Date: _____

BY COURIER

The Honourable _____
Attorney General, and
The Honourable _____
Minister of Health
Province of _____

Template of letters to attorneys general and ministers of health

Dear Attorney General _____ and Minister _____:

Re: The potential positive health impact of tobacco health care cost recovery litigation

We, the 137 signatories of this letter, are writing to you on a matter of pressing concern for both justice and public health, the implementation of your health care cost recovery litigation strategy related to alleged tobacco industry fraud and other misbehaviour.

We believe that the provinces and territories have discussed a pan-Canadian tobacco litigation strategy in the development of their cost recovery legislation and related lawsuits. The claims filed to date for just two provinces exceed a stunning $110 billion. Total claims when filed will undoubtedly approach $150 billion. We also believe that any litigation decisions have the potential to have a positive impact on the health of Canadians if plaintiff governments keep top of mind that the predatory behaviour involved was a root cause of an epidemic of preventable diseases.

Given this, we are writing with respect to the medicare cost recovery lawsuits for four important reasons. First, we want to ensure that justice commensurate with the gravity of the alleged misbehaviour results from the litigation and, second, that health outcomes needed to repair the damage caused by any wrongful behaviour are key objectives of the litigation. Third, it is imperative that the provinces and territories recognize the inadequacies of the 2008 and 2010 smuggling settlements with tobacco manufacturers that were negotiated by the federal government and take steps to avoid a repetition of such disturbing outcomes.

Finally, as stakeholders in the results of any litigation and/or any settlement process, we have concerns about what it will take to achieve both justice related to the industry's misbehaviour and outcomes that are in the best interests of public health. The issues of adequate human and financial resources available to Canada's attorneys general for the litigation as well as the long term commitment needed to prevail are some of the concerns raised in this communication.

Some context for this letter is required. Despite breakthroughs over the last three decades in policy and legislation related to the tobacco issue, the tobacco epidemic remains Canada's number one preventable cause of illness and death. It is estimated that the tobacco industry has caused or contributed to well over one million premature deaths in Canada during more than five decades of the alleged fraud and conspiracy.

Based on World Health Organization research in the 1990s, Health Canada predicted at the time that tobacco industry products would kill three million Canadians then alive. Whatever the current mortality estimate, an undoubtedly staggering number of deaths will result, in whole or in part, because of the industry's past fraud-based marketing. This is the same repugnant behaviour which has created the cause of action for health care cost recovery lawsuits. Leadership on the part of provincial attorneys general and ministers of health related to this litigation could help to blunt this ominous forecast. Canadian governments must implement far more aggressive measures to address tobacco morbidity and mortality and to reduce tobacco-related health care costs caused by wrongful industry activity. The tobacco epidemic has been reduced in size but continues to be of tragic dimensions. Tobacco is very far from being "done".

With this as background, we compliment you and your government for the passage of legislation to facilitate its lawsuit and for filing its claim against Canadian companies and their international parents for the recovery of the health care costs of tobacco use. There is abundant evidence that much of the disturbing behaviour that led to massive settlements in the United States also occurred on this side of the border. Based on our knowledge of industry deception, on internal tobacco industry documents and on provincial lawsuits filed in court, fraud, negligence, conspiracy, failure to report honestly to governments and fraudulent conveyance may also have taken place in Canada, pursuant to practices and policies developed domestically or directed by or in collusion with international parents or affiliates.

As you proceed in discussions with your colleagues in other provinces and the territories, we urge you to keep in mind the concerns that follow. Because of our personal and professional interests in both justice and public health and because of the values of the health and human service organizations that we represent or support, we have a responsibility to inform you of our collective position related to the alleged wrongful behaviour and of our expectations related to the outcomes of the litigation.

Justice – The facilitating legislation passed in all ten provinces and the claims filed to date in most of the provinces and territories are all in response to the largest and most destructive fraud in the history of Canadian business and public health. It is alleged that the tobacco industry lied for decades with respect to the risks of its products, the addictiveness of tobacco, the industry's manipulation of nicotine, the lowered risks of 'light' and 'mild' cigarettes, the risks of second-hand smoke and the industry's marketing to youth. Justice demands that those responsible be held accountable before the law.

Positive health outcomes from these lawsuits, including changed industry behavior, are among the most meaningful ways for Canadian governments to hold tobacco manufacturers responsible for their predatory behaviour and for the victims of tobacco and/or their families to be assured that a measure of justice has been obtained. The need for justice for well over one million victims must be a fundamental reason for litigation over this fraud. Canadians will better understand the goals and costs of litigation if attorneys general and ministers of health explain that principles of justice underlie the need for these lawsuits.

