File No. 33563

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

BETWEEN:

THE ATTORNEY GENERAL OF CANADA
Appellant / Respondent by Cross-Appeal
(Respondent)

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., B.A.T INDUSTRIES P.L.C., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, CARRERAS ROTHMANS LIMITED, PHILIP MORRIS USA INC., PHILIP MORRIS INTERNATIONAL INC., R.J. REYNOLDS TOBACCO COMPANY and R.J. REYNOLDS TOBACCO INTERNATIONAL, INC.
Respondents / Appellants by Cross-Appeal
(Appellants)

and

ATTORNEY GENERAL OF BRITISH COLUMBIA
Intervener
(Party pursuant to a notice of constitutional question)

and

ATTORNEY GENERAL OF ONTARIO and HER MAJESTY THE QUEEN IN RIGHT OF NEW BRUNSWICK
Interveners

FACTUM OF THE RESPONDENT, HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA

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

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TABLE OF CONTENTS

PART I: STATEMENT OF FACTS 1

A. *Introduction and Statement of Position* 1

B. *The Facts* 2

PART II: QUESTIONS IN ISSUE 3

PART III: ARGUMENT 4

A. *Questions of Statutory Interpretation may be Decided on a Motion to Strike* 4

B. *Section 8(2) of the Act is Exhaustive of the Defendants' Rights of Contribution* 7

C. *It is Unnecessary to Address the Other Contribution-Related Issues* 18

D. *In this Case, Canada is not Liable to B.C. Under the* Health Care Costs Recovery Act . 19

E. *The* Negligence Act *Conditions Contribution Upon Liability to the Plaintiff* 20

PART IV: SUBMISSIONS REGARDING COSTS 22

PART V: ORDER SOUGHT 22

PART I: STATEMENT OF FACTS

A. *Introduction and Statement of Position*

1. The respondents / appellants on cross-appeal (the "defendants") in these proceedings are eleven companies involved in the tobacco industry, who have delivered or intend to deliver third party notices to the Attorney General of Canada, in his capacity as representative of the federal Crown before the courts (see s. 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50).

2. The third party notices claim, among other things, that the federal Crown is liable to make "contribution and indemnity pursuant to the *Negligence Act*, R.S.B.C. 1996, c. 333" to the defendants, as a result of certain conduct in which the federal Crown is alleged to have taken part (see, for instance, para. 186 of Imperial Tobacco Canada Limited's third party notice[1]). In this court, the defendants have, without any footing in their pleadings and for the first time, broadened their "contribution claim" to include contribution "at common law" (see paras. 98-101 of the consolidated factum of Rothmans, Benson & Hedges Inc., Rothmans Inc., Philip Morris USA Inc. and Philip Morris International Inc. (collectively, "Rothmans")).

3. This factum, that of Her Majesty the Queen in Right of British Columbia ("British Columbia" or "B.C."), the plaintiff in these proceedings, is solely concerned with the defendants' contribution and indemnity claims, both those made under the *Negligence Act* and at common law. British Columbia takes no position on the defendants' other claims against Canada – *i.e.*, those for damages in tort, for equitable indemnity (a novel concept, said to be distinct from "contribution and indemnity"), and for declaratory relief.

4. The contribution and indemnity claims "disclose no reasonable claim" for purposes of Rule 19(24)(a) of the B.C. *Supreme Court Rules*, B.C. Reg. 221/90 (now Rule 9-5(1)(*a*)), because on a proper interpretation of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 (the "Act"), a defendant may only seek "contribution toward payment of [...] the cost of health care benefits" from "one or more of the defendants" found liable for the same "tobacco related wrong" (s. 8(2); emphasis added). By that provision, the Act

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[1] Appellant's Record, Volume II, p. 112. The other third party notices are for all intents and purposes the same.

comprehensively defines the rights of the defendants to contribution, and limits those rights to contribution from other defendants. Because Canada is not a defendant, it cannot be liable to the defendants for contribution, whether under the *Negligence Act* or the common law. Accordingly, the cross-appeals should be dismissed insofar as they would seek to revive the defendants' claims for contribution and indemnity from Canada.

5. British Columbia advanced this argument before the Court of Appeal for British Columbia (see para. 12 of the reasons of Hall J.A.), but the court found it unnecessary to address the point in light of its conclusion that Canada is not a "manufacturer" under the Act (see paras. 27-33). However, in this court the defendants have added a number of points to their array of arguments, and have thereby altered the priority of the issues. The "manufacturer" point was determinative in the Court of Appeal because of the court's further conclusion that a third party must be liable to B.C. under the Act in order to give rise to a claim for contribution under the *Negligence Act*, following the Court's decision in *Giffels v. Eastern Construction*, [1978] 2 S.C.R. 1346. The defendants now say that even if Canada is not liable to B.C. under the Act, it is liable to B.C. under the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27, and further, that they may seek contribution not only under the *Negligence Act*, but also at common law (relying on *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3). The addition of these arguments means that the defendants' contribution claims are not entirely resolved by the conclusion that Canada was not intended to be a "manufacturer". For this reason, British Columbia's focus in this court is on the proper interpretation and legal consequences of s. 8(2) of the Act, which B.C. will submit is a full answer to all of the defendants' claims for contribution.

