2005 SCC 83, [2005] 3 S.C.R. 870, at para. 44, per Bastarache J., concurring; see also *Unifund*, at paras. 58 and 80; *Sharp*, at para. 116). With respect, my colleague's attempt to ground a meaningful connection in the real and substantial connection test blurs the distinction ably made by Bastarache J., even though the law is clear that the former is a higher standard.

[172] I therefore respectfully disagree that the certification of the class action based on a real and substantial connection established through shared common issues (or commonality) will ensure a meaningful connection between the enacting province, the legislative subject matter, and those made subject to it. Given the distinction between a real and substantial connection and a meaningful connection, a finding of the former does not necessarily entail a finding of the latter. Conversely, concluding that no meaningful connection can be established has no impact on the question of whether the common issues shared between the non-resident class plaintiffs and the resident representative plaintiff suffice to establish a real and substantial connection for the purposes of adjudicative jurisdiction over a multi-jurisdictional class proceeding. My colleague's analysis either fails to address or ignores the distinction between the two tests, despite the appellants' arguments on this point (A.F., at para. 98).

[173] That being said, it would be imprudent to comment on how the real and substantial connection test is to be met in the context of multi-jurisdictional class actions — a question that has not been raised by the parties in the present appeal. Our Court has never ruled on this question, and there are diverging opinions at the appellate level, as well as considerable academic debate, on whether the certification of common issues is sufficient to ground a superior court's jurisdiction over foreign class members (see *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, 193 D.L.R. (4th) 67; *HSBC v. Hocking*, 2008 QCCA 800, [2008] R.J.Q. 1189; *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792, 417 D.L.R. (4th) 467). In this context, I would be wary of commenting on this issue without it being raised on a proper record.

[174] My colleague also states that the "nature of the class action" and the "choice of the foreign Crowns to participate in the proceeding" are what allow s. 11 to maintain a meaningful connection to British Columbia (para. 88). It is unclear what the "nature of the class action" might refer to, aside from the potential to resolve common issues. But my colleague's reliance on the so-called "choice" of the foreign Crowns to participate, or their "consent" to the proceedings, is problematic (para. 91).

[175] I take issue with the statement that the foreign Crowns have chosen to participate. They have not, since the nature of an opt-out regime is such that the foreign governments are not actually "choosing" to participate. There is no true choice, because the provinces are already participating unless they take the steps to opt out within the timeline and on the conditions specified by the certification judge.

[176] Furthermore, even if true consent *were* obtained from the foreign governments, consent should still play no role in deciding whether there is a meaningful connection. Consent from foreign governments cannot determine the constitutionality of an impugned provision. As I stated earlier, there may be cases where foreign governments believe that a law in one province is advantageous to them, even where that law goes beyond that province's law-making powers. Mutual agreement cannot save a law that is *ultra vires* the province.

[177] Having made this clarification, I now turn to the question of whether a meaningful connection can be established in this case.

(b) *There Is No Meaningful Connection in This Case*

[178] My colleague concludes that there is a meaningful connection between the enacting province, the subject matter of the law, and those made subject to the law, in line with the test employed in *Imperial Tobacco*. This conclusion is premised in part on her view that following certification, the extraterritorial effects on foreign Crowns arise not from s. 11, but from the court's decision to certify the action (para. 90).

[179] I disagree with this premise. The extraterritorial effects flow from the provision, not from the court's certification. First, the purpose of s. 11 is to authorize the Province to seek certification of the class action from the court. The action cannot be certified without the existence of s. 11. Second, the assessment of a meaningful connection must be made with a view to the pith and substance of the impugned law. Once again, I reiterate that the dominant feature of s. 11 can be ascertained only by reference to what happens in the class action post-certification.

[180] In my opinion, the test that Major J. adopted in *Imperial Tobacco* must be viewed in the specific context of that case, where the analysis concerned the *TRA* in its entirety. In the instant appeal, the analysis is concerned with one specific provision: s. 11 of the *ORA*.

