

# CAMPAIGN FOR JUSTICE ON TOBACCO FRAUD

## CAMPAGNE POUR OBTENIR JUSTICE FACE À LA FRAUDE DU TABAC

October 18, 2018

### BACKGROUND

#### THE WRONGFUL BEHAVIOUR ALLEGED IN THE PROVINCES' HEALTH CARE COST RECOVERY LAWSUITS AGAINST THE TOBACCO INDUSTRY

##### I. How destructive was the industry's alleged misconduct?

The provinces allege that Canadian tobacco manufacturers and their international parents engaged in conspiracy, negligence and fraud<sup>1</sup> over five decades. The provinces claim that the cigarette companies lied and suppressed information about risks, conspired to undermine government and health agency warnings, attacked organizations that distributed risk information about smoking and second-hand smoke, targeted women and children in its dishonest marketing and denied the manipulation of nicotine in its products.

According to mortality estimates, the “tobacco-related wrongs” caused or contributed to 1–2 million deaths in Canada. The Ontario claim describes the behaviour as “unconscionable”. Judge Brian Riordan of the Quebec Superior Court called it “ruthless”, “beyond irresponsible” and “immoral”<sup>2</sup>

##### II. What are the potential public policy benefits of the provincial cost recovery lawsuits

1. **JUSTICE** – The provinces must hold the manufacturers accountable before the law for fraud or, in the legal language of the claims, their “tobacco-related wrongs”. If the provincial claims are proven in court, the illegal behaviour would constitute the largest and most destructive fraud in the history of Canadian business or public health. It would be an outrage if tobacco companies were not brought to justice for such conduct.
2. **HEALTH** – The provincial lawsuits have the potential to lead directly to significant health outcomes including performance guarantees that would change industry behaviour. These lawsuits could also create a deterrence against similar misbehaviour by other industries.

The literature shows that when smokers learn about the ugly behaviour of the industry, smoking cessation attempts increase. It is not surprising that smokers might rebel and attempt to quit smoking after they learn that the industry has taken advantage of them.

3. **COMPENSATION/COST RECOVERY** – There is a very real potential for the provinces to recover billions of dollars in compensation for the health care costs incurred by caring for sick, disabled and dying smokers. The potential for recovery is an asset worth billions to Canadian taxpayers. Governments that claim to be good fiscal managers will be shown to be incompetent

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<sup>1</sup> Fraud is an act of trickery or deceit, an intentional false representation or misrepresentation, a concealment or non-disclosure for the purpose of inducing a person who is relying on disclosure to give up something valuable, for example a legal right, property, money or health.

<sup>2</sup> Blais/Létourneau class action trial on behalf of Quebec victims of the industry's wrongful behaviour.

if they fail to realize significant recovery of the over \$120 billion claimed to date. We hold that to achieve maximum recovery, the manufacturers must be taken through trial.

4. **PUBLIC HEALTH EDUCATION** – Industry document disclosure could be one of the key benefits of the cost recovery litigation. In 2001, the World Health Organization said “Tobacco litigation’s single greatest contribution to global tobacco control has been the release of long-secret industry documents” to the public. When the Minnesota government settled with the tobacco industry after the state had taken the manufacturers through trial but before the jury began deliberation, 40 million pages of previously secret documents were ultimately disclosed to the public. From a health education perspective, these documents were a public health treasure ranking with reports of the U.S. Surgeon General.

There would be public education benefits through media exposure during a cost recovery trial, a trial that would last months, even years. As a result of a trial or a settlement, corrective statements in the media to refute the decades of dishonesty could be ordered or negotiated. However, such statements have to be a major improvement over those mandated by U.S. Federal Court Judge Gladys Kessler following her 2006 decision.<sup>3</sup>

### III. Why did we decide to publish our open letter to the Provincial Premiers?

1. We have heard nothing from the provinces’ Attorneys General about ensuring that their lawsuits will produce benefits for public health. In fact, we have no reason to believe that public health is even on their litigation agendas as we approach the first provincial cost recovery trial in New Brunswick in November.
2. A Campaign for Justice on Tobacco Fraud (CJTF) national poll found that less than one percent of Canadians are aware that the provinces are suing the tobacco manufacturers for fraud even though the alleged illegal misconduct, if proven in court, would be the largest and most destructive fraud in the history of Canadian business or public health. Lack of awareness is a huge win for Big Tobacco and a significant loss for public health education. We hope the CJTF letter to Provincial Premiers will put the health community’s concerns on the public record and help put the tobacco epidemic back on the priority lists of issues for the provinces.
3. In the absence of public and opinion leader awareness of the potential for public health outcomes from the cost recovery litigation, when provinces are facing deficits and are searching for new sources of revenue, we are concerned that they may view the litigation as nothing more than a “cash grab” and could ignore the public health potential of their lawsuits. If cash remains the only objective, the lawsuits could become largely a waste of time and money. After all, if the objective is only dollars, this goal could be realized more efficiently through taxation.

