File No. 33563

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPELLANT/
RESPONDENT ON CROSS-APPEAL
(Third Party)

and

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA

RESPONDENT
(Respondent)

and

IMPERIAL TOBACCO CANADA LIMITED, ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., JTI-MACDONALD CORP., R.J. REYNOLDS TOBACCO COMPANY AND R.J. REYNOLDS TOBACCO INTERNATIONAL INC., B.A.T INDUSTRIES P.L.C., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED and CARRERAS ROTHMANS LIMITED

RESPONDENTS/
APPELLANTS ON CROSS-APPEAL
(Appellants)

and

ATTORNEY GENERAL OF BRITISH COLUMBIA and ATTORNEY GENERAL OF NEW BRUNSWICK

INTERVENERS

FACTUM ON APPEAL AND CROSS-APPEAL OF B.A.T INDUSTRIES P.L.C. and BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED (RESPONDENTS/APPELLANTS ON CROSS-APPEAL)

(Rules 42 and 43 of the Rules of the Supreme Court of Canada)

SUDGEN, McFEE & ROOS LLP
700 - 375 Water Street
Vancouver, British Columbia V6B 5N3

Craig P. Dennis
Michael D. Shirreff
Tel.: 604 687-7700
Fax: 604 687-5596
cdennis@smrlaw.ca

Counsel for the Respondents/Appellants on Cross-Appeal, B.A.T Industries p.l.c. and British American Tobacco (Investments) Limited

STIKEMAN ELLIOTT LLP
50 O'Connor Street, Suite 1600
Ottawa, Ontario K1P 6L2

Nicholas McHaffie
Tel.: 613 566-0546
Fax: 613 230-8877
nmchaffie@stikeman.com

Agent for the Respondents/ Appellants on Cross-Appeal, B.A.T Industries p.l.c. and British American Tobacco (Investments) Limited

TO:

DEPARTMENT OF JUSTICE
Deputy Attorney General of Canada
Room 1251 — East Tower
Bank of Canada Building
234 Wellington Street
Ottawa, Ontario K1A 0H8

per: **Paul Vickery**
Tel.: 613 948-1483
Fax: 613 941-5879
pvickery@justice.gc. àa

per: **Travis Henderson**
Tel.: 613 957-1304
Fax: 613 941-5879
jtyhurst@justice.gc.ca

Counsel for the Appellant/Respondent on Cross-Appeal

DEPARTMENT OF JUSTICE
Room 1212 — East Tower
Bank of Canada Building
234 Wellington Street
Ottawa, Ontario K1A 0H8

Christopher M. Rupar
Tel.: 613 941-2351
Fax: 613 954-1920
crupar@ justice. gc.ca

Agent for the Appellant/
Respondent on Cross-Appeal

AND TO:

BULL, HOUSSER & TUPPER LLP
3000 Royal Centre
1055 West Georgia Street
Vancouver, British Columbia V6E 3R3

Daniel A. Webster, Q.C,
Tel.: 604 641-4874
Fax: 604 646-2517
daw@bht.com

Counsel for the Respondent, Her Majesty the Queen in Right of British Columbia

BURKE-ROBERTSON LLP
70 Gloucester Street
Ottawa, Ontario K2P 0A2

Robert E. Houston, Q.C.
Tel.: 613 566-2058
Fax: 613 235-4430
rhouston @burkerobertson.com

Agent for the Respondent, Her Majesty the Queen in Right of British Columbia

AND TO:

HARPER GREY LLP
650 West Georgia Street, Suite 3200
Vancouver, British Columbia V6B 4P7

Christopher M. Rusnak
Tel.: 604 895-2838
Fax: 604 669-9385
crusnak@harpergrey.com

Counsel for the Respondent*/* Appellant on Cross-Appeal, Carreras Rothmans Limited

STIKEMAN ELLIOTT LLP
50 O'Connor Street, Suite 1600
Ottawa, Ontario K1P 6L2

Nicholas McHaffie
Tel.: 613 566-0546
Fax: 613 230-8877
nmchaffie@stikeman.com

Agent for the Respondent*/*Appellant on Cross-Appeal, Carreras Rothmans Limited

AND TO:

OSLER, HOSKIN & HARCOURT LLP
Suite 6100 — 1 First Canadian Place
100 King Street West
Toronto, Ontario M5X 1B8

Deborah Glendinning
Tel.: 416 862-4714
Fax: 416 862-6666
dglendinning@osler.com

Counsel for the Respondent*/*Appellant on Cross-Appeal, Imperial Tobacco Canada Limited

OSLER, HOSKIN & HARCOURT LLP
340 Albert Street, Suite 1900
Ottawa, Ontario K1R7Y6

Patricia J. Wilson
Tel.: 613 787-1009
Fax: 613 235-2867
pwilson@osler.com

Agent for the Respondent/Appellant on Cross-Appeal, Imperial Tobacco Canada Limited

AND TO:

MACAULAY McCOLL
650 West Georgia Street, Suite 1575
Vancouver, British Columbia V6B 4N9

Kenneth N. Affleck, Q.C.
Tel.: 604 687-9811
Fax: 604 687-8716
kaffleck@macaulay.com

Counsel for the Respondents/Appellants on Cross-Appeal, Rothmans, Benson & Hedges Inc. and Rothmans Inc.

GOWLING LAFLEUR HENDERSON LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

Henry S. Brown, Q.C.
Tel.: 613 786-0139
Fax: 613 563-9869
henry.brown@gowlings.com

Agent for the Respondents/Appellants on Cross-Appeal, Rothmans, Benson & Hedges Inc. and Rothmans Inc.

AND TO:

FARRIS, VAUGHAN, WILLS & MURPHY LLP
700 West Georgia Street, Suite 2500
Vancouver, British Columbia V7Y 1B3

Jeffrey J. Kay, Q.C.
Tel.: 604 661-9321
Fax: 604 661-9349
jkay@farris.com

Counsel for the Respondents/ Appellants on Cross-Appeal, JTI-MacDonald Corp., R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc.

GOWLING LAFLEUR HENDERSON LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

Henry S. Brown, Q.C.
Tel.: 613 786-0139
Fax: 613 563-9869
henry.brown@gowlings.com

Agent for the Respondents/ Appellants on Cross-Appeal, JTI-MacDonald Corp., R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc.

AND TO:

DAVIS & COMPANY LLP
Suite 2800 — Park Place
666 Burrard Street
Vancouver, British Columbia V6C 2Z7

D. Ross Clarke, Q.C.
Tel.: 604 643-2911
Fax: 604 687-1612
drclarke@davis.ca

Counsel for the Respondent/Appellant on Cross-Appeal, Philip Morris USA Inc.

GOWLING LAFLEUR HENDERSON LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

Henry S. Brown, Q.C.
Tel.: 613 786-0139
Fax: 613 563-9869
henry.brown@gowlings.com

Agent for the Respondent/Appellant on Cross-Appeal, Philip Morris USA Inc.

AND TO:

McCARTHY TETRAULT LLP
Suite 2500
1000 de la Gauchetière Street West
Montréal, Québec H3B OA2

Simon V. Potter
Tel.: 514 397-4268
Fax: 514 875-6246
spotter@mccarthy.ca

Counsel for the Respondent/Appellant on Cross-Appeal, Philip Morris International Inc.

GOWLING LAFLEUR HENDERSON LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

Henry S. Brown, Q.C.
Tel.: 613 786-0139
Fax: 613 563-9869
henry.brown@gowlings.com

Agent for the Respondent/Appellant on Cross-Appeal, Philip Morris International Inc.

AND TO:

BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, Ontario M5X 1A4

Jeffrey S. Leon
Tel: (416) 777-7472
Fax: (416) 863-1716
leonj@bennettjones.com

Counsel for the Attorney General of New Brunswick

FASKEN MARTINEAU DUMOULIN LLP
55, Metcalfe Street, Suite 1300
Ottawa, Ontario K1P 6L5

Leslie J. Milton
Tel: (613) 236-3882
Fax: (613) 230-6423
lmilton@fasken.com

Agent for the Attorney General of New Brunswick

AND TO:

ATTORNEY GENERAL OF BRITISH COLUMBIA
1001 Douglas St., 6th Floor,
Victoria, British Columbia V8W 9J7

George H. Copley, Q.C.
Tel: (250) 356-8875
Fax: (250) 356-9154
george.copley@gov.bc.ca

Counsel for the Attorney General of British Columbia

BURKE-ROBERTSON LLP
70 Gloucester Street
Ottawa, Ontario K2P 0A2

Robert E. Houston, Q.C.
Tel.: 613 566-2058
Fax: 613 235-4430
RHouston @burkerobertson.com

Agent for the Attorney General of British Columbia

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FACTUM OF RESPONDENT ON APPEAL

PART I: STATEMENT OF FACTS

Overview of Appeal and Cross-appeal

1. Together, the appeal and cross-appeal raise a single question: can the government of Canada, on a pleadings motion, escape liability for what it did by reason of who it is?

2. Canada, on the facts pleaded, has acted in ways materially similar, if not identical, to the conduct of the defendants alleged to give rise to their liability: (i) representations by Canada guided the smoking behaviour of consumers (Amended 3PN, para. 35) (Appellant's Record ("AR"), Vol. III, p. 166), (ii) representations by Canada guided the conduct of Canadian cigarette manufacturers in their dealings with consumers (Amended 3PN, para. 67) (AR, Vol. III, p. 174), and (iii) Canada developed and earned royalties from the very strains of tobacco used in most cigarettes sold and consumed in British Columbia for two decades (Amended 3PN, para. 2(a)) (AR, Vol. III, p. 153). The simple premise of the third party notices is that, if the defendants bear responsibility for the province's health care costs by reason of their alleged conduct (which they deny), then, at the least, Canada should share in that responsibility by reason of its own similar or identical conduct.

3. In counter to that simple premise, Canada invokes an array of legal arguments to argue that Canada should avoid liability for its alleged conduct: among other contentions, that liability for health care costs was not foreseeable, that "policy" reasons override private law duties of care, that the statutory definition of "manufacturer" does not mean what the words say, and that governmental immunity should shield Canada from liability.

4. Canada assembles those legal arguments in response to the two main planks of the third party notices: (i) Canada is liable to the defendants for contribution or indemnity and (ii) Canada is liable directly to the defendants for the tort of negligent misrepresentation and other breaches of duties owed to the defendants. Canada's appeal from the judgment of the Court of Appeal for British Columbia addresses only one aspect of the second plank – Canada's direct liability to the defendants for negligent

misrepresentation. The cross-appeals by the defendants bring into play the remaining elements, including the now uncontroversial proposition that two or more persons whose fault has caused a loss are, as between themselves, liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault (*Negligence Act*, R.S.B.C. 1996, c. 333, s. 4(2)(b)).

5. On Canada's appeal, it is submitted that the majority of the Court of Appeal correctly held that it is not plain and obvious that Canada owed no duty of care to defendants in connection with the claim of negligent misrepresentation. As stated by Tysoe J.A., "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 [the defendants say they do], and it is not plain and obvious that policy considerations negate the *prima facie* duty of care" (RJ, para. 89) (AR, Vol. I, p. 78). A pleadings motion is an unsuitable vehicle for the sweeping, no-duty ruling Canada seeks.

6. On the cross-appeal, it is submitted that the legal basis for the rejection of the contribution and indemnity claim against Canada does not hold. The Court of Appeal cited *Giffels v. Eastern Construction*, [1978] 2 S.C.R. 1346, 1354 and concluded that no claim of contribution or indemnity is available against Canada because, on the Court of Appeal's analysis, Canada "could not be liable to the plaintiff under the terms of" the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 ("*Tobacco Damages/Costs Recovery Act*") (RJ, para. 33) (AR, Vol. I, pp. 55-56). But if *Giffels* means that potential liability to the plaintiff is a pre-condition to liability for contribution or indemnity, then the more recently-enacted, generic *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 supplies that pre-condition. Whether Canada meets the statutory definition of "manufacturer" in -- and therefore can be liable under -- the *Tobacco Damages/Costs Recovery Act* is irrelevant because, if not, Canada can be liable to the plaintiff as a "wrongdoer" under the *Health Care Costs Recovery Act*. That potential liability satisfies the *Giffels* pre-condition. The claim for contribution or indemnity against Canada should stand.

Statement of Facts

Disagreement with Appellant's Statement of Facts

7. These defendants do not accept the appellant's statement of facts in its entirety. These defendants do not take issue with the section of the appellant's statement of facts under the heading, "Cost Recovery Legislation and Litigation", save for the account of the third party notices at paragraph 11. These defendants rely on their own description of the third party notices set out in this factum and their factum on the cross-appeal.

8. These defendants do not accept the section of the appellant's statement of facts under the heading, "The Policy, Legislative and Regulatory Context". The appellant asserts facts not established and incapable of constituting part of the record on a pleadings motion where evidence is inadmissible. For instance, the appellant is unable to cite any supporting reference for the claim at paragraph 17 as to what motivated Canada's conduct. The assertion in the second sentence of paragraph 17 is at odds with the pleadings which state that, whatever else guided Canada's behaviour, Canada acted with an eye to its financial interest (see Amended 3PN, paras. 16 (noting that Canada acted in light of its "substantial interest" in the matter of smoking "from a revenue point of view") and 39 (noting the Deputy Minister of National Revenue's reference to "our interest in revenue") (AR, Vol. III, pp. 159-160 and 167)).

The Litigation

9. The appeal by the Attorney General of Canada arises from a motion by Canada to strike out as disclosing no reasonable claim third party notices issued against Canada in British Columbia's action pursuant to s. 2 of the *Tobacco Damages/Costs Recovery Act*. The Court of Appeal for British Columbia upheld the third party notices in part. As will be so in this Court, the appeal in the British Columbia government action was heard together with a related appeal in *Knight v. Imperial Tobacco Canada Limited*. The Court of Appeal delivered judgment in the two appeals on the same day: *British Columbia v. Imperial Tobacco Canada Limited*, 2009 BCCA 540 (AR, Vol. I, p. 36); and *Knight v. Imperial Tobacco Canada Limited*, 2009 BCCA 541 (AR, Vol. I, p. 80). The two sets of

reasons for judgment cross reference one another; at times it will be convenient in the government action to refer also to the Court of Appeal's reasons in *Knight*.

10. British American Tobacco (Investments) Limited and B.A.T Industries p.l.c. are two defendants in the action commenced by Her Majesty in right of British Columbia. The *Tobacco Damages/Costs Recovery Act* creates a direct and distinct action by British Columbia against a "manufacturer" to recover the "cost of health care benefits" caused or contributed to by a "tobacco related wrong" (*Tobacco Damages/Costs Recovery Act*, ss. 2(1), (2) and (4)).

11. British Columbia alleges that defendants committed a series of tobacco related wrongs which caused the province to incur health care costs. The defendants deny the plaintiff's allegations. In the alternative, all but two operationally inactive defendants filed third party notices against Canada or stated the intention to do so. The defendants say that if they committed wrongful acts that in law caused the province to incur recoverable health care costs, then so too did Canada and Canada should face liability to the degree of its own fault. A comprehensive description of the claims made in the third party notice of these defendants is found in their factum on the cross-appeal.

12. Canada's appeal concerns the claim in the third party notice for negligent misrepresentation in respect of Canada's role in developing and licensing for use tobacco strains used in lower delivery cigarettes. The majority of the Court of Appeal held that (i) it is not plain and obvious that Canada did not owe a *prima facie* duty of care to defendants with respect to representations made by it to defendants in connection with tobacco strains developed for use in light and mild cigarettes (*Knight*, para. 66) (AR, Vol. I, p. 105) and (ii) it is not plain and obvious that policy considerations should negate at this stage of the proceeding the *prima facie* duty of care for negligent misrepresentation (*Knight*, para. 87 (AR, Vol. I, p. 112); *BC*, para. 87 (AR, Vol. I, p. 78)).

