COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia v. Imperial Tobacco Canada Limited,* 2009 BCCA 540

Date: 20091208
Dockets: CA036017; CA036048; CA036057; CA036073; CA036080; CA036800; CA036801

Dockets: CA036017; CA036048; CA036057; CA036073; CA036080

Between:

Her Majesty the Queen in Right of British Columbia

Respondent
(Plaintiff)

And

Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc.

Appellants
(Defendants)

And

The Attorney General of Canada

Third Party

- and -

Docket: CA036800

Between:

Her Majesty the Queen in Right of British Columbia

Respondent
(Plaintiff)

And

Philip Morris USA Inc.

Appellant
(Defendant)

And

Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc.

Respondents
(Defendants)

And

The Attorney General of Canada

Third Party

- and -

Docket: CA036801

Between:

Her Majesty the Queen in Right of British Columbia

Respondent
(Plaintiff)

And

Philip Morris International Inc.

Appellant
(Defendant)

And

Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc.

Respondents
(Defendants)

And

The Attorney General of Canada

Third Party

Before: The Honourable Mr. Justice Hall
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice D. Smith

On appeal from: Supreme Court of British Columbia, April 10, 2008, (*British Columbia v. Imperial Tobacco Canada Limited*, 2008 BCSC 419, S010421)

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Counsel for the Attorney General of British Columbia pursuant to a notice of constitutional question dated May 21, 2008	G.H. Copley, Q.C.
Place and Date of Hearing:	Vancouver, British Columbia June 1-5, 2009
Place and Date of Judgment:	Vancouver, British Columbia December 8, 2009

Reasons dissenting in part by:
The Honourable Mr. Justice Hall

Concurred in by:
The Honourable Mr. Justice Lowry

Written Reasons by:
The Honourable Mr. Justice Tysoe (Page 36, para. 65)

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Mr. Justice Hall:

[1] The defendant appellants appeal from a judgment of Madam Justice Wedge pronounced April 10, 2008 allowing an application under R. 19(24) of the *Rules of Court* by the Crown federal ("Canada") to strike third party notices issued by the defendant appellants. The appellants seek contribution and indemnity from Canada concerning claims advanced against them by Her Majesty the Queen in Right of British Columbia ("British Columbia") under the provisions of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 [*Costs Recovery Act*]. In reasons indexed as 2008 BCSC 419, the learned chambers judge allowed the application of Canada essentially for two reasons. Firstly, she held that the provincial legislation, the *Costs Recovery Act*, does not create or modify an action in tort. She found that the legislation creates a stand-alone statutory cause of action permitting recovery by the Province of health care costs. In her opinion, such a cause of action was not a cause of action described in s. 3 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 [*CLPA*]. Section 3 of the *CLPA* modifies the common law of Crown immunity by providing that Canada may incur liability for damages in respect of a tort committed by a servant of the Crown. Since the judge found the cause of action not to be a tort claim, the defendants could not successfully invoke s. 3 of the *CLPA*. Therefore the third party claim could not succeed under that theory of liability advanced by the defendant tobacco companies.

[2] As well, Wedge J. held that the provisions of the *Costs Recovery Act*, being a provincial legislative enactment, could not bind Canada. She noted that s. 17 of the *Federal Interpretation Act*, R.S.C. 1985, c. 1-21, provides that no enactment is binding on Her Majesty or affects Her Majesty except as mentioned in the enactment. Canada is not mentioned in the *Costs Recovery Act*. She concluded that the case of *F.B.D.B. v. Hillcrest Motor Inn Inc. (*1986), 6 B.C.L.R. (2d) 223, [1986] 6 W.W.R. 444 (S.C.), aff'd (1988), 26 B.C.L.R. (2d) 379 (C.A.) [*Hillcrest*], stands for the proposition that a provincial statute cannot bind Canada. That proposition rests on what is termed the doctrine of interjurisdictional immunity. The

appellants submit *Hillcrest* was wrongly decided and for that reason a five-person Court was empanelled to consider the correctness of *Hillcrest*.

[3] What was at issue in *Hillcrest* was a question of creditor's priority as between the Federal Business Development Bank ("F.B.D.B."), a federal entity which was the holder of a debenture and mortgage over Hillcrest's assets and the Workers Compensation Board of British Columbia (the "Board"), a provincial entity which claimed for unpaid employer assessments. Hillcrest was in receivership. The contest was thus described in the judgment of Low L.J.S.C. (as he then was):

> The Board claims priority under s. 52(1) of the *Workers Compensation Act*:
>
> > 52. (1) Notwithstanding anything contained in any other Act, the amount due by an employer to the board ... on an assessment made under this Act, or in respect of an amount which the employer is required to pay to the board under this Act, or on a judgment for it, constitutes a lien in favour of the board ... payable in priority over all liens, charges or mortgages of every person, whenever created or to be created, with respect to the property, or proceeds of property, real, personal or mixed, used in or in connection with or produced in or by the industry with respect to which the employer was assessed or the amount became payable ... and the lien for the amount due the board ... continues to be valid and in force with respect to each assessment until the expiration of 5 years from the end of the calendar year for which the assessment was levied.
>
> The property, real and personal, covered by the debentures and mortgage was used by Hillcrest in connection with the hotel industry. The Board assessed Hillcrest with respect to that industry.
>
> The Bank, as an agent of the federal Crown, claims to be unaffected by s. 52(1) under the general principle of Crown immunity.

[4] Low L.J.S.C. said this by way of conclusion at 232:

> The security interest of the Bank in the assets of Hillcrest is federal public property. The province is without power to pass legislation effectively giving the Board a lien on those assets having priority over the Bank's interest.

[5] This Court sustained the decision of Low L.J.S.C. Craig J.A., after noting that he agreed with the result reached by Low L.J.S.C., went on to say this at 383-384:

> Although the trial judge concluded that the British Columbia legislature undoubtedly meant to make the federal Crown subject to the provision of s. 52(1) of the Workers Compensation Act, he rejected the submission that the F.B.D.B. was bound by the subsection. Referring to s. 42 of the Federal Business Development Bank Act and s. 105 of the Financial Administration Act, he held that the F.B.D.B. could exercise its powers only as an agent of the Crown. He relied, particularly, on the judgment of the Supreme Court in *R. v. Eldorado Nuclear Ltd.-Eldorado Nucléaire Ltée; R. v. Uranium Canada Ltd.- Uranium Canada Ltée*, [1983] 2 S.C.R. 551, 7 Admin. L.R. 195, 77 C.P.R. (2d) 1, 8 C.C.C. (3d) 449, 1 O.A.C. 243, 4 D.L.R. (4th) 193, 50 N.R. 120. The court was considering legislation essentially the same as ss. 42 and 105. In giving the judgment of the majority, Dickson, J. said at pp. 565-66:
>
> > When a Crown agent acts within the scope of the public purposes it is statutorily empowered to pursue, it is entitled to Crown immunity from the operation of statutes, because it is acting on behalf of the Crown.
>
> I think that this view is determinative of all grounds of appeal in this case. The F.B.D.B. was acting within the scope of its powers which the legislation had authorized it to pursue. This is the paramount consideration. The fact that s. 24(1) of the Federal Business Development Bank Act provides that in exercising its authorized powers, the Bank may exercise all the rights, powers and privileges of a natural person does not assist the Board.
>
> In giving the judgment of the majority in *Re Pac. West. Airlines Ltd*.; *R. v. Can. Tpt. Comm*., [1978] 1 S.C.R. 61, 2 Alta. L.R. (2d) 72, 75 D.L.R. (3d) 257, 2 A.R. 539, 14 N.R. 21, Laskin C.J.C. expressed somewhat similar views. He said at pp. 72-73:
>
> > The point that I raise, namely whether Her Majesty or the Crown, where generally referred to in federal or provincial legislation should be taken to mean the Crown in right of Canada or of a Province, as the case may be, is influenced by the fact *that a Provincial Legislature cannot in the valid exercise of its legislative power, embrace the Crown in right of Canada in any compulsory regulation*. This does not mean that the federal Crown may not find itself subject to provincial legislation where it seeks to take the benefit thereof: see *Toronto Transportation Commission v. The King*, [[1949] S.C.R. 510]; *The Queen v. Murray*, [[1967] S.C.R. 262.]. [Emphasis of Craig J.A.]
>
> The italicized portion of the quotation supports the view that s. 52(1) is inapplicable to a Crown agency acting within its legislated powers.

[6] Mr. Copley, counsel for the Attorney General, submitted that the decision in the *Hillcrest* case could be supported under the doctrine of paramountcy. That may be a plausible explanation of the result in that case but if it is not necessary to

decide this case on constitutional grounds, that issue need not finally be resolved in the present litigation.

[7] The Attorney General of British Columbia submits that generally a court will be reluctant to consider and decide a constitutional question if a case can be decided on an alternate basis such as statutory interpretation or some other non-constitutional issue: *The Queen in Right of Manitoba v. Air Canada,* [1980] 2 S.C.R. 303 at 320, Laskin C.J.C.; *James Richardson and Sons v. M.N.R*., [1984] 1 S.C.R. 614 at 620, Wilson J.

[8] Counsel for British Columbia submits that as a matter of statutory interpretation, it should be found that the Province of British Columbia in enacting the *Costs Recovery Act* did not intend to affect Canada. Counsel for the Attorney General of British Columbia supports the argument advanced by counsel for British Columbia and submits that it is not necessary for the Court to decide the constitutional issue.

