IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia v. Apotex Inc.,*
2025 BCSC 92

Date: 20250122
Docket: S189395
Registry: Vancouver

Between:

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

Plaintiff

And

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

Defendants

Before: The Honourable Mr. Justice Brundrett

Certification Judgment

Counsel for the Plaintiff:	R. Mogerman, K.C. J. Winstanley C. Hermanson L. Brasil R. Egit C.K.B. Harman
Counsel for Apotex Inc.:	H. Radomski N.D. Luca
Counsel for Bristol-Myers Squibb Canada and Bristol-Myers Squibb Company:	D.T. Neave R. von Ruti
Counsel for Ethypharm Inc.	B. Olthuis, K.C. J. Hernaez
Counsel for Janssen Inc. and Johnson & Johnson:	G. McKee R.L. Reinertson K. Russell J. Hutchinson A. Kavanagh
Counsel for Pro Doc Limitee:	K. Sherriff F. Amine
Counsel for The Jean Coutu Group (PJC) Inc.:	G.B. Shaw D. Ronde J. Cytrynbaum D. DiPardo
Counsel for Purdue Pharma L.P., Purdue Pharma, The Purdue Frederick Company Inc. and Purdue Pharma Inc.:	L. Mercer (watching brief only)
Counsel for Sanis Health Inc. and Shoppers Drug Mart Inc.	K. Sachar M. Paterson D. Glendinning
Counsel for Sandoz Canada Inc.:	P.J. Pliszka A. Borrell T.A. Posyniak (by videoconference) P. Sergeyev
Counsel for Valeant Canada LP / Valeant Canada S.E.C. and Bausch Health Companies Inc.:	J. Sullivan, K.C. D. Urquhart B. Gordon

Counsel for Kohl & Frisch Distribution Inc., Kohl & Frisch Limited, AmerisourceBergen Canada Corporation, United Pharmacists Manitoba Inc., Procurity Inc., Procurity Pharmacy Services Inc. and uniPHARM Wholesale Drugs Ltd.:	T. Farrell A. Iourina
Counsel for McKesson Canada Corporation. and McKesson Corporation:	S.A. Forbes C. Sethi R. Gao M. Churilov (by videoconference)
Counsel for Noramco Inc.:	J. McArthur, K.C. L. Cundari P. Elahi P. Palmer
Counsel for Nu-Quest Distribution Inc.:	K.S. Morgan
Counsel for LPG Inventory Solutions:	C. Dennis, K.C. G. Rincon
Teva Canada Innovation G.P.-S.E.N.C., Teva Canada Limited, Teva Pharmaceutical Industries Ltd., Teva Pharmaceuticals-USA, Inc., Actavis Pharma Company, Joddes Limited., Ranbaxy Pharmaceuticals Canada Inc., Sun Pharmaceuticals Industries., and Pharmascience Inc.:	L. Fric C. Lockwood R. Carson E. MacKinnon H. Mallabone
No other appearances	
Place and Date of Hearing:	Vancouver, B.C. November 27–December 1, December 4–8, 11–15, 18–19, 2023
Supplemental Written Submissions of the Plaintiff and Expert Report:	March 11, 2024
Responsive Submissions of Jean Coutu Group (PJC) Inc. and Pro Doc Limitee:	March 25, 2024
Reply Submissions of the Plaintiff:	April 2, 2024
Place and Date of Judgment:	Vancouver, B.C. January 22, 2025

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I. OVERVIEW

[1] This proposed class proceeding is brought by the plaintiff His Majesty the King in Right of the Province of British Columbia (the “Province”) on behalf of itself and other federal, provincial, and territorial governments to recover health care, pharmaceutical and treatment costs related to prescription opioids from 1996 onward. The case is unprecedented in many ways. The size and complexity of the case, the number of defendants, the targeting of the alleged over-supply of *prescription* opioids which are highly regulated, and the use of health care costs recovery statutes all make this case unique. In addition, unlike other proposed class action cases in Quebec and Ontario by consumers who most directly suffered the harm of addiction, the proposed action only includes Canadian governments in the plaintiff class.

[2] The defendants comprise dozens of pharmaceutical manufacturers, wholesalers, and distributors alleged to have been involved in the manufacture, marketing, distribution, or sale of opioid-related products in Canada. The Province alleges that the defendants' wrongful conduct in over-promoting prescription opioid use caused or contributed to an opioid epidemic that has resulted in extensive and devastating personal and social consequences which led to the expenditure by class member governments of substantial opioid-related health care costs.

[3] This case has taken over five years to reach the certification stage in which it now requires court approval to determine whether and how it ought to go forward as a group proceeding on behalf of a class of member governments. These reasons address two applications:

1) the applications by some of the defendants to dismiss the action against them for jurisdictional reasons; and

2) the application by the Province in which it seeks on its own behalf and on behalf of other Canadian governments for certification of this action as a class proceeding under the *Class Proceedings Act,* R.S.B.C. 1996, c. 50 [*CPA*].

[4] In relation to the certification application, the Court must consider the five criteria enumerated in s. 4(1) of the *CPA.* The first criteria in s. 4(1)(a) is not in issue because the proposed causes of action have substantially survived a previous challenge to the pleadings: *British Columbia v. Apotex*, 2022 BCCA 1, aff'd *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 [*Valeant*]. However, the defendants strongly challenge satisfaction of all the remaining criteria, particularly whether the claims of the class members raise common issues and whether a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. The Province seeks an order appointing itself as the representative plaintiff and various orders associated with certification to facilitate the claims advanced.

[5] The defendants oppose the certification application for numerous reasons. All are sophisticated and well-established firms that manufacture or distribute pharmaceutical prescription opioid products with approval from Health Canada as to their representations and product ingredients. They cite *inter alia* the differences among defendants and the opioid-related products they produce or distribute to argue that the defendant group and the opioids in issue are not fungible and that the many potential individual issues are likely to overwhelm any proposed common issues. More generally, they submit that while in many cases the class action procedure offers benefits in terms of access to justice, judicial economy and behaviour modification, the class member governments do not require class action procedures to attain access to justice or behaviour modification.

[6] For the reasons that follow, I find that certification of the Province's claims is appropriate in this case. Specifically, I find that there is some evidence for each of the certification requirements in ss. 4(1)(b) to (e) of the *CPA.* I find some basis in fact for the proposed common issues, which are common across members of the class, keeping in mind that the commonality requirement is not a merits-based test. On the issue of preferability, I find that a class proceeding would be a fair, efficient, and manageable method of advancing the claims and that the proposed class proceeding offers a clearly preferable method of resolving the claims when

compared with other realistically available means of resolution. In fact, while complications and individual issues may arise, an omnibus action by means of the proposed class proceeding is a far better option than the alternatives from a practical cost-benefit approach.

[7] As for the jurisdictional challenges, LPG Inventory Solutions (“LPG”) submits that this Court lacks subject matter competence over the dispute because the claims made against it arise in Ontario. In addition, LPG, the Jean Coutu Group (PJC) Inc. (“Jean Coutu”), and Pro Doc Limitee (“Pro Doc”) submit that other jurisdictions offer a more appropriate forum for the resolution of the Province’s claims, and this Court ought to decline jurisdiction. On the issue of subject matter competence, I find that legislative restrictions do not prevent the exercise of this Court’s jurisdiction over the dispute. On the issue of forum of convenience, I find that an alternative forum to adjudicate the claims would not be fairer or more efficient for this matter such that the Province should be denied the benefits of its decision to select British Columbia as its litigation forum. I therefore dismiss the jurisdictional challenges.

II. BACKGROUND AND POSITIONS OF THE PARTIES

[8] British Columbia, as well as some other provinces and territories of Canada, in different ways and to different extents at different times, have struggled with the abuse of illicit opioids for over a century. The evidence filed on this hearing indicates that the larger problem with opioids long predates the current "opioid crisis" and stretches back to the unregulated sale of medicines in 19th century British North America. While there is no question that illicit opioids (often related to street fentanyl) are now linked to appalling social problems in Canada, including the alarming problem of drug overdose deaths, the extent to which the alleged over-production and distribution of prescription opioid medicines have contributed to this widespread problem (and its health care cost impacts) is disputed.

[9] Opioid medicines, as defined in the Third Amended Notice of Civil Claim (“TANCC”), are an important tool for the treatment of chronic pain that are also prescribed for a range of other purposes including cough suppression and the

treatment of diarrhea and shortness of breath. Many injectable opioid medicines are used primarily as anesthetic or analgesic adjuncts for surgeries or post-operative procedures and are administered under the supervision of health care professionals. Certain other opioid medicines are used as a treatment for illicit opioid abuse and to prevent overdoses from illicit opioids.

[10] The Province has of late conceded that its case does not include injectable opioids (except those prescribed for out-patient use that was the subject of marketing/promotion), such as some used in anesthesia. Nor does its liability assessment include (except in respect of damages) opioid agonist therapies such as methadone since these are designed to prevent withdrawal symptoms and reduce craving for opioids.

[11] The Province submits that every province and territory in Canada is experiencing an epidemic of opioid addiction, overdose, and death. It says that all jurisdictions experienced a significant increase in opioid prescriptions beginning in the late 1990s, leading to a peak between 2011 and 2016. The Province alleges that this so-called prescription crisis led to an illicit opioid crisis.

[12] Many of the factual common issues relate to the defendants' alleged involvement in this rise in opioid use from the late 1990s to the present and the state of knowledge of the medical and pharmaceutical community regarding the risks and benefits of opioid use, the knowledge of the defendants of such risks and benefits, and the actions they took or failed to take.

[13] As noted, this certification application is unique because the putative class is entirely composed of Canadian governments. As the defendants point out, the present allegations are also exceptional because the same government entities that make up the plaintiff class have long been responsible for approving prescription opioids for distribution, operating drug benefit plans, providing health care services, regulating the practice of medicine and the prescribing of medicine, and/or monitoring the use of prescription medicines, particularly narcotics. Specifically, Health Canada, a government entity, not only approved the medicines at issue but

also regulated the labelling and warnings (referred to as a product monograph) provided with the product.

[14] The Province submits that it is not suing the defendants merely for "providing" opioids which, when properly approved and prescribed, have valid uses in specific contexts. Rather, the thrust of its claims is that the defendant manufacturers negligently designed their opioid products and misrepresented the risks and benefits of opioids in an aggressive marketing campaign, which caused an "opioid epidemic" as defined in the TANCC. The distributor defendants then delivered opioids in quantities they knew or should have known exceeded any legitimate market and failed to warn of risks and dangers.

[15] This case has similarities to the earlier tobacco litigation cases involving tobacco manufacturers under the *Tobacco Damages Recovery Act,* S.B.C. 1997, c. 41 [*TRA*]: see *British Columbia v. Imperial Tobacco Ltd.,* 2005 SCC 49 [*Imperial Tobacco*]. In *Imperial Tobacco,* the Supreme Court of Canada held that the pith and substance of the *TRA* was the creation of a civil cause of action and that the cause of action was in British Columbia. None of the tobacco actions commenced in various jurisdictions reached the trial stage despite the passage of significant time.

[16] The present underlying enabling legislation designed to assist the Province in pursuing recovery for opioid-related health care costs, the *Opioid Damages and Health Care Costs Recovery Act,* S.B.C. 2018, c. 35 [*ORA*], is similar to the *TRA*. Unlike the *TRA*, which did not contain a provision authorizing multi-jurisdictional Crown proceedings, s. 11 of the *ORA* allows the bringing of "multi-Crown" class proceedings as an adjunct to the Province's own claims.

[17] This case differs from other proposed class proceedings in which consumers or end-users of opioids have sued drug companies for the consequences of oversupply: see, for instance, *Gebien v. Apotex Inc*, 2023 ONSC 6792 (partial certification approval); *Carruthers v. Purdue Pharma*, 2022 SKKB 214 (settlement approval); and *Bourassa v. Abbott Laboratories Ltd. et al*., 2024 QCCS 1245 (authorization approval).

[18] Similar litigation has also taken place in numerous jurisdictions in the United States. In December 2017, 46 actions filed in the United States regarding alleged improper marketing of and inappropriate distribution of various prescription opiate medications were transferred to the Northern District of Ohio: *In Re: National Prescription Opiate Litigation*, MDL No. 2804 [*Opioid MDL*]. There are now in excess of 2,600 actions commenced by counties, municipalities, cities, and hospital districts, among others, consolidated in the *Opioid MDL*. The American opioid litigation has continued to progress over the last five years, with a number of cases pushed toward summary motions, trials and settlements. Such US settlements and judgments involve several cross-border defendants named in this proposed class action, including Endo International PLC. ("Endo"), Janssen, Johnson & Johnson, Purdue Pharma L.P. ("Purdue Pharma"), Teva Pharmaceuticals Industries Ltd., Teva Pharmaceuticals USA, Inc., Kohl & Frisch Limited, and McKesson Corporation.

[19] The defendants submit that this action was conceived as primarily being directed at Purdue-related entities, that the action against the Canadian Purdue-related entities has settled (the American Purdue-related entities have largely gone bankrupt), and that they do not fit the "Purdue mold," let alone the requirements for certification. As such, they submit the proposed class action is ill-conceived.

[20] This proposed class action involves numerous causes of action pleaded against a large number of defendants in relation to conduct over an extended period of time. The defendants maintain this class action has the potential to become a monster of complexity and cost, and will unnecessarily add additional procedures, cost, inconvenience, and delay to already complex individual claims: *Tiemstra v. Insurance Corp of British Columbia* (1996), 22 B.C.L.R. (3d) 49, 1996 CanLII 2819 (S.C.) and *Kett v. Mitsubishi Materials Corporation*, 2020 BCSC 1879 at paras. 1, 208.

[21] Moreover, as further discussed below, the defendants submit that there are individual material differences among defendants, among the products they manufacture or distribute, among the time-frame in which such activity occurred, and

among the jurisdictions and legal regimes in which the defendants operate. The defendants also submit that individual issues are tied up with causation and damages issues. They argue that individual differences undermine the Province's position, especially with respect to commonality and preferability.

[22] The Province submits that because its claims are significant, its case will proceed to a merits determination whether or not the action is certified. Nevertheless, the Province submits that a single class proceeding is far preferable to potentially having to run 13 nearly identical stand-alone actions in different provincial and territorial jurisdictions. It submits that there is significant commonality among the issues, the parties, and the subject matter of the proceedings, and therefore there are significant gains to be had through a single proceeding. Here, the Province argues that many of the same questions will need to be answered: what did the defendants do, what did they know, when did they know it, what information did they have available, and did they as alleged deceive and mislead the relevant players in the health care system to unduly inflate the sale of opioids? At this point, when the merits of the proceeding have yet to be tested, the Province submits that a single proceeding is best suited to grapple with the many issues between the parties.

III. ORDERS SOUGHT

[23] The Province seeks the following orders:

1. An order certifying this action as a class proceeding pursuant to the *CPA*.
2. An order defining:
    (a) a class of all federal, provincial and territorial governments that, during the period from 1996 to the present (the "Class Period"), paid health care, pharmaceutical, treatment, and other costs related to opioids (the "Class" and the "Class Members"); and
    (b) a subclass of federal, provincial, and territorial governments that have legislation specifically directed at recovery of damages and health care costs arising from an "opioid-related wrong" as that term is defined in the relevant legislation (the "*ORA* Subclass").
3. An order appointing HMKBC as the representative plaintiff of the Class and the *ORA* Subclass.

4. An order staying any other British Columbia proceeding relating to this proposed class proceeding.

5. An order stating the nature of the claims asserted on behalf of the Class to be:

   (a) breach of the *Competition Act*, R.S.C. 1985, c. 19;

   (b) unjust enrichment; and

   (c) public nuisance.

6. An order stating the nature of the claims asserted on behalf of the *ORA* Subclass to be:

   (a) claims pursuant to the *ORA*, and equivalent opioid cost recovery legislation enacted by other Canadian provinces or territories.

7. An order stating the relief sought by the Class to be the relief set out in paragraph 220 of the Third Amended Notice of Civil Claim.

8. An order approving the proposed Litigation Plan set out in Schedule "A" to this Notice of Application.

9. An order that the proceeding be certified on the basis of the Common Issues set out in Schedule "A" to the proposed Litigation Plan.

10. An order setting the form and content of the notice program for the certification of this action, as set out in the proposed Litigation Plan.

11. An order stating that:

    (a) members of the Class may opt in to this class proceeding by sending a written election by email or regular mail to Class Counsel within 14 days after certification of this action on a final basis (the "Opt In Date");

    (b) no person may opt in to this class proceeding after the Opt In Date; and

    (c) within 30 days from the Opt In Date, class counsel will report to the Court the names of the entities who have opted in to this class proceeding.

12. An order or orders providing such further and other relief and directions as class counsel may request and as this Honourable Court may deem just.

[24] The Province's claim of public nuisance has been struck, and that claim is no longer operative.

IV. THE PLAINTIFF CLASS

[25] As noted above, the Province seeks to define the following classes:

a) a class of all federal, provincial and territorial governments (the "Class" and the "Class Members") that paid health care, pharmaceutical, treatment and other costs related to opioids during the period from 1996 to the present (the "Class Period"); and

b) a subclass of federal provincial, and territorial governments that have legislation specifically directed at recovery of damages and health care costs arising from an "opioid-related wrong" as that term is defined in the relevant legislation (the "*ORA* Subclass").

[26] All of the provincial and territorial governments except the Yukon have introduced dedicated opioid legislation directed at enabling the recovery of damages and health care costs.

[27] The Province and potential Class Members allege that they spend billions of dollars each year to fund health care services to Canadian residents, including (but not limited to) medically necessary physician services, hospitalization, and other medical treatment costs for prevention as well as acute and chronic conditions. They submit that these costs are health care benefits for the purposes of the *ORA* and that the amounts spent are in large part derived from taxpayer contributions.

V. THE DEFENDANTS

A. The Defendant Groupings as Defined in the TANCC

[28] The defendants all allegedly manufacture, market, distribute, and sell opioid drugs or opioid products ("Opioid Product(s)") in Canada, including in British Columbia, and are "manufacturers" or "wholesalers" (also referred to as distributors) for the purposes of the *ORA*.

[29] "Opioid Products" are referred to in para. 5 of the TANCC as products that contain any opioid drugs, and the term is used interchangeably throughout the claim

with “opioids” (the same approach will be used throughout these reasons). As well, “Opioid Product” is a defined term in s. 1 of the *ORA* and is tied to the definition of a breach of duty giving rise to an “opioid-related wrong.”

[30] Colloquially, the terms “distributor” and “wholesaler” may be used interchangeably, though these terms have slightly different meanings in s. C.01A.001(1) of the *Food and Drug Regulations*, C.R.C, c. 870 [*FDR*].

[31] Opioid Products are a class of drugs that are defined in the TANCC as having a chemical compound that is naturally found in the opium poppy plant or which are synthetically or semi-synthetically made using the same chemical structure. They include, but are not limited to: Butorphanol, Fentanyl, Hydrocodone, Hydromorphone, Meperidine, Methadone, Morphine, Normethadone, Opium, Oxycodone, Oxymorphone, Pentazocine, Tapentadol, and Tramadol.

[32] The “Manufacturer Defendants”, as defined in para. 93 of the TANCC, are alleged to have marketed and promoted Opioid Products in Canada as being less addictive than was actually known to the Manufacturer Defendants and for conditions the Manufacturer Defendants knew the drugs were not effective in treating. Such marketing and promotion efforts by the Manufacturer Defendants allegedly resulted in an increase in prescription and use of all Opioid Products, including long and short-acting opioids.

[33] The “Generic Manufacturers”, as defined in para. 194 of the TANCC, are alleged to have been aware of the marketing of brand name Opioid Products by Manufacturer Defendants and to have endorsed and promulgated the misrepresentations about opioids, and made a deliberate decision to manufacture, market, and sell their generic versions of brand name Opioid Products without regard for the potential risks to public health.

[34] The “Distributor Defendants”, as defined in para. 115 of the TANCC, are alleged to have delivered the Opioid Products manufactured and marketed by the Manufacturer Defendants to pharmacies and hospitals in Canada in quantities that

they knew or should have known exceeded any legitimate market. The Province says the Distributor Defendants ignored the suspicious sales volumes and patterns; instead, the Distributor Defendants purchased large volumes of Opioid Products from the Manufacturer Defendants and engaged in a common design with the Manufacturer Defendants to maximize the sale of opioids in Canada. Such distribution efforts by the Distributor Defendants allegedly intensified the crisis of opioid abuse, addiction and death in Canada. Where a particular entity within a corporate family of defendants engaged in unlawful conduct, the Province alleges it did so on behalf of all entities within that corporate family.

B. The Manufacturer Defendants

1. Apotex Defendants

[35] Apotex Inc. is a Canadian pharmaceutical company incorporated in Ontario that manufactures and sells “generic” Opioid Products across Canada, including in British Columbia, such as fentanyl, hydromorphone hydrochloride, oxycodone hydrochloride, and tramadol hydrochloride.

[36] Apotex Inc.’s parent company, Apotex Pharmaceutical Holdings, Inc. (together with Apotex Inc., “Apotex”), is also incorporated under the laws of Ontario. It does not carry on business outside of that province but is alleged to have acted in a common design with Apotex Inc. to develop, test, manufacture, seek regulatory authorization, market, sell, and conduct post-market surveillance of Opioid Products in Canada.

[37] While Apotex obtained a notice of compliance and made new drug submissions for its products, it says it did so in compliance with government regulations. It points out that it did not design or develop any active pharmaceutical ingredients in its products and that it only introduced subsequent-entry versions of Opioid Products.

[38] Apotex denies engaging in promotional or marketing efforts alleged in the TANCC, either alone or pursuant to a common design with others. Its submissions

emphasize that as a generic manufacturer, it did not design, test, develop or generate the market for Opioid Products.

2. The Bristol-Myers Squibb Defendants

[39] Bristol-Myers Squibb Canada (“BMS Canda”) is a Canadian pharmaceutical company incorporated in Nova Scotia and extra-provincially registered in British Columbia that manufactured and sold in Canada Opioid Products licensed from other companies, such as Endocet, Endocan, Percocet, and Percodan, which contain oxycodone hydrochloride.

[40] Its American parent company, Bristol-Myers Squibb Company, is alleged to be “inextricably interwoven” with BMS Canada (together, the “BMS Defendants”) through imposing its global standards and safety reporting requirements and assisting it in obtaining the right to market Opioid Products developed by other companies.

[41] In 2001, BMS Canada received Health Canada's authorization to make available for use in Canada seven prescription medicines that appear to fall with the Province’s definition of Opioid Products. These include Endocet, Endodan, Hycodan, Hycomine, Numorphan, Percocet and Percodan (in addition to a nasal spray called Stadol NS, which was the subject of proceedings in Ontario). Each was approved by Health Canada. Each was only available to patients through a prescription from a licenced pharmacist. All were immediate-release products rather than long-acting opioids.

[42] The BMS Defendants deny that they developed, promoted, marketed or advertised Opioid Products in Canada and point out that Health Canada authorized them to make available each medicine they did produce. They submit the TANCC provides no specific factual basis for the alleged wrongdoings and liability against the BMS Defendants.

3. Ethypharm

[43] Ethypharm Inc. (“Ethypharm”) is a Canadian pharmaceutical company that markets and sells branded Opioid Products containing morphine sulfate (M-Elson and M-Ediat) through its distributing partners. It is the Canadian subsidiary of Ethylpharm SAS, a French pharmaceutical manufacturing company that is not a defendant in this proceeding. Ethypharm was added to this action pursuant to a consent order pronounced on February 16, 2021.

[44] Ethypharm SAS’s pharmaceutical business focuses on two areas: the central nervous system and hospital injectables. Ethypharm SAS markets its drugs directly in Europe and China, and with partners in North America and the Middle East.

[45] The Province alleges that Ethypharm manufactured, marketed, and sold Opioid Products in Canada and that it markets and sells brand opioid products called M-Elson (a morphine sulfate product sold in extended-release capsules) and M-Ediat (an immediate-release product), which have an active ingredient of morphine sulfate.

[46] Ethypharm says that before January 1, 2016, it did not manufacture, market, distribute or sell Opioid Products in Canada. Before this time, it sold M-Eslon directly to another company, Sanofi, as well as its predecessor, who then distributed M-Eslon in British Columbia. After January 1, 2016, Ethypharm entered a distribution agreement with Valeo Pharma Inc. to distribute M-Elson in Canada; however, Valeo Pharma Inc. was solely responsible for marketing Ethypharm SAS morphine products in Canada. Ethypharm says that it has played a negligible role in the Opioid Products market in Canada and did not engage in manufacturing or making misrepresentations as alleged.

4. The Janssen Defendants

[47] Johnson & Johnson is an American pharmaceutical company based in New Jersey that manufactures, markets, and sells Opioid Products. Two of its subsidiaries—Janssen Inc. (“Janssen”) and Noramco Inc. (now Noramco)—are co-

defendants in this action (collectively with Johnson & Johnson, the "Janssen Defendants").

[48] Janssen is a Canadian research-based pharmaceutical company headquartered in Toronto that manufactured, marketed, and sold branded Opioid Products in Canada during the Class Period, including Duragesic (fentanyl), Jurnista (hydromorphone hydrochloride), Tramacet (tramadol hydrochloride), Ultram (tramadol hydrochloride), and Nucynta CR (tapentadol hydrochloride). Janssen Inc. sold Nucynta CR to Endo Ventures Ltd. in August 2016.

[49] Janssen points out that each of its Opioid Products was reviewed and approved for distribution and sale in Canada by the federal government, and some of its Opioid Products were also reviewed and approved by different provincial governments. Janssen says that since 1996, it has not developed, designed, or produced any Opioid Products but has sold a different variety of Opioid Products that were developed, designed, and produced by others. It has also advertised or promoted some of its Opioid Products to some health care professionals in Canada who were responsible for treating patients and prescribing medicines.

[50] Noramco is an American company that imports opium poppy plants and processes them into active pharmaceutical ingredients for use by the other Janssen Defendants and other pharmaceutical companies. Noramco says it creates active pharmaceutical ingredients for Opioid Products by processing certain narcotic raw materials, which are then purchased and altered by drug manufacturers to make their finished products. Noramco points out that its pharmaceutical ingredients cannot be prescribed by physicians or consumed by patients. It concedes it has advertised and promoted pharmaceutical ingredients to manufacturers but denies ever participating in the marketing or promotion of finished Opioid Products.

[51] Tasmanian Alkaloids, another Johnson & Johnson subsidiary that is not a party to the litigation, produced the opium poppy plants in Australia that were imported by Noramco Inc. Together, Tasmanian Alkaloids and Noramco Inc. are alleged to have been one of the largest suppliers of active pharmaceutical

ingredients for narcotics in Canada, including oxycodone, hydrocodone, codeine, and morphine.

5. The Pharmascience Defendants

[52] Joddes Limited ("Joddes") is a Canadian investment holding company. Its subsidiary Pharmascience Inc. ("Pharmascience," collectively with Joddes, the "Pharmascience Defendants") is a Canadian pharmaceutical company based in Quebec that manufactures and sells generic Opioid Products containing butorphanol tartrate, fentanyl, hydromorphone hydrochloride, morphine sulfate, buprenorphine hydrochloride, oxycodone hydrochloride, and tramadol hydrochloride.

[53] Pharmascience points out that it does not advertise or promote its generic Opioid Products to prescribers or consumers.

[54] Joddes is incorporated in Canada but is not an operating company. Rather, it is an investment holding company based in Quebec that denies any involvement in Pharmascience's day-to-day business operations.

6. The Pro Doc/Jean Coutu Defendants

[55] Jean Coutu Group is a Canadian drugstore chain with its headquarters in Quebec. Pro Doc (together with Jean Coutu, the "Quebec Defendants"), its subsidiary, is a Canadian pharmaceutical company incorporated in Quebec (where is carries on business) that manufactured and sold generic Opioid Products containing fentanyl, oxycodone hydrochloride, and tramadol hydrochloride. The Province alleges that Pro Doc was established to be a "captive supplier" of generic drugs for Jean Coutu.

[56] Pro Doc points out that its business operations are exclusive to Quebec, it is a small company with 52 employees, and it is not affiliated with any other defendants except Jean Coutu. It is limited to purchasing drugs from generic manufacturers which it then sells to Jean Coutu for the purpose of supplying the pharmacist/owners in Quebec who are franchisees of Jean Coutu, and (in very small quantities representing 1.3% of its sales) to other wholesalers in Quebec. Pro Doc says it did

not “market” its Opioid Products but only provided limited product information and warnings only in Quebec as required. All Pro Doc opioids are only distributed with Health Canada approval.

7. The Ranbaxy Defendants

[57] Sun Pharmaceutical Industries Ltd. is an Indian pharmaceutical company that does not carry on business in Canada. However, its Canadian subsidiary, Sun Pharma Canada Inc., formerly Ranbaxy Pharmaceuticals Canada Inc. (“Ranbaxy”), manufactures and sells generic Opioid Products containing tramadol hydrochloride and fentanyl.

[58] Sun Pharmaceuticals Canada Inc. points out that it never sold a generic version of OxyContin products. It denies advertising or promoting its generic Opioid Products to prescribers or consumers.

8. Sanis

[59] Sanis Health Inc. (“Sanis”) is a Canadian pharmaceutical company incorporated in 2009 and is an indirect subsidiary of Loblaw Companies Limited. The TANCC characterizes Sanis as both part of the Manufacturer Defendants and the Generic Manufacturers.

[60] Sanis denies it fabricated its own generic Opioid Products, but it did manufacture and sell generic Opioid Products licensed from other drug manufacturers, which contained morphine SR (for sustained release), oxycodone/acetaminophen, and tramadol/acetaminophen during the Class Period. It began selling these products in mid-2011 and stopped by June 2021. It predominantly sold products to the defendant Shoppers Drug Mart Inc. but had a minimal share of the market in provinces where Sanis Opioid Products were sold.

[61] Sanis points out that its activities were approved by Health Canada, it had no direct relationship with prescribers or consumers, and by the time it entered the market, the risks of opioid addition were well known to the public. It denies ever engaging in marketing or promotion of its Opioid Products.

9. Sandoz

[62] Sandoz Canada Inc. (“Sandoz”) is a Canadian pharmaceutical company incorporated in Quebec that sold the brand name drug Supeudol in Canada, an immediate-release oral tablet containing oxycodone hydrochloride. It also sold generic Opioid Products with the following active ingredients: alfentanil, fentanyl, hydromorphone hydrochloride, meperidine hydrochloride, morphine sulfate, nalbuphine hydrochloride (Nubain), oxycodone acetaminophen, sufentanil citrate, and tramadol.

[63] The majority of the Opioid Products Sandoz produced and/or sold were injectable Opioid Products, which were administered under the supervision of healthcare professionals and mostly within hospitals or other supervised care facilities. It points out that it did not design or develop any of the active pharmaceutical ingredients in its Opioid Products and that Health Canada approved all of its Opioid Products.

10. The Teva Defendants

[64] Teva Pharmaceutical Industries Ltd. is an Israeli company. Its Canadian subsidiary, Teva Canada Limited (“Teva”), and its American subsidiary, Teva Pharmaceuticals USA, Inc. are also named defendants. In 2016, Teva acquired and later amalgamated with the Canadian company Actavis Pharma Company (formerly Cobalt Pharmaceutical Company), also a named defendant.

[65] During the Class Period, Teva sold generic Opioid Products containing fentanyl, hydromorphone hydrochloride, morphine sulfate, buprenorphine hydrochloride, morphine hydrochloride, oxycodone hydrochloride, codeine phosphate, and tramadol hydrochloride. In 2016, Teva entered into an exclusive agreement to distribute OxyNeo, a brand name opioid manufactured by Purdue Pharma. Teva and other generic defendants deny they advertised or promoted their generic Opioid Products to prescribers or consumers.

[66] Teva Canada Innovation G.P.-S.E.N.C., (collectively, with Teva Pharmaceutical Industries Ltd., Teva, and Teva Pharmaceuticals USA, the "Teva Defendants") is an affiliate of Teva that is also a party to the litigation, who marketed and sold the Opioid Product Fentora (containing fentanyl), for which Teva Canada Limited is the market authorization holder. Fentora is a specialized opioid used to manage breakthrough cancer pain. Teva Canada Innovation G.P.-S.E.N.C. concedes that it manufactured a minimal amount (less than $200,000 in total sales in British Columbia) of Fentora which was infrequently dispensed for breakthrough cancer pain.

11. The Valeant Defendants

[67] Bausch Health Companies Inc. (formerly known as Valeant Pharmaceuticals International, Inc. until July 2018) is a Canadian pharmaceutical company headquartered in Quebec and registered pursuant to the laws of British Columbia. Bausch Health Companies Inc. denies that it currently manufactures, markets, sells, or distributes the Health Canada Drug Information Number for any Opioid Products in Canada.

[68] Bausch Health Companies Inc. owns and controls Valeant Canada LP ("Valeant," collectively with Bausch Health Companies Inc., the "Valeant Defendants"), a Quebec limited partnership that manufactured and marketed pharmaceutical products in Canada during the Class Period, including the brand name Opioid Products M.O.S. (morphine hydrochloride), COPHYLAC (normethadone HCI and P-hydroxyephedrine), RALIVIA (tramadol hydrochloride), and ONSOLIS (fentanyl citrate). On or about December 16, 2018, Valeant disposed of its assets and ceased business operations. Valeant no longer has employees or assets and no longer manufactures or distributes Opioid Products.

C. The Generic Manufacturer Defendants

[69] Certain Manufacturer Defendants allegedly manufactured, marketed, and sold generic Opioid Products during the Class Period (the "Generic Manufacturer Defendants").

[70] The Generic Manufacturer Defendants include Apotex, Pharmascience, Pro Doc, Ranbaxy, Sanis, Sandoz, Teva, Roxane Laboratories Inc., and Mylan Pharmaceuticals ULC (the last two defendants have settled).

[71] The Generic Manufacturer Defendants may be contrasted with "brand name" or original manufacturers of Opioid Products. Generic Manufacturer Defendants do not create novel drugs; rather, they come to market later with second or subsequent versions of already established drugs produced by the original manufacturers. As such, they submit that they do not engage in the misrepresentations as alleged.

D. The Distributor Defendants

[72] The distributor defendants allegedly delivered the Opioid Products manufactured and marketed by the Manufacturer Defendants and Generic Manufacturer Defendants to pharmacies and hospitals in Canada (the "Distributor Defendants").

1. The Kohl & Frisch Defendants

[73] Kohl & Frisch Limited is a licensed pharmaceutical wholesaler that distributed pharmaceutical products, including Opioid Products, to licensed pharmacies across Canada during the Class Period.

[74] AmerisourceBergen Canada Corporation ("Americsource", together with Kohl & Frisch Limited, the "Kohl & Frisch Defendants") is a Canadian health care distribution company that also distributed Opioid Products in Canada during the Class Period. In March 2013, it was acquired by Kohl & Frisch Limited and renamed to Kohl & Frisch Distribution Inc. One year later, it amalgamated with Kohl & Frisch Limited. The Province alleges that Kohl & Frisch Limited is liable for all of Amerisource's acts and omissions as its successor.

2. The McKesson Defendants

[75] McKesson Corporation is an American pharmaceutical wholesale and distribution company incorporated in Delaware with its headquarters in Texas. While it has not conducted business in Canada, its wholly-owned subsidiary, McKesson

Canada Corporation (“McKesson,” together with McKesson Corporation, the “McKesson Defendants”), distributed drugs and other consumer products, including opioids, to retail and hospital pharmacies in Canada during the Class Period.

[76] McKesson submits that it has no contact with patients who are the end users of the pharmaceutical products it distributes. It also points out that its distribution centres are licensed and authorized by Health Canada. It denies it is involved in the manufacturing or marketing of Opioid Products.

3. Jean Coutu

[77] In addition to allegations of common design with drug manufacturer Pro Doc, the Province claims against Jean Coutu as a distributor of Opioid Products to pharmacies, hospitals, and other dispensaries in Québec during the Class Period.

[78] As noted above, Jean Coutu is a Canadian drugstore chain headquartered in Quebec with its head office in Montreal. Jean Coutu is a regional franchisor for a franchise network of retail stores that sell pharmaceutical products and other goods. It does not own stores or pharmacies in its network and does not operate or conduct business in British Columbia.

[79] Jean Coutu points out that it does not deliver Opioid Products to British Columbia, its operations are the subject of a strict regulatory regime operated by Health Canada, it is not responsible for the development or updating of safety information about the Opioid Products it distributes, and it is not involved in the relationship between prescribers and their patients.

4. Nu-Quest

[80] Nu-Quest Distribution Inc. (“Nu-Quest”) is a Canadian pharmaceutical wholesaler based in Newfoundland and Labrador that distributed pharmaceutical products, including Opioid Products, to pharmacies, hospitals, and other dispensaries in the Atlantic provinces and Ontario during the Class Period.

[81] Nu-Quest states that it is a family-run business and is strictly a wholesaler distributing mostly in Newfoundland and Labrador. Though it has not raised a jurisdictional challenge, Nu-Quest submits that it is a foreign company caught up in these proceedings. It denies having ever collaborated or entered into a common design with other wholesalers or manufacturers of Opioid Products to increase the sale of or market for Opioid Products. It submits that it is barely mentioned at all in the general allegations against the defendants.

5. The Procurity Defendants

[82] Procurity Inc. (“Procurity”) is a Canadian pharmaceutical wholesaler that distributed Opioid Products and other drugstore products to pharmacies in British Columbia, Alberta, Manitoba, Saskatchewan, Northwest Ontario, and Nunavut until January 2016, at which point it ceased its operations and sold its assets to McKesson Canada Corporation. Procurity was formerly known as United Pharmacists Wholesale Manitoba Ltd. (1978–1997), United Pharmacists Ltd. (1997–2003), and Procurity Pharmacy Services Inc. (2003–2006) (together with Procurity, the “Procurity Defendants”).

[83] Procurity says its role in the pharmaceutical supply chain was limited to ordering, receiving, warehousing, and transporting pharmaceutical products ordered by its pharmacy customers.

6. uniPHARM

[84] uniPHARM Wholesale Drugs Ltd. (“uniPHARM”) is a Canadian pharmaceutical wholesaler incorporated in British Columbia that distributed Opioid Products and other drugstore products to predominantly independent pharmacies in British Columbia, Alberta, and the Yukon.

[85] The Province alleges that uniPHARM acted in a common design with the Procurity Defendants in sharing data and developing business strategies for the sale and distribution of Opioid Products in Canada. uniPHARM says that its role is limited

to ordering, receiving, warehousing, and transporting products ordered by its pharmacy customers.

7. LPG

[86] LPG is a Canadian pharmaceutical wholesaler established in 2001 and headquartered in Ontario. LPG distributed Opioid Products and other drugs to community pharmacies, hospitals, clinics, and health care practitioners in Canada during the Class Period. It also sells drugs such as methadone and suboxone to treat opioid dependency.

[87] LPG is of a relatively modest size, with approximately 50 employees. It has a Narcotics and Controlled Drugs licence, which allows it to possess, sell, and distribute Opioid Products with Health Canada approval. The vast majority of its Opioid Products sales are in Ontario, with a small amount of sales in other provinces and very little (10 sales of injectables from 2012-2018) in British Columbia. It does not manufacture Opioid Products, and Opioid Products form only a minor portion of its business. It denies collaborating with others on the sale of Opioid Products.

8. The Shoppers Drug Mart Defendants

[88] Shoppers Drug Mart Inc. (“Shoppers Drug Mart”) is a Canadian pharmaceutical wholesaler. It is a direct subsidiary of Loblaw Companies Limited and was amalgamated under the laws of Canada on January 3, 2021. It licenses franchises that are independently owned and operated by individual pharmacists.

[89] Shoppers Drug Mart is characterized as a distributor defendant in the TANCC. It denies operating retail pharmacies throughout Canada. Instead, pharmacies that operate within Shoppers Drug Mart stores are independently owned and operated as franchises. Shoppers Drug Mart has a closed wholesaling model, under which it only sells and distributes Opioid Products and other products to pharmacies owned and operated by franchisees of its affiliate and corporate pharmacies owned and operated by its affiliates. It says it has no involvement in

developing or updating the product monograph for the Opioid Products it distributes and no involvement in the relationship between prescribers and their patients.

E. Defendants Removed from the Litigation

[90] The Province has discontinued its action against the following defendants.

1. The Purdue Defendants

[91] The plaintiffs reached a settlement with Purdue Pharma, Purdue Pharma Inc. and Purdue Frederick Inc. (the "Purdue Canada Defendants") on May 17, 2022, which was approved by this Court on December 16, 2022: *British Columbia v. Purdue Pharma Inc.*, 2022 BCSC 2288 [*Purdue Settlement*]. An appeal from the settlement by a proposed intervenor was quashed: *Lac La Ronge Indian Band v. British Columbia,* 2024 BCCA 58.

2. The Roxane Defendants

[92] Boehringer Ingelheim GMB is a German pharmaceutical company that formerly owned two Canadian pharmaceutical manufacturing companies, both headquartered in Ontario: Roxane Laboratories Inc. and Boehringer Ingelheim (Canada) Ltd. ("BI Canada"). BI Canada had a division known as Roxane Labs. Roxane Laboratories Inc. and Roxane Labs (collectively, "Roxane") manufactured and sold brand name Opioid Products in Canada, including Roxicet (oxycodone hydrochloride) and Oramorph SR (morphine sulfate), as well as generic drugs containing hydromorphone hydrochloride.

[93] In 2016, Hikma Pharmaceuticals PLC, a Jordanian pharmaceutical company, acquired Roxane Laboratories Inc. and Boehringer Ingelheim Roxane Inc. (Boehringer Ingelheim GMB's US subsidiary) which have become, respectively, the American companies Hikma Labs Inc. and West-Ward Columbus Inc (collectively, the "Roxane Defendants").

[94] The plaintiffs entered into a proposed settlement agreement with the Roxane Defendants on April 5, 2022, which this Court approved on December 16, 2022.

3. Imperial

[95] Imperial Distributors Canada Inc. (“Imperial”) is a Canadian pharmaceutical distribution company. The plaintiffs entered into a “Tolling and Standstill Agreement” with Imperial dated September 18, 2023, as a result of which the plaintiffs discontinued their claim against Imperial on September 20, 2023.

4. Mylan

[96] Mylan Pharmaceuticals ULC (“Mylan”) is a Canadian pharmaceutical company that manufactures and sells generic Opioid Products containing active ingredients such as fentanyl, buprenorphine hydrochloride, and tramadol hydrochloride. The plaintiffs entered into a proposed settlement agreement with Mylan on October 12, 2023, which was approved by this Court on December 21, 2023.

5. The Endo Defendants

[97] Endo is an international pharmaceutical company incorporated in Ireland. Three of its subsidiaries—Paladin Labs, Endo Pharmaceuticals Inc., and Endo Ventures Ltd.—are included as co-defendants (collectively with Endo, the “Endo Defendants”). Paladin Labs is a Canadian company that manufactures, markets and sells Opioid Products in Canada. The Province alleges that Paladin Labs is affiliated with and/or controlled by Endo Pharmaceuticals Inc., an American company. Endo Ventures Ltd. is an Irish corporation that markets and sells branded Opioid Products containing tapentadol hydrochloride in Canada.

[98] The Endo Defendants are alleged to have been engaged in a common design in the development, testing, manufacturing, marketing, and selling of Abstral (fentanyl), Statex (morphine sulfate), Metadol and Metadol-D (methadone hydrochloride), and Tridural (tramadol hydrochloride). They are also alleged to be in a common design with BMS Canada, to which they licensed their trademarks.

[99] Endo filed for Chapter 11 protection in the United States Bankruptcy Court for the Southern District of New York on August 16, 2022. These Chapter 11

proceedings were recognized by the Ontario Superior Court of Justice in proceedings under Part IV of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 on August 19, 2022: *Paladin Labs Canadian Holding Inc.*, 2022 ONSC 4748. As part of an arrangement to facilitate the sale of Endo International PLC, a trust has been established for the benefit of existing private opioid claimants. The Province supported the proposed sale: *Paladin Labs Canadian Holding Inc.,* 2024 ONSC 219 at para. 39.

[100] Thus, the Endo Defendants have not filed a response to civil claim or response to the certification application. They did not make submissions at the certification hearing.

VI. THE HISTORY OF PROCEEDINGS TO DATE

[101] On August 29, 2018, the Province commenced this putative class proceeding by filing a Notice of Civil Claim (the "Claim").

[102] After the passage of the *ORA* on October 31, 2018, the Province filed an amended Notice of Civil Claim on June 20, 2019. The amendments corrected certain minor party misnomers, removed a party against whom the claim had been discontinued, and pleaded additional statutes, including the *ORA,* which had not come into force at the time the original Claim was filed.

[103] On July 25, 2019, the Province filed an application to add certain parties related to the Purdue Canada Defendants as parties to the action.

[104] On October 1, 2019, a judicial management conference was held to address the Province's application to add the Purdue Canada Defendants.

