Tobacco-related Litigation in Canada

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

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Introduction

Holding the tobacco industry accountable for illegal activity, whether through criminal charges or civil suits, 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 higher prices for tobacco products, reduce 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.[1]

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

Civil actions against the tobacco industry are relatively new in Canada although litigation to defend tobacco control statutes dates back to 1988 (i.e. tobacco industry challenge to the *Tobacco Products Control Act*[2]).

Apart from civil suits, there is the Criminal Code, and other legislation, which offer options for holding the tobacco industry criminally accountable. However, to date, it has not been used in any significant way as a means of changing corporate behaviour and furthering 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[3].

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

Interesting and important facts

Canada is playing a leadership role

Canada is quickly becoming one of the most dangerous countries in the world for cigarette manufacturers. In September 2005, in a unanimous decision, the Supreme Court of Canada found British Columbia's *Tobacco Damages and Health Care Costs Recovery Act* to be constitutional. Five other provinces (Saskatchewan, Manitoba, New Brunswick, Nova Scotia and Newfoundland and Labrador) have passed, or are in the process of passing, similar legislation. If these lawsuits are eventually successful (it will take years before they actually get to trial), Canada will have Big Tobacco in a very precarious position.

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

British American Tobacco is the third largest tobacco company in the world.4 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 Limited (which has more than half 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).5

The Canadian cigarette market has been a virtual oligarchy for decades, with Imperial sitting on top. Up until recently, with the increase in discount cigarette sales, the vast majority of consumers were willing to pay a premium price for cigarettes. The rise of discount brands has begun to cut into profit margins, but tobacco manufacturing is still incredibly profitable. This trend was achieved by regular manufacturer prices increases. Many of these increases occurred at the same time as governments increased taxes so that consumers would not be aware of the industry's strategy.

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.

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 the profit margins on cigarettes is much larger than on comparable consumer products. 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 these injustices. There are a variety of reasons why litigation should be utilized.

Tobacco Products Liability Suits Offer at Least Seven Potential Social Benefits

- Increases the cost of tobacco products;
- Draws public attention to the dangers of smoking;
- Sheds light on the tobacco industry and raise public awareness;
- Can motivate industry change;
- Unearths incriminating internal documents through discovery;
- Money from verdicts can be used to reimburse health-care costs;
- A flood of cases could bankrupt the industry[6].

Increasing the Cost of Tobacco Products

- Smoking costs third parties over $17 billion in health care and lost productivity each year in Canada.[7] (This does not include the social costs, such as the impact on a family after losing its head of the household prematurely to a 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 the Dangers of Smoking

- 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 October 2002, in which a jury awarded $28 billion to the plaintiff[8], 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;
- "Voluntary" changes to date have been modest and mostly cosmetic, but movement is noticeable.

Discovery of Industry Documents

- Document-based studies of industry misbehaviour within and outside Canada have assisted tobacco control efforts around the world;
- The first benefit of internal documents is that a lot of information about industry practices is uncovered. 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 has helped make the industry a political pariah.

Reimbursing Health-Care Costs

- Funds obtained through litigation 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 funds they receive from Medicaid reimbursement cases and the 1998 "Master Settlement Agreement" to fund tobacco control programs.

Forcing the Industry to Face the Potential of Bankruptcy

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

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 – After a four and a half year criminal investigation, the RCMP charged four tobacco companies with six counts of fraud and one count of conspiracy to commit fraud and to possess proceeds of crime. The defendants include: JTI-Macdonald, Corp. formerly known as RJR-Macdonald, Inc. and several of its subsidiaries, including R.J. Reynolds Tobacco Co., (Delaware), USA; R.J. Reynolds Tobacco International, Inc., (Delaware), USA; Northern Brands International, Inc., (Delaware).

