UBC Law Review

Volume 45 | Issue 1 Article 9

1-2012

Supreme Court of Canada Affirms the Request Principle in R v Imperial Tobacco Addendum

ADDENDUM

SUPREME COURT OF CANADA AFFIRMS THE REQUEST PRINCIPLE IN *R V IMPERIAL TOBACCO*

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In my article entitled "Indemnities for Acts Done at Another's Request",[1] I traced the evolution of the "request principle." Briefly stated, the request principle provides that when one person does an act at the request of another and the act turns out to be injurious to the rights of a third party, the person doing the act may be entitled to an indemnity from the person who requested it to be done. I considered the contours of, and limitations on, the request principle and examined various theoretical rationales for the obligation. I concluded that although the principle is often described in terms of an "implied contract," it is best explained by reference to the law of unjust enrichment. On this theory, the requesting party discharges a liability owed jointly to the third party with the party to whom the request is made. While the contractual analysis is appropriate in some cases, in most instances the indemnity obligation is imposed by law.

The first case discussed in my article was the decision of the BC Supreme Court in *Knight v Imperial Tobacco*.[2] The Supreme Court of Canada has now released its decision in that case: *R v Imperial Tobacco Canada*.[3] The case

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1 Byron Shaw, "Indemnities for Acts Done at Another's Request" (2011) 44:2 UBC L Rev 331.

2 *Knight v Imperial Tobacco*, 2007 BCSC 964, 76 BCLR (4th) 100.

3 *R v Imperial Tobacco Canada*, 2011 SCC 42, [2011] 3 SCR 45 [*Imperial Tobacco*].

provides further and recent confirmation from the Supreme Court that the request principle is firmly established in Canada. While the Court's discussion of the request principle is extremely brief, it is noteworthy for at least three reasons, as explained more fully below.

Imperial Tobacco concerned two appeals from the BC Court of Appeal: *Knight v Imperial Tobacco Canada Ltd*[4] and *British Columbia v Imperial Tobacco Canada Lt d.*[5] As discussed in my article, *Knight* was a class action brought by purchasers of light and mild cigarettes to recover the costs of cigarettes and punitive damages from Imperial Tobacco. The class advanced common law claims and a claim pursuant to the *Business Practices and Consumer Protection Act*.[6] The essence of the claim was that the levels of tar and nicotine listed on Imperial's tobacco packages were inaccurate and that smoke from light cigarettes was just as harmful as smoke from regular cigarettes.

In the *Costs Recovery* case, the Government of British Columbia sought to recover the cost of medical treatment for individuals suffering from tobacco-related illnesses from tobacco companies, including Imperial, pursuant to the *Tobacco Damages and Health Care Costs Recovery Act*.[7] That statute provides the government of British Columbia with a "direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong."[8]

In both *Knight* and the *Costs Recovery* case, the tobacco companies issued third-party notices to the Government of Canada claiming contribution and indemnity. The tobacco companies grounded their third-party claims in negligent misrepresentation, negligent design, failure to warn, and a claim in "equitable indemnity." The essence of the claim in equitable indemnity was that the federal government had made requests and demands of

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4 *Knight v Imperial Tobacco Canada Ltd,* 2009 BCCA 541, 313 DLR (4th) 695 [*Knight*].

5 *British Columbia v Imperial Tobacco Canada Ltd,* 2009 BCCA 540, 313 DLR (4th) 651 [*Costs Recovery*].

6 *Business Practices and Consumer Protection Act*, SBC 2004, c 2.

7 *Tobacco Damages and Health Care Costs Recovery Act*, SBC 2000, c 30.

8 *Ibid*, s 2(1).

manufacturers concerning the development, marketing,and promotion of light cigarettes in an effort to encourage the public to "switch down." The chambers judges struck out the third-party claims. Their decisions were reversed in part by the BC Court of Appeal. A unanimous Supreme Court of Canada restored the decisions of the chambers judges and struck out the third-party claims that would have been allowed by the BC Court of Appeal.

McLachlin CJC delivered the judgment of the Court. She adopted the parties' characterization of the request principle as a claim for equitable indemnity. McLachlin CJC dealt with the argument quickly, dismissing it in just three paragraphs. She described the principle of equitable indemnity as "a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given."[9] McLachlin CJC approved of the 1945 decision of the Supreme Court in *Parmley v Parmley*,[10] which in turn adopted the following passage from *Birmingham and District Lond Co v London and North Western Railway Company*:[11] "claims of equitable indemnity 'proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so.'"[12]

On the facts, the Government of Canada had no obligation to indemnify. McLachlin CJC adopted Hall JA's analysis, dissenting in part in the BC Court of Appeal, in the *Costs Recovery* case:

> [I]f the notional reasonable observer were asked whether or not Canada, in the interaction it had over many decades with the appellants, was undertaking to indemnify them from some future liability that might be incurred relating to their business, the observer would reply that this could not be a rational expectation, having regard to the relationship between the parties. Likewise, if Canada through its agents had been specifically asked or a suggestion had been made to its agents by representatives of the appellants

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9 *Imperial Tobacco*, *supra* note 3 at para 147.

10 *Parmley v Parmley* [1945] SCR 635, [1945] 4 DLR 81 [*Parmley*].

11 *Birmingham and District Lond Co v London and North Western Railway Company* (1886), [1887] 34 Ch D 261 [*Birmingham*].

12 *Imperial Tobacco*, *supra* note 3 at para 147, citing *Birmingham*, *supra* note 11 at 275.