British Columbia's Position

[9] Before Wedge J., the respondent, Her Majesty the Queen in Right of British Columbia, conceded that having regard to the provisions of the *Costs Recovery Act* and the allegations contained in the third party notices, Canada might be found liable to the appellants for indemnity or contribution. In this Court, British Columbia resiles from this position and advances an argument that on a proper construction of the *Costs Recovery Act*, it should be held that Canada could not be found to be a "manufacturer" under the terms of that legislation. It submits that since liability could not be found against Canada under the terms of the legislation, Canada could not be held to be liable for contribution under the *Rules of Court* on this theory of liability advanced by the appellants.

[10] In the *Costs Recovery Act*, "manufacture" and "manufacturer" are defined as follows:

> "manufacture" includes, for a tobacco product, the production, assembly or packaging of the tobacco product;
>
> "manufacturer" means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past
>
> (a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco 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 tobacco products by that person or by other persons,
>
> (c) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or
>
> (d) is a trade association primarily engaged in
>
> (i) the advancement of the interests of manufacturers,
>
> (ii) the promotion of a tobacco product, or
>
> (iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;

[11] British Columbia argues that having regard to the legislative regime in force at the time the *Costs Recovery Act* was passed, particularly the provisions of the *Interpretation Act*, R.S.B.C. 1996, c. 238, and the obvious purpose for passage of the statute, namely the wish of British Columbia to recover health care costs from companies engaged in manufacturing and selling tobacco products in British Columbia, it must be the case that the British Columbia legislature had no intention to include Canada as a potential target of the *Costs Recovery Act*. Since the argument now advanced by this respondent was not before her, the learned chambers judge did not consider the merits of this submission.

[12] It also submits that Canada would not be amenable to a claim for contribution and indemnity under the provisions of the *Negligence Act* because of the comprehensive treatment of the subject of contribution between defendants set out in the *Act*. British Columbia submitted this statute was something in the nature of a "code" and that to allow the provisions of the *Negligence Act* to be invoked by the defendants in this litigation would render s. 8 of the *Costs Recovery Act* something of a dead letter.

[13] In a recent case in this Court, *Adbusters Media Foundation v. Canadian Broadcasting Corp.*, 2009 BCCA 148, the Court said this about striking a claim, in a statement of claim (or a third party notice) at para. 14:

> [14] The test under R. 19(24) is uncontroversial. In *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, Mr. Justice Iacobucci, for the court, wrote:
>
> > 15 An excellent statement of the test for striking out a claim under such provisions is that set out by Wilson J. in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980:
> >
> > > ... assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ... should the relevant portions of a plaintiff's statement of claim be struck out ... .
>
> The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether there it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment. See also *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

The Appellants' Position

[14] The appellants submit the chambers judge erred in striking out the third party notices. They rely on a line of cases from this Court, other appellate courts and the Supreme Court of Canada which suggest that it is only when it is plain and obvious that a party cannot succeed in a contribution claim that such a claim ought to be struck under a provision such as Rule 19(24). The appellants submit that in this case Canada cannot satisfy the plain and obvious test and the notices ought to be allowed to stand.

[15] It is argued by the appellants that Canada owed and breached a duty of care to consumers. It is said that if this is so, Canada, by reason of the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333, would be obliged to contribute to any liability of the appellants to British Columbia. It is said as well that Canada, by its activities and interaction with the appellants over many years, breached a duty of care owed on traditional tort grounds to the tobacco manufacturer appellants. On this basis also it is submitted Canada could be found liable to contribute to or to indemnify the appellants under the provisions of the *Negligence Act.* Further, it is submitted that Canada could be found liable to indemnify the appellants under the doctrine of equitable indemnity. It is submitted that in any event, the third party notices against Canada ought to be allowed to stand to allow the appellants to seek declaratory relief. It is said that it is necessary for Canada to remain a party to the litigation to enable the appellants to utilize the discovery process to properly defend themselves in the action.

The Pleadings

[16] The Statement of Claim of British Columbia alleges that tobacco contains an addictive substance, nicotine. Smoking tobacco products exposes smokers to harmful substances including tar, nicotine, carbon monoxide and other toxins. Smoking cigarettes causes or contributes to disease including cancer, emphysema and heart and vascular disease. British Columbia alleges that by 1950 and thereafter the appellants knew or ought to have known that smoking cigarettes could cause or contribute to disease in smokers. It is alleged the defendants sold a defective product and failed to properly warn consumers of the risks of smoking. As a result, British Columbia seeks to claim against the defendants for the total past expenditure by government for health care benefits and the present value of health care benefits to be provided in future resulting from tobacco related disease or the risk thereof. The sums claimed could obviously be substantial.

[17] The Third Party Notice of Imperial Tobacco Canada Limited (“ITCAN”) which is generally representative of the third party notices of the other defendants is very

lengthy and detailed. Certain of the material allegations therein contained are as follows:

> 8. Agriculture Canada is established pursuant to the Department of Agriculture and Agri-Food Act, R.S.C., 1985, c. A-9, s. 4, and predecessor statutes which confers broad powers, duties and functions with respect to agriculture, agricultural products, and research related to agriculture and products derived from agriculture including the operation of experimental farms.
>
> 9. From 1906 and at all material times, officials of Agriculture Canada at the Delhi Research Station and elsewhere carried out a programme of cooperation with and support for tobacco growers and cigarette manufacturers, including ITCAN and its predecessor companies, which programme included:
>
> (a) research into and analysis of the chemical and physical composition of tobacco for the purpose of determining which varieties produced the quality required by manufacturers and consumers of tobacco products including total alkaloid (nicotine) and sugar levels;
>
> (b) research into the chemical constituents of tobacco smoke;
>
> (c) research regarding nicotine and tobacco varieties with a level of nicotine in the leaf believed by Officials to be suitable for use in the manufacture of tobacco products;
>
> (d) participation in the Tobacco Variety Evaluation Committee, the Evaluation Committee on Agricultural Chemicals for Tobacco, the Canadian Tobacco Quality Evaluation Committee, the Manufacturers' Smoke Evaluation Committee; the Canadian Tobacco Research Group and the Delhi Engineering Research Group;
>
> (e) the initiation of smoke preference studies of tobacco treated with experimental pesticides;
>
> (f) control of the varieties of tobacco seed available for use in Canada;
>
> (g) breeding and/or genetic engineering of improved smoking quality tobacco varieties for use by cigarette manufacturers, and frequent consultation and cooperation with cigarette manufacturers on the influence of genetic variation in nicotine, "tar" and surface waxes/lipids on flavour and aroma in relation to [mutagenicity]/biological activity of tobacco smoke;
>
> (h) participation in the creation of Centre de Coopération pour les Recherches Scientifiques Relatives au Tabac (hereinafter "C.O.R.E.S.T.A.") as a world tobacco organization and attendance at the International Tobacco Scientific Congresses sponsored by C.O.R.E.S.T.A. to present scientific reports;

(i) publishing the results of its research in *Tobacco Science*, the *Canadian Journal of Plant Science*, the *Canadian Journal of Genetics and Cytology* and other scientific journals and in *The Lighter*, its own publication;

(j) attendance at the Tobacco Chemists Research Conference meetings and hosting several such meetings including the presentation of reports on tobacco growing and tobacco product manufacturing;

(k) advising cigarette manufacturers of the desirable content of nicotine in tobacco to be used in the manufacture of tobacco products;

(l) research into the agricultural practices and chemical fertilizers ("cultural practices") that cause variations in the chemical content of tobacco leaf including nicotine;

(m) from about 1970 participation with Officials of Health Canada in the "Less Hazardous Cigarette Programme" including the Delhi Tobacco and Health Bio-Assay Programme; and

(n) from about 1970 the manufacture of cigarettes for testing on Agriculture Canada's smoking machines and for testing by cigarette manufacturers to determine smoker satisfaction.

10. Agriculture Canada has also undertaken or sponsored research programmes relating to tobacco, smoking and health in support of the National Programme developed by Health Canada as further particularized herein.

…

13. In the early 1950's, epidemiological studies began to appear in the public and scientific literature reporting an association between smoking cigarettes and the rising incidence of lung cancer. These studies were supplemented by clinical and experimental studies that were regarded by some members of the scientific and public health communities as providing evidence that cigarette smoke contained substances capable of causing disease. At all material times, Officials knew of these studies and on occasion republished summaries of the studies in official Health Canada publications.

14. In the 1950's, Officials recognized smoking and health as a priority issue and, in 1955, commissioned and undertook a major epidemiological study, known as the "Veterans Study", to examine the relationship between smoking and disease.

…

16. In July 1957, Officials advised, requested or directed ITCAN and other cigarette manufacturers to embark on a programme of "selective reduction"; namely, to support basic independent research directed to determining which, if any, constituents of tobacco smoke potentially caused disease, particularly lung cancer, so that they could be removed from cigarette smoke if technically feasible.

…

> 18. Also beginning in the 1950's, upon the advice, request or direction of Officials, ITCAN and other cigarette manufacturers developed and incorporated filters into cigarette design as a possible means of reducing potentially toxic constituents in cigarette smoke. In July 1957, a cigarette manufacturer advised the Deputy Minister of Health that no health related claim was being made for filters on cigarettes, and the Deputy Minister agreed or advised this was appropriate.