[181] Moreover, there is a marked divergence between the context and legislation in *Imperial Tobacco* and those in the current case. In *Imperial Tobacco*, the defendant tobacco manufacturers challenged the constitutional validity of British Columbia's

TRA. The *TRA* created a direct and distinct cause of action authorizing the Province of British Columbia to sue the tobacco manufacturers for the tobacco-related health care costs that it incurred. That was its pith and substance. It did not purport to engage the rights of any other province (see E. Edinger, "*British Columbia v. Imperial Tobacco Canada Ltd.*: Extraterritoriality and Fundamental Principles" (2006), 43 *Can. Bus. L.J.* 301, at pp. 306-7). Nor did it operate within the context of a class action. The pith and substance of the *TRA* was the creation of a new cause of action within the province, as well as the simplification of the evidentiary burdens involved.

[182] Writing for a unanimous Court, Major J. recognized that an assessment of the validity of legislation must have regard to "the relationships among the enacting territory, the subject matter of the law, and the person[s] sought to be subjected to its regulation" (*Imperial Tobacco*, at para. 35, citing *Unifund*, at para. 63). He found that the pith and substance of the legislation was in the province, irrespective of the fact that the defendants were not all physically located within the province. Regarding the requisite meaningful connection, he arrived at the following conclusion, at para. 37:

> 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. [Emphasis added.]

[183] It is uncontested among the parties in this appeal that, with the exception of s. 11, the legislation at the heart of this case mirrors the *TRA* considered by our Court in *Imperial Tobacco* (see A.F., at para. 13; R.F., at para. 15). I accept this proposition. Indeed, both the *ORA* and the *TRA* provide the enacting province with a direct and distinct cause of action in relation to a particular wrong — be it tobacco- or opioid-related. I do not dispute the fact that the enactment of the *ORA*, like that of the *TRA*, simplified the rules and grounded a cause of action for the Province. But the *ORA* is unique in a significant way. Section 11 allows the Province of British Columbia to bring a class action on behalf of other governments across Canada. No such mechanism was available to the Province under the *TRA*.

[184] In my opinion, what differentiates the result of the analysis in this case is twofold. First, the fact that the subject matter of the law is, in pith and substance, related to the substantive rights of other governments necessarily means that it has no meaningful connection with the enacting province. Unlike the circumstances in *Imperial Tobacco*, it cannot be said that the Province of British Columbia has any meaningful connection with the substantive rights of the other provincial governments and the federal government. Indeed, the manner in which the substantive rights of other provinces — to litigate for the recovery of health care costs — operate in the context of a civil action in British Columbia is beyond the purview of the enacting province. To use the words of McIntyre J. in *Upper Churchill*, I would conclude that the result of s. 11 is therefore "the derogation from or elimination of extra-provincial rights" (p. 332).

[185] Second, there is a difference between those "made subject to" the law considered in *Imperial Tobacco* and those made subject to s. 11 of the *ORA*. As illustrated by the excerpt above, the defendant tobacco manufacturers in *Imperial Tobacco* were made subject to the *TRA*. The legislation in that case provided the Province of British Columbia with a direct and distinct cause of action against the said defendants for tobacco-related harms suffered by British Columbians. As Major J. recognized, there was "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" (para. 38). The purpose of the legislated cause of action was to simplify and codify a mechanism through which the Province could recoup health care costs for a breach of a duty owed "to persons in British Columbia" (paras. 40-41). The action itself was against the defendants, and the duty was owed by the defendants. The central component of the *TRA* was therefore the direct and distinct cause of action against the defendants who were made subject to the law for the harms they were said to have caused. The Province of British Columbia was authorized to bring an action on behalf of its own province for the harms suffered therein.

