



NATIONAL ASSEMBLY

FIRST SESSION

THIRTY-NINTH LEGISLATURE

Bill 43

(2009, chapter 34)

**Tobacco-related Damages and Health
Care Costs Recovery Act**

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EXPLANATORY NOTES

The purpose of this Act is to establish special rules for the recovery of tobacco-related health care costs attributable to a wrong committed by one or more tobacco product manufacturers. It also seeks to make some of those rules applicable to the recovery of damages for a tobacco-related injury.

More specifically, the Act confirms the Government's right to recover directly from tobacco product manufacturers the health care costs assumed by the Government or by a government body and caused or contributed to by a wrong committed by those tobacco product manufacturers, including a failure in their obligation to inform the public about the risks and dangers posed by tobacco products.

The Act also modifies how the right of recovery may be exercised, allowing the Government to bring an action on a collective basis to recover the costs incurred for all health care recipients stemming from exposure to tobacco products of one or more types, or on an individual basis to recover the part of the costs incurred for certain particular recipients of similar health care. With respect to those two types of actions, the Act introduces certain modifications to the ordinary rules of civil liability otherwise applicable.

Consequently, and aside from the inherent characteristics of collective or individual actions, the Act provides that statistical data or data derived from epidemiological, sociological or any other relevant studies will be admissible as evidence in such actions, for instance to establish causation between the wrong committed by a defendant and the health care costs whose recovery is being sought or between exposure to a tobacco product and the disease suffered by the health care recipients, or to determine the health care costs being sought. In the case of an action brought on a collective basis, the Act also sets out specific rules with respect to the elements of proof required to find a defendant liable, as well as the means by which the amount of the health care costs for which the defendant is held liable may be reduced or the defendant's share of responsibility for the cost may be adjusted, and establishes the conditions for finding two or more defendants solidarily liable. In the case of an action taken on an individual basis, the Act also sets out rules for

apportioning liability among two or more defendants that are parties to the action, including the factors the court may consider in apportioning liability.

Under the Act, the special rules for an action brought by the Government on an individual basis are applicable to an action brought by a person or the person's heirs or other successors to recover damages for a tobacco-related injury caused or contributed to by a wrong committed in Québec by a tobacco product manufacturer, as well as to a class action based on the recovery of damages for such injury.

Lastly, the Act introduces special rules, common to all or some of the actions described in the Act, to complement the other new rules or to ensure that they are applied in keeping with the object of the Act. Some of those rules have to do with the right of a defendant to bring a recursory action against one or more of its co-defendants, demanding that they pay their share of the health care costs or damages the defendant is required to pay in addition to its share. Other rules provide that an action, including a class action, commenced before or within three years after the date the provisions come into force may not be dismissed on the ground that the right to recover the health care costs or damages is prescribed; the rules also authorize an action that may have been dismissed on that ground in the past to be revived under certain conditions. Other rules in the Act not only grant the Government regulatory power to take any measure necessary or useful for their application, but also give the provisions of the Act all the retroactive effect necessary to ensure their full application, in particular to enable the Government to exercise its right to recover tobacco-related health care costs regardless of when the tobacco-related wrong was committed.

Bill 43

TOBACCO-RELATED DAMAGES AND HEALTH CARE COSTS RECOVERY ACT

THE PARLIAMENT OF QUÉBEC ENACTS AS FOLLOWS:

CHAPTER I

PURPOSE AND DEFINITIONS

1. The purpose of this Act is to establish specific rules for the recovery of tobacco-related health care costs attributable to a wrong committed by one or more tobacco product manufacturers, in particular to allow the recovery of those costs regardless of when the wrong was committed.

It also seeks to make certain of those rules applicable to the recovery of damages for an injury attributable to a wrong committed by one or more of those manufacturers.

2. For the purposes of this Act, “tobacco product manufacturer” means any group of persons or assets, whatever its legal form, that manufactures or manufactured, or causes or caused another group to manufacture, tobacco, a tobacco derivative or a product containing tobacco.

The following groups of persons or assets are considered tobacco product manufacturers:

(1) a group that, during the course of a fiscal year, derives or derived 10% or more of its revenues, calculated on a consolidated basis in accordance with accounting principles generally accepted in Canada, from research on, or the manufacture, marketing or promotion of, tobacco products by itself or by another group;

(2) a group that engages or engaged, or causes or caused another group to engage, in research on or the marketing or promotion of tobacco products; and

(3) a group that is or was a trade association whose principal activity consists or consisted in promoting the interests of tobacco product manufacturers, or engaging, or causing another group to engage, in research on or the marketing or promotion of tobacco products.