6. The constitutional question stated by the Chief Justice will be addressed by the Attorney General of British Columbia, in his intervener's factum. However, it might be noted that as a result of the absence of any right of contribution from non-defendants, any liability that Canada may have to the defendants in this case does not originate in any statute of British Columbia, and must instead result from tort law or from principles of equity.

B. *The Facts*

7. The only "facts" before the Court are the defendants' allegations against Canada in the third party notices.

8. It appears from the defendants' facta that there is some issue about whether the Attorney General of Canada has fairly characterized the allegations made against him. British Columbia intends to take no part in that debate. The particulars of the defendants' allegations are of no consequence here because B.C.'s submissions are confined to matters of statutory interpretation, as to which the only relevant "facts" are so-called "legislative facts" relating to the purposes for which the Act was made, and the social and political context in which it was enacted (see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, *per* La Forest J., at para. 79). The Court can and does take notice of such facts in the course of its statutory interpretation analysis: see *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24, [2006] 1 S.C.R. 865, at para. 37 ("part of the context is 'the condition of things existent at the time of the enactment': *Grand Trunk Railway Co. of Canada v. Hepworth Silica Pressed Brick Co.* (1915), 51 S.C.R. 81, at p. 88").

PART II: QUESTIONS IN ISSUE

9. Among the issues before the Court on the cross-appeals is whether the defendants' third party notices disclose a reasonable claim for contribution and indemnity, either under the *Negligence Act* or at common law. British Columbia will advance five points in relation to that issue:

A. Questions of statutory interpretation may be decided on a motion to strike.

B. Properly interpreted, s. 8(2) of the Act is exhaustive of the defendants' rights of contribution, and leaves the defendants with no right of contribution from Canada.

C. That conclusion makes it unnecessary to address the other contribution-related issues.

D. In any event, in the circumstances of this case Canada cannot be liable to British Columbia under the *Health Care Costs Recovery Act*, due to s. 24(3)(b) of that statute.

E. Contribution from Canada is not available under the *Negligence Act* in the absence of liability on the part of Canada to the plaintiff, British Columbia.

PART III: ARGUMENT

10. These proceedings have their origin in a motion brought by the Attorney General of Canada, seeking an order that the third party notices be struck. Accordingly, the first step in the analysis is to determine the appropriate approach on a motion to strike.

A. *Questions of Statutory Interpretation may be Decided on a Motion to Strike*

11. Canada's motion was brought under Rule 19(24) of the *Supreme Court Rules*, which codifies the court's inherent jurisdiction to strike a pleading where, in the language of para. (a) of that subrule, "it discloses no reasonable claim".

12. In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, the Court confirmed the appropriateness of the "plain and obvious" test for determining whether a claim is reasonable. Wilson J. described that test in these terms, at p. 980:

> [A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

13. *Hunt* involved a tort claim for conspiracy. The claim was novel in that it sought to extend the tort of conspiracy outside its traditional home in commercial law, to the personal injury context (in particular, to a claim for exposure to asbestos), and to change the "predominant purpose" element of the tort in that context (see pp. 988-990). The Court held that whether the law should be extended in the manner sought by the plaintiff was not appropriately the subject of a Rule 19(24) motion, and that such questions should only be decided after the plaintiff had been given the benefit of a full trial on the merits.

14. The Court has since decided a significant number of cases that originated from motions to strike. In so doing, the Court has from time to time endorsed Wilson J.'s articulation of the proper approach: see, for instance, *Canadian Council of Churches v. Canada (Minister of*

Employment and Immigration), [1992] 1 S.C.R. 236, at p. 257, and *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15.

15. While the test set out in *Hunt* will generally set a high bar for the moving party, the Court's jurisprudence shows that in appropriate cases questions of law may be resolved on a motion to strike. The recent decision in *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, is illustrative in this regard.

16. At issue was whether certain social workers owed a duty of care to the family of a child who had been placed under the social workers' protection. The defendants brought a motion to strike the claim. The Court, speaking through Justice Abella, held that as a matter of law, no duty of care ought properly to be found on the facts alleged. The Court's conclusions were as follows:

> Because there is no legal duty of care owed by the treatment centre and Mr. Baptiste to R.D.'s family, there is no reasonable cause of action against them disclosed by the statement of claim. No amount of evidence would revise this legal conclusion and, as a result, a trial to determine whether the family is entitled to the damages it seeks would not be justified. [para. 65; emphasis added]

17. What *Syl Apps* teaches is that where a legal conclusion is dispositive of a claim, and where "no amount of evidence" could alter that conclusion, it is within the court's power to decide the point of law and strike the claim. Once the question of law is resolved in the defendant's favour, then in the language of *Hunt* it is "plain and obvious" that the plaintiff's claim will fail, because no showing by the plaintiff at trial could possibly lead to judgment for the plaintiff. On this scenario, the plaintiff has no chance of success, and thus "no reasonable claim" for purposes of Rule 19(24).

18. Questions of statutory interpretation are well-suited to this approach. By definition, ascertaining a statute's meaning, in light of applicable interpretive principles, is a judicial task for which resort to evidence that may be adduced on discovery or at trial will be neither necessary nor appropriate. This is not to say that there is no factual element to the interpretive analysis; "legislative facts" found in *Hansard* and the reports of law reform commissions and

legislative committees all may bear on the intention of Parliament or of a Legislature. But there is no reason why resort to those sources cannot be had on a motion to strike.

