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Litigation against the Tobacco Industry: Monitoring Update

What is the Issue?

Litigation against the tobacco industry is any attempt to challenge the tobacco industry through judicial process. The legal challenge may consist of criminal charges or civil action. Claimants can be individual persons, groups suffering a common harm (class action) or third parties (e.g., governments, non-governmental organizations, insurance companies or unions). Claims against the tobacco industry have included health harms (nicotine addiction or illness), wrongful death, healthcare costs (money spent treating those who get sick from tobacco products), involvement in smuggling, racketeering, conspiracy, defective product, concealment of scientific evidence, fraud, deception, misconduct, failure to warn consumers adequately of the dangers of tobacco products, negligence and exposure of the public to unreasonable danger.

KEY FINDING:

Healthcare cost recovery lawsuits against the tobacco industry have been filed by 9 provincial governments, including Ontario.

Litigation and Public Health

Litigation against the tobacco industry has the potential to yield public health benefits (Collishaw 2010). For example, disclosure of damaging internal documents (Hammond et al. 2009; SHAF/NSRA 2009) provides information on how the tobacco industry behaves, which in turn can be used for the benefit of tobacco control. Monetary awards for plaintiffs can be put towards tobacco control. Large awards have the potential to bankrupt or enfeeble the tobacco industry. Through litigation, the tobacco industry can be forced to reform its behaviour. The Tobacco Strategy Advisory Group (TSAG 2010, p. 41) recommends that the Ontario government identify public health provisions that should be included in a judgment or settlement resulting from tobacco industry litigation. Trial publicity has an educational component, informing the public about the health effects of tobacco use and tobacco industry behaviour. Litigation encourages smoke-free policies, e.g., in India and Uganda.¹ Litigation can cause the price of tobacco

¹ Litigation by non-governmental organizations in India and Uganda produced judicial orders requiring smoke-free public places (Daynard 2003).

products to increase as a by-product of payment of damages. In 2010, 76% of Ontario adults said tobacco companies are responsible for the smoking-related health problems of smokers.²

Healthcare Cost Recovery Legislation

The purpose of healthcare cost recovery legislation is to clarify the rights of parties involved and procedures to be followed when an action proceeds. For example, the Ontario 2009 *Tobacco Damages and Health Care Costs Recovery Act* provides that the province may sue tobacco companies directly for alleged wrongdoing and to recover damages going back several decades. The Ontario legislation outlines statistical methods for determining the cost of damages incurred by taxpayers and the burden of proof required to link exposure to tobacco products to tobacco-related disease. It provides a formula for determining market share so that liability among tobacco companies can be allocated accordingly. Ten Canadian provinces and two Canadian territories (Northwest Territories and Nunavut) have enacted tobacco healthcare cost recovery legislation (Table 1). Beyond Canada, tobacco health care cost recovery legislation appears to be rare. In the United States, it has been adopted in Florida and Massachusetts.

Canada

As shown in Table 1, healthcare cost recovery lawsuits against the tobacco industry have been filed by the governments of British Columbia (2001), New Brunswick (2008), Ontario (2009), Newfoundland and Labrador (2011), Alberta (2012), Saskatchewan (2012), Manitoba (2012), Quebec (2012) and Prince Edward Island (2012). Ontario is seeking \$50 billion, while Quebec is seeking \$60 billion. The governments of Nova Scotia and Nunavut have each announced their intention to file a healthcare cost recovery lawsuit.

On July 29, 2011, the Supreme Court of Canada, in a unanimous judgment, stated that the tobacco industry could not name the federal government as a third party in the B.C. healthcare cost recovery litigation. The tobacco industry's argument (dismissed by the Supreme Court) was that if the industry should lose and be ordered to pay damages, then the tobacco industry should be able to try and force the federal government as a "third party" to reimburse the industry for all or part of the damages payable.

² 2010 CAMH Monitor Survey, analysis by OTRU.