[186] On the other hand, s. 11 of the *ORA* serves a broader purpose than merely to establish or ground the Province of British Columbia's cause of action against the defendants — a function of the *ORA* in its entirety (see C.A. reasons, at paras. 1 and 96). Unlike the remaining provisions of the *ORA*, s. 11 is not merely concerned with the statutory cause of action for opioid-related wrongs *in the province*. Nor is it

concerned with the defendants in this case. Those are functions that are addressed and accomplished by the remainder of the *ORA*. Instead, the focus of s. 11 is on the other governments as plaintiffs and how their substantive rights operate in the context of the civil action. Section 11 permits the Province of British Columbia to presumptively act, as a representative plaintiff, on behalf of other provincial governments and the federal government in a class proceeding. Contrary to the respondent's assertion (see R.F., at para. 91), it is not the Province or the defendants that are made subject to the strictures of s. 11. Instead, it is the other provincial governments and the federal government. I would maintain this logic even if I were to proceed on the premise that s. 11 is procedural in nature and potentially falls under s. 92(14) of the *Constitution Act, 1867*.

[187] For these reasons, I am of the view that the Province of British Columbia does not have a meaningful connection with *both* the subject matter of s. 11 and those made subject to it. More specifically, there is no connection between the Province of British Columbia and the other governments named in the class action; no connection between the Province of British Columbia and the claims of the other governments; and no connection between the Province of British Columbia and the subject matter of s. 11. As a result, s. 11 of the *ORA* does not respect the territorial limitations prescribed by s. 92 of the *Constitution Act, 1867*.

(2) Legislative Sovereignty

[188] Having found that there is no meaningful connection between the enacting province, the subject matter of the law, and those made subject to the law, I need not,

for the disposition of this appeal, opine on whether s. 11 of the *ORA* pays respect to the legislative sovereignty of the other provincial governments and the federal government. However, I wish to voice some concerns about the ability of a legislature to encroach on the legislative sovereignty of other provinces and the federal government or to effectively bind provincial legislatures and Parliament by default.

[189] The equal sovereignty of the provinces and the federal government is fundamental to our system of federalism (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 56-59). By operation of the territorial limitation imposed by s. 92 of the *Constitution Act, 1867*, each province is obliged to respect the sovereignty of the other provinces within their respective legislative spheres, and each can expect the same respect in return (*Unifund*, at paras. 50-51; *Imperial Tobacco*, at para. 27). A province must therefore avoid encroaching on matters that properly fall within the exclusive jurisdiction of other provinces through its legislation.

[190] In *Imperial Tobacco*, Major J. did not specify what requirement an impugned provision must meet in order for its pith and substance to respect the legislative authority of the other provinces. Importantly, however, he noted that although the cause of action created by the *TRA* might "capture, to some extent, activities occurring outside of British Columbia", there was no encroachment on the sovereignty of the other provinces because "no territory could possibly assert a stronger relationship to that cause of action than British Columbia" (para. 38). In contrast, it cannot be said that the Province of British Columbia has the strongest relationship to

the substantive rights of other governments to litigate for the recovery of health care costs in the present case.

[191] Allowing British Columbia to bind other provincial governments and the federal government to its multi-Crown class proceeding could encroach on the legislative sovereignty of those governments. Such participation could in effect bind the provincial legislatures and Parliament. Indeed, in the present case, if the executive does not opt out of the commenced class proceeding, the authority of the legislatures and Parliament would be fettered because they could not validly legislate their way out of the proceeding. Participation in the class proceeding would come at the expense of the authority of the legislatures and Parliament to supervise the conduct of Crown litigation through their attorneys general.

[192] This stands in stark contrast to the circumstances in *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, where our Court concluded that an executive agreement to implement a proposed national cooperative system for the regulation of capital markets did not and could not fetter the sovereignty of the legislatures of the participating provinces. That was because the provinces could always legislate to pull the executive out of the agreement (para. 67; see also J. Poirier, "The 2018 Pan-Canadian Securities Regulation Reference: Dualist Federalism to the Rescue of Cooperative Federalism" (2020), 94 *S.C.L.R.* (2d) 85).

