

# **Tobacco-related Litigation in Canada**

**A report prepared by the  
Non-Smokers' Rights Association  
and the  
Smoking and Health Action Foundation**

**January 2005**

## Introduction

Holding the tobacco industry accountable for criminal activity and/or civil misbehaviour through litigation serves a number of public health objectives:

- it acts as a deterrent to prevent misconduct in the future;
- it affords victims, including governments, the opportunity to recover financial losses caused by misconduct or to seek damages as compensation for physical harm suffered;
- litigation can protect public health strategies (e.g., tobacco taxation) from being undermined;
- damages, awards or settlements passed on to consumers in the form of high prices for tobacco products reduces consumption and prevalence;
- litigation forces internal industry documents into the public domain and gives governments, the media and researchers a window into the workings of the industry.<sup>1</sup>

Increased knowledge of industry behavior in turn leads to better public policy and educates governments and the public.

Actions to hold the tobacco industry accountable in civil law are relatively new in Canada although litigation to defend tobacco control statutes from attack dates back to 1988 (e.g. tobacco industry challenge to the *Tobacco Products Control Act*<sup>2</sup>).

Apart from civil law, the Criminal Code offers further litigious options. However, to date, it has not been used in any significant way to change corporate behaviour and further public health objectives. One exception is the criminal charges laid in 2003 by the Royal Canadian Mounted Police related to the tobacco smuggling fraud of the early 1990s.<sup>3</sup>

Where public health could be improved, litigation in Canada should be monitored and encouraged.

# **The Importance and Relevance of Litigation Against the Tobacco Industry**

## **Compensatory Damages Cases**

The tobacco product marketplace is riddled with significant anomalies. One of the most obvious is that cigarettes generate tremendous profit margins for the tobacco industry. However, the sale of tobacco products leads to massive third party costs. The costs are borne by governments, which fund the health care system, and by society at large, due to the lost productivity of citizens sick or dead due to tobacco-related diseases. This externalization of costs is perhaps the tobacco industry's greatest coup. Litigation provides governments and individuals an opportunity to seek compensation for this injustice. There are a variety of reasons why litigation should be utilized.

## **Tobacco Products Liability Suits Offer at Least Six Potential Social Benefits<sup>4</sup>**

- Raise the cost of tobacco products
- Draw public attention to the dangers of smoking
- Can motivate industry change
- Unearth incriminating internal documents through discovery
- Money from verdicts can be used to reimburse health-care costs
- A flood of cases could bankrupt the industry

## **Raising the Cost of Tobacco Products**

- Smoking costs third parties over \$15 billion in health care and lost productivity each year in Canada.<sup>5</sup> (This does not include the social costs, such as the impact on a family after losing its head of the household at an early age to tobacco-caused preventable death.)
- Shifting some of those costs to manufacturers through litigation would force an increase in prices.
- Higher costs would deter youth from starting to smoke.

## **Drawing Public Attention to Smoking Dangers**

- Putting a face to the harmful effects of smoking helps the public realize the danger.

## **Motivating Industry Change**

- Fear of large punitive damage awards, such as the *Bullock* case in California in Oct. 2002 (in which a jury awarded \$28 billion to the plaintiff<sup>6</sup>), may motivate the industry to alter its behaviour. That alteration of behaviour could include: less deceptive marketing, an end to outrageous claims that second-hand smoke isn't harmful, more above-board lobbying practices.
- Concern about product liability awards is frequently cited by manufacturers of other products as reasons for including graphic warnings, altering product designs, or even withholding particularly dangerous products from the market.
- The "voluntary" changes to date have been modest and mostly cosmetic, but movement is finally perceptible.

## **Discovering Industry Documents**

- Document-based studies of industry misbehaviour within and outside Canada has assisted tobacco control efforts around the world.
- The first benefit of internal documents is that it uncovers a lot of information about industry practices. Better public policy and regulations flow from making that information known.
- Internal documents have been instrumental in persuading juries to focus on the industry's misdeeds.
- The availability of documents on-line and in depositories have helped make the industry a political pariah.

## **Reimbursing Health-care Costs**

- Money from verdicts and settlements can be used to reimburse individuals and health care plans for injuries and expenses caused by tobacco products.
- Some states in the U.S. use money they receive from Medicaid reimbursement cases and the 1998 “Master Settlement Agreement” to fund tobacco control programs.

## **Bankrupting the Industry**

- With large punitive damage verdicts on the rise, there is a possibility that a flood of such cases could bankrupt the industry.
- A bankruptcy court could require tobacco companies to change their behaviour or make their products less toxic.

## **Interesting/important facts**

### **Canada is playing a leadership role**

When it comes to litigation against the tobacco industry, Citigroup (one of the world's largest banks) says outside the United States, “The biggest risk appears to be in Canada, where some provinces are trying to legislate themselves the right to sue to recover healthcare costs.”<sup>7</sup> If British Columbia is successful with its *Tobacco Damages and Health Care Costs Recovery Act*, and other provinces and territories show the same leadership, Canada will have Big Tobacco on the run (or at least breaking a moderate sweat due to a light jog).

### **Why litigation in Canada is so important (the BAT factor)**

British American Tobacco is the third largest tobacco company in the world, after government-owned China National Tobacco (1) and Philip Morris (2). Worldwide, Canada is the largest single profit generator for BAT. Extremely high profit margins for cigarette companies are a Canadian anomaly. BAT, the parent company of Imperial Tobacco Canada (which has about 2/3 of the Canadian market) sells roughly 10 times as many cigarettes in Europe as it does in Canada. But BAT generates almost as much profit from its Canadian sales as from all its European sales: profit margins were 8.8 times larger in Canada than in Europe (in 2003).<sup>8</sup> If tobacco company profits (particularly BAT's) are significantly impacted in Canada through litigation, this leaves Big Tobacco with less money to try to recruit new customers, to lobby against regulations, or to take governments to court.

