

T-1450-15

**FEDERAL COURT OF CANADA**

BETWEEN:

**RADU HOCIUNG**

Plaintiff

and

**MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

Defendant

**MOTION RECORD**

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Per: Eric Peterson  
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**TO:**

The Registrar  
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Suite 200  
Toronto, Ontario  
M5V 3L6

**AND TO:**

Radu Hociung  
226 Willowdale Avenue  
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**FEDERAL COURT OF CANADA**

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# **TAB 1**

T-1450-15

**FEDERAL COURT OF CANADA**

BETWEEN:

**RADU HOCIUNG**

Plaintiff

And

**MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

Defendant

**NOTICE OF MOTION**

**TAKE NOTICE THAT** the defendant will make a motion to the Court in writing pursuant to Rules 221 and 369 of the *Federal Courts Rules*.

**THE MOTION IS FOR:**

1. an Order striking the statement of claim in its entirety, without leave to amend;
2. Costs; and
3. Such other relief as counsel may advise and this Honourable Court deems just.

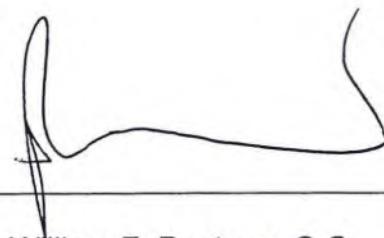
**THE GROUNDS FOR THE MOTION ARE:**

1. The statement of claim discloses no reasonable cause of action.
2. This Court's jurisdiction on an action made pursuant to section 135 of the Customs Act is limited to non-monetary relief.
3. Sections 129-135 of the *Customs Act*, R.S.C., 1985, c. 1 (2<sup>nd</sup> Supp.)
4. Rules 221 and 369 of the *Federal Court Rules*.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

1. The pleadings herein.

**DATE:** August 29, 2016



William F. Pentney, Q.C.  
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Per: Eric Peterson  
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# **TAB 2**



ACTION

(Court File No.)

FEDERAL COURT

Radu Hociung

Plaintiff

and

Minister of Public Safety and Emergency Preparedness

Defendant

**STATEMENT OF CLAIM**

**STATEMENT OF CLAIM TO THE DEFENDANT**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your

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statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

(Date)

AUG 28 2015

ORIGINAL SIGNED BY  
ANIL KAMAL  
A SIGNÉ L'ORIGINAL

Issued by: \_\_\_\_\_

(Registry Officer)

180 Queen Street West      180, rue Queen Ouest  
Suite 200      bureau 200  
Toronto, Ontario      Toronto, Ontario  
Address of local office:      M5V 3L6

TO: (Name and address of each defendant)

**CLAIM**

This is an Action pursuant section 135 of the Customs Act. Re Ministerial Decision CS-74472/4273-14-0724

1. The plaintiff, Radu Hociung, claims against the Defendant, Minister of Public Safety and Emergency Preparedness:
  - a) On October 21, 2014, the Plaintiff entered Canada at the Queenston Bridge point of entry. Upon entry, he declared all goods brought into Canada, namely a pair of auto tires, several tablets of Advil medication and a bottle of water. These goods were declared pursuant section 12 of the Customs Act, and are not in dispute in this Action.
  - b) The Plaintiff also had United States Currency, in form of four \$50 Gold Buffalo coins, and twenty \$1 Silver Eagles coins, issued by the United States Mint pursuant United Stated Code Title 31, sections 5112(a)(11) and 5112(e) respectively. USC Title 31 also declares these coins Legal Tender in sections 5103 and 5112(h).
  - c) Being under the prescribed amount of C\$10,000, the plaintiff did not declare the currency pursuant to Section 12 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA).
  - d) Upon a random secondary inspection, the CBSA officer Christopher DEBSKI (CBSA badge #11276) discovered the currency, and claimed it was unreported goods and thus would be seized and destroyed. This is unlawful, as currency cannot be used as anything other than currency, pursuant USC Title 31 Section 5111(d), as well as the Currency Act section 11. Both laws provide severe fine and imprisonment for any person melting or using otherwise than as currency any coin that is current and legal tender in Canada and the United States respectively.

- e) The Plaintiff informed officer Debski that the coins are United States legal tender currency issued by the United States government, and thus cannot be considered goods, but are financial instruments as defined by the Excise Tax Act. As such, they are not subject to declaration under the Customs Act, but under the PCMLTFA, subject to the prescribed amount requirement.
- f) Officer Debski's narrative report filed October 21, 2014 contains several material errors:
  - i. The officer requested the Plaintiff's WALLET, keys and passport, and coins not the "keys, passport, license, ownership and gold coins".
  - ii. As the Plaintiff turned the gold and silver currency to officer Debski, the officer asked "Where do you have so much money from?", to which the Plaintiff responded "It is my family's savings". This question and answer are not mentioned in the officer's narrative report.
  - iii. The officer threatened the Plaintiff with violence, raising his voice and saying three distinct times that "this is an arrestable offence", while assuming an aggressive posture with his gun prominently displayed. These threats were not mentioned in the narrative report.
  - iv. One of the questions the Plaintiff asked the officer was "How many such \$50 coins can I enter the country without declaring them under the PCMLTFA". The officer's answer was that there is no limit, and they need not be declared in accordance with PCMLTFA as long as they are declared under the Customs Act and the tax is paid. The officer omitted this question and his answer from his narrative report. His answer is incorrect, as bringing more than \$10,000 of currency into Canada would be required to be reported pursuant section 12 of the PCMLTFA.
- g) The GST/HST Memorandum 17.1 explicitly defines "financial instruments" to

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include precious metal coins that have been issued by a government authority, and clarifies that they are thus exempt from tax.

- h) Officer Debski was informed by the CBSA superintendent of the contents of GST/HST Memorandum 17.1 and the officer even quoted the Memorandum verbatim in his narrative report, while claiming the opposite of the Memorandum's intent, that currency is "goods".
- i) Officer Debski furnished an "Online rating Report" showing that coins that are not legal tender are subject to 13% GST/HST. This report is unlawful, as it misrepresents legal tender currency as "not legal tender coins" in order to justify a tax claim. The report was generated by CBSA officer #17097.
- j) Officer Debski decided that the sum of \$1606.97 must be paid as terms of release of the Plaintiff's currency.
- k) While he was aware of the GST/HST memorandum 17.1, which clearly states foreign precious metal currency is not subject to tax, officer Debski conspired with agent #17097 to commit fraud as defined by section 380 of the Criminal Code, R.S. C. 1985, c. C-46.
- l) Based on the interaction by officer Debski with the Plaintiff, it is clear that the officer:
  - i. Knew the coins are currency as he was requesting them to be turned over (question about the provenance of the money)
  - ii. Intended to confiscate the money under non-declaration section 12 of the PCMLTFA. For this he needed to establish either a reasonable suspicion of criminal provenance, as well as a sum exceeding \$10,000 (which is why he requested the wallet, in order to search for additional currency), without which arrest and confiscation could not be reasonably justified.
  - iii. Knew that the PCMLTFA applies to the coins, and not the Customs Act, when he threatened arrest. Arrest is not a possible outcome of violations of the

Customs Act, but it is an automatic outcome of violations of the PCMLTFA.

- iv. Willfully committed fraud by seizing and demanding payment for the return of currency, when he clearly understood that no violation of the Customs Act or the PCMLTFA had occurred.

m) On October 23, the Plaintiff started the process of a request for Minister's decision pursuant Customs Act section 129, seeking to overturn officer Debski's seizure on the grounds that currency is not subject to declaration under section 12 of the Customs Act, and thus the Plaintiff had not contravened the Act.

n) During the ensuing requests for additional documentation, the CBSA has made several false claims, misrepresenting the PCMLTFA

o) On November 3, 2014, A Kendall, the Adjudicator assigned to the request, attempted the explanation that the seized coins are "collectable" [sic], and thus goods. She also misrepresented the PCMLTFA by stating it defines currency to exclude un-circulated coins. In fact, the PCMLTFA does not define currency. However, the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulation (PCMLTFR) defines "cash" to include "coins or bank notes of countries other than Canada", though it states no circulation qualifiers. As this misrepresentation was committed in support of the demand for payment of \$1606.97. Adjudicator Kendall's misrepresentation constitutes fraud as defined by section 380 of the Criminal Code, R.S. C. 1985, c. C-46.

i. The full definition of "cash" given by the PCMLTFR is:

"cash" means coins referred to in section 7 of the *Currency Act*, notes issued by the Bank of Canada pursuant to the *Bank of Canada Act* that are intended for circulation in Canada or coins or bank notes of countries

other than Canada. (*espèces*)\*

- ii. To be clear, the definition of "cash" does include the word "circulation", used to qualify only "notes issued by the Bank of Canada pursuant to the Bank of Canada Act that are intended for circulation in Canada". The "circulation" qualifier originates from the Bank of Canada Act section 25(5), and it is used to make the distinction between bank notes used as currency and bank notes not used as currency, ie, promissory notes and bills of exchange, neither of which are currency, though they are bank notes issued by the Bank of Canada.
  - iii. It is clear from the definition's wording that "cash" includes foreign legal tender coins and bank notes, without limitation to their circulation status, as well as Canadian coin currency without limitation to its circulation status.
- p) On November 6, 2014 the Plaintiff responded and further clarified that neither is the circulation requirement stated in the PCMLTFA, nor does the PCMLTFA, include a definition of "currency". Further, the US Code Title 31 explicitly states that uncirculated coins issued under its authority are current, legal-tender, and thus the adjudicator's view is an untruthful fabrication.
- q) On December 11, A Kendall responded, this time attempting a new explanation. She claimed that the coins are "commodities" and thus "goods" She also admitted that the PCMLTFA does not contain a definition for currency. The misrepresentation that currency is "commodities" once again is made in support of the demand for payment of \$1606.97, and thus constitutes fraud.
- r) On January 20, 2015, the Plaintiff wrote to the President of the CBSA, Mr. Luc Portelance, informing him of the fraud perpetrated by CBSA employee A Kendall, and requesting reassignment of the case to a law-abiding officer instead.

- s) On or about February 9, 2015, the President's secretary phoned the Plaintiff to acknowledge receipt of the request to reassign, that there appears something improper had taken place, and that the legal team had been informed and was investigating. She promised that an outcome of the lawyers investigation will be communicated to the Plaintiff in writing.
- t) Following two more phone calls from the Plaintiff to the President's office, requesting the written response or acknowledgment of the January 20<sup>th</sup> letter, the secretary promised a response will be given. However, as of August 27, no such letter was received by the plaintiff. It appears that the president of the CBSA is refusing to investigate the charge of fraud against A Kendall.
- u) On March 9, 2015, a new CBSA employee, M Gagnon wrote to the plaintiff and attempted the explanation that foreign coins are not "cash" as they are not "intended for circulation". This is a misrepresentation of the PCMLTFA in support of the demand for payment of \$1606.97 and thus also constitutes fraud as defined by section 380 of the Criminal Code, R.S. C. 1985, c. C-46.
- v) As it follows the request of reassignment to the president of the CBSA, it is clear that this instance of fraud comes as a result of instructions given by the president to M Gagnon.
- w) On March 13, the Plaintiff responded to M Gagnon, clarifying that the wording of the "cash" definition applies the "intended for circulation in Canada" qualifier only to Canadian bank notes, and not to foreign currency, notes nor coins, nor Canadian coins.
- x) On May 26, M Gagnon responded with an attempt to once more change the explanation why the coins are "goods". She claimed that they are collector coins as their true value is not the same as their face value.
- y) On June 1, 2015, the Minister rendered his decision to the Plaintiff signed by Jeffrey Strickland for the Minister of Public Safety. In his decision, the

Minister also claims that there is a requirement for foreign currency to be intended for circulation in order to be considered "cash", as provided by the PCMLTFA. In fact, as explained above, there is no circulation requirement for foreign coins, and the "intended for circulation in Canada" from the definition of "cash" applies exclusively to "bank notes issued by the Bank of Canada", and not to Canadian coins, nor any coins or bank notes of countries other than Canada.

- z) Further, in his decision, the Minister lowered the demand for payment from \$1606.97 to \$321.39 as terms for release, without reference to any legal basis to support such a change. As such, the \$321.39 sum represents nothing but ransom.

2. The Plaintiff also claims:

- a) Since the PCMLTFA came into effect in 2000, the CBSA has routinely classified gold and silver legal-tender currency, both Canadian and foreign as "goods" in order to collect tax, duty and/or non-declaration fines.
- b) This policy of the CBSA subverts the intent of the PCMLTFA, which is to report large currency amounts transiting Canada's borders to the FINTRAC for analysis. The CBSA's actions thus impairs the ability of FINTRAC to detect criminal and terrorist activity, and therefore puts the safety of Canada.
- c) It is a well publicized fact that gold currency is treated as goods at Canada's borders, and it is reasonable to conclude that criminals and terrorists use this method of money transfer in order to make payments across Canada's border without scrutiny by authorities. While not all transfers of gold across the border are connected to criminal activities, it would be unreasonable to assume that all such transfer are innocent. Currently about \$133,000,000 in gold and silver currency are imported into Canada annually, and about \$1,800,000,000 are exported annually (2013 statistics from Industry Canada).

- d) Therefore the Minister of Public Safety, and the CBSA are, as a matter of policy, supporting and facilitating crime and terrorism.
3. The plaintiff requests the following from the Honourable Court:
- a) Damages of \$15000 from the CBSA for the threats of violence by officer Debski and the fraud attempted by the same, as well as CBSA employee 17097, A Kendall, M Gagnon, and for the instructions leading to fraud given by the president of the CBSA, Luc Portelance.
  - b) Damages of \$2000 for accusing the Plaintiff of smuggling and violating the Customs Act, which resulted in non-eligibility to US Nexus Trusted Traveller program.
  - c) Costs incurred by the Plaintiff in relation to this incident, including travel to court and travel to the Queenston Bridge CBSA location to recover the currency.
  - d) Punitive and exemplary damages of \$5,000,000 from the Ministry of Public Safety for the sustained policy of aiding crime and terrorism in Canada, while deriving profits from it since 2000.
  - e) Clearing the Plaintiff's legal record that would result in heightened scrutiny and baggage searches, at border crossing beyond normal border procedures that would apply to a citizen in good standing.
4. The plaintiff further requests from the Honourable Court:
- a) A declaration that all US coinage listed within 31 USC as currency of the United States is considered as foreign currency and financial instruments in Canada, as provided by the Excise Tax Act, and not "goods", and thus not subject to any provision of the Customs Act, which deals exclusively with "goods", explicitly naming currencies such as commemorative issues and precious metal issues that the CBSA may be

unfamiliar with and thus declare to be "goods".

- b) A declaration that all Canadian Coins issued by the Royal Canadian Mint pursuant to section 7 of the *Currency Act*, specifically including all the commemorative issues, gold, silver and platinum denominations specified in the *Royal Canadian Mint Act* are currency of Canada for the purposes of the Customs Act and the Proceeds of Crime (Money Laundering) and Terrorist Financing Act [PCMLTFA], to reinforce the Minister's of Finance sworn and signed affidavit to the same effect.
- c) A declaration that all currency is not subject to declaration under the Customs Act, regardless of its circulation, commemorative, base metal, age, or collectible factor.
- d) A declaration that although all currency domestic and foreign may collectible, this does not mean it is "goods". Ie, currency cannot arbitrarily be declared "goods". This is also provided in the *Currency Act* and USC Title 31, which states currency may not be used for any other purpose than as currency.
- e) A declaration that even though some currency, including older notes and coins, and gold, silver and platinum coins, is worth more than its face value as collectible items, it does not mean it is "goods", and remains "currency" as provided by the *Currency Act* sec. 11, and also 31 USC Sec. 5111. Even the Royal Canadian Mint directly sells many such coins for more than their face value, without charging GST/PST, implying they are exempt from tax under ETA. Even these collector coins are currency and may be used for circulation and thus are not "goods". Other examples of contemporary, current Canadian coins worth more than their face value:
  - f) 2012 25-cent coin uncirculated "war of 1812" Brock Colour, with a collector fair market value [FMV] of \$17,
  - g) 2012 circulated version of the 25-cent colour Brock quarter FMV \$1.24,
  - h) 1957 circulated 25-cent quarters FMV \$4.38,

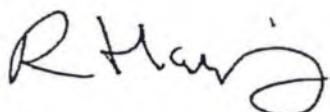
- i) 1957 \$20 circulated note FMV \$60,
  - j) 2006 \$5 uncirculated note, FMV \$72
- k) A declaration of the value of collectable currency (which really is any currency someone might want to keep rather than spend) for the purposes of the PCMLTFA even if this value is different than face value. The Currency Act provides that the gold \$50 coins are worth their face value as legal tender. The Bank of Canada redeems them for face value. The Currency Act prohibits melting all coins, including precious metal coins, and using them for purposes other than currency. Thus a \$50 coin cannot be legally melted and manufactured into jewelry or for industrial use. Thus whatever value the underlying metal may be, that value is unavailable for use.
- l) A declaration of the value of gold, silver and platinum currency domestic and foreign for the purposes of PCMLTFA, whether this value is the face value or another value. Due to melt restrictions on US currency, it appears the only possible value a US\$50 coin is US\$50.
- m) An order to the Minister's Public to immediately release the Plaintiff's currency without encumbrance.
- n) An order to the Minister of Public Safety to implement a phased plan of changing the CBSA policy to follow the intent of the PCMLTFA by considering all currencies domestic and foreign as "cash". As it is current practice to ship gold and silver currency across the border without PCMLTFA declaration, this needs to be a phased plan in which the travelling public as well as precious metals dealers be informed of the change, and a transitional period be allowed for.
- o) An order to the Prime Minister to create an oversight body to ensure lawful implementation of the PCMLTFA by the Minister of Public Safety.
- p) An order to the Minister of Public Safety to refund all taxes, duties, and any fines obtained by the CBSA in relation to shipments of gold and silver coins, foreign and

domestic, since the PCMLTFA was enacted.

The plaintiff proposes that this action be tried at Kitchener, or if not possible, Toronto.

August 27, 2015

Sincerely,



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(Signature of solicitor or plaintiff)

Radu Hociung  
226 Willowdale Ave  
Waterloo, ON N2J 3M1  
Tel: (519) 883-8454  
Fax: (519) 574-4009

SOR/2004-283, s. 35

# **TAB 3**

T-1450-15

**FEDERAL COURT OF CANADA**

BETWEEN:

**RADU HOCIUNG**

Plaintiff

and

**MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

Defendant

**MEMORANDUM OF FACT AND LAW**

**OVERVIEW**

1. The plaintiff brings this action to challenge the seizure of several United States Treasury gold and silver collector coins by the CBSA upon his return to Canada.
2. Prior to returning to Canada, the Plaintiff purchased the collector coins in the U.S. the same day.
3. The collectors coins are considered goods and must be declared in accordance with section 12 of the *Customs Act* at the time of importation.

4. The plaintiff failed to declare these collector coins to the CBSA upon entry. The CBSA seized the coins as forfeit for being in contravention of section 12 of the Act.
5. The plaintiff appealed the seizure to the Minister, and the Minister's delegate rendered a decision confirming the seizure.
6. The plaintiff also claims damages with respect to the performance of duties of certain CBSA officers. The Court's jurisdiction in an action made pursuant to section 135 of the *Customs Act* is limited to non-monetary relief, that is to say whether a contravention of the Act or regulations had occurred. Furthermore, section 106 of the *Customs Act* requires the plaintiff to bring a claim for damages by way of action within 3 months of the alleged cause of action.. The plaintiff has failed to do so within the required timeframe and is now statute barred.
7. Accordingly, the statement of claim discloses no reasonable cause of action and should be struck out pursuant to Rule 221(1)(a) of the *Federal Court Rules*.

## **STATEMENT OF FACTS**

8. The plaintiff presented himself to the CBSA at the Queenston Bridge in Niagara-on-the-Lake, Ontario on October 21, 2014
9. At the primary inspection booth, the plaintiff declared to having purchased two tires valued at approximately \$500 and a bottle of

Advil. He was subsequently referred to secondary to verify his declaration.

10. During secondary examination, a receipt from Jack Hunt Coin Broker Inc. dated October 21, 2014 was discovered in the glove compartment of the plaintiff's BMW.
11. The receipt confirmed the purchase of United States gold and silver coins earlier that day in the U.S. for the amount of \$5,700.00 USD (\$6,427.89 CAD).
12. The gold coins in question are four \$50 USD Buffalo Gold Bullion coins and are collector items not intended for circulation as currency. The silver coins in question are twenty \$1 USD Silver Eagles coins also collector items not intended for circulation as currency.
13. A Border Services Officer working secondary inspection seized the collector coins as forfeit for failure to report in accordance with section 12 of the *Customs Act*. He then offered the plaintiff terms of release in the amount of \$1,606.97 for the return of the coins, which the plaintiff refused. The plaintiff was advised of his appeal rights.
14. The defendant has denied the plaintiff's allegations in the statement of claim that CBSA officers threatened the plaintiff with violence or told him that the collector coins would be destroyed.