19. The Court's cases confirm that a motion to strike may provide an appropriate vehicle for resolution of interpretive questions. *Syl Apps* itself involved an extensive interpretive analysis of the *Child and Family Services Act*, R.S.O. 1990, c. C.11, with a view to determining whether that regime created the necessary proximity between the treatment centre and the family of a child in the centre's care (see paras. 42, 46, 48-49, 51, 59-61). Likewise, the decision to strike the claims in *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562, turned upon a review of the provisions of the *Law Society Act*, R.S.O. 1990, c. L.8 (see paras. 13-17). Finally in this vein, *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793, concerned a motion to strike a judicial review of a tax assessment issued by the Minister of National Revenue. The case "turn[ed] on [...] the interpretation of s. 160" of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (para. 7). *Addison & Leyen* thus was purely a case of statutory interpretation; it was not a duty of care case. The Court's interpretation of s. 160 led it to the conclusion that the application for judicial review should be struck.

20. More generally, these cases disclose that although the complexity of a claim will not militate in favour of striking it (*per Hunt*), by the same token the complexity or importance of the legal issues raised is no obstacle to striking a claim, if the claim is fully answered by a legal point on which evidence at a trial could shed no further light. The Court very recently demonstrated its preparedness to resolve on a motion to strike complex legal problems involving multiple statutory regimes when it considered the jurisdiction of the Ontario Superior Court *versus* that of the Federal Court of Canada in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, and its companion cases. The "plain and obvious" standard applied (see para. 15 of *TeleZone*). Nevertheless, in some 81 paragraphs of reasons, the Court definitively resolved the legal question of whether a superior court may hear a compensation claim arising from a decision of a federal board.

21. The application of interpretive principles to the Act is no different in substance. There can be no "reasonable cause of action" if, applying the approach used by courts every day to interpret statutes, the Act precludes the defendants' contribution claims against Canada.

22. In this case, like any other, the Court must give effect to the will of the Legislature, as reflected in the words chosen by the Legislature, placed in their full context and with attention to the Legislature's purpose. No trial is necessary to resolve the legal consequences of the Act's provisions, nor could one be helpful.

23. For these reasons, the defendants can find no shelter for their contribution claims in the "plain and obvious" standard.

B. *Section 8(2) of the Act is Exhaustive of the Defendants' Rights of Contribution*

24. The defendants say they may seek contribution from Canada under the *Negligence Act*, on the theory that (1) Canada is a "manufacturer" under the Act, and therefore, on the facts alleged, shares in the defendants' liabilities to B.C. under the Act; (2) alternatively, Canada is a "wrongdoer" liable to B.C. for tobacco related health care costs under the *Health Care Costs Recovery Act*; or (3) in the further alternative, no liability to the plaintiff (*i.e.*, B.C.) is needed in order to seek contribution under the *Negligence Act*, and that to the extent the Court's decision in *Giffels*, *supra*, says otherwise, it should be reversed. Should all three of those arguments fail, the defendants say that *Blackwater v. Plint*, *supra*, recognized the existence of a right of contribution at common law, applicable in circumstances where the *Negligence Act* does not permit contribution.

25. The Act provides a full answer to all of those arguments. The Act contains provisions that confer upon defendants a limited right of contribution. A review of those provisions, in the context of the scheme of the Act and with attention to the Legislature's purpose in making the Act, leads to the conclusion that the contribution rights conferred by the Act are exhaustive of the rights that defendants were intended to possess.

26. Section 8(2) is the decisive provision in this regard. It reads:

> 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.

The right of contribution created by this provision is limited to contribution among defendants. It gives the defendants no right to seek contribution from Canada.

27. The right of contribution created by the *Negligence Act* is much more broad. Section 4 of that statute reads:

> (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.

28. According to the defendants, the common law widens their contribution rights further, to permit a claim for contribution to be made "even where there is a statutory but more narrow contribution right" (Rothmans, para. 100).

29. The question becomes how s. 8 of the Act was intended to interact with the *Negligence Act* (and with the common law right of contribution, if indeed it exists here). There are three possibilities.

30. The first is that the Act and the *Negligence Act* were intended to overlap and to co-exist completely. On this theory, contribution could be sought under any of the Act, the *Negligence Act*, and the common law, as applicable. Imperial Tobacco Canada Limited ("Imperial") told the Court of Appeal that this was the right treatment of s. 8(2).

31. The problem is that if the defendants can seek contribution from Canada under the *Negligence Act* or at common law, there is no reason why they could not similarly invoke those legal tools as between one another. In that event, s. 8(2) of the Act becomes a dead letter. Section 8(2), like the *Negligence Act*, permits contribution, but is more narrow in two respects: it

is limited to contribution among defendants, and it is limited to contribution against another defendant found liable for the same tobacco related wrong.[2] If the *Negligence Act* or the common law can require contribution and indemnity for liability under the Act, s. 8(2) would be useless.

32. "[N]o legislative provision should be interpreted so as to render it mere surplusage": *R. v. Proulx*, [2000] 1 S.C.R. 61, at para. 28; see also *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, at paras. 45-46; and Sullivan, *Sullivan on the Construction of Statutes* (5th ed., 2008), at p. 210. This principle militates against an interpretation of s. 8(2) that would permit it to overlap with the *Negligence Act* or the common law. The Court should be very slow to find that in crafting the special substantive and procedural provisions in the Act (in this regard, see ss. 3, 4, and 5), the Legislature intended that one among them would meaninglessly echo a subset of the contribution rights that, on this view, are already provided by the *Negligence Act*.