[105] In November and December 2019, the defendants filed various applications relating to the sequencing of proposed jurisdiction and constitutional challenges.

[106] On December 6, 2019, the Province filed its application response to the various motions brought on by the defendants.

[107] On December 12-13, 2019, the Court received submissions on the timing or sequencing of various motions relative to the anticipated certification hearing, as well as the timing of the filing of responses to civil claim.

[108] On March 19, 2020, I issued reasons for judgment substantially setting the hearing of all motions in conjunction with the certification hearing and directing the parties to set a schedule for the exchange of certification materials: *British Columbia v. Apotex Inc.*, 2020 BCSC 412 [*Sequencing Decision*]. Any defendants who had not filed a jurisdictional response were ordered to file a Response to Civil Claim within 45 days of the date of judgment. Two defendants, Jean Coutu and Pro Doc, sought and obtained leave to appeal the *Sequencing Decision*: *British Columbia v. Apotex Inc.*, 2020 BCCA 186.

[109] On September 23, 2020, the Province delivered to the defendants its certification record, an application to add certain defendants (BGP Pharma ULC, Endo Ventures Ltd., BI Canada, Teva Canada Innovation G.P.-S.E.N.C., and Noramco, Inc.), an application to amend the amended Notice of Civil Claim, and a proposed schedule to certification.

[110] On December 8, 2020, a case management conference was held to schedule a hearing date to address the Province’s application to add defendants and to set a schedule leading to the certification hearing.

[111] On February 16, 2021, various defendants applied for a pause or suspension of proceedings by virtue of the stay of proceedings granted in Ontario against the Purdue Canada Defendants, some of which were the subject of bankruptcy proceedings in the United States. At that hearing, the Court determined that the Province’s proposed applications would not violate the Ontario stay orders: *British Columbia v. Apotex Inc.*, 2021 BCSC 346. The hearing of the Province’s applications was set to a five-day hearing to begin on April 26, 2021 (the "Cause of Action Hearing"), and the Court granted the Province leave to file a second amended Notice of Civil Claim (the "Second Amended Claim").

[112] In addition, notwithstanding the earlier sequencing ruling, the parties agreed that the following applications would be heard as part of the Cause of Action Hearing:

(a) the Province's application for leave to amend the Second Amended Claim;

(b) the Province's application to add BGP Pharma ULC and Noramco Inc. as defendants; and

(c) any applications of the defendants (including proposed or newly added defendants) to strike the pleadings.

[113] The parties agreed that the Cause of Action Hearing would be determinative for the purposes of s. 4 (1)(a) of the *CPA*.

[114] On March 29, 2021, the Province filed the Second Amended Claim. That day, the Province also filed an amended application to amend the Second Amended Claim.

[115] The Second Amended Claim added the following parties by consent: Ethypharm, Endo Ventures Ltd., BI Canada, Roxane Laboratories Inc. and Teva Canada Innovation G.P.-S.E.N.C. (collectively, the "Added Defendants"). None of the Added Defendants have served a response to civil claim.

[116] The Second Amended Claim also incorporated certain language to reflect the stay of proceedings against the Purdue Canada Defendants.

[117] Over the course of March 2021, a number of defendants delivered Notices of Application to strike the Province's pleadings to be considered as part of the Cause of Action Hearing.

[118] In the course of the Cause of Action Hearing, the Province agreed to abandon its application to add BGP Pharma UDC as a defendant and indicated it was not pursuing negligence as a stand-alone claim.

[119] Judgment from the Cause of Action Hearing was reserved to January 4, 2022. The Court granted the Province's application for leave to add Noramco Inc. as a defendant and to further amend the Second Amended Claim. With the exception of the claims based on the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 8, which were found to be duplicative, the Court dismissed all of the various defendants' motions to strike, with the net result that the Province had met the cause of action requirement in s. 4(1)(a) of the *CPA*: *British Columbia v. Apotex Inc.*, 2022 BCSC 1 [*Pleadings Decision*].

[120] On June 4, 2021, the Court of Appeal partially directed that the jurisdiction challenges of Jean Coutu and Pro Doc be heard in advance of the certification application: *British Columbia v. The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219.

[121] In light of the Cause of Action Hearing outcome, and as permitted in the Scheduling Agreement, on March 24, 2022, the Province served on the defendants an amended Notice of Application, seeking certification of the action and ancillary relief, and Affidavit #3 of Conall Kelly.

[122] On December 30, 2021, the Province commenced a separation action on behalf of itself and other provincial, territorial and federal governments in Canada against the defendants McKinsey & Company Inc. United States and McKinsey & Company Canada/McKinsey & Compagnie Canada (together, "McKinsey"): *British Columbia v. McKinsey*, 2023 BCSC 1762.

[123] The parties attended a judicial management conference on April 22, 2022 to confirm a scheduling agreement reached between the parties.

[124] On June 6-8, 2022, the Court of Appeal heard the defendants' appeal of the Cause of Action Hearing and an appeal related to the February 16, 2021 Order related to stay issues regarding the Purdue Canada Defendants. On November 2, 2022, the Court of Appeal substantially dismissed the defendants' challenges to various causes of action in the Province's claim but struck the Province's claim of public nuisance: *Valeant.*

[125] Some of the defendants brought applications to strike the Province's amended certification application and sought an order requiring the Province to file a further or supplementary affidavit of the representative plaintiff. Justice Fitzpatrick heard the application on July 15, 2022 and issued reasons for judgment on August 15, 2022. Justice Fitzpatrick declined to strike the amended certification application but ordered the Province to file an amended Notice of Application and amended representative plaintiff affidavit within 60 days of her reasons: *British Columbia v. Apotex Inc.*, 2022 BCSC 1383.

[126] On August 16, 2022, Endo filed for chapter 11 protection in the United States Bankruptcy Court for the Southern District of New York under chapter 11 of title 11 of the United States Code.

[127] On August 19, 2022, Chief Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) issued an order In the Matter of the *Companies' Creditors Arrangement Act* (Paladin Labs).

[128] On September 20-21, 2022, the Court heard constitutional challenges by way of summary trial applications. On December 8, 2022, the Court dismissed the constitutional challenges brought by the defendants: *British Columbia v. Apotex,* 2022 BCSC 2147. An appeal to the Court of Appeal was dismissed on July 28, 2023: *Sandoz Canada Inc. v. British Columbia,* 2023 BCCA 306 [*Sandoz BCCA*]. On November 29, 2024, the Supreme Court of Canada dismissed an appeal from *Sandoz BCCA* and thereby upheld the validity of s. 11 of the *ORA*: *Sanis Health Inc. v. British Columbia*, 2024 SCC 40 [*Sanis SCC*].

[129] On September 26-28, 2022, as directed by the Court of Appeal, the Court heard the jurisdiction *simpliciter* applications of Jean Coutu and Pro Doc in advance of the certification hearing. On April 25, 2023, the jurisdiction applications were dismissed: *British Columbia v. Pro Doc Limitee,* 2023 BCSC 662. The application of Jean Coutu and Pro Doc to stay proceedings against them until the Court of Appeal had decided their jurisdiction appeals was dismissed on August 2, 2023: *British Columbia v. Apotex,* 2023 BCSC 1354. The jurisdiction appeals remain outstanding.

[130] On December 16, 2022, this Court approved a settlement of claims by the Province against the Purdue Canada Defendants as well as Roxane Laboratories Inc., Hikma Labs Inc., Hikma Pharmaceuticals Plc, BI Canada and West-Ward Columbus Inc.: *Purdue Settlement*.

[131] On September 21, 2023, the Province filed a notice of discontinuance against Imperial.

[132] On December 21, 2022, this Court approved a settlement of claims by the Province against Mylan Pharmaceuticals ULC: *British Columbia v. Apotex,* 2023 BCSC 2401.

[133] On September 21, 2023, the Province entered a tolling and standstill agreement with Imperial. The Province has discontinued its claim against Imperial.

[134] On November 17, 2023, the Court dismissed an application by Sanis, Shoppers Drug Mart, Sandoz, and McKesson for an order adjourning the certification hearing scheduled to begin on November 27, 2023, pending resolution of the constitutional appeal in the Supreme Court of Canada: *Sanis Health Inc. v. HMTKBC* (24 November 2023), 40864 (SCC). On November 24, 2023, a Supreme Court of Canada justice dismissed a motion to stay certification proceedings pending the constitutional appeal. The appeal of the constitutional issue was heard on May 23-24, 2024. The Court reserved its decision.

[135] On December 21, 2023, the Court approved a settlement of claims against Mylan. Mylan was alleged to have had minimal participation in the Opioid Products market and stood at the low end of the spectrum of relative market share when compared with the other defendants.

[136] The Court heard the certification application and jurisdiction applications in this matter between November 27 and December 19, 2023. The decision on all applications was reserved subject to leave being given to the Province to respond to a belatedly filed expert affidavit from the Quebec Defendants on the significance of the *Opioid-related Damages and Health Care Costs Recovery Act*, S.Q. 2023, c. 25

[*Quebec ORA*]. Subsequently, the Court received a responsive affidavit and supplemental materials from the parties.

[137] As noted, on November 29, 2024, the Supreme Court of Canada upheld the validity of s. 11 of the *ORA*: *Sanis SCC*. In doing so, the Court held that the Crown in right of British Columbia is a person capable of being a representative plaintiff under the *CPA* and that foreign Crowns may sue in any court having jurisdiction in the particular matter. The Court also held that common issues establish a real and substantial connection for the purposes of adjudicatory jurisdiction.

VII. THE THIRD AMENDED NOTICE OF CIVIL CLAIM

[138] The causes of action are set out at para. 4 of the TANCC as follows:

> The plaintiff brings this claim to recover opioid-related health care costs, as well as the costs of addressing and abating a crisis of opioid dependency and addiction. The plaintiff brings this action on its own behalf and on behalf of a class of other provincial and federal entities, as defined below, on the following basis:
>
> (a) causes of action on behalf of all Class Members:
>
> (i) as against all Defendants:
>
> A. public nuisance; and
>
> (ii) as against the Manufacturer Defendants:
>
> A. section 36 of the *Competition Act* based on a breach of s. 52 of the *Competition Act*; and
>
> B. unjust enrichment;
>
> (b) statutory causes of action on behalf of *ORA* Subclass Members under s. 2(1) of the ORA with joint and several liability under s. 4 of the ORA based on the following opioid-related wrongs:
>
> (i) as against all Defendants:
>
> A. negligent failure to warn;
>
> (ii) as against the Manufacturer Defendants:
>
> A. negligent design;
>
> B. negligent misrepresentation;
>
> C. fraudulent misrepresentation/deceit;
>
> D. breach of s.52 of the *Competition Act*; and
>
> E. breach of s.9 of the *Food and Drugs Act*; and

> (c) the plaintiff and the Class Members rely upon allegations of common design not as an independent cause of action but rather as a form of joint or concerted action liability that provides a pathway to liability for other claims.

[139] As noted in *Sandoz BCCA* at para. 47, the suggestion in para. (b) above is that the statutory causes of action asserted on behalf of *ORA* Subclass members (i.e., provinces other than British Columbia) are causes arising under ss. 2 and 4 of the *ORA*. It is understood that this is erroneous and that instead the subparagraph should refer to causes arising under the other provinces' counterparts to those sections in their respective opioid recovery statutes.

[140] The claim based upon public nuisance was struck in *Valeant*. However, the Court otherwise upheld my determination that the various claims should not be struck as disclosing no reasonable cause of action.

[141] Generally, the Province pleads in the TANCC that Opioid Products are powerful and addictive painkillers. Each defendant is alleged to have created or assisted in the creation of an epidemic of addiction in British Columbia and throughout each province and territory in Canada.

[142] In the TANCC, the Province alleges that until the mid-1990s, prescription Opioid Products were not widely used because they were generally considered by the medical community to be too addictive to treat chronic pain conditions, which would require long-term use of such drugs. Instead, Opioid Products were prescribed primarily for use in the treatment of palliative conditions or for short-term acute pain, which required brief use.

[143] The Province alleges that, after Purdue Pharma introduced a time-release formulation of the opioid drug OxyContin in 1996, Purdue Pharma and other Manufacturer Defendants developed and promoted a narrative that pain was undertreated and should be made a higher priority by healthcare practitioners. At the same time, they allegedly began vigorously marketing long-acting Opioid Products as less addictive, less subject to abuse and diversion and less likely to cause tolerance and withdrawal than other pain medications despite a lack of scientific

evidence to support these claims. Individually and in concert, the Manufacturer Defendants promoted these Opioid Products as safe, effective, and appropriate for long-term use for routine pain conditions.

[144] Hence, the Province's claim against the Manufacturer Defendants is generally that they marketed and promoted Opioid Products in Canada as less addictive than they knew them to be and for conditions they knew the drugs were not effective in treating. These misleading marketing and promotion efforts allegedly increased the prescription and use of all Opioid Products.

[145] The Province's claim against the so-called Generic Manufacturer Defendants is that they repeated, endorsed, and sought to benefit from the misrepresentation of brand manufacturers, including by failing to take steps to prevent Opioid Products from being diverted into the illegal market when they knew or ought to have known that the representations were false and misleading.

[146] The claim against the Distributor Defendants is based on failure to warn. The Province alleges that they delivered Opioid Products (manufactured and marketed by the Manufacturer Defendants) to pharmacies, hospitals and other dispensaries across Canada in quantities they knew or should have known exceeded any legitimate market, thereby intensifying the crisis of Opioid Products-related use, addiction, and death in Canada. The Province alleges that the Distributor Defendants knew or ought to have known that Opioid Product sales in some communities or pharmacies were disproportionate to the population or the pharmacies' sizes and sales volumes. The Distributor Defendants are defined in para. 115 of the TANCC as Imperial Distributors, Kohl & Frisch, McKesson, Jean Coutu, Nu-Quest, Procurity, uniPHARM, LPG and Shoppers Drug Mart.

[147] The Province relies on allegations of common design not as an independent cause of action but rather as a form of joint or concerted action liability that provides a pathway to liability for other claims. In this regard, it alleges defendants acted pursuant to a common design a) between parent and subsidiary defendants, b) between unaffiliated defendants who worked together in concert to market, sell and

distribute opioids in Canada, c) between all Manufacturer Defendants, and d) between all Manufacturer Defendants (including Generic Manufacturer Defendants) and the Distributor Defendants.

[148] The pleadings allege that where a particular entity within a corporate family of defendants engaged in unlawful conduct, it did so on behalf of all entities within that corporate family.

[149] In summary, the Province pleads that each of the defendants knew or ought to have known about the dangers of using Opioid Products to treat chronic non-cancer pain. Each defendant should have worked to counter false information and ensure that these dangerous drugs were used only when truly necessary. Instead, each defendant chose to participate in the lucrative Opioid Products market, relying on, repeating and endorsing misrepresentations and misleading information in the process.

[150] The Province alleges that the dramatic surge in the public's consumption of Opioid Products has injured and unreasonably interfered with the public's health and safety and has caused a substantial detriment to the Province and the Class Members, namely, the Opioid Products epidemic. The TANCC alleges the following damages:

> 225. As a result of the Opioid Epidemic caused by the Defendants' conduct described above, which constitutes an "opioid-related wrong" for the purposes of the ORA, the plaintiff and the Class Members have suffered damage in the amount of the substantial expense in paying for Opioid prescriptions and other health care costs related to the use of Opioids, including expenditures made directly or through one or more agents or other intermediate bodies, for programs, services, benefits or similar expenses associated with opioid-related disease, injury or illness, all of which are recoverable "health care benefits" for the purposes of the ORA. Such damage suffered by the plaintiff and the Class Members includes,…but is not limited to:
>
> (a) secondary effect medications resulting from side effects of Opioid use, such as medications for constipation and lack of sleep;
>
> (b) medical treatment for side effects of Opioid use;
>
> (c) medications used to treat addiction;

> (d) the cost of harm reduction services and programs, including overdose prevention sites, the distribution of Naloxone and the Take Home Naloxone Program;
>
> (e) drug-addiction treatment, including the costs of any mandated counselling;
>
> (f) emergency medical treatment for overdose and symptoms of withdrawal, including ambulance services, emergency department visits and hospitalizations;
>
> (g) associated medical costs for co-morbidities arising from use of Opioids, such as treatment of Hepatitis C and AIDS;
>
> (h) coroner's costs associated with Opioid overdose deaths; and
>
> (i) in-office visits to obtain refills and/or monitor abuse.

[151] Thus, the Province's claim alleges that it and the Class Members suffered damages in a variety of ways, impacting increased health care costs as a result of the Opioid Products-related harm that was caused by the defendants' involvement in the manufacture or distribution of Opioid Products.

VIII. THE *ORA*

[152] The *ORA* is intended in general terms to be similar to the *TRA* which created a civil cause of action to allow the Province to recover tobacco-related public health care costs directly from tobacco manufacturers for "tobacco-related wrongs". The *ORA* seeks to accomplish a similar objective for health care costs caused or contributed to by "opioid-related wrongs" allegedly committed by manufacturers and distributors of Opioid Products: *Sandoz BCCA* at paras. 1 and 7.

[153] Section 2(1) of the *ORA* grants the government a "direct and distinct" action against a manufacturer, wholesaler, or consultant to recover the "cost of health care benefits" caused or contributed to by an "opioid-related wrong." This statutory cause of action is provided to the British Columbia government and only in relation to torts committed in British Columbia or breaches of duty or obligation owed to persons in British Columbia.

[154] The *ORA* was enacted on October 31, 2018. It was recently amended by Bill 34, *Opioid Damages and Health Care Costs Recovery Amendment Act, 2022*, 42nd Parl., 3rd Sess., British Columbia, 2022 (assented to November 3, 2022), to

include a right of action against a consultant in addition to a manufacturer or wholesaler.

[155] The *ORA* defines an "opioid-related wrong" in s. 1(1) as follows:

> (a) a tort that is committed in British Columbia by a manufacturer or wholesaler and that causes or contributes to opioid-related disease, injury or illness, or
>
> (b) […] a breach, by a manufacturer or wholesaler, of a common law, equitable or statutory duty or obligation owed to persons in British Columbia who have used or been exposed to or might use or be exposed to an opioid product.

[156] The *ORA* defines a "manufacturer" in s. 1(1) as follows:

> **"manufacturer"** means a person who manufactures or has manufactured an opioid product and a person who, in the past or currently,
>
> (a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of an opioid product,
>
> (b) for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of opioid products by that person or by other persons,
>
> (c) engages in or causes, directly or indirectly, other persons to engage in promoting an opioid product, or
>
> (d) is a trade association primarily engaged in
>
> (i) advancing the interests of manufacturers,
>
> (ii) promoting an opioid product, or
>
> (iii) causing, directly or indirectly, other persons to engage in promoting an […] opioid product;

[157] The *ORA* defines "wholesaler" in s. 1(1) as follows:

> **"wholesaler"** means a person who distributes, sells or offers for sale opioid products
>
> (a) to pharmacies, distributors or other persons for resale, or
>
> (b) to hospitals, facilities or care centres for patient use.

[158] Factual and legal causation of "disease, injury or illness or the risk of disease, injury or illness" arising from opioid use must be presumed by the court according to s. 3(2) of the *ORA* if the plaintiff can establish the following under s. 3(1):

> (a) the defendant breached a common law, equitable or statutory duty or obligation owed to insured persons who have used or been exposed to or might use or be exposed to the type of opioid product,
>
> (b) using the type of opioid product can cause or contribute to disease, injury or illness, and
>
> (c) during all or part of the period of the breach referred to in paragraph (a) of this subsection, the type of opioid product, manufactured or promoted by the defendant, was offered for distribution or sale in British Columbia.

[159] The rest of s. 3 provides an aggregate health care benefits recovery scheme that relieves the plaintiff (including, as of November 3, 2022, the government of Canada) from having to prove that any particular cost was caused by any particular defendant to the action.

[160] Section 4(1) of the *ORA* provides that defendants in an action under the legislation are jointly and severally liable for the cost of health care benefits if they "jointly breached a duty or obligation described in the definition of 'opioid-related wrong'." Pursuant to s. 4(2), manufacturers or wholesalers are deemed to have "jointly breached a duty or obligation" if, among other things, they

> […]
>
> (b) at common law, in equity or under an enactment…would be held
>
> (i) to have conspired or acted in concert in respect of the breach, [or]
>
> (ii) to have acted in a principle and agent relationship with each other with respect to the breach, […]
>
> […]
>
> [Emphasis added.]

[161] Section 11(1)(b) of the *ORA* provides that "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":

> […]
>
> (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,
>
> […]

[162] Accordingly, s. 11(1)(b) of the *ORA* adopts the certification test in s. 4 of the *CPA* and engages all of the case law that has provided guidance on how to apply that section. This provision has survived constitutional scrutiny: *Sanis SCC*.

[163] Other than s. 11, the remainder of the *ORA* is geared towards supporting the British Columbia government in pursuing the new cause of action related to opioid-related wrongs in the province.

[164] The *ORA* provides the British Columbia government and the government of Canada with procedural and substantive advantages, including:

- the option in s. 2(4) to pursue the recovery of health care costs on an aggregate basis;
- the benefit of certain evidentiary presumptions and other provisions in ss. 2(5)(a) and 3(2) which obviate matters of proof relating to causation;
- the guaranteed admissibility in s. 5 of certain evidence in the action to prove its damages; and
- relief in s. 6 from the ordinary limitation period in pursuing the action.

[165] As summarized in *Valeant* at para. 85, the *ORA* significantly alters traditional substantive and procedural tort principles to address what the legislature has determined are, if breaches of duty can be established, mass tort(s) affecting large numbers of individuals. It shifts the cost of health care benefits, which might otherwise not be recoverable, onto manufacturers and distributors. The *ORA* has to be interpreted in light of its purpose to address alleged mass torts that are thought to be impossible, practically, to prosecute under traditional individual tort principles: *Valeant* at para. 79.

IX. THE PARTIES' EVIDENCE

A. Evidentiary Objections to the Province's Factual Evidence

1. Positions of the Parties

[166] The defendants object to much of the Province's evidence tendered on the certification and jurisdiction applications. They point out that evidence tendered on an application for certification must meet the usual criteria for admissibility: *Ernewein v. General Motors of Canada Ltd*., 2005 BCCA 540 at paras. 31-32; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2008 BCSC 1263 at para. 25.

[167] In particular, some of the defendants take issue with the evidence appended to the affidavits of the Province's paralegal, saying that certain attached exhibits are hearsay evidence and thus should not be admitted. The defendants also submit that the source of out-of-court statements in the Province's materials have not been properly identified. For instance, Valeant and Bausch challenge Exhibits "D", "E", "J", "K", "M" – "P", "U" and "LL"- "NN" of Affidavit #8 of Conall Kelly ("Kelly Affidavit #8") on this basis. In the alternative, the Valeant and Bausch defendants argue that the evidence has not been properly sworn on information and belief, as the Province's affidavits rely on "omnibus preambles" rather than identifying the source of and belief in each appended exhibit individually.

[168] Counsel for the Janssen Defendants have also identified specific documents they object to as including inadmissible opinion or hearsay evidence: Exhibits "A", "B", "C1"–"C35", "D" and "Q" of Affidavit #2 of Conall Kelly ("Kelly Affidavit #2"); Exhibits "B" and "E" of Affidavit #3 of Conall Kelly ("Kelly Affidavit #3", collectively with Kelly Affidavit #8 and Kelly Affidavit #2, the "Kelly Affidavits"), and Exhibits "I", "DD" and "GG" of Kelly Affidavit #8.

[169] I summarize these objections in the following chart:

Document	Description	Objection
Kelly Affidavit #2, Exhibit “A”, “B”, and “C1” – “C35”	Printouts from the Government of Canada website from 2019 and 2020 setting out data and statements regarding overdoses and deaths across various provinces over time.	By Janssen: The (individual) author of the documents is not properly identified, and Mr. Kelly does not attest to his belief in the truth of the contents. Some reports are “multi-level hearsay,” stating that they rely on other organizations' data. Conclusory statements are opinion evidence. There is a conflict of interest because these documents were published by one of the proposed Class Members after the litigation commenced.
Kelly Affidavit #2, Exhibit “D”	A statement of the former federal Health Minister to the House of Commons dated December 2018.	By Janssen: Not properly sworn on information and belief, and discusses matters of political posturing/opinion.
Kelly Affidavit #2, Exhibit “Q”	A document from the U.S. Centers for Disease Control and Prevention (“CDC”) webpage from 2020.	By Janssen: Author of the document is not identified. It is opinion evidence, which does not concern matters in Canada.
Kelly Affidavit #3, Exhibit “B”	A research article from a publication called “Library of Parliament Hill Studies” dated January 6, 2022.	By Janssen: Inadmissible hearsay and opinion evidence (for the truth of its contents).
Kelly Affidavit #3, Exhibit “E”	A journal article published in PLOS One in January 2020.	By Janssen: Inadmissible hearsay and opinion evidence (for the truth of its contents).
Kelly Affidavit #8, Exhibit “D”	A journal article published in the Journal of Pain Research and Management in 2010, acknowledging Valeant and other pharmaceutical companies as supporters of a pilot program.	By Valeant: Not sworn on information and belief; inadmissible hearsay.
Kelly Affidavit #8, Exhibit “E”	A document listing Valeant and other defendants as sponsors of speaking events at McGill.	By Valeant: Not sworn on information and belief; inadmissible hearsay.
Kelly Affidavit #8, Exhibit “I”	A journal article titled “Chronic pain in Canada: Have we improved our management of chronic noncancer pain?” published in the Journal of Pain Research and Management in 2007.	By Janssen: Inadmissible hearsay and opinion evidence (for the truth of its contents).

Kelly Affidavit #8, Exhibit "J"	A program registration guide to the Canadian Pain Society Annual Conference in Quebec in 2009 listing Valeant, Biovail, Purdue, and Janssen as sponsors.	By Valeant: Not sworn on information and belief; inadmissible hearsay.
Kelly Affidavit #8, Exhibit "K"	A program for the Canadian Pain Society's 2007 annual conference, listing Valeant, Biovail, and other defendants as sponsors.	By Valeant: Not sworn on information and belief; inadmissible hearsay.
Kelly Affidavit #8, Exhibit "M"	An article published in the Journal of Pain Research and Management by DE Moulin et al, which lists "Valeant" as a competing interest.	By Valeant: The source of the document is stated, but the source of the information within it is not identified, and Mr. Kelly does not affirm his belief in the information.
Kelly Affidavit #8, Exhibit "N"	An article published in Les cahiers de MedActuel, which states that several authors have a conflict of interest with respect to Valeant or Biovail.	By Valeant: The source of the document is stated, but the source of the information within it is not identified, and Mr. Kelly does not affirm his belief in the information.
Kelly Affidavit #8, Exhibit "O"	A PowerPoint presentation stating it was presented by Mark Barnes at the Canadian Pharmacists Conference in 2015, disclosing that Mr. Barnes is a consultant with Janssen, Pharmascience, and Valeant/Biovail.	By Valeant: The source of the document is stated, but the source of the information within it is not identified, and Mr. Kelly does not affirm his belief in the information.
Kelly Affidavit #8, Exhibit "P"	An article published in the Journal of Pain Research and Management, which lists "Valeant" and other defendants (e.g., PharmaScience, Apotex, Janssen, Johnson & Johnson) as a competing interest because it provided funding to several authors of the article.	By Valeant: Not sworn on information and belief; inadmissible hearsay.
Kelly Affidavit #8, Exhibit "U"	A copy of the Official Congress Program for the International Association for the Study of Pain's 2010 World Congress on Pain, which lists Endo, Paladin Labs, Valeant Canada Limited, Biovail, and others as sponsors.	By Valeant: Not sworn on information and belief; inadmissible hearsay. (Valeant also notes that the Province of Quebec is also listed as a sponsor, though this goes to what inferences can be drawn from the evidence rather than its admissibility).

Kelly Affidavit #8, Exhibit "DD"	A printout from what appears to be a personal online blog called Psychology of Pain created by an individual representing himself to be an Emeritus Professor of Psychology from University of Western Ontario.	By Janssen: Inadmissible opinion evidence, unattributed hearsay.
Kelly Affidavit #8, Exhibit "GG"	A screenshot of a webpage from 2010 accessed using "The Wayback Machine" of a website called "Let's Talk Pain."	By Janssen: Inadmissible hearsay and does not even mention Opioid Products.
Kelly Affidavit #8, Exhibit "LL"	An article published in Continuing Education Alberta stating that publication was supported by an unrestricted grant from Biovail Canada.	By Valeant: The source of the document is stated, but the source of the information within it is not identified, and Mr. Kelly does not affirm his belief in the information.
Kelly Affidavit #8, Exhibit "MM"	A French-language publication, "Communique", published by L'Association Quebecois de la douleur chronique, containing a photo of a representative of Valeant Canada with the awardee of a $5,000 grant to a "physical educator" for an internship in India on yoga as a relief to chronic pain.	By Valeant: The source of the document is stated, but the source of the information within it is not identified, and Mr. Kelly does not affirm his belief in the information. There is no certified English translation, which is mandatory for admitting French-language documentary evidence for the truth of its contents.
Kelly Affidavit #8, Exhibit "NN"	A copy of the 2012 Canadian Rheumatology Association guidelines for the diagnosis and management of fibromyalgia syndrome, which lists Valeant and Biovail, along with Janssen, Purdue, Abbott, BMS, Paladin, and others as conflicts of interest.	By Valeant: The source of the document is stated, but the source of the information within it is not identified, and Mr. Kelly does not affirm his belief in the information.

(the Exhibits listed above, collectively, the "Kelly Exhibits").

[170] The defendants further submit that the Court has a vital gate-keeping function with respect to the admissibility of evidence on the present applications.

[171] The Province submits that the vast majority of its evidence is not hearsay because it is not tendered for the truth of its contents but rather simply to show its existence, which may provide "some basis in fact" to support certification. In particular, it submits that the contested evidence is not relied on for the truth of its contents but to show "some basis in fact" for the proposed common issues and the proposed class, including the propositions that:

a) the Manufacturer Defendants and Generic Manufacturer Defendants:

   i. influenced prescribing guidelines;

   ii. funded research studies supporting the use of Opioid Products;

   iii. sponsored pain conferences and continuing medical education events; and

   iv. advertised their products.

b) Opioid Products are commonly referred to and dealt with as a class of drugs which cause or contribute to the same diseases, injuries, or illnesses.

[172] In response to the defendants' arguments that some exhibits are not properly attributed, the Province relies on *Sharp v. Royal Mutual Funds Inc*., 2019 BCSC 2357, in which Justice Francis found that, for the purpose of establishing some basis in fact for the existence of other class members and common claims, identifying the website from which documents are taken is sufficient to authenticate the documents as publicly accessible web pages: at para. 39.

[173] In the alternative, the Province submits that where its evidence contains hearsay, it is admissible on these interlocutory applications because the source of the information is provided and its evidence otherwise complies with the *Supreme Court Civil Rule*s. The Province further submits that many of the Kelly Exhibits qualify under the public document hearsay exception, citing *Pantusa v. Parkland Fuel Corporation*, 2022 BCSC 322 at para. 74. It notes as well that, in some instances, its evidence is supplemented by the evidence of the defendants.

[174] The Province points out that the merits of the claim are not in issue. The task at hand on certification involves a search for common issues rather than answers: *Hollick v. Toronto (City),* 2001 SCC 68 at paras. 16, 25.

2. Legal Principles Relevant to the Admissibility of Lay Evidence

[175] In *Heubner v. PR Seniors Housing Management Ltd*., *D.B.A. Retirement Concepts*, 2021 BCSC 837 at para. 15, Justice Murray helpfully summarized the rules that apply to evidence on a certification motion as an interlocutory application:

> 1) An affidavit must only state what an affiant would be able to testify to at trial: Rule 22-2(12);
>
> 2) An affidavit may contain statements as to information and belief if the source of the information and belief is given: Rule 22-2(13). The person who gave the information must be identified: *Albert v. Politano*, 2013 BCCA 194 [*Albert*] at paras. 19-22;
>
> 3) For certification, the plaintiff in a proposed class proceeding must show "some basis in fact" or “evidentiary basis” for each of the certification requirements, other than the requirement that the pleading discloses a cause of action: *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 [*Pro-Sys SCC*] at paras. 99-105; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 25; *Ernewein* at paras. 25-26;
>
> 4) While the evidentiary burden on a certification motion is low (the “some basis in fact” test), that burden must be discharged by evidence which meets the usual criteria for admissibility: *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, 2019 ONSC 5967 [*Harris*] at para. 37; *Ernewein* at para. 31;
>
> 5) Evidence may be excluded if its prejudicial effect outweighs its probative value. This will include evidence that may confuse, mislead, or distract the trier of fact's attention from the main issues, lead to irrational conclusions, unduly occupy the trier of fact's time, and impair a fair hearing: *Harris* at para. 38, citing *R. v. Mohan*, [1994] 2 S.C.R. 9 at para. 18 and *R. v. Potvin*, [1989] 1 S.C.R. 525 at para. 2;
>
> 6) Evidentiary rulings must be made in the context of the particular pleadings and the particular facts of each case: *Harris* at para. 50, *Pro-Sys SCC* at para. 104;
>
> 7) On a certification motion, the court has an important gate-keeping role with respect to the admissibility of evidence, and it is not appropriate or fair to shirk that responsibility by saying let it in, and the objections will go to weight rather than admissibility: *Harris* at para. 37.

[176] The fourth *Heubner* rule specifically notes that the “some basis in fact” standard, which applies to all the certification requirements other than the existence of a cause of action, must be met with evidence that satisfies the “usual criteria for admissibility.” This refers not to the general rule against hearsay but to the common law rules of evidence that have not been displaced by the *Supreme Court Civil Rules*—for example, that opinion evidence is only admissible from a certified expert, where the court has received their qualifications, education, experience, information,

and assumptions on which the opinion is based, and the instructions given: *Araya v. Nevsun Resources Ltd*., 2016 BCSC 1856 at para. 181; *Abbotsford (City) v. Mostertman*, 2022 BCCA 448 at para. 15; *Ernewein* at para. 31.

[177] As the second *Heubner* rule indicates, in a class certification under s. 4 of the *CPA* (*i.e.*, an interlocutory application that does not seek a final order), Rule 22-2(13) of the *Supreme Court Civil Rules* permits the use of hearsay evidence in an affidavit so long as the source of the information and belief is given. Hearsay evidence that fails to identify the specific, identifiable source of an affiant's information and belief will not be relied on: *Huebner* at para. 30; *McEwan v. Canadian Hockey League,* 2022 BCSC 1104 at paras. 83-84. Recently in *Gionet v. Syngenta,* 2024 BCSC 1440, the Court stated as follows with respect to the admissibility of hearsay evidence on certification:

> [81] Hearsay evidence by way of affidavits sworn on information and belief is appropriate at class certification pursuant to R. 22-2(13)(b)(i). Certification is interlocutory and does not result in a final order, nor does it allow a determination on the merits. Instead, the plaintiffs are seeking to establish "some basis in fact" for certification issues. In these circumstances, the potential prejudice associated with relying on hearsay evidence is minimal. Where there is content which would be characterised as hearsay, I find that it is admissible as necessary for the purpose of indicating relevant evidence which would likely be available to the plaintiffs at trial: *Cantlie* at paras. 157–158.

[178] In *McEwan*, the defendants brought an application to strike the plaintiff's affidavits filed in support of certification on the basis that they contained inadmissible (unattributed) hearsay. In her analysis, Justice Sharma reiterated the legal principles concerning hearsay, noting the following "admissible" purposes for an out-of-court statement:

a) to establish the fact that a statement was made (para. 34);

b) to demonstrate a person's state of mind (para. 36); or

c) to further a narrative or to explain events that follow (para. 36).

[179] The Court confirmed at para. 39 that "the purpose of requiring affiants to identify the source, and confirm a belief in the information, is to avoid putting the reliability of the information beyond the reach of the opposing party."

[180] The purpose for which evidence is adduced is a critical factor that informs whether a statement is admissible. The court at certification is not engaged in making determinations about the credibility or reliability of the evidence presented in the affidavits filed in support of certification: *McEwan* at paras. 49–50; *Gionet* at para. 68. While the court should be mindful of opening the floodgates of evidence during certification, it is important to keep in mind that admitting evidence at this preliminary stage does not mean the evidence will be admitted in the same manner at trial: *McEwan* at para. 98; *Pro-Sys SCC* at paras. 102-103.

[181] This case is unique in that the applicable legislation, the *ORA*, contains a statutory provision allowing for the tendering of population-based evidence to establish causation and to quantify damages or the cost of health care benefits:

> **Population-based evidence to establish causation and quantify damages or cost**
>
> **5** Statistical information and information derived from epidemiological, sociological and other relevant studies, including information derived from sampling, is admissible as evidence for the purposes of establishing causation and quantifying damages or the cost of health care benefits respecting an opioid-related wrong in an action brought
>
> (a) by or on behalf of a person, in the person's own name or as a member of a class of persons under the *Class Proceedings Act*,
> (b) by the government under section 2 (1), or
> (c) by the government of Canada under section 2.1 (1).
>
> [Emphasis added.]

[182] This provision was given little consideration in the evidentiary objections of the defendants and the submissions of the parties, but I find that it assists the Province in its plea for the admission of statistical information and information derived from epidemiological, sociological, and other relevant studies. As the

passage above indicates, such evidence may be used "for the purposes of establishing causation and quantifying damages or the cost of health care benefits."

3. Discussion of the Province's Factual Evidence

[183] I begin my discussion of evidentiary issues by reiterating that the Province does not tender the vast majority of its evidence for the truth of its contents. As the Province argued, it is looking for questions, not answers. The Province submits that the contested Kelly Exhibits are not offered for the truth of their contents or to make findings of fact but to show that there is some basis in fact to support certification. The Province alternatively submits that if its evidence is characterized as hearsay, it is in any event admissible under traditional exceptions to the hearsay rule and pursuant to Rule 22-2(13) of the *Supreme Court Civil Rules*.

[184] I will further discuss my general approach to assessing the evidence on this application, being cautious to keep the above legal principles in mind and being mindful that the "some basis" in fact standard must be discharged by evidence which meets the usual criteria for admissibility. I would not adopt an approach of considering all the evidence tendered and assuming objections will go to weight rather than admissibility. I accept that the Court has an important gate-keeping role in this regard.

[185] I note that the evidentiary record on the certification application is massive and far more extensive than necessary to resolve the disputed issues and assess the nature of the action for the purposes of certification. Some of the evidence about the background, corporate structure, relationships, regulatory regime and opioid-related activities of the parties was helpful. Nevertheless, some of the considerable evidence before the Court sometimes strayed into merits questions more commonly wrestled with at trial or on a summary judgment motion (referred to in submissions as the "did the defendant do it?" question).

[186] The merits are not in issue at this stage at which commonality, preferability and jurisdiction are the principal questions to consider. The appropriate approach at certification, as detailed below, is a more modest one searching for "some basis in

fact" as to whether the plaintiff has satisfied the certification criteria in ss. 4(b) through (e) of the *CPA.* Although there are numerous issues to consider, the main themes that run through the various claims—namely, the central allegations of negligent design, negligent misrepresentation, and failure to warn—are not analytically complicated. While I assess the evidentiary objections below with more specificity, none of the impugned documents discussed below are critical to my fundamental conclusions on certification and jurisdiction.

[187] With those preliminary comments, I turn to my discussion of the Province's factual evidence.

[188] I agree with some of the evidentiary arguments put forward by the defendants. For instance, I agree that the wording of the "omnibus preambles" used in the Kelly Affidavits is problematic to the extent that the Province relies on documents for their truth because the language in the affidavits omits a more precise statement of belief in the truth of, and the source for, the appended documents. As such, it is not generally sufficient to satisfy the "information and belief" requirement for relying on the documents for the truth of their contents (*i.e.*, for a hearsay purpose). Thus, except where otherwise admissible for their truth under a traditional exception, the contested Kelly Exhibits can only be relied on under Rule 22-2(13) for non-hearsay purposes (e.g., as proof that the statements in the document were made): see *Albert v. Politano,* 2013 BCCA 193 at paras. 19-22; *Degen v. British Columbia*, 2021 BCSC 268 at paras. 27–42; *L.M.U. v. R.L.U.*, 2004 BCSC 95 at paras. 31-39; *Tasci (Re),* 2020 BCSC 1438 at paras. 66-71.

[189] In *Sharp*, Francis J. held that publicly accessible documents obtained online are admissible to establish some basis in fact for the existence of other class members and common claims. Further, she found that, given the public nature of the documents, identifying the website from which the documents were taken was sufficient authentication: at paras. 38-39.

[190] I find that, except for Kelly Affidavit #8, Exhibits "D", "I"-"K", "M", "P", and "U", Mr. Kelly has sufficiently authenticated the Kelly Exhibits by indicating the URL from

which he accessed the documents (and from which the documents could be accessed by the public, at least as of the date the affidavit was sworn). I agree with the Court in *Sharp* that such authentication is sufficient, as the existence of these documents will be used to demonstrate only that there is "some basis in fact" for the s. 4(1) *CPA* requirements.

[191] The same cannot be said for Exhibits "D", "I"-"K", "M", "P", and "U" of Kelly Affidavit #8. These documents, nor the affidavit, indicate the URL from which Mr. Kelly accessed the documents and thus are not sufficiently authenticated.

[192] Having found that the documents contained in the Kelly Exhibits, save for those listed in the preceding paragraph, have been sufficiently authenticated, I turn to the question of whether the documents can be relied upon in support of the certification application. As noted, the Kelly Exhibits may generally be admissible for non-hearsay purposes. However, to the extent that this conclusion may be in error, and in order to address other objections to the impugned evidence, I make the below comments regarding various categories of defence objections.

[193] Beginning with the hearsay objection, I note that some of the proffered evidence falls within a traditional exception to the hearsay rule, which is presumptively admissible without resort to the principled approach to the hearsay rule: see, for instance, *R v. Larson*, 2003 BCCA 18 at para. 18; *R. v. MacKinnon,* 2022 ONCA 811 at paras. 31-39, 62. For example, I can consider whether the Province has established an exception to the rule against hearsay, such as the "public record exception" or the "statements against interest" exception.

[194] I find generally that much of the information from newspaper articles or blogs contains double hearsay or opinion evidence and is of questionable relevance: compare, *Hvitved v. Home Depot of Canada Inc.*, 2025 BCSC 18 at para. 19. I have not taken that evidence into account.

[195] Similarly, I do not rely on the documents filed in the United States proceedings for their truth, except where it is admissible under another exception to

the hearsay rule, such as the admissions against interest exception. Such documents can be relied upon for the non-hearsay purpose of indicating relevant evidence that would likely be available to the plaintiffs at trial (*Gionet* at paras. 81-82).

[196] Further, I do not rely on opinion evidence offered in secondary sources unless that evidence is relevant for non-hearsay purposes or properly before the Court by way of an expert report.

[197] I have considered some of the conference programs and journal articles as evidence of the social, historical and contextual framework of the Province's allegations supporting the existence of common issues: *Araya v. Nevsun*, 2016 BCSC 1856 at para. 138(b), aff'd 2017 BCCA 401; *Schwoob v. Bayer Inc*., 2013 ONSC 2207 at para. 39; s. 5 of the *ORA*. The information in these publications is useful not for its truth as opinion evidence but for the fact that it was said. Taken together, these publications reflect the discourse that was taking place in the scientific and industry community at the time and the kind of evidence that may be available to the Province at trial.

[198] The names of defendants appearing on sponsor or conflict of interest lists provides some basis in fact for the Province's allegation that the defendants did provide funding for those industry activities, which the Province may wish to prove at trial. Nonetheless, I agree with the defendants that even if this is true, this conduct is not necessarily improper, nor is it conclusive evidence of an opioid-related wrong.

[199] I have considered the product monographs of the various Opioid Products in these proceedings where the source of the monograph is properly before the Court. The product monographs constitute statements against interest and are admissible as an exception to the hearsay rule. As product monographs are a common feature of the defendants' medicines marketed in Canada, there was no serious dispute as to their admissibility.

[200] In any event, it appears that the Province is not relying on the statements in the product monographs for their truth but for the fact that they were made. Assessing whether representations were made, and whether a case can be made that the representations were misleading or that there was a failure to warn, does not require an assessment of the truth of the representations. Instead, the question is: what was the state of industry knowledge at the time the statements were made? Again, the Province is only required to show there was "some basis in fact" for its claim that the defendants failed to warn users of known or suspected risks of Opioid Products during the Class Period: *Bartram v. GlaxoSmithKline Inc.,* 2013 BCCA 462 [*GSK*] at para. 32. The defendants' own published information is relevant to that assessment: *GSK* at para 33.

[201] There are some limitations on the product monograph evidence. For instance, the only indication as to the time period over which each version was used is the inclusion of the "date of revision." As such, I have not relied on these exhibits to show with greater particularity the time periods over which the representations in the product monographs were made. Nonetheless, I find that the product monographs may be relied on by the Province within the limitations of that evidence.

