

Finding a smoking

Gun

BC v. The Tobacco Industry?

Lisa Riddle

completed her first two years of law school at the University of Saskatchewan, College of Law. She is presently a third year visiting student at the University of Victoria, Faculty of Law. Upon graduation, Lisa will clerk with the Ontario Court of Justice (General Division).

The High Cost of Smoking in British Columbia

Tobacco products are the leading cause of preventable death and disease in Canada today. Every year, cigarette smoking causes more deaths than alcohol, car accidents, plane crashes, murder, suicide, illegal drugs and AIDS combined.¹ However, despite the generally accepted link between smoking and health problems, cigarette manufacturers have only once been held liable for the damages their products inflict.² The tobacco industry has been aware for many years of both the dangers associated with their products, and ways that they could be made safer.³ Yet manufacturers continue to deny these dangers⁴ and have failed to produce a less harmful product.⁵

On September 26, 1996, B.C. Health Minister Joy MacPhail announced that the province is investigating the possibility of suing tobacco companies to recover the estimated one billion dollars a year⁶ spent treating smoking-related illnesses.⁷ Recent developments in U.S. tobacco litigation may provide B.C. with the strategy it needs to recoup smoking's huge economic toll. Currently, 22 American states have launched lawsuits against the tobacco industry.⁸ Some of the states that have brought these lawsuits have developed legislation providing themselves with a right of subrogation to the claims of individual smokers.⁹ Others have developed statutes which create an independent cause of action against companies that cause increases in the cost of health care.¹⁰ The province may wish to consider developing statutes similar to those created in the U.S., and then bring an action based either on a right of subrogation or an independent cause of action. Given the recent advances in medical knowledge about the health risks associated with smoking, and newly-uncovered evidence of the tobacco industry's awareness of those risks, B.C. may have chosen an opportune moment to test the courts' willingness to assign the health care costs of smoking to the tobacco industry.

*J. Beltrame, "First Tobacco Company Says Cigarettes are Addictive" *The Vancouver Sun* (21 March 1997) A1.

1 R. Cunningham, "Tobacco Products Liability in Common Law Canada" (1990) 11 *Health Law in Canada* 43; R. Doll & R. Peto, "Causes of Cancer, Quantitative Estimates of Avoidable Risks" (1981) 66 *Journal of the National Cancer Institute* 1191 at 1220.

2 *Carter v. Brown & Williamson Tobacco Corp.*, 680 So. 2d 546 (1996); see also G. Clarkin, "B & W Gets Smoked in Court" *CNN Financial Network* (11 July 1996). Found at http://cnnfn.com/hotstories/companies/9608/09/tobacco_pkg/index.htm on 31 October 1996. In the United States, a number of actions have been brought by individuals against cigarette manufacturers, including some class actions. Some examples include: *Cipollone v. Liggett Grp. Inc.*, 505 U.S.504 (1992); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Kotler v. American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990). See also G. J. Annas, "Tobacco Litigation as Cancer

Editor's note: Just prior to publication, U.S. tobacco manufacturer, the Liggett Group, settled the actions brought by 22 states to recover the health care costs associated with treating smoking-related illness. The Liggett Group made the unprecedented admission that the tobacco industry knew that tobacco was addictive, and causes cancer.*

Putting B.C. into Smokers' Shoes

The province incurs enormous costs in the treatment of smoking-related illness every year. These costs, however, are mere economic losses, for which the courts have long been hesitant to compensate.¹¹ In contrast, many of B.C.'s smokers have suffered physical illness and disease caused by smoking, the kind of losses for which the courts are far more willing to award damages. Stemming from those health problems are medical expenses incurred to treat smoking-related illnesses. These expenses are nominally charged to the individual smoker, yet are ultimately covered by provincial health insurance. To recover the costs of treating smoking-related illness, the province may wish to step into the shoes of smokers and sue the tobacco industry on their behalf.

A common feature of most insurance contracts is a right of subrogation whereby the insurer, having compensated an individual for a loss, may step into that individual's shoes and sue the party that caused the damage.¹² A number of B.C.

Prevention: Dealing with the Devil" (1997) 336 New England Journal of Medicine 304 at 304. In Canada, only two individuals have brought actions against tobacco companies for negligence. Both have been unsuccessful. See *Perron v. R.J.R. MacDonald Inc.*, [1996] B.C.J. No. 2093 (Q.L.) (British Columbia Court of Appeal); *Caputo v. Imperial Tobacco Ltd.*, [1996] O.J. No. 1396 (Q.L.) (Ontario Court of Justice (General Division)).

