Tobacco-Related Litigation in Canada

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

March 2008

Introduction

Holding the tobacco industry accountable for illegal activity, whether through criminal charges or civil suits, serves a number of public health objectives:

- Litigation acts as a deterrent to prevent misconduct in the future;
- Litigation 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 tobacco consumption and prevalence;
- Litigation forces internal industry documents into the public domain, giving governments, the media and researchers a window into the workings of the industry.[1]

Increased knowledge of industry behaviour leads to the development of better public policy.

Civil actions against the tobacco industry are relatively new in Canada, although litigation to oppose 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, charging tobacco companies with criminal offences has not been used 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]

In Canada litigation against tobacco companies should be monitored and encouraged, as it has been proven to be effective in promoting public health objectives.

Canada Is Playing a leadership role

Canada is one of the riskiest countries in the world for cigarette manufacturers, in terms of their future financial viability. 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. In March 2008, New Brunswick became the second province in Canada to launch a health-care costs recover lawsuit against tobacco companies, using this type of legislation.

The litigation enabling legislation that these provinces have passed is so strong, some legal analysts suggest that it “stacks the deck” in favour of the provinces in a way that almost guarantees the provinces a successful outcome at trial. It has been estimated that tens, possibly hundreds, of billions of dollars are at stake. If the tobacco companies are eventually found guilty, and are forced by the courts to pay out damages, the potential exists to essentially bankrupt the companies due to the large sums of money involved.

If these lawsuits are eventually successful (it will take years before they actually get to trial), Canada will have Big Tobacco in a very financially precarious position.

Why Litigation in Canada Is So Important (The BAT Factor)

British American Tobacco (BAT) is the third largest tobacco company in the world.[4] Worldwide, Canada has been the largest single profit generator for BAT. Extremely high profit margins for cigarette companies are a Canadian anomaly. In the past, BAT, which is the parent company of Imperial Tobacco Canada (which has about half of the legal market in Canada), sold roughly 10 times as many cigarettes in Europe, as it did here. But BAT generated almost as much profit from its Canadian sales as from all its European sales in 2003. Profit margins were 8.8 times larger in Canada than in Europe.[5]

The Canadian cigarette market has been a virtual oligarchy for decades, with Imperial sitting on top. 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 of unusually high profits 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 litigation in Canada has a significant impact on tobacco company profits (particularly BAT's), this would leave Big Tobacco with less money to try to recruit new customers, to lobby against regulations, or to take governments to court.

The Importance of Litigation Against the Tobacco Industry

The Social Benefits of Tobacco Products Liability Suits

The tobacco product marketplace is riddled with significant anomalies. One of the most obvious is that the profit margin on cigarettes is much larger than on comparable consumer products. However, the use of tobacco products leads to massive third-party costs. The costs are borne by taxpayers through their governments, which fund the health care system, and by society at large, due to the lost productivity of citizens who become sick or die prematurely 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.
- Could motivate industry change.
- Unearths incriminating internal documents through discovery.
- Provides funding (from verdicts) that could be used to reimburse health-care costs.
- Could bankrupt the industry, if there were a sufficient number of cases and/or awards/settlements were large enough.[6]

Increasing the Cost of Tobacco Products

Smoking costs third parties over $17 billion in health care costs and lost productivity each year in Canada.[7] (This does not include the social costs, such as the impact on a family of losing the head of its household prematurely to a preventable tobacco-caused 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 2002 *Bullock* case in California , in which a jury awarded $28 billion to the plaintiff,[8] may motivate the industry to alter its behaviour. The industry could change its behaviour by: engaging in less deceptive marketing, ending its outrageous claims that second-hand smoke isn't harmful, making its lobbying practices more transparent. Concern about product liability awards is frequently cited by manufacturers of other products, for example, as reasons for including graphic warnings, altering product designs, or even withholding particularly dangerous products from the market. "Voluntary" changes to date by the industry have been modest and mostly cosmetic, but movement is noticeable.

Discovery of Industry Documents

Studies of industry misbehaviour within and outside Canada based on internal tobacco company documents have assisted tobacco control efforts around the world. Internal documents have been instrumental in persuading juries to focus on the industry's misdeeds. The availability of documents on-line and in depositories on tobacco company practices has helped make the industry a political pariah. The end result is better public policy, including more effective legislation and regulation to control the tobacco industry and protect the public from their products.

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 the companies to change their behaviour or make their products much less toxic and deadly.

A Summary of Tobacco-Related Litigation in Canada

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:

- 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 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]

(New!) In January 2006 Stanley Smith reached a deal with the Crown that will likely see him testify against the company and its executives. The judge said Smith is one of the finest tobacco smuggling informants in the world. Smith, a former executive of RJR-Macdonald, and former sales representative Les Thompson, have each filed breach of contract lawsuits against the company. The company has essentially abandoned them both, suggesting that they were rogue employees, acting on their own accord.

