

SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

**APPELLANT /
RESPONDENT ON CROSS-APPEAL**

- and -

IMPERIAL TOBACCO CANADA LIMITED

**RESPONDENT /
APPELLANT ON CROSS-APPEAL**

- and -

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ATTORNEY GENERAL OF BRITISH COLUMBIA,
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RESPONDENT ON CROSS-APPEAL'S FACTUM

PART I – FACTS & OVERVIEW

Overview

1. In this class action, consumers seek to recover monies paid to, and profits made by, Imperial Tobacco Canada Limited (“Imperial”) in respect of purchases of “light” and “mild” cigarettes. The claim, brought pursuant to provincial trade practice legislation, is based upon alleged deceptive trade practices by Imperial. Imperial seeks by cross-appeal to pass on any liability to Canada by means of third party claims based upon Canada’s alleged statutory liability under the same provincial trade practices statutes, as well as negligence and equitable indemnity. The Court of Appeal struck out the third party claims at issue (with the exception of negligent misrepresentation, the subject of Canada’s appeal) and the Attorney General of Canada (“Canada”) opposes this cross-appeal.

2. What is at stake here, as in the companion *Costs Recovery* matter, is the ability of Canada to protect the health of the Canadian public through its tobacco control policies, free of the spectre of indeterminate liability to tobacco manufacturers sued by consumers for breach of provincial trade practices legislation.

3. Canada was not a “participant in the tobacco business” as argued by Imperial. The third party notice does not allege that Canada acted as an industry player. Rather, it alleges that Canada’s research into and development of tobacco varieties arose as part of broader programmes to address the adverse health effects of cigarettes. As the Court of Appeal unanimously held, Canada is thus not a “supplier” under the provincial trade practices legislation, as it is not alleged that Canada acted “in the course of business”. If such legislation is nonetheless held to be applicable to Canada, Imperial relies only upon federal legislation, the *Crown Liability and Proceedings Act*, to bind Canada to the provincial legislation. The federal legislation does not, however, apply.

4. With respect to the claim for negligence, it is plain and obvious, as the Court of Appeal held, that any duty of care which Canada owed to the tobacco manufacturers for “negligent design” is negated by policy considerations. The potential creation of a widening sphere of indeterminate liability here is a significant policy concern which negates any *prima facie* duty of

care found to exist. Canada's actions involved developing programmes, pursuant to a broad statutory discretion to act in the public interest, and to respond to the health risks of tobacco products. A duty of care would also conflict with the balancing of a myriad of interests required for the development of such programmes.

5. With respect to the alleged duties to Imperial and consumers based upon "failure to warn", the Court of Appeal was correct in not considering such allegations, which are not raised in the third party notice.

6. Finally, the doctrine of equitable indemnity has no application. The Court of Appeal did not err in finding that it is plain and obvious that Canada cannot be held to have undertaken to indemnify the cross-appellants for any liability to the plaintiff.

Facts

7. The background facts with respect to this action, as well as the policy, legislative and regulatory context are set out in Canada's factum on the appeal at paragraphs 6 – 21. The additional facts below relate specifically to the matters at issue in the cross-appeal.

The Trade Practices Claim

8. The first branch of Imperial's third party claim for contribution and indemnity is based upon Canada's alleged liability to the plaintiff under provincial trade practices legislation.¹ The Court of Appeal unanimously held that it was plain and obvious that Canada's alleged activities "were not done in the course of business" within the meaning of that legislation and therefore that it did not apply to Canada.²

9. The majority also held that Canada was not, in any case, bound by the provincial legislation, based upon the common law doctrine that a statute does not bind the Crown unless it is expressly named or bound by necessary implication, which requirements were not satisfied.³

¹ *The Trade Practices Act (TPA)* R.S.B.C. (1996), c. 457, ss. 18 and 22, Appellants' Joint Book of Authorities ("A.B.A.") Vol. V, Tab 89, and its successor, *The Business Practices and Consumer Protection Act (BPCPA)*, S.B.C. 2004, c. 2, ss. 171 and 172, A.B.A., Vol. IV, Tab 59. The *TPA* is applicable from May 9, 1997 to July 3, 2004; *BPCPA* from July 4, 2004 to the opt-out / opt-in date set by the Court in the main action.

² *Knight v. Imperial Tobacco Canada Limited*, 2009 BCCA 541 (C.A.) per Tysoe J.A., at paras. 34-5, A.R. p. 42; per Hall J.A. at para. 96, A.R. p. 64

³ *Ibid.*, at para 29, A.R., p. 40-41.

Other Claims as Dealt with by the Court of Appeal

10. With respect to the claims in the third party notice founded on what he termed “negligent design”, Tysoe J.A. for the majority of the Court of Appeal held that it was plain and obvious that any *prima facie* duty of care owed by Canada to tobacco manufacturers was negated by policy considerations. He held:

[T]he claim of ITCAN for recovery of pure economic loss from Canada gives rise to indeterminate liability, and this consideration is sufficient to negate the *prima facie* duty of care found to be owed by Canada at the first stage of the *Anns* test. Evidence at trial would not affect this conclusion, and a decision can be made on the claim at this stage of the proceedings.⁴

11. Tysoe J.A. did not identify the paragraphs of the third party notice containing the allegations he referred to as involving “negligent design”. Hall J.A., for the minority, did not acknowledge or separately assess any claim in the TPN for “negligent design”. As noted in Canada’s factum on the appeal, the main action seeks the refund of monies paid by consumers for cigarettes purchased from Imperial, based solely on statute.⁵ It alleges thirteen statutory “deceptive acts or practices” by Imperial in respect of light cigarettes.⁶

12. Hall J.A. for the minority would have struck out the claims in negligence against Canada in their entirety. Hall J.A. identified policy concerns which weighed against extending liability to Canada in negligence: (a) indeterminate liability for claims involving economic loss;⁷ (b) that Canada “is a regulator of the tobacco industry, not an insurer”;⁸ (c) that “imposing a duty of care on Canada towards tobacco manufacturers ... would conflict with measures designed to encourage and curtail smoking as deleterious to health”;⁹ and (d) that “[w]hile the development of new strains of tobacco involved Agriculture Canada, in my view the government engaged in such activities as a regulator of the tobacco industry seeking to protect the health interests of the Canadian public. Policy considerations underlaid all of these various activities undertaken by departments of the federal government.”¹⁰

⁴ *Ibid.*, at para. 83, A.R. p. 59.

⁵ See: Appellant’s Factum, at para 7; and *TPA*, *supra*, ss. 18 and 22, A.B.A., Vol. V, Tab 89, pp. 241-243; and *BPCPA*, *supra*, A.B.A., Vol. IV, Tab 59, pp. 135-136.

⁶ See: Appellant’s Factum, at para 8; and Statement of Claim, at para. 11, A.R., pp. 118-120.

⁷ *Knight (CA)*, *supra*, at para. 103, A.R., p. 67.

⁸ *Ibid.*, A.R., p. 67.

⁹ *Ibid.*, at para. 108, relying on the reasoning of the motions judge, A.R., pp. 69-70.

¹⁰ *Ibid.*, at para. 100, A.R. p. 66.

13. With respect to what Imperial refers to as “failure to warn”, neither Tysoe nor Hall J.J.A. assessed, or acknowledged the existence of, allegations of this nature in the Third Party Notice.

14. With respect to the claim for equitable indemnity, the Court of Appeal was unanimous that it was plain and obvious that that aspect of the third party notice could not succeed.¹¹

Constitutional Issue

15. As the Court of Appeal unanimously concluded that Canada was not a supplier under the provincial trade practices legislation, the Court found it unnecessary to decide whether or not this legislation applied to Canada as a matter of constitutional law.¹² In view of fact that the cross-appellant does not rely upon provincial legislation to bind Canada, the constitutional issue stated by the Chief Justice does not arise in this appeal.¹³

Position on Imperial's Statement of Facts

16. Canada takes issue with certain of Imperial's statements of fact. The pleadings must be taken to be true for the purposes of a motion to strike, and Imperial makes certain assertions inconsistent with the pleadings, in an attempt to create the impression of an arguable case. By contrast, reference to the pleadings themselves make it evident that no trial is needed to determine that it is plain and obvious that the claims in question must fail.

17. Imperial asserts that “none of the facts pleaded in the Knight TPN relate to Canada's role as a regulator”¹⁴; that “Imperial's claims in the Knight TPN do not relate in any way to Canada's regulation of an industry.”¹⁵ This is incorrect. The third party notice makes references throughout to Canada's role as a statutory regulator. For example, it contains the following allegations respecting Canada's escalating assertion and exercise of regulatory authority:

¹¹ *Ibid.*, at para. 90 (Tysoe J.A. for the majority), A.R., p. 61; and para. 109 (Hall J.A. for the minority), A.R., p. 70 referring to his reasons in *B.C. v. Imperial Tobacco Ltd.*, 2001 BCCA 540, at para. 57, A.R., p. 101.

¹² *Ibid.*, at para. 36 A.R., pp. 42-43.

¹³ The Chief Justice stated the following constitutional question: “Are the *British Columbia Trade Practices Act*, R.S.B.C. 1996, c. 457, and the *Business and Consumer Protection Act*, S.B.C. 2004, c. 2, constitutionally inapplicable to the federal Crown because the latter is constitutionally immune from liability under the Act?” A.R., p. 180.

¹⁴ Imperial Cross-Appeal Factum, at para. 18.

¹⁵ *Ibid.*, at para. 50.

2. The Federal Government acted, at material times and in ways material to this action, in carrying out its statutory duties and exercising its authority and powers, through Health Canada and Agriculture Canada.

...

22. In the mid-1960s, the Federal Government, in furtherance of its responsibility for protecting the health of continuing smokers, and through its Officials at Health Canada and Agriculture Canada, explored ways to reduce tar in tobacco smoke. ... Officials at Health Canada decided in 1967 to limit the maximum amount of tar and nicotine cigarettes could contain as measured by standard testing methods. Legislation was introduced into Parliament to achieve that objective. While the Bill did not become law, the rationale for the Bill was to encourage continuing smokers to switch to light and mild products. Rather than pursue legislation, Officials of Health Canada decided to implement specific programmes.

...

69. On January 1, 1976, under threat of government regulation, ITCAN and other members of the CTMC agreed to publish tar and nicotine information on cigarette packages pursuant to the encouragement, advice, requests or direction of Officials of Health Canada.

70. From January 1, 1989 onwards, ITCAN was required under the *Tobacco Products Control Act*, S.C. 1988, c. 20 to report to the Federal Government and to publish on packages the emissions of tar, nicotine and carbon monoxide and other smoke constituent yields as measured by the standard testing methods approved by Officials of Health Canada.

...

