

Tobacco Damages and Health-care Costs Recovery Act

CHAPTER 46 OF THE ACTS OF 2005



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**An Act to Recover Damages and Health-care Costs
from Manufacturers of Tobacco**

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Short title

1 This Act may be cited as the *Tobacco Damages and Health-care Costs Recovery Act*. 2005, c. 46, s. 1.

Interpretation

2 (1) In this Act,

(a) “cost of health-care benefits” means the sum of

(i) the present value of the total expenditure by Her Majesty in right of the Province for health-care benefits provided for insured persons resulting from tobacco-related disease or the risk of tobacco-related disease, and

(ii) the present value of the estimated total expenditure by Her Majesty in right of the Province for health-care benefits that could reasonably be expected will be provided for those insured persons resulting from tobacco-related disease or the risk of tobacco-related disease;

(b) “disease” includes general deterioration of health;

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

- (d) “health-care benefits” means
- (i) insured hospital services, insured professional services and the Insured Prescription Drug Plan under the *Health Services and Insurance Act*,
 - (ii) payments made by Her Majesty in right of the Province under the *Co-ordinated Home Care Act*, *Health Authorities Act*, *Homemakers’ Services Act*, *Homes for Special Care Act* or the *Social Assistance Act*, and
 - (iii) other expenditures, made directly or through one or more agents or other intermediate bodies, by Her Majesty in right of the Province for programs, services, benefits or similar matters associated with disease;
- (e) “insured person” means
- (i) a person, including a deceased person, for whom health-care benefits have been provided, or
 - (ii) a person for whom health-care benefits could reasonably be expected will be provided;
- (f) “joint venture” means an association of two or more persons, if
- (i) the relationship among the persons does not constitute a corporation, a partnership or a trust, and
 - (ii) the persons each have an undivided interest in assets of the association;
- (g) “manufacture” includes, for a tobacco product, the production, assembly or packaging of the tobacco product;
- (h) “manufacturer” means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past
- (i) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,
 - (ii) for any fiscal year of the person, derives at least ten per cent 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,
 - (iii) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or
 - (iv) is a trade association primarily engaged in

- (A) the advancement of the interests of manufacturers,
 - (B) the promotion of a tobacco product, or
 - (C) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;
 - (i) “person” includes a trust, joint venture or trade association;
 - (j) “promote” or “promotion” includes, for a tobacco product, the marketing, distribution or sale of the tobacco product and research with respect to the tobacco product;
 - (k) “tobacco product” means tobacco and any product that includes tobacco;
 - (l) “tobacco-related disease” means disease caused or contributed to by exposure to a tobacco product;
 - (m) “tobacco-related wrong” means
 - (i) a tort committed in the Province by a manufacturer that causes or contributes to tobacco-related disease, or
 - (ii) in an action under subsection 3(1), a breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons in the Province who have been exposed or might become exposed to a tobacco product;
 - (n) “type of tobacco product” means one or a combination of the following tobacco products:
 - (i) cigarettes,
 - (ii) loose tobacco intended for incorporation into cigarettes,
 - (iii) cigars,
 - (iv) cigarillos,
 - (v) pipe tobacco,
 - (vi) chewing tobacco,
 - (vii) nasal snuff,
 - (viii) oral snuff,
 - (ix) a prescribed form of tobacco.
- (2) The definition of “manufacturer” in subsection (1) does not include
- (a) an individual;
 - (b) a person who

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

(ii) is not related to

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

(B) a person described in paragraph (1)(h)(i); or

(c) a person who

(i) is a manufacturer only because paragraph (1)(h)(ii) or (iii) applies to the person, and

(ii) is not related to

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

(B) a person described in paragraph (1)(h)(i) or (iv).

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

(a) an affiliate, within the meaning of the *Companies Act*, of the other person; or

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

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

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

(i) carrying at least fifty per cent of the votes for the election of directors of the corporation and the votes carried by the shares are sufficient, where exercised, to elect a director of the corporation, or

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

(b) is a partnership, trust or joint venture and the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, has an ownership interest in the assets of that person that entitles the other person or group to receive at least fifty per cent of the profits or at least fifty per cent of

the assets on dissolution, winding up or termination of the partnership, trust or joint venture.

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

(6) For the purpose of determining the market share of a defendant for a type of tobacco product sold in the Province, the court shall calculate the defendant's market share for the type of tobacco product by the following formula:

$$dms = \frac{dm}{MM} \times 100\%$$

where

dms= the defendant's market share for the type of tobacco product from the date of the earliest tobacco-related wrong committed by that defendant to the date of trial;

dm= the quantity of the type of tobacco product manufactured or promoted by the defendant that is sold within the Province from the date of the earliest tobacco-related wrong committed by that defendant to the date of trial;

MM= the quantity of the type of tobacco product manufactured or promoted by all manufacturers that is sold within the Province from the date of the earliest tobacco-related wrong committed by the defendant to the date of trial. 2005, c. 46, s. 2.

Right of action

3 (1) Her Majesty in right of the Province has a direct and distinct action against a manufacturer to recover the cost of health-care benefits caused or contributed to by a tobacco-related wrong.

