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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 citizens who get sick from tobacco smoke), involvement in smuggling, racketeering, conspiracy, defective product, concealment of scientific evidence, fraud, deception, misconduct, failure to warn consumers adequately of the dangers of tobacco smoke, negligence and exposing the public to unreasonable danger.

#### KEY FINDING:

**In June 2011, Nova Scotia announced its intention to file a healthcare recovery lawsuit against the tobacco industry**

### 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<sup>1</sup>. Litigation can cause the price of tobacco products to increase as a by-product of payment of damages. In 2009, 76% of Ontario adults said tobacco companies are responsible for the smoking-related health problems of smokers.<sup>2</sup>

### 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. Particularities vary by jurisdiction. For example, the Ontario 2009 *Tobacco Damages and Health Care Costs Recovery Act* allows the province to sue tobacco

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

<sup>2</sup> 2009 CAMH Monitor Survey, "Panel A" Jan-Jun 2009 ( $n = 1035$ ), analysis by OTRU

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 one Canadian territory (Nunavut) have enacted tobacco healthcare cost recovery legislation (Table 1). Beyond Canada, tobacco healthcare 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) and Newfoundland and Labrador (2011). Ontario is seeking \$50 billion. The case in British Columbia is pivotal because it was the first to be filed in Canada and has a set trial date (September 2011). On July 29, 2011, the Supreme Court of Canada overruled an earlier decision that had allowed the federal government to be included as a third party in the B.C. healthcare cost recovery litigation. At the same time, the Supreme Court also decided that the federal government could not be included as a third party in a B.C. class action suit against Imperial Tobacco Canada for recovery of money spent by smokers on “light” and “mild” cigarettes. Trial dates for provinces other than British Columbia have not been announced. The governments of Quebec, Alberta, Manitoba and Nova Scotia intend to file healthcare cost recovery lawsuits, but so far none of them has announced a date of filing.

## 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.<sup>3</sup> In June 2011, Imperial Tobacco Canada Ltd. announced its intention to file a \$1.5 billion lawsuit against contraband tobacco manufacturers and retailers on First Nations Reserves, claiming these First Nations manufacturers and retailers should be brought in as third parties to the lawsuit filed by the Ontario government against the tobacco industry (*Ottawa Citizen*, June 18, 2011).

<sup>3</sup> <http://www.tobaccojusticeclassaction.com/>

## 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<sup>4</sup>, 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). Award or settlement amounts in other pivotal U.S. cases were \$300 million in 1997, \$144 billion in 2000, \$30 million in 2001 and \$299 million in 2009 (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.

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.

<sup>4</sup> [http://en.wikipedia.org/wiki/Tobacco\\_Master\\_Settlement\\_Agreement#State\\_litigation](http://en.wikipedia.org/wiki/Tobacco_Master_Settlement_Agreement#State_litigation)

**Table 1: Healthcare Cost Recovery Legislation and Litigation against the Tobacco Industry, by Canadian Provincial and Territorial Jurisdiction, as of July 6, 2011**

<b>Jurisdiction</b>	<b>Year Healthcare Cost Recovery Legislation Adopted</b>	<b>Year Lawsuit Filed</b>	<b>Amount Sought in \$CDN, if Known</b>	<b>Comments</b>
British Columbia	2000	2001	unspecified [sometimes cited as potentially \$10 billion] <sup>a</sup>	In 2000, BC healthcare cost recovery legislation, modeled after a Florida law, was introduced. 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 against Imperial Tobacco Canada Ltd., JTI-McDonald 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. The BC lawsuit goes to trial Sep 2011. Since BC was the first Canadian province to adopt healthcare cost recovery legislation and file a lawsuit against the tobacco industry, the outcome of the BC case is pivotal.
Newfoundland and Labrador	2001	2011	unspecified	The NL lawsuit against more than 12 cigarette manufacturers, including Rothmans and Philip Morris, seeks to recover the costs of treating smoking-related illnesses and expose the tobacco industry for misrepresenting the harm associated with its products.
Nova Scotia	2005	Pending		In June 2011, NS announced its plan to file a healthcare cost recovery lawsuit against the tobacco industry, joining forces with the MB government in this pursuit. The date of filing is not known.
Manitoba	2006	Pending		In Nov 2009, the MB government announced its intention to file a healthcare cost recovery lawsuit. The date of filing is not known. In June 2011, NS and MB said they would join forces in this pursuit.
New Brunswick	2006	2008	unspecified [sometimes cited as potentially \$10 billion] <sup>b</sup>	The tobacco industry had challenged the NB lawsuit, but in October 2010 the Supreme Court of Canada dismissed these challenges. In particular, the Supreme Court upheld the right of the province to retain external lawyers on a contingency-fee basis.
Saskatchewan	2007			
<b>Ontario</b>	<b>2009</b>	<b>2009</b>	<b>\$50 billion</b>	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 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.
Alberta	2009	Pending		In Oct 2010, the AB government announced its intention to file a healthcare cost recovery lawsuit. The date of filing is not known.

Quebec	2009	Pending	about \$30 billion	In Oct 2009, the QC government announced its intention to file a healthcare cost recovery lawsuit. The date of filing is not known.
Prince Edward Island	2009			
Northwest Territories				
Nunavut	2010			Assent was given to the NU <i>Tobacco Damages and Health Care Cost Recovery Act</i> Nov 1, 2010, but at the time of writing it is not known when this legislation will enter into force.
Yukon				

<sup>a</sup> 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](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20050929/bc_tobacco_lawsuits_050929/20050929?hub=Canada)

<sup>b</sup> Canadacast 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.”

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

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	1999	\$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 <sup>b</sup> (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). <sup>c</sup>
Florida	2000	\$144 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, was followed by about 8000 individual lawsuits against the tobacco industry in Florida. As of Sep 2009, the industry had lost 8 of 10 post-Engle individual trials (TPLP 2009). (See also 2009 Naugle case at the end of this table).
New Jersey	2001	\$30 million	<i>Blue Cross Blue Shield of New Jersey v. Philip Morris</i> , third-party payer	A U.S. insurance company successfully sued the tobacco industry to recover costs associated with tobacco-related illnesses (Jacobson & Soliman 2002, p. 230). At the time, most other attempts by third-party payers (e.g., insurers or unions) had been dismissed.
Florida	2009	\$299 million	<i>Naugle v. Philip Morris</i> , individual trial by jury	In this 3-week trial, the jury awarded \$55 million in compensatory damages and \$244 million in punitive damages to a female plaintiff in Florida who began smoking in 1968, quit in 1993, and suffers from severe emphysema (TPLP 2009). At the time, this award was the highest achieved for an individual suing the tobacco industry.

<sup>a</sup> 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).

<sup>b</sup> 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).

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

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