15. The plaintiff appealed the seizure to the Minister of Public Safety and Emergency Preparedness. The Minister's delegate rendered a decision on June 1, 2015 which maintained the seizure of the coins, however, reduced the terms of release owing for their return to \$321.39. In his decision, the Minister's delegate advised that the collector coins are not cash or currency but rather goods for the purpose of reporting under the *Customs Act*.
16. The plaintiff further challenged the Minister's decision that a contravention had occurred by way of action in accordance with s. 135
17. From the outset of the seizure, the plaintiff has argued that the collector coins are not goods but rather currency, and as such, he was not obligated to report them under the *Customs Act* but rather the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMTLFA)*. However, because the value of the collector coins did not equal or exceed the threshold prescribed under the *PCMTLFA* or the *Cross-border Currency and Monetary Instruments Reporting Regulations (CCMIRRs)*, the plaintiff was not obligated to report the collector coins at all.
18. With respect to the plaintiff's claim for damages, the defendant has denied the damages. Moreover, the plaintiff may not seek damages in this action but must bring a separate action for damages pursuant to section 106 of the *Customs Act*.

## POINTS IN ISSUE

19. The only issue in dispute herein is the whether the U.S. Treasury Coins are goods. If they are goods, then the claim has no chance of success, and the statement of claim should be struck out

## SUBMISSIONS

### Motions to strike under Rule 221(1)(a)

20. On a motion to strike under Rule 221(1)(a), assuming the facts as pleaded are true, the Court must ask whether there is a reasonable prospect that the claim will succeed.<sup>1</sup>
21. All persons entering Canada are required to declare the goods purchased, or otherwise acquired abroad which they are importing into Canada.in accordance with the section 12 of *Customs Act*.<sup>2</sup>
22. Also, at the time of entry into Canada, travellers must submit a report of currency or monetary instruments in their possession that are equal or greater than the prescribed threshold of \$10,000.00 CAD in accordance with the *PCMTLFA* and the *CCMIRRs* respectively.

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<sup>1</sup> *Imperial Tobacco Inc. v. Canada (A.G.)*, 2011 SCC 42.

<sup>2</sup> *Customs Act*, R.S.C., 1985, c.1 (2nd Supp.), section 12.

23. The plaintiff claims that the U.S. Treasury gold and silver coins are currency and s their total value was under \$10,000.00 CAD, he claims that he was not obligated to report them.
24. Although the term "currency" is not defined in the PCMLTFA, the term "cash" is defined in the PCMLTFR as follows: "coins referred to in section 7 of the *Currency Act*, notes issued by the Bank of Canada pursuant to the *Bank of Canada Act* that are intended for circulation in Canada, or coins or bank notes of countries other than Canada."<sup>3</sup>
25. By comparison, the *PCMLTFR* specifically defines precious metals as "gold, silver, palladium or platinum in the form of coins, bars, ingots or granules or in any other similar form".<sup>4</sup>
26. The Oxford English Dictionary defines "currency" as "[t]hat which is current as a medium of exchange; the circulating medium (whether coins or notes); the money of a country in actual use."<sup>5</sup>
27. It is beyond doubt that the term "currency" does not apply to collector gold and silver coins. These coins typically have a face value of one or two dollars, as is the case here. However, the real value is much

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<sup>3</sup> PCMLTFR, subsection 1(2), definition of "cash"

<sup>4</sup> PCMLTFR, subsection 1(2), definition of "precious Metal"

<sup>5</sup> Oxford English Dictionary, "currency", 4.a.

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higher and is a product of two factors: (1) the current market value of the precious metal (composition and level of purity), measured by weight, and (2) the degree to which the coin is prized among the collector community as rare and sought after. Collector coins are part of a limited issue produced by a government mint or treasury. So a one-ounce gold collector coin is not worth its nominal face value of one or two dollars, but rather the market value of an ounce of gold, plus whatever rarity value applies to the limited issue of those coins. In comparison, in-circulation coins used as regular legal tender such as quarters, nickels and dimes, are mainly made from steel, nickel, copper and aluminum. Collector coins are meant to be acquired for coin collections. They are not part of the money of a country in actual use, and are not intended for circulation.

28. The *Royal Canadian Mint Act*<sup>6</sup> deals with non-circulation coins produced by the Mint. Section 6 of the Act provides that "[t]he Governor in Council may authorize the issue of non-circulation coins of a denomination listed in Part 1 of the schedule." Section 2 of the Act defines a "non-circulation coin as "a coin composed of base metal, precious metal or any combination of those metals that is not intended for circulation and that is listed in Part 1 of the schedule". The same principle applies to the U.S. Treasury Buffalo Gold Bullion

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<sup>6</sup> *Royal Canadian Mint Act*, R.S.C., 1985, c. R-9.

Coins and silver coins at issue herein: They are not intended for circulation.

29. The *Currency Act* provides a good example of how collector coins cannot be considered as currency. Section 8 of the Act deals with legal tender. Subsection 8(2) provides for limitations on the use of coins as legal tender:

**8(2)** A payment in coins referred to in subsection (1) is a legal tender for no more than the following amounts for the following denominations of coins:

- (a) forty dollars if the denomination is two dollars or greater but does not exceed ten dollars;
- (b) twenty-five dollars if the denomination is one dollar;
- (c) ten dollars if the denomination is ten cents or greater but less than one dollar;
- (d) five dollars if the denomination is five cents; and
- (e) twenty-five cents if the denomination is one cent.

**(2.1)** In the case of coins of a denomination greater than ten dollars, a payment referred to in subsection (1) may consist of not more than one coin, and the payment is a legal tender for no more than the value of a single coin of that denomination.<sup>7</sup>

#### **Claim for damages – improper and statute-barred**

30. The plaintiff cannot seek damages in an action instituted under s. 135 of the *Customs Act* because the only issue for the Court to

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<sup>7</sup> *Currency Act*, R.S.C., 1985, c. C-52, section 8

determine in such proceedings is whether there was a contravention of the Act or its regulations

31. Any claims for damages with respect to the performance of CBSA officers' duties should be brought by way of separate action pursuant to subsections 106(1) and (2) of the *Customs Act*. The limitation period for bringing a claim for damages under section 106(1) with respect to the performance of a CBSA officer's duties is three months.<sup>8</sup> In the present case, even if the plaintiff had a claim for damages, which the defendant has denied in the statement of defence, the limitation period has expired.
32. As a result of the foregoing, there is no reasonable prospect that the claim will succeed, and that is clear from the facts as pleaded in the claim.

## ORDER SOUGHT

33. The defendant requests an order:
  - (a) striking out the statement of claim herein, in its entirety, without leave to amend;
  - (b) Its costs; and
  - (c) such other relief as counsel may advise and this Honourable Court deems just.

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<sup>8</sup> *Customs Act*, subsection 106(1): "No action or judicial proceeding shall be commenced against an officer for anything done in the performance of his duties under this or any other Act of Parliament or a person called on to assist an officer in the performance of such duties more than three months after the time when the cause of action or the subject-matter of the proceeding arose."

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- 10 -

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated at Toronto this 29<sup>th</sup> day of August, 2016.



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Eric Peterson, Crown Counsel  
of counsel for the defendant

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## PART I – LIST OF AUTHORITIES

*Imperial Tobacco Inc. v. Canada (A.G.), 2011 SCC 42*

## APPENDIX A - STATUTES AND REGULATIONS

*Customs Act, R.S.C., 1985, c.1 (2nd Supp.)*

*Oxford English Dictionary, "currency"*

*Royal Canadian Mint Act, R.S.C., 1985, c. R-9.*

*Currency Act, R.S.C., 1985, c. C-52, section 8*

# **TAB 4**

\*\* Preliminary Version \*\*

*Case Name:*  
**R. v. Imperial Tobacco Canada Ltd.**

**Her Majesty The Queen in Right of Canada, Appellant /  
Respondent on cross-appeal, and  
Imperial Tobacco Canada Limited, Respondent / Appellant on  
cross-appeal, and  
Attorney General of Ontario and Attorney General of British  
Columbia, Interveners.  
And between  
Attorney General of Canada, Appellant / Respondent on  
cross-appeal, and  
Her Majesty The Queen in Right of British Columbia,  
Respondent, Imperial Tobacco Canada Limited, Rothmans, Benson  
& Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., R.J.  
Reynolds Tobacco Company, R.J. Reynolds Tobacco International  
Inc., B.A.T. Industries p.l.c., British American Tobacco  
(Investments) Limited, Carreras Rothmans Limited, Philip  
Morris USA Inc. and Philip Morris International Inc.,  
Respondents / Appellants on cross-appeal, and  
Attorney General of Ontario, Attorney General of British  
Columbia, and Her Majesty The Queen in Right of the Province  
of New Brunswick, Interveners.**

[2011] S.C.J. No. 42

[2011] A.C.S. no 42

2011 SCC 42

[2011] 3 S.C.R. 45

[2011] 3 R.C.S. 45

308 B.C.A.C. 1

419 N.R. 1

2011EXP-2380

J.E. 2011-1326

335 D.L.R. (4th) 513

205 A.C.W.S. (3d) 92

21 B.C.L.R. (5th) 215

25 Admin. L.R. (5th) 1

86 C.C.L.T. (3d) 1

[2011] 11 W.W.R. 215

83 C.B.R. (5th) 169

2011 CarswellBC 1968

2011 CarswellBC 1969

File Nos.: 33559, 33563.

Supreme Court of Canada

Heard: February 24, 2011;

Judgment: July 29, 2011.

**Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish,  
Abella, Charron, Rothstein and Cromwell JJ.**

(151 paras.)

**Appeal From:**

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Civil litigation -- Civil procedure -- Parties -- Party types -- Government or Crown agents -- Third party procedure -- Notice -- Striking out or setting aside -- Third party defence -- Appeals -- Cross-appeals -- Appeals by Government of Canada from decisions that claims by tobacco companies for negligent misrepresentation and negligent design should be allowed to go to trial allowed -- Tobacco companies were defendants in two actions and issued third party notices to Canada, alleging that if found guilty, they were entitled to compensation for negligent misrepresentation. neg-*

*ligent design, and failure to warn -- Court of Appeal allowed in part companies' appeals from decisions striking notices -- All claims brought against Canada were bound to fail and were struck -- Alleged negligent misrepresentations to tobacco industry should not give rise to tort liability because of policy considerations.*

*Health law -- Public health -- Tobacco control -- Tobacco marketing restrictions -- Packaging, labelling and warnings -- Restrictions on supply of tobacco products -- Practice and procedure -- General principles -- Legislation -- Interpretation -- Statutes -- Appeals by Government of Canada from decisions that claims by tobacco companies for negligent misrepresentation and negligent design should be allowed to go to trial allowed -- Tobacco companies were defendants in two actions and issued third party notices to Canada, alleging that if found guilty, they were entitled to compensation for negligent misrepresentation, negligent design, and failure to warn -- Court of Appeal allowed in part companies' appeals from decisions striking notices -- All claims brought against Canada were bound to fail and were struck -- Alleged negligent misrepresentations to tobacco industry should not give rise to tort liability because of policy considerations.*

*Tort law -- Negligence -- Duty and standard of care -- Duty of care -- Causation -- Foreseeability and remoteness -- Application of principles -- Liability based on breach of statutory duty -- Defence to breach of statutory duty -- Appeals by Government of Canada from decisions that claims by tobacco companies for negligent misrepresentation and negligent design should be allowed to go to trial allowed -- Tobacco companies were defendants in two actions and issued third party notices to Canada, alleging that if found guilty, they were entitled to compensation for negligent misrepresentation, negligent design, and failure to warn -- Court of Appeal allowed in part companies' appeals from decisions striking notices -- All claims brought against Canada were bound to fail and were struck -- Alleged negligent misrepresentations to tobacco industry should not give rise to tort liability because of policy considerations.*

*Tort law -- Torts by the Crown -- Actions against the Crown -- Negligence -- Fraud and misrepresentation -- Negligent misrepresentation (Hedley Byrne principle) -- Appeals by Government of Canada from decisions that claims by tobacco companies for negligent misrepresentation and negligent design should be allowed to go to trial allowed -- Tobacco companies were defendants in two actions and issued third party notices to Canada, alleging that if found guilty, they were entitled to compensation for negligent misrepresentation, negligent design, and failure to warn -- Court of Appeal allowed in part companies' appeals from decisions striking notices -- All claims brought against Canada were bound to fail and were struck -- Alleged negligent misrepresentations to tobacco industry should not give rise to tort liability because of policy considerations.*

Appeals by the Government of Canada (Canada) from decisions of the British Columbia Court of Appeal allowing in part the tobacco companies' appeals from Canada's successful motions to strike the third party notices issued by Imperial Tobacco (Imperial) and other tobacco companies. Imperial was a defendant in two cases, one where the Government of British Columbia was seeking to recover the cost of medical treatment of individuals suffering from tobacco-related illnesses from a group of 14 tobacco companies ("Costs Recovery case"), and the other where a class action was brought against Imperial seeking a refund for "light" cigarettes purchased. In both cases, third-party notices were issued to Canada, alleging that if the tobacco companies were held liable, they were entitled to compensation for negligent misrepresentation, negligent design, and failure to warn, as

well as at equity. Canada brought motions to strike the third party notices, arguing that the claims failed to disclose a reasonable cause of action. In both cases, the chambers judges agreed with Canada, and struck all of the third-party notices. The Court of Appeal found that the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies in both cases should proceed to trial. It held that the negligent misrepresentation claim based on Canada's alleged duty of care to consumers should proceed in the class-action case, as should the negligent design claims. Canada appealed the finding that the claims for negligent misrepresentation and the claim for negligent design should be allowed to go to trial. The tobacco companies cross-appealed the striking of the other claims.

**HELD:** Appeals allowed; cross-appeals dismissed. All the claims of Imperial and the other tobacco companies brought against Canada were bound to fail, and were struck. The private law claims against Canada in the Costs Recovery case that arose from an alleged duty of care to consumers had to be struck. A third party could only be liable for contribution under the Negligence Act if it was directly liable to the plaintiff. Even if Canada breached duties to smokers, this would have no effect on whether it was liable to British Columbia, the plaintiff in that case. There were two types of negligent misrepresentation claims at issue. First, in the class action case, Imperial alleged that Canada negligently misrepresented the health attributes of low-tar cigarettes to consumers. Second, in both cases, Imperial and the other tobacco companies alleged that Canada made negligent misrepresentations to the tobacco companies. The facts pleaded did not bring either claim within a settled category of negligent misrepresentation. The next question was whether the facts disclosed a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this was established, a *prima facie* duty of care arose and the analysis proceeded to the second stage, which asks whether there were policy reasons why this *prima facie* duty of care should not be recognized. The facts pleaded in Imperial's third-party notice in the class-action case established no direct relationship between Canada and the consumers of light cigarettes. Consequently, there was no finding of proximity. With respect to the tobacco companies, the alleged negligent misrepresentations to the tobacco industry in both cases should not give rise to tort liability because of policy considerations. First, the alleged statements were protected expressions of government policy. Second, recognizing a duty of care would expose Canada to indeterminate liability. The government's alleged course of action, to encourage people who continued to smoke to switch to low-tar cigarettes, was adopted at the highest level in the Canadian government. Canada developed this policy out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease. These alleged representations were matters of government policy, with the result that the tobacco companies' claims against Canada for negligent misrepresentation had to be struck out. The crux of the failure to warn claim was essentially the same as the negligent misrepresentation claim, and should be rejected for the same policy reasons. The Minister of Health's recommendations on warning labels were integral to the government's policy of encouraging smokers to switch to low-tar cigarettes. The decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health was a decision that constituted a course of action based on Canada's health policy. As a core government policy decision, it could not ground a claim for negligent design. The tobacco companies' claim that Canada would be liable under the Tobacco Damages and Health Care Costs Recovery Act as a manufacturer was also struck. Holding Canada accountable under the Costs Recovery Act would defeat the legislature's intention of transferring the health-care costs resulting from tobacco related wrongs from taxpayers to the tobacco industry. Canada was not liable as a "supplier" under the Business Practices and Consumer Protection Act and the Trade Practice Act. Canada did not promote the use of low-tar

cigarettes for a commercial purpose, but for a health purpose, and thus cannot be considered a "supplier". In addition, the claim that Canada was liable for equitable indemnity was also dismissed. When Canada directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. Under such circumstances, it was unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request.

#### **Statutes, Regulations and Rules Cited:**

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, s. 1

Department of Agriculture and Agri Food Act, R.S.C. 1985, c. A-9, s. 4

Department of Health Act, S.C. 1996, c. 8, s. 4(1)

Federal Tort Claims Act, 28 U.S.C, s. 2680(a), s. 2680(h)

Health Care Costs Recovery Act, S.B.C. 2008, c. 27, s. 8(1), s. 24(3)(b)

Negligence Act, R.S.B.C. 1996, c. 333,

Supreme Court Civil Rules, B.C. Reg. 168/2009, s. 9-5

Supreme Court Rules, B.C. Reg. 221/90, s. 19(24), s. 19(27)

Tobacco Act, S.C. 1997, c. 13, s. 4

Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, s. 1, s. 1, s. 2, s. 3(3)(b)

Tobacco Products Control Act, S.C. 1988, c. 20, s. 3

Trade Practice Act, R.S.B.C. 1996, c. 457, s. 1

#### **Subsequent History:**

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

#### **Court Catchwords:**

*Civil procedure -- Third-party claims -- Motion to strike -- Tobacco manufacturers being sued by provincial government to recover health care costs of tobacco-related illnesses, and by consumers of "light" or "mild" cigarettes for damages and punitive damages -- Tobacco companies issuing third-party notices to federal government claiming contribution and indemnity -- Whether plain and obvious that third-party claims disclose no reasonable cause of action.*

*Torts -- Negligent misrepresentation -- Failure to warn -- Negligent design -- Duty of care -- Proximity -- Tobacco manufacturers being sued by provincial government and consumers and issuing third-party notices to federal government claiming contribution and indemnity -- Federal government claiming representations constituted government policy immune from judicial review -- Whether facts as plead establish prima facie duty of care -- If so, whether conflicting policy considerations negate such duty.*

*Torts -- Provincial statutory scheme establishing rights of action against tobacco manufacturers and suppliers -- Whether federal government liable as a "manufacturer" under the Tobacco Dam-*

ages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, or a "supplier" under the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, and the Trade Practice Act, R.S.B.C. 1996, c. 457.

#### Court Summary:

The appeal concerns two cases before the courts in British Columbia. In the *Costs Recovery* case, the Government of British Columbia is seeking to recover, pursuant to the *Tobacco Damages and Health Care Costs Recovery Act* ("CRA"), the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of tobacco companies, including Imperial. British Columbia alleges that by 1950, the tobacco companies knew or ought to have known that cigarettes were harmful to one's health, and that they failed to properly warn the public about the risks associated with smoking their product. In the *Knight* case, a class action was brought against Imperial alone on behalf of class members who purchased "light" or "mild" cigarettes, seeking a refund of the cost of the cigarettes and punitive damages. The class alleges that the levels of tar and nicotine listed on Imperial's packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions to smokers, and alleges that the smoke produced by light cigarettes was just as harmful as that produced by regular cigarettes.

In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design and failure to warn, as well as at equity. They also allege that Canada would itself be liable as a "manufacturer" under the *CRA* or a "supplier" under the *Business Practices and Consumer Protection Act* and the *Trade Practice Act*, and that they are entitled to contribution and indemnity from Canada pursuant to the *Negligence Act*. Canada brought motions to strike the third-party notices, arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies' appeals in part. A majority held that the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada's alleged duty of care to consumers should proceed, as should the negligent design claim. The court unanimously struck the remainder of the tobacco companies' claims.

*Held:* The appeals should be allowed and the claims should be struck out. The tobacco companies' cross-appeals should be dismissed.

On a motion to strike, a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. The approach must be generous, and err on the side of permitting a novel but arguable claim to proceed to trial. However, the judge cannot consider what evidence adduced in the future might or might not show. Here, it is plain and obvious that none of the tobacco companies' claims against Canada have a reasonable chance of success.

#### *Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case*

In the *Costs Recovery* case, the private law claims against Canada for contribution and indemnity based on alleged breaches of a duty of care to smokers must be struck. A third party may only be liable for contribution under the *Negligence Act* if it is directly liable to the plaintiff, in this case,

British Columbia. Here, even if Canada breached duties to smokers, this would have no effect on whether it was liable to British Columbia.

#### *The Claims for Negligent Misrepresentation*

There are two relationships at issue in these claims: one between Canada and consumers and one between Canada and tobacco companies. In the *Knight* case, Imperial alleges that Canada negligently represented the health attributes of low-tar cigarettes to consumers. In both the *Knight* case and the *Costs Recovery* case, the tobacco companies allege that Canada made negligent misrepresentations to the tobacco companies.

The facts as pleaded do not bring Canada's relationship with consumers and the tobacco companies within a settled category of negligent misrepresentation. Accordingly, to determine whether the alleged causes of action have a reasonable prospect of success, the general requirements for liability in tort must be met. At the first stage, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. In a claim of negligent misrepresentation, both of these requirements for a *prima facie* duty of care are established if there was a "special relationship" between the parties. A special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case. If proximity is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized.

Here, on the facts as pleaded, Canada did not owe a *prima facie* duty of care to consumers. The relationship between the two was limited to Canada's statements to the general public that low-tar cigarettes are less hazardous. There were no specific interactions between Canada and the class members. Consequently, a finding of proximity in this relationship must arise from the governing statutes. However, the relevant statutes establish only general duties to the public, and no private law duties to consumers. In light of the lack of proximity, this claim in the *Knight* case should be struck at the first stage of the analysis.