3 S.A. Glantz, D.E. Barnes, L. Bero, P. Hanauer and J. Slade, "Looking Through a Keyhole at the Tobacco Industry, The Brown and Williamson Documents" (1995) 274 Journal of the American Medical Association 219 at 219-223. In this and subsequent articles, the authors have compiled and analysed documents from Brown and Williamson Tobacco Corporation (B&W), the British American Tobacco Company (BAT), and other tobacco interests provided by an anonymous source, obtained from the U.S. Congress, and received from the private papers of a former BAT officer. The complete indexed document set has been deposited in the Archives and Special Collections Department of the University of California, San Francisco, Library and Centre for Knowledge Management. The documents are available on the Internet and may be located at <http://www.library.ucsf.edu/tobacco>. See also D. Levy, "58 Tobacco Memo Cited Cancer Link" *USA Today* (23 October 1996) B3; and J.J. Curran, Jr., (Address to the American University Law Review Annual Banquet, 20 April 1996) [(1996) 45 American University Law Review 929 at 932].

4 A.D. Frank, "Tobacco Under Fire" *CNN Financial Network* (15 May 1996). Found at http://cnnfn.com/news/9605/15/tobacco_attack.pkg/index.htm on 31 October 1996.

5 Curran, see note 3 at 932.

6 B.C. Ministry of Health and Ministry Responsible for Seniors, "Smoking in B.C.". Found at <http://www.hlth.gov.bc.ca:80/cpa/prevcare/smoke.html> on 30 October 1996.

7 J. Beatty and T. Barrett, "MacPhail seeks provincial allies in tobacco suit" *The Vancouver Sun* (26 September 1996) B6.

8 "New York Becomes the 20th State to Sue Major Tobacco Companies" *Fox News* (27 January 1997). Found at http://www.foxnews.com/business/wires/ft_0127_93.sml on 29 January 1997; State Tobacco Information Centre, "State Suit Summary". Found at <http://stic.neu.edu/summary.htm> on 13 February 1997; "Memos talk of hiding data" *CNN Financial Network* (18 September 1996). Found at <http://cnnfn.com/hotstories/companies/9609/18/tobacco/index.html> on 31 October 1996.

9 Such actions include *Minnesota v. Philip Morris*, No. C1-94-8565 (2d Judicial District, 17 August 1994); *Texas v. American Tobacco Company*, No. 5-96CV 91 (Eastern District of Texas, Texarkana Division, 28 March 1996); *Connecticut v. Philip Morris* No. C-96-2090 (Northern District of California, 18 July 1996). For a complete listing of U.S. state actions against the tobacco industry, see "State Suit Summary" at note 8.

10 *Commonwealth of Massachusetts v. Philip Morris Inc.*, No. 95-7378, States, Mega, LEXIS 6859 (Middlesex Superior Court, 19 December 1995); *Agency for Health Care Administration v. Associated Industries of Florida, Inc.*, No. 95-1466A0, States, Mega, LEXIS 1057 (15th Judicial Circuit, 21 February 1995).

11 A.M. Linden, *Canadian Tort Law*, 5th ed. (Vancouver: Butterworths, 1993) at 397. However, recent SCC decisions indicate that economic loss may be recoverable where justified by "compelling policy reasons." See *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* (1995), 121 Dominion Law Reports (4th) 193 at 199.

12 G. Brown, J. Menezes, *Insurance Law in Canada* (Toronto: Carswell, 1982) at 313-314.

13 R.S.B.C. 1979, c. 200, s. 224; R.S.B.C. 1979, c. 204, s. 25.

14 R.S.B.C. 1979 c. 437, s. 10(6); R.S.C. 1985, c. 22 (4th Supp.), s. 48(3).

15 *Hospitals Act*, R.S.A. 1980, c. H-11, as am. by S.A. 1994, c. 37. Section 81(1) of the Act provides "If a beneficiary receives health services for personal injuries suffered as a result of a wrongful act or omission of a wrongdoer, the Crown has the right to recover from the wrongdoer the Crown's cost of health services (a) for health services that the beneficiary has received for those personal injuries, and (b) for health services that the beneficiary will likely receive in the future for those personal injuries."