Eight former and current employees were also charged, including: Edward Lang of Naples, Florida (former member of the Board of Directors of RJR-Macdonald, Inc. and former Senior Vice President of Manufacturing for R.J. Reynolds Tobacco Co.), Dale Sisel of Gillette, Wyoming (former President and Chief Executive Officer for R.J. Reynolds Tobacco International, Inc.), Jaap Uittenbogaard of Jupiter, Florida (former Chief Financial Officer and Vice President of Finance for R.J. Reynolds Tobacco International, Inc. and former Director of Northern Brands International, Inc.), Pierre Brunelle of Geneva, Switzerland and the Province of Quebec (former President and Chief Executive Officer of RJR-Macdonald, Inc. and former member of the Board of Directors of RJR- Macdonald, Inc.), Paul Neumann of Geneva, Switzerland (former Vice President of Finance for RJR-Macdonald, Inc. and current employee of Japan Tobacco International, Geneva), Roland Kostantos of Geneva, Switzerland (former Chief Financial Officer for R.J. Reynolds Tobacco International, Inc. and former Vice President of Finance, Chief Financial Officer, and Vice President of Finance and Administration for RJR-Macdonald, Inc.), Stanley Smith of British Columbia (former Vice President of Sales for Canada for RJR- Macdonald, Inc.), and Peter MacGregor of Atlanta, Georgia (former Manager of Finance and Administration for Northern Brands).[9]

The Crown alleges that the companies and the individuals conspired 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.

In the 1980s and early 1990s, tax increases led to high cigarette prices, which were extremely successful in driving down smoking rates. While this downward trend pleased public health professionals, it inflicted serious damage on the tobacco companies' bottom lines. As a result, it is alleged that Canada's Big three tobacco companies (Imperial, Rothmans and JTI-Macdonald) exported duty-free cigarettes out of the country. They then worked together with smugglers so the cigarettes could then be smuggled back into Canada, where they were sold on the black market, to avoid paying taxes.

Faced with a smuggling crisis and bad press coverage, the federal and provincial governments caved in and rolled back tobacco taxes to keep legal cigarettes competitive. The impact on public health was devastating. A mortality impact assessment done for Health Canada and obtained under the federal *Access to Information Act* predicted that 45,000 future tobacco-caused deaths would occur just from the increase in adolescent smoking in the five years

following the tax rollback from 1994 to 1999. The RCMP now claims the firms provided the cigarettes "knowing that these products were being smuggled back into Canada and on to the commercial market."[10]

A preliminary inquiry into these charges took place in a Toronto court throughout 2005 and into February 2006. After written submissions from the Defence and Crown, oral submissions were heard. The judge is expected to report on whether or not the case should proceed to trial in May 2007.

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.11 However, in 2005, in the Companies' Creditors Arrangement Act proceeding described below the Attorney General amended and increased the amount of its claim from $1.5 billion to $4.3 billion. The parties have agreed to a stay of all proceedings pending in the Superior Court of Justice, subject to notice by one of the parties that it wishes to terminate the stay. On January 19, 2007, the court ordered that the case be scheduled for trial no later than December 31, 2008, subject to further order of the court.12

Québec Department of Revenue actions

August 11, 2004 – The Québec government obtained a court judgment 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 related to smuggling allegations. The certificate was filed Aug. 11 in Québec Superior Court, triggering an immediately enforceable court judgment in favour of the department. The certificate covers the period of Jan. 1, 1990, to Dec. 31, 1998. The government says JTI 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 protection under the Companies' Creditors Arrangement Act (CCAA).[13] 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.[14] “*In the absence of CCAA protection the effect of these seizures would have unavoidably led to the bankruptcy of JTI-Macdonald*.” In November 2004, JTI-MC filed a motion in the Superior Court, Province of Quebec, District of Montreal, seeking a declaratory judgment to set aside, annul and declare inoperative the tax assessment and all ancillary enforcement measures and to require the Quebec Minister of Revenue to reimburse JTI-MC for funds unduly appropriated, along with interest and other relief.[15]

Six other provinces follow suit

In addition to the claims by the Attorney General of Canada and Québec, six provinces have filed claims.[16] In total, the provinces and the Attorney General claim that JTI-Macdonald Corp. owes them about $10 billion[17]:

Canada	$4,300,000,000
British Columbia	450,000,000
Manitoba	23,000,000
Ontario	1,550,000,000
Québec	1,360,000,000
New Brunswick	1,495,522,667
Nova Scotia	326,109,000
Prince Edward Island	75,000,000
TOTAL (just provinces)	$5,279,631,667
TOTAL (provinces & Canada)	$9,579,631,667

Due to JTI's successful application for court protection (under the CCAA), it could be a number of years before this case works its way through the courts, and perhaps longer before Canada and the provinces are successful in recouping all or a portion of the claimed $10 billion in foregone taxes and other damages arising from the cigarette smuggling and tax evasion crisis of the mid-1990s.