This will be of great importance as the manufacturers attempt to position governments as "senior partners" in their nefarious activities and recovery litigation as "a waste of taxpayers' money".

Deterrence of future misconduct – As you well understand, one of the purposes of criminal sanctions and civil remedies is to create deterrents against wrongful behaviour. Now, through litigation, Canadian jurisdictions have begun the process of holding the industry accountable for decades of destructive activity. This has the potential to create a powerful deterrent against similar behaviour by this industry and others in the future. In the interests of public health and the Rule of Law, it is essential that the objective of deterrence lie at the core of this litigation and that this objective be stressed in communications with the public.

Cost recovery – In the United States, faced with the threat of further litigation related to the same wrongful behaviour now being alleged in claims by the provinces, American tobacco giants settled with 50 state attorneys general for US$246 billion or, at the time, about C$400 billion. While state governments involved in the settlement cover health care costs for only about 15-20% of the state population, Canadian provinces cover 100% of their citizens because of our universal health care system. Therefore, the claims of Canadian jurisdictions should be larger per capita.

For perspective, in 1998, after the Minnesota Attorney General, Blue Cross and Blue Shield took tobacco manufacturers through the plaintiff's arguments at trial, the manufacturers were persuaded to settle for US$6.1 billion payable over 25 years. After adjustments for population and currency differences at that time and after adjustments for the greater amounts paid out by the provinces for health care coverage, a Minnesota-comparable settlement in Ontario could have been worth as much as C$1 billion per year for 25 years. Over a decade later, based on the Ontario C$50 billion cost recovery claim filed in 2009, the Quebec C$60 billion claim filed in 2012 and other provincial claims, the total claims by Canadian provinces and any territories will approach C$150 billion.

If the provinces are successful in litigation, the aggregate of the provincial demands will undoubtedly call into question the ability of Canadian tobacco manufacturers to pay in full any judgment of the court. However, in the B.C., Ontario and New Brunswick medicare cost recovery litigation, the courts have ruled that the provinces may include as defendants the parent companies which the provinces believe share responsibility for the fraud. It will take patience, determination and long term commitment on the part of the provinces to gain access to the resources of the parents or to reverse transactions where assets may have been fraudulently conveyed out of the country.

Health benefits from litigation – Research into health care cost recovery litigation and settlements suggests a potential for significant public health outcomes to flow from these lawsuits. The World Health Organization gives legitimacy to the demand of the health community that public health objectives be made a priority in the litigation process:

> "A realistic understanding of tobacco litigation over the last fifty years, and appreciation that tobacco use is a global health problem, both suggest that decisions about tobacco litigation and the relief to be sought should be premised not on the expectation of large financial recoveries, but on the goal of advancing public health in a meaningful fashion."

Any realistic assessment of the American experience will reveal that U.S. litigation and negotiation produced mixed results for public health. Nevertheless, we believe that, if attorneys general and ministers of health keep health goals at the top of the list of objectives for cost recovery litigation, major gains for public health can be realized.

Four desired public health objectives from the litigation process are outlined here. Additional recommendations for health outcomes will undoubtedly follow from health organizations.

1. **Disclosure of documents** – The negotiated settlement in Minnesota alone ultimately placed 40 million pages of previously secret tobacco documents in the public domain, arguably one of the most significant developments in tobacco control of the last century. The disclosure of Canadian industry documents and the window on industry behaviour that they would provide for legislators, the media and public would be invaluable. Given the importance that document disclosure would play in encouraging discussion in the media and in designing tobacco control programmes and policies, it is critical that Canadian provinces make document disclosure to the public a priority.

2. **Public education** – The public education benefits from unpaid media that would accompany litigation, disclosure and the trial process would be enormous and would undoubtedly dwarf the benefits of an ongoing paid tobacco control mass media campaign. Knowledge of industry misbehaviour would encourage smoking prevention with youth as well as smoking cessation among youth and adults.

3. **Performance-based regulation** – This reform rests on the principle that the cigarette makers themselves should be forced to take responsibility for the damage caused by their products. For example, changes in smoking rates among youth could be demanded and compliance measured. Tobacco companies that fail to achieve the mandated reductions in prevalence or consumption could be subjected to serious financial penalties. In other words, industry financial losses from non-compliance could outweigh its gains from its failure to meet the reductions in tobacco use imposed by or registered in the courts.

   Facing massive pressure from state litigation, the U.S. tobacco industry agreed to performance-based standards or "look-back provisions" in the Global Settlement Agreement before the U.S. Congress in 1997, but the bill did not pass. Later, the U.S. Department of Justice asked the judge for a similar remedy in the federal government's fraud suit against Big Tobacco. While the ruling said the industry was engaged in racketeering, the judge decided that she was not able to include a performance-based remedy in that decision, not because it would not work but because such a remedy was blocked by an earlier ruling of a higher court. However, what the Department of Justice

pleading demonstrates is that performance-based regulation is realistic and that when the Canadian industry faces going to trial or bankruptcy it could, like its American relatives, be pressed to agree to this reform.

