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3rd SESSION, 63rd GENERAL ASSEMBLY
Province of Prince Edward Island
58 ELIZABETH II, 2009

BILL NO. 12

Tobacco Damages and Health Care Costs Recovery Act

Honourable L. Gerard Greenan
Attorney General

GOVERNMENT BILL

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AMENDMENTS

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TITLE: **TOBACCO DAMAGES AND HEALTH CARE COSTS RECOVERY ACT**

#	SECTION	AMENDMENT	DATE

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CHAIRMAN, IN COMMITTEE

BILL NO. 12 **2009**

Tobacco Damages and Health Care Costs Recovery Act

BE IT ENACTED by the Lieutenant Governor and the Legislative Assembly of the Province of Prince Edward Island as follows:

1. (1) In this Act — Definitions

(a) "cost of health care benefits" means the sum of — cost of health care benefits

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

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

(b) "disease" includes general deterioration of health; — disease

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

(d) "health care benefits" means — health care benefits

(i) benefits, as defined under the *Drug Cost Assistance Act* R.S.P.E.I. 1988 Cap. D-14,

(ii) insured services, as defined under the *Hospital and Diagnostic Services Insurance Act* R.S.P.E.I. 1988, Cap. H-8,

(iii) basic health services, as defined under the *Health Services Payment Act* R.S.P.E.I. 1988, Cap. H-2,

(iv) health services, as defined under the *Health Services Act* R.S.P.E.I. 1988, Cap. H 1.5,

(v) health services, as defined under the *Health Services Act* R.S.P.E.I. 1988, Cap. H 1.6,

(vi) emergency medical services, as defined under Part II of the *Public Health Act* R.S.P.E.I. 1988, Cap. P- 30,

(vii) services or benefits provided under the

(A) *Hospitals Act* R.S.P.E.I. 1988, Cap. H-10.1,

(B) *Hospital Act* R.S.P.E.I. 1951, Chapter 74,

(C) *Hospitals Act* R.S.P.E.I. 1988, Cap. H-10,

(D) *Long-Term Care Subsidization Act* R.S.P.E.I. 1988, Cap. L-16.1,

(E) *Provincial Infirmary Act* R.S.P.E.I. 1951, Chapter 30,

(F) *Provincial Home for the Aged Act* R.S.P.E.I. 1951, Chapter 32,

(G) *Provincial Sanatorium Act* R.S.P.E.I. 1974, Cap. P-26,
(H) *Provincial Sanatorium Act* R.S.P.E.I. 1951, Chapter 38,
(I) *Health and Community Services Act* R.S.P.E.I. 1988, Cap. H-1.1,
(J) *Social Assistance Act* R.S.P.E.I. 1951, Chapter 41,
(K) *Mothers Allowance Act* R.S.P.E.I. 1951 Chapter 101,
(L) *Prince Edward Island General Welfare Assistance Act* R.S.P.E.I. 1951, Chapter 32,
(M) *Welfare Assistance Act* R.S.P.E.I. 1988, Cap. W-3 renamed *Social Assistance Act* R.S.P.E.I. 1988, Cap. S-4.3,

(viii) other expenditures, made directly or through one or more agents or other intermediate bodies, by Her Majesty in right of the Province of Prince Edward Island for programs, services, benefits or similar matters associated with disease;

insured person

(e) "insured person" means
(i) a person, including a deceased person, for whom health care benefits have been provided, or
(ii) a person for whom health care benefits could reasonably be expected will be provided;

joint venture

(f) "joint venture" means an association of two or more persons, if
(i) the relationship among the persons does not constitute a corporation, a partnership or a trust, and
(ii) the persons each have an undivided interest in assets of the association;

manufacture

(g) "manufacture" includes, for a tobacco product, the production, assembly or packaging of the tobacco product;

manufacturer

(h) "manufacturer" means a person who manufactures or has manufactured a tobacco product, and includes a person who currently or in the past
(i) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,
(ii) for any fiscal year of the person, derives at least 10 per cent of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons,
(iii) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or
(iv) is a trade association primarily engaged in
(A) the advancement of the interests of manufacturers,
(B) the promotion of a tobacco product, or

(C) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;

(i) "person" includes a trust, joint venture or trade association; person

(j) "promote" or "promotion" includes, for a tobacco product, the marketing, distribution or sale of the tobacco product and research with respect to the tobacco product; promote or promotion

(k) "tobacco product" means tobacco and any product that includes tobacco; tobacco product

(l) "tobacco-related disease" means disease caused or contributed to by exposure to a tobacco product; tobacco-related disease

(m) "tobacco-related wrong" means tobacco-related wrong

(i) a tort committed in the province by a manufacturer that causes or contributes to tobacco-related disease, or

(ii) in an action under subsection 2(1), a breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons in the province who have been exposed or might become exposed to a tobacco product;

(n) "type of tobacco product" means one or a combination of the following tobacco products: type of tobacco product

(i) cigarettes,
(ii) loose tobacco intended for incorporation into cigarettes,
(iii) cigars,
(iv) cigarillos,
(v) pipe tobacco,
(vi) chewing tobacco,
(vii) nasal snuff,
(viii) oral snuff,
(ix) a prescribed form of tobacco.