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 in support of the application for a search warrant, the RCMP alleged that smuggling cost the federal government $607 million in unpaid taxes. 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.[18] According to an ITL press release, the RCMP had a "search warrant for documents related mainly to the period 1989 to 1994."[19] 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 officer 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.

No charges have been laid to date, though the case remains open.

January 2002 – Smuggling-related charges against Rothmans, Benson & Hedges (RBH) also appear possible. In January 2002, the RCMP launched an investigation into RBH's business records and sales of products exported from Canada in the period 1989-1996.[20]

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." [21]

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

British Columbia

A recent legal analysis by Physicians for a Smoke-Free Canada noted: "As one of the most progressive anti-tobacco governments in the country, British Columbia was the first province to sue the tobacco companies."[22] 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, marketed 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. filed its suit under the *Tobacco Damages Recovery Act* of 1998. Before litigation could begin the tobacco companies challenged the constitutionality of the *Act*, stating that acts attempt to lump together its corporate parents with their Canadian subsidiaries was impermissibly extra-territorial. 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. However, the Court upheld the power of the Legislature to enact all of the other essential features of the 1998 *Act*.

In the spring 2000 session of the B.C. legislature, a new Act, the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000was passed.[23] 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 those raised in the first challenge.[24]

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 not 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 new *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 heard the appeal in June 2005. Eight provinces (Newfoundland & Labrador, Nova Scotia, New Brunswick, Ontario, Québec, Manitoba, Saskatchewan and Alberta) intervened to support B.C.'s legislation. In September 2005, in a unanimous decision, the Supreme Court found the B.C. Act to be constitutional.

But, the international tobacco companies weren't finished trying to get out of the lawsuit. On February 1, 2006, the companies tried to get the lawsuit again thrown out because they argued the *Act* was again constitutionally inapplicable. In another unanimous judgment, the B.C. Court of Appeal held that the foreign manufacturers, including British American Tobacco, Philip Morris and R.J. Reynolds, must stand trial.[25] This ruling upheld a June 2005 judgment of the B.C. Supreme Court. On April 5, 2007, the Supreme Court of Canada rejected a final appeal by the transnational companies to be removed from the lawsuit. The case will now proceed to trial.

David Laundy, a spokesperson for the Canadian Tobacco Manufacturers' Council, said that if the government is eventually successful in suing the companies, the Canadian companies won't be able to afford to pay the billions of dollars being sought.[26] Citigroup, one of the world's largest banks, says the B.C. suit, if successful, has a chance to bankrupt BAT's Canadian business (Imperial Tobacco).[27] 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.[28] The case was watched closely by other provinces and there are now five provinces (Newfoundland, Nova Scotia, New Brunswick, Manitoba and Saskatchewan) that have passed, or are in the process of passing, virtually identical health care costs recovery legislation. So far, however, B.C. is the only government with a health-care costs recovery lawsuit before the courts.

Newfoundland & Labrador

On May 24, 2001, the Newfoundland & Labrador government passed the *Tobacco Health Care Costs Recovery Act*[29], 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 had 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).[30] British Columbia and Saskatchewan intervened in support of the Newfoundland and Labrador legislation. Imperial Tobacco Canada, Rothmans, Benson & Hedges Inc. and JTI-Macdonald Corp. intervened to oppose the validity of the legislation. However, the reference case has not been heard and won't be heard because the issue was resolved by the Supreme Court of Canada when it ruled in favour of the B.C. legislation. Newfoundland is now the second province with a health care costs recovery lawsuit against tobacco companies poised to go before the courts.

Nova Scotia

On December 8, 2005, Nova Scotia's Bill 222, the *Tobacco Damages and Health-care Costs Recovery Act*,[31] received Royal Assent. It is virtually identical to B.C.'s legislation.

New Brunswick

This province's version of the *Tobacco Damages and Health-care Costs Recovery Act*[32] achieved Royal Assent on June 22, 2006. It, too, is virtually identical to B.C.'s legislation. In December 2006, the New Brunswick Attorney General issued a call for proposals for a law

firm or consortium of law firms to represent the province in its suit against the tobacco industry.[33]

Manitoba

The Tobacco Damages and Health Care Costs Recovery Act,[34] also known as Bill 27, received first reading on March 16, 2006. The bill received Royal Assent on June 14, 2006. It too is virtually identical to B.C.'s legislation.