4. **Funding for a tobacco control trust** – A significant amount of the recovered costs should be set aside to repair the damage caused by the industry's alleged wrongful behaviour, by funding a tobacco control trust that is independent of governments and free to implement many of the non-legislative elements of a comprehensive tobacco control programme. The work of such a tobacco control trust must not be subjected to either content control by the industry or political interference. A precedent for the mechanism of a trust created through the litigation process, although flawed, was the American Legacy Foundation established by the U.S. *Master Settlement Agreement*.

Concerns about litigation plans: the discredited 2008 and 2010 smuggling settlements

As the provinces and territories implement their litigation plans, there are a number of concerns that are widely held among organizations engaged in tobacco control. We wish to place these concerns on the record.

We must avoid a repetition of the discredited and, from a public health perspective, very disturbing 2008 and 2010 smuggling settlements involving Imperial Tobacco Canada Limited (Imperial), Rothmans, Benson & Hedges (RBH), Rothmans Inc. (Rothmans), JTI-Macdonald Corp. (JTI-Macdonald), R.J. Reynolds Tobacco (RJ Reynolds), Northern Brands International, Inc. (Northern Brands) and the federal government and the provinces. While these settlements were presented to the public as a triumph for the Rule of Law, they were extremely inadequate. The settlements have been described as "sweetheart deals" with tragic missed opportunities for public health. A critique of the settlements by the Non-Smokers' Rights Association is enclosed.

The analysis of the 2008 smuggling settlements with Imperial, RBH and Rothmans includes the following criticisms:

(a) **There was no transparency** – Before the Imperial, RBH and Rothmans settlements, criminal charges had been laid and a lawsuit filed against a competitor family of companies including JTI-Macdonald, RJ Reynolds, and Northern Brands along with several of their executives. Yet, after years of investigations, including RCMP raids of the Imperial and RBH offices, no criminal charges over smuggling were laid against Imperial or RBH executives. And no lawsuits were filed. Health organizations waited to learn of the outcome of these investigations, investigations of considerable importance to justice and public health. But on the day the settlements were announced, the companies only admitted guilt to a seemingly trivial technical breach of the *Excise Act*. No admission of fraud or of "abetting, conspiracy and the possession of the proceeds of crime." Unfortunately, the public was completely unaware that settlement talks had been underway. In the absence of lawsuits and criminal charges, the public was left without any real understanding of the behaviour that led to the settlements.

(b) **The financial settlement amounted to "chump change"** – Based on claims totaling $10 billion filed in the suit against JTI-Macdonald, RJ Reynolds, Northern Brands and related companies in response to a Crown Claims Bar Order, it is estimated that the smuggling claims against Imperial, RBH and Rothmans could have been $20 to $30 billion. However, **the federal and provincial governments settled for $1.15 billion in fines and damages, or less than 5 cents on the dollar of a credible claim. Moreover, the value of the settlement will be greatly diminished by the fact that settlement payments will be spread over many years and paid in discounted dollars.**

Paul Finlayson, a former senior executive with Imperial's parent company who helped plan the smuggling and who was close to the centre of the wrongful behaviour, called the RCMP investigation a "sham" and the amount of the settlement "insane" and "chump change" (William Marsden, Montreal's *The Gazette*, September 6, 2008). His remarks strongly suggest that both the recovery and the deterrent value of the settlement were inadequate.

(c) **There was no disclosure of tobacco industry documents** – Unlike the landmark settlement negotiated by the state of Minnesota, documents that might educate the public about (a) the role of the industry in contributing to tobacco smuggling and in undermining efforts to address the tobacco epidemic, (b) the benefits of a high tobacco tax health strategy, and (c) measures that would help prevent smuggling in the future were not disclosed.

(d) **The immunity given to tobacco executives undermined the principle of deterrence –** The settlement ensured that the executives involved would evade criminal responsibility. In the wake of alleged corporate conspiracy and fraud that are expected to cause thousands of tobacco deaths in the future, the get-out-of-jail-free cards given to Imperial and Rothmans executives sent a destructive soft-on-corporate-crime message to the public and to industry.

(e) **Components of the settlements are dependent upon future tobacco sales** – This creates an unacceptable conflict between public health objectives and an ongoing government dependency on a revenue stream from the tobacco companies involved.