# A list and summary of tobacco-related litigation in Canada

## Criminal Charges and Civil Litigation Related to Contraband

### RCMP criminal charges against JTI-Macdonald

**February 28, 2003** - the RCMP laid six counts of fraud and one count of conspiracy against JTI-Macdonald, formerly known as RJR-Macdonald, Inc. and several of its subsidiaries. Eight former senior executives were also charged. Investigators accused the companies of conspiring to defraud the governments of Canada, Ontario and Quebec of \$1.2 billion in tax revenue between 1991 and 1996. The companies are alleged to have supplied the Canadian black market with Canadian-brand tobacco products manufactured in Canada and Puerto Rico. After a four-year investigation, the RCMP claimed the firms provided the cigarettes "knowing that these products were being smuggled back into Canada and on to the commercial market."<sup>9</sup> A preliminary inquiry into these charges is scheduled to take place in a Toronto court from April 4-June 30, 2005.

### Attorney General of Canada civil lawsuit

**August 13, 2003** – The Attorney General of Canada filed suit in the Ontario Superior Court of Justice against JTI-Macdonald and related entities and R.J. Reynolds Tobacco Company and related entities (in total, 13 companies) for \$1.5 billion to recover tax losses caused by what it called a “massive conspiracy” to smuggle cigarettes. The government is seeking to compel the defendants to surrender profits from their actions, and to pay damages.<sup>10</sup> A preliminary hearing on the charges is scheduled for April, 2005 in an Ontario court. The defendants have not filed a defence in the Civil Action. Rather, the parties have entered into a stay agreement.<sup>11</sup>

### Québec Department of Revenue actions

**August 11, 2004** – The Québec government obtained a court judgement ordering JTI-Macdonald Corp. of Toronto to pay nearly \$1.4 billion immediately, the largest assessment for unpaid taxes in the province's history. Under Section 13 of the Québec Department of Revenue Act, Québec Revenue Minister Lawrence Bergman issued a certificate attesting that the company owed tax money. The certificate was filed Aug. 11 in Québec Superior Court and a clerk issued a judgement in favour of the department right away. Mr. Bergman's certificate covers the period of Jan. 1, 1990, to Dec. 31, 1998. Resorting to Section 13 is uncommon but not groundbreaking. What's exceptional is the amount claimed against JTI. The government says the company owes \$1,364,430,357.51 in unpaid taxes, penalties and interest. The order was accompanied by an order to JTI's customers (retailers who sell cigarettes) to remit to the government any accounts payable to JTI. On Aug. 17, 2004, JTI announced that it had filed for bankruptcy protection under the Companies' Creditors Arrangement Act (CCAA).<sup>12</sup> JTI said the action was necessary after the Québec Ministry of Revenue served an order Aug. 11 demanding immediate payment of \$1.36 billion. “This order was accompanied by cash seizures from its customers resulting in an immediate deprivation to JTI-MC of about 40 per cent of its Canada-wide revenues,” the company stated in a press release.<sup>13</sup> “In the absence of CCAA protection the effect of these seizures would have unavoidably led to the bankruptcy of JTI-Macdonald.”

## **More smuggling-related litigation is likely**

**November 27, 2004** – RCMP agents searched the head office of Imperial Tobacco Canada Ltd. (ITL) in Montreal for documents related to allegations of cigarette smuggling. In the affidavit requesting the right to execute the search warrant, the RCMP alleged that smuggling led to \$607 million in unpaid taxes to the federal government. The search was part of the RCMP investigation dubbed C-Oiler, a criminal probe that began in 1998. In the affidavit, Marc Roussy, an RCMP investigator overseeing Project C-Oiler, outlined the reasons for the search. Roussy alleged Imperial conspired with several other firms – including ITL's parent company, British American Tobacco (BAT) – and individuals to sell billions of cigarettes to U.S. distributors so they could be smuggled back into Canada through the Akwesasne Reserve, which straddles the Quebec, Ontario and U.S. borders.<sup>14</sup> According to an ITL press release, the RCMP had a “search warrant for documents related mainly to the period 1989 to 1994.”<sup>15</sup> ITL also stated that, “the company is surprised about suspicions that it was in any way linked to smuggling activities in the early 1990s.” However, the affidavit is full of quotes from internal industry documents that suggest top executives at Imperial Tobacco knew full well that smuggling was taking place. In fact, the documents suggest that ITL was pursuing partnerships with smugglers so as not to lose market share. The affidavit quotes from a 1993 ITL fax:

“Through non-participation in smuggled channels, ITL's share of this market has fallen by almost 30 share points to its current level of 28 per cent. With our re-entry into this channel, we anticipate recovering our lost share.”

The affidavit alleges the collusion with the smugglers went to the top of British American Tobacco. The affidavit quotes confidential letters exchanged in 1993 between Ulrich Herter, the managing director at BAT and Don Brown, chairman, president and chief executive at Imperial Tobacco. In the letters, Brown and Herter discuss amending a contract obliging Imperial to pay a royalty rate to its parent company for supplying BAT's du Maurier brand outside Canada. They agree that, as Imperial was supplying the cigarettes to the U.S. market, in the knowledge that many of them would be smuggled back into Canada, it should pay only a two per cent rate, rather than the normal five per cent, to its parent company. Herter tells Brown:

“Although we agreed to support the Federal government's effort to reduce smuggling by limiting our exports to the USA, our competitors did not. Subsequently we have decided to remove the limits on our exports to regain our share of Canadian smokers... Until the smuggling issue is resolved an increasing volume of our domestic sales in Canada will be exported then smuggled back for sale here.”

Although no charges have been laid to date, it appears as though the RCMP have collected strong evidence against Imperial and BAT.

**January 2002** – Smuggling-related charges against Rothmans, Benson & Hedges (RBH) also appear possible. In January 2002, the RCMP commenced an investigation into RBH's business records and sales of products exported from Canada in the period 1989-1996.<sup>16</sup>

## Tobacco Product Liability Litigation in Canada

**“In our opinion, the situation in British Columbia is the most risky of any litigation situation for the industry outside the US. It will set a precedent, one way or the other, for the rest of Canada, and potentially further afield.”<sup>17</sup>**

- “The Simple Guide to Litigation – June 2004,”  
by Smith Barney (a division of Citigroup Global Markets Inc.)