The manufacture of a tobacco product includes the production, assembly and packaging of the product.

3. A group of persons or assets means, among other things, a joint stock company or other legal person, a partnership, an association without a legal personality, a trust and a foundation whose assets constitute a patrimony by appropriation.

It also means a joint venture, that is, a group of persons whose relationship does not constitute a legal person or a partnership and in which each person has an undivided interest in assets of the group.

4. Despite section 2, a group whose tobacco-related activity is limited to acting or having acted as a wholesaler or retailer of tobacco products is considered a tobacco product manufacturer only if it is or was related to a group that manufactures or manufactured, or causes or caused another group to manufacture, tobacco products.

Similarly, a group whose tobacco-related activity is limited to deriving or having derived revenues from research on, or the manufacture, marketing or promotion of, tobacco products, or to engaging or having engaged, or causing or having caused another group to engage, in research on or the marketing or promotion of tobacco products is considered a tobacco product manufacturer only if

(1) it is or was related to a group that manufactures or manufactured, or causes or caused another group to manufacture, tobacco products; or

(2) it is or was related to a group that is or was a trade association whose principal activity consists or consisted in promoting the interests of tobacco product manufacturers, or in engaging, or causing another group to engage, in research on or the marketing or promotion of tobacco products.

5. A group is considered to be related to another group if

(1) it belongs to the same group as the other group; or

(2) it is an affiliate of the other group or an affiliate of an affiliate of that group.

6. Two groups are considered to be members of the same group if one is an affiliate of the other, both are affiliates of the same group or both are controlled by the same group or natural person.

A group is considered to be controlled by another group or a natural person when

(1) voting securities of the group representing over 50% of the votes required to elect its directors are held, otherwise than solely as security, by or on behalf of that other group or that person; and

(2) the number of votes carried by those securities is sufficient to elect a majority of the directors of the group.

7. A group is considered to be an affiliate of another group if

(1) it is a joint-stock company and if the other group, or a group of groups not dealing with each other at arm's length of which the other group is a member, holds an interest in shares of the company

(a) carrying at least 50% of the votes required to elect the directors of the company and a sufficient number of votes to elect a director of the company;

(b) having a fair market value, including a premium for control, if applicable, of at least 50% of the fair market value of all the issued and outstanding shares of the company;

(2) it is a partnership, trust or joint venture and the other group, or a group of groups not dealing with each other at arm's length of which the other group is a member, has an interest in the assets of the partnership, trust or joint venture that entitles it to receive at least 50% of the profits or at least 50% of the assets on the dissolution, winding up or termination of the partnership, trust or joint venture; or

(3) the other group, or a group of groups not dealing with each other at arm's length of which the other group is a member, has direct or indirect influence that, if exercised, would result in de facto control of the group, except if the other group deals at arm's length with that group and derives influence solely as a lender.

For the purposes of this section, "not dealing at arm's length" has the meaning assigned to it in the Taxation Act (R.S.Q., chapter I-3).

8. Health care is tobacco-related when the disease or general deterioration of health warranting it, or the risk of the disease or deterioration, is caused or contributed to by the health care recipient's exposure to a tobacco product by contact, ingestion, inhalation or assimilation, including exposure to smoke or another by-product of the use, consumption or combustion of the tobacco product.

CHAPTER II

RECOVERY OF TOBACCO-RELATED HEALTH CARE COSTS

DIVISION I

GENERAL CONDITIONS FOR RIGHT OF RECOVERY

9. The Government has the right to recover directly, from one or more tobacco product manufacturers, tobacco-related health care costs caused or contributed to by a wrong committed by a tobacco product manufacturer, in

particular, failure to inform the public of the risks and dangers posed by tobacco products.

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

10. The health care costs the Government is entitled to recover from tobacco product manufacturers under this Act are the sum of

(1) the present value of the total expenditure by the Government or by government bodies for tobacco-related health care; and

(2) the present value of the estimated total expenditure by the Government or by government bodies for tobacco-related health care that it could reasonably expect would have to be provided by the Government or a government body.