A preliminary inquiry into the criminal charges laid by the RCMP against JTI-Macdonald took place in a Toronto court throughout 2005 and into February 2006. In May 2007 a judge ruled there was enough evidence against JTI-Macdonald and its former president Edward Lang to bring the case to trial. However, Judge David Fairgrieves of the Ontario Superior Court of Justice cited “insufficient evidence” when he threw out charges against the other six accused. In November 2007 the Crown asked for a judicial review of that decision. Lang and JTI-Macdonald also asked for a review. Arguments were heard in December 2007. Also in December 2007, JTI-Macdonald Corp. abandoned its effort to have the order committing it to trail quashed.

On February 19, 2008, Ontario Superior Court Justice Ian Nordheimer reinstated the fraud and conspiracy charges against the other six accused—Dale Sisel, Jaap Uittenbogaard, Pierre Brunelle, Paul Neumann, Roland Kostantos and Peter MacGregor. Justice Nordheimer refused Mr. Lang’s request to quash the order committing him to trial.

As for when the matter will finally proceed to trail, it is scheduled to go to an assignment court on April 2, 2008.

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.

An agreement was reached by the parties involved to stay all proceedings in the case. The stay ends if notice is given by one of the parties that it wishes to do so. "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. (JTI-MC) 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-MC owes almost $1.4 billion in unpaid taxes, penalties and interest. The order was accompanied by an order to JTI-MC'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 Ac*t (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 Quebec Superior Court, 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, as summarized below:[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 (provinces only)	$5,279,631,667
TOTAL (federal govt & provinces)	$9,579,631,667

In the CCAA Proceedings, the Canadian government and some of the provincial governments have argued that they can make the same tax and related claims against the R.J. Reynolds Tobacco Company, whose parent company, Reynolds American Inc., was also the parent of RJR-Macdonald at the time its employees and executives were allegedly orchestrating the tobacco smuggling. In a 2007 report to the U.S. Securities and Exchange Commission, Reynolds American indicated that,: "To date, none of those provincial governments have filed and served RJR or any of its affiliates with a formal Statement of Claim like the Canadian federal government did in August and September 2003."

Due to JTI-MC'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 some or all 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 Canada. 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, since 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 U.S. 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 the 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*, was 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 were 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.

The Supreme Court decision did not signify the end of the efforts by the international tobacco companies to get out of the lawsuit. On February 1, 2006, the companies tried to get the lawsuit again thrown out, arguing that 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, a former B/C/ 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 virtually identical health care costs recovery legislation.

(New!) A September 2010 date has been set for the trial to begin.[29] The tobacco companies tried to enjoin the federal government with a Third Party Notice, but the court ruled against the companies, and it was thrown out. Trying to blame other entities for their wrongdoing has long been a strategy used by tobacco companies. This most recent attempt – motivate chiefly by selfish concerns – was not successful.

British Columbia could see a tremendous financial increase in any damages the tobacco companies are eventually made to pay due to an April 2007 decision by the Supreme Court of Canada. The Court ruled that it would not hear an appeal by the foreign parent and holding companies (of the original Canadian tobacco companies named as Defendants by the province), which argued that they should be excluded from the lawsuit. The foreign companies which were denied the exclusion are BAT Industries Plc and its subsidiary British American Tobacco (Investments) Ltd.; Reynolds American Inc.’s R.J. Reynolds Tobacco Co., as well as R.J. Reynolds Tobacco International, Inc; Altria Group Inc.’s Philip Morris International Inc. and Philip Morris Inc.; Carreras Rothmans Ltd.; and Ryesekks Plc.[30]

New Brunswick

Virtually identical to B.C.'s legislation, New Brunswick’s version of the *Tobacco Damages and Health-care Costs Recovery Act*[31] received Royal Assent on June 22, 2006.

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.[32]

(New!) On March 13, 2008, New Brunswick officially filed its lawsuit against the tobacco companies, becoming only the second province in Canada to do so. The government has retained a consortium of Canadian and American lawyers and law firms on a contingency fee basis, meaning the province will not pay any legal fees up front. If the lawsuit is eventually successful, the consortium will cover its costs and fees by taking a percentage (12%-22%) of the amounts received by the province as a result of the litigation.[33] [34]

Health Minister Michael Murphy explained the government's rationale for filing the lawsuit: "While we continue our efforts to keep people from smoking and helping those who do to quit, we will also work to ensure that tobacco companies are made liable for the damage to the health of New Brunswickers, and the financial burden put on taxpayers for health-care costs. That is something this government is committed to."[35]

Attorney General T.J. Burke added: "Tobacco companies must be held accountable, and we intend to be at the forefront of doing just that. With proclamation of the legislation, we are now moving ahead aggressively with the lawsuit."[36]

Newfoundland & Labrador

On May 24, 2001 the Newfoundland & Labrador government passed the *Tobacco Health Care Costs Recovery Act*,[37] which permits the government to sue tobacco companies for the cost of treating smoking-related illnesses, estimated to be $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, the government referred the constitutionality of the Act to the Supreme Court of Newfoundland and Labrador (Court of Appeal) in October 2002.[38] British Columbia and Saskatchewan intervened in support of the Newfoundland and Labrador legislation. Imperial Tobacco Canada Ltd., Rothmans, Benson & Hedges Inc. and JTI-Macdonald Corp. intervened to oppose the validity of the legislation. However, the reference case will not be heard because the issue was resolved by the Supreme Court of Canada when it ruled in favour of the B.C. legislation.