[18] It is further alleged that as early as 1908, it was known that smoking could be harmful to health and federal legislation, the *Tobacco Restraint Act*, S.C. 1908, c. 73, was passed to prevent the sale of tobacco products to minors. By 1950, there were studies being published internationally suggesting there could be a link between cancer and smoking. In 1954, the federal government provided funds to the National Cancer Institute of Canada for research into smoking and health. By the early 1960s, Health Canada officials and Ministers of Health were increasingly sounding the tocsin that smoking could have a wide array of negative health consequences. Health Canada developed a national health program to address smoking related issues. This was termed the "National Smoking and Health Program".

[19] At a 1963 Conference on Smoking and Health, the federal government announced it was budgeting for a five-year anti-smoking program. *Inter alia*, the federal government sought to encourage people to limit or stop smoking, to take steps to inform the public of smoking risks and to conduct research into manufacturing a less hazardous cigarette. From these initiatives, innovations such as filters for cigarettes and milder tobacco strains evolved.

[20] Para. 42 of ITCAN's third party notice pleads:

> 42. From 1906, Agriculture Canada had conducted research to support the cigarette manufacturers to improve the quality of tobacco grown in Canada, and beginning in or about 1964, Officials of Agriculture Canada became involved in researching the ingredients in tobacco and tobacco smoke at the Delhi Research Station for the purpose of supporting the National Programme.

[21] In 1971, the federal government introduced draft legislation, which died on the order paper, that would have mandated health warnings on cigarette packaging. Such warnings had been implemented in the U.S. some years earlier. In 1971, as a result of discussions with federal officials, tobacco manufacturers such as ITCAN began to voluntarily place warnings on packaging in the following terms: "Warning … the Department of National Health and Welfare advises that danger to health increases with amounts smoked."

[22] By the mid 1960s, there was a general scientific consensus that lowering the tar content of tobacco should ameliorate the health risks to smokers. Para. 69 of the third party notice states:

> 69. In the mid-1960's, Officials at Health Canada and Agriculture Canada explored ways to reduce "tar" in tobacco smoke. This approach reflected the conclusion of Officials that a programme of identifying and removing specific toxic constituents from tobacco smoke ("selective reduction") was unlikely to yield satisfactory results, and that a programme of general reduction of "tar" exposure might reduce the incidence of disease on a population or average basis.

[23] Para. 72 of the third party notice states:

> 72. At that time, Officials of Health Canada concluded that, notwithstanding the knowledge of consumers of the possible health risks of smoking, a portion of current smokers would choose to continue to smoke and that a portion of non-smokers would choose to begin to smoke. Officials began implementing a programme to provide relevant and accurate information to smokers, guiding them in making choices about their smoking behaviour, including inducing them to choose brands of cigarettes with lower deliveries of "tar" and nicotine as measured by standard testing methods ("light and mild products"). This programme, as further particularized below, involved providing information and advice to smokers about deliveries of "tar", nicotine and carbon monoxide as measured by standard testing methods, as well as information and advice to smokers about smoking behaviour, and advice about the unreliability of standard testing methods using machines to determine the exposure of individual smokers. Officials also gave advice, made requests or gave directions to cigarette manufacturers about the development and promotion of light and mild products and the use of standard testing machines. The programme also involved co-operation with Officials at Agriculture Canada to develop strains of tobacco peculiarly suitable for use in light and mild products that were eventually sold to consumers in British Columbia.

[24] The objective of this activity on the part of federal officials was to encourage people not to smoke and also to attempt to lower smoking risks for those who persisted in the habit. Tables were published by government starting in the late 1960s setting out the tar and nicotine content of various brands, but this methodology was discontinued by 1975 when manufacturers began setting out tar and nicotine yields on packaging. Industry and government sought to develop new breeds of tobacco with higher nicotine levels that could be "filtered down" to obtain a safer low tar cigarette with a medium nicotine yield. In 1973, the then Minister of Health, Mr. Lalonde, announced that officials of Health Canada and Agriculture Canada along with the tobacco industry were endeavouring to develop strains of tobacco that would lower tar and nicotine levels in cigarettes.

[25] Under the heading in the third party notice "Design and Development of a 'Less Hazardous Cigarette' by Officials" the following is pleaded:

> 110. For many years, Officials of Agriculture Canada, and particularly those at the Delhi Research Station, undertook a comprehensive research and development programme in support of the Canadian tobacco industry. The purpose of this research and of the programme included improvements to the quality (including nicotine and sugar levels) and marketability of Canadian tobacco varieties and leaf processing, having regard to the desires and preferences of consumers, and later to further Health Canada's Less Hazardous Cigarette programme, as particularized below.
>
> 111. In 1968, Officials of Health Canada initiated studies at the University of Waterloo including a chemical and physical analysis of marketed Canadian cigarettes, an analysis of "tar" and nicotine and carbon monoxide yields, butt length and paper, as well as studies of how smoking behaviour changes with use of lower yield cigarettes, and statistical studies involving monitoring of "tar" and nicotine and carbon monoxide yields in Canadian cigarettes, all of which were done for the purpose of publishing League Tables and for the purpose of developing a programme to permit the manufacture of a less hazardous cigarette.
>
> 112. In or about 1969, Officials of Agriculture Canada at the Delhi Research Station embarked upon a programme to develop a less hazardous cigarette (hereinafter the "Less Hazardous Cigarette Programme"). The Programme continued until the late 1980's and, without limiting the generality of the foregoing, included:
>
> (a) identifying and reducing compounds deleterious to health in existing varieties of tobacco plants;
>
> (b) development of new varieties of tobacco which when smoked yielded a lower "tar" to nicotine ratio; and

(c) development of new tests to assess the relative safety of the new varieties of tobacco plants (bioassay).

…

118. On January 22, 1973, the Minister of Agriculture, Mr. Whelan, and the Minister of Health, Mr. Lalonde, announced the construction of new laboratories at the Delhi Research Station in order to develop tobacco varieties and cultural, curing and other processing techniques that could contribute to the production of light and mild products. The contemplated tobacco varieties were ones containing a lower percentage of "tar" producing constituents than the existing varieties. The objective was that new types of tobacco, when combined with improvements in manufacturing processes, such as the production of reconstituted tobacco sheet and advancements in filter design, would enable further steps to be taken in the production of light and mild products that would expose smokers to fewer harmful substances.

119. On January 22, 1973, the Minister of Health announced a three-way programme of cooperative research between Health Canada and Agriculture Canada, and the University of Waterloo to contribute to international efforts to produce less hazardous light and mild products, to develop types of tobacco products that would be required in the future, and to facilitate Health Canada's leadership and guidance of the tobacco industry in matters affecting health. The Minister of Health confirmed that regular communications on these matters between the two government departments and the cigarette manufacturers were continuing. The Minister also confirmed that Health Canada was involved in a programme which was one component of a broad programme (the Less Hazardous Cigarette Programme) to reduce the hazards of cigarette smoking, which included public education, studies of ways to help Canadians avoid or discontinue smoking, and surveillance of cigarettes on the market.

120. As part of the Less Hazardous Cigarette Programme, in 1973, Health Canada through, *inter alia*, Dr. Colburn and Dr. Forbes at the University of Waterloo, undertook studies of smoking behaviour and responses of smokers to modified cigarettes. Also in 1973 and 1974, Officials at the Delhi Research Station were researching the phenomenon of compensation and noted the need of some smokers to maintain sufficient "dose levels".

…

127. The result of the Less Hazardous Cigarette Programme was that Agriculture Canada Officials at the Delhi Research Station had between about 1979 and 1983 created varieties of tobacco with a lower "tar" to nicotine ratio, including Nordel, Delgold, Newdel and Candel, which contained significantly higher levels of nicotine than previously available varieties, which when smoked produced a lower "tar" to nicotine ratio and were therefore believed to produce a safer cigarette. These varieties were tested at the Delhi Research Station for their relative safety and to determine whether they were consistent with levels of biological activity or mutagenicity acceptable to Officials, and whether they were acceptable to consumers when manufactured into cigarettes for the purpose of improving marketability. Officials licensed those varieties and promoted them for use by all growers of

> tobacco in Canada, and for use by the cigarette manufacturers, including ITCAN, in their products for sale to consumers in British Columbia.
>
> …
>
> 129. By 1983, the tobacco varieties developed by Agriculture Canada Officials, in response to grower requirements and the international market for tobacco leaf, and in order to satisfy consumer demand for light and mild products, comprised about 95% of the tobacco available to cigarette manufacturers. By 1983, nearly all tobacco products consumed in British Columbia were manufactured from these varieties.
>
> …
>
> 131. By reason of the foregoing, the Federal Government is a manufacturer within the terms of the *Act*. At material times, it has:
>
> (a) manufactured tobacco products;
>
> (b) caused, directly or indirectly, through arrangements with contractors, licensees, franchisees or others, the manufacture of tobacco products; and
>
> (c) engaged in or has caused, directly or indirectly, other persons to engage in the promotion of tobacco products, including cigarettes.

[26] The appellants argue these allegations support claims against Canada which take several forms and which should not have been struck pursuant to R. 19(24). Each of these claims is canvassed below.

Discussion

(i) Statutory Liability

[27] The *Costs Recovery Act* provides in s. 2 that "[t]he government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong." The definition of manufacturer is set forth above in para. 10. Canada and British Columbia submit that the federal government should be found not to be a manufacturer within the meaning of the *Act*. The appellants submit that Canada (the federal government) falls within the plain words of the definition portion of the *Costs Recovery Act* and would be liable under the claims advanced by British Columbia had Canada been sued. If Canada is not within the category of manufacturer, it could not be potentially liable in this action commenced by British Columbia against the defendant tobacco companies. If not

potentially liable, then claims for contribution made against it by the appellants under the *Negligence Act* fall away.