11. The cost of tobacco-related health care includes the cost of medical services, health services and other health and social services, including pharmaceutical services and drugs, the Government or a government body covers under, in particular, the Hospital Insurance Act (R.S.Q., chapter A-28), the Health Insurance Act (R.S.Q., chapter A-29), the Act respecting prescription drug insurance (R.S.Q., chapter A-29.01), the Act respecting health services and social services (R.S.Q., chapter S-4.2) and the Act respecting health services and social services for Cree Native persons (R.S.Q., chapter S-5).

The cost of tobacco-related health care also includes the cost of any type of program and service established or insured by the Government or a government body to deal with a disease or a general deterioration of health associated with tobacco, including programs and services to educate the public about the risks and dangers posed by tobacco products or to fight tobacco addiction.

DIVISION II

EXERCISING RIGHT OF RECOVERY

§1. — General provisions

12. When exercising the right to recover tobacco-related health care costs under this Act, the Government may bring an action on a collective basis to recover the costs incurred for all recipients of health care required following exposure to one or more types of tobacco product, or on an individual basis, to recover the costs incurred for certain particular recipients of that health care.

Each of the following products, as well as any combination of those products, constitutes a type of tobacco product: cigarettes, cigars, cigarillos, cigarette tobacco, pipe tobacco, chewing tobacco, nasal snuff, oral snuff and any other form of tobacco prescribed by regulation.

§2. — *Special provisions for an action brought on a collective basis*

13. If the Government brings an action on a collective basis, it is not required to identify particular health care recipients individually or prove the cause of the disease suffered by, or the general deterioration of health of, a particular health care recipient or the portion of the health care costs incurred for such a recipient.

Moreover, no one may be compelled in such an action

(1) to answer questions on the health of, or the health care provided to, particular health care recipients; or

(2) to produce the medical records and documents of, or the documents related to health care provided to, particular health care recipients, except as provided by a law or a rule of law, practice or procedure that requires the production of documents relied on by an expert witness.

14. Despite the second paragraph of section 13, the court may, at the request of a defendant, order the production of statistically meaningful samples of records and documents concerning, or relating to health care provided to, particular health care recipients.

In that case, the court determines conditions for the sampling and for the communication of information contained in the samples, specifying, among other things, what kind of information may be disclosed.

The identity of, or identifying information with respect to, the particular health care recipients concerned by the court order may not be disclosed. Moreover, no record or document concerning, or relating to health care provided to, particular health care recipients may be produced under the order unless any information they contain that reveals or may be used to trace the identity of the recipients has been deleted or blanked out.

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

The same applies to proof of the health care costs whose recovery is being sought in such an action.

16. For a defendant who is a party to an action brought on a collective basis to be held liable, the Government must prove, with respect to a type of tobacco product involved in the action, that

(1) the defendant failed in the duty to abide by the rules of conduct, to which the defendant is bound in the circumstances and according to usage or law, in respect of persons in Québec who have been or might become exposed to the type of tobacco product;

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

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

17. If the Government establishes the elements of proof required under section 16, the court presumes

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

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

18. When the presumptions set out in section 17 apply, the court sets the cost of all the health care required following exposure to the category of tobacco products involved in the action and provided after the date of the defendant's first failure.

Each defendant to whom the presumptions apply is liable for the costs in proportion to its market share in the type of product involved. That share, determined by the court, is equal to the relation between

(1) the quantity of tobacco products of the type involved in the action that were manufactured by the defendant and that were sold in Québec between the date of the defendant's first failure and the date of the action; and

(2) the total quantity of tobacco products of the type involved in the action that were manufactured by all the manufacturers of those products and that were sold in Québec between the date of the defendant's first failure and the date of the action.

19. The court may reduce the amount of the health care costs for which a defendant is liable or adjust among the defendants their share of responsibility for the health care costs if one of the defendants proves either that its failure did not cause or contribute to the exposure of the persons in Québec who were exposed to the type of product involved in the action, or that its failure did not cause or contribute to the disease suffered by, or the general deterioration of health of, a number of those persons, or cause or contribute to the risk of such a disease or such deterioration.

20. Defendants who are parties to an action brought on a collective basis are solidarily liable for the health care costs set by the court

(1) if the failure to abide by the rules of conduct to which the defendants are bound in respect of the persons in Québec who have been or might become exposed to a type of tobacco product involved in the action is common to all of them; or

(2) if, because of the common failure, at least one of the defendants is found liable for the health care costs set by the court.