[202] I have regard to various public documents where the source of information is provided, and the documents meet the criteria for the application of the exception for written statements prepared by public officials in the exercise of their duty: *Huebner* at paras. 91–95; *Pantusa v. Parkland Fuel Corp,* 2022 BCSC 322 at paras. 63–84; *Yahey v. British Columbia,* 2021 BCSC 1287 at para. 74; *R. v. A.P.* (1996), 109 C.C.C. (3) 385 (Ont. C.A.) at paras. 827–828. For instance, Exhibits "A", "B" and "C1-C35" to Kelly affidavit #2 are all Government of Canada documents which fall within the public document exception. For present purposes, the reports and publications taken from government websites satisfy the four criteria: their subject matter is "of a public nature," they were "prepared with a view to being retained and kept as a public record," they were "made for a public purpose and available to the public for inspection at all times," and they were "prepared by a public officer in pursuance of his duty."

[203] Janssen argues that the public records exception should not apply in these circumstances, given that the Canadian governments publishing the records, being the proposed Class Members themselves, have a substantial conflict of interest. Further, Janssen argues that public documents published after the commencement of proceedings are inadmissible. I do not agree with either of these submissions. The public documents hearsay exception is premised on the presumption that that those assigned an official duty to record will see it as important and perform the duty honestly and accurately, and that any inaccuracies would be exposed and corrected through public scrutiny: *Huebner* at para. 92. The commencement of litigation does not affect those public duties which have remained intact. Further, there is no suggestion that the public officials who prepared the reports have any involvement or personal interest in the litigation. I find that these documents are admissible under the public records exception and sufficiently reliable for the purpose of establishing "some basis in fact."

[204] In addition, Janssen and other defendants submit that the Kelly Affidavits have been mischaracterized and overstated in the Province's written submissions and do not support the Province's assertions on certification. In particular, they submit the following:

> (i) **"Exhibit Q"** to the **Kelly Affidavit #2**, a U.S. CDC document specific to the U.S., does not mention Canada at all and is entirely focussed on events in the U.S. It is not evidence of anything in Canada and should not be used to draw any inferences with respect to the role prescription opioids have played in an opioid epidemic here.
>
> (ii) **Exhibits "G", "M", "P", "NN",** and **"Q"** to the **Kelly Affidavit #8**, publications authored by a number of scientific and medical professionals, provide no evidence that Janssen
> (or any of the Manufacturer Defendants) made the alleged Opioid Misrepresentations and/or improperly influenced prescribing decisions. There is nothing unlawful, nefarious, or unusual about providing educational or research grants (including unrestricted grants).
>
> (iii) **Exhibits "J", "K", and "U"** to the **Kelly Affidavit #8**, which consist of three conference programs/brochures for conferences in Canada which were sponsored by Janssen and numerous other organizations, also do not provide evidence of the alleged misconduct or the alleged Opioid Misrepresentations, as there is nothing illegal or improper about sponsoring an industry conference; these events were supported by a multitude of groups, including government and academic institutions.

> (iv) **Exhibits "DD", "GG"** and **"II"** to the **Kelly Affidavit #8** are the only three documents cited by the Province as evidence that "opioid manufacturers disseminated information, including misrepresentations, about opioids on websites". However, none of these documents provides any evidence that Janssen made misrepresentations about opioids on websites.
>
> > (1) Exhibit "DD" which is objected to as inadmissible, is a printout from what appears to be a personal online blog called *Psychology of Pain* created by an individual representing himself to be an Emeritus Professor of Psychology from University of Western Ontario.
> >
> > (2) "Exhibit GG" is a printout from a "Let's Talk Pain" webpage from 2010, but there is no reference or mention of opioids or Opioid Medicines in the document.
> >
> > (3) Exhibit "II" is a document produced by a U.S. Janssen entity (which is not a defendant to this litigation) merely listing financial contributions to U.S.-based organizations, including professional societies and non-profit pain patient groups.

[205] While I agree with many of the above concerns, most go to the weight or the effect of the evidence rather than the admissibility of the evidence.

[206] The Province has tendered statements made by the federal Minister of Health to the House of Commons on December 10, 2018 that describe the existence of a national opioid crisis. This evidence is objected to as hearsay. However, as the Province has indicated it relies on such statements for non-hearsay purposes, I would consider it on this limited basis though of course this case turns on more specific considerations than such an expression of general societal concern. In any event, these impugned statements to the House of Commons are similar to repeated references to an opioid overdose crisis that courts have taken judicial notice of, as noted below.

[207] I note that the Quebec Defendants objected to some of the exhibits appended to the Kelly Affidavits being before the Court in French only and to the lack of an official English translation. For instance, Mr. Kelly appends a French article called MedActuel to his affidavit.

[208] Rule 22-3 of the *Supreme Court Civil Rules* requires that documents used in court be in English: *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42 [*Conseil scolaire francophone*]; *Vansky v. Guo*, 2023

BCSC 2124. I would therefore not consider French materials without an English translation.

B. The Province's Factual Evidence

1. General

[209] Much of the Province's evidence is directed at the existence of an opioid epidemic, its national impact, and the defendants' conduct in connection to it.

[210] Canadian courts have taken judicial notice of a crisis related to overdoses of opioids and their derivatives in numerous cases in the criminal context: *R. v. Parranto,* 2021 SCC 46 at paras. 59, 93-96, 98; *R. v. Harmes,* 2022 BCSC 663 at para. 41; *R. v. Cashman,* 2022 BCSC 1836 at para. 55; *R. v. Charles*, 2021 ONSC 5907 at para. 20*; R. v. Sekhon*, 2020 BCSC 2247 at paras. 38, 40; *R. v. Otto*, 2019 ONSC 6446 at para. 36; *R. v. Olvedi*, 2018 ONSC 6330 at para. 14.

[211] In the present case, the Province relies on official reports from the Government of Canada that show the growing number of opioid-related overdoses and deaths in every part of the country, as well as official statements characterizing the situation as a national public health crisis, to show there is an opioid epidemic in Canada.

[212] The Province further submits that there is some basis in fact that prescription opioids have played a key role in the opioid epidemic.

[213] The Province's evidence indicates generally that since the late 1980s there has been a considerable increase in the use of prescription opioids in Canada. Increased prescription use has been followed by a growth in reports of associated harms and an increased rate in the use of non-prescription opioids. The Province suggests that pharmaceutical opioids played a role in causing opioid-related adverse health outcomes in Canada during the Class Period, particularly prior to 2015 when fentanyl and fentanyl analogs were introduced to the illegal drug market.

[214] More specifically, the Province's evidence suggests that every province and territory experienced a significant increase in the prescription of opioids between 1996 and the mid-2010s, followed by more reports of associated harms and an increased usage of non-prescription opioids. The cause of that increase in prescribing and the harms arising from it are the focus of this litigation. In particular, the alleged role that prescription opioids played in creating a demand for illicit opioids is strongly contested between the parties.

[215] The Province points to the following publicly available information as evidence to support the allegations made in the TANCC:

a) Regarding the plaintiff's allegation that opioid manufacturers influenced prescribing guidelines:

(i) an article titled "Drivers of the Opioid Crisis: An appraisal of financial conflicts of interest in clinical practice guideline panels at the peak of opioid prescribing" (published January 2020) concludes that:

> Our findings reveal that the guidelines for opioid prescribing chronic noncancer pain from 2007 to 2013 were at risk of bias because of pervasive conflicts of interest with the pharmaceutical industry and a paucity of mechanisms to address bias. Even highly-rated guidelines examined in a 2014 systematic review and critical appraisal had many red flags.

(ii) The authors of the Consensus Statement on the pharmacological management of chronic neuropathic pain: Revised consensus statement from the Canadian Pain Society (2007) disclose the following "Competing Interests":

A. AJ Clark has received honoraria for consultations and speaker fees for educational presentations from Janssen-Ortho (Canada), and Valeant Canada.

B. I. Gilron has received research support from Pharmascience (Canada) and Apotex (Canada) and he has received honoraria for consultations and speaker fees for educational presentations from Johnson and Johnson (Canada) and Janssen-Ortho (Canada).

C. MA Ware has received financial support for research funding and honoraria for CME activities from Valeant Canada.

D. A. Boulanger has received honoraria for consultations and/or speaker fees for educational presentations from Janssen-Ortho (Canada), Pharmascience (Canada) and Valeant Canada.

E. P. Squire has received honoraria for consultations and speaker fees for educational presentations from Valeant Canada and JanssenOrtho (Canada).

F. A. Gordon has received research grant funding and/or honoraria for consultations and speaker fees for educational presentations from Janssen-Ortho (Canada), Pharmascience (Canada) and Valeant Canada.

G. R. Jovey has received honoraria as a speaker and consultant for Janssen-Ortho (Canada) and Valeant Canada.

H. M. Lynch has received unrestricted grants for support of a research consortium from Valeant Canada.

(iii) The authors of the Consensus Statement on the Pharmacological management of chronic neuropathic pain: Revised consensus statement from the Canadian Pain Society (2014) disclosed the following "Competing Interests":

A. A. Boulanger has received honoraria for consultations and speaker fees for educational presentations from Janssen.

B. GA Finley has provided consultation on research design to Johnson & Johnson PR&D on studies of tramadol, and to Janssen R&D on studies of tapentadol.

C. I. Gilron has received support from Pharmascience, Apotex, Johnson & Johnson and Janssen-Ortho.

D. A. Gordon has received honoraria for consultations and speaker fees for educational presentations from Janssen.

E. P. Taenzer has received an honorarium for consultation from Valeant.

F. MA Ware has received grant support from Valeant.

G. EL Weinberg has received honoraria for consultations and/or speaker fees for educational presentations from Janssen and Valeant.

H. OD Williamson has received speaker fees from Johnson and Johnson Inc. Canada.

(iv) The authors of the Canadian guidelines for the diagnosis and management of fibromyalgia syndrome disclose the following conflicts of interest:

A. MA Fitzcharles has received consulting fees, speaking fees and/or honoraria from Janssen and Valeant.

B. G. Ko has received consulting fees, speaking fees and/or honoraria from Valeant.

C. D. Moulin has received consulting fees, speaking fees and/or honoraria from Valeant.

D. P. Panopalis has received consulting fees and/or honoraria from Bristol-Myers Squibb.

E. Y. Shir has received consulting fees, speaking fees and/or honoraria from Janssen.

(v) In a presentation titled "Update on NOUGG Guidelines" November 2017, the presenter Sol Stern, a family physician, declares relationships with commercial interests including the BMS advisory board and honoraria from Bristol Myers Squibb, Ethypharm, Janssen and J&J.

(b) Regarding the plaintiff's allegation that opioid manufacturers funded research studies supporting the use of opioids: a 2002 study titled "Chronic pain in Canada – Prevalence, treatment, impact and the role of opioid analgesia", supported by an unrestricted grant from Janssen-Ortho Inc., concluded: INTERPRETATION: Chronic noncancer pain is common in Canadian adults and has a major social and economic impact. Despite growing evidence supporting the efficacy and safety of major opioid analgesics for chronic noncancer pain, less than 10% of chronic pain patients taking prescription medication were treated with a major opioid. Chronic pain is undertreated in Canada, and major opioid analgesics are probably underutilized in the management of moderate to severe pain as part of a multidisciplinary treatment program.

(c) Regarding the plaintiff's allegation that opioid manufacturers sponsored pain conferences and continuing medical education events:

(i) Valeant Canada Limited provided an unrestricted educational grant to support the 2009 Canadian Pain Society Conference.

(ii) Janssen-Ortho Inc. was a Gold Sponsor of the 2009 Canadian Pain Society Conference and a number of presentations were "presented in collaboration with Janssen-Ortho Inc."

(iii) Valeant Canada Limited and Janssen Ortho-Inc. sponsored the 2008 Canadian Pain Society Annual Conference.

(iv) Valeant Canada Limited and Janssen-Ortho sponsored the 2010 World Congress on Pain in Montreal.

(v) BMS Canada sponsored the Queen's University 25th Annual Anesthesiology Research Day.

(d) Regarding the plaintiff's allegation that opioid manufacturers advertised their products: the agenda material for the Canadian Pain Society Annual Conference in 2008 includes an advertisement for Tramacet (Janssen-Ortho Inc).

(e) Regarding the plaintiff's allegation that opioid manufacturers disseminated information, including misrepresentations, about opioids on websites:

(i) Teva Pharmaceuticals USA, Inc. operated the website "painmatters.com".

(ii) Endo and Actavis Elizabeth LLC supported the website "painedu.org".

> (iii) Janssen's "Let's Talk Pain" campaign (2007-2012), a marketing campaign created by Janssen in partnership with the American Pain Foundation and other US advocacy groups, included a website.

[216] Although this action is at the pre-certification stage and no discovery has yet taken place, the Province cites the above publicly available information as support for the defendants' participation in the conduct alleged in its pleading.

2. The Role of Health Canada and Compliance with Federal Regulations

[217] The parties' evidence sets out important background, which is generally not in dispute, regarding the regulation of pharmaceutical medicines in Canada.

[218] Pharmaceutical medicines, including Opioid Products, are heavily regulated in Canada by the federal, provincial and territorial governments in important ways that vary by jurisdiction. For many years, federal and provincial governments and agencies have been responsible for, among other things, approving prescription medicines for distribution (including prescription Opioid Products), operating drug benefit plans, approving prescription medicines for reimbursement through those plans, providing health care services, regulating the practice of medicine, regulating the prescription of medicines, and/or monitoring the use of prescription medicines, particularly narcotics. The federal government has also been responsible for, among other things, the criminalization and prosecution of the possession, use, or sale of illicit drugs and the unlawful use or sale of prescription medicines.

[219] For those purposes, federal and provincial governments and their agencies have established strict laws and regulations supervising, regulating, and controlling the development, manufacture, marketing, distribution, and sale of pharmaceutical medicines in Canada. The federal government is responsible for, among other things, matters relating to drug product approval, manufacturing, labelling, promotion, intellectual property, safety and effectiveness, and market competitiveness. The federal and provincial governments are also responsible for deciding which medicines to include in their formularies to cover their use in public insurance plans and for establishing the prices reimbursable to pharmacies for

prescription medicines. Any Opioid Product that the Province or a member of the proposed Class has paid for (or reimbursed an insured person for) has been expressly approved by that government as eligible for reimbursement in light of its efficacy, safety, and cost. At various times during the proposed Class Period, the Province and the proposed Class Members have made different decisions concerning which particular Opioid Products are included in their respective formularies.

[220] An application to market a drug in Canada is made by filing a New Drug Submission with Health Canada, which contains detailed information and data about the drug's safety, effectiveness, and quality, such as the following: the drug's chemistry; preclinical and clinical studies; the manufacturing process; the proposed indications (uses), dosage, and conditions of use; packaging and labelling; and information regarding therapeutic claims and side effects. Health Canada issues a Notice of Compliance ("NOC") approving the sale of the drug only if the New Drug Submission complies with the applicable regulations, including the requirements for evidence of safety and effectiveness of the drug for its approved indications (uses), and if the benefits of the drug outweigh the risks.

[221] Aside from the approval process, there are restrictions governing the packaging, labelling, and advertising of prescription medicines based on how the medicine (or its active ingredient) is categorized and/or scheduled under the *Food and Drugs Act*, R.S.C. 1985, c. F-27 [*FDA*], the *FDR*, and the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [*CDSA*] and its associated regulations, including the *Narcotic Control Regulations*, C.R.C., c. 1041, which have varied over time, including since 1995. With respect to advertising, manufacturers of prescription medicines are not free to market or advertise their medicines in Canada without restriction. Direct-to-consumer advertising of prescription medicines is prohibited in Canada. Advertising that is directed to health care professionals is highly regulated by a combination of federal legislation, various Health Canada guidance documents, and voluntary codes of standards for health product advertising.

[222] There is no dispute that Health Canada regulated, reviewed, and approved the different warnings given by the Manufacturer Defendants and Generic Manufacturer Defendants for each of their Opioid Products. These warnings are contained in each of the medicine's labelling and product monographs, or product information documents, as the case may be.

[223] As described on a 2018 Government of Canada webpage titled "Access to Generic Drugs in Canada," Health Canada describes a product monograph as follows:

> A Product Monograph is a factual, scientific document on the drug product that, devoid of promotional material, describes the properties, claims, indications, and conditions of use for the drug, and that contains any other information that may be required for optimal, safe, and effective use of the drug. A Product Monograph should include appropriate information respecting the name of the drug, its therapeutic or pharmacologic classification, its actions and/or clinical pharmacology, and its indications and clinical uses. The monograph should also include contraindications, warnings, precautions, adverse reactions, drug interactions and effects on laboratory tests, symptoms and treatment of overdosage, dosage and administration, storage and stability, pharmaceutical information, dosage forms, pharmacology, toxicology, microbiology, special handling instructions, information on clinical trials, information for the consumer, references, and the dates of the initial printing and current revision.
> […]
> From a medical and scientific standpoint, the prime objective of a Product Monograph is to provide essential information that may be required for the safe and effective use of a new drug.

[224] A manufacturer's proposed product monograph is submitted to Health Canada with each New Drug Submission or Supplemental New Drug Submission (for example, for an application for a change in indications, which are the approved uses of medicine) and must be approved by Health Canada. As part of this review, the draft product monograph is evaluated "sentence by sentence and word by word to ensure that the very best information is provided to Healthcare Professionals": *Martin v. Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744 at para. 84; *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53 at paras. 83-84.

[225] The product labelling for each medicine contains the approved indications and contraindications for the medicine, potential drug interactions, warnings of the

known risks associated with the use of the medicine, and adverse reactions reported about the medicine. The product monograph is made available to healthcare professionals and pharmacies.

[226] In addition to the highly regulated nature of Opioid Products at the federal level, some province-specific regulations and policies impact prescribing decisions and restrictions, monitoring and surveillance of opioid prescriptions and use, as well as harm reduction measures. The different provincial regulations impact the involvement of each provincial and territorial government in facilitating access to Opioid Products, influencing prescribing decisions, and addressing Opioid Products-related harms in their jurisdiction. There is wide variation across the provinces and territories for such regulations.

[227] With respect to British Columbia specifically, for some or all of the time since 1996, the Province has administered a province-wide network that links all pharmacies to a central data system and records every prescription dispensed in a pharmacy connected to the network ("PharmaNet"). Health care professionals across the province, including physicians, pharmacies, and hospitals, can access PharmaNet and the information therein. One of the stated purposes of PharmaNet is to improve prescription safety. PharmaNet helps to prevent accidental duplication of prescriptions and prescription fraud, protects patients from drug interactions and dosage errors, and offers health professionals, including prescribing physicians and dispensing pharmacists, comprehensive information about a patient's prescription medicine history, among other things.

[228] Provincial and federal regulations have played and continue to play a role in influencing prescribing decisions through the operation of their respective formularies, specific rules or procedures for the substitution of generic medicines (where available) for innovative medicine, their regulation of physicians and pharmacists and their respective regulatory bodies, the operation of prescription drug monitoring programs intended to identify and deter misuse or diversion of prescription medicines, and decisions regarding whether and the extent to which the

cost of each (or any) Opioid Products would be reimbursable through public insurance plans.

3. Promotion and Marketing of Opioids in Canada

[229] The Province points to evidence it submits supports its claims that the Manufacturer Defendants wrongfully downplayed the risk of addiction and overstated the benefits of Opioid Products to expand the market for their drugs.

[230] Prior to the mid-1990s, Opioid Products were primarily used to treat pain in terminal cancer patients. The Province alleges that, in an effort to broaden the market for opioid prescriptions, the Manufacturer Defendants spent hundreds of millions of dollars on promotional activities and educational materials that denied or downplayed the risk of addiction and overstated the benefits of Opioid Products use. These materials were regularly distributed to healthcare professionals to promote a narrative that Opioid Products should be used to treat chronic pain in non-cancer and/or non-terminal patients.

[231] The Province points to numerous examples of the defendants' alleged promotion and marketing of Opioid Products in Canada:

a) Paid advertisements were placed in medical journals, such as the Canadian Medical Association Journal, by the Manufacturer Defendants. These advertisements allegedly marketed Opioid Products as a safer alternative to other pain medications and appropriate for anyone who needed long-term pain relief.

b) The Manufacturer Defendants, independently and in concert, funded patient advocacy groups, which produced educational materials containing information that appeared independent and reliable, but was in fact false and misleading. Groups that advocated for the de-stigmatization of Opioid Products such as the Canadian Pain Coalition, the Chronic Pain Association of Canada, and People in Pain Network received funding from the Manufacturer Defendants.

c) In addition to print advertising and funding societies such as the Canadian Pain Society, the promotion and marketing of Opioid Products in Canada took the form of lectures to medical students, textbooks, and key opinion leaders. Lectures aimed at medical students promoting the safety and efficacy of Opioid Products were supported by pharmaceutical companies

> that marketed Opioid Products in Canada. This conflict of interest was not disclosed.

[232] The Province argues that the primary objective of the Manufacturer Defendants' alleged conduct was to overcome resistance in the medical community to the use of prescription Opioid Products for patients experiencing chronic non-cancer pain in order to expand the market for Opioid Products and generate and encourage long-term patient consumption of Opioid Products.

[233] The Province argues that the alleged pattern of false and deceptive marketing and promotion by the Manufacturer Defendants contained misrepresentations, as further explained in its TANCC, such as:

> (a) patients using Opioids for pain would experience improvement to function and quality of life without adverse effects;
>
> (b) patients using Opioids for pain generally would not become addicted and that doctors could use screening tools to exclude patients who might;
>
> (c) withdrawal from Opioid use was easily managed;
>
> (d) Opioid use relieved pain when used long-term without significant risk;
>
> (e) there was little risk of adverse effects of Opioid use;
>
> (f) certain long-acting Opioids provided 12 hours of pain relief;
>
> (g) Opioids could be taken in higher and higher doses without increased risk to patients; and
>
> (h) abuse-deterrent Opioid formulations were safer and lowered the potential of abuse
>
> (Collectively, the "Opioid Misrepresentations").

[234] As noted below by reference to the TANCC, the Province submits that the Generic Manufacturer Defendants were at all material times aware of the marketing of brand name Opioid Products by Manufacturer Defendants such as Purdue Pharma, Janssen, and Endo. It further argues that the Generic Manufacturer Defendants endorsed and promulgated the Opioid Misrepresentations and made a

deliberate decision to manufacture, market, and sell their generic versions of brand name Opioid Products without regard for the potential risks to public health.

[235] The Province submits that the Distributor Defendants supplied Opioid Products in quantities that they knew or should have known exceeded any legitimate market, deepening the crisis of Opioid Products abuse, addiction, and death in Canada. In particular, the Distributor Defendants were aware or should have been aware that:

> (a) sales of Opioid Products in some communities were disproportionate to the population;
>
> (b) sales of Opioid Products in some retail pharmacies were disproportionate to the pharmacy's size and sales volume; and
>
> (c) sales of Opioid Products to some retail pharmacies were so large as to be suspicious for the risk of illicit diversion.

[236] As such, the Province argues that the Distributor Defendants knew or should have known, including from experience in the United States, that the Manufacturer Defendants' deceptive and misleading marketing efforts would lead to a dramatic increase in consumption of Opioid Products in Canada and that by distributing ever-increasing amounts of Opioid Products, the Distributor Defendants were contributing to the creation of the Opioid Products epidemic in Canada.

[237] On November 26, 2012, Health Canada issued a letter to controlled substances licensed dealers regarding controlled-release oxycodone products. The letter imposed a condition on licensed dealers to report any unusual orders involving controlled release formulations of oxycodone products to Health Canada within 72 hours of becoming aware of such orders.

[238] In 2018, the federal Minister of Health issued a letter to Canadian manufacturers and distributors of Opioid Products requesting they immediately cease any and all marketing and advertising of Opioid Products to health care professionals.

[239] On October 23, 2018, Health Canada exercised its authority under the *FDR* to order the Manufacturer Defendants to provide clear information about the safe use of Opioid Products and the risks associated with their use. The new regulations require the Manufacturer Defendants to include a warning sticker and information handout. The warning indicates that Opioid Products can cause dependence, addiction, and overdose. It also states that the use of Opioid Products can result in overdose, addiction, physical dependence, life-threatening breathing problems, worsening rather than improving pain, and withdrawal.

[240] While prescription Opioid Products have become more regulated, they continue to be prescribed for use in-patient treatment and care.

C. The Defendants' Factual Evidence

[241] The defendants have filed affidavit evidence from senior executives declaring that the defendants have never engaged in the various activities relevant to the action. Those affidavits provide evidence about the nature of the Opioid Products developed, manufactured, or distributed by the defendants, the warnings that accompanied those products, the defendants' corporate structures and merger and acquisition histories, the nature of the defendants' dealings with physicians, health authorities, and other defendants in this action, and the time period, geographic area, and manner in which the defendants conducted opioid-related business activities—all of which I find to be within the personal knowledge of the deponents and admissible as evidence on this application.

[242] The defendants also include evidence of the regulatory approval received for their Opioid Products and related business activities—such as approval by Health Canada for product monographs, the inclusion of their products on provincial drug formularies, and approvals by the Pharmaceutical Advertising Advisory Board—some of which is sworn on information and belief.

[243] BMS Canada submitted an affidavit sworn by Serena Filosi, Senior Manager of Regulatory Affairs at BMS Canada, which appends letters from Health Canada, including one which asks BMS Canada to "look closely at your existing or

developmental global pipeline for products that may assist the collective response to the opioid crisis, and to seriously consider pursuing paths to market for these products in Canada." In Affidavit #1 of Katherine Tsokas, submitted by Janssen, Ms. Tsokas deposes that data from analytics provider IQVIA will not be available to the Province because "Janssen has been advised by IQVIA" that it will not be provided for use in litigation, which I note is double hearsay.

[244] I note that the defendants seek a final order dismissing the case against them, for which they may not rely on evidence sworn on information and belief: Rule 22-2(13) of the *Supreme Court Civil Rules*.

[245] Sun Pharmaceutical Industries Ltd., Teva Pharmaceutical Industries Ltd., and Teva Pharmaceuticals USA, Inc. each submitted affidavits deposing that they do not carry on business anywhere in Canada and have never previously submitted to the jurisdiction of any Canadian court, though Sun Pharmaceutical Industries Ltd. indirectly owns the Canadian subsidiary Sun Pharma Canada Inc., and Teva Pharmaceutical Industries Ltd. indirectly owns the Canadian subsidiaries Teva and Teva Canada Innovation G.P.-S.E.N.C.

[246] To the extent that the statements made in Sun Pharmaceutical Industries Ltd., Teva Pharmaceutical Industries Ltd., and Teva Pharmaceuticals USA, Inc.'s affidavits offer legal conclusions or opinions rather than facts within the knowledge of the affiants, I treat these statements as raising merits issues that should be resolved at trial: *Tiboni v. Merck Frosst Canada Ltd*., 2008 CanLII 37911 at paras. 51–53, 295 DLR (4th) 32 (Ont. S.C.J.).

[247] The Province objects to an affidavit from Chris Potter, a senior executive with Shoppers Drug Mart, and formerly for Sanis, as overly broad and outside the affiant's knowledge. Mr. Potter's affidavit attests that Sanis and Shoppers Drug Mart have not engaged in the marketing, promoting, or advertising of Sanis' Opioid Products. If accepted, Mr. Potter's evidence would amount to positive evidence that these defendants have not engaged in the behaviour alleged in the TANCC.

[248] I agree with the defendants that, to the extent that Mr. Potter's affidavit relies on his considerable personal knowledge of Shoppers Drug Mart or Sanis from 2009 forward, it is admissible and is properly before the Court. To the extent Mr. Potter's affidavit relies on hearsay, that evidence is not admissible for its truth.

D. The Expert Evidence of the Parties

[249] The parties filed expert reports from numerous experts. These reports opined on or challenged opinions on the nature of Opioid Products, differences among Opioid Products, the feasibility of isolating effects of wrongful promotion on use, the impact of increased Opioid Product use on the incidence of opioid-related harm, methodology for calculation of alleged wrongs, whether it is possible to assess these issues nationally in light of provincial variation, and jurisdictional issues.

[250] The Province submitted seven expert reports from four different experts: Dr. Robyn Tamblyn, an epidemiologist; Dr. Hakique Virani, an M.D. specializing in public health and addictions medicine; Dr. Aslam Anis, an economist specializing in public health; and Dr. Matthew Perri III, an academic specializing in pharmacy practice including marketing, statistics and health care systems. The defendants tendered 12 expert reports from nine different experts. The Province withdrew its objection to the admissibility of Dr. Hollis' report, and the admissibility of the other defense expert reports was not challenged.

[251] Much of the expert evidence is theoretical; for instance, where it addresses whether there is a theoretical methodology for analyzing a certain issue.

[252] The Province also submitted as evidence five expert reports tendered in the *Opioid MDL* from the following doctors: Anna Lembke, M.D.; Mark A. Schumacher, PhD; David Cutler, PhD; Katherine Keyes, PhD; and Meredith Rosenthal, PhD. I have not relied on these reports for their truth, as there is no indication of the instructions given to these experts, and the defendants had no ability to cross-examine the experts on the reports. However, I note that these reports may point to the existence of the data referred to therein without relying on the truth of the report's contents. Also, some of the information contained in these reports is less

directly relevant to the certification issues in that it relates to the American pharmaceutical industry and the prevalence of opioid addiction without offering an opinion on the comparability to the Canadian market.

[253] The following is a summary by topic of the expert evidence proffered.

1. Evidence of the History and Nature of Opioids

[254] Four expert reports detailed the history of opioids and how they have been prescribed and policed in Canada: the first report of Dr. Hakique Virani (for the Province); the report of Dr. Matthew Perri III (for the Province); the report of Dr. David Chan (for Janssen); and the report of John Sullivan (for Sanis/Shoppers Drug Mart). This evidence is largely uncontroverted.

[255] Dr. Virani is a medical doctor and clinical professor in the faculty of medicine and dentistry at the University of Alberta, a Royal College specialist in Public Health and Preventative Medicine, and a diplomate of the American Board of Addictions Medicine. Dr. Chan is an associate professor of health policy at Stanford University and a staff physician of internal medicine at the Department of Veterans Affairs Health Care System in California.

[256] Drs. Virani and Chan explained that opioids are a group of chemical compounds that interact with opioid receptors. Opiates are naturally occurring opioids, such as morphine, codeine, and heroin, extracted from the opium poppy plant. Modern use of opioids began in the early 1800s with the development of morphine. Heroin was introduced in 1898. Fentanyl was developed in the 1960s. Semi-synthetic and synthetic opioids began to be used for the treatment of pain in the 1970s. These drugs may be “full agonists” (i.e., causing a “full opioid effect”)—such as fentanyl, hydromorphone, oxycodone, methadone, and hydrocodone—or they may be “partial agonists” (i.e., causing a “partial opioid effect”), such as tramadol, pentazocine, and buprenorphine. In the 1990s, the medical community shifted from only using opioids to treat severe acute pain or terminal conditions to also prescribing them to treat both minor acute pain and chronic pain. Prescriptions also increased in potency.

[257] Dr. Perri is a pharmacy doctor and professor at the University of Georgia, College of Pharmacy. Dr. Perri provided testimony and a report in the *Opioid MDL*. Dr. Perri describes some of the marketing techniques that were common to the pharmaceutical industry throughout the Class Period, including the following: personal selling to physicians, which may include providing gifts and free samples of the product; advertising or funding studies in medical journals; peer-to-peer marketing through key opinion leaders; hosting professional development and education events, such as dinners or webinars; influencing clinical practice guidelines; sponsoring education sessions for medical students; influencing formularies; and direct-to-consumer marketing (which, though it is mostly not permitted in Canada, may occur through exposure to American television and magazines).

[258] Dr. Perri also provides context about the regulatory regime impacting Opioid Products. Pharmaceutical companies must comply with the *FDA* and the *CDSA*, which require that advertising not be "false, misleading, deceptive, or likely to create an erroneous impression regarding character, value, quality, composition, merit, or safety." Health Canada recommends having all advertising reviewed by one of two advertising preclearance agencies before use. These bodies adhere to the Pharmaceutical Advertising Advisory Board Code of Advertising Acceptance and the Advertising Standards Canada Canadian Code of Advertising Standards.

[259] Mr. Sullivan served for 33 years in the Drug Enforcement Section of the Ontario Provincial Police as an officer and detective, and later as Bureau Commander of the Organized Crime Enforcement Bureau, and now works for an organization providing professional development and training to law enforcement. Mr. Sullivan explained that, over the past decade, provinces such as British Columbia, Alberta, and Ontario have been more substantially affected by the increasing availability and use of illicit fentanyl and its analogues than, for example, Quebec and the Atlantic provinces. These inter-provincial differences arise due to differences in demand, supply (e.g., opioids are often smuggled into Canada from abroad principally through British Columbia, which is the closest point of entry to

Asia, or domestically manufactured in clandestine laboratories chiefly located in British Columbia, Alberta, and Ontario), and the effectiveness of law enforcement and public policy efforts to combat the illicit drug trade. Further, even decades before the Class Period, the use and trade of illicit opioids have been centered around British Columbia. More recently, the importation of illicit opioids in British Columbia has decreased, but the importing of manufacturing ingredients and equipment has increased. Further, British Columbia has the highest concentration of production activities in the country.

[260] Mr. Sullivan explained that opioids made up 41% of seized drugs tested in British Columbia in 2021. In contrast, fentanyl represented less than 1% of drug seizures tested in Quebec, where cocaine and methamphetamines are a greater problem. While British Columbia's opioid toxicity deaths increased almost threefold from 2016 to 2021 (and Alberta's more than doubled), those in Nova Scotia have declined each year since 2017.

2. Differences across Opioid Products

[261] The reports of Dr. David Chan (for Janssen), Dr. Chris Giorschev (for Teva, Ranbaxy, and Pharmascience), and Dr. Leon Shargel (for BMS Canada) point out the variations across different Opioid Products.

[262] Dr. Chan notes that Opioid Products differ in their indications, contraindications, side effects, and drug interactions, as well as their strength, duration, and other dimensions.

[263] Dr. Giorschev is a licensed Ontario physician and change-of-scope holder in chronic pain management (with a certificate of competence in addiction medicine) from the College of Physicians and Surgeons of Ontario. Dr. Giorschev was asked to give an overview of the material differences between various Opioid Products and to "comment on other matters" he considered to be relevant to his analysis, if appropriate.

[264] Dr. Giorschev stated that Opioid Products include a wide variety of medications with “dramatically” different potencies, side effects (including risk for addiction), types of opioid receptors stimulated, routes of delivery, clinical uses (including some used for the treatment of addiction), and levels of control/restriction. Hence, his view is that different Opioid Products need to be assessed individually in terms of their effects, uses, and potential for abuse.

[265] Dr. Giorschev notes that most opioid abuse and opioid-related deaths are from illicit rather than medical sources (particularly from illicit fentanyl). He states that fentanyl stimulates the “Mu” receptor, which is responsible for analgesia, respiratory depression, euphoria, decreased gastric motility, sedation, and physical dependence. However, he does not offer examples of how other Opioid Products stimulate receptors. He also does not opine on the risk and prevalence of those who become dependent on medical Opioid Products switching to other Opioid Products (and/or to an illicit supply of that Opioid Products product).

[266] Dr. Shargel has a PhD from the George Washington University Medical Centre and has worked as a pharmacist. He is the manager and founder of Applied Biopharmaceuticals LLC. Dr. Shargel noted the differences between conventional (immediate-release) drug products, which release the drug immediately after oral administration, and modified-release drugs, which deliberately change the rate of drug release. With conventional Opioid Products, no deliberate effort is made to modify the drug release rate. By contrast, modified-release Opioid Products allow the dosing frequency to be reduced and stabilize the drug concentration in the blood plasma, minimizing adverse effects.

[267] Dr. Shargel explains that delayed-release and extended-release products are the two most common types of modified-release drugs. Extended-release tablets remain in the GI tract and do not disintegrate, so the active drug may be released gradually.

[268] Dr. Shargel points out that extended-release formulations may be abused—for instance, by crushing up pills so that all the medication is absorbed immediately.

He states that the United States Food and Drug Administration ("US FDA") is encouraging the development of Opioid Products with abuse-deterrent formulations to help combat the Opioid Products crisis.

[269] According to Dr. Shargel, each of BMS Canada's approved Opioid Products are conventional dosage forms, known as immediate release (rather than modified- or extended-release), none of which contained an abuse deterrent. He also notes that the US FDA approved a wider assortment of Percocet medications, at higher dosages, in the United States than have been approved and sold in Canada.

3. The Effects of Wrongful Promotion on the Use of Opioid Products

[270] Two of the Province's experts, Dr. Anis and Dr. Perri, opined on what methodologies could be used to determine the effects of the defendants' alleged wrongful promotional efforts on the sale of Opioid Products. Dr. Anis' first report (the "Anis Report") prompted responsive reports by Dr. Aidan Hollis (for Sanis and Shoppers Drug Mart) and Dr. Stephen Becker (for Mylan). The report of Dr. David Chan (for the Janssen Defendants) also opines on this topic.

[271] Dr. Anis has a PhD in economics from Carlton University and is a Professor at the School of Population and Public Health at the University of British Columbia. In his first report, he was asked to address the following questions:

> 1. Is there a methodology that can be used to determine if the combined effect of the defendant manufacturers' marketing and promotion of prescription Opioids since 1995 was a substantial contributing factor to the increase in opioid use in Canada?
>
> 2. Is there a methodology that can be used to determine whether the increase in the use of prescription Opioids in Canada since 1995 would have occurred "but for" the allegedly unlawful marketing and promotion of Opioids by the defendants?
>
> 3. Is there a methodology that can be used to quantify the increase in prescription Opioid use in Canada resulting from the defendant manufacturers' marketing and promotion efforts since 1995?

> 4. If yes to the first three questions, to what extent is this methodology sensitive to the potential that any one or more of the defendant manufacturers may be found at trial not to have engaged in unlawful marketing and promotion practices?

[272] Dr. Anis concluded that Opioid Products are commonly marketed to intermediaries, such as physicians and drug plan managers, through information pamphlets, free samples, journal advertising, funded research, and key opinion leaders who speak on industry-sponsored expert panels or influence treatment guidelines. This is particularly true in Canada, as universal health care means that patients are usually not sensitive to price. Studies have noted that promotional messages from Opioid Products pharmaceutical companies have contained misinformation by understating the drugs' adverse effects, particularly addiction. Studies have also found that marketing has a more significant effect on physician prescribing of pharmaceutical drugs than scientific information about the drug. The effects of marketing efforts on the use of drugs can extend for several years beyond when the marketing ends.

[273] Well-established economic frameworks can be applied to empirically estimate the impact of the marketing and promotional activities of Opioid Product manufacturers in expanding the sales of their Opioid Products.

[274] The proposed methodology uses time-series data related to the defendants' promotional activities and the volume of Opioid Products dispensed. In addition to the anticipated records kept by the defendants themselves, which will be available on discovery, data on promotional activities includes monthly data from IQVIA about advertising expenditures in journals, as well as the number and length of visits made and samples provided to Canadian doctors, broken down by company and product. At the individual level, data on the volume of Opioid Products dispensed can be found on Pharmanet, operated by British Columbia's provincial drug insurance plan, PharmaCare. This data can be linked to the health care services these individuals utilized through PopData BC. At the community level, IQVIA tracks pharmaceutical sales to each pharmacy and hospital "at a near-census level", which can then be converted to constant dollars using Statistics Canada's Prescribed Medicines Price

Index. This data can be used to conduct a time-series regression analysis to estimate the impact of promotional activities on the sales of particular Opioid Products, as well as on overdose deaths. This in turn can be used to establish hypothetical “but for” scenarios if the alleged excessive and misleading marketing and promotion of Opioid Products had never occurred. This model includes variables to account for government policy changes to curb the use of Opioid Products.

[275] This regression analysis yields an impact factor at each dollar level of promotional spending, which will determine how the promotion and marketing of Opioid Products increased their sales, both directly and indirectly. Damages from the harms associated with opioid use can be evaluated in a similar manner.

[276] I note that Dr. Anis only considered the availability of data for British Columbia.

[277] Dr. Hollis is a professor of economics at the University of Calgary (with a PhD from the University of Toronto) who focuses on pharmaceutical markets. He was asked by Sanis/Shoppers Drug Mart to reply to the Anis Report. Dr. Hollis opines that Dr. Anis’ proposed model for identifying the effect of promotion on Opioid Product sales is not consistent with the studies relied on in the Anis Report (which consider market shares rather than total sales). Dr. Hollis further opines that increased sales as a function of increased promotion does not necessarily mean that the promotional increase caused the increase in sales; an increase in sales could have caused the increase in promotion, or both increases could be caused by an unobserved third variable, such as increased demand (which could very well be the case, as studies show that sales volume, levels of promotion, and the price of a product are often jointly determined).

[278] According to Dr. Hollis, the Anis Report also does not specify the covariates that are to be used in the regression model and omits relevant variables that ought to be used to control for other factors. Further, Dr. Hollis claims that the “stock of promotion” variable, used by Dr. Anis to model the carryover returns to promotional efforts from previous years, cannot be estimated when only one variable is known.

[279] Dr. Hollis criticizes the proposed dummy (i.e., binary indicator) variables, explaining that “guidelines that are biased in favour of opioids” and “key opinion leaders” are not truly binary and are difficult to define. The regression model is also designed to estimate the marginal, rather than overall, effect of promotion on sales.

[280] Another criticism by Dr. Hollis is that the Anis Report offers no methodology to reliably estimate the effect of wrongful promotion versus the impact of promotion generally. According to Dr. Hollis, it is difficult to determine which interactions with doctors included misleading information and how much information was misleading. Further, Dr. Hollis says that the Anis Report is not clear about how it would calculate “normal” promotional levels in order to determine what was “excessive” and how the effect of wrongful promotion could be measured by jurisdiction. Provinces and territories vary in how they regulate the prescription of Opioid Products (e.g., duplicate vs triplicate models), in their population demographics (which affects demand), and in their data availability. Additionally, Dr. Hollis says the Anis Report does not provide any methodology intended to estimate the effect of any alleged “wrongful” promotion by a specific defendant on a specific product’s sales. Different Opioid Products are regulated differently, operate with different levels of competition, face different consumer demands, and are at different stages of their product life cycles (all of which would affect “normal” levels of promotion).

[281] Finally, Dr. Hollis opines that the data listed in the Anis Report would assist in the analysis of prescribing behaviours within, but not across, each province and territory. However, there is other data in the possession of provinces and territories that is relevant to the relationship between wrongful promotion and sales of particular Opioid Products within a particular province or territory that has not been referenced, such as information about the sales of different types of Opioid Products or how compliance with government policies was monitored in each jurisdiction during the relevant period.

[282] Dr. Becker was also asked to respond to the Anis Report. Dr. Becker has a PhD in Public Policy from the University of Texas. He is a founder and director of

Applied Economics Consulting, Inc. He concludes that Dr. Anis' methodology is flawed in that:

> 1) It does not distinguish between lawful and unlawful promotional activity. The model mostly focuses on promotion generally, and any attempts to measure only a certain kind of promotion equate "unlawful" with "excessive" (i.e., above normal levels of) promotion. Further, these efforts do not propose a credible methodology to establish "normal" vs "excessive" levels of promotion.
>
> 2) It uses a critical variable that lacks a reliable basis for estimation ("stock of promotion"). It does not describe any method for determining the variable's "depreciation rate" (i.e., reduction in prior-year cumulative impact each year). It also never indicates whether this variable will be a single measure or whether it will use multiple measures of promotion (though this would be easily clarified).
>
> 3) It cannot support the number of necessary independent variables since it uses annual data and therefore has at most 27 observations, which could reliably support only two to three independent variables.
>
> 4) It does not consider the potential non-liability (or difference in liability) of any of the Defendant Manufacturers in any credible or reliable way (i.e., it does not offer a method of separating the effect of the defendants' individual promotion efforts).
>
> 5) It does not provide a reliable basis for distinguishing effects across Opioid Products and across regions.

[283] Ultimately, Dr. Becker thought that the proposed methodology would not yield a reliable basis for determining on a class-wide basis whether unlawful promotion (vs promotion generally) increased the use of Opioid Products.

[284] In his second report of July 14, 2023, Dr. Anis was asked to reply to the reports of Dr. Becker and Dr. Hollis.

[285] Dr. Anis concluded that the foregoing criticisms of his first report do not change his opinions. Dr. Anis tested out his methodology using Monte Carlo simulations (a class of algorithms that use random sampling), which are provided in an appendix, and claims his methodology to be workable.