16 *Medicare Protection Act*, S.B.C. 1992, c. 76, s. 45(j), as am. by S.B.C. 1995, c. 52.

17 S.B.C. 1995, c. 21.

18 See note 17 at s. 2(1).

19 *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.* (1995), 128 Dominion Law Reports (4th) 577 at 641 (British Columbia Supreme Court); *Rentway Canada Ltd. v. Laidlaw Transport Ltd.* (1989), 49 Canadian Cases on the Law of Torts 150 at 158 (Ontario High Court of Justice).

20 *Prentis v. Yale Manufacturing Co.*, 365 N.W.2d 176 at 183-184 (Mich. 1984) as cited in *Rentway*, see note 19 at 159.

statutes governing insurance relationships, such as the Insurance Act and the Insurance (Motor Vehicle) Act provide insurers with a right of subrogation.¹³ There are also a number of statutes that provide the provincial and federal governments with a right of subrogation when they have made payments to individuals in fulfillment of a statutory obligation. For instance, the B.C. Workers' Compensation Act and the federal Emergencies Act both provide government bodies with a right of subrogation to the claims of individuals to whom the government has provided compensation.¹⁴

Some provinces have drafted statutes which provide a right of subrogation for the recovery of the cost of medical services. For example, Alberta's Hospitals Act provides the Crown with a right of subrogation to the claims of injured persons to whom they have provided medical services, thus allowing the province to recover the costs of treatment from the responsible party.¹⁵ In B.C., the Medicare Protection Act allows the Lieutenant Governor in Council to make regulations that provide the Medical Services Commission with a right of subrogation.¹⁶ Under this Act, the B.C. government could pass a regulation which creates a right of subrogation similar to that in the Alberta statute.

A statutory right of subrogation would allow the province to step into the shoes of each individual smoker to pursue recovery of smoking-related health care expenses. However, the cost and time required to bring separate actions on behalf of each smoker would soon prove prohibitive. B.C.'s recently-introduced Class Proceedings Act¹⁷ provides a solution to this problem. Under the Act, a representative member of the class of people who have suffered smoking-related health problems could initiate an action to recover health care costs on behalf of the entire class.¹⁸ Using a statutory right of subrogation, the province could bring a tort action in the name of one smoker on behalf of the class, and would be subrogated to all claims made in that action. Claims against the tobacco industry in such an action might include damages for negligent design of cigarettes, failure to warn consumers of the health hazards associated with smoking, and deceptive trade practices.

Cigarettes: A Defectively Designed Product

All manufacturers, including manufacturers of tobacco products, are subject to a common law duty to "make reasonable efforts to reduce any risk to life and limb that may be inherent in the design" of a product, of which they are aware.¹⁹ In order to determine whether a manufacturer has satisfied this duty an analysis is made of its decision to produce the item. The manufacturer is expected to weigh the potential risk to consumers that its product creates against the utility of using a specific design.²⁰ Of particular significance will be whether the risks associated with the product could have been diminished easily or inexpensively.²¹ Emphasis will be placed on the quality of the manufacturer's decision and whether it conforms to socially accepted standards.²² However, a manufacturer never has the right to produce a product that is inherently dangerous when it is possible to manufacture the same article without risk of harm.²³

Information recently made available to the public indicates that tobacco companies have been aware for many years of the dangers associated with smoking, as well as possible ways to make tobacco products less dangerous.²⁴ As early as 1964, the tobacco industry knew that nicotine was addictive,²⁵ and that cigarette tar caused cancer in animals.²⁶ It has been confirmed that tobacco companies knowingly add carcinogens and toxins to their products during the manufacturing process.²⁷ For example, tobacco industry giant Brown & Williamson added the chemical coumarin to their pipe tobaccos, despite their awareness that it is a lung-specific carcinogen more commonly used as a rat poison.²⁸ The tobacco industry has conducted research into the development of a “safe” cigarette which would contain fewer dangerous ingredients and therefore cause fewer health problems than regular cigarettes.²⁹ However, this “safe” cigarette has never been marketed, and tobacco manufacturers continue to add known carcinogens to their products.

