

### **3A. BOXES 4-8: MAIN FEATURES OF ENABLING LEGISLATION**

While not all health-care cost recovery litigation has been based on legislation, there is general consensus that outside the United States, enabling legislation has made such litigation possible and viable. By conferring a direct cause of action on the government, Canada's enabling legislation has dramatically reduced the power imbalance between claimants and the tobacco industry, and the industry's capacity to deflect attention from their own conduct individual smokers.

The health care cost recovery enabling legislation of the Canadian Provinces was modelled on the laws passed by the first province to do so, British Columbia. Importantly, British Columbia's current legislation was held to be constitutionally valid by the Supreme Court of Canada. There are some material differences in the legislation, and some of the key ones are referred to below, but the legislation share common objectives – namely to facilitate tobacco related health care cost recovery by the government, and to make it easier for victims of smoking related disease to obtain compensation for tobacco related damage – and adopt very similar legal methods to achieve those ends.<sup>1</sup> The legislation of the Provinces has the following main features:

- a) Confers a direct cause of action on governments in relation to tobacco-related wrongs, and allows them to recover health-care costs for particular individuals who have received health-care benefits and treatment, or on an aggregate basis, or for a population of persons who have received health-care benefits and treatment as a result of exposure to tobacco.
- b) Defines the legal wrongs covered by the legislation, for which the industry will be liable if they are found to have committed them, and identifies the tobacco defendants potentially liable under the legislation, including those involved in the manufacturing, supply and marketing of tobacco products as well as those involved in lobbying on behalf of the industry.
- c) Provides that causation between a tobacco defendant's wrong and exposure to tobacco smoke, and exposure to tobacco and tobacco related disease, can be proved using statistical and sociological evidence (in some cases solely on the basis of this evidence).
- d) Identifies the burden and standard of proof, (including rebuttable legal presumptions in some cases) and what claimants must prove, and do not have to prove. In particular, in claims brought on a collective basis, no claimant is required to prove causation for any individual person, but provision is made to allow the defendant to access statistically meaningful samples of health care records and documents.
- e) Provides that defendants are jointly and severally liable if they jointly breached a duty ("tobacco-related wrong"), and at least one of them is held liable for the cost of the health-care benefits; and identify rights of contribution between defendants.
- f) Canadian enabling legislation also addresses many of obstacles faced by victims of smoking related disease seeking to claim compensation, both in individual proceedings or class actions. This includes reviving causes of action, and clarifying causation rules. These reforms are addressed in the toolkits on facilitating access to justice for victims of smoking related disease on a collective basis, and individually.

#### **Conferring a direct cause of action**

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<sup>1</sup> List each of the provinces that have enabling legislation and links to each Act.

Health care providers seeking to recover the costs associated with treatment of patients suffering conditions for which third parties are liable have historically confronted technical legal obstacles. These have included doubts as to whether the tortfeasor owes any legal obligation to the health care provider, and whether the damages are recoverable. For insurers rights of subrogation may be available (i.e. the insurer brings a claim on behalf of the patient), and US states have also devised restitutionary liability theories to pursue claims directly against tobacco manufacturers. However, the simplest solution would be to recognise that health care providers – both public and private – have a direct cause of action against tobacco manufacturers and suppliers.

Health care cost recovery enabling legislation confer rights of action on governments directly. For example, section 2 of Ontario's legislation states that:

#### **Direct action by Crown**

The Crown in right of Ontario has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong.

#### **Action not subrogated**

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

#### **Action independent of recovery by others**

In an action under subsection (1), the Crown in right of Ontario may recover the cost of health care benefits whether or not there has been any recovery by other persons who have suffered damage caused or contributed to by the tobacco related wrong committed by the defendant.<sup>2</sup>

Similarly, section 9 of the Quebec legislation states:

The Government has the right to recover directly, from one or more tobacco product manufacturers, tobacco-related health care costs caused or contributed to by a wrong committed by a tobacco product manufacturer, in particular, failure to inform the public of the risks and dangers posed by tobacco products.

This right is not a subrogated right. It belongs to the Government in its own right, and exists even if health care recipients or other persons have received damages for injury caused or contributed to by a wrong committed by a tobacco product manufacturer.<sup>3</sup>

An important limitation of these sections is that they do not confer a direct cause of action on *private health care insurers* as well as governments. This might be explained by the fact that in Canada private insurers are generally prohibited from insuring health care services provided by governments. However, given that many other countries deliver health care through a combination of both public and private providers, legislation that confers direct causes of action on private insurers will increase the total tobacco related health care costs that may be recoverable from the industry, and facilitate action by private organisations who have an obvious financial incentive in pursuing claims against the tobacco industry, and generally have sufficient resources to do it successfully. Accordingly Parties that have a significant private health insurance sector might consider conferring a direct a cause of action for tobacco related health care costs on private insurers as well as governments.