[286] In response to Dr. Hollis' claim that the studies he cites calculate the effect of marketing on a company's market share rather than sales, Dr. Anis explains that changing the outcome variable does not make a significant difference, as the data sources and dependent variable definitions remain the same and use the same stock variable for the depreciating returns to promotional activity over time. He claims that his use of a stock variable to compute a promotional depreciation rate is quite standard and applies the widely accepted Non-Linear Least Squares optimization technique. In his view, the 240 data points he can obtain for each variable (i.e., monthly data over 20 years) are sufficient to reliably estimate regressions with 20 covariates, such as his proposed regression. These variables include controls for external factors such as the issuance of new clinical guidelines for pain treatment.

[287] In response to the criticism by both experts that he failed to distinguish between lawful and unlawful advertising efforts, Dr. Anis explains that his model presumes that these efforts were unlawful, as this is an issue that will need to be proven at trial. If the Court determines that a certain defendant's marketing and promotional activities were lawful, data related to that defendant can simply be excluded from the model.

[288] Dr. Anis also addresses concerns by both experts about omitted variable bias (*i.e.*, the possibility that an omitted third variable, to which an included variable is correlated, is actually causing the effect). To address this, Dr. Anis uses the Non-Linear Two Stage Least Squares method, a standard method for assessing causality that complements, rather than takes away from, the proposed regression model.

[289] According to Dr. Anis, his methodology can be easily modified to account for how the effect of advertising may change over the drug's life cycle, if necessary, through using dummy (i.e., binary indicator) variables.

[290] Dr. Anis accounts for the potential of promotion yielding decreasing returns to scale as more and more money is spent by using a logarithmic (a form of non-linear) model.

[291] In response to concerns that dummy (i.e., binary indicator) variables cannot properly account for the fact that key opinion leaders or guidelines promoting the use of Opioid Products might vary in their "aggressiveness" or intensity, Dr. Anis states that ignoring intensity in this context is common practice and will not yield erroneous conclusions.

[292] Further, Dr. Anis submits that this regression can be conducted at the aggregate (national) level, despite differences in certain provincial and territorial conditions, by including fixed effects to account for differences in prescribing behaviours across jurisdictions.

[293] Dr. Anis concludes as follows:

> 7. Despite the critique by Dr. Hollis and Dr. Becker of the proposed methodology presented in my original report, I want to reiterate, as stated in my original expert report, that an economic framework can be applied to empirically estimate the impact of the marketing and promotional activities of opioid manufacturers in expanding the sales of their opioid products and therefore opioid use in Canada.
>
> 8. Furthermore, Dr. Hollis and Dr. Becker base their critique by mis-interpreting the general structural model that I present which is based on the economic framework, as a reduced form model. The structural form provides for a good intuitive explanation of the relationship between variables per the economic framework being employed. However, obtaining the estimates of the model coefficients requires one to make sure that these estimates are not biased because of endogeneity (regressing one endogenous variable on another), omitted variables, or other statistical problems that can affect the precision of the estimates.
>
> [Emphasis added.]

[294] Dr. Hollis was then asked to respond to Dr. Anis' second report. According to Dr. Hollis, he and Dr. Anis agree on the following points:

- The "promotion" variable must be estimated using a number of other variables that will be excluded from the model, which is known as the "instrumental variables" method. However, Dr. Hollis warns that Dr. Anis has excluded important instrumental variables, such as "time".

- The regression model must control for the "many different factors" that change the effectiveness and amount of promotion in generating sales, including the life cycle of the drug, government policy choices, such as prescription drug monitoring programs, the number of competitors, market size, drug class, and scientific evidence about effectiveness. (However, Dr. Hollis points out that Dr. Anis has not explained how all of these variables would be defined and whether there is data available to define them. Dr. Hollis would also incorporate the following factors: the number of different available Opioid Products, the availability of non-Opioid Product alternatives, doctor "detailing" activities by drug category, and advertising in professional publications or medical conferences.)

- Promotion may affect market share rather than just market size. That is, it may not necessarily increase the number of Opioid Products users or the amount of Opioid Products used, which would lead to greater harms; it may instead simply cannibalize existing sales from competitors. (However, I note that Dr. Hollis and Dr. Anis appear to disagree about the implications of this. Dr. Hollis suggests that a methodology for determining whether promotion is market-expanding or market-share expanding is necessary. In my view, while this may be more precise, it does not seem strictly necessary; if the output variable is the total market sales of a particular drug, then the model will capture only the market-expanding effects of promotion.)

- The effectiveness and amount of promotion must be determined on a jurisdiction-by-jurisdiction basis.

[295] Dr. Hollis also claims that Dr. Anis has conceded that the effectiveness and amount of promotion must be determined on a drug-by-drug basis since he acknowledged that the drug's life cycle will impact the effects of promotion. However, in my view, this is not an accurate characterization of Dr. Anis' report, which indicates that the model can control for the stage of a drug's life cycle (perhaps by using a series of indicator variables to indicate which stage of the life cycle the drug is in). I do agree with Dr. Hollis that Dr. Anis has not completely explained how the life cycle of each drug will be identified/defined.

[296] Dr. Hollis continues to assert, contrary to Dr. Anis' reports, that:

- The proposed regression model is incompletely described, as it cannot plausibly estimate "wrongful" promotion (vs all promotion, including "lawful" promotion). The second regression that Dr. Anis proposes to determine "excessive" promotion is problematic for a number of reasons, including that it does not include promotion or Opioid Product sales as variables.

(and further, that there is no indication that "excessive" promotion would amount to legally "wrongful" promotion).

- In previous studies, the proposed regression model was used to determine market share (as a percentage), rather than total market sales (in dollars). This approach cannot be as easily applied to calculate total market sales as Dr. Anis suggests.

- Dr. Anis' Monte Carlo simulations should not be relied on, since:

    - they test the regression proposed in the first report, which Dr. Anis later concedes must be amended; and

    - the randomly generated data used in the simulation does not resemble real-world data, which does not normally fall along a standard normal distribution with no correlation across time.

[297] Dr. Hollis appears to be opining on the feasibility of quantifying the exact harms caused by "wrongful" promotion, whereas Dr. Anis was asked whether it is possible to demonstrate that this "wrongful" promotion was a "but for" cause of opioid-related harms. I agree with Dr. Hollis that quantifying damage in this regard may be a challenge and will be dependent upon what if any promotional activity is later found by the Court to be "wrongful."

[298] Despite his criticisms, Dr. Hollis seems to accept that Dr. Anis' model is generally workable on a jurisdiction-by-jurisdiction basis. In explaining why the end result will not be optimally precise, I find his criticisms have the tenor of over-particularity. Dr. Hollis' response is overly critical on a legal level, as the model for present purposes must yield a reasonable—not an exact—estimate of the loss. What is "reasonable" must be informed by the circumstances, including the complexity and multiplicity of factors at play, with the proviso that the weight of any results will be subject to argument over accuracy and the interplay of other causal factors.

[299] While Dr. Hollis points out the challenges in applying Dr. Anis' model to each province and territory using the exact same available data and variables so as to allow an "apples to apples" comparison of effects in the various provinces and territories, such challenges do not pose a significant hurdle for certification. As long

as a reasonable calculation of the harm can be arrived at on the best evidence available for each province and territory, inter-provincial and -territorial differences in calculating harm can be discounted. I find that there is sufficient commonality when it comes to the proposed modelling and statistical methods employed, as well as many of the variables and some of the data (as it relates to national events and conduct).

[300] While I agree with Dr. Becker that the failure to distinguish between “lawful” and “unlawful” promotional efforts may be important, it is challenging to develop a model (or to know whether it is possible to develop a model) determining the effects of “wrongful” promotion when the question of which promotional efforts were “unlawful” is a live legal issue that must first be addressed. It may be that measuring and quantifying “unlawful” vs “lawful” promotional efforts is not possible, but I find that some satisfactory rough estimate can be employed notwithstanding challenges inherent in accounting for “unlawful” promotional efforts.

[301] I have also considered Dr. Chan's report. The Janssen Defendants asked Dr. Chan to explain the factors that impact how medications are prescribed, whether an adverse event may result from an Opioid Product prescription, whether these factors vary by province, and, if so, whether a national assessment of these issues is possible. Dr. Chan explains that the decision to prescribe a particular drug involves many factors and is highly individualized. There are macro factors (such as clinical guidelines, formulary restrictions, controlled substance monitoring programs, and regulatory and reporting requirements), physician-specific factors (such as past experiences, medical training, mental lists and defaults, and marketing to physicians) and patient-specific factors (such as a patient’s needs, goals, and preferences, and dynamic treatment processes) that affect these decisions.

[302] According to Dr. Chan, the factors impacting both prescribing decisions and the potential for adverse events arising from Opioid Products may vary significantly across Canadian provinces and territories, as each province and territory has its own drug insurance plan/formulary, prescription drug monitoring program, and prescribing guidelines. Provinces and territories also differ in the availability of opioid

alternatives, opioid use disorder treatments, and drugs like Naloxone, as well as in their population characteristics and workplace injury rates. He notes that the types of Opioid Products utilized in each province and territory also varied considerably: hydrocodone was utilized almost exclusively in Ontario between 2005 and 2020, Nova Scotia and Saskatchewan utilized a relatively high share of hydromorphone compared to other provinces, and Ontario and Alberta utilized a relatively high share of oxycodone.

[303] Dr. Chan does not explain why he concludes that these differences across provinces would prevent national assessment; he does not discuss any statistical methods (i.e., that might be used to control for these factors) in detail; nor does he address the methods proposed by the Province.

4. The Impact of Opioid Products Use on Opioid-Related Harm

[304] The Province submitted expert reports opining that Opioid Product use or exposure can cause or contribute to Opioid Product-related harms and that a number of methodological approaches can be used to quantify this relationship. The defendants submitted responding reports, which primarily focussed on whether these issues can be assessed across provinces and territories (i.e., on a common basis), in light of interprovincial and interterritorial variation.

[305] The Province's expert, Dr. Virani, opined on whether it was possible to answer the following two proposed common issues on a common basis:

> (a) can the use of or exposure to Opioid Products cause or contribute to disease, injury, or illness? and
>
> (b) if so, what are the diseases, injuries, or illnesses that can be caused or contributed to by such use or exposure?

[306] Dr. Virani concluded that it was possible to answer both of the proposed common issues on a common basis without having to conduct inquiries at an individual product or user level.

[307] In response to question (a), Dr. Virani concluded that Opioid Products can cause or contribute to disease, injuries, or illnesses. Opioid Products are known to cause the following side effects: non-life threatening effects such as dry mouth, excessive sweating, itchiness, sedation, weakness, constipation, nausea, and vomiting; the depression of the central respiratory drive (leading to hospitalization or death); the exacerbation of sleep-disordered breathing (increasing the risk of adverse cardiovascular events); hormonal dysregulation, which contributes to an increased risk of fractures; gastrointestinal issues; suppression of the immune system; unintentional poisoning (overdose); and disordered use (addiction). The risk of addiction is estimated to be 5.5%. Dr. Virani stated that these risks are disproportionate to the benefits, as data suggests that Opioid Products may result in little or no difference in pain when compared to non-opioid medications.

[308] In response to question (b), Dr. Virani concluded that it is possible to assess on a common basis what harms have resulted from chronic opioid exposure without needing to analyze this at an individual level. Large data sets, such as those kept by some medical regulatory bodies or drug benefits plan administrators, can be used to determine the rate at which Opioid Products are dispensed in a population as well as in particular subgroups. This can be compared to diagnostic codes from data on the use of health services to estimate the incidence and prevalence of opioid-related diseases, illnesses, and injuries.

[309] The Province also submitted a report from Dr. Robin Tamblyn. Dr. Tamblyn holds a PhD in Epidemiology from McMaster University and is a professor of medicine, epidemiology, and biostatistics at McGill University. In her report, Dr. Tamblyn opines that a number of methodological approaches could be used to evaluate the relationship between increased Opioid Product use and the prevalence of opioid-related harms or illness on a population-wide basis. These methodologies can be applied in the same manner to each Canadian jurisdiction:

> 1. The first step is to estimate the risk of potential harm from Opioid Products use within the jurisdiction. This could be done through one of two types of observational studies: a cohort study, in which persons are included

> based on whether they are users or non-users of Opioid Products and then followed to measure their subsequent health-related outcomes, or a case control study, in which persons are included based on whether they have had certain health-related outcomes and then their prior exposure to potential causes of the outcome is investigated. The advantages of both approaches can be combined by using nested case-control studies within a defined cohort, or a case cohort study.
>
> 2. The second step is to measure the population attributable risk in that particular jurisdiction, which estimates the proportion of adverse health events that are attributable to Opioid Products use by combining the risk of these adverse outcomes with the prevalence of Opioid Products use in the population. This can also be done using observational cohort studies.

[310] Dr. Tamblyn explains that Canada is uniquely positioned to execute such methodologies, as each province and territory tracks individual demographic information, prescriptions, medical services, hospitalizations, and births and deaths in health care databases. This data has already been used to describe the risks associated with Opioid Product use and other medications. However, Dr. Tamblyn notes that the richness of the data available differs across jurisdictions; for example, British Columbia and Alberta track this data across the entire population, whereas Ontario only has data available for certain subgroups of the population, such as those who are 65 and older, welfare recipients, children with no private insurance, and those with high drug costs.

[311] The defendants submitted two expert reports responding to the opinion of Dr. Tamblyn: the report of Dr. Laurentius Marais (for the Janssen Defendants) and the report of Dr. Joseph Doyle (for Sanis and the Shoppers Drug Mart Defendants). Also relevant to the question of national assessment are the reports of John Sullivan (for Sanis and Shoppers Drug Mart) and Dr. David Chan (for the Janssen Defendants).

[312] Dr. Laurentius Marais has a PhD in business administration and mathematics from Stanford. He is a principal consultant at William E. Wecker Associates, where he is a biostatician. Dr. Marais was asked to explain the methodology proposed by Dr. Tamblyn and provide an opinion as to whether implementing this methodology would require province-by-province analysis.

[313] Dr. Marais agrees that data is available for the "population-attributable risk" calculations proposed by Dr. Tamblyn. However, in his view, the differences in the manner in which this data is collected and maintained across provinces require that these calculations be performed separately at the level of the individual provinces.

[314] In her second report, Dr. Tamblyn agrees with Dr. Marais that provincial calculations would also need to be calculated and summed to provide a national total.

[315] Dr. Joseph Doyle has been an economics professor at Massachusetts Institute of Technology since 2002. He holds a PhD in economics from the University of Chicago, with a specialty in public economics (health and child welfare). Dr. Doyle was asked to opine on:

a) whether Dr. Tamblyn's proposed methodology could reliably estimate a causal relationship between the increased use of a type of Opioid Products and the incidence of Opioid Products-related harms;

b) whether her report adequately addresses the differences in data availability and sufficiency across provinces; and

c) whether the methodology used would need to vary by jurisdiction based on data availability or other unique circumstances in the various provinces.

[316] Dr. Doyle concludes as follows:

a) If Dr. Tamblyn is suggesting a "Canada-wide" study estimating a single association between increased Opioid Products use and Opioid Products-related harm, this would not be feasible because it would compare dissimilar, unrepresentative data from across the various Canadian jurisdictions. Further, Dr. Tamblyn's model does not allow for the determination of the share of Opioid Products use that is associated with the alleged misconduct of a particular defendant or set of defendants. The report provides very little information about the proposed methodology, such as the outcomes of interest, main explanatory variables, data sources, and time periods. For example, it does not explain whether illicit Opioid Products use will be included, or whether its use will be measured as total consumption, or some other measurement. The proposed methodologies are also prone to

confounding variables that make it difficult to infer causation; while controlling for other factors helps to reduce this risk, we may not know, or be able to readily define or measure, all of the confounding variables. The model ought to control for factors such as mental health and differences in provincial Opioid Products-dependency treatment programs. These confounding factors will "vary widely across regions and over time".

The framework also does not focus on increased Opioid Products use resulting from the alleged misconduct of the defendants. If we are aiming to hold particular defendants responsible, then Opioid Products-related harms ought also to be calculated by drug, as these drugs will have different marginal impacts on Opioid Products-related harms.

b) While a Canada-wide study is not possible, province-specific data limitations could potentially be managed, and conclusions adjusted, when separate studies are conducted for each province and territory using different methodological frameworks to account for the unique data limitations.

c) Rather than applying the proposed methodology to each province and territory separately, it would be preferable to construct a suitable methodology for each province/territory based on the nature and level of data available.

[317] Dr. Doyle opines that, given the differences in data collection across the various provincial and territorial health authorities, the proper approach would be to choose different methodologies for each province and territory based on what data is available. Dr. Tamblyn disagrees, stating in her second report that the modern approach to pharmaceutical risk estimation is to conduct a common protocol-based study across multiple jurisdictions, which better facilitates cross-jurisdictional comparisons. This common protocol would establish the study's time frame, design, study population, and measures of drug exposure, outcomes, effect modifiers and confounders.

[318] Dr. Tamblyn notes that there are more commonalities than differences between provincial and territorial data sources:

- first, nationally standardized data is collected on all hospitalizations in each province and is, with the exception of Quebec, reported and available through the Canadian Institute of Health Information;

- second, all births and deaths are recorded in vital statistic registers provincially and are available through the Statistics Canada Canadian Research Data Centre Network;

- third, all essential medical care provided to Canadian residents is documented by provincial health insurance agencies, including information about the recipient and the services they received, which is in the process of being compiled and harmonized on the Canadian Health Data Research Network; and

- fourth, all inpatient prescription medications are covered under the *Canada Health Act*, R.S.C. 1985, c. C-6, and would be documented in hospital drug information systems. Further, all outpatient prescription medications would be, at a minimum, documented in the databases kept by community pharmacies. In provinces that provide public drug insurance, this information would also be available in provincial databases; in all but Ontario, it would also be available on provincial "pharmanets" developed by Canada Health Infoway that compile records of dispensed prescriptions for each resident.

[319] Like Dr. Hollis, Dr. Doyle appears to accept that a province-by-province assessment using the proposed methodology (with a few modifications) is feasible. His use of the phrase "tailoring the methodology" suggests that the methodology needs to be adjusted rather than reinvented when applied to each province and territory.

[320] Similar to Dr. Hollis' report, Dr. Doyle's report appears to opine on a scientific rather than legal standard of proof. For the most part, Dr. Doyle does not explain why the additional confounding variables (variables that influence both dependent and independent variables) he raises could not simply be controlled for in the model; in other words, he does not suggest that there is no data that could be used to measure these factors.

[321] Dr. Doyle points out that the framework does not focus on increased opioid use resulting from the alleged misconduct of any individual or group of defendants. However, it appears feasible that models proposed by other experts could be used in conjunction to determine how much of the rise in opioid use is attributable to the wrongful conduct of the defendants.

[322] Mr. John Sullivan was asked by Shoppers Drug Mart to opine on what types of information and data are collected by, or made available to, law enforcement agencies pertaining to trade in and use of illicit drugs and how law enforcement agencies compile and analyze this information. According to Mr. Sullivan, data kept by the provincial and federal governments during the Class Period includes:

- opioid seizure data for each province sourced from all law enforcement agencies operating in the province, broken down by type and source of opioids;
- Health Canada's Drug Analysis Service analysis reports on illicit opioid seizures submitted by law enforcement agencies for analysis;
- information and data relating to the dismantling of clandestine illicit opioid-producing labs, including production capacity and the manufactured Opioid Products seized at crime scenes;
- death data, broken down by the type(s) of Opioid Product and whether it was from a pharmaceutical or non-pharmaceutical source (a "non-pharmaceutical" source is defined as when there is "no evidence of a patch, vial, or other pharmaceutical formulation at the scene, or no/unknown evidence of a prescription"); and
- surveys of drug users and intercepted drug-related communications and intelligence gathering.

[323] Mr. Sullivan noted that this data is collected in a fragmented manner, and there is a "lack of cohesiveness across datasets."

5. Legal Principles Relevant to the Admission of Expert Evidence

[324] In *O'Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371, Chief Justice Hinkson summarized the principles relevant to the admission of expert evidence on an application for certification as follows:

> [73] In *Mostertman v. Abbotsford (City)*, 2022 BCSC 1769 [*Mostertman*], Justice Dley wrote that to be admissible in a certification application, the expert opinion must still meet the test from *R. v. Mohan*, [1994] 2 S.C.R. 9, 1994 CanLII 80, and set out the "essential components of qualifications, education, experience, information and assumptions on which the opinion is based, the instructions given, and the research": *Mostertman* at paras. 19, 21.

> [74] I accept that expert opinion evidence on an application for certification must, therefore, satisfy a two-step inquiry to be admissible. First, the opinion must be: 1) relevant; 2) necessary in assisting the trier of fact; 3) not subject to an exclusionary rule; and 4) from a properly qualified expert. Second, the Court may use its residual discretion to exclude the evidence if its prejudicial effect outweighs its probative value: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 19.
>
> [75] An expert affiant must attest or testify that they recognize and accept their duty to assist the Court and be impartial, independent, and unbiased: *White Burgess* at paras. 32, 48.

6. Admissibility of the Province's Expert Reports

[325] To the extent that the defendants' submissions challenge the admissibility of the Province's expert reports on the basis that they do not satisfy the criteria enumerated in *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23, I find such objections to be wholly without merit.

[326] I find that the proffered expert evidence is logically relevant, necessary to assist the trier of fact, not subject to any exclusionary rule and that all the experts are all properly qualified and offer opinions within their expertise. Additionally, I find that the benefits of admitting the experts' evidence outweigh their potential risks, considering factors such as legal relevance, necessity, reliability and absence of bias.

E. Expert Evidence on Jurisdictional Issues

1. Mr. Patrice Deslauriers

[327] Pro Doc and Jean Coutu submitted three expert reports from Mr. Patrice Deslauriers, a Quebec lawyer and law professor at the University of Montreal. He was asked to opine on how the laws of Quebec may differ from those of the common law provinces, and specifically British Columbia, with respect to the causes of action advanced against Pro Doc and Jean Coutu.

[328] In his first report (the "Deslauriers Report #1"), Mr. Deslauriers offered the following opinions:

1. Applying Quebec's choice of laws rules, Mr. Deslauriers finds that Quebec law would apply to the claims raised on behalf of the Province of Quebec and its agencies against Pro Doc/Jean Coutu.

2. Under Quebec law, Quebec's *Consumer Protection Act*, C.Q.L.R., c. P-40.1, does not apply to the sale of prescription medications. Instead, three bases of action are available: art. 1468 of the *Civil Code of Quebec*, C.Q.L.R., c. C.C.Q-1991[CCQ] provides an action against a manufacturer, distributor, or supplier for an injury caused by a safety defect to movable property; art. 1457 CCQ holds a person liable for any injury they cause to another by their fault; and art.1726 CCQ provides recourse for latent defects to a party who contracts with the seller (such as a manufacturer, distributor, or supplier) of property.

Article 1457 CCQ requires proof of fault (by breach of a legislative provision or the conduct expected of a reasonable person in society), injury, and a causal link between the two. Causation may be established on a balance of probabilities based on common sense inferences. Rather than the "but for" test, which ultimately evaluates whether the conduct may have caused the damage, Quebec civil law considers whether the damage is the "logical, direct and immediate consequence of the fault" (i.e., actually caused by the defendant's fault). The causal link can be broken where the victim's fault is of equal or greater severity than that of the defendant, which the defendants allege applies in this case.

The applicable limitation period is three years (art. 2925 CCQ), except where there is an impossibility to act (art. 2884 CCQ). Article 1468 CCQ imposes obligations on a manufacturer (including of medications) to: (1) ensure the quality and safety of the marketed product; and (2) inform all potential users of the product's dangers. To establish a duty to inform, the party owing the duty must have knowledge of the information, the information must be of decisive importance, and it must be impossible for the party to whom the duty is owed to inform itself (or, they must legitimately rely on the owing party). Quebec law has a similar doctrine to the "learned intermediary" doctrine (see *Brousseau c. Laboratoires Abbott limitée*, 2019 QCCA 801).

3. There is no comparable legislation in Quebec that gives the Province of Quebec a direct cause of action against a manufacturer or wholesaler. However, the Province of Quebec could recover these health care costs through subrogation of the patients' rights (under art. 1651 CCQ) by operation of law (art. 1656 CCQ), given that the Province of Quebec assumed these costs. This subrogation is specifically granted in the *Health Insurance Act*, C.Q.L.R. c. A-29, s. 18, the *Hospital Insurance Act*, C.Q.L.R. c. A-28, s. 10(1); and the *Act Respecting Health and Social Services*, C.Q.L.R. c. S-4.2, s. 78. Third persons who assume health care costs can also recover them by

instituting a direct action under art. 1457 CCQ (as they are considered "another" within the meaning of that article), or under art. 1468 CCQ.

4. Sections 36 and 52 of the *Competition Act* are often invoked in conjunction with art. 1457 CCQ, and are less important/relevant given the existence of that article. Sections 8.1 and 8.2 of the *Interpretation Act*, R.S.C. 1985, c. I-21, acknowledge that the recognition of bijuralism and complementarity can lead to different results in applying federal legislation, and commonly "the civil law serves as a supplementary source of law to federal legislation." Thus, conditions such as damage and the causal link invoked in the *Competition Act* ought to be governed by Quebec law, while the concept of fault is governed by the *Competition Act*, since it is specifically addressed in that legislation.

5. Although the results are often similar in practice, the civil law concept of *enrichissement sans cause*, codified in arts. 1493-1494 CCQ, is conceptually different from the common law unjust enrichment test as it requires: (1) an enrichment, (2) an impoverishment, (3) a correlation between the two, (4) the absence of justification, (5) the absence of evasion of the law, and (6) the absence of any other remedy.

6. There is no cause of action similar to the claim for fraud/deceit alleged in the pleadings, as Quebec has not adopted the common law classification of torts. Instead, a claim based on deceit/fraud would be governed by art. 1457 CCQ, the general article for extracontractual liability.

7. As the common law classification of torts is not adopted in Quebec law, the tort of common design or concerted action would be governed by art. 1457 CCQ. There is case law recognizing that the "joint participation in a wrongful act" can constitute a fault under this article, and under art. 1480 CCQ, where a common intent is established. (This cause of action is comparable to the "concerted action" concept in common law: see *Montréal (Ville) v. Lonardi*, 2018 SCC 29 at paras. 65-66).

8. Other Quebec-specific laws or regulations that apply to the manufacture and distribution of pharmaceuticals, including Opioid Products, which may be relevant include the following: *Public Health Act*, C.Q.L.R. c. S-2.2; *Act respecting prescription drug insurance*, C.Q.L.R. c. A-29.01; *Pharmacy Act*, C.Q.L.R. c. P-10; *Code of ethics of pharmacists*, C.Q.L.R. c. P-10, r. 7; and *Regulation respecting the conditions governing the accreditation of manufacturers and wholesalers of medications*, C.Q.L.R. c. A-29.01, r. 2.

[329] I note that Mr. Deslaurier's first report was written before Quebec's equivalent *ORA* legislation, the *Quebec ORA*, passed on November 2, 2023.

[330] In his second report, also written prior to the coming into force of the *Quebec ORA*, Mr. Deslauriers provides various opinions on the proposed common issues in this case ("Deslauriers Report #2"). The passing of the *Quebec ORA* has overtaken the opinions of Mr. Deslauriers in his first two reports and in particular his opinion that there is no comparable legislation in Quebec that provides for a direct cause of action.

[331] In his third opinion, Mr. Deslauriers addresses the impact of the *Quebec ORA* ("Deslauriers Report #3"). Specifically, this report considers whether that Act is a complete code or whether it will require reference to other sources of law for its interpretation and application and, if so, what sources should be considered.

[332] Mr. Deslauriers concludes as follows in his third report with respect to the four civil law concepts referred to in the *Quebec ORA*:

a. Fault: the provision set out at Art. 19(1), imposing liability where the defendant fails to abide by the rules of conduct to which they are bound in the circumstances and according to usage or law, bears a "striking resemblance" to 1457 CCQ. Rather than providing a complete rule on the matter, the act is silent and insufficient on some essential elements of fault, such as the impact of a statutory breach. Resort must therefore be taken to 1457 CCQ in interpreting this provision.

b. Causation: the phrases "cause" and "lien de causalite" used throughout the *Quebec ORA* must be read in conjunction with the CCQ, which refers to similar concepts in arts. 1457 and 1607. Secondly, two terms ("occasionne" and "contribuer/e a causer") are used, but are both translated in English to "contribute"/"contributed." Courts must consider whether there is any difference between these two French concepts, per the rules of statutory interpretation. The word "occasionne" is found in some articles of the CCQ, and is translated in English in different ways, including the term "caused". Additionally, the *Quebec ORA* does not provide a complete rule on causation; it is silent and insufficient on some essential elements, such as the learned intermediary doctrine, force majeure, and the "state of knowledge" defence. These must be assimilated into the statute.

c. Solidarity: section 22 of the *Quebec ORA* indicates that defendants who are parties to an action brought on a collective basis are "solidarily" (jointly) liable for the health care costs set by the court. Section 23(2) indicates that a failure to abide by the rules of conduct is deemed to be a common failure committed by two or more manufacturers if: (1) at least one manufacturer is held to have

failed in its duty to abide by the rules of conduct; and (2) they would be held under a law or a rule of law to have conspired, acted in concert, or acted as each other's representatives with respect to the failure, ***or to be solidarily***, even vicariously, liable for the injury caused. (See also section 35 on retroactive effect). The *Quebec ORA* does not provide for a complete regime on solidarity, and merely references the concept (since, for example, it is silent on the doctrine of joint participation in a wrongful act dealt with in art. 1480 CCQ).

d. Shared liability: the *Quebec ORA* provides (at s. 21) for shared liability in the case of an action brought on a collective basis between defendants "in proportion to their market share" when applying the presumptions in s. 20. Section 25 states that, in apportioning liability, the court may consider any factor it considers relevant, including a defendant's market share. The *Quebec ORA* does not provide for a complete regime of contributory fault, and rather merely references the concept, since it is silent on the doctrine of *novus actus interveniens*.

[333] The Province agreed that there is no question that the common law and civil law are distinct legal systems. The Province did however take issue with the concept that discrete issues of Quebec law will need to be proven as facts in the British Columbia court.

[334] As Pro Doc and Jean Coutu filed Mr. Deslauriers' third report late, I gave the Province leave to file a responsive report. The Province filed a report by Catherine Perrault (the "Perrault Report").

2. Caroline Perrault

[335] Caroline Perrault has been practicing law in Quebec since 1997 and has extensive experience in product liability class actions involving pharmaceutical products and medical devices. I find that she is a properly qualified expert in the area of class proceedings and civil law.

[336] With some modifications, Ms. Perrault generally agrees with the theory mentioned in Deslauriers Report #1 and Deslauriers Report #2 as applicable at the time his affidavits were drafted. However, she is of the opinion that Deslauriers Report #3 is incomplete. She opines that Delauriers Report #3 is theoretical and

limited to the analysis that could be made of any other Quebec statute with no counterpart elsewhere in Canada.

[337] Ms. Perrault opines that the *Quebec ORA* should be interpreted by reference to the *CCQ* and the case law applicable to it but says that there are other sources relevant to its interpretation and application, such as the fundamental goals of class proceedings. Ms. Perrault wrote that she disagreed that the *CCQ*, the *Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12, and the *Charter of the French Language*, C.L.Q.R. c. C-11 were the sole source of interpretation for the *Quebec ORA.* She thought that Mr. Deslauriers disregarded the highly specific context of the *Quebec ORA* and the intent of the legislature.

[338] Ms. Perrault opined that it is useful in interpreting the *Quebec ORA* to be aware of the case law relating to the Quebec equivalent of the *TRA* and similar legislation elsewhere in Canada. Importantly, Ms. Perrault pointed out that there are many overlapping areas in civil and common law that can be decided commonly and that any specific civil law issues could be decided individually. She offered examples with respect to fault (standard of care), fault (and punitive damages), securities (reliance), manufacturers' liability (continuous duty to inform), and apportionment of liability.

[339] With respect to common design, Ms. Perrault pointed to the Supreme Court of Canada's comment in *Montreal v. Lonardi,* 2018 SCC 29 at para. 65 that "the concept of joint participation in a wrongful act under art. 1480 *CCQ* is comparable to the 'concerted action' concept of the common law."

[340] Based in part on the Perrault Report, the Province submitted that the Quebec Defendants overstate the extent to which the Quebec government's claim differs from that of the common law jurisdiction governments. The Province maintains that while any application of civil law is necessarily an individual issue that applies only to Quebec, there is a core of factual and legal issues that will apply equally to Quebec. Further, the Province argues that minor differences that may arise in interpreting the *Quebec ORA* may be properly addressed in a national class proceeding.

3. Admissibility of the Province's Responsive Report

[341] The Quebec Defendants objected to the admissibility of the Perrault Report on the following bases: (1) Ms. Perrault is in an irreparable conflict of interest; (2) her report opines on the ultimate issue; and (3) the Province's failure to deliver a responding expert on time exemplifies why the class action is not preferable.

[342] These submissions are without merit. In particular, I reject the suggestion that because Ms. Perrault is employed at a certain law firm, or has acted as counsel on certain cases in the past, her independence is compromised. Ms. Perrault attested that she was aware of her duty as an expert to assist the court and not act as an advocate. It is apparent that she has acted as an expert for both plaintiffs and defendants. She does not act against any of the defendants in this action, though her firm has acted as counsel in relation to litigation against Purdue Pharma, which is no longer a party.

[343] I also reject the other bases for opposing the receipt of Ms. Perrault's evidence. She does not opine on the ultimate issue of whether the action should be certified. Her report was not submitted outside of the allowable time period because an extension was granted for its receipt due to the late-filed Deslauriers Report #3. The Perrault Report only became necessary because the Deslauriers Report #3 was admitted on the basis that the Province would be afforded a reasonable opportunity to respond. I also find that the Perrault Report does not go beyond its proper scope, nor does it amount to the Province splitting its case.

[344] I admit the Perrault Report into evidence.

[345] I reject the request of the Quebec Defendants to obtain a further (fourth) report from Mr. Deslauriers.

X. JURISDICTION

A. General

[346] The jurisdiction applications comprise the following:

1) An application by LPG dated March 9, 2023 for an order to dismiss or stay the plaintiff's action as against LPG on the basis of subject matter competence and *forum non conveniens* (i.e., that this action is more appropriately and conveniently heard in another court).

2) An application by Pro Doc dated August 31, 2023 for an order to stay the plaintiff's action as against Pro Doc on the basis of *forum non conveniens*.

3) An application by Jean Coutu dated September 5, 2023 for an order to dismiss or stay the action against Jean Coutu on the basis of *forum non conveniens*.

[347] In a decision released April 25, 2023, I held that the Province's pleadings and the limited evidentiary record supported the elements necessary to ground a finding of territorial competence and that the Applicants had not rebutted that finding. I found that there was a real and substantial connection between the facts on which the action is based and the jurisdiction of British Columbia: *British Columbia v. Pro Doc Limitee*, 2023 BCSC 662 (the "*Jurisdiction Decision*"). An appeal of that decision is pending before the Court of Appeal.

B. Evidence – Legal Framework

[348] Rule 14(6) of the *Supreme Court Civil Rules* provides as follows:

> (6) A party who has been served with an originating process in a proceeding, whether served with the originating process in that proceeding in or outside of British Columbia, may, after entering an appearance,
>
> (a) apply to strike out a pleading or to dismiss or stay the proceeding on the ground that the originating process or other pleading does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,
>
> (b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding, or
>
> (c) allege in a pleading that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.

[349] A party is entitled to rely on affidavit evidence in the context of Rule 14(6) in order to supply jurisdictional facts that are omitted from the pleadings. This does not permit the plaintiff to redefine its claim or to expand the claim beyond its pleadings: *Conor Pacific Group Inc. v. Canada (Attorney General)*, 2011 BCCA 403 at para. 31 [*Conor Pacific*].

[350] As LPG and the other defendants objecting to jurisdiction in this case (the "Jurisdiction Applicants") seek a final order dismissing the case against them on jurisdictional grounds, they may not rely on affidavit evidence containing statements on information and belief pursuant to Rule 22-2(12) and (13): *Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C*., 1997 CanLII 4091 (BCCA) at para. 49, 87 B.C.A.C. 97; *Elite Mortgage Corp. v. Dereewnko,* 2019 BCCA 125 at para. 28.

C. The Parties' Evidence

[351] The Jurisdiction Applicants rely on affidavit evidence in support of their applications.

[352] Jean Coutu relies on Affidavits #1 and #3 of Mr. Jean-Michel Coutu, the Senior Vice-President and Chief Network Officer of Jean Coutu, both submitted in support of its response to certification. Jean Coutu is one of the Manufacturer Defendants and Distributor Defendants. It is incorporated in Quebec and has its head office in Montreal. It is a regional franchisor for a franchise network of retail stores that sell pharmaceutical products and other goods. It does not have offices, inventory, employees or commercial relationships in British Columbia, and it does not supply its Opioid Products directly to British Columbia. Most of its records are in French only.

[353] Pro Doc relies on Affidavit #1 of Mr. Patrice Deslauriers, which is outlined above. As noted, the Province objects to some of this evidence and argues that its significance should be limited. Mr. Deslauriers' first and second reports were completed before the enactment of the *Quebec ORA*, which is the subject of his third affidavit.

[354] Pro Doc is a subsidiary of Jean Coutu that is alleged to have marketed, manufactured, and sold in Canada generic Opioid Products containing active ingredients such as fentanyl, oxycodone hydrochloride, and tramadol hydrochloride. Pro Doc points out that it sells private label generic drugs that are manufactured by third-party manufacturers. Pro Doc is the distributor of products sold at the stores of the pharmacist franchisees of Jean Coutu. Its business operations are solely in Quebec, where its witnesses and documents are also domiciled.

[355] LPG's evidence indicates that it is one of the Distributor Defendants. It sells Opioid Products to pharmacies, hospitals, facilities, and care centres for patient use. LPG is incorporated in Ontario, has its head office there, and denies it has anything more than minimal commercial interests outside Ontario. It has sold Opioid Products in Canada since 2009, with a small proportion of its sales alleged to be in British Columbia. LPG's combined sales in British Columbia, Alberta, Saskatchewan, Manitoba and Prince Edward Island are less than $10,000. Its affidavit evidence also establishes that it has never had a place of business in British Columbia or been registered outside of Ontario, its records and documentation, as well as all of its employees, are in Ontario, and that it does not own property outside of Ontario.

[356] In support of its response to the Jurisdiction Applicants' *forum non conveniens* argument, the Province relies upon the TANCC, the proposed common issues on its application for certification, and its evidence tendered on certification.

D. Jurisdiction – General Principles

[357] A jurisdiction challenge involves one or more of three questions: (i) subject matter competence; (ii) territorial competence; and (iii) *forum non conveniens*. The first two questions concern the existence of the Court's jurisdiction. The third question relates to whether the court ought to exercise its jurisdiction: *Douez v. Facebook,* 2022 BCSC 914 at para. 19 [*Douez 2022*]; aff'd *Facebook, Inc. v. Douez,* 2023 BCCA 40. Numerous passages from *Douez 2022* were recently cited with approval in *Campbell v. Capital One Financial Corporation*, 2024 BCCA 253.

[358] The distinction between subject matter competence and territorial competence is codified in the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*]. Section 1 defines these terms as follows:

> "subject matter competence" means the aspects of a court's jurisdiction that depend on factors other than those pertaining to the court's territorial competence;
>
> "territorial competence" means the aspects of a court's jurisdiction that depend on a connection between
>
> a) the territory or legal system of the state in which the court is established, and
> b) a party to a proceeding in the court or the facts on which the proceeding is based.

[359] In *Conor Pacific*, the Court commented on the difference between the two concepts as follows:

> [38] It is important to appreciate the distinction between territorial jurisdiction and subject-matter jurisdiction. Territorial jurisdiction, known at common law as *jurisdiction simpliciter*, is concerned with the connection between the dispute and the court's territorial authority. A Canadian court may only assume territorial jurisdiction over a proceeding where there is a real and substantial connection between the action and the territory over which the court exercises jurisdiction: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289. In contrast, subject-matter jurisdiction is concerned with the court's legal authority to adjudicate the subject-matter of the dispute. For example, the Provincial Court does not have subject-matter jurisdiction with respect to claims for libel, slander or malicious prosecution: *Small Claims Act*, R.S.B.C. 1996, c. 430, s. 3(2).
>
> […]
>
> [43] Thus, failure to establish subject-matter jurisdiction under s. 21(1) of the *CLPA* means that the provincial superior court in question does not have jurisdiction. There is no need to engage in a second inquiry under the *CJPTA* to establish territorial jurisdiction.
>
> [Emphasis added.]

[360] Hence, the question of jurisdiction is made up of two distinct questions – whether a court has jurisdiction and whether it ought to exercise it. This framework reflects the distinction between subject matter jurisdiction and territorial jurisdiction. A *forum non conveniens* analysis can only occur once subject matter jurisdiction is

established, and it has no relevance to the jurisdictional analysis addressing the existence of jurisdiction: *Campbell* at paras. 113-114; *Club Resorts Ltd. v. Van Breda,* 2012 SCC 17 at para. 101 [*Club Resorts*].

E. Subject Matter Competence

1. LPG's Position

[361] LPG submits that the Province cannot establish subject matter competence. LPG submits that the claims against it, if any, arise in Ontario. LPG submits that both s. 21(1) of the federal *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C 50 [*CLPA*] and s. 9(1) of the *Supreme Court Act*, R.S.B.C. 1996, c. 443 [*Supreme Court Act*] limit this Court's jurisdiction.

[362] LPG argues that s. 9(1) of the *Supreme Court Act* sets out the relevant statutory restriction; namely, "[t]he court … has jurisdiction in all cases, civil and criminal, arising in British Columbia*"* [Emphasis added.] LPG argues that the words "arising in British Columbia" constitute a subject matter limitation. It further argues that this condition is not satisfied merely by filing a claim in this Court. LPG also submits that this is not a case arising in British Columbia as it concerns LPG, and any hypothetical case against LPG could only arise in Ontario.

[363] Further, LPG argues that the *CLPA* is procedural in nature. As such, it is not jurisdiction-conferring: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2010 BCSC 472 at para. 18 [*Sun-Rype*].

[364] Finally, LPG submits that it is the Province's burden to establish subject matter competence, and it has failed to do so.

2. Legal Principles

[365] As indicated by Justices Brown and Rowe (dissenting, but not on this point), a superior court's inherent jurisdiction is an aspect of its subject matter jurisdiction, not an aspect of its territorial jurisdiction: *Newfoundland and Labrador (Attorney*

General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam), 2020 SCC 4 at para. 105.

[366] The Supreme Court of British Columbia is a court of plenary; that is, it has unlimited, original jurisdiction. This means, in general terms, that there is no claim which cannot be brought to this Court for adjudication. At the same time, the legislature has the right to carve out specific subject areas from the jurisdiction of the Court: *Sadler v. Surrey (City of)*, 2001 BCSC 936 at paras. 27-28. Thus, determining the question of subject matter jurisdiction depends on whether legislative restrictions placed upon the Court's jurisdiction restrict the Court's ability to hear the subject matter before it.

[367] The Court has the subject matter jurisdiction to decide issues before it unless that jurisdiction is ousted by statute: *Tri-City Capital Corp. v. 0942317 B.C. Ltd*., 2017 BCCA 179 at para. 17, citing *Buchan v. Moss Management Inc.,* 2010 BCCA 393 at para. 29.

[368] Section 1 of the *CJPTA* describes subject matter competence in the negative; it is defined as covering aspects of a court's jurisdiction other than territorial competence. As noted in *Douez 2022*:

> [21] Subject matter jurisdiction refers to situations where a statute restricts a court's authority over matters such as the nature of the dispute or the amount in issue, where it confers exclusive jurisdiction to a particular decision-making body, or situations where the subject matter relates to a foreign immovable property ... It is often defined in the negative, as relating to all aspects of a court's jurisdiction other than territorial jurisdiction [citing *CJPTA*, s.1].

[369] Subject matter competence concerns whether the Court has jurisdiction in relation to the subject of the dispute because, for example, of the amount of money at stake or the existence of legislation assigning exclusive jurisdiction over a dispute to a board or tribunal. That is, it refers to situations where a statute restricts the Court's authority over matters: *Scott v. Hale,* 2009 BCSC 228 at para. 34.

[370] As noted above, whether territorial competence exists does not determine the existence of subject matter competence: *Gould v. Western Coal Corporation,* 2012 ONSC 5184 at para. 327; *Scott* at para. 18; *Campbell* at paras. 113-114.

3. Discussion

[371] I cannot agree with LPG that this Court lacks subject matter competency over the claims in relation to the out-of-province parties.

[372] The subject matter of the case involves *inter alia* a claim for unjust enrichment, a statutory claim under the *Competition Act*, and direct claims for breaches of common law and statutory duties pursuant to the *ORA.* The Province claims (on behalf of itself and the Class Members) for damages and recovery of health care costs. There is no legislative or other restriction placed upon this Court that clearly inhibits it from hearing such a claim or granting such relief. Therefore, the subject matter of this case is well within the subject matter competence of this Court.