72. Officials at Health Canada monitored the introduction of "milder" versions of popular brands by tobacco manufacturers and their increasing market share noting that, in 1977, their introduction had been made in response to public demand, government pressure in the form of continuing negotiations and the possibility of stringent government regulation.

...

IX. THE SUPERVISION AND REGULATION OF ITCAN BY FEDERAL GOVERNMENT OFFICIALS

110. At material times, the right to manufacture, promote and distribute cigarettes, including "Light" and "Mild" cigarettes was authorized and sanctioned by the Federal Government and its Officials and ITCAN's activities were monitored, and directed by it. In material matters, ITCAN acted on the advice or at the request of Officials of the Federal Government.

111. The Federal Government through its Officials also monitored ITCAN's advertising, marketing and promotional activities in relation to "Light" and "Mild" cigarettes to ensure they complied with its overall objectives and health programmes.

112. Through its advice, requests or direction to ITCAN, the Federal Government and its Officials have defined the standards applicable to ITCAN's communications with its consumers. The Officials of Health Canada and Agriculture Canada have monitored and directed ITCAN in matters relating to smoking and health and have requested ITCAN to act in certain ways or refrain from acting in certain ways now alleged by the Plaintiff to be deceptive acts or practices under the *Trade Practice Act*, R.S.B.C. 1996, c. 457.¹⁶

¹⁶ Amended Third Party Notice of Imperial Tobacco Canada Limited ("TPN"), A.R., pp. 136, 141, 151, 152, 158, and 159; See also: Statement of Defence of Imperial Tobacco Canada Limited ("Statement of Defence"), at paras. 11, 24, and 25, A.R., pp. 127 and 130.

18. In addition to allegations which specifically reference proposed and actual regulatory action by Canada, the third party notice is replete with allegations of Canada's "direction" of the tobacco manufacturers' conduct. It also alleges as a general proposition that Imperial "complied with the duties defined by and the standards set by Officials of the Federal Government".¹⁷ The source of this ability to "set standards", was evidently Canada's statutory and regulatory authority.

19. The main claim in this proceeding relates to purchases of cigarettes occurring only after May 8, 1997.¹⁸ This is well after Canada passed detailed tobacco-specific regulatory legislation governing this industry in 1988.¹⁹

20. Imperial states that "[t]his is a case against Canada as the designer and developer of the very consumer product at issue".²⁰ That is not the case. The "consumer product at issue" is "'light' and 'mild' cigarettes" ("Light Cigarettes"),²¹ produced, marketed, and sold by Imperial. Canada is not alleged to have designed or developed Imperial's Light Cigarettes, or any consumer product for that matter. What the third party notice does allege is that Canada conducted research into and developed tobacco varieties and licensed them to growers.²² Tobacco varieties are not a consumer product. They are not alleged to have been supplied or sold to consumers by anyone.

21. Imperial also states as a fact that Canada "created the standard testing methods"²³ used to determine the level of toxic emissions in cigarettes. There is no allegation in the third party notice that the standard testing methods used to determine tar and nicotine levels in tobacco products were created by Canada.

22. Imperial states that the third party notice "explains that Canada became a major participant in the tobacco business, in designing, promoting and licensing the same 'light' and 'mild' tobacco strains incorporated into Imperial's products, and complained of by the

¹⁷ See: TPN at para. 122; see also 121, 123, A.R., p. 161.

¹⁸ Appellant's Factum, at para. 9 referring to the certification decision, 2006 BCCA 235, at paras. 35-6, A.B.A., Vol. II, Tab 33, pp. 145-6.

¹⁹ *Tobacco Products Control Act*, S.C. 1988, c. 20, A.B.A., Vol. V, Tab 85, p. 163.

²⁰ Imperial Cross-Appeal Factum, at para. 3.

²¹ Statement of Claim, at paras. 3 and 4, A.R., p. 115 and 116.

²² TPN, at para. 96, A.R., p. 155.

²³ Imperial Cross-Appeal Factum at paras. 15 and 17.

plaintiff".²⁴ This is incorrect. First, the plaintiff's claim makes no complaint about deceptive practices associated with tobacco strains or varieties. The consumer products at issue in respect of the alleged deceptive acts and practices by Imperial are Light Cigarettes.²⁵

23. Second, the third party notice does not allege that Canada "became a major participant in the tobacco business" through its involvement in developing and licencing tobacco varieties. The development of tobacco varieties is alleged to have arisen as part of Canada's broader programmes to address the public health effects of cigarettes. Canada's participation is not alleged to have occurred as part of a business venture. For example:

9. Through its Officials, and in carrying out its statutory duties and exercising its authority and powers, Health Canada has developed a smoking and health programme through which it has executed or implemented at the operational level governmental policy on smoking and health. That smoking and health programme was originally developed and implemented as a result of the first national Conference on Smoking and Health in 1963, which established that governmental policy should be to act so as to *protect the public from the risks of smoking* through a programme of education about the risks of smoking and research into the hazards of smoking and the possibilities of reducing those risks. ...

...

31. On or about November 18, 1971, Dr. Chapman of Health Canada confirmed to representatives of the tobacco growers and ITCAN that Health Canada Officials were interested in *protecting the health of continuing smokers* by, amongst other things, reducing the tar and nicotine content of cigarette smoke and producing light and mild products.

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

...

34. On January 22, 1973, the Minister of Health announced a three-way programme of cooperative research between two government departments, namely, Health Canada and Agriculture Canada, and a university (the University of Waterloo) to contribute to international efforts to produce less hazardous light and mild products and to facilitate Health Canada's guidance of the tobacco industry in matters affecting health. The Minister confirmed the continuance of regular communications on these matters between

²⁴ Imperial Cross-Appeal Factum, at para. 16.

²⁵ Statement of Claim, at paras.7, 11(c), A.R., 116 and 118.

the two government departments and the tobacco manufacturers. The Minister confirmed that the joint research programme was *one component of a broad programme to reduce the hazards of cigarette smoking* in which Health Canada was involved and which included public education, studies of ways to help Canadians avoid or discontinue smoking and surveillance of light and mild products on the market.

...

93. At material times in the 1970's, Officials at Delhi Research Station and/or Health Canada sponsored research at the University of Guelph into developing methods for biological evaluation of different tobacco types *with the objective of producing a less hazardous cigarette*.²⁶

24. Canada's research into and development of tobacco varieties is thus alleged to have occurred in the context of programmes introduced under Health Canada's mandate to protect the public health. In the words of the foregoing paragraphs, Canada acted "in carrying out its statutory duties and exercising its authority and powers", "to protect the public from the risks of smoking", to "protect the health of continuing smokers", to "expose smokers to fewer harmful substances", "to contribute to international efforts to produce less hazardous light and mild products and to facilitate Health Canada's guidance of the tobacco industry in matters affecting health" and "to reduce the hazards of cigarette smoking". Such alleged actions are not those of a mere business participant in the tobacco industry.

PART II – QUESTIONS IN ISSUE

25. Canada submits on the issues raised by the cross-appellants that:

- (a) The Court of Appeal did not err in finding that it is plain and obvious that Canada is not a "supplier" under, and is not bound by, provincial trade practices legislation, whether directly or as a result of the application of the *Crown Liability and Proceedings Act*;
- (b) No error was committed by the Court of Appeal in striking the claim for "negligent design" and failing to recognize a claim for "failure to warn"; and
- (c) Similarly, no error was committed in striking out the claim based on the doctrine of equitable indemnity.

²⁶TPN, A.R., pp. 138, 143, 144, and 155 [emphasis added].

PART III – ARGUMENT

A. The *Trade Practices Act* Claim Cannot Succeed

26. The Court of Appeal was unanimous in finding that the provincial trade practices legislation did not apply to Canada. First, the majority held that the provincial legislation was not intended to bind the federal Crown.²⁷ Second, the Court of Appeal was unanimous in agreeing with the motions judge that Canada did not fall within the legislative definition of “supplier”.²⁸ No error was committed in either respect.

27. At common law, for the Crown to be bound by statute, there must be: (1) expressly binding words; (2) a clear intention to bind manifest from the terms of the statute; or, (3) an intention to bind where the purpose of the statute would be wholly frustrated if the Crown was not bound, such that an absurdity, as opposed to simply an undesirable result, would occur.²⁹ Imperial argued in the courts below that the provincial trade practices legislation evinces the necessary intention to bind the federal Crown. The three judges of the Court of Appeal who considered this issue held that it did not. Tysoe J.A. stated:

[28] The Legislature of British Columbia took a different course than Parliament. Rather than codifying the common law immunity, in whole or in part, the Legislature enacted s. 14(1) of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which reads as follows:

- (1) Unless it specifically provides otherwise, an enactment is binding on the government.

The term “government” is defined in s. 29 of the provincial Act to mean “Her Majesty in right of British Columbia”.

[29] Consequently, Canada continues to enjoy the common law immunity from the operation of statutes enacted by the British Columbia Legislature. As the *Trade Practice Act* does not expressly name Canada and as Canada is not bound by necessary implication, it is plain and obvious the *Trade Practice Act* does not apply to Canada.³⁰

²⁷ *Knight* (CA), *supra*, at paras. 27-29, A.R., pp. 40-41.

²⁸ *Ibid.*, at paras. 34-35, A.R., p. 42.

²⁹ *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission*, [1989] 2 S.C.R. 225 at para. 130, Appellant's (Respondent on Cross-Appeal) Supplementary Joint Book of Authorities (“A.S.B.A.”), Tab 2.

³⁰ *Knight* (CA), *supra*, at paras. 28-29, A.R., pp. 40-41.

28. Imperial does not challenge the foregoing finding in its cross-appeal to this Court. Its position is that “the *Trade Practices Act* applies to Canada by virtue of a federal statute - the Federal *CLPA*”.³¹ As a result, two issues are raised:

(a) Does Canada fall with the definition of “supplier” in the provincial trade practices legislation?

(b) If so, is that legislation binding on Canada by virtue of the *Crown Liability and Proceedings Act* (“*CLPA*”), section 3?

29. Canada submits that it is plain and obvious that:

(a) Canada does not fall with the provincial legislation and the Court of Appeal committed no error in so finding; and

(b) Even if this Court finds that the Court of Appeal erred and that it is not plain and obvious that the statute does not apply to Canada, the *CLPA* does not make the provincial legislation binding on Canada.

(a) Canada is not a “Supplier” under Provincial Trade Practices Legislation

30. As both the Chambers Judge and Court of Appeal correctly held, Canada cannot be a “supplier” within the meaning of such legislation. The definition of “supplier” requires that the “person” alleged to have engaged in deceptive practices act “in the course of business”.³² Such a provision cannot apply to Canada’s servants, whose actions are not alleged to have been carried out “in the course of business”. Trade practice legislation deals with “business ethics”, not government actions.³³ Canada’s alleged actions involved programmes put in place to mitigate the health risks of tobacco products produced by the tobacco industry. Canada is not alleged to have been motivated by commercial or other “business” considerations. As Tysoe J.A. held:

It is alleged that Canada developed strains of tobacco for incorporation into light and mild cigarettes and promoted the use of the cigarettes. While the alleged activities of Canada could fall within the category of promotion under clause (b) of the definition, the activities were not done in the course of business. The

³¹ Imperial Cross-Appeal Factum, at para. 38.