As for the tobacco companies, the facts pleaded allege a history of interactions between Canada and the tobacco companies capable of establishing a special relationship of proximity giving rise to a *prima facie* duty of care. The allegations are that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials, going far beyond the sort of statements made by Canada to the public at large. Furthermore, Canada's regulatory powers over the manufacturers coupled with its specific advice and its commercial involvement could be seen as supporting a conclusion that Canada ought reasonably to have foreseen that the tobacco companies would rely on the representations and that such reliance would be reasonable in the pleaded circumstance.

Canada's alleged negligent misrepresentations do not give rise to tort liability, however, because of conflicting policy considerations. The alleged representations constitute protected expressions of government policy. Core government policy decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. The representations in this case were part and parcel of a government policy, adopted at the highest level in the Canadi-

an government and developed out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease, to encourage people who continued to smoke to switch to low-tar cigarettes.

The claims for negligent misrepresentation should also fail because they would expose Canada to indeterminate liability. Recognizing a duty of care for representations to the tobacco companies would effectively amount to a duty to consumers. While the quantum of damages owed by Canada to the companies in both cases would depend on the number of smokers and the number of cigarettes sold, Canada had no control over the number of people who smoked light cigarettes.

#### *The Claims for Failure to Warn*

The tobacco companies make two allegations for failure to warn: (1) that Canada directed the tobacco companies not to provide warnings on cigarette packages about the health hazards of cigarettes and (2) that Canada failed to warn the tobacco companies about the dangers posed by the strains of tobacco it designed and licensed. These two claims should be struck. The crux of the first claim is essentially the same as the negligent misrepresentation claim, and should be rejected for the same policy reasons. The Minister of Health's recommendations on warning labels were integral to the government's policy of encouraging smokers to switch to low-tar cigarettes. As such, they cannot ground a claim in failure to warn. The same is true of the second claim. While the tort of failure to warn requires evidence of a positive duty towards the plaintiff, nothing in the third-party notices suggests that Canada was under such a positive duty here. A plea of negligence, without more, will not suffice to raise a duty to warn. In any event, such a claim would fail for the policy reasons applicable to the negligent misrepresentation claim.

#### *The Claims for Negligent Design*

The tobacco companies have brought two types of negligent design claims against Canada. They submit that Canada breached its duty of care to the tobacco companies when it negligently designed its strains of low-tar tobacco. In the *Knight* case, Imperial submits that Canada breached its duty of care to consumers of light and mild cigarettes. The two negligent design claims establish a *prima facie* duty of care. With respect to Canada's design of low-tar tobacco strains, the proximity alleged with the tobacco companies is not based on a statutory duty, but on commercial interactions between Canada and the tobacco companies. In the *Knight* case also, it is at least arguable that Canada was acting in a commercial capacity towards the consumers of light and mild cigarettes when it designed its strains of tobacco. However, the decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada's health policy and based on social and economic factors. As a core government policy decision, it cannot ground a claim for negligent design. These claims should accordingly be struck.

#### *Liability as a "Manufacturer" and a "Supplier"*

The tobacco companies' contribution claim in the *Costs Recovery* case that Canada could qualify as a "manufacturer" under the *CRA* should be struck. It is plain and obvious that the federal government does not qualify as a manufacturer of tobacco under that Act. When the Act is read in context and all of its provisions are taken into account, it is apparent that the British Columbia legislature did not intend Canada to be liable as a manufacturer. This is confirmed by the text of the statute, the intent of the legislature in adopting the Act, and the broader context of the relationship between the province and the federal government. Holding Canada accountable under the *CRA* would defeat the

legislature's intention of transferring the health-care costs resulting from tobacco-related wrongs from taxpayers to the tobacco industry. Similarly, the tobacco companies cannot rely on the recently adopted *Health Care Costs Recovery Act* in an action for contribution under the *CRA*. Finally, Canada could not be liable for contribution under the *Negligence Act* or at common law since it is not directly liable to British Columbia.

Imperial's claim in the *Knight* case that Canada could qualify as a "supplier" under the *Trade Practices Act* and the *Business Practices and Consumer Protection Act* which replaced it should also be struck. Canada's purpose for developing and promoting tobacco as described in the third-party notice suggests that it was not acting "in the course of business" or "in the course of the person's business" as those phrases are used in those statutes. Those phrases must be understood as limited to activities undertaken for a commercial purpose. Here, it is plain and obvious from the facts pleaded that Canada did not promote the use of low-tar cigarettes for a commercial purpose, but for a health purpose. Canada is therefore not a supplier and is not liable under those statutes.

#### *Claims for Equitable Indemnity and Procedural Considerations*

The tobacco companies' claims of equitable indemnity should be struck. Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. When Canada directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. Under such circumstances, it is unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request.

Finally, the claims for declaratory relief should be struck. The tobacco companies' ability to mount defences would not be severely prejudiced if Canada was no longer a third party in the litigation.

#### **Cases Cited**

**Applied:** *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; **referred to:** *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Donoghue v. Stevenson*, [1932] A.C. 562; *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Followka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132; *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401; *Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)* (2006), 276 D.L.R. (4) 411; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Home Office v. Dorset Yacht Co.*, [1970] 2 W.L.R. 1140; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145; *X v. Bedfordshire County Council*, [1995] 3 All E.R. 353; *Barrett v. Enfield London Borough Council*, [2001] 2 A.C. 550; *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424; *Pyrenees Shire Council v. Day*, [1998] HCA 3, 192 C.L.R. 330; *Office of Personnel Management v. Richmond*, 496

U.S. 414 (1990); *United States v. Neustadt*, 366 U.S. 696 (1961); *Dalehite v. United States*, 346 U.S. 15 (1953); *United States v. Gaubert*, 499 U.S. 315 (1991); *Berkovitz v. United States*, 486 U.S. 531 (1988); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984); *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737; *Day v. Central Okanagan (Regional District)*, 2000 BCSC 1134, 79 B.C.L.R. (3d) 36; *Elias v. Headache and Pain Management Clinic*, 2008 CanLII 53133; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3; *Parmley v. Parmley*, [1945] S.C.R. 635.

### **Statutes and Regulations Cited**

*Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, s. 1 "supplier".

*Department of Agriculture and Agri-Food Act*, R.S.C. 1985, c. A-9, s. 4.

*Department of Health Act*, S.C. 1996, c. 8, s. 4(1).

*Federal Tort Claims Act*, 28 U.S.C. ss. 2680(a), (h).

*Health Care Costs Recovery Act*, S.B.C. 2008, c. 27, ss. 8(1), 24(3)(b).

*Negligence Act*, R.S.B.C. 1996, c. 333.

*Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 9-5.

*Supreme Court Rules*, B.C. Reg. 221/90, rr. 19(24), (27).

*Tobacco Act*, S.C. 1997, c. 13, s. 4.

*Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30, ss. 1 "manufacture", "manufacturer", 2, 3(3)(b).

*Tobacco Products Control Act*, S.C. 1988, c. 20, s. 3.

*Trade Practice Act*, R.S.B.C. 1996, c. 457, s. 1 "supplier".

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### **History and Disposition:**

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (Hall, Saunders, Lowry, Tysoe and Smith JJ.A.), 2009 BCCA 541, 99 B.C.L.R. (4) 93, 313 D.L.R. (4) 695, [2010] 2 W.W.R. 9, 280 B.C.A.C. 160, 474 W.A.C. 160, [2009] B.C.J. No. 2445 (QL), 2009 CarswellBC 3300, reversing in part a decision of Satanove J. striking out third-party notices, 2007 BCSC 964, 76 B.C.L.R. (4) 100, [2008] 4 W.W.R. 156, [2007] B.C.J. No. 1461 (QL), 2007 CarswellBC 1806. Appeal allowed and cross-appeal dismissed.

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (Hall, Saunders, Lowry, Tysoe and Smith J.J.A.), 2009 BCCA 540, 98 B.C.L.R. (4) 201, 313 D.L.R. (4) 651, [2010] 2 W.W.R. 385, 280 B.C.A.C. 100, 474 W.A.C. 100, [2009] B.C.J. No. 2444 (QL), 2009 CarswellBC 3307, reversing in part a decision of Wedge J. striking out third-party notices, 2008 BCSC 419, 82 B.C.L.R. (4) 362, 292 D.L.R. (4) 353, [2008] 12 W.W.R. 241, [2008] B.C.J. No. 609 (QL), 2008 CarswellBC 687. Appeal allowed and cross-appeal dismissed.

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[Editor's note: A corrigendum was published by the Court September 29, 2011. The corrections have been incorporated in this document and the text of the corrigendum is appended to the end of the judgment.]

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The judgment of the Court was delivered by

McLACHLIN C.J.:--

## I. Introduction

1 Imperial Tobacco ("Imperial") is a defendant in two cases before the courts in British Columbia, *British Columbia Canada v. Imperial Tobacco Canada Ltd.*, Docket: S010421, and *Knight v. Imperial Tobacco Canada Ltd.*, Docket: L031300. In the first case, the Government of British Columbia is seeking to recover the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of 14 tobacco companies, including Imperial ("Costs Recovery case"). The second case is a class action brought against Imperial alone by Mr. Knight on behalf of class members who purchased "light" or "mild" cigarettes, seeking a refund of the cost of the cigarettes and punitive damages ("Knight case").

2 In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design, and failure to warn, as well as at equity. They also allege that Canada would itself be liable under the statutory schemes at issue in the two cases. In the *Costs Recovery* case, it is alleged that Canada would be liable under the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 ("CRA"), as a "manufacturer". In the *Knight* case, it is alleged that Canada would be liable as a "supplier" under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("BPCPA"), and its predecessor, the *Trade Practice Act*, R.S.B.C. 1996, c. 457 ("TPA").

3 In both cases, Canada brought motions to strike the third party notices under r. 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90 (replaced by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 9-5), arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges agreed with Canada, and struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies' appeals in part. A majority of 3-2 held that the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada's alleged duty of care to consumers should proceed, as should the negligent design claims in the *Knight* case. The court unanimously struck the remainder of the tobacco companies' claims.

4 The Government of Canada appeals the finding that the claims for negligent misrepresentation and the claim for negligent design should be allowed to go to trial. The tobacco companies cross-appeal the striking of the other claims.

5 For the reasons that follow, I conclude that all the claims of Imperial and the other tobacco companies brought against the Government of Canada are bound to fail, and should be struck. I would allow the appeals of the Government of Canada in both cases and dismiss the cross-appeals.

## II. Underlying Claims and Judicial History

### A. *The Knight Case*

6 In the *Knight* case, consumers in British Columbia have brought a class action against Imperial under the *BPCPA* and its predecessor, the *TPA*. The class consists of consumers of light or mild cigarettes. It alleges that Imperial engaged in deceptive practices when it promoted low-tar cigarettes as less hazardous to the health of consumers. The class alleges that the levels of tar and nico-

tine listed on Imperial's packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions to smokers, and alleges that the smoke produced by light cigarettes was just as harmful as that produced by regular cigarettes. The class seeks reimbursement of the cost of the cigarettes purchased, and punitive damages.

7 Imperial issued a third-party notice against Canada. It alleges that Health Canada advised tobacco companies and the public that low-tar cigarettes were less hazardous than regular cigarettes. Imperial alleges that while Health Canada was initially opposed to the use of health warnings on cigarette packaging, it changed its policy in 1967. It instructed smokers to switch to low-tar cigarettes if they were unwilling to quit smoking altogether, and it asked tobacco companies to voluntarily list the tar and nicotine levels on their advertisements to encourage consumers to purchase low-tar brands. Contrary to expectations, it now appears that low-tar cigarettes are potentially more harmful to smokers.

8 Imperial also alleges that Agriculture Canada researched, developed, manufactured, and licensed several strains of low-tar tobacco, and collected royalties from the companies, including Imperial, that used these strains. By 1982, Imperial pleads, the tobacco strains developed by Agriculture Canada were "almost the only tobacco varieties available to Canadian tobacco manufacturers" (*Knight* case, amended third-party notice of Imperial, at para. 97).

9 Imperial makes five allegations against Canada:

- 1) Canada is itself liable under the *BPCPA* and the *TPA* as a "supplier" of tobacco products that engaged in deceptive practices, and Imperial is entitled to contribution and indemnity from Canada pursuant to the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333.
- 2) Canada breached private law duties to consumers by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn them against the hazards of low-tar cigarettes, and by failing to design its tobacco strain with due care. Consequently, Imperial alleges that it is entitled to contribution and indemnity from Canada under the *Negligence Act*.
- 3) Canada breached its private law duties to Imperial by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn Imperial about the hazards of low-tar cigarettes, and by failing to design its tobacco strain with due care. Imperial alleges that it is entitled to damages against Canada to the extent of any liability Imperial may have to the class members.
- 4) In the alternative, Canada is obliged to indemnify Imperial under the doctrine of equitable indemnity.
- 5) If Canada is not liable to Imperial under any of the above claims, Imperial is entitled to declaratory relief against Canada so that it will remain a party to the action and be subject to discovery procedures under the *Supreme Court Rules*.

10 Canada brought an application to strike the third-party claims. It was successful before Satanove J. in the Supreme Court of British Columbia (2007 BCSC 964, 76 B.C.L.R. (4th) 100). The chambers judge struck all of the claims against Canada. Imperial was partially successful in the Court of Appeal (2009 BCCA 541, 99 B.C.L.R. (4th) 93). The Court of Appeal unanimously struck

the statutory claim, the claim of negligent design between Canada and Imperial, and the equitable indemnity claim. However, the majority, *per* Tysoe J.A., held that the two negligent misrepresentation claims and the negligent design claim between Canada and consumers should be allowed to proceed. The majority reasons did not address the failure to warn claim. Hall J.A., dissenting, would have struck all the third-party claims.

#### B. *The Costs Recovery Case*

**11** The Government of British Columbia has brought a claim under the *CRA* to recover the expense of treating tobacco-related illnesses caused by "tobacco related wrong[s]". Under the *CRA*, manufacturers of tobacco products are liable to the province directly. The claim was brought against 14 tobacco companies. British Columbia alleges that by 1950, these tobacco companies knew or ought to have known that cigarettes were harmful to one's health, and that they failed to properly warn the public about the risks associated with smoking their product.

**12** Various defendants in the *Costs Recovery* case, including Imperial, brought third-party notices against Canada for its alleged role in the tobacco industry. I refer to them collectively as the "tobacco companies". The allegations in this claim are strikingly similar to those in the *Knight* case. The tobacco companies plead that Health Canada advised them and the public that low-tar cigarettes were less hazardous and instructed smokers that they should quit smoking or purchase low-tar cigarettes. The tobacco companies allege that Canada was initially opposed to the use of warning labels on cigarette packaging, but ultimately instructed the industry that warning labels should be used and what they should say. The tobacco companies also plead that Agriculture Canada researched, developed, manufactured and licensed the strains of low-tar tobacco which they used for their cigarettes in exchange for royalties.

**13** The tobacco companies brought the following claims against Canada:

- 1) Canada is itself liable under the *CRA* as a "manufacturer" of tobacco products, and the tobacco companies are entitled to contribution and indemnity from Canada pursuant to the *Negligence Act*.
- 2) Canada breached private law duties to consumers for failure to warn, negligent design, and negligent misrepresentation, and the tobacco companies are entitled to contribution and indemnity from Canada to the extent of any liability they may have to British Columbia under the *CRA*.
- 3) Canada breached its private law duties owed to the tobacco companies for failure to warn and negligent design, and negligently misrepresented the attributes of low-tar cigarettes. The tobacco companies allege that they are entitled to damages against Canada to the extent of any liability they may have to British Columbia under the *CRA*.
- 4) In the alternative, Canada is obliged to indemnify the tobacco companies under the doctrine of equitable indemnity.
- 5) If Canada is not liable to the tobacco companies under any of the above claims, they are entitled to declaratory relief.

**14** Canada was successful before the chambers judge, Wedge J., who struck all of the claims (2008 BCSC 419, 82 B.C.L.R. (4th) 362). In the Court of Appeal, the majority, *per* Tysoe J.A., allowed the negligent misrepresentation claim between Canada and the tobacco companies to proceed

(2009 BCCA 540, 98 B.C.L.R. (4th) 201). Hall J.A., dissenting, would have struck all the third-party claims.

### III. Issues Before the Court

15 There is significant overlap between the issues on appeal in the *Costs Recovery* case and the *Knight* case, particularly in relation to the common law claims. Both cases discuss whether Canada could be liable at common law in negligent misrepresentation, negligent design and failure to warn, and in equitable indemnity. To reduce duplication, I treat the issues common to both cases together.

16 There are also issues and arguments that are distinct in the two cases. Uniquely in the *Costs Recovery* case, Canada argues that all the contribution claims based on the *Negligence Act* and Canada's alleged duties of care to smokers should be struck because even if these alleged duties were breached, Canada would not be liable to the sole plaintiff British Columbia. The statutory claims are also distinct in the two cases. The issues may therefore be stated as follows:

1. What is the test for striking out claims for failure to disclose a reasonable cause of action?
2. Should the claims for contribution and indemnity based on the *Negligence Act* and alleged breaches of duties of care to smokers be struck in the *Costs Recovery* case?
3. Should the tobacco companies' negligent misrepresentation claims be struck out?
4. Should the tobacco companies' claims of failure to warn be struck out?
5. Should the tobacco companies' claims of negligent design be struck out?
6. Should the tobacco companies' claim in the *Costs Recovery* case that Canada could qualify as a "manufacturer" under the *CRA* be struck out?
7. Should Imperial's claim in the *Knight* case that Canada could qualify as a "supplier" under the *TPA* and the *BPCPA* be struck out?
8. Should the tobacco companies' claims of equitable indemnity be struck out?
9. If Canada is not liable to the tobacco companies under any of the third-party claims, are the tobacco companies nonetheless entitled to declaratory relief against Canada so that it will remain a party to both actions and be subject to discovery procedures under the *Supreme Court Rules*?

### IV. Analysis

#### A. *The Test for Striking Out Claims*

17 The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhayji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83;

*Odhavji Estate; Hunt; Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

**18** Although all agree on the test, the arguments before us revealed different conceptions about how it should be applied. It may therefore be useful to review the purpose of the test and its application.

**19** The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

**20** This promotes two goods -- efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be -- on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

**21** Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

**22** A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

**23** Before us, Imperial and the other tobacco companies argued that the motion to strike should take into account, not only the facts pleaded, but the possibility that as the case progressed, the evidence would reveal more about Canada's conduct and role in promoting the use of low-tar ciga-

lettes. This fundamentally misunderstands what a motion to strike is about. It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.

24 This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action it is asserting. If new developments raise new possibilities -- as they sometimes do -- the remedy is to amend the pleadings to plead new facts at that time.

25 Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way -- in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the law and the litigation process*, the claim has no reasonable chance of succeeding.

26 With this framework in mind, I proceed to consider the tobacco companies' claims.

#### B. *Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case*

27 In the *Costs Recovery* case, Canada argues that all the claims for contribution based on its alleged duties of care to smokers must be struck. Under the *Negligence Act*, Canada submits, contribution may only be awarded if the third party would be liable to the plaintiff directly. It argues that even if Canada breached duties to smokers, such breaches cannot ground the tobacco companies' claims for contribution if they are found liable to British Columbia, the sole plaintiff in the *Costs Recovery* case. This argument was successful in the Court of Appeal.

28 The tobacco companies argue that direct liability to the plaintiff is not a requirement for being held liable in contribution. They argue that contribution in the *Negligence Act* turns on fault, not liability. The object of the *Negligence Act* is to allow defendants to recover from other parties that were also at fault for the damage that resulted to the plaintiff, and barring a claim against Canada would defeat this purpose, they argue.

29 I agree with Canada and the Court of Appeal that a third party may only be liable for contribution under the *Negligence Act* if it is directly liable to the plaintiff. In *Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346, dealing with a statutory provision similar to that in British Columbia, Laskin C.J. stated:

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

30 Accordingly, it is plain and obvious that the private law claims against Canada in the *Costs Recovery* case that arise from an alleged duty of care to consumers must be struck. Even if Canada breached duties to smokers, this would have no effect on whether it was liable to British Columbia, the plaintiff in that case. This holding has no bearing on the consumer claim in the *Knight* case since consumers of light or mild cigarettes are the plaintiffs in the underlying action.

31 The discussion of the private law claims in the remainder of these reasons will refer exclusively to the claims based on Canada's alleged duties of care to the tobacco companies in both cases before the Court, and Canada's alleged duties to consumers in the *Knight* case.

### C. The Claims for Negligent Misrepresentation

32 There are two types of negligent misrepresentation claims that remain at issue on this appeal. First, in the *Knight* case, Imperial alleges that Canada negligently misrepresented the health attributes of low-tar cigarettes to consumers, and is therefore liable for contribution and indemnity on the basis of the *Negligence Act* if the class members are successful in this suit. Second, in both cases before the Court, Imperial and the other tobacco companies allege that Canada made negligent misrepresentations to the tobacco companies, and that Canada is liable for any losses that the tobacco companies incur to the plaintiffs in either case.

33 Canada applies to have the claims struck on the ground that they have no reasonable prospect of success.

34 For the purposes of the motion to strike, we must accept as true the facts pleaded. We must therefore accept that Canada represented to consumers and to tobacco companies that light or mild cigarettes were less harmful, and that these representations were not accurate. We must also accept that consumers and the tobacco companies relied on Canada's representations and acted on them to their detriment.