13. The reasons of the Court of Appeal set out the factual elements of the negligent misrepresentation claim against Canada, all of which must, on a preliminary pleadings motion, be taken as true:

- The third party notice alleges that Canada became a participant in the tobacco industry (*Knight*, para. 59) (AR, Vol. I, p. 103).
- Officials at Agriculture Canada developed strains of tobacco peculiarly suitable for incorporation into light and mild products by altering the ratio of tar to nicotine in the leaf, and the defendants have paid to Canada license fees and royalties in respect of those strains of tobacco (*Knight*, para. 9(b)) (AR, Vol. I, pp. 84-85).
- Health Canada marketed those strains of tobacco and the strains became almost the only tobacco available in Canada for manufacturing light and mild cigarettes (*Knight*, para. 9(c)) (AR, Vol. I, p. 88).
- The tobacco produced from the strains developed and licensed by Canada became a component of most of the tobacco products sold in British Columbia (*BC*, para. 29) (AR, Vol. I, p. 53).
- Canada represented to defendants that the tobacco strains developed and licensed by Canada for use in light and mild cigarettes were less hazardous to the health of smokers than regular cigarettes (*Knight*, para. 64) (AR, Vol. I, pp. 104-105).
- Officials at Health Canada made representations and gave advice to defendants, on which they relied, regarding the relative health risks of consuming light and mild products, including representations about the relative safety of light and mild products, the accuracy of information provided by standard measuring methods, the deliveries of tar and nicotine, and the extent of compensation by smokers of light and mild products (*Knight*, para. 9(d)) (AR, Vol. I, p. 85).
- Officials at Health Canada failed to disclose information within its knowledge, including, among other matters, the extent to which smokers may have compensated for lower delivery levels (*Knight*, para. 9(f)) (AR, Vol. I, p. 85).
- Health care costs incurred as a result of diseases caused or contributed to by smoking tobacco, for which the province of British Columbia seeks recovery from defendants, 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 (*BC*, para. 82) . (AR, Vol. I, pp. 76-77).

- The allegations against Canada go beyond its role as a regulator (*Knight*, paras. 54, 88) (AR, Vol. I, pp. 101 and 113), or may do so (*BC*, para. 89) (AR, Vol. I, p. 78).
- Other than legislation prohibiting the sale of tobacco to minors, there was no federal legislation regulating the tobacco industry in Canada until 1988 (*Knight*, para. 13) (AR, Vol. I, p. 86).

PART II: QUESTIONS IN ISSUE

14. It is submitted that, on a proper analysis, the question at issue is as follows: given that the analysis of when a public body may owe a private law duty of care involves matters of mixed fact and law, is it possible to conclude on a preliminary pleadings motion, and in the absence of evidence, that it is plain and obvious that Canada can owe no duty of care with respect to representations Canada made to defendants concerning the attributes of the tobacco strains Canada developed and licensed for use in return for royalties paid by defendants?

PART III: STATEMENT OF ARGUMENT

Introduction

15. As stated in the overview in Part I, the appeal and cross-appeal collectively raise one question: can the government of Canada, on a pleadings motion, escape liability for what it did by reason of who it is?

16. The defendants submit that Canada cannot. Canada's conduct in developing and supplying under license the very tobacco strains used by consumers distinguishes this case from one involving a governmental regulator of a consumer product in the manufacture of which Canada played no role (i.e., where Canada did not develop and earn royalties under license from the supply of the product's central ingredient).

17. More to the point, Canada cannot escape liability on a preliminary pleadings motion. The complexity of the legal arguments that Canada has had to assemble in an effort to answer all of the allegations against it illustrates that the issues are not apt for determination on a strike-out application. The rule of procedure that allows, in the absence of an evidentiary record, for the striking out of pleadings which plainly and obviously disclose no reasonable claim is not a suitable vehicle to decide the sort of difficult and far-reaching issues of mixed law and fact now before this Court: namely, the claimed constitutional immunity of Her Majesty in right of Canada, sensitive issues of statutory interpretation and, on Canada's appeal, an assessment (with no evidentiary record) of whether Canada owed a duty of care in respect of, among other matters, the tobacco varieties Canada developed and licensed to defendants.

18. Beyond adopting the submission of the other defendants, these defendants submit that the determination sought by Canada -- that Canada can owe no duty of care to defendants in the circumstances alleged in the third party notices -- ought not to be made on a preliminary pleadings motion. The response in this factum to Canada's appeal is two-fold: (1) the plea of negligent misrepresentation against the designer or developer of a constituent of a consumer product falls into an established category of liability, which streamlines the analysis supporting a duty of care; and (2) if that is not so, the framework developed by this Court for assessing whether a duty of care is owed outside of a previously-established category (the *Anns/Cooper* test, as it sometimes is referred to) involves questions of mixed law and fact that ought not to be resolved in the evidentiary vacuum of a strike-out application. On either basis, Canada's appeal should be dismissed.

19. Before developing those submissions, it will be helpful in order to gain an understanding of the appeal and cross-appeal to situate in a suitable analytical framework the issues on Canada's strike-out application.

Analytical Framework for Third Party Notice

20. The appeal comes before this Court on a motion by Canada under R. 9-5(1)(a) of the *Supreme Court Civil Rules* (formerly R. 19(24)(a) of the *Rules of Court*) to strike the third party notice as disclosing no reasonable claim. The test on an application to strike

"is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether 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 [seat]:" *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, para. 15 *per* Iacobucci J. Correctly applying jurisprudence cited in this Court's judgment in *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959, 978, Tysoe J.A. for the majority stated that the law "is well settled that such an application is to be decided on the basis of the pleadings as they exist or as they may reasonably be amended" (*Knight*, para. 6) (AR, Vol. I, p. 83).

21. The two planks to the third party notice -- (1) a claim for contribution or indemnity and (2) a direct claim for breaches of duty owed by Canada to defendants -- track the first two grounds of the procedural rule which permits the making of a third party claim. In British Columbia, that procedural rule now is R. 3-5(1) of the *Supreme Court Civil Rules* (Rule 22 of the *Rules of Court* at the time of filing the third party notice), which provides:

> (1) A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that
>
> > (a) the party is entitled to contribution or indemnity from the person in relation to any relief that is being sought against the party in the action,
> >
> > (b) the party is entitled to relief against the person and that relief relates to or is connected with the subject matter of the action.

22. Each plank of the third party notice raises a series of questions. One approach to organizing the issues which potentially arise on the appeal and cross-appeal follows:

> **(A) *Contribution or Indemnity***
>
> I. To be liable for contribution or indemnity, must Canada potentially be liable to the province under provincial health care costs recoupment legislation (i.e., the *Tobacco Damages/Costs Recovery Act* or the *Health Care Costs Recovery Act*)?
>
> II. If yes,

(a) Is Canada caught by one statute or the other as a matter of statutory interpretation?

(b) If yes, is there an immunity available to Canada by reason of either

(i) governmental immunity from statute, or

(ii) constitutional immunity?

(c) If yes, is the immunity overcome by s. 3 of the *Crown Liability and Proceedings Act,* R.S.C. 1985, c. C-50, s. 3?

(d) If yes, can a claim for contribution or indemnity under the *Negligence Act* be made in the context of an action under s. 2 of the *Tobacco Damages/Cost Recovery Act*?

III. If no, is a claim for contribution or indemnity available in any event?

(B) *Direct Claims Against Canada*

I. Does Canada owe a duty of care to defendants in negligent misrepresentation in connection with tobacco strains developed and licensed by Canada for use in lower delivery products?

II. Does Canada owe a duty of care to defendants in respect of negligence in the design of tobacco strains developed and licensed by Canada for use in lower delivery products?

III. Does Canada owe a duty of care to defendants in respect of allegations of a duty to warn?

23. On Canada's appeal, only the issue set out above as issue B.I arises: is it plain and obvious that the claim of negligent misrepresentation against Canada, as pleaded or as it may reasonably be amended, is bound to fail? The remaining issues arise on the cross-appeal of the defendants.

Not Plain and Obvious to Strike Claim on Preliminary Pleadings Motion

24. As stated, the submission made in this factum in response to Canada's appeal is two-fold: (1) the plea of negligent misrepresentation against the designer or developer of a constituent of a consumer product falls into an established category of liability, which streamlines the analysis supporting a duty of care; and (2) if that is not so, the framework developed by this Court for assessing whether a duty of care is owed involves questions

of mixed law and fact that ought not to be resolved in the evidentiary vacuum of a strike-out application. The submission will be developed by consideration of three subjects: (1) some observations on the *Anns/Cooper* test; (2) the significance of the plea of negligent misrepresentation falling into an established category of liability; and (3) why, outside of an established category, a finding of no duty under the *Anns/Cooper* framework is ill-suited to a preliminary pleadings motion.

Anns/Cooper Test

25. More than a quarter century has passed since this Court's decision in *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2. Since that time this Court has not wavered from its basic adherence to the analytical framework derived from *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) for when public bodies may owe private law duties to avoid causing damage to other persons in proximity to them.

26. Since *Nielsen*, the issue has come before this Court at least a dozen times (from *Just v. British Columbia*, [1989] 2 S.C.R. 1228 to *Reference re: Broome v. Prince Edward Island*, [2010] 1 S.C.R. 360). This Court has declined to follow the course taken in other jurisdictions which have moved away from the two-stage *Anns* inquiry: *Shire of Sutherland v. Heyman* (1985), 60 A.L.R. 1, 1-4; *Murphy v. Brentwood District Council*, [1991] 1 A.C. 398 (H.L.). Reflecting the development of the jurisprudence in such cases as *Cooper v. Hobart*, [2001] 3 S.C.R. 537, a current formulation of the two-stage test comes from *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129, at para. 20:

> The test for determining whether a person owes a duty of care involves two questions: (1) does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and (2) if so, are there any residual policy considerations which ought to negate or limit that duty of care?

27. The two-stage *Anns/Cooper* test is not without critics in this country: see for example, E.J. Weinrib, "The Disintegration of Duty," (2006), 31 Adv. Q. 212. But the test may be too entrenched now to permit a significant reappraisal. In *Cooper*, this Court stated that "*Anns* continues to provide a useful framework in which to approach the question of whether a duty of care should be imposed in a new situation" (para. 28) and

noted further that this "Court has repeatedly affirmed that approach as appropriate in the Canadian context" (para. 24). If that is so, it must also be recognized that use of the *Anns/Cooper* framework has implications.

28. One such implication is that duty rulings, based on the *Anns/Cooper* analysis, tend to be fact-intensive and case-specific. This can lead to a situation at odds with the view in some academic circles that no-duty "rulings … ought to be categorical and ought not [to] be tickets good only for a single ride:" Cardi and Green, "Duty Wars," (2008), 81 S. Cal. L. Rev. 671, 732. The frequency with which this Court has addressed the issue in recent years illustrates the potential one-off nature of a ruling under the *Anns/Cooper* analysis. The issue was before the Court at least five times between 2007 and 2010 (*Hill*; *Syl Apps Secure Treatment Centre v. B.D.,* [2007] 3 S.C.R. 83; *Holland v. Saskatchewan*, [2008] 2 S.C.R. 551; *Fullowka v. Pinkerton's of Canada,* [2010] 1 S.C.R. 132; and *Reference re: Broome*). Including *Nielsen*, *Hill* and *Fullowka*, in most cases the issue has come to this Court following trial, although *Syl Apps* and *Holland* are examples of cases in the minority where the issue came before the Court on a motion to strike.

29. This Court's emphasis on the significance of established categories of liability mitigates somewhat the potential one-off nature of *Anns/Cooper* rulings. In *Cooper*, this Court stated that "questions of liability will be determined primarily by reference to established and analogous categories of recovery" (para. 39). An established or analogous category of recovery has a two-fold significance: first, "generally, proximity is established by reference to these categories" (*Cooper*, para. 31, see also *Hill*, para. 25); and second, within a recognized category of recovery "the second stage of *Anns* will seldom arise" (*Cooper*, para.39). The latter is so because prior recognition of the duty of care provides assurance that "there are no overriding policy considerations that would negative the duty of care" (*Cooper*, para. 39).

30. For a claim falling within an established or analogous category of recovery, a ruling in favour of recognizing a duty of care can be made in streamlined fashion. But, as will be argued, outside of established categories it is submitted that the *Anns/Cooper* framework involves so many elements, factual and otherwise, that the required analysis cannot adequately be performed within the procedural confines of a motion to strike

pleadings. *Hill* itself is a prime example: at stage two, the policy stage, the Court expressly rested its analysis on the evidence in the record ("some of the evidence suggests that tort liability has no adverse effect on the capacity of police to investigate crime" (para. 57); "[t]he record provides no basis for concluding that there will be a flood of litigation against the police if a duty of care is recognized" (para. 61)).

Negligent Misstatement a Recognized Category

31. The liability at issue on the appeal is liability for negligent misstatement. That is a previously recognized category of recovery. The identity of the representor (Canada) and the representee (defendants) cannot alter the result.

32. In *Cooper*, this Court expressly identified negligent misstatement as a category in which proximity has been recognized: "Yet other categories are liability for negligent misstatement" (C*ooper*, para. 36). A recognized category of recovery such as this identifies the relationship at issue as one of sufficient proximity (*Cooper*, para. 31) and ensures that there are no overriding policy considerations that negative the duty of care (*Cooper*, para. 39).

33. Canada entered into a relationship with defendants under which Canada licensed to and in return received royalties from defendants for their use of the tobacco strains Canada developed. Canada represented to defendants that those tobacco strains it developed and licensed for use in light and mild cigarettes were less hazardous to the health of smokers than tobacco strains used in regular cigarettes (*Knight*, para. 64) (AR, Vol. I, pp. 104-105). That relationship between Canada, as designer of the product, and defendants, as user of the product, meets what Tysoe J.A. described "as a recognized category of sufficient proximity giving rise to a duty of care" (*Knight*, para. 48) (AR, Vol. I, p. 99).

34. Canada argues that the relationship alleged in this case does not fall within a recognized category by submitting that the third party notice alleges "representations by a public authority operating pursuant to a statutory scheme" (Appellant's Factum, para. 45). The first problem with Canada's argument is that, as Tysoe J.A. recognized, there was no statutory scheme prior to 1988 (*Knight*, para. 13) (AR, Vol. I, p. 86). The second

problem is that Canada's argument misunderstands what is required in order for a relationship to fall within a recognized category. Canada's argument rests on the belief that the required relationship flows not from the roles played by the relevant actors but, instead, from the identity of the occupants of those roles. In other words, Canada argues that it is not a recognized relationship because there is no prior decision addressing Canada and the defendants specifically. But that misstates the required analysis. What places this case into an established category is the relationship between the designer and the users of a product where the designer makes representations about the product to those users.

35. The designer of a product, here tobacco strains, who receives royalties from those whom the designer licenses to use the product, both expects and intends the user to rely on the designer's representations about the product's attributes. As Professor Weinrib explains, this interaction grounds the "entitlement as against the defendant specifically, to recover the economic loss flowing from the defendant's reliance-inviting conduct" (Weinrib, "The Disintegration of Duty", *supra*, p. 229).

36. This Court's acknowledgement in *Cooper* that negligent misstatement is an established category of recovery distinguishes this case from those exemplified by *Cooper* and *Hill*. Both involved new categories of liability: in *Cooper*, whether a statutory regulator owed a private law duty of care to members of the investing public for negligence in failing properly to oversee the conduct of an investment company licensed by the regulator; in *Hill*, whether the law recognizes a duty of care on an investigating police officer to a suspect in the course of investigation. By contrast, there is no novelty to the liability of a designer of a constituent of a consumer product who, as part of a commercial relationship with users of the designer's product, negligently misrepresents the product's attributes, as is alleged here. (Canada represented to defendants that "the tobacco strains developed and licensed by Canada for use in light and mild cigarettes were less hazardous to the health of smokers than regular cigarettes" (*Knight*, *para*. 64; see also para. 16, *supra*) (AR, Vol. I, pp. 87, 104-105).

37. Canada's argument, framed as it is ("representations by a public authority operating pursuant to a statutory scheme"), both fails to reflect the facts and betrays the

vulnerability of Canada's position. Canada asks to be excused for what it did by reason of who it is (a public authority), notwithstanding that nothing in *Nielsen* or cases subsequent supports a view that liability can be avoided by reason of being a public body. Rather, what prompted the Court to embark on the analysis it did in *Nielsen* was precisely that the defendant was a public authority -- that was the starting point for the analysis, not the end point. But, on Canada's argument here, it is the end point, and indeed the only point. Canada otherwise cannot answer on this appeal the allegations regarding its active development and promotion of its own tobacco strains to defendants (and consumers).