Table 1: Healthcare Cost Recovery Legislation and Litigation against the Tobacco Industry, by Canadian Provincial and Territorial Jurisdiction, as of June 22, 2012

Jurisdiction	Year Healthcare Cost Recovery Legislation Adopted	Year Lawsuit Filed	Amount Sought in \$CDN, if Known	Comments
British Columbia	2000	2001	unspecified [sometimes cited as potentially \$10 billion] ^a	<p>BC healthcare cost recovery legislation, modeled after a Florida law, was adopted in 2000 and proclaimed in 2001. The legislation was challenged by the tobacco industry, but on Sep 29, 2005, the Supreme Court of Canada declared it to be constitutional. The BC lawsuit was filed in 2001 against Imperial Tobacco Canada Ltd., JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc. and the Canadian Tobacco Manufacturers' Council as well as foreign cigarette makers British American Tobacco Ltd., Philip Morris Inc. and RJ Reynolds Tobacco Co. Lawsuits subsequently filed by other provinces would have similar defendants.</p> <p>In the BC lawsuit, the courts have dismissed an attempt by foreign parent companies to be removed as defendants. In a separate issue, on July 29, 2011, the Supreme Court of Canada dismissed a tobacco industry attempt to force the federal government to reimburse the industry for damages payable should the industry lose.</p>
Newfoundland and Labrador	2001	2011	unspecified	The NL government filed its lawsuit on February 8, 2011. As part of the case, the foreign parent companies have brought a motion to attempt to be removed as defendants.
Nova Scotia	2005	Pending		In June 2011, the NS government announced its intention to file a healthcare cost recovery lawsuit against the tobacco industry, and to join forces with the MB government in this pursuit by retaining the same lawyers.
Manitoba	2006	2012		The MB government filed its lawsuit on May 31, 2012.
New Brunswick	2006	2008	unspecified [sometimes cited as potentially \$10 billion] ^b	In NB, the courts dismissed an attempt by the tobacco industry to challenge the contingency fee arrangement that the NB government had with its lawyers. The courts have also dismissed an attempt by the foreign parent companies to be removed as defendants. Also, in Jan. 2012, the NB Court of Queen's Bench dismissed an attempt by the tobacco industry to name as third party defendants some tobacco manufacturers that are located on First Nations reserves and that supply contraband.
Saskatchewan	2007	2012		The SK government filed its lawsuit in June 2012.
Ontario	2009	2009	\$50 billion	ON had preliminary healthcare cost recovery legislation in 2000, but in 2009 more detailed healthcare cost recovery legislation came into force. The ON healthcare cost recovery lawsuit filed in the ON Superior Court of Justice is against Imperial Tobacco Canada Ltd., JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., the Canadian Tobacco Manufacturers' Council and others, including foreign parent companies, to recover the cost of treating tobacco-related illnesses going back to 1955. The ON government alleges that the tobacco industry has long known that cigarettes were addictive and that active and passive smoking cause disease, but did little to mitigate the risk; conspired to mislead the public about the dangers of tobacco products and to make those products more addictive; suppressed evidence of risk; failed to help prevent adolescent smoking and countered public education campaigns against smoking. A motion by foreign parent companies to be removed as defendants was dismissed by the Ontario Superior Court in January 2012; the issue is under appeal to the Ontario Court of Appeal. In the ON case, in an issue not yet determined, the tobacco industry is pursuing as third party defendants some tobacco manufacturers/distributors that are located on First Nations reserves and that supply contraband.

Alberta	2009	2012	\$10 billion	The AB government filed its lawsuit on June 1, 2012.
Quebec	2009	2012	\$60 billion	QC filed its lawsuit on June 8, 2012. A constitutional challenge to the QC legislation facilitating the lawsuit was commenced in 2009 and has not yet been determined.
Prince Edward Island	2009	2012	unspecified	The PEI government filed its lawsuit on September 10, 2012.
Nunavut	2010	Pending		On August 5, 2011, the Nunavut Justice Minister stated that Nunavut intended to file a lawsuit against the tobacco industry.
Northwest Territories	2011			NWT has adopted legislation to facilitate a medicare cost recovery lawsuit, but the NWT Government is not known to have yet announced an intention to file a lawsuit.
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^a CTV.ca News Staff. Top court rules B.C. can sue tobacco companies. CTV News, Sep 30, 2005:

http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20050929/bc_tobacco_lawsuits_050929/20050929?hub=Canada

^b Canadaeast News Service, p. A4, Mar 24, 2008: <http://www.smoke-free.ca/litigation/webpages/New%20Brunswick.htm>; scroll down to last article “U.S. lawyer says N.B. has leg up in tobacco lawsuit.”

