

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

COLIN MACKAY, STEVEN GROUND, HAROLD GROUND,
TIM REID and SABINE REID and
DARRELL ROCKWOOD and MARILYN ROCKWOOD

- and -

PURDUE PHARMA INC., PURDUE PHARMA-L.P., PURDUE PHARMA, THE
PURDUE FREDERICK COMPANY, THE PURDUE FREDERICK COMPANY
PURDUE FREDERICK INC., and THE P.F. LABORATORIES INC.

AMENDED THIS Aug 28/14 PURSUANT TO
MISFEITCE RULE 26.02 CONFORMANCE A
 RULE/LA REGLE 26.02
 THE ORDER OF
L'ORDONNANCE DU
DATED / FAIT LE
REGISTRAR GREFIER
SUPERIOR COURT OF JUSTICE COUR SUPREME DE JUSTICE

Defendants

Proceeding under the *Class Proceedings Act, 1992*

SECOND FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

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

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

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

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES,

LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date ~~August 28, 2014~~ *Nov. 7, 2007*

Issued by *S. Chandradat*
Local registrar

Address of 393 University Avenue
court office 10th Floor
Toronto, ON M5G 1E6

TO: Purdue Pharma
575 Granite Court
Pickering, ON
Canada L1W 3W8

AND TO: Purdue Pharma LP
One Stamford Forum
201 Tresser Boulevard
Stamford, CT, USA
06901-3431

AND TO: Purdue Pharma Inc.
40 King Street West
Suite 4400
Toronto, ON M5H 3V4

AND TO: The P.F. Laboratories Inc.
700 Union Blvd
Totowa, New Jersey 07512
USA

AND TO: Purdue Frederick Inc.
40 King Street West,
Suite 4400
Toronto, Ontario
M5H 3Y4

AND TO: The Purdue Frederick
Company Inc.
One Stamford Forum
201 Tresser Boulevard
Stamford, CT, USA
06901-3431

CLAIM

DEFINED TERMS

1. The following terms used throughout this statement of claim have the meanings indicated:

- (a) “**BCBA**” means the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44;
- (b) “**CJA**” means the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (c) “**Class**” and “**Class Members**” means all persons in Canada, including their estates, other than residents of Quebec, who were prescribed and ingested the drug OxyContin (generic name: oxycodone), which was manufactured, marketed and/or sold or otherwise placed into the stream of commerce in Canada by the Defendants;
- (d) “**Class Period**” means January 1996 through to March 2012, when OxyContin was removed from the Canadian market (and replaced with OxyNeo);
- (e) “**Colin**” means Colin MacKay;
- (f) “**CPA**” means the *Class Proceedings Act*, 1992, S.O. 1992, c. 6;
- (g) “**Darrell**” means Darrell Rockwood;
- (h) “**Family Class**” means all persons resident in Canada who by virtue of a personal relationship to a Class Member, have a *Family Law Act* R.S.O. 1990, c. F.3 (or equivalent in other province or territories) derivative claim for damages.
- (i) “**FDA**” means the United States Food and Drug Administration;
- (j) “**FLA**” means *the Family Law Act*, R.S.O. 1990, c. F.3, as amended, and similar legislation in the other provinces and territories;
- (k) “**Food and Drug Act**” means the *Food and Drug Act*, R.S.C. 1985, c. F-27;
- (l) “**Frederick**” means The Purdue Frederick Company;

- (m) **“Frederick Canada”** means Purdue Frederick Inc.;
- (n) **“Frederick Inc.”** means The Purdue Frederick Company, Inc.;
- (o) **“Harold”** means Harold Ground;
- (p) **“HC”** means Health Canada;
- (q) **“IR”** means instant release in the context of the formulation of a drug;
- (r) **“Marilyn”** means Marilyn Rockwood;
- (s) **“Opioid”** means the family of synthetic narcotic pain medications which resemble naturally occurring opiates, and include morphine, Oxycodone and methadone;
- (t) **“Oxycodone”** means an Opioid analgesic which is twice as potent as morphine;
- (u) **“OxyContin”** means Oxycodone tablets manufactured, marketed, distributed and sold under the trademark OXYCONTIN in Canada;
- (v) **“PFL”** means The P.F. Laboratories Inc.;
- (w) **“Purdue”** means all of the Defendants;
- (x) **“Purdue Canada”** means Purdue Pharma Inc.;
- (y) **“Purdue Pharma”** means Purdue Pharma, a limited partnership registered in the Province of Ontario;
- (z) **“Purdue US”** means Purdue Pharma L.P.;
- (aa) **“Sabine”** means Sabine Reid;
- (bb) **“SR”** means sustained release in the context of the formulation of a drug;
- (cc) **“Steven”** means Steven Ground; and

(dd) “**Tim**” means Tim Reid.

RELIEF CLAIMED

2. Colin, Steven, Tim and Darrell claim:

- (a) an order pursuant to the *CPA* certifying this action as a class proceeding and appointing them as Representative Plaintiffs for the class of persons defined at paragraph 1(c);
- (b) a declaration that each of the Defendants is vicariously liable for the acts and omissions of each of the others, and that each Defendant is vicariously liable for the acts and omissions of its officers, directors, agents, employees, and representatives;
- (c) a declaration that Purdue was negligent in the development, manufacture, distribution, marketing and sale of OxyContin;
- (d) in the alternative to the claim for damages, an accounting or other such restitutionary remedy disgorging the revenues realized by the Defendants from their sales of OxyContin;
- (e) damages in the amount of \$300,000,000 or in such other amount as the court finds appropriate;
- (f) an Order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- (g) punitive damages in the amount of \$100,000,000 or in such other amount as the court finds appropriate;
- (h) prejudgment and post judgment interest, compounded at a rate equal to Purdue’s annual internal rate of return, or pursuant to sections 128 and 129 of the *CJA*;
- (i) costs of this action on a substantial indemnity basis, plus, pursuant to s. 26(9) of the *CPA* the costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes; and

(j) such further and other relief as this Honourable Court deems just.

3. Marilyn, Harold, and Sabine claim on their own behalf and on behalf of the other members of the Family Class:

- (a) an order pursuant to the *CPA* certifying this action as a class proceeding and appointing them Representative Plaintiffs of the Family Class defined in paragraph 1(h);
- (b) damages pursuant to section 61 of the *FLA*, and similar legislation in other provinces listed in "Schedule "A", where applicable, in the amount of \$25,000,000 or such other amount as the court finds appropriate;
- (c) prejudgment and post judgment interest, compounded at a rate equal to Purdue's annual internal rate of return, or pursuant to sections 128 and 129 of the *CJA*;
- (d) costs of this action on a substantial indemnity basis, and, pursuant to section 26(9) of the *CPA*, the costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes; and
- (e) such further and other relief as to this court seems just.

THE NATURE OF THIS ACTION

4. The Plaintiffs allege that the Defendants were negligent in the development, design, manufacture, distribution, marketing and sale of OxyContin and that the Defendants knew at all material times that anyone who ingested OxyContin would be at significant risk of becoming addicted to it. The result was that many users of OxyContin suffered from overdose, addiction and/or withdrawal effects which were severe, profound, and of long duration. Notwithstanding these effects of addiction and/or withdrawal, Purdue failed to adequately warn class members of such risks.

5. The Plaintiffs also allege that the Defendants marketed and promoted OxyContin in Canada as safer and less addictive than they knew it to be or ought to have known it to be and failed to give proper warning of the drug's high potential for abuse.

THE PARTIES

(a) The Plaintiffs

6. Colin is a resident of Barrie, Ontario. He was prescribed OxyContin by his physician in 1996 to treat his pain suffered as a result of injuries sustained in an accident. He developed an addiction to OxyContin, which lasted for approximately seven years.

7. Steven is a resident of Richmond Hill, Ontario. In or about 2001, he was prescribed OxyContin by his physician as a result of injuries sustained in an accident. He developed an addiction to OxyContin, which lasted for approximately five years.

8. Harold is Steven's father. He resides in Richmond Hill, Ontario.

9. Tim is a resident of Sarnia, Ontario. He was prescribed OxyContin by his physician for treatment of an injury in approximately 2001. He developed an addiction to OxyContin, which lasted for approximately 4 years.

10. Sabine was Tim's wife during the period of his Oxycontin use. She resides in Wallaceburg, Ontario.

11. Darrell resides in Windsor, Ontario with his mother Marilyn. He is employed as a corrections officer. In or about March of 2004, Darrell's family physician prescribed OxyContin for back pain. Darrell became addicted to OxyContin. In 2006, Darrell was admitted to an addiction treatment program in Windsor, Ontario.

12. Marilyn is Darrell's mother. She resides in Windsor, Ontario

(b) The Defendants

13. Purdue developed, designed, manufactured, distributed, marketed and sold OxyContin, a prescription Opioid pain medication in the United States and in Canada.

14. Purdue Canada is a corporation incorporated under the *CBCA* with its head office in Toronto. Its principal place of business is in Pickering, Ontario. It is the general partner in the limited partnership carrying on business under, the name Purdue Pharma, and distributes OxyContin in Canada.

15. Purdue US is a limited partnership organized pursuant to the laws of the State of Delaware, based in Stamford Connecticut. It owns the trademark OxyContin in the United States. It owned the Canadian patent for OxyContin until 2005. Its partners are closely held private American corporations which, directly or indirectly, own all issued shares of their co-Defendants. Purdue developed, designed, manufactured, distributed, marketed and sold OxyContin, in the United States and Canada.