Limitations of Pleadings Motion

38. To conduct the *Anns/Cooper* analysis within the procedural confines of a motion to strike, outside of an established category, is to ask that pre-trial procedural rule to assume a burden it cannot bear.

39. Canada argues at paragraph 30 of its factum that whether a pleading demonstrates a duty of care is an issue of law. Canada makes that claim in support of a brief submission that the issue on the appeal is suitable for determination on a preliminary motion to strike.

40. But the framework which this Court has developed to decide questions of duty of care has reached a stage in its development that renders the required analysis unsuitable for a pleadings motion. Considering what this Court has said about the elements of the *Anns/Cooper* test, the analysis entailed extends beyond an abstract issue of law. In cases such as this, the assessment involves a question of mixed law and fact, as this Court described the concept in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748. The Court explained in *Southam* that "questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfied the legal test" (para. 35 *per* Iacobucci J.). Employing that conceptual framework from *Southam*, it is apparent that what this Court has said about the elements of the *Anns/Cooper* framework puts the inquiry beyond the realm of a pure question of law.

41. Canada supports its submission on the appeal by reference to three factors: foreseeability, proximity and stage two policy considerations. A consideration of each of those factors illustrates the point that adjudicative findings of fact flowing from a full evidentiary record (as was available to the Court in *Hill*, among other cases) provide a firmer and more appropriate foundation for a proper assessment.

Foreseeability

42. As a concept, foreseeability provides limited analytical bite at the duty stage.

43. First, in the abstract foreseeability presents the difficulty noted by the Australian High Court in *Modbury Triangle Shopping Centre v. Anzil,* [2000] 176 ALR 411, 436 (Aust. H.C. *per* Hayne J.):

> In almost every case in which a plaintiff suffers damage it is foreseeable that, if reasonable care is not taken, harm may follow. As Dixon C.J. said in argument in *Chapman v. Hearse*, 'I cannot understand why any event that does happen is not foreseeable by a person of sufficient imagination and intelligence.' Foresight of harm is not sufficient to show that a duty of care exists.

44. Second, as a factual inquiry foreseeability may more properly arise at the breach and proximate cause stages of a negligence analysis. That view has led courts in some American jurisdictions not to rely on foreseeability at the duty stage: *New York City Asbestos Litigation,* 840 N.E. 2d 115 (2005 CANY) (foreseeability bears on the scope of a duty, not whether a duty exists in the first place); *Gipson v. Kasey*, 150 P. 3d 228 (2007 Ariz. S.C.) (foreseeability is not a factor to be considered by courts when making determinations of duty).

> To clarify, we now expressly hold that foreseeability is not a factor to be considered by courts when making determinations of duty, and we reject any contrary suggestion in prior opinions.
>
> Whether an injury to a particular plaintiff was foreseeable by a particular defendant necessarily involves an inquiry into the specific facts of an individual case. …
>
> Foreseeability … is more properly applied to the factual determinations of breach and causation than to the legal determination of duty.
>
> *Gipson, supra,* paras. 15-17

45. The contest over foreseeability reflected in the majority and dissenting judgments in the Court of Appeal demonstrates the difficulty of assessing foreseeability in the abstract.

46. In dissent, Hall J.A. characterized direct liability for provincial health care costs as unforeseeable (*BC*, para. 38) (AR, Vol. I, p. 58). But why that should be so as a matter of fact is unclear. Hall J.A. referred to the potential liability for health care costs under subrogated claims, but he regarded subrogated claims as "different and distinct" (*BC,* para. 39) (AR, Vol. I, p. 58). From the standpoint of foreseeability, it is respectfully submitted that the distinction on which Hall J.A. relied is unconvincing. Foreseeability ought not to turn on the legal underpinning of the claim, whether subrogated or direct.

47. And there is a more fundamental problem with Hall J.A.'s reasoning. This is a claim that extends back 60 years. The foreseeability inquiry cannot be answered by picking only a single point in time along that 60 year spectrum. Even if something were unforeseeable at an early stage of that time horizon, later developments may make it foreseeable at a subsequent stage. In a case such as this, foreseeability must be assessed as a factual inquiry over the entire time period covered by the pleadings. The facts may support foreseeability, and a duty, at one point in time but not another. Evidence and a trial will be required to sort out that and its implications.

48. Hall J.A.'s purported distinction between a subrogated and a direct claim bears out the need for a factual assessment. *The Tobacco Damages/Costs Recovery Act*, brought into force in 2001, was not the first provincial statute in Canada to create direct liability for provincial health care costs. It was not even the first of its kind in British Columbia (predecessor legislation brought into force in 1998 was struck down as unconstitutional). Further, although British Columbia only brought into force in 2009 the generic *Health Care Costs Recovery Act*, equivalent legislative provisions permitting provinces direct rights of action to recover health care costs have been in effect in Alberta and Ontario for longer.

> **62**(1) If a beneficiary receives health services for personal injury suffered as a result of a wrongful act or omission of a wrongdoer,

> the Crown has the right to recover from the wrongdoer the Crown's cost of health services
>
> (a) for the health services that the beneficiary has received for those personal injuries,
>
> (b) for health services that the beneficiary will likely receive in the future for those personal injuries.
>
> *Hospitals Act,* R.S.A. 2000, c. H-12, s. 63 (first enacted as s. 80 by the *Hospitals Amendment Act*, 1994, c. 37, coming into force on August 1, 1996 with further amendments (see Statutes of Alberta 1996, 4th Sess., 23rd Leg., Table of Statutes, page 92)
>
> **36.0.1**(1) If the Plan has paid for insured services as a result of negligence or other wrongful act or omission of a person, the Plan has a right, independent of its subrogated rate under ss. 30(1) and 46(5), to recover, directly against that person, the costs for insured services that have been incurred in the past and that will probably be incurred in the future as a result of the negligence or the wrongful act or omission.
>
> *Health Insurance Act,* R.S.O. 1990, c. H-6, s. 36.0.1 (enacted by *an Act to amend certain statutes administered by the Ministry of Health and Long-Term Care in relation to supporting and managing the health care system,* S.O. 1999, c. 10, coming into force 5 January 2000 (see: O. Gazette, p. 34)

49. The Alberta provision first was enacted in 1994 (although it did not come into force in 1996). As a matter of fact, Canada must have known, and be taken to have known, of the Alberta provision prior to its enactment. How much sooner Canada knew, or should be taken to have known, will be a matter of discovery and evidence at trial. Further, co-defendants' appeal factum (RBH/PM, para. 32) refers to a longstanding federal provision allowing a direct right of recovery for certain health care costs. Although these defendants submit that Hall J.A.'s distinction between subrogated and direct is unsupportable, they should not be denied the right of inquiry which could enable them to meet Hall J.A.'s point on the facts by demonstrating that, at least by some stage along the 60 year liability spectrum in issue in this case – and well before the coming into force of the *Tobacco Damages/Costs Recovery Act* -- direct liability for health care costs was foreseeable (and indeed likely foreseen).

50. The point is, if foreseeability is to have a meaningful role in the negligence analysis, it must consist of more than an abstraction and instead must involve an inquiry into the specific facts of an individual case. A motion to strike pleadings presented in an evidentiary vacuum is ill-suited to that sort of factual inquiry. So long as foreseeability remains part of the duty inquiry under the *Anns/Cooper* framework, it is an inquiry better left to trial.

Proximity

51. A consideration of what this Court has said about the proximity analysis, against the backdrop of the *Southam* conceptual framework, shows that the analysis involved in this part of the *Anns/Cooper* test also involves more than a narrow question of law.

52. In *Hill*, McLachlin C.J. stated, at para. 24:

> Generally speaking, the proximity analysis involves examining the relationship at issue, considering factors such as expectations, representations, reliance and property or other interests involved: *Cooper* at para. 34. Different relationships raise different considerations. 'The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic': *Cooper*, para. 35. No single rule, factor or definitive list of factors can be applied in every case.

53. The case-specific examination of the relationship at issue, considering factors such as expectations, representations, reliance and property or other interests involved, is beyond the capacity of a pleadings motion in respect of which no evidence is admissible. Under the *Southam* conceptual framework, it cannot be said that the proximity analysis, as this Court described it in *Hill*, is a pure question of law. At the least, it is a matter of mixed law and fact. In the context of a claim spanning more than half a century, proximity, like foreseeability, must be assessed at discrete points along a long time horizon. The necessary factual inquiry is better left to trial and adjudicative findings of fact based on a full evidentiary record.

Stage Two Policy Considerations

54. Observing that the stage two policy considerations "are uncontrolled by the relationship between the parties," one of Canada's, and indeed the continent's, leading tort scholars questions the second stage of the *Anns/Cooper* test.

> A plaintiff can therefore be denied compensation on the basis of policy considerations that, while one-sidedly pertinent to the defendants or to persons carrying on a similar activity, have no normative bearing on the position of the plaintiff as the sufferor of an injustice.
>
> E.J. Weinrib, "The Disintegration of Duty", *supra*, p. 235

55. Canada's argument is an example of the one-sided use of policy considerations criticized by Professor Weinrib. Left out of Canada's list of policy considerations is the most significant one of all: the need to ensure that those who develop a product and receive royalties for licensing the product's use have incentive to take care in the product's design. Canada, by asking this Court to absolve it of responsibility to take care in the design of the tobacco strains it developed and licensed for use, seeks this Court's permission to externalize the cost of the risk created by Canada's lack of care. Allowing Canada to externalize the cost of its own lack of care serves to increase the overall risk to the marketplace because Canada, spared the cost of its own lack of care, would have incentive to over-supply the market with its tobacco strains. Any policy analysis that did not give weight to this consideration would be deficient. *Hill* supports such a two-sided policy analysis (para. 47).

56. Illustrating the dangers of "an uncontrolled" policy analysis, Canada draws upon the passage of Cardozo J. in *Ultramares v. Touche,* 174 NE 441, at 444 (NYCA, 1931) ("liability in an indeterminate amount for an indeterminate time to an indeterminate class") to raise the spectre of indeterminate liability. But, as Professor Weinrib points out, "the indeterminacy of losses is problematic only if liability is a response to the suffering of a loss": Weinrib, *supra*, p. 230. Canada's argument is an example of what Professor Weinrib describes as "a transformation of the role of Cardozo's famous phrase about indeterminate liability" (p. 231). That transformation stems from a misunderstanding of what Cardozo meant by the phrase, which was simply that the basis

of negligence liability must be sought elsewhere than in the foreseeable loss (Weinrib, *supra,* p. 231). Canada flips on its head Cardozo's admonition that loss alone cannot ground liability by arguing, in effect, that the magnitude of the potential loss is a reason for immunity. Were this Court ever to be persuaded to endorse such a proposition, it ought not to do so without a full appreciation of the relationship between the parties controlled by a full evidentiary record and adjudicative findings of fact flowing therefrom.

PART IV: SUBMISSIONS ON COSTS

57. There is no reason to depart from the ordinary rule that costs of this appeal, and below, should follow the event.

PART V: STATEMENT OF THE ORDER SOUGHT

58. The appeal should be dismissed with costs throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: January 10, 2011

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CRAIG P. DENNIS
MICHAEL D. SHIRREFF

Solicitors for B.A.T Industries P.L.C. and British American Tobacco (Investments) Limited

PART VI:
TABLE OF AUTHORITIES

JURISPRUDENCE

Authority	**Paragraph**
Shire of Sutherland v. Heyman (1985), 60 A.L.R. 1	26
Syl Apps Secure Treatment Centre v. B.D., [2007] 3 S.C.R. 83	28
Ultramares v. Touche, 174 NE 441, at 444 (NYCA, 1931)	56

OTHER MATERIAL

Authority	**Paragraph**
Cardi and Green, "Duty Wars", (2008), 81 S. Cal. L. Rev. 671	28
E.J. Weinrib, "The Disintegration of Duty", (2006), 31 Adv. Q 212	27, 35, 54, 56

LEGISLATION

Legislation	**Paragraph**
Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 3	22
Health Care Costs Recovery Act, S.B.C. 2008, c. 27	6, 22, 48
Health Insurance Act, R.S.O. 1990, c. H.6	48
Ministry of Health and Long-Term Care Statute Law Amendment Act, S.O. 1999, c. 10	48
Hospitals Act, R.S.A. 2000, c. H-12	48
Hospitals Amendment Act, 1994, S.A. 1994, c. 37	48
Hospitals Amendment Act, 1996, S.A. 1996, c. 24	48
Statutes of Alberta, 1996, Table of Public Statutes: *Hospitals Act*, RSA 80 cH-11	48
Negligence Act, R.S.B.C. 1996, c. 333, s. 4(2)(b)	4, 22
Supreme Court Civil Rules, R. 3-5(1), R. 9-5(1)(a) (formerly R. 19(24)(a) of the British Columbia *Rules of Court*)	20, 21
Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30	6, 9, 10, 22, 48, 49

PART VII:
STATUTORY PROVISIONS

*** REPRODUCED AT PART VII OF FACTUM ON CROSS-APPEAL ***

Tab	**Statute**
A.	*Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 3
B.	*Health Care Costs Recovery Act*, S.B.C. 2008, c. 27
C.	*Negligence Act*, R.S.B.C. 1996, c. 333, s. 4(2)(b)
D.	*Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30

FACTUM OF APPELLANT ON CROSS-APPEAL

PART I: STATEMENT OF FACTS

Overview

59. The cross-appeal raises the remaining issues set out at paragraph 22 of the factum of these defendants on the appeal, beyond issue B.I which is the subject of the appeal. For the reasons stated in the factum on appeal and following, it is submitted that no portion of the third party notice should be struck out on this preliminary pleadings motion.

Statement of Facts

Introduction

60. On the cross-appeal, these defendants appeal from the order of the Court of Appeal striking out the aspects of their third party notice other than the misrepresentation allegations addressed in Canada's appeal.

61. The underlying action was commenced by British Columbia pursuant to s. 2 of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 ("*Tobacco Damages/Costs Recovery Act"*). British Columbia claims against the defendants for the recovery of the cost of health care benefits caused or contributed to by tobacco related wrongs. The defendants assert that they have not committed any tobacco related wrongs and have not been the cause in law of the incurring of the cost of health care benefits by British Columbia.

62. In the alternative, the defendants commenced third party proceedings against Canada alleging that if there were any wrongful activities, then the responsibility must be shared as between *all* responsible parties. The defendants allege that Canada both committed the same or similar activities and actions alleged by British Columbia to have been wrongful on the part of defendants and shaped defendants' conduct throughout the material period with specific advice and directions from federal officials.

63. Despite Canada's attempt to define its broad and extensive 60 year involvement in the tobacco industry as that of a regulator alone, the third party notice demonstrates that Canada's involvement went beyond that of a regulator and encroached on commercial aspects of the industry. Canada itself developed and produced tobacco, which it required defendants to use,

and then it collected fees and royalties when this government tobacco entered the commercial stream and was sold in the form of cigarettes to consumers. If the defendants are to be held liable to British Columbia for similar actions, it should be open to them to seek contribution and indemnity from others involved, including Canada. The precise role played by Canada in respect of the various acts alleged, and the implications of that role, are matters for evidence and trial.

Pleadings: nature of the third party allegations against Canada

64. To put the detailed pleadings in the third party notice in proper context, it is useful also to review the claims advanced by British Columbia as described in the statement of claim. There is a direct relationship between the allegations levied against the defendants and the claim-over that is sought to be advanced against Canada. The defendants' claims against Canada rest on the same or similar conduct said by British Columbia to constitute tobacco related wrongs, reveal that Canada played an intimate role in the tobacco related wrongs attributed to the defendants, and span the same material period described in the statement of claim.

Defective Product

65. British Columbia alleges that the defendants breached their duty to consumers to design a reasonably safe product by failing to eliminate or reduce substances in cigarettes which caused or contributed to disease. Further, British Columbia claims that the defendants manipulated the level and bio-availability of nicotine in cigarettes and thereby *increased* the risks to consumers by designing and manufacturing "mild", "low tar" and "light" cigarettes, which allegedly were promoted in a manner which led reasonable consumers to believe the product was safer to use than it actually was (amended statement of claim, paras. 49-53) (AR, Vol. II, pp. 19-20).