In light of this evidence, it appears that the tobacco companies have not met their obligation to reduce the known risks associated with the use of their products, and could be held liable for defects in their design. Cigarette manufacturers have been aware of the risks associated with smoking for many years, yet have not made reasonable efforts to remedy them by adding fewer toxic chemicals to their products. Although some may derive pleasure from smoking, this primarily psychological benefit cannot possibly outweigh the risks inherent in the use of tobacco products. Decisions such as that of the Ontario High Court in *Nicholson v. John Deere Ltd.* confirm that a manufacturer will be found liable for producing a defective product where the product is inherently dangerous and could have been manufactured in such a way as to remove the risk of harm.³⁰ While it may not be possible to remove all the risk of harm associated with smoking, this decision clearly indicates that manufacturers are held to a high standard with regard to the safe design of their products.

In addition to establishing that cigarettes are defectively designed, the province would also have to prove that the defects in design caused the damages suffered by individual smokers. In past tort actions against the tobacco industry, causation has been the most difficult element to establish. Cigarette manufacturers have relied on the lack of conclusive proof that smoking causes disease.³¹ However, recent medical evidence has conclusively linked smoking with lung cancer and heart disease.³² The link between smoking and other diseases, however, is less conclusive;³³ the province’s ability to establish causation with respect to other diseases will depend on the trier of fact’s willingness to accept the overwhelming evidence that smoking is the *most likely* cause of illness.

The Tobacco Companies’ Duty to Warn

If cigarettes are not found to be a defectively designed product, the tobacco companies will have to demonstrate that they have met their duty to warn consumers of “dangers inherent in the use of its product of which [they have] knowledge or ought to have knowledge.”³⁴ This duty arises as a result of the disparity

Manufacturers of tobacco products are subject to a common law duty to “make reasonable efforts to reduce any risk to life and limb that may be inherent in the design of their product.”

21 *Ford Motor Co. v. Nowak*, 638 S.W.2d 582 at 585-586 (Texas Court of Appeal 1982) as cited in *Rentway*, see note 19 at 161.

22 *Prentis*, see note 20.

23 *Nicholson v. John Deere Ltd.* (1986), 34 Dominion Law Reports (4th) 542 at 549 (Ontario High Court of Justice); Linden, see note 11 at 567.

24 Glantz, “Looking Through a Keyhole”, see note 3 at 219-223.

25 Glantz, “Looking Through a Keyhole” see note 3 at 220; also see generally S.A. Glantz, D.E. Barnes, L. Bero, P. Hanauer, J. Slade, “Nicotine and Addiction: The Brown and Williamson Documents” (1995) 274 *Journal of the American Medical Association* 225-233.

26 Glantz, “Looking Through a Keyhole” see note 3 at 222.

27 Glantz, “Looking Through a Keyhole” see note 3 at 220-221.

28 A. M. Freedman, “Cigarette Defector Says CEO Lied to Congress About View of Nicotine” *The Wall Street Journal*, Western ed. (26 January 1996) A1 at A12.

29 Glantz, “Looking Through a Keyhole” see note 3 at 221, 223.

30 *Nicholson*, see note 23 at 549.

31 *Annas*, see note 2 at 304.

32 M.F. Denissenko, A. Pao, M. Tang, and G.P. Pfeifer, “Preferential Formation of Benzo[a]pyrene Adducts at Lung Cancer Mutational Hotspots in P53” (1996) 274 *Science* 430 at 432;

33 *Doll*, see note 1 at 1220.

34 *Hollis v. Birch* (1995), 27 Canadian Cases on the Law of Torts (2d) 1 at 19 (Supreme Court of Canada).

in knowledge between consumers and manufacturers.³⁵ Manufacturers are presumed to know more about the hazardous nature of their products than the consumer and thus they have a duty to inform consumers of these dangers,³⁶ even if the information is available from sources other than the manufacturer.³⁷ The duty to warn is continuous, requiring that the manufacturer warn of any dangers known at the time of sale, as well as any dangers that are discovered after the product has been sold.³⁸

Cigarettes are very dangerous items; they have been linked to cancers, heart disease and respiratory illnesses.³⁹ As noted previously, the tobacco industry has been aware of the dangers associated with its products for several years.⁴⁰ In many cases, the tobacco industry was aware of the health hazards posed by smoking before the medical community.⁴¹ In light of this evidence, the tobacco industry appears to have had an obligation to warn consumers of the dangers associated with smoking.

