NATIONAL ASSEMBLY OF QUÉBEC

FIRST SESSION FORTY-THIRD LEGISLATURE

Bill 36
(2023, chapter 25)

Opioid-related Damages and Health Care Costs Recovery Act

Introduced 5 October 2023
Passed in principle 17 October 2023
Passed 1 November 2023
Assented to 2 November 2023

Québec Official Publisher
2023

EXPLANATORY NOTES

The purpose of this Act is to establish special rules applicable to the recovery of opioid-related health care costs attributable to a wrong committed by opioid product manufacturers or wholesalers or their consultants. It also seeks to make some of those rules applicable to the recovery of damages for an injury attributable to a wrong committed by one or more of those manufacturers, wholesalers or consultants.

More specifically, the Act grants the Government the right to recover directly, from any opioid product manufacturer and wholesaler and their consultants, the health care costs that the Government or a government body has covered, provided those costs were caused or contributed to by a wrong committed by those manufacturers, wholesalers or consultants. The Act provides, in particular, that a failure to inform the public of the risks and dangers posed by those products constitutes a wrong.

The Government may, in particular, bring a legal action on a collective basis to recover the costs incurred for all recipients of health care required following their exposure to one or more types of opioid products. For the purposes of legal actions, the Act proposes a certain number of modifications to the ordinary rules of civil liability otherwise applicable, including the admissibility as evidence of statistical information to establish certain elements of a defendant's civil liability or to establish the health care costs whose recovery is being sought.

The Act extends the application of some of those modifications to an action brought by a person, their heirs or other successors for recovery of damages for any opioid-related injury caused or contributed to by a wrong committed in Québec by a manufacturer or wholesaler of opioid products or any of its consultants, as well as to any class action based on the recovery of damages for such an injury.

In addition, the Act confers on the Government the option to exercise its right of recovery in the context of a class action regarding which the Government acts as plaintiff before a court of Québec on behalf of a class composed of governments and bodies of other

provinces or territories of Canada, or as a member of such a class on behalf of which such an action is exercised elsewhere in Canada.

Lastly, the Act sets out various rules, including the solidary liability of the officer of a manufacturer, wholesaler or consultant with respect to the opioid-related health care costs or damages to which the manufacturer, wholesaler or consultant is liable for any injury caused or contributed to by a wrong it has committed. The Act also provides that an action, including a class action, in progress on the date the provisions come into force, or brought within a certain time limit after that date, may not be dismissed on the ground that the right of recovery is prescribed, and authorizes the revival, under certain conditions, of some of those actions that may have been dismissed on that ground in the past.

Bill 36

OPIOID-RELATED DAMAGES AND HEALTH CARE COSTS RECOVERY ACT

THE PARLIAMENT OF QUÉBEC ENACTS AS FOLLOWS:

CHAPTER I

PURPOSE AND DEFINITIONS

1. The purpose of this Act is to establish specific rules applicable to the recovery of opioid-related health care costs attributable to a wrong committed by one or more opioid product manufacturers or wholesalers, or one or more consultants to them, in particular to allow the recovery of those costs regardless of when the wrong was committed.

It also seeks to make certain of those rules applicable to the recovery of damages for an injury attributable to a wrong committed by one or more of those manufacturers, wholesalers or consultants.

2. For the purposes of this Act, an opioid product is a product that contains one of the drugs or active ingredients listed in Schedule I and that is in the form of a pill, a capsule, an oral liquid, a powder, an injectable substance or a topical, or a combination of any of those forms.

All opioid products that are in the same form or the same combination of forms constitute, for the purposes of this Act, a type of opioid products.

The Government may amend Schedule I.

3. For the purposes of this Act, "manufacturer" means any group that manufactures or manufactured, or causes or caused another group to manufacture, an opioid product. The manufacture of an opioid product includes the production, assembly and packaging of the product.