[193] It may be that a provincial Crown can be bound by the consequences of its actions when it chooses to exercise its civil rights or to act outside the province, in its

capacity as a natural person (see D. Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969), 47 *Can. Bar Rev.* 40, at pp. 60-61). In such circumstances, the territorial limitations on provincial powers would prevent the legislature of that province from relieving the Crown of those consequences. This is not a case of the Crown binding the legislature, but a simple application of the territorial limitations imposed by s. 92 of the *Constitution Act, 1867*. Unlike the situation in *Upper Churchill*, where a foreign government is forced into a class action under s. 11 of the *ORA*, the consequences are suffered in that government's province. There is no expectation that a province can legislate in respect of a contract situated in another province. But it is expected that a province can legislate for the recovery of health care costs incurred in its own province, irrespective of statutory regimes enacted in other provinces. It is a matter that properly belongs to that province. The question of whether a provincial Crown can opt in and then bind its own legislature in this way, however, should be left for another day.

[194] I add that, in my view, the fact that the other governments have endorsed the constitutional validity of the provision is of no moment in this case and does not save its validity. It is true that the other governments, on the basis of their understanding of the regime, have expressed support for the constitutional validity of the provision through acknowledgment letters (see Appellants' Condensed Book, tab 7). In their letters, the other provincial governments and the federal government characterize s. 11 as an "opt-in" provision that grants them the freedom to take positive steps to join the class proceeding as non-representative plaintiffs. Each of them refers to its

understanding that if this action is certified, it "will have the right to 'opt-in' to the proceeding" (see, e.g., tab 7). This is a misunderstanding of the provision, as it operates within the context of an opt-out regime.

[195] The support of the other governments — as reflected in their acknowledgment letters — serves no meaningful purpose and should not be given any significant weight. With respect, while it is true that caution is appropriate where other attorneys general support the validity of another legislature's enactment (see *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, at para. 33), that is quite different from my colleague's contention that the presumption of constitutionality is "especially strong" when the other attorneys general support the law's validity. In this case, each acknowledgment letter that is available in the record clearly misconstrues s. 11 as an opt-in provision. This interpretation of the impugned provision is not tenable and, accordingly, the presumption cannot be relied upon (see *R. v. Brown*, 2022 SCC 18, [2022] 1 S.C.R. 374, at para. 88; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 15). The opt-out provision automatically includes the other governments in the class proceeding and grants them the right to opt out. It does not offer the other governments the choice to opt in after excluding them by default. The governments' support is not based on a proper reading of the provision.

[196] I would be remiss if I did not add the following remark. Just as the provincial legislatures cannot delegate their legislative authority in respect of matters

that fall within their exclusive jurisdiction under Part VI of the *Constitution Act, 1867*, so too are they unable to consent to other provinces arrogating such authority (see *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31; *Reference re Pan-Canadian Securities Regulation*, at para. 75). The provinces cannot amend the Constitution by mutual consent.

(3) Conclusion on Territorial Limitations

[197] I find that s. 11 exceeds the territorial limitations on the legislative jurisdiction of British Columbia. In my view, the enacting province does not have a meaningful connection with both the impugned legislation and those made subject to it. While our Court has often emphasized the importance of enhancing access to justice and facilitating intergovernmental cooperation, the constitutional boundaries that underlie the fundamental structure of Canadian federalism must be respected.

C. *Ancillary Powers*

[198] Given my conclusion that the provision is *ultra vires* the legislature of British Columbia, it is necessary to briefly consider whether the *prima facie* invalidity of the provision can be saved under the ancillary powers doctrine.

[199] The ancillary powers doctrine employs a rational and functional connection test to determine whether the impugned provision considered in the pith and substance analysis is connected to a valid legislative scheme. As our Court indicated in *Reference*

re Assisted Human Reproduction Act, 2010 SCC 61, [2010] 3 S.C.R. 457, at para. 127, the test of "necessity" applies "where the encroachment on the jurisdiction of the other level of government is substantial". Our Court went on to distinguish the two approaches, at para. 138:

> The rational and functional connection test assesses the relationship between the ancillary provisions and the otherwise valid legislative scheme in which they appear. The ancillary provisions must support the scheme in a way that is rational in purpose and functional in effect. . . . It need not be shown that the scheme would fail without the ancillary provisions; that would be a test of necessity. Rather, the ancillary provisions must themselves perform a function that complements the other provisions in the scheme, and they cannot have been tacked on merely as a matter of convenience.