66. The following pleadings from the third party notice reveal the role of Canada in these commercial aspects – research and design and the sale of tobacco products – of the industry. Federal officials in this respect were not establishing protocols in an effort to regulate the industry. Canada stepped into the tobacco arena, as a manufacturer and promoter of specific tobacco products or their main constituent.

- From 1906, federal Crown officials conducted a program of cooperation with and support for tobacco growers and cigarette manufacturers, which included: a) research

into the chemical constituents of tobacco smoke; b) control of the varieties of tobacco seed available to be used in Canada; c) a breeding and/or genetic engineering program to improve the smoking quality of tobacco varieties for use by manufacturers; and d) the manufacture of cigarettes for testing by the federal Crown to determine smoker satisfaction.

Amended 3PN, para. 11(b), (f), (g) and (n) (AR, Vol. III, pp. 156-158)

- In the 1960s officials of Agriculture Canada, and particularly those of the Delhi Research Station, undertook a comprehensive research and development program in support of the tobacco industry. The purpose of this research was, in part, to improve the quality and marketability of Canadian tobacco, having regard to the desires and preferences of consumers.

  Amended 3PN, para. 23 (AR, Vol. III, pp. 161-162)

- In about 1969, officials at Agriculture Canada embarked on a program to develop a less hazardous cigarette. This program, which continued until the late 1980s, included the development of new varieties of tobacco which yielded a lower "tar to nicotine" ratio.

  Amended 3PN, para. 24 (AR, Vol. III, p. 162)

- Between about 1979 and 1983, Agriculture Canada created varieties of tobacco which produced a lower "tar" to nicotine ratio and were therefore believed to be "safer", but which contained higher levels of nicotine than previously available varieties. Officials licensed these varieties and promoted them for use by all growers of tobacco in Canada, and for use by cigarette manufacturers in their products for sale to consumers.

  Amended 3PN, para. 26 (AR, Vol. III, pp. 162-163)

- By 1983, nearly all tobacco products consumed in British Columbia were manufactured from tobacco varieties developed by officials at Agriculture Canada. The federal Crown earned licensing fees and royalties from those varieties sold to consumers.

  Amended 3PN, paras. 19 and 20 (AR, Vol. III, pp. 160-161)

Duty to Warn

67. British Columbia also claims that, in addition to allegedly designing a negligent product, defendants committed a tobacco related wrong in failing to provide any, or any reasonable, warning to consumers about the health risks of smoking (amended statement of claim, paras. 56-57) (AR, Vol. II, pp. 20-21).

68. Again, Canada is linked directly to these allegations. Defendants allege that Canada failed to warn about the properties of the tobacco strains developed and licensed by Canada and said by Canada to be "safer" (see para. 8 above). Additionally, Canadian officials, who accepted that they owed a duty to inform consumers of the health risks of smoking, had knowledge (from their own research, but also from research shared with government by the industry) about the properties and risks of tobacco and smoking. This knowledge was derived from Canada's development and promotion of tobacco products.

69. With this knowledge, Canadian officials initially directed the defendant manufacturers not to provide warnings about the health hazards of cigarettes. Subsequently, and again acting on Canada's own knowledge, Canada directed what was to be included in the health warnings. For many years, the warnings on the products were warnings of, and expressly attributed to, Health Canada.

- Officials communicated at all material times directly with consumers to inform them of the health risks of smoking and the properties of cigarettes, with an intention to influence consumer conduct.

  Amended 3PN, para. 35 (AR, Vol. III, p. 166)

- By 1963, the Minister of Health and National Welfare accepted that the federal government had a duty to inform consumers of the risks to health connected with cigarette smoking.

  Amended 3PN, para. 36 (AR, Vol. III, p. 166)

- In 1964, Canadian cigarette manufacturers entered into a voluntary advertising code, the contents of which had been discussed with and accepted by officials of the federal Crown.

  Amended 3PN, para. 39 (AR, Vol. III, p. 167)

- Federal Crown officials made decisions about the need for, and contents of, warning labels on packages of cigarettes sold to consumers. In 1965, federal government officials advised cigarette manufacturers that warning labels were not necessary and that public awareness of the potential health risks of tobacco was ubiquitous.

  Amended 3PN, para. 42(a) (AR, Vol. III, p. 168)

- By 1972, when cigarette companies voluntarily placed warnings on cigarette packaging, the wording for the warning was dictated by federal government officials.

  Amended 3PN, para. 42(b) (AR, Vol. III, p. 168)

- Prior to 1990, federal government officials took the position that there should be no warning that cigarettes were addictive.

  Amended 3PN, para. 42(c) (AR, Vol. III, p. 168)

Misrepresentation

70. The statement of claim alleges that defendants misrepresented to consumers the risks of smoking, including addiction and disease. Further, British Columbia claims defendants made representations to consumers with respect to smoking which they knew were false, or which were made with willful blindness or recklessness as to their truth (amended statement of claim, paras. 77-79) (AR, Vol. II, pp. 26-27). The alleged particulars include representing that certain cigarettes such as “filter”, “mild”, “low tar” and “light” brands were safer than other cigarettes, and misrepresenting the actual intake of tar and nicotine associated with smoking their cigarettes.

71. Defendants allege in the third party proceedings that Canada owed a duty of care to defendants and made representations -- on the same matters for which British Columbia seeks to attach liability to defendants -- to defendants that caused or contributed to defendants’ engaging

in the conduct alleged by British Columbia to constitute tobacco related wrongs. In particular, the third party proceedings allege that Canada made representations to defendants about warning labels (both the need for and the contents of), the extent of compensation when consumers switched to lower "tar" brands, the health risks associated with the tobacco strains designed, manufactured and promoted by Canada, and the "tar" and nicotine levels in particular cigarettes as tested by Canada against government standards.

- Officials advised defendants with respect to the desirable content of nicotine in tobacco to be used in the manufacture of tobacco products.

  Amended 3PN, para. 11(k) (AR, Vol. III, p. 158)

- Canada developed tobacco varieties which produced a lower "tar" to "nicotine" ratio and therefore were believed to be "safer". Those varieties were tested by Canada in terms of their biological activity or mutagenicity levels. Once acceptable to officials, and consumers, the varieties were licensed by Canada and promoted to growers of tobacco in Canada.

  Amended 3PN, para. 26 (AR, Vol. III, pp. 162-163)

- In or about 1965, officials advised defendants that warning labels were not necessary and that the public awareness of the potential health risks of tobacco was ubiquitous.

  Amended 3PN, para. 42(a) (AR, Vol. III, p. 168)

Proceedings in the courts below

72. Canada moved under then R. 19(24)(a) of the British Columbia *Rules of Court* (now R. 9-5(1) of the *Supreme Court Civil Rules*) to strike the defendants' third party notices on the basis that they failed to disclose a reasonable cause of action.

73. The first instance judge struck the third party notices in their entirety, determining the issue on a narrow basis – holding that the liability of the federal Crown cannot unilaterally be determined by provincial legislation such as the *Tobacco Damages/Costs Recovery Act* (RJ, para. 65, AR Vol. I, p. 26). She summarized her disposition of the application as follows:

> I have concluded that the Third Party Notices must be struck on the following grounds:
>
> 1. It is plain and obvious that the allegations cannot succeed because Canada is immune to liability under the province's ***Costs Recovery Act;*** and
>
> 2. Canada's immunity precludes all proceedings against it, including third party proceedings for declaratory relief.
>
> RJ, para. 10 (AR, Vol. I, pp. 42-43)

74. The defendants appealed that decision. On 8 December 2009, the Court of Appeal allowed the appeal in part. The Court of Appeal did not uphold the striking of the defendants' negligent misrepresentation claim, which is based on the relationship between defendants and Canada and the representations Canadian federal officials made to defendants.

75. The Court of Appeal did not address the constitutional issue invoked by the first instance judge to strike the claims, holding that the issue need not be resolved given that Canada was not a "manufacturer" as defined under the terms of the *Tobacco Damages/Costs Recovery Act* (RJ, para. 33, *per* Hall J.A.) (AR, Vol. I, p. 56).

76. The Court of Appeal, writing through Tysoe J.A., held that a *prima facie* duty of care was owed by Canada to defendants with respect to the representations made by Canada in connection with the tobacco strains developed and licensed by Canada for use in light and mild cigarettes, including the accuracy of information provided by standard measuring methods, the deliveries of tar and nicotine, and the extent of compensation by smokers of those products (*Knight,* paras. 65-66) (AR, Vol. I, p. 105). Relying on well-developed legal principles, the Court of Appeal held that there is sufficient proximity in the relationship between the designer of a product and a manufacturer who uses the product in goods sold to the public (*Knight*, para. 65) (AR, Vol. I, p. 105).

77. The Court of Appeal struck the defendants' claims for contribution and indemnity under the *Negligence Act* and the *Tobacco Damages/Costs Recovery Act,* the claim that Canada owed defendants a duty of care with respect to the design of certain tobaccos, the claim that Canada breached a private law duty in failing to warn defendants, and the claim for equitable indemnity (RJ, para. 91 *per* Tysoe J.A.) (AR, Vol. I, p. 79).

PART II: QUESTIONS IN ISSUE

78. The issue on the cross-appeal is whether, on a preliminary pleadings motion and in the absence of evidence, it can be concluded that it is plain and obvious that:

(a) no claim for contribution or indemnity is available against Canada; and

(b) no direct claims, over and above the claim for negligent misrepresentation, are available against Canada.

79. The Chief Justice has stated the following constitutional question:

> Is the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30, constitutionally inapplicable to the federal Crown because the latter is constitutionally immune from liability under the *Act*?

PART III: STATEMENT OF ARGUMENT

Introduction

80. As stated, there are two main planks to the third party notices against Canada: (i) Canada is liable to the defendants for contribution or indemnity and (ii) Canada is liable directly to the defendants for the tort of negligent misrepresentation and other breaches of duties owed to the defendants. All but one element of the second plank (Canada's liability to defendants for negligent misrepresentation) is at issue in the cross-appeal.

81. These defendants adopt the submissions of their co-defendants. This factum will address how the Court of Appeal for British Columbia erred in striking out the claim against Canada under s. 4 of the *Negligence Act*, R.S.B.C. 1996, c. 333 for contribution or indemnity.

82. It is settled law in British Columbia that a claim for contribution under s. 4 of the *Negligence Act* constitutes a reasonable cause of action that survives challenge on a motion to strike a pleading as disclosing no viable claim.

> *McNaughton v. Baker* (1998), 25 B.C.L.R. (2d) 17, 27 (C.A.)

83. The third party notice alleges that Canada developed and licensed to defendants the strains of tobacco incorporated into cigarettes smoked by consumers in British Columbia for two decades. Canada's potential responsibility as the supplier of a constituent element in a consumer product is well founded in law.

> Of course, if a producer of a specific component part could be proved negligent, it would undoubtedly also be held liable to the consumer or <u>would be required to indemnify the assembler for any damages the latter had to pay as a result of the former's fault</u>. [footnote omitted] [emphasis added]
>
> Linden, *Canadian Tort Law*, 7th ed. (Butterworths, 2001), p. 573

84. Canada advanced two arguments in the Court of Appeal in an effort to overcome the result pointed to by that settled law. First, because the *Tobacco Damages/Costs Recovery Act*

creates liability to one (the province) for breaches of duties to another (consumers), Canada argued that its potential breaches of duties to consumers were irrelevant. Canada asserted that, to be liable for contribution or indemnity, Canada had to face potential liability to the province and it did not because it did not fall within the definition of "manufacturer" in the *Tobacco Damages/Costs Recovery Act*. (Notably, Canada had not argued at first instance that the right to contribution or indemnity against Canada depended on Canada's potential liability to the province; this was a new argument introduced for the first time on appeal.) Second, Canada argued that even if it were potentially caught by the definition of "manufacturer" (as the first instance judge held), then it enjoyed an immunity from the *Tobacco Damages/Costs Recovery Act* which the provincial legislature was incapable constitutionally of overcoming. The Court of Appeal accepted Canada's first argument and therefore found it unnecessary to decide the second. These defendants say that Canada's position is unsound on both counts.

85. If potential liability to the plaintiff is a pre-condition to the right to claim contribution or indemnity under the *Negligence Act*, then that pre-condition is satisfied here. Either Canada faces potential liability to the plaintiff for health care costs under the *Tobacco Damages/Costs Recovery Act* or Canada faces liability to the plaintiff for health care costs under the generic *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27. It does not matter whether Canada is a "manufacturer" under the *Tobacco Damages/Costs Recovery Act*. Further, there is no presumption in favour of Canada's immunity from provincial legislation and no constitutional impediment to valid provincial legislation binding Her Majesty in right of Canada.

Canada Liable for Contribution or Indemnity

Requirement of Liability to Plaintiff is Met

86. If the decision of this Court in *Giffels v. Eastern Construction Co.,* [1978] 2 S.C.R. 1346, 1354 means that a pre-condition to the ability to seek contribution or indemnity from Canada is that Canada potentially be liable to the plaintiff, then that pre-condition is met. In light of the coming into force of the *Health Care Costs Recovery Act*, the focus in the Court below on whether Canada meets the definition of "manufacturer" under the *Tobacco Damages/Costs Recovery Act* was misplaced. The *Tobacco Damages/Costs Recovery Act* is only one possible route by which Canada could be liable to the plaintiff. The other possible route is the generic

Health Care Costs Recovery Act. If Canada is not a "manufacturer" under the *Tobacco Damages/Costs Recovery Act*, it is a "wrongdoer" under the generic *Health Care Costs Recovery Act*. Either way, Canada potentially is liable to the plaintiff. The *Giffels* pre-condition is satisfied. The claim for contribution or indemnity against Canada should stand.

87. These defendants adopt the submission of their co-defendants that Canada is a "manufacturer" under the *Tobacco Damages/Costs Recovery Act*. Canada cannot avoid the plain meaning of the definition of "manufacturer" by arguing that the provincial legislature intended something different from what the words it chose plainly mean.

88. The foundation for a claim of contribution or indemnity under the *Negligence Act* is the allegation that the third party breached a duty owed to the very person to whom the defendant is alleged to have owed a duty: *Peter v. Anchor Transit Ltd.* (1979), 100 D.L.R. (3d) 37, 39-40 (B.C.C.A.). Under the *Tobacco Damages/Costs Recovery Act*, the relevant duty in the definition of "tobacco related wrong" is to consumers. That Canada, as the designer of a constituent element of a consumer product, can owe a duty to consumers who use the product is not in dispute: Waddams, *Products Liability*, 4th ed. (Carswell, 2002), p. 15; *Yates v. Dow Chemical Company*, 68 A.D. 2d 907, 909 (N.Y. App. Div. 1979); *Knight*, paras. 47-48. Further, if Hall J.A. intended to say otherwise at para. 98 of his reasons in *Knight*, the absence of a claim by a plaintiff against Canada is no bar to a third party claim by virtue of the express terms of R. 3-5(2) of the *Supreme Court Civil Rules*, which permits a third party claim to be pursued whether or not the third party already is a party to the action.

89. Canada cannot escape potential liability for contribution or indemnity even if it is not a "manufacturer" under the *Tobacco Damages/Costs Recovery Act*. That is because, if Canada does not face potential liability to the province for health care costs under the *Tobacco Damages/Costs Recovery Act*, it can face that liability under the generic *Health Care Costs Recovery Act.* This is because the *Health Care Costs Recovery Act*, by the terms of s. 24(3)(b), creates a right of action in favour of the province to recover health care costs caused by the fault of a wrongdoer wherever the *Tobacco Damagers/Costs Recovery Act* does not apply (subject only to other stated exceptions not relevant here).

90. Under the *Health Care Costs Recovery Act*, the province may commence a legal proceeding in its own name to recover past and future costs of health care services where, as a direct or indirect result of the negligence or wrongful act or omission of a wrongdoer, health care services have been received in respect of personal injury. The *Health Care Costs Recovery Act* provides, in s. 8:

> **8**(1) Despite section 2 [beneficiary's right to recover] and independent of its subrogated right under section 7 [government has subrogated right], if, as a direct or indirect result of the negligence or wrongful act or omission of a wrongdoer, a beneficiary suffers a personal injury for which the beneficiary receives or could reasonably be expected to receive one or more health care services, the government may recover from the wrongdoer
>
> (a) the past cost of health care services, and
>
> (b) the future cost of health care services.
>
> (2) The government may commence a legal proceeding in its own name for the recovery of the past and future costs of health care services referred to in subsection (1).