Nova Scotia

On December 8, 2005, Nova Scotia's Bill 222, the *Tobacco Damages and Health-care Costs Recovery Act*,[39] received Royal Assent. It is virtually identical to B.C.'s legislation.

Manitoba

The *Tobacco Damages and Health Care Costs Recovery Act*[40] received first reading on March 16, 2006 and 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, Saskatchewan *The Tobacco Damages and Health Care Costs Recovery Act*[41] on November 21, 2006. The Act received Royal Assent on April 26, 2007.

Québec

In June 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.[42] 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.[43]

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. To date, the Government of Ontario has refused to do so.[44]

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.[45] "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.[46]

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.[47]

Seeking reimbursement for money spent on defective products is a tactic used successfully in *Susan Miles, et al. v. Philip Morris, Inc.*,[48] a landmark American consumer fraud class action case, filed in 2000. Philip Morris was 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 i.e. 'light' cigarettes, which smokers purchased because they thought they were healthier than regular cigarettes. The Illinois Supreme Court decertified the class action in 2005. The fact it was overturned in the U.S. does not prevent courts in a different jurisdiction, such as Canada, from awarding large sums of money related to wrongs committed by companies here.

(New!) As it also did in the Knight class action (see below), Imperial Tobacco Canada has filed a third party notice against the federal government in the Sparkes action. Imperial argues that the federal government played a role in the ‘light’ and ‘mild’ consumer fraud by encouraging consumers to consider choosing brands of cigarettes with lower deliveries of tar and nicotine and by encouraging the tobacco industry to develop and promote these products. The Sparkes class action has not yet been certified, but a certification hearing took place in September 2007 and a decision by the case management judge is expected soon.

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 have liked the trial to begin in 2007, while the tobacco companies are trying to postpone it to at least 2009. In its preliminary announcement to shareholders reporting on year-end results for 2007, British American Tobacco said: "This litigation is expected to take several years to proceed to trial."[49] When the class actions eventually do make it to trial, they will be heard in Québec Superior Court in Montreal. The judge who will hear the cases was to have been Carole Julien, but that has now changed to Brian Riordan.

(New!) In order to facilitate the class actions proceeding to trial, a case management team, involving all the lawyers in the case, is meeting almost every month. However, it appears as though the tobacco company lawyers are attempting to put up as many legal roadblocks as possible. To date, representatives from the Létourneau and the Conseil québécois class have been asked thousands of questions on-the-record by the tobacco company lawyers. Soon lawyers representing Létourneau and the Conseil québécois hope to be able to question the tobacco company executives (or their representatives). Before that can happen though, the tobacco company lawyers have requested that the judge order the Plaintiffs to identify the documents about which questions would pertain. As of the time of writing, the judge had not yet rendered his decision on the matter.

Cécilia Létourneau v. JTI-Macdonald Corp., Imperial Tobacco Canada Ltée and Rothmans, Benson & Hedges Inc.[50]**:** Christine Fortin and Joseph Mandelan, both of Montreal, along with Cécilia Létourneau of Rimouski, say cigarette manufacturers have known for decades that their products are harmful and addictive. In 1998 lawyers from the law firm Trudel & Johnson representing the three smokers 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 10, 1999), were addicted to the nicotine in cigarettes manufactured by the respondents and who remain addicted; and the legal heirs of persons included in the group at the time of service of the motion but who later died without first quitting smoking.[51] The claim seeks $5,000 for each person included in the group plus compensation for specific damages,[52] for a total of $17.8 billion.[53]

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 and for 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.[54]

Ragoonanan Estate v. Imperial Tobacco Canada Ltd.

This class action deals 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.[55] The claim alleges that the injuries, death and property loss suffered in the fire could have been avoided or reduced if the defendants' cigarettes had been fire-safe. The claims against RBH and JTI-Macdonald were dismissed, as they had no immediate connection to the fire at issue (the cigarette was made by Imperial Tobacco Canada). The plaintiffs are attempting to have the suit certified as a class action which would have included relatives of victims of other cigarette-caused fires. The claims in the case include a breach of the company's duty to produce a safe product and of their duty to warn of hazards of their products.[56] The class was denied certification on October 31, 2005 by Ontario Superior Court Judge Maurice Cullity.[57]

(New!) The decision to disallow certification of the Class was appealed by the Plaintiffs on January 28 and 29, 2008 and judgment is awaited.[58]

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*,[59] 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. Superior Court Justice Warren Winkler ruled that the suit was too broad and did not meet the requirements for certification.[60]

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 as it involved 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 [be] 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.[61]

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.[62] 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. Knight is also seeking a refund for all the money he and any other members of the class paid to purchase the allegedly misrepresented cigarettes. The law firm estimates that compensation and damages could run into the hundreds of millions of dollars. The B.C. advocacy group 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 reimburse Imperial any amount that the plaintiff is ordered to pay.[63]

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 up to the opt-out date set by the Court.[64] The new judgment effectively reduced the Class Period to 1997 (from 1974) until trial, reducing by 23 years the period from which potential claimants could be drawn.[65] This significantly reduces the potential damages payable should any of the defendants be found guilty.