**British Columbia:** “As one of the most progressive anti-tobacco governments in the country, British Columbia was the first province to sue the tobacco companies.”<sup>18</sup> B.C.'s lawsuit names Imperial Tobacco Canada, Rothmans, Benson & Hedges, JTI-Macdonald, the Canadian Tobacco Manufacturers' Council and several foreign companies (including BAT, Philip Morris and R.J. Reynolds). It alleges tobacco manufacturers failed to warn consumers of the dangers of smoking, marked light cigarettes as safe, and targeted children in their advertising and marketing. The government seeks to recover \$10 billion in health-care costs from tobacco companies.

B.C. brought its suit under the *Tobacco Damages Recovery Act* of 1998. The tobacco companies counter-claimed, successfully arguing the constitutionality of the Act. The Supreme Court of British Columbia, in finding for the manufacturers, stated that the "enterprise liability" feature of the 1998 Act was impermissibly extra-territorial in its effect. As a consequence, the B.C. Government's lawsuit, which was entirely dependent on the legislation, was dismissed. The Court upheld the power of the Legislature to enact all of the essential features of the 1998 Act, except for those provisions providing for enterprise liability, i.e., those provisions making each of the four international tobacco groups liable for the wrongful behaviour of its Canadian subsidiary.

In the spring 2000 session, a new Act, the *Tobacco Damages and Health Care Costs Recovery Act*, SBC 2000 (the “2000 Act”), was passed. The enterprise liability provisions were removed but the central features of the 1998 Act were retained. On January 24, 2001, the government used the 2000 Act to again file against the tobacco companies. The manufacturers countered by filing a constitutional challenge to the validity of the new Act on virtually the same grounds as the raised in the first challenge.<sup>19</sup>

In June, 2003, the B.C. Supreme Court found that the 2000 Act was unconstitutional because it had another impermissible extra-territorial effect. This conclusion was based on the Supreme Court's view that the government's claim could include the cost of treating B.C. residents who had smoked in whole or in part outside the Province.

But, on May 10, 2004, the B.C. Court of Appeal unanimously upheld the constitutionality of the 2000 Act. The decision gave the province the green light to proceed with the lawsuit. However, once again, the tobacco companies appealed. The Supreme Court of Canada will hear the appeal on June 8-9, 2005.

David Laundy, a spokesperson for the Canadian Manufacturers' Council, said that if the government is eventually successful in suing the companies, the Canadian tobacco companies won't be able to afford to pay the billions of dollars being sought.<sup>20</sup> Citigroup, one of the world's largest banks (which seeks to do business with tobacco companies, and therefore watches the litigation risks faced by the industry quite closely), says the B.C. suit, if successful, has a chance to bankrupt BAT's Canadian business (Imperial Tobacco Canada).<sup>21</sup>

But Colin Hansen, B.C.'s former health services minister, said he feels little sympathy for tobacco companies or for their claims of lack of money. "I'd like to see them go out of business," Hansen said.<sup>22</sup> The case is being watched closely by other provinces. If B.C. is successful, other provinces will likely follow its lead.

**Newfoundland & Labrador:** On May 24, 2001 the Newfoundland & Labrador government passed the *Tobacco Health Care Costs Recovery Act*<sup>23</sup>, which permits the government to sue tobacco companies for the cost of treating smoking-related illnesses. Newfoundland health officials estimate that smoking-related illnesses cost the province \$360 million a year. It was anticipated that tobacco manufacturers would challenge the legislation, as they challenged similar legislation in B.C., and for this reason, on October 18, 2002, the government announced that it had referred the constitutionality of the *Act* to the Supreme Court of Newfoundland and Labrador (Court of Appeal).<sup>24</sup> British Columbia and Saskatchewan have intervened in support of the Newfoundland and Labrador legislation. Imperial Tobacco Canada, Rothmans, Benson & Hedges Inc. and JTI-Macdonald Corp. have intervened to oppose the validity of the legislation. If the *Act* is proclaimed, Newfoundland would likely become the second province (after British Columbia) to launch such a lawsuit in Canada.

**Québec:** "On June 21, 2001, the provincial government established a special committee to examine the feasibility of a Medicare cost recovery lawsuit against the industry, to examine possible legal approaches, and to provide recommendations. The announcement was made by the Minister of Justice (Linda Goupil) and the Associate Minister of Health, Social Services and Youth Protection (Gilles Baril)."<sup>25</sup> The outcome of the committee's work has not been made public.



## Class actions

### Newfoundland

**Sparkes:** On July 20, 2004, a Newfoundland law firm filed a class-action lawsuit against tobacco giant Imperial Tobacco, claiming the Montreal-based company deceived its customers in its marketing of 'light' and 'mild' cigarettes.<sup>26</sup> "It's on behalf of all those people who, in the belief that light cigarettes were a more healthful alternative, smoked light cigarettes anywhere in the last 30 years or so," said Ches Crosbie, the plaintiff's lawyer.<sup>27</sup> Crosbie filed the lawsuit in Newfoundland Supreme Court on behalf of Victor Sparkes of Conception Bay South, Nfld. Sparkes, a former smoker, said he hasn't developed any obvious illnesses as a result of the smoking he did for 15 years. He said he smoked light cigarettes because he believed it could delay the onset of smoking-related illnesses. The lawsuit, which is similar to one filed in 2003 in British Columbia, isn't seeking compensation for people who suffered health problems due to smoking. Instead, the suit is based on Newfoundland's *Trade Practices Act*, a statute enacted in the 1970s as part of pro-consumer reforms. "We're saying it was a deceptive trade practice and forbidden by the act," said Crosbie. The suit will seek the refund of money made from the sales of 'light' and 'mild' cigarettes since their introduction in the 1970s. Crosbie said hundreds of millions of dollars are at stake.<sup>28</sup> Seeking reimbursement for money spent on defective products is a tactic which was successful in *Susan Miles, et al. v. Philip Morris Cos, Inc.*<sup>29</sup>, a landmark consumer fraud class action case, which was filed in 2000. Philip Morris et al were ordered to pay \$10.1 billion – \$7.1 billion in compensatory damages to the class and another \$3 billion in punitive damages to the State of Illinois – after selling defective and fraudulent products, 'light' cigarettes, which smokers purchased because they thought they were healthier than regular cigarettes.