91. There is nothing in the *Health Care Costs Recovery Act's* definition of "wrongdoer" to exclude Canada from its ambit. The *Health Care Costs Recovery Act* defines "wrongdoer" as follows:

> "**wrongdoer**" means
>
> (a) a person whose negligent or wrongful act or omission causes or contributes to a beneficiary's personal injury or death, and
>
> (b) a person who is responsible at law for the acts or omissions of a person referred to in paragraph (a)
>
> but does not include the beneficiary.

92. As stated, by reason of s. 24(3)(b) of the *Health Care Costs Recovery Act*, that statute operates where the *Tobacco Damages/Costs Recovery Act* does not. Section 24(3)(b) states:

> **24**(3) This Act does not apply in relation to health care services that are provided or are to be provided to a beneficiary in relation to
>
> …

> (b) personal injury or death arising out of a tobacco related wrong as defined in the *Tobacco Damages and Health Care Costs Recovery Act* … .

93. The effect of s. 24(3)(b) of the *Health Care Costs Recovery Act* is that, if Canada is not liable to the province for health care costs under the *Tobacco Damages/Costs Recovery Act*, it may be liable to the province for health care costs under the *Health Care Costs Recovery Act*. Under the *Tobacco Damages/Costs Recovery Act*, only a "manufacturer", as defined in that statute, can commit a "tobacco related wrong". If Canada is not a "manufacturer", then by definition it cannot commit a "tobacco related wrong" as defined in the *Tobacco Damages/Costs Recovery Act*. If Canada cannot commit a "tobacco related wrong" as defined in the *Tobacco Damages/Costs Recovery Act*, then it can be subject to the *Health Care Costs Recovery Act*. The *Health Care Costs Recovery Act* captures a negligent or wrongful act or omission by Canada that causes or contributes to a beneficiary's personal injury or death.

94. Thus the only significance to whether Canada is a "manufacturer" under the *Tobacco Damages/Costs Recovery Act* is whether Canada's liability to the province for health care costs falls under the *Tobacco Damages/Costs Recovery Act* (if Canada is a "manufacturer") or under the *Health Care Costs Recovery Act* (if Canada is not). Either is sufficient for the purpose of a claim of contribution or indemnity under the *Negligence Act*; the basis of the third party's liability to the plaintiff need not be the same as the defendant's: *Anderson v. Stevens* (1981), 29 B.C.L.R. 355, 356, 361-362 (S.C.). Either under one statute or the other, Canada potentially is liable to the province for health care costs caused or contributed to by Canada's fault. If, as the Court of Appeal held, the obstacle to the claim for contribution or indemnity against Canada is that Canada must potentially be liable to the province for health care costs, that obstacle is overcome.

95. Canada's potential liability to the province for health care costs under the *Health Care Costs Recovery Act* is a complete answer to Canada's *Giffels* objection and renders irrelevant Canada's argument that it is not a "manufacturer" under the *Tobacco Damages/Costs Recovery Act*. It should be noted that, whereas the *Tobacco Damages/Costs Recovery Act* came into force in 2001, the *Health Care Costs Recovery Act* only came into force in 2009. In particular, the *Health Care Costs Recovery Act* was not in force at the time of the filing of the third party

notice. For that reason, the *Health Care Costs Recovery Act* is not pleaded in the third party notice. But, given that this matter comes before this Court as a preliminary motion to strike pleadings, that is immaterial. It is settled law on a motion to strike that the Court must take the pleading as it stands or as it may be amended: see *Knight*, para. 6 and the jurisprudence cited in *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, 978. Further, as already noted, Canada did not argue *Giffels* at first instance and itself relied on it for the first time before the Court of Appeal.

96. Either as a "manufacturer" under the *Tobacco Damages/Costs Recovery Act*, or as a "wrongdoer" under the *Health Care Costs Recovery Act*, Canada potentially is liable to the province for the very health care costs which the province seeks to recover from defendants in this action. Permitting the contribution or indemnity claim to stand fosters the purpose of the statutory right to claim contribution. As Glanville Williams stated, "… the right of contribution rests upon the notion of unjust enrichment:" *Joint Torts and Contributory Negligent* (Gaunt, reprint 1998), p. 135. It would be unjust for defendants alone to bear responsibility for the portion of the province's health care costs caused or contributed to by Canada's fault (if any there be). That was the reasoning on which the Ontario Court of Appeal allowed a third party claim to stand in *Ukrainian (Fort William) Credit Union Ltd. v. Nesbitt Burns Ltd.* (1997), 152 D.L.R. (4th) 640 (Ont.C.A.).

> Contribution (which I think is essentially what is sought in Nesbitt's third party claim), falls generally under the broad ambit of the law of restitution…
>
> Contribution, in the context of Nesbitt's [third party] claim against DICO, would remedy the unjust enrichment that would accrue if Nesbitt was required to pay all of the [plaintiff] 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.
>
> > *Ukrainian (Fort William) Credit Union Ltd. v. Nesbitt Burns Ltd.* (1997), 152 D.L.R. (4th) 640 (Ont. C.A.), paras. 21-23 *per* Osborne J.A. ([1997] S.C.C.A. No. 672).

No Immunity Available

97. Canada's answer to the foregoing seeks to combine governmental immunity from statute with interjurisdictional immunity (both explained below) to create a more potent form of immunity from valid provincial legislation for Her Majesty in right of Canada: regardless of intention, a provincial legislature is incompetent constitutionally to bind Canada to valid provincial legislation. The first instance judge accepted Canada's argument on this point, holding that Canada is immune to liability under the *Tobacco Damages/Costs Recovery Act* (R.J., para. 10) (AR, Vol. I, p. 7).

98. Canada confirmed its intention to advance the same argument in this Court by applying to state a constitutional question, which the Chief Justice framed as follows:

> Is the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30, constitutionally inapplicable to the federal Crown because the latter is constitutionally immune from liability under the *Act*?

99. Canada's argument on the constitutional question will come in response to the cross-appeal. These defendants will defer their entire response to Canada on that issue to their reply factum on the cross-appeal. But, in order to frame the issue, the remainder of this factum will address two general subjects related to Canada's immunity argument: the first is to distinguish among different types of immunity in order better to understand the form of immunity Canada asserts, and the second is to explain why, in light of legislative initiatives in British Columbia, the decisive question is whether, in 1974, the British Columbia legislature was competent to abolish for Her Majesty in right of Canada the presumption of immunity from provincial statutes.

Distinguishing Concepts

100. As a prelude to the argument Canada is expected to advance in response to the cross-appeal, it is helpful to review the different senses in which the term "immunity" may be used. The term embraces both historic common law immunities enjoyed by the Crown, as well as principles of Canadian constitutional law derived from the distribution of legislative authority in ss. 91 and 92 of the *Constitution Act, 1867*.

101. A brief introduction to three distinct concepts follows. The first two involve historic common law immunities: (1) Crown immunity from tort and (2) governmental immunity from statute. The third is a creation of domestic constitutional law: (3) interjurisdictional immunity. Whether the latter of those concepts extends to the form of immunity urged by Canada and found by the first instance judge is the subject of the constitutional question.

(1) Crown Immunity from Tort

102. At common law the Crown is immune from liability in tort.

> *Tobin v. The Queen* (1864), 16 C.B.(N.S.) 310, 143 E.R. 1148 (C.P.)
> *Feather v. The Queen* (1865), 6 B&S 257, 122 E.R. 1191 (Q.B.)

103. The doctrine of Crown immunity from tort was "a rule designed by policy-minded judges to meet what they conceived to be nineteenth century conditions:" W.I.C. Binnie, "Attitudes Toward State Liability in Tort: A Comparative Study" (1964), 22 U. Tor. Fac. L. Rev. 88, 91.

104. The Crown's immunity to claims in tort did not extend to claims for breach of contract or for restitution. Originally through the procedural device of the petition of right, the Crown was answerable to such claims.

> The Petition of Right is merely a procedural device, for after the royal consent is obtained, the Petition proceeds to trial on its merits.
>
> Binnie, *supra,* pp. 92-3

105. With the availability of the procedural device of the petition of right, tort law stood on its own as the area where the Crown was immune from liability. That remained the case until the intervention of statute. A watershed was the enactment in the United Kingdom in 1947 of the *Crown Proceedings Act*, which imposed liability in tort on the Crown. The U.K. statute became the model for legislation in Canada. Nine provinces enacted similar statutes between 1951 and 1974 (all except Quebec where the Crown already was liable in tort (delict)). At the federal level, after a series of statutes commencing in 1887 had imposed a measure of liability on the Crown, Parliament enacted a more comprehensive statute in 1951 which imposed tort liability on

the Crown. As stated by Professor Hogg, "The result is that the Crown is liable in tort in all Canadian provinces, as well as the federal jurisdiction."

> Hogg, *Constitutional Law of Canada*, 5th ed. supp. (Thomson Carswell ll. ed.), vol. 1 p. 10-13

106. The current statutory provision which speaks to the liability in tort of Her Majesty in right of Canada is s. 3 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 3 which provides:

> **3**. The Crown is liable for the damages for which, if it were a person, it would be liable
> …
> b. in any other province [except Quebec], in respect of
> (i) a tort committed by a servant of the Crown, or
> (ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

107. The *Crown Liability and Proceedings Act* addresses tort specifically because liability in tort was the exceptional case where the Crown remained immune from liability. The *Crown Liability and Proceedings Act* was necessary to reverse the common law immunity from liability in tort. It is understood to retain liability in all circumstances where the petition of right would previously have been available, such as claims in contract or for restitution.

> Hogg and Monahan, *Liability of the Crown*, 3d ed. (Carswell), pp. 244-5, fn. 4.

(2) Governmental Immunity from Statute

108. Although now the subject of legislation, the Crown historically enjoyed governmental immunity from statute at common law – the Crown was not bound by legislation except by express words or by necessary implication.

> Gibson, *Interjurisdictional Immunity in Canadian Federalism* (1969), 47 Can. Bar Rev. 40, 42

109. Governmental immunity from statute was not a constitutional principle; it was a rule of statutory construction.

> It follows that the Crown is not immune from statutes by virtue of any rule of the constitution. However, the Crown does enjoy a measure of immunity by virtue of a common law rule of statutory construction (or interpretation). The rule is that the Crown is not bound by the statute except by express words or by necessary implication. … The rule is not a power to override a statute that applies to the Crown; the rule is a rule of construction, designed to ascertain whether or not the statute does apply to the Crown.
>
> Hogg, *supra*, pp. 10-14 to 10-15

110. As a rule of statutory construction, it was subject to several exceptions, including "statutes that are beneficial to the Crown (including particular provisions that are burdensome) … [and] all statutes relevant to a civil proceeding to which the Crown is a party": Hogg, *supra*, p. 10-17.

111. Law reformers and leading scholars saw little virtue in a rule of governmental immunity from statute. Glanville Williams criticized the rule as an anachronistic inheritance of the middle ages whose survival "is due to little but the *vis inertiae*": Williams, *Crown Proceedings* (1948), p. 53. Professor Hogg also condemned governmental immunity from statute as "far broader than is needed by an executive which controls the legislative branch, and because it is not needed it conflicts with the basic constitutional assumption that the Crown should be under the law": Hogg, *supra*, p. 10-16 to 10-17. Law reform commissions registered similar concern.

> In our view the present law governing liability of the Crown, insofar as it still provides privileges and immunities not enjoyed by ordinary persons, is opposed to popular and widely-held conceptions of government. We share a deeply-held notion that the government and its officials ought to be subject to the same legal rules as private individuals and, in particular, should be accountable to injured citizens for unauthorized action.
>
> Ontario Law Reform Commission, *Report on the Liability of the Crown* (1989), pp. 2 to 3.
>
> See also: Alberta Law Reform Institute, *The Presumption of Crown Immunity*, Report No. 71, July 1994, p. 4.

112. This Court expressed its reservations in *R. v. Eldorado Nuclear* Ltd., [1983] 2 S.C.R. 551, although in that case, unlike here, an express federal statutory provision bound the Court.

> Why that presumption should be made is not clear. It seems to conflict with basic notions of equality before the law. The more active government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject. This Court is not, however, entitled to question the basic concept of Crown immunity, for Parliament has unequivocally adopted the premise that the Crown is *prima facie* immune.
>
> *R. v. Eldorado Nuclear*, p. 558, *per* Dickson J. (as he then was).

113. British Columbia intervened legislatively in 1974 to abolish the rule of governmental immunity from statute: *Interpretation Act*, R.S.B.C. 1974, c. 42. The current statutory provision in British Columbia is s. 14 of the *Interpretation Act*, R.S.B.C. 1996, c. 238. As *Eldorado Nuclear* reflects, the federal *Interpretation Act*, R.S.C. 1985, c. I-21, in s. 17, does not follow the British Columbia innovation.

114. Both of the historic Crown immunities discussed above – Crown immunity from tort and governmental immunity from statute – migrated to British North America with the rest of the public law of England. Upon Confederation in 1867, the Crown in right of Canada and in right of each province came to enjoy the same privileges and immunities as the Crown in right of the United Kingdom.

> OLRC, *Report on the Liability of the Crown*, *supra*, p. 8.

(3) Interjurisdictional Immunity

115. In *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, this Court held that interjurisdictional immunity is now a doctrine of limited application in Canadian constitutional law (para. 33) and expressly cautioned against "an intensive reliance on the doctrine" (para. 47).

116. Historically, the doctrine of interjurisdictional immunity was used to protect that which makes certain works or undertakings, things or persons (such as aboriginal lands and people) specifically of federal jurisdiction. The theory was that the exclusivity of federal power over the

subject denies power to the provincial legislature. So conceived, the doctrine protects the "core" of the federal subject from impairment by otherwise valid provincial legislation.

> In the *Canadian Western Bank* case, the Supreme Court by a majority narrowed the interjurisdictional immunity by insisting that, if a provincial law merely affects (without having an adverse effect on) the core of the federal subject, then the doctrine did not apply. In that case, the pith and substance doctrine would prevail, enabling the provincial law to apply to the core of the federal subject. Only if the provincial law would "impair" the core of the federal subject, would interjurisdictional immunity apply.
>
> Hogg, *supra*, p. 15-38.2
>
> See also: *Chatterjee v. Ontario (Attorney General)*, [2009] 1 S.C.R. 624, 629

117. The constitutional question in this case asks whether the limited doctrine of interjurisdictional immunity has a further sense, not discussed in *Canadian Western Bank* – an extended form of immunity that purports to offer Her Majesty in right of Canada a shield from provincial legislation without inquiry into whether "the provincial law would 'impair' the core of the federal subject." As framed by Professor Hogg, the question is "the extent to which the Parliament or a Legislature has the constitutional power to make laws binding upon other governments in the Canadian federation:" Hogg, *supra,* p. 10-19.

118. Although it would technically be "interjurisdictional," or "intergovernmental," the immunity that Canada asks this Court to endorse differs conceptually from how this Court described interjurisdictional immunity in *Canadian Western Bank*. The immunity sought to be invoked by Canada seeks to add a constitutional division of powers fetter on to governmental immunity from statute: the rule of construction would involve asking not only whether the enacting legislature intended the legislation to bind Her Majesty, but also whether the enacting legislature in a federal state had the capacity to do so.

Question Is Whether Province Can Abolish Federal Immunity to Provincial Statute

119. The first instance judge correctly recognized that the decisive question is whether the provincial legislature was competent in 1974 to reverse, for provincial statutes, the common law

governmental immunity from statute not only for Her Majesty in right of British Columbia but also for Her Majesty in right of Canada: "… in the present case the question is whether the province is capable of reversing the presumption in respect of the Federal Crown" (RJ, para. 37) (AR, Vol. I, pp. 15-16).

120. The Court of Appeal professed not to decide that constitutional issue. But, whether the Court of Appeal realized it or not, it did reach a conclusion on immunity that only is available if Canada enjoys the immunity from valid provincial legislation for which it contends.

121. The Court of Appeal held that Canada "continues to enjoy the common law immunity from the operation of [provincial] statutes" (*Knight*, para. 29) (AR, Vol. I, pp. 92-93). That conclusion was in error. Unless Canada is immune from valid provincial legislation (in this case the 1974 *Interpretation Act*), there has been since 1974 no presumption in British Columbia against application of valid provincial legislation to Canada.

