Canada's historic tobacco settlement: a significant public health setback

A critique by Garfield Mahood, President, Campaign for Justice on Tobacco Fraud

> "The international implications of the Canadian tobacco settlement are 'far-reaching'."
>
> Dr. Adriana Blanca Marquizo, Head,
> Framework Convention on Tobacco Control Secretariat

> "Justice and the law are different trains on different tracks"
>
> author unknown

International attention

On March 6, 2025 Ontario Superior Court Chief Justice Geoffrey Morawetz approved an historic $32.5 billion settlement between the tobacco industry and Canadian provinces and territories. Class action lawsuits brought by injured smokers from Quebec, and in separate suits, harmed smokers from elsewhere in Canada were also settled. The settlement concluded decades of litigation and five years of mediation under the *Companies Creditors Arrangement Act*, Canada's bankruptcy avoidance legislation.

In August 2025, Dr. Adriana Blanca Marquizo, head of the Geneva-based Secretariat for the *Framework Convention on Tobacco Control*, told Paul Webster who was reporting for *The Lancet* that the settlement has attracted worldwide attention. "The international implications of the Canadian tobacco settlement are 'far-reaching' and it clearly demonstrates that the tobacco industry can be held liable for their actions."*

Well not quite. André Lespérance, a lawyer acting for the Quebec class action plaintiffs, was on the inside of the settlement negotiations. He told Webster:

> "Unfortunately, the numerous Canadian provincial governments that fund health care seldom cooperated with each other with regard to the tobacco litigation … to win against the tobacco industry in court you need to present a totally united front."

The story of the settlement is long and complex. To put it charitably, to date much of the commentary on the settlement has been shallow and uncritical of both the

contents of the outcome and the role of some of the players in the litigation. This analysis departs from most if not all of the other critiques. It does not purport to be

* Andrew Higgins, professor of civil procedure at Oxford University also told Webster, "This [the settlement] is being watched internationally." Higgins is the chair of the World Health Organization's expert group on legal liability for the purposes of tobacco control.

complete or even without flaws. With that admission on the record, here is my assessment of what took place.

The provinces and territories sued Canada's three major tobacco manufacturers, JTI-Macdonald Corp., Rothmans, Benson & Hedges, Imperial Tobacco Canada Ltd. and their international parents to recover health care costs incurred over more than five decades as a result of industry conspiracy, negligence, fraud and other "wrongful behaviour." The claims were reported to be more than $500 billion.

However it seems that the $500 billion loss estimate, a number used by government lawyers and health agencies, including this writer earlier, may be a gross underestimate. We learned later in documents that were part of one government's preparation for the expected trial that the governments had a much higher estimate of damages.

Glenn Harrison, an economist and Chair of Risk Management and Insurance at Georgia State University in the USA was asked by lawyers representing one or more governments to prepare his estimate of the compensatory damages to be recovered in the lawsuits. He was an expert used by American states in their lawsuits against Big Tobacco that led to the U.S. Master Settlement Agreement (MSA). Professor Harrison wrote:

> "I was asked in March 2020 to calculate the present value of the total expenditures by each Province and Territory for the health care benefits that have been provided, and that could reasonably be expected will be provided, for insured persons resulting from tobacco-related disease … The aggregate quantum over all provinces and territories is calculated to be $944.5 billion in present value 2020 dollars."

This almost doubles the damage figure interested parties were operating with earlier. This has to change any assessment of the final settlement.

Multiple lawsuits

The first of the provincial suits was filed in British Columbia in 1998. The two class action suits against the companies on behalf of Quebec smokers harmed by the industry's wrongful conduct were also filed in 1998. In total there were four class action suits filed against the manufacturers. The first was registered by Cécilia Létourneau (the Létourneau class action). The second was filed two months later by the Quebec Council on Tobacco and Health (CQTS) with lead plaintiff Jean-Yves Blais

(the CQTS-Blais class action). In response the Quebec Superior Court combined both class actions into one lawsuit. This led to the most significant tobacco trial in Canadian history, Blais/Létourneau v. the three major tobacco manufacturers and their international parents.

The Blais/Létourneau suit wasn't the only challenge the manufacturers were facing.

Add to the litigation list a third suit, the Knight class action in British Columbia on behalf of victims of the 'light' and 'mild' marketing fraud. This fraud involved the industry's deception about reduced harm from so-called 'light' and 'mild' cigarettes.

In the fourth class action, the plaintiffs, tobacco farmers, held that they had been harmed financially by the manufacturers, their partners in the egregious behaviour. The farmers were not innocent players in the tobacco epidemic.

While this litigation was going on and in anticipation that they could be hit with huge court awards, the manufacturers were busy conveying their assets out of the country. In the event of punishing damages the strategy was to ensure that the cupboards of the Canadian tobacco subsidiaries would be bare. Just one example, one company sold its trademarks worth hundreds of millions to a related foreign company for $1.00. That company was accused by provinces of fraudulent conveyance.

In 2016, after the two-year Blais/Latourneau trial, Superior Court Justice Brian Riordan found the industry's wrongful behaviour "ruthless," "immoral" and "beyond irresponsible." He awarded the plaintiffs $15 billion in compensatory and punitive damages. Riordan's decision was upheld upon appeal with a minor adjustment for damages.

Over the next couple of years of never ending delays and no sign that the governments would ever bring the tobacco companies to trial I came to the conclusion that some high profile, hard hitting advocacy was needed.

Advocacy for primary prevention

As head of the Campaign for Justice on Tobacco Fraud (CJTF) I decided to publish a full-page ad, "*An open letter to Provincial and Territorial Premiers,*" to press governments to bring the miscreants to trial. It ran in *The Globe and Mail,* Canada's most influential newspaper on February 26, 2019. The main ad was accompanied by an adjoining one-third page ad listing over 130 deans and professors of medicine and public health, physicians, medical officers of health and lawyers who, along with an activist/philanthropist, endorsed and paid for this expensive project.

(See CNW/Telbec news release,
http://justiceontobaccofraud.ca/downloads/en/News%20Release%20-%20Globe%20ad%20for%2026%20February%202019.pdf
The full-page ad,
http://justiceontobaccofraud.ca/downloads/en/Globe%20ad%20scan%20PUB_CJTF_ad_Open_Letter_8_97x20_IMP.pdf
The ad with the 130 signatories,
http://justiceontobaccofraud.ca/downloads/en/Updated%20endorsers%20pagePUB_CJTF_ad_signatories_5_33x15_IMP_v2_FEB24.pdf.)

The CJTF and the ad endorsers wanted to obtain health benefits and changed industry behaviour from any lawsuits filed. One demand was for the release of internal tobacco industry documents. This precedent was set by the American state settlement, the MSA. The Canadian Cancer Society (CCS) had said elsewhere that the release of these documents would be "a public health treasure."

The ad also pressed for "court enforced reductions in teen smoking," and "look-back provisions" requiring the industry to pay monetary penalties if youth smoking reduction targets were not met. This youth protection measure was proposed by the late Senator John McCain in a bill