Saskatchewan

With tobacco-related health care costs estimated at $145 million annually, this second Prairie province launched Bill 29, *An Act to Recover Damages and Health Care Costs from Manufacturers of Tobacco*[35], on November 21, 2006. The *Act* received second reading on December 5, 2006 and should be passed into law in 2007.

Québec

On June 21, 2001, the Québec government established a special committee to examine the feasibility of a health care cost recovery lawsuit against the industry, to examine possible legal approaches, and to provide recommendations.[36] The outcome of the committee's work has not been made public.

Ontario

In December 1999, the Ontario government passed the *Ministry of Health and Long-Term Care Statute Law Amendment Act, 1999*. The *Act* created an independent cause of action for Ontario, which it could use on its own behalf to take action against a person or company to recover costs related to paying for Medicare as a result of negligence (or wrongful act or omission) by that person or company.[37]

Ontario's legislation is far less detailed and comprehensive than the B.C.-style legislation. In 2006 and 2007, public health advocates in Ontario worked to encourage the government to pass legislation similar to B.C.'s, but have not been successful so far.

Class Action Lawsuits

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.[38] "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.[39]

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 smoking 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.[40]

Seeking reimbursement for money spent on defective products is a tactic which was successful in *Susan Miles, et al. v. Philip Morris Cos, Inc.*[41], a landmark American consumer fraud class action case, which was filed in 2000. Philip Morris et al were initially 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. However, the Illinois Supreme Court decertified the Miles class action in 2005. The Sparkes class action has not yet been certified, but the certification hearing is scheduled to take place the week of September 17, 2007.

Létourneau and Conseil québécois

In Québec, after six years of preliminary motions, the hearing on the certification of two class action suits (*Létourneau* 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 was rendered February 21, 2005, by Justice Pierre Jasmin, who certified the two cases to proceed as class actions. Pursuant to the rules of procedure in Québec, the tobacco companies cannot appeal the judgment respecting certification.

The two class actions will be argued at the same time, but they remain two separate class actions. Lawyers for Cécilia Létourneau and the Conseil québécois cannot agree with the tobacco company lawyers on when the trial should begin. Those that brought the suits would like the trial to begin in 2007, while the tobacco companies are trying to postpone it to 2009. When the suits eventually do make it to trial, they will be heard in Québec Superior Court in Montreal. The judge who will hear the case is Carole Julien.

Cécilia Létourneau v. JTI-Macdonald Corp., Imperial Tobacco Canada Ltée and Rothmans, Benson & Hedges Inc.[42]

Christine Fortin and Joseph Mandelan, both of Montreal, along with Cécilia Létourneau of Rimouski, say cigarette manufacturers have known for decades their products are harmful and addictive. In 1998 lawyers for the three smokers from the law firm Trudel & Johnson asked Québec Superior Court to hear the suit against Imperial Tobacco Ltd., Rothmans, Benson and Hedges Inc. and RJR Macdonald Inc. The claim was filed on behalf of all Québecers who, at the time of service of the motion (September 12, 1998), were addicted to the nicotine in cigarettes manufactured by the respondents and who remained addicted, as well as the legal heirs of persons included in the group at the time of service of the motion but later died without first quitting smoking.[43] It seeks $5,000 for each person included in the group plus compensation for specific damages,[44] for a total of $17.8 billion.[45]

Conseil québécois sur le tabac et la santé and Jean-Yves Blais v. JTI-Macdonald Corp., Imperial Tobacco Canada Ltée and Rothmans, Benson & Hedges Inc.

The class action suit launched by the Québec Council on Tobacco and Health is seeking compensation for victims of cancers of the lung, larynx and throat as well as emphysema sufferers, as well as for the legal heirs of deceased persons in the group. The class action suit is seeking $5 billion in damages.[46]

Ragoonanan Estate v. Imperial Tobacco Ltd.