In addition to its opposition to class certification, the federal government tried to be removed as a third party. Health Canada's chances of being removed were increased by the B.C. Court of Appeal, which limited the Class Period from 1997 until trial. The federal *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. Furthermore, 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."[66]

(New!) In July 2007 the federal government's motion to strike out the third party notice issued against them by Imperial was granted.[67] However, it is under appeal by Imperial.[68] As of March 2008, no date to hear that appeal had been set.

Individual Product Liability Cases

Spasic

On May 1, 1997, *Spasic v. Imperial Tobacco et al*[69] was filed against Imperial Tobacco and Rothmans, Benson & Hedges for millions of dollar in damages. A second suit, *Spasic Estate v. B.A.T. Industries p.l.c.*[70], 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.[71]

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 their tortious actions.[72]

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 the small community of Milton, Ontario. The case continues to inch closer to trial at the Superior Court of Justice in Toronto.

(New!) The Plaintiffs brought a motion which was heard October 25, 2006 to compel the Defendants to serve sworn affidavits of documents and to approve a confidentiality order. The Court granted the order sought by the Plaintiff and the Defendants have provided lists of documents disclosing relevant evidence that are currently and were previously in their possession.

The next case conference in the action is scheduled for April 2008 to deal with a number of pre-trial matters.

McIntyre

Following the 1999 lung cancer death of her husband, Ronald at age 63, 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,[73] 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 and denied ITL's request for intervener status.

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.[74]

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 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 further 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."[75]

Industry Suits Against Governments

The Industry's Challenge to Canada's Tobacco Act

The *Tobacco Act*[76] 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 mandate 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.—argued the highly successful warnings constitute an unjustified expropriation of their trademarks. The industry also claimed 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,[77] but the industry appealed to the Québec Court of Appeal.[78] On August 22, 2005, the court handed down its judgment, which upheld the vast majority of the law but eased some advertising restrictions.[79] 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.

Specifically, in striking down section 18(2)(a), the Court ruled that the prohibition on promotion does not include the financing by tobacco manufacturers and retailers of scientific works that refer to a tobacco product or a brand element. The Court of Appeal also struck down the prohibition in Section 20 on promotion that "is likely to create an erroneous impression about" the characteristics or health effect of a tobacco product on the grounds that the phrase is vague and overly broad. The Court believes that the prohibition on promotion by means that are false, misleading or deceptive is sufficient. With regard to sections 24, 25, it ruled tobacco companies could associate their corporate names with sponsored events – as long as the corporate names do not 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.[80]

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 suspected that the tobacco industry didn't want the matter to go before the Supreme Court because the companies privately believed that they could 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 to the contrary. 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 in total, 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 a total advertising ban was required, not just for the protection of young non-smokers, but for people already addicted to the nicotine in cigarettes. Cigarettes are 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.

(New!) On June 28, 2007 the Supreme Court unanimously (9-0) upheld the federal *Tobacco Act* in its entirety, including the regulations requiring the graphic, picture-based health warnings on cigarette packages.

Rothmans, Benson & Hedges Inc. v. Saskatchewan

On March 11, 2002, Saskatchewan proclaimed precedent-setting legislation, the *Tobacco Control Act*[81], which banned tobacco product displays in retail stores accessible to minors under 18. Most retailers 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 rejected RBH's legal challenge,[82] 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.[83] 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, fittingly onWeedless Wednesday, the Supreme Court ruled unanimously in favour of Saskatchewan. It found that provinces can ban powerwalls, because it is not inconsistent with the overall intent 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.[84]

The legislation set a precedent that other provinces and territories (including Manitoba, Nunavut, Prince Edward Island, Northwest Territories, Nova Scotia, British Columbia, Ontario, Québec, Alberta, New Brunswick and the Yukon), and, indeed, other countries around the world (Thailand and Ireland[85]), are now following or preparing to follow.

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 rendered its decision regarding the validity of the *Tobacco Act*. On November 20, 2006, Justice Hélène Le Bel dismissed Grey's motion for an injunction.

(New!) A trial date for the bar owners' constitutional challenge of the *Tobacco Act* has been scheduled for May 2009.

B.C. Liquor Licensees & Retailers Assn. v. British Columbia (Workers' Compensation Board)[86]

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.[87] Led by the B.C. Liquor Licensees and Retailers Association, an organization with tobacco industry ties,[88] the WCB 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 WCB, overturning the smoke-free policy after being in place only three months.