In the event that the tobacco industry denies awareness of the health effects of smoking, it may still be held liable on the grounds that it had constructive knowledge of those effects. In *Buchan v. Ortho Pharmaceuticals (Canada) Ltd.*, the Ontario Court of Appeal held that manufacturers of prescription drugs are experts in their field, and thus have a duty to keep abreast of scientific research pertaining to their products and to communicate their findings to the doctors who prescribe them.⁴² Similarly, tobacco manufacturers could be held to be experts in their respective field, and found liable for failing to warn smokers of health risks of which it ought to have been aware. Furthermore, according to the Supreme Court of Canada in *Hollis v. Birch*, manufacturers can be held liable for failing to warn consumers of dangers associated with their products once they become aware of this information.⁴³ The tobacco industry can therefore be held liable for failing to disclose information obtained from the medical community regarding the health effects of smoking.

The nature and extent of the warning that is required varies according to the potential hazard posed by the product.⁴⁴ When the ordinary use of a product gives rise to significant danger, its manufacturer will be responsible for providing a detailed description of the nature of the risk and the extent of the danger.⁴⁵ The manufacturer also must not lessen the impact of the warning through efforts to improve the product's reputation with advertising and promotion.⁴⁶ The manufacturer has a duty to be forthright and honest in disclosing to the public all current information regarding its product.⁴⁷ This standard is particularly high when the product is intended for human consumption.⁴⁸

Despite the broad scope of the duty to warn and evidence indicating that the tobacco industry has been aware of the dangers associated with smoking for many years, the only warnings that the industry has ever issued have been in response to provincial and federal legislation.⁴⁹ The messages placed on cigarette packages do not warn consumers of the nature and full extent of the dangers associated with cigarette smoking, as required by both *Buchan* and *Hollis*.⁵⁰ Warnings such as "Cigarette smoking is harmful to you" and "Smoking reduces life expectancy" do not describe all of the potential risks associated with smoking, such as lung cancer, heart disease and

35 *Lambert et al. v. Lastoplex Chemicals Co. Ltd. et al.*, [1972] Supreme Court Reports 569 at 574-575.

36 *Hollis*, see note 34 at 19.

37 *Buchan v. Ortho Pharmaceutical (Canada) Ltd.* (1986), 54 Ontario Reports 92 at 114 (Ontario Court of Appeal).

38 *Buchan*, see note 37 at 101.

39 Doll, see note 1 at 1220; Denissenko, see note 32 at 432.

40 Glantz, "Looking Through a Keyhole" see note 3 at 223; see also Frank, note 4.

41 Glantz, "Looking Through a Keyhole" see note 3 at 220-221; see also Glantz, "Nicotine and Addiction" see note 25 at 232.

42 *Buchan*, see note 37 at 112.

43 *Hollis*, see note 34 at 19.

44 *Hollis*, see note 34 at 20; *Lambert*, see note 35 at 575.

45 *Buchan*, see note 37 at 101; *Hollis*, see note 34 at 20.

46 *Buchan*, see note 37 at 101.

47 *Buchan*, see note 37 at 113.

48 *Hollis*, see note 34 at 20.

49 *Cunningham*, see note 1 at 46.

50 *Buchan*, see note 37 at 101; *Hollis*, see note 34 at 20.

51 *Cunningham*, see note 1 at 46.

52 *Buchan*, see note 37 at 101.

53 *Hollis*, see note 34 at 20-21.

54 *Hollis*, see note 34 at 34; *Buchan*, see note 37 at 121.

55 *Cunningham*, see note 1 at 48.

respiratory illnesses, nor do they set out the mortality rate associated with smoking. In addition to the inadequacy of these warnings, the tobacco industry has gone to enormous lengths to reduce their impact. These efforts include limiting the content and appearance of the warnings placed on cigarette packages, denying to both consumers and government the health risks posed by smoking,⁵¹ and portraying smoking positively in advertising campaigns. These practices clearly breach the manufacturer's duty, as described in *Buchan*, not to minimize the effect of any warnings they issue.⁵² Finally, tobacco products are intended for human consumption; therefore, the warning issued by their manufacturers should be particularly comprehensive.⁵³ The tobacco companies have not fulfilled this duty by warning consumers about the full extent of the hazards posed by cigarette smoking.