16. Purdue US controls numerous wholly owned subsidiaries, including the co-Defendants, who were engaged in the development, design, manufacture, distribution, marketing and sale of OxyContin in Canada.

17. Purdue Canada is a corporation incorporated under the *CBCA* with its head office in Toronto.

18. Purdue Pharma is a limited partnership registered in the Province of Ontario. Its principal place of business is in Pickering, Ontario. Purdue Pharma and its predecessors have been operating in Canada for more than fifty years. Purdue Pharma maintains a fully integrated R & D laboratory, drug development function and manufacturing capabilities in Canada. Purdue Pharma has 300 employees in Canada and annual sales in Canada of over \$200 million. Purdue Pharma is the owner of the trademark OxyContin. Since approximately 2005, it has been the owner of the Canadian patent for OxyContin.

19. Frederick is a corporation incorporated in the State of New York. Its head office is in Stamford, Connecticut. It carried on research and development of OxyContin.

20. Frederick Inc. is a corporation whose antecedents are unknown to the Plaintiffs. It is a signatory to a plea agreement in the United States District Court for the Western District of Virginia in which it admitted to the felony of misbranding OxyContin with the intent to defraud or mislead.

21. Frederick Canada is a corporation incorporated under the *CBCA*. Its head office is in Toronto, Ontario. Its principal place of business is in Pickering, Ontario.

22. PFL is a corporation incorporated in the State of New Jersey. It manufactured OxyContin that was distributed in Canada between 1996 and 2001.

23. At all material times, the Defendants shared the common purpose of developing, designing, manufacturing, distributing, marketing and selling OxyContin for profit in the Canadian market.

24. In particular, the Defendants provided executive services to each other, copied each other with correspondence in relation to OxyContin's regulatory approval, marketing and sale, and met and conferred frequently to discuss and advance the promotion and sale of OxyContin within the Canadian market. In particular

- (a) Purdue US and PFL, in entering into a plea agreement in the United States regarding the marketing and misbranding of OxyContin, included the Canadian Purdue entities, insulating them from claims against their property with respect to further U.S. liabilities, evidencing the control of the US entities over the Canadian entities;
- (b) The plea agreement also contained provisions, (particularized below at paragraphs 32-34), whereby it is evident that the U.S. Purdue entities exercised control over the Canadian entities with respect to the manner in which the Canadian Purdue entities placed OxyContin into the stream of commerce, as well as exercised control over research, sales, marketing and promotion of OxyContin in Canada.

25. The Defendants failed to warn or otherwise adequately communicate the addictive properties, abuse potential and severe withdrawal effects of OxyContin to regulatory authorities, health practitioners and Class Members. The Defendants were aware, at all material times, of the consequent harm being done to Class Members by OxyContin. The Defendants participated in, acquiesced in and approved the decision to continue promoting, marketing, distributing and selling OxyContin in Canada nonetheless.

26. The Defendants are therefore liable for the acts and omissions of each other.

MATERIAL FACTS

OxyContin

27. The active ingredient in OxyContin is Oxycodone. Oxycodone is a narcotic which is frequently prescribed for the treatment of moderate to severe short-term and long-term pain. It is also prescribed for use in palliative care for the terminally ill.

28. OxyContin was approved by the U.S. Food and Drug Administration in 1995. It was approved by Health Canada in 1996 as a prescription opioid.

29. Usage of OxyContin in accordance with its prescription resulted in dependency on the drug, requiring more frequent and higher doses and leading, in the majority of cases, to addiction in patients.

30. Discontinuance of OxyContin also causes severe withdrawal symptoms which are extremely painful and often require further medical intervention. Moreover, many patients require painful medical detoxification, including a weaning off OxyContin program, or prescriptions of clonidine or methadone.

31. The concerns about OxyContin addiction and severe withdrawal symptoms were well known to the Defendants for many years. In 2003, the Newfoundland and Labrador government established the OxyContin Task Force in response to a number of deaths resulting from OxyContin use in that province.

Failure to Warn

32. At no time was the risk of addiction and/or severe withdrawal symptoms associated with OxyContin use, disclosed, or adequately disclosed by the Defendants to Canadian consumers, regulators and/or the scientific/medical community.

(a) United States Guilty Plea Agreement

33. In the U.S., on May 7, 2007, Frederick Inc., the parent corporation responsible for the development, design, marketing and selling of OxyContin in the U.S, entered into a plea agreement with the United States Attorney for the Western District of Virginia whereby it pleaded guilty to the felony of misbranding OxyContin with the intent to mislead or defraud.

34. Pursuant to the provisions of the plea agreement, Frederick Inc., along with Purdue US and three of their officers, including the chief executive officer of Frederick, Inc. agreed to pay more than \$634 million US in fines, penalties and forfeitures for misbranding OxyContin with the intent to defraud or mislead. The misbranding and misleading conduct alleged related to failing to adequately disclose the risks of abuse and making false claims that OxyContin was less addictive and less likely to cause withdrawal as compared to alternative medications.

35. The plea agreement includes:

- (a) an Agreed Statement of Facts, containing details of the misbranding in the promotion and marketing of OxyContin:
 - (i) Purdue sales representatives in the U.S. were instructed to and did falsely advise healthcare providers that OxyContin had less euphoric effect and less abuse potential than other short-acting Opioids and created training and information materials to support this falsehood;
 - (ii) Purdue US had drafted and published an article in a medical journal on March 27, 2000, that, among other things represented that certain doses of OxyContin (below 60 mg) would not cause one to develop tolerance and could be discontinued abruptly without withdrawal symptoms, despite knowing both these statements to be false;
 - (iii) The year prior to the article being published, the U.S. Purdue entities received an analysis of the study listing patients who had symptoms related to Opioid withdrawal and which indicating that some patients likely became physically dependent on OxyContin;
 - (iv) In months following the publication of the article, Purdue U.S. did not publish or take any steps to advise the medical community or the public about reports relating to study participants who had experienced withdrawal symptoms.
- (b) a list of related and associated entities which Frederick Inc. and Purdue US purport to protect from claims against their properties, in exchange for the plea agreement and the Civil Settlement Agreement (an agreement whereby Frederick Inc. and Purdue US collectively agreed to immediately pay to the United States the sum of \$100,615,797.25 in exchange for protection for themselves and other related entities, from further prosecution in the United States and protection from claims against their property). Among those related entities protected are: Purdue

Canada, Frederick Canada, Purdue Pharma and PFL (PFL while not a Canadian entity, is the company that manufactured the OxyContin tablets sold in Canada between 1996 and 2001);

- (c) a Corporate Integrity Agreement whereby Purdue US agreed to establish and maintain a corporate compliance program for all persons whose job responsibilities relate to the dissemination of promotional or medical/scientific information about Purdue's products including "...sales, marketing, pricing, or promotion of Purdue's products, research and development". This agreement contains detailed obligations requiring Purdue US to establish, inter alia, a compliance officer, corporate compliance council, written code of conduct, written policies and procedures, training and Field Sales Force Promotional Monitoring Program.

36. Despite acknowledgement in May 2007 of the risks of addiction and severe withdrawal symptoms associated with OxyContin use in the U.S., the Defendants herein took no steps to communicate these facts with the Plaintiffs or Class Members.

37. While the Canadian product monograph for OxyContin was amended from time to time, between 1996 and 2012, at no time did the language in the product monograph adequately warn of the risks of addiction and/or serious withdrawal symptoms associated with its use. Indeed, the risks, abuse potential, addictive nature and serious withdrawal symptoms were minimized.

38. At all times during the Class Period, Purdue knew or ought to have known that the risks of using OxyContin included severe complications and side effects.

39. At all material times, Purdue knew or ought to have known that OxyContin was at least as addictive as other Opioid analgesics.

40. The Defendants, through its servants and agents, failed to adequately warn physicians and consumers, including the Plaintiffs and Class Members, that the risk of addiction associated with using OxyContin is the same or higher as compared to other Opioid analgesics, and further failed to adequately warn of the risks of severe withdrawal symptoms.

Fitness for Purpose and Negligent Design

41. Purdue further failed to provide adequate safety data to Health Canada with respect to OxyContin, for inclusion in the Canadian product monographs and labelling. At all times, Purdue knew or should have known that OxyContin was defective, unsafe and unreasonably dangerous and as such, not fit for its intended purposes.

42. Purdue used the SR formulation to justify, to Health Canada, a higher dose of the Opioid oxycodone than an IR formulation would contain.

43. The SR formulation is such that it provides an immediate dose of oxycodone, to be followed by other doses at various intervals. The amount of oxycodone released immediately in some SR formulations (i.e. the 80 mg tablet) could be higher than IR formulations, leading to exposure to potentially higher doses of oxycodone, creating or contributing to the risk of addiction and associated withdrawal symptoms.

44. Purdue also manufactured the high-dose SR formulation without any effective safety mechanism to prevent its immediate release by grinding, chewing or, other means.

45. In March 2012, OxyContin was withdrawn from the Canadian market and replaced by OxyNeo (a similar SR Opioid analgesic, containing the same active ingredient as OxyContin, but ostensibly designed to be more tamper-resistant).

Negligent Distribution, Marketing and Sale

46. The Defendants marketed OxyContin as being a safer Opioid analgesic for pain management, with less risk of addiction, and the associated effects, than other Opioid analgesics.

47. As in the United States, the Defendants aggressively marketed OxyContin in Canada without adequately disclosing the risk of addiction and serious withdrawal symptoms associated with its use.

48. At all times, Purdue, through its servants and agents, negligently, recklessly and/or carelessly marketed, distributed and/or sold OxyContin without adequate warnings of the product's serious risks and side effects.