(f) **The settlement failed to compensate governments adequately for future tobacco taxation losses following the smuggling-induced 1994 tax rollbacks –** The tobacco tax losses or foregone revenue from the reduced tax base that followed the tobacco tax rollbacks would have added billions of dollars to the claims of the governments. This foregone revenue as a result of lowered tax rates was negotiated away.

The criticism of the April 2010 settlement with JTI-Macdonald, RJ Reynolds and Northern Brands is much the same as that of the smuggling settlement with their competitors nearly two years earlier. The total claim by governments was in excess of $10 billion. Not surprisingly, RJ Reynolds, the former parent of JTI-Macdonald (then RJR-Macdonald), agreed to settle for $325 million. The recovery from JTI-Macdonald was $150 million and from the defunct RJ Reynolds subsidiary Northern Brands, $75 million, $550 million in all.

Most disturbing, after the Crown contended that the criminal conspiracy involved was "the largest offence of its nature in Canadian history," after millions of dollars expended on RCMP investigations and a months-long preliminary inquiry into criminal charges, after the preliminary inquiry committed JTI-Macdonald and one of its senior executives to trial, and after an appeal court instructed the lower court to reconsider sending others to trial, after this huge investment of public resources, as with the 2008 settlement, the JTI-Macdonald/RJ Reynolds executives involved were allowed to escape criminal prosecution.

Given this background, we have concerns about both the objectives of the provinces and territories in health care cost recovery litigation and what will be required to prevail in court while, at the same time, maintaining public support throughout a potentially lengthy litigation process.

Respect for stakeholder interest – Health organizations in particular and the health and human service community in general, while not parties to any litigation, are stakeholders in the cost recovery litigation process. The health and human service community has expended, over time, hundreds of millions of dollars funding research focused on tobacco diseases, providing services and support for the victims of these diseases, promoting prevention and encouraging cessation. Moreover, at great expense, the health community will be expected to provide similar services in the future to the victims of the alleged fraud and conspiracy. These stakeholders wish to have their views incorporated into any litigation decision-taking process when something so significant to their work is involved.

Public health outcomes, key litigation objectives – We are concerned that, at present, few attorneys general have placed public health objectives on their lists of desired litigation outcomes. For example, public health goals were mentioned by the province of British Columbia when its claim was filed but there was no mention of such outcomes in the legislature related to the tabling of Ontario's enabling legislation or in the press release or news conference at the time the province filed its claim. To date, health organizations have not been offered the necessary broad consultations about desired outcomes and the provinces have not volunteered potential reforms for discussion.

The use of outside legal counsel – Based on past tobacco industry litigation strategies, we do not believe that many provinces and territories are capable of pursuing litigation objectives effectively when restricted to the use of in-house counsel. Given the conflicting demands on the time of government litigators, and given the challenges that defendants almost certainly will present (see Minnesota "Symposium – Tobacco Regulation: The Convergence of Law, Medicine & Public Health," *William Mitchell Law Review*, Vol. 25, No. 2, 1999 [1]), we do not believe it is realistic for the provinces to achieve a just outcome in the interests of public health without the utilization of some leading litigators via outside counsel. This is not an issue of in-house legal competence. At issue is the limitation of in-house legal resources available to governments and the magnitude of the work to be done. To their credit, several provinces are using both in-house and external counsel as part of their legal teams.

[1] Not available online. Reprints available through the Campaign for Justice on Tobacco Fraud.

Prepare to go to trial – Given both the history of litigation and negotiation in the cost recovery process in the United States and the advice of law professors and senior legal counsel assisting the Campaign for Justice on Tobacco Fraud, we believe that tobacco manufacturers will not negotiate in a meaningful way unless attorneys general in Canada prepare both to go to trial and, preferably, take the manufacturers through trial, as with the precedent-setting legal strategy of the State of Minnesota (see *William Mitchell Law Review* cited above). In the absence of a trial or the real prospect of a trial occurring, the industry will demand that the provinces make huge concessions in order to obtain a settlement. Consequently, the serious objectives for cost recovery litigation will not be realized.

Industry misinformation must not go unchallenged – The industry will mount an aggressive disinformation campaign in response to the challenges presented by cost recovery litigation. Provincial attorneys general and health ministers must be pro-active and meet this challenge. Upholding the Rule of Law should not be dependent upon public support. Nevertheless public support and confidence in the objectives of litigation would be valuable. When tobacco manufacturers claim that governments were "senior partners" in the industry's activities, the public must be assisted to understand that no government partnered with the industry in the alleged fraud and conspiracy.

Attorney General _____ and Minister _____, drawing attention to the importance of health care cost recovery litigation and achieving health-centred outcomes from such litigation are a priority of the health and human services community. We urge you to give serious consideration to our concerns and recommendations. On our part, we will work to develop public understanding and support for your leadership.

Sincerely,

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