33. The second possible interpretation of s. 8(2) is that the provision only was intended to govern claims against defendants for contribution to liability for the same wrong, and that the *Negligence Act* or the common law could apply to any other contribution claim. In the court below, this theory was advanced by Philip Morris International Inc. ("PMI"), and was Imperial's alternative argument.

34. To explore the soundness of this interpretation it is necessary to consider the nature of the two contribution regimes. Pursuant to s. 8(4), where a contribution claim is made under s. 8(2), the court may apportion liability and order contribution in accordance with the considerations listed in s. 7(3)(a) to (k), which look to matters such as the length in time of a defendant's conduct, the degree of toxicity in the defendant's product, the extent to which a defendant tested the product, whether a defendant assumed a leadership role in manufacturing the product, and whether the defendant made efforts to warn the public. A claim for contribution under the *Negligence Act*, by contrast, would not be governed by those factors specifically – instead, the court's task would simply be to allocate liability based on "fault".

[2] In the context of the government's aggregate action, a "tobacco related wrong" is 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". Thus, different breaches of duty will give rise to separate tobacco related wrongs.

35. Consideration of these provisions reveals that this second interpretive theory is as unsatisfactory as the first. If the contribution analysis under the Act is taken to be the same as the contribution analysis under the *Negligence Act* (*i.e.*, if the factors listed in s. 7(3) are treated as equivalent to "fault"), then again s. 8(2) would serve no function, and for that matter s. 8(4) would be meaningless, too. The Legislature would have achieved nothing by putting those provisions in the Act.

36. The theory falls apart entirely if, on the other hand, the two contribution analyses are different. That would mean the Legislature intended that contribution among defendants would be governed by a different regime than contribution between a defendant and a third party (like Canada) – and, still less plausibly, that contribution would be assessed differently depending on whether the defendants choose to seek indemnity for the same wrong (in which case the Act would apply), or for different wrongs (in which case the *Negligence Act* would apply), even from each other. Analytical distinctions of this kind would be arbitrary and of doubtful workability.

37. It is noteworthy that on this theory of the Act, s. 8(2) is taken to impliedly oust the *Negligence Act* to the extent that s. 8(2) applies to a given contribution claim. The ouster accepted by PMI is only partial – the *Negligence Act* still would apply to all contribution claims other than those between defendants for the same tobacco related wrong. Nevertheless PMI was prepared to accept, in the court below at least, that s. 8(2) should be understood as creating an implied exception to the *Negligence Act*. PMI's submission thus itself raises the question of whether the implied exception to the *Negligence Act* created by s. 8(2) was intended to oust the *Negligence Act* only partially, or instead to oust it entirely by exhausting the rights of contribution that defendants enjoy in the context of an aggregate action brought by the government under the Act. The latter is the third, final and best interpretation of s. 8(2).

38. This third approach has two advantages, from the standpoint of the Driedger analysis. First, it is the only approach where s. 8(2) has substantial work to do, rather than being surrounded by or subsumed in the *Negligence Act*'s contribution regime. Second, it is consistent with the scheme of the aggregate action created by the Act. Since the aggregate action is at the heart of the Act, and is the subject of many of its provisions, the interaction between s. 8(2) and

the aggregate action must be of particular importance to the analysis. The consistency of the third interpretation with the scheme of the Act requires some discussion to explain.

39. In *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, Major J. summarized the gist of the Act in these terms:

> [The Act] authorizes an action by the government of British Columbia against a manufacturer of tobacco products for the recovery of health care expenditures incurred by the government in treating individuals exposed to those products. Liability hinges on those individuals having been exposed to tobacco products because of the manufacturer's breach of a duty owed to persons in British Columbia, and on the government of British Columbia having incurred health care expenditures in treating disease in those individuals caused by such exposure. [para. 1]

40. Sections 3 and 4 of the Act contain a number of relevant features of the Act's scheme.

41. Once the government makes the showing required by s. 3(1) of the Act, the first element of which is a defendant's breach of a duty owed to persons in British Columbia who have or may be exposed to cigarettes, the defendant's liability for health care costs incurred thereafter by the government is presumed. Section 3(4) permits the defendants to reallocate liability where they succeed in showing that their breach did not cause or contribute to exposure or disease, as follows:

> 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). [emphasis added]

Section 3(4), echoing s. 8(2), limits the reallocation of liability to "defendants". This provides contextual confirmation that the group of persons against whom liability was to flow would be defendants named in the action.

42. A second important element of the Act's scheme is its mechanism for the presumptive calculation of quantum. A defendant's presumed quantum of liability is based on the

defendant's market share (s. 3(3)(b); and see Major J.'s summary of s. 3 at paras. 10-12 of *British Columbia v. Imperial Tobacco*). In other words, a defendant is not presumptively liable for all the health care costs that cigarettes are deemed to have caused; rather, its initial position involves liability only for a percentage of health care costs that is equal to its share of the cigarette market.