CAUSES OF ACTION

(a) Negligence

49. The Defendants knew or ought to have known that OxyContin had addictive properties and could cause damage to persons who ingested it, including severe withdrawal symptoms.

50. At all material times, the Defendants owed a duty of care to the Plaintiffs and Class Members. The Defendants breached the standard of care owed to the Plaintiffs and Class Members.

51. The Plaintiffs allege that Purdue, as the developer, designer, manufacturer, distributor and seller of prescription medication, owed a duty of care to them and the other Class Members, breached the standard of care expected in the circumstances, and was thereby negligent in the development, design, manufacture, marketing, distribution and sale of OxyContin. Such negligence includes but is not limited to the following:

- (a) Purdue failed to ensure that OxyContin was not dangerous to Class Members and that the drug was fit for its intended purpose and was of merchantable quality;
- (b) Purdue failed to conduct appropriate testing to determine whether and to what extent the ingestion of OxyContin poses serious health risks, including addiction;
- (c) Purdue failed to adequately test OxyContin in a manner that would fully disclose the various side effects and the magnitude of the risks associated with its use;
- (d) Purdue failed to conduct any or adequate follow-up studies on the efficacy and safety of OxyContin;
- (e) Purdue failed to provide Class Members and their physicians with any or any adequate warnings of inherent risks associated with OxyContin;
- (f) Purdue failed to provide Class Members and their physicians with any or any adequate information and warnings respecting the correct usage of OxyContin;

- (g) Purdue failed to provide any or any adequate updated and current information to Class Members and their physicians respecting the risks and efficacy of OxyContin as such information became available;
- (h) Purdue failed to provide prompt warnings of potential hazards of OxyContin in the product monograph and in the product labelling;
- (i) Purdue failed to warn Class Members and their physicians about the need for comprehensive regular medical monitoring to ensure early discovery of potential addiction;
- (j) after receiving actual or, constructive notice of problems with OxyContin, Purdue failed to issue adequate warnings, to withdraw or to recall the drug, to publicize the problem and otherwise to act properly and in a timely manner to alert the public, Class Members and their physicians, of the drug's inherent dangers;
- (k) Purdue failed to establish any adequate procedures to educate their sales representatives and prescribing physicians respecting the correct usage of OxyContin and the risks associated with the drug;
- (l) Purdue falsely stated and/or implied that OxyContin was safe and fit for its intended purpose when they knew or ought to have known that these representations were false;
- (m) Purdue misstated the state of research, opinion and medical literature pertaining to the purported benefits of OxyContin and its associated risks, as compared to other available Opioid analgesics;
- (n) Purdue failed to cease the manufacture and/or distribution of OxyContin when they knew or ought to have known that this drug caused or could cause significant injury;
- (o) Purdue marketed OxyContin at dosage levels that they knew or ought to have known to be unsafe;

- (p) Purdue disregarded reports of symptoms of addiction among patients who consumed OxyContin;
- (q) Purdue failed to instruct their employees to properly evaluate, record and advise on complaints of the addictive effects of OxyContin;
- (r) Purdue failed to accurately and promptly disclose to HC information relating to addiction risks associated with OxyContin and to modify OxyContin' s product monograph and product labelling accordingly in a timely manner or at all even though this information was available in the United States, to regulators, consumers and physicians;
- (s) Purdue failed to monitor and to initiate a timely review, evaluation and investigation of reports of addiction associated with the use of OxyContin in Canada;
- (t) Purdue marketed OxyContin as a safer, less addictive Opioid analgesic, when they knew or ought to have known of the high risks of addiction;
- (u) Purdue failed to conform with applicable disclosure and reporting requirements pursuant to the *Food and Drugs Act* and the regulations thereunder;
- (v) Purdue hired incompetent personnel and appointed incompetent officers and directors;
- (w) Purdue failed to instruct their servants, agents, officers and directors to act ethically and responsibly;
- (x) Purdue failed to properly supervise their employees, their subsidiaries and their affiliated corporations;
- (y) Purdue encouraged their employees to increase sales volumes while neglecting to inform consumers, retailers, hospitals, physicians and pharmacists of the serious risks of addiction associated with OxyContin;

- (z) Purdue failed to withdraw or recall OxyContin in a timely manner because of the cost and the negative publicity and their overriding concern for lost profits;
- (aa) Purdue falsely understated the addictive risks of OxyContin, while at the same time falsely overstating the safety and efficacy of the drug; and
- (bb) Purdue used the SR formulation to justify a larger dose of the Opioid Oxycodone than an IR formulation would contain (and in some cases release immediately), and manufactured the high-dose SR formulation without a safety mechanism to prevent its immediate release by grinding, chewing or, other means.

52. The Plaintiffs plead that the Defendants' negligence caused the Class Members to acquire and ingest OxyContin when they knew or should have known that such use would cause harm to the Class Members and the Family Class Members.

53. The Defendants developed, designed, marketed, distributed, advertised and sold OxyContin, when they know or should have known that in the circumstances, injury and damage to the Class Members and the Family Class Members was likely to result.

54. As a result of the acts and omissions of the Defendants, the Class Members have suffered damages and losses, and continue to suffer damages and losses, including addiction, severe withdrawal symptoms and other side effects of OxyContin.

55. As a further result of the acts and omissions of the Defendants, the Family Class have suffered damages and losses, and continue to suffer damages and losses, including actual expenses reasonably incurred for the benefit of the Class Members, a reasonable allowance for loss of income or the value of services provided to the Class Members and an amount to compensate for the loss of guidance, care and companionship they might reasonably have expected to receive from the Class Members.

56. Some, but not all, of the Defendants' concerns, motivations and intentions in engaging in the negligent conduct were to:

- (a) increase the sales of OxyContin and their profits;

- (b) increase or hold their market share;
- (c) avoid adverse publicity;
- (d) place their profits above the safety of Class Members and others;
- (e) maintain brand trust and corporate image;
- (f) avoid alerting Class Members, HC, the FDA, health practitioners, the public and their competitors to the dangers and addictive properties and effect of OxyContin; and
- (g) cause Class Members to ingest and continue to ingest OxyContin and thereby suffer harm.

57. The Plaintiffs plead and rely upon the provisions of the *Class Proceedings Act, 1992*, S.O. 1992, c.6; the *Food and Drugs Act*, R.S.C. 1985, c. F.27 and regulations thereunder; the *Business Practices Act*, R.S.O. 1990, c. B.18; the *Consumer Protection Act, 2002*, S.O. 2002, c.30; and the *Competition Act*, R.S.C. 1985, c. C-34.

(b) Waiver of Tort

58. In the alternative to the claims in negligence, the Plaintiffs plead that they are entitled to claim “waiver of tort” and thereby to claim an accounting or other such restitutionary remedy for disgorgement of the revenues generated by the Defendants as a result of the sale of OxyContin, due to the failure of the Defendants to properly bring the risks associated with OxyContin to the attention of the Plaintiffs.

59. The Plaintiffs claim that such an election is appropriate for the following reasons:

- (a) Revenue was acquired in a manner in which the Defendants cannot in good conscience retain;
- (b) The integrity of the marketplace would be undermined if an accounting was not required;

- (c) Absent the Defendants' tortuous conduct OxyContin could not have been marketed nor would the Defendants have received any revenue in Canada; and
- (d) The Defendants engaged in wrongful conduct by putting into the marketplace a product which causes or had the potential to cause serious risks of injury.

(c) Breach of Sections 36 and 52 of the *Competition Act*

60. As a result of their conduct in actively marketing OxyContin as less addictive, less subject to abuse, and less likely to cause severe withdrawal symptoms than other pain medications, the Defendants are liable under sections 36 and 52 of the *Competition Act* R.S.C. 1985, c. C-34 ("*Competition Act*") for knowingly or recklessly making a representation to the public that is false or misleading in a material respect. The Defendants at all times knew, or were reckless as to their knowledge that OxyContin was and is a highly addictive drug.

61. The Plaintiffs plead and rely upon the facts and allegations referred to above.

62. By virtue of making representations to the public as to the effectiveness of OxyContin, the Defendants breached section 52 of the *Competition Act*, in that the representations:

- (a) were made to the public;
- (b) were made for the purpose of promoting the business interests of the Defendants;
- (c) were false and misleading in a material respect; and,
- (d) stated a level of safety of ingesting OxyContin which was not accurate.

63. The Plaintiffs plead that the non-disclosure of the serious effects of ingesting OxyContin constituted material and misleading representations for the purposes of section 52 of the *Competition Act*.

64. The Plaintiffs plead that they and other Class Members relied upon the Defendants' representations. Alternatively, the Plaintiffs rely upon section 52(1.1) of the *Competition Act* and plead that it is unnecessary for any Class Member to show actual reliance on the misleading statements of the Defendants for the purposes of establishing a breach of the *Competition Act*.

65. The Plaintiffs plead that the Defendants have acted in such a high-handed, wanton and reckless manner, without regard to public safety, and were motivated by economic considerations as to warrant a claim for punitive damages.

DAMAGES

66. The Defendants developed, designed, marketed, distributed, advertised and sold OxyContin, in Canada, when they knew or should have known that in the circumstances, injury and damage to the Class Members and the Family Class Members was likely to result.

67. As a result of the acts and omissions of the Defendants, the Class Members have suffered damages, including damages relating to pain and suffering and loss of past and future income and continue to suffer damages and losses, including addiction, severe withdrawal symptoms and other side effects of OxyContin use.