### Québec

In Québec, after six years of preliminary motions, the hearing on the certification of two class action suits (*Fortin* and *Conseil québécois*) finally took place in November, 2004, in Québec Superior Court in Montreal. During the two week hearing, the tribunal was charged with deciding whether it is possible to sue Canada's three main tobacco companies. A decision will be rendered by the end of May, 2005, at the latest.<sup>30</sup>

**Fortin**<sup>31</sup>: Christine Fortin and Joseph Mandelan (both of Montreal), along with Célia Létourneau of Rimouski, Québec, say cigarette manufacturers have known for decades their products are harmful. In Sept. 1998, lawyers for the three smokers (from the law firm of Trudel and Johnson) asked Québec Superior Court to hear the suit against Imperial Tobacco Ltd., Rothmans, Benson and Hedges Inc. and RJR MacDonald Inc. The tobacco companies would have to pay Quebecers more than \$11.5 billion if the class-action suit gets to court and succeeds.<sup>32</sup> The proposed suit is on behalf of 2.3 million Quebecers who are addicted to nicotine, as well as the legal heirs of the person included in the group but deceased.<sup>33</sup> It seeks \$5,000 in punitive damages for each smoker plus compensation for specific damages.<sup>34</sup>

### **Conseil québécois sur le tabac et la santé:**

The class action suit launched by the Quebec Council on Tobacco and Health is seeking to compensate victims of cancers of the lung, larynx and throat as well as emphysema sufferers.

From Rothmans Inc. Annual Report 2004 - "On November 18, 1998, the Québec Council on Smoking and Health filed a motion in Québec Superior Court seeking court authorization to institute a class action against RBH, Imperial Tobacco Canada Limited and JTI-Macdonald Corp. on behalf of all

persons who have allegedly suffered certain diseases as a result of smoking cigarettes manufactured by the respondents. The claims are based on allegations of failure to warn, addiction, nicotine manipulation, advertising directed at young people, false advertising and inadequate warnings. The claimant is seeking unspecified general and exemplary damages and the establishment of a fund with the object of limiting cigarette consumption, supporting medical research into tobacco linked illnesses and reimbursing the Province of Québec for certain health care costs incurred by it in treating these illnesses.”

## Ontario

**Ragoonanaan/Baboolal v. Imperial Tobacco et al**<sup>35</sup>: This class action deals specifically with fire-safe cigarettes. Following a January 18, 1998 “house-fire caused by a smouldering cigarette, the relatives of the three people who died in the fire brought an action against Imperial Tobacco, Rothmans Benson & Hedges, and JTI-MacDonald. The claim alleges that the injuries, death and property loss suffered in the fire could have been avoided or reduced if the defendants' cigarettes had been fire-safe. The claims against RBH and JTI-MacDonald have been dismissed, as they have no immediate connection to the fire at issue (the cigarette was made by Imperial Tobacco Canada). The plaintiffs are attempting to have the suit certified as a class action that will include relatives of victims of other cigarette-caused fires. Imperial Tobacco will likely argue that insufficient scientific evidence exists, making it impossible for the plaintiffs to prove their case, so the case should be dismissed. The claims in the case include a breach of the company's duty to produce a safe product, and of their duty to warn of hazards of their products.”<sup>36</sup>

**Caputo et al v. Imperial Tobacco et al**: On January 13, 1995, Canada's first proposed class action on behalf of nicotine-dependent and otherwise injured smokers, *Caputo et al v. Imperial Tobacco et al*<sup>37</sup>, was filed. The lawsuit proposed to benefit millions of Ontario smokers and their families. The allegations were similar to those being levelled at the defendants' controlling and affiliate companies in other jurisdictions: negligence, misrepresentation, conspiracy, deception, suppression of research, and products liability. However, in February 2004, the class action was thrown out of court. “After nine years of legal wrangling, Superior Court Justice Warren Winkler ruled that the multimillion-dollar suit, which could have become the largest lawsuit in Canadian history if allowed, was too broad and did not meet the requirements for certification.”<sup>38</sup> Toronto lawyer Andres Seibert, who works on the case for the law firm Sommers & Roth, declined to discuss what, if anything, will take place after the cost hearings.<sup>39</sup> There is an outstanding cost motion brought by the defendants, wherein the defendants are seeking \$1.2 million from the plaintiff's solicitors.

## British Columbia

**Knight v. Imperial Tobacco**<sup>40</sup>: On May 8, 2003, Vancouver law firm Klein Lyons filed a class action suit in the Supreme Court of British Columbia, on behalf of smokers of 'light' and 'mild' cigarettes in B.C. The statement of claim alleges that Imperial Tobacco Canada, which manufactures du Maurier, Player's and Matinee brand cigarettes, knowingly deceived smokers into believing 'light' and 'mild' cigarettes were less harmful than regular cigarettes. Roberts Creek resident Kenneth Knight, who smoked a pack and a half for 17 years, is not seeking compensation for personal injuries sustained through tobacco use. Rather, he is asking the court for a permanent injunction to stop Imperial Tobacco from marketing or selling 'light' or 'mild' cigarettes. He's also seeking a refund for all the cigarettes he and any other members of the class paid to purchase the allegedly misrepresented cigarettes. Compensation and damages could run into the hundreds of millions of dollars, the law firm estimates.

Airspace Action on Smoking and Health is encouraging smokers or former smokers to join in the class action suit. On April 30, 2004, Imperial Tobacco Canada filed its Statement of Defence and also filed a third party notice against the Attorney General of Canada. The third party notice seeks to force the federal government to participate in the case, and to have the federal government reimburse to the plaintiffs any amount that Imperial could eventually be condemned to pay.<sup>41</sup> A certification hearing for the proposed class action was heard in October 2004. Lawyers representing Kenneth Knight, Imperial Tobacco Canada and Health Canada all presented. Doug Lennox, a Toronto lawyer acting on behalf of Knight, said it could take anywhere from three to six months (or longer) for the judge to reach a decision as to whether or not to certify the class.<sup>42</sup>