[373] LPG cites two statutory provisions that arguably impact this Court's subject matter competence. The first is s. 9(1) of the *Supreme Court Act,* which reads as follows:

> **Jurisdiction and sittings**
>
> 9 (1)The court continues to be a court of original jurisdiction and has jurisdiction in all cases, civil and criminal, arising in British Columbia. [Emphasis added.]

[374] As noted, LPG argues that the phrase "arising in British Columbia" creates a jurisdictional limit which affects the underlying facts and parties that a matter concerns. I cannot agree.

[375] First, the factors LPG cites in support of its subject matter competence argument are that LPG is an Ontario company with no property outside of Ontario, that it is not extra-provincially registered, and that 99% of its Opioid Products sales have been in Ontario. These factors are properly considered within the territorial competence framework. They are not relevant factors under the subject matter competence analysis.

[376] Second, the phrase “arising in British Columbia” is preceded by the word “cases.” The full phrase is “has jurisdiction in all cases, civil or criminal, arising in British Columbia.” I agree with the Province that the word “case” merely refers to a legal proceeding rather than the factual events upon which the case is based, as suggested by LPG. No case exists if none is filed. The provision also adopts the word “case” rather than the arguably wider word, “claim.” “Claim” is defined in s. 1 of the *Limitations Act,* S.B.C. 2012, c. 13 as “a claim to remedy an injury, loss or damage that occurred as a result of an at or omission.” Thus, I interpret the word “case” in s. 9 of the *Supreme Court Act* to merely refer to a court proceeding which is commenced in the Province.

[377] Third, LPG’s interpretation of the phrase “arising in British Columbia” as a jurisdictional limit conflicts with s. 2(2) of the *CJPTA* which provides that “[t]he territorial competence of a court is to be determined solely by reference to this Part.” [Emphasis added.] The *CJPTA* is therefore a complete code for the determination of territorial competence. The implications of LPG’s interpretation are broad in that it would mean that British Columbia courts could not decide claims that have a component of the factual matrix arising outside of British Columbia. Further, its interpretation of this Court’s subject matter jurisdiction would appear to result in a more restrictive limitation on this Court’s authority than the applicable territorial competence limitation in the *CJPTA*.

[378] As noted above, the only restriction on the subject matter jurisdiction of a court when a case (as a legal proceeding) arises in British Columbia is if relevant legislation restricts the court's authority relating to the nature of the dispute, the amount in issue, etc. or it grants exclusive jurisdiction over a certain subject matter to a particular court, board or tribunal, or if the subject matter relates to foreign immovable property: *Swain v. MBM*, 2013 BCSC 1050 at para. 15; *Douez 2022* at para. 21. That is not the case here.

[379] LPG argues that s. 21(1) of the *CLPA* should be used to interpret s. 9 of the *Supreme Court Act*. Section 21(1) of the *CLPA* reads as follows:

> **Concurrent jurisdiction of provincial court**
>
> **21 (1)** In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province in which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.

[380] LPG asserts that there are linguistic and conceptual parallels between s. 9(1) of the *Supreme Court Act* and s. 21(1) of the *CLPA*, such that the test used to determine whether a claim arises in the province for the purposes of s. 21(1) (asking where the "substance of the claim" arises) is suitable to apply when determining whether a claim arises in the province for the purposes of s. 9(1). LPG says that under this test, s. 9(1) ousts this Court's subject matter jurisdiction. For the reasons above, I do not accept this argument.

[381] Further, section 21(1) of the *CLPA* on its plain language is not jurisdiction-limiting vis-à-vis this Court; instead, it provides this Court with concurrent jurisdiction over claims against the federal Crown in certain cases.

[382] The opening words of s. 21(1) of the *CLPA* ("In all cases where a claim is made against the Crown") indicate that it sets out a test for determining which provincial superior court has subject-matter jurisdiction in respect of claims against the federal Crown: *Conor Pacific* at para. 6. That is a different context than the present, which involves claims against private companies.

[383] The rationale behind s. 21(1) is not operative here. As explained in *Babington-Browne v. Canada (Attorney General),* 2016 ONCA 549 at paras. 9-14, at common law the federal Crown could not be sued in tort, or indeed in any court. Thus, the provincial superior court could not assert an inherent jurisdiction, a doctrine grounded in common law, over claims against the federal Crown. By s. 21(1), Parliament gave provincial superior courts concurrent jurisdiction with the federal court over claims against the federal Crown so long as the claim arose in their province: see *Tan v. Canada (Attorney General)*, 2023 BCSC 1092 at para. 28. The purpose of s. 21(1) was to limit or eliminate multiple proceedings arising out of

the same set of facts and to facilitate citizens' access to justice. On its face, s. 21(1) does not exclude this Court's jurisdiction: *Babington-Browne* at para. 13-14.

[384] I can find no support for the proposition that s. 21(1) bars claims by the federal Crown. Nor does the *CLPA* limit the subject matter competence of this Court in this context.

[385] I make some additional points. I note that multi-jurisdictional class proceedings are expressly contemplated in the *CPA*: see ss. 4(3) and 4(4) of the *CPA*; *Sandoz BCCA* at para. 39. In *Sanis SCC*, the Court recognized the jurisdiction of superior courts over extraterritorial plaintiffs or issues, and noted that superior courts often adjudicate cases with claims arising elsewhere or requiring the application of foreign law: at paras. 90, 92. Superior courts can preside over class actions that are national in scope: *Sanis SCC* at para. 93. The argument that only causes of action that "arise" in British Columbia are within this Court's jurisdiction appears inconsistent with the existence of multi-jurisdictional class proceedings, this court's plenary authority, and *Sanis SCC*.

[386] The Supreme Court of Canada has held that if it is alleged that a statute has removed the jurisdiction of a provincial superior court, the onus is on the party alleging such to show same by reference to "statutory terms that are clear, explicit and unambiguous": *Canada (Attorney General) v. TeleZone,* 2010 SCC 62 at para. 45.

[387] There is no clear and explicit basis in the legislation LPG refers to that would limit this Court's jurisdiction over the subject matter of the litigation. In all the circumstances, I find that this Court has jurisdiction over the subject matter of the litigation.

F. Forum Non Conveniens

1. Legal Principles

[388] If jurisdiction is found to exist, this Court may decline jurisdiction under the principles of *forum non conveniens*. *Forum non conveniens* only comes into play

when jurisdiction is established; it has no relevance to the jurisdictional analysis itself.

[389] Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. The decision to raise this doctrine rests with the parties: *Club Resorts* paras. 101-102.

[390] The normal state of affairs is that jurisdiction should be exercised once properly assumed: *Van Breda v. Village Resorts Ltd.,* 2012 SCC 17 at para. 109.

[391] Section 11 of the *CJPTA* sets out the framework for the *forum non conveniens* analysis:

> **Discretion as to the exercise of territorial competence**
>
> **11** (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
> (b) the law to be applied to issues in the proceeding,
> (c) the desirability of avoiding multiplicity of legal proceedings,
> (d) the desirability of avoiding conflicting decisions in different courts,
> (e) the enforcement of an eventual judgment, and
> (f) the fair and efficient working of the Canadian legal system as a whole.

[392] Section 11 of *CJPTA* is a codification of the common law of *forum non conveniens*, and the list of factors is non-exhaustive: *Club Resorts* at paras. 105-106; *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11 at para. 22. The factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context and might include the locations of

parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties: *Club Resorts* at para. 110.

[393] As to the nature of the burden, the Court held as follows in *Club Resorts* at para. 103:

> If a defendant raises an issue of *forum non conveniens,* the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.

[394] The Court added the following:

> [108] Regarding the burden imposed on a party asking for a stay on the basis of forum non conveniens, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established. It was used in *Spiliada* and *Amchem*. On the other hand, it has not always been used consistently and does not appear in the *CJPTA* or any of the statutes based on the *CJPTA*, which simply require that the party moving for a stay establish that there is a "more appropriate forum" elsewhere. Nor is this expression found in art. 3135 of the Civil Code of Québec, which refers instead to the exceptional nature of the power conferred on a Quebec authority to decline jurisdiction: ". . . it may exceptionally and on an application by a party, decline jurisdiction . . .".
>
> [109] The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. Forum non conveniens may play an important role in identifying a forum that is clearly more

> appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.
>
> [Emphasis added.]

[395] The test was restated in *Haaretz.com v. Goldhar,* 2018 SCC 28, where the Court held that the *forum non conveniens* analysis exercises fairness and efficiency by adopting a case-by-case approach to identify whether an alternative jurisdiction may be “clearly more appropriate”: at para. 28.

[396] As noted above, in the *Jurisdiction Decision*, I previously dismissed jurisdictional challenges by Pro Doc and Jean Coutu with respect to the territorial competence of this Court over the proposed proceedings. The parties disagree on the relevance of the *Jurisdiction Decision* to the question of *forum non conveniens*.

[397] The Province argues that the *Jurisdiction Decision* is relevant to the these applications. As noted, in *Club Resorts*, the Supreme Court of Canada specifically held that on an application for *forum non conveniens*, "[t]he defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation": at para. 103.

[398] The Province points out that in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, Bastarache J. in dissent remarked that "[o]bviously, jurisdiction *simpliciter* and *forum non conveniens* are related, and the factors determining the latter inquiry will overlap with those applicable in the former": at para. 125. The Province submits that the core difference between the two concepts is that while territorial competence is a legal remedy, *forum non conveniens* is a discretionary one. On this basis, the Province submits that many of the findings in this Court's reasoning in the *Jurisdiction Decision* apply to and inform the *forum non conveniens* analysis.

[399] The Jurisdiction Applicants argue that their home jurisdictions are the more appropriate forum to address the claim(s) against them and that the claims should be stayed on that basis. Where the evidence indicates that the alternative forum is in

a better position to dispose fairly and efficiently of the litigation, the court should grant the stay. This is especially true, the Jurisdiction Applicants say, in cases where the evidence raises doubt as to whether proceeding in the chosen forum will provide the defendant with a fair opportunity to present its case: *Haaretz.com* at paras. 46-47; *Club Resorts* at para. 109.

[400] With respect to the relevance of the *Jurisdiction Decision*, while I find that my analysis within that decision remains relevant, I would consider the various jurisdictional factors on the record and submissions before me on the Jurisdiction Applicants' present jurisdictional motions.

2. Discussion

[401] The ultimate question impacting whether to decline to exercise territorial competence under s. 11(1) of the *CJPTA* is whether the court of another state is a more appropriate forum in which to hear the proceeding.

[402] Applying the principles above within the framework of s. 11 of the *CJPTA,* I would first have regard to the interests of the parties to a proceeding and the ends of justice in s. 11(1). I recognize that individualized domestic proceedings may be in the interests of the Jurisdiction Applicants for various reasons. However, taking a larger view of the matter with the interests of all parties in mind, I find that removing the Jurisdiction Applicants would not serve the ends of justice overall. As I further discuss below, there are considerable benefits to litigating a comprehensive set of similar claims in one jurisdiction. Decoupling the Jurisdiction Applicants from this omnibus proceeding will add delay, inefficiency, and duplication to the proper resolution of the claim.

[403] There was some debate among the parties as to the relevance of the actions in *Bourassa* and *Gebien* and the ease with which the Quebec and Ontario governments could be added as plaintiffs in those proceedings. However, the fact remains that Quebec and Ontario are not putative plaintiffs in those proceedings. Those actions have an entirely different character in that they involve a consumer-led class action seeking to recover private rather than public losses. *Bourassa*

specifically involves a class action involving opioid use disorder. Further, the *ORA*-related issues in this Crown-led proceeding are not at play in those proceedings. While Justice Perell found the factual underpinning of this case to be "virtually identical" to that in *Gebien,* I agree with his conclusion that the two cases are "both procedurally and substantively distinguishable … for the purposes of the Jurisdiction Motion." Overall, I cannot find that the *Bourassa* and the *Gebien* actions are parallel proceedings which could be deferred to in order to satisfy the ends of justice.

[404] Other provinces have adopted legislation which is similar to or complementary to the *ORA.* This fact, along with the lack of initiation of proceedings in other jurisdictions, supports a provincial consensus to pursue cost recovery measures through the national class proceeding represented by the Province's putative claim. It appears that the Province, supported by the proposed class member governments, are all of the view that litigating the claims against all defendants in one jurisdiction will serve the goals of economy and efficiency.

[405] While the position of the Jurisdiction Applicants implies individual provincial and territorial actions could be instituted based on where the defendants are based, I find that it is reasonably foreseeable that the Opioid Products distributed by the Jurisdiction Applicants in Ontario and Quebec could be indirectly accessed or consumed by consumers in other provinces. Resulting harm could occur outside Quebec or Ontario in relation to Opioid Products distributed in those provinces. Hence, the question of the appropriate jurisdiction is a more complicated problem that is not solved by merely moving extra-territorial claims to the home jurisdiction where certain defendants reside: see the *Jurisdiction Decision* at paras. 107, 114.

[406] Additionally, I note the following with respect to the non-exhaustive list of factors in s. 11(2) of the *CJPTA.*

a) Comparative convenience and expense

[407] With respect to s. 11(2)(a), the comparative convenience and expense for the parties to the proceeding and for their witnesses in litigating in this Court or in any alternative forum, there is at present no Crown-initiated proceeding against the

Jurisdiction Applicants filed in Quebec or Ontario (or any other province). The Province has pursued this claim in British Columbia on behalf of the putative class for over five years. If such a proceeding were to be commenced in Quebec or Ontario, it would be years behind the present proceeding. The opportunity to advance a multi-Crown omnibus proceeding in British Columbia that deals with all claims by all class member governments against all defendants offers substantial savings and efficiency for the parties.

[408] On the other hand, I find that there would be considerable inconvenience and expense assumed by the Province and the other proposed Class Members if the proceeding were to be re-instituted or co-instituted in other jurisdictions. Witnesses for the Jurisdiction Applicants may well have to testify about similar facts in multiple proceedings in more than one jurisdiction if more than one jurisdiction is involved. The Quebec and Ontario governments are not the only stakeholders in the claims against Jurisdiction Applicants. There are spill-over or inter-provincial/inter-territorial aspects to the claims, and the Jurisdiction Applicants' arguments are weighted in favour of the comparative convenience to them rather than the comparative convenience to all parties, including members of the proposed Class.

[409] If a comprehensive action proceeds in British Columbia, it would encompass proceedings against all of the Canadian governments against the defendants. I assess that removal of the Jurisdiction Applicants from the present proceedings would not end the need to deal with Quebec- or Ontario-related issues, such as the application of the *ORA* in those provinces, and would not bring an end to out-of-province claims by Class Members against the Jurisdiction Applicants. In sum, the extraction and relocation of any or all of the Jurisdiction Applicants from the present proceedings to another jurisdiction is not as simple as made out by the Jurisdiction Applicants.

[410] The Jurisdiction Applicants assert that their witnesses are located in their home jurisdictions. I accept that LPG is an Ontario-based business and that Pro Doc and Jean Coutu are Quebec-based businesses. As such, many of their witnesses

would be located there. That said, all parties appear to be well-funded, though certainly some are more funded than others. As well, there may be opportunities to call witnesses by video or to file documents in digital form. As Justice Belobaba noted in *Leon v. Volkswagen AG,* 2018 ONSC 4265, while the physical location of parties, witnesses, or evidence made sense as an important factor in the pre-digital era, such factors may be less significant in this case given the opportunities for testimony by video and the efficiency of electronic document delivery: see also *Logan Instruments Canada Corp. v. Wang*, 2023 ONSC 2784 at para. 17(b) to a similar effect.

[411] While there certainly will be some expense and inconvenience to out-of-province parties and witnesses in a British Columbia-based omnibus proceeding, the reduction of the potential multiplicity of actions will lessen the need for witnesses to give similar evidence in multiple proceedings in multiple jurisdictions.

[412] At this stage, I am not prepared to firmly decide the extent to which language rights issues may complicate the proceedings. If Quebec opts into the proposed class proceeding, it may be that it will have attorned to the jurisdiction of the British Columbia courts where civil proceedings are conducted in English: *Supreme Court Civil Rules*, R. 22-3(2); *Conseil scolaire francophone*; *An Act that all Proceedings in Courts of Justice within that Part of Great Britain called England, and in the Court of Exchequer in Scotland, shall be in the English Language* (G.B.), 1731, 4 Geo. II, c. 26. I note also that in *Sanis SCC* at para. 67, the Court held that a Crown that chooses to litigate in another province must subject itself to the procedural rules of that forum. Section 11 of the *ORA* extends to this proceeding the additional substantive rights and remedies that the *ORA* provides exclusively to British Columbia, while the substantive rights of foreign Crowns who choose to participate under these procedural rules remain unchanged: *Sanis SCC* at para. 73.

[413] Nevertheless, I accept that for the Quebec Defendants, there may be procedural issues including issues of necessary translation of documents and interpretation of proceedings. I accept that there may also be arguable substantive

issues with respect to the application of the *CCQ* and other Quebec statutes to be dealt with in the future. To be sure, these individual considerations could weigh in favour of a proceeding in the home jurisdiction of the Quebec Defendants.

[414] To date, neither of the Quebec Defendants have made requests for French language accommodations. Both have retained English-speaking counsel. The British Columbia courts recognize Canada's two official languages and can and do provide accommodations for French-speaking litigants. I am advised that the Province and Class counsel are prepared to commit to providing language accommodations, including possible proceedings in French, should any participating representatives or witnesses be unable to appear in English; and to cooperate with the Jurisdiction Applicants to produce court-approved translations of any necessary documents. On the basis of the evidence filed on this application, the parties appear fully capable of calling expert evidence on the law of Quebec. While I accept for the sake of argument that for the Quebec Defendants there may be language and Quebec law issues that will complicate the proposed proceedings, I contemplate that such issues would be manageable.

[415] In particular, these types of individual issues would be manageable in a British Columbia-based proceeding between sophisticated entities for whom issues of interpretation of documents, translation of proceedings, and the preparation of expert evidence on foreign law are less daunting. In the language of *Haaretz.com,* I cannot find that proceeding in the chosen forum in British Columbia will impair the defendants' fair opportunity to present their case. Overall, I find that the defendants' argument over comparative convenience and expense fails to weigh in favour of declining jurisdiction over the litigation as a whole on the facts of this case.

b) Law to be applied

[416] With respect to s. 11(2)(b), the law to be applied to issues in the proceeding, the Province's claim includes causes of action at common law and pursuant to the *ORA* for harm that occurred in British Columbia and across Canada.

[417] If the case against the defendants is certified, the law applying to any one defendant will not solely be that of their home province. The law to be applied in torts is the law of the place where the tort was committed: *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022, 1994 CanLII 44. Yet, the Province's allegation of opioid-related activities by the defendants and resulting harm does not end at provincial borders. Hence, the law to be applied to any one defendant is not solely that of their home province. Issues of British Columbia law and the law of other jurisdictions will also arise because the Province's claim is pleaded under the laws of British Columbia, and there are spill-over legal consequences from the nature of the claims.

[418] I note as well that some of the common issues will require interpretation of provincial and territorial *ORA*-equivalent legislation for the purposes of the *ORA* Subclass. The British Columbia courts are competent to apply the laws of other provinces: *Tolofson*. In *Sanis SCC*, the Court affirmed that superior courts can preside over national class actions while following their home province's procedural rules and often applying the substantive laws from other provinces to each class members' individual claims:

> [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.

[419] I accept that the Quebec and Ontario *ORA*-equivalent legislation are not complete codes and may raise issues of interpretation (foreign law issues) that will need to be litigated as individual issues if the case is certified. However, there is also considerable overlap between the *ORA*-equivalent legislation in Quebec and Ontario and the *ORA*. Nearly all provinces and territories in Canada have enacted their own version of an opioid health care cost recovery statute "similar" to the *ORA*: *Sanis SCC* at para. 25; *Sandoz BCCA* at para. 58.

[420] While there are minor differences between the Quebec or Ontario *ORA*-equivalent legislation and the *ORA,* and consideration of the *Quebec ORA* will require reference to different rules under Quebec civil law to resolve individual issues, many of the core principles in the statutes are similar. For instance, many of the definitions, the rights of recovery, the presumption of causation, and the processes for calculating recovery in the Quebec and Ontario *ORA*-equivalent legislation are similar to that of the *ORA*. As noted, British Columbia courts are equally competent as the superior courts of other provinces to engage in this exercise. As well, similar terminology is used in these *ORA*-related statutes.

[421] Moreover, there is also overlap between product liability principles underlying the common law and Quebec civil law: see, for instance, *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé,* 2019 QCCA 358 at paras. 278, 297, 338-339; *Brousseau c. Laboratoires Abbott limitée,* 2019 QCCA 801 at paras. 110-112.

[422] Overall, while this factor may weigh in favour of Quebec, or to a lesser extent Ontario in some respects, as forums to adjudicate the claims against the Jurisdiction Applicants, I do not assign to this factor the significant weight that the defendants ascribe to it.

c) Multiplicity of legal proceedings

[423] With respect to s. 11(2)(c), the desirability of avoiding multiplicity of legal proceedings, I find that this factor overwhelmingly favours the single proceeding presently underway in British Columbia. The decision to decline jurisdiction in favour of a future, Crown-initiated proceeding in other provinces would undoubtedly lead to a multiplicity of similar legal proceedings.

d) Conflicting decisions

[424] With respect to s. 11(2)(d), the desirability of avoiding conflicting decisions in different courts, I again find that this factor strongly favours the maintenance of jurisdiction in British Columbia.

[425] If certain defendants are removed from the present proceeding, there is an increased risk of conflicting judgments in parallel proceedings. Other actions would engage in similar *ORA*-related analysis, and the multiplicity of proceedings would offer numerous opportunities for various courts to come to inconsistent conclusions.

e) Enforcement

[426] With respect to s. 11(2)(e), the enforcement of an eventual judgment, I accept that the enforcement of judgments in the home province of a defendant could be more efficient and effective. However, all the Jurisdiction Applicants are out-of-province defendants, and I expect that reciprocal enforcement legislation would facilitate the enforcement of judgments obtained in other provinces. Canadian courts have adopted a generous and liberal approach to the recognition and enforcement of foreign judgments: *Chevron Corp. v. Yaiguaje*, 2015 SCC 42.

[427] For instance, art. 3155 *CCQ* provides that a decision rendered outside Quebec is generally recognized and declared enforceable unless one of six exceptions applies: *Barer v. Knight Brothers LLC,* 2019 SCC 13 at paras. 23-24. This framework has been described as creating a presumption of validity in favour of a foreign decision. Moreover, art. 3168 *CCQ* outlines six circumstances in which the jurisdiction of foreign authorities is recognized in Quebec, one of which is “(3) injury was suffered in the State where the decision was rendered and it resulted from a fault which was committed in that State or from an injurious act or omission which occurred there”. On the basis of findings this Court has already made in the *Jurisdiction Decision* at paras. 107, 114, 117 and 123-126, art. 3168(3) would appear to apply to favour the recognition of a British Columbia judgment in Quebec.

[428] As well, Ontario and British Columbia are parties to the *Reciprocal Enforcement of Judgments Act,* R.S.O. 1990, c. R. 5, s. 2. There is no reason to expect that Ontario would not recognize and give effect to any judgment in the present case. I therefore regard the enforcement factor as neutral.

f) Fair and efficient legal system

[429] With respect to s. 11(2)(f), the fair and efficient working of the Canadian legal system as a whole, I recognize the obvious point that it would not be fair or efficient overall to divert the claims against the Jurisdiction Applicants, resulting in multiple parallel proceedings none of which have thus far commenced in other provinces. Such a move would be highly detrimental to the fairness and efficiency of resolving the opioid-related claims of the various parties.

g) Common law factors

[430] I have also considered a number of residual common law factors including where the parties carry on business, where the causes of action arose, where the loss or damage occurred, juridical advantages and disadvantages to the parties, convenience or inconvenience to potential witnesses, costs of conducting the litigation in this jurisdiction, the applicable substantive law, the difficulty and cost of proving foreign law, if necessary, and whether there are parallel proceedings in other jurisdictions: *Mayer v. Merchant Law Group LLP*, 2023 BCSC 1797 at para. 26; *Stern v. Dove Audio Inc.,* [1994] B.C.J. No. 863 at para. 62, 1994 CanLII 1478 (BCSC).

[431] Clearly, other comparable forums exist in other provinces. However, weighing all the factors, and being mindful of individual issues with respect to the out-of-province jurisdictions and while not leaning too instinctively in favour of the domestic court, I am not convinced that a proceeding in Ontario or Quebec is more appropriate, let alone clearly more appropriate. It is not necessary to ensure fairness to the parties and efficient resolution of the dispute for the present claims to be heard in Quebec or Ontario: *Club Resorts* at para. 104. I find that the chosen forum in British Columbia will provide the Jurisdiction Applicants with a fair opportunity to present their case.

G. Conclusion on Jurisdiction

[432] Overall, while the Jurisdiction Applicants make some valid points with respect to factors favouring the litigation of the Class Members' claims in other provinces,

the Jurisdiction Applicants have not met their burden of showing that either Quebec or Ontario are more appropriate forums to decide the case against them. I dismiss the application for this Court to decline to exercise is jurisdiction under s. 11(1) of the *CJPTA* as *forum non conveniens*.

[433] The applications of Pro Doc, Jean Coutu and LPG for dismissal of the claims against them on jurisdictional grounds are dismissed.

XI. THE CERTIFICATION APPLICATION

A. The General Positions of the Parties

[434] The Province proposes to certify the common issues attached hereto at Schedule A. It submits that all the issues listed therein satisfy the test for commonality set out in s. 4(1)(c) of the *CPA.*

[435] The defendants submit that the Province has not shown a basis in fact to certify any of the proposed common issues against any of the defendants. They submit that facts play an essential role at this stage, the Province's burden is an evidentiary one, and the commonality test requires the Province to show that an issue exists and that it is common among class members. The defendants submit that the Province has failed this test.

B. The Legal Requirements for Certification

[436] Section 4(1) of the *CPA* sets out the following requirements for certification:

> **4** (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[437] "Common issues" are defined in s. 1 of the *CPA* as follows:

> "common issues" means
>
> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[438] The court is required to certify an action as a class proceeding where the requirements of s. 4(1) of the *CPA* are met: *Pro-Sys SCC* at para. 107.

[439] The question at certification is whether the action can properly proceed as a class action. Certification does not involve an assessment of the merits and is not a pronouncement on the viability or strength of the action. The outcome of certification is not predictive of the outcome of the common issues at trial. The focus at this stage is not on the merits or the weight of the evidence but rather on the appropriate form of the action: *Pro-Sys SCC* at paras. 99, 102, 105; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 19–20.

[440] The Province bears the onus of satisfying all of the requirements for certification. For s. 4(1)(a), the court must assume that the facts as stated in the notice of civil claim are true and ask whether it is "plain and obvious" that the Provinces' notice of civil claim discloses no reasonable cause of action, which is determined on the same "plain and obvious" standard as an application under R. 9-5(1): *Pro-Sys SCC* at para. 63.

[441] For each of the other certification requirements, the Province must show "some basis in fact" to support the certification elements in ss. 4(a) through (e): *Hollick* at paras. 24–25. This evidentiary standard does not require the court to

resolve conflicting facts or evidence. The test reflects the fact that, at certification, the court is ill-equipped to resolve conflicts in the evidence or engage in finely calibrated assessments of evidentiary weight: *Pro-Sys SCC* at paras. 99–102. The certification stage is decidedly not meant to be a preliminary test of the merits of the action: *Hollick* at para. 16.

[442] The “some basis in fact” threshold is low. It is not a burden to prove anything on the balance of probabilities: *Nissan* at paras. 134-136. When expert evidence conflicts as to matters that may affect whether a proposed common issue can be resolved on a class-wide basis, the plaintiff’s evidence need not prove its case nor be preferred over the conflicting evidence: *Rebuck v. Ford Motor Company,* 2018 ONSC 7405 at para. 26, citing *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641, 2005 CanLII 42474 at para. 76. The threshold is deliberately low because the evidence has not been through the trial laboratory. The low threshold anticipates that the evidence will be more developed at trial, and the findings of fact may well be different: *Bowman v. Kimberly-Clark Corporation,* 2023 BCSC 1495 at para. 74.

[443] However, the Province cannot rely upon allegations alone—the standard for assessing evidence at certification involves more than “symbolic scrutiny” or “a superficial level of analysis into the sufficiency of the evidence”: *Pro-Sys SCC* at para. 103.

[444] The use of the word "some" means that the evidentiary record need not be exhaustive and certainly does not require a record upon which the merits will be argued. This legislative intention is reflected in s. 2(3)(a) of the *CPA*, which (although often not strictly adhered to) requires the certification motion to be brought within 90 days of the filing of the response to civil claim (i.e., at the early stages of the proceeding, before discovery has taken place): *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127 at para. 34; *AIC Limited v. Fischer*, 2013 SCC 69 at para. 41 [*Fischer*]; *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 102, leave to appeal ref’d, 38784 (19 December 2019) & 39403 (29 April 2021) [*Nippon*].

[445] The court plays an important gatekeeper function on a certification application to ensure that there is evidence supporting the existence of sufficient facts to meet each of the s. 4(1) criteria and that the proceeding is suitable for class treatment. The power to strike hopeless claims is a valuable housekeeping measure essential to effective and fair litigation: *Atlantic Lottery Corp. v. Babstock*, 2020 SCC 19 at para. 18 [*Atlantic Lottery*]. In *Pro-Sys SCC* at para. 103, the Court stated that it was "worth reaffirming the importance of certification as a meaningful screening device." At para. 104, the Court held that:

> ...[t]here must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.

See also *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at para. 27.

[446] In *Pro-Sys SCC,* the Court noted the following:

> [114] One area in which difficulty is encountered in indirect purchaser actions is in assessing the commonality of the harm or loss-related issues. In order to determine if the loss-related issues meet the "some basis in fact" standard, some assurance is required that the questions are capable of resolution on a common basis. In indirect purchaser actions, plaintiffs generally seek to satisfy this requirement through the use of expert evidence in the form of economic models and methodologies.
>
> […]
>
> [118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.
>
> [Emphasis added.]

[447] In the companion decisions of *Rumley v. British Columbia,* 2001 SCC 69 and *Hollick*, the Court discussed the commonality and preferable procedure requirements

and commented that courts should interpret these criteria generously to give full effect to the benefits of class proceedings.

C. Individual Issues and Other Obstacles to Certification

[448] The defendants make numerous objections to the Province's certification application. With the exception of s. 4(1)(a) of the *CPA,* which was substantially decided by the *Pleadings Decision*, every aspect of the Province's case for certification was strongly disputed.

[449] In particular, the defendants argue that numerous individual issues in the claims against them complicate the picture such that the action cannot be meaningfully adjudicated. They argue that the proposed action will be complex in part because different companies sold different products at different times in different jurisdictions. I accept this submission to a degree.

[450] However, the extent to which individual issues and potential complexity impact the analysis of commonality and preferability is strongly disputed by the parties.

[451] While some of the objections will be considered within the context of the statutory criteria, I find it worthwhile to mention some of the major themes of the defendants' objections below. I have considered all of the defendants' objections, even if not specifically mentioned herein. Moreover, I have considered the individual submissions of the defendants, the sufficiency of the evidence, and their arguments that certification ought not apply in their unique situations.

1. Differences Among Opioids

[452] The defendants submit that the evidence supports differences among Opioid Products. For instance, Dr. Giorshev opines that Opioid Products are a broad class of pharmaceuticals with a range of effects and are prescribed for a range of treatments. He states that this broad category of pharmaceutical products includes very different types of medications with very different effects and that different types of Opioid Products have very different types of pharmacology.

[453] The TANCC refers to the following collective and non-exhaustive definition as follows:

> "Opioid Drugs" are a class of drugs that are defined by a chemical compound that is naturally found in the opium poppy plant or which are synthetically or semi-synthetically made using the same chemical structure, and include (but are not limited to) Butorphanol, Fentanyl, Hydrocodone, Hydromorphone, Meperidine, Methadone, Morphine, Normethadone, Opium, Oxycodone, Oxymorphone, Pentazocine, Tapentadol, and Tramadol.

[454] The TANCC states further that:

> "Opioid Products" are products that contain any Opioid Drugs. A "controlled release" Opioid Product formulation is a system that delivers an agent at a controlled rate for an extended time. Different terms such as extended-release (ER, XR, XL), sustained- release (SR), time-release (TR), long-acting (LA), sustained-action (SA) and controlled delivery (CD) may also be used to describe a controlled release formulation.

[455] The above definitions are used categorically for the rest of the claims in the TANCC.

[456] The defendants submit that the Province's treatment of Opioid Products as a monolithic whole and their failure to acknowledge product differentiation is fatal to the Province's certification request. They argue that the common issues break down into product-specific questions involving timing, usage and other individualized assessments. They point out in particular that the Province's admission that opioid agonist therapies do not form part of their case undermines their position that Opioid Drugs can be treated as a fungible class of drugs.

[457] While I agree with the defendants that not all Opioid Products are equal, I do not agree that the differences are so significant that this alone impairs the certification application.

[458] First, the *ORA* assists the Province in structuring its claim on the basis of Opioid Products as a fungible class. As noted in *Valeant* at para. 96, the definition of a "type of opioid product" in the *ORA* is "all embracing, and does not distinguish between specific products for the purpose of tying specific products or types of products either to the duties owed, or issues of causation and disease." Rather, the

definition is “generic, inclusive, and all encompassing, capturing examples of the types of product of concern.”

[459] Second, the evidence establishes that Opioid Products may be assessed as a class rather than individually. Dr. Virani discusses the nature of Opioid Products as a group of drugs with chemical compounds that interact with opioid receptors. While he agreed with Dr. Giorshev that differences in the characteristics of various pharmaceutical opioids exist, he maintained that they can all cause or contribute to similar dysfunction, injury, and illness. He thought that the unintended or adverse outcomes associated with Opioid Products are generally the same. He opined that it is possible to assess on a common basis what harms have resulted from chronic Opioid Products exposure without needing to analyze this at an individual level and that methodologies can be adopted to estimate the incidence and prevalence of Opioid Products-related diseases, illnesses, and injuries. Overall, the differences among Opioid Products do not fill the analysis with such pessimism that meaningful conclusions cannot be drawn.

[460] Third, the Court of Appeal has provided guidance on the ability and need to assess Opioid Products individually. In *Valeant,* the Court of Appeal commented as follows with respect to the fungibility of Opioid Products:

> [86] I accept the Province's submission that the ORA contemplates a single action, with multiple defendants, assessing potential liability in respect of systemic conduct affecting potentially large numbers of British Columbians. Moreover, I accept that, as pleaded, opioids are largely fungible products, although they may take different forms or carry different brand names. One important foundation to the claim is the alleged fact that once addicted to a type of opioid, a person will satisfy their dependency by any one of a variety of opiates. The different brands and types of opioids are, to plunder and modify a phrase from another context, opiate-delivery devices.
>
> [Emphasis added.]

[461] The Court did not accede to the argument that the pleadings were fatally flawed due to the individuality of Opioid Products or defendants. In so deciding, the Court commented as follows:

> [91] First, it is not plain and obvious to me that what the appellants allege to be necessary elements of the cause of action are indeed necessary. Perhaps most importantly, I agree with the Province that there is nothing in the ORA which plainly and obviously requires that the breach of a common law, equitable or statutory obligation must be expressly tied to the specific type of opioid product marketed by the company.
>
> [92] Certainly, the Province must plead each defendant (a) manufactured or promoted a type of opioid product, and (b) that type of opioid product can cause or contribute to disease injury or illness. The plaintiff must also plead that the defendant owed and breached a common law duty to persons who used, have been exposed, or might use or be exposed to the type of opioid product manufactured or promoted by the defendant.
>
> [93] What is not plain and obvious is whether s. 3(1)(a) requires that the breach of duty specifically relate or be limited to the particular opioid product manufactured or promoted by the defendant. Rather, an available alternative interpretation is that a defendant owes a duty to potential users of its type of product, but can breach that duty by committing a wrong in relation to other types of opioids, or in relation to opioids generally.
>
> [Emphasis added.]

[462] These comments in *Valeant* were made within the context of a challenge to the pleadings, and as the defendants point out, they are not strictly binding in the present context. Nevertheless, I find the Court's comments helpful in the certification context. After reviewing relevant provisions of the *ORA,* the Court in *Valeant* concluded as follows:

> [97] These sections suggest that the scheme of the ORA contemplates that differences among types of opioid products are immaterial, or of limited relevance to the statutory cause of action: it is beside the point whether some defendants manufactured and sold opioid products in the form of patches and pills that were dispensed to individuals through pharmacies, while other defendants manufactured or sold injectable liquids that were sold to hospitals and administered to patients only in a hospital setting. The statutory cause of action can be read, arguably, as consistent with the fundamental nature of opioids, which to a person dependent on opioids are fungible.
>
> [Emphasis added.]

[463] I agree with this passage and would apply the foregoing comments here in the present context. In my view, an arguable interpretation of the *ORA* is available that would make it irrelevant that the Opioid Products in question took different forms or were treated differently in different jurisdictions. I would not accede to the

defendants' suggestion that this class of drugs is not amenable to common issue treatment because it is possible to break down the drug into further qualitative differences or differences in how it has been dealt with across jurisdictions. It follows that the Province may, if the evidence supports it, argue as a matter of law that the Opioid Products in question are sufficiently fungible such that they support the existence of the common issues.

[464] A similar argument to that raised by the defendants here was rejected in *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338, leave to appeal to SCC ref'd, 40479 (4 May 2023) [*Nissan*], where the putative plaintiff alleged that Nissan negligently designed, manufactured, and sold a dangerous defective part in their motor vehicles. Nissan argued that the chambers judge did not deal with the fact that some changes to the timing chain mechanism were made over the time period in question, so it could not be said that there was a single timing change mechanism across all of the class vehicles. Nissan also alleged that its evidence suggested that changes were made that solved some of the problems: at para. 144. The Court stated that such arguments went to the merits and should be dealt with at trial. The Court reasoned as follows:

> [145] It is to be remembered that the scope of the class covers approximately 64,000 vehicles. If the evidence evolves to support subclasses because of differences in the timing chain mechanisms, that can be addressed later. The parameters of the class were determined by reference to the TSBs, all of which related to problems with the timing chain mechanisms. The TSBs were significant evidence which the judge was not wrong to consider.
>
> [146] There was also clearly a joined issue in the case as to whether the defect posed a danger or not. The plaintiff's evidence and pleading alleged that the defect did pose a danger, but Nissan denied this. As can be seen from Nissan's approach to the question of whether there is a cause of action in negligence, the implications of the timing chain defect and how it affects the engine and the risks it poses will be of importance to all class members. The common issues as framed, and as certified by the judge, will flesh out that dispute and the determination of these issues will benefit all class members.
>
> [Emphasis added.]

[465] In *Bourassa,* the Court rejected the arguments that opioid medications should not be lumped together and that differences among opioids prevented authorization

in that case: at paras. 132-147. Justice Morrison held that individual differences among opioids primarily go to the question of whether the different opioid medications actually cause opioid use disorder: at para. 136.

[466] I would apply the reasoning in *Valeant, Nissan* and *Bourassa* here. The differences among addictive Opioid Products (such as differences in potency, routes of delivery, clinical use, administration, abuse potential or prescribing behaviour in different jurisdictions) identified by the defendants and the experts may give rise to issues of fact that will need to be fleshed out at trial. However, the factual record supports the Province's position that opioids can be dealt with as a whole. I do not agree with the defendants that such differences mean that Opioid Products are not capable of being adjudicated as a class of products in a meaningful way.

2. Differences Between Jurisdictions

[467] The defendants submit that the various proposed common issues will require province-by-province determinations.

[468] For instance, Dr. Chan notes that there are cross-province and -territory differences in underlying institutional, health care practitioner, and population-level factors that impact prescribing decisions and the potential for adverse effects. The evidence also indicates that there were regional and inter-provincial differences in advertising and the promotion of Opioid Products. It may be that if multiple representations were made, such as across sales representatives, they were made differently in different places.

[469] Sanis filed an expert report from Mr. John Sullivan, a former police officer with significant experience in drug investigations. Mr. Sullivan indicates that "[d]ifferences between the provinces and territories in the trade in, and use of, different types of illicit opioids existed prior to 1996 and continue to exist today."

[470] Dr. Hollis and Dr. Anis agree that any model quantifying the effect of promotion on sales of Opioid Products must identify, evaluate, and quantify differences in the policy choices made in each jurisdiction. Dr. Hollis opines that the

provinces and territories are not all the same, and a high-level national treatment is inadequate to understand the effect of promotion on sales of an Opioid Drug in each jurisdiction. This may well have implications for whether the causation-use presumption is rebutted because there may be interprovincial differences in any such analysis.

[471] The supply and use of Opioid Products may, of course, vary between jurisdictions. The approach of jurisdictions to treatment may be different. The evidence as to demographic factors is likely to vary across jurisdictions. For instance, Dr. Chan indicates that:

> …another dimension in which local healthcare capacity may differ is the available vacancies in pain and addiction programs across provinces and territories. Academic and governmental studies have found that longer wait times for addiction programs can contribute to an increase in adverse events resulting in hospitalizations and deaths. Due to the lack of publicly available data, I am unable to analyze the differences in pain and addiction program vacancies across provinces. However, if such differences exist, they would contribute to different levels of opioid prescribing across provinces.

[472] Many of the factors that differ interprovincially will affect causation. Others will affect harm-related assessments.

[473] Dr. Virani disputes the import of inter-provincial and inter-territorial differences to a degree. For instance, in his reply report of June 26, 2023, he states with respect to Dr. Chan's report that:

> Importantly, in the time period the Chan report uses to illustrate these cross-provincial differences in adverse drug outcomes, population exposure to pharmaceutical opioids was four to five years past its peak across the country and non-pharmaceutical fentanyl and fentanyl analogs were playing a more considerable role.
> […]
> However, if concerned that unique place characteristics (such as population health factors) may modify the effects of a population hazard exposure, it is more appropriate to analyse how changes in the hazard exposure over time are associated with an outcome of concern in each place. Using the same data sources, the trend in population opioid exposure from 2006 to 2013 for each state mirrors remarkably its trend in fatal opioid overdoses. This state-level observation is consistent with what was seen at the national level from 1999 to 2010: changes in adverse outcomes from pharmaceutical opioids closely reflected changes in population opioid exposure over time. [Citations omitted.]

[474] Of course, individual issues will exist in all jurisdictions that are joined. As the Court held in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 54 [*Dutton*] and *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 77 [*Vivendi*], if material differences emerge in the plaintiff class, they can be dealt with at trial.

[475] The Province maintains, and I accept to a degree, that case management provisions in s. 27 of the *CPA* will allow the Court to manage individual issues raised in the proceeding.

[476] The individual differences across jurisdictions are a potential complicating factor, which I take into account. Overall, however, I find that inter-jurisdictional differences such as opioid use, effects, or formulary coverage are not fatal to a determination of the parameters of the proposed classes, and the significance of such differences is largely a matter that can be appropriately dealt with at trial.

3. Differences Between Defendants

[477] The defendants argue that due to various differences in the business activities and practices of various defendants and differences in the types of misrepresentations provided to Class Members, the Province's case breaks down into individual assessments such that certification ought to be refused.

[478] Some of the defendants argued that they were uniquely situated and that their business practices differed. As such, they assert they should not be lumped in with the other defendants for the purposes of certification.

[479] In support of these submissions, some defendants filed evidence as to the nature of their businesses and their involvement with Opioid Products.

[480] For instance, Noramco's evidence indicates that it makes active pharmaceutical ingredients but not finished drug products. It does not market or promote Opioid Products beyond marketing to manufacturers, and it does not participate in making representations to health care professionals or end-users other

than to its customers. Although Noramco was previously a subsidiary of Johnson & Johnson, it has had no relationship since 2016, and Johnson & Johnson never acted as Noramco's agent.

[481] Pro Doc maintains that it distributed only six generic Opioid Products in the Class Period, did not manufacture anything, purchased drugs from generic manufacturers, and resold almost all of its Opioid Products to Jean Coutu to supply its franchise pharmacies, which are owned by independent pharmacists. It submits that it does not sell directly to pharmacies, hospitals, or end-users. It denies it is a manufacturer.

[482] Other defendants, such as BMS, Sanis, and Shoppers Drug Mart, submit that the Province has introduced little or no evidence against them. These defendants argue that after failing to provide any evidence of impugned conduct, the Province cannot use common design to hold them liable.

[483] I accept that there are differences among defendants; however, as outlined in the TANCC and as discussed in *Valeant,* the Province's claim against the defendants is structured into groupings and corporate families. In *Valeant*, the Court rejected the argument that it was an error to group together manufacturers or distributors who had engaged in substantially similar conduct: at paras. 64-75.