In addition to proving that cigarette manufacturers have a duty to warn consumers of the dangers associated with smoking, the province must establish a causal link between that failure to warn and smoking-related illnesses. This will require the province to prove that smoking causes illness, and that the tobacco industry's failure to warn affected either individuals' decisions to start smoking, or their failure to quit.⁵⁴ In the past, cigarette manufacturers have argued successfully that smokers were aware of the dangers associated with smoking as a result of warnings issued by doctors or family members, and yet they chose to continue smoking. Further warnings, therefore, would have made no difference to their behaviour.⁵⁵ However, recent studies indicate that the majority of smokers start smoking before the age of 19.⁵⁶ Therefore, despite current restrictions against the sale of tobacco to minors, most of today's smokers became addicted as teenagers, when they were less able to make informed choices about health issues.⁵⁷ With the recent revelation that the tobacco industry is aware of the addictive properties of nicotine,⁵⁸ it will be difficult for them to argue that smokers could have quit before becoming addicted.

Defences

In previous negligence suits brought against the tobacco industry, manufacturers have successfully defended their actions by alleging that the claimants voluntarily assumed the risks associated with smoking, or were contributorily negligent by continuing to smoke after they became aware of the dangers.⁵⁹ However, the defence of voluntary assumption of risk has fallen out of favour with the courts in Canada, and its application has been restricted to situations where the plaintiff has full knowledge and appreciation of the risk and waives the right to a negligence claim.⁶⁰ Smokers cannot be said to have made any such waiver, as they do not have access to enough information about the health effects of smoking to make an informed decision and accept the associated risks.

The tobacco industry has employed the defence of contributory negligence with some success.⁶¹ Individuals have a responsibility to use reasonable care to protect themselves,⁶² and may be found contributorily negligent where they willingly accept or knowingly expose themselves to risk.⁶³ The tobacco industry has often asserted that

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56 Cunningham, see note 1 at 51.

57 "R.J. Reynolds Saw Future in Young Smokers" *CNN Interactive* (10 July 1996). Found at <http://www.cnn.com/HEALTH/9608/23/nfm/tobacco.side/index.html> on 28 September 1996; "Clinton, Gore Launch Anti-Smoking Campaign" *CNN Interactive* (23 August 1996). Found at <http://www.cnn.com/US/9608/23/clinton.tobacco.update/index.html> on 28 September 1996.

58 Glantz, "Looking Through a Keyhole" see note 3 at 220; also see generally Glantz, "Nicotine and Addiction" see note 25 at 225-233.

59 E. Frohlich, "Statutes Aiding States' Recovery of Medicaid Costs from Tobacco Companies: A Better Strategy for Redressing an Identifiable Harm" (1995) 21 *American Journal of Law and Medicine* 445 at 445.

60 *Miller v. Decker*, [1957] Supreme Court Reports 624 at 626; *Crocker v. Sundance Northwest Resorts Ltd.* (1988), 44 Canadian Cases on the Law of Torts 225 at 238 (Supreme Court of Canada); Linden, see note 11 at 459.

61 M. Hansen, "Capitol Offensives" (1997), 83 *American Bar Association Journal* 50 at 50.

62 Linden, see note 11 at 435.

63 *Jeffrey v. Commodore Cabaret Ltd.* (1995), 128 *Dominion Law Reports* (4th) 535 at 542 (British Columbia Supreme Court).

smokers were aware of the hazards associated with cigarettes and should have quit smoking to avoid illness.⁶⁴ With our increased knowledge of the addictive nature of nicotine and the resulting difficulty of quitting, this argument might not be as convincing today. In addition, it may be argued that consumers are not fully aware of all of the dangers associated with smoking. The tobacco industry has deflected attention away from the dangers inherent in the use of their product through their advertising and promotion campaigns, as well as their denial of the health hazards posed by smoking.

The B.C. Trade Practice Act

British Columbia might consider bringing a subrogated claim on behalf of smokers under the B.C. Trade Practice Act.⁶⁵ This Act allows consumers who have entered into transactions involving a deceptive trade practice by a supplier of goods to sue for resulting damages.⁶⁶ The Act defines a deceptive trade practice as “an oral, written, visual, descriptive or other representation, including a failure to disclose” or “any conduct having the capability, tendency or effect of deceiving or misleading a person.”⁶⁷

The courts have interpreted the definition of deceptive trade practices very broadly. In *Rushak v. Henneken* the British Columbia Court of Appeal held that deceptive practices included “giving an unqualified opinion as to quality when you have factual knowledge indicating the opinion is in some aspect wrong.” The court further held that suppliers must refrain from any misleading statements.⁶⁸ With the recent disclosure of tobacco industry documents confirming that manufacturers have been aware of the dangers associated with smoking for many years and yet have continued to promote their products as safe, an action against the industry for deceptive trade practices appears to have a strong chance of success.