## Individual product liability cases

**Spasic (Ontario):** On May 1, 1997, *Spasic v. Imperial Tobacco et al*<sup>43</sup> was filed against Imperial Tobacco and Rothmans, Benson & Hedges for alleged damages in the amount of \$1,000,000. A second suit, *Spasic Estate v. B.A.T. Industries p.l.c.*<sup>44</sup>, was brought against British American Tobacco and its Montreal subsidiary, Imperial Tobacco, in September 1997 after new evidence was revealed about the relationship between the companies. Mirjana Spasic died of smoking-related lung cancer in February 1998 but her estate continues to pursue both lawsuits.<sup>45</sup> The suits claim the defendant tobacco companies were negligent and deceitful in their manufacture and distribution of cigarettes, and conspired together to deceive the public about the dangers of cigarettes. In addition to these arguments that are traditionally used against tobacco companies, the suits also claim intentional spoliation of evidence – a claim that the tobacco companies had destroyed evidence of the tortious actions.<sup>46</sup> The defendants have managed to drag out the proceedings for years, but in early December, 2004, Andreas Seibert said a trial date is finally in sight. “We will be serving our affidavit of documents shortly (to show what we have access to), then we get a copy of theirs. Then we get to look at their corporate documents and cross-examine their corporate representative witnesses, then we go to trial.”<sup>47</sup> Seibert said the *Spasic Estate v. BAT Industries plc* claim will likely eventually be combined with *Spasic v. Imperial Tobacco et al.*

**McIntyre (Ontario):** Following the death of her husband, Ronald, 63, due to lung cancer in 1999, Mrs. Maureen McIntyre started a wrongful death action against Imperial Tobacco Ltd. (ITL). She is suing for \$11 million. Her main impediment to date has been lack of funds. She signed a contingency agreement with a law firm, but since such an agreement is not legal under Ontario law, brought a motion before the Ontario court to have them declare the payment arrangement as valid. When the court allowed this motion<sup>48</sup>, the government of Ontario appealed the judgement. On appeal, ITL applied for intervener status in Mrs. McIntyre's motion, claiming that they had an interest in the outcome of the decision. The court of appeal found that the issue before them, namely the proposed fee arrangement between the plaintiff and her counsel, had nothing to do with ITL, therefore their request for intervener status has been denied. The appeal decision on the validity of the payment arrangement has not yet been given, nor has any specific action been taken in her case against ITL.<sup>49</sup>

**Stright (Nova Scotia):** Lower Sackville, Nova Scotia resident Peter Stright started smoking cigarettes in 1975, when he was 11 years old. He became addicted to nicotine and later in life developed Buerger's Disease. Stright claims that his nicotine addiction and Buerger's Disease were caused by the negligent and/or intentional acts of Imperial Tobacco Limited. The Statement of Claim for the case states, “The Defendant designed, manufactured and distributed tobacco products that are inherently defective and dangerous when used as intended; that is ignited and inhaled into the body.” It is claimed that Imperial Tobacco knew or ought to have known that their products were dangerous and that the company should have warned its customers, “of the dangerous and defective nature of its tobacco products.”<sup>50</sup>

## Industry suits against governments

### **The industry's challenge to Canada's *Tobacco Act***

The *Tobacco Act* was enacted by Parliament on April 25, 1997. The purpose of the *Act* was to provide a legislative response to the national public health crisis caused by tobacco. There is a consensus in the national health community that tobacco industry marketing is a major cause of that public health crisis. To protect the health of Canadians, the legislation severely limits the advertising avenues available to the tobacco industry. Regulations brought under the *Act* later mandated picture-based health warnings on cigarette packages. But Canada's biggest tobacco manufacturers – JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., and Imperial Tobacco Canada Ltd. – argue the highly successful warnings constitute an unjustified expropriation of their trademarks. The industry also claims that the advertising restrictions are equivalent to a total advertising ban, violating their constitutional right to freedom of expression according to section 2(b) of the *Canadian Charter of Rights and Freedoms*. In December 2002, the Québec Superior Court dismissed the tobacco manufacturers' claims<sup>51</sup>, but the industry appealed to the Québec Court of Appeal<sup>52</sup>. The appeal was heard in November and December 2004. A decision is expected some time in 2005.

### **Rothmans, Benson & Hedges Inc. v. Saskatchewan**<sup>53</sup>

On March 11, 2002, Saskatchewan proclaimed precedent-setting legislation (the *Tobacco Control Act*<sup>54</sup>), which banned tobacco product displays in retail stores accessible to minors under 18. The law forced retailers to hide cigarettes behind a sliding door, curtains or blinds, effectively removing the power wall displays of the tobacco industry. In May, 2002, RBH launched a lawsuit against the legislation, saying the province had overstepped its jurisdiction. In September 2002, the court rejected<sup>55</sup> RBH's legal challenge, but the industry appealed the decision at the Saskatchewan Court of Appeal. In 2003, the Court of Appeal found in favour of RBH. In its decision<sup>56</sup>, the court stated the legislation was invalid on a jurisdictional matter. That is, the federal *Tobacco Act* made the province of Saskatchewan's legislation invalid, because the federal *Act* allows for such displays and the province was not allowed to take that right away from the retailers. The province appealed to the Supreme Court of Canada. On January 19, 2005 – Weedless Wednesday, ironically – the Court found unanimously in favour of Saskatchewan. The Supreme Court ruling meant that the ban on tobacco product displays and promotion immediately became the law again in Saskatchewan.<sup>57</sup> However, RBH still has other legal avenues available, next possibly arguing the law infringes on their Charter rights.

Meanwhile, the legislation has set a precedent that other provinces (including Manitoba<sup>58</sup>, Ontario and Prince Edward Island), and, indeed, other countries around the world (Ireland<sup>59</sup>), are prepared to follow.

**Imperial Tobacco Canada Limited, et al. v. Her Majesty the Queen in Right of British Columbia**  
and  
**Imperial Tobacco Limited, et al. v. Attorney General of British Columbia (B.C.) (30411)<sup>1</sup>**

Tobacco companies quashed British Columbia's first attempt to sue for health care costs recovery. B.C.'s lawsuit, brought under the *Tobacco Damages Recovery Act* of 1998, named Imperial Tobacco Canada, Rothmans, Benson & Hedges, JTI-Macdonald, the Canadian Tobacco Manufacturers' Council and several foreign companies. Using the Act, the province filed its Medicare cost recovery lawsuit against tobacco manufacturers on November 12, 1998. On the same day, the industry filed a constitutional challenge to the Act. On February 21, 2000, the B.C. Supreme Court invalidated the Act, deciding that the "enterprise liability" features of the Act, where the foreign affiliates of Canadian tobacco manufacturers were grouped together and treated as if they were the same entities (for example, Imperial Tobacco and BAT were grouped together), were impermissibly extra-territorial in their effect.