A group that is in one of the following situations is considered a manufacturer:

(1) it is or was a trade association whose principal activity consists or consisted in promoting the interests of manufacturers, or engaging, or causing another group to engage, in the promotion of an opioid product; or

(2) it is related to a group referred to in the first paragraph or in subparagraph 1 of this paragraph and it meets any of the following conditions:

(*a*) it derives or derived, during the course of a fiscal year, 10% or more of its revenues, calculated on a consolidated basis in accordance with accounting principles generally accepted in Canada, from the manufacture or promotion of opioid products by itself or by another group, or

(*b*) it engages or engaged, or causes or caused another group to engage, in the promotion of an opioid product.

Despite the second paragraph, a wholesaler or retailer of opioid products is not considered a manufacturer if it is not related to a group referred to in the first paragraph.

For the purposes of this Act, the promotion of an opioid product includes the marketing of the product, whether direct or indirect, as well as the distribution and sale of the product. A group that undertakes research on an opioid product is also considered to be promoting it.

4. For the purposes of this Act, "wholesaler" means any group that distributes, sells or offers for sale opioid products to pharmacies, distributors or other persons for resale or to health and social services institutions or other health services providers for patient use.

5. For the purposes of this Act, "consultant" means any group that advises a manufacturer or wholesaler on the distribution, sale or offering for sale of opioid products.

6. For the purposes of sections 3 to 5, "group" means any group of persons or assets, regardless of its juridical form.

Such a group includes, among other things, a joint stock company or other legal person, a partnership, an association without legal personality, a trust, and a foundation whose assets constitute a patrimony by appropriation.

It also includes a joint venture, that is, a group of persons whose relationship does not constitute a legal person or a partnership and who each have an undivided interest in assets of the group.

7. A group is considered to be related to another group in either of the following cases:

(1) it is a member of the same group as the other group; or

(2) it is an affiliate of the other group or an affiliate of an affiliate of that group.

8. Two groups are considered to be members of the same group if one is an affiliate of the other, both are affiliates of the same group or both are controlled by the same group or natural person.

A group is considered to be controlled by another group or a natural person when the following conditions are met:

(1) voting securities of the group representing over 50% of the votes required to elect its directors are held, otherwise than solely as security, by or on behalf of that other group or that person; and

(2) the number of votes attached to those securities is sufficient to elect a majority of the directors of the group.

9. A group is considered to be an affiliate of another group if

(1) it is a joint-stock company and if the other group, or a group of groups not dealing at arm's length with each other of which the other group is a member, holds an interest in shares of the company that either

(*a*) carry at least 50% of the votes required to elect the directors of the company and a sufficient number of votes to elect a director of the company; or

(*b*) have a fair market value, including a premium for control, if applicable, that corresponds to at least 50% of the fair market value of all the issued and outstanding shares of the company;

(2) it is a partnership, trust or joint venture and the other group, or a group of groups not dealing at arm's length with each other of which the other group is a member, has an interest in the assets of the partnership, trust or joint venture that entitles it to receive at least 50% of the profits or at least 50% of the assets on the dissolution, winding up or termination of the partnership, trust or joint venture; or

(3) the other group, or a group of groups not dealing at arm's length with each other of which the other group is a member, has direct or indirect influence that, if exercised, would result in de facto control of the group, except if the other group deals at arm's length with that group and derives influence solely as a lender.

For the purposes of this section, "not dealing at arm's length" has the meaning assigned to it in the Taxation Act (chapter I-3).

10. For the purposes of this Act, health care is opioid-related when the disease, injury or illness warranting it, or the risk of such a disease, injury or illness, is caused or contributed to by the health care recipient's exposure to an opioid product, including the use of such a product, whether by ingestion, inhalation, injection, application or assimilation and whether intentional or otherwise.

The fact that an opioid product was combined with another drug or substance or that the product was used in a form other than the one prescribed or advised by a health professional or the one recommended by the product's manufacturer,

or the fact that the health care recipient was exposed to the product in a manner other than the one prescribed, advised or recommended, as applicable, by a health professional or the manufacturer has no impact on causation between the exposure to the opioid product and the disease, injury or illness suffered by the recipient who was exposed to it.