35 The law first recognized a tort action for negligent misrepresentation in *Hedley Byrne*. Prior to this, parties were confined to contractual remedies for misrepresentations. *Hedley Byrne* represented a break with this tradition, allowing a claim for economic loss in tort for misrepresentations made in the absence of a contract between the parties. In the decades that have followed, liability for negligent misrepresentation has been imposed in a variety of situations where the relationship between the parties disclosed sufficient proximity and foreseeability, and policy considerations did not negate liability.

36 Imperial and the other tobacco companies argue that the facts pleaded against Canada bring their claims within the settled parameters of the tort of negligent misrepresentation, and therefore a *prima facie* duty of care is established. The majority in the Court of Appeal accepted this argument in both decisions below (*Knight* case, at paras. 45 and 66; *Costs Recovery* case, at para. 70).

37 The first question is whether the facts as pleaded bring Canada's relationships with consumers and the tobacco companies within a settled category that gives rise to a duty of care. If they do, a *prima facie* duty of care will be established: see *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 15. However, it is important to note that liability for negligent misrepresentation depends on the nature of the relationship between the plaintiff and defendant, as discussed more fully below. The question is not whether negligent misrepresentation is a recognized tort, but whether there is a reasonable prospect that the relationship alleged in the pleadings will give rise to liability for negligent misrepresentation.

38 In my view, the facts pleaded do not bring either claim within a settled category of negligent misrepresentation. The law of negligent misrepresentation has thus far not recognized liability in the kinds of relationships at issue in these cases. The error of the tobacco companies lies in assuming that the relationships disclosed by the pleadings between Canada and the tobacco companies on the one hand and between Canada and consumers on the other are like other relationships that have been held to give rise to liability for negligent misrepresentation. In fact, they differ in important ways. It is sufficient at this point to note that the tobacco companies have not been able to point to any case where a government has been held liable in negligent misrepresentation for statements made to an industry. To determine whether such a cause of action has a reasonable prospect of success, we must therefore consider whether the general requirements for liability in tort are met, on the test set out by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, and somewhat reformulated but consistently applied by this Court, most notably in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537.

39 At the first stage of this test, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129.

#### (1) Stage One: Proximity and Foreseeability

40 On the first branch of the test, the tobacco companies argue that the facts pleaded establish a sufficiently close and direct, or "proximate", relationship between Canada and consumers (in the *Knight* case) and between Canada and tobacco companies (in both cases) to support a duty of care with respect to government statements about light and mild cigarettes. They also argue that Canada could reasonably have foreseen that consumers and the tobacco industry would rely on Canada's statements about the health advantages of light cigarettes, and that such reliance was reasonable. Canada responds that it was acting exclusively in a regulatory capacity when it made statements to the public and to the industry, which does not give rise to sufficient proximity to ground the alleged duty of care. In the *Costs Recovery* case, Canada also alleges that it could not have reasonably foreseen that the B.C. legislature would enact the *CRA* and therefore cannot be liable for the potential losses of the tobacco companies under that Act.

41 Proximity and foreseeability are two aspects of one inquiry -- the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law. Foreseeability is the touchstone of negligence law. However, not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.

42 Proximity and foreseeability are heightened concerns in claims for economic loss, such as negligent misrepresentation: see, generally, *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210. In a claim of negligent misrepresentation, both these requirements for a *prima facie* duty of care are established if there was a "special relationship" between the parties: *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165. In *Hercules Managements*, the

Court, *per* La Forest J., held that a special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case (para. 24). Where such a relationship is established, the defendant may be liable for loss suffered by the plaintiff as a result of a negligent misstatement.

**43** A complicating factor is the role that legislation should play when determining if a government actor owed a *prima facie* duty of care. Two situations may be distinguished. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.

**44** The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a *prima facie* duty of care. It may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care. Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*), or removing children from harmful environments (*Syl Apps*). In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public: see, e.g., *Cooper* and *Syl Apps*. As stated in *Syl Apps*, "[w]here an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity" (at para. 28; see also *Followka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132, at para. 39).

**45** The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises: *Syl Apps*; see also *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401. However, the factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant.

**46** Finally, it is possible to envision a claim where proximity is based both on interactions between the parties and the government's statutory duties.

**47** Since this is a motion to strike, the question before us is simply whether, assuming the facts pleaded to be true, there is any reasonable prospect of successfully establishing proximity, on the basis of a statute or otherwise. On one hand, where the sole basis asserted for proximity is the statute, conflicting public duties may rule out any possibility of proximity being established as a matter of statutory interpretation: *Syl Apps*. On the other, where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis.

48 As mentioned above, there are two relationships at issue in these claims: the relationship between Canada and consumers (the *Knight* case), and the relationship between Canada and tobacco companies (both cases). The question at this stage is whether there is a *prima facie* duty of care in either or both these relationships. In my view, on the facts pleaded, Canada did not owe a *prima facie* duty of care to consumers, but did owe a *prima facie* duty to the tobacco companies.

49 The facts pleaded in Imperial's third-party notice in the *Knight* case establish no direct relationship between Canada and the consumers of light cigarettes. The relationship between the two was limited to Canada's statements to the general public that low-tar cigarettes are less hazardous. There were no specific interactions between Canada and the class members. Consequently, a finding of proximity in this relationship must arise from the governing statutes: *Cooper*, at para. 43.

50 The relevant statutes establish only general duties to the public, and no private law duties to consumers. The *Department of Health Act*, S.C. 1996, c. 8, establishes that the duties of the Minister of Health relate to "the promotion and preservation of the health of the people of Canada": s. 4(1). Similarly, the *Department of Agriculture and Agri-Food Act*, R.S.C. 1985, c. A-9, s. 4, the *Tobacco Act*, S.C. 1997, c. 13, s. 4, and the *Tobacco Products Control Act*, S.C. 1988, c. 20, s. 3 (repealed), only establish duties to the general public. These general duties to the public do not give rise to a private law duty of care to particular individuals. To borrow the words of Sharpe J.A. of the Ontario Court of Appeal in *Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)* (2006), 276 D.L.R. (4th) 411, "I fail to see how it could be possible to convert any of the Minister's public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals": para. 17. At the same time, the governing statutes do not foreclose the possibility of recognizing a duty of care to the tobacco companies. Recognizing a duty of care on the government when it makes representations to the tobacco companies about the health attributes of tobacco strains would not conflict with its general duty to protect the health of the public.

51 Turning to the relationship between Canada and the tobacco companies, at issue in both of the cases before the Court, the tobacco companies contend that a duty of care on Canada arose from the transactions between them and Canada over the years. They allege that Canada went beyond its role as regulator of industry players and entered into a relationship of advising and assisting the companies in reducing harm to their consumers. They hope to show that Canada gave erroneous information and advice, knowing that the companies would rely on it, which they did.

52 The question is whether these pleadings bring the tobacco companies within the requirements for a special relationship under the law of negligent misrepresentation as set out in *Hercules Managements*. As noted above, a special relationship will be established where (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation, and (2) such reliance would, in the particular circumstances of the case, be reasonable. In the cases at bar, the facts pleaded allege a history of interactions between Canada and the tobacco companies capable of fulfilling these conditions.

53 What is alleged against Canada is that Health Canada assumed duties separate and apart from its governing statute, including research into and design of tobacco and tobacco products and the promotion of tobacco and tobacco products (third-party statement of claim of Imperial in the *Costs Recovery* case, 5 A.R., vol. 2, at p. 66). In addition, it is alleged that Agriculture Canada carried out a programme of cooperation with and support for tobacco growers and cigarette manufacturers including advising cigarette manufacturers of the desirable content of nicotine in tobacco to

be used in the manufacture of tobacco products. It is alleged that officials, drawing on their knowledge and expertise in smoking and health matters, provided both advice and directions to the manufacturers including advice that the tobacco strains designed and developed by officials of Agriculture Canada and sold or licensed to the manufacturers for use in their tobacco products would not increase health risks to consumers or otherwise be harmful to them (pp. 109-10). Thus, what is alleged is not simply that broad powers of regulation were brought to bear on the tobacco industry, but that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials.

54 What is alleged with respect to Canada's interactions with the manufacturers goes far beyond the sort of statements made by Canada to the public at large. Canada is alleged to have had specific interactions with the manufacturers in contrast to the absence of such specific interactions between Canada and the class members. Whereas the claims in relation to consumers must be founded on a statutory framework establishing very general duties to the public, the claims alleged in relation to the manufacturers are not alleged to arise primarily from such general regulatory duties and powers but from roles undertaken specifically in relation to the manufacturers by Canada apart from its statutory duties, namely its roles as designer, developer, promoter and licensor of tobacco strains. With respect to the issue of reasonable reliance, Canada's regulatory powers over the manufacturers, coupled with its specific advice and its commercial involvement, could be seen as supporting a conclusion that reliance was reasonable in the pleaded circumstance.

55 The indices of proximity offered in *Hercules Managements* for a special relationship (direct financial interest; professional skill or knowledge; advice provided in the course of business, deliberately or in response to a specific request) may not be particularly apt in the context of alleged negligent misrepresentations by government. I note, however, that the representations are alleged to have been made in the course of Health Canada's regulatory and other activities, not in the course of casual interaction. They were made specifically to the manufacturers who were subject to Health Canada's regulatory powers and by officials alleged to have special skill, judgment and knowledge.

56 Before leaving this issue, two final arguments must be considered. First, in the *Costs Recovery* case, Canada submits that there is no *prima facie* duty of care between Canada and the tobacco companies because the potential damages that the tobacco companies may incur under the *CRA* were not foreseeable. It argues that "[i]t was not reasonably foreseeable by Canada that a provincial government might create a wholly new type of civil obligation to reimburse costs incurred by a provincial health care scheme in respect of defined tobacco related wrongs, with unlimited retroactive and prospective reach" (A.F. at para. 36).

57 In my view, Canada's argument was correctly rejected by the majority of the Court of Appeal. It is not necessary that Canada should have foreseen the precise statutory vehicle that would result in the tobacco companies' liability. All that is required is that it could have foreseen that its negligent misrepresentations would result in a harm of some sort to the tobacco companies: *Hercules Managements*, at paras. 25-26 and 42. On the facts pleaded, it cannot be ruled out that the tobacco companies may succeed in proving that Canada foresaw that the tobacco industry would incur this type of penalty for selling a more hazardous product. As held by Tysoe J.A., it is not necessary that Canada foresee that the liability would extend to health care costs specifically, or that provinces would create statutory causes of action to recover these costs. Rather, "[i]t is sufficient that Canada could have reasonably foreseen in a general way that the appellants would suffer harm

if the light and mild cigarettes were more hazardous to the health of smokers than regular cigarettes" (at para. 78).

58 Second, Canada argues that the relationship in this case does not meet the requirement of reasonable reliance because Canada was not acting in a commercial capacity, but rather as a regulator of an industry. It was therefore not reasonable for the tobacco companies to have relied on Canada as an advisor, it submits. This view was adopted by Hall J.A. in dissent, holding that "it could never have been the perception of the appellants that Canada was taking responsibility for their interests" (*Costs Recovery* case, at para. 51).

59 In my view, this argument misconceives the reliance necessary for negligent misrepresentation under the test in *Hercules Managements*. When the jurisprudence refers to "reasonable reliance" in the context of negligent misrepresentation, it asks whether it was reasonable for the listener to rely on the speaker's statement as accurate, not whether it was reasonable to believe that the speaker is guaranteeing the accuracy of its statement. It is not plain and obvious that it was unreasonable for the tobacco companies to rely on Canada's statements about the advantages of light or mild cigarettes. In my view, Canada's argument that it was acting as a regulator does not relate to reasonable reliance, although it exposes policy concerns that should be considered at stage two of the *Anns/Cooper* test: *Hercules Managements*, at para. 41.

60 In sum, I conclude that the claims between the tobacco companies and Canada should not be struck out at the first stage of the analysis. The pleadings, assuming them to be true, disclose a *prima facie* duty of care in negligent misrepresentation. However, the facts as pleaded in the *Knight* case do not show a relationship between Canada and consumers that would give rise to a duty of care. That claim should accordingly be struck at this stage of the analysis.

## (2) Stage Two: Conflicting Policy Considerations

61 Canada submits that there can be no duty of care in the cases at bar because of stage-two policy considerations. It relies on four policy concerns: (1) that the alleged misrepresentations were policy decisions of the government; (2) that recognizing a duty of care would give rise to indeterminate liability to an indeterminate class; (3) that recognizing a duty of care would create an unintended insurance scheme; and (4) that allowing Imperial's claim would transfer responsibility for tobacco products to the government from the manufacturer, and the manufacturer "is best positioned to address liability for economic loss" (A.F., at para. 72).

62 For the reasons that follow, I accept Canada's submission that its alleged negligent misrepresentations to the tobacco industry in both cases should not give rise to tort liability because of stage-two policy considerations. First, the alleged statements are protected expressions of government policy. Second, recognizing a duty of care would expose Canada to indeterminate liability.

### (a) *Government Policy Decisions*

63 Canada contends that it had a policy of encouraging smokers to consume low-tar cigarettes, and pursuant to this policy, promoted this variety of cigarette and developed strains of low-tar tobacco. Canada argues that statements made pursuant to this policy cannot ground tort liability. It relies on the statement of Cory J. in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, that "[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors" (p. 1240).

64 The tobacco companies, for their part, contend that Canada's actions were not matters of policy, but operational acts implementing policy, and therefore, are subject to tort liability. They submit that Canada's argument fails to account for the "facts" as pleaded in the third-party notices, namely that Canada was acting in an operational capacity, and as a participant in the tobacco industry. The tobacco companies also argue that more evidence is required to determine if the government's actions were operational or pursuant to policy, and that the matter should therefore be permitted to go to trial.

65 In the *Knight* case, the majority in the Court of Appeal, *per* Tysoe J.A., agreed with Imperial's submissions, holding that "evidence is required to determine which of the actions and statements of Canada in this case were policy decisions and which were operational decisions" (para. 52). Hall J.A. dissented; in his view, it was clear that all of Canada's initiatives were matters of government policy:

[Canada] had a responsibility, as pleaded in the Third Party Notice, to protect the health of the Canadian public including smokers. Any initiatives it took to develop less hazardous strains of tobacco, or to publish the tar and nicotine yields of different cigarette brands were directed to this end. While 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. [para. 100]

66 In order to resolve the issue of whether the alleged "policy" nature of Canada's conduct negates the *prima facie* duty of care for negligent misrepresentation established at stage one of the analysis, it is necessary to first consider several preliminary matters.

(i) Conduct at Issue

67 The first preliminary matter is the conduct at issue for purposes of this discussion. The third-party notices describe two distinct types of conduct -- one that is related to the allegation of negligent misrepresentation and one that is not. The first type of conduct relates to representations by Canada that low-tar and light cigarettes were less harmful to health than other cigarettes. The second type of conduct relates to Agriculture Canada's role in developing and growing a strain of low-tar tobacco and collecting royalties on the product. In argument, the tobacco companies merged the two types of conduct, emphasizing aspects that cast Canada in the role of a business operator in the tobacco industry. However, in considering negligent misrepresentation, only the first type of conduct -- conduct relevant to statements and representations made by Canada -- is at issue.

(ii) Relevance of Evidence

68 This brings us to the second and related preliminary matter -- the helpfulness of evidence in resolving the question of whether the third-party claims for negligent misrepresentation should be struck. The majority of the Court Appeal concluded that evidence was required to establish whether Canada's alleged misrepresentations were made pursuant to a government policy. Likewise, the tobacco companies in this Court argued strenuously that insofar as Canada was developing, growing, and profiting from low-tar tobacco, it should not be regarded as a government regulator or policy

maker, but rather a business operator. Evidence was required, they urged, to determine the extent to which this was business activity.

69 There are two problems with this argument. The first is that, as mentioned, it relies mainly on conduct -- the development and marketing of a strain of low-tar tobacco -- that is not directly related to the allegation of negligent misrepresentation. The only question at this point of the analysis is whether policy considerations weigh against finding that Canada was under a duty of care to the tobacco companies to take reasonable care to accurately represent the qualities of low-tar tobacco. Whether Canada produced strains of low-tar tobacco is not directly relevant to that inquiry. The question is whether, insofar as it made statements on this matter, policy considerations militate against holding it liable for those statements.

70 The second problem with the argument is that, as discussed above, a motion to strike is, by its very nature, not dependent on evidence. The facts pleaded must be assumed to be true. Unless it is plain and obvious that on those facts the action has no reasonable chance of success, the motion to strike must be refused. To put it another way, if there is a reasonable chance that the matter as pleaded may in fact turn out not to be a matter of policy, then the application to strike must be dismissed. Doubts as to what may be proved in the evidence should be resolved in favour of proceeding to trial. The question for us is therefore whether, assuming the facts pleaded to be true, it is plain and obvious that any duty of care in negligent misrepresentation would be defeated on the ground that the conduct grounding the alleged misrepresentation is a matter of government policy and hence not capable of giving rise to liability in tort.

71 Before we can answer this question, we must consider a third preliminary issue: what constitutes a policy decision immune from review by the courts?

### (iii) What Constitutes a Policy Decision Immune from Judicial Review?

72 The question of what constitutes a policy decision that is generally protected from negligence liability is a vexed one, upon which much judicial ink has been spilled. There is general agreement in the common law world that government policy decisions are not justiciable and cannot give rise to tort liability. There is also general agreement that governments may attract liability in tort where government agents are negligent in carrying out prescribed duties. The problem is to devise a workable test to distinguish these situations.

73 The jurisprudence reveals two approaches to the problem, one emphasizing discretion, the other, policy, each with variations. The first approach focuses on the discretionary nature of the impugned conduct. The "discretionary decision" approach was first adopted in *Home Office v. Dorset Yacht Co.*, [1970] 2 W.L.R. 1140 (H.L.). This approach holds that public authorities should be exempt from liability if they are acting within their discretion, unless the challenged decision is irrational.

74 The second approach emphasizes the "policy" nature of protected state conduct. Policy decisions are conceived of as a subset of discretionary decisions, typically characterized as raising social, economic and political considerations. These are sometimes called "true" or "core" policy decisions. They are exempt from judicial consideration and cannot give rise to liability in tort, provided they are neither irrational nor taken in bad faith. A variant of this is the policy/operational test, in which "true" policy decisions are distinguished from "operational" decisions, which seek to implement or carry out settled policy. To date, the policy/operational approach is the dominant ap-

proach in Canada: *Just; Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145.

75 To complicate matters, the concepts of discretion and policy overlap and are sometimes used interchangeably. Thus Lord Wilberforce in *Anns* defined policy as a synonym for discretion (p. 500).

76 There is wide consensus that the law of negligence must account for the unique role of government agencies: *Just*. On the one hand, it is important for public authorities to be liable in general for their negligent conduct in light of the pervasive role that they play in all aspects of society. Exempting all government actions from liability would result in intolerable outcomes. On the other hand, "the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions": *Just*, at p. 1239. The challenge, to repeat, is to fashion a just and workable legal test.

77 The main difficulty with the "discretion" approach is that it has the potential to create an overbroad exemption for the conduct of government actors. Many decisions can be characterized as to some extent discretionary. For this reason, this approach has sometimes been refined or replaced by tests that narrow the scope of the discretion that confers immunity.

78 The main difficulty with the policy/operational approach is that courts have found it notoriously difficult to decide whether a particular government decision falls on the policy or operational side of the line. Even low-level state employees may enjoy some discretion related to how much money is in the budget or which of a range of tasks is most important at a particular time. Is the decision of a social worker when to visit a troubled home, or the decision of a snow-plow operator when to sand an icy road, a policy decision or an operational decision? Depending on the circumstances, it may be argued to be either or both. The policy/operational distinction, while capturing an important element of why some government conduct should generally be shielded from liability, does not work very well as a legal test.

79 The elusiveness of a workable test to define policy decisions protected from judicial review is captured by the history of the issue in various courts. I begin with the House of Lords. The House initially adopted the view that all discretionary decisions of government are immune, unless they are irrational: *Home Office v. Dorset Yacht Co.* It then moved on to a two-stage test that asked first whether the decision was discretionary and, if so, rational; and asked second whether it was a core policy decision, in which case it was entirely exempt from judicial scrutiny: *X (minors) v. Bedfordshire County Council*, [1995] 3 All E.R. 353. Within a year of adopting this two-stage test, the House abandoned it with a ringing declamation of the policy/operational distinction as unworkable in difficult cases, a point said to be evidenced by the Canadian jurisprudence: *Stovin v. Wise*, [1996] A.C. 932 (H.L.), *per* Lord Hoffman. In its most recent foray into the subject, the House of Lords affirmed that both the policy/operational distinction and the discretionary decision approach are valuable tools for discerning which government decisions attract tort liability, but held that the final test is a "justiciability" test: *Barrett v. Enfield London Borough Council*, [2001] 2 A.C. 550. The ultimate question on this test is whether the court is institutionally capable of deciding on the question, or "whether the court should accept that it has no role to play" (p. 571). Thus at the end of the long judicial voyage the traveller arrives at a test that essentially restates the question. When should the court hold that a government decision is protected from negligence liability? When the court concludes that the matter is one for the government and not the courts.