(2) The definition of "manufacturer" in subsection (1) does not include "manufacturer", exclusions

(a) an individual;
(b) a person who
(i) is a manufacturer only because they are a wholesaler or retailer of tobacco products, and
(ii) is not related to
(A) a person who manufactures a tobacco product, or
(B) a person described in subclause (i) of the definition of "manufacturer"; or
(c) a person who
(i) is a manufacturer only because subclause (ii) or (iii) of the definition of "manufacturer" applies to the person, and
(ii) is not related to

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

(B) a person described in subclause (i) or (iv) of the definition of "manufacturer".

Meaning of "related"

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

(a) affiliated with the other person, as described in section 1.1 of the *Companies Act* R.S.P.E.I 1988, Cap. C-14; or

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

Meaning of "affiliate"

(4) For the purposes of clause (3)(b), a person is an affiliate of another person if the person

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

(i) carrying at least 50 per cent of the votes for the election of directors of the corporation and the votes carried by the shares are sufficient, if exercised, to elect a director of the corporation, or

(ii) having a fair market value, including a premium for control if applicable, of at least 50 per cent of the fair market value of all the issued and outstanding shares of the corporation; or

(b) is a partnership, trust or joint venture and the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, has an ownership interest in the assets of that person that entitles the other person or group to receive at least 50 per cent of the profits or at least 50 per cent of the assets on dissolution, winding up or termination of the partnership, trust or joint venture.

Deemed affiliate

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

Formula for determining market share

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

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

where

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

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

MM = the quantity of the type of tobacco product manufactured or promoted by all manufacturers that is sold within the province from the date of the earliest tobacco-related wrong committed by the defendant to the date of trial.

Direct action by the province

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

Action not subrogated

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

Action independent of recovery by others

(3) In an action under subsection (1), Her Majesty in right of the Province of Prince Edward Island may recover the cost of health care benefits whether or not there has been any recovery by other persons who have suffered damage caused or contributed to by the tobacco-related wrong committed by the defendant.

Recovery for individuals or on aggregate basis

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

(a) for particular individual insured persons; or

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

Evidence and procedure in action brought on aggregate basis

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

(a) it is not necessary

(i) to identify particular individual insured persons,

(ii) to prove the cause of tobacco-related disease in any particular individual insured person, or

(iii) to prove the cost of health care benefits for any particular individual insured person;

(b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits for particular individual insured persons are not

compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness;

(c) a person is not compellable to answer questions with respect to the health of, or the provision of health care benefits for, particular individual insured persons;

(d) notwithstanding clauses (b) and (c), on application by a defendant, the court may order discovery of a statistically meaningful sample of the documents referred to in clause (b) and the order shall include directions concerning the nature, level of detail and type of information to be disclosed; and

(e) if an order is made under clause (d), the identity of particular individual insured persons shall not be disclosed and all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons shall be deleted from any documents before the documents are disclosed.

Recovery of cost of health care benefits

3. (1) In an action under subsection 2(1) for the recovery of the cost of health care benefits on an aggregate basis, subsection (2) applies if Her Majesty in right of the Province of Prince Edward Island proves, on a balance of probabilities, that, in respect of a type of tobacco product,

(a) the defendant breached a common law, equitable or statutory duty or obligation owed to persons in the province who have been exposed or might become exposed to the type of tobacco product;

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

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

Presumptions

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

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

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

Effect of presumptions

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

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

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

Reduction or readjustment

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

Joint and several liability

4. (1) Two or more defendants in an action under subsection 2(1) are jointly and severally liable for the cost of health care benefits if

(a) those defendants jointly breached a duty or obligation described in the definition of "tobacco-related wrong" in clause 1(1)(m); and

(b) as a consequence of the breach described in clause (a), at least one of those defendants is held liable in the action under subsection 2(1) for the cost of those health care benefits.

Joint breach

(2) For the purposes of an action under subsection 2(1), two or more manufacturers, whether or not they are defendants in the action, are deemed to have jointly breached a duty or obligation described in the definition of "tobacco-related wrong" in clause 1(1)(m) if

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

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

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

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

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

Population based evidence

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

(a) by Her Majesty in right of the Province of Prince Edward Island under subsection 2(1); or

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

Limitation periods

6. (1) No action that is commenced within two years after the coming into force of this section by

(a) Her Majesty in right of the Province of Prince Edward Island;

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

(c) a personal representative of the estate of a deceased person on behalf of a dependant, as defined in the *Fatal Accidents Act* R.S.P.E.I. 1988, Cap. F-5, of the deceased person,

for damages, or the cost of health care benefits, alleged to have been caused or contributed to by a tobacco-related wrong is barred under the *Statute of Limitations Act* R.S.P.E.I. 1988, Cap. S-7 or the *Fatal Accidents Act* or by a limitation period under any other Act.

Certain actions revived

(2) Any action described in subsection (1) for damages alleged to have been caused or contributed to by a tobacco-related wrong is revived if the action was dismissed before the coming into force of this section merely because it was held by a court to be barred or extinguished by the *Statute of Limitations Act* or by the *Fatal Accidents Act* or by a limitation period under any other Act.