43. This is a highly significant facet of the scheme. In this way, the Act automatically carves up the defendants' liability into distinct silos, and immediately diminishes a defendant's need to seek contribution. In a common law tort case, two tortfeasors that both contribute to a loss will both be liable to the plaintiff for the entirety of the damage they have caused (*per* s. 4(2) of the *Negligence Act*), and if one pays more than the sum reflecting his or her percentage of "fault", he or she may seek contribution for the extent of the excess paid. By contrast, the Act pre-cuts the liability pie, and thereby defines the liability of each defendant. The Act does so with reference to a percentage – *i.e.*, market share – that the Legislature adjudged will most fairly reflect on a presumptive basis each defendant's responsibility. Contribution, it must be remembered, is "the right of a tortfeasor who pays more than its share of the plaintiff's damages to recover the excess amount paid from other tortfeasors": *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 101 (emphasis added). Under the Act, defendants will presumptively pay only (and literally) their "share". The Act thus adapts tort law concepts to the aggregate action context, and in so adapting them, makes contribution less apposite to the ultimate allocation of liability.

44. In this regard, it is noteworthy that if British Columbia fails to name a manufacturer as a defendant, then it loses its claim to the percentage of health care costs referable to that manufacturer's market share (subject to the operation of the joint liability provisions in s. 4, discussed below). While defendants may reduce or reallocate their liability by disproving causation (s. 3(4)), there is no means by which British Columbia can in s. 3 impose upon a defendant liability for a share of the market (and, in consequence, a share of health care costs) that has been left unclaimed by British Columbia.

45. Given the scheme of the Act's presumptions, it made sense for the Legislature to limit the defendants' rights of contribution to contribution for the same tobacco related wrong – in other

words, to cases where two defendants jointly commit a tobacco related wrong. We have seen that where different wrongs of other persons cause the same costs as those caused by a defendant, the defendant will presumptively be liable only for its market share. In these situations, as discussed above, the quantum measurement chosen by the Legislature makes obsolete the broad right of contribution contemplated by the *Negligence Act*. On the other hand, where two defendants jointly commit a tobacco related wrong, they will be jointly and severally liable as a result of s. 4(1) of the Act. That provision reads:

> 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.

Under this provision, two defendants may be liable for the same piece of the market share pie. When s. 4(1) applies, it will be appropriate to apportion the market share for which two defendants are made jointly liable, and s. 8 ensures that may be done. As noted earlier, s. 7(3) sets out the criteria by which that apportionment will be calculated. Putting all of this in other words, liability may be apportioned and contribution sought within a particular silo of liability, but contribution between silos is not contemplated by the Act.

46. However, there remains to explain the Legislature's choice to limit the right of contribution to contribution from defendants only. Why would the Legislature have thought that third parties who participate in the same wrong as a defendant ought not to be liable for contribution? The issue arises where a defendant and a non-defendant are jointly liable for the same wrong under s. 4(2) of the Act:

> 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.

In cases where s. 4(2) applies, British Columbia's choice of defendants will affect the ability of any one defendant to obtain contribution from their co-conspirators, principals, *etc.* A defendant may be liable based on the market share for which he is considered responsible under the Act, without any right of contribution and indemnity from another person with whom that defendant acted jointly in the eyes of the Act.

47. This can only be viewed as a practical choice on the part of the Legislature. British Columbia may, as a result of the s. 8 contribution right's focus, sue particular participants in a potentially vast conspiracy, without fearing that the litigation will be hopelessly bogged down by third party claims brought by that defendant against 5, 10, or 20 alleged co-conspirators. The Court's interpretation of the Act must be alive to the practical impossibilities that could result from the customary application of tort law principles to the peculiar challenges posed by an aggregate action against an industry as cunning and resourceful as the tobacco industry. Limiting the right of contribution to defendants was intended to simplify the action and permit this case to one day see the inside of a trial courtroom.

48. This element of the Legislature's intent is borne out by another aspect of s. 8. The Act contemplates that any proceedings seeking contribution will take place after judgment against the defendants has been obtained. Section 8(2) speaks of a "defendant who is found liable" having a right to commence an action or proceeding for contribution (emphasis added). Subsection (3) provides that the right to bring such a proceeding exists whether or not the defendant "has paid

any of the damages or the cost of health care benefits" – again suggesting that contribution proceedings would take place after the plaintiff has obtained judgment, and the defendant seeking contribution has been ordered to pay. By deferring litigation over contribution to a stage after the prosecution of the government's claim is complete, the Act prevents contribution claims from obstructing, confusing, or cluttering the aggregate action.

49. For all these reasons, the best interpretation of s. 8(2) is that it was intended to be exhaustive of the defendants' contribution rights. The scheme of the Act reveals that it is the joint liability created by s. 4(1) that provides the *raison d'être* for the contribution right in s. 8(2). Section 4(2) performs the separate function of deeming defendants to be liable for joint acts with non-parties. What s. 4(2) does not do is show that the Act contemplates *Negligence Act* contribution, as Imperial submits at para. 98 of its factum. Nothing in s. 4(2) suggests that it was intended to supplement the contribution rights expressly set out in s. 8(2).

50. This conclusion means that the Act may, if the defendants are right about the definition of "manufacturer", or about the *Health Care Costs Recovery Act*, or about *Giffels*, come into conflict with s. 4 of the *Negligence Act*. If the defendants' contribution arguments are right, then the Act would say "no" to their claims while the *Negligence Act* would say "yes".