In April 2000, WCB published a new draft second-hand smoke Regulation for public hearings. This draft Regulation removed the partial exemption for public entertainment and long-term residential care and provincial correctional facilities, but also provided for the development of designated smoking rooms (DSRs) that workers could enter only in specified circumstances

On May 1, 2002, the Regulations come into effect requiring employers in public entertainment facilities (including restaurants, bars, pubs, lounges, nightclubs, bingo halls, bowling alleys, and gambling casinos) to control workers' exposure to second-hand smoke by either prohibiting smoking in the workplace, or restricting smoking to separately structured and ventilated DSRs. Workers in the hospitality industry have the right to choose whether to enter a DSR and may not be discriminated against for choosing not to enter a DSR. The Regulation requires that there be only intermittent exposure to second-hand smoke and workers who choose to work in the DSR must not exceed 20% of their work shift.

References

[1] Collishaw N. “From Montreal to Minnesota: Following the Trail of Imperial Tobacco's Documents.” Physicians for a Smoke-Free Canada. September 1999. P. 2. www.smoke-free.ca/pdf_1/MONTMINNnov1.pdf. Accessed 28 March 2008.

[2] *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. http://scc.lexum.umontreal.ca/en/1995/1995rcs3-199/1995rcs3-199.html. Accessed 28 March 2008.

[3] Royal Canadian Mounted Police. “RCMP Lays Criminal Charges Against Canadian Tobacco Company.” Press Release. 28 February 2003.

[4] The China National Tobacco Corporation, which is government-owned, is No. 1 and Philip Morris International is No. 2.

[5] Thompson F. “Discount cigarettes and other cheap tobacco products.” Non-Smokers' Rights Association. 17 May 2004. www.nsra-adnf.ca/cms/index.cfm?group_id=1342. Accessed 28 March 2008.

[6] Tobacco Control Resource Centre, Inc. “Types and Uses of Tobacco Litigation.” PowerPoint Presentation. Slides 27-33. http://tc.bmjjournals.com/content/vol11/issue3/images/data/DC1/TCRC.zip. Accessed 28 March 2008.

[7] Rehm et al. “The Costs of Substance Abuse in Canada 2002.” Canadian Centre on Substance Abuse. March 2006. www.ccsa.ca/NR/rdonlyres/18F3415E-2CAC-4D21-86E2-CEE549EC47A9/0/ccsa0113322006.pdf. Accessed 28 March 2008.

[8] *Note: A judge later reduced the award to $28 million. “Tobacco Lawsuit Award Slashed.” CBSNEWS.com. 19 December 2002. www.cbsnews.com/stories/2002/10/04/national/main524400.shtml. Accessed 28 March 2008.

[9] Royal Canadian Mounted Police. “RCMP Lays Criminal Charges Against Canadian Tobacco Company.” Press Release. 28 February 2003.

[10] Ibid.

[11] Department of Justice Canada. “Government of Canada Announces Legal Action Against Tobacco Companies.” Press Release. 13 August 2003. www.justice.gc.ca/en/news/nr/2003/doc_30962.html. Accessed 28 March 2008.

[12] Reynolds American Inc. “Form 10-K.” 27 February 2007. Notes to Consolidated Financial Statements. EX-99.1, Miscellaneous Exhibit. P. 55. www.secinfo.com/dsVsf.u1Jq.t.htm. Accessed 28 March 2008.

[13] Companies' Creditors Arrangement Act. http://laws.justice.gc.ca/en/c-36/35512.html. Accessed 28 March 2008.

[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. Accessed 28 March 2008.

[15] Reynolds American Inc. “Form 10-K.” 27 February 2007. Notes to Consolidated Financial Statements. EX-99.1, Miscellaneous Exhibit. P. 55. www.secinfo.com/dsVsf.u1Jq.t.htm. Accessed 28 March 2008.

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

[17] Eighth Report of the Monitor, In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended and in the matter of JTI-Macdonald Corp., Ontario Superior Court of Justice. Court File No. 04 CL 5530. 12 July 2005. www.blgcanada.com/jti/documents/Eighth%20Report_final_Jul12-05.pdf. Accessed 28 March 2008.

References Continued

[18] Cherry P. “Imperial Tobacco accused of smuggling: $607 million in taxes withheld: RCMP affidavit.” *The Gazette* (Montreal). 15 December, 2004.

[19] Imperial Tobacco Canada. “Imperial Tobacco Canada cooperates with RCMP.” Press release. 26 November 2004. www.cnw.ca/fr/releases/archive/November2004/26/c8301.html.

[20] Rothmans Inc. “Notes to Consolidated Financial Statements.” Annual Report 2004. P. 55. www.rothmansinc.ca/English/2004/AnnReport/15_Notes.pdf. Accessed 28 March 2008.

[21] Smith Barney (a division of Citigroup Global Markets Inc.). “The Simple Guide to Litigation – June 2004.”