³² *BPCPA*, *supra*, s. 1, A.B.A., Vol. IV, Tab 59, p. 16; *TPA*, *supra*, s. 1, A.B.A., Vol. V, Tab 89, p. 232.

³³ *R. v. Sunner* (1977), 4 B.C.L.R. 272 at para. 11, A.S.B.A., Tab 23.

encouragement given to smokers to use light and mild cigarettes was alleged to have been done by Health Canada out of health considerations. It was not alleged to have been done by Canada in the course of a business carried on for the purpose of earning a profit.³⁴

31. Tysoe J.A. did not suggest that the presence or absence of profit was decisive. What was decisive for him was the nature of Canada's alleged conduct as reflected in the previous sentence, which Imperial has not challenged or referred to: "The encouragement given to smokers to use light and mild cigarettes was alleged to have been done by Health Canada out of health considerations."³⁵ This is an accurate reflection of the pleadings. Canada is alleged to have acted to mitigate the health risks of the commercial products distributed by tobacco companies, not to have commenced or to have furthered its own competing or parallel commercial businesses.

32. It is plain and obvious from the pleadings that this is not a situation where government was acting as or through a commercial enterprise. There is no suggestion in the relevant federal statutory schemes that there was a mandate from Parliament to engage in commercial or business activities in this area. What the third party notice alleges is that Canada created several programmes to address the health effects of tobacco products and to lower toxic emissions which might be deleterious to health.³⁶ Among these were efforts to lower harmful emissions through research into and development of tobacco varieties.

33. The presence of allegations that Canada licenced tobacco varieties to growers and collected royalties does not make it arguable that Canada was engaged in a business venture, given that Canada's overall objective is alleged to have been to mitigate the health effects of tobacco, not to commence or to engage in business activities associated with tobacco varieties. Royalties may permit some return from licencing, but there is no allegation that this return was substantial, or more importantly, that obtaining royalties was the purpose of Canada's actions.

34. All six judges hearing the motions in the courts below were satisfied that it was plain and obvious that Canada did not fall within the definition of "supplier" in the provincial trade

³⁴ *Knight (CA)*, *supra*, at para. 35, A.R., p. 42.

³⁵ *Ibid.*, A.R. p. 42.

³⁶ See, for example, TPN, paras. 9 and 34, A.R., pp. 138 and 144, and discussion at paras. 23-24, *supra*.

practice legislation. For the foregoing reasons, they committed no error in striking out this portion of the claim.

(b) Canada is not Bound by Virtue of s. 3 of the CLPA

35. In the event that the Court finds that the Court of Appeal erred and that Canada falls within the definition of “supplier” in provincial trade practices legislation, this issue becomes relevant. Section 3 of the *CLPA* does not make such provincial trade practices legislation binding on the federal Crown. The deceptive practices provisions set out in the provincial legislation do not fall within the meaning of “tort” in that section. Section 3 provides that in provinces other than Quebec:

3. The Crown is liable for the damages for which, if it were a person, it would be liable	3. En matière de responsabilité, l'État est assimilé à une personne pour :
(b) in respect of	b) . . .
(i) a tort committed by a servant of the Crown, or	(i) <i>les délits civils</i> commis par ses préposés,
(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.	(ii) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens. ³⁷

36. As the Chambers Judge noted, liability under the provincial legislation “may not require proof of reliance, or intention to deceive, or damage. It is therefore quite different from the classic torts of negligence, negligent misstatement and deceit.”³⁸ Although the Chambers judge reached a different conclusion, it is submitted that given these differences, and others she did not refer to, it is plain and obvious that the provincial legislation creates a new statutory cause of action with numerous elements that differ substantially from a cause of action in tort.

37. There are several significant differences between the statutory deceptive practices provisions and tort. First, unlike an action in negligence, the trade practices legislation requires neither a finding of duty of care, nor permits a court to negative the existence of a duty founded on an assessment of the policy implications of imposing such a duty, as the common law permits.

³⁷ R.S.C. 1985, c. C-50, s. 3, emphasis added.

³⁸ *Knight v. Imperial Tobacco Canada Limited*, 2007 BCSC 964, (SC), at para. 15, A.R., p. 9.

Second, no breach of the common law standard of care is required; all that is required is that the elements of the statutory breach be shown. Recovery is permitted for restitutionary reasons, which under the common law would only be available for the breach of an equitable, not tortious, obligation.³⁹ Indeed, the plaintiffs' claim is framed in restitutionary terms.⁴⁰

38. Third, the test in the section differs substantially from common law negligent misrepresentation:

- (i) there is no requirement of "special relationship" between the representor and the representee;
- (ii) there is no requirement that the representor must have acted intentionally or negligently in making the representation;
- (iii) there is no requirement (at least under certain provisions) that the representee must have relied, in a reasonable manner, or otherwise, on the representation; and
- (iv) there is no requirement (at least under certain provisions) that the reliance must have been detrimental to the representee in the sense that damages resulted to the representee from the representation.⁴¹

39. Hogg and Monahan state with respect to subsection 3(1) of the *Crown Liability and Proceedings Act*:

That subsection is not a comprehensive imposition of liability in tort, and it has been interpreted narrowly by the Courts, who have excluded liability under provincial statutes that do not fit squarely within the language.⁴²

40. A narrow interpretation is consistent with the general common law presumption against binding the Crown in the absence of clear language. While those authors acknowledge that section 3 encompasses provincial statutory laws "creating or modifying tortious or delictual

³⁹ *TPA*, *supra*, s. 18(4), A.B.A., Vol. V, Tab 89, pp. 241-242; see also *BPCPA*, *supra*, s. 172(3), A.B.A., Vol. IV, Tab 59, pp. 135-136.

⁴⁰ Statement of Claim, at para. 17, A.R., p. 121.

⁴¹ *Queen v. Cognos*, [1993] 1 S.C.R. 87 at p. 110, Imperial Tobacco Canada Limited Joint Book of Authorities ("Imperial B.A."), Vol. IV, Tab 51, p. 24

⁴² Hogg and Monahan, *Liability of the Crown* (3d, 2000) at p. 310, Imperial B.A., Vol. V, Tab 70, p. 153, citing, *inter alia*, *The Queen v. Breton* (1967), 65 D.L.R. (2d) 76 (S.C.C.), A.S.B.A., Tab 22.

liability”⁴³, the provisions in question do not bear the hallmarks of tort liability, given the substantial differences in their elements enumerated above.

41. Imperial argues that the legislation falls within “the broad definition of tort”⁴⁴. However, authors such as Linden, cited by the chambers judge, define tort as liability “based in a civil wrongdoing, other than breach of contract, which the law will redress by an award of damages”.⁴⁵ The legislation has as much or more to do with modification of contract law as with tort law. It was aimed at creating a new regime to protect consumers where contract law had failed. Professor Belobaba wrote that this legislation:

... has substantially altered common law notions regarding the scope of the contract, the doctrine of privity of contract, the admissibility of parole evidence, and the availability of remedies.⁴⁶

42. The deceptive practices provisions do not simply create or modify tort liability. They create a whole new species of statutory liability, whose origins and intent lie well beyond the boundaries of tort law. Section 3 of the *CLPA* was not intended to sweep in all statutory breaches; if it had been, Parliament would not have restricted the reference to liability in “tort”, and used broader language, such as “statutory liability”.⁴⁷ For these reasons, the section does not impose liability on Canada for the breaches of provincial statute alleged in the third party notice.

(c) Constitutional Issue

43. Imperial has abandoned its argument that the provincial legislation is binding on Canada of its own force. It relies solely on the *CLPA*. For this reason, the constitutional issue is no longer raised and need not be addressed in this cross-appeal. Canada's position on the constitutional issue is set out in its responding factum to the cross-appeal in the *Costs Recovery* case.⁴⁸

⁴³ *Ibid.*, Imperial B.A., Vol. V, Tab 70, p. 152.

⁴⁴ Imperial C.A. Factum, at para. 59.

⁴⁵ *Knight* (SC 2007), *supra*, at para. 15, A.R., pp. 9-10.

⁴⁶ See E. Belobaba, “Unfair Trade practices Legislation: Symbolism and Substance in Consumer Protection” (1977) 15(2) Osgoode Hall L.J. 327 at 330.

⁴⁷ As in the *Uniform Model Act* referred to in Hogg and Monahan, *Liability of the Crown* (3d, 2000) at pp. 112-114, A.S.B.A., Tab 34.

⁴⁸ *Attorney General of Canada v. Her Majesty the Queen in Right of British Columbia, et al.* (“Costs Recovery”) SCC File No.: 33563. See: Canada's Factum as Respondent on Cross-Appeal (“Canada's Cost Recovery Cross-appeal Factum”), at paras. 72-91.

B. No Error In Respect of Duty of Care in Negligence

(a) The Majority Did not Err in Striking out the Claims for “Negligent Design”

44. Imperial repeats the same arguments made in its factum in the *Costs Recovery* appeal in this respect.⁴⁹ For the reasons set out in Canada's responding factum in *Costs Recovery*,⁵⁰ Tysoe J.A. committed no error in striking out the third party notices in this respect.

45. In any case, the third party notice does not allege that Canada designed or supplied a defective or dangerous product. In its responding factum on the appeal, the only paragraph that Imperial refers to in support of the suggestion that a “negligent design” claim is made in the third party notice is para. 138(e), which seeks a declaration and provides:

WHEREFORE ITCAN claims against the Federal Government as follows:

(e) A declaration that Officials of the Federal Government owed purchasers of “Light” and “Mild” cigarettes duties of care *in the design or development of light and mild products* and to provide reliable information to consumers about the deliveries of tar and nicotine and about the health risks associated with the use of “Light” and “Mild” cigarettes⁵¹

46. The foregoing paragraph does not assert a cause of action of negligent design of tobacco varieties. Even if it could be said to involve an allegation of design negligence (which it could not, given that required elements such as supplying a product, and that the product was defective, are not alleged)⁵², it relates to tobacco products, not tobacco varieties. Furthermore, Canada is not alleged in the third party notice to have supplied either consumers or Imperial with tobacco varieties. No claim for “negligent design” is made out.

(b) The Majority Did not Err in Respect of “Failure to Warn”

47. Imperial argues that the Court of Appeal erred in failing to separately examine allegations in the third party notice alleging “failure to warn” by Canada, making the same arguments set out in its cross-appeal factum in *Costs Recovery*.⁵³ For the reasons set out in Canada's *Costs*

⁴⁹ Imperial Cross-Appeal Factum, at paras. 103-143.