51. The Court recently restated the principles governing conflicting enactments in *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, as follows:

> The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:
>
> > According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.
> >
> > (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350)
>
> Thus, a law which provides for the expulsion of a train passenger who fails to pay the fare is not in conflict with another law that only provides for a fine because the application of one law did not exclude the application of the other (*Toronto Railway Co. v. Paget*

> (1909), 42 S.C.R. 488). Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results. A law, for example, which allows for the extension of a time limit for filing an appeal only before it expires is in direct conflict with another law which allows for an extension to be granted after the time limit has expired (*Massicotte v. Boutin*, [1969] S.C.R. 818). [para. 47; emphasis added]

52. If the Act says "no" while the *Negligence Act* says "yes", the two enactments would be "directly contradictory", and thus in conflict.

53. In the presence of a conflict, there are further rules that determine which provision ought to prevail. The majority in *Lévis (City)*, *per* Bastarache J., recited those principles at para. 58:

> When a conflict does exist and it cannot be resolved by adopting an interpretation which would remove the inconsistency, the question that must be answered is which provision should prevail. The objective is to determine the legislature's intent. Where there is no express indication of which law should prevail, two presumptions have developed in the jurisprudence to aid in this task. These are that the more recent law prevails over the earlier law and that the special law prevails over the general (Côté, at pp. 358-62). The first presumes that the legislature was fully cognizant of the existing laws when a new law was enacted. If a new law conflicts with an existing law, it can only be presumed that the new one is to take precedence. The second presumes that the legislature intended a special law to apply over a general one since to hold otherwise would in effect render the special law obsolete. Neither presumption is, however, absolute. Both are only indices of legislative intent and may be rebutted if other considerations show a different legislative intent (Côté, at pp. 358-59).

54. In this case, it is unnecessary to resort to the two presumptions discussed by Bastarache J. This issue arises in the context of a claim under the Act. The Legislature must have intended that the rules in the Act would apply in the event of a conflict with external statutes.

55. In any event, the presumptions outlined in *Lévis (City)* favour the application of the Act. It is both the more recent and the more specific law. The Act thus impliedly repealed s. 4 of the *Negligence Act* in part (or created an implied exception to that provision), so as to prevent its

application to an aggregate action brought by the government under the Act. (See Sullivan, *supra*, at pp. 346-350.)

56. Finally, if there is a common law contribution right that exists in the absence of the *Negligence Act*, it is necessarily displaced by statutory provisions that are intended to be comprehensive of the defendants' contribution rights: see *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, at para. 126, *per* the Chief Justice, and *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 97, *per* L'Heureux-Dube J.). Section 8(2) and its companion provisions of the Act therefore preclude the assertion of contribution rights at common law.

57. Against all this, the defendants' main contention is that they have a "legal right to seek contribution and indemnity", and that "parties cannot be deprived of legal rights without explicit statutory language to that effect", citing *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60 (see paras. 100-101 of Imperial's factum).

58. The defendants are complaining here about the loss of a chicken for which there was no egg. If the Act comprehensively articulates the defendants' rights of contribution, then from the moment the defendants became liable under the Act (*i.e.*, January 24, 2001), their rights of contribution were limited to those conferred by the Act. The right to seek contribution under the *Negligence Act* was not taken away because, so far as the defendants' liability under the Act is concerned, it never existed. This is in stark contrast to the situation before the Court in *Crystalline*, in which the issue was whether the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, ought to be interpreted so as to destroy a landlord's pre-existing right to sue a tenant who assigns a lease to an insolvent person.

59. In the Court of Appeal, PMI made the further point that to conclude s. 8(2) is comprehensive of the defendants' contribution rights would be to send tort law back to the 18th century, when contribution between tortfeasors was barred. The flaw in this argument is evident from the earlier discussion of the Act's scheme: PMI underestimates the degree to which the Act modernized and restructured tort law principles. The liability scheme set up by the Act (principally in s. 3) created for the aforementioned reasons a sensible basis to restructure in parallel the defendants' rights of contribution. What PMI perceives to be an unfair revival of tort

law from the 1700s is in fact a rational and fair feature of the aggregate action crafted by the Legislature.

60. Moreover, any unfairness that arises from denying the defendants the ability to seek contribution from non-defendants is mitigated by two factors.

61. First, s. 8(2) relates only to the defendants' right to seek contribution; it does not prevent independent claims based on other forms of liability to the defendants. The claims against Canada in tort and for equitable indemnity are convenient examples in this regard.

62. The second mitigating factor is the manner in which British Columbia has pursued its claim. As the Statement of Claim makes plain,[3] British Columbia has endeavoured to name Canadian tobacco manufacturers who have amongst them an overwhelming share of the B.C. market for cigarettes, and has named along with them other companies within each of the Canadian manufacturers' corporate groups, who are alleged to have actively participated in the wrongful conduct described in the Statement of Claim. In *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, JTI-Macdonald Corp., Rothmans, and Imperial "admitted that they produce almost all of the cigarettes sold in Canada" (para. 17); all three are named as defendants in these proceedings. British Columbia has not singled out particular manufacturers, nor would it have been in British Columbia's interest to do so.

63. There is, in short, no right of contribution other than that set up by s. 8(2). The contribution claims should therefore be struck.