[484] Moreover, the Court in *Valeant* eschewed the significance of different defendants being involved in different ways in the manufacturing or distribution of Opioid Products:

> [97] These sections suggest that the scheme of the ORA contemplates that differences among types of opioid products are immaterial, or of limited relevance to the statutory cause of action: it is beside the point whether some defendants manufactured and sold opioid products in the form of patches and pills that were dispensed to individuals through pharmacies, while other defendants manufactured or sold injectable liquids that were sold to hospitals and administered to patients only in a hospital setting. The statutory cause of action can be read, arguably, as consistent with the fundamental nature of opioids, which to a person dependent on opioids are fungible.

[485] Further, the Court in *Valeant* noted as follows:

> [60] … Moreover, it is unrealistic in a claim of this complexity and size, involving so many parties who are alleged to have engaged in systemic conduct over decades, to expect or require the level of detail demanded by the appellants. It would be impossible to plead the exact words, date, and place of each occasion when misrepresentations were made by sales representatives or at medical conferences and so on, when what is alleged is a systematic course of conduct. [Emphasis added.]

[486] I adopt this characterization here. What is being alleged is a systemic and flawed course of conduct in the production and distribution of Opioid Products.

[487] While individual differences among defendants exist, the fact remains that the Province raises similar claims requiring resolution of the same facts against the same grouping of defendants. To be sure, there may be individual defendant-specific issues following the resolution of the common issues. For instance, if it is established during a common issues trial that a defendant owed a certain duty, the determination of whether the defendant was in breach to a particular class member can be decided at the individual issues stage. Yet, I cannot find that such differences among defendants are so significant that they necessarily defeat the right of the plaintiff governments to proceed as a class based on the case as it has been structured.

4. The Distributor Defendants' Objections

[488] The Distributor Defendants submit that the Province has not met its burden in certifying the case against them. In particular, they argue that the only cause of action asserted against them (breach of duty to warn end-users), possibly combined with a common design in relation to all defendants to increase Opioid Product sales in Canada, fails for lack of a basis in fact for the existence of common issues. They submit that there is no evidence against them, such as evidence to show the existence of a duty being a common issue.

[489] The Distributor Defendants make various arguments about their differences in position, their financial incentives to increase Opioid Product sales, whether they manage inventory, and whether agency and/or collaborative relationships exist between themselves and other entities. For instance, they argue that they operate in

a controlled system regulated by Health Canada, have no role to play in providing warnings to end-users of Opioid Products, do not market or promote products they distribute, do not sell to patients or individuals, do not influence sales volumes, and have no incentive to encourage increased prescribing.

[490] I find that the vast majority of these submissions are merit arguments that ought to be considered at trial.

[491] The Province's case against the Distributor Defendants is based on the idea that the Distributor Defendants closely monitored the shipment of Opioid Products and delivered them in massively increasing quantities between the mid-1990s and mid-2010s without adequate regard for warnings of the risks of opioid use. As the argument goes, the Distributor Defendants were the actors in the chain that had the most information about where drugs were going and had the greatest ability to recognize abuse and warn others.

[492] The Province's submissions regarding a number of proposed factual common issues, such as questions regarding the Opioid Products distributed by each Distributor Defendant (common issue #6), where they distributed the products and during what time period (common issue #7), and the relationship between the Distributor Defendants' related entities and whether each is the agent of the other (common issue #8), are applicable to the Distributor Defendants and are common to the Class Members' claims.

[493] Some of the Distributor Defendants' arguments appear to be grounded in their lack of duty of care to end users. However, the case law generally supports the imposition of a duty to warn by both manufacturers and distributors: *Walford v. Jacuzzi Canada Ltd*., 2007 ONCA 729 at para. 34; *Childs v. Desormeaux*, 2006 SCC 18 at para. 35; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 SCR 1210 at p. 1229, 1997 CanLII 307 (SCC); *Player v. Janssen-Ortho Inc*., 2014 BCSC 1122 at para. 33; *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189, 1973 CanLII 6 (SCC); *Hutton v. General Motors of*

Canada Ltd, 2010 ABQB 606; *McEvoy v. Ford Motor Co*, [1989] B.C.J. No. 1639, 1989 CarswellBC 1481 (BCSC).

[494] McKesson asserts that the affidavit evidence it has filed negates the imposition of such a duty in this case. However, I find that fuller consideration of this issue would be a merits issue for trial depending on factors such as the distributor's role, their relationship with the manufacturer, and whether they could have reasonably tested or inspected the product.

[495] With respect to the distributors in *Gebien,* counsel in that case conceded that if there was no cause of action for enabling the expansion of the black market paving the way for the public health crisis, then there would have been no negligence claim against the distributor defendants. The plaintiff abandoned his wider allegations of distribution negligence: *Gebien* at para. 407. Here, the case is structured differently against distributors in that it relies on a duty to warn.

[496] The Distributor Defendants clearly distributed Opioid Products in Canada during the Class Period. The evidence indicates that they were part of the chain of distribution that had access to information about where drugs were going and, arguably, the ability to recognize the signs of potential abuse and diversion. Evidence that the prescription Opioid Products they distributed may have been defective or dangerous, together with evidence of an oversupply and evidence about the sufficiency of actual warnings, provide some basis in fact for the common issues related to failing to warn of the known hazards and risks associated with such products, the full hazards of which may not have been known to end users.

5. The Generic Manufacturer Defendants' Objections

[497] The Generic Manufacturer Defendants include Apotex, Pharmascience, Mylan, Pro Doc, Sandoz, Ranbaxy, Teva, Actavis, and Sanis. They submit that there is no basis in fact for the causes of action against them and that there is no rational connection between the proposed common issues and the generic drug companies. In particular, they say that the record does not support allegations of a marketing

campaign to drive increased opioid prescriptions. They say the only evidence of marketing is related to product monographs, which have not been shown to be inaccurate nor over- or under-stated.

[498] The Generic Manufacturer Defendants thus submit that the Province has not discharged its evidentiary burden to show some basis in fact on each of the common issues. Further, the Generic Manufacturer Defendants submit that the proposed class proceeding is not the preferable procedure for resolving the proposed common issues. They also deny participating in a common design with any other person to market Opioid Products or to target prescribers to increase prescriptions.

[499] The Generic Manufacturer Defendants point out that they do not create or enhance the market for a drug. They enter the market later and do not advertise or promote their products to doctors or patients. As they come to the market years after the original manufacturers have already developed a new therapy, and then only with subsequent versions of established drugs already deemed to be safe, they cannot be held liable for an increased market caused by others. They further submit that they are constrained by their ability to make representations with doctors and patients, even if they wanted to, because of the regulatory regime in Canada which requires a notice of compliance for a new drug product.

[500] The Generic Manufacturer Defendants also point to *Gebien,* in which the Court found that it was implausible that the generic drugs would assist in a common design over 30 years to expand the Opioid Products market when they only got permission to sell generic oxycodone in 2012. Perell J. dismissed the claim against Jean Coutu because it was plain and obvious there was no viable claim against it as a manufacturer: *Gebien* at paras. 228-229.

[501] One difficulty with many of the Generic Manufacturer Defendants' arguments is that many go to the merits of the Province's claims and not the question of whether the proposed common issues can be answered on a common basis. The inquiry at this stage is not whether the Generic Manufacturer Defendants made misrepresentations or failed to adequately warn of the dangers of Opioid Products.

Rather, the inquiry is directed at whether there is some evidence that supports the argument that the common issues are common across members of the Class.

[502] The defendants' affidavit evidence indicates that:

- Generic manufacturers must report adverse events to Health Canada.
- The *FDR* requires generic manufacturers to prepare annual summary reports and period reviews, including carrying out medical reviews, conducting critical analyses of safety data, and developing conclusions.
- In circumstances where an originator product is withdrawn from the market and the generic manufacturer continues to market its generic version, the generic manufacturer is responsible for updating the product monograph as required by Health Canada.
- Generic drug companies focus their marketing on pharmacists who dispense prescription drugs once they have been prescribed, with the aim of encouraging them to dispense the company's generic version of the drug in favour of the innovator product and/or the generic products of other manufacturers. Marketing messages in this context focus more or less exclusively on product availability, product quality, price, and appearance, as well as information contained in the product monograph (i.e., indications, administration and posology).

[503] With respect to the product monographs, the evidence suggests that no warnings or safety indications could be added thereto by a generic manufacturer unless specifically approved by Health Canada, with subsequent adoption by all brand and generic manufacturers. In any event, the evidence supports an argument that choosing to market a product and "rely" on a brand manufacturer's product monograph (when a generic manufacturer is aware that the product monograph contains misleading or inaccurate statements) could arguably attract liability.

[504] As noted by Dr. Perry, when brand name manufacturers are successful in creating demand for a drug, this creates opportunities for future generic entry in the market, which occurred in the prescription Opioid Products market after the introduction of OxyContin. He proposes research to describe the "how" and "why" of Manufacturer Defendants' marketing process, strategies, tactics, and outcomes. The evidence from Teva indicates that it distributed OxyNeo educational materials at

pharmacies. The Province also points to information from the Pharmacy Opioid Summit put on by the Canadian Pharmacists Association which states that member companies supported efforts to educate physicians on appropriate prescribing and to educate patients on appropriate use and safe storage to prevent diversion. The evidence thus establishes an opportunity for a flow of information from the generic manufacturers to physicians and, in turn, to end-users.

[505] The evidentiary record overall supports a basis for further exploration of the Province's claims against the Generic Manufacturers based on the proposed common issues. This would include formulary submissions and communications with provincial formularies, communications with pharmacists about generic Opioid Products, communications with other pharmaceutical companies regarding Opioid Products, internal communications regarding the decision to sell generic Opioid Products, and internal communications reflecting knowledge of the Opioid Products epidemic and/or the risks associated with Opioid Products.

[506] The allegation against the Generic Manufacturer Defendants is that they repeated, endorsed, and sought to benefit from the misrepresentations of Manufacturer Defendants by selling generic versions of Opioid Products without regard for the potential risks to public health. The precise causal significance and factual extent of the defendants' marketing activities and coordination with others is to be determined at trial, but I find based on the evidentiary record that there is some basis in fact for the common issues in relation to the Generic Manufacturer Defendants.

6. Health Canada Approval

[507] The defendants submit that Health Canada's approval undermines the satisfaction of the "some basis in fact" standard for the common issues. They point to evidence that Health Canada approves labelling (i.e., the product monograph/prescribing information) of the Opioid Products, as well as the drugs themselves. The Generic Manufacturer Defendants in particular point out that the Opioid Products they sell are second or subsequent in market entry to approval of

the drug by Health Canada and, the generic product monographs they generate are identical to those contained in the originator's product. Indeed, the Opioid Products at issue appear to be developed and distributed in a highly regulated manner.

[508] The defendants point out that Health Canada is still approving some Opioid Products for the treatment of non-cancer pain. This, the defendants say, is some evidence that both the federal and provincial/territorial governments concede that Opioid Products are safe and effective for the treatment of non-cancerous pain, which is arguably inconsistent with the negligent design and negligent misrepresentation claims.

[509] I do not regard these arguments as dispositive at this stage. First, Health Canada approval or regulatory compliance is not determinative of liability for the Manufacturer Defendants: *Miller v. Merck Frosst Canada Ltd.*, 2013 BCSC 544 at paras. 65-67 (approval by Health Canada not dispositive of liability and represents an issue for trial); *Stanway v. Wyeth Canada Inc*., 2011 BCSC 1057 at para. 47(a); *Heward v. Eli Lilly & Company*, 295 DLR (4th) 175, 2008 CanLII 32303 (Ont. S.C. Div. Ct.) at para. 35 ("Compliance with the regulations of Health Canada does not insulate drug manufacturers from claims based on a breach of common law."); *Brousseau* at para. 158 ("Compliance with statutory or regulatory standards is therefore relevant, but not conclusive … with respect to … duty to warn. In *Taylor v. Canada (Attorney General)*, 2020 ONSC 1192 at para. 613, the Court characterized the Crown in this regard as "more of a watchdog than police officer…".

[510] Second, whether or not the defendants were in regulatory compliance, and the impact if any of regulatory compliance, are merits issues for trial. I note in this regard that the manufacturer bears the responsibility for the safety and efficacy testing of the product, including the duty to provide all necessary information to the user, as prescribed by law. There is no explicit duty imposed on Health Canada in the legislation with respect to assessing the safety of a product: *Klein v. American Medical Systems, Inc*., 278 DLR (4th) 722, 2006 CanLII 42799 (Ont. S.C. Div. Ct.) at paras. 32-33; see also, *Drady v. Canada (Health)*, 2008 ONCA 659 at paras. 37-38;

Attis v. Canada (Health), 2008 ONCA 660 at paras. 70-78; and *Taylor v. Canada (Attorney General)*, 2012 ONCA 479 at para. 61.

[511] In *Brousseau*, the Court held that a pharmaceutical manufacturer will not have satisfied its civil duty to warn merely because it has satisfied the regulatory requirements established by Health Canada. However, compliance with statutory or regulatory standards may tend to indicate that the manufacturer has satisfied its duty to warn. Again, however, this appears to me to be an issue for trial.

[512] All authorities cited above on this point are factually distinguishable in some way. Nevertheless, I find based on the foregoing that the precise effect of regulatory approval is a matter for trial and that prior regulatory approval does not take away from the commonality of issues if otherwise established.

7. Causation Issues

[513] The defendants took the position that causation must be analyzed on a jurisdiction-by-jurisdiction basis. They say that the Province has alleged a chain of causation in three stages: (1) “causation use” (whether the defendants’ activity caused an increase in the use of Opioid Products); (2) “causation harm” (whether increased harm resulted from increased use); and, (3) health care costs (whether the harm caused health care costs to be incurred by the Province).

[514] The defendants submit that all the *ORA* does is shift the onus for one of the causation-related elements. Further, the defendants submit that the *ORA* asks about causation in the Province, not on a class-wide basis, and that this is fatal to commonality. The defendants say any analysis of whether the “causation use presumption” (as set out in the *ORA*) is rebutted must be done jurisdiction by jurisdiction.

[515] As to damages, the Province concedes that the amount of health care costs spent is an individual issue that will have to be determined on a jurisdiction-by-jurisdiction basis. However, the Province submits that the models used to assess causation and damages need not be individualized.

[516] The defendants submit that the "causation harm" analysis must be conducted jurisdiction by jurisdiction because of interprovincial and interterritorial variation in prescribing behaviour, prescription rates, and policy choices.

[517] Overall, the defendants submit that any issue that attempts to address "causation use" and the rebuttal of the presumption is not common and cannot be certified.

[518] I note that the *ORA* sets out a simplified procedure for causation and damages assessments that sets this case apart from others.

[519] Moreover, the Province's expert evidence indicates that drawing the causation connection between the alleged conduct of the defendants and the resulting harm is a common exercise.

[520] I accept that there may well be individual or interprovincial issues of causation related to use, harm, and damages assessments. However, I cannot accept that complications caused by issues of causation weigh heavily in favour of individual trials.

8. Adequacy of the Province's Methodology

[521] As noted above, the Province is required to establish that its expert methodology is sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that if harm is established at the trial of the common issues, there is a means by which to demonstrate that it is common to the Class. The methodology must be grounded in the facts of the case, and there must be some evidence of the availability of the data to which the methodology is to be applied: *Pro-Sys SCC* at paras. 115-119.

[522] *Pro-Sys SCC* provided the following guidance in indirect purchaser actions on the role of expert evidence (in the form of economic models and methodologies) in assessing the commonality of the harm or loss-related issues:

> [115] The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole (see *Chadha*, at para. 31). The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove "common impact", as described in the U.S. antitrust case of *In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002). That is, plaintiffs must demonstrate that "sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class" (*ibid.*, at p. 155). It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain.
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> [118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.
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> [119] To hold the methodology to the robust or rigorous standard suggested by Microsoft, for instance to require the plaintiff to demonstrate actual harm, would be inappropriate at the certification stage…
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> [Emphasis added.]

[523] The reports by Dr. Anis, Dr. Perri and Dr. Tamblyn (all filed by the Province) provide some basis in fact that there exists a methodology that can be used to determine whether the defendants' conduct caused an increase in the sale and/or use of Opioid Products in Canada during the Class Period, and to quantify that increase.

[524] Dr. Tamblyn provides a basis to find that a methodology can be used to assess the relationship between an increase in the use of Opioid Products in Canada since 1995 and the incidence and prevalence of Opioid Product-related harms or illnesses on a population-wide basis. She states that first, one would need to be able to estimate the risk of potential harms (adverse health outcomes) from the

use of Opioid Products. Second, one would need to measure the population-attributable risk, which combines the risk of adverse outcomes with the prevalence of Opioid Product use (or change in prevalence of Opioid Product use). She notes that there is a substantial body of literature that has used observational studies to estimate the harms of Opioid Product use. She points to data available in Canada that could be used to support such methodology, and she notes that the methodology is the same regardless of jurisdiction (though the richness of the available data varies across jurisdictions).

[525] Dr. Perri indicates that a quantitative assessment of the correlation between marketing expenditures and sales can provide evidence of the link between marketing by manufacturers and increased sales. However, given the limitations of correlation, Dr. Perri suggests a case study approach to provide a linkage between marketing and sales. This methodology is accepted and used in the medical community, and it was employed in *Opioid MDL* in the United States.

[526] Dr. Anis opined that an economic framework could be applied to empirically estimate the impact of the marketing and promotional activities of opioid manufacturers in expanding the sales of their products and, therefore, the use of Opioid Products in Canada.

[527] The adequacy of these methodologies is strongly disputed. For instance, both Dr. Doyle and Dr. Moray take the position that methodology has to be done province by province. There are questions as to the availability and uniformity of data that may hinder the application of a uniform methodology. The defendants submit that the analysis of the harm caused by use or exposure to Opioid Products, or the marketing and promotion of prescription Opioid Products, will inevitably break down into product-specific variations. However, these, like many of the defendants' objections, are issues for trial.

[528] I would not at this stage hold the proposed methodologies to a robust or rigorous standard. Nor would I attempt to assess the competing expert evidence as to the viability of the proposed methodologies: *Pro-Sys Consultants Ltd. v. Infineon*

Technologies AG, 2009 BCCA 503 at paras. 67-69 [*Pro-Sys BCCA*]. The methodologies suggested by Drs. Tamblyn, Anis, and Perri offer a realistic prospect of establishing loss on a class-wide basis such that if liability is established on a trial of common issues, there is a means to demonstrate that it is common to the class. There is some evidence as to the availability of appropriate data so as to allow the application of the proposed methodologies.

9. Quebec Law and French Language Issues

[529] The Quebec Defendants (Pro Doc and Jean Coutu) submit that: (1) the Province has thus far ignored Quebec civil law issues; (2) the Province is required to address Quebec civil law; (3) the impact of Quebec civil law means that the proposed common issues are not common at all; and, (4) the impact of Bill C-36 (the *Quebec ORA*) will create individual issues.

[530] The Quebec Defendants filed three expert reports from Mr. Patrice Deslauriers, a Quebec law professor. As noted above, that evidence indicates that there are numerous differences in litigating the claims in light of the application of Quebec civil law. Many of these differences are directly relevant to the *forum non conveniens* analysis, but the defendants submit that they also have relevance to the commonality and preferability analysis under s. 4(1) of the *CPA*.

[531] The Quebec Defendants argue that three statutes will have an important role to play in potential litigation: the *Charter of Human Rights and Freedoms*; the *Charter of the French Language*; and the *CCQ*.

[532] The Province submits that all the defendants, including the Quebec Defendants, are tied together through the tools of marketing that drove the alleged misinformation. The Province submits that the factual analysis that will take place respecting the common issues will overlap with Quebec-related issues significantly, and there is no reason why this Court cannot apply Quebec law.

[533] I have difficulty with the breadth of the submission of the Quebec Defendants that the failure of the Province to account for Quebec law is fatal to certification. The Quebec Defendants submitted that the Province has failed to address how fundamental language rights will be maintained in British Columbia. Those defendants submitted that "BC will be in breach of its duties under the *Charter of the French Language*" and other Quebec statues.

[534] Procedurally, the *Charter of the French Language* is a Quebec statute that does not impose obligations on the British Columbia government in prosecuting its case before the courts of British Columbia. From my understanding, it provides rights and benefits to individuals and *inter alia* imposes obligations on government entities with respect to language rights before the courts of Quebec. While it would certainly apply to communications between the Quebec Defendants and the Quebec government, the *Charter of the French Language* does not impose obligations on the Province or courts with respect to the manner in which proceedings will be conducted in British Columbia.

[535] In terms of possible procedural complications, as noted earlier, it will be necessary to have documents in French translated into English to comply with R. 22-3. Rule 22-3 provides that:

> (2) Unless the nature of the document renders it impracticable, every document prepared for use in the court must be in the English language, legibly printed, typewritten, written or reproduced on 8 1/2 inch ´ 11 inch durable white paper or durable off-white recycled paper.

[536] As noted above, in *Conseil scolaire francophone*, the Court held that the British Columbia legislature has exercised its power to regulate the language to be used in court proceedings in British Columbia by adopting legislative provisions which require civil "proceedings", which includes exhibits to affidavits filed as part of those proceedings, to be in English.

[537] The Quebec Defendants point to the comments of Justice Iyer in *Campbell v. Capital One,* 2022 BCSC 928 at para. 46 to the effect that counsel seeking to certify a multijurisdictional class action including Quebec must ensure that their pleading

and submissions address the distinctive nature of Quebec law. While that proposition may have been appropriately applied in the circumstances of *Campbell,* that case turned on somewhat different considerations in that it involved a decision as to whether the action should include Quebec in light of an ongoing multijurisdictional proceeding there and the impact of how the British Columbia proceeding would fit with the Quebec proceeding: see paras. 34-37. In the case at bar, however, there is no ongoing proceeding in Quebec involving the same parties, and, in any event, the parties have now tendered evidence on the relevance and potential application of Quebec law.

[538] In the *Jurisdiction Decision*, this Court accepted that there is a real and substantial connection between British Columbia and the Quebec Defendants. Part of the reasoning was that the Court found in this pharmaceutical context that individual defendants are not "siloed" in each province. It is not enough to argue, as the Quebec Defendants do, that since Pro Doc sold Opioid Products only to Jean Coutu in Quebec, or that Jean Coutu only acted as a franchisor to pharmacies in Quebec, no other province might have a valid claim against them.

[539] Even if a manufacturer or distributor such as Pro Doc operated solely in one province, there may be spill-over effects from the distribution of prescription Opioid Products resulting in harm in other provinces. For instance, a person could develop an opioid use disorder in Quebec and move elsewhere where health care costs are later incurred. Or a patient might receive Opioid Products in Quebec but take them outside of the province for travel or work. Moreover, the various defendants are alleged to have acted in a common design with each other through the tools of marketing that drove their sales. Hence, removing the Quebec Defendants due to the raised civil law and language issues does not so easily solve the problem of the defendants' potential extra-provincial liability for harm to other governments which would likely still necessitate multiple proceedings.

[540] The Quebec Defendants argue that Quebec civil law principles implicated by the proposed common issues require separate legal tests in the analysis of the

proposed common issues. As such, the Quebec Defendants say certain proposed common issues must be resolved on an individual basis and are thus not “common” issues. For example, Pro Doc submits that proposed common issue 8 asks a legal question that invokes the common law concept of agency, which is inapplicable in Quebec civil law. It says that a separate legal analysis would be required to answer the question of whether the Quebec Defendants are agents of the other defendants.

[541] The Province submits that the Quebec Defendants overstate the differences between Quebec civil law and common law principles. It says that Quebec civil law, including the core articles of the *CCQ* that are relevant to the dispute, have extensive overlap with common law principles that are implicated by the proposed common issues.

[542] I accept to some extent the Quebec Defendants’ submission that there will be substantive issues regarding Quebec law comprising individual issues that will need to be determined on an individual basis. These individual issues are emphasized in Mr. Deslauriers' reports. Significantly, however, there are no proposed common issues that directly concern Quebec law. As well, to the extent Ms. Perrault’s conclusions concerning the impact of Quebec law are contrary to those of Mr. Deslauriers, I prefer Ms. Perrault’s evidence over that of Mr. Deslauriers.

[543] Ms. Perrault indicates, and I accept, that there are many areas in the civil and common law that overlap and can be decided commonly, leaving other issues to be decided individually. These include fault (standard of care and punitive damages), manufacturers’ liability (continuous duty to inform), and apportionment of liability: see, for instance, *Montréal (Ville) v. Lonardi*, 2018 SCC 29 at para. 65 (the concept of joint participation in a wrongful act under art. 1480 *CCQ* is comparable to the “concerted action” concept of the common law); *Brousseau* at paras. 111-112, 169-172 (discusses the similarities in the duty to warn and the learned intermediary rule). Ms. Perrault concludes that case law from Quebec confirms that legal principles applicable in the present case are largely similar in Quebec and the common law

provinces. Overall, I find that the proposed common issues will involve some overlap between common law and Quebec law principles.

[544] Ms. Perrault points to the fact that the *Quebec ORA* was adopted with the intent of facilitating the participation of the Quebec government in the British Columbia opioids class action and harmonizing the Quebec civil law regime with the legislation of the common law provinces for the purpose of this exceptional case. She did not believe the *CCQ* to be the sole source of interpretation for the *Quebec ORA* or that there would even be a significant need to refer to the CCQ to resolve issues that will arise in this particular case.

[545] Ms. Perrault also points out that in the past, numerous class actions have been certified/authorized for a national class and/or settled nationally with the same common issue(s), including cases dealing with fault/competition and manufacturers' liability: see, for example, *Infineon Technologies AG v. Option consommateurs,* 2013 SCC 59 and *Harper v. American Medical Systems Canada Inc.,* 2019 ONSC 5723.

[546] I reject the submission that a common issues trial could not significantly advance the litigation as a class action: see *Sauer v. Canada (Attorney General)*, 2010 ONSC 4399 at paras. 10-12 (where the rights of Quebec class members were accounted for). I find that the proposed common issues would advance the litigation for the Class including the government of Quebec.

[547] There is substantial commonality among the issues, and in particular among the factual issues. The legal issues will certainly raise some individual differences as to how liability and damages will ultimately apply to the Quebec litigants, but they would nevertheless advance the litigation. As well, the common issues at this point address how to deal with liability under the TANCC, the *ORA,* and the *CPA,* and do not directly require individualized decisions about Quebec law or language rights. I would not find that the Class should be defined more narrowly to exclude Quebec because that province shares the same interest as others in the resolution of the common issues.

[548] If the Quebec government does not opt out of proceedings, and the trial proceeds against the Quebec Defendants and others, case management issues will no doubt arise. It will be necessary as proceedings unfold to be cognizant of the need for translation of documents and possible interpretation during proceedings, as well as the eventual resolution of individual substantive issues necessitating the application of Quebec law.

[549] My concern at this point is mainly with the form of the proceeding in which the claims are to be adjudicated and whether it can properly proceed as a class action, though I am cognizant of issues of Quebec law that may arise. My focus remains on whether the Province has met the basis for certification under s. 4(1) of the *CPA.* The fact that the case may require the application of extra-provincial laws to extra-provincial class members is not a bar to certification, though it of course has relevance to preferability, commonality, and the issue of forum of convenience.

[550] Therefore, I accept the presence of procedural and substantive complicating factors and the need to be cognizance of Quebec law and French language issues. However, I assess that allowing the proceeding to go ahead as a class action will undoubtedly avoid duplication of fact-finding and is necessary to resolve each Class member's claim, though success for the various Class Members may vary in this respect given the later need to resolve residual individual issues of Quebec law.

10. Common Design / Joint Liability Issues

[551] The defendants at certification unanimously deny the Province's allegation that they participated in a common design to overcome resistance in the medical community to Opioid Products. They submit that the presumption is that one party is not liable for the actions of another and that the Province's evidence only goes so far as supporting lawful corporate activity between the defendants. The defendants' argument in this regard is relevant to common issues 22-28, which are further discussed below.

[552] Again, the merits are not in issue at this stage. The plaintiff is not required to prove that the defendants were engaged in a common design in order to certify a common issue asking whether the defendants were engaged in a common design.

[553] There are indications in the evidence as to the interconnections between the various defendants that are worthy of exploration at trial. Some of the defendants are clearly inter-related due to their corporate relationships and there is some evidence of cooperation in industry-related activities. The nature of the corporate relationships provides some basis for the common design allegations: *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 at paras. 66-70.

[554] The Province points out that proceedings remain in their early stages at this point, and the defendants have not been put through the discovery process. In this regard, the Court in *Valeant* remarked as follows:

> [63] … At this early stage in the action and before discovery, the Province cannot be expected to know all of the specifics of the generalized conduct it alleges. The extent a particular defendant engaged in specific conduct, even "public" conduct such as promotional activities at medical conferences or promotions to medical practitioners, is better known to the defendant than the Province. The issues raised by the appellants relate more to issues of proof than pleading.
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> [167] It must be remembered that this action is at an early stage, and at this stage the Province likely has relatively limited information about intercorporate relationships and how different companies within a corporate family may have undertaken different aspects of conduct alleged to be wrongful. It is not appropriate to cut off these claims at a pleadings stage when there is likely substantial asymmetry of information about how different corporate families structured their internal affairs and organized their manufacturing, promotion, research or distribution activities. As more information emerges, further amendments or particularization may be called for. This can be managed through the discovery process. At this stage, the pleadings cannot be taken merely to assert some kind of group enterprise liability or to improperly disregard the separate existence of corporate entities.

[555] Again, at this stage, what is required is some basis in fact for the common design allegations. A higher standard of proof of wrongful conduct is not required at this stage.

[556] The evidence establishes some basis for the alleged interconnections between defendants. There is some evidence of possible harmonization and coordination of corporate activities. The defendants are tied together through their corporate relationships, participation in the opioid industry, and through the instruments of marketing, promotion, and distribution of Opioid Products. There is some evidence of concerted conduct toward the common end of broad promotion and sale of Opioid Products.

D. Whether the Pleadings Disclose a Cause of Action (s. 4(1)(a))

[557] This requirement for certification may be dealt with summarily. Applications to strike the causes of action in the Province's claim, with the exception of public nuisance, have already been decided largely in the Province's favour: *Valeant.* The parties agree that these applications are determinative of the s. 4(1)(a) branch of the certification test.

[558] In relation to the present case, the Court of Appeal in *Valeant* confirmed this Court's decision that the pleadings disclose the following causes of action:

Class Group	**Defendant Group**	**Cause of Action**
Class Members	Manufacturer Defendants	• Breach of s. 52 of the *Competition Act*. • Unjust Enrichment.
ORA Subclass Members (all Class Members except Yukon)	All Defendants (including Distributor Defendants)	*ORA* claim, predicated on negligent failure to warn.
ORA Subclass Members (all Class Members except Yukon)	Manufacturer Defendants	*ORA* claims, predicated on: • negligent design; • negligent misrepresentation; • fraudulent misrepresentation/deceit; • breach of s. 52 of the *Competition Act*; and • breach of s. 9 of the *FDA*.

[559] The Province and all Class Members rely upon allegations of common design not as an independent cause of action but rather as a form of joint or concerted action liability that provides a pathway to liability for other claims.

[560] As the above-mentioned claims passed the scrutiny of this Court in the *Pleadings Decision* and the Court of Appeal in *Valeant,* I find that the Province has properly pled the above-mentioned causes of action.

E. Whether there is an Identifiable Class of Two or More Persons (s. 4(1)(b))

[561] Section 4(1)(b) of the *CPA* requires the Province to establish that there is an identifiable class of two or more persons. The class must be defined with reference to objective criteria that do not depend on the merits of the claim. The class definition must bear a rational relationship to the common issues: *Watson v. Bank of America Corporation*, 2014 BCSC 532 at paras. 63 and 64, rev'd in part, 2015 BCCA 362 [*Watson BCSC*]; *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82 [*Jiang #1*].

[562] The Province seeks certification of this action on behalf of all federal, provincial and territorial governments that, during the Class Period, paid health care, pharmaceutical, treatment, and other costs related to Opioid Products; and all federal, provincial, and territorial governments that have legislation specifically directed at recovery of damages and health care costs arising from an "opioid-related wrong" as that term is defined in the *ORA*.

[563] I can find no conflict among or between Class and *ORA* Subclass Members. All Class and *ORA* Subclass members have a common interest in determining whether the defendants improperly marketed and/or distributed Opioid Products. If any conflicts arise, those can be addressed at subsequent stages of the proceeding.

[564] Of the potential *ORA* Subclass, only Yukon has not introduced dedicated *ORA*-equivalent legislation. The legislation passed by other *ORA* Subclass members is generally supportive of the present certification application.

[565] The defendants submit that governments are not "persons" for the purposes of s. 4(1)(b) of the *CPA.* The word "persons" is not defined in the *CPA.* Section 29 of the *Interpretation Act,* R.S.B.C. 1996, c. 238 defines "persons" as including a

corporation and the Crown is excluded from the definition of "corporation." I am unable to accept this argument (which I note was made prior to the Court's decision in *Sanis SCC*).

[566] The Court in *Sanis SCC* recently affirmed that, unless expressly narrowed by statute, the Crown has the capacity as a natural person to enforce common law and statutory causes of action available to it:

> [47] … 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.

[567] The Court went on to dismiss the argument that the *Interpretation Act* expressly narrows the Province's power to enforce statutory causes of action:

> [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' <u>includes</u> 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.
>
> […]
>
> [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).

[568] Thus, I am satisfied that the Province has the capacity to bring an action on behalf of a class for *ORA*-related causes of action. I am also satisfied that the other proposed *ORA* Subclass members are "persons" for the purposes of s. 4(1)(b) of the *CPA*.

[569] For non-*ORA* claims based on unjust enrichment or a stand-alone claim under the *Competition Act,* I similarly held in the *Pleadings Decision* at para. 143 that there is nothing to exclude the Crown from the definition of "person" in s. 36 of the *Competition Act*. Given the above, I find that the Province has the power to enforce these common law and statutory causes of action on behalf of the rest of the Class and that the Class Members are "persons" for the purposes of s. 4(1)(b) of the *CPA*.

[570] As a result, I find there is an identifiable class of two or more persons in relation to the claims advanced by the putative plaintiff.

[571] There must also be a rational relationship between the class identified by the plaintiff and the proposed common issues: *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924, 2004 CanLII 45444 (ONCA) at para. 48. I have no difficulty making that finding here.

[572] Finally, the Distributor Defendants argue that the action cannot be certified against the Distributor Defendants on behalf of the *ORA* Subclass because governments that have not enacted *ORA*-equivalent legislation are not members of the *ORA* Subclass and therefore do not have a cause of action against the Distributor Defendants. This argument is perhaps somewhat dated in that, at present, all Canadian provincial and territorial governments except Yukon have adopted *ORA*-equivalent legislation.

[573] Further, this argument appears to me to be inconsistent with the long-settled law in British Columbia that a representative plaintiff does not need to have a cause of action against each named defendant: *MacKinnon v. Instaloans Financial Solution Centres (Kelowna) Ltd*, 2004 BCCA 472 at paras. 49-51. Separate but overlapping classes can be certified in the same action: *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at paras. 76, 111, 121. I would not give effect to this argument. The Province has met the requirements of s. 4(1)(b).

F. Whether the Proposed Claims Raise Common Issues (s. 4(1)(c))

1. General

[574] The Province's proposed common issues are set out in its Schedule A – Further Revised Common Issues (reproduced as Appendix B to these Reasons). Some of the proposed common issues have been deleted such that the Province now proposes 44 common issues instead of 55 as originally articulated. All issues related to public nuisance (29-34) have been struck from the proposed common issues. In addition, issues 1, 4, 5, 12, and 55 have been removed.

[575] In *Pro-Sys SCC,* the Court distinguished between common issues relating to the scope and existence of the causes of action pleaded and common issues relating to loss. The loss-related common issues require the use of expert evidence to establish a credible or plausible methodology in order for commonality to be established on a class-wide basis: *Pro-Sys SCC* at paras. 113, 118.

2. Legal Principles Applicable to the Common Issues Analysis

[576] Section 4(1)(c) of the *CPA* requires that "the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members."

[577] Section 1 of the *CPA* defines "common issues" as issues that are (a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[578] The Court of Appeal has held that "[t]he commonality threshold is low; a triable factual or legal issue which advances the litigation when determined will be sufficient": *Finkel* at para. 22.

[579] As noted above, the Court in *Hollick* and *Pro-Sys SCC* held that the class representative must show some basis in fact for each of the certification requirements set out in the *CPA* other than the requirement that the pleadings disclose a cause of action. The certification stage is decidedly not meant to be a test of the merits of the action: see s. 5(7) of the *CPA*. Rather, this stage is concerned with the form of the action and whether it can properly proceed as a class action: *Hollick* at para. 16; *Pro-Sys SCC* at para. 99. The Court in *Pro-Sys SCC* further provided further guidance as follows at para. 108:

> In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:
>
> (1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
>
> (4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.

> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[580] The commonality requirement has been described as the central notion of a class proceeding. It is based on the notion that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings: *Pro-Sys SCC* at para. 106. Even a significant level of difference among class members does not preclude a finding of commonality: *Pro-Sys SCC* at para. 112.

[581] An issue is common only where its resolution is necessary to the resolution of each class member's claim: *Pro-Sys SCC* at para. 108. Questions may be common even if the answer to the question might vary from one member of the class to another. For a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at paras. 45-46.

[582] An issue will not satisfy the common issues test if it is framed in overly broad terms: *Rumley* at para. 29. An issue stated in general terms, even if it results in a finding common to the class, will not be appropriate as a common issue to support certification if it provides only context and does not yield concrete answers to real claims that would advance the litigation in a meaningful way: *Rumley* at para. 29; *Charlton v. Abbott Laboratories Ltd.*, 2015 BCCA 26 at para. 85; *Pro-Sys SCC* at para. 139; *Hollick* at paras. 18-21; *Pioneer v. Godfrey,* 2019 SCC 42 at para. 109.

[583] In analyzing whether there is some basis in fact for a common issue, the court must consider the language of the common issue that is proposed and whether there is some evidence that supports the argument that it is a common issue across members of the class. This is a low threshold. The purpose of the requirement is to ensure there is a minimum evidentiary foundation to support the certification order: *Nissan* at paras. 133-134. A pleading, legislation or legal principles can support the

existence of an issue, and together with some evidence of commonality, will meet the certification test, but merely pleading an issue does not make it common: *Bowman* at para. 136.

[584] The parties strongly disagreed on the proper approach to commonality in this case. The defendants submit that the some basis in fact standard requires a two-step approach by which the plaintiff must adduce evidence on (a) the existence of a common issue, and (b) the commonality of that issue across the entire class.

[585] The defendants urged me to follow the *dicta* from Justice Gascon in *Jensen v. Samsung Electronics Co. Ltd.,* 2021 FC 1185 at paras. 213-216 [*Jensen FC*], aff'd in 2023 FCA 89 [*Jensen FCA*] that supports a two-step approach; see also, *Bhangu v. Honda Canada Inc*., 2021 BCSC 794 at para. 99; *Price v. H Lundbeck A/S,* 2018 ONSC 4333 at para. 82, rev'd on other grounds, 2020 ONSC 913 (Div. Ct.).

[586] Courts in British Columbia have generally not found it useful to split the commonality analysis into two steps. In *Nissan* at para. 132, the Court of Appeal rejected the need for "two distinct categories of evidence," some evidence that there is a common defect and some evidence that the alleged defect is dangerous. The Court directed that the inquiry should focus on the language of the common issue that is proposed and whether there is some evidence that supports the argument that it is a common issue across members of the class: *Nissan* at para. 133. The purpose of the requirement that there be some basis in fact to support the common issues is to provide the certification judge with some level of confidence that certification will be of practical benefit when, in the future, the claims reach trial, as opposed to being simply a procedural complication for claims that are not truly common. It also helps the judge determine if a class proceeding is a preferable procedure: *Nissan* at para. 139.

[587] Most recently, in *Mentor Worldwide LLC v. Bosco,* 2023 BCCA 127, the Court of Appeal expressed the approach in the following terms:

> [33] For the remaining criteria in s. 4(b)–(e), the plaintiff must present sufficient evidence to show 'some basis in fact' that the requirements for certification are

> met: *Hollick* at para. 25. This does not involve an assessment of the merits. Thus, for example regarding the commonality requirement, the plaintiff must show some basis in fact that the issues are common to all class members, not some basis in fact that the acts alleged actually occurred: *Pro-Sys* at para. 110. The purpose of the 'some basis in fact' requirement is to ensure that that the action can proceed on a class basis without "foundering at the merits stage" because the certification requirements are not met: *Pro-Sys* at para. 104.
>
> [34] The evidentiary threshold that the plaintiff must meet on a certification hearing is a low one: "*some* basis in fact is to be contrasted with *no* basis in fact": *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 104. This evidentiary requirement must be understood in the context of the *CPA* scheme, which envisions that applications for certification will be brought at the early stages of the proceeding: *Nissan v. Mueller*, 2022 BCCA 338 at para. 136. As the merits are not being argued on certification, the record does not have to be exhaustive: *Fischer* at para. 41. While the defendant is entitled to respond to the plaintiff with its own evidence, the court cannot engage in any detailed weighing of conflicting evidence: *Sun-Rype* at para. 68; *Fischer* at para. 43.

[588] In *Bowman,* Justice Matthews concluded that the two-step evidentiary test is not appropriate for every common issue that might be sought to be certified in a given case. While there must be common issues to certify a class proceeding, their existence is determined by whether they are live issues of fact or law, which is not always an evidentiary matter. There must be some evidence of the commonality of a proposed common issue. That evidence will often also go to its existence, but if it does not, the existence can be supported by the pleadings or the law: at para. 139.

[589] As Hinkson C.J.S.C. alluded to in *O'Connor*, there may well be little substantive difference in breaking the test down into two steps as long as the Court remains mindful that the merits of the case are not in issue. In that case, this Court adopted a more functional approach while recognizing that some basis in fact for class-wide commonality requires more than mere speculation:

> [261] In considering the authorities above, regardless of whether it is called a one- or two-step test, the plaintiff's burden is the same. He must show some basis in fact that the issues are common to the class. He need not prove on a balance of probabilities that the defendants actually caused or contributed to the Wildfire. However, as stated in *Hollick* at para. 25, he must show some basis in fact that the claims raise common issues, "other than the requirement that the pleadings disclose a cause of action."

> [262] Put another way, "is there some evidence of class-wide commonality, that is some evidence that the proposed common issue can be answered on a class-wide basis": *Trotman* at para. 57, citing *Grossman v. Nissan Canada*, 2019 ONSC 6180.
>
> [263] I struggle to see how the plaintiff can meet his burden of showing that an issue can be proven in common for the class without providing some basis in fact that there is a common issue in the first place. Thus, whether the one-step or two-step articulation of the test is used, the outcome is the same.

[590] In *Barroqueiro v. Qualcomm,* 2023 BCSC 1662*,* I did not adopt the two-part test urged by the defendants because I found it lacked support in the *dicta* provided in *Pro-Sys SCC,* the language of s. 4(1) of the *CPA,* and the jurisprudence in cases such as *Sun-Rype*, *Fischer*, and *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22, all of which caution the certification judge not to conduct an adjudication on the merits. In *Barroqueiro,* I found at paras. 210-211 that using the one-step rather than the two-step test would have little practical effect because my findings with respect to commonality also supported the existence of the issues in that case.

[591] As noted, the two-step approach has generally not found a great deal of traction in British Columbia, and trial decisions such as *O'Connor* have generally favoured a more functional approach which addresses form rather than merits. But rather than focus on whether the approach to commonality should involve one step or two, I find it more helpful to ensure that the analysis is not out of step with applicable principles in the guiding authorities.

[592] I would therefore follow the guidance provided by the Supreme Court of Canada in *Dutton*, *Hollick* and *Pro-Sys SCC* quoted above, and the dicta from our Court of Appeal in *Harrington v. Dow Corning Corp.*, 2000 BCCA 605 at para. 20; *Watson v. Bank of America*, 2015 BCCA 362 at para. 152; *Ewert v. Canada (Attorney General)*, 2022 BCCA 131 at para. 25; *Nippon* at para. 104; *LaSante v. Kirk*, 2023 BCCA 28 at para. 61; *Rorison v. Insurance Corporation of British Columbia*, 2023 BCCA 474 at paras. 111-112; as well as *Nissan* and *Mentor Worldwide LLC* quoted above.

[593] These authorities provide that for the commonality test in s. 4(1)(c) of the *CPA,* the court must consider the language of the common issue that is proposed,

and whether there is some basis in fact, as opposed to no basis in fact, that supports the argument that the issue is a common across members of the class: *Nissan* at para. 132; *Mentor Worldwide LLC* at para. 33. The underlying question is whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis: *Pro-Sys* at paras. 108, 110.