⁵⁰ Canada's *Costs Recovery* Cross-appeal Factum, at paras. 84-97.

⁵¹ A.R., p. 167, emphasis added.

⁵² See Canada's *Costs Recovery* Cross-appeal Factum at paras. 99-101.

⁵³ Imperial Cross-Appeal Factum, at paras. 75-81.

Recovery factum, it is submitted that no allegations for failure to warn arise.⁵⁴ With respect to the specific arguments made by Imperial directed to the pleadings in this action, they do not disclose allegations of “failure to warn in respect of the tobacco that Canada negligently designed and promoted” as Imperial suggests.⁵⁵

48. The portion of the third party notice Imperial refers to as raising duties to Imperial does not relate to “failure to warn”.⁵⁶ The allegations appear under the heading “Representations and Advice of Officials of the Federal Government to ITCAN” and relate to Canada’s alleged “representations” and “advice” to Imperial, matters dealt with in Canada’s appeal.

49. With respect to Imperial’s reference to “duties to consumers”, no “failure to warn” in respect of tobacco varieties is alleged in the portions of the pleading Imperial refers to.⁵⁷ The only paragraph that alleges even a failure to disclose by Canada relates, not to tobacco varieties, but to Light Cigarettes,⁵⁸ a product which Canada is not alleged to have produced or supplied. This cannot provide the basis for the proffered “failure to warn”.

50. In the alternative, if allegations of failure to warn in respect of tobacco varieties can be discerned from the pleadings, it is submitted that the policy concerns identified by the Court of Appeal and canvassed in Canada’s *Costs Recovery* cross-appeal factum negate any *prima facie* duty of care which may arise.⁵⁹ Canada adopts those submissions here.

C. Canada Cannot be Liable Based on “Equitable Indemnity”

51. As the Court of Appeal held, the concept of equitable indemnity is of no application here. Imperial adopts the submissions of other defendants in the *Costs Recovery* appeal on this issue.⁶⁰ Rothmans, Benson & Hedges Inc., et al. (“RBH”) are the only defendants to address this issue in

⁵⁴ Canada’s *Costs Recovery* Cross-Appeal Factum, at paras. 102-109.

⁵⁵ Imperial’s Cross-appeal Factum, para. 82.

⁵⁶ *Ibid.*, para. 76.

⁵⁷ *Ibid.*, referring to paras. 53-66 and 124-128.

⁵⁸ Third Party Notice, para. 124(f), A.R., pp. 163-4.

⁵⁹ Canada’s *Costs Recovery* Cross-Appeal Factum, paras. 103-106.

⁶⁰ *Ibid.*, at para. 144.

their cross-appeal submissions.⁶¹ Those submissions identify no error by the Court of Appeal in striking out this claim.

52. The concept of equitable indemnity has been applied in the context of private law relationships in circumstances where, at the request or under the direction of party B, party A carries out an act, which was not manifestly tortious to his knowledge, but which exposes party A to liability in tort.⁶² In *Parmley v. Parmley*, this Court explained that “all” meritorious equitable indemnity cases “proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so”.⁶³

53. No such understanding or “implied promise to indemnify” has been pleaded in the present case. Indeed, the only plea in the lengthy third party notice that refers specifically to equitable indemnity is paragraph 137, which states the following:

ITCAN at material times acted at the request of Officials of the Federal Government as particularized herein. The requests or recommendations made by Officials of the Federal Government reasonably resulted in ITCAN acting in a manner that was not manifestly tortious or apparently illegal to ITCAN. If in so doing, ITCAN comes under a liability to the Plaintiff, the Federal Government is required to indemnify ITCAN to the extent of the liability so incurred.⁶⁴

54. Nowhere in the third party notice is there any plea which could reasonably imply that the parties had an “understanding” that Imperial would be indemnified, or that the government of Canada had by its words or conduct promised to indemnify that company. Furthermore, as held by Hall J.A. (Tysoe J.A. concurring in this respect), such an understanding would be inconsistent with the nature of the relationship between those parties alleged in the third party notice:

[I]t seems clear to me from the factual matrix set out in the third party notices that Canada was acting in general as a regulator to the tobacco industry, in which

⁶¹ Factum of Rothmans, Benson & Hedges Inc., Rothmans Inc., Philip Morris USA Inc., and Philip Morris International Inc. on Cross-Appeal in SCC File No.: 33563 (“RBH Cross-appeal Factum”), at paras. 102-112.

⁶² *Parmley v. Parmley*, [1945] S.C.R. 635, at 647, Consolidated Book of Authorities of Rothmans, Benson & Hedges Inc., Rothmans Inc., Philip Morris USA Inc., and Philip Morris International Inc. (“RBH B.A.”), Vol. II, Tab 38, p. 767; *Reference re: Goods and Services Tax*, [1992] 2 S.C.R. 445, at para. 46, A.S.B.A., Tab 25 (equitable indemnity found inapplicable on the facts).

⁶³ *Parmley*, *supra*, at p. 648, RBH B.A., Vol. II, Tab 38, p. 769.

⁶⁴ A.R., p. 166

industry the appellants have long been participants. I am of the opinion that if the notional reasonable observer were asked whether or not Canada, in the interaction it had over many decades with the appellants, was undertaking to indemnify them from some future liability that might be incurred relating to their business, the observer would reply that this could not be a rational expectation, having regard to the relationship between the parties.⁶⁵

55. The cross-appellants argue that there is no requirement for “an agreement, express or implied” in order to make out an arguable claim for equitable indemnity, because such a requirement would render the principle redundant.⁶⁶ The Court of Appeal did not suggest, however, that there was any need to prove agreement. What it did indicate was that the principle of equitable indemnity requires at least some factual foundation upon which an implied promise to indemnify (or “undertaking” as the Hall J.A put it) could be based. This is fully consistent with this Court’s decision in *Parmley*. The Court pointed out that any compliance by the dentist to the request made by the doctor involved the dentist’s “professional skill and knowledge”, and hence provide no basis to imply a promise to indemnify. Estey J. concluded:

I do not think that this type of request, nor the relations which existed between the doctor and the dentist, provides a basis or a foundation for the implication of a promise to indemnify.⁶⁷

56. The Court of Appeal’s conclusion here is fully justified based upon such reasoning, because *a fortiori*, in comparison to the situation in *Parmley*, the type of requests and relations between a regulator and manufacturer provide no basis or foundation for the implication of a promise to indemnify.⁶⁸

57. It is inconceivable that the government of Canada would undertake or promise to indemnify tobacco manufacturer, if (1) any of the manufacturer’s products harmed anyone or increased the costs of health care programs, and (2) the manufacturer was sued as a result. Clearly, no government would remove from a manufacturer of a product its legal accountability to consumers to provide a safe product, particularly when, as here, the product in question involves known health concerns. Indeed, in the *Tobacco Act*⁶⁹, Parliament was careful to ensure

⁶⁵ *British Columbia v. Imperial Tobacco Ltd.*, *supra*, (BCCA), at para. 57, A.R., p. 24.

⁶⁶ RBH Cross-Appeal Factum, at para. 109.

⁶⁷ *Parmley*, *supra*, at p. 648, RBH B.A., Vol. II, Tab 38, p. 768

⁶⁸ *Ibid.*, RBH B.A., Vol. II, Tab 38, p. 768; See also: *Knight* (SC 2007), *supra*, at para. 60, A.R., p. 24.

⁶⁹ *Tobacco Act*, S.C. 1997, c. 13, A.B.A., Vol. V, Tab 75, p. 29.

that regulatory standards did not remove the manufacturers' common law obligations to consumers. Section 16 provides:

This Part does not affect any obligation of a manufacturer or retailer at law or under an Act of Parliament or of a provincial legislature to warn consumers of the health hazards and health effects arising from the use of tobacco products or from their emissions.⁷⁰

58. For these reasons, Hall J.A. correctly concluded:

... if Canada through its agents had been specifically asked or a suggestion had been made to its agents by representatives of the appellants that Canada might in future be liable for any such responsibility or incur such a liability, the answer would have been firmly in the negative.⁷¹

59. The foregoing also meets the cross-appellants' suggestion that the Court of Appeal's finding of foreseeability as an element of the negligence claim undermines its conclusion that there is no foundation for an implied promise to indemnify.⁷² The loss in question in *Parmley* was arguably foreseeable, but the Court nonetheless examined the circumstances for some indication of a basis for a promise to indemnify to be implied. If foreseeability alone were the foundation for an implied promise to indemnify, the scope of this doctrine would be vast, and requests would routinely give rise to an arguable case for equitable indemnity. This Court's decision in *Parmley* makes it clear that the principle is not capable of such a wide and potentially unlimited application.

60. The cases relied on by the cross-appellant are not similar to the present case. One is an old case dealing with promissory notes that reflects the law merchant of the British Empire and Commonwealth,⁷³ the others involve directions to seize property given to a bailiff and sheriff by

⁷⁰ *Ibid.*, s. 16, A.B.A., Vol. V, Tab 75, p. 38.

⁷¹ *British Columbia v. Imperial Tobacco Ltd.*, *supra*, (BCCA), at para. 57, A.R., p. 24.

⁷² RBH Cross-Appeal Factum, at paras. 110-11.

⁷³ *Secretary of State for India v. Bank of India Ltd.*, [1938] 2 All E.R. 797 (P.C.), RBH B.A., Vol. III, Tab 49, p. 981 (defendant bank asked plaintiff government to renew promissory note, neither aware that note had been fraudulently endorsed by broker).

the defendant arising out of debt.⁷⁴ Those cases do not involve a government requesting or directing a manufacturer to comply with governmental policies or regulations.

61. It would be inappropriate to expand the rather arcane law of equitable indemnity to provide a means for parties who sue government in tort to advance an alternate route to preserve their action even if these claims in tort failed under the *Anns/Cooper* test. If such claims fail to satisfy the requirements of tort based upon the absence of proximity or "Stage II" policy considerations, the same concerns underlying the tort analysis should limit the expansion of this cause of action. For example, where, as here, government is alleged to have directed or induced persons or entities to comply with regulatory or policy initiatives, to imply an obligation for government to indemnify such persons incurring tort liability to third parties would create potentially indeterminate liability for government in all such dealings with regulated persons or entities.⁷⁵ As the Chambers Judge at para. 64:

... it would be inconsistent to find that Canada bears no duty of care to either the plaintiffs or Imperial for the passing of regulatory controls that Imperial claims caused it harm, and also to find that Canada could be liable to indemnify Imperial for any damages it may suffer.

62. For the foregoing reasons, it is submitted that the Court of Appeal committed no error in striking out the claim for equitable indemnity.