C. *It is Unnecessary to Address the Other Contribution-Related Issues*

64. The foregoing conclusion means that the Court will not reach a laundry list of other legal questions arising from the defendants' contribution claims. Among those questions are these:

(1) whether Canada is a "manufacturer" under the Act;

(2) whether Canada is a "wrongdoer" under the *Health Care Costs Recovery Act*; and

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[3] A.R., Vol. II, p. 6 *et seq.*

(3) whether contribution under the *Negligence Act* is available absent liability on the part of the third party to the plaintiff (*i.e.*, the question of whether *Giffels* is distinguishable or wrongly decided).

65. Nevertheless, the following paragraphs will briefly address the defendants' arguments that absent liability as a "manufacturer", the federal Crown is liable to B.C. under the *Health Care Costs Recovery Act*, and their further argument that the Court should revise its treatment of the *Negligence Act* by distinguishing or reversing *Giffels*.

D. *In this Case, Canada is not Liable to B.C. Under the* Health Care Costs Recovery Act

66. The defendants argue that if Canada is not liable as a "manufacturer" under the Act, it nevertheless may be liable as a "wrongdoer" under the *Health Care Costs Recovery Act*.

67. Section 24(3)(b) of the latter statute reads:

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

68. The defendants note this provision in their facta (Rothmans, para. 74; B.A.T Industries P.L.C. and British American Tobacco (Investments) Limited, para. 92), but seem not to appreciate its significance.

69. Section 24(3)(b) declines to create any cause of action against a wrongdoer for health care costs "arising out of a tobacco related wrong". Where health care services are provided as a result of such wrongs, the *Health Care Costs Recovery Act* "does not apply".

70. All of the health care costs that are the subject of this litigation arose from tobacco related wrongs. Any right of contribution possessed by the defendants must necessarily be in respect of the plaintiff's losses – *i.e.*, it is a right of contribution to the defendants' liability for health care costs resulting from the tobacco related wrongs upon which B.C.'s claim is based. Since the *Health Care Costs Recovery Act* does not apply to any of the health care services that gave rise

to those costs, it cannot impose upon the federal Crown any liability to British Columbia in the circumstances of this case.

E. *The* Negligence Act *Conditions Contribution Upon Liability to the Plaintiff*

71. Rothmans advance the further argument that liability to B.C. is unnecessary for Canada to be liable to the defendants for contribution. They say it is only necessary to show that "fault" in the sense of "blameworthiness" on the part of the federal Crown caused or contributed to British Columbia's loss (see para. 83 of Rothmans' factum).

72. The Court's decision in *Giffels* stands at odds with this submission. That case considered the Ontario version of the same provision of the *Negligence Act* (see p. 1353). Laskin C.J. said this, on behalf of a unanimous Court:

> I am of the view that it is a precondition of the right to resort to contribution that there be liability to the plaintiff. I am unable to appreciate how a claim for contribution can be made under s. 2(1) by one person against another in respect of loss resulting to a third person unless each of the former two came under a liability to the third person to answer for his loss. [p. 1354; emphasis added]

Laskin C.J. went on to distinguish the case before him, in which the third party was never liable to the plaintiff (due to the terms of a contract between those parties), from one in which the third party was liable to the plaintiff (at which time a right of contribution from the third party would arise), but later became not liable because of "some independent transaction or settlement made after an actionable breach of contract or duty" (p. 1355).

73. Contrary to Rothmans' argument (at para. 96), this case is not "within the scenario that Laskin C.J. distinguished". The very premise of the defendants' argument at this point is that Canada was never liable to British Columbia under either the Act or the *Health Care Costs Recovery Act*. As a result, if, as Laskin C.J. held, "it is a precondition of the right to resort to contribution that there be liability to the plaintiff", the fact that Canada never shared the defendants' liability to British Columbia under either statute means that contribution from Canada under the *Negligence Act* is not available to the defendants, as both Hall and Tysoe JJ.A. correctly concluded (paras. 33, 66).

74. Rothmans' fallback position, at para. 97 of their factum, is that *Giffels* should be reversed. Importantly, the "fault" upon which Rothmans rely is their allegation that Canada breached duties owed not to British Columbia, but to B.C. consumers (see para. 86 of their factum). To prevail, Rothmans must convince the Court that the *Negligence Act* is intended to create a right of contribution where a third party (such as Canada) breaches a duty owed to a fourth party (such as a consumer), and that breach causes or contributes to the plaintiff's loss.

75. Laskin C.J.'s interpretation, on the other hand, requires that the third party's "fault" be in relation to the same person (the plaintiff) as the defendant's fault, such that there is liability to the plaintiff on the part of the third party. This approach is perfectly consistent with the language and scheme of s. 4 of the *Negligence Act*.

76. Section 4 begins by referring to "damage or loss", in relation to which both joint and several liability "to the person suffering the damage or loss", and a corresponding right of contribution are created by subsection (2). In the context of this litigation, the only "damage or loss" alleged is the money spent by British Columbia on health care for tobacco related disease, and accordingly "the person" to whom liability is contemplated can only be British Columbia. It is that liability – the liability to British Columbia – that is then the basis for the allocation of fault under subsection (1), and the corresponding right of contribution based on one's degree of fault under subsection (2). Nothing in the section indicates that it creates a right of contribution for liability arising from one person's "damage or loss" (*i.e.*, that of British Columbia), because of "fault" in relation to a completely different group of persons (*i.e.*, consumers).