Class Actions

In Quebec, on March 12, 2012, the trial began in Quebec Superior Court in two major class actions seeking a total of \$27 billion in damages from the tobacco industry. The two class actions are (1) *Létourneau*,³ and (2) *Conseil québécois sur le tabac et la santé (CQTS) and Blais*.⁴ These cases were originally filed in 1998. On February 21, 2005, the Quebec Superior Court certified the cases to proceed as class actions.

The trial is scheduled to continue well into 2013. Two blogs, related to the trial,⁵ one in English and the other in French, are being maintained. As well, one of the plaintiffs maintains a website pertaining to the case,⁶ and a further website provides access to proceedings and exhibits (including internal tobacco industry documents) in the cases.⁷

There is one other case in Canada certified to proceed as a class action against the tobacco industry, *Knight v. Imperial Tobacco Canada Ltd*, which pertains to “light” and “mild” cigarettes. On July 29, 2011, the Supreme Court of Canada decided that the tobacco industry could not name the federal government as a third party defendant in this case, a conclusion that was the same as that of the BC medicare cost recovery case.

Litigation and Contraband

Litigation against the tobacco industry for contraband is distinct from litigation for healthcare cost recovery. In Canada, provincial healthcare cost recovery litigation is civil action whereas contraband litigation has elements of civil and criminal action. In 2008, Canadian federal and provincial governments reached a settlement of \$1.15 billion with Rothmans, Benson & Hedges and Imperial Tobacco Canada Ltd. as a result of contraband. This total included \$300 million in fines and \$850 million in civil payments. The settlement followed criminal charges filed by the Royal Canadian Mounted Police (RCMP) in 2003 and a \$1.5 billion civil claim filed by the federal government in 2003. In April 2010, the federal, provincial and territorial governments entered settlements with JTI-Macdonald, R.J. Reynolds Tobacco Company and a related company; the companies paid a total of \$550 million in fines and civil payments.

In October 2010, some Ontario tobacco producers decided to proceed with a class action against the Ontario government for alleged failure to enforce provisions of legislation, such as the *Tobacco Tax Act* and the *Retail Sales Tax Act*, relevant to the control of contraband tobacco.⁸

³ Cécilia Létourneau v. JTI-Macdonald Corp., Imperial Tobacco Canada Ltd. and Rothmans, Benson & Hedges Inc

⁴ Conseil québécois sur le tabac et la santé and Jean-Yves Blais v. JTI-Macdonald Corp., Imperial Tobacco Canada Ltd. and Rothmans, Benson & Hedges Inc

⁵ English: <http://tobaccotrial.blogspot.ca/> French: <http://procesdutabac.blogspot.ca/>

⁶ <http://www.cqts.qc.ca/recours/>

⁷ <https://tobacco.asp.visard.ca/main.htm>

⁸ <http://www.tobaccojusticeclassaction.com/>

In June 2011, Imperial Tobacco Canada Ltd. filed a \$1.5 billion third party claim against specified tobacco manufacturers and distributors located on First Nations Reserves and that supply contraband, claiming these manufacturers and retailers should be brought in as third parties to the healthcare cost recovery lawsuit filed by the Ontario government against the tobacco industry (*Ottawa Citizen*, June 18, 2011; Imperial Tobacco Canada Ltd., June 23, 2011)

Litigation and Other Dangerous Products

Litigation against the tobacco industry has been compared with litigation against gun manufacturers, the asbestos industry and automobile manufacturers (Jacobson and Soliman 2002). In these cases, litigation has led to a change in industry practices. For example, U.S. gun manufacturers agreed to curtail marketing of their products in return for ending state and municipal litigation. The U.S. asbestos industry went into bankruptcy and ceased operations as a result of litigation. U.S. automobile manufacturers agreed to install safety features like airbags and rear-seat shoulder harnesses in response to litigation.