This class action dealt specifically with fire-safe cigarettes. After a house-fire, which was caused by a smouldering cigarette, killed three people on January 18, 1998, relatives of the victims brought an action against Imperial Tobacco, Rothmans Benson & Hedges, and JTI-Macdonald.[47] The claim alleged 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 were dismissed, as they had no immediate connection to the fire at issue (the cigarette was made by Imperial Tobacco Canada). The plaintiffs attempted to have the suit certified as a class action which would have included relatives of victims of other cigarette-caused fires. The claims in the case included a breach of the company's duty to produce a safe product, and of their duty to warn of hazards of their products.[48] However, the class was denied certification on October 31, 2005 by Ontario Superior Court Judge Maurice Cullity.[49]

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*[50], 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 product liability. However, in February 2004, the motion to have the action certified was not accepted by the court. The *Canadian Press* reported at the time that, “After nine years of legal wrangling, Superior Court Justice Warren Winkler ruled that the multi million-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.”[51]

There was an outstanding cost motion brought by the defendants, wherein the defendants were seeking $1.2 million from the plaintiff's solicitors. On March 8, 2005, Justice Winkler ruled that the defendants were not entitled to any costs related to the nine years of litigation or for the certification motion as it was involving public interest and health. The court also dismissed the defendants' motion to recover costs against the plaintiffs' lawyers, holding that:

> [a]ccess to justice and other laudable goals of the CPA [Class Proceedings Act] will only served as long as there are counsel willing to take risks in order to advance the cause of plaintiffs of modest means or modest claims. ... The "chilling effect" of inordinate or improperly founded costs awards against the plaintiffs or their counsel will likely have the effect of rendering the goals underlying the CPA [including defendant behaviour modification] unachievable.[52]

Knight v. Imperial Tobacco

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 Matinée brand cigarettes, knowingly deceived smokers into believing 'light' and 'mild' cigarettes were less harmful than regular cigarettes.[53] Roberts Creek resident Kenneth Knight, who smoked a pack and a half of cigarettes 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 ordered to pay.[54]

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. On February 8, 2005, the B.C. Supreme Court certified the class action. Both the Government of Canada and Imperial Tobacco appealed the decision to certify the class. The appeal was heard before a panel of judges at the B.C. Court of Appeal in February 2006. On May 11, 2006, the Court upheld the class action certification, but the judgment narrowed the scope of the class action somewhat. Originally the Class Period approved was from July 5, 1974[55] up to the opt-out / opt-in date set by the Court in this proceeding. The new judgment effectively reduced the relevant time period from 1974 until trial to 1997 until trial.[56] This significantly reduces the potential damages payable should any of the defendants be found guilty.

In addition to its opposition to class action certification, the federal government is also trying to be removed as a third party. Health Canada's chances of being removed were increased by the fact that the B.C. Court of Appeal has limited the Class Period from 1997 until trial. The *Tobacco Act* has been in place that entire time and it is harder to sue the government when it is acting under a single statute. The *Act* includes the provision that its labelling regulations do "not affect any obligation of a manufacturer or retailer at law or under an Act of Parliament or of a provincial legislature to warn consumers of the health hazards and health effects arising from the use of tobacco products or from their emissions."[57]

Additional submissions, related to the change in the Class Period, by Imperial Tobacco and Health Canada will be filed and another day of arguments was to be heard April 10, 2007.

Individual product liability cases

Spasic

On May 1, 1997, *Spasic v. Imperial Tobacco et al*[58] was filed against Imperial Tobacco and Rothmans, Benson & Hedges for alleged million-dollar damages. A second suit, *Spasic Estate v. B.A.T. Industries p.l.c.*[59], was brought against British American Tobacco and its Montreal subsidiary, Imperial Tobacco Canada, 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.[60]

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.[61]

The defendants have managed to drag out the proceedings for years, but a trial date is finally in sight. The *Spasic v. Imperial* case has been transferred to Toronto from Milton. A case management Master has been assigned to the action to hear all the motions that are ordinarily returnable before a Master and otherwise to case-manage the action. Case management masters are frequently assigned to complex cases such as this to assist the Parties in achieving efficiencies and move the case along. The case continues to move closer to trial at the Superior Court of Justice in Toronto.

McIntyre

Following the 1999 lung cancer death of her husband, Ronald, 63, Mrs. Maureen McIntyre started a wrongful death action against Imperial Tobacco Ltd. (ITL). She is suing for $11 million, alleging Ronald's death was caused by smoking cigarettes manufactured and marketed by Imperial.