D. Declaratory Relief

63. A final issue is whether, if all of the monetary claims are struck out, the claims for declaratory relief may nonetheless proceed. For the reasons set out in Canada's reply to the cross-appellants in *Costs Recovery*, it is submitted that the declaratory relief claim should fail with the claims associated with them.

⁷⁴ See: RBH Cross-Appeal Factum at paras. 103-104, citing *Rawlins v. Monsour* (1978), 88 D.L.R. (3d) 601 (Ont. C.A.), RBH B.A., Vol. III, Tab 41, p. 793 and *Robertson v. Taylor* (1901), 4 Terr. L.R. 474 (N.W.T.S.C.), rev'd (1901), 31 S.C.R. 615, RBH B.A., Vol. III, Tab 44, p. 883.

⁷⁵ *Knight* (SC 2007), *supra*, at para. 64, A.R., p. 25.

PART IV – COSTS

64. The appellant seeks its costs of this appeal and in the courts below.

PART V – ORDER SOUGHT

65. The appellant seeks an order striking out the third party notice in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Dated at Ottawa, this 28th day of January, 2011.

Paul Vickery

John S. Tyhurst

Of Counsel for the Appellant/Respondent on Cross-Appeal

PART VI – ALPHABETICAL TABLE OF AUTHORITIES

<i>Cases</i>	<i>Paragraph(s)</i>
<i>AGT v. CRTC</i> , [1989] 2 S.C.R. 22527
<i>British Columbia v. Imperial Tobacco Ltd.</i> , 2009 BCCA 540 14, 54, 58
<i>Knight v. Imperial Tobacco Canada Limited</i> , 2007 BCSC 96436, 41, 61
<i>Knight v. Imperial Tobacco</i> , 2009 BCCA 5418, 9, 10, 12, 14, 15, 26 27, 30, 31
<i>Parmley v. Parmley</i> , [1945] S.C.R. 63552, 55, 56
<i>The Queen v. Breton</i> (1967), 65 D.L.R. (3d) 76 (S.C.C.)39
<i>Queen v. Cognos</i> , [1993] 1 S.C.R. 8738
<i>R. v. Sunner</i> (1977), 4 B.C.L.R. 27230
<i>Reference re: Goods and Services Tax</i> , [1992] 2 S.C.R. 44552
<i>Secretary of State for India v. Bank of India Ltd.</i> , [1938] 2 All E.R. 797 (P.C)60
 <i>Texts</i>	
P. Hogg and P. Monahan, <i>Liability of the Crown</i> , 3 rd ed. (York University, Ont.: Carswell, 2000),39, 40, 42
See E. Belobaba, “Unfair Trade practices Legislation: Symbolism and Substance in Consumer Protection” (1977) 15(2) <i>Osgoode Hall L.J.</i> 32741
 <i>Statutes and Regulations</i>	
<i>The Business Practices and Consumer Protection Act</i> , S.B.C. 2004, c. 28, 11, 30, 37
<i>Crown Liability and Proceedings Act</i> , R.S.C. 1985, c. C-5035
<i>Tobacco Act</i> , S.C. 1997, c. 13, s. 1656, 57
<i>Tobacco Products Control Act</i> , S.C. 1988, c. 2019
<i>The Trade Practices Act</i> , R.S.B.C. 1996, c. 4578, 30, 37

PART VII

STATUTES AND REGULATIONS (*extracts*)

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IMPORTANT INFORMATION

This Act is current to January 30, 2008.

This Act has "Not In Force" sections. See the Table of Legislative Changes.

INTERPRETATION ACT
[RSBC 1996] CHAPTER 238

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- 10 The enacting clause of an Act of the Legislature may be in the following form: "Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:".

Reference aids and clarifications

- 11 (1) In an enactment, a head note to a provision or a reference after the end of a section or other division
- (a) is not part of the enactment, and
 - (b) must be considered to have been added editorially for convenience of reference only.
- (2) In an enactment, if a reference to a provision of the enactment or any other enactment is followed by italicized text in square brackets that is or purports to be descriptive of the subject matter of the provision, subsection (1) (a) and (b) applies to the text in square brackets.
- (3) The Lieutenant Governor in Council may make regulations amending an enactment for the purpose of changing a reference to a specific minister or ministry in a provision of the enactment to the minister or ministry, as applicable, currently assigned responsibility in relation to the matter.

Definitions and interpretation provisions

- 12 Definitions or interpretation provisions in an enactment, unless the contrary intention appears in the enactment, apply to the whole enactment including the section containing a definition or interpretation provision.

Application of expressions in enactments to regulations

- 13 An expression used in a regulation has the same meaning as in the enactment authorizing the regulation.

Government bound by enactments; exception

- 14 (1) Unless it specifically provides otherwise, an enactment is binding on the government.
- (2) Despite subsection (1), an enactment that would bind or affect the government in the use or development of land, or in the planning, construction, alteration, servicing, maintenance or use of improvements, as defined in the *Assessment Act*, does not bind or affect the government.

corporations.

(3) In an enactment words in the singular include the plural, and words in the plural include the singular.

(4) If a word or expression is defined in an enactment, other parts of speech and grammatical forms of the same word or expression have corresponding meanings.

Expressions defined

29 In an enactment:

"acquire" means to obtain by any method and includes accept, receive, purchase, be vested with, lease, take possession, control or occupation of, and agree to do any of those things, but does not include expropriate;

"affidavit" or **"oath"** includes an affirmation, a statutory declaration, or a solemn declaration made under the *Evidence Act*, or under the *Canada Evidence Act*; and the word **"swear"** includes solemnly declare or affirm;

"bank" or **"chartered bank"** means a bank to which the *Bank Act* (Canada) applies;

"barrister" or **"solicitor"** or **"barrister and solicitor"** means a practising lawyer as defined in section 1 (1) of the *Legal Profession Act*;

"British Columbia land surveyor" means a person entitled to practise as a land surveyor under the *Land Surveyors Act*;

[**"calendar year"**, see **"year"**]

[**"Canada"**, see **"government of Canada"**]

"Cascade Mountains" means the line described in the Schedule to this Act;

[**"chartered bank"**, see **"bank"**]

[**"civil engineer"**, see **"professional engineer"**]

"commencement", with reference to an enactment, means the date on which the enactment comes into force;

"commercial paper" includes a bill of exchange, cheque, promissory note, negotiable instrument, conditional sale agreement, lien note, hire purchase agreement, chattel mortgage, bill of lading, bill of sale, warehouse receipt, guarantee, instrument of assignment, things in action and any document of title that passes

ownership or possession and on which credit can be raised;

**"consolidated revenue fund", "consolidated revenue" or
"consolidated revenue fund of the Province"** means the
consolidated revenue fund of British Columbia;

"corporation" means an incorporated association, company, society,
municipality or other incorporated body, where and however
incorporated, and includes a corporation sole other than Her
Majesty or the Lieutenant Governor;

"correctional centre" means a correctional centre under the
Correction Act;

"county" means a county constituted and defined in the *County
Boundary Act*;

"Court of Appeal" means the court continued by the *Court of Appeal
Act*;

"credit union" means a credit union or extraprovincial credit union
authorized to carry on business under the *Financial Institutions
Act*;

"Criminal Code" means the *Criminal Code* (Canada);

["Crown, the", see "Her Majesty"]

"deliver", with reference to a notice or other document, includes mail
to or leave with a person, or deposit in a person's mail box or
receptacle at the person's residence or place of business;

"Deputy Provincial Secretary" includes the Deputy Provincial
Secretary and Deputy Minister of Government Services;

"dispose" means to transfer by any method and includes assign, give,
sell, grant, charge, convey, bequeath, devise, lease, divest,
release and agree to do any of those things;

"electoral district" means an electoral district referred to in section 18
of the *Constitution Act*;

"Executive Council" means the Executive Council appointed under the
Constitution Act;

"Gazette" means The British Columbia Gazette published by the
Queen's Printer of British Columbia;

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

"government agent" means a person appointed under the *Public*

Service Act as a government agent;

"government of Canada" or "Canada" means Her Majesty in right of Canada or Canada, as the context requires;

"Governor", "Governor of Canada" or "Governor General" means the Governor General of Canada and includes the Administrator of Canada;

"Governor in Council" or "Governor General in Council" means the Governor General acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Queen's Privy Council for Canada;

"Great Seal" means the Great Seal of the Province;

"herein" used in a section or part of an enactment must be construed as referring to the whole enactment and not to that section or part only;

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

"holiday" includes

(a) Sunday, Christmas Day, Good Friday and Easter Monday,

(b) Canada Day, Victoria Day, British Columbia Day, Labour Day, Remembrance Day and New Year's Day,

(c) December 26, and

(d) a day set by the Parliament of Canada or by the Legislature, or appointed by proclamation of the Governor General or the Lieutenant Governor, to be observed as a day of general prayer or mourning, a day of public rejoicing or thanksgiving, a day for celebrating the birthday of the reigning Sovereign, or as a public holiday;

"insurance company" means

(a) an insurance company, or

(b) an extraprovincial insurance corporation

authorized to carry on insurance business under the *Financial Institutions Act*;

"judicial district" means a judicial district defined in the *Supreme Court Act*;

"justice" means a justice of the peace and includes a judge of the Provincial Court;

["King, the", see "Her Majesty"]

"land" includes any interest in land, including any right, title or estate in it of any tenure, with all buildings and houses, unless there are words to exclude buildings and houses, or to restrict the meaning;

"land title legislation", prior to October 31, 1979 means the *Land Registry Act* and after October 30, 1979 means the *Land Title Act*;

"lawyer" means a practising lawyer as defined in section 1 (1) of the *Legal Profession Act*;

"Legislative Assembly" means the Legislative Assembly of British Columbia constituted under the *Constitution Act*;

"Legislature" means the Lieutenant Governor acting by and with the advice and consent of the Legislative Assembly;

"Lieutenant Governor" means the Lieutenant Governor of British Columbia and includes the Administrator of British Columbia;

"Lieutenant Governor in Council" means the Lieutenant Governor acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Executive Council;

"mail" refers to the deposit of the matter to which the context applies in the Canada Post Office at any place in Canada, postage prepaid, for transmission by post, and includes deliver;

"may" is to be construed as permissive and empowering;

"medical practitioner" means a person entitled to practise under the *Medical Practitioners Act*;

"mentally disordered person", "mentally incompetent person", "mentally ill person", or "person with a mental disorder" means a person with a mental disorder as defined in section 1 of the *Mental Health Act*;

["mining engineer", see "professional engineer"]

"minister" means that member of the Executive Council charged by order of the Lieutenant Governor in Council with the administration of the enactment;

"minor" means a person under the age of majority;

"month" means a period calculated from a day in one month to a day

numerically corresponding to that day in the following month, less one day;

"municipality" means, as applicable,

(a) the corporation into which the residents of an area are incorporated as a municipality under the *Local Government Act*, the *Vancouver Charter* or any other Act, or