3. Analysis of Proposed Common Issues

[594] The Province submits that its allegations arise from national conduct with national impact. It submits that it would be inefficient and would result in duplication of fact-finding and legal analysis if each member of the Class was required to independently pursue the claims that are advanced against the defendants. For example, the Province says the common issues will resolve broad factual inquiries that are necessary to the resolution of each Class Member's claim, including the following:

> (a) what Opioid Products were manufactured and sold in Canada during the Class Period, the time period in which each Opioid Product was sold, and where in Canada the Opioid Product was sold;
>
> (b) whether the defendant made any Opioid Misrepresentations, and whether the Opioid Misrepresentations were made in relation to opioids generally or with respect to a specific Opioid Product;
>
> (c) where and when the Opioid Misrepresentation was made; and
>
> (d) the defendants' knowledge of the risks of Opioid Products and benefits of Opioid Products use at all material times.

[595] The Province submits that the common issues also address legal questions such as the duties owed by the defendants to Class Members or the *ORA* Subclass to end users of Opioid Products and whether those duties have been breached. The answers to these questions are submitted to be common to Class Members or *ORA* Subclass members and are necessary for the resolution of those claims.

[596] The defendants' objections to the proposed common issues include the themes and objections outlined above. They say that the Province's proposed common issues are impermissibly broad and vague (or alternatively not common),

that the Province has not shown how these broad allegations apply to the defendants (including the Generic Manufacturer Defendants and Distributor Defendants), and that some are simply not necessary. They further argue that all proposed common issues require individual assessments and lack some basis in fact on the evidence. While the defendants concede the threshold to show some basis in fact is low, they submit the threshold is still significant.

[597] I do not agree with these objections. I find that the Province has established some basis in fact for the proposed common issues on the basis of admissible evidence filed on this hearing, the pleadings, and the applicable legislation and legal principles. All of the proposed common issues will move the litigation forward in a significant way. The defendants have not shown that there is no basis in fact for the proposed common issues. I find that the class proceeding is appropriate to be prosecuted on the basis of the proposed common issues.

a) Common Issues 2-3 (Effect of Opioids) and 6-8 (the Defendants and Their Products)

[598] The Province sets out proposed common issues 2-3 related to Opioid Products-Related Disease, Injury or Illness as follows:

> 2. Can use of or exposure to Opioid Products cause or contribute to disease, injury or illness?
>
> 3. If so, what are the diseases, injuries or illnesses that can be caused or contributed to by use of or exposure to Opioid Products?

[599] In addition, the Province sets out proposed common issues 6-8 related to the defendants and their Opioid Products as follows:

> 6. During the Class Period, what Opioid Products were manufactured, marketed and/or sold in Canada by each Manufacturer Defendant?
>
> 7. During the Class Period, what Opioid Products were distributed, sold, or offered for sale in Canada by each Distributor Defendant?
>
> 8. With regard to each group of Defendants that is defined collectively in the Third Amended Notice of Civil Claim:
>
> a) What is the relationship between each Defendant?

b) Are the relationships such that each is the agent of the other for the purposes of the manufacture, marketing and sale of Opioids in Canada and/or the distribution of Opioid Products in Canada?

[600] Common issues 2-3 and 6-8(a) are issues of fact. They are foundational but tied to the context of the litigation. They address the nature of the alleged defect in Opioid Products, associated harm and the defendants' relationship with Opioid Products.

[601] None of the aforementioned issues are determinative of liability, but the answers to all the above questions are common to all Class Members and are necessary factual inquiries underlying each Class Member's claim.

[602] Common issue 8(b) (agency) is a legal issue which largely depends on the answer to common issue 8(a) (relationship between the defendants). Both are aimed at the relationships among defendants that may give rise to liability.

[603] While the defendants submit that these proposed common issues are too general or lack some basis in fact to raise a common issue across the entire proposed Class, I assess that their resolution will provide answers that will help meaningfully advance the litigation. I do not agree with the defendants that these proposed common issues are too general.

[604] Despite the objections of the defendants outlined above, including their submissions about the variety of Opioid Products in issue, the Province has provided some evidence that these factual questions can be answered on a class-wide basis without having to conduct individual inquiries either at a product level or a user level. This is consistent with the approach in other cases, including *Valeant, Nissan* and *Bourassa*. The proposed common issues can be answered without making findings of fact with respect to each individual government claimant. I assess that these common issues will meaningfully advance the litigation.

b) Common Issues 9-11 (The Manufacturer Defendants' Opioid Misrepresentations)

[605] Proposed common issues 9-11 provide as follows:

> 9. Did the Manufacturer Defendants, or any of them, make one or more of the Opioids Misrepresentations?
>
> 10. If the answer to common issue #9 is yes:
>
> (a) Which Manufacturer Defendants and in relation to which Opioid Products?
>
> (b) Were any of the Opioid Misrepresentations made by the Manufacturer Defendants untrue, inaccurate or misleading?
>
> (c) Were any of the Opioid Misrepresentations made by the Manufacturer Defendants false?
>
> 11. Did the conduct of the Manufacturer Defendants, in making the Opioids Misrepresentations, cause an increase in the prescription of Opioid Products in Canada?

[606] The Province has withdrawn common issue 12.

[607] Opioid Misrepresentations are defined in the TANCC at paras. 158-206 in relation to various conduct by the Manufacturer Defendants that the Province alleges give rise to liability, including aggressively and improperly marketing Opioid Products and making Opioid Misrepresentations as to the nature and effects of Opioid Products.

[608] These proposed common issues mainly relate to determinations about the Manufacturer Defendants' marketing practices during the Class Period and the legal significance of any Opioid Misrepresentations. I assess that these common issues will avoid duplication of fact-finding or legal analysis and are necessary to the resolution of each class member's claim.

[609] I agree with the Province that these issues arguably address, on a national basis, what representations were made at what time and whether they were illegal. The answers to these issues will inform the causes of action based on misrepresentations. I do not agree that they are overly broad or that the inquiries will necessarily break down into thousands of individual issues. It does not appear that individual communications would have been made to each of the Class Members. Rather, the Opioid Products-related representations appear on the evidence to have been disseminated on a wider basis, supporting an inference of uniformity on a class-wide basis. The evidence from the Province's expert, Dr. Perri, supports the

submission that these issues are amenable to common resolution. In his report, Dr. Perri states that:

> a) Marketing is an "integrated process reflecting strategic and operational planning and implementation." Marketing practices are developed through macro-level information gathering, market-wide strategy, segmenting of customer groups and targeting of market segments.
>
> b) Pharmaceutical companies use a wide range of marketing methods to employ them including: personal selling by PSRs to deliver information and messaging creating for dissemination by companies; research, publications, & medical journal advertising, peer-to-peer marketing; CME and CPD programs; clinical practice guidelines; influence on formularies; direct-to-consumer marketing; and branded and unbranded marketing. All of these methods are employed based on the marketing strategies and messaging that are carefully developed and implemented at the organizational level. The vast majority involve materials that are widely disseminated and may have been uniformly accessible across provinces, or even nationwide.
>
> c) Pharmaceutical manufacturers, including multinational companies, place a priority on consistency of all marketing messages, subject to differences in locally approved product information. While marketing may be manipulated between locales, the core principles, theory, strategies and tactics do not.
>
> [Emphasis added.]

[610] The Province's evidence offers some basis in fact that the proposed common issues are amenable to common resolution.

[611] The defendants submit that the impact of the foregoing questions is individual and that the nature and extent of marketing to physicians will necessarily vary or that these are individual issues that need to be resolved on a province-by-province basis. The defendants also point to affidavit evidence that representations made to doctors varied by regional factors due to differences in sales representatives, formulary status, and patient populations. The defendants submit that the Province alleges many different kinds of representations and that the Province's case includes a variety of representations based upon product monographs: see, for instance,

Hyundai Auto Canada Corp. v. Engen, 2023 ABCA 85 at paras. 31-34; *Evans v. General Motors*, 2019 SKQB 98 at paras. 62-63.

[612] The Generic Manufacturer Defendants argue that they made no representations at all or merely repeated what the original Manufacturer Defendants had stated. The Generic Manufacturer Defendants dispute that they had knowledge of, endorsed or sought to benefit from any misrepresentation.

[613] Common issue 11 asks whether the defendants' conduct in making the Opioids Misrepresentations caused an increase in the prescription of Opioid Drugs in Canada. In Dr. Anis' initial report and his reply report, he concludes that "an economic framework can be applied to empirically estimate the impact of the marketing and promotional activities of opioid manufacturers in expanding the sales of their Opioid Products and therefore opioid use in Canada." This evidence provides some basis in fact that there is a workable methodology to estimate the effect of promotion on Opioid Product utilization in Canada.

[614] In *Carom v. Bre-X Minerals Ltd*., 51 OR (3d) 236, 2000 CanLII 16886 (ONCA), the Court found that it was an error to overemphasize the number and diversity of impugned representations at this early juncture. The Court reasoned as follows:

> [49] With respect, I think it is a mistake, at this early juncture of the litigation, to overemphasize the number and diversity of Bre-X's representations. One of the potential benefits of a class action with certified common issues relating to the knowledge and conduct of the defendants is that the resolution of those issues might narrow substantially the subsequent inquiries on the plaintiffs' side of the coin. As I understand the theory of the plaintiffs, the named defendants participated in a scheme to promote Bre-X shares by embarking on a program of issuing press releases they knew to be false, that portrayed the assay results from the Busang site as demonstrating the existence of a gold mine of staggering dimensions. If these facts can be established by the plaintiffs, the questions raised in para. 8 (f) of the order declaring the common issues must be addressed. What did the individual def's know about the promotional fraud? […] In short, the existence of 160 representations should not be used as a reason to refuse certification as a class action; rather, certification is, potentially, a way of reducing those 160 representations to a much smaller number of relevant ones.

[615] I would adopt this reasoning and apply it in the present case.

[616] While the answers to some of these proposed common issues may include individual differences among representations, I assess that such variation does not significantly detract from the conclusion that the proposed common issues raise issues common to all Class Members. I find that the Province has shown some basis in fact for these proposed common issues.

c) Common Issues 13-21 (The Defendants' Knowledge)

[617] The Province proposes the following common issues relevant to the defendants' knowledge:

> 13. At all material times, what was the state of knowledge of the medical and pharmaceutical community regarding the risks and benefits of opioid use?
>
> 14. Prior to entering the market for manufacturing, marketing and selling an Opioid Product, what steps did the Manufacturer Defendants take to research, investigate, and/or assess the risks and benefits of opioid use?
>
> 15. At all material times, what knowledge did the Manufacturer Defendants have of the risks and benefits of opioid use?
>
> 16. Prior to entering the market for manufacturing, marketing and selling a generic version of a brand name Opioid Product, what steps did the Generic Manufacturers take to research, investigate and/or assess the risks and benefits of opioid use?
>
> 17. At all material times, what knowledge did the Generic Manufacturers have of the risks and benefits of opioid use?
>
> 18. At all material times, what knowledge did the Distributor Defendants have of the risks and benefits of opioid use?
>
> 19. What data and/or knowledge did the Defendants have in relation to the distribution and sale of Opioid Products, including:
>
> a) Volume of Opioid Products sold;
> b) Location of purchase;
> c) Prescribing doctor; and
> d) Dispensing pharmacy.
>
> 20. At all material times, what knowledge did the Defendants have in relation to the behaviour of users who become addicted to or dependent on Opioid Products, including whether users would:
>
> a) Purchase opioids on the illicit market;
> b) Seek out multiple healthcare providers to write prescriptions;

c) Seek prescriptions for higher dosages;
d) Seek prescriptions for higher quantities; and/or
e) Seek out pharmacies that would fill opioid prescription on a 'no questions asked basis'.

21. At all material times, were the Defendants aware that their promotion, marketing, sale and distribution of Opioids would cause an increase in the consumption of Opioids?

[618] The TANCC alleges, *inter alia*, that:

159. The Manufacturer Defendants knew or ought to have known that their representations regarding the risks and benefits of Opioids were not supported by or were contrary to scientific evidence. The Manufacturer Defendants also knew that doctors and patients rely heavily on educational materials, such as treatment guidelines, continuing medical education seminars, articles and websites to inform their treatment decisions.

[…]

199. The Generic Manufacturer Defendants repeated, endorsed and sought to benefit from the Opioids Misrepresentations made by the Manufacturer Defendants when they knew, or ought to have known, that the Opioids Misrepresentations were false and misleading,

[…]

202. The Generic Manufacturer Defendants endorsed and promulgated the Opioid Misrepresentations, and made a conscious decision to manufacture, market and sell Opioids without regard for the potential risks to public health.

[…]

204. The Distributor Defendants knew or should have known from experience in the United States that the Manufacturer Defendants' deceptive and misleading marketing efforts would lead to a dramatic increase in consumption of Opioids in Canada and that by distributing ever increasing amounts of Opioids, the Distributor Defendants would be contributing to the creation of the Opioid Epidemic in Canada.

[…]

212. Through their collection of detailed sales data, the Distributor Defendants were aware or should have been aware that: (a) sales of Opioids in some communities were disproportionate to the population; (b) sales of Opioids in some retail pharmacies were disproportionate to the pharmacy's size and sales volume; and (c) sales of Opioids to some retail pharmacies were so large as to be suspicious for risk of illicit diversion.

213. The Distributor Defendants ignored the suspicious sales volumes and patterns. Instead, the Distributor Defendants purchased large volumes of Opioids from the

> Manufacturer and Generic Manufacturer Defendants and engaged in a common design with the Manufacturer and Generic Manufacturer Defendants to maximize the sale of Opioids in Canada.

[619] The foregoing questions address the state of the defendants' knowledge of the risks of Opioid Product use at various times, which relates to the Province's opioid-related wrong claims.

[620] Common issues 13, 14 and 16 strike me as appropriate precursor questions that will advance the litigation because they are relevant to liability. They address the state of knowledge of the medical and pharmaceutical industry regarding the risks and benefits of Opioid Product use. Common issues 14 and 16 specifically address steps taken by the Manufacturer Defendants and Generic Manufacturer Defendants prior to entering the Opioid Products market to research, investigate and/or assess the risks and benefits of Opioid Product use.

[621] Common issues 15 and 17-21 focus on the defendants' knowledge regarding the risks and benefits of Opioid Products use, the distribution and sale of Opioid Products, the behaviour of users who became addicted to Opioid Products and whether their promotion, marketing, sale and distribution would cause an increase in consumption of Opioid Products.

[622] Common issues 16 and 17 address the state of knowledge of the Generic Manufacturer Defendants. Some of the Generic Manufacturer Defendants submit that the proposed common issues do not advance the case against them because they did not manufacture finished Opioid Drugs. I have made comments on the Generic Manufacturer Defendants above. I find that the submission of the Generic Manufacturer Defendants raises merits issues and, in any event, is complicated by issues of awareness of risks, common design and agency, and the extent to which the Generic Manufacturer Defendants knowingly took advantage of opportunities to enter the Opioid Products market. It appears to me that the evidentiary record establishes an appropriate factual and legal basis for these proposed common issues related to the Generic Manufacturer Defendants' knowledge.

[623] Common issue 18 relates to knowledge of the risks and benefits of Opioid Product use by the Distributor Defendants. The Distributor Defendants argued that they are only tied to one cause of action, and the case against them is necessarily weaker. I have made comments on the Distributor Defendants above. As well, I note the comments in *Valeant*:

> [130] I think there is no merit in those suggestions. The principles relied on may have application in circumstances where a novel category of claim is under consideration. Here, though, I do not think that the duty of a drug manufacturer or distributer not to make negligent false statements can be regarded as anything other than an established category of duty. It is intimately and inextricably connected with the duty to warn. Commonly, a negligent misstatement will simultaneously be a breach of a duty to warn. Given the nature of pharmaceuticals, and the asymmetry of information about their properties and risks, it is surely obvious that statements made to consumers are, without more, reasonably intended to induce reliance, and on them is reasonable.
>
> [Emphasis added.]

[624] That the Distributor Defendants fall into one direct category of failure to warn, keeping in mind that they are allegedly intertwined with the common design allegations, does not mean that the Distributor Defendants are insignificant. The Province alleges that the Distributor Defendants were the “canary in the coal mine,” in that they were well-placed to track shipments of Opioid Products and alert others to “hot spots”.

[625] Finally, the Distributor Defendants argue that absent from the authorities are cases where pharmaceutical distributors are defendants, and the only claim against them is failure to warn. I agree that the claims against the distributors are somewhat novel in this context. Nevertheless, the claims against the distributors have survived a pleadings challenge, the evidentiary record supports some basis in fact that these issues are common to all class members, and the law dictates that novel but arguable claims should be permitted: *Finkel* at para. 17; *Atlantic Lottery* at para. 19, citing *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42 at para. 21. I cannot find that the claim against the Distributor Defendants is doomed to fail or that there is no evidence of the existence of such a claim being common to all Class Members.

[626] The proposed common issues about the defendants' knowledge are appropriate, amenable to resolution as common issues, and will advance the litigation. I am satisfied that the proposed questions raise common issues to Class Members as required by the *CPA* and that their resolution will meaningfully advance the litigation.

d) Common Issues 22-28 (Common Design)

[627] The Province seeks to certify the following issues related to common design:

> 22. With regard to each group of Defendants that is defined collectively in the Third Amended Notice of Civil Claim, did the Defendants act pursuant to a common design to develop, test, manufacture, seek regulatory approval, market, sell, and conduct post-market surveillance of Opioids in Canada?
>
> 23. Did the Manufacturer and Distributor Defendants share market data, sales data, sales forecast, marketing plans and demand estimates between each other?
>
> 24. Did the Manufacturer and Distributor Defendants engage in a common design to maximize the sale of Opioids in Canada?
>
> 25. Did Bristol-Meyers act pursuant to a common design with Endo Pharmaceuticals Inc. and Endo International PLC to market Opioid Products developed by the Endo corporate entities in Canada?
>
> 26. Did Teva and Purdue act pursuant to a common design to manufacture, distribute, market and sell OxyNeo in Canada?
>
> 27. Did the Manufacturer Defendants engage in a common design to overcome resistance in the medical community to the use of prescription Opioids for patients experiencing chronic non-cancer pain, and thereby generate and encourage long-term patient consumption of Opioids?
>
> 28. Are the Defendants jointly and severally liable for any damage caused by their common design?

[628] In the TANCC, the Province advances allegations of common design with respect to certain defendant groups, including between corporate families, the Manufacturer Defendants, and between the Manufacturer and Distributor Defendants. The Province does not rely upon allegations of common design as an independent cause of action but rather as a form of joint or concerted action liability that provides a pathway to liability for other torts. The Province has not alleged the tort of conspiracy.

[629] Overall, common issues 22-28 appear aimed at advancing the Province's common design claims. The issues ask whether the various groups of defendants engaged in a common design and whether the defendants are jointly and severally liable for their common design. The focus of these questions is on the defendants' conduct.

[630] Common issue 22, dealing with whether the defendants acted pursuant to a common design to engage in certain conduct, is a foundational common question which I assess will advance the litigation and is necessary for the resolution of each class member's claim.

[631] Common issue 23 is a factual question asking whether the defendants engaged in some of the conduct alleged to be part of the common design. Some of the defendants have filed affidavits stating that they did not engage in this conduct. This evidence goes to the merits and is premature at this stage to rely upon. The evidentiary record supports the common issue being posed and that an inquiry will advance the litigation.

[632] Common issues 24-27 are legal questions, some of which relate to a specific common design between groups of defendants. The nature of the defendants' cooperation and whether it constitutes a common design are questions that will advance the litigation.

[633] The defendants submit that the factual basis for advancing these claims is absent from the evidentiary record, such that the common issues are incapable of being supported. In particular, the defendants allege that there is no evidence of a scheme with an unlawful object and no evidence of anyone providing substantial assistance.

[634] In my view, these submissions are without merit in this particular context. While the defendants argued that there is nothing in the record to support allegations of common design, there is enough in the record to support the commonality of these issues across the Class. Further exploration of this argument is for trial.

[635] The Province has pointed to evidence supporting various connections between defendants. All were involved in manufacturing or distributing prescription Opioid Products to varying degrees. The context is alleged to be an industry-wide one where the defendants participated in a scheme to significantly increase the supply of prescription Opioid Products in the Canadian market during the Class Period. There is an open question as to whether the risks of Opioid Products were downplayed at different times and whether such behaviour was sufficiently coordinated to attract common design liability. Again, these are questions for trial. I assess, despite the presence of potential individual issues, that the above-mentioned common design-related issues raise issues common to Class Members as required by the *CPA,* that they will help avoid duplication of fact-finding or legal analysis, and that their resolution will meaningfully advance the litigation.

e) Common Issues 35-37 (Unjust Enrichment)

[636] Under the heading “Direct Claims,” the Province posits various proposed common issues related to causes of action separate from those based on the *ORA*. The claims related to public nuisance have been omitted as that cause of action has been struck.

[637] Common issues 35-37 relate to unjust enrichment and pose the following questions:

> 35. Were the Manufacturer Defendants enriched as a result of making one or more of the Opioids Misrepresentations?
>
> 36. If yes, what was the amount of the enrichment, and did the Class Members suffer a corresponding deprivation?
>
> 37. If yes, was there a juristic reason for the defendants’ enrichment?

[638] I note the following comments of the Court of Appeal in *Valeant*:

> [168] The point of the unjust enrichment claim is to recover moneys paid to the appellants in purchasing opioids. The elements of unjust enrichment are not in issue. The Province needs to plead enrichment, corresponding deprivation, and an absence of a juristic reason that would justify the enrichment. The Province alleges that every manufacturer defendant was unjustly enriched: at paras. 274–80. The Province clarified in its factum, and at the hearing, that the alleged “wrongful and

> unlawful actions" breaching "both common law and statutory obligations" render the contracts illegal. The Province relies on the material facts pleaded throughout the FANCC as support for the summary pleading at paras. 274–80.

[639] The defendants argue that the above-proposed common issues fail because they break down into individualized inquiries or require a province-by-province analysis. I do not agree that this is necessarily so. I am reminded that the question of commonality is determined from the perspective of class members and not from the perspective of the defendants. Moreover, the fact that the gains of the Manufacturer Defendants may come in the form of revenues from different jurisdictions does not necessarily mean that individual inquiries are necessary.

[640] With respect to the absence of a juristic reason, the defendants argue that there is no basis in fact for a common issue because Opioid Drugs were distributed through wholesalers and distributors pursuant to contracts of purchase and sale. However, in *Valeant* at para. 173, the Court noted that material facts that might support the displacement of some or all of the contracts under which Opioid Products were sold have been pleaded. If such a contract is voidable or otherwise unenforceable in law, perhaps due to a breach of the *Competition Act* or the *FDA,* it may fail to constitute a juristic reason for enrichment: *Bodnar v. The Cash Store Inc*., 2005 BCSC 1228, aff'd 2006 BCCA 260 at paras. 15-17; *Tracy v. Instaloans Financial Solution Centres (BC) Ltd*., 2008 BCSC 669 at paras. 25-27, aff'd 2009 BCCA 110. Whether the Province can prove the absence of the established categories of juristic reason, one of which is a contract, is an issue of the merits, not of the pleadings, and is not appropriate for consideration at certification: *Pro-Sys SCC* at para. 88. The fact that Opioid Products were distributed through contracts with wholesalers and distributors is not a bar to the certification of the unjust enrichment claim.

[641] The proposed questions relate to amounts, if any, the defendants received from making improper representations about Opioid Products and the absence of a juristic reason for the enrichment. These questions will yield answers that will be substantially the same for all the members of the Class. In my view, these elements

of the unjust enrichment claim can be determined on a group basis. The proposed questions will significantly advance the litigation. I find that the above proposed common issues are appropriate to determine as common issues.

f) Common Issue 38 (Breach of the *Competition Act*)

[642] Common issue 38 poses the following question:

> 38. If the Court determines that any of the Manufacturer Defendants made any false or misleading Opioid Misrepresentations, did those Manufacturer Defendants breach duties owed pursuant to s. 52 of the *Competition Act*?

[643] Section 52 of the *Competition Act* provides as follows:

> (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that
>
> (a) any person was deceived or misled;
>
> (b) any member of the public to whom the representation was made was within Canada; or
>
> (c) the representation was made in a place to which the public had access.
>
> (1.2) For greater certainty, in this section and in sections 52.01, 52.1, 74.01, 74.011 and 74.02, the making or sending of a representation includes permitting a representation to be made or sent.
>
> (1.3) For greater certainty, the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation, unless the obligatory charges or fees represent only an amount imposed by or under an Act of Parliament or the legislature of a province.
>
> (2) For the purposes of this section, a representation that is
>
> (a) expressed on an article offered or displayed for sale or its wrapper or container,
>
> (b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,
>
> (c) expressed on an in-store or other point-of-purchase display,

> (d) made in the course of in-store or door-to-door selling to a person as ultimate user, or by communicating orally by any means of telecommunication to a person as ultimate user, or
>
> (e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,
>
> is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).
>
> (2.1) Where a person referred to in subsection (2) is outside Canada, a representation described in paragraph (2)(a), (b), (c) or (e) is, for the purposes of subsection (1), deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.
>
> (3) Subject to subsection (2), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) is deemed to have made that representation to the public.
>
> (4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.
>
> (5) Any person who contravenes subsection (1) is guilty of an offence and liable
>
> (a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or
>
> (b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.
>
> (6) Nothing in Part VII.1 shall be read as excluding the application of this section to a representation that constitutes reviewable conduct within the meaning of that Part.
>
> (7) No proceedings may be commenced under this section against a person against whom an order is sought under Part VII.1 on the basis of the same or substantially the same facts as would be alleged in proceedings under this section.

[644] The Province alleges that the Manufacturer Defendants are liable for a breach of s. 52 of the *Competition Act* under s. 36 of the *Competition Act*: *Valeant* at para. 221, citing the TANCC at paras. 232–234. To do so, the Province must show that the damages claimed under s. 36 are “as a result of” the s. 52 breach.

[645] The above question depends on whether any of the Manufacturer Defendants made Opioid Misrepresentations. It asks whether the Manufacturer Defendants breached duties owed pursuant to s. 52 of the *Competition Act.* It focuses on the knowledge and conduct of the Manufacturer Defendants, similar to common issues 9-11 that deal with misrepresentations. I assess that this question raises an issue common to class members and will significantly move the litigation forward and should be certified.

g) Common Issue 39 (*ORA* Claims Advanced on Behalf of *ORA* Subclass Members)

[646] Common issue 39 is the first of a series of questions (which includes common issues 39-54) that the Province put under the heading "*ORA* CLAIMS ADVANCED ON BEHALF OF *ORA* SUBCLASS MEMBERS." Proposed common issue 39 provides as follows:

> 39. Are the Defendants, or any of them, a 'manufacturer' and/or 'wholesaler' of an opioid product, as defined in the *ORA*?

[647] Question 39 is a definitional question closely linked to key definitions in the *ORA* which trigger certain rights for the Province under that recovery legislation.

[648] If a defendant is not a manufacturer or wholesaler (or, given amendments to the *ORA*, a consultant), the *ORA* does not apply. While similar definitions may vary to a minor degree across the various *ORA*-equivalent legislation, the same factual inquiry will apply similarly across the *ORA* Subclass. Any such minor definitional variation does not undermine the commonality of the proposed inquiry. I assess that this question is common to all class members and will meaningfully advance the litigation.

h) Common Issue 40 (*FDA*)

[649] Common issue 40 provides as follows:

> 40. Did the Manufacturer Defendants breach duties owed pursuant to s. 9 of the *Food and Drugs Act*?

[650] Section 9(1) of the *FDA* reads as follows:

> (1) No person shall label, package, treat, process, sell or advertise any drug in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

[651] The Province alleges that the Manufacturer Defendants breached their duties under this provision with respect to their labelling, packaging, sale, and advertisement of Opioid Drugs in Canada, thereby supporting a claim under the *ORA.* Notably, the *FDA* is federal legislation and applies to the Manufacturer Defendants regardless of where in Canada their products are manufactured.

[652] The extent to which individual inquiries are necessary was disputed by the parties, and whether the question as currently phrased is too open-ended in that it might apply to all products manufactured by a defendant was contested. Accordingly, I would amend the proposed common issue as follows:

> 40. Did the Manufacturer Defendants breach duties owed pursuant to s. 9 of the *Food and Drugs Act* in relation to their Opioid Products? [Emphasis added.]

[653] The defendants argued that this proposed common issue breaks down similar to that proposed in *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 at para. 147. *Singer* dealt with an allegation against two manufacturers of sunscreen that their advertising and labelling misrepresented the effectiveness of their products. I agree with the defendants that, to some extent, individual inquiries with respect to specific representations and Opioid Products of the defendants will be necessary. However, with the amendment above, I would not find that such an inquiry will be overly broad or that a sufficient basis for a common issue in relation to a breach of the *FDA* has not been shown.

[654] The Province's claim is clearly limited to Opioid Drugs. Common issue 40 relates to the labelling and packaging of Opioid Products that are done on a broad basis within Canada. From the perspective of the *ORA* Subclass, the factual and legal findings related to each Opioid Product will apply to all members of the *ORA* Subclass.

[655] I assess that there is some basis in fact for this proposed common issue being common to all class members and that it will meaningfully advance the litigation.

i) Common Issues 41-42 (Negligent Failure to Warn – Manufacturer Defendants)

[656] Common issues 41-42 provide as follows:

> 41. Did the Manufacturer Defendants owe a duty to directly or through prescribing physicians warn end users of Opioids of the risk of addiction, dependency, adverse side effects, and death attendant upon Opioid use?
>
> 42. Did the Manufacturer Defendants breach their duty to warn by failing to make reasonable efforts to communicate the risks and dangers of using their Opioid Products to prescribing physicians and end users?

[657] These questions again relate to the Manufacturer Defendant's duties and the alleged breach of those duties.

[658] The question raised by common issue 41 relates to whether a duty to warn was owed to end-users of opioids, directly or indirectly. Clearly, a manufacturer has a duty to warn consumers of dangers inherent in the use of a product to which the manufacturer has or ought to have knowledge: see *Valeant* at para. 108; *Hollis* at para. 20. The existence of a duty to warn is foundational and common to the Class. There is some evidence to support the question as a common issue. The parties appear to agree that if the defendants accept that such a duty is owed, this question need not be included in the common issues.

[659] Common issue 42 deals with the establishment of a breach of a manufacturer's duty by failing to make reasonable efforts to communicate the risks and dangers of Opioid Drugs. While the defendants dispute this allegation, I am not at this point considering the merits of whether the defendants breached any duty owed.

[660] I would not find that common issues 41 or 42 break down into individual determinations among *ORA* Subclass members. For instance, if the answer to issue

42 depended upon a statement or omission in a specific product monograph, the finding of a breach would apply equally to all members of the *ORA* Subclass. The fact that the answer may differ from defendant to defendant does not take away from the fact that any such inquiry would apply to all of the *ORA* Subclass members.

[661] I assess that there is some basis in fact for these proposed common issues as being common to all class members and that they will meaningfully advance the litigation.

j) Common Issues 43-44 (Negligent Failure to Warn – Distributor Defendants)

[662] The only common issues specifically concerning causes of action against the Distributor Defendants are the two negligent failure to warn common issues in common issues 43 and 44. These proposed common issues read as follows:

> 43. Did the Distributors Defendants owe a duty to end users of Opioids to directly or through prescribing physicians warn of the known risks of addiction, dependency, adverse side effects, and death caused by the Opioids they distribute and sold during the Class Period?
>
> 44. Did the Distributor Defendant breach their duty to warn by failing to warn prescribing physicians and end user of the known hazards and risks associated with Opioids?

[663] These questions relate to the Distributor Defendants' duties and the alleged breach of those duties.

[664] The arguments of the Distributor Defendants in relation to these common issues are reviewed above. They submit that there is no basis for the existence of these common issues. Each of the Distributor Defendants has pointed out the differences in their distribution chain positions and pointed out that they operate within a highly controlled system. These defendants argue that absent special circumstances, distributors are entitled to rely on manufacturers to warn end users and have no independent duty to warn.

[665] Again, however, the certification of a class proceeding is not meant to test the merits of a claim or determine if it is likely to succeed: *Pro-Sys SCC* at para. 110. If

the statutory requirements in s. 4(1) of the *CPA* are met, the court must certify the action. There is no residual discretion. My role at this stage is simply to determine whether the Province has shown "some basis in fact" for each of the requirements, save for the requirement that the pleadings disclose a cause of action.

[666] While some of the arguments of the Distributor Defendants questioned the imposition of a duty to end users of Opioid Products, the authorities canvassed above support the imposition of a duty to warn on both manufacturers and distributors. The Court in *Valeant* quoted from Linden et al., *Canadian Tort Law*, 12th ed. (Toronto: LexisNexis, 2022), on the existence of such a duty (at 298):

> [P]roduct manufacturers and distributors owe a duty to warn of inherently dangerous products or dangerous uses of safe products. The duty arises when the defendant becomes aware or ought to have become aware of the danger, including dangers it discovers after sale. Significantly, the duty arises even when the danger was not caused by any fault on the part of the defendant.

[667] All of the Distributor Defendants were involved at one level or another in the distribution of Opioid Products in Canada. The Distributor Defendants raise merits issues that will need to be resolved at trial. I agree with the Province that the merits question of whether a duty of care should ultimately be imposed in this specific context, and if so, whether that duty has been breached, goes beyond the appropriate analysis on this application.

[668] At this stage, I cannot agree with the Distributor Defendants that the Province has failed to show any basis in fact to support imposing a duty on the Distributor Defendants to warn Canadian end users of the known risks of addiction, dependence, adverse side effects and death caused by Opioid Products.

[669] The Province has shown that the answer to common issues 43 and 44 will be common among all members of the *ORA* Subclass, whether the distributor is in-province or out-of-province. I assess that there is some basis in fact for common issues 43 and 44 and that these questions will meaningfully advance the litigation.

k) Common Issues 45-48 (Negligent Misrepresentations and Fraudulent Misrepresentations – Manufacturer Defendants)

[670] Common issues 45-48 provide as follows:

> Negligent Misrepresentations
>
> 45. Did the Manufacturer Defendants know, or ought to have known, that the Opioid Misrepresentations were untrue, inaccurate or misleading?
>
> 46. Did the Manufacturer Defendants act negligently in making the Opioid Misrepresentations?
>
> Fraudulent Misrepresentation/Deceit
>
> 47. Did the Manufacturer Defendants make the Opioid Misrepresentations knowing them to be untrue, or without belief in their truth?
>
> 48. Were the Manufacturers Defendants reckless as to whether the Opioid Misrepresentations were true or false?

[671] These proposed common issues inquire into the knowledge and conduct of the Manufacturer Defendants as it relates to the duties they owed and whether those duties were breached. These questions address knowledge of the truth of their marketing representations.

[672] Once again, I assess that there will be individual issues and differences between defendants arising from multiple representations they allegedly made. However, I do not agree that these questions will need to be resolved on a province-by-province or territory-by-territory basis. Dr. Perri indicated that pharmaceutical manufacturers prioritize the consistency of marketing messaging, that marketing strategies are implemented at the organizational level, and that the vast majority of such strategies involve widely disseminated material. As well, there appears to be a certain uniformity to the impugned pharmaceutical representations in that many were made through labelling and the product monographs of Opioid Products. Dr. Perri's evidence supports the proposition that while marketing variables may vary from location to location, the core messaging or content of the communication to customers is generally consistent.

[673] I find that it will benefit the litigation to make factual determinations as to the nature and extent of the Manufacturer Defendants marketing efforts and as to the knowledge of the defendants, particularly determinations as to the defendants' knowledge of whether any misrepresentations were untrue, inaccurate, or misleading.

[674] Dr. Anis concludes that "an economic framework can be applied to empirically estimate the impact of the marketing and promotional activities of opioid manufacturers in expanding the sales of their Opioid Products and therefore opioid use in Canada." It appears to me, notwithstanding the criticisms of the defendants' experts, that a plausible methodology is available to estimate the effect of marketing promotion on the use of Opioid Products in Canada.

[675] I find there to be some basis in fact for these proposed common issues related to negligent and fraudulent misrepresentation, and I find that these issues will meaningfully advance the litigation.

l) Common Issues 49-51 (Negligent Design by the Manufacturer Defendants)

[676] Common issues 49-51 are as follows:

> 49. Did the Manufacturer Defendants owe end users of opioids a duty to exercise reasonable care in manufacturing, marketing and selling opioids?
>
> 50. If the answer to common issue #49 is yes, what was the standard of care owed by the Manufacturer Defendants?
>
> 51. Did any of the Manufacturer Defendants breach the duty by defectively designing their Opioid Products?

[677] These proposed common issues inquire into the Manufacturer Defendants' knowledge and conduct as it relates to the duties owed by these defendants, the applicable standard of care, and whether these duties were breached.

[678] The defendants argue that these proposed common issues are overly broad, citing, *inter alia*, the diversity among Opioid Drugs and among the defendants. However, the issues as phrased are tied generally to the Manufacturer Defendants,

their duty toward end users of Opioid Products, and the applicable standard of care. I assess that the answer to these questions would be substantially the same for members across the *ORA* Subclass.

[679] As noted in *Harrington,* the first step in every product liability case alleging negligent design, manufacture, or marketing involves inquiries into the existence of a defect by determining whether the product is defective under ordinary use or, although non-defective, has a propensity to injure. The second step is an assessment of the state of the manufacturer's knowledge of the dangerousness of its product to determine whether the manufacturer's duty was not to manufacture and distribute, or to distribute only with an appropriate warning: *Harrington* at paras. 42-43.

[680] I note the comments of Justice Strathy (as he then was) in *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, aff'd 2012 ONSC 3692 (Div. Ct.) at paras. 171-74 on the nature of the task in this context:

> [174] The evidence to establish that the product is defective and that liability can be determined on a class-wide basis, may vary from case to case. In some cases, evidence that the defendant or regulatory authority has made a product recall may be sufficient. In other cases, the fact that numerous consumers have experienced a product failure under normal operating conditions may suffice. In still other cases, expert evidence may be required.

[681] The Province's negligent design claim alleges that (a) the choice of opioids as the active ingredient for chronic non-cancer pain is the design defect of the product, (b) the risk of harm includes heightened risk of addiction, adverse health consequences and lack of any effective abuse-deterrent design, and (c) non-steroidal anti-inflammatory drugs are the alternative design that is safer and economically feasible: *Valeant* at para. 117. In other words, the defect alleged is the choice of opioids as the active ingredient. There is no question that the alleged defect exists: opioids are the active ingredient in Opioid Products. The question of whether such a condition constitutes a defect such that a negligent design claim is established is the factual and legal issue that the common issues are intended to answer.

[682] The issue of Health Canada approval is discussed above. I find that the precise effect of regulatory approval is a matter for trial, and prior regulatory approval does detract from the commonality of the proposed common issues.

[683] The Province has conceded that opioid agonist therapies are not included in its liability assessment (but are included for the purposes of assessing damages). It has also conceded that injectable Opioid Products are not included except for any injectable Opioid Products that were prescribed for outpatient use and were the subject of marketing/promotion. The proposed common questions ought therefore to be read with those caveats in mind.

[684] There appears to be little dispute that a manufacturer has a duty to exercise reasonable care in manufacturing, marketing and selling their products. Accordingly, there is some dispute as to whether common issue 49 is necessary. However, I would not strike common issue 49 as it was not clear to me that there was unanimity on this point.

[685] For questions 49-51, I find that the Province has established some basis in fact for the proposed common issues and that these common issues would meaningfully advance the litigation.

m) Common Issues 52-54 (*OR*A Claims)

[686] Common issues 52-54 relate specifically to *ORA* claims and provide as follows:

> 52. Did the Defendants breach any common law, statutory or equitable duties owed to insured persons who have used or been exposed to or might use or be exposed to an Opioid Product pursuant to s. 3(1)(a) of the *ORA*?
>
> 53. If the answer to common issue #52 is yes, can using the Opioid Product cause or contribute to disease, injury or illness, pursuant to s. 3(1)(b) of the *ORA*?
>
> 54. If the answer to common issue #53 is yes, was the Opioid Product that was manufactured or promoted by the Defendant offered for sale in Canada during all or part of the breach, pursuant to s. 3(1)(c) of the *ORA*?

[687] Factual and legal causation of “disease, injury or illness or the risk of disease, injury or illness” arising from opioid use must be presumed by the court according to

s. 3(2) of the *ORA* if the Province establishes certain prerequisites under s. 3(1) of that legislation. Section 3(1) of the *ORA* provides that in an action brought on an aggregate basis, the government can benefit from certain presumptions:

> 3 (1) In an action under section 2 (1) or 2.1 (1) for the recovery of the cost of health care benefits on an aggregate basis, subsection (2) of this section applies if the government, or the government of Canada, as the case may be, proves, on a balance of probabilities, that, in respect of a type of opioid product,
>
> > (a) the defendant breached a common law, equitable or statutory duty or obligation owed to insured persons who have used or been exposed to or might use or be exposed to the type of opioid product,
> >
> > (b) using the type of opioid product can cause or contribute to disease, injury or illness, and
> >
> > (c) during all or part of the period of the breach referred to in paragraph (a) of this subsection, the type of opioid product, manufactured or promoted by the defendant, was offered for distribution or sale in British Columbia.

[688] Common issue 52, which engages the s. 3(1)(a) inquiry respecting a breach of duty, is similar to previous questions in asking whether the defendants breached duties owed to insured persons. It appears that the answer to common issue 52 will depend on the answers to the preceding common issues as to whether a common law or statutory duty is established. This common issue imports that inquiry into the *ORA* structure.

[689] Common issue 53, which engages the s. 3(1)(b) inquiry respecting cause or contribution to disease, illness or injury, asks whether the use of an Opioid Products product can cause or contribute to disease, injury or illness under the *ORA.* This common issue overlaps with the inquiry under common issues 2 and 3, but restates the common issue within the *ORA* framework.

[690] Common issue 54 engages the s. 3(1)(c) inquiry with respect to whether the type of Opioid Products product was offered for distribution or sale in British Columbia. This common issue overlaps with common issue 6 and again invokes the *ORA* framework.

[691] As these common issues overlap with previous common issues, my analysis will be brief. I find that there is evidence that supports some basis in fact for these issues being common across members of the *ORA* Subclass and that answering these common issues will move the litigation forward in a meaningful way.

n) Summary of Findings on the Common Issues

[692] I recall that the commonality requirement has a low threshold, though that hurdle cannot be satisfied by mere speculation and must be discharged by evidence which meets the usual criteria for admissibility. Although there must be a rational connection between the identifiable class and the proposed common issues, a common issue does not have to be determinative of liability. It merely needs to raise a triable factual or legal issue, the determination of which will move the litigation forward: *Thorburn v. BC*, 2013 BCCA 480 at para. 38, citing *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343, 1997 CanLII 4111 (BCCA) at para. 53.

[693] Here, the proposed common issues address the elements of the claims brought on behalf of the Class Members or *ORA* Subclass members. I have little difficulty in finding that their resolution will advance the litigation for each member of the Class.

[694] I find that there are no conflicts among the Class Members that undermine the certification of the above-mentioned common issues. The common issues above are not dependent upon individual findings of fact that must be made for each Class Member. I am aware of the defendants' argument based upon *Rumley* that common issues that give only a superficial appearance of commonality are not rationally connected to the claims in the lawsuit. However, I reject the defendants' submissions that the common issues are framed in overly broad terms or that they are overwhelmed by individualized inquiries. In particular, I reject the defendants' submission that a jurisdiction-by-jurisdiction analysis for each common issue is necessary.

[695] I would add that even if I were to follow the two-step or bifurcated approach urged upon me by the defendants, my findings on the common issues would ultimately be the same.

[696] In my view, the resolution of the above-mentioned common issues is capable of benefitting all members of the Class, or the *ORA* Subclass where applicable, if successfully prosecuted. I reject the submission that the practical effect of certifying the proposed common issues would break down into numerous individual proceedings or will be overburdened by complexity. Rather, the proposed common issues represent a practical tool to move the litigation forward efficiently.

G. Whether a Class Proceeding is the Preferable Procedure (s. 4(1)(d))

[697] A class proceeding must be the "preferable procedure for the fair and efficient resolution of the common issues": *CPA* at s. 4(1)(d). In *AIC Limited v. Fischer*, 2013 SCC 69 at para. 48, the Court held that the plaintiff must show some basis in fact that: "(1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims."

[698] I must consider all relevant matters, including the enumerated factors set out in s. 4(2) of the *CPA* which provides as follows:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[699] In assessing preferability, I would conduct my analysis bearing in mind the goals of class proceedings including improving access to justice, enhancing judicial economy, and encouraging behaviour modification: *Hollick* at para. 27; *Pro-Sys SCC* at para. 137. This is a comparative exercise. In *Finkel* at para. 25, the Court of Appeal confirmed that when comparing a class proceeding to other realistically available means for resolving the claims, a practical cost-benefit approach applies. The ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve the goals of class proceedings: *Fischer* at paras. 22-23.

[700] In *Jiang v. Vancouver City Savings Credit Union,* 2019 BCCA 149 at para. 33 [*Jiang #2*], the Court commented that the focus of a preferability analysis is "on comparing the procedure of a class proceeding with any alternative means to resolve the claims of the class members." The possible need for individualized inquiries is a relevant factor when considering whether other means of resolving the claims are less practical or less efficient: *Jiang #1* at para. 105.