[22] Meldrum H. “Big Tobacco Big Responsibilities: The Basic Principles of Civil and Criminal Liability for Canadian Corporations.” Prepared for Physicians for a Smoke-Free Canada. 2002. p. 43.

[23] Government of British Columbia. *Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000.*,Received Royal Assent on July 6, 2000. www.qp.gov.bc.ca/statreg/stat/T/00030_01.htm. Accessed 28 March 2008.

[24] Ibid.

[25] *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398. Court file No. CA033179-CA033188. 15 September 2006. www.courts.gov.bc.ca/jdb-txt/ca/06/03/2006bcca0398.htm. Accessed 28 March 2008.

[26] Meissner D. “B.C. plans $10-billion tobacco lawsuit after appeal court upholds law.” Canadian Press. 20 May 2004. www.medbroadcast.com/health_news_details.asp?news_id=4117&news_channel_id=1004. Accessed 28 March 2008.

[27] Spielman A, Schaeufele N. “Canadian Court WILL hear appeal on Critical Case.” A report by Smith Barney (a division of Citigroup Global Markets Inc.). 16 December 2004.

[28] Meissner D. “B.C. plans $10-billion tobacco lawsuit after appeal court upholds law.” Canadian Press. 20 May 2004. www.medbroadcast.com/health_news_details.asp?news_id=4117&news_channel_id=1004. Accessed 28 March 2008.

[29] British American Tobacco. “Preliminary Announcement – Year Ended 31 December 2007.” p. 34. 28 February 2008. www.bat.com/group/sites/uk__3mnfen.nsf/vwPagesWebLive/DO7C8SXJ/$FILE/medMD7C8UNP.pdf?openelement. Accessed 17 March 2008.

[30] Randall P. “Canada refuses foreign tobacco appeal on lawsuit.” Reuters. 5 April 2007. www.reuters.com/article/consumerproducts-SP/idUSN0541508920070405. Accessed 26 March 2008.

[31] New Brunswick. *Tobacco Damages and Health-care Costs Recovery Act*. www.gnb.ca/legis/bill/pdf/55/3/Bill-05.pdf. Accessed 28 March 2008.

[32] Bissett K, Canadian Press. “N.B. pushes ahead with tobacco suit.” *The Brantford Expositor*. 22 December 2006. p. A11.

[33] Government of New Brunswick. “Lawyers retained for tobacco lawsuit.” Press release. 12 September 2007. www.gnb.ca/cnb/news/jus/2007e1138ju.htm. Accessed 17 March 2008.

[34] Government of New Brunswick. “Province files lawsuit against the tobacco industry.” Press release. 8 March 2008. http://www.gnb.ca/cnb/news/he/2008e0305he.htm. Accessed 17 March 2008.

[35] Ibid.

[36] Ibid.

[37] Government of Newfoundland & Labrador. *Tobacco Health Care Costs Recovery Act*, received

References Continued

Royal Assent on May 24, 2001. http://assembly.nl.ca/Legislation/sr/statutes/t04-2.htm. Accessed 28 March 2008.

[38] Government of Newfoundland & Labrador. "Government announces next steps with tobacco litigation." Department of Justice. Press release. 18 October 2002. www.gov.nl.ca/releases/2002/just/1018n01.htm. Accessed 28 March 2008.

[39] Nova Scotia. *Tobacco Damages and Health-care Costs Recovery Act*. www.gov.ns.ca/legislature/legc/bills/59th_1st/3rd_read/b222.htm. Accessed 28 March 2008.

[40] Government of Manitoba. *Tobacco Damages and Health Care Costs Recovery Act* http://web2.gov.mb.ca/laws/statutes/2006/c01806e.php. Accessed 28 March 2008.

[41] Government of Saskatchewan. *The Tobacco Damages and Health Care Cost Recovery Act.* http://www.publications.gov.sk.ca/details.cfm?p=23236. Accessed 28 March 2008.

[42] Norwegian Agency for Health and Social Welfare, Department for tobacco control. "Tobacco Litigation Worldwide." Section 3.1, "Background on Tobacco Liability Lawsuits in Canada." Section 3.1 authored by: Rob Cunningham, Canadian Cancer Society. 16 October 2001. p. 40. http://shdir.no/vp/multimedia/archive/00001/IS-1004_1701a.pdf. Accessed 28 March 2008. Accessed 28 March 2008.

[43] Explanatory Note, Legislation Assembly of Ontario website. Accessed 28 March 2006. [No longer available online]

[44] Non-Smokers' Rights Association. "More than 100 public health officials and Medical Officers of Health urge Ontario to sue Big Tobacco." Press release. 19 June 2006. www.nsra-adnf.ca/cms/index.cfm?group_id=1444. Accessed 17 March 2008.

[45] *Victor Todd Sparkes v. Imperial Tobacco Canada Limited*. Amended Statement of Claim. 29 November 2004. www.chescrosbie.com/files/light%20cigaretts/lc_amended_statement_of_claim.pdf. Accessed 28 March 2008.