Maureen's main impediment to date has been lack of funds. She signed a contingency agreement with a law firm, but since such agreements have not been considered permissible 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 on March 1, 2001,[62] the government of Ontario appealed the judgment. 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 it had nothing to do with ITL, therefore, on July 26, 2001, ITL's request for intervener status was denied.

In regards to the Attorney General's appeal, the Court of Appeal agreed with the judge of the lower court that, in spite of long-standing legal traditions, lawyers' contingency fee agreements are not prohibited per se. However, since the contingency fee arrangement, in this particular case, was to be based solely on a percentage of the damages (and not on the amount of time spent by lawyers, the quality of the legal services, etc.), the judges found that it would be premature to say whether the fees that may become payable under the proposed agreement would be fair and reasonable.[63]

However, it appears as though no action has been taken against ITL since the Court of Appeal ruled in favour of the contingency agreement.

Stright

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.”[64]

Industry suits against governments

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

The *Tobacco Act*[65] was enacted by Parliament on April 25, 1997. The purpose of the *Act* is to provide a legislative response to the national public health crisis caused by tobacco industry products. There is a consensus in the international health community that tobacco industry marketing is a major cause of that crisis. To protect the health of Canadians, the legislation significantly limits the advertising avenues available to the tobacco industry. It regulates the manufacturing, sale, labelling and promotion of tobacco products in Canada.

Regulations brought under the *Act* mandated picture-based health warnings on cigarette packages. But Canada's largest 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 of the *Act* are equivalent to a total advertising ban, violating their right to freedom of expression under the *Canadian Charter of Rights and Freedoms*.

In December 2002, the Québec Superior Court dismissed the tobacco manufacturers' claims,[66] but the industry appealed to the Québec Court of Appeal.[67] On August 22, 2005, the court handed down its judgment, which upheld the vast majority of the law but eased some advertising restrictions.[68] A majority of the Court of Appeal declared certain portions of sections 18(2), 20, 24 and 25 of the *Act* to be of no force or effect. These provisions concern, more specifically, industry-funded scientific works that promote tobacco or specific brands, promotion "likely to create an erroneous impression," and the use of a manufacturer's name for sponsorship purposes.[69] The Court ruled tobacco companies could associate their corporate names with sponsored events – as long as the corporate names don't include a tobacco product-related brand element.

Québec's high court upheld, on a 2-1 vote, the constitutionality of the definition of "lifestyle advertising" and the prohibition on advertising that "could be construed on reasonable grounds to be appealing to young persons". The health warning labelling provisions were unanimously upheld.

On October 20, 2005, then Health Minister Ujjal Dosanjh asked for leave to appeal the Québec Court of Appeal decision to the Supreme Court of Canada on all issues the court had ruled against the government.[70]

The three major tobacco companies filed their response, arguing that the Supreme Court should not allow the federal government to appeal. At the same time, the three companies filed a joint conditional application to cross-appeal, so that if the Supreme Court did grant permission to the federal government to appeal, the companies would cross-appeal on the following two issues: i) the advertising restrictions in sections 18, 19, 20 and 22 of the *Act*; ii) the picture-based health warnings in the Tobacco Products Information Regulations.

Many observers suspect the tobacco industry didn't want the matter to go before the Supreme Court because it privately believes it can live with the *Tobacco Act*. That is because the *Act* contains only partial restrictions on advertising, and falls short of a total ban – despite the

industry's fictitious claims. The *Act* allows information and brand-preference advertising that is neither lifestyle nor appealing to youth. Permitted ads may appear in publications with at least 85% adult readership, direct mail to adults, and places where young people are prohibited by law, such as bars. Further, logos are permitted on “accessories” such as lighters and matches.

Despite the objections of the tobacco companies, on March 23, 2006, the Supreme Court of Canada (SCC) agreed to hear the appeal and rule on the constitutionality of the *Act*.

The SCC heard oral arguments on February 19, 2007, concerning the constitutional validity of federal advertising restrictions, the ban on tobacco sponsorships, and the 50% size for the package warnings. There were 22 lawyers representing the federal government, JTI-Macdonald Corp., Imperial Tobacco Canada Ltd., Rothmans, Benson & Hedges Inc., British Columbia, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick and the Canadian Cancer Society.