**80** Australian judges in successive cases have divided between a discretionary/irrationality model and a "true policy" model. In *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424 (H.C.), two of the justices (Gibbs C.J. and Wilson J.) adopted the *Dorset Yacht* rule that all discretionary decisions are immune, provided they are rational (p. 442). They endorsed the policy/operational distinction as a logical test for discerning which decisions should be protected, and adopted Lord Wilberforce's definition of policy as a synonym for discretion. Mason J., by contrast, held that only core policy decisions, which he viewed as a narrower subset of discretionary decisions, were protected (p. 500). Deane J. agreed with Mason J. for somewhat different reasons. Brennan J. did not comment on which test should be adopted, leaving the test an open question. The Australian High Court again divided in *Pyrenees Shire Council v. Day*, [1998] HCA 3, 192 C.L.R. 330, with three justices holding that a discretionary government action will only attract liability if it is irrational and two justices endorsing different versions of the policy/operational distinction.

**81** In the United States, the liability of the federal government is governed by the *Federal Tort Claims Act* of 1946, 28 U.S.C. ("FTCA"), which waived sovereign immunity for torts, but created an exemption for discretionary decisions. Section 2680(a) excludes liability in tort for

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. [Emphasis added.]

Significantly, s. 2680(h) of the *FTCA* exempts the federal government from any claim of misrepresentation, either intentional or negligent: *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), at p. 430; *United States v. Neustadt*, 366 U.S. 696 (1961).

**82** Without detailing the complex history of the American jurisprudence on the issue, it suffices to say that the cases have narrowed the concept of discretion in the *FTCA* by reference to the concept of policy. Some cases develop this analysis by distinguishing between policy and operational decisions: e.g., *Dalehite v. United States*, 346 U.S. 15 (1953). The Supreme Court of the United States has since distanced itself from the approach of defining a true policy decision negatively as "not operational", in favour of an approach that asks whether the impugned state conduct was based on public policy considerations. In *United States v. Gaubert*, 499 U.S. 315 (1991), White J. faulted the Court of Appeals for relying on "a nonexistent dichotomy between discretionary functions and operational activities" (p. 326). He held that the "discretionary function exception" of the *FTCA* "protects only governmental actions and decisions based on considerations of public policy" (at p. 323, citing *Berkovitz v. United States*, 486 U.S. 531 (1988), at p. 537 (emphasis added)), such as those involving social, economic and political considerations: see also *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984).

**83** In *Gaubert*, only Scalia J. found lingering appeal in defining policy decisions as "not operational", but only in the narrow sense that people at the operational level will seldom make policy decisions. He stated that "there is something to the planning vs. operational dichotomy -- though ... not precisely what the Court of Appeals believed" (p. 335). That "something" is that "[o]rdinarily, an employee working at the operational level is not responsible for policy decisions, even though policy considerations may be highly relevant to his actions". For Scalia J., a government decision is

a protected policy decision if it "ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations".

84 A review of the jurisprudence provokes the following observations. The first is that a test based simply on the exercise of government discretion is generally now viewed as too broad. Discretion can imbue even routine tasks, like driving a government vehicle. To protect all government acts that involve discretion unless they are irrational simply casts the net of immunity too broadly.

85 The second observation is that there is considerable support in all jurisdictions reviewed for the view that "true" or "core" policy decisions should be protected from negligence liability. The current Canadian approach holds that only "true" policy decisions should be so protected, as opposed to operational decisions: *Just*. The difficulty in defining such decisions does not detract from the fact that the cases keep coming back to this central insight. Even the most recent "justiciability" test in the U.K. looks to this concept for support in defining what should be viewed as justiciable.

86 A third observation is that defining a core policy decision negatively as a decision that it is not an "operational" decision may not always be helpful as a stand-alone test. It posits a stark dichotomy between two water-tight compartments -- policy decisions and operational decisions. In fact, decisions in real life may not fall neatly into one category or the other.

87 Instead of defining protected policy decisions negatively, as "not operational", the majority in *Gaubert* defines them positively as discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and political considerations. Generally, policy decisions are made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations. The decision is a considered decision that represents a "policy" in the sense of a general rule or approach, applied to a particular situation. It represents "a course or principle of action adopted or proposed by a government": *New Oxford Dictionary of English* (1998), at p. 1434. When judges are faced with such a course or principle of action adopted by a government, they generally will find the matter to be a policy decision. The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.

88 Policy, used in this sense, is not the same thing as discretion. Discretion is concerned with whether a particular actor had a choice to act in one way or the other. Policy is a narrow subset of discretionary decisions, covering only those decisions that are based on public policy considerations, like economic, social and political considerations. Policy decisions are always discretionary, in the sense that a different policy could have been chosen. But not all discretionary decisions by government are policy decisions.

89 While the main focus on the *Gaubert* approach is on the nature of the decision, the role of the person who makes the decision may be of assistance. Did the decision maker have the responsibility of looking at social, economic or political factors and formulating a "course" or "principle" of action with respect to a particular problem facing the government? Without suggesting that the question can be resolved simply by reference to the rank of the actor, there is something to Scalia J.'s observation in *Gaubert* that employees working at the operational level are not usually involved in making policy choices.

90 I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

91 Applying this approach to motions to strike, we may conclude that where it is "plain and obvious" that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort. If it is not plain and obvious, the matter must be allowed to go to trial.

(iv) Conclusion on the Policy Argument

92 As discussed, the question is whether the alleged representations of Canada to the tobacco companies that low-tar cigarettes are less harmful to health are matters of policy, in the sense that they constitute a course or principle of action of the government. If so, the representations cannot ground an action in tort.

93 The third-party notices plead that Canada made statements to the public (and to the tobacco companies) warning about the hazards of smoking, and asserting that low-tar cigarettes are less harmful than regular cigarettes; that the representations that low-tar cigarettes are less harmful to health were false; and that insofar as consumption caused extra harm to consumers for which the tobacco companies are held liable, Canada is required to indemnify the tobacco companies and/or contribute to their losses.

94 The third-party notices implicitly accept that in making the alleged representations, Health Canada was acting out of concern for the health of Canadians, pursuant to its policy of encouraging smokers to switch to low-tar cigarettes. They assert, in effect, that Health Canada had a policy to warn the public about the hazardous effects of smoking, and to encourage healthier smoking habits among Canadians. The third-party claims rest on the allegation that Health Canada accepted that some smokers would continue to smoke despite the adverse health effects, and decided that these smokers should be encouraged to smoke lower-tar cigarettes.

95 In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes. This was a "true" or "core" policy, in the sense of a course or principle of action that the government adopted. The government's alleged course of action was adopted at the highest level in the Canadian government, and involved social and economic considerations. Canada, on the pleadings, developed this policy out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease. In my view, it is plain and obvious that the alleged representations were matters of government policy, with the result that the tobacco companies' claims against Canada for negligent misrepresentation must be struck out.

96 Having concluded that the claims for negligent misrepresentation are not actionable because the alleged representations were matters of government policy, it is not necessary to canvas the other stage-two policy grounds that Canada raised against the third-party claims relating to negligent misrepresentation. However, since the argument about indeterminate liability was fully argued, I will briefly discuss it. In my view, it confirms that no liability in tort should be recognized for Canada's alleged misrepresentations.

(b) *Indeterminate Liability*

97 Canada submits that allowing the defendants' claims in negligent misrepresentation would result in indeterminate liability, and must therefore be rejected. It submits that Canada had no control over the number of cigarettes being sold. It argues that in cases of economic loss, the courts must limit liability to cases where the third party had a means of controlling the extent of liability.

98 The tobacco companies respond that Canada faces extensive, but not indeterminate liability. They submit that the scope of Canada's liability to tobacco companies is circumscribed by the tort of negligent misrepresentation. Canada would only be liable to the smokers of light cigarettes and to the tobacco companies.

99 I agree with Canada that the prospect of indeterminate liability is fatal to the tobacco companies' claims of negligent misrepresentation. Insofar as the claims are based on representations to consumers, Canada had no control over the number of people who smoked light cigarettes. This situation is analogous to *Cooper v. Hobart*, where this Court held that it would have declined to apply a duty of care to the Registrar of Mortgage Brokers in respect of economic losses suffered by investors because "[t]he Act itself imposes no limit and the Registrar has no means of controlling the number of investors or the amount of money invested in the mortgage brokerage system" (para. 54). While this statement was made in *obiter*, the argument is persuasive.

100 The risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss. In *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, the Court, *per* Rothstein J., held that "in cases of pure economic loss, to paraphrase Cardozo C.J., care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate" (para. 62). If Canada owed a duty of care to consumers of light cigarettes, the potential class of plaintiffs and the amount of liability would be indeterminate.

101 Insofar as the claims are based on representations to the tobacco companies, they are at first blush more circumscribed. However, this distinction breaks down on analysis. Recognizing a duty of care for representations to the tobacco companies would effectively amount to a duty to consumers, since the quantum of damages owed to the companies in both cases would depend on the number of smokers and the number of cigarettes sold. This is a flow-through claim of negligent misrepresentation, where the tobacco companies are passing along their potential liability to consumers and to the province of British Columbia. In my view, in both cases, these claims should fail because Canada was not in control of the extent of its potential liability.

(c) *Summary on Stage-Two Policy Arguments*

102 In my view, this Court should strike the negligent misrepresentation claims in both cases as a result of stage-two policy concerns about interfering with government policy decisions and the prospect of indeterminate liability.

#### D. Failure to Warn

**103** The tobacco companies make two allegations of failure to warn: B.A.T. alleges that Canada directed the tobacco companies not to provide warnings on cigarette packages (the labelling claim) about the health hazards of cigarettes; and Imperial alleges that Canada failed to warn the tobacco companies about the dangers posed by the strains of tobacco designed and licensed by Canada.

##### (1) Labelling Claim

**104** B.A.T. alleges that by instructing the industry to not put warning labels on their cigarettes, Canada is liable in tort for failure to warn. In the *Knight* case, Tysoe J.A. did not address the failure to warn claims. Hall J.A., writing for the minority, would have struck those claims on stage-two grounds, finding that Canada's decision was a policy decision and that liability would be indeterminate. Hall J.A. also held that liability would conflict with the government's public duties (para. 99). In the *Costs Recovery* case, Tysoe J.A. adopted Hall J.A.'s analysis from the *Knight* case in rejecting the failure to warn claim as between Canada and the tobacco companies (para. 89). B.A.T. challenges these findings.

**105** The crux of this failure to warn claim is essentially the same as the negligent misrepresentation claim, and should be rejected for the same policy reasons. The Minister of Health's recommendations on warning labels were integral to the government's policy of encouraging smokers to switch to low-tar cigarettes. As such, they cannot ground a claim in failure to warn.

##### (2) Failure to Warn Imperial About Health Hazards

**106** The Court of Appeal, *per* Tysoe J.A., held that the third-party notices did not sufficiently plead that Canada failed to warn the industry about the health hazards of its strains of tobacco. Imperial argues that this was in error, because the elements of a failure to warn claim are identical to the elements of the negligence claim, which was sufficiently pleaded.

**107** Canada points out that the two paragraphs of the third-party notices that discuss failure to warn only mention the claims that relate to labels, and not the claim that Canada failed to warn Imperial about potential health hazards of the tobacco strains. Canada also argues that to support a claim of failure to warn, the plaintiff must not only show that the defendant acted negligently, but that the defendant was also under a positive duty to act. It submits that nothing in the third-party notices suggests that Canada was under such a positive duty here.

**108** I agree with Canada that the tort of failure to warn requires evidence of a positive duty towards the plaintiff. Positive duties in tort law are the exception rather than the rule. In *Childs v. Desormeaux*, the Court held:

Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved. [para. 31]

Moreover, none of the authorities cited by Imperial support the proposition that a plea of negligence, without more, will suffice to raise a duty to warn: *Day v. Central Okanagan (Regional District)*, 2000 BCSC 1134, 79 B.C.L.R. (3d) 36, *per* Drossos J.; see also *Elias v. Headache and Pain Management Clinic*, 2008 CanLII 53133 (Ont. S.C.J.), *per* Macdonald J. (paras. 6 to 9).

**109** Even if pleading negligence were viewed as sufficient to raise a claim of duty to warn, which I do not accept, the claim would fail for the stage-two policy reasons applicable to the negligent misrepresentation claim.

#### *E. Negligent Design*

**110** The tobacco companies have brought two types of negligent design claims against Canada that remain to be considered. First, they submit that Canada breached its duty of care to the tobacco companies when it negligently designed its strains of low-tar tobacco. The Court of Appeal held that the pleadings supported a *prima facie* duty of care in this respect, but held that the duty was negated by the stage-two policy concern of indeterminate liability. Second, Imperial submits that Canada breached its duty of care to the consumers of light and mild cigarettes in the *Knight* case. A majority of the Court of Appeal held that this claim should proceed to trial.

**111** In my view, both remaining negligent design claims establish a *prima facie* duty of care, but fail at the second stage of the analysis because they relate to core government policy decisions.

##### (1) *Prima Facie* Duty of Care

**112** I begin with the claim that Canada owed a *prima facie* duty of care to the tobacco companies. Canada submits that there was no *prima facie* duty of care since there is no proximity between Canada and the tobacco companies, relying on the same arguments that it raises in the negligent misrepresentations claims.

**113** In my view, the Court of Appeal correctly concluded that Canada owed a *prima facie* duty of care towards the tobacco companies with respect to its design of low-tar tobacco strains. I agree with Tysoe J.A. that the alleged relationship in this case meets the requirements for proximity:

If sufficient proximity exists in the relationship between a designer of a product and a purchaser of the product, it would seem to me to follow that there is sufficient proximity in the relationship between the designer of a product and a manufacturer who uses the product in goods sold to the public. Also, the designer of the product ought reasonably to have the manufacturer in contemplation as a person who would be affected by its design in the context of the present case. It would have been reasonably foreseeable to the designer of the product that a manufacturer of goods incorporating the product could be required to refund the purchase price paid by consumers if the design of the product did not accomplish that which it was intended to accomplish. [*Knight* case, para. 67]

**114** The allegation is that Canada was acting like a private company conducting business, and conducted itself toward the tobacco companies in a way that established proximity. The proximity alleged is not based on a statutory duty, but on interactions between Canada and the tobacco companies. Canada's argument that a duty of care would result in conflicting private and public duties does not negate proximity arising from conduct, although it may be a relevant stage-two policy consideration.

**115** For similar reasons, I conclude that on the facts pleaded, Canada owed a *prima facie* duty of care to the consumers of light and mild cigarettes in the *Knight* case. On the facts pleaded, it is at least arguable that Canada was acting in a commercial capacity when it designed its strains of tobacco. As *Tysoe J.A.* held in the court below, "a person who designs a product intended for sale to the public owes a *prima facie* duty of care to the purchasers of the product" (para. 48).

## (2) Stage-Two Policy Considerations

**116** For the reasons given in relation to the negligent misrepresentation claim, I am of the view that stage-two policy considerations negate this *prima facie* duty of care for the claims of negligent design. The decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada's health policy. It was a decision based on social and economic factors. As a core government policy decision, it cannot ground a claim for negligent design. This conclusion makes it unnecessary to consider the argument of indeterminate liability also raised as a stage- two policy objection to the claim of negligent design.

### F. *The Direct Claims Under the Costs Recovery Act*

**117** The tobacco companies submit that the Court of Appeal erred when it held that it was plain and obvious that Canada could not qualify as a manufacturer under the *CRA*. They also present three alternative arguments: (1) that if Canada is not liable under the Act, it is liable under the recently adopted *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 ("*HCCRA*"); (2) that if Canada is not liable under either the *CRA* or the *HCCRA*, it is nonetheless liable to the defendants for contribution under the *Negligence Act*; and (3) that in the further alternative, Canada could be liable for contribution under the common law (joint factum of Rothmans, Benson & Hedges ("RBH") and Philip Morris only).

**118.** Section 2 of the *CRA* establishes that "[t]he government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong". The words "manufacture" and "manufacturer" are defined in s. 1 of the Act as follows:

"**manufacture**" includes, for a tobacco product, the production, assembly or packaging of the tobacco product;

"**manufacturer**" means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past

- (a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,
- (b) for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons,
- (c) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or

- (d) is a trade association primarily engaged in
- (i) the advancement of the interests of manufacturers.
  - (ii) the promotion of a tobacco product, or
  - (iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;

The third-party notices allege that Canada grew (manufactured) tobacco and licensed it to the tobacco industry for a profit, and that Canada "promoted" the use of mild or light cigarettes to the industry and the public. These facts, they say, brings Canada within the definition of "manufacturer" of the *CRA*.

**119** Canada submits that it is not a manufacturer under the Act. In the alternative, it submits that it is immune from the operation of this provincial statute at common law and alternatively under the Constitution.

**120** For the reasons that follow, I conclude that Canada is not a manufacturer under the Act. Indeed, holding Canada accountable under the *CRA* would defeat the legislature's intention of transferring the health-care costs resulting from tobacco related wrongs from taxpayers to the tobacco industry. This conclusion makes it unnecessary to consider Canada's arguments that it would in any event be immune from liability under the provincial Act. I would also reject the tobacco companies' argument for contribution under the *HCCRA* and the *Negligence Act*, and the common law contribution argument.

**(1) Could Canada Qualify as a Manufacturer Under the *Costs Recovery Act*?**

**121** The Court of Appeal held that the definition of "manufacturer" could not apply to the Government of Canada. I agree. While the argument that Canada could qualify as a manufacturer under the *CRA* has superficial appeal, when the Act is read in context and all of its provisions are taken into account, it is apparent that the British Columbia legislature did not intend for Canada to be liable as a manufacturer. This is confirmed by the text of the statute, the intent of the legislature in adopting the Act, and the broader context of the relationship between the province and the federal government.

**(a) Text of the Statute**

**122** The definition of manufacturer in s. 1 "manufacturer" (b) of the Act includes a person who "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". Hall J.A. held that this definition indicated that the legislature intended the Act to apply to companies involved in the tobacco industry, and not to governments.

**123** The tobacco companies respond that the definition of "manufacturer" is disjunctive since it uses the word "or", such that an individual will qualify as a manufacturer if it meets any of the four definitions in (a) to (d). Even if Canada is incapable of meeting the definition in (b) of the Act (deriving 10% of its revenues from the manufacture or promotion of tobacco products), Canada qualifies under subparagraphs (a) (causing the manufacture of tobacco products) and (c) (engaging in or causing others to engage in the promotion of tobacco products) on the facts pled, they argue.

124 Like the Court of Appeal, I would reject this argument. It is true that s. 1 must be read disjunctively, and that an individual will qualify as a manufacturer if it meets any of the four definitions in (a) to (d). However, the Act must nevertheless be read purposively and as a whole. A proper reading of the Act will therefore take each of the four definitions into account. It will also consider the rest of the statutory scheme, and the legislative context. When the Act is read in this way, it is clear that the B.C. legislature did not intend to include the federal government as a potential manufacturer under the *CRA*.

125 The fact that one of the statutory definitions is based on revenue percentage suggests that the term "manufacturer" is meant to capture businesses or individuals who earn profit from tobacco-related activities. This interpretation is reinforced by the provisions of the Act that establish the liability of defendants. Section 3(3)(b) provides that "each defendant to which the presumptions [provided in s. 3(2) of the *CRA*] 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". This language cannot be stretched to include the Government of Canada.

126 I conclude that the text of the *CRA*, read as a whole, does not support the view that Canada is a "manufacturer" under the Act.

(b) *Legislative Intention*

127 I agree with Canada that considerations related to legislative intent further support the view that Canada does not fall within the definition of "manufacturer". When the *CRA* was introduced in the legislature, the Minister responsible stated that "the industry" manufactured a lethal product, and that "the industry" composed of "tobacco companies" should accordingly be held accountable (*B.C. Debates of the Legislative Assembly*, vol. 20, 4th Sess., 36th Parl., June 7, 2000, at p. 16314). It is plain and obvious that the Government of Canada would not fit into these categories.

128 Imperial submits that it is improper to rely on excerpts from *Hansard* on an application to strike a pleading, since evidence is not admissible on such an application. However, a distinction lies between evidence that is introduced to prove a point of fact and evidence of legislative intent that is provided to assist the court in discerning the proper interpretation of a statute. The former is not relevant on an application to strike; the latter may be. Applications to strike are intended to economize judicial resources in cases where on the facts pled, the law does not support the plaintiff's claim. Courts may consider all evidence relevant to statutory interpretation, in order to achieve this purpose.

(c) *Broader Context*

129 The broader context of the statute strongly supports the conclusion that the British Columbia legislature did not intend the federal government to be liable as a manufacturer of tobacco products. The object of the Act is to recover the cost of providing health care to British Columbians from the companies that sold them tobacco products. As held by this Court in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473:

[T]he driving force of the Act's cause of action is compensation for the government of British Columbia's health care costs, not remediation of tobacco manufacturers' breaches of duty. While the Act makes the existence of a breach of duty one of several necessary conditions to a manufacturer's liability to the govern-

ment, it is not the mischief at which the cause of action created by the Act is aimed. [para. 40]

The legislature sought to transfer the medical costs from provincial taxpayers to the private sector that sold a harmful product. This object would be fundamentally undermined if the funds were simply recovered from the federal government, which draws its revenue from the same taxpayers.