An Independent Cause of Action

As an alternative to bringing a tort action against tobacco companies based on a right of subrogation to the claims of individual smokers, British Columbia could develop legislation providing itself with an independent cause of action against the tobacco industry. In the United States, both Massachusetts and Florida have passed statutes that allow the state to bring an action against any party that causes an increase in the cost of health care. Under Florida’s Medicaid Third Party Liability Act, when the state health department “pays for or becomes liable for, medical care under the Medicaid program” it has a cause of action against a liable third party to recover the full amount of medical assistance provided.⁶⁹ Similarly, the Massachusetts legislation provides the state government with a “separate and independent cause of action to recover from any third party, assistance provided to a claimant under [Medicaid].”⁷⁰

While an independent statutory cause of action would establish the existence of a duty on the part of the tobacco industry not to cause an increase in health care costs, B.C. must still establish the other elements of a tort action. As previously noted, it may be difficult to prove a causal link between smoking and an

64 Cunningham, see note 1 at 51.

65 *Trade Practice Act*, R.S.B.C. 1979, c. 406.

66 See note 65 at s. 22.

67 See note 65 at s. 3.

68 (1991), 84 Dominion Law Reports (4th) 87 at 95 (British Columbia Court of Appeal).

69 Florida Statutes, s.409.910(6)(a) (West 1994).

70 Massachusetts Acts, chap. 60 s. 276 (West 1994).

increase in health care costs. The extent of damages suffered by the province, and the liability of each cigarette manufacturer for those damages might also be hard to determine. The Florida Medicaid Third Party Liability Act has addressed these complexities. The Act provides that in any action against a third party for recovery of health care costs, the state evidence code is to be “liberally construed,” allowing for the use of statistical analysis to prove issues of causation and aggregate damages. Further, where the third party is liable due to its manufacture or sale of an item, the state may proceed against it under a “market share theory,” provided that the products are “substantially interchangeable among brands, and that substantially similar factual and legal issues would be involved in seeking recovery against each liable third party individually.”⁷¹ Florida’s statute also precludes the use of the affirmative defences of contributory negligence and voluntary assumption of risk.⁷² Should the province choose to pursue an independent cause of action against the tobacco industry, it would do well to learn from Florida’s example.

While the province stands to benefit greatly from the creation of a statutory duty not to cause an increase in health care costs, the economic and political implications of such a decision cannot be discounted. Other industries which produce goods that might potentially cause health problems may no longer choose to do business in B.C., resulting in the loss of jobs and a negative impact on the economy. For this reason, B.C. may wish to limit the application of such a statutory duty to the tobacco industry alone. However, because the damages recoverable under an action against a manufacturer must justify the expense of bringing the suit, it is likely that the province will only invoke the duty in the most extreme cases.

Conclusion

Tobacco products occupy a unique position in the North American marketplace. They are the only products on the market that kill when used exactly as the manufacturer intends.⁷³ Nonetheless, tobacco manufacturers have only once been held liable for the damages their products inflict. Should B.C. choose to pursue an action against the tobacco industry to recover smoking-related health care costs, it will confront more than legal precedent. It must also battle the tobacco industry’s historical foothold in the North American market, and the immense economic power that supports its position.

However, that foothold is slipping. Actions against the tobacco industry to recover health care costs are proliferating in the U.S. With greater economic resources than individual smokers, governments are better able to battle the tobacco industry over liability. In addition, recent advances in medical research linking smoking to disease have overcome the traditional stumbling block of causation in these cases. Although none of the U.S. cases have yet been decided, B.C. should pay attention to the valuable strategic precedent they are setting. However, B.C. should not wait for a U.S. court decision before initiating its own action against the tobacco industry. Its chances of success are better now than ever before.

Tobacco products are the only products on the market that kill when used exactly as the manufacturer intends.

⁷¹ See note 69 at s.409.910(9)(a),(b).

⁷² Frohlich, see note 59 at 445.

⁷³ Cunningham, see note 1 at 47.