[200] The appellants submit that s. 11 is neither rationally nor functionally connected to the *ORA* and thus cannot be saved by the doctrine. The respondent argues that the intrusion in this case, if any, is minimal. In particular, the respondent suggests that there is a rational and functional connection between s. 11 of the *ORA* and the legislative scheme in its entirety.

[201] While I acknowledge the flexible approach that has been endorsed by our Court (see *Reference re Assisted Human Reproduction Act*, at para. 139), as well as my colleague's remarks about cooperation between Canadian regulatory regimes (para. 37), I am of the view that the ancillary powers doctrine cannot uphold the constitutional validity of s. 11 of the *ORA*.

[202] As the appellants contend, s. 11 of the *ORA* is "the only provision of the *ORA* related to causes of action of other provincial or territorial governments under their own substantive laws" (A.F., at para. 112). As I indicated earlier and as my colleague notes at para. 22 of her reasons, the *ORA* otherwise largely mirrors and is modeled after the *TRA* considered by our Court in *Imperial Tobacco*. Its focus is to establish or ground a direct and distinct cause of action against the defendants. Indeed, the *TRA* fulfills its function without a provision that relates to a multi-Crown class proceeding.

[203] So too, then, should the *ORA*. Without s. 11, the *ORA* properly grounds and establishes a direct and distinct cause of action against manufacturers, wholesalers or consultants in respect of opioid-related wrongs. As I have discussed in these reasons, the intrusion of s. 11 on the competence of other governments is substantial; thus, there is a "higher . . . threshold for upholding it on the basis of the ancillary powers doctrine" (*Reference re Assisted Human Reproduction Act*, at para. 127). The provision is not needed to enforce the substantive aspects of the remainder of the *ORA*. Rather, the Province of British Columbia can proceed with its own claim in its own province in the absence of s. 11.

[204] Thus, I conclude that the constitutional validity of s. 11 of the *ORA* cannot be upheld through the ancillary powers doctrine. The *ORA* can stand and can fulfill the objectives of the legislature of British Columbia without the support of s. 11, as the provision is not "necessarily incidental" to the otherwise valid scheme, nor does it

"actively further" it (see C. Mathen and P. Macklem, eds., *Canadian Constitutional Law* (6th ed. 2022), at pp. 215 and 225; Brun, Tremblay and Brouillet, at paras. VI-2.49 to VI-2.54; see also *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453).

D. *Remedy*

[205] As I have found that the impugned provision's pith and substance does not respect the territorial limitations imposed upon the provinces by the Constitution, I turn finally to the issue of remedy.

[206] In short, the appropriate remedy is severance. Where a court employs the doctrine of severance, it does so in order "to interfere with the laws adopted by the legislature as little as possible" (*Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 696). As our Court indicated in *Schachter*, at p. 696, "when only a part of a . . . provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared". In a more recent decision, our Court stated that rather than striking down an Act in its entirety, which is rarely done, remedies such as severance "should be employed when possible so that the constitutional aspects of legislation are preserved" (*Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at para. 116).

[207] In my view, s. 11(1)(b) and (2) of the *ORA* should be severed, and the remaining portions of s. 11 should be spared. The *ORA* is not bound up with these

provisions, and it otherwise closely mirrors the *TRA*, which our Court found to be constitutionally valid in *Imperial Tobacco*. Thus, the balance of the statutory scheme can stand on its own, and only "partial invalidation of the law" is necessary (see Mathen and Macklem, at p. 1306). The other provisions in s. 11 need not be disturbed.

III. Conclusion

[208] For these reasons, I would allow the appeal. I would declare that s. 11(1)(b) and (2) are *ultra vires* the legislature of British Columbia and should be severed from the *ORA*.

Appeal dismissed with costs, CÔTÉ J. *dissenting.*

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