[28] The modern approach to statutory interpretation is well known and provides the words of a statute are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the statute, its object and the intention of the legislature: see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes,* 4th ed. (Markham: Butterworths, 2002) at 1; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26; and *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 at para. 21.

[29] In order to determine the question of whether Canada is a "manufacturer", it seems to me that the *Costs Recovery Act* as a whole has to be considered. In the statute, "manufacture" is defined to include "the production, assembly or packaging of the tobacco product." Tobacco product is defined by the Act as meaning "tobacco and any product that includes tobacco". As alleged in the third party notice, Canada researched and developed strains of tobacco as part of the quest by Canada and the industry for lighter or milder strains of tobacco. The strains produced were licensed for use by participants in the industry such as the appellants. The tobacco produced from these strains became a component of most of the tobacco products sold by the appellants in British Columbia. The appellants argue that because of this activity on the part of Canada, it ought to be found that Canada is a "manufacturer" within the terms of the *Costs Recovery Act*.

[30] However, when one goes on to consider other provisions of the statute, it seems less likely that Canada was intended by the legislature to be within the parameters of the *Costs Recovery Act*. For instance, subsection (b) of the definition of "manufacturer" adverts to the derivation of at least 10% of revenues for a fiscal year from the manufacture or promotion of tobacco products. I note also that potential liability of defendants is stipulated to be based on market share. Section 3(3)(b) provides "each defendant to which the presumptions apply is liable for the

proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product." I note that s. 1(6) of the statute provides as follows:

> (6) For the purposes of determining the market share of a defendant for a type of tobacco product sold in British Columbia, the court must calculate the defendant's market share for the type of tobacco product by the following formula:
>
> $$dms = \frac{dm}{MM} \times 100\%$$
>
> where
>
> dms = the defendant's market share for the type of tobacco product from the date of the earliest tobacco related wrong committed by that defendant to the date of trial;
>
> dm = the quantity of the type of tobacco product manufactured or promoted by the defendant that is sold within British Columbia from the date of the earliest tobacco related wrong committed by that defendant to the date of trial;
>
> MM = the quantity of the type of tobacco product manufactured or promoted by all manufacturers that is sold within British Columbia from the date of the earliest tobacco related wrong committed by the defendant to the date of trial.

Manifestly, Canada has not been engaged in the business of selling tobacco products in British Columbia, nor does it derive at least 10% of annual revenues from the manufacture or promotion of tobacco products. Neither could it be said that Canada has a market share in tobacco products sold in British Columbia.

[31] At the time this legislation was introduced by the British Columbia government of the day, the minister responsible indicated that the government believed that "the industry" manufactured a product that killed people, and that the government believed that "the industry" should be held accountable for the costs of treating tobacco related illnesses. The minister made reference to "tobacco companies". The terms used by the minister are not at all apt to include Canada as a target of the legislation. British Columbia submits that while *Hansard* must always be used with caution, it can be a legitimate source of assistance in determining the purpose of legislation, citing *H.L. v. Canada (Attorney General)*, 2005 SCC 25, at para. 106, [2005] 1 S.C.R. 401; and see *R. v. Craig*, 2009 SCC 23, at paras. 20-21. However,

apart from any reliance on *Hansard*, a plain reading of the words in the context of the statute as a whole reveals the legislature did not intend to capture Canada within the definition of "manufacturer".

[32] At this point, it seems appropriate to advert to an issue that arose primarily in connection with the constitutional issues said to be extant in this case. B.A.T. Industries plc and British America Tobacco (Investments) Limited advanced an argument concerning whether or not the federal government might be found to be subject to the terms of British Columbia legislation. Reference was made to the *Interpretation Act*, R.S.B.C. 1974, c. 42, and the *Interpretation Act*, R.S.B.C. 1996, c. 238. Arguably, under the earlier legislation, provincial enactments were meant to be binding on the Crown federal. Low L.J.S.C. (as he then was) in *Hillcrest*, suggested that the intention of the legislature under the 1974 legislation could be seen as an attempt by the province to make statutes binding on the provincial and federal Crown in the absence of a contrary provision in any particular statute. As a result of the *Statute Revision Act*, R.S.B.C. 1996, c. 440, the definition of "government" was changed to make it clear that only the British Columbia government was to be included within the definition of "government". Counsel for B.A.T. suggested that this, being a substantive change, was not an appropriate change to make by this methodology and that the amendment ought to be found to have no force or effect. Because I would not reach the constitutional question in this case, I do not have to resolve this interesting issue. I would however observe that I do not disagree with the comments of Tysoe J.A. on this subject in the companion case of *Knight* released concurrently with this judgment. What is in my view significant from the legislative history, is that at the time the *Costs Recovery Act* was enacted, the *Interpretation Act* defined "government" to be the government of British Columbia. That impacts on the question of the intention of the legislature and militates against the suggestion that Canada was to be bound by the *Costs Recovery Act*.

[33] It is also to be noted that there have been in existence for many years fiscal arrangements between Canada and British Columbia providing for health care cost

transfers from the federal government to the provincial government based on formulas incorporating tax revenues and cost sharing. If the *Costs Recovery Act* were to be construed to permit the inclusion of Canada as a manufacturer targeted for the recovery of provincial health costs, this would permit a direct economic claim to be advanced against Canada by British Columbia to obtain further funding for health care costs. In light of these longstanding fiscal arrangements between governments, I cannot conceive that the legislature of British Columbia could ever have envisaged that Canada might be a target under the *Costs Recovery Act*. At the very least, having regard to the definition of government contained in the current *Interpretation Act*, it seems to me that if Canada was intended to be a target, it would have been specifically named in the legislation. For one level of government to directly target another level of government seeking to exact financial compensation from that level of government seems to me a matter sufficiently fraught with constitutional considerations to require a clear indication in the legislation that this is intended and there is no such indication in this legislation. In my opinion, a consideration of the applicable legislation is strongly indicative that there was no intention on the part of British Columbia to seek to include Canada as an entity from whom recovery could or would be sought under the terms of the *Costs Recovery Act*. I do not therefore consider that Canada could be held to be a manufacturer under the terms of the *Act* and therefore it could not be potentially liable to the plaintiff British Columbia in this action. Since Canada could not be liable to the plaintiff under the terms of the *Costs Recovery Act*, the defendants cannot have the right to seek contribution against Canada under the provisions of the *Negligence Act*: see *Giffels v. Eastern Construction*, [1978] 2 S.C.R. 1346, 84 D.L.R. (3d) 344, and *Orange Julius Canada v. City of Surrey*, 2000 BCCA 467, 79 B.C.L.R. (3d) 199.

(ii) Subrogated Tort Claim

[34] The defendants also argue that aside from the potential liability of Canada to British Columbia under the terms of the *Costs Recovery Act* being a route to a successful claim for contribution and indemnity under the terms of the *Negligence Act*, Canada might also be found liable for contribution and indemnity under the

Negligence Act because arguably it breached a duty to consumers of tobacco products. I do not consider that this submission is legally sustainable because of the nature of the claim advanced by the plaintiff British Columbia under s. 2(1) of the *Costs Recovery Act*. The claim is a direct monetary claim advanced against the defendants, not a subrogated claim based on some alleged breach of a duty to consumers. A breach of duty to consumers may be adverted to in the statute but it is not the basis of the claim advanced in the action by British Columbia. The Supreme Court of Canada observed in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para. 40, [2005] 2 S.C.R. 473, that the essence of the cause of action advanced here by British Columbia is compensation for the government of British Columbia's health care costs rather than remediation of manufacturers' breaches of duty to consumers. In the context of this litigation, the asserted breach of duty by Canada to consumers is simply not relevant. If the asserted breach of duty were found to exist, it would not assist the appellants because that is not the sort of liability or claim that would result in any recovery by the plaintiff British Columbia against the appellants and hence is not a basis upon which any claim for indemnity or contribution under the *Negligence Act* could be advanced against Canada. (See *Giffels* referred to in para. 33, *supra*)

(iii) Direct Tort Claim

[35] The appellant Imperial Tobacco Canada Limited, in a comprehensive submission adopted by the other appellants, argued that Canada breached duties it owed the appellants under traditional tort principles. It is said that this is so because Canada in concert with the appellants over a course of many years researched and developed tobacco strains that were licensed for sale and incorporated by the appellant companies in tobacco products sold in this province. Further, it is submitted that Canada gave directions to the appellants concerning the content of warnings to consumers, which directions were followed by the appellants.

[36] The appellants thus assert that if they are to be found liable to British Columbia for the economic claims advanced by British Columbia based on the sale

of tobacco products and a failure to issue appropriate warnings, then Canada should be found liable for contribution and indemnity to the appellants. Canada submits that it ought not to be found liable because the "harm", an economic harm, for which the appellants seek contribution and indemnity from Canada was not foreseeable and further that there should not be found to be any proximity between the defendants and Canada that could lead to the finding of any duty of care towards the defendants. Canada also says there are valid policy reasons negativing any duty of care which Canada might be found to owe to the appellants based on principles set out in cases such as *Cooper v. Hobart*, 2000 SCC 79, [2001] 3 S.C.R. 537.

[37] The appellants submit that because there has been legislation in force in British Columbia for decades allowing the province to claim health care costs from tortfeasors, it was entirely foreseeable that a statute like the *Costs Recovery Act* might come to be enacted by British Columbia. It is argued by Canada that it was not possible for Canada to foresee that a provincial government might enact legislation creating a wholly new type of civil obligation to recover health care costs in the terms of the *Costs Recovery Act*.