[701] The defendants submit that the Province has failed to provide this Court with some basis in fact that certifying this case is the preferable procedure. They submit the Province has not shown that the proposed class action is a fair, efficient and manageable method of dealing with the various claims. They point out that the Province would not otherwise be denied the benefit of access to justice for aggrieved persons. The defendants ask, “why should this Court certify a class proceeding based on a statutory claim which mandates individual proceedings?”

[702] I will follow the s. 4(2) factors to guide my analysis of preferable procedure.

1. Whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members (s. 4(2)(a));

[703] The first factor is whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members.

[704] The defendants submit that the nature of the proposed proceeding is too burdened by individual issues to be litigated as a class proceeding.

[705] While I accept that there are important individual issues apart from the resolution of common issues, the common issues here are central. I find that the common issues offer threshold considerations on important aspects of the Province's claims which are strongly contested by the defendants. Given the nature, number and relative importance of the common issues, all of which are significant, I cannot find that individual issues will predominate over the common issues. Rather, I find that the questions of fact and law common to the proposed Class Members and *ORA* Subclass will predominate over any questions affecting only individual members.

[706] The common issues address the factual context to the Class Members' and *ORA* Subclass' claims, such as the involvement of each defendant in Opioid Drugs, their relevant knowledge and conduct related to Opioid Products, whether each defendant made any Opioid Misrepresentations and during what timeframe. The common issues also address legal issues, such as the duties that each defendant owed to the Class Members and end users of Opioid Products, and whether those duties were breached. The substantial ingredients of the liability issues are central and can be resolved in a common way, thereby eliminating the need to litigate them for each class member.

[707] As well, I take into account the operation of the *ORA* and *ORA*-equivalent legislation. As the Court held in *Valeant,* the *ORA* is structured to permit an aggregate action relying essentially on statistical analyses related to populations of individuals. The *ORA* needs to be interpreted in light of its purpose to address alleged mass torts that are thought to be impossible, practically, to prosecute under traditional individual tort principles: *Valeant* para. 79. At para. 85, the Court in *Valeant* held that "[i]t is evident, then, that the *ORA* significantly alters traditional substantive and procedural tort principles to address what the legislature has determined are, if breaches of duty can be established, mass tort(s) affecting large

numbers of individuals." The presence of numerous *ORA*-related questions of law common to almost all Class Members lends weight to the prevalence of issues common to the class over any questions affecting only individual members.

[708] While potential complexity in some of the individual issues will remain following the resolution of the common issues, the common issues are at the heart of the claims advanced. Moreover, many of the individual issues relate to damages, which will be individual to each Class Member. Section 7 of the *CPA* provides that a court must not refuse to certify a class proceeding merely because the relief claimed includes a claim that would involve individual damages assessment. The *CPA* also includes case management tools in ss. 12, 27, and 28 to help manage any complexities arising from individual issues: see *Jiang #1* at para. 112.

[709] I accept that individual issues will arise, but I find that questions of fact or law common to class members will predominate over (and indeed, will overwhelm) any questions affecting only individual members. Overall, I assess this factor favours the proposed class proceeding.

2. Whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions (s. 4(2)(b))

[710] The second factor is whether a significant number of Class Members have a valid interest in individually controlling the prosecution of separate actions.

[711] None of the Class Members have filed their own claim in another jurisdiction, even though they are fully capable of doing so. In fact, all of the proposed Class Members, except Yukon and the federal government, have passed *ORA*-equivalent legislation that supports their participation in the present proceedings. There is no evidence that any Class Members have expressed an interest in controlling the prosecution of separate actions.

[712] It is possible that individual governments may have a unique interest in asserting greater individual control over the prosecution of a separate action to the extent necessary to address issues unique to other jurisdictions. However, no

competing claims over controlling the proceeding have been made by other Class Members, and in any event, such a consideration if established would only involve a small minority of the proposed class rather than a "significant number" of the members of the proposed class.

[713] I assess that this factor weighs in favour of dealing with the claims by way of a class proceeding.

3. Whether the class proceeding would involve claims that are or have been the subject of any other proceedings (s. 4(2)(c))

[714] The third factor is whether the class proceeding would involve claims that are or have been the subject of any other proceedings. The government-led "claims" for health care cost recovery at issue in the TANCC are not currently the subject of any other proceedings. There are no other proceedings that involve aggregate claims by the Canadian governments that are the same or similar to those advanced in the present proceeding. This factor favours the proposed class proceeding.

4. Whether other means of resolving the claims are less practical or less efficient and whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means (s. 4(2)(d))

[715] The fourth factor is whether other means of resolving the claims are less practical and less efficient.

[716] The only viable alternative means of resolving the claims mooted by the parties was the option for parallel proceedings in other provinces. The Province argues that parallel proceedings could potentially result in numerous different proceedings by numerous different governments before numerous different courts. While it is possible that not all Class Members would proceed against all defendants if each member of the Class was left to their own devices, I have no doubt that the suggestion for parallel proceedings in other jurisdictions would result in duplicative

and overlapping discovery procedures, fact-finding and legal analysis that could otherwise take place in this jurisdiction in one omnibus proceeding.

[717] I assess that dividing the Province's claims into multiple proceedings would result in duplication, delay, and substantial inefficiency. The comments of the Court in *Sanis SCC* which refer to "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," support this view: at para. 3 (see also, paras. 1-2, 16, 74, 116). The fact that there are common issues in this case that are common to all Class Members additionally weighs against alternative means of resolving the claims.

[718] In terms of other means to resolve the claims, the defendants put forward suggestions of sorting the claims more effectively, pursuing an action with a narrower group of drugs or a narrower group of plaintiffs or defendants, and commencing actions in other jurisdictions. To the extent a narrower action would not resolve all the claims of the Class Members, this would represent a less effective option. I assess that these options would be less practical and efficient overall.

[719] Other options such as test cases or regulatory proceedings were not addressed in any detail before me. In any event, I find they would not be better suited to resolving the claims of the Class Members.

[720] I find that a class proceeding would be far more practical and efficient in resolving the various claims of the Class Members compared to other means.

5. Whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means (s. 4(2)(e))

[721] The final enumerated factor is a comparative one which overlaps with considerations of how best to achieve the goal of judicial economiy in class proceedings. Here, I assess that the administration of the class proceeding would not create greater difficulties than those likely to be experienced if relief were sought by other means.

[722] As noted, the main alternative option – parallel individual proceedings in other jurisdictions – would very likely result in multiple Crown plaintiffs suing multiple defendants in multiple jurisdictions. Proceeding in this manner would undoubtedly result in duplication and inefficiency.

[723] In addition, and without assigning blame, I note that this case has taken over five years from its inception to reach a certification hearing and over six years to reach a decision on certification. The defendants took the position that all pre-certification applications should be heard prior to certification, and the Province and the Court eventually partially acceded to this position. Many, though not all, applications were heard prior to certification.

[724] These proceedings have seen various applications to suspend, stay or adjourn proceedings, all of which were dismissed: *British Columbia v. Apotex Inc.,* 2021 BCSC 346; *British Columbia v. Apotex Inc.,* 2023 BCSC 1354; *British Columbia v. Apotex Inc.,* 2023 BCSC 2047; *Sanis Health Inc. v. HMTKBC* (24 November 2023), 40864 (SCC). Several interlocutory appeals have been heard.

[725] Should parallel proceedings start afresh in another jurisdiction, I expect the road to certification may be similarly arduous. Such a lengthy course of litigation is not practical or efficient, nor is it in the interests of justice. Delay is a constitutional imperative in criminal cases, but it is also a broader concern in civil cases that should not be permitted to insidiously impair the timely administration of justice.

[726] I accept to some extent the defendants' arguments that administration of this class proceeding may result in complications, including the potential for numerous individual issues trials. I also accept that there are differences in the individual actions in that different defendants sold different opioid-related products in different jurisdictions at different times. However, practically speaking, the benefits to a class proceeding in the present context far outweigh the costs of this particular approach. While I expect there will be challenges in an omnibus proceeding – some perhaps significant – it is time for all parties to "get on with it," something I anticipate will not

happen in a timely, cost effective or expeditious manner if relief is sought by other means.

6. Other Factors

[727] I consider the preferability issue with references to the goals of class proceedings, which include access to justice, judicial economy, and behaviour modification.

[728] In terms of access to justice, the analysis has two interconnected dimensions: one focussing on process and concerned with whether the claimants have access to a fair process to resolve their claims; the other focussing on substance (the results to be obtained) and concerned with whether the claimants will receive a just and effective remedy for their claims if established: *Fischer* at para. 24. Here, the class member governments vary in size and resources but are all sophisticated entities fully capable of litigating their claims on their own. While there would be some process-based challenges in terms of duplication and the need to proceed in more than one jurisdiction, I would consider these concerns under the judicial economy rationale rather than considering them as part of the fairness of the process within the access to justice rationale. Although smaller governments may face greater challenges, I find there are no significant barriers in accessing justice for the Class Members.

[729] With respect to behaviour modification, I am not convinced that a class proceeding will further the objective of behaviour modification underlying the *CPA* significantly more than individual proceedings.

[730] Still, there is a general deterrence value in behaviour modification. The Court explained as follows in *Pro-Sys BCCA*:

> [73] The chambers judge did not consider behaviour modification an important goal in this case because the respondents have already been fined for their unlawful conduct and have settled with direct purchasers in class actions in the United States. In my view, he took a too narrow view of this goal. While the fines and the settlements may well serve to modify the behaviour of the respondents and to deter them from further such conduct, the chambers judge overlooked that the goal of

> behaviour modification also considers other potential wrongdoers. As McLachlin C.J.C. said in *Western Canadian Shopping Centres*,
>
> > [29] ... class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery.
> >
> > [Emphasis added.]

[731] Similarly, in *Finkel,* the Court held that "[b]ehaviour modification is facilitated by encouraging actual and potential wrongdoers to take full account of the harm they cause or might cause to the public": at para. 13. If a drug is defective and liability attaches to a manufacturer or seller, a significant incidental result is that the pharmaceutical industry is more likely to take greater care in the development and testing of new products to ensure their safety before marketing them: *Wilson v. Servier Canada Inc*, 50 OR (3d) 219, 2000 CanLII 22407 (ONSC) at para. 126.

[732] Following this reasoning, I assess that certification will provide some general behaviour modification benefits. Those benefits may be tempered by the fact that Opioid Drugs are already manufactured and distributed in a highly regulated manner. That said, the ultimate question is whether other available means of resolving the claim are preferable, not whether a class action would fully achieve the three goals of the *CPA*: *Fischer* at para. 23.

[733] Concerns over judicial economy loom large here in this case and weigh heavily in the preferability analysis. I note the following comments of the Court in *Sandoz BCCA*:

> [84] As far as the authority given to the Province by s. 11 to sue on behalf of other provinces is concerned, both the context and extrinsic evidence discussed earlier support the contention that the "dominant purpose" of the provision was to further the policy objectives discussed in the caselaw and in the ULCC Report - to permit mass torts asserted by provincial governments and territories to be adjudicated in one or only a few jurisdictions rather than in every Canadian province and territory, and thus to bring about a more efficient and less expensive process.
>
> […]

> [97] In my view, the fact that "in the real world", each participating province will make the choice - either by opting in or deciding not to opt out - to take part in British Columbia's proceeding under the ORA constitutes a "meaningful connection" between each Subclass member's cause(s) of action on one hand, and on the other hand, the Province as the representative plaintiff and the Supreme Court of British Columbia as adjudicator. *Harrington* suggests that the mere commonality of the issues raised in each proceeding would also constitute a sufficient "connection." For the same reasons, s. 11 does not in my opinion 'disrespect' the substantive authority of participating provinces to create and pursue direct actions against opioid drug manufacturers and distributors. To the contrary, it provides an opportunity to bring about the consolidation of multiple proceedings that might have arisen in every province and territory in Canada, into one or a few proceedings, avoiding the necessity for multiple counsel and attendances in multiple courts.
>
> […]
>
> [100] … As I have suggested, the right to choose to participate in a multi-Crown proceeding in British Columbia represents a benefit that is intended to save the expense and inconvenience of many separate actions in Canada and thus ultimately to serve the public interest. …
>
> […]
>
> [102] … The multi-Crown proceeding represents an innovative response to the expense, time and inefficiencies involved in several separate actions. It represents a major step towards what in Canada may not be possible in the full sense - a truly national class proceeding. The caselaw favours a generous and flexible approach to innovations of this kind, provided the substantive rights and authority of each province are respected. The policy reasons underlying class actions - which the appellants did not challenge by means of any statistical or economic evidence - fully support the goals of multi-Crown proceedings.
>
> [Emphasis added.]

[734] On appeal, the Court in *Sanis SCC* similarly took note of the important role that national multi-Crown class actions can play:

> [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.
>
> […]
>
> [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*.
>
> […]
>
> [57] … 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.
>
> …
>
> [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.
>
> [Emphasis added.]

[735] The language in *Sandoz BCCA* and *Sanis SCC* offers strong support for the position of the Province on the preferability analysis.

[736] The defendants argue that jurisdiction issues impact the preferability analysis. In particular, the defendants submit that this Court ought not to exercise jurisdiction over foreign plaintiffs against foreign (out-of-province) defendants in relation to foreign conduct. The defendants submit that these claims lack sufficient connection to British Columbia such that a class proceeding in British Columbia is not the preferable procedure. The defendants submit that these factors should be accounted for in the preferability analysis under s. 4(1)(d).

[737] I have rejected the argument that British Columbia is *forum non conveniens* in this context. I have indicated that because the various claims of the class member governments and the defendants in various provinces are linked, the idea that the issue of liability between an individual defendant and a class member government could be carved out to be dealt with in a party's home province or territory is not tenable.

[738] As for any residual issues of jurisdiction arising from the territorial competence of this Court to address the claims of out-of-province Class Members over out-of-province defendants for out-of-province conduct, a five-member panel of the Court of Appeal held that this Court may, when a real and substantial connection exists to establish territorial competence, determine claims concerning out-of-province plaintiffs within the context of a national class action: *Harrington* at paras. 78, 97-99; see also, *Chalmers v. AMO Canada Company*, 2010 BCCA 560 at paras. 37-44; and *Sandoz BCCA* at para. 97. In *Harrington*, the Court commented as follows with respect to the existence of jurisdiction based on the commonality of issues raised in the subject matter of the action:

> [92] Where the traditional rules are not adequate to ensure fairness and order then other considerations will become relevant. One such consideration will be the nature of the subject matter of the action. In this case, the alleged wrongful acts are defective manufacture or failure to warn. When a manufacturer puts a product into the marketplace in any province in Canada, it must be assumed that the manufacturer knows the product may find itself anywhere in Canada if it is capable of being moved. As I suggested earlier in these reasons, it is reasonable to infer that a manufacturer of a breast implant knows that every purchaser will wear that implant wherever she resides, and that if the implant causes injury then the suffering will occur wherever she resides, and require treatment in that location. By the action of sale, the manufacturer risks an action in any province. In these circumstances, there can be no injustice in requiring a manufacturer to submit to judgment in any Canadian province. The concept of forum non conveniens is available to deal with any individual case where a different forum is established as more appropriate. As Mr. Justice La Forest remarked in the passage I quoted from *Tolofson*, *supra*, in some circumstances individuals need not be tied to the courts of the jurisdiction where the right arose, but may choose one to meet their convenience.
>
> […]
>
> [100] For these reasons, I am satisfied Mr. Justice Mackenzie was correct to find that the existence of a common issue of fact constituted sufficient connection to found jurisdiction in this case.
>
> [Emphasis added.]

[739] While the defendants took issue at the certification hearing with the application of this language in the present context, the constitutionality decision in *Sanis SCC* has since resolved this dispute. In that case, the Court (citing *Harrington* and other decisions) adopted the position that common issues may establish a real and substantial connection for adjudicatory jurisdiction:

> [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.
>
> [Emphasis added.]

[740] Section 11 of the *ORA* authorizes the Province to bring an action that maintains a meaningful connection to British Columbia through the common issues within that litigation, the court's jurisdiction over those issues, and the consent of all participating Crowns: *Sanis SCC* at para. 91. As common issues can ground the jurisdiction in a superior court over a multi-Crown class proceeding, the defendants' jurisdictional argument on preferability is without merit.

[741] Finally, with respect to concerns over individual issues, I note the options available in the post-certification stage under ss. 12, 27 and 28 of the *CPA*:

> **Court may determine conduct of proceeding**
>
> 12 The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.
>
> **Determination of individual issues**

27(1) When the court determines common issues in favour of a class or subclass and determines that there are issues, other than those that may be determined under section 32, that are applicable only to certain individual members of the class or subclass, the court may

> (a) determine those individual issues in further hearings presided over by the judge who determined the common issues or by another judge of the court,
>
> (b) appoint one or more persons including, without limitation, one or more independent experts, to conduct an inquiry into those individual issues under the Supreme Court Civil Rules and report back to the court, or
>
> (c) with the consent of the parties, direct that those individual issues be determined in any other manner.

(2) The court may give any necessary directions relating to the procedures that must be followed in conducting hearings, inquiries and determinations under subsection (1).

(3) In giving directions under subsection (2), the court must choose the least expensive and most expeditious method of determining the individual issues that is consistent with justice to members of the class or subclass and the parties and, in doing so, the court may

> (a) dispense with any procedural step that it considers unnecessary, and
>
> (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

(4) The court must set a reasonable time within which individual members of the class or subclass may make claims under this section in respect of the individual issues.

(5) A member of the class or subclass who fails to make a claim within the time set under subsection (4) must not later make a claim under this section in respect of the issues applicable only to that member except with leave of the court.

(6) The court may grant leave under subsection (5) if it is satisfied that

> (a) there are apparent grounds for relief,
>
> (b) the delay was not caused by any fault of the person seeking the relief, and
>
> (c) the defendant would not suffer substantial prejudice if leave were granted.

(7) Unless otherwise ordered by the court making a direction under subsection (1) (c), a determination of issues made in accordance with subsection (1) (c) is deemed to be an order of the court.

Individual assessment of liability

> 28 Without limiting section 27, if, after determining common issues in favour of a class or subclass, the court determines that the defendant's liability to individual class members cannot reasonably be determined without proof by those individual class members, section 27 applies to the determination of the defendant's liability to those class members.

[742] These sections provide a wealth of judicial tools to address individual issues in a timely and practical manner and, importantly, in ways that promote the underlying objectives of class proceedings including judicial economy: *Jiang #1* at para. 112.

7. Conclusion on Preferability

[743] Balancing all the relevant factors and the submissions of the parties, I am satisfied that the Province has met the requirements of s. 4(1)(d) of the *CPA,* bearing in mind the considerations in s. 4(2) and the goals of class proceedings. A class proceeding is the preferable procedure for the fair and efficient resolution of the proposed common issues. As well, a class proceeding is preferable for the resolution of the claims compared with other realistically available means for their resolution.

H. Representative Plaintiff and the Litigation Plan (s. 4(1)(e))

[744] Section 4(1)(e) of the *CPA* requires the existence of a representative plaintiff who:

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

1. Whether the Representative Plaintiff is Suitable

[745] The proposed representative plaintiff, the Province, is prepared to represent the interests of the Class Members and the *ORA* Subclass. The Province has met this aspect of the test.

2. The Province's Litigation Plan

[746] Justice Gerow commented on the purpose of a litigation plan as follows in *Fakhri v. Alfalfa's Canada, Inc*. (cba *Capers Community Market*), 2003 BCSC 1717:

> [77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members. *Hoy v. Medtronic*, at paras. 81-82; *Scott v. TD Waterhouse Investor Services*, paras. 164-167.

[747] The purpose of the plan is to provide a framework for the class proceeding that shows that the representative plaintiff and class counsel understand the complexities of the case. It is not to resolve all procedural issues before certification has taken place: *Jiang #2* at para. 57, citing *Godfrey v. Sony Corporation,* 2017 BCCA 302 at para. 253, and *Lam v. University of British Columbia*, 2010 BCCA 325 at paras. 85–86.

[748] The Province has put forward a detailed litigation plan, being Schedule A in its certification materials. The plan is reproduced in these reasons as Appendix A.

[749] The Province's litigation plan sets out steps in the litigation schedule prior to the common issues trial dealing with notice of certification and the opt-in procedure, pleadings, a confidentiality order, the preservation of evidence, document exchange and management, examinations for discovery, expert reports, applications and ongoing case management and mediation. The plan contemplates scheduling of the common issues trial. It then sets out litigation steps following the common issues trial, including a procedure for notice of resolution of common issues and resolution of common issues, a claims process and administration, and class counsel fees and costs. The plan contemplates that amendments may be made from time to time by directions given at judicial management conferences or by further order of the Court.

[750] I am satisfied that the Province has put forward a litigation plan providing a workable method for advancing the litigation, including a notice program providing a reasonable method for notifying Class Members. The litigation plan contemplates the resolution of individual issues and sets out the next steps in the event of success on certain common issues. It also refers to the simplified damages procedures set out in the *ORA.*

[751] The defendants are critical of the Province's litigation plan. They submit that the Province has no plan for how to deal with individual issues, that the plan does not adequately deal with non-*ORA* claims, and it ignores the fact that the defendants can dispute causation on individual issues trials. The Quebec Defendants submit that the litigation plan does not adequately address Quebec civil law.

[752] A litigation plan need not meet a standard of perfection. I am satisfied that the litigation plan put forward is workable in its essentials: it puts forward "a framework within which the case may proceed" and "demonstrate[s] that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case": *Godfrey* at paras. 252-255.

[753] I expect that issues such as causation, non-*ORA* claims, translation of documents and proof of Quebec law will create complexity as the litigation unfolds. However, I view these considerations as premature to decide at this point in the litigation. Moreover, there will likely need to be revision of the plan, further case management and adaption over time to account for such complexities, including sensitivity to French language issues in light of the expected evidence at trial. Overall, however, I assess that the litigation plan at present is sufficient: *Godfrey* at para. 256.

[754] Finally, I am satisfied that the Province does not have, on the common issues, an interest that is in conflict with the interests of other Class Members. In the circumstances of this case, such a suggestion is not tenable.

I. Conclusion on Certification

[755] The defendants left no stone unturned in their opposition to the Province's arguments for certification. While these Reasons are comprehensive, they may not address the many permutations in the arguments raised by the defendants. I have considered all of the defendants' arguments in detail, though I do not find it necessary to address the aspects of their arguments that were given less emphasis or those that have little merit. While some of these arguments are well put from the perspective of the defendants, I would take a broader view of this matter from the perspective of the litigation as a whole.

[756] Fundamentally, while the defendants raise numerous valid and potentially complex individual issues which detract from the requirements in s. 4(1) of the *CPA,* I find that there are substantial benefits to addressing all of the claims of the Class Members in one aggregate national class action in British Columbia. The option to remove certain defendants in favour of the possibility of proceedings in other jurisdictions is likely to lead to a multiplicity of regional cases, with added overall expense, delay and complexity.

[757] The many complications and individual issues may well present significant challenges at the merits stage of proceedings. However, I find the defendants' concerns about potentially complex individual issues to be overstated. The substantial ingredients of the liability issues are central here and can be resolved in a common way, thereby eliminating the need to litigate them for each Class Member. The questions of fact and law common to the proposed Class Members predominate over any questions affecting only individual members, and the class proceeding will provide significant efficiency to addressing the various claims. The resolution of the common issues will significantly advance the claims of the Class Members in a meaningful way. To answer such issues commonly will significantly avoid duplication in legal and factual analysis.

[758] The Province has satisfied each of the requirements in s. 4(1) of the *CPA.* The claims of the Class and the *ORA* Subclass shall be certified as set out in the reasons above.

XII. CONCLUSION

[759] I order the following:

a) LPG's application for dismissal of its claims on the basis of a lack of subject matter jurisdiction is dismissed.

b) The application by LPG, Pro Doc and Jean Coutu for dismissal of the claims on the basis of *forum non conveniens* are dismissed.

c) The Province's application to certify this action as a class proceeding pursuant to the *CPA* is granted.

d) The classes are defined as follows:

   i) a class of all federal, provincial and territorial governments that, during the period from 1996 to the present (the "Class Period"), paid health care, pharmaceutical, treatment and other costs related to opioids (the "Class" and the "Class Members"); and

   ii) a subclass of federal, provincial, and territorial governments that have legislation specifically directed at recovery of damages and health care costs arising from an "opioid-related wrong" as that term is defined in the relevant legislation (the "*ORA* Subclass").

e) The Province is appointed as the representative plaintiff of the Class and the *ORA* Subclass.

f) Any other British Columbia proceeding relating to this proposed class proceeding is stayed.

g) The nature of the claims asserted on behalf of the classes are those set out in the Province's application, with the exception of public nuisance.

h) The nature of the claims asserted on behalf of the *ORA* Subclass are stated to be: claims pursuant to the *ORA*, and equivalent opioid cost recovery legislation enacted by other Canadian provinces or territories.

i) The relief sought by the Class is stated to be the relief set out in paragraph 220 of the TANCC.

j) The proposed Litigation Plan set out in Schedule "A" to the Notice of Application is approved.

k) The proceeding is certified on the basis of the common issues set out in Schedule "A" to the proposed Litigation Plan, subject to any modifications indicated in these reasons.

l) The form and content of the notice program for the certification of this action is stated to be that set out in the proposed Litigation Plan.

m) In terms of opt-in decisions by class members:

i) members of the Class may opt in to this class proceeding by sending a written election by email or regular mail to Class Counsel within 30 days after certification of this action on a final basis (the "Opt In Date");

ii) no person may opt in to this class proceeding after the Opt In Date; and

iii) forthwith after the expiry of the 30 day Opt In Date, class counsel will report to the Court the names of the entities who have opted in to this class proceeding.

[760] I express my appreciation to all counsel for the capable manner in which they organized themselves and provided their detailed submissions.

“Brundrett J.”

Appendix A

SCHEDULE "A" TO NOTICE OF APPLICATION — LITIGATION PLAN

Unless defined here, defined terms have the meaning ascribed to them in the Second Amended Notice of Civil Claim of Her Majesty the Queen In Right of the Province of British Columbia v Apotex Inc. et al, Vancouver Registry No.: S189395 (the "**Action**")

PART 1: THE CLASS AND CLASS COUNSEL

The Class

1. The proposed class consists of the Plaintiff and:

> (a) A class of Federal, provincial and territorial Canadian governments comprising, in addition to Her Majesty the Queen in right of the Province of British Columbia ("HMQBC"), Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of Alberta, the Government of Saskatchewan, Her Majesty the Queen in right of the Province of Manitoba, Her Majesty the Queen in right of Ontario, the Attorney General of Quebec, Her Majesty the Queen in right of the Province of New Brunswick, Her Majesty the Queen in right of the Province of Nova Scotia, Her Majesty in right of Newfoundland and Labrador, the Government of Prince Edward Island, the Government of the Northwest Territories, the Government of Nunavut and the Government of the Yukon; (the "**Class**"); and
>
> (b) a subclass of those Class members who, as of the date of the certification application, have legislation specifically directed at recovery of damages and health care costs arising from the Opioid Epidemic[1] (the "ORA Subclass").

2. The proposed representative plaintiff and a number of Class Members have enacted ORA legislation:

> (a) British Columbia: Opioid Damages and Health Care Costs Recovery Act, SBC 2018, c. 35 (the "**BC ORA**")
>
> (b) Alberta: Opioid Damages and Health Care Costs Recovery Act, SA 2019, c. 0-8.5;
>
> (c) Saskatchewan: Opioid Damages and Health Care Costs Recovery Act, SS 2020;

[1] As defined in paragraph 143 of the Second Amended Claim.

(d) Ontario: Opioid Damages and Health Care Costs Recovery Act, SO 2019, c. 17;

(e) Newfoundland and Labrador: Opioid Damages and Health Care Costs Recovery Act, SNL 2019, c. 0-62; and

(f) Nova Scotia: Opioid Damages and Health Care Costs Recovery Act, SNS 2020, c. 4.

Class Counsel

3. The plaintiff has retained Branch MacMaster LLP, Camp Fiorante Matthews Mogerman LLP of Vancouver, BC and Howie Sacks and Henry LLP of Toronto, ON as counsel (collectively, "**Class Counsel**"). Class Counsel has the knowledge, skill, experience, personnel and financial resources to prosecute the action to resolution.

Reporting to and Communicating with Class Members

4. The Plaintiff and Class Counsel are in direct contact with the proposed Class Members, and will provide updates from time to time as to the status of the litigation.

PART 2: LITIGATION SCHEDULE PRIOR TO THE COMMON ISSUES TRIAL

5. After disposition of the certification application, assuming success for the Plaintiff, the parties will attend a case management conference to set a schedule for the remaining steps in the Action, which are described below. The Plaintiff proposes that the common issues trial be scheduled for 120 days on the earliest available court dates following completion of the steps set out below.

Notice of Certification and Opt In Procedure

6. As part of the certification application, the Plaintiff will ask the Court to:

(a) settle the form and content of the notice of certification (the "**Notice**"):

(b) determine the method by which Notice will be given;

(c) set a deadline for Class Members to opt-in to the Action; and

(d) establish the procedure by which proposed Class Members will opt-in to the Action.

7. The Plaintiff proposes that Notice be provided by Class Counsel directly to each

potential Class Member by email and/or registered mail, within 14 days from the date of the order certifying this Action as a class proceeding.

8. The Plaintiff will be responsible for the cost of disseminating the Notice, if any.

9. The Plaintiff proposes that the deadline for potential Class Members to opt-in to the Action be set for 30 days from the date that the Notice is provided to each potential Class Member (the "**Opt-In Period**").

10. Potential Class Members will opt-in to the Action by sending written notice of their intention to opt-in by email or registered mail to Class Counsel.

11. Within 14 days of the expiration of the Opt-In Period, Class Counsel will provide a report to the Court and to the Defendants listing the names of all Class Members who have opted-in to the Action.

Pleadings

12. Within 30 days of the expiration of the Opt-In Period, the Plaintiff will make any amendments to the Notice of Civil Claim that may be necessary as a result of the certification order.

13. Within 30 days of service of the Plaintiff's amended Notice of Civil Claim, the Defendants will file amended Responses to Civil Claim.

14. Within 14 days of service of the Defendants' amended Responses to Civil Claim, the Plaintiff will file any amended Reply that may be necessary.

Confidentiality Order

15. To the extent any party believes it is necessary to put in place a confidentiality order, that party will bring an application for a confidentiality order before the close of pleadings.

Preservation of Evidence

16. The Defendants possess a large number of documents relating to their actions or omissions in the development, manufacture, testing, sale, promotion, marketing and distribution of Opioids. These documents are not only generated in the course of normal business activities, but in some instances, are required by the regulatory framework that governs the development, manufacture, distribution or sale of Opioid Products.

17. The Defendants must preserve and produce all relevant information and documents whether in electronic or paper form.

18. On October 15, 2019, the Plaintiff made a detailed request for preservation of the Defendants' documents. If necessary at any stage in the proceedings, the Plaintiff will apply for a formal preservation and/or production order.

19. Additionally, a substantial number of documents have already been identified and produced in the Oklahoma State Action or in the Opioid MDL. Those documents are within the possession or control of the parties who produced them, or related parties, and the Plaintiff anticipates will be produced by those parties when the action reaches the discovery stage of litigation.

Document Exchange and Management

20. Within 30 days after the Court issues a decision on the application to certify this action as a class proceeding, or as otherwise agreed to by the Parties, the Parties shall attend a "meet and confer" in order to develop a discovery plan (the "**Discovery Plan**").

21. The Discovery Plan shall be completed and delivered to the Court within 60 days of the "meet and confer".

22. Document production, including delivery of privilege lists, will be completed by no later than 6 months after the Parties have agreed to the Discovery Plan.

Examinations for Discovery

23. The Plaintiff proposes that examinations for discovery take place over a 4 month period, starting 60 days after the Parties' document production is complete.

24. The Plaintiff will conduct an examination for discovery of a representative from each of the Defendants but cannot, until the production of documents has been completed, estimate the time required for each examination. Scheduling will also need to include time for receipt of responses to requests and any objections.

25. The Plaintiff may ask the Court for an order allowing examination of more than one representative of each Defendant, if necessary.

Expert Reports

26. The Plaintiff proposes the following schedule for the exchange of expert reports:

(a) delivery of the Plaintiff's expert reports: within 90 days of completion of examinations for discovery;

(b) delivery of the Defendants' expert reports: within 90 days of delivery of the Plaintiff's expert reports; and

(c) delivery of the Plaintiff's reply expert reports: within 60 days of delivery of the Defendants' expert reports.

27. The Plaintiff proposes that cross-examinations on expert reports, if any are agreed to by the Parties or ordered by the Court, take place over a 2 month period, starting no later than 30 days after the agreement between the Parties or the order of the Court.

Applications and Ongoing Case Management

28. Additional applications may be necessary and will be scheduled as the Action progresses.

29. In order to facilitate the scheduling of applications in a timely manner, and to promote the efficient management of the litigation, the plaintiff proposes that recurring Judicial Management Conferences be scheduled every two months.

30. In the event that there are no issues to be addressed at a scheduled Judicial Management Conference, the parties will advise the Court by letter and the Judicial Management Conference will be adjourned.

Mediation

31. The Plaintiff may deliver a Notice to Mediate under the Notice to Mediate (General) Regulation, BC Reg 4/2001 prior to any summary judgment application or trial.

32. The Plaintiff will participate in mediation if the Defendants are prepared to do so.

PART 3: TRIAL OF THE COMMON ISSUES

33. After the disposition of the certification application and the expiration of the Opt-In Period, the Plaintiff will ask the Court to schedule the common issues trial. The Plaintiff will also consider whether it is possible to resolve any of the common issues by way of any other streamlined means such as a notice to admit, interrogatories or summary trial.

PART 4: LITIGATION STEPS FOLLOWING THE COMMON ISSUES TRIAL

Notice of Resolution of Common Issues

34. After disposition of the common issues trial, the Plaintiff will ask the Court to:

(a) settle the form and content of a notice of resolution of common issues

(the "**Notice of Resolution**"); and

(b) direct that the Notice of Resolution be provided by Class Counsel directly to the Class Members.

Resolution of Individual Issues

35. Within 45 days of a decision following the common issues trial, assuming success in favour of the Plaintiff, the parties shall attend a Case Judicial Management to set a schedule and determine the process to be followed in bringing the Action to final resolution. The process which will be required is dependent on the nature of the decision at the common issues trial.

36. Two examples of the processes which the Court may direct are outlined below (these two processes are not mutually exclusive and could proceed simultaneously):

Success on ORA Common Issues

37. If the Plaintiff is successful on the *ORA* Subclass common issues, the presumptions in subsection 3(2) of the BC ORA (and equivalent subsections in the other provinces' *ORA* legislation) will apply. The court may direct that the next step for the *ORA* Subclass is to follow the simplified procedures set out in sections 3 and 5 of the BC *ORA* (and equivalent subsections in the other provinces' *ORA* legislation) in order to calculate the amount of the defendant(s) aggregate liability, and the apportionment of damages.

Success on Public Nuisance Common Issues

38. If the Plaintiff is successful on the public nuisance common issues, the court may direct that the next step for the Class is to calculate damages on the basis of the abatement remedy that is sought.

Claims Process and Administration

39. In the event that funds are recovered for the Class, either through settlement or an award of damages, the funds will be distributed to Class Members based on a formula that will assess the relative impact and cost of the Opioid Epidemic on each Class Member.

Class Counsel Fees and Costs

40. The Court will be asked to fix the amount of Class Counsel fees, disbursements and applicable taxes ("**Class Counsel Fees**"). Class Counsel will ask the Court to direct the payment of Class Counsel Fees out of the monies recovered or owing as a first charge.

PART 5: AMENDMENTS TO THIS PLAN

41. This plan may be amended from time to time by directions given at Judicial Management Conferences or by further order of the Court.

Appendix B

Further Revised Common Issues

Unless defined here, defined terms have the meaning ascribed to them in the Third Amended Notice of Civil Claim

A. Opioid Related Disease, Injury or Illness

~~1. What is an Opioid Product?~~

2. Can use of or exposure to Opioid Products cause or contribute to disease, injury or illness?

3. What are the diseases, injuries or illnesses that can be caused or contributed to by use of or exposure to Opioid Products?

B. ~~The Opioid Epidemic~~

~~4. Is there an Opioid Epidemic in Canada?~~

~~5. What impact has the Opioid Epidemic had on Canadian society?~~

C. The Defendants and their Opioid Products

6. During the Class Period, what Opioid Products were manufactured, marketed and/or sold in Canada by each Manufacturer Defendant?

7. During the Class Period, what Opioid Products were distributed, sold, or offered for sale in Canada by each Distributor Defendant?

8. With regard to each group of Defendants that is defined collectively in the Third Amended Notice of Civil Claim:

    a) What is the relationship between each Defendant?

    b) Are the relationships such that each is the agent of the other for the purpose of the manufacture, marketing and sale of Opioids in Canada and/or the distribution of Opioid Products in Canada?

D. The Manufacturer Defendants' Opioid Misrepresentations

9. Did the Manufacturer Defendants, or any of them, make one or more of the Opioids Misrepresentations?

10. If the answer to common issue #9 is yes:
    a) Which Manufacturer Defendants and in relation to which Opioid Products?

    b) Were any of the Opioid Misrepresentations made by the Manufacturer Defendants untrue, inaccurate or misleading?

    c) Were any of the Opioid Misrepresentations made by the Manufacturer Defendants false?

11. Did the conduct of the Manufacturer Defendants, in making the Opioids Misrepresentations, cause an increase in the prescription of Opioid Products in Canada?

E. ~~Diversion of Opioid Products~~

~~12. Did each Defendant report diversion, loss and/or theft of Opioid Products? If so, which Defendants in relation to which Opioid Products, and to whom did they report?~~

F. The Defendants' Knowledge

13. At all material times, what was the state of knowledge of the medical and pharmaceutical community regarding the risks and benefits of opioid use?

14. Prior to entering the market for manufacturing, marketing and selling an Opioid Product, what steps did the Manufacturer Defendants take to research, investigate, and/or assess the risks and benefits of opioid use?

15. At all material times, what knowledge did the Manufacturer Defendants have of the risks and benefits of opioid use?

16. Prior to entering the market for manufacturing, marketing and selling a generic version of a brand name Opioid Product, what steps did the Generic Manufacturers take to research, investigate and/or assess the risks and benefits of opioid use?

17. At all material times, what knowledge did the Generic Defendants have of the risks and benefits of opioid use?

18. At all material times, what knowledge did the Distributor Defendants have of the risks and benefits of opioid use?

19. What data and/or knowledge did the Defendants have in relation to the distribution and sale of Opioid Products, including:

a) Volume of Opioid Products sold;

b) Location of purchase;

c) Prescribing doctor; and

d) Dispensing pharmacy.

20. At all material times, what knowledge did the Defendants have in relation to the behaviour of users who become addicted to or dependent on Opioid Products, including whether users would:

a) Purchase opioids on the illicit market;

b) Seek out multiple healthcare providers to write prescriptions;

c) Seek prescriptions for higher dosages;

d) Seek prescriptions for higher quantities; and/or

e) Seek out pharmacies that would fill opioid prescription on a 'no questions asked basis'.

21. At all material times, were the Defendants aware that their promotion, marketing, sale and distribution of Opioids would cause an increase in the consumption of Opioids?

G. Common Design

22. With regard to each group of Defendants that is defined collectively in the Third Amended Notice of Civil Claim, did the Defendants act pursuant to a common design to develop, test, manufacture, seek regulatory approval, market, sell, and conduct post-market surveillance of Opioids in Canada?

23. Did the Manufacturer and Distributor Defendants share market data, sales data, sales forecast, marketing plans and demand estimates between each other?

24. Did the Manufacturer and Distributor Defendants engage in a common design to maximize the sale of Opioids in Canada?

25. Did Bristol-Meyers act pursuant to a common design with Endo Pharmaceuticals Inc. and Endo International PLC to market opioid products developed by the Endo corporate entities in Canada?

26. Did Teva and Purdue act pursuant to a common design to manufacture, distribute, market and sell OxyNeo in Canada?

27. Did the Manufacturer Defendants engage in a common design to overcome resistance in the medical community to the use of prescription Opioids for patients experiencing chronic non-cancer pain, and thereby generate and encourage long-term patient consumption of Opioids?

28. Are the Defendants jointly and severally liable for any damage caused by their common design?

Direct Claims

H. ~~Public Nuisance~~

~~29. Did the Defendants' conduct, individually and in concert with each other, cause the Opioid Epidemic in Canada, including in British Columbia?~~

~~30. Did the Defendants' conduct unreasonably interfere with the Canadian and British Columbian public's health, safety, morality, comfort, and convenience?~~

~~31. Does the Defendants' conduct amount to an attack upon the rights of residents of Canada, including British Columbians, to live their lives unaffected by the inconvenience and discomfort caused by the Opioid Epidemic?~~

~~32. Did the Defendants' conduct annoy, injure, or endanger the comfort, health, and safety of Canadians, including British Columbians?~~

~~33. Did the Defendants' conduct cause the plaintiff and the Class Members to bear social and economic costs, including increased health care and criminal justice costs?~~

~~34. Are the Defendants jointly and severally liable for the cost of abatement of the public nuisance?~~

I. Unjust Enrichment

35. Were the Manufacturer Defendants enriched as a result of making one or more of the Opioids Misrepresentations?

36. If yes, what was the amount of the enrichment, and did the Class Members suffer a corresponding deprivation?

37. If yes, was there a juristic reason for the defendants' enrichment?

J. Breach of the Competition Act

38. If the Court determines that any of the Manufacturers Defendants made any false or misleading Opioid Misrepresentations, did those Manufacturer Defendants breach duties owed pursuant to s. 52 of the Competition Act?

ORA CLAIMS ADVANCED ON BEHALF OF *ORA* SUBCLASS MEMBERS[2]

39. Are the Defendants, or any of them, a 'manufacturer' and/or 'wholesaler' of an opioid product, as defined in the ORA?

Food and Drugs Act

40. Did the Manufacturer Defendants breach duties owed pursuant to s. 9 of the Food and Drugs Act?

Negligent Failure to Warn

41. Did the Manufacturer Defendants owe a duty to directly or through prescribing physicians warn end users of Opioids of the risk of addiction, dependency, adverse side effects, and death attendant upon Opioid use?

42. Did the Manufacturer Defendants breach their duty to warn by failing to make reasonable efforts to communicate the risks and dangers of using their Opioid Products to prescribing physicians and end users?

43. Did the Distributors Defendants owe a duty to end users of Opioids to directly or through prescribing physicians warn of the known risks of addiction, dependency, adverse side effects, and death caused by the Opioids they distribute and sold during the Class Period

44. Did the Distributor Defendant breach their duty to warn by failing to warn prescribing physicians and end user of the known hazards and risks associated with Opioids?

Negligent Misrepresentations

45. Did the Manufacturer Defendants know, or ought to have known, that the Opioid Misrepresentation were untrue, inaccurate or misleading?

46. Did the Manufacturer Defendants act negligent in making the Opioid Misrepresentations?

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[2] For convenience, the references in this section are to the British Columbia *Opioid Damages and Health Care Costs Recovery Act,* SBC 2018, c. 35, but the ORA Claims are also advanced pursuant to equivalent ORA legislation enacted by Alberta, Saskatchewan, Ontario, Newfoundland and Labrador Nova Scotia, Manitoba, and Prince Edward Island, and any other jurisdiction that may enact ORA legislation prior to certification.

Fraudulent Misrepresentation/Deceit

47. Did the Manufacturer Defendants make the Opioid Misrepresentations knowing them to be untrue, or without belief in their truth?

48. Were the Manufacturers Defendants reckless as to whether the Opioid Misrepresentations were true or false?

Negligent Design

49. Did the Manufacturer Defendants owe end users of opioids a duty to exercise reasonable care in manufacturing, marketing and selling opioids?

50. If the answer to common issue #49 is yes, what was the standard of care owed by the Manufacturer Defendants?

51. Did any of the Manufacturer Defendants breach the duty by defectively designing their Opioid Products?

K. ORA Claims

52. Did the Defendants breach any common law, statutory or equitable duties owed to insured persons who have used or been exposed to or might use or be exposed to an Opioid Product pursuant to s.3(1)(a) of the ORA?

53. If the answer to common issue #52 is yes, can using the Opioid Product cause or contribute to disease, injury or illness, pursuant to s.3(1)(b) of the ORA?

54. If the answer to common issue #53 is yes, was the Opioid Product that was manufactured or promoted by the Defendant offered for sale in Canada during all or part of the breach, pursuant to s.3(1)(c) of the ORA?

~~PUNATIVE DAMAGES~~

~~55. Are the Defendants liable to pay punitive damages having regard to the nature of their conduct? If the answer is yes, how much should the Defendants pay?~~