(b) the geographic area of the municipal corporation;

"must" is to be construed as imperative;

"newspaper", in a provision requiring publication in a newspaper, means a printed publication in sheet form, intended for general circulation, published regularly at intervals of not longer than a week, consisting in great part of news of current events of general interest;

"now" must be construed as referring to the time of commencement of the enactment containing the word;

[**"oath"**, see **"affidavit"**]

"obligation" includes a duty and a liability;

"peace officer" includes

(a) a mayor, sheriff and sheriff's officer,

(b) a warden, correctional officer, and any other officer or permanent employee of a penitentiary, prison, correctional centre or youth custody centre, and

(c) a police officer, police constable, constable or other person employed for the preservation and maintenance of the public peace;

"person" includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law;

"personal representative" includes an executor of a will and an administrator with or without will annexed of an estate, and, if a personal representative is also a trustee of part or all of the estate, includes the personal representative and trustee;

"prescribed" means prescribed by regulation;

"proclamation" means a proclamation of the Lieutenant Governor under the Great Seal issued under an order of the Lieutenant Governor in Council;

"professional engineer", "civil engineer" or "mining engineer" or words implying recognition of any person as a professional engineer or member of the engineering profession means a person registered or licensed under the *Engineers and Geoscientists Act*;

"property" includes any right, title, interest, estate or claim to or in property;

"Province" means the Province of British Columbia or Her Majesty in right of British Columbia as the context requires;

"province", when used as meaning a part of Canada, includes the Northwest Territories, the Yukon Territory and Nunavut;

"Provincial Court" means the Provincial Court of British Columbia;

"Provincial Treasurer" or "Treasurer" means the Minister of Finance and includes the Deputy Minister of Finance;

"Provincial Treasury" or "Treasury" means the Ministry of Finance constituted under the *Financial Administration Act*;

[*"Queen, the", see "Her Majesty"*]

"Railway Belt" means the land on the mainland of British Columbia expressed to be granted to Canada by section 2 of chapter 14 of the Statutes of British Columbia, 1884;

"record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise;

"regional district" means a regional district as defined in the *Local Government Act*;

"registered mail" includes certified mail;

"registrar" of a court includes the clerk of the court;

"Registrar of Companies" means the person appointed to that office under the *Business Corporations Act*;

"Registrar of Titles" or "registrar" means the registrar of a land title district appointed to that office under the *Land Title Act*;

"right" includes a power, authority, privilege and licence;

"Rules of Court", when used in relation to a court, means rules made under

- (a) the *Court Rules Act*, or
- (b) under any other enactment that empowers the making of rules governing practice and procedure in that court;

"rural area" means territory that is not in a municipality;

"savings institution" means

- (a) a bank,
- (b) a credit union,
- (c) an extraprovincial trust corporation authorized to carry on deposit business under the *Financial Institutions Act*,
- (d) a corporation that is a subsidiary of a bank and is a loan company to which the *Trust and Loan Companies Act* (Canada) applies, or
- (e) the B.C. Community Financial Services Corporation established under the *Community Financial Services Act*;

"school district" means a school district as defined in the *School Act*;

"security" includes a security as defined in the *Securities Act*; [see also *"sureties"*]

"shall" is to be construed as imperative;

[*"solicitor"*, see *"barrister"*]

[*"Sovereign, the"*, see *"Her Majesty"*]

"Supreme Court" means the Supreme Court of British Columbia;

"sureties" means sufficient sureties, and **"security"** means sufficient security, and one person is sufficient for either unless otherwise expressly required;

[*"swear"*, see *"affidavit"*]

[*"Treasurer"*, see *"Provincial Treasurer"*]

[*"Treasury"*, see *"Provincial Treasury"*]

"Surveyor General" or "Surveyor General of British Columbia" means the Surveyor General appointed under the *Land Title and Survey Authority Act*;

"trust company" means

- (a) a trust company authorized under the *Financial Institutions Act* to carry on trust business, or
- (b) an extraprovincial trust corporation authorized under the

Financial Institutions Act to carry on trust business, deposit business or both;

"will" means a will as defined in the *Wills Act*;

"words" includes figures, punctuation marks, and typographical, monetary and mathematical symbols;

"writing", "written", or a term of similar import includes words printed, typewritten, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in visible form;

"year" means any period of 12 consecutive months; but a reference to a **"calendar year"** means a period of 12 consecutive months beginning on January 1, and a reference by number to a dominical year means a period of 12 consecutive months beginning on January 1 of that dominical year;

"youth custody centre" means a youth custody centre as defined in the *Youth Justice Act*.

Metric expressions

- 30 In an enactment, metric expressions and symbols have the meaning given to them in the *Weights and Measures Act* (Canada) and if not mentioned there, have the meaning given to them in the International System of Units established by the General Conference of Weights and Measures.

Common names

- 31 In an enactment, the name commonly applied to a country, place, body, corporation, society, officer, functionary, person, party or thing means the country, place, body, corporation, society, officer, functionary, person, party or thing to which the name is commonly applied, although the name is not the formal or extended designation of it.

Citation includes amendments

- 32 In an enactment a reference to another enactment of the Province or of Canada is a reference to the other enactment as amended, whether amended before or after the commencement of the enactment in which the reference occurs.

References in enactments

- 33 (1) A reference in an enactment to a series of numbers or letters by the first and last numbers or letters of the series includes the number or



CANADA

CONSOLIDATION

CODIFICATION

Crown Liability and Proceedings Act

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

CHAPTER C-50

CHAPITRE C-50

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Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50

Crown Liability and Proceedings — December 14, 2010

PART I		PARTIE I	
LIABILITY		RESPONSABILITÉ CIVILE	
LIABILITY AND CIVIL SALVAGE		RESPONSABILITÉ ET SAUVETAGES CIVILS	
Liability	<p>3. The Crown is liable for the damages for which, if it were a person, it would be liable</p> <p>(a) in the Province of Quebec, in respect of</p> <p>(i) the damage caused by the fault of a servant of the Crown, or</p> <p>(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and</p> <p>(b) in any other province, in respect of</p> <p>(i) a tort committed by a servant of the Crown, or</p> <p>(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.</p> <p>R.S., 1985, c. C-50, s. 3; 2001, c. 4, s. 36.</p>	<p>3. En matière de responsabilité, l'État est assimilé à une personne pour :</p> <p>a) dans la province de Québec :</p> <p>(i) le dommage causé par la faute de ses préposés,</p> <p>(ii) le dommage causé par le fait des biens qu'il a sous sa garde ou dont il est propriétaire ou par sa faute à l'un ou l'autre de ces titres;</p> <p>b) dans les autres provinces :</p> <p>(i) les délits civils commis par ses préposés,</p> <p>(ii) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.</p> <p>L.R. (1985), ch. C-50, art. 3; 2001, ch. 4, art. 36.</p>	Responsabilité
Motor vehicles	<p>4. The Crown is liable for the damage sustained by anyone by reason of a motor vehicle, owned by the Crown, on a highway, for which the Crown would be liable if it were a person.</p> <p>R.S., 1985, c. C-50, s. 4; 2001, c. 4, s. 37.</p>	<p>4. L'État est également assimilé à une personne pour ce qui est de sa responsabilité à l'égard du dommage que cause à autrui, sur une voie publique, un véhicule automobile lui appartenant.</p> <p>L.R. (1985), ch. C-50, art. 4; 2001, ch. 4, art. 37.</p>	Véhicules automobiles
Civil salvage	<p>5. (1) Subject to subsection (2), the law relating to civil salvage, whether of life or property, applies in relation to salvage services rendered in assisting any Crown ship or aircraft, or in saving life from a Crown ship or aircraft, or in saving any cargo or apparel belonging to the Crown, in the same manner as if the ship, aircraft, cargo or apparel belonged to a private person.</p>	<p>5. (1) Sous réserve du paragraphe (2), le droit régissant le sauvetage civil de personnes ou de biens s'applique aux services de sauvetage effectués pour prêter assistance à des navires ou aéronefs de l'État, ou aux personnes se trouvant à leur bord, ou pour sauver les cargaisons ou les accessoires de ces navires ou aéronefs, l'État étant assimilé à un particulier.</p>	Sauvetage civil
Claims in Federal Court	<p>(2) All claims against the Crown under subsection (1) shall be heard and determined by a judge of the Federal Court.</p> <p>R.S., 1985, c. C-50, s. 5; 2001, c. 4, s. 38, c. 26, s. 296.</p>	<p>(2) Les réclamations exercées contre l'État au titre du paragraphe (1) sont présentées à un juge de la Cour fédérale pour instruction et décision.</p> <p>L.R. (1985), ch. C-50, art. 5; 2001, ch. 4, art. 38, ch. 26, art. 296.</p>	Juridiction compétente
Limitation period for salvage proceedings	<p>6. [Repealed, 2001, c. 6, s. 113]</p> <p>7. (1) Section 145 of the <i>Canada Shipping Act, 2001</i> applies in respect of salvage services rendered to Crown ships or aircraft as it applies in respect of salvage services rendered to other ships or aircraft.</p>	<p>6. [Abrogé, 2001, ch. 6, art. 113]</p> <p>7. (1) L'article 145 de la <i>Loi de 2001 sur la marine marchande du Canada</i> s'applique à tous les services de sauvetage, qu'ils aient été rendus aux navires ou aéronefs de l'État ou à d'autres.</p>	Prescription en matière de sauvetage