77. Rothmans' interpretation of the *Negligence Act* is also profoundly unfair. At bottom, the defendants are saying that the *Negligence Act* obliges Canada to pay for liabilities that it does not share. To that end, Rothmans seeks the distortion of the *Negligence Act*, and the reversal of a considered opinion of Laskin C.J. along the way, all in order to contrive some basis on which Canada must relieve the tobacco industry of its liability for health care costs. The Court should see their argument for what it is, and reject it.

PART IV: SUBMISSIONS REGARDING COSTS

78. British Columbia does not seek costs in this court and asks that costs not be ordered against it.

PART V: ORDER SOUGHT

79. The cross-appeals should be dismissed with respect to the defendants' claims for contribution and indemnity from the federal Crown.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 31st day of January, 2011.

Daniel A. Webster, Q.C.

Ryan D.W. Dalziel

PART VI: TABLE OF AUTHORITIES

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2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool), [1996] 3 S.C.R. 919	56
A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30, [2009] 2 S.C.R. 181	56
Blackwater v. Plint, 2005 SCC 58, [2005] 3 S.C.R. 3	5, 24
Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd., [1997] 3 S.C.R. 1210	43
British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49, [2005] 2 S.C.R. 473	39, 42
Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of), 2006 SCC 24, [2006] 1 S.C.R. 865	8
Canada v. Addison & Leyen Ltd., 2007 SCC 33, [2007] 2 S.C.R. 793	19
Canada (Attorney General) v. JTI-Macdonald Corp., 2007 SCC 30, [2007] 2 S.C.R. 610	62
Canada (Attorney General) v. TeleZone Inc., 2010 SCC 62	20
Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236	14
Crystalline Investments Ltd. v. Domgroup Ltd., 2004 SCC 3, [2004] 1 S.C.R. 60	57, 58
Edwards v. Law Society of Upper Canada, 2001 SCC 80, [2001] 3 S.C.R. 562	19
Giffels v. Eastern Construction, [1978] 2 S.C.R. 1346	5, 24, 50, 72, 74
Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959	12, 13, 15, 17, 20
Lévis (City) v. Fraternité des policiers de Lévis Inc., 2007 SCC 14, [2007] 1 S.C.R. 591	51, 53, 55
Odhavji Estate v. Woodhouse, 2003 SCC 69, [2003] 3 S.C.R. 263	14

Placer Dome Canada Ltd. v. Ontario (Minister of Finance), 2006 SCC 20, [2006] 1 S.C.R. 715	32
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RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199	8
Syl Apps Secure Treatment Centre v. B.D., 2007 SCC 38, [2007] 3 S.C.R. 83	15-17, 19
STATUTES	
Health Care Costs Recovery Act, S.B.C. 2008, c. 27, s. 24(3)(b)	5, 9(D), 24, 50, 64-70
Negligence Act, R.S.B.C. 1996, c. 333	throughout
Supreme Court Civil Rules, R. 9-5(1) (formerly R. 19(24))	4, 11
Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30	throughout
TEXT	
Sullivan, *Sullivan on the Construction of Statutes* (5th ed., 2008), pp. 210, 346-350	32, 55

PART VII: STATUTORY PROVISIONS

[over page]

This Act is Current to January 19, 2011

HEALTH CARE COSTS RECOVERY ACT

[SBC 2008] CHAPTER 27

Assented to May 29, 2008

Contents

1 Definitions
2 Beneficiary's right to recover
3 Obligation to claim
4 Requirement to notify government of claim
5 Final disposition of claim or legal proceeding
6 Government may intervene in proceeding or assume conduct of claim
7 Government has subrogated right
8 Government has independent right to recover
9 Government proceedings
10 Information from insurer
11 Beneficiary's duty to cooperate
12 Beneficiary's duty to give notice to minister before settlement
13 Settlement of claims
14 Orders for information and documents
15 Protection of information and records provided
16 Minister's certificates
17 Joint and several liability
18 Priority of beneficiary's payments
19 Government has separate appeal right in beneficiary's proceeding
20 Payments to government
21 Indemnification of beneficiary for costs and expenses
22 Service of notices to government
23 Section 5 of *Offence Act* does not apply
24 Application of this Act
25 Regulations
26-27 Consequential Amendments
28 Commencement

Definitions

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

NEGLIGENCE ACT

[RSBC 1996] CHAPTER 333

Contents

1 Apportionment of liability for damages
2 Awarding of damages
3 Apportionment of liability for costs
4 Liability and right of contribution
5 Negligence of spouse in cause of action that arose before April 17, 1985
6 Questions of fact
7 Actions against personal representatives
8 Further application

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.

Rule 9-5 — Striking Pleadings

Scandalous, frivolous or vexatious matters

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be,

(b) it is unnecessary, scandalous, frivolous or vexatious,

(c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

(d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[am. B.C. Reg. 119/2010, Sch. A, s. 22.]

This Act is Current to January 19, 2011

TOBACCO DAMAGES AND HEALTH CARE COSTS RECOVERY ACT

[SBC 2000] CHAPTER 30

Assented to July 6, 2000

Contents

1 Definitions and interpretation
2 Direct action by government
3 Recovery of cost of health care benefits on aggregate basis
4 Joint and several liability in an action under section 2 (1)
5 Population based evidence to establish causation and quantify damages or cost
6 Limitation periods
7 Liability based on risk contribution
8 Apportionment of liability in tobacco related wrongs
9 Regulations
10 Retroactive effect
11 Spent
12 Commencement

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.