[38] This is certainly new and innovative legislation. It purports to give the British Columbia government a claim against tobacco companies for conduct that was perceived until the enactment of this legislation to be legal and not susceptible to economic claims of the sort advanced by British Columbia in this action. The legislation effected a dramatic change in that it sought to make companies like the appellants liable for damages based on a new statutory cause of action. This legislation represents a wholly new departure by a provincial government suing to recover from manufacturers of tobacco products costs incurred by government for health care. As I noted above, the third party notices of the appellants make clear that Canada and the defendant companies endeavoured over several decades to develop better, safer strains of Canadian tobacco in the quest to ameliorate the health risks of tobacco to smokers. Canada also sought to ensure that warnings were provided to Canadian consumers about the hazards of smoking. These concerns of Canada and the appellants were related to the health risks of

consumers of tobacco products. These activities were not in my opinion motivated by some fear that at a future date legislation like the *Costs Recovery Act* might come into existence. That was simply not within the contemplation of anyone and was wholly unforeseeable.

[39] My colleague, Tysoe J.A., observes that legislation has existed for many years in Canadian jurisdictions allowing a province to advance a subrogated claim for health costs from a tortfeasor. That is so, but the British Columbia legislation under consideration here is quite different in concept because it creates a direct monetary claim irrespective of proven injury to a person or the cost of health care benefits for any individual (s. 2(5)(a) of the *Act*). As well, liability for damages on the part of a defendant is quantified by "its market share in the type of tobacco product" (s. 3(3)(b) of the *Act*). This legislation creates a species of liability very different and distinct from subrogated claims under previously extant health related legislation.

[40] In order to advance their private law tort claim, the defendants must first establish Canada owed them a duty of care. In *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 [*Cooper*] the Supreme Court of Canada held the starting point for the determination of whether a duty of care exists is the determination of whether the case falls within or is analogous to a category of cases in which a duty of care has already been recognized (para. 41). As articulated by Chief Justice McLachlin in *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 at para. 15:

> The reference to categories simply captures the basic notion of precedent: where a case is like another case where a duty has been recognized, one may usually infer that sufficient proximity is present and that if the risk of injury was foreseeable, a *prima facie* duty of care will arise. On the other hand, if a case does not clearly fall within a relationship previously recognized as giving rise to a duty of care, it is necessary to carefully consider whether proximity is established.

[41] The appellants contend their relationship with Canada is analogous to claims that have been found to impose a duty of care, namely, claims of negligent misrepresentation and failure of duty to warn. They cite *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626, and *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189, 40 D.L.R. (3d) 530, as the authorities which establish a

category of duty of care for claims of negligent misrepresentation and failure of duty to warn, respectively. I do not agree that the relationship between Canada and the appellants in this case is sufficiently analogous to cases in which a duty of care for such claims has been recognized. In my view, the private law tort claim advanced by the appellants that Canada should be found liable to the defendants based on its role in developing tobacco strains and providing directions to the companies concerning warnings to consumers, are novel claims.

[42] Where the case does not fall within an already established category, as here, the analysis then proceeds to the test articulated in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), as adopted by the Supreme Court of Canada in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, at 10-11:

> (1) is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,
>
> (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

[43] In *Cooper* the Court clarified the *Anns* analysis in the following way:

> 30 In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.
>
> [Emphasis in original.]

[44] Therefore the first stage of the *Anns* test involves a question of both foreseeability of the harm which occurred and proximity in the relationship of the

parties such that a duty of care should be imposed. If both of these requirements are satisfied, then a *prima facie* duty of care exists. The second stage of the test involves an examination of policy factors, aside from the relationship of the parties, which might negate the imposition of a duty of care.

[45] As the defendants frame their private law tort claim against Canada as one of negligent misrepresentation, it is necessary to canvass the test established in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, 146 D.L.R. (4th) 577. In that case Mr. Justice La Forest, writing for the Court, held there was no reason why the same general approach to the duty of care analysis should not be taken in cases of negligent misrepresentation (para. 21). He held at para. 24 that in a case of negligent misrepresentation the first stage of the *Anns* test should involve the following questions:

> To my mind, proximity can be seen to inhere between a defendant-representor and a plaintiff-representee when two criteria relating to reliance may be said to exist on the facts: (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable.

[46] A common requirement for the existence of a duty of care generally and in a negligent misrepresentation claim is foreseeability. Foreseeability in the case of a general tort claim must be foreseeability of the harm which occurred to the plaintiff, while in a claim for negligent misrepresentation it is reasonable foreseeability of reliance on the representation made to the plaintiff. In this case, the third party claims of the appellants do not meet the primary requirement of foreseeability.

[47] The cause of action advanced under the *Costs Recovery Act* by the government of British Columbia, “a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong” was at the time of the enactment of the legislation an unexpected and unprecedented initiative by the government of British Columbia. I do not consider that it was at all foreseeable by either Canada or the appellants that this sort of legislation was likely to be enacted. Since the harm was not foreseeable, it follows

that any claim for contribution and indemnity advanced by the appellants could not be viable. Therefore, the claim over sought to be advanced against Canada under this head by the appellants is bound to fail.

[48] I will have more to say about this later when I come to consider the claims advanced by the appellants under the head of common law indemnity, but it seems to me also that it would be fundamentally inconsistent with the relationship between the parties, namely Canada as regulator and the appellant companies in the industry, to find that a duty of care should be found to exist between Canada and the appellants. That is so because of the considerations expressed in cases such as *Cooper*; *Kimpton v. Canada (A.G.) and British Columbia (HMTQ)*, 2004 BCCA 72, 23 B.C.L.R. (4th) 249; *Holtslag v. Alberta*, 2006 ABCA 51, 265 D.L.R. (4th) 518; and *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562.

[49] Canada had a large number of interests and concerns to address regarding the tobacco industry. It was concerned with the appellants, with the tobacco growers, and perhaps most importantly, with consumers of tobacco products. It had a responsibility as government to regulate the sale of tobacco products to ensure that increasing health concerns were properly addressed. The relationship between Canada and the appellant companies was one of regulator and regulated. It took some period of time before a detailed legislative scheme came to be in place but at all material times the appellants took direction from Canada concerning sales of tobacco products to the public.

[50] The appellants seek to rely upon the decision in *Sauer v. Canada (Attorney General)*, 2007 ONCA 454, 225 O.A.C. 143, leave to appeal ref'd [2007] S.C.C.A. No. 454 (QL). What was at issue in that case was alleged responsibility to farmers for damages arising from an outbreak of mad cow disease caused by contaminated feed. In *Attis v. Canada (Minister of Health)*, 2008 ONCA 660, 300 D.L.R. (4th) 415, the Ontario Court of Appeal said this about *Sauer* at para. 49:

> *Sauer* concerned a proposed class action by cattle farmers relating to Canada's regulation of cattle feed to prevent mad cow disease. This court upheld the motion judge's conclusion that it was not plain and obvious that

> the plaintiff's allegation of a duty of care could not succeed. The motion judge's reasons regarding the action against Canada, as opposed to the action against the manufacturer, were contained at para. 91, where he stated that whether the government's actions concerned policy or operational decisions required a more complete evidentiary record. The question of proximity was advanced on appeal. On that issue, this court found a sufficient pleading of proximity at para. 62 on the basis of the many express "public representations by Canada that it regulated cattle feed *to protect commercial cattle farmers among others*" (emphasis added). Accordingly, the result in *Sauer* depended on the allegation of specific representations by the government that it was acting in the interests of the plaintiffs.
>
> [Internal footnotes omitted.]

[51] That is a quite different situation from the present case where it could never have been the perception of the appellants that Canada was taking responsibility for their interests. The present case is more analogous to the type of situation disclosed in *Granite Power Corp. v. Ontario* (2004), 72 O.R. (3d) 194, 189 O.A.C. 128. In that case the plaintiff power company alleged it had suffered economic harm because of actions taken by government officials. Although a portion of the action alleging misfeasance in a public office was allowed to proceed, the Ontario Court of Appeal held there was insufficient proximity between the plaintiff and government to support a *prima facie* duty of care. Moldaver J.A. said this at para. 24:

> Manifestly, under the legislative scheme, the Minister did not owe a duty of care exclusively to Granite. On the contrary, he owed a duty of care to the public as a whole, of which Granite was but one constituent. Hence, even if the Minister ought reasonably to have foreseen that Granite would suffer economic harm if he was careless in carrying out his duties under the Act, there was insufficient proximity between the Minister and Granite to ground a *prima facie* duty of care: see *Cooper v. Hobart*, *supra* at paras. 49 and 50. That determination alone is fatal to the claim in negligence.

[52] In my opinion, precisely the same situation exists in the case at bar having regard to the relationship between Canada and the appellants. On this basis the purported claims over alleging negligent conduct on the part of Canada toward the appellants cannot succeed.

[53] Both the appellants and Canada have devoted a portion of their argument to addressing the question of whether Canada's decisions in relation to the alleged activity were made at the policy or operational level. The question of whether a

government action is a policy decision, which would negate the imposition of a duty of care, or the implementation of policy, which would attract liability, is a question which arises at the second stage of the *Anns* analysis (see *Cooper* at para. 38). Because I have found the appellant's claim fails at the first stage of the *Anns* test due to lack of foreseeability, I have found it unnecessary to decide this question on this appeal.

