



NO. C985781
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ROTHMANS, BENSON & HEDGES INC.

PLAINTIFF

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

DEFENDANT

STATEMENT OF DEFENCE

1. The Defendant denies the allegations in the Amended Statement of Claim except those allegations that are hereinafter admitted, and pleads as follows:

The Parties

2. The Defendant admits the allegations contained in paragraphs 1 and 2 of the Amended Statement of Claim.

3. The Defendant says in answer to paragraph 3 of the Amended Statement of Claim that the Defendant is the official legal advisor of the Lieutenant Governor of British Columbia and the legal member of the Executive Council of the Province of British Columbia. The *vires* of legislation may be challenged in an action against the Attorney General and a declaration as to the law may be made in such an action.

The Nature of the Plaintiff's Action

4. The Defendant admits that the Plaintiff's action is for the declaration sought as described in paragraph 4 of the Amended Statement of Claim.

5. The Defendant says in answer to paragraph 5 of the Amended Statement of Claim that the description of the *Tobacco Damages and Health Care Costs Recovery Act* (the "Act") therein is not a complete description of the Act, and the Defendant says that the Act speaks for itself.

6. The Defendant admits that the grounds alleged in paragraph 6 of the Amended Statement of Claim are the principal grounds upon which the Plaintiff's declaration is sought, but denies the allegations in paragraph 6 and in particular the Defendant denies that the Act:

- a) purports to interfere or does interfere with the core of the judicial function, or that it violates the principle of the rule of law, the system of constitutional supremacy in Canada or the separation of powers;
- b) violates the rule of law;
- c) exceeds the territorial limits of provincial legislative competence;

7. The Defendant further says in answer to paragraph 6 of the Amended Statement of Claim that, inasmuch as the Plaintiff's claim as to the constitutionality of the Act is based on ss. 2 to 12 of the Act, in particular s. 2, which provides that a ministerial certificate may be issued in respect of an insured person or a class of insured persons setting out the cost of past health care benefits and the cost of future health care benefits, the Plaintiff's claim is to that extent premature, academic, not ripe for determination or otherwise moot because sections 2 to 12 have not been brought into force.

8. The Defendant says that in any event a certificate will not necessarily be issued in any action, and that the Plaintiff's claim is therefore premature, academic, not ripe or otherwise speculative.

Alleged Interference with the Judicial Function by Ministerial Action

9. The Defendant denies the allegations contained in paragraphs 7 and 8 of the Amended Statement of Claim and specifically denies that s. 1(1), s. 2(2) or s. 2(3) of the Act or any other provision of the Act confers judicial power on any minister of the Crown.

10. The Defendant further says in answer to paragraphs 7 and 8 of the Amended Statement of Claim that under the *Act* the elements of a cause of action, namely the existence of a duty, the occurrence of a breach of duty, causation and whether damages or health care costs resulting from the breach should be awarded are matters to be determined by a judge of the Supreme Court of British Columbia.

11. The Defendant further says in answer to paragraphs 7 and 8 of the Amended Statement of Claim that a ministerial certificate under s. 2 of the *Act* may only be issued in respect of an insured person or a class of insured persons, and cannot be issued where the government sues a tobacco manufacturer pursuant to s. 13(5)(b) of the *Act* on an aggregate basis.

12. The Defendant further says that a ministerial certificate is only evidence of the cost of a particular benefit provided by the government.

Alleged Interference with the Judicial Function by Legislative Action

13. The Defendant denies the allegations contained in paragraph 9 of the Amended Statement of Claim.

14. The Defendant specifically denies that the *Act* confers on the Legislature or on any minister of the Crown the powers of a judge appointed pursuant to s. 96 of the *Constitution Act, 1867*.

15. The Defendant specifically denies that the *Act* unconstitutionally purports to interfere or interferes with the judicial process.

16. The Defendant further says in answer to paragraph 9 of the Amended Statement of Claim that the *Act* leaves it to a judge of the Supreme Court of British Columbia to determine in any action what evidence ought to be admitted, the assessment of evidence, the facts that may be found on the basis of such evidence and to apply the law to the facts.

Alleged Interference with the Judicial Function**i) Judicial Independence**

17. The Defendant denies the allegations contained in paragraphs 10 and 11 of the Amended Statement of Claim.

18. The Defendant specifically denies that the *Act* confers on any minister of the Crown the powers of a judge appointed under s. 96 of the *Constitution Act, 1867*.

19. The Defendant specifically denies that the *Act* violates judicial independence and impartiality and the Defendant further says that the *Act* leaves it to a judge of the Supreme Court of British Columbia to determine in any action what evidence ought to be admitted, the assessment of the evidence, the facts that may be found on the basis of such evidence, and the law to be applied to the facts.

ii) Judicial Process

20. The Defendant denies the allegations contained in paragraph 12 of the Amended Statement of Claim.

21. The Defendant specifically denies that the *Act* confers the powers of a judge appointed under s. 96 of the *Constitution Act, 1867* on any minister of the Crown.

22. The Defendant specifically denies that the *Act* interferes with or frustrates the judicial process or the rule of law or that the *Act* interferes with the core jurisdiction of a judge.

iii) Judicial Power

23. The Defendant denies the allegations contained in paragraphs 13 and 14 of the Amended Statement of Claim.

24. The Defendant specifically denies that the *Act* confers on any minister of the Crown the powers of a judge appointed under s. 96 of the *Constitution Act, 1867*.

Alleged Violations of the Constitution of Canada qua the Judicial Function

25. The Defendant denies the allegations in paragraphs 15 and 16 of the Amended Statement of Claim.

26. The Defendant specifically denies that the *Act* undermines judicial independence, process and power or that it undermines the rule of law or the supremacy of the rule of law.

27. The Defendant specifically denies that the powers of a judge appointed under s. 96 of the *Constitution Act, 1867* are conferred on any minister of the Crown.

Alleged Violation of the Rule of Law

28. The Defendant denies the allegations contained in paragraphs 17, 18 and 19 of the Amended Statement of Claim, and the Defendant specifically denies that the *Act* is inconsistent with the rule of law.

29. In further answer to the whole of the Amended Statement of Claim, the defendant says that to the extent that the provisions of the *Act* create any new cause of action or modify substantive rules of the law or modify the rules of civil procedure, including the rules of evidence, or modify limitation periods, the said provisions of the *Act* are validly enacted in relation to heads of power in Section 92 of the *Constitution Act, 1867* and are otherwise constitutional.

Allegation of Ultra Vires

30. The Defendant denies the allegation in paragraph 20 of the Amended Statement of Claim that the *Act* is *ultra vires* the Legislative Assembly of British Columbia.

31. The Defendant further says in answer to paragraph 20 of the Amended Statement of Claim that any effect, adverse or otherwise, of the *Act* on extra-provincial rights or any extra-provincial consequences of the *Act* are an incidental effect of the *Act*, which is validly enacted in relation to heads of power in s. 92 of the *Constitution Act, 1867*.

Severability

32. If any provision or provisions of the *Act* are unconstitutional, the same are severable.

WHEREFORE the Defendant claims:

1. That the Plaintiff's action be dismissed.
2. Costs, or, in the alternative, special or increased costs.

Bull, Housser & Tupper

per:



Solicitors for the Defendant

Dated: February 23, 1999

This STATEMENT OF DEFENCE is filed by Bull, Housser & Tupper, Solicitors for the Defendant, whose office address and address for delivery is 3000 - 1055 West Georgia Street, Vancouver, British Columbia, V6E 3R3 Attention: D. A. Webster, Q.C.
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STATEMENT OF DEFENCE

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