International Litigation

The United States is the global leader in litigation against the tobacco industry. After numerous failed attempts from 1954 to 1992, there were successes following which the rate of lawsuits increased. For example, in 1994, there were 278 U.S. cases pending against Philip Morris whereas in 2001 there were 1580 U.S. cases pending against Philip Morris (Jacobson and Soliman 2002, p. 230). Before the 1998 Medicare-related U.S. Master Settlement Agreement,⁹ four U.S. states (Mississippi, Florida, Texas and Minnesota) had reached settlements with the tobacco industry. In 1998, the other 46 states as well as the District of Columbia, Puerto Rico and the Virgin Islands reached a settlement of \$206 billion to be paid over 25 years (Jacobson and Soliman 2002; Sweda 2001; TPLP 2009). Additional Information about selected US cases is found in Table 2.

Beyond dollar amounts, other effects of U.S. awards or settlements include the funding of a medical research foundation by tobacco companies, the waiving of the statute of limitations for some individual suits involving secondhand smoke, the release of tobacco industry internal documents, an agreement from the tobacco industry to restrict the marketing of tobacco products and the channelling of some settlement money to public health. As a result of litigation against the tobacco industry, there has also been increased media attention to the problem of tobacco use (Mather 1998), decreased youth access to tobacco products and improvements in protection from secondhand smoke (Jacobson and Soliman 2002, p. 231). In their review of the impact of litigation on public health policy, Jacobson and Soliman (2002) conclude that litigation captures public attention and sometimes forces an issue onto the policy agenda. However, they caution that policy changes as a direct result of litigation have been limited.

⁹ http://en.wikipedia.org/wiki/Tobacco_Master_Settlement_Agreement#State_litigation

Litigation against the tobacco industry has been attempted in other countries, including Argentina (Flores et al. 2006), Australia (Gostin 2007), Bangladesh, India, Mali, Uganda (Daynard 2003), Finland (Hiilamo 2007), Israel (Siegel-Itzkovitch 2005), Korea (Si-soo 2009) and Turkey (Karlikaya 2006). As far as is known, these cases are ongoing (no award or settlement announced yet) or have failed.

Table 2: Litigation against the Tobacco Industry in the United States: Selected Examples, by U.S. Jurisdiction, Year and Award or Settlement Amount^a

U.S. Jurisdiction	Year of Award or Settlement	Award or Settlement \$U.S.	Case Name & Type	Comments
Florida	1997	\$300 million	<i>Broin v. Philip Morris Companies</i> , class action	This class action suit by flight attendants in Florida to recover for damage caused by secondhand smoke ended in 1997 with the announcement of a proposed settlement, including payment of \$300 million by the tobacco companies to establish a medical research foundation and the agreement that individual flight attendants harmed by secondhand smoke can sue tobacco companies regardless of statute of limitations. Subsequently over 3000 individual lawsuits were filed by flight attendants in Florida for personal injury as a result of illness caused by secondhand smoke (Jacobson & Soliman 2002, p. 233, 237; Sweda 2001, p. 203).
46 states	1998	\$206 billion over 25 years	Master Settlement Agreement, Medicaid class action	In this historical settlement between five U.S. cigarette companies and 46 U.S. states, the tobacco industry was obliged to release damaging internal documents and agreed to restrict marketing of its products ^b (King & Siegel 2001). Some U.S. states used their part of the settlement for public health, but many did not (Jacobson & Soliman 2002, pp. 228-229). ^c
Florida	2000	\$145 billion	<i>Engle v. RJ Reynolds</i> , class action	This class action suit, which had been filed on behalf of Florida citizens, residents and survivors harmed by tobacco smoke. The original \$145 billion damage award was overturned on appeal when the class action was decertified. However, this was followed by about 8000 individual “Engle progeny” lawsuits against the tobacco industry in Florida. As of Sep 2009, the industry had lost 8 of 10 post-Engle individual trials (TPLP 2009).

^a Ordered by year of award. From 1954 to 1992, most U.S. attempts to sue the tobacco industry failed (Jacobson & Soliman 2002, p. 229, 231).

^b For example, the tobacco industry agreed to restrict marketing and advertising to youth, ban the use of cartoon characters in advertising, restrict brand-name sponsorship, ban outdoor advertisements and fund anti-smoking advertisements through the creation of the American Legacy Foundation; however, the tobacco industry has not lived up to all of these agreements (Jacobson & Soliman 2002, p. 229).

^c For more on U.S. state funding of tobacco control after the Master Settlement Agreement, see <http://www.tobaccofreekids.org/reports/settlements/>

Note: This update reports on information that was current as of December 2012.

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