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50

Responsabilité civile de l'État et contentieux administratif — 14 décembre 2010

	<p>(2) [Repealed, 2001, c. 6, s. 114]</p> <p>R.S., 1985, c. C-50, s. 7; 2001, c. 6, s. 114, c. 26, s. 298.</p>	<p>(2) [Abrogé, 2001, ch. 6, art. 114]</p> <p>L.R. (1985), ch. C-50, art. 7; 2001, ch. 6, art. 114, ch. 26, art. 298.</p>	
Saving in respect of prerogative and statutory powers	<p>8. Nothing in sections 3 to 7 makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute, and, in particular, but without restricting the generality of the foregoing, nothing in those sections makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces.</p> <p>R.S., c. C-38, s. 3.</p>	<p>8. Les articles 3 à 7 n'ont pas pour effet d'engager la responsabilité de l'État pour tout fait — acte ou omission — commis dans l'exercice d'un pouvoir qui, sans ces articles, s'exercerait au titre de la prérogative royale ou d'une disposition législative, et notamment pour les faits commis dans l'exercice d'un pouvoir dévolu à l'État, en temps de paix ou de guerre, pour la défense du Canada, l'instruction des Forces canadiennes ou le maintien de leur efficacité.</p> <p>S.R., ch. C-38, art. 3.</p>	Sauvegarde de la prérogative et des pouvoirs de l'État
	<p>SPECIAL PROVISIONS RESPECTING LIABILITY</p>	<p>DISPOSITIONS SPÉCIALES CONCERNANT LA RESPONSABILITÉ</p>	
No proceedings lie where pension payable	<p>9. No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.</p> <p>R.S., 1985, c. C-50, s. 9; 2001, c. 4, s. 39(F).</p>	<p>9. Ni l'État ni ses préposés ne sont susceptibles de poursuites pour toute perte — notamment décès, blessure ou dommage — ouvrant droit au paiement d'une pension ou indemnité sur le Trésor ou sur des fonds gérés par un organisme mandataire de l'État.</p> <p>L.R. (1985), ch. C-50, art. 9; 2001, ch. 4, art. 39(F).</p>	Incompatibilité entre recours et droit à une pension ou indemnité
Liability for acts of servants	<p>10. No proceedings lie against the Crown by virtue of subparagraph 3(a)(i) or (b)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.</p> <p>R.S., 1985, c. C-50, s. 10; 2001, c. 4, s. 40.</p>	<p>10. L'État ne peut être poursuivi, sur le fondement des sous-alinéas 3a)(i) ou b)(i), pour les actes ou omissions de ses préposés que lorsqu'il y a lieu en l'occurrence, compte non tenu de la présente loi, à une action en responsabilité contre leur auteur, ses représentants personnels ou sa succession.</p> <p>L.R. (1985), ch. C-50, art. 10; 2001, ch. 4, art. 40.</p>	Responsabilité quant aux actes de préposés
Motor vehicles	<p>11. No proceedings lie against the Crown by virtue of section 4 in respect of damage sustained by any person by reason of a motor vehicle on a highway unless the driver of the motor vehicle or the driver's personal representative or succession is liable for the damage so sustained.</p> <p>R.S., 1985, c. C-50, s. 11; 2001, c. 4, s. 40.</p>	<p>11. L'article 4 ne permet aucun recours contre l'État à l'égard du dommage causé par un véhicule automobile sur une voie publique sauf si le conducteur, l'un de ses représentants personnels ou sa succession en est responsable.</p> <p>L.R. (1985), ch. C-50, art. 11; 2001, ch. 4, art. 40.</p>	Véhicules automobiles
	<p>12. [Repealed, 1999, c. 31, s. 70]</p>	<p>12. [Abrogé, 1999, ch. 31, art. 70]</p>	

TRADE PRACTICE ACT

CHAPTER 457

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Definitions

1 In this Act:

"business premises" does not include a dwelling house;

"consumer" means an individual, other than a supplier, who participates in a consumer transaction, and includes a guarantor or donee of that individual;

“consumer transaction” means

- (a) a sale, lease, rental, assignment, award by chance or other disposition or supply of any kind of personal property to an individual for purposes that
 - (i) are primarily personal, family or household, or
 - (ii) relate to a business opportunity requiring both expenditure of money or property and personal services by that individual and in which the individual has not been previously engaged, or
- (b) a solicitation or promotion by a supplier with respect to a transaction referred to in paragraph (a);

“court” means

- (a) in relation to an action or application brought under section 18, the Supreme Court, and
- (b) in relation to other matters, any court of competent jurisdiction;

“director” means the Director of Trade Practices appointed by the minister, and includes a person authorized in writing by the director to perform any of the director's duties and exercise any of the director's powers under this Act;

“estimate” means a representation about the future price of a consumer transaction;

“interim injunction” includes an interlocutory injunction;

“media” means any means of communication and includes but is not limited to radio, television, billboards, newspapers, magazines, handbills, pamphlets and flyers;

“minister” includes a person designated in writing by the minister;

“personal property” means a right, title or interest in personal property, whether tangible or intangible and includes but is not limited to

- (a) chattels that are or are intended to be attached to real property on or after delivery,
- (b) services, and
- (c) credit, other than credit extended solely on the security of land,

but does not include securities as defined in the *Securities Act* or contracts of insurance under the *Insurance Act*;

“price” means the total obligation or consideration payable, given, undertaken or assumed by a consumer under a consumer transaction;

“representation” includes any term of a written contract or form of contract, notice or other document used or relied on by a supplier in connection with a consumer transaction;

"services" means services that are the subject of a consumer transaction, either together with, or separate from, any kind of personal property;

"supplier" means a person, other than a consumer, who in the course of the person's business solicits, offers, advertises or promotes the disposition or supply of the subject of a consumer transaction or who engages in, enforces or otherwise participates in a consumer transaction, whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of the supplier;

"unit" includes an identifiable part, portion or instalment of the entire consumer transaction or the consideration for or the subject matter of it.

Advertising

- 2 (1) A supplier who, on behalf of another person, prints, distributes, broadcasts, telecasts or otherwise publishes a deceptive or misleading advertisement is not liable under section 18, 22, or 25 if the supplier proves that the supplier
- (a) received the advertisement for printing, distributing, broadcasting, telecasting or otherwise publishing in the ordinary course of business, and
 - (b) did not know and had no reason to suspect that its publication would contravene this Act.
- (2) A person who accepts an advertisement for printing, distributing, broadcasting, telecasting or otherwise publishing in the ordinary course of the person's business must, for each advertisement, maintain a record of the name and address of the person who provides the advertisement.

Deceptive acts or practices

- 3 (1) For the purposes of this Act, a deceptive act or practice includes
- (a) an oral, written, visual, descriptive or other representation, including a failure to disclose, and
 - (b) any conduct
- having the capability, tendency or effect of deceiving or misleading a person.
- (2) A deceptive act or practice by a supplier in relation to a consumer transaction may occur before, during or after the consumer transaction.
- (3) Without limiting subsection (1), one or more of the following, however expressed, constitutes a deceptive act or practice:
- (a) a representation that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that it does not have;
 - (b) a representation that the supplier has a sponsorship, approval, status, affiliation or connection that the supplier does not have;
 - (c) a representation that the subject of a consumer transaction is of a particular standard, quality, grade, style or model if it is not;

- (c) an undertaking to reimburse to the consumers or class of consumers designated in the undertaking any money, property or other thing received from them in connection with a consumer transaction, including money necessarily spent in making and pursuing a complaint;
 - (d) an undertaking that consumer transactions involving the supplier and the consumers or class of consumers designated in the undertaking will be carried out by the supplier in accordance with terms and conditions specified in the undertaking;
 - (e) an undertaking to provide a bond in accordance with the *Bonding Act*;
 - (f) an undertaking to reimburse to the director the costs of any investigation, as certified by the minister;
 - (g) requirements for the form, content and maintenance of trust accounts, records, contracts, advertisements or other documents or papers respecting consumer transactions engaged in by the supplier.
- (3) The director may terminate an investigation or proceeding on the acceptance of a written undertaking or assurance from a supplier under subsection (1) if
- (a) an investigation of the supplier has been ordered under section 10, or
 - (b) enforcement proceedings have been commenced by the director under section 18.

Actions and proceedings

- 18 (1) In an action brought by the director, or any other person whether or not that person has a special, or any, interest under this Act or the regulations, or is affected by a consumer transaction, the court may grant either or both of the following:
- (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction is a deceptive or unconscionable act or practice;
 - (b) an interim or permanent injunction restraining a supplier from engaging or attempting to engage in a deceptive or unconscionable act or practice in respect of a consumer transaction.
- (2) If the court grants relief under subsection (1) it may make a further order requiring the supplier to advertise to the public in the media in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions the court considers reasonable and just, particulars of any judgment, declaration, order or injunction granted against the supplier under subsection (1) (a) or (b) or subsection (4).
- (3) In an action under subsection (1), any person, including the director, may sue on the person's own behalf and, at the person's option, on behalf of consumers generally, or a designated class of consumers, in British Columbia.

- (4) In an action for a permanent injunction under subsection (1) (b), the court may restore to any person who has an interest in it any money or property that may have been acquired because of a deceptive or unconscionable act or practice by the supplier.
- (5) In an action brought by the director under subsection (1) (a) or (b), the court may award to the director costs, or a reasonable proportion of them, of the investigation of a supplier conducted under this Act.
- (6) The director may apply, without notice to anyone, for an interim injunction under subsection (1) (b), and, if the court is satisfied that there are reasonable and probable grounds for believing there is an immediate threat to the interests of persons dealing with the supplier because of an alleged deceptive or unconscionable act or practice in respect of a consumer transaction, the court must grant an interim injunction on the terms and conditions it considers just.
- (7) In an action brought under this section, or in an appeal from it, the plaintiff is not required to provide security for costs.

Rules for interim injunctions

- 19 In any application under section 18 for an interim injunction, the following rules apply:
 - (a) the court must give greater weight, importance and the balance of convenience to the protection of consumers than to the carrying on of the business of a supplier;
 - (b) the director or any other person applying under that section is not required to post a bond or give an undertaking as to damages;
 - (c) the applicant need not establish that irreparable harm will be done to the applicant or all other consumers, or any designated class of consumers, in British Columbia, if the interim injunction is not granted.

Injunctions and orders not stayed on appeal

- 20 Despite any other Act, an appeal to the Court of Appeal does not stay an interim or permanent order or injunction made under section 18 (1) (b), or any other order made under this Act.

Notice to director

- 21 (1) In an action under section 18 commenced by a person other than the director, that person must serve the director with a copy of the writ of summons.
- (2) On being served under subsection (1), the director may, on application to the court, intervene in the action as a party, on the terms and conditions the court considers just.
- (3) The court may proceed with the action even though the director has not been served under subsection (1).

Section 22

Damages recoverable by consumer

- 22 (1) If a consumer has entered a consumer transaction involving a deceptive or unconscionable act or practice by a supplier, a court may, in an action in respect of the transaction, do one or more of the following:
- (a) award the consumer damages in the amount of any loss or damage suffered by the consumer because of the deceptive or unconscionable act or practice, including punitive or exemplary damages;
 - (b) make any order, including rescission of the transaction or restitution of any money, property or other consideration given or provided by the consumer;
 - (c) subject to section 4 (4), impose other terms the court considers just.
- (2) Subject to the monetary jurisdiction specified in the *Small Claims Act*, the Provincial Court of British Columbia has concurrent jurisdiction for the purposes of this section.
- (3) A consumer must not commence an action claiming relief under subsection (1) if the consumer or a person on the consumer's behalf has made application to the court in respect of the same defendant and transaction under section 26.

Conclusive proof

- 23 If an act or practice of a supplier has been declared or permanently enjoined by a court as being a deceptive or unconscionable act or practice under section 18, the order is, in any other civil proceeding involving the supplier except an appeal from the order, conclusive proof that the act or practice in question is deceptive or unconscionable.