For the purposes of this Act, "disease, injury or illness" also includes general deterioration of health or problematic use of, or addiction to, opioid products.

CHAPTER II

RECOVERY OF HEALTH CARE COSTS

DIVISION I

GENERAL CONDITIONS FOR RIGHT OF RECOVERY

11. The Government has the right to recover directly, from one or more manufacturers, wholesalers and consultants, opioid-related health care costs caused or contributed to by a wrong committed by any of them, in particular for failure to inform the public of the risks and dangers posed by those products.

That right is not a subrogated right. It belongs to the Government in its own right, and exists even if damages were recovered by health care recipients or other persons for injury caused or contributed to by such a wrong.

12. The opioid-related health care costs the Government has the right to recover under this Act include the cost of medical services, hospital services and other health services and social services, including pharmaceutical services and drugs, the Government or a government body covers under, in particular, the Hospital Insurance Act (chapter A-28), the Health Insurance Act (chapter A-29), the Act respecting prescription drug insurance (chapter A-29.01), the Act respecting health services and social services (chapter S-4.2) and the Act respecting health services and social services for Cree Native persons (chapter S-5).

Opioid-related health care costs also include the cost of any type of program and service established or insured by the Government or a government body to deal with a disease, injury or illness associated with opioid products, including programs and services to educate the public about the risks and dangers posed by such products or to fight problematic use of those products.

13. The opioid-related health care costs the Government has the right to recover under this Act are the sum of

(1) the present value of the total expenditure by the Government or by government bodies for opioid-related health care; and

(2) the present value of the estimated total expenditure by the Government or by government bodies for opioid-related health care that it could reasonably expect would have to be provided by the Government or a government body.

14. No agreement entered into before 31 October 2018 by the Government or on its behalf that concerns compensation relating to the opioid-related health care costs incurred because of a wrong committed by a manufacturer, wholesaler or consultant defeats the Government's option to exercise, against any of them, its right of recovery under this Act. In addition, no such agreement has the effect of excluding or limiting, in the context of an action instituted by the Government or in which the Government participates under this Act, the liability of the manufacturer, wholesaler or consultant or the evidence that may be administered in support of the contentions invoked against the manufacturer, wholesaler or consultant.

Where, in the context of an action referred to in the first paragraph, a manufacturer, wholesaler or consultant is ordered to pay a sum of money to the Government, the court must determine that sum by deducting any compensation amount paid to the Government under an agreement referred to in that paragraph.

No defendant in an action referred to in the first paragraph, or ordered to pay a sum of money to the Government in the context of such an action, may claim damages from the Government for a reason relating to an agreement referred to in that paragraph.

DIVISION II

EXERCISING RIGHT OF RECOVERY

§1. — *General provisions*

15. When exercising the right to recover opioid-related health care costs under this Act, the Government may bring an action either on a collective basis to recover the costs incurred for all recipients of health care required following exposure to one or more types of opioid products, or on an individual basis to recover the part of the costs incurred for certain particular recipients of that health care.

§2. — *Special provisions for an action brought on a collective basis*

16. If the Government brings an action on a collective basis, it is not required to identify particular health care recipients individually or prove the cause of the disease, injury or illness suffered by a particular health care recipient or the portion of the health care costs incurred for such a recipient.

Moreover, no one may be compelled in such an action

(1) to answer questions on the health of, or the health care provided to, particular health care recipients; or

(2) to produce the medical records and documents of, or the documents related to health care provided to, particular health care recipients, except as provided by a law, rule of law or court or tribunal regulation that requires the production of documents relied on by an expert witness.

17. Despite the second paragraph of section 16, the court may, at the request of a defendant, order the production of statistically meaningful samples of records and documents concerning, or relating to health care provided to, particular health care recipients.

In that case, the court determines conditions for the sampling and for the communication of information contained in the samples, specifying, among other things, what kind of information may be disclosed.

The identity of, or identifying information with respect to, the particular health care recipients concerned by the court order must not be disclosed. Moreover, no record or document concerning, or relating to health care provided to, particular health care recipients may be produced under the order unless any information they contain that reveals or may be used to trace the identity of the recipients has been deleted or blanked out.