68. As a further result of the acts and omissions of the Defendants, the Family Class have suffered damages and losses, and continue to suffer damages and losses, including actual expenses reasonably incurred for the benefit of the Class Members, a reasonable allowance for loss of income or the value of services provided to the Class Members and an amount to compensate for the loss of guidance, care and companionship they might reasonably have expected to receive from the Class Members.

69. Some, but not all, of the Defendants' concerns, motivations and intentions in engaging in the negligent conduct were to:

- (a) increase the sales of OxyContin and their profits;
- (b) increase or hold their market share;
- (c) avoid adverse publicity;
- (d) place their profits above the safety of Class Members and others;
- (e) maintain brand trust and corporate image;

- (f) avoid alerting Class Members, HC, the FDA, health practitioners, the public and their competitors to the dangers and addictive properties and effect of OxyContin; and
- (g) cause Class Members to ingest and continue to ingest OxyContin and thereby suffer harm.

70. The Plaintiffs assert that as a result of the acts and omissions alleged herein, the Class Members and the members of the Family Class suffered damages and losses, and will suffer damages and losses in the future.

71. Furthermore, as a result of the breach of section 52 of the *Competition Act*, the Plaintiffs and Class Members have suffered damages and are entitled to a civil remedy pursuant to section 36(1) of the *Competition Act*.

72. The Plaintiffs plead that, by virtue of the acts and omissions described herein, the Defendants are liable to them in damages. Each of the Defendants is vicariously liable for the acts and omissions of the others for the following reasons:

- (a) each was the agent of the other;
- (b) each Defendant's business was operated so that it was inextricably interwoven with the business of the other;
- (c) each Defendant entered into a common advertising and business plan with the other to manufacture, test, distribute and sell OxyContin; and
- (d) each Defendant operated pursuant to a common business plan to distribute and sell OxyContin.

73. The Plaintiffs, Harold, Sabine and Marilyn bring this action on behalf of all Family Class Members pursuant to the *FLA*, as amended, and other comparable provincial and territorial legislation as listed in Schedule "A" to recover pecuniary and non-pecuniary losses resulting from the illnesses and/or- injuries of Class Members. The damages claimed by Family Class include:

- (a) actual expenses reasonably incurred for the benefit of a Class Member;
- (b) a reasonable allowance for travel expenses actually incurred in visiting the Class Member during his or her treatment or recovery;
- (c) where, as a result of the injury, nursing, housekeeping or other services have been provided for a Class Member, a reasonable allowance for loss of income or, the value of the services; and
- (d) an amount to compensate for the loss of guidance, care and companionship that the Family Class might reasonably have expected to receive from a related Class Member if the injury or, death had not occurred.

74. The Plaintiffs and Class Members are also entitled to recover, as damages or costs in accordance with the *CPA*, the costs of administering the plan to distribute the damages recovered in this action.

REAL AND SUBSTANTIAL CONNECTION

75. There is a real and substantial connection between the subject matter of this action and the Province of Ontario for the following reasons:

- (a) the Defendants carry on business in Ontario;
- (b) the Defendants manufacture the OxyContin distributed and sold in Ontario;
- (c) the Defendants distribute and sell OxyContin in Ontario and derive substantial income in Ontario from such sales; and
- (d) the Plaintiffs' damages, and those of other Class Members resident in Ontario, were sustained in Ontario.

SERVICE EX JURIS, STATUTES AND PLACE OF TRIAL

76. This statement of claim may be served without court order outside Ontario because the claim is:

- (a) in respect of a tort committed in Ontario (rule 17.02(g));

- (b) in respect of damages sustained in Ontario arising from a tort or breach of contract however committed (rule 17.02 (h));
- (c) against a person outside Ontario who is a necessary and proper party to this proceeding properly brought against another person served in Ontario (rule 17.02(o)); and,
- (d) against a person carrying on business in Ontario (rule 17.02(p)).

77. The Plaintiffs rely upon the statutes as set out in Schedules "A" and "B" hereto, including, *inter alia*, the following statutes:

- (a) CPA;
- (b) Food and Drug Act;
- (c) *Negligence Act*, R.S.O. 1990, c. N.1;
- (d) *Sale of Goods Act*, R.S.O. 1990, c. S.1;
- (e) *Consumer Protection Act 2002*, S.O. 2002, c. 30, Schedule A
- (f) *Competition Act*, R.S. 1985 c. C 34; and
- (g) FLA.

78. The Plaintiffs propose that this action be tried in Toronto.

Date: August 28, 2014

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SCHEDULE A

PROVINCIAL STATUTES -- FAMILY MEMBER CLAIMS

Alberta

Tort-feasors Act, R.S.A. 2000 c. T-5

Loss of consortium through injury

2.1(1) When a person has, either intentionally or by neglect of some duty existing independently of contract, inflicted physical harm on a married person and thereby deprived the spouse of that married person of the society and comfort of that married person, the person who inflicted the physical harm is liable in an action for damages by the spouse or in respect of the deprivation.

(2) The right of a spouse to bring the action referred to in subsection (1) is in addition to, and independent of, any right of action that the married person has, or any action that the spouse in the name of the married person has, for injury inflicted on the married person.

Fatal Accidents Act, R.S.A. 2000, c.F-8.

Action for damages

2 When the death of a person has been caused by a wrongful act, neglect or default that would, if death had not ensued, have entitled the injured party to maintain an action and recover damages, in each case the person who would have been liable if death had not ensued is liable to an action for damages notwithstanding the death of the party injured.

Persons entitled to benefits

3(1) An action under this Act

(a) shall be for the benefit of the spouse, adult interdependent partner, parent, child, brother or sister of the person whose death has been so caused, and

(b) shall be brought by and in the name of the executor or administrator of the person deceased,

and in the action the court may give to the persons respectively for whose benefit the action has been brought those damages that the court considers appropriate to the injury resulting from the death.

(2) If there is no executor or administrator, or if the executor or administrator does not bring the action within one year after the death of the party injured, then the action may be brought by and in the name of all or any of the persons for whose benefit the action would have been, if it had been brought by or in the name of the executor or administrator.

(3) Every action so brought shall be for the benefit of the same persons and is as nearly as possible subject to the same regulations and procedure as if it were brought by and in the name of the executor or administrator.

Damages for bereavement

8(1) In this section,

- (a) "child" means a son or daughter, whether legitimate or illegitimate;
- (b) "parent" means a mother or father.

(2) If an action is brought under this Act, the court, without reference to any other damages that may be awarded and without evidence of damage, shall award damages for grief and loss of the guidance, care and companionship of the deceased person of

(a) subject to subsections (3) and (4), \$75 000 to the spouse or adult interdependent partner of the deceased person,

(b) \$75 000 to the parent or parents of the deceased person if the deceased person, at the time of death,

- (i) was a minor, or
- (ii) was not a minor but was unmarried and had no adult interdependent partner, to be divided equally if the action is brought for the benefit of both parents, and

(c) \$45 000 to each child of the deceased person who, at the time of the death of the deceased person,

- (i) is a minor, or
- (ii) is not a minor but is unmarried and has no adult interdependent partner.

(3) The court shall not award damages under subsection (2)(a) to the spouse or adult interdependent partner if the spouse or adult interdependent partner was living separate and apart from the deceased person at the time of death.

(4) Repealed 2002 cA-4.5 s36.

(5) A cause of action conferred on a person by subsection (2) does not, on the death of that person, survive for the benefit of the person's estate.

Other Provinces: see the following Acts

Manitoba

Fatal Accidents Act, C.S.S.M. c.F50, as amended

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

New Brunswick

Fatal Accidents Act, R.N.S.B. 1973, c.F-7.

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

Newfoundland

Fatal Accidents Act, R.S.N.L. 1990, c.F-6

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

Nova Scotia

Fatal Accidents Act, R.S.N.S. 1989, c.163, amended 2000 c.29, ss9-12.

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

Prince Edward Island

Fatal Accidents Act, R.S.P.E.I. 1988, c.F-5, as amended

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

SCHEDULE B

SUBROGATION LEGISLATION

Hospital Insurance and Health and Social Services Administration Act, R.S.N.W.T. 1988, c. T-3,

Current to Gazette Vol. XXVII:10 (October 31, 2006)

section 19.

19(1) Subrogation

Where insured services have been provided to an insured person in respect of an injury resulting from a wrongful act or omission of another, the Minister is subrogated to the rights of the insured person against any other person for the recovery of the full amount of the cost of providing the insured services.

19(2) Enforcement

The Minister may enforce the rights subrogated under subsection (1) by

- (a) bringing an action in the name of the Minister or in the name of the insured person; and
- (b) effecting a settlement at such time and for such amount as the Minister considers appropriate.

R.S.N.W.T. 1988, c. 126 (Supp.), s. 10; 2002, c. 17, s. 6 (Sched. F, item 4)

Nunavut

Hospital Insurance and Health and Social Services Administration Act R.S.N.W.T. 1988, c. T-3

Current to Gazette Vol. 8:10 (October 31, 2006)

19(1) Subrogation

Where insured services have been provided to an insured person in respect of an injury resulting from a wrongful act or omission of another, the Minister is subrogated to the rights of the insured person against any other person for the recovery of the cost of the insured services provided.

19(2) Enforcement

The Minister may enforce the rights subrogated under subsection (1) by

- (a) bringing an action in the name of the Minister or in the name of the insured person; and
- (b) effecting a settlement at such time and for such amount as the Minister considers appropriate.