122. The reason why the Court of Appeal was in error was two-fold: (1) in 1974, the British Columbia legislature abolished governmental immunity from provincial statute for both Her Majesty in right of British Columbia and Her Majesty in right of Canada and instead legislated that provincial statutes are presumed to apply to both levels of government unless they expressly state otherwise (*Interpretation Act*, R.S.B.C. 1974, c. 42), and (2) even if the presumption in favour of application subsequently was removed validly in respect of Her Majesty in right of Canada, that repeal of the statutory presumption in favour of application does not revive the prior common law which presumed against application. If the presumption in favour of application to Canada in 1974 was subsequently validly turned off, that did not turn back on the prior presumption against application.

123. The first point is that in 1974 the British Columbia legislature intended to reverse the common law presumption of immunity in respect of both Her Majesty in right of British Columbia and Her Majesty in right of Canada. That conclusion flows from the combined effect of s. 13 in the 1974 *Act* (now s. 14 of the current *Act*) and the definition of "Her Majesty" in the 1974 *Act*.

124. Section 13 of the 1974 *Act* stated:

> Unless an enactment otherwise specifically provides, every *Act*, and every enactment made thereunder, is binding on Her Majesty.

125. In turn, the 1974 *Act* defined "Her Majesty" as follows, so as expressly to include Her Majesty in right of Canada:

> "Her Majesty", "His Majesty", "the Queen", "the King", "the Crown" or the Sovereign" means the Sovereign of the United Kingdom, Canada, and Her other realms and territories, and Head of the Commonwealth.

126. The Courts in British Columbia have held, correctly given the statutory language chosen, that the intent of the provincial legislature in enacting the 1974 *Act* was to reverse the common law presumption of immunity from provincial statutes in respect of <u>both</u> Her Majesty in right of British Columbia and Her Majesty in right of Canada.

> I think that section must be seen as an intention by the legislature of this province to make all its statutes binding on the provincial and federal Crown in the absence of a contrary provision in a particular statute.
>
> *F.B.D.B. v. Hillcrest* (1986), 6 B.C.L.R. (2d) 223, 231 (S.C.) *per* Low J. (as he then was), aff'd (1988), 26 B.C.L.R. (2d) 379 (C.A.).

127. Subsequent to the enactment of the 1974 *Act*, there was a purported change to s. 13, now s. 14, of the *Interpretation Act*. The term "Her Majesty" was replaced by "government". By virtue of the following definition, "government" appears to have a narrower meaning than "Her Majesty" and excludes Her Majesty in right of Canada.

> "government" or "government of British Columbia" means Her Majesty in right of British Columbia;

128. The substitution of "government" for "Her Majesty" in s. 14 of the current *Interpretation Act* came about in an unusual way. Rather than an act of the legislature, the change was effected by legislative counsel pursuant to the *Statute Revision Act*, R.S.B.C. 1996, c. 440. This Court's judgment in *R. v. Popovic and Askov,* [1976] 2 S.C.R. 308, 322 may create doubt about the efficacy of a substantive change by legislative counsel and indeed founded the following comment in *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis Canada Inc., 2008), p. 658.

> In the *Popovic* case Pigeon J. suggests that the law cannot be changed unless the legislature has formed an intention to change it. On this approach, the presumption against substantive change in a statute revision is virtually irrebuttable and provisions like s. 7 of the *Revised Statutes of Canada, 1906 Act* are dead letters. Since revision commissions are never authorized to make substantive changes in the law, and since legislatures enact revisions on the understanding that no substantive changes have been made, it is hard to see how a change in a statute revision could ever meet the *Popovic* test.

129. In any event, the Court of Appeal appears to have misapprehended the position of these defendants on this issue (see *Knight*, para. 30; *B.C.*, para. 32). In this Court, as it was in the Court of Appeal, it is submitted that it does not matter whether the substitution of "government" for "Her Majesty" was effective in law. All that matters to this argument of the defendants is that the 1974 *Interpretation Act* turned off for Her Majesty in right of Canada the common law presumption of immunity. The Court of Appeal misconstrued the defendants' argument and failed to address the decisive point of the argument.

130. That decisive point leads to the second aspect of the argument set out at paragraph 64 above. Once the British Columbia legislature reversed the presumption of immunity for Canada in 1974, legislating instead a presumption in favour of application, a subsequent removal of the presumption in favour does not revive the previous presumption against application. That is so because that is what the *Interpretation Act* says in s. 35(1)(a), which provides:

> If all or part of an enactment is repealed, the repeal does not
>
> (a) revive an enactment or thing not in force or existing immediately before the time when the repeal takes effect.

131. The critical point is that if, as the defendants contend, the British Columbia legislature was competent in 1974 to turn off the presumption of immunity in favour of Canada, then since then there has been in British Columbia no presumption that Canada "continues to enjoy the common law immunity from the operation of [provincial] statutes" (*Knight*, para. 29). It does not matter that subsequently British Columbia may have turned off the 1974 presumption in favour of the application of provincial statutes to Canada. The effect of that (if effective at all) is only that now there is no presumption in favour. By reason of s. 35(1)(a) of the *Interpretation Act*, it does not revive the presumption against. It leaves the matter as an exercise of statutory interpretation, with no presumption operative either way. As previously stated, on a proper

construction of the *Tobacco Damages/Costs Recovery Act*, Canada's actions place Canada within the statute's ambit.

132. For this reason, the Court of Appeal's holding that Canada continues to enjoy the common law immunity from the operation of provincial statutes can stand only if Canada, and the first instance judge, are correct in saying that Canada enjoys a blanket immunity from the operation of valid provincial statutes. These defendants say there is no such immunity. Further submissions on this issue will follow in the reply factum.

PART IV: SUBMISSIONS ON COSTS

133. There is no reason to depart from ordinary rule that costs of the cross-appeal, and below, should follow the event.

PART V: STATEMENT OF THE ORDER SOUGHT

134. The cross-appeal should be allowed with costs throughout. The constitutional question should be answered in the negative or, alternatively, on the basis that it is not plain and obvious that the answer is "yes".

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: January 10, 2011

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CRAIG P. DENNIS
MICHAEL D. SHIRREFF

Solicitors for B.A.T Industries P.L.C. and British American Tobacco (Investments) Limited

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CONSOLIDATION

CODIFICATION

Crown Liability and Proceedings Act

Loi sur la responsabilité civile de l'État et le contentieux administratif

CHAPTER C-50

CHAPITRE C-50

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PART I

LIABILITY

LIABILITY AND CIVIL SALVAGE

PARTIE I

RESPONSABILITÉ CIVILE

RESPONSABILITÉ ET SAUVETAGES CIVILS

Liability

3. The Crown is liable for the damages for which, if it were a person, it would be liable

(*a*) in the Province of Quebec, in respect of

(i) the damage caused by the fault of a servant of the Crown, or

(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and

(*b*) in any other province, in respect of

(i) a tort committed by a servant of the Crown, or

(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

R.S., 1985, c. C-50, s. 3; 2001, c. 4, s. 36.

Responsabilité

3. En matière de responsabilité, l'État est assimilé à une personne pour :

a) dans la province de Québec :

(i) le dommage causé par la faute de ses préposés,

(ii) le dommage causé par le fait des biens qu'il a sous sa garde ou dont il est propriétaire ou par sa faute à l'un ou l'autre de ces titres;

b) dans les autres provinces :

(i) les délits civils commis par ses préposés,

(ii) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.

L.R. (1985), ch. C-50, art. 3; 2001, ch. 4, art. 36.

Motor vehicles

4. The Crown is liable for the damage sustained by anyone by reason of a motor vehicle, owned by the Crown, on a highway, for which the Crown would be liable if it were a person.

R.S., 1985, c. C-50, s. 4; 2001, c. 4, s. 37.

Véhicules automobiles

4. L'État est également assimilé à une personne pour ce qui est de sa responsabilité à l'égard du dommage que cause à autrui, sur une voie publique, un véhicule automobile lui appartenant.

L.R. (1985), ch. C-50, art. 4; 2001, ch. 4, art. 37.

Civil salvage

5. (1) Subject to subsection (2), the law relating to civil salvage, whether of life or property, applies in relation to salvage services rendered in assisting any Crown ship or aircraft, or in saving life from a Crown ship or aircraft, or in saving any cargo or apparel belonging to the Crown, in the same manner as if the ship, aircraft, cargo or apparel belonged to a private person.

Sauvetage civil

5. (1) Sous réserve du paragraphe (2), le droit régissant le sauvetage civil de personnes ou de biens s'applique aux services de sauvetage effectués pour prêter assistance à des navires ou aéronefs de l'État, ou aux personnes se trouvant à leur bord, ou pour sauver les cargaisons ou les accessoires de ces navires ou aéronefs, l'État étant assimilé à un particulier.

Claims in Federal Court

(2) All claims against the Crown under subsection (1) shall be heard and determined by a judge of the Federal Court.

R.S., 1985, c. C-50, s. 5; 2001, c. 4, s. 38, c. 26, s. 296.

Juridiction compétente

(2) Les réclamations exercées contre l'État au titre du paragraphe (1) sont présentées à un juge de la Cour fédérale pour instruction et décision.

L.R. (1985), ch. C-50, art. 5; 2001, ch. 4, art. 38, ch. 26, art. 296.

6. [Repealed, 2001, c. 6, s. 113]

6. [Abrogé, 2001, ch. 6, art. 113]

Limitation period for salvage proceedings

7. (1) Section 145 of the *Canada Shipping Act, 2001* applies in respect of salvage services rendered to Crown ships or aircraft as it applies in respect of salvage services rendered to other ships or aircraft.

Prescription en matière de sauvetage

7. (1) L'article 145 de la *Loi de 2001 sur la marine marchande du Canada* s'applique à tous les services de sauvetage, qu'ils aient été rendus aux navires ou aéronefs de l'État ou à d'autres.

HEALTH CARE COSTS RECOVERY ACT

[SBC 2008] CHAPTER 27

Assented to May 29, 2008

Contents

Definitions

1 In this Act:

"beneficiary" has the same meaning as in the *Medicare Protection Act*;

"future cost of health care services" means the present value of the estimated total cost of all health care services that are provided, or are reasonably expected to be provided, to a beneficiary as a direct or indirect result of a personal injury described in section 2 after the date of settlement or, if there is no settlement, after the first day of trial;

"health care practitioner" means any of the following:

(a) a medical practitioner;

(b) a person authorized to practise as a member of a health care profession or occupation that may be prescribed under section 25 (2) (a) *[regulations]*;

"health care services" means

(a) benefits as defined in the *Hospital Insurance Act*,

(b) benefits as defined in the *Medicare Protection Act*,

(c) payments made by the government under the *Continuing Care Act*,

(d) expenditures, made directly or through one or more agents or intermediate bodies, by the government for emergency health services provided in respect of a beneficiary under the *Emergency and Health Services Act*, and

(e) any other act or thing, including, without limitation, the provision of any health care treatment, aid, assistance or service or any drug, device or similar matter associated with personal injury,

(i) for which a payment or expenditure is or may be made, whether directly or through one or more agents or intermediaries, by the government in respect of a beneficiary, and

(ii) that is designated by regulation under section 25 (2) (b) *[regulations]*;

"health care services claim", in relation to personal injury suffered by a beneficiary, means a claim for the recovery of the past and future costs of health care services attributable to that personal injury;

"past cost of health care services" means the total cost of all health care services provided to a beneficiary as a direct or indirect result of a personal injury described in section 2, including those services provided up to and including the date of settlement or, if there is no settlement, the first day of trial;

"wrongdoer" means

(a) a person whose negligent or wrongful act or omission causes or contributes to a beneficiary's personal injury or death, and

(b) a person who is responsible at law for the acts or omissions of a person referred to in paragraph (a),

but does not include the beneficiary.

Beneficiary's right to recover

2 (1) If, as a direct or indirect result of the negligence or wrongful act or omission of a wrongdoer, a beneficiary suffers a personal injury for which the beneficiary receives or could reasonably be expected to receive one or more health care services, the beneficiary may, subject to sections 6 *[government may intervene in proceeding or assume conduct of claim]* and 20 (2) and (3) *[payments to the government]*, recover from the wrongdoer

(a) the past cost of health care services, and

(b) the future cost of health care services.

(2) Subsection (1) applies whether or not the personal injury was caused in whole or in part by the wrongdoer.

(3) For the purposes of subsection (1) but subject to section 20 (2) and (3) *[payments to the government]*, payment or expenditure by the government, whether directly or through one or more agents or intermediaries, under any of the Acts referred to in the definition of "health care services" or under any other government plan or scheme of insurance for past and future costs referred to in subsection (1) must not be construed to affect the right of the beneficiary to recover those costs in the same manner as if those costs are paid or payable by the beneficiary.

(4) The past and future costs referred to in subsection (1) may be recovered as damages, compensatory damages or otherwise.

Obligation to claim

3 (1) If, in his or her own name or as a member of a class of persons under the *Class Proceedings Act*, a beneficiary referred to in section 2 (1) *[beneficiary's right to recover]* of this Act or his or her personal or other legal representative commences a legal proceeding against a person alleged to be the wrongdoer for damages arising from or related to the beneficiary's personal injury or death, the beneficiary or his or her personal or other legal representative must include a health care services claim in that legal proceeding.

(2) Subsection (1) does not apply if the government has already done either of the following:

(a) settled the health care services claim referred to in subsection (1);

(b) commenced a legal proceeding under section 8 (2) *[government has independent right to recover]* to recover the past and future costs of health care services.

(3) If a health care services claim has not been included in a legal proceeding described in subsection (1), the court must permit amendment of the originating documents, up to 6 months after the date on which the originating documents were filed with the court, in order to provide for that inclusion.

(4) Nothing in the *Limitation Act* prevents inclusion of a health care services claim under subsection (3) if the original legal proceeding for damages under subsection (1) is brought within the time limited for doing so under that Act.

Requirement to notify government of claim

4 (1) Within 21 days after commencing a legal proceeding referred to in section 3 (1) *[obligation to claim]*, written notice of the legal proceeding must be given to the government

(a) by the beneficiary or his or her personal or other legal representative, or

(b) if the beneficiary or his or her personal or other legal representative is represented in the legal proceeding by a lawyer, by the lawyer or by the beneficiary or his or her personal or other legal representative.

(2) Notice under subsection (1) must be in the prescribed form and include a copy of the originating documents for the legal proceeding.

Final disposition of claim or legal proceeding

5 (1) A legal proceeding referred to in section 3 (1) *[obligation to claim]* must not be discontinued or dismissed by consent unless the consent of the minister is filed with the court.

(2) The court must not set aside, dismiss or strike out a health care services claim unless the court is satisfied that the government has been given a reasonable opportunity to appear and make representations.

(3) The court must not make an order finally disposing of a legal proceeding referred to in section 3 (1) *[obligation to claim]* unless the court is satisfied that the government has been given both of the following:

(a) the written notice required under section 4 *[requirement to notify government of claim]*;

(b) written notice of the application for the order of final disposition.

Government may intervene in proceeding or assume conduct of claim

6 (1) The government may, in relation to a legal proceeding referred to in section 3 (1) *[obligation to claim]*, do any of the following:

(a) intervene in the proceeding;

(b) on written notice to the beneficiary or his or her personal or other legal representative, as the case may be, assume conduct of the health care services claim portion of the proceeding.

(2) In assuming conduct under subsection (1) (b), the government may, as it sees fit, pursue, discontinue or settle all or any part of the health care services claim.

Government has subrogated right

7 (1) The government is subrogated to any right of the beneficiary referred to in section 2 *[beneficiary's right to recover]* to recover the past and future costs of health care services under that section.

(2) For the purposes of subsection (1), the government may commence legal proceedings, in its own name or in the name of the beneficiary, for recovery of those past and future costs of health care services.

(3) If a legal proceeding is commenced under section 3 (1) *[obligation to claim]* after the commencement of a legal proceeding referred to in subsection (2) of this section, the 2 legal proceedings are, unless the court orders otherwise, to be consolidated.