18. In an action brought on a collective basis, proof of causation between alleged facts, in particular between the defendant's wrong or failure and the health care costs whose recovery is being sought, or between the exposure to an opioid product and the disease, injury or illness suffered by the recipients of that health care, may be established on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies, including information derived from a sampling.

The same applies to proof of the health care costs whose recovery is being sought in such an action.

19. For a defendant who is a party to an action brought on a collective basis to be held liable, the Government must prove, with respect to the type of opioid products involved in the action, that

(1) the defendant failed in the duty to abide by the rules of conduct, to which the defendant is bound in the circumstances and according to usage or law, in respect of persons in Québec who have been or might be exposed to that type of opioid products;

(2) exposure to that type of opioid products may cause a person to suffer, or contribute to their suffering, a disease, injury or illness; and

(3) the type of opioid products manufactured or promoted by the defendant was distributed or offered for sale in Québec during all or part of the period of the failure.

20. If the Government establishes the elements of proof required under section 19, the court presumes

(1) that the persons who were exposed to the type of opioid products manufactured or promoted by the defendant would not have been exposed to that type of products had the defendant not failed in its duty; and

(2) that the exposure to the type of opioid products manufactured or promoted by the defendant caused or contributed to the disease, injury or illness, or the risk of disease, injury or illness, of a number of persons who were exposed to that type of products.

21. When the presumptions set out in section 20 apply, the court sets the cost of all the health care required following exposure to the type of opioid products involved in the action and provided after the date of the defendant's first failure.

Each defendant to whom the presumptions apply is liable for the costs in proportion to its market share in the type of opioid products involved. That share is determined by the court by applying the following rules:

(1) if the defendant is a manufacturer, its share is equal to the relation between

(*a*) the quantity of opioid products of the type involved in the action that the defendant manufactured and that were distributed, sold or offered for sale in Québec between the date of the defendant's first failure and the date of the action; and

(*b*) the total quantity of opioid products of the type involved in the action manufactured by all the manufacturers of those products and that were purchased or distributed in Québec, with a view to providing health care, between the date of the defendant's first failure and the date of the action; or

(2) if the defendant is a wholesaler, its share is equal to the relation between

(*a*) the quantity of opioid products of the type involved in the action that the defendant distributed, sold or offered for sale in Québec between the date of the defendant's first failure and the date of the action; and

(*b*) the quantity of opioid products of the type involved in the action that were distributed, sold or offered for sale in Québec, with a view to providing health care, between the date of the defendant's first failure and the date of the action.

The court may reduce the amount of the health care costs for which a defendant is liable or adjust among the defendants their share of responsibility for the health care costs if one of the defendants proves either that its failure did not cause or contribute to the exposure of the persons in Québec who were exposed to the type of opioid products involved in the action, or that its failure did not cause or contribute to the disease, injury or illness, or the risk of a disease, injury or illness, of a number of those persons.

22. Defendants who are parties to an action brought on a collective basis are solidarily liable for the health care costs set by the court

(1) if the failure to abide by the rules of conduct to which the defendants are bound in respect of the persons in Québec who have been or might be exposed to the type of opioid products involved in the action is common to all of them; or

(2) if, because of the common failure, at least one of the defendants is found liable for the health care costs set by the court.

23. Failure to abide by the rules of conduct to which they are bound in respect of the persons in Québec who have been or might be exposed to a type of opioid products is deemed to be a common failure committed by two or more manufacturers, wholesalers or consultants, whether or not the manufacturers, wholesalers or consultants are defendants in the action, if

(1) at least one of the manufacturers, wholesalers or consultants is held to have failed in its duty to abide by the rules of conduct; and

(2) the manufacturers, wholesalers or consultants 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 or contributed to by the failure in a civil action that awarded damages for the injury.