R.S.N.W.T. 1988, c. 126 (Supp.), s. 10

Hospital Insurance Services Act, R.S.Y. 2002, c. 112,
Current to Gazette Vol. 25:10 (October 15, 2006)

10. Subrogation

On the provision of insured services to an insured person in respect of an injury resulting from a wrongful act or omission of another person, the Government of the Yukon shall be subrogated to all rights of the injured person for the purpose of recovering the cost of those insured services, and may bring an action either in its own name or in the name of the insured person for the recovery of the amount thereof and effect a settlement of the claim.

Hospitals Insurance Act, R.S.B.C. 1996, c. 204 [en. 1994, c. 37, s.4; am. 1996, c.24, s.1(3)]
Current to Gazette Vol. 49:19 (October 20, 2006)

25. Third party liability

25(1)

If, as a result of the wrongful act or omission of another, a beneficiary suffers personal injuries for which the beneficiary receives hospital services paid for by the government, the beneficiary has the same right to recover the sum paid for the services against the person guilty of the wrongful act or omission as the beneficiary would have had, had the beneficiary been required to pay for the services personally.

25(2)

On the beneficiary recovering the sum or part of it under subsection (1), the beneficiary must pay it at once to the minister.

25(3)

The minister may order that a commission be paid for money recovered under subsection (1) and the amount of the commission and the conditions under which it may be paid must be in accordance with the rules prescribed by the Lieutenant Governor in Council.

25(4)

The government is subrogated to the rights of the beneficiary to recover sums paid for hospital services by the government, and an action may be maintained by the government, either its name or the name of the beneficiary, for the recovery of the sum paid for hospital services as provided in subsection (1).

25(5)

It is not a defence to an action brought by the government under subsection (4) that a claim for damages has been adjudicated on unless the claim included a claim for the sum paid for hospital

services, and it is not a defence to an action brought by a beneficiary for damages for personal injuries that an action taken by the government under subsection (4) has been adjudicated on.

25(6)

No release or settlement of a claim or judgment based on a cause of action for damages for personal injuries in a case where the injured person has received hospital services paid for is binding on the government unless the minister or a person designated by the minister has approved the settlement in writing.

25(7)

The Lieutenant Governor in Council may, by regulation, limit or define the circumstances that give rise to a cause of action under this section.

25(8)

This section applies to claims for hospital services arising after a day to be set by the Lieutenant Governor in Council.

R.S.B.C. 1996 (Supp.), c. 204, s. 10

Alberta

Hospitals Act R.S.A. 2000, c. H-12

Part 5 -- Crown's Right to Recover Health Costs

Division 1 -- Crown's Right of Recovery

s 62. Crown's right of recovery

62(1)

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.

62(2)

If a beneficiary is contributorily negligent, the Crown is entitled to recover 100% of the Crown's cost of the beneficiary's health services less a percentage for the beneficiary's contributory negligence as determined under sections 63 and 64.

62(3)

Notwithstanding this Division, the Crown does not have a right to recover the Crown's cost of health services provided to a beneficiary if

- (a) the beneficiary's personal injuries are caused by an act or omission of a wrongdoer in the use or operation of an automobile, and
- (b) the wrongdoer is, when the injuries are caused, insured under a motor vehicle liability policy.

Saskatchewan

Department of Health Act, R.S.S. 1978, c. D-17

Current to Gazette Vol. 102:44 (November 3, 2006)

19. Liability of certain third parties and insurers

19(1)

In this section:

(a) [Repealed 1997, c. 34, s. 9.]

(b) "health services" means:

- (i) insured services within the meaning of *The Saskatchewan Medical Care Insurance Act*;
- (ii) inpatient services or outpatient services provided in a hospital or any other health facility;
- (iii) services provided pursuant to section 10 that a physical therapist is authorized to provide; or
- (iv) any other services prescribed in the regulations.

19(2)

Where, as a result of the negligence or other wrongful act of any other person, a beneficiary suffers personal injuries for which the beneficiary receives health services, the beneficiary has the same right to recover the cost of those services from the person guilty of the negligence or other wrongful act as the beneficiary would have had if he or she had been required to pay for the health services.

19(3)

On the provision of health services to a beneficiary mentioned in subsection (2), the minister shall be subrogated to all rights of recovery of the beneficiary from any person with respect to the cost of those health services and may bring an action in the name of the beneficiary to enforce those rights.

19(4)

Nothing in subsection (2) or (3) restricts the right of the beneficiary to recover any sum with respect to the personal injuries in addition to the cost of health services received by the beneficiary.

19(5)

Where a beneficiary brings an action to recover any sum with respect to the personal injuries mentioned in subsection (4), the beneficiary shall, on behalf of the minister, include in his or her claim a claim for the cost of health services received by the beneficiary.

19(6)

Except with the written consent of the minister, no action mentioned in subsection (5) shall be settled without provision being made for payment in full of the cost of health services received by the beneficiary.

19(7)

The cost of health services received by a beneficiary shall be determined in accordance with the following:

- (a) where the health service is an insured service within the meaning of *The Saskatchewan Medical Care Insurance Act*, the cost of the health service is equal to the amount to be paid for that type of service as set out in the regulations made pursuant to that Act;
- (b) subject to clause (c), where the health service is an inpatient service or an outpatient service provided to the beneficiary in a hospital or other health facility, the cost of the health service is to be calculated on the basis of the daily rate for that type of service set by the department for the purpose of charging other provinces or territories of Canada for the provision of that service to residents of those provinces or territories while they are in Saskatchewan;
- (c) where the health service is provided outside a hospital by a physical therapist who is under contract to, or is an employee of, the department or a regional health authority or an affiliate, as defined in *The Regional Health Services Act*, the cost of the health service is to be calculated on the basis of the rate for that type of service set by the department; or
- (d) where the health service is a service that is prescribed in the regulations, the cost of the health service is to be calculated in the manner set out in the regulations.

19(8)

On recovering all or any part of the cost of health services received by the beneficiary, the beneficiary shall immediately pay the amount recovered to the minister.

19(9)

The minister may bear the proportion of the taxable costs payable by a beneficiary conducting an action mentioned in this section that bears the same ratio to the total of those costs as the amount claimed on behalf of the minister bears to the total amount claimed, but the portion of the taxable costs borne by the minister shall not exceed 50% of the amount claimed on the minister's behalf.

19(10)

An insurer who is liable to indemnify the person guilty of the negligence or other wrongful act mentioned in subsection (2) shall pay to the minister the lesser of:

- (a) the amount for which the insurer is liable; and
- (b) the cost of the health services received by the beneficiary.

19(11)

A payment to the minister pursuant to subsection (10) shall, to the extent of the amount paid, discharge the liability of the insurer to the person guilty of the negligence or other wrongful act mentioned in subsection (2).

19(12)

Notwithstanding anything in *The Automobile Accident Insurance Act*, where a beneficiary mentioned in subsection (2) receives benefits pursuant to Part VIII of that Act, the insurer within

the meaning of that Act shall pay to the minister the cost of health services received by the beneficiary determined in accordance with subsection (7), unless the minister agrees otherwise.

1995, c. 10, s. 2(3); 1997, c. 34, s. 9; 2002, c. R-8.2, s. 73(6)

Manitoba

Manitoba Public Insurance Corporation Act, C.C.S.M. c. P215

Current to Gazette Vol. 135:44 (November 4, 2006)

s.26: Subrogation

26(1) Subrogation

Upon making any payment of benefits or insurance money or upon assuming liability for such payment, the corporation is subrogated to and shall be deemed to be an assignee of all rights of recovery against any other person liable in respect of the loss, damage, injury, or death of every person to whom, or on whose behalf, or in respect of whom, the benefits or insurance money are to be paid; and the corporation may enforce those rights of recovery as provided in subsection (6) to the extent that the corporation has paid or has assumed liability to pay the benefits or insurance money.

26(2) When rights of subrogation apply

The rights conferred upon the corporation under this section apply only where the loss, damage, injury, or death for which the corporation has paid or has assumed liability to pay benefits or insurance moneys is caused or contributed to by the fault of

- (a) a person who, at the material time, was driving a motor vehicle
 - (i) while not qualified to drive a motor vehicle; or
 - (ii) while not authorized by law to drive a motor vehicle; or
 - (iii) that was not designated in an unexpired owner's certificate; or
 - (iv) that was towing an unregistered trailer that was required to be registered under *The Drivers and Vehicles Act*; or
 - (v) while under the influence of intoxicating liquor or drugs to such an extent as to be for the time being incapable of the proper control of the motor vehicle; or
- (b) a person who, at the material time, was driving or operating a motor vehicle or trailer without the consent, express or implied, of the owner thereof or who otherwise is not a person entitled to the benefit of subsection 38(4); or
- (c) a person whose fault did not consist of acts or omissions in the ownership, use, or operation of a motor vehicle or trailer; or
- (d) a person not the owner of a vehicle causing the loss, damage, injury or death or sustaining the loss or damage who at the material time is engaged in the business of selling, repairing, servicing, storing or parking automobiles or the servant or agent of any such person.

26(3) No reduction of liability

The liability of any of the persons mentioned in subsection (2) is not limited, restricted, or reduced by reason of this section; but in every case to which this section applies, the liability for the loss, damage, injury, or death and the damages recoverable therefor shall be determined and assessed as fully as if section 38 had not been enacted.

26(4) Liability of other persons

Every person who, either alone or together with others, is, or apart from this Act would be, liable for loss, damage, injury, or death caused by the fault of a person mentioned in subsection (2) shall, for the purpose of this section, be liable to the same extent as the person mentioned in subsection (2).