130 The tobacco companies' proposed application of the *CRA* to Canada is particularly problematic in light of the long-standing funding relationship between the federal and provincial governments with regards to health care. The federal government has been making health transfer payments to the provinces for decades. As held by Hall J.A.:

If the *Costs Recovery Act* were to be construed to permit the inclusion of Canada as a manufacturer targeted for the recovery of provincial health costs, this would permit a direct economic claim to be advanced against Canada by British Columbia to obtain further funding for health care costs. In light of these longstanding fiscal arrangements between governments, I cannot conceive that the legislature of British Columbia could ever have envisaged that Canada might be a target under the *Costs Recovery Act*. [para. 33]

131 Imperial argues that the only way to achieve the object of the *CRA* is to allow the province to recover from all those who participated in the tobacco industry, including the federal government. I disagree. Holding the federal government accountable under the Act would defeat the legislature's intention of transferring the cost of medical treatment from taxpayers to the tobacco industry.

#### (d) Summary

132 For the foregoing reasons, I conclude that it is plain and obvious that the federal government does not qualify as a manufacturer of tobacco products under the *CRA*. This pleading must therefore be struck.

#### (2) Could Canada Be Found Liable Under the *Health Care Costs Recovery Act*?

133 The tobacco companies submit that if Canada is not liable under the *CRA*, it would be liable under the *HCCRA*, which creates a cause of action for the province to recover health care costs generally from wrongdoers (s. 8(1)). Canada submits that the *HCCRA* is inapplicable because it provides that the cause of action does not apply to cases that qualify as "tobacco related wrong[s]" under the *CRA* (s. 24(3)(b)). RBH and Philip Morris respond that a "tobacco related wrong" under the *CRA* may only be committed by a "manufacturer". Consequently, if the *CRA* does not apply to Canada because it cannot qualify as a manufacturer, it is not open to Canada to argue that the more general *HCCRA* does not apply either.

134 In my view, the tobacco companies cannot rely on the *HCCRA* in a *CRA* action for contribution. While it is true that Canada is incapable of committing a tobacco-related wrong itself if it is not a manufacturer, the underlying cause of action in this case is that it is the defendants who are alleged to have committed a tobacco-related wrong. The *HCCRA* specifies that it does not apply in

cases "arising out of a tobacco related wrong as defined in the *Tobacco Damages and Health Care Costs Recovery Act*" (s. 24(3)(b)). This precludes contribution claims arising out of that Act.

(3) Could Canada Be Liable for Contribution Under the *Negligence Act* if It Is not Directly Liable to British Columbia?

135 RBH and Philip Morris submit that even if Canada is not liable to British Columbia, it can still be held liable for contribution under the *Negligence Act*. They argue that direct liability to the plaintiff is not a requirement for being held liable in contribution.

136 As noted above, I agree with Canada's submission that, following *Giffels*, a party can only be liable for contribution if it is also liable to the plaintiff directly.

137 Accordingly, I would reject the argument that the *Negligence Act* in British Columbia allows recovery from a third party that could not be liable to the plaintiff.

(4) Could Canada Be Liable for Common Law Contribution?

138 RBH and Philip Morris submit that if this Court rejects the contribution claim under the *Negligence Act*, it should allow a contribution claim under the common law. They rely on this Court's decisions in *Bow Valley* and *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3, in which this Court recognized claims of contribution which were not permitted by statute.

139 I would reject this argument. In my view, the cases cited by RBH and Philip Morris support common law contribution claims only if the third party is directly liable to the plaintiff. In *Bow Valley*, the Court recognized a limited right of contribution "between tortfeasors", and noted that the defendants were "jointly and severally liable to the plaintiff" (paras. 101 and 102). A similar point was made by this Court in *Blackwater* (*per McLachlin C.J.*), which stated that a "common law right of contribution between tortfeasors may exist" (para. 68 (emphasis added)). There is no support in our jurisprudence for allowing contribution claims in cases where the third party is not liable to the plaintiff.

G. *Liability Under the Trade Practices Act and the Business Practices and Consumer Protection Act*

140 In the *Knight* case, Imperial alleges that Canada satisfies the definition of a "supplier" under the *Trade Practices Act* (*TPA*) and the *Business Practices and Consumer Protection Act* (*BPCPA*). The *TPA* was repealed and replaced by the *BPCPA* in 2004. Imperial argues that the Court of Appeal erred in striking its claim against Canada under these statutes.

141 In my view, Canada could not qualify as a "supplier" under the Acts on the facts pled. Section 1 of the *TPA* defined supplier as follows:

"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.

Section 1 of the *BPCPA* defines supplier as follows:

"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 Regarding 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;

**142** The Court of Appeal unanimously held that neither definition could apply to Canada because its alleged actions were not undertaken "in the course of business". The court held that the pleadings allege that Canada promoted the use of mild or light cigarettes, but only in order to reduce the health risks of smoking, not in the course of a business carried on for the purpose of earning a profit (para. 35).

**143** Imperial submits that it is not necessary for Canada to have been motivated by profit to qualify as a "supplier" under the Acts, provided it researched, designed and manufactured a defective product. Canada responds that its alleged purpose of improving the health of Canadians shows that it was not acting in the course of business. This was not a case where a public authority was itself operating in the private market as a business, but rather a case where a public authority sought to regulate the industry by promoting a type of cigarette.

**144** I accept that Canada's purpose for developing and promoting tobacco as described in the third-party notice suggests that it was not acting "in the course of business" or "in the course of the person's business" as those phrases are used in the *TPA* or the *BPCPA*, and therefore that Canada could not be a "supplier" under either of those statutes. The phrases "in the course of business" and "in the course of the person's business" may have different meanings, depending of the context. On the one hand, they can be read as including all activities that an individual undertakes in his or her professional life: e.g., see discussion of the indicia of reasonable reliance above. On the other, they can be understood as limited to activities undertaken for a commercial purpose. In my view, the contexts in which the phrases are used in the *TPA* and the *BPCPA* support the latter interpretation. The definitions of "supplier" in both Acts refer to "consumer transaction[s]", and contrast suppliers, who must have a commercial purpose, with consumers. It is plain and obvious from the facts pleaded that Canada did not promote the use of low-tar cigarettes for a commercial purpose, but for a health purpose. Canada is therefore not a supplier under the *TPA* or the *BPCPA*, and the contribution claim based on this ground and the *Negligence Act* should be struck.

**145** Having concluded that Canada is not liable under the *TPA* and the *BPCPA*, it is unnecessary to consider whether, if it were, Canada would be protected by Crown immunity.

#### H. *The Claim for Equitable Indemnity*

**146** RBH and Philip Morris submit that if the tobacco companies are found liable in the *Costs Recovery* case, Canada is liable for "equitable indemnity" on the facts pleaded. They submit that whenever a person requests or directs another person to do something that causes the other to incur liability, the requesting or directing person is liable to indemnify the other for its liability. Imperial adopts this argument in the *Knight* case.

**147** Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. As stated in *Parmley v. Parmley*, [1945] S.C.R. 635, claims of equitable indemnity "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" (p. 648, quoting Bowen L.J. in *Birmingham and District Land Co. v. London and North Western Railway Company* (1886), 34 Ch. D. 261, at p. 275).

**148** In my view, the Court of Appeal, *per* Hall J.A., correctly held that the tobacco companies could not establish this requirement of the claim:

[I]f 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. Likewise, 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. [*Costs Recovery* case, para. 57]

When Canada directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. Under such circumstances, it is unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request.

#### I. *Procedural Considerations*

**149** In the courts below, the tobacco companies argued that even if the claims for compensation against Canada are struck, Canada should remain a third party in the litigation for procedural reasons. The tobacco companies argued that their ability to mount defences against British Columbia in the *Costs Recovery* case and the class members in the *Knight* case would be severely prejudiced if Canada was no longer a third party. This argument was rejected in chambers by both Wedge J. and Satanove J. The majority of the Court of Appeal found it unnecessary to consider the question, while Hall J.A. would have affirmed the holdings of the chambers judges.

**150** The tobacco companies did not pursue this issue on appeal. I would affirm the findings of Wedge J., Satanove J. and Hall J.A. and strike the claims for declaratory relief.

#### V. Conclusion

**151** I conclude that it is plain and obvious that the tobacco companies' claims against Canada have no reasonable chance of success, and should be struck out. Canada's appeals in the *Costs Re-*

covery case and the *Knight* case are allowed, and the cross-appeals are dismissed. Costs are awarded throughout against Imperial in the *Knight* case, and against the tobacco companies in the *Costs Recovery* case. No costs are awarded against or in favour of British Columbia in the *Costs Recovery* case.

*Appeals allowed and cross-appeals dismissed with costs.*

**Solicitors:**

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*Solicitors for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33559): Hunter Litigation Chambers Law Corporation, Vancouver.*

*Solicitors for the respondent Her Majesty the Queen in Right of British Columbia (33563): Bull, Housser & Tupper, Vancouver.*

*Solicitors for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33563): Osler, Hoskin & Harcourt, Toronto.*

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*Solicitors for the respondent/appellant on cross-appeal Carreras Rothmans Limited (33563): Harper Grey, Vancouver.*

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\* \* \* \* \*

Corrigendum, released September 29, 2011

Please note the following change in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42:

The last reference in para. 147 should be "(p. 648, quoting Bowen L.J. in *Birmingham and District Land Co. v. London and North Western Railway Company* (1886), 34 Ch. D. 261, at p. 275)."

# **TAB 5**

## **Customs Act**

R.S.C., 1985, c. 1 (2nd Supp.)

### **Report of Goods**

#### **Report**

**12 (1)** Subject to this section, all goods that are imported shall, except in such circumstances and subject to such conditions as may be prescribed, be reported at the nearest customs office designated for that purpose that is open for business.

#### **Time and manner of report**

**(2)** Goods shall be reported under subsection (1) at such time and in such manner as the Governor in Council may prescribe.

#### **Who reports**

**(3)** Goods shall be reported under subsection (1)

- (a)** in the case of goods in the actual possession of a person arriving in Canada, or that form part of the person's baggage where the person and the person's baggage are being carried on board the same conveyance, by that person or, in prescribed circumstances, by the person in charge of the conveyance;
- (a.1)** in the case of goods imported by courier or as mail, by the person who exported the goods to Canada;
- (b)** in the case of goods, other than goods referred to in paragraph (a) or goods imported as mail, on board a conveyance arriving in Canada, by the person in charge of the conveyance; and
- (c)** in any other case, by the person on behalf of whom the goods are imported.

#### **Goods returned to Canada**

**(3.1)** For greater certainty, for the purposes of the reporting of goods under subsection (1), the return of goods to Canada after they are taken out of Canada is an importation of those goods.

#### **Where goods are reported outside Canada**

**(4)** Subsection (1) does not apply in respect of goods that are reported in the manner prescribed under subsection (2) prior to importation at a customs office outside Canada unless an officer requires that the goods be reported again under subsection (1) after importation.

#### **Exception**

**(5)** This section does not apply in respect of goods on board a conveyance that enters Canadian waters, including the inland waters, or the airspace over Canada while proceeding directly from one place outside Canada to another place outside Canada unless an officer otherwise requires.

### Written report

(6) Where goods are required by the regulations to be reported under subsection (1) in writing, they shall be reported in the prescribed form containing the prescribed information, or in such form containing such information as is satisfactory to the Minister.

### Certain goods not subject to seizure

(7) Goods described in tariff item No. 9813.00.00 or 9814.00.00 in the List of Tariff Provisions set out in the schedule to the *Customs Tariff*

- (a) that are in the actual possession of a person arriving in Canada, or that form part of his baggage, where the person and his baggage are being carried on board the same conveyance,
- (b) that are not charged with duties, and
- (c) the importation of which is not prohibited under the *Customs Tariff* or prohibited, controlled or regulated under any Act of Parliament other than this Act or the *Customs Tariff*

may not be seized as forfeit under this Act by reason only that they were not reported under this section.

R.S., 1985, c. 1 (2nd Supp.), s. 12, c. 41 (3rd Supp.), s. 119;

1992, c. 28, s. 3;

1996, c. 31, s. 75;

1997, c. 36, s. 149;

2001, c. 25, s. 12;

2015, c. 3, s. 60(F)..

## Limitation of Actions or Proceedings

### Limitation of action against officer or person assisting

**106 (1)** No action or judicial proceeding shall be commenced against an officer for anything done in the performance of his duties under this or any other Act of Parliament or a person called on to assist an officer in the performance of such duties more than three months after the time when the cause of action or the subject-matter of the proceeding arose.

# **TAB 6**

# **Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations**

**SOR/2002-184**

*cash* means coins referred to in section 7 of the Currency Act, notes issued by the Bank of Canada pursuant to the Bank of Canada Act that are intended for circulation in Canada or coins or bank notes of countries other than Canada. (*espèces*)

*precious metal* means gold, silver, palladium or platinum in the form of coins, bars, ingots or granules or in any other similar form. (*métal précieux*)

# **TAB 7**

# Oxford English Dictionary | The definitive record of the English language

## currency, *n.*

**Pronunciation:** Brit. /'kʌrənsi/ , /'kʌrənsi/ , U.S.  
/'kərənsi/

**Frequency (in current use):**

**Etymology:** formed as CURRENCY *n.* + -ENCY suffix.

†**1.**

**a.** The fact or condition of flowing, flow; course; *concr.* a current, stream. *Obs. rare.*

1657 J. HOWELL *Londinopolis* 18 To preserve the currency of the stream.

1698 E. TYSON in *Philos. Trans.* (Royal Soc.) 20 135 To shew the Currency of their *Canalis* here.

1758 R. BINNELL *Descr. Thames* 11 The Currency runs..with such Force, as to render the Navigation thereof imperfect.

†**b.** ‘Fluency; readiness of utterance; easiness of pronunciation’ (Johnson). *Obs.*

**c.** Running, rapid motion. (*nonce-use.*)

1841 L. HUNT *Seer* (1864) II. 69 We are truly in a state of transition,—of currency rather [in a coach].

**2.** The course (of time); the time during which anything is current.

1726 J. AYLiffe *Parergon Juris Canonici Anglicani* 196 The Currency of Time to establish a Custom, ought to be with a Continuando from the beginning to the end of the Term.

- 1837 J. R. McCULLOCH *Statist. Acct. Brit. Empire* I. III. i. 461 During the entire currency of the lease.
- 1850 Tait's *Edinb. Mag.* Jan. 4/1 Must his exclusion run only during the currency of other parts of his sentence?
- 1856 T. DE QUINCEY *Confessions Eng. Opium-eater* (rev. ed.) in *Select. Grave & Gay* V. 288 She might be in the currency of her eighth year.

**3.** Of money: The fact or quality of being current or passing from man to man as a medium of exchange; circulation.

Also *fig.*

- 1699 J. LOCKE *Reply to Bishop of Worcester's Answer to 2nd Let.* 130 'Tis the receiving of them by others, their very passing, that gives them their Authority and Currancy.
- 1722 *London Gaz.* No. 6078/2 All such of the said Bills..lose their Currency.
- 1735 POPE *Dunciad* (new ed.) I. 21 (*note*) The papers of Drapier against the currency of Wood's Copper Coin in Ireland.
- 1862 J. RUSKIN *Munera Pulveris* (1880) 15 The laws of currency and exchange.

#### **4.**

a. That which is current as a medium of exchange; the circulating medium (whether coins or notes); the money of a country in actual use.

- 1729 B. FRANKLIN *Modest Enq.* 27 Money..by being coin'd..is made a Currency.
- 1776 A. SMITH *Inq. Wealth of Nations* I. II. ii. 396 The paper currencies of North America.
- 1861 G. J. GOSCHEN *Theory Foreign Exchanges* 58 If there is a large paper currency side by side with the gold.
- 1866 A. CRUMP *Pract. Treat. Banking* vii. 154 The currencies of two countries..being dissimilar.

*fig.*

- 1806 J. BERESFORD *Miseries Human Life* I. iii. 48 General Miseries—the common currency of human existence.
- 1879 T. H. S. ESCOTT *England* II. 425 Their mischievous influences upon the moral currency.

**b.** *spec.* Applied to a current medium of exchange when differing in value from the money of account; e.g. the former currency and banco of Hamburg (see *BANCO* *n.*), the depreciated paper currency of various countries, and the local shillings and pence, of less value than sterling money formerly used in various British colonies.

- 1755 *JOHNSON Dict. Eng. Lang.* *Currency*..6. The papers stamped in the English colonies by authority, and passing for money.
- 1776 A. SMITH *Inq. Wealth of Nations* I. i. viii. 85 In the province of New York, common labourers earn three shillings and sixpence currency.
- 1872 *Japanese in Amer.* 201 Paper money..is also called currency.

**c.** Formerly a name for native-born Australians, as distinguished from *sterling*, or English-born. Also *attrib.* and as *adj.*

- 1827 P. CUNNINGHAM *Two Years New S. Wales* II. xxi. 53 Our Currency lads and lasses are a fine interesting race.
- 1827 P. CUNNINGHAM *Two Years New S. Wales* (ed. 2) II. ii. 48 The Currencies grow up tall and slender, like the Americans.
- 1837 J. D. LANG *Hist. Acct. New S. Wales* I. 220 Contests..between the colonial youth and natives of England, or, to use the phrase of the colony, between currency and sterling.
- 1878 *Punch* 10 Aug. 60/1 We currency-folk have..been able to absorb your convict refuse without contamination from its criminal leaven.
- 1892 K. LENTZNER *Austral. Word-bk.* 19 *Currency*, persons born in Australia, natives of England being termed 'sterling'.
- 1894 W. C. DAWE (*title*) The confessions of a currency girl.
- 1899 *Macmillan's Mag.* June 127/1 The boys when questioned would say: 'I'm not English; I'm Currency.'
- 1953 *Landfall* 7 173 She spoke the King's English like a currency lass.

**5.** The fact or quality of being current, prevalent, or generally reported and accepted among mankind; prevalence, vogue; *esp.* of ideas, reports, etc.

- 1722 *London Gaz.* No. 6077/2 The Currency of the ordinary Distempers.
- 1798 J. FERRIAR *Certain Var. Man* 213 The story..seems to have gained currency.
- 1841 T. CARLYLE *On Heroes* v. 295 Johnson's Writings, which once had such currency and celebrity, are now as it were disowned by the young generation.
- 1862 H. SPENCER *First Princ.* II. iv. §53 The currency of this belief continues.

## COMPOUNDS

**C1.** General *attrib.* (mostly in senses 3, 4).

**currency crank** *n.*

- 1931 H. G. WELLS *Work, Wealth & Happiness* (1932) ix. 363 General discussion [on currency] has been further burked by dubbing anyone who raised the question, a 'Currency Crank'.
- 1944 G. B. SHAW *Everybody's Polit. What's What?* xi. 84 The Currency Crank is a nuisance in every movement for social reform.

**currency money** *n.*

- 1816 M. KEATING *Trav.* (1817) II. 178 Currency-money here has depreciated..a full third.

**currency-mongering** *n.*

- 1885 *Pall Mall Gaz.* 9 June 5 America..has shown itself able to do strange things in the way of currency-mongering.

**currency purpose** *n.*

- 1866 A. CRUMP *Pract. Treat. Banking* viii. 160 The great advantage of coined money for currency purposes.

**currency question** *n.*

1849 D. M. MULOCK *Ogilvies* 17 He is..particularly well read on the currency question.

**currency restriction** *n.*

1967 'R. SIMONS' *Taxed to Death* ix. 151 Several printed formis about currency restrictions.

**C2.**

**currency note** *n.* paper money used as currency, esp. the £1 and 10s. notes first issued by the Treasury for circulation as legal tender during the war of 1914–18; a treasury note.

1891 J. L. KIPLING *Beast & Man in India* v. 105 A currency note for a thousand rupees.

1893 R. KIPLING *Many Inventions* The currency notes accumulated in the drawer.

1914 *Proclamation* 3 Feb. in *Jrnl. Inst. Bankers* (1915) 36 113 Payment for the order at its face value in coins or currency notes.

1920 *Discovery* May 145/1 Our over-issues of currency notes.

1922 *Encycl. Brit.* XXXI. 969/2 The 1914 Act..allowed an issue of £1 and 10s. currency notes by the Treasury.

This entry has not yet been fully updated (first published 1893).

# **TAB 8**



CANADA

CONSOLIDATION

CODIFICATION

## Royal Canadian Mint Act

R.S.C., 1985, c. R-9

## Loi sur la Monnaie royale canadienne

L.R.C. (1985), ch. R-9

Current to August 1, 2016

À jour au 1 août 2016

Last amended on December 16, 2014

Dernière modification le 16 décembre 2014

## OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

### Published consolidation is evidence

**31 (1)** Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

### Inconsistencies in Acts

**(2)** In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

## NOTE

This consolidation is current to August 1, 2016. The last amendments came into force on December 16, 2014. Any amendments that were not in force as of August 1, 2016 are set out at the end of this document under the heading "Amendments Not in Force".

## CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1<sup>er</sup> juin 2009, prévoient ce qui suit:

### Codifications comme élément de preuve

**31 (1)** Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

### Incompatibilité — lois

**(2)** Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

## NOTE

Cette codification est à jour au 1 août 2016. Les dernières modifications sont entrées en vigueur le 16 décembre 2014. Toutes modifications qui n'étaient pas en vigueur au 1 août 2016 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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**ANNEXE**



R.S.C., 1985, c. R-9

L.R.C., 1985, ch. R-9

## An Act respecting the Royal Canadian Mint

## Loi concernant la Monnaie royale canadienne

### Short Title

#### Short title

**1** This Act may be cited as the *Royal Canadian Mint Act*.

R.S., c. R-8, s. 1.