#### **Defining the wrongs and persons covered by the legislation**

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<sup>2</sup> Tobacco Damages and Health Care Cost Recovery Act 2009, s 2 (Ontario)

<sup>3</sup> Tobacco-related Damages and Health Care Costs Recovery Act 2009, s 9 (Quebec)

To avoid legal uncertainty, there is value in ensuring that any enabling legislation defines the civil wrongs that are covered by the legislation. For example, section 1 of Ontario's legislation states that:

“tobacco related wrong” means,

- (a) a tort committed in Ontario by a manufacturer which causes or contributes to tobacco related disease, or
- (b) in an action under subsection 2 (1) [action by the government], a breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons in Ontario who have been exposed or might become exposed to a tobacco product; (“faute d’un fabricant”)<sup>4</sup>

This section does not create any new torts (i.e. any retrospective legal obligations). It simply identifies the civil wrongs, breach of which entitles the government (or other persons) to claim the recovery of tobacco related health care costs.

For the same reason it is important to identify the tobacco defendants who are subject to the Act, and therefore potentially liable for tobacco related damage and health care costs. The legislation varies in the wording used but an overarching theme is that liability extends beyond manufacturers to include related companies, tobacco suppliers, those involved in marketing tobacco products and those organisation set up to lobby for the industry. For example, section 1 the British Columbian legislation defines ‘manufacturer’ as:

a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past

(a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,

(b) for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons,

(c) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or

(d) is a trade association primarily engaged in

(i) the advancement of the interests of manufacturers,

(ii) the promotion of a tobacco product, or

(iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product<sup>5</sup>

### **Proof of causation and quantum of damage using statistical evidence and sociological studies**

Traditionally courts have required each individual claimant establish that a specific defendant breached a legal duty to the claimant, and that this breach caused the claimant to suffer damage.

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<sup>4</sup> Tobacco Damages and Health Care Cost Recovery Act 2009, s 1 (Ontario).

<sup>5</sup> Tobacco Damages and Health Care Costs Recovery Act 2000, s 1 (British Columbia)

Causation in this context typically involves two questions: a) Was the defendant's civil wrongs *a cause* of a person or person starting or continuing to smoke?; and b) Was those persons exposure to tobacco smoke a cause of their disease?

A strong case can be made that proof of *both* these questions should be allowed solely through the use of statistical and sociological evidence.

On the question of the effect of the tobacco industry's behaviour, there is a large body of reliable evidence to suggest that the tobacco industry has successfully increased demand for tobacco products, and slowed the rate of decline in smoking prevalence, since the dangers of smoking were first publicly known and tobacco control measures were implemented. At a population level, there is compelling evidence, supported by considerable marketing, psychology, behavioural and econometric research, that the tobacco industry efforts to conceal research on the health risks of smoking, to undermine independent evidence and advice on the health risks including the warnings on tobacco packaging, and the marketing of tobacco products have causally contributed to greater rates of tobacco use than would have otherwise been the case. Much of this research is catalogued in the many U.S. Surgeon General reports dedicated to tobacco, and other authoritative reports of the National Cancer Institute, the Institute of Medicine.<sup>6</sup> For the purposes of establishing the legal liability of the industry, the research is also discussed in detail in the landmark 2006 judgment of Kessler J in *United States v Philip Morris et al.*<sup>7</sup>

The causal relationship between exposure to tobacco smoke and disease has been established by overwhelming evidence – which even the industry now publicly accepts,<sup>8</sup> despite privately acknowledging the reliability of the evidence decades ago.<sup>9</sup> This evidence extends to measuring the scale of tobacco related death and disease, which amounts to around 6 million deaths each year.<sup>10</sup> There are reliable modelling and techniques that can be used to estimate the costs of treating smoking related diseases in different countries. Importantly the underlying evidence about the relationship between tobacco exposure and disease is sufficiently clear, that it may be possible for econometricians to produce reliable models of the costs of treating smoking related diseases even in those countries that do not consistently record the causes of diseases suffered by individual patients. The WHO has developed a tool that provides step by step guidance for estimating health care and other economic costs from tobacco taking into account varying data availability, from the relatively limited data available in many lower income countries to the more complete data available in higher income countries. The tool is available online at:

[http://apps.who.int/iris/bitstream/10665/44596/1/9789241501576\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/44596/1/9789241501576_eng.pdf)

A compelling case can be made for allowing use of epidemiological evidence to prove causation in health-care cost recovery litigation without having to prove causation for each individual patient. This is because the causation question in health-care cost recovery litigation is precisely the same causation question to which epidemiology studies are directed: is tobacco a cause of certain illnesses and what percentage of those illnesses in a given population are attributable to tobacco use? Even if it were

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<sup>6</sup> See eg *The Health Consequences of Smoking – 50 Years of Progress* (2014); *Preventing Tobacco Use Amongst Youth and Young Adults* (2012); *Reducing Tobacco Use* (2000).

<sup>7</sup> *United States v Philip Morris USA, Inc. et al*, No. 99-2496 (Amended Final Opinion) 449 F.Supp.2d 1 (D.D.C. 2006).

<sup>8</sup> See eg statement of Philip Morris International, available at [http://www.pmi.com/eng/tobacco\\_regulation/smoking\\_and\\_health/pages/smoking\\_and\\_health.aspx](http://www.pmi.com/eng/tobacco_regulation/smoking_and_health/pages/smoking_and_health.aspx)

<sup>9</sup> Which has been well documented in studies of internal tobacco industry documents: see eg S Glantz, *The Cigarette Papers* (1996); R Proctor, *Golden Holocaust* (2012).

<sup>10</sup> The World Health Organization *Tobacco Fat Sheet* (2015), available at: <http://www.who.int/mediacentre/factsheets/fs339/en/>

possible to engage in a causation enquiry in relation to each individual patient, such an enquiry would involve prohibitive cost for both the parties and the court, and almost certainly produce the same answer as that derived from epidemiological evidence.

Both the issue of causation and quantification of damage are dealt with in tobacco health care cost recover legislation, though the procedures used vary.

For example, British Columbia's legislation expressly makes admissible 'Statistical information and information derived from epidemiological, sociological and other relevant studies, including information derived from sampling,' as evidence 'for the purposes of establishing causation and quantifying damages or the cost of health care benefits respecting a tobacco related wrong in an action brought.'<sup>11</sup> The legislation also provides a rebuttable presumption between tobacco manufacturer's breach and causation of damage.<sup>12</sup>

By contrast Quebec's legislation does not provide a rebuttable presumption but does allow causation of exposure to tobacco smoke and tobacco related disease to be proved *solely* through statistical and sociological evidence. Section 15 states:

*"In an action brought on a collective basis, proof of causation between alleged facts, in particular between the defendant's wrong or failure and the health care costs whose recovery is being sought, or between exposure to a tobacco product and the disease suffered by, or the general deterioration of health of, the recipients of that health care, may be established on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies, including information derived from a sampling."*<sup>13</sup>

### **Burden and standard of proof**

No tobacco specific enabling legislation that we are aware of reverses the burden of proof, however the legislation does clearly set out what the claimant is required to prove, the type of evidence by which it can prove it, the standard of proof required (the balance of probabilities) and what does not have to be proven by the claimant. Some legislation creates rebuttable legal presumptions. For example, under British Columbia's legislation, if the Government is able to prove that a tobacco defendant has committed a civil wrong, a court must presume that the tobacco defendant's breach caused exposure and disease (or increased the risk of disease) to a portion of the population, but the defendant can reduce the amount of their liability by proving on a balance of the probabilities that their breach did not cause exposure or the disease. Section 3 states:

### **Recovery of cost of health care benefits on aggregate basis**

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

- (a) the defendant breached a common law, equitable or statutory duty or obligation owed to persons in British Columbia who have been exposed or might become exposed to the type of tobacco product,
- (b) exposure to the type of tobacco product can cause or contribute to disease, and

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<sup>11</sup> Tobacco Damages and Health Care Costs Recovery Act 2000, s 5 (British Columbia)

<sup>12</sup> See burden and standard of proof section below.

<sup>13</sup> Tobacco-related Damages and Health Care Costs Recovery Act 2009, s 15 (Quebec).

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

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

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

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

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

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

(b) each defendant to which the presumptions apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product.

(4) The amount of a defendant's liability assessed under subsection (3) (b) may be reduced, or the proportions of liability assessed under subsection (3) (b) readjusted amongst the defendants, to the extent that a defendant proves, on a balance of probabilities, that the breach referred to in subsection (1) (a) did not cause or contribute to the exposure referred to in subsection (2) (a) or to the disease or risk of disease referred to in subsection (2) (b).