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

(3) In an action under subsection (1), Her Majesty in right of the Province may recover the cost of health-care benefits whether or not there has been

any recovery by other persons who have suffered damage caused or contributed to by the tobacco-related wrong committed by the defendant.

(4) In an action under subsection (1), Her Majesty in right of the Province may recover the cost of health-care benefits

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

(5) Where Her Majesty in right of the Province seeks in an action under subsection (1) to recover the cost of health-care benefits on an aggregate basis,

- (a) it is not necessary to
 - (i) identify particular individual insured persons,
 - (ii) prove the cause of tobacco-related disease in any particular individual insured person, or
 - (iii) prove the cost of health-care benefits for any particular individual insured person;
- (b) the health-care records and documents of particular individual insured persons or the documents relating to the provision of health-care benefits for particular individual insured persons are not compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness;
- (c) a person is not compellable to answer questions with respect to the health of, or the provision of health-care benefits for, particular individual insured persons;
- (d) notwithstanding clauses (b) and (c), on application by a defendant, the court may order discovery of a statistically meaningful sample of the documents referred to in clause (b) and the order must include directions concerning the nature, level of detail and type of information to be disclosed; and
- (e) where an order is made under clause (d), the identity of particular individual insured persons must not be disclosed and all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons must be deleted from any documents before the documents are disclosed. 2005, c. 46, s. 3.

Standard of proof and presumptions

4 (1) In an action under subsection 3(1) for the recovery of the cost of health-care benefits on an aggregate basis, subsection (2) applies if Her Majesty in right of the Province 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 the Province who have been exposed or might become exposed to the type of tobacco product;

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

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

(2) Subject to subsections (1) and (4), the court shall 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 clause (1)(a); and

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

(3) Where the presumptions under clauses (2)(a) and (b) apply,

(a) the court shall determine on an aggregate basis the cost of health-care benefits provided after the date of the breach referred to in clause (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 clause (a) equal to its market share for the type of tobacco product.

(4) The amount of a defendant's liability assessed under clause (3)(b) may be reduced, or the proportions of liability assessed under clause (3)(b) readjusted amongst the defendants, to the extent that a defendant proves, on a balance of probabilities, that the breach referred to in clause (1)(a) did not cause or contribute to the exposure referred to in clause (2)(a) or to the disease or risk of disease referred to in clause (2)(b). 2005, c. 46, s. 4.

Joint and several liability of defendants

5 (1) Two or more defendants in an action under subsection 3(1) are jointly and severally liable for the cost of health-care benefits if

(a) those defendants jointly breached a duty or obligation described in the definition of “tobacco-related wrong” in subsection 2(1); and

(b) as a consequence of the breach described in clause (a), at least one of those defendants is held liable in the action under subsection 3(1) for the cost of those health-care benefits.

(2) For purpose of an action under subsection 3(1), two or more manufacturers, whether or not they are defendants in the action, are deemed to have jointly breached a duty or obligation described in clause 2(1)(m) if

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

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

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

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

(iii) to be jointly or vicariously liable for the breach if damages would have been awarded to a person who suffered as a consequence of the breach. 2005, c. 46, s. 5.

Evidence

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

(a) by or on behalf of a person in the person's own name; or

(b) by Her Majesty in right of the Province under subsection 3(1).
2005, c. 46, s. 6.

Limitation periods not to apply to actions

7 (1) No action that is commenced within two years after the coming into force of this Section by

(a) Her Majesty in right of the Province;

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

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

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

(2) Any action described in subsection (1) for damages alleged to have been caused or contributed to by a tobacco-related wrong is revived if the action was dismissed before the coming into force of this Section merely because it

was held by a court to be barred or extinguished by the *Limitation of Actions Act* or a limitation period in any other enactment. 2005, c. 46, s. 7.

Apportionment of liability

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

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

(a) one or more defendants caused or contributed to a risk of disease by exposing persons to a type of tobacco product; and

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

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

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

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

(b) the market share the defendant had for 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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(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; and

(k) other factors considered relevant by the court. 2005, c. 46, s. 8.

Actions for contribution

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

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

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

(4) In an action or proceeding described in subsection (2), the court may apportion liability and order contribution among each of the defendants in accordance with the considerations listed in clauses 8(3)(a) to (k). 2005, c. 46, s. 9.

Regulations

10 (1) The Governor in Council may make regulations

(a) prescribing a form of tobacco for the purpose of sub-clause 2(1)(n)(ix);

(b) providing for administrative and procedural matters for which no express, or only partial, provision has been made;

(c) defining any word or expression used in this Act and not defined in this Act;

(d) respecting any matter or thing that the Governor in Council considers advisable or necessary to carry out effectively the intent and purpose of this Act.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the *Regulations Act*. 2005, c. 46, s. 10.

Retroactivity

11 When brought into force under Section 12, a provision of this Act has the retroactive effect necessary to give the provision full effect for all purposes including allowing an action to be brought under subsection 3(1) arising from a tobacco-related wrong, whenever the tobacco-related wrong occurred. 2005, c. 46, s. 11.

Effective date

12 This Act comes into force on such day as the Governor in Council orders and declares by proclamation. 2005, c. 46, s. 12.

Proclaimed - September 26, 2014
In force - September 26, 2014