26(5) Non-application to owner

Subsection (4) does not apply to an owner of a motor vehicle or trailer where loss, damage, injury, or death is caused by fault on the part of a driver or operator of that motor vehicle or trailer who, at the material time, was not the owner, and

(a) was living with and was a member of the family of the owner, if the owner proves that the driver or operator had acquired possession of the motor vehicle or trailer without the consent, express or implied, of the owner; or

(b) if the owner proves that he has observed and performed the terms and conditions of a plan insofar as those terms and conditions relate to third party liability insurance and are required to be observed and performed by him.

26(6) Power of corporation in enforcing rights to which it is subrogated

For the purpose of enforcing the rights of recovery to which the corporation is subrogated and of which it is deemed to be an assignee under subsection (1) the corporation may

(a) bring a separate action in its own name to recover from the person liable in respect of the loss, damage, injury, or death the amount of benefits and insurance money that it has paid or for which it has assumed liability; or

(b) join with any other person who has a cause of action for the loss, damage, injury, or death in respect of which benefits and insurance money have been paid or for which the corporation has assumed liability, to bring, upon such terms as may be agreed to by that person, one action in the name of that person for all damages that may be recoverable in respect of that cause of action.

26(7) Person may bring action in own name

Where the corporation brings a separate action under clause (6)(a), a person who has a cause of action in respect of the loss, damage, injury, or death for which the corporation has paid or assumed liability for benefits or insurance money may bring action in his own name for the damages recoverable by him; but he may recover only the amount by which the damages exceed the benefits and insurance money.

26(8) Rights of corporation not to be prejudiced

The commencement of an action or other proceeding by any person in respect of loss, damage, injury, or death shall not prejudice the right of the corporation to bring, at any time prior to judgment in that action or other proceeding, a separate action under clause 6(a) and subsection (7) applies to such action.

26(9) Compromising of claims restricted

Upon being notified in writing that the corporation has made or is making a claim or bringing an action or other proceeding under this section, no person shall negotiate or effect a compromise, settlement, or satisfaction of any claim of that person to the prejudice of the claim of the corporation; and a person receiving such a notice who has received benefits or insurance money

(a) shall enter into such agreements and execute such documents as the corporation may reasonably request to further secure the rights conferred upon the corporation under this section; and

(b) shall not interfere in any negotiations for compromise or settlement or in, except as provided in subsection (7), the action or proceeding; but, whenever requested by the corporation, shall aid in securing information and evidence and the attendance of any witness, and shall co-operate with the corporation, except in a pecuniary way, in any action or other proceeding or in the prosecution of an appeal.

2005, c. 37, Sched. A, s. 158(5)

The Health Services Insurance Act R.S.M. 1987, c. H35
Current to Gazette Vol. 135:44 (November 4, 2006)

Section 97.

97(1) Definition of past and future insured services

In this section,

"future cost of insured services" means the estimated total cost of the future insured hospital, medical or other health services made necessary as the result of a bodily injury that will probably be required by an insured person after the date of settlement or, where there is no settlement, the first day of trial; (*"coût futur des services assurés"*)

"past cost of insured services" means the total cost of the insured hospital, medical or other health services made necessary as the result of a bodily injury and provided to an insured person up to and including the date of settlement or, where there is no settlement, the first day of trial. (*"coût antérieur des services assurés"*)

97(2) Action by insured person for cost of insured services

When, as a result of the negligence or other wrongful act or omission of another person, an insured person suffers bodily injuries for which he or she receives insured hospital, medical or other health services under this Act, and he or she is not entitled to receive compensation under Part 2 of *The Manitoba Public Insurance Corporation Act*, the person may, subject to section 101, bring an action against and recover from that other person

(a) the past cost of the insured services; and

(b) the future cost of insured services;

for which the person, if he or she were not an insured person, would be legally liable to pay.

97(3) Cost of hospital services

For the purpose of this section, the cost of insured hospital services shall be the per diem rate approved by the minister.

97(4) Certificate

For the purpose of an action referred to in this section, the minister may issue one or more certificates that set out

- (a) the insured hospital, medical or other health services that an insured person has received for bodily injuries suffered as a result of the negligence or other wrongful act or omission of another person; and
- (b) the cost of those services.

97(5) Admissibility of certificate

A certificate under subsection (4) is admissible in evidence as proof, in the absence of evidence to the contrary, of the facts stated in the certificate without proof of the minister's appointment or signature.

1991-92, c. 8, s. 20; 1992, c. 35, s. 37; 1993, c. 36, s. 6(3); 2001, c. 21, s. 10

Ontario

Health Insurance Act, R.S.O. 1990, c. H.6

Current to Gazette Vol. 139:47 (November 25, 2006)

Section 30 & 31: Subrogation

30(1) Subrogation

Where, as the result of the negligence or other wrongful act or omission of another, an insured person suffers personal injuries for which he or she receives insured services under this Act, the Plan is subrogated to any right of the insured person to recover the cost incurred for past insured services and the cost that will probably be incurred for future insured services, and the General Manager may bring action in the name of the Plan or in the name of that person for the recovery of such costs.

30(2) Payment by Plan recoverable by insured

For the purposes of subsection (1), the payment by the Plan for insured services shall not be construed to affect the right of the insured person to recover the amounts so paid in the same manner as if such amounts are paid or to be paid by the insured person.

30(3) Cost of hospital services

For the purposes of this section, the cost of insured services rendered to an insured person in or by a hospital or health facility shall be at the rate charged by the hospital or health facility to a person who is not an insured person.

30(4) Exception

Despite subsection (1), the Plan is not subrogated to the rights of an insured person in respect of personal injuries arising directly or indirectly from the use or operation, after the 21st day of June, 1990 and before the day section 267.1 of the *Insurance Act* comes into force, of an automobile in Canada, the United States of America or any other jurisdiction designated in the *Statutory Accident Benefits Schedule* under the *Insurance Act*.

30(5) Exception

Despite subsection (1), the Plan is not subrogated to the rights of the insured person, as against a person who is insured under a motor vehicle liability policy issued in Ontario, in respect of

personal injuries arising directly or indirectly from the use or operation, after section 29 of the *Automobile Insurance Rate Stability Act, 1996* comes into force, of an automobile in Ontario or in any other jurisdiction designated in the *Statutory Accident Benefits Schedule* under the *Insurance Act*.

30(6) Definition

In subsection (5),

"**motor vehicle liability policy**" has the same meaning as in the *Insurance Act*.

1993, c. 10, s. 53; 1996, c. 21, s. 51

31(1) Subrogated claim included in action

Any person who commences an action to recover for loss or damages arising out of the negligence or other wrongful act of a third party, to which the injury or disability in respect of which insured services have been provided is related shall, unless otherwise advised in writing by the General Manager, include a claim on behalf of the Plan for the cost of the insured services.

31(2) Recovery paid to Ontario

Where a person recovers a sum in respect of the cost of insured services, the person shall forthwith pay the sum recovered to the Minister of Finance.

2006, c. 19, Sched. L, s. 11(5)

Newfoundland

Medical Care Insurance Act, 1999 S.N. 1999, c. M-5.1,

Current to Gazette Vol. 81:46 (November 17, 2006)

s 19. Recovery of costs for services

19(1)

This section applies where insured services are provided to an injured or disabled person, in this section referred to as the "insured person", with respect to an injury or disability where the injury or disability was caused by, or contributed to by, or results from an occurrence other than a motor vehicle accident in which the person, whose fault, negligence or other wrongful act or omission caused, contributed to or resulted in the injury or disability, in this section referred to as the "tortfeasor", is insured at the date of the accident, by a policy of insurance through a licensed insurer carrying on business in the province.

19(2)

An insured person who receives insured services in respect of an injury or disability caused or contributed to by or resulting from the fault, negligence or other wrongful act or omission of a tortfeasor has the same right to recover the cost of those insured services from the tortfeasor as he or she would have had if the person had himself or herself been required to pay for the services.

19(3)

An insured person who, under subsection (1), recovers from another person the whole or a part

of the cost of insured services shall, on recovery from that other person, pay to the minister the amount recovered and the minister may, if the amount so recovered is not paid to it within a reasonable time, recover the amount from the insured person as a debt due the Crown.

19(4)

Where the cost of insured services referred to in subsection (1) is paid, or an agreement has been entered into covering payment, by the minister to a person, physician or professional medical corporation or where the services are provided by a person employed in the department, the minister is subrogated to all rights of recovery of or on behalf of the insured person against the tortfeasor and may bring an action in his or her own name or in the name of the insured person to enforce those rights against the tortfeasor in respect of the cost of the insured services.

19(5)

The rights conferred upon the minister by subsection (4) shall not be considered to restrict other rights of recovery of the insured person in respect of the injury or disability referred to in subsection (1) for loss or damage not the subject of insured services and if the insured person starts an action in respect of that loss or damage he or she shall include a claim on behalf of the minister for the cost of the insured services provided to the insured person.

19(6)

It is not a defence to an action brought by the minister under subsection (4) that a claim for damages has been adjudicated upon unless that claim included a claim for the sum paid for insured services, and it is not a defence to an action for damages for personal injuries brought by an insured person that an action taken by the minister under subsection (4) has been adjudicated upon.

19(7)

A release or settlement of claim which includes the cost of insured services is not effective unless the minister has consented to the release or settlement or unless the minister is satisfied with the provisions of the release or settlement.

19(8)

The costs of an action by or on behalf of an insured person in which a claim has been included on behalf of the minister under subsection (5) shall be borne by the minister in the same proportion as the claim of the minister for the cost of insured services provided bears to the total claim by or on behalf of the insured person in the action.