§3. — *Special provisions for an action brought on an individual basis*

24. If it is not possible to determine which defendant in an action brought on an individual basis caused or contributed to the exposure, to a type of opioid products, of the particular health care recipients who suffered a disease, injury or illness resulting from that exposure, but because of a failure in a duty imposed on them, one or more of the defendants also caused or contributed to, for persons, the risk of a disease, injury or illness by exposing them to the type of opioid products involved, the court may find each of those defendants liable for health care costs incurred, in proportion to its share of liability for the risk.

25. In apportioning liability under section 24, the court may consider any factor it considers relevant, including

(1) the length of time a defendant engaged in the conduct that caused or contributed to the risk;

(2) a defendant's market share in the type of opioid products that caused or contributed to the risk;

(3) the degree of potency of the type of opioid products manufactured or promoted by a defendant;

(4) the sums spent by a defendant on promoting the type of opioid products that caused or contributed to the risk;

(5) the degree to which a defendant collaborated or participated with other manufacturers, wholesalers or consultants in any conduct that caused, contributed to or aggravated the risk;

(6) the extent to which a defendant conducted tests and studies to determine the health risk resulting from exposure to the type of opioid products involved;

(7) the extent to which a defendant assumed a leadership role in manufacturing or promoting the type of opioid products involved;

(8) the efforts a defendant made to warn health professionals and the public about the health risks resulting from exposure to the type of opioid products involved;

(9) the extent to which a defendant continued manufacturing or promoting the type of opioid products involved after it knew or ought to have known of the health risks resulting from exposure to that type of product;

(10) the extent to which a defendant continued promoting the type of opioid products involved after it knew or ought to have known that the amount or dosage of the type of product promoted did not reasonably reflect the health needs of the health care recipients who were likely to be exposed to that type of product; and

(11) the affirmative steps that a defendant took to reduce the health risks resulting from exposure to the type of opioid products involved.

26. The provisions of section 18, which relate to the establishment of causation between alleged facts and to proof of health care costs, are applicable to actions brought on an individual basis.

CHAPTER III

RECOVERY OF OPIOID-RELATED DAMAGES

27. Despite any incompatible provision, the rules of Chapter II relating to actions brought on an individual basis apply, with the necessary modifications, to an action brought by a person or their heirs or other successors for recovery of damages for any opioid-related injury, including any health care costs, caused or contributed to by a wrong committed in Québec by one or more manufacturers or wholesalers of opioid products or by consultants to those manufacturers or wholesalers.

Those rules also apply to any class action based on the recovery of damages for the injury.

CHAPTER IV

MISCELLANEOUS PROVISIONS

DIVISION I

LIABILITY OF DIRECTORS AND OFFICERS

28. A director, partner or any other officer of a manufacturer, wholesaler or consultant is solidarily liable, with that manufacturer, wholesaler or consultant, as applicable, for the health care costs or damages for any injury caused or contributed to by an opioid-related wrong committed by the manufacturer, wholesaler or consultant if, in any manner, the director, partner or officer participates in the commission of the wrong, including by an order, authorization or consent or a failure to act.

However, the director, partner or other officer may be relieved from that liability if they establish that they were not and could not reasonably have been aware of the acts or omissions with which the manufacturer, wholesaler or consultant is charged or if they demonstrate that they exercised due diligence, taking the necessary precautions to prevent those acts or omissions.

DIVISION II

RECURSORY ACTIONS

29. Unless found liable under section 24, a defendant that is required to pay health care costs or damages for injury following a judgment in an action under this Act may demand from the other defendants found liable in the same action their respective shares in those costs or damages, whether or not the defendant has paid all or only a part of its share.

In that case, the court apportions liability among the defendants and determines each defendant's contribution, considering, if the court considers it relevant, the factors listed in section 25.

DIVISION III

CLASS ACTIONS

30. Despite article 571 of the Code of Civil Procedure (chapter C-25.01), the Government may exercise its right of recovery under this Act in the context of a class action regarding which the Government acts as plaintiff before a court of Québec or as a member of a class on behalf of which such an action is exercised elsewhere in Canada. Such actions are governed by the substantive rules set out in this Act.

The class represented by the Government or of which it is a member may only consist of the Government of Canada, federal bodies and governments or bodies of other provinces or territories that cover opioid-related health care costs within the meaning of this Act.