> that Canada might in future be liable for any such responsibility or incur such a liability, the answer would have been firmly in the negative.[13]

McLachlin CJC went on to note that it was "unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request" because it "directed the tobacco industry about how it should conduct itself... in its capacity as a government regulator".[14]

McLachlin CJC's discussion of the request principle is noteworthy for three reasons. First, McLachlin CJC's language suggests that the indemnity obligation is limited to situations of *agency*. However, she did not directly consider whether the principle extends beyond the agency context, nor was it necessary to do so. As discussed at Section I(D) of my article,[15] the House of Lords has affirmed that the request principle "is not made to rest on the fact of the plaintiff's being an agent . . . but merely on the fact of the plaintiff having done an act at the request of the defendant which was not manifestly illegal or tortious".[16] It is submitted that this statement remains good law in Canada despite the language used by McLachlin CJC in *Imperial Tobacco*. Indeed, in the *Birmingham* decision on which Estey J relied in *Parmley*, Bowles LJ acknowledged that the request principle is "not confined only to the case of principal and agent", stating that "there are other cases which it is not necessary to examine now."[17]

Second, and more significantly, *Imperial Tobacco* leaves the nature of the indemnity obligation open. McLachlin CJC's reference to the doctrine as an "express or implied" obligation, the language of "implicit promise," and the approval of Hall JA's "reasonable observer" analysis may be taken to suggest that the obligation is contractual.[18] However, McLachlin CJC also approved

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13 *Costs Recovery*, *supra* note 5 at para 57.

14 *Imperial Tobacco*, *supra* note 3 at para 148.

15 Shaw, *supra* note 1 at 340 ff.

16 *Dugdale v Lovering* (1875) LR 10 CP 196 at 199, [1874–80] All ER Rep 545 (approved by the House of Lords in *Sheffield v Barclay*, [1905] AC 392 at 397, [1904–07] All ER Rep 747 (HL)).

17 *Birmingham*, *supra* note 11 at 275.

18 See *Imperial Tobacco*, *supra* note 3 at paras 147–48.

of Estey J's judgment in *Parmley*. In *Parmley*, Estey J quoted the formulation of the request principle from Underhill's *A Summary of the Law of Torts or Wrongs Independent of Contract*.[19] In an explanatory note following his formulation of the request principle, Underhill suggests that the indemnity obligation is imposed by the court as a matter of justice and fairness:

> A man may do an act on the face of it lawful and in the belief that it is so, but it proves to be an infringement of another's rights: and in those circumstances, as has been seen already, he will have no answer to an action by the wronged party.... But when he is led into doing such an act by some one else, *it is but just* that the person really responsible for the doing of the act should bear the consequences, *and the law gives effect to this commonsense principle by compelling that person to indemnify the other who has acted on his directions*.[20]

In any event, the early judgments and texts quoted in *Parmley* and *Imperial Tobacco* were written before the leading Canadian cases on unjust enrichment were decided. As discussed in the article, early cases characterized claims that would now be understood as restitutionary claims in implied contract. Further, while the contractual analysis may be applicable in some cases, it is not helpful in others. For instance, it may be true that in the *Knight* and *Costs Recovery* cases, there was no reasonable expectation of an indemnity. However, as the cases discussed in the article make clear, an expectation of an indemnity—whether reasonable or unreasonable—is not a necessary condition for the application of the request principle. There are many cases in which the court has imposed an obligation of indemnity where there is, in truth, no expectation of indemnity or any intention to contract. In short, the implied contract or "implicit promise of indemnity" is in many cases no more than a fiction to achieve a just and fair result.[21]

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[19] Arthur Underhill, A Summary of the Law of Torts or Wrongs Independent of Contract, 14th ed (London, UK: Butterworth & Co, 1941).

[20] *Ibid* at 44 [emphasis added].

[21] As discussed in the article, the request cases can be analyzed in terms of a claim of unjust enrichment for a benefit conferred under compulsion of law. Under this framework, the party requesting the act (A) and the party carrying out the act (B) are joint tortfeasors vis-à-vis the third party suffering damages (C). B becomes compelled to make a payment to

Third, since the nature of the obligation was not explored in *Imperial Tobacco*, it remains unclear whether liability may be apportioned between the requesting party and the party carrying out the request. As discussed in Section IV(D)(4) of my article,[22] if the obligation is based on an "implied contract", as the older cases suggest, then there can be no apportionment. Modern contribution statutes—including the *Negligence Act*[23] considered in *Knight*—carve out an exception to the rule allowing contribution among tortfeasors for contracts "express or implied."[24] Under the implied contract theory, the successful party necessarily recovers a complete indemnity. While the Supreme Court characterized the request principle in *Knight* as a claim for "equitable *indemnity*",[25] McLachlin CJC did not analyze the distinction between contribution and indemnity, and used the terms interchangeably throughout her judgment. As discussed in my article, as a matter of both principle and fairness, the better view is that apportionment should be an option available to the court.

C, which discharges a liability that should properly fall to A, the party who requested the act in the first place. B is therefore entitled to claim against A. See Shaw, *supra* note 1 at 369–70.

22 *Ibid* at 375ff.

23 *Negligence Act*, RSBC 1996, c 333.

24 As discussed at note 21, under the unjust enrichment analysis, A and B are joint tortfeasors vis-à-vis the third party. In *Imperial Tobacco*, *supra* note 3 at para 29, McLachlin CJC affirmed that a party may only be liable for contribution and indemnity if it is directly liable to the plaintiff, rejecting the tobacco companies' argument that the federal government was liable because it was at "fault".

25 *Imperial Tobacco*, *supra* note 3 at para 146 [emphasis added].