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Supreme Court: Canadian Governments Can Join in Class Actions to Pursue Redress for Cross-Border Harms

Canada's federal structure means national class actions naturally raise potential constitutional questions. Those questions become potentially more thorny where a class action is pursued not on behalf of individuals across multiple provinces and territories, but instead provincial and territorial governments themselves. The Supreme Court's recent decision in *Sanis Health Inc v British Columbia* addressed many of those concerns and ultimately defined a broad scope for national class proceedings, including where a proposed class includes other provincial or territorial governments.

By way of background, in 2018 the government of British Columbia commenced a proposed class proceeding against various manufacturers, marketers and distributors of opioid products. While a number of different legal theories were advanced, in essence the lawsuit seeks to try to hold various defendants responsible for the province's healthcare costs associated with the opioid crisis.

Shortly after the litigation was commenced, the British Columbia legislature enacted the *Opioid Damages and Healthcare Costs Recovery Act* (the "ORA"). The ORA created a direct statutory cause of action for British Columbia in the litigation. In addition, section 11 of the ORA authorized British Columbia to bring an action on behalf of a proposed class that included other provincial and territorial governments and health insurers. In essence, subject to those other governments' right to opt out of the class proceeding post-certification, the ORA created a regime whereby other governments' claims for recovery of opioid-related costs could be litigated in, and adjudicated by, the courts of British Columbia.

Several of the defendants challenged the constitutionality of section 11 of the ORA arguing that it was *ultra vires* the legislation of British Columbia. In a 6-1 decision, a majority of the Supreme Court of Canada held that section 11 of the ORA was constitutional, upholding the decisions of the B.C. Court of Appeal and Supreme Court, below.

Justice Karakatsanis, writing for the majority, agreed with the courts below that section 11 of the ORA only created a procedural mechanism for the application of the ORA to opioid related proceedings and did not alter any other governments' substantive rights.

While the majority recognized that the effect of the ORA might be to diminish litigation autonomy of foreign Crowns (i.e., governments outside of British Columbia), the Court noted that this was necessarily a feature of any litigation where a foreign Crown chooses to litigate in another province. Relying heavily on the fact that foreign Crowns had the ability to opt out of a certified class proceeding, the majority found that no other provincial or territorial governments were forced to participate in litigation in British Columbia.

The majority also rejected the argument of the Defendants that section 11 of the ORA did not have a sufficient "real and substantial" connection to British Columbia insofar as foreign Crowns' claims under foreign law (i.e., that of other provinces or territories) for events occurring in foreign territory (i.e., in those provinces or territories).

Instead, the majority held, section 11 maintained a meaningful connection to British Columbia, both because of the very nature of class proceedings and the ability that the foreign Crowns had to opt out of the class proceeding. The Supreme Court agreed that there needed to be a real and substantial connection between British Columbia and the class as a whole for B.C. courts to take jurisdiction over the claims of the foreign Crowns, but held that the existence of common issues that were shared between the resident representative plaintiff and the non-resident class plaintiffs established that connection.

In contrast, Justice Côté as the lone dissenter took no comfort from the opt-out scheme. She held that an opt-out scheme necessarily meant that section 11 purported to substantively bind foreign Crowns. She concluded that the pith and substance of section 11 was thus to legislate in respect of property and civil rights outside the province, contrary to the territorial limitations necessarily associated with that head of constitutional power.

Takeaways

The immediate effect of the Supreme Court's decision is to allow British Columbia's claims for recovery of opioid-related costs on behalf of both itself and foreign Crowns to proceed in British Columbia. However, the decision has broad significance also as to the law of class proceedings generally, in at least three respects.

First, *Sanis Health* confirms unambiguously and explicitly the constitutionality of national class actions generally. In the late 2000s and early 2010s, there was some academic commentary that questioned the constitutionality of national class actions. That commentary raised similar arguments as those raised by the Defendants in *Sanis Health*: namely, that a national class action would have the effect of the courts of one province adjudicating on the property and civil rights of individuals in another province who had not expressly opted into that class proceeding. While the academic debate persisted for some time, ultimately national class actions became common and well-accepted in the class actions bar and courts. It soon became reasonably well-accepted among lower courts and practitioners that national class actions were permissible, though the Supreme Court had never directly weighed in on the issue. *Sanis Health* removes any lingering doubts that may have existed on this issue and confirms the constitutional viability of national class actions.

Second, and more notably, the Supreme Court of Canada expressly endorsed the idea that the existence of common issues shared between a representative plaintiff in the litigation forum and a plaintiff class outside of it is sufficient to establish a real and substantial connection that can ground the Court's adjudicative jurisdiction over an entire class. Put differently, if there exist resident class members who have a claim and issues common to resident and foreign class members, a provincial Court has sufficient connection to the claims to assume jurisdiction over the entire class. This framework for establishing adjudicative jurisdiction over non-resident class members had never been considered by the Supreme Court but had been endorsed by certain provincial Courts of Appeal, including the Ontario Court of Appeal in *Airia Brands Inc v Air Canada* and the Manitoba Court of Appeal in *Meeking v Cash Store Inc.* Justice Côté's concerns about deciding that issue on the record before the Supreme Court when it had not been previously argued. The Supreme Court was apparently also not motivated by the concerns previously raised by one of the of the authors of this post related to the impacts of such a framework for class action jurisdiction.

Finally, and perhaps most obviously, *Sanis Health* supports the notion that Courts will be flexible in allowing Crowns to participate in and create ad hoc class actions. Nearly twenty years ago in *British Columbia v Imperial Tobacco Canada Ltd*, the Supreme Court deemed constitutional provinces' efforts to recover health care costs related to tobacco use through the mechanism of statutory causes of action. Faced with a health crisis with similar features, the Supreme Court has now given

the green light to the innovative mechanism of multi-government class actions to address similar claims. With this green light, we should not be surprised to see Canadian governments expand the use of similar substantive and procedural strategies to address broad public harms in the future.