(iv) Claim for Contribution and Indemnity

[54] It was argued by Mr. Affleck, counsel for Rothmans, Benson & Hedges Inc. and Rothmans Inc., that even if no basis could be established for contribution and indemnity pursuant to the provisions of the *Negligence Act*, the third party notices nonetheless ought to be allowed to stand on the basis that Canada might be found liable on the basis of an independent claim over. Reliance was placed upon the case of *Ukrainian (Fort William) Credit Union Ltd. v. Nesbitt, Burns Ltd.* (1997), 152 D.L.R. (4th) 640, 36 O.R. (3d) 311 (Ont. C.A.). In that case, the credit union brought an action in negligence against its financial advisors and these advisors sought to commence a third party proceeding against the Deposit Insurance Corporation of Ontario ("DICO"), the statutory regulator of the credit union. DICO, as has Canada in the present case, moved to strike out the claim alleging that the proceeding ought to be found to be barred by a statute which provided that no proceeding for damages could succeed against DICO for any act done in good faith in the execution of duty. DICO succeeded at first instance, but on an appeal the case was allowed to proceed on the basis that the claim for contribution and indemnity could fall within the ambit of the law of restitution. In that case, Osborne J.A. said at para. 23:

> [23] Contribution, in the context of Nesbitt's claim against DICO, would remedy the unjust enrichment that would accrue if Nesbitt were required to pay all of the Credit Union's claim, in circumstances where DICO was responsible for part of the loss. Requiring DICO to pay its share of the loss to Nesbitt, by the application of the restitutionary principles thus corrects what would otherwise be an unjust enrichment. All of this assumes that Nesbitt is liable to the Credit Union and that there is merit in Nesbitt's claim for contribution (or indemnity) from DICO. Who is liable to whom and for what will, of course have to be determined at trial.

[55] If that case is rightly decided, it seems to me that it would make for a radical alteration in the law relating to contribution and indemnity under contributory negligence statutes such as the *Negligence Act*. I consider the case is one that ought not to be followed and I would decline to do so. If a claim under the *Negligence Act* is not viable in this litigation, it does not become viable on the basis urged by Mr. Affleck.

[56] Mr. Kay, counsel for JTI-MacDonald Corp., R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc., advanced a submission that even if the appellants are not able to mount a successful claim for contribution and indemnity under the provisions of the *Negligence Act*, it still ought to be possible for them to successfully seek contribution and indemnity from Canada because of the common law principle of equitable indemnity. It was submitted that on the authorities, an entitlement to this sort of relief can arise if an individual does an act at the request of another when the act performed does not appear at the time of performance to be manifestly wrong or tortious later results in liability of the actor. If subsequently liability arises because of the performance of such act, the actor should be found entitled to indemnity. The principle has been adverted to in cases such as *Secretary of State for India v. Bank of India Ltd.*, [1938] 2 All E.R. 797 (P.C.) at 800-802, and by the Supreme Court of Canada in the case of *Parmley v. Parmley*, [1945] S.C.R. 635, [1945] 4 D.L.R. 81. It is submitted that because the appellant defendants acted upon many requests of government officials respecting warnings and information to consumers, as well as upon advice concerning the development, packaging and marketing of tobacco products, activities not manifestly unlawful at the time, but now apparently rendered so *ex post facto* by this new legislation, the *Costs Recovery Act*, the appellants ought to be able to seek indemnity from Canada on the basis of this legal principle.

[57] While the principle could arguably be one of wide application in circumstances where an innocent party has been made to incur liability at the request of another person or entity, it seems to me that to seek to rely upon that principle in the instant case makes no sense in the context of the relationship

between Canada and the defendant appellants. It seems clear to me from the factual matrix set out in the third party notices that Canada was acting in general as a regulator to the tobacco industry, in which industry the appellants have long been participants. The principle of equitable indemnity is said to rest upon an implied duty to indemnify if things turn out badly for the actor who has performed the requested act. I am of the opinion that if the notional reasonable observer were asked whether or not Canada, in the interaction it had over many decades with the appellants, was undertaking to indemnify them from some future liability that might be incurred relating to their business, the observer would reply that this could not be a rational expectation, having regard to the relationship between the parties. Likewise, if Canada through its agents had been specifically asked or a suggestion had been made to its agents by representatives of the appellants that Canada might in future be liable for any such responsibility or incur such a liability, the answer would have been firmly in the negative. While this principle of law exists and can in certain factual situations create an obligation to indemnify, it seems to me to be simply inapplicable here having regard to the context of the relationship between Canada and the appellants. Accordingly, I would not give effect to this submission advanced on behalf of the appellants.

(v) Claim for Declaratory Relief

[58] The appellants also argue, relying upon the case of *British Columbia Ferry Corp. v. T&N plc* (1995), 16 B.C.L.R. (3d) 115, 65 B.C.A.C. 118 [*B.C. Ferry*], that the third party notices should be allowed to stand so that the they can seek declaratory relief. This is said to be necessary to allow them to develop the necessary information through discovery to properly defend against the action of British Columbia. The learned chambers judge dealt with this matter at paras. 89 and following of her reasons:

> [89] As a result of Canada's agreement to be bound by the *Rules of Court*, the Defendants will be entitled to seek document production under Rule 26 and witness testimony under Rules 28 and 38. They will also continue to have the right to make application under the federal *Access to Information Act*, R.S.C. 1985, c. A-1 to obtain Canada's tobacco-related documents.

> [90] There is nothing in the *Costs Recovery Act* to suggest that Canada must be a party in order to allow the court to determine the extent of the Defendants' liability. It is settled law that a trial judge may make an assessment of fault against a non-party in order to reduce the defendant's proportionate liability.
>
> [91] Where a third party is immune by operation of law, all proceedings against it are precluded: *Pearse v. Canpar Transport Ltd. et al.*, 2001 BCSC 594, 88 B.C.L.R. (3d) 312.
>
> [92] In *B.C. Ferry*, the Court of Appeal emphasized at pp. 129-130 that the third party in question had been properly joined, and that "a private accord between plaintiff and third party" should not entirely negate the joinder:
>
> > It is important to keep in mind that the defendants had a perfect right to bring third party proceedings against the respondents, based on allegations of fault attributed to them in the Third Party Notices…. It would, in my view, [be] manifestly wrong if a private accord between plaintiff and third party could work to deprive a defendant of the ability to establish an element of proof essential to the just resolution of the action on which all parties had joined issue. …. In those circumstances, I am of the view that the third party claims for declaratory relief should be allowed to proceed.
>
> [93] The Court of Appeal made clear at p. 129 that such claims for declaratory relief for purely procedural advantage ought to be the exception rather than the rule:
>
> > While I am of the view that the general rule against sanctioning actions brought for purely procedural relief will always be an important consideration governing the exercise of the court's discretion to grant declaratory relief, I do not accept the proposition that it must be regarded as a controlling consideration in all cases. There will be instances, albeit rarely, where the declaratory relief should be granted notwithstanding the fact that it is needed only for such purpose.
>
> [94] *B.C. Ferry* stands for the proposition that a third party which is properly part of an action at the time it is commenced may not, by settling its claim with the plaintiff, escape discovery under the *Rules of Court* if the result is significant prejudice to another, non-settling party. In the present case, Canada has been immune from liability from the time the action was commenced and, accordingly, was never a proper party in the litigation.
>
> [95] Further, Canada has agreed to submit to the *Rules of Court* which will permit the Defendants access to all of the procedures necessary to assist the court in determining their liability as distinct from the liability of Canada.

[59] This case is very different from the *B.C. Ferry* case in that there it was thought requisite in the interests of justice for the applicant to be able to keep the settling defendant in the litigation to properly explore the factual background the

applicant relied upon for its defence. In the present case, it is abundantly clear from the third party notices that the appellants have a broad and comprehensive knowledge of the role Canada performed relative to the industry over many years. The chambers judge exercised her discretion against permitting the notices to stand. Since Canada was found by the judge to be immune to liability on constitutional grounds, only declaratory relief could have been granted in favour of the appellants.

[60] While I have not found it necessary to reach the issue of the possible constitutional immunity of Canada from the claim advanced by British Columbia, I have concluded that Canada could not be liable here because it is not within the terms of the *Costs Recovery Act*. Therefore, as the chambers judge held on another basis, Canada has been immune from suit from the outset. Therefore, the reasoning of the chambers judge should be equally applicable having regard to the basis upon which I would strike out the third party claims. However, I wish to emphasize that it appears to me that there is no basis to keep the applicant Canada in this litigation for purposes analogous to those found requisite in *B.C. Ferry* because, as I have observed, the appellants have a very full and complete knowledge of the role of Canada in events that occurred over several decades. I would not interfere with the discretionary ruling of Wedge J.

[61] I also note, as did the chambers judge, that Canada has agreed to submit to the *Rules of Court* which ought to permit the appellants proper access to any additional information they may think requisite to assist in their defence. It seems to me, having regard to this stance of Canada and the obvious knowledgeability of the appellants concerning the activities of representatives of Canada, quite unnecessary to order that Canada be required to be party to this complicated and expensive litigation when I see no utility to be gained from such. Thus, for somewhat different reasons than the learned chambers judge, I would reach the same conclusion concerning the possible declaratory relief. As has been observed more than once, the principle in *B.C. Ferry* is not to be extended and the need to allow the continuance of an action seeking only declaratory relief against a party for informational purposes will only arise in limited circumstances. I would not therefore

accede to the argument advanced that the third party notices should be allowed to stand so that the appellants may seek declaratory relief against Canada.