21. Failure to abide by the rules of conduct to which they are bound in respect of the persons in Québec who have been or might become exposed to a type of tobacco product, is deemed to be a common failure committed by two or more tobacco product manufacturers, whether or not the manufacturers are defendants in the action, if

(1) at least one of those manufacturers is held to have failed in its duty to abide by the rules of conduct; and

(2) the manufacturers would be held under a law or a rule of law to have conspired, acted in concert or acted as each other's representatives with respect to the failure, or to be solidarily, even vicariously, liable for the injury caused or contributed to by the failure in a civil action that awarded damages for the injury.

§3. — *Special provisions for an action brought on an individual basis*

22. If it is not possible to determine which defendant in an action brought on an individual basis caused or contributed to the exposure to a type of tobacco product of particular health care recipients who suffered from a disease or a general deterioration of health resulting from the exposure, but because of a failure in a duty imposed on them, one or more of the defendants also caused or contributed to the risk for people of contracting a disease or experiencing a general deterioration of health by exposing them to the type of tobacco product involved, the court may find each of those defendants liable for health care costs incurred, in proportion to its share of liability for the risk.

23. In apportioning liability under section 22, the court may consider any factor it considers relevant, including

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

(2) a defendant's market share in the type of tobacco product that caused or contributed to the risk;

(3) the degree of toxicity of the substances in the type of tobacco product manufactured by a defendant;

(4) the sums spent by a defendant on research, marketing or promotion with respect to the type of tobacco product that caused or contributed to the risk;

(5) the degree to which a defendant collaborated or participated with other manufacturers in any conduct that caused, contributed to or aggravated the risk;

(6) the extent to which a defendant conducted tests and studies to determine the health risk resulting from exposure to the type of tobacco product involved;

(7) the extent to which a defendant assumed a leadership role in the manufacture of the type of tobacco product involved;

(8) the efforts a defendant made to warn the public about the health risks resulting from exposure to the type of tobacco product involved, and the concrete measures the defendant took to reduce those risks; and

(9) the extent to which a defendant continued manufacturing, marketing or promoting the type of tobacco product involved after it knew or ought to have known of the health risks resulting from exposure to that type of tobacco product.

24. The provisions of section 15 that relate to the establishment of causation between alleged facts and to proof of health care costs are applicable to actions brought on an individual basis.

CHAPTER III

RECOVERY OF TOBACCO-RELATED DAMAGES

25. Despite any incompatible provision, the rules of Chapter II relating to actions brought on an individual basis apply, with the necessary modifications, to an action brought by a person or the person's heirs or other successors for recovery of damages for any tobacco-related injury, including any health care costs, caused or contributed to by a tobacco-related wrong committed in Québec by one or more tobacco product manufacturers.

Those rules also apply to any class action based on the recovery of damages for the injury.

CHAPTER IV

RECURSORY ACTIONS, PRESCRIPTION AND REGULATIONS

DIVISION I

RECURSORY ACTIONS

26. Unless found liable under section 22, a defendant that is required to pay health care costs or damages for injury following a judgment in an action under this Act may demand from the other defendants found liable in the same action their respective shares in those costs or damages, whether or not the defendant has paid all or only a part of its share in those costs or damages.

In that case, the court apportions liability among the defendants and determines each defendant's contribution, considering, if the court deems it relevant, the factors listed in section 23.

DIVISION II

PRESCRIPTION

27. An action, including a class action, to recover tobacco-related health care costs or damages for tobacco-related injury may not be dismissed on the ground that the right of recovery is prescribed, if it is in progress on 19 juin 2009 or brought within three years following that date.

Actions dismissed on that ground before 19 juin 2009 may be revived within three years following that date.

DIVISION III

REGULATIONS

28. In addition to the regulatory power conferred on it by section 12, the Government may, by regulation, take any measure necessary or useful for carrying out this Act and fully achieving its purposes.

CHAPTER V

FINAL PROVISIONS

29. The Minister of Health and Social Services is responsible for the administration of this Act.

30. This Act may not be interpreted as preventing rules similar to those provided in the Act with respect to an action brought by the Government on a collective basis from being applied in a class action brought to recover damages for tobacco-related injuries.

31. This Act has the retroactive effect necessary to ensure its full application, in particular to enable the Government to exercise its right to recover tobacco-related health care costs regardless of when the tobacco-related wrong was committed.

32. This Act comes into force on 19 June 2009.