19(9)

If within 2 months after the last act or omission which caused the injury or disability of an insured person an action has not been started by or on behalf of that person under subsection (1) for the recovery of damages arising out of the injury or disability, the minister upon service of notice on the insured person may start an action in his or her own name or in the name of that person for the recovery of the cost of the insured services, and before trial of the action that person may join in the action another claim arising out of the same occurrence upon the conditions as to costs or otherwise that to the court may seem just and may in that case effect settlement of that claim.

19(10)

A liability insurer shall pay to the minister an amount referable to a claim for recovery of the cost of insured services that would otherwise be payable to an insured person and payment of that amount to the minister discharges the liability of the insurer to pay that amount to the insured person or to a person claiming under or on behalf of the insured person.

19(11)

For the purpose of subsection (10) a "**liability insurer**" means a person regularly engaged in the business of underwriting risks in respect of negligence.

19(12)

Where as a result of a claim under this section there are insufficient funds to provide complete recovery to an insured person for his or her losses or injury and to pay the cost of insured services, that person and the minister shall share to that extent in proportion to their respective losses in a recovery, but nothing in this provision prevents the minister from waiving in whole or in part its share of an amount recovered where in the opinion of the minister the circumstances so warrant.

19(13)

For the purpose of this section,

- (a) "**insured services**" means insured services as defined in the regulations made under this Act;
- (b) "**participating province**" means a participating province as defined by the *Canada Health Act* (Canada); and
- (c) the cost of insured services provided is,
 - (i) in the province, or a participating province, the cost as established by the minister, and
 - (ii) elsewhere than in the province or a participating province, the cost calculated at a rate which, in the opinion of the minister, is fair having regard of the services provided.

2001, c. 9, s. 24

PEI

Hospital and Diagnostic Services Insurance Act, R.S.P.E.I. 1988, c. H-8

Current to Gazette Vol. 132:47 (November 25, 2006)

Section 14:

14(1) Definitions

In this section

- (a) "**injured person**" means a person who has suffered injury due to the negligent or wrongful act or omission of another person;
- (b) "**other person**" means the person who appears to have been negligent or committed a wrongful act or omission that resulted in injury to the injured person.

14(2) Right to claim for insured services

Subject to section 65.1 of the *Insurance Act* R.S.P.E.I. 1988, Cap. I-4, an injured person who receives insured services pursuant to this Act

(a) shall have the same right to claim for the cost of the insured services against the other person, as the injured person would have had if the injured person had been required to pay for the insured services; and

(b) shall include a claim for the cost of insured services received pursuant to this Act, where the injured person makes a claim against the other person.

14(3) Payment of damages to Minister

Where, pursuant to subsection (2) a person recovers damages attributable to insured services received pursuant to this Act, the person shall, within 20 days, pay those damages to the Minister.

14(4) Subrogation

The Minister is subrogated to the right of the injured person to claim against the other person pursuant to subsection (2).

14(5) Minister's action

Where an injured person

(a) recovers damages against the other person by court order or by settlement but does not pay to the Minister the amount attributable to a claim for the cost of the insured services; or

(b) does not claim the cost of insured services against the other person, the Minister may maintain an action against the injured person for the recovery of the cost of insured services provided pursuant to this Act.

14(6) Not binding against Minister, unless

An adjudication of the injured person's claim against the other person shall not be binding against the Minister unless the claim included the cost of insured services provided pursuant to this Act.

14(7) Not a defence, unless

The settlement or release of an injured person's claim against the other person shall not be binding against nor be a defence against the Minister's claim under this section unless

(a) the claim included the cost of insured services provided pursuant to this Act; and

(b) the Minister has approved the settlement or release in writing.

14(8) Approval not releasing Minister's claim

The Minister may give written approval to a settlement by the injured person which does not settle or release the claim of the Minister for cost of the insured services provided pursuant to this Act.

14(9) Net amount prorated

Subject to the regulations, where the net amount recovered pursuant to this section is insufficient to cover both the damages of the injured person and the cost of insured services provided pursuant to this Act, the injured person and the Minister shall share the recovery in proportion to their respective losses, unless the Minister agrees otherwise in writing.

14(10) Insurer to provide information

Every liability insurer, at the Minister's request, shall provide information to the Minister respecting

- (a) a claim made against an insured person by a person who received insured services pursuant to this Act; and
- (b) the terms and conditions of any settlement entered into by an insured person and a person who received insured services pursuant to this Act.

14(11) Claim against liability insurer

Where an injured person makes a claim against a liability insurer respecting injuries that included the provision of insured services under this Act, the liability insurer shall pay to the Minister the cost of the insured services, which shall discharge the insurer of liability for those insured services.

14(12) Where *Insurance Act* applies

Subsection (11) does not apply where subsection 65.1(7) of the *Insurance Act* R.S.P.E.I. 1988, Cap. I-4 applies.

14(13) Certificate prima facie proof

In an action pursuant to this section, a certificate signed on behalf of the Minister shall be *prima facie* proof

- (a) that the person named in the certificate has received insured services pursuant to this Act in the amount showing in the certificate; and
- (b) and of the office, authority and signature of the person signing, without proof of the person's appointment, authority or signature.

14(14) Minister may approve recovery fees

The Minister may approve the payment of recovery fees as prescribed, in respect of the injured person's claim for the cost of insured services received pursuant to this Act.

1993, c. 30, s. 61(8)(e); 1997, c. 22, s. 30(5)(k); 1999, c. 29, s. 3

Nova Scotia

Health Services and Insurance Act R.S.N.S. 1989, c. 197
Current to Gazette Vol. 30:21 (November 10, 2006)

Section 18:

18(1) Right of recovery by injured person

Where, as a result of the negligence or wrongful act or omission of another, a person suffers personal injuries for which the person received insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment, home-care services, care for a person in a home for special care or child-care facility to which the Province has made payment, insured professional services under this Act, or any other care,

services or benefits designated by regulation, including the future costs of any such care, services or benefits, the person

(a) has the same right to recover the sum paid for the care, services or benefits against the person who was negligent or was responsible for the wrongful act or omission as the person would have had if that person had been required to pay for the care, services or benefits; and

(b) if the person makes any claim for the personal injuries suffered against the person who was negligent or who was responsible for the wrongful act or omission, shall claim and seek to recover the costs of the care, services or benefits.

18(2) Payment to Minister

Where, under subsection (1), a person recovers a sum in respect of insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services received by him under this Act, he shall forthwith pay the sum recovered to the Minister.

18(3) Subrogation of Crown

Her Majesty in right of the Province shall be subrogated to the rights of a person under this Section to recover any sum paid by the Minister for insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services provided to that person, and an action may be maintained by Her Majesty, either in Her own name or in the name of that person, for the recovery of such sum.

18(4) Defence excluded

It shall not be a defence to an action brought by Her Majesty in right of the Province under subsection (3) that a claim for damages has been adjudicated upon unless the claim included a claim for the sum paid for insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment and insured professional services and it shall not be a defence to an action for damages for personal injuries brought by a person who has received insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services that an action taken by Her Majesty under subsection (3) has been adjudicated upon.

18(5) Settlement or judgment not binding

No release or settlement of a claim or judgment based upon a cause of action for damages for personal injuries in a case where the injured person has received insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services under this Act shall be binding upon Her Majesty unless the Minister or a person designated by him has approved the release or settlement in writing.

18(5A)

Subject to subsection (5C), where, as a result of a claim pursuant to this Section,

(a) the claim is settled or a judgment is obtained; and

(b) insufficient funds are available to provide complete recovery to the injured person for the injured person's losses and injuries and to pay the costs of the care, services and benefits referred to in subsection (1),

the injured person and Her Majesty in right of the Province shall share *pro rata* in proportion to their respective losses in any recovery in accordance with the terms and conditions prescribed by regulation.

18(5B)

No person acting on their own behalf or on behalf of another person, shall, without the approval in writing pursuant to subsection (5C) of the Minister, make a settlement of a claim based upon a cause of action for damages for personal injuries in a case where the injured person has received care, services or benefits referred to in subsection (1) unless at the same time the person makes a settlement to recover the same *pro rata* proportion in respect of the cost of the care, services and benefits referred to in subsection (1) as the injured person is to recover in respect of the person's losses and injuries.

18(5C)

Where a person who makes a claim pursuant to subsection (1) has obtained an offer for a settlement whereby the same *pro rata* proportion of the cost of the care, services and benefits referred to in subsection (1) would be recovered as the injured person would recover in respect of the person's losses and injuries but, in the opinion of the Minister or a person designated by the Minister, the offer would not provide sufficient recovery in respect of the care, services and benefits referred to in subsection (1), the Minister or a person designated by the Minister may approve, in writing, a release or settlement whereby the person making a claim pursuant to subsection (1) makes a settlement of a claim in respect of the person's injuries or losses without making a settlement in respect of the cost of the care, services and benefits referred to in subsection (1), but the written approval is not binding on Her Majesty in right of the Province in relation to a claim made pursuant to subsection (5) in respect of the cost of the care, services and benefits referred to in subsection (1).

18(5D)

Every liability insurer carrying on business in the Province shall provide the Minister, when requested to do so, information relating to

- (a) a claim made against an insured person by a person who received any of the care, services or benefits referred to in subsection (1); or
- (b) the terms and conditions of any settlement entered into by an insured person and a person who received any of the care, services or benefits referred to in subsection (1).

18(5E)

Notwithstanding any other provision of this Act, the Minister may, in accordance with the regulations, authorize the payment of a fee to a barrister and solicitor who makes a claim on behalf of an injured person and recovers a sum in respect of the cost of care, services or benefits referred to in subsection (1) that are received by the injured person.