Quebec's legislation also adopts a presumption between breach and causation. Section 16 states that the Government must prove:

(1) the defendant failed in the duty to abide by the rules of conduct...in respect of persons in Québec who have been or might become exposed to the type of tobacco product;

(2) exposure to the type of tobacco product may cause or contribute to a disease or the general deterioration of a person's health; and

(3) the type of tobacco product manufactured by the defendant was offered for sale in Québec during all or part of the period of the failure.<sup>14</sup>

If the Government establishes these elements of proof then, pursuant to section 17, the court presumes:

(1) that the persons who were exposed to the type of tobacco product manufactured by the defendant would not have been exposed had the defendant not failed in its duty; and

(2) that the exposure to the type of tobacco product manufactured by the defendant caused or contributed to the disease or general deterioration of health, or the risk of disease or general deterioration of health, of a number of persons who were exposed to that type of product.<sup>15</sup>

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<sup>14</sup> Tobacco-related Damages and Health Care Costs Recovery Act 2009, s 16 (Quebec)

<sup>15</sup> Tobacco-related Damages and Health Care Costs Recovery Act 2009, s 17 (Quebec)

All enabling legislation expressly provides that in claims brought on a collective basis, the Government is not required to prove the cause of tobacco related disease in any particular individual, or prove the cost of health care benefits for any particular individual.

The legislation also exempts the disclosure of health care records and documents except as required by a law that requires the production of documents relied on by an expert witness. However, a defendant is permitted to apply for disclosure of a statistically meaningful sample of health care records and documents. This due process requirement allows tobacco defendants to meaningfully challenge the size of a claim for tobacco related health care costs.

### **Measure of liability and apportionment of damages between defendants**

The basic principle governing the apportionment of liability of tobacco defendants in health care cost recovery legislation is that of joint and several liability, although there are some important modifications to this principle.

In common with other jurisdictions, Ontario's legislation provides that a tobacco defendant will only be fully liable for the losses caused by other tobacco defendants if it is established that they jointly committed a tobacco related wrong, and at least one of them is held liable.<sup>16</sup> The joint commission of a tort is deemed to occur where one or more manufacturers, whether or not they are a defendant, are held to have committed a tobacco related wrong and those manufacturers would be held to have conspired with each other, or were in a principal agent relationship with respect to the wrong, or would be jointly or vicariously liable for the breach. A defendant who is held liable can commence contribution proceedings against other defendants, and in apportioning damages between defendants the court is entitled to take into account a range of factors including their market share and their culpability for the tobacco epidemic in Quebec.<sup>17</sup> The factors are:

- (a) the length of time a defendant engaged in the conduct that caused or contributed to the risk of disease;
- (b) the market share the defendant had in the type of tobacco product that caused or contributed to the risk of disease;
- (c) the degree of toxicity of any toxic substance in the type of tobacco product manufactured or promoted by a defendant;
- (d) the amount spent by a defendant on promoting the type of tobacco product that caused or contributed to the risk of disease;
- (e) the degree to which a defendant collaborated or acted in concert with other manufacturers in any conduct that caused, contributed to or aggravated the risk of disease;
- (f) the extent to which a defendant conducted tests and studies to determine the risk of disease resulting from exposure to the type of tobacco product;
- (g) the extent to which a defendant assumed a leadership role in manufacturing the type of tobacco product;
- (h) the efforts a defendant made to warn the public about the risk of disease resulting from exposure to the type of tobacco product;

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<sup>16</sup> Tobacco Damages and Health Care Costs Recovery Act 2009, s 4 (Ontario)

<sup>17</sup> Tobacco Damages and Health Care Costs Recovery Act 2009, s 8 (Ontario)

- (i) the extent to which a defendant continued manufacture or promotion of the type of tobacco product after it knew or ought to have known of the risk of disease resulting from exposure to the type of tobacco product;
- (j) affirmative steps that a defendant took to reduce the risk of disease to the public;
- (k) other considerations considered relevant by the court.<sup>18</sup>

The purpose of these rules is to hold tobacco defendants found liable for tobacco related wrongs fully accountable for the costs associated with the wrongs by the industry acting in concert or conspiring with each other to deceive the public, even if the defendant was acting as a local agent for an international tobacco company headquartered elsewhere. In such a scenario, it is incumbent on the defendant to seek contribution from other companies engaged in the conspiracy.

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<sup>18</sup> Tobacco Damages and Health Care Costs Recovery Act 2009, s 7 (Ontario)