[62] Finally, this is a case in my opinion in which a further factual record will not be helpful to determine the viability of the claims advanced against Canada in the third party notices: *Klein v. American Medical Systems Inc.* (2006), 278 D.L.R. (4th) 722, 80 O.R. (3d) 217 (Ont. Div. Ct.); *Eliopoulous v. Ontario (Minister of Health & Long Term Care)* (2006), 276 D.L.R. (4th) 411, 82 O.R. (3d) 321 (Ont. C.A.); *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83 [*Syl Apps Secure Treatment Centre*]; *Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62, 94 D.L.R. (4th) 284 (C.A.). Although spoken in a different context, I agree with these comments of Taylor J.A. in *Kripps:*

> 86 A court might be tempted, at the present point in the development of the Canadian law of negligence, to permit every negligence claim to proceed to trial. But that would lead to a long and costly period of uncertainty, one particularly costly in the commercial world where certainty in the law is of considerable importance. It seems to me that the courts would fail in their duty to the community were they to decline to exercise jurisdiction under R. 19(24) simply because of the current state of the jurisprudence in this area of the law. It is, I think, important in some cases that the court make a decision at this stage concerning the extent to which recovery in negligence can be enlarged, and I believe this to be such a case.
>
> 87 Having considered the claims struck out below in detail, finding no authority which would support them, and being of the view both that there is no reasonable possibility of the law being extended so as to allow them and that further proceedings for exploration of the facts and the law could not assist in establishing them, I have concluded that we ought to uphold the decision striking out these claims.

[63] In this case the decision concerning the viability of the third party claims advanced in the notices can and should be made on what is presently known and in the record. For the reasons I have expressed *supra*, I do not consider that the third party notices issued by the defendants disclose any possibly valid claim that can be advanced by the appellants against Canada. The claims are bound to fail. As was observed by the Supreme Court of Canada in *Syl Apps Secure Treatment Centre* at para. 65: "No amount of evidence would revise this legal conclusion". The chambers judge was not in error in ordering the notices struck and I consider her

decision should be sustained, albeit for somewhat different reasons. Accordingly, I would dismiss this appeal.

[64] My conclusions on the issues I have dealt with above make it unnecessary for me to deal with the question of whether or not the cause of action advanced by British Columbia under the *Costs Recovery Act* is or is not a tort. It also is unnecessary for me to deal with the question of whether or not it should be found, as the chambers judge held, that Canada should enjoy constitutional immunity from this claim. Likewise, I do not find it necessary to resolve the issue of whether the *Hillcrest* case is correctly decided. As well, I do not find it necessary to address the argument advanced by counsel for British Columbia concerning the relationship between the indemnity provisions of the *Costs Recovery Act* and the *Negligence Act*. I would leave all those questions for another day.

"The Honourable Mr. Justice Hall"

I agree:

"The Honourable Mr. Justice Lowry"

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

[65] I have read the draft reasons for judgment of my colleague, Mr. Justice Hall, and while I am in agreement with some of the conclusions he has reached, I am unable to agree with his disposition of the appeal for the reasons I have set out below. In these reasons, I will employ the same terms as Hall J.A. has used.

[66] I agree with the conclusion of Hall J.A. that Canada is not a "manufacturer" under the *Costs Recovery Act*. I also agree with his conclusion that it would not assist the appellants if it were found Canada owed a duty of care to consumers of tobacco products, and had breached that duty of care. The decision in *Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*, [1978] 2 S.C.R. 1346, 84 D.L.R. (3d) 344, has been accepted by this Court in *Orange Julius Canada Ltd. v. Surrey (City)*, 2000 BCCA 467, 190 D.L.R. (4th) 1 at para. 53, to stand for the proposition that it is a precondition of the right to resort to contribution under the *Negligence Act*, R.S.B.C. 1996, c. 333, that the third party be liable to the plaintiff. As Canada is not a "manufacturer" under the *Costs Recovery Act*, British Columbia does not have a claim against it, and the appellants are not in a position to avail themselves of the provisions of the *Negligence Act*.

[67] I am further in agreement with the conclusion of Hall J.A. that the doctrine of equitable indemnity has no application on the facts alleged in this case. In light of my view of the outcome of this appeal, it would not be necessary to decide if the claims for declaratory relief in the third party notices should be permitted to remain in place if all other claims in the third party notices were to be struck out. If it were necessary to decide the issue, I would agree with Hall J.A.'s conclusion that it would not be appropriate to interfere with the discretionary ruling of the chambers judge in that regard.

[68] The issue upon which I find myself in respectful disagreement with Hall J.A. is whether it is plain and obvious that Canada did not owe a duty of care to the appellants. As I understand the position of the appellants in making the claim that

Canada breached a duty of care owed to them, they are not relying on the claim to seek contribution and indemnity pursuant to the *Negligence Act*. Rather, the appellants allege that the breach of the duty of care caused, or contributed to, them suffering damage or loss "as measured by the extent of any liability to [British Columbia]" (e.g., para. 184 of the third party notices of ITCAN and Rothmans, Benson & Hedges Inc. and Rothmans Inc.).

[69] Mr. Justice Hall has concluded that it is plain and obvious that Canada did not owe a duty of care to the appellants because it was not reasonably foreseeable by Canada that legislation like the *Costs Recovery Act* would be enacted. It is this conclusion with which I am unable to agree. In view of his conclusion regarding foreseeability, it was not necessary for Hall J.A. to deal with the other aspects of the two-stage *Anns* test, but, as a result of my differing conclusion in that regard, I will apply both stages of the *Anns* test with respect to the allegation that Canada owed a duty of care to the appellants in connection with both the negligent misrepresentations allegedly made by Canada and the negligence alleged against Canada in connection with the development of the tobacco strains used in light and mild cigarettes. I have discussed this topic at some length in my reasons in the companion appeal, *Knight v. Imperial Tobacco Canada Limited*, 2009 BCCA 541 (the "*Knight* Reasons"); in these reasons, I will discuss principally the element of foreseeability.

First Stage of *Anns* Test

[70] The first stage of the *Anns* test involves a consideration of the question of whether "the relationship between the plaintiff and the defendant disclose[s] sufficient foreseeability and proximity to establish a *prima facie* duty of care" (*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 at para. 20). As I have explained in the *Knight* Reasons, it is my view that there was sufficient proximity between Canada and the appellants. I will move to a consideration of the foreseeability requirement.

[71] What needs to have been reasonably foreseen by the defendant is harm resulting from the defendant's actions or omissions. In *Resurfice Corp. v. Hanke,* 2007 SCC 7, [2007] 1 S.C.R. 333, Chief Justice McLachlin described foreseeability in terms of harm caused by risk-creating behaviour:

> [6] Liability for negligence requires breach of a duty of care arising from a reasonably foreseeable risk of harm to one person, created by the act or omission of another: *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239, at p. 247, *per* Laskin J. (as he then was). By enforcing reasonable standards of conduct, so as to prevent the creation of reasonably foreseeable risks of harm, tort law serves as a disincentive to risk-creating behaviour: *Stewart v. Pettie*, [1995] 1 S.C.R. 131, at para. 50, *per* Major J. The major elements of a tort action — duty, breach causing injury and cause — reflect "the principle of moral wrongdoing which is the basis of the negligence law": L. Klar, "Downsizing Torts", in N. J. Mullany and A. M. Linden, eds., *Torts Tomorrow: A Tribute to John Fleming* (1998), 305, at p. 307.

Also see *Hill* at para. 32.

[72] A seminal decision on the topic of reasonable foreseeability is *Hughes v. Lord Advocate*, [1963] 1 All E.R. 705, [1963] A.C. 837 (H.L.). Workers had left burning paraffin lamps close to an open manhole. While the workers were gone, young boys came to explore the situation and, when one of the boys tripped over a lamp, it fell into the manhole. Paraffin escaped from the lamp and formed a vapour that was ignited by the flame. An explosion resulted. Despite the expert evidence that this particular chain of events was not reasonably foreseeable, the House of Lords held that the plaintiff was entitled to recovery in negligence because there had been a foreseeable danger. Lord Morris summarized his reasons as follows at 712:

> My Lords, in my view there was a duty owed by the defenders to safeguard the pursuer against the type or kind of occurrence which in fact happened and which resulted in his injuries, and the defenders are not absolved from liability because they did not envisage "the precise concatenation of circumstances which led up to the accident".

Lord Morris took the quoted phrase from *Harvey v. Singer Manufacturing Co. Ltd.*, 1960 S.C. 155, 3rd Digest Supp. at 172.

[73] A similar phrase was also quoted in *The Queen v. Côté*, [1976] 1 S.C.R. 595, 51 D.L.R. (3d) 244, a case involving a motor vehicle accident. Mr. Justice Dickson (as he then was) said the following at 604:

> The duty of care which rests upon the Minister of Highways admittedly is confined to reasonably foreseeable dangers, the broad general test being that enunciated by this Court in *University Hospital Board v. Lépine* [[1966] S.C.R. 561]http://scc.lexum.umontreal.ca/en/1974/1976rcs1-595/1976rcs1-595.html - _ftn3, at p. 579, "whether a reasonable person should have anticipated that what happened might be a natural result of that act or omission". If one applies that test to the present case, what happened here was a series of collisions between motor vehicles. The impugned act or omission lay in permitting to continue for some hours a "treacherous, slippery and dangerous" icy condition upon a short stretch of much-travelled highway with a known tendency to ice up. It would seem to me that a reasonable person, familiar with Canadian winters, should have anticipated a vehicle collision or collisions as the natural, and indeed probable, result of such a condition of manifest danger. It is not necessary that one foresee the "precise concatenation of events"; it is enough to fix liability if one can foresee in a general way the class or character of injury which occurred: *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. (Wagon Mound No. 2)* [[1967] 1 A.C. 617]; *School Division of Assiniboine South No. 3 v. Hoffer*, [[1971] 4 W.W.R. 746, appeal dismissed, [1973] S.C.R. vi], appeal to this Court dismissed.