18(6) Payment by liability insurer

Where a person whose act or omission resulted in personal injuries to another is insured by a liability insurer, the liability insurer shall pay to the Minister any amount referable to a claim for recovery of the cost of insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment and insured professional services that would otherwise be paid to the insured person and payment of that amount to the

Minister discharges the liability of the insurer to pay that amount to the insured person or to any person claiming under or on behalf of the insured person.

18(7) Amount payable

For the purposes of this Section, the sum paid for insured hospital services that are received by an injured person shall be an amount equal to the charges of the hospital in which the services were provided, at rates approved by the Minister, that the insured person would have been required to pay if he was not entitled to receive the services as insured hospital services under this Act.

18(8) Certificate as prima facie proof

In an action under this Section a certificate of a person designated by the Minister as to the sum paid for insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services received by an injured person is admissible in evidence and is *prima facie* proof of that sum.

18(9)

[Repealed 2002, c. 5, s. 24(3).]

18(10)

This Section applies except where personal injury has occurred as the result of a motor vehicle accident in which the person whose act or omission resulted in the personal injury is insured by a policy of third-party liability insurance on or after the date this subsection comes into force.

18(11)

The Minister may impose a levy to be paid by each motor vehicle insurer with respect to each vehicle insured by that insurer for the purpose of recovering insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services pursuant to this Act incurred by third parties as a result of personal injury in motor vehicle accidents.

18(12)

Within sixty days after the coming into force of subsections (10) to (20), the Minister shall estimate the levy applicable to the end of the calendar year and so inform the Superintendent of Insurance.

18(13)

Within ninety days of the coming into force of subsections (10) to (20), the Superintendent of Insurance shall notify the insurers of the estimate and the insurers shall remit payment forthwith.

18(14)

Commencing no later than the fifteenth day of January, 1993, and by the fifteenth day of January of each subsequent year, the Superintendent of Insurance shall give notice to the insurers of the estimate and the insurers shall remit to the Superintendent the amount estimated in equal quarterly payments commencing on the thirty-first day of March, 1993, such quarterly payments to be payable within sixty days following the end of each quarter.

18(15)

Upon receipt of the funds payable by insurers pursuant to subsections (10) to (20), the Superintendent of Insurance shall credit the amount to the recovery account identified by the Minister.

18(16)

The Minister shall annually re-evaluate the accuracy of the levy estimate in the following year.

18(17)

The Minister shall advise the Superintendent of Insurance of the adjustments and the Superintendent shall give notice to the insurers of the adjustments.

18(18)

Where the adjusted amount is greater than the estimate, the insurers shall remit payment forthwith.

18(19)

Where the adjusted amount is less than the estimate, the insurers account shall be credited with the surplus.

18(20)

No interest is payable on the surplus or deficit resulting after the calculation of the adjusted amount.

18(21)

For greater certainty, in subsections (2) to (8) "insured hospital services" includes any care, services or benefits for which costs have been or may in the future be paid by the Minister in relation to negligence or a wrongful act or omission including, without limiting the generality of the foregoing, ambulance services to which the Province has made payment, home-care services, care for a person in a home for special care or child-care facility to which the Province has made payment and any services prescribed in the regulations as insured hospital services for the purpose of this subsection.

1992, c. 20, s. 12; 2002, c. 5, s. 24

New Brunswick

Hospital Services Act, R.S.N.B. 1973, c. H-9

Current to Gazette Vol. 164:1901 (November 29, 2006)

10(1) Where, as a result of the negligence or wrongful act of another, a person suffers personal injuries for which he receives entitled services under this Act or the regulations, he

(a) shall have the same right to claim and to recover the cost of the entitled services against the person who was negligent or who did the wrongful act as he would have had if he, himself, had been required to pay for the entitled services, and

(b) if he makes any claim for the personal injuries suffered against the person who was negligent or who did the wrongful act, shall claim and seek to recover the cost of the entitled services.

10(2) Where under subsection (1), a person either acting for himself or on behalf of another person, recovers a sum in respect of entitled services received under this Act or the regulations, he shall as soon as practicable pay such sum recovered to the Minister.

10(3) Where, as a result of the negligence or wrongful act of another, a person suffers personal injuries for which he receives entitled services under this Act or the regulations and he does not claim against the person who was negligent or who did the wrongful act, Her Majesty the Queen in right of the Province may maintain an action in her own name or in the name of the injured person for recovery of the cost of the entitled services.

10(4) Where, as a result of the negligence or wrongful act of another, a person suffers personal injuries for which he receives entitled services under this Act or the regulations and a claim is made against the person who was negligent or who did the wrongful act but the person making the claim, either acting on his own behalf or on behalf of another person, does not

(a) claim for the cost of the entitled services,

(b) if a release is given or the claim is settled, obtain a written approval of the release or settlement in accordance with subsection (9) or (10), or

(c) pay any sum recovered in respect of the entitled services to the Minister in accordance with subsection (2),

Her Majesty the Queen in Right of the Province may maintain an action in her own name against the person making the claim, whether acting on his own behalf or on behalf of another person, for recovery of the cost of the entitled services.

10(5) It shall not be a defence to an action brought by Her Majesty under subsection (4) that a release has been given, a claim has been settled or a judgment obtained unless

(a) the claim included a claim for the cost of the entitled services, and

(b) if a release is given or the claim is settled, the Minister has under subsection (9) or (10) approved the release or settlement.

10(6) Where the Minister approves in writing a release or settlement under subsection (10), Her Majesty the Queen in right of the Province may continue the action or maintain an action in her own name for recovery of the cost of the entitled services.

10(7) Subject to subsection (10), where, as a result of a claim under this section

(a) the claim is settled or a judgment is obtained, and

(b) insufficient funds are available to provide complete recovery to the injured person for his losses and injuries and to pay the cost of the entitled services,

the injured person and Her Majesty the Queen in right of the Province shall share *pro rata* in proportion to their respective losses in any recovery in accordance with the terms and conditions prescribed by regulation.

10(8) No person, acting for himself or on behalf of another person, shall, without the approval in writing under subsection (9) or (10) of the Minister make a settlement of a claim based upon a cause of action for damages for personal injuries in a case where the injured person has received entitled services under this Act or the regulations unless at the same time he makes a settlement to recover the same *pro rata* proportion in respect of the cost of the entitled services as the injured person is to recover in respect of his losses and injuries.

10(9) No release or settlement of a claim or judgment based upon a cause of action for damages for personal injuries in a case where the injured person has received entitled services under this Act or the regulations is binding upon Her Majesty unless the Minister has approved the release or settlement in writing.

10(10) Notwithstanding subsection (9), where a person who makes a claim under subsection (1) has obtained an offer for a settlement whereby the same *pro rata* proportion of the cost of entitled services would be recovered as the injured person would recover in respect of his losses and injuries but, in the opinion of the Minister, the offer would not provide sufficient recovery in respect of the entitled services, the Minister may approve in writing a release or settlement whereby the person making a claim under subsection (1) makes a settlement of a claim in respect of his injuries or losses without making a settlement in respect of the cost of the entitled services but the written approval is not binding on Her Majesty in relation to a claim made under subsection (6) in respect of the cost of the entitled services.

10(11) Where a person whose negligent or wrongful act resulted in personal injuries to another is insured by a liability insurer carrying on business in the Province and a claim made in respect of those personal injuries does not include a claim for the cost of the entitled services received by the injured person under this Act or the regulations, the liability insurer shall pay to the Minister the cost of the entitled services and payment of that amount to the Minister discharges the liability of the insurer to pay the cost of the entitled services in any subsequent claim to the insured person or any person claiming under or on behalf of the insured person.

10(12) Every liability insurer carrying on business in the Province shall provide the Minister, when requested to do so, information relating to

(a) a claim made against an insured person by a person who received entitled services under this Act or the regulations, or

(b) the terms and conditions of any settlement entered into by an insured person and a person who received entitled services under this Act or the regulations.

10(13) In an action under this section a certificate signed or purporting to be signed by or on behalf of the Minister shall be accepted by all courts

(a) as conclusive proof

(i) that the person named in the certificate has received entitled services,

(ii) that the amount recorded in the certificate is the cost of the entitled services received by the person named in the certificate, and

(iii) of the office, authority and signature of the person signing or purporting to sign the certificate, without proof of his appointment, authority or signature, and

(b) as *prima facie* proof that the entitled services were received in respect of the personal injuries suffered.

10(14) This section applies except where the personal injuries occurred as a result of the use or operation of a motor vehicle registered in the Province.

1960-61, c.11, s.10; 1975, c.28, s.1; 1985, c.13, s.2; 1986, c.42, s.1; 1988, c.18, s.2; 1992, c.81, s.2.

10.01 The Minister may, in accordance with the *Insurance Act*, impose a levy for the purpose of recovering the cost of the entitled services provided to persons under this Act as a result of personal injuries arising out of the use or operation of a motor vehicle registered in the Province.

1992, c.81, s.3; 2003, c.21, s.5.

10.1 Notwithstanding any other provision of this Act, the Minister may, in accordance with the regulations, authorize the payment of a fee to a barrister and solicitor who makes a claim on behalf of an injured person and recovers a sum in respect of the cost of entitled services in accordance with section 10.

1988, c.18, s.3.

11 In the event of conflict between any provision of this Act and any provision of any other Act of New Brunswick, the provision of this Act prevails.

1960-61, c.11, s.11.

MACKAY et al
Plaintiffs and PURDUE PHARMA et al
Defendants

Court File No. 07-CV-343201CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**SECOND FRESH AS AMENDED
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