Substitute action of director

- 24 (1) The director may, on behalf of a consumer, commence or assume the conduct of proceedings, defend any proceedings brought against the consumer, with a view to enforcing or protecting the rights of the consumer respecting a contravention or suspected contravention of those rights or of any enactment or law relating to the protection or interests of consumers if the director is satisfied that
- (a) the consumer has
 - (i) a cause of action,
 - (ii) a defence to an action,
 - (iii) grounds for setting aside a default judgment, or
 - (iv) grounds for an appeal or to contest an appeal,
- and
- (b) it is in the public interest.
- (2) The director must not commence, assume the conduct of or defend any proceedings under subsection (1) without first obtaining
- (a) an irrevocable written consent of the consumer, and
 - (b) the written consent of the minister.

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IMPORTANT INFORMATION

This Act is Current to October 6, 2010.

BUSINESS PRACTICES AND CONSUMER PROTECTION ACT
[SBC 2004] CHAPTER 2

Assented to March 31, 2004

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This Act is current to October 6, 2010.

BUSINESS PRACTICES AND CONSUMER PROTECTION ACT

[SBC 2004] CHAPTER 2

Part 1 — Definitions and Application

Definitions

1 (1) In this Act:

"administrative authority" means the Business Practices and Consumer Protection Authority established under the *Business Practices and Consumer Protection Authority Act*;

"administrative penalty" means a penalty imposed under section 164;

"associate", if used to indicate a relationship with a person, means

(a) a spouse, parent, child, sibling or business partner of the person, or

(b) a corporation of which a sufficient number of shares to elect a majority of the corporation's directors is beneficially owned, directly or indirectly, by

(i) the person,

(ii) one or more of the persons referred to in paragraph (a), or

(iii) the person and one or more of the persons referred to in paragraph (a);

"compensation fund" means a compensation fund established under section 130 or the Travel Assurance Fund continued under section 130;

"compliance order" means an order issued under section 155 by an inspector;

"consumer" means an individual, whether in British Columbia or not, who participates in a consumer transaction, but does not include a guarantor;

"Consumer Advancement Fund" means the Consumer Advancement Fund established under section 139;

"consumer transaction" means

(a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or

(b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a),

and, except in Parts 4 and 5, includes a solicitation of a consumer by a supplier for a contribution of money or other property by the consumer;

"direct sales prohibition order" means an order issued under section 156 by the director;

"director", except in reference to a director of a corporation, means, subject to the restrictions specified in a designation, the individual or administrative authority designated under section 175 as director;

"goods" means personal property, fixtures, credit and prepaid purchase cards, but does not include a security as defined in the *Securities Act* or contracts of insurance under the *Insurance Act*;

"goods or services" means goods or services or both;

"inspector" means the director or a person designated as an inspector under section 176;

"licence" means a licence issued under section 145 and includes a renewal of the licence;

"payday loan" has the meaning given to it in section 112.01
[definitions];

"prepaid purchase card" has the meaning given to it in section 56.1
[definitions];

"private dwelling" means a

(a) a structure that is occupied as a private residence, or

(b) if only part of a structure is occupied as a private residence, that part of the structure;

"property freezing order" means an order made under section 159 (2) by the director;

"publish" means make public in any manner, including by or through any media;

"services" means services, whether or not the services are together with or separate from goods, and includes a membership in a club or organization;

"supplier" means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by

(a) supplying goods or services or real property to a consumer, or

(b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",

whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person and, except in Parts 3 to 5 [*Rights of Assignees and Guarantors Respecting Consumer Credit; Consumer Contracts; Disclosure of the Cost of Consumer Credit*], includes a person who solicits a consumer for a contribution of money or other property by the consumer;

"supply" includes, in respect of the supply of goods or services or real property to a consumer, a sale, lease, assignment, award by chance or other disposition;

"time share contract" means a contract by which the consumer acquires the right to use property, whether or not the property is located in British Columbia,

(a) for a period of time each year or other interval, and

(b) as part of a plan that provides for the use of the property to circulate, in any year or other interval, among persons participating in the plan,

but does not include a time share plan as defined in the *Real Estate Development Marketing Act*;

"total cost of credit" has the meaning given to it in section 57
[definitions];

"total price" means the total obligation or amount that is payable,
given, undertaken or assumed by a consumer under a consumer
transaction;

"undertaking" means an undertaking accepted under section 154 by the
director.

(2) Subject to subsection (3), the definitions in the *Cremation, Interment
and Funeral Services Act*, except where a contrary definition is set out in
this Act or the regulations, apply to this Act.

(3) The definition of "register" in the *Cremation, Interment and Funeral
Services Act* does not apply to this Act.

Application of this Act

2 (1) Parts 6 [*Credit Reporting*] and 7 [*Debt Collection*] apply to
transactions, matters or things, regardless of whether they involve a
consumer.

(2) Except for the following, this Act does not apply to a sale, lease,
mortgage of or charge on land or a chattel real:

(a) Parts 2 [*Unfair Practices*] and 5 [*Disclosure of the Cost of
Consumer Credit*];

(b) section 3 and Parts 3 [*Rights of Assignees and Guarantors
Respecting Consumer Credit*], 8 to 10 [*Compensation Funds
and Consumer Advancement Fund; Licences; Inspections and
Enforcement*], 13 [*Offences and Penalties*] and 14
[*Regulations*], as those Parts relate to Parts 2 and 5.

Waiver or release void except as permitted

3 Any waiver or release by a person of the person's rights, benefits or
protections under this Act is void except to the extent that the waiver or
release is expressly permitted by this Act.

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This Act is Current to October 6, 2010

BUSINESS PRACTICES AND CONSUMER PROTECTION ACT

[SBC 2004] CHAPTER 2

Part 2 — Unfair Practices

Division 1 — Deceptive Acts or Practices

Deceptive acts or practices

4 (1) In this Division:

"deceptive act or practice" means, in relation to a consumer transaction,

- (a) an oral, written, visual, descriptive or other representation by a supplier, or
- (b) any conduct by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

"representation" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.

(2) A deceptive act or practice by a supplier may occur before, during or after the consumer transaction.

(3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:

- (a) a representation by a supplier that goods or services
 - (i) have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have,
 - (ii) are of a particular standard, quality, grade, style or model if they are not,

- (iii) have a particular prior history or usage that they do not have, including a representation that they are new if they are not,
 - (iv) are available for a reason that differs from the fact,
 - (v) are available if they are not available as represented,
 - (vi) were available in accordance with a previous representation if they were not,
 - (vii) are available in quantities greater than is the fact, or
 - (viii) will be supplied within a stated period if the supplier knows or ought to know that they will not;
- (b) a representation by a supplier
- (i) that the supplier has a sponsorship, approval, status, affiliation or connection that the supplier does not have,
 - (ii) that a service, part, replacement or repair is needed if it is not,
 - (iii) that the purpose or intent of a solicitation of, or a communication with, a consumer by a supplier is for a purpose or intent that differs from the fact,
 - (iv) that a consumer transaction involves or does not involve rights, remedies or obligations that differs from the fact,
 - (v) about the authority of a representative, employee or agent to negotiate the final terms of a consumer transaction if the representation differs from the fact,
 - (vi) that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading,
 - (vii) that a consumer will obtain a benefit for helping the supplier to find other potential customers if it is unlikely that the consumer will obtain the benefit,
 - (viii) that appears in an objective form such as an editorial, documentary or scientific report if the representation is primarily made to sell goods or services, unless the representation states that it is an advertisement or promotion, or
 - (ix) to arrange for the consumer an extension of credit for a fee, unless the fee is deducted from the advance, as defined in section 57 [definitions];

(c) a representation by a supplier about the total price of goods or services if

(i) a person could reasonably conclude that a price benefit or advantage exists but it does not,

(ii) the price of a unit or instalment is given in the representation, and the total price of the goods or services is not given at least the same prominence, or

(iii) the supplier's estimate of the price is materially less than the price subsequently determined or demanded by the supplier unless the consumer has expressly consented to the higher price before the goods or services are supplied;

(d) a prescribed act or practice.

Prohibition and burden of proof

5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.

(2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

Advertising

6 (1) In this section, "**advertiser**" means a supplier who publishes advertisements.

(2) An advertiser who, on behalf of another supplier, publishes a deceptive or misleading advertisement is not liable under section 171 *[damages recoverable]*, 172 *[court actions respecting consumer transactions]* or 189 *[offences]* if the advertiser proves that the advertiser did not know and had no reason to suspect that its publication would contravene section 5.

(3) An advertiser, for each advertisement accepted, must maintain a record of the name and address of the supplier who provides the advertisement.

Division 2 — Unconscionable Acts or Practices

Application of this Division

7 Nothing in this Division limits, restricts or derogates from a court's power or jurisdiction.

Damages recoverable

171 (1) Subject to subsection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a

- (a) supplier,
- (b) reporting agency, as defined in section 106 *[definitions]*,
- (c) collector, as defined in section 113 *[definitions]*,
- (d) bailiff, collection agent or debt pooler, as defined in section 125 *[definitions]*, or
- (e) a person required to hold a licence under Part 9 *[Licences]*

who engaged in or acquiesced in the contravention that caused the damage or loss.

(2) A person must not bring an action under this section if an application has been made, on the person's behalf, to the court in respect of the same defendant and transaction under section 192 *[compensation to consumers]*.

(3) The Provincial Court has jurisdiction for the purposes of this section, even though a contravention of this Act or the regulations may also constitute a libel or slander.

Court actions respecting consumer transactions

172 (1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:

- (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
- (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.

(2) If the director brings an action under subsection (1), the director may sue on the director's own behalf and, at the director's option, on behalf of consumers generally or a designated class of consumers.

(3) If the court grants relief under subsection (1), the court may order one or more of the following:

- (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;
 - (b) if the action is brought by the director, that the supplier pay to the director the actual costs, or a reasonable proportion of the costs, of the inspection of the supplier conducted under this Act;
 - (c) that the supplier advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section.
- (4) The director may apply, without notice to anyone, for an interim injunction under subsection (1) (b).
- (5) In an application for an interim injunction under subsection (1) (b),
- (a) the court must give greater weight and the balance of convenience to the protection of consumers than to the carrying on of the business of a supplier,
 - (b) the applicant is not required to post a bond or give an undertaking as to damages, and
 - (c) the applicant is not required to establish that irreparable harm will be done to the applicant, consumers generally or any class of consumers if the interim injunction is not granted.
- (6) If the director applies, without notice to anyone, for an interim injunction under subsection (1) (b), the court must grant the interim injunction, on the terms and conditions it considers just, if the court is satisfied that there are reasonable grounds for believing there is an immediate threat to the interests of consumers dealing with the supplier because of an alleged contravention of this Act or the regulations in respect of a consumer transaction.
- (7) In an action brought under subsection (1), or an appeal from it, the plaintiff is not required to provide security for costs.

Notice to director

173 (1) A person who

- (a) brings an action under section 171 [*damages recoverable*] must serve the director with,