[46] Canadian Press. "Class-action lawsuit filed against Imperial Tobacco." 20 July 2004. www.tobacco.org/articles/lawsuit/sparkes/. Accessed 28 March 2008.

[47] Canadian Press. "Lawsuit filed in Nfld. against tobacco company." 20 July 2004. www.ctv.ca/servlet/ArticleNews/story/CTVNews/1090359397268_11. Accessed 28 March 2008.

[48] *Susan Miles, et al. v. Philip Morris, Inc.* http://tobacco.neu.edu/litigation/cases/supportdocs/miles_decision.htm. Accessed 28 March 2008.

[49] British American Tobacco. "Preliminary Announcement – Year Ended 31 December 2007." 28 February 2008. P. 35. www.bat.com/group/sites/uk__3mnfen.nsf/vwPagesWebLive/DO7C8SXJ/$FILE/medMD7C8UNP.pdf?openelement. Accessed 12 March 2008.

[50] *Cécilia Létourneau v. JTI-Macdonald Corp., Imperial Tobacco Canada Ltée and Rothmans, Benson & Hedges Inc.* Court File No. 500-06-000076-983.

[51] Quebec Superior Court. Notice to Members. *Cécilia Létourneau v. JTI-Macdonald Corp., Imperial Tobacco Canada Ltée and Rothmans, Benson & Hedges Inc.*, Court File No. 500-06-000076-983. 21 February 2004. www.trudeljohnston.com/en/tabac/notice_to_members.pdf. Accessed 28 March 2008.

[52] Canadian Press. "Three plan $11.5-billion lawsuit against tobacco firms." 11 September 1998. http://lists.essential.org/1998/intl-tobacco/msg00145.html. Accessed 28 March 2008.

[53] Rothmans Inc. "Renewal Annual Information Form: For the period ended March 31, 2006." p. 20.

[54] Ibid.

[55] *Ragoonanan v. Imperial Tobacco et al*, (2000) Superior Court of Justice, Ontario. No. 4597. www.canlii.org/en/on/onsc/doc/2005/2005canlii5861/2005canlii5861.pdf. Accessed 28 March 2008.

References Continued

[56] Meldrum H. “Big Tobacco Big Responsibilities: The Basic Principles of Civil and Criminal Liability for Canadian Corporations.” Prepared for Physicians for a Smoke-Free Canada in 2002. p. 43.

[57] Imperial Tobacco Canada. “Another Tobacco Class Action Denied Certification.” Press release. 31 October 2005.

[58] British American Tobacco. “Preliminary Announcement – Year Ended 31 December 2007.” 28 February 2008. p. 35. www.bat.com/group/sites/uk__3mnfen.nsf/vwPagesWebLive/DO7C8SXJ/$FILE/medMD7C8UNP.pdf?openelement. Accessed 10 March 2008.

[59] *Caputo v. Imperial Tobacco et al* [1995]. Amended Statement of Claim. http://sommersandroth.com/cases-caputo-soc-amend.htm. Accessed 28 March 2008.

[60] Brautigam T. “Class action lawsuit against cigarette companies thrown out of court.” Canadian Press. 5 February 2004. http://lists.essential.org/pipermail/intl-tobacco/2004q1/001031.html. Accessed 28 March 2008.

[61] Sommers & Roth. “Tobacco Litigation.” www.sommersandroth.com/tobacco-litigation.htm. Accessed on 22 March 2007.

[62] *Knight v. Imperial Tobacco*. Class Action Statement of Claim. 8 May 2003. www.kleinlyons.com/class/light_cigs/sofc.pdf. Accessed 28 March 2008.

[63] Imperial Tobacco Canada. “Interim Financial Statements, Second Quarter Report.” 30 June 2004.

[64] Note: July 5, 1974, being the proclamation into force of the *Trade Practice Act*, R.S.B.C. 1996, C. 457.

[65] Court of Appeal for British Columbia. *Knight v. Imperial Tobacco Canada Limited*, 2006 BCCA 235. 11 May 2006. www.courts.gov.bc.ca/jdb-txt/ca/06/02/2006bcca0235.htm. Accessed 28 March 2008.

[66] *Tobacco Act*. Section 16. http://laws.justice.gc.ca/en/showtdm/cs/T-11.5. Accessed 28 March 2008.

[67] *Knight v. Imperial Tobacco Canada Limited*. Supreme Court of British Columbia, Docket: L031300. Registry: Vancouver. 3 July 2007. “Decision of Madam Justice Satanove dismissing third party claim by Imperial Tobacco Canada Ltd. against the Federal Government.” www.kleinlyons.com/class/light_cigs/cdocs.php. Accessed 10 March 2008.

[68] British American Tobacco. “Preliminary Announcement – Year Ended 31 December 2007.” Press release. 28 February 2008. www.bat.com/group/sites/uk__3mnfen.nsf/vwPagesWebLive/DO7C8SXJ/$FILE/medMD7C8UNP.pdf?openelement. Accessed 10 March 2008.