This section does not prevent a member of the class on behalf of which the Government intends to act from opting out of the class by informing the court clerk of its decision, as provided for in article 580 of the Code of Civil Procedure. A member who wishes to opt out of the class must also inform the Attorney General of Québec.

DIVISION IV

RECOVERY OF OPIOID-RELATED HEALTH CARE COSTS BY THE GOVERNMENT OF CANADA

31. The Government of Canada has, against any manufacturer, wholesaler and consultant, the same right as that of the Government under this Act to recover the opioid-related health care costs caused or contributed to by a wrong committed by any of them.

The health care costs referred to in the first paragraph include the cost of medical services, hospital services and other health services and social services, including pharmaceutical services and drugs, that the Government of Canada covers on behalf of the recipients of those services through programs intended specifically for them because of their membership in a population group.

The right of recovery provided for in this section and the conditions for exercising it are governed by the provisions of Chapter II, except section 12.

DIVISION V

PRESCRIPTION

32. No action, including a class action, brought by or on behalf of the Government or the Government of Canada to recover opioid-related health care costs may, if it is in progress on 2 November 2023 or brought within 15 years following that date, be dismissed on the ground that the right of recovery is prescribed.

33. No action, including a class action, brought by persons, their heirs or other successors to recover damages for opioid-related injuries may, if it is in progress on 2 November 2023 or brought within three years following that date, be dismissed on the ground that the right of recovery is prescribed.

Actions that, before 2 November 2023, were dismissed on that ground may be revived within three years following that date.

CHAPTER V

FINAL PROVISIONS

34. The provisions of this Act may not be interpreted as preventing rules similar to those in the Act with respect to an action brought by the Government on a collective basis from being applied in a class action brought by persons, their heirs or other successors to recover damages for opioid-related injuries.

35. The provisions of this Act have the retroactive effect necessary to ensure their full application. Therefore, without limiting the generality of the foregoing, the right to recover opioid-related health care costs may be exercised and the officer who participated in the commission of an opioid-related wrong by a manufacturer, wholesaler or consultant is held solidarily liable regardless of when the opioid-related wrong giving access to the exercise of that right or giving rise to that liability was committed.

36. The Government may, by regulation, take any measure necessary or useful for carrying out this Act and fully achieving its purpose.

37. The Minister of Health and Social Services is responsible for the administration of this Act.

38. This Act comes into force on 2 November 2023.

SCHEDULE I
(*Section 2*)

LIST OF DRUGS AND ACTIVE INGREDIENTS:

(1) anileridine;

(2) buprenorphine, including but not limited to buprenorphine hydrochloride;

(3) butorphanol, including but not limited to butorphanol tartrate;

(4) codeine, except for those products referred to in subsection 36 (1) of the Narcotic Control Regulations made under the Controlled Drugs and Substances Act (Statutes of Canada, 1996, chapter 19), including but not limited to codeine phosphate;

(5) diacetylmorphine;

(6) fentanyl, including but not limited to fentanyl citrate;

(7) hydrocodone, including but not limited to hydrocodone bitartrate;

(8) hydromorphone, including but not limited to hydromorphone hydrochloride;

(9) levorphanol;

(10) meperidine, including but not limited to meperidine hydrochloride;

(11) methadone, including but not limited to methadone hydrochloride;

(12) morphine, including but not limited to morphine hydrochloride and morphine sulfate;

(13) nalbuphine;

(14) normethadone, including but not limited to normethadone hydrochloride;

(15) opium, including but not limited to opium and belladonna;

(16) oxycodone, including but not limited to oxycodone hydrochloride;

(17) oxymorphone, including but not limited to oxymorphone hydrochloride;

(18) pentazocine, including but not limited to pentazocine hydrochloride and pentazocine lactate;

(19) propoxyphene;

(20) remifentanil;

(21) sufentanil;

(22) tapentadol, including but not limited to tapentadol hydrochloride; and

(23) tramadol, including but not limited to tramadol hydrochloride.