

Tobacco-related Litigation in Canada

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

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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, 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 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 dates back to 1988 (e.g. tobacco industry challenge to the *Tobacco Products Control Act*²).

Apart from civil law, the Criminal Code offers further options for holding the tobacco industry 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

When it comes to litigation against the tobacco industry, Citigroup, one of the world's largest banks, which seeks to do business with tobacco companies, and therefore watches the litigation risk the industry faces quite closely, states that 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."⁴ In September 2005, the Supreme Court of Canada found British Columbia's *Tobacco Damages and Health Care Costs Recovery Act* to be constitutional in a unanimous (nine to zero) decision. Four other provinces (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, after government-owned China National Tobacco (1) and Philip Morris International (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).⁵ 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 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 Seven Potential Social Benefits⁶

- Increase the cost of tobacco products
- Draw public attention to the dangers of smoking
- Sheds light on the tobacco industry and raises public awareness
- 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

Increasing the Cost of Tobacco Products

- Smoking costs third parties over \$15 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 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 Oct. 2002, in which a jury awarded \$28 billion to the plaintiff⁸, 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 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.
- A bankruptcy court could require tobacco 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 laid six counts of fraud and one count of conspiracy against JTI-Macdonald, formerly known as RJR-Macdonald, Inc. and several of its subsidiaries, including JTI-Macdonald, Corp., formerly known as RJR-Macdonald, Inc., Toronto, Ontario; 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).

Investigators allege 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. High cigarette prices, achieved through taxation increases in Canada in the early 1990s, 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 3 tobacco companies (Imperial, Rothmans and JTI-Macdonald) exported duty-free cigarettes out of the country, then smuggled the cigarettes 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."⁹ A preliminary inquiry into these charges took place in a Toronto court throughout 2005 and into February 2006. Written submissions related to the preliminary inquiry from Defence and Crown attorneys are due in July, September and October, 2006, with oral submissions scheduled to be heard in a Toronto court from November 6-10. After the oral submissions, the judge will decide whether or not the case should proceed to trial.

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.¹⁰ A preliminary hearing on the charges was 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.¹¹

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 judgment 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 is 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).¹² 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.¹³ “*In the absence of CCAA protection the effect of these seizures would have unavoidably led to the bankruptcy of JTI-Macdonald.*” JTI has since counter-sued Québec for allegedly driving it into bankruptcy protection.

Six other provinces follow suit

Besides Canada and Québec, six provinces have filed claims* against JTI-Macdonald Corp.¹⁴:

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	<u>75,000,000</u>
TOTAL	\$9,579,631,667
TOTAL (just provinces)	\$5,279,631,667

* 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.

Due to JTI successfully applying for bankruptcy protection, it could be a number of years before this case works itself 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 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 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.¹⁵ According to an ITL press release, the RCMP had a “search warrant for documents related mainly to the period 1989 to 1994.”¹⁶ 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.”

Although no charges have been laid to date, it appears as though the RCMP has 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 1989-1996.¹⁷

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.”*¹⁸

- “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.”¹⁹ 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. The tobacco companies counter-claimed, successfully arguing on 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 of the B.C. legislature, 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 those raised in the first challenge.²⁰

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 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 (nine to zero), the Supreme Court found the B.C. Act to be constitutional.

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.²¹ 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 Canada).²²

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.²³ The case was watched closely by other provinces and there are now four provinces (Newfoundland, Nova Scotia, New Brunswick and Manitoba) that have passed, or are in the process of passing, virtually identical health care costs recovery legislation.

Ontario: In December 1999, the Ontario government passed the *Ministry of Health and Long-Term Care Statute Law Amendment Act, 1999*. "The Bill amends the *Health Insurance Act* to allow the Plan or the Minister of Health and Long-Term Care to bring an action, independently of any subrogated right of action, against a person to recover costs incurred to pay for insured services rendered as a result of the person's negligence or wrongful act or omission. The *Long-Term Care Act, 1994* is amended in a similar manner to allow the Minister to bring an action, independently of any subrogated right of action, against a person to recover costs incurred to pay for services provided under that Act as a result of the person's negligence or wrongful act or omission."²⁴ Ontario's legislation is far less detailed and comprehensive than the B.C.-style legislation.

Newfoundland & Labrador: On May 24, 2001 the Newfoundland & Labrador government passed the *Tobacco Health Care Costs Recovery Act*²⁵, 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).²⁶ 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.

Nova Scotia: On December 8, 2005, Nova Scotia's Bill No. 222, the *Tobacco Damages and Health-care Costs Recovery Act*,²⁷ 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*²⁸ achieved second reading on Dec. 9, 2005. It, too, is virtually identical to B.C.'s legislation.

Manitoba: The *Tobacco Damages and Health Care Costs Recovery Act*,²⁹ also known as Bill 27, received first reading on March 16, 2006. It, also, is virtually identical to B.C.'s legislation.

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."³⁰ The outcome of the committee's work has not been made public.

Class Action Lawsuits

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.³¹ "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.³² 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.³³ Seeking reimbursement for money spent on defective products is a tactic which was successful in *Susan Miles, et al. v. Philip Morris Cos, Inc.*³⁴, 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 Miles case has since been thrown out of court. The Sparkes class action has not yet been certified.