[69] *Spasic v. Imperial Tobacco et al*. Amended Statement of Claim. Ontario Court (General Division), Court File No: C17773/97. 1 May 1997. www.sommersandroth.com/cases-spasic-soc-amend.htm. Accessed 10 March 2008.

[70] *Spasic Estate v. B.A.T. Industries p.l.c.* Statement of Claim. www.sommersandroth.com/cases-spasic-bat-soc.htm. Accessed 28 March 2008.

[71] Sibbald B. “Will litigation become part of public health arsenal in Canada's war on smoking?” *Canadian Medical Association Journal*. 30 May 2000; 162 (11). www.cmaj.ca/cgi/content/full/162/11/1608. Accessed 28 March 2008.

[72] Meldrum H. “Big Tobacco Big Responsibilities: The Basic Principles of Civil and Criminal Liability for Canadian Corporations.” Prepared for Physicians for a Smoke-Free Canada in 2002. p. 44.

[73] Drummie G. “Tobacco suit a go: Judge.” *Toronto Sun*. 3 March 2001. http://lists.essential.org/pipermail/intl-tobacco/2001q1/000430.html. Accessed 28 March 2008.

References Continued

[74] *McIntyre (Estate) v. Ontario (Attorney General)*. Ontario Court of Appeal. Court File No. C36074. 10 September 2002. www.canlii.org/en/on/onca/doc/2002/2002canlii45046/2002canlii45046.pdf. Accessed 28 March 2008.

[75] *Stright v. Imperial Tobacco Company Ltd.* Supreme Court of Nova Scotia. Court File No. 177663. 5 September 2002

[76] Government of Canada. *Tobacco Act* (1997, c. 13). http://laws.justice.gc.ca/en/showtdm/cs/T-11.5. Accessed 28 March 2008.

[77] *JTI Macdonald v. Attorney General of Canada*, Québec Superior Court. 13 December 2002. www.jugements.qc.ca/php/decision.php?liste=28588631&doc=0C5E565646011D0B. Accessed 28 March 2008.

[78] Canadian Cancer Society. "Quebec Court of Appeal to Hear Key Tobacco Case Starting Monday, November 29." Press release. 25 November 2004.

[79] *JTI Macdonald v. Attorney General of Canada*, Québec Court of Appeal. 22 August 2005. Unofficial English Translation. http://www.canlii.org/en/qc/qcca/doc/2005/2005qcca726/2005qcca726.pdf. Accessed 28 March 2008.

[80] Health Canada. "Minister Dosanjh announces that the Government of Canada seeks leave to appeal in constitutional challenge of the *Tobacco Act*." Press release. 20 October 2005. www.hc-sc.gc.ca/ahc-asc/media/nr-cp/2005/2005_111_e.html. Accessed 28 March 2008.

[81] Government of Saskatchewan. *The Tobacco Control Act*, Chapter 1-14.1 of the *Statutes of Saskatchewan, 2001*. www.qp.gov.sk.ca/documents/english/Statutes/Statutes/t14-1.pdf. Accessed 28 March 2008.

[82] *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2002] S.J. No. 541 (SCQB). www.lawsociety.sk.ca/dbtw-wpd/exec/dbtwpub.dll?AC=GET_RECORD&XC=/dbtw-wpd/exec/dbtwpub.dll&BU=http%3A%2F%2Fwww.lawsociety.sk.ca%2Fnewlook%2FLibrary%2Ffulltextnew.htm&TN=fulltext&SN=AUTO23276&SE=329&RN=0&MR=20&RF=fullNew3P&DF=fullLongNew2P&RL=0&DL=0&NP=3&ID=&MF=WPENGMSG.INI&MQ=&TI=0. Accessed 28 March 2008.

[83] Ibid.

[84] Government of Saskatchewan. "Supreme Court upholds tobacco law." Press release. 19 January 2005. www.gov.sk.ca/news?newsId=d508f93f-4614-4442-89ea-f4f1f5e6f71e. Accessed 28 March 2008.

[85] *Public Health (Tobacco) Bill, 2001*, Initiated as: *Number* 46 of 2001, Parliament of Ireland. www.gov.ie/bills28/bills/2001/4601/default.htm. Accessed 28 March 2008.

[86] B.C. Liquor Licensees & Retailers Association (and Kevin Pugh). v. British Columbia (Workers' Compensation Board), (2000) 5 W.W.R. 575, 74 B.C.L.R. (3d) 319, 21 Admin L.R. (3d) 153, 2000 B.C.S.C. 505, March 22, 2000, Vancouver L000212 (Stromberg-Stein J.).

[87] Moore D. "Public hearings on B.C. tobacco ban begins." Canadian Press. 9 June 2000.

[88] J Drope, S Glantz. "British Columbia capital regional district 100% smokefree bylaw: a successful public health campaign despite industry opposition." *Tobacco Control* 2003; 12: 264-268.