Drafters of the original legislation, the *Tobacco Damages Recovery Act*, thought it would pierce the company's "corporate veil," but the court decided the Act was unconstitutional because it exceeded the Province's territorial jurisdiction. When the legislation was redrafted, creating the *Tobacco Damages and Health Care Costs Recovery Act* of 2000, the province dealt with the original extraterritorial concerns by separating the companies, but this added a layer of complicity to their case. Now B.C. lawyers have to prove that Imperial Tobacco Canada had access to the research that was taking place in Southampton, England, which was being conducted by Imperial's parent company BAT, and that that evidence clearly showed that cigarettes were dangerous and deadly and that Imperial had a duty to inform its costumers of those facts.

On January 24, 2001, the government used the 2000 Act to file against the tobacco companies.<sup>60</sup> The manufacturers countered by filing a constitutional challenge to the validity of the new Act on virtually the same grounds raised in the first challenge.<sup>61</sup>

In June, 2003, the BC Supreme Court found the 2000 Act was unconstitutional because it had a new impermissible extra-territorial effect exceeding its constitutional competence.<sup>62</sup> This conclusion was based on the Supreme Court's view that the government's claim could include the cost of treating BC residents who had smoked in whole or in part outside the Province.

However, on May 10, 2004, the B.C. Court of Appeal, in a unanimous decision, ruled that the *Tobacco Damages and Health Care Costs Recovery Act* is constitutionally valid legislation. The decision effectively gave the province the green light to proceed with the lawsuit, which seeks to recover \$10 billion in health-care costs. But, once again, the tobacco companies appealed. The Supreme Court of Canada will hear the appeal on June 8-9, 2005.

---

<sup>1</sup> Both these actions relate to B.C.'s *Tobacco Damages and Health Care Costs Recovery Act*.

### **B.C. Liquor Licencees & Retailers Assn. v. British Columbia (Workers' Compensation Board)<sup>63</sup>**

On April 15, 1998, in an effort to protect British Columbians from the deadly effects of second-hand smoke, the Workers' Compensation Board adopted regulations banning smoking in all public places. An exemption was provided to restaurants, bars, casinos, long-term care facilities and provincial prisons, as long as proper ventilation systems were installed and smoking was restricted to designated areas. However, the workers' compensation board put an expiry date on the exemption and as of January 1, 2000, it started enforcing a 100% smoking ban in all workplaces across the province. It was, at the time, the toughest anti-smoking policy in the country. But the regulations ignited a fiery protest from smokers and businesses that serve them.<sup>64</sup> Led by the Liquor Licensees and Retailers Association of B.C., an organization with tobacco industry ties<sup>65</sup>, the Workers' Compensation Board was brought to court. Lawyers for the Liquor Licensees and Retailers Association successfully argued that the ban was unjust because it had been enacted without proper consultation. On March 22, 2000, the British Columbia Supreme Court struck the policy down, after only three months of the regulations being in place.