Government has independent right to recover

8 (1) Despite section 2 *[beneficiary's right to recover]* and independent of its subrogated right under section 7 *[government has subrogated right]*, if, as a direct or indirect result of the negligence or wrongful act or omission of a wrongdoer, a beneficiary suffers a personal injury for which the beneficiary receives or could reasonably be expected to receive one or more health care services, the government may recover from the wrongdoer

(a) the past cost of health care services, and

(b) the future cost of health care services.

(2) The government may commence a legal proceeding in its own name for the recovery of the past and future costs of health care services referred to in subsection (1).

(3) Subsection (1) applies whether or not the personal injury was caused in whole or in part by the wrongdoer.

(4) The past and future costs of health care services referred to in subsection (1) may be recovered as damages, compensatory damages or otherwise.

(5) Subject to subsection (7), the government must not commence a legal proceeding under subsection (2) after the later of the following 2 dates:

(a) the date that is 6 months after the expiration of the limitation period that applies to the beneficiary's right to commence a legal proceeding against the alleged wrongdoer for damages in respect of the personal injury referred to in section 2 *[beneficiary's right to recover]*;

(b) the earliest of the following dates:

(i) the date that is 6 months after the date on which the government first receives notice under section 4 *[requirement to notify government of claim]*;

(ii) the date that is 6 months after the date on which the minister first receives notice or information under section 10 *[information from insurer]*;

(iii) the date that is 6 months after the date on which the minister is first provided with records or information from the beneficiary or his or her personal or other legal representative under section 11 (2) *[beneficiary's duty to cooperate]*;

(iv) the date that is 6 months after the date on which the minister first receives notice under section 12 *[beneficiary's duty to give notice to minister before settlement]*;

(v) the date that is 6 months after the date on which the minister first receives notice under section 13 (1) (a) *[settlement of claims]*.

(6) The government may include in a legal proceeding commenced under this section a claim for an order establishing liability for the personal injury or death suffered by a beneficiary referred to in section 2 (1) *[beneficiary's right to recover]* and the claim may be made even after the expiration of the limitation period that applied to the beneficiary's right to commence a legal proceeding against the alleged wrongdoer, but any order granted in respect of that claim has effect only in relation to the health care services claim.

(7) Subsection (5) (b) does not apply if the limitation period referred to in subsection (5) (a) has expired before the date that subsection comes into force.

Government proceedings

9 (1) The government need not obtain the permission of the beneficiary or his or her family members or personal or other legal representative to commence a legal proceeding under section 7 (2) *[government has subrogated right]* or 8 (2) *[government has independent right to recover]*.

(2) It is not a defence to a legal proceeding commenced by the government under section 8 (2) *[government has independent right to recover]* that a claim for damages for the beneficiary's personal injury or death has been adjudicated or settled unless

(a) the claim or settlement included a health care services claim, and

(b) in the case of a settlement, the requirements of section 13 *[settlement of a health care services claim]* have been met.

(3) It is not a defence to a legal proceeding commenced in respect of a beneficiary for a claim, other than a health care services claim, for damages for the beneficiary's personal injury or death that a legal proceeding commenced by the government under section 7 (2) *[government has subrogated right]* or 8 (2) *[government has independent right to recover]* has been adjudicated or settled.

(4) Despite subsection (2), it is a defence to a legal proceeding commenced by the government under section 8 (2) *[government has independent right to recover]* that a claim for damages for the beneficiary's personal injury or death has been adjudicated or settled before the date that section 8 (2) comes into force.

Information from insurer

10 (1) This section applies to an insurer of a person if an act or omission of the insured person has or may have caused or contributed to the personal injury or death of a beneficiary.

(2) An insurer must, within 60 days after learning of the matter described in subsection (1), notify the minister of those circumstances in the prescribed form.

(3) The minister may request the insurer to provide the minister with one or more of the following:

(a) a copy of the insured person's insurance policy;

(b) if the matter was reported to the police, a copy of the police report, if any;

(c) a copy of any affidavit, pleadings or application, as they relate to legal proceedings in respect of the matter.

(4) The insurer must comply with the minister's request in the manner and before the date specified in the request.

(5) Provision of information under this section is not an admission or acknowledgement of liability in relation to the insured.

(6) Subsection (2) does not apply in respect of a matter that the insurer learns of before that subsection comes into force.

Beneficiary's duty to cooperate

11 (1) A beneficiary and his or her personal or other legal representative must cooperate fully with the minister and the government and their agents and legal counsel in the government's recovery of past and future costs of health care services under this Act in respect of that beneficiary.

(2) Without limiting subsection (1), the beneficiary or his or her personal or other legal representative must

(a) at the request of the minister and as often as the minister considers necessary, do one or more of the following:

(i) provide the minister with records or information that are in the possession or under the control of the beneficiary or the personal or other legal representative and relate to the following:

(A) the nature and extent of the beneficiary's injury;

(B) the treatment, current condition and prognosis of the injury;

(C) the rehabilitation of the beneficiary in respect of the injury;

(D) the cause, origin and circumstances of the injury;

(E) the health care services that have been received or may be required by the beneficiary in relation to the injury;

(ii) provide evidence relating directly or indirectly to the health care services claim

(A) in any form required by the minister, and

(B) in any proceeding or other forum required by the minister,

(b) at the request and expense of the minister and as often as the minister considers necessary, do one or more of the following:

(i) allow a health care practitioner selected by the minister to examine the beneficiary;

(ii) allow any evaluation required by the minister to be performed by a person selected by the minister;

(iii) obtain and provide to the minister a certificate or report, in any form required by the minister, of an attending health care practitioner as to one or more of the following as may be requested by the minister:

(A) the nature and extent of the beneficiary's injury;

(B) the treatment, current condition and prognosis of the injury;

(C) any other aspect of the beneficiary's injury or rehabilitation,

(c) provide the persons assisting the government in its efforts to recover the past and future costs of health care services

referred to in subsection (1) with any cooperation reasonably required by those persons,

(d) comply with a request under paragraph (a) or (b) in the manner and before the date specified in the request, and

(e) comply with the requirements of section 12 *[beneficiary's duty to give notice to minister before settlement]*.

Beneficiary's duty to give notice to minister before settlement

12 At least 21 days before a beneficiary referred to in section 2 *[beneficiary's right to recover]* or his or her personal or other legal representative enters into any settlement relating to the personal injury referred to in that section, the beneficiary or personal or other legal representative must give notice to the minister in the prescribed form and in accordance with the regulations, if any, under section 25 (2) (d) *[regulations]*.

Settlement of claims

13 (1) A claim against a person alleged to be the wrongdoer for damages arising from or related to a beneficiary's personal injury or death must not be settled unless

(a) the person who would be liable to make payments under the proposed settlement gives to the minister notice of the proposed terms of settlement, in the prescribed form and in accordance with the regulations, if any, under section 25 (2) (d) *[regulations]*, and

(b) the minister consents in writing to the proposed settlement.

(2) If the proposed settlement referred to in subsection (1) (a) is a settlement requiring approval of the court under the *Class Proceedings Act*, the person referred to in subsection (1) (a) must

(a) give the minister the notice under that provision, and

(b) receive the minister's written consent under subsection (1) (b)

before filing with the court any application for the approval of the court under that Act.

(3) Before consenting under subsection (1) (b), the minister may request the person referred to in subsection (1) (a) to provide the minister with any records or information that the minister considers necessary to evaluate the proposed settlement as it relates to the government's

recovery of past and future costs of health care services in respect of the beneficiary.

(4) A person receiving a request by the minister under subsection (3) must comply with that request in the manner and before the date specified in the request.

(5) If the person referred to in subsection (1) (a) does not give notice in accordance with that provision,

(a) the government has the right to recover from that person the total amount of the past and future costs of health care services relating to the beneficiary's injury,

(b) the total amount of the past and future costs of health care services referred to in paragraph (a) may be recovered as a debt due from that person to the government, and

(c) section 17 *[joint and several liability]* does not apply.

(6) The person liable to make payments required under the proposed settlement must submit to the minister, within the time period provided under subsection (7), the full amount of the settlement that is, in the proposed terms of settlement referred to in subsection (1) (a), designated as being attributable to the cost of the applicable health care services.

(7) The time period referred to in subsection (6) is the 60-day period following the date of the minister's consent under subsection (1) (b) or such longer period as may be approved by the minister on request of the person who is liable to make payments required under the settlement.

(8) Any release given in relation to a claim referred to in subsection (1) is void unless

(a) the person to whose benefit the release is given gives to the minister, in accordance with the regulations, if any, under section 25 (2) (d) *[regulations]*, written notice of the proposed terms of the release, and

(b) the minister consents in writing to the release.

(9) This section applies whether or not a legal proceeding has been commenced in relation to the health care services claim.

Orders for information and documents

14 (1) If the minister considers that a beneficiary, insurer or other person has failed to provide records or information under one or more of sections 10 to 13, the minister may apply to the Supreme Court for an order under this section.

(2) On application by the minister, the Supreme Court may, subject to any conditions that it considers appropriate, make an order compelling the beneficiary, insurer or other person to provide the required records or information if the Supreme Court is satisfied that

(a) the records or information are in the possession or under the control of the beneficiary, insurer or other person, and

(b) the records or information are relevant to the government's right of recovery.

(3) An order made under this section may include an order for the actual costs, disbursements and expenses incurred by the minister in relation to an application under this section.

Protection of information and records provided

15 (1) Provision of any information or records under sections 10 to 14 does not constitute waiver of any privilege that may exist in the information or records.

(2) Information and records referred to in subsection (1)

(a) may only be used by the minister, the government and their agents and legal counsel for purposes of the government's recovery of past and future costs of health care services under this Act, and

(b) may not be disclosed to any other person except for those purposes.

Minister's certificates

16 (1) A certificate

(a) purporting to have been issued by or on behalf of the minister for the purposes of

(i) a health care services claim, or

(ii) recovery under section 13 (5) *[settlement of claims]*, and

(b) setting out the health care services that have been received by a beneficiary or class of beneficiaries and the health care services that a beneficiary or class of beneficiaries will likely receive in the future for personal injuries suffered as a result of the negligence or wrongful act or omission of a wrongdoer,

is proof of those health care services.

(2) A certificate

(a) purporting to have been issued by or on behalf of the minister for the purposes of

(i) a health care services claim, or

(ii) recovery under section 13 (5) *[settlement of claims]*, and

(b) setting out the past cost of health care services, the future cost of health care services, or both, attributable to personal injury suffered by a beneficiary or a class of beneficiaries,

is conclusive proof of the past cost of health care services, the future cost of health care services, or both, as the case may be.

Joint and several liability

17 If it is determined in a legal proceeding referred to in section 3 (1) *[obligation to claim]*, 7 (2) *[government has subrogated right]* or 8 (2) *[government has independent right to recover]* that the personal injury of a beneficiary was caused, in whole or in part, by the negligence or wrongful act or omission of 2 or more wrongdoers, those wrongdoers are jointly and severally liable for the percentage of the past and future costs of heath care services attributable to the personal injury that is equal to the percentage of total fault for the injury that is determined by the court to be attributable to those wrongdoers.

Priority of beneficiary's payments

18 (1) Subject to subsection (2), payments to a beneficiary or family member of the beneficiary under a judgment obtained against a wrongdoer, or under a settlement to which the minister has consented under section 13, that is based on a claim respecting the personal injury or death suffered by the beneficiary have priority over payments to the government under a judgment obtained against a wrongdoer, or under a settlement to which the minister has consented under section 13, that is based on the government's right of recovery under section 7 (1) *[government has subrogated right]* or 8 (1) *[government has independent right to recover]*.

(2) Subsection (1) does not apply to a payment received by the government under a judgment obtained against, or a settlement entered into with, a wrongdoer before the beneficiary or family member has obtained a judgment against, or entered into a settlement with, the wrongdoer.

(3) When the government has received a payment under a judgment obtained against, or a settlement entered into with, a wrongdoer before the beneficiary or family member has obtained a judgment against, or entered into a settlement with, the wrongdoer, the minister may pay to the beneficiary or family member an amount that does not exceed the payment received by the government if

(a) the beneficiary or family member subsequently obtains a judgment, or enters into a settlement with, the wrongdoer, and

(b) the minister believes that the beneficiary or family member will not receive the full amount to which the beneficiary is entitled under the judgment or settlement.

Government has separate appeal right in beneficiary's proceeding

19 If judgment has been given in a legal proceeding referred to in section 3 (1) *[obligation to claim]* and the beneficiary or his or her personal or other legal representative has not appealed the decision within the appeal period set out in section 14 of the *Court of Appeal Ac*t, the government may, within 15 days after the date that appeal period expires, appeal in its own name the judgment as it relates to the health care services claim.

Payments to government

20 (1) The court must, as part of any judgment awarded in a legal proceeding referred to in section 3 (1) *[obligation to claim]*, 7 (2) *[government has subrogated right]* or 8 (2) *[government has independent right to recover]*, designate the amount of the judgment that is applicable to the health care services claim.

(2) The amount designated for the health care services claim by the court under subsection (1), or, if a different amount is designated for the health care services claim in a settlement consented to by the minister under section 13 (1) (b) *[settlement of claims]* or in settlement of a legal proceeding that may be commenced under section 8 *[government has independent right to recover]*, that different amount, is a debt due to the government by the person obliged to pay the judgment amount or the settlement amount, as the case may be.

(3) If the amount of the debt referred to in subsection (2) has been recovered by, has been paid to or is held by any other person, including, without limiting this, the beneficiary or the beneficiary's personal or other legal representative, the person

(a) holds that amount in trust for the government, and

(b) must, within 30 days after the person's receipt of that amount, submit that amount to the minister responsible for the *Financial Administration Act*.

Indemnification of beneficiary for costs and expenses

21 Subject to the regulations, if any, under section 25 (2) (h) *[regulations]*, the government must indemnify a beneficiary or his or her personal or other legal representative for the following:

(a) any costs awarded against that person in relation to a legal proceeding referred to in section 3 (1) *[obligation to claim]*, as those costs relate to the conduct of the health care services claim;

(b) expenses reasonably and necessarily incurred by that person in complying with section 11 (1) and (2) (a) *[beneficiary's duty to cooperate]*.

Service of notices to government

22 Written notice to the government under section 4 (1) *[requirement to notify government of claim]* or 5 (3) (b) *[final disposition of claim or legal proceeding]*

(a) must be served on the Attorney General at the Ministry of the Attorney General in the City of Victoria, and

(b) is sufficiently served if

(i) left there during office hours with a solicitor on the staff of the Attorney General at Victoria,

(ii) mailed by registered mail to the Deputy Attorney General at Victoria, or

(iii) if provided by any other means of service prescribed in the regulations.

Section 5 of *Offence Act* does not apply

23 Section 5 of the *Offence Act* does not apply to this Act.

Application of this Act

24 (1) Subject to this section, this Act applies in relation to any personal injury suffered by a beneficiary, whether before or after this subsection comes into force.

(2) The requirements of sections 3 *[obligation to claim]*, 4 *[requirement to notify government of claim]* and 5 *[final disposition of claim or legal proceeding]* do not apply in relation to legal proceedings commenced before this subsection comes into force.

(3) This Act does not apply in relation to health care services that are provided or are to be provided to a beneficiary in relation to

(a) personal injury or death arising out of a wrongdoer's use or operation of a motor vehicle if the wrongdoer has, when the injury is caused, coverage under the plan, as those terms are defined in the *Insurance (Vehicle) Act*,

(b) personal injury or death arising out of a tobacco related wrong as defined in the *Tobacco Damages and Health Care Costs Recovery Act*, or

(c) personal injury or death arising out of and in the course of the beneficiary's employment if compensation is paid or payable by the Workers' Compensation Board out of the accident fund continued under the *Workers Compensation Act*.

(4) In subsection (3) (c):

"compensation" includes a health care benefit provided under the *Workers Compensation Act*;

"personal injury" includes occupational disease as defined in the *Workers Compensation Act*.