### Interpretation

#### Definitions

**2** In this Act,

**base metal** means any metal other than precious metal; (*métal commun*)

**base metal coin** [Repealed, 1999, c. 4, s. 1]

**Board** means the Board of Directors of the Mint appointed under this Act; (*conseil*)

**circulation coin** means a coin composed of base metal that is listed in Part 2 of the schedule and that is put into circulation in Canada for use in day-to-day transactions; (*monnaie de circulation*)

**Master** means the Master of the Mint; (*président*)

**Minister** [Repealed, 2005, c. 38, s. 129]

**Mint** means the Royal Canadian Mint established by this Act; (*Monnaie*)

**non-circulation coin** means a coin composed of base metal, precious metal or any combination of those metals that is not intended for circulation and that is listed in Part 1 of the schedule; (*monnaie hors circulation*)

**precious metal** means gold, silver, platinum or any of the platinum group of metals. (*métal précieux*)

### Titre abrégé

#### Titre abrégé

**1** *Loi sur la Monnaie royale canadienne*.

S.R., ch. R-8, art. 1.

### Définitions

#### Définitions

**2** Les définitions qui suivent s'appliquent à la présente loi.

**conseil** Le conseil d'administration de la Monnaie, nommé en application de la présente loi. (*Board*)

**directeur** [Abrogée, L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 1]

**métal commun** Tout métal autre qu'un métal précieux. (*base metal*)

**métal précieux** L'or, l'argent et le platine, ainsi que tout métal voisin du platine. (*precious metal*)

**ministre** [Abrogée, 2005, ch. 38, art. 129]

**Monnaie** La Monnaie royale canadienne constituée aux termes de la présente loi. (*Mint*)

**monnaie de circulation** Les pièces de monnaie composées de métal commun énumérées à la partie 2 de l'annexe qui sont mises en circulation pour servir aux opérations courantes au Canada. (*circulation coin*)

**monnaie hors circulation** Les pièces de monnaie composées de métal commun ou de métal précieux, ou d'une combinaison de ces métaux, qui ne sont pas destinées à la circulation et sont énumérées à la partie 1 de l'annexe. (*non-circulation coin*)

**pièce de métal commun** [Abrogée, 1999, ch. 4, art. 1]

**precious metal coin** [Repealed, 1999, c. 4, s. 1]  
R.S., 1985, c. R-9, s. 2; R.S., 1985, c. 35 (3rd Supp.), s. 1; 1996, c. 16, s. 60; 1999, c. 4, s. 1; 2005, c. 38, s. 129.

## Designation of Minister

### Power of Governor in Council

**2.1** The Governor in Council may designate a member of the Queen's Privy Council for Canada to be the Minister for the purposes of this Act.

2005, c. 38, s. 130.

## Incorporation, Objects and Head Office

### Incorporation

**3 (1)** The Master of the Mint and such other persons as constitute the Board of Directors of the Mint are hereby incorporated as a body corporate under the name of the Royal Canadian Mint.

### Objects

**(2)** The objects of the Mint are to mint coins in anticipation of profit and to carry out other related activities.

### Exception

**(2.1)** However, the Mint shall not anticipate profit with respect to the provision of any goods or services to Her Majesty in right of Canada, including the minting of circulation coins.

### Head office

**(3)** The head office of the Mint shall be in the National Capital Region as described in the schedule to the *National Capital Act*.

R.S., 1985, c. R-9, s. 3; R.S., 1985, c. 35 (3rd Supp.), s. 2; 2014, c. 39, s. 185.

## Capital

### Authorized capital

**3.1 (1)** The authorized capital of the Mint is forty million dollars, divided into four thousand shares of ten thousand dollars each.

**pièce de métal précieux** [Abrogée, 1999, ch. 4, art. 1]

**président** Le président de la Monnaie. (*Master*)

L.R. (1985), ch. R-9, art. 2; L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 1; 1996, ch. 16, art. 60; 1999, ch. 4, art. 1; 2005, ch. 38, art. 129.

## Désignation du ministre

### Pouvoir du gouverneur en conseil

**2.1** Le gouverneur en conseil peut désigner tout membre du Conseil privé de la Reine pour le Canada à titre de ministre pour l'application de la présente loi.

2005, ch. 38, art. 130.

## Constitution, mission et siège

### Constitution

**3 (1)** Est constituée la Monnaie royale canadienne, organisme doté de la personnalité morale et composé du président de la Monnaie et des autres membres du conseil.

### Mission

**(2)** La Monnaie a pour mission la frappe de pièces en vue de réaliser des bénéfices; elle exerce en outre des activités connexes.

### Exception

**(2.1)** Toutefois, la Monnaie ne peut avoir en vue la réalisation de bénéfices relativement à la fourniture de marchandises ou de services à Sa Majesté du chef du Canada, notamment la frappe des pièces de monnaie de circulation.

### Siège

**(3)** Le siège de la Monnaie est fixé dans la région de la capitale nationale définie à l'annexe de la *Loi sur la capitale nationale*.

L.R. (1985), ch. R-9, art. 3; L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 2; 2014, ch. 39, art. 185.

## Composition du capital

### Capital social

**3.1 (1)** La Monnaie a un capital autorisé de quarante millions de dollars, réparti en quatre mille actions de dix mille dollars chacune.

## Purchase of shares

**(2)** The Governor in Council may, by order, approve the purchase by the Minister of shares of the Mint and the payment therefor out of the Consolidated Revenue Fund.

## Shares

**(3)** The shares of the Mint are not transferable and when issued to the Minister in accordance with this Act shall be registered in the books of the Mint in the name of the Minister and held by the Minister in trust for Her Majesty in right of Canada.

## Limitation

**(4)** No shares of the Mint may be issued otherwise than as expressly authorized by this Act.

R.S., 1985, c. 35 (3rd Supp.), s. 2.

## Redemption of shares

**3.2 (1)** The Mint shall, at the request of the Minister after consultation with the Board, redeem such number of shares issued to the Minister in accordance with this Act as the Minister may direct.

## Redemption price

**(2)** The price to be paid for each share redeemed by the Mint pursuant to subsection (1) is the issue price of the share.

R.S., 1985, c. 35 (3rd Supp.), s. 2.

## Powers

### Powers

**4 (1)** In carrying out its objects, the Mint has the rights, powers and privileges and the capacity of a natural person and may in particular

- (a)** procure the incorporation, dissolution or amalgamation of subsidiaries and acquire or dispose of any shares in them;
- (b)** acquire and dispose of any interest in any entity by any means; and
- (c)** generally do all things that are incidental or conducive to the exercise of its powers with respect to
  - (i)** coins of the currency of Canada,
  - (ii)** coins of the currency of countries other than Canada,
  - (iii)** gold, silver and other metals, and

## Souscription des actions

**(2)** Le gouverneur en conseil peut, par décret, autoriser le ministre à acheter des actions de la Monnaie et à les payer sur le Trésor.

## Actions

**(3)** Les actions de la Monnaie ne sont pas transférables. Les actions émises en faveur du ministre, en vertu de la présente loi, sont inscrites à son nom dans les livres de l'organisme et il les détient, en fiducie, pour Sa Majesté du chef du Canada.

## Restriction

**(4)** Les actions de la Monnaie doivent être émises de la manière expressément autorisée par la présente loi.

L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 2.

## Rachat d'actions

**3.2 (1)** Sur demande du ministre et après consultation du conseil, la Monnaie rachète au ministre tout ou partie des actions qu'elle a émises en faveur de celui-ci, selon les directives de ce dernier.

## Prix de rachat

**(2)** Le prix de rachat est identique à la valeur des actions au moment de leur émission.

L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 2.

## Pouvoirs

### Pouvoirs de la Monnaie

**4 (1)** La Monnaie a, pour l'exécution de sa mission, la capacité d'une personne physique; à ce titre, elle peut notamment :

- a)** assurer la constitution, la dissolution ou la fusion de filiales et en acquérir ou aliéner les actions;
- b)** acquérir et aliéner, par tout moyen, des droits sur une entité;
- c)** prendre toute mesure accessoire ou utile à l'exercice de ses pouvoirs à l'égard :
  - (i)** des pièces de monnaie canadiennes,
  - (ii)** des pièces de monnaie étrangères,
  - (iii)** de l'or, de l'argent et d'autres métaux,
  - (iv)** de médailles, de plaques, de jetons et d'autres objets fabriqués de métal en tout ou en partie.

(iv) medals, plaques, tokens and other objects made or partially made of metal.

#### Additional powers

(2) In addition to the powers under section 21 of the *Interpretation Act*, the Mint may

(a) acquire, hold and alienate real property or any interest therein; and

(b) make grants in lieu of taxes to any municipality in Canada in amounts not exceeding the taxes that might be levied by that municipality in respect of real property under the administration and control of the Mint if the Mint were not an agent of Her Majesty.

R.S., 1985, c. R-9, s. 4; R.S., 1985, c. 35 (3rd Supp.), s. 3; 1999, c. 4, s. 2.

#### Agent of Her Majesty

5 The Mint is for all its purposes an agent of Her Majesty in right of Canada.

R.S., c. R-8, s. 5; 1984, c. 31, s. 14.

**5.1 to 5.3** [Repealed, 1999, c. 4, s. 3]

## Non-circulation Coins

#### Issue of coins

6 The Governor in Council may authorize the issue of non-circulation coins of a denomination listed in Part I of the schedule.

R.S., 1985, c. R-9, s. 6; R.S., 1985, c. 35 (3rd Supp.), s. 5; 1999, c. 4, s. 3.

#### Amendment to Part 1 of the schedule

**6.1** The Governor in Council may, by order, amend Part I of the schedule by adding or deleting a denomination of a non-circulation coin.

1999, c. 4, s. 3.

#### Characteristics

**6.2** The Mint may determine the characteristics, other than the design, of any denomination of a non-circulation coin.

1999, c. 4, s. 3.

#### Design

**6.3** The Minister may determine the design of any denomination of a non-circulation coin.

1999, c. 4, s. 3.

#### Pouvoirs supplémentaires

(2) En plus des pouvoirs que lui confère l'article 21 de la *Loi d'interprétation*, la Monnaie peut :

a) acquérir et posséder des immeubles ou droits immobiliers et les aliéner;

b) accorder à toute municipalité du Canada, pour tenir lieu d'impôts, des subventions n'excédant pas les impôts qui, si elle n'était pas mandataire de Sa Majesté, pourraient être perçus par cette municipalité pour les immeubles relevant de son autorité.

L.R. (1985), ch. R-9, art. 4; L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 3; 1999, ch. 4, art. 2.

#### Qualité de mandataire de Sa Majesté

5 La Monnaie est, dans le cadre de ses attributions, mandataire de Sa Majesté du chef du Canada.

S.R., ch. R-8, art. 5; 1984, ch. 31, art. 14.

**5.1 à 5.3** [Abrogés, 1999, ch. 4, art. 3]

## Monnaie hors circulation

#### Émission de monnaie hors circulation

6 Le gouverneur en conseil peut autoriser l'émission de monnaie hors circulation d'une des valeurs faciales énumérées à la partie I de l'annexe.

L.R. (1985), ch. R-9, art. 6; L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 5; 1999, ch. 4, art. 3.

#### Modification de la partie 1 de l'annexe

**6.1** Le gouverneur en conseil peut, par décret, modifier la partie I de l'annexe par adjonction ou suppression d'une valeur faciale.

1999, ch. 4, art. 3.

#### Caractéristiques

**6.2** Les caractéristiques — à l'exclusion du dessin — de la monnaie hors circulation d'une valeur faciale donnée sont déterminées par la Monnaie.

1999, ch. 4, art. 3.

#### Dessin

**6.3** Le dessin de la monnaie hors circulation d'une valeur faciale donnée est fixé par le ministre.

1999, ch. 4, art. 3.

## Circulation Coins

### Issue of coins

**6.4 (1)** The Governor in Council may, by order, authorize the issue of circulation coins of a denomination listed in Part 2 of the schedule.

### Characteristics

**(2)** The order must specify the characteristics for that issue of coin.

1999, c. 4, s. 3.

### Design

**6.5** The Governor in Council may determine the design of any circulation coin to be issued.

1999, c. 4, s. 3.

### Amendment to Part 2 of the schedule

**6.6** The Governor in Council may, by order, amend Part 2 of the schedule by amending any characteristic of a circulation coin.

1999, c. 4, s. 3.

## Coins of Canada

### Coins to be delivered to Minister of Finance

**7 (1)** All coins of the currency of Canada that are produced at or supplied by the Mint shall be delivered to the Minister of Finance or such person as the Minister of Finance may designate.

### Storage, preparation and movement of coins

**(2)** The Mint shall comply with such instructions as the Minister of Finance may give respecting the storage of coins of the currency of Canada or the preparation and movement of shipments of such coins to or from the Mint.

### Payments to Mint to be made from C.R.F.

**(3)** Payments for the production, storage, preparation or movement of coins of the currency of Canada shall be made out of the Consolidated Revenue Fund on the authorization of the Minister of Finance.

**(4)** [Repealed, 1999, c. 4, s. 4]

**(5)** [Repealed, R.S., 1985, c. 35 (3rd Supp.), s. 6]

R.S., 1985, c. R-9, s. 7; R.S., 1985, c. 35 (3rd Supp.), s. 6; 1999, c. 4, s. 4.

## Monnaie de circulation

### Émission de monnaie de circulation

**6.4 (1)** Le gouverneur en conseil peut, par décret, autoriser l'émission de monnaie de circulation d'une des valeurs faciales énumérées à la partie 2 de l'annexe.

### Caractéristiques

**(2)** Le décret précise les caractéristiques de la monnaie de circulation à émettre.

1999, ch. 4, art. 3.

### Dessin

**6.5** Le dessin de la monnaie de circulation est fixé par le gouverneur en conseil.

1999, ch. 4, art. 3.

### Modification de la partie 2 de l'annexe

**6.6** Le gouverneur en conseil peut, par décret, modifier la partie 2 de l'annexe par modification de caractéristiques d'une monnaie de circulation.

1999, ch. 4, art. 3.

## Pièces canadiennes

### Remise des pièces de monnaie canadienne au ministre des Finances

**7 (1)** Toutes les pièces de monnaie canadienne fabriquées ou fournies par la Monnaie sont remises au ministre des Finances ou à la personne désignée par celui-ci.

### Entreposage, préparation et transport des pièces

**(2)** La Monnaie est tenue de se conformer aux instructions du ministre des Finances concernant l'entreposage des pièces de monnaie canadienne ou la préparation de chargements de ces pièces et leur acheminement au départ ou à destination de l'établissement.

### Prélèvements sur le Trésor

**(3)** Les fonds requis pour la production, l'entreposage, la préparation ou le transport des pièces de monnaie canadienne sont prélevés sur le Trésor avec l'autorisation du ministre des Finances.

**(4)** [Abrogé, 1999, ch. 4, art. 4]

**(5)** [Abrogé, L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 6]

L.R. (1985), ch. R-9, art. 7; L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 6; 1999, ch. 4, art. 4.

## Master and Board of Directors

### Board of Directors

**8** The Board of Directors of the Mint shall consist of not less than nine and not more than eleven directors, including the Chairperson and the Master.

R.S., 1985, c. R-9, s. 8; R.S., 1985, c. 35 (3rd Supp.), s. 7; 1999, c. 4, s. 5.

### Chairperson

**9** The Chairperson shall be appointed by the Governor in Council to hold office during pleasure for any term that the Governor in Council considers appropriate.

R.S., 1985, c. R-9, s. 9; R.S., 1985, c. 35 (3rd Supp.), s. 7; 1999, c. 4, s. 6(E).

### Appointment of Master of the Mint

**10 (1)** The Master shall be appointed by the Governor in Council to hold office during pleasure for such term as the Governor in Council considers appropriate.

**(2)** [Repealed, R.S., 1985, c. 35 (3rd Supp.), s. 8]

### Master

**(3)** The Master is the chief executive officer of the Mint and shall devote the whole of his time to the business of the Mint.

### Acting Master

**(4)** The Board may authorize one of its directors or an officer of the Mint to act as Master in the event that the Master is absent or incapacitated or if the office of Master is vacant but no person so authorized shall act as Master for a period exceeding sixty days without the approval of the Governor in Council.

R.S., 1985, c. R-9, s. 10; R.S., 1985, c. 35 (3rd Supp.), s. 8.

### Appointment of directors

**11** Each director, other than the Chairperson and the Master of the Mint, shall be appointed by the Minister, with the approval of the Governor in Council, to hold office during pleasure for a term not exceeding four years that will ensure, as far as possible, the expiration in any one year of the terms of office of not more than one half of the directors.

R.S., 1985, c. R-9, s. 11; R.S., 1985, c. 35 (3rd Supp.), s. 9; 2006, c. 9, s. 298.

### Conditions of eligibility

**12 (1)** Each director appointed under section 11 must have experience in the field of metal fabrication or production, industrial relations or a related field.

## Président et conseil d'administration

### Conseil d'administration

**8** Le conseil se compose de neuf à onze membres, dont le président du conseil et le président.

L.R. (1985), ch. R-9, art. 8; L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 7; 1999, ch. 4, art. 5.

### Président du conseil

**9** Le gouverneur en conseil nomme à titre amovible le président du conseil pour le mandat qu'il estime indiqué.

L.R. (1985), ch. R-9, art. 9; L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 7; 1999, ch. 4, art. 6(A).

### Président

**10 (1)** Le gouverneur en conseil nomme à titre amovible le président pour le mandat qu'il estime indiqué.

**(2)** [Abrogé, L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 8]

### Premier dirigeant

**(3)** Le président est le premier dirigeant de la Monnaie et se consacre à temps plein aux affaires de celle-ci.

### Intérim

**(4)** En cas d'absence ou d'empêchement du président ou de vacance de son poste, le conseil peut autoriser un administrateur ou un fonctionnaire de la Monnaie à assurer l'intérim pendant un maximum de soixante jours, sauf prorogation approuvée par le gouverneur en conseil.

L.R. (1985), ch. R-9, art. 10; L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 8.

### Nomination des administrateurs

**11** Les autres administrateurs sont nommés à titre amovible par le ministre, avec l'approbation du gouverneur en conseil, pour des mandats respectifs de quatre ans au maximum, ces mandats étant, dans la mesure du possible, échelonnés de manière que leur expiration au cours d'une même année touche au plus la moitié des administrateurs.

L.R. (1985), ch. R-9, art. 11; L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 9; 2006, ch. 9, art. 298.

### Conditions de nomination

**12 (1)** Les administrateurs nommés au titre de l'article 11 doivent avoir de l'expérience en matière de production et de fabrication des métaux, de relations industrielles, ou dans un domaine connexe.

## Outside interests

**(2)** A person is not eligible to be appointed or to continue as a director of the Mint if the person is not a Canadian citizen ordinarily resident in Canada or if, directly or indirectly, the person is engaged in any undertaking involving or associated with

- (a)** the production or distribution of copper, copper alloy, nickel or precious metals;
- (b)** the purchase, production, distribution or sale of coins or coin operated devices; or
- (c)** the vending of goods and services by means of coin operated devices.

## Disposing of interest

**(3)** Where any interest prohibited by subsection (2) vests in a director by will or succession for his own benefit, the director shall, within three months thereafter, absolutely dispose of the interest.

R.S., 1985, c. R-9, s. 12; R.S., 1985, c. 35 (3rd Supp.), s. 10.

## Re-appointment of director

**13** A director on the expiration of his term of office is eligible for re-appointment to the Board in the same or another capacity.

R.S., c. R-8, s. 13.

## Temporary substitute director

**14** The Governor in Council may, on such terms and conditions as the Governor in Council may prescribe, appoint a temporary substitute director if a director, other than the Master, is unable at any time to perform the duties of office by reason of absence or incapacity.

R.S., 1985, c. R-9, s. 14; R.S., 1985, c. 35 (3rd Supp.), s. 11(F).

## Vacancy on Board

**15** Where the office of a director becomes vacant during the term of the director appointed thereto, the Governor in Council may appoint a director for the remainder of that term.

R.S., c. R-8, s. 13.

## Salary and benefits

**16 (1)** The directors shall be paid such salary as is fixed by the Governor in Council and shall receive such benefits as are fixed by the Board.

## Expenses

**(2)** Each director is entitled to be paid by the Mint such travel and other expenses incurred by the director while absent from his ordinary place of residence in the course

## Intérêts extérieurs

**(2)** Pour être nommé administrateur de la Monnaie, ou continuer à en exercer la charge, il faut être citoyen canadien et résider habituellement au Canada. Il faut, en outre, ne pas avoir d'intérêts, directs ou indirects, dans une entreprise liée de près ou de loin à :

- a)** la production ou la distribution du cuivre, des alliages de cuivre, du nickel ou des métaux précieux;
- b)** l'achat, la production, la distribution ou la vente de pièces ou de distributeurs automatiques;
- c)** la vente de marchandises et de services au moyen de distributeurs automatiques.