Québec

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 Feb. 21, 2005, by Justice Pierre Jamain, who certified the two cases to proceed as class actions. The tobacco companies cannot appeal the judgement respecting certification, pursuant to the rules of procedure in Québec.

Cécilia Létourneau v. JTI-Macdonald Corp., Imperial Tobacco Canada Ltée and Rothmans, Benson & Hedges Inc.³⁵: 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 and addictive. 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 claim was filed on behalf of 2.3 million Québécois who are addicted to the nicotine in cigarettes manufactured by the respondents, as well as the legal heirs of the person included in the group but deceased.³⁶ It seeks \$5,000 in punitive damages for each smoker plus compensation for specific damages,³⁷ for a total of \$17.8 billion.³⁸

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 Quebec Council on Tobacco and Health is seeking to compensate victims of cancers of the lung, larynx and throat as well as emphysema sufferers, as well as the legal heirs of deceased persons in the group. The class action suit is seeking \$5 billion in damages.³⁹

Ontario

Ragoonanan Estate v. Imperial Tobacco Ltd.: This class action dealt 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.”⁴⁰ 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.⁴¹ However, the class was denied certification on October 31, 2005 by Ontario Superior Court Judge Maurice Cullity.⁴²

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*⁴³, was filed. The lawsuit proposed to benefit millions of Ontario smokers and their families. The allegations were similar to those being leveled 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 motion to have the action certified was not accepted by the court. “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.”⁴⁴ There was an outstanding cost motion brought by the defendants, wherein the defendants were seeking \$1.2 million from the plaintiff's solicitors. That cost motion has been ruled on and the judge ruled that there were to be no costs awarded in the action.

British Columbia

Knight v. Imperial Tobacco⁴⁵: 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.⁴⁶ 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 Feb. 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 Feb. 2006, and judgement has been reserved. The federal government is also trying to be removed as a third party, but that likely won't be heard until a decision is reached on the appeal to decertify the class.

Individual product liability cases

Spasic (Ontario): On May 1, 1997, *Spasic v. Imperial Tobacco et al*⁴⁷ 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.*⁴⁸, 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.⁴⁹ 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.⁵⁰ 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.”⁵¹ Seibert said the *Spasic Estate v. BAT Industries plc* claim will likely eventually be combined with *Spasic v. Imperial Tobacco et al*. The latter case has since 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. Issues relating to a confidentiality order in the action remain outstanding.⁵²

McIntyre (Ontario): 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. 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 motion⁵³, 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 was 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.⁵⁴

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.”⁵⁵

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* is 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 the 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 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 constitutional right to freedom of expression according to the *Canadian Charter of Rights and Freedoms*. In December 2002, the Québec Superior Court dismissed the tobacco manufacturers' claims⁵⁶, but the industry appealed to the Québec Court of Appeal⁵⁷. The appeal was heard in November and December 2004. On August 22, 2005, the court handed down its judgement which upheld most of the federal law on tobacco advertising but eased some advertising restrictions. The Court ruled tobacco companies could associate their corporate names – not the names of specific brands – with sponsored events. The judges also ruled, in relation to s. 20 of the *Act*, that promoting a tobacco product by means “that are false, misleading or deceptive” is still illegal, but struck down as too vague the prohibition on other means “that are likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions.” Québec's high court nonetheless 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”. Health warning labelling provisions were unanimously upheld. On October 20, 2005, Health Minister Ujjal Dosanjh announced that the Government of Canada had asked for leave to appeal the Québec Court of Appeal decision. A Health Canada press release implied that their main concern was the ruling regarding the allowance of corporate branding at sponsored events. On March 23, 2006, the Supreme Court of Canada agreed to rule on the constitutionality of the *Act*. The appeal will be heard some time in 2006.

Rothmans, Benson & Hedges Inc. v. Saskatchewan⁵⁸

On March 11, 2002, Saskatchewan proclaimed precedent-setting legislation, the *Tobacco Control Act*⁵⁹, 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 rejected⁶⁰ 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 decision⁶¹, 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 ruled 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.⁶²

The legislation set a precedent that other provinces (including Manitoba⁶³, Nunavut, Prince Edward Island, Ontario and Québec), and, indeed, other countries around the world (Iceland, Thailand and Ireland⁶⁴), are now following or preparing 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)¹

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 complexity 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 customers of those facts.

On January 24, 2001, the government used the 2000 Act to file against the tobacco companies.⁶⁵ 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.⁶⁶

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.⁶⁷ 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.

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 heard the appeal in June 2005, and, in September 2005, the Court upheld the constitutionality of the legislation.

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

B.C. Liquor Licensees & Retailers Assn. v. British Columbia (Workers' Compensation Board)⁶⁸

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 smoke-free legislation in the country. But the regulations ignited a fiery protest from smokers and businesses that serve them.⁶⁹ Led by the Liquor Licensees and Retailers Association of B.C., an organization with tobacco industry ties⁷⁰, the Workers' Compensation Board was brought to court. Lawyers for the Liquor Licensees and Retailers Association successfully argued that the 100% 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.

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- ¹³ 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>
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