In 2008, the federal and provincial governments had claims against the manufacturers of \$10 billion for their involvement in smuggling. The health community argued that the claims could have been closer to \$20 billion. Yet in settlements in 2008 and 2010 these governments settled for \$1.15 billion. Fines brought the total to \$1.7 billion. The next day, the Harper government gave \$300 million back to tobacco farmers and linked the two decisions together in news releases, thereby bringing the total settlement to less than \$1 billion (excluding the fines). Critics argued that the farm bailout was to save the seat of Diane Findlay, a tobacco area MP and a minister in the Harper cabinet, in the upcoming election.

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<sup>3</sup> United States of America et al v. Philip Morris USA Inc., et al, August 17/2006.

The pennies-on-the-dollar settlements cheated Canadian taxpayers, virtually eliminated the justice goal of deterrence and sent a strong message that sweetheart settlements would be available in the cost recovery litigation. The CJTF was established to help prevent a repeat of similar cave-ins.

4. In the 20-year history of the health care cost recovery litigation process, the ad is the first time that any group in the health community has pressed the provinces in a significant public way recently to make health outcomes goals of the lawsuits.

#### **IV. Canadian Medicare/health care cost recovery lawsuits**

- All 10 provinces have filed cost recovery lawsuits in Canada, collectively seeking more than \$120 billion in damages from tobacco manufacturers, including foreign parent companies. When all provinces file, the claims are expected to reach \$160 billion.
- New Brunswick will be the first province to go to trial, with the trial scheduled for November 4, 2019. No other provinces yet have a trial date, and are at various pre-trial steps.
- All 10 provinces, as well as the Northwest Territories and Nunavut, have passed legislation that strengthens the evidentiary case available to the provinces and eliminates some blocks that the industry has used historically to prevent governments from holding Big Tobacco to account.
- The British Columbia government started the Canadian cost recovery process in 1998. Industry legal manoeuvres and, critics argue, lack of aggressiveness on the part of the provinces and a justice system in Canada that facilitates long delays in bringing lawsuits to trial have caused this litigation to creep into its third decade.

As André Picard has pointed out,

“there is really no excuse for these [tobacco and other] cases to drag on for so long – not in a country where tobacco use still kills 45,000 Canadians a year, and where tobacco-related health costs exceed \$6.5 billion annually.”<sup>4</sup>

#### **V. American states hold Big Tobacco to account**

Cost recovery initiatives in Canada followed examples set by US state governments in bringing tobacco companies to justice. In the USA, medicare lawsuits resulted in settlements of US\$246 billion payable over 25 years and as mentioned earlier, public disclosure of more than 40 million pages of previously secret industry documents, new marketing restrictions and the establishment of the American Legacy Foundation to address the harm caused by industry products.

For perspective, according to one estimate, if the equivalent of the ground-breaking Minnesota settlement of US \$6.1 billion in 1997 had been obtained in Ontario, after adjusting for currency differences and differences in population size, a Minnesota-equivalent settlement in Ontario would have brought the province \$1 billion a year for 25 years.

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<sup>4</sup> André Picard, “There’s a big legal battle between the provinces and the tobacco industry, but it’s being fought at a snail’s pace.” *The Globe and Mail*, July 12, 2018

## VI. Other actions of note against Big Tobacco in Canada

As lawyer Rob Cunningham reports:

“In Quebec, there are two private class actions on behalf of individual victims. On May 27, 2015, the Quebec Superior Court awarded \$15.5 billion in damages against the three major tobacco companies in Canada: Imperial Tobacco Canada Ltd.; Rothmans, Benson & Hedges Inc.; and JTI- Macdonald Corp. This was the largest damage award in Canadian history. An appeal was heard before the Quebec Court of Appeal in November 2016, with a judgment pending. In order to be able to appeal, two of the tobacco companies had to post roughly \$1 billion in court so that this partial amount would be immediately available to plaintiffs should the appeal be unsuccessful.”

And in 2008 and 2010, Canada’s three major tobacco companies pled guilty separately to contributing to contraband and agreed to civil settlements and fines totaling \$1.7 billion, the “sweetheart settlements” referred to earlier.

## VII. The health and economic impacts of the industry’s “unconscionable” wrongful behaviour

Tobacco industry products remain the leading cause of preventable disease and death, killing more than 45,000 Canadians a year. And there are still 5 million smokers in Canada, 16 percent of the population.

Is the tobacco issue done as many opinion leaders incorrectly believe? Health Canada just released the results of its latest survey. They were shocking. **For the first time in decades, the survey showed that the steady year-after-year decline in smoking prevalence has ended. Worse, the decline has not just flat-lined but smoking has increased among those 15 years and older, from 13% to 15%. As well, Health Canada reports that youth smoking rates have not changed since 2013!**

Total health care costs from tobacco industry products are \$6.5 billion per year.

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The Campaign for Justice on Tobacco Fraud is a non-profit organization incorporated under the *Canada Not-for-profit Organizations Act*. The mission of the CJTF is to reduce the morbidity and mortality caused by tobacco industry products.

Thanks to lawyer Rob Cunningham for his assistance with this Backgrounder. The CJTF however is responsible for the text of this document.