## Cession d'intérêts

**(3)** L'administrateur qui devient — soit par testament, soit par voie de succession — titulaire, à titre personnel, d'intérêts extérieurs au sens du paragraphe (2) doit s'en départir dans les trois mois.

L.R. (1985), ch. R-9, art. 12; L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 10.

## Reconduction de mandat

**13** Le mandat des administrateurs peut être reconduit, à des fonctions identiques ou non.

S.R., ch. R-8, art. 13.

## Intérim

**14** En cas d'absence ou d'empêchement d'un administrateur autre que le président, le gouverneur en conseil peut, selon les modalités qu'il fixe, nommer un administrateur intérimaire.

L.R. (1985), ch. R-9, art. 14; L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 11(F).

## Vacance au conseil

**15** En cas de vacance d'un poste d'administrateur, le gouverneur en conseil peut nommer un administrateur pour le reste du mandat.

S.R., ch. R-8, art. 13.

## Traitements et avantages

**16 (1)** Les administrateurs reçoivent le traitement fixé par le gouverneur en conseil et les avantages fixés par le conseil.

## Indemnités

**(2)** Les administrateurs ont droit, suivant le barème fixé par règlement administratif de la Monnaie, aux frais de déplacement et autres engagés pour l'accomplissement,

of his duties under this Act as may be fixed by by-law of the Mint.

R.S., 1985, c. R-9, s. 16; R.S., 1985, c. 35 (3rd Supp.), s. 12.

## Staff of the Mint

### Officers and employees

**17 (1)** The Mint may appoint such officers, agents and employees as are necessary for the proper conduct of the work of the Mint.

### Remuneration

**(2)** The remuneration of officers, agents and employees of the Mint shall be a charge against the revenues of the Mint.

R.S., c. R-8, s. 15.

### Master, officers and employees not part of federal public administration

**18 (1)** The Master, officers and employees of the Mint are not part of the federal public administration but shall be deemed to be employed in the federal public administration for the purposes of the *Government Employees Compensation Act* and any regulations made pursuant to section 9 of the *Aeronautics Act*.

### Master and employees deemed employed in public service

**(2)** The Master, officers and employees of the Mint shall be deemed to be employed in the public service for the purposes of the *Public Service Superannuation Act*, and the Mint shall be deemed to be a Public Service corporation for the purposes of that Act.

### Contracting powers not limited by collective agreements

**(3)** No collective agreement entered into by the Mint with its employees pursuant to Part I of the *Canada Labour Code* shall prohibit or limit the power of the Mint to enter into contracts with any person to provide for the procurement by the Mint of any goods or services from that person or the minting of coins by that person.

R.S., 1985, c. R-9, s. 18; R.S., 1985, c. 35 (3rd Supp.), s. 13(F); 2003, c. 22, ss. 224(E), 225(E).

## By-laws

### By-laws

**19** The Board may make by-laws respecting

hors de leur lieu ordinaire de résidence, des fonctions qui leur sont confiées en application de la présente loi.

L.R. (1985), ch. R-9, art. 16; L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 12.

## Personnel de la monnaie

### Recrutement

**17 (1)** La Monnaie peut nommer le personnel et les mandataires nécessaires à l'exercice de ses activités.

### Rémunération

**(2)** La rémunération du personnel et des mandataires de la Monnaie est imputée sur les recettes de l'établissement.

S.R., ch. R-8, art. 15.

### Appartenance à l'administration publique fédérale

**18 (1)** Le personnel de la Monnaie — le président compris — est réputé faire partie de l'administration publique fédérale pour l'application de la *Loi sur l'indemnisation des agents de l'État* et des règlements pris en vertu de l'article 9 de la *Loi sur l'aéronautique*.

### Appartenance à la fonction publique

**(2)** Le personnel de la Monnaie — le président compris — est réputé faire partie de la fonction publique pour l'application de la *Loi sur la pension de la fonction publique*. De même, la Monnaie est assimilée à un organisme de la fonction publique pour l'application de cette loi.

### Intégrité du pouvoir de contracter

**(3)** Les conventions collectives conclues entre l'établissement et son personnel sous le régime de la partie I du *Code canadien du travail* n'ont pas pour effet de porter atteinte au pouvoir de la Monnaie de passer des contrats pour la frappe de pièces ou la fourniture — à l'établissement — de marchandises ou services par le cocontractant.

L.R. (1985), ch. R-9, art. 18; L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 13(F); 2003, ch. 22, art. 224(A) et 225(A).

## Règlements administratifs

### Règlements administratifs

**19** Le conseil peut, par règlement administratif, prévoir :

**a)** les fonctions et les règles de conduite du personnel;

- (a) the duties and conduct of officers, agents and employees of the Mint;
- (b) the conditions of employment and the fixing of the remuneration of officers, agents and employees of the Mint;
- (c) the time and place for the holding of meetings of the Board, the quorum at those meetings and the procedure in all business at those meetings; and
- (d) generally the conduct and management of the affairs of the Mint.

R.S., c. R-8, s. 14; 1984, c. 31, s. 14.

## Financial

### Borrowing power

**20 (1)** The Mint may, for the attainment of its objects, borrow money from the Consolidated Revenue Fund or any other source, but the total amount outstanding at any time may not exceed 75 million dollars or such greater amount as may be specified in an appropriation Act.

### Government loans

**(2)** The Minister of Finance may lend money to the Mint from the Consolidated Revenue Fund.

### Conditions of borrowing

**(3)** The Mint shall not enter into any particular transaction to borrow money pursuant to subsection (1) without the approval of the Minister of Finance with respect to the time and the terms and conditions of the transaction.

R.S., 1985, c. R-9, s. 20; R.S., 1985, c. 35 (3rd Suppl.), s. 14; 1999, c. 4, s. 7.

**21 to 25** [Repealed, R.S., 1985, c. 35 (3rd Suppl.), s. 14]

### Auditor

**26 (1)** The Auditor General of Canada is the auditor of the Mint.

### Inspection of stores and metals

**(2)** The Auditor General of Canada shall inspect the inventories of stores and metals of the Mint at least once in each year.

R.S., c. R-8, s. 24; 1976-77, c. 34, s. 30(F); 1984, c. 31, s. 14.

- b)** les conditions d'emploi et la fixation de la rémunération du personnel;
- c)** les dates et lieux des réunions du conseil, leur quorum et leur déroulement;
- d)** d'une façon générale, la direction et la gestion des affaires de la Monnaie.

S.R., ch. R-8, art. 14; 1984, ch. 31, art. 14.

## Dispositions financières

### Emprunt

**20 (1)** Pour l'exécution de sa mission, la Monnaie peut procéder, auprès du Trésor ou d'autres sources, à des emprunts d'un montant global maximal de soixantequinze millions de dollars ou, le cas échéant, du montant supérieur fixé par loi de crédits.

### Prêts sur le Trésor

**(2)** Le ministre des Finances peut consentir à la Monnaie des prêts sur le Trésor.

### Conditions de l'emprunt

**(3)** La Monnaie doit obtenir l'approbation du ministre des Finances quant aux modalités de temps et aux conditions de l'emprunt visé au paragraphe (1).

L.R. (1985), ch. R-9, art. 20; L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 14; 1999, ch. 4, art. 7.

**21 à 25** [Abrogés, L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 14]

### Vérificateur

**26 (1)** Le vérificateur général du Canada est le vérificateur de la Monnaie.

### Contrôle des inventaires

**(2)** Le vérificateur général contrôle au moins une fois par an les inventaires des métaux et des pièces en magasin à la Monnaie.

S.R., ch. R-8, art. 24; 1976-77, ch. 34, art. 30(F); 1984, ch. 31, art. 14.

## SCHEDULE

(Sections 2 and 6 to 6.3)

### PART 1

#### Non-circulation Coins

##### *Denominations*

One million dollars  
One hundred thousand dollars  
Two thousand five hundred dollars  
One thousand two hundred and fifty dollars  
One thousand dollars  
Five hundred dollars  
Three hundred and fifty dollars  
Three hundred dollars  
Two hundred and fifty dollars  
Two hundred dollars  
One hundred and seventy-five dollars  
One hundred and fifty dollars  
One hundred and twenty-five dollars  
One hundred dollars  
Seventy-five dollars  
Fifty dollars  
Thirty dollars  
Twenty-five dollars  
Twenty dollars  
Fifteen dollars  
Ten dollars  
Eight dollars  
Five dollars  
Four dollars  
Three dollars  
Two dollars  
One dollar  
Fifty cents  
Twenty-five cents  
Ten cents  
Five cents  
Three cents  
One cent

## ANNEXE

(articles 2 et 6 à 6.3)

### PARTIE 1

#### Monnaie hors circulation

##### *Valeurs faciales*

Un million de dollars  
Cent mille dollars  
Deux mille cinq cents dollars  
Mille deux cent cinquante dollars  
Mille dollars  
Cinq cents dollars  
Trois cent cinquante dollars  
Trois cents dollars  
Deux cent cinquante dollars  
Deux cents dollars  
Cent soixante-quinze dollars  
Cent cinquante dollars  
Cent vingt-cinq dollars  
Cent dollars  
Soixante-quinze dollars  
Cinquante dollars  
Trente dollars  
Vingt-cinq dollars  
Vingt dollars  
Quinze dollars  
Dix dollars  
Huit dollars  
Cinq dollars  
Quatre dollars  
Trois dollars  
Deux dollars  
Un dollar  
Cinquante cents  
Vingt-cinq cents  
Dix cents  
Cinq cents  
Trois cents  
Un cent

## PART 2

### Circulation Coins

(Sections 2 and 6.4 to 6.6)

1 A two dollar coin of which

- (a) the composition is
  - (i) for the inner core, aluminum bronze (copper, aluminum and nickel), and
  - (ii) for the outer ring, pure nickel;
- (b) the standard weight is 7.30 grams; and
- (c) the margin of tolerance with respect to weight is 42.38 grams per kilogram of 137 pieces.

1.1 A two dollar coin of which

- (a) the composition is
  - (i) for the inner core, multi-ply brass-plated aluminium bronze, and
  - (ii) for the outer ring, multi-ply nickel-plated steel;
- (b) the standard weight is 6.92 grams; and
- (c) the margin of tolerance with respect to weight is ±30.45 grams per kilogram of 145 pieces.

2 A one dollar coin of which

- (a) the composition is bronze plated nickel;
- (b) the standard weight is 7.0 grams; and
- (c) the margin of tolerance with respect to weight is 21.38 grams per kilogram of 143 pieces.

2.1 A one dollar coin of which

- (a) the composition is brass plated nickel;
- (b) the standard weight is 7.0 grams; and
- (c) the margin of tolerance with respect to weight is ±21.38 grams per kilogram of 143 pieces.

2.2 A one dollar coin of which

- (a) the composition is multi-ply brass-plated steel;
- (b) the standard weight is 6.27 grams; and
- (c) the margin of tolerance with respect to weight is ±30.4 grams per kilogram of 160 pieces.

3 A fifty cent coin of which

- (a) the composition is pure nickel;
- (b) the standard weight is 8.1 grams; and
- (c) the margin of tolerance with respect to weight is 12.81 grams per kilogram of 123 pieces.

3.1 A fifty cent coin of which

- (a) the composition is nickel, copper and nickel-plated steel;
- (b) the standard weight is 6.9 grams; and

## PARTIE 2

### Monnaie de circulation

(articles 2 et 6.4 à 6.6)

1 Pièce de deux dollars :

- a) composée :
  - (i) pour la partie centrale, de bronze d'aluminium (cuivre, aluminium et nickel),
  - (ii) pour l'anneau extérieur, de nickel pur;
- b) dont le poids légal est de 7,30 grammes;
- c) dont la marge de tolérance pour le poids est de 42,38 grammes par kilogramme de 137 pièces.

1.1 Pièce de deux dollars :

- a) composée :
  - (i) pour la partie centrale, de bronze d'aluminium plaq   multicoche au laiton,
  - (ii) pour l'anneau ext  rieur, d'acier plaqu   multicoche au nickel;
- b) dont le poids légal est de 6,92 grammes;
- c) dont la marge de tol  rance pour le poids est de ± 30,45 grammes par kilogramme de 145 pi  ces.

2 Pi  ce de un dollar :

- a) compos  e de nickel plaqu   bronze;
  - b) dont le poids légal est de 7,0 grammes;
  - c) dont la marge de tol  rance pour le poids est de 21,38 grammes par kilogramme de 143 pi  ces.
- 2.1 Pi  ce de un dollar :
- a) compos  e de nickel plaqu   laiton;
  - b) dont le poids légal est de 7,0 grammes;
  - c) dont la marge de tol  rance pour le poids est de ±21,38 grammes par kilogramme de 143 pi  ces.

2.2 Pi  ce de un dollar :

- a) compos  e d'acier plaqu   multicoche au laiton;
- b) dont le poids légal est de 6,27 grammes;
- c) dont la marge de tol  rance pour le poids est de ±30,4 grammes par kilogramme de 160 pi  ces.

3 Pi  ce de cinquante cents :

- a) compos  e de nickel pur;
- b) dont le poids légal est de 8,1 grammes;
- c) dont la marge de tol  rance pour le poids est de 12,81 grammes par kilogramme de 123 pi  ces.

3.1 Pi  ce de cinquante cents :

- a) compos  e d'acier plaqu   nickel, de cuivre et de nickel;
- b) dont le poids légal est de 6,9 grammes;

(c) the margin of tolerance with respect to the weight is  $\pm 30.39$  grams per kilogram of 144 pieces.

**4** A twenty-five cent coin of which

- (a) the composition is pure nickel;
- (b) the standard weight is 5.05 grams; and
- (c) the margin of tolerance with respect to weight is 14.26 grams per kilogram of 198 pieces.

**4.1** A twenty-five cent coin of which

- (a) the composition is nickel, copper and nickel-plated steel;
- (b) the standard weight is 4.4 grams; and
- (c) the margin of tolerance with respect to the weight is  $\pm 29.66$  grams per kilogram of 227 pieces.

**5** A ten cent coin of which

- (a) the composition is pure nickel;
- (b) the standard weight is 2.07 grams; and
- (c) the margin of tolerance with respect to weight is 21.44 grams per kilogram of 483 pieces.

**5.1** A ten cent coin of which

- (a) the composition is nickel, copper and nickel-plated steel;
- (b) the standard weight is 1.75 grams; and
- (c) the margin of tolerance with respect to the weight is  $\pm 34.43$  grams per kilogram of 571 pieces.

**6** A five cent coin of which

- (a) the composition is cupronickel (75 parts copper and 25 parts nickel);
- (b) the standard weight is 4.6 grams; and
- (c) the margin of tolerance with respect to weight is 39.77 grams per kilogram of 217 pieces.

**6.1** A five cent coin of which

- (a) the composition is nickel, copper and nickel-plated steel;
- (b) the standard weight is 3.95 grams; and
- (c) the margin of tolerance with respect to the weight is  $\pm 30.51$  grams per kilogram of 253 pieces.

**7** A one cent coin of which

- (a) the composition is bronze (copper, tin and zinc);
- (b) the standard weight is 2.5 grams; and
- (c) the margin of tolerance with respect to weight is 44.96 grams per kilogram of 400 pieces.

**8** A one cent coin of which

- (a) the composition is CPZ (copper plated zinc);
- (b) the standard weight is 2.25 grams; and
- (c) the margin of tolerance with respect to weight is 26.72 grams per kilogram of 444 pieces.

**9** A one cent coin of which

(c) dont la marge de tolérance pour le poids est de  $\pm 30,39$  grammes par kilogramme de 144 pièces.

**4** Pièce de vingt-cinq cents :

- a) composée de nickel pur;
- b) dont le poids légal est de 5.05 grammes;
- c) dont la marge de tolérance pour le poids est de 14.26 grammes par kilogramme de 198 pièces.

**4.1** Pièce de vingt-cinq cents :

- a) composée d'acier plaqué nickel, de cuivre et de nickel;
- b) dont le poids légal est de 4.4 grammes;
- c) dont la marge de tolérance pour le poids est de  $\pm 29,66$  grammes par kilogramme de 227 pièces.

**5** Pièce de dix cents :

- a) composée de nickel pur;
- b) dont le poids légal est de 2.07 grammes;
- c) dont la marge de tolérance pour le poids est de 21.44 grammes par kilogramme de 483 pièces.

**5.1** Pièce de dix cents :

- a) composée d'acier plaqué nickel, de cuivre et de nickel;
- b) dont le poids légal est de 1.75 gramme;
- c) dont la marge de tolérance pour le poids est de  $\pm 34,43$  grammes par kilogramme de 571 pièces.

**6** Pièce de cinq cents :

- a) composée de cuivre-nickel (75 parties cuivre et 25 parties nickel);
- b) dont le poids légal est de 4.6 grammes;
- c) dont la marge de tolérance pour le poids est de 39.77 grammes par kilogramme de 217 pièces.

**6.1** Pièce de cinq cents :

- a) composée d'acier plaqué nickel, de cuivre et de nickel;
- b) dont le poids légal est de 3.95 grammes;
- c) dont la marge de tolérance pour le poids est de  $\pm 30,51$  grammes par kilogramme de 253 pièces.

**7** Pièce de un cent :

- a) composée de bronze (cuivre, étain et zinc);
- b) dont le poids légal est de 2.5 grammes;
- c) dont la marge de tolérance pour le poids est de 44.96 grammes par kilogramme de 400 pièces.

**8** Pièce de un cent :

- a) composée de ZPC (zinc plaqué cuivre);
- b) dont le poids légal est de 2.25 grammes;
- c) dont la marge de tolérance pour le poids est de 26.72 grammes par kilogramme de 444 pièces.

**9** Pièce de un cent :

- (a) the composition is CPS (copper plated steel);
- (b) the standard weight is 2.35 grams; and
- (c) the margin of tolerance with respect to weight is 25.5 grams per kilogram of 425 pieces.

R.S., 1985, c. 35 (3rd Supp.), s. 15; SOR/88-410; SOR/90-475; SOR/91-432, 510; SOR/93-105; 1995, c. 26, s. 1; SOR/95-45; SOR/96-75, 104, 488; SOR/98-92, 94, 96, 141, 192; 1999, c. 4, s. 8; SOR/2000-161, 360; SOR/2003-250, 368; SOR/2005-322, 323, 324, 325; SOR/2006-17, 233; SOR/2007-22, 177; SOR/2011-192, 324; SOR/2014-165.

- a) composée de APC (acier plaqué cuivre);
- b) dont le poids légal est de 2,35 grammes;
- c) dont la marge de tolérance pour le poids est de 25,5 grammes par kilogramme de 425 pièces.

L.R. (1985), ch. 35 (3<sup>e</sup> suppl.), art. 15; DORS/88-410; DORS/90-475; DORS/91-432, 510; DORS/93-105; 1995, ch. 26, art. 1; DORS/95-45; DORS/96-75, 104, 488; DORS/98-92, 94, 96, 141, 192; 1999, ch. 4, art. 8; DORS/2000-161, 360; DORS/2003-250, 368; DORS/2005-322, 323, 324, 325; DORS/2006-17, 233; DORS/2007-22, 177; DORS/2011-192, 324; DORS/2014-165.

## RELATED PROVISIONS

— 2005, c. 38, s. 29

### *Royal Canadian Mint Act*

**29** The Minister of National Revenue is the Minister for the purposes of the *Royal Canadian Mint Act* until another member of the Queen's Privy Council for Canada is designated under section 2.1 of that Act, as enacted by section 130 of this Act.

## DISPOSITIONS CONNEXES

— 2005, ch. 38, art. 29

### *Loi sur la Monnaie royale canadienne*

**29** Pour l'application de la *Loi sur la Monnaie royale canadienne*, la mention de « ministre », dans cette loi, vaut mention du ministre du Revenu national jusqu'à ce qu'une désignation soit faite par le gouverneur en conseil en application de l'article 2.1 de cette loi, édicté par l'article 130 de la présente loi.

# **TAB 9**

# Currency Act

R.S.C., 1985, c. C-52

## Legal Tender

### Legal tender

**8 (1)** Subject to this section, a tender of payment of money is a legal tender if it is made

- (a) in coins that are current under section 7; and
- (b) in notes issued by the Bank of Canada pursuant to the *Bank of Canada Act* intended for circulation in Canada.

### Limitation

**(2)** A payment in coins referred to in subsection (1) is a legal tender for no more than the following amounts for the following denominations of coins:

- (a) forty dollars if the denomination is two dollars or greater but does not exceed ten dollars;
- (b) twenty-five dollars if the denomination is one dollar;
- (c) ten dollars if the denomination is ten cents or greater but less than one dollar;
- (d) five dollars if the denomination is five cents; and
- (e) twenty-five cents if the denomination is one cent.

### Coins of denominations greater than ten dollars

**(2.1)** In the case of coins of a denomination greater than ten dollars, a payment referred to in subsection (1) may consist of not more than one coin, and the payment is a legal tender for no more than the value of a single coin of that denomination.

### Different amounts payable on the same day

**(3)** For the purposes of subsections (2) and (2.1), where more than one amount is payable by one person to another on the same day under one or more obligations, the total of those amounts is deemed to be one amount due and payable on that day.

**(4)** [Repealed, 2012, c. 19, s. 388]

R.S., 1985, c. C-52, s. 8;  
R.S., 1985, c. 35 (3rd Supp.), s. 18;  
1999, c. 4, s. 12;  
2012, c. 19, s. 388.