Regulations

25 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

(a) prescribing health care professions and occupations for the purposes of paragraph (b) of the definition of "health care practitioner";

(b) designating an act or thing for the purposes of paragraph (e) of the definition of "health care services";

(c) prescribing forms for the purposes of this Act;

(d) prescribing the means of giving a notice to the minister under section 12 *[beneficiary's duty to give notice to minister before settlement]*, 13 (1) (a) or (8) (a) *[settlement of claims]*,

including prescribing when notices given by those means are deemed to be received;

(e) establishing the terms and conditions under which a lawyer for a beneficiary, or for his or her personal or other legal representative, may also represent the government's interests in respect of a health care services claim including the basis of any contingency fee arrangement that may be entered into in relation to such representation;

(f) exempting a person or a member of a class of persons from all or any of the provisions of this Act, and establishing terms and conditions applicable to those exemptions;

(g) exempting a legal proceeding or health care services claim or a class of legal proceedings or health care services claims from all or any of the provisions of this Act, and establishing terms and conditions applicable to those exemptions;

(h) respecting the circumstances in which, the costs or expenses for which and the extent to which, if at all, the government may provide indemnification under section 21 *[indemnification of beneficiary for costs and expenses]*;

(i) prescribing other means of service for the purposes of section 22 (b) *[service of notices to government]*, including prescribing when documents provided by those means are deemed to be received;

(j) defining any term or expression used but not defined in this Act.

Consequential Amendments

[Note: See Table of Legislative Changes for the status of sections 26 and 27.]

Section(s)	Affected Act
26-27	*Hospital Insurance Act*

Commencement

28 This Act comes into force by regulation of the Lieutenant Governor in Council.

NEGLIGENCE ACT

[RSBC 1996] CHAPTER 333

Contents

Apportionment of liability for damages

1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

(2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.

(3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

Awarding of damages

2 The awarding of damage or loss in every action to which section 1 applies is governed by the following rules:

(a) the damage or loss, if any, sustained by each person must be ascertained and expressed in dollars;

(b) the degree to which each person was at fault must be ascertained and expressed as a percentage of the total fault;

(c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss is entitled to recover from that other person the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person;

(d) as between 2 persons each of whom has sustained damage or loss and is entitled to recover a percentage of it from the other, the amounts to which they are respectively entitled must be set off one against the other, and if either person is entitled to a greater amount than the other, the person is entitled to judgment against that other for the excess.

Apportionment of liability for costs

3 (1) Unless the court otherwise directs, the liability for costs of the parties to every action is in the same proportion as their respective liability to make good the damage or loss.

(2) Section 2 applies to the awarding of costs under this section.

(3) If, as between 2 persons, one is entitled to a judgment for an excess of damage or loss and the other to a judgment for an excess of costs there is a further set off of the respective amounts and judgment must be given accordingly.

Liability and right of contribution

4 (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.

(2) Except as provided in section 5 if 2 or more persons are found at fault

(a) they are jointly and severally liable to the person suffering the damage or loss, and

(b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

Negligence of spouse in cause of action that arose before April 17, 1985

5 (1) In an action founded on fault or negligence and brought for loss or damage resulting from bodily injury to or the death of a married person, if one of the persons found to be at fault or negligent is the spouse of the married person, no damages, contribution or indemnity are recoverable

for the portion of loss or damage caused by the fault or negligence of that spouse.

(2) The portion of the loss or damage caused by the fault or negligence of the spouse referred to in subsection (1) must be determined although that spouse is not a party to the action.

(3) This section applies only if the cause of action arose before April 17, 1985.

Questions of fact

6 In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

Actions against personal representatives

7 (1) If a person dies who, because of this Act, would have been liable for damages or costs had the person continued to live, an action or third party proceedings that, because of this Act, could have been brought or maintained against the person who has died may be brought and maintained or, if pending, may be continued against the personal representative of the deceased person.

(2) The damages and costs recovered under subsection (1) are payable out of the estate of the deceased person in similar order of administration as the simple contract debts of the deceased person.

(3) If there is no personal representative of the deceased person appointed in British Columbia within 3 months after the person's death, the court, on the application of a party intending to bring or continue an action or third party proceedings under this section, and on the notice to other parties, either specially or generally by public advertisement, as the court may direct, may appoint a representative of the estate of the deceased person for all purposes of the intended or pending action or proceedings and to act as defendant in them.

(4) The action or proceedings brought or continued against the representative appointed under subsection (3) and all proceedings in them bind the estate of the deceased person in all respects as if a duly constituted personal representative of the deceased person were a party to the action.

(5) An action or third party proceeding must not be brought against a personal representative under subsection (1), or against a representative of the estate appointed under subsection (3), after the time otherwise limited for bringing the action.

Further application

8 This Act applies to all cases where damage is caused or contributed to by the act of a person even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so.

This Act is Current to December 29, 2010

TOBACCO DAMAGES AND HEALTH CARE COSTS RECOVERY ACT

[SBC 2000] CHAPTER 30

Assented to July 6, 2000

Contents

Definitions and interpretation

1 (1) In this Act:

"cost of health care benefits" means the sum of

(a) the present value of the total expenditure by the government for health care benefits provided for insured persons resulting from tobacco related disease or the risk of tobacco related disease, and

(b) the present value of the estimated total expenditure by the government for health care benefits that could reasonably be expected will be provided for those insured persons resulting

from tobacco related disease or the risk of tobacco related disease;

"disease" includes general deterioration of health;

"exposure" means any contact with, or ingestion, inhalation or assimilation of, a tobacco product, including any smoke or other by-product of the use, consumption or combustion of a tobacco product;

"health care benefits" means

(a) benefits as defined under the *Hospital Insurance Act*,

(b) benefits as defined under the *Medicare Protection Act*,

(c) payments made by the government under the *Continuing Care Act*, and

(d) other expenditures, made directly or through one or more agents or other intermediate bodies, by the government for programs, services, benefits or similar matters associated with disease;

"insured person" means

(a) a person, including a deceased person, for whom health care benefits have been provided, or

(b) a person for whom health care benefits could reasonably be expected will be provided;

"joint venture" means an association of 2 or more persons, if

(a) the relationship among the persons does not constitute a corporation, a partnership or a trust, and

(b) the persons each have an undivided interest in assets of the association;

"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;

"person" includes a trust, joint venture or trade association;

"promote" or **"promotion"** includes, for a tobacco product, the marketing, distribution or sale of the tobacco product and research with respect to the tobacco product;

"tobacco product" means tobacco and any product that includes tobacco;

"tobacco related disease" means disease caused or contributed to by exposure to a tobacco product;

"tobacco related wrong" means,

(a) a tort committed in British Columbia by a manufacturer which causes or contributes to tobacco related disease, or

(b) in an action under section 2 (1), a breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons in British Columbia who have been exposed or might become exposed to a tobacco product;

"type of tobacco product" means one or a combination of the following tobacco products:

(a) cigarettes;

(b) loose tobacco intended for incorporation into cigarettes;

(c) cigars;

(d) cigarillos;

(e) pipe tobacco;

(f) chewing tobacco;

(g) nasal snuff;

(h) oral snuff;

(i) a prescribed form of tobacco.

(2) The definition of "manufacturer" in subsection (1) does not include

(a) an individual,

(b) a person who

(i) is a manufacturer only because they are a wholesaler or retailer of tobacco products, and

(ii) is not related to

(A) a person who manufactures a tobacco product, or

(B) a person described in paragraph (a) of the definition of "manufacturer", or

(c) a person who

(i) is a manufacturer only because paragraph (b) or (c) of the definition of "manufacturer" applies to the person, and

(ii) is not related to

(A) a person who manufactures a tobacco product, or

(B) a person described in paragraphs (a) or (d) of the definition of "manufacturer".

(3) For the purposes of subsection (2), a person is related to another person if, directly or indirectly, the person is

(a) an affiliate, as defined in section 1 of the *Business Corporations Act*, of the other person, or

(b) an affiliate of the other person or an affiliate of an affiliate of the other person.

(4) For the purposes of subsection (3) (b), a person is deemed to be an affiliate of another person if the person

(a) is a corporation and the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, owns a beneficial interest in shares of the corporation

(i) carrying at least 50% of the votes for the election of directors of the corporation and the votes carried by the shares are sufficient, if exercised, to elect a director of the corporation, or

(ii) having a fair market value, including a premium for control if applicable, of at least 50% of the fair market value of all the issued and outstanding shares of the corporation, or

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

(5) For the purposes of subsection (3) (b), a person is deemed to be an affiliate of another person if the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, has any direct or indirect influence that, if exercised, would result in control in fact of that person except if the other person deals at arm's length with that person and derives influence solely as a lender.

(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.

Direct action by government

2 (1) The 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.

(2) An action under subsection (1) is brought by the government in its own right and not on the basis of a subrogated claim.

(3) In an action under subsection (1), the government may recover the cost of health care benefits whether or not there has been any recovery by other persons who have suffered damage caused or contributed to by the tobacco related wrong committed by the defendant.

(4) In an action under subsection (1), the government may recover the cost of health care benefits

(a) for particular individual insured persons, or

(b) on an aggregate basis, for a population of insured persons as a result of exposure to a type of tobacco product.

(5) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,

(a) it is not necessary

(i) to identify particular individual insured persons,

(ii) to prove the cause of tobacco related disease in any particular individual insured person, or

(iii) to prove the cost of health care benefits for any particular individual insured person,

(b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits for particular individual insured persons are not compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness,

(c) a person is not compellable to answer questions with respect to the health of, or the provision of health care benefits for, particular individual insured persons,

(d) despite paragraphs (b) and (c), on application by a defendant, the court may order discovery of a statistically meaningful sample of the documents referred to in paragraph (b) and the order must include directions concerning the nature, level of detail and type of information to be disclosed, and

(e) if an order is made under paragraph (d), the identity of particular individual insured persons must not be disclosed and all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons must be

deleted from any documents before the documents are disclosed.

Recovery of cost of health care benefits on aggregate basis

3 (1) In an action under section 2 (1) for the recovery of the cost of health care benefits on an aggregate basis, subsection (2) applies if the government proves, on a balance of probabilities, that, in respect of a type of tobacco product,

(a) the defendant breached a common law, equitable or statutory duty or obligation owed to persons in British Columbia who have been exposed or might become exposed to the type of tobacco product,

(b) exposure to the type of tobacco product can cause or contribute to disease, and

(c) during all or part of the period of the breach referred to in paragraph (a), the type of tobacco product, manufactured or promoted by the defendant, was offered for sale in British Columbia.

(2) Subject to subsections (1) and (4), the court must presume that

(a) the population of insured persons who were exposed to the type of tobacco product, manufactured or promoted by the defendant, would not have been exposed to the product but for the breach referred to in subsection (1) (a), and

(b) the exposure described in paragraph (a) caused or contributed to disease or the risk of disease in a portion of the population described in paragraph (a).

(3) If the presumptions under subsection (2) (a) and (b) apply,

(a) the court must determine on an aggregate basis the cost of health care benefits provided after the date of the breach referred to in subsection (1) (a) resulting from exposure to the type of tobacco product, and

(b) 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.

(4) The amount of a defendant's liability assessed under subsection (3) (b) may be reduced, or the proportions of liability assessed under subsection (3) (b) readjusted amongst the defendants, to the extent that a defendant proves, on a balance of probabilities, that the breach referred

to in subsection (1) (a) did not cause or contribute to the exposure referred to in subsection (2) (a) or to the disease or risk of disease referred to in subsection (2) (b).

Joint and several liability in an action under section 2 (1)

4 (1) Two or more defendants in an action under section 2 (1) are jointly and severally liable for the cost of health care benefits if

(a) those defendants jointly breached a duty or obligation described in the definition of "tobacco related wrong" in section 1 (1), and

(b) as a consequence of the breach described in paragraph (a), at least one of those defendants is held liable in the action under section 2 (1) for the cost of those health care benefits.

(2) For purposes of an action under section 2 (1), 2 or more manufacturers, whether or not they are defendants in the action, are deemed to have jointly breached a duty or obligation described in the definition of "tobacco related wrong" in section 1 (1) if

(a) one or more of those manufacturers are held to have breached the duty or obligation, and

(b) at common law, in equity or under an enactment those manufacturers would be held

(i) to have conspired or acted in concert with respect to the breach,

(ii) to have acted in a principal and agent relationship with each other with respect to the breach, or

(iii) to be jointly or vicariously liable for the breach if damages would have been awarded to a person who suffered as a consequence of the breach.

Population based evidence to establish causation and quantify damages or cost

5 Statistical information and information derived from epidemiological, sociological and other relevant studies, including information derived from sampling, is admissible as evidence for the purposes of establishing causation and quantifying damages or the cost of health care benefits respecting a tobacco related wrong in an action brought

(a) by or on behalf of a person in the person's own name or as a member of a class of persons under the *Class Proceedings Act*, or

(b) by the government under section 2 (1).

Limitation periods

6 (1) No action that is commenced within 2 years after the coming into force of this section by

(a) the government,

(b) a person, on his or her own behalf or on behalf of a class of persons, or

(c) a personal representative of a deceased person on behalf of the spouse, parent or child, as defined in the *Family Compensation Act*, of the deceased person,

for damages, or the cost of health care benefits, alleged to have been caused or contributed to by a tobacco related wrong is barred under the *Limitation Act*.

(2) Any action described in subsection (1) for damages alleged to have been caused or contributed to by a tobacco related wrong is revived if the action was dismissed before the coming into force of this section merely because it was held by a court to be barred or extinguished by the *Limitation Act*.

Liability based on risk contribution

7 (1) This section applies to an action for damages, or the cost of health care benefits, alleged to have been caused or contributed to by a tobacco related wrong other than an action for the recovery of the cost of health care benefits on an aggregate basis.

(2) If a plaintiff is unable to establish which defendant caused or contributed to the exposure described in paragraph (b) and, as a result of a breach of a common law, equitable or statutory duty or obligation,

(a) one or more defendants causes or contributes to a risk of disease by exposing persons to a type of tobacco product, and

(b) the plaintiff has been exposed to the type of tobacco product referred to in paragraph (a) and suffers disease as a result of the exposure,

the court may find each defendant that caused or contributed to the risk of disease liable for a proportion of the damages or cost of health care benefits incurred equal to the proportion of its contribution to that risk of disease.

(3) The court may consider the following in apportioning liability under subsection (2):

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

(b) the market share the defendant had in the type of tobacco product that caused or contributed to the risk of disease;

(c) the degree of toxicity of any toxic substance in the type of tobacco product manufactured or promoted by a defendant;

(d) the amount spent by a defendant on promoting the type of tobacco product that caused or contributed to the risk of disease;

(e) the degree to which a defendant collaborated or acted in concert with other manufacturers in any conduct that caused, contributed to or aggravated the risk of disease;

(f) the extent to which a defendant conducted tests and studies to determine the risk of disease resulting from exposure to the type of tobacco product;

(g) the extent to which a defendant assumed a leadership role in manufacturing the type of tobacco product;

(h) the efforts a defendant made to warn the public about the risk of disease resulting from exposure to the type of tobacco product;

(i) the extent to which a defendant continued manufacture or promotion of the type of tobacco product after it knew or ought to have known of the risk of disease resulting from exposure to the type of tobacco product;

(j) affirmative steps that a defendant took to reduce the risk of disease to the public;

(k) other considerations considered relevant by the court.

Apportionment of liability in tobacco related wrongs

8 (1) This section does not apply to a defendant in respect of whom the court has made a finding of liability under section 7.

(2) A defendant who is found liable for a tobacco related wrong may commence, against one or more of the defendants found liable for that wrong in the same action, an action or proceeding for contribution toward payment of the damages or the cost of health care benefits caused or contributed to by that wrong.

(3) Subsection (2) applies whether or not the defendant commencing an action or proceeding under that subsection has paid all or any of the damages or the cost of health care benefits caused or contributed to by the tobacco related wrong.

(4) In an action or proceeding described in subsection (2), the court may apportion liability and order contribution among each of the defendants in accordance with the considerations listed in section 7 (3) (a) to (k).

Regulations

9 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations prescribing a form of tobacco for the purposes of paragraph (i) of the definition of "type of tobacco product" in section 1 (1).

Retroactive effect

10 When brought into force under section 12, a provision of this Act has the retroactive effect necessary to give the provision full effect for all purposes including allowing an action to be brought under section 2 (1) arising from a tobacco related wrong, whenever the tobacco related wrong occurred.

Spent

11 *[Repeal. Spent. 2000-30-11.]*

Commencement

12 This Act comes into force by regulation of the Lieutenant Governor in Council.