[74] In addition to the acceptance of the general principle enunciated in *Hughes v. Lord Advocate* in *Côté*, *Hughes v. Lord Advocate* was specifically approved by the Supreme Court of Canada in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, 153 D.L.R. (4th) 385 at para. 76.

[75] In my opinion, the requirement of foreseeability does not mean that Canada must have reasonably foreseen the enactment of the *Costs Recovery Act*. As indicated in the above passage from *Côté*, all that is necessary is reasonable foreseeability in a general way of the type of harm caused by Canada's acts or omissions.

[76] It seems clear to me that Canada could have reasonably foreseen that if smoking light and mild cigarettes turned out to be more, rather than less, hazardous to the health of smokers than regular cigarettes, then those smokers might have increased injury as a result of smoking light and mild cigarettes. Canada could have

reasonably foreseen that the light and mild cigarettes would cause additional harm to the smokers. Such foreseeability would satisfy the foreseeability requirement for a duty of care owed by Canada to smokers.

[77] It also seems to me that Canada could have reasonably foreseen that, if additional harm were caused to smokers of light and mild cigarettes, the appellants, as the manufacturers of the cigarettes, had potential liability for the damages flowing from the additional harm. The potential increased liability is the harm or injury to the appellants that was reasonably foreseeable by Canada. The potential increased liability is the general way in which the harm or injury occurred, and it was reasonably foreseeable by Canada.

[78] In my opinion, it was not necessary for Canada to have reasonably foreseen the exact nature of the damages flowing from the additional harm caused by smoking light and mild cigarettes. In particular, the requirement of reasonable foreseeability does not, in my view, involve an inquiry into whether Canada could have reasonably foreseen that the potential increased liability of the appellants would include health care costs. Nor, in my view, is it required that Canada should have reasonably foreseen that the claim would be made against the appellants by a provincial government, as opposed to the injured smokers themselves. It is sufficient that Canada could have reasonably foreseen in a general way that the appellants would suffer harm if the light and mild cigarettes were more hazardous to the health of smokers than regular cigarettes.

[79] Even if the harm that is required to have been reasonably foreseen by Canada in order to support the existence of a duty of care owed to the appellants is the enactment of legislation giving a provincial government the right to recover health care costs from the appellants, it is my view that it is not plain and obvious that such legislation was not reasonably foreseeable by Canada.

[80] In concluding that it was not foreseeable by Canada that British Columbia would enact legislation such as the *Costs Recovery Act*, Hall J.A. has noted that the legislation creates a direct and distinct action to recover the cost of health care

benefits caused or contributed to by a tobacco related wrong. It is my view that it is not necessary for Canada to have reasonably foreseen the exact nature of the legislation. It would be sufficient, in my opinion, if Canada could have reasonably foreseen the enactment of legislation giving a province the right to recover the cost of health care benefits. It should not matter whether that right is a direct right or a subrogated right, or whether the legislation is directed at wrongdoers generally or a specific type of wrongdoer.

[81] Legislation giving provinces the right to recover health care costs against wrongdoers has existed in Canada for many years. For example, s. 14 of the *Hospital Insurance Act*, S.N.S. 1958, c. 3, contained the following provisions:

> 14 (1) Where, as a result of the wrongful act or omission of another, a person suffers personal injuries, for which he receives insured services under this Act, he shall have the same right to recover the sum paid for those services against the person guilty of the wrongful act or omission as he would have had if he, himself, had been required to pay for the services.
>
> (2) Where, under subsection (1), a person recovers a sum in respect of insured services received by him under this Act, he shall forthwith pay the sum recovered to the Commission.
>
> (3) Her Majesty the Queen in the right of the Province shall be subrogated to the rights of a person, under this Section to recover any sum paid by the Commission for insured services provided to that person, and an action may be maintained by Her Majesty, either in Her own name or in the name of that person, for the recovery of such sum.

Similar legislation has existed in other provinces during the period in question in this litigation (Newfoundland (1958), Ontario (1960), Manitoba (1967), New Brunswick (1968), Prince Edward Island (1970) and Quebec (1970)). The British Columbia Legislature passed similar legislation in 1950 (the *Hospital Insurance Act Amendment Act, 1950,* S.B.C. 1950, c. 29), but it was never proclaimed. British Columbia did enact legislation in 1992 authorizing the Lieutenant Governor in Council to make regulations respecting rights of subrogation (see s. 45(2)(j) of the *Medical and Health Care Services Act*, S.B.C. 1992, c. 76) and it now has an entire statute dealing with the topic (see the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27).

[82] This type of legislation permitted provincial governments to maintain subrogated actions against the appellants for health care costs incurred as a result of diseases caused or contributed to by smoking tobacco, if a wrongful act or omission could be proven. Such costs could include costs that would not have been incurred but for the fact that the patient smoked a strain of tobacco developed by Canada for use in light and mild cigarettes. Although the *Costs Recovery Act* creates a direct cause of action and contains evidentiary advantages for the benefit of British Columbia, these are not the types of things that need to have been reasonably foreseeable in order to create a duty of care on Canada.

[83] The fact that other provinces had this type of legislation during the period in question does not, in my view, conclusively establish that it was reasonably foreseeable to Canada that British Columbia would enact legislation enabling it to recover health care costs from the appellants. There may be evidence germane to this issue that could be developed during the course of the litigation. However, it is certainly not plain and obvious that Canada was unable to have reasonably foreseen that the appellants could be liable to British Columbia for increased health care costs if light and mild cigarettes were more hazardous to the health of smokers than regular cigarettes.

Second Stage of *Anns* Test

[84] The second stage of the *Anns* test involves consideration of whether there are "any residual policy considerations which ought to negate or limit [the *prima facie*] duty of care" (*Hill* at para. 20).

[85] In the *Knight* appeal, counsel for ITCAN asserted that Canada owed it a duty of care giving rise to liability in negligent misrepresentation and what counsel referred to as product liability negligence (which I referred to in the *Knight* Reasons as design negligence and negligent design). In its factum in this appeal, ITCAN also refers to a duty to warn. I will deal briefly with all three claims by reference to the *Knight* Reasons and the reasons of Hall J.A. in *Knight*.

[86] As I have explained in the *Knight* Reasons, it is my view that it is plain and obvious that the policy consideration involving indeterminate liability is sufficient to negate the *prima facie* duty of care owed by Canada in connection with the claim of negligent design.

[87] As I have also explained in the *Knight* Reasons, I am of the view that it is not plain and obvious that policy considerations negate the *prima facie* duty of care owed by Canada in connection with the claim of negligent misrepresentation.

[88] As I read ITCAN's third party notice, the allegation of a failure to warn does not relate specifically to the tobacco strains developed by Canada for use in light and mild cigarettes. Paragraphs 149 and 150 of its third party notice assert that if, as alleged by British Columbia, warnings of the health risks of smoking cigarettes generally should have been given prior to 1972 and inadequate warnings were given after 1972, this was known by Canada, and the failure of the appellants resulted from conduct of Canada.

[89] The principal point of difference between Hall J.A. and myself in *Knight* is Hall J.A. believes that all of Canada's actions fall within its purview as regulator and that policy considerations militate against the imposition of a duty of care on Canada. In contrast, it appears to me that the allegations against Canada with respect to its development of the tobacco strains used in light and mild cigarettes may go beyond Canada's role as regulator, and it is not plain and obvious that policy considerations negate the *prima facie* duty of care. However, the difference between us does not apply to this claim of a failure to warn. This claim is against Canada in its role as regulator and, for the reasons given by Hall J.A. in *Knight*, I agree that the *prima facie* duty of care in this regard is negated by policy considerations.

[90] ITCAN's factum on this appeal does refer to a duty owed by Canada to warn it of the "alleged inherent risks in the tobacco products that Canada created". This presumably refers to the tobacco strains developed by Canada for use in light and mild cigarettes. However, I read ITCAN's third party notice as alleging that Canada

made representations that it ought to have known were false, not that Canada knowingly made false representations and failed to warn of increased health risks it knew about. Hence, it is my view that the pleadings as they presently stand do not raise an issue with respect to any duty by Canada to warn of the additional dangers of the tobacco strains developed by it.

Conclusion

[91] In the result, I would allow the appeal by setting aside the order of April 10, 2008, that struck the third party notices in their entirety, and by substituting in its place an order striking only the portions of the third party notices relating to the claims of the appellants that (i) they are entitled to contribution and indemnity from Canada on the basis that the *Costs Recovery Act* applies to Canada, (ii) Canada owed the appellants a duty of care with respect to the design of the tobacco strains used in light and mild cigarettes, (iii) Canada is liable in connection with a failure to warn, as alleged in paras. 149 and 150 of ITCAN's third party notice, and (iv) the appellants are entitled to be indemnified by Canada on the basis of the doctrine of equitable indemnity.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Madam Justice D. Smith"