British Columbia's arguments before the Court were unique in that its lawyers argued that tobacco advertising should not be a form of protected speech under the Charter, and that in fact a total advertising ban was required, not just for the protection of young non-smokers, but for people already addicted to the nicotine found in cigarettes. Cigarettes are internationally, scientifically recognized as deadly products and tobacco companies incite, through advertising, addicted smokers to partake in an inherently risky activity, argued B.C.'s lawyers.

The Supreme Court is expected to rule soon, possibly in the fall of 2007.

Rothmans, Benson & Hedges Inc. v. Saskatchewan[71]

On March 11, 2002, Saskatchewan proclaimed precedent-setting legislation, the *Tobacco Control Act*72, which banned tobacco product displays in retail stores accessible to minors under 18. The law forced retailers to not display tobacco products. Most responded by hiding cigarettes behind a sliding door, curtains or blinds. In May 2002, RBH launched a lawsuit against the legislation, saying the province had overstepped its jurisdiction, arguing that the federal *Tobacco Act* afforded them an absolute right to display tobacco products at the point-of-sale. In September 2002, the court rejected73 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, the court stated the legislation was invalid on a jurisdictional matter.74 It ruled that Section 30 of the federal *Tobacco Act* made 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 Supreme Court ruled unanimously in favour of Saskatchewan. It found that provinces can ban powerwalls, because it is not inconsistent with the overall intend of the federal *Tobacco Act*. The Supreme Court ruling meant that the ban on tobacco product displays and promotion immediately became the law again in Saskatchewan.75

The legislation set a precedent that other provinces and territories (including Manitoba,76 Nunavut, Prince Edward Island, Northwest Territories, Nova Scotia, Ontario and Québec), and, indeed, other countries around the world (Iceland, Thailand and Ireland77), are now following or preparing to follow.

B.C. Liquor Licensees & Retailers Assn v. British Columbia (Workers' Compensation Board)[78]

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 workplaces. 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 a sunset clause 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 smoke-free legislation in the country.

But the regulations ignited protest from smokers and businesses that serve them.79 Led by the B.C. Liquor Licensees and Retailers Association, an organization with tobacco industry ties,80 the Workers' Compensation Board was taken to court. Lawyers for the Liquor Licensees and Retailers Association successfully argued that the 100% ban should be struck down because it had been enacted without proper consultation. On March 22, 2000, the British Columbia Supreme Court ruled against the Workers' Compensation Board, overturning the smoke-free policy, after only three months of the regulations being in place.

Québec bar owners v. Le Procureur Général du Québec

On September 23, 2005, bar owners Peter Sergakis (Placements Sergakis and Complexe Sky) and Voula Demopoulos (Les Billards Scratch) filed a motion before Québec Superior Court opposing numerous sections of the province's new *Tobacco Act* (introduced in June 2005), suggesting that elements of the bill were too restrictive and violated individual freedoms. They were represented by lawyer Julius Grey, who specializes in constitutional law. On December 1, 2005, the Attorney General of Québec filed a motion of inadmissibility in an attempt to invalidate the bar owners' motion without trial. On April 10, 2006, Justice Pierre Sénécal of the Superior Court of Québec dismissed the Attorney General's motion. On May 3, 2006, the Attorney General filed a motion before the Court of Appeal of Québec in an attempt to reverse Justice Sénécal's decision. On May 9, 2006, Justice André Brassard of the Court of Appeal dismissed the motion.

Québec's *Tobacco Act* came into force on May 31, 2006, prohibiting smoking in bars and restaurants. Less than two months later, on July 25, lawyer Julius Grey filed an injunction motion to stay the prohibition until the Superior Court renders its decision regarding the validity of the *Tobacco Act*. On November 20, 2006, Justice Hélène LeBel dismissed Grey's injunction.

A trial date for the bar owners' constitutional challenge of the *Tobacco Act* has not yet been determined, but is likely to be heard sometime in April or May, 2007.

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[13] Companies' Creditors Arrangement Act. http://laws.justice.gc.ca/en/c-36/35512.html

[14] JTI-Macdonald Corp. "JTI-Macdonald Corp. Granted Court Protection to Continue Business - Following a $1.36 billion claim by Revenue Quebec," press release, 24 August 2004. www.jti.co.jp/JTI_E/Release/04/20040824.html

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[16] Only two parties have actually initiated civil litigation against JTI-Macdonald (Attorney General of Canada, Québec Ministry of Revenue). The other provinces have filed claims in the claims process, but have not yet technically filed suit.

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