Liability based on risk contribution

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

Two or more defendants

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

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

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

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

Considerations

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

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

(b) the market share the defendant had in the type of tobacco product that caused or contributed to the risk of disease;

(c) the degree of toxicity of any toxic substance in the type of tobacco product manufactured or promoted by a defendant;

(d) the amount spent by a defendant on promoting the type of tobacco product that caused or contributed to the risk of disease;

(e) the degree to which a defendant collaborated or acted in concert with other manufacturers in any conduct that caused, contributed to or aggravated the risk of disease;

(f) the extent to which a defendant conducted tests and studies to determine the risk of disease resulting from exposure to the type of tobacco product;
(g) the extent to which a defendant assumed a leadership role in manufacturing the type of tobacco product;
(h) the efforts a defendant made to warn the public about the risk of disease resulting from exposure to the type of tobacco product;
(i) the extent to which a defendant continued manufacture or promotion of the type of tobacco product after the defendant knew or ought to have known of the risk of disease resulting from exposure to the type of tobacco product;
(j) affirmative steps that a defendant took to reduce the risk of disease to the public;
(k) other factors considered relevant by the court.

Apportionment of liability in tobacco-related wrongs

8. (1) This section does not apply to a defendant in respect of whom the court has made a finding of liability under section 7.

Action or proceeding for contribution

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

Action or proceeding may be commenced even if damages or costs not paid

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

Apportioning liability and contributions, factors

(4) In an action or proceeding described in subsection (2), the court may apportion liability and order contribution among each of the defendants in accordance with the considerations listed in clauses 7(3)(a) to (k).

Regulations

9. The Lieutenant Governor in Council may make regulations
(a) prescribing a form of tobacco for the purposes of subclause (i) of the definition of "type of tobacco product" in clause 1(1)(n);
(b) providing for administrative and procedural matters for which no express, or only partial, provision has been made;
(c) defining any word or expression used in this Act or the regulations that is not defined in this Act;
(d) respecting any other matter or thing that the Lieutenant Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Act.

Retroactive effect

10. When brought into force under section 11, a provision of this Act has the retroactive effect necessary to give the provision full effect for all

purposes, including allowing an action to be brought under subsection 2(1) arising from a tobacco-related wrong, whenever the tobacco-related wrong occurred.

Commencement

11. This Act comes into force on a date that may be fixed by proclamation of the Lieutenant Governor in Council.

EXPLANATORY NOTES

SECTION 1 sets out definitions and descriptions for the words and terms used in the Act.

SECTION 2 establishes that Her Majesty in right of the Province of Prince Edward Island has a direct and distinct action against a manufacturer of tobacco to recover the costs of health care benefits caused or contributed to by a tobacco-related wrong.

SECTION 3 sets out presumptions that shall apply in an action brought by Her Majesty in right of the Province of Prince Edward Island where certain facts are proved.

SECTION 4 establishes that two or more defendants in an action brought under this Act by Her Majesty in right of the Province of Prince Edward Island are jointly and severally liable for the cost of the health care benefits provided to insured persons by Her Majesty in right of the Province of Prince Edward Island where those defendants have committed a tobacco-related wrong.

SECTION 5 indicates that statistical information and other information derived from studies and sampling is admissible in evidence in an action brought by Her Majesty in right of the Province of Prince Edward Island under this Act, or by or on behalf of a person in the person's own name, for the purpose of establishing causation and quantifying damages.

SECTION 6 states that no action that is commenced within two years after the coming into force of this section by Her Majesty in right of the Province of Prince Edward Island, by a person on his or her own behalf, or by a personal representative of the estate of a deceased person on behalf of a dependant of the deceased person, is barred by any statutory limitation period.

SECTION 7 sets out factors which the court may consider when apportioning liability among multiple defendants where an action against two or more defendants is brought on a non-aggregate basis.

SECTION 8 permits a defendant who is found liable for a tobacco-related wrong to commence an action against one or more of the defendants found liable for that wrong in the same action.

SECTION 9 authorizes regulations to be made for the purposes of this Act.

SECTION 10 clarifies that, once this Act comes into force, a provision of this Act has the retroactive effect necessary to give the provision full effect for all purposes, including allowing Her Majesty in right of the Province of Prince Edward Island to bring any action under this Act arising from a tobacco-related wrong, whenever the tobacco-related wrong occurred.

SECTION 11 provides for the commencement of this Act.

BILL NO. 12

Tobacco Damages and Health Care Costs Recovery Act

STAGE:	*DATE:*
1st Reading:	November 25, 2009
2nd Reading:	
To Committee:	
Reported:	
3rd Reading and Pass:	
Assent:	

SIGNATURES:

Honourable Barbara A. Hagerman, Lieutenant Governor

Honourable Kathleen M. Casey, Speaker

Clerk

Honourable L. Gerard Greenan

Attorney General

GOVERNMENT BILL

2009

3rd SESSION, 63rd GENERAL ASSEMBLY