- <sup>1</sup> Neil E. Collishaw, "From Montreal to Minnesota: Following the Trail of Imperial Tobacco's Documents," Physicians for a Smoke-Free Canada, September 1999, pp. 2.
- <sup>2</sup> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R.  
[http://www.lexum.umontreal.ca/csc-scc/en/pub/1995/vol3/html/1995scr3\\_0199.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/1995/vol3/html/1995scr3_0199.html)
- <sup>3</sup> Royal Canadian Mounted Police, "RCMP Lays Criminal Charges Against Canadian Tobacco Company," February 28, 2003. [http://www.rcmp-grc.gc.ca/news/2003/n\\_0308\\_e.htm](http://www.rcmp-grc.gc.ca/news/2003/n_0308_e.htm)
- <sup>4</sup> Tobacco Control Resource Centre, Inc., "Types and Uses of Tobacco Litigation," PowerPoint presentation, slide 27-33. <http://tc.bmjournals.com/content/vol11/issue3/images/data/DC1/TCRC.zip>
- <sup>5</sup> Murray J Kaiserman, "The Cost of Smoking in Canada," *Chronic Diseases in Canada*, Vol. 18, No. 1, 1997.  
[http://www.phac-aspc.gc.ca/publicat/cdic-mcc/18-1/c\\_e.html](http://www.phac-aspc.gc.ca/publicat/cdic-mcc/18-1/c_e.html)
- <sup>6</sup> \*Note: A judge later reduced the award to \$28 million. "Tobacco Lawsuit Award Slashed," CBSNEWS.com, Dec. 19, 2002. <http://www.cbsnews.com/stories/2002/10/04/national/main524400.shtml>
- <sup>7</sup> Smith Barney (a division of Citigroup Global Markets Inc.), "Where There's Smoke: It's Never Been Worse, But We Remain Neutral (Just)," August 2004. Available upon request.
- <sup>8</sup> Non-Smokers' Rights Association, "Discount cigarettes and other cheap tobacco products," Francis Thompson, May 17, 2004. [http://www.nsr-aadn.ca/news\\_info.php?cPath=29&news\\_id=231](http://www.nsr-aadn.ca/news_info.php?cPath=29&news_id=231)
- <sup>9</sup> Royal Canadian Mounted Police, "RCMP Lays Criminal Charges Against Canadian Tobacco Company," February 28, 2003. [http://www.rcmp-grc.gc.ca/news/2003/n\\_0308\\_e.htm](http://www.rcmp-grc.gc.ca/news/2003/n_0308_e.htm)
- <sup>10</sup> Department of Justice Canada, "Government of Canada Announces Legal Action Against Tobacco Companies," August 13, 2004. [http://www.justice.gc.ca/en/news/nr/2003/doc\\_30962.html](http://www.justice.gc.ca/en/news/nr/2003/doc_30962.html)
- <sup>11</sup> Ontario Supreme Court of Justice Affidavit of Michel Poirier, chief executive officer of JTI-Macdonald, Aug. 24, 2004, pp. 10 (available upon request).
- <sup>12</sup> Companies' Creditors Arrangement Act <http://laws.justice.gc.ca/en/c-36/35512.html>
- <sup>13</sup> JTI-Macdonald Corp., "JTI-Macdonald Corp. Granted Court Protection to Continue Business - Following a \$1.36 billion claim by Revenue Quebec," August 24, 2004 press release.  
<http://www.newswire.ca/en/releases/archive/August2004/24/c3691.html>
- <sup>14</sup> The Gazette (Montreal) "Imperial Tobacco accused of smuggling: \$607 million in taxes withheld: RCMP affidavit," Paul Cherry, December 15, 2004.
- <sup>15</sup> Imperial Tobacco Canada press release, "Imperial Tobacco Canada cooperates with RCMP," November 26, 2004.  
<http://www.cnw.ca/fr/releases/archive/November2004/26/c8301.html>
- <sup>16</sup> Rothmans Inc. Annual Report 2004, "Notes to Consolidated Financial Statements," pp. 55.  
[www.rothmansinc.ca/English/2004/AnnReport/15\\_Notes.pdf](http://www.rothmansinc.ca/English/2004/AnnReport/15_Notes.pdf)
- <sup>17</sup> Smith Barney (a division of Citigroup Global Markets Inc.), "The Simple Guide to Litigation – June 2004. Available upon request.
- <sup>18</sup> Heidi Meldrum, "Big Tobacco Big Responsibilities: The Basic Principles of Civil and Criminal Liability for Canadian Corporations," prepared for Physicians for a Smoke-Free Canada in 2002, pp. 43. [www.safework.ca/BigTobacco.pdf](http://www.safework.ca/BigTobacco.pdf)
- <sup>19</sup> Heidi Meldrum, "Big Tobacco Big Responsibilities: The Basic Principles of Civil and Criminal Liability for Canadian Corporations," prepared for Physicians for a Smoke-Free Canada in 2002, pp. 43. [www.safework.ca/BigTobacco.pdf](http://www.safework.ca/BigTobacco.pdf)
- <sup>20</sup> Canadian Press, "B.C. Plans \$10-billion tobacco lawsuit after appeal court upholds law," Dirk Meissner, May, 20, 2004.
- <sup>21</sup> Smith Barney (a division of Citigroup Global Markets Inc.), "Canadian Court WILL hear appeal on Critical Case," Adam Spielman, Nadja Schaeufele, December 16, 2004.
- <sup>22</sup> Canadian Press, "B.C. Plans \$10-billion tobacco lawsuit after appeal court upholds law," Dirk Meissner, May, 20, 2004.
- <sup>23</sup> Government of Newfoundland & Labrador, "*Tobacco Health Care Costs Recovery Act*," May 24, 2001.  
<http://www.gov.nf.ca/hoa/bills/bill0109.htm>
- <sup>24</sup> Government of Newfoundland & Labrador, "Government announces next steps with tobacco litigation," Department of Justice press release, October 18, 2002. <http://www.gov.nl.ca/releases/2002/just/1018n01.htm>
- <sup>25</sup> Norwegian Agency for Health and Social Welfare, department for tobacco control, "Tobacco Litigation Worldwide," Section 3.1, "Background on Tobacco Liability Lawsuits in Canada," is written by: Rob Cunningham, Canadian Cancer Society, October 16, 2001, pp. 41. <http://www.tobakk.no/materiell/pdf/litigation.pdf>
- <sup>26</sup> *Victor Todd Sparkes v. Imperial Tobacco*, [2004]. For the Statement of Claim, see:  
[http://www.chescrosbie.com/pdf/lc\\_claim.pdf](http://www.chescrosbie.com/pdf/lc_claim.pdf)
- <sup>27</sup> Canadian Press, "Class-action lawsuit filed against Imperial Tobacco," July 20, 2004.  
<http://www.tobacco.org/articles/lawsuit/sparkes/>
- <sup>28</sup> Canadian Press, "Lawsuit filed in Nfld. against tobacco company," July 20, 2004.  
[http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1090359397268\\_11](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1090359397268_11)
- <sup>29</sup> *Susan Miles, et al. v. Philip Morris Cos, Inc.*, [http://tobacco.neu.edu/litigation/cases/supportdocs/miles\\_decision.htm](http://tobacco.neu.edu/litigation/cases/supportdocs/miles_decision.htm)
- <sup>30</sup> Interview with Mario Bujold, executive director, Conseil québécois sur le tabac et la santé, December 2004.
- <sup>31</sup> *Fortin c. Imperial Tobacco ltée*, [1999].  
<http://www.tobaccolaw.org/documents/french/cases/FortinImperialTobacco.htm>
- <sup>32</sup> Canadian Press, "Three plan \$11.5-billion lawsuit against tobacco firms," September 11, 1998.  
<http://lists.essential.org/1998/intl-tobacco/msg00145.html>



- <sup>33</sup> Rothmans Inc. Annual Report 2004, "Notes to Consolidated Financial Statements," pp. 54.  
[www.rothmansinc.ca/English/2004/AnnReport/15\\_Notes.pdf](http://www.rothmansinc.ca/English/2004/AnnReport/15_Notes.pdf)
- <sup>34</sup> Canadian Press, "Three plan \$11.5-billion lawsuit against tobacco firms," September 11, 1998.  
<http://lists.essential.org/1998/intl-tobacco/msg00145.html>
- <sup>35</sup> *Ragoonanan v. Imperial Tobacco et al*, [2000] O.J. No. 4597.  
<http://www.tobaccolaw.org/documents/english/cases/ONSUPCTRagoonanFireSafeCigCase2000.pdf>
- <sup>36</sup> Heidi Meldrum, "Big Tobacco Big Responsibilities: The Basic Principles of Civil and Criminal Liability for Canadian Corporations," prepared for Physicians for a Smoke-Free Canada in 2002, pp. 43. [www.safework.ca/BigTobacco.pdf](http://www.safework.ca/BigTobacco.pdf)
- <sup>37</sup> *Caputo v. Imperial Tobacco et al* [1995]. For the Statement of Claim, see: <http://sommersandroth.com/cases-caputo-soc-amend.htm>
- <sup>38</sup> Canadian Press, "Class action lawsuit against cigarette companies thrown out of court," Tara Brautigam, February 5, 2004. <http://lists.essential.org/pipermail/intl-tobacco/2004q1/001031.html>
- <sup>39</sup> Interview with Andreas Seibert, lawyer with Sommers & Roth PC, December 8, 2004.
- <sup>40</sup> *Knight v. Imperial Tobacco*, Class Action Statement of Claim, May 8, 2003.  
<http://www.kleinlyons.com/lightcigs/sofc.pdf>
- <sup>41</sup> Imperial Tobacco Canada, "Interim Financial Statements, Second Quarter Report," June 30, 2004.
- <sup>42</sup> Interview with Doug Lennox, lawyer with Klein Lyons, December 20, 2004.
- <sup>43</sup> *Spasic v. Imperial Tobacco et al*, May 1, 1997. Ontario Court (General Division), Court File No: C17773/97.  
<http://www.sommersandroth.com/cases-spasic-soc-amend.htm>
- <sup>44</sup> *Spasic Estate v. B.A.T. Industries p.l.c.* <http://www.sommersandroth.com/cases-spasic-bat-soc.htm>
- <sup>45</sup> Canadian Medical Association Journal, "Will litigation become part of public health arsenal in Canada's war on smoking?" Barbara Sibbald, CMAJ, May 30, 2000; 162 (11). <http://www.cmaj.ca/cgi/content/full/162/11/1608>
- <sup>46</sup> Heidi Meldrum, "Big Tobacco Big Responsibilities: The Basic Principles of Civil and Criminal Liability for Canadian Corporations," prepared for Physicians for a Smoke-Free Canada in 2002, pp. 44. [www.safework.ca/BigTobacco.pdf](http://www.safework.ca/BigTobacco.pdf)
- <sup>47</sup> Interview with Andreas Seibert, lawyer with Sommers & Roth PC, December 8, 2004.
- <sup>48</sup> Toronto Sun, "Tobacco suit a go: Judge," Gretchen Drummie, March 3, 2001. <http://lists.essential.org/pipermail/intl-tobacco/2001q1/000430.html>
- <sup>49</sup> Heidi Meldrum, "Big Tobacco Big Responsibilities: The Basic Principles of Civil and Criminal Liability for Canadian Corporations," prepared for Physicians for a Smoke-Free Canada in 2002, pp. 45. [www.safework.ca/BigTobacco.pdf](http://www.safework.ca/BigTobacco.pdf)
- <sup>50</sup> *Stright v. Imperial Tobacco Company Ltd.*, September 5, 2002. Supreme Court of Nova Scotia court file # 177663, available upon request.
- <sup>51</sup> *JTI Macdonald v. Attorney General Canada*, Québec Superior Court, December 13, 2002.  
<http://www.tobaccolaw.org/documents/english/cases/JTIMacdonaldvAGCanada2002.htm>
- <sup>52</sup> Canadian Cancer Society press release, "Quebec Court of Appeal to Hear Key Tobacco Case Starting Monday, November 29," November 25, 2004. <http://www.newswire.ca/en/releases/archive/November2004/25/c7163.html>
- <sup>53</sup> *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2002] S.J. No. 541 (SCQB).  
<http://www.tobaccolaw.org/documents/english/cases/RothmansBensonHedgesInc.v.Saskatchewan%202002.HTM>
- <sup>54</sup> *The Tobacco Control Act*, Chapter 1-14.1 of the *Statutes of Saskatchewan, 2001*.  
<http://www.qp.gov.sk.ca/documents/english/Statutes/Statutes/t14-1.pdf>
- <sup>55</sup> *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2002] S.J. No. 541 (SCQB)  
<http://www.tobaccolaw.org/documents/english/cases/RothmansBensonHedgesInc.v.Saskatchewan%202002.HTM>
- <sup>56</sup> *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2002] S.J. No. 541 (SCQB)  
<http://www.tobaccolaw.org/documents/english/cases/RothmansBensonHedgesIncvSaskatchewan2003.htm>
- <sup>57</sup> Government of Saskatchewan, "Supreme Court upholds tobacco law," January 19, 2005.  
<http://www.gov.sk.ca/newsrel/releases/2005/01/19-032.html>
- <sup>58</sup> *The Non-Smokers Health Protection Amendment Act*, Manitoba, S.M. 2002, c. 37.  
<http://web2.gov.mb.ca/laws/statutes/2002/c03702e.php>
- <sup>59</sup> *Public Health (Tobacco) Bill, 2001*, Initiated as: Number 46 of 2001, Parliament of Ireland.  
<http://www.gov.ie/bills28/bills/2001/4601/default.htm>
- <sup>60</sup> *British Columbia v Imperial Tobacco et al*, Supreme Court of BC, 2001.  
<http://www.tobaccolaw.org/documents/english/cases/BritishColumbiaVImperialTobaccoCdaetalStatementofClaim2001.pdf>
- <sup>61</sup> Heidi Meldrum, "Big Tobacco Big Responsibilities: The Basic Principles of Civil and Criminal Liability for Canadian Corporations," prepared for Physicians for a Smoke-Free Canada in 2002, pp. 43. [www.safework.ca/BigTobacco.pdf](http://www.safework.ca/BigTobacco.pdf)
- <sup>62</sup> *Her Majesty in Right of British Columbia v Imperial Tobacco Limited Canada et al*, Supreme Court of BC, 2003.  
<http://www.tobaccolaw.org/documents/english/cases/HMTQvImperialTobaccoCdaLtdetal2003.htm>
- <sup>63</sup> B.C. Liquor Licencees & Retailers Assn. v. British Columbia (Workers' Compensation Board), [2000] B.C.J. No. 584 (B.C. S.C.). [http://www.tobaccolaw.org/documents/english/cases/BC.LiquorLicencees&RetailersAssn.v.B.C.\(WCB\).htm](http://www.tobaccolaw.org/documents/english/cases/BC.LiquorLicencees&RetailersAssn.v.B.C.(WCB).htm)
- <sup>64</sup> Canadian Press, "Public hearings on B.C. tobacco ban begins," Dene Moore, June 9, 2000.  
[http://www.canoe.ca/Health0006/11\\_smoking.html](http://www.canoe.ca/Health0006/11_smoking.html)
- <sup>65</sup> J Drope, S Glantz. British Columbia capital regional district 100% smokefree bylaw: a successful public health campaign

despite industry opposition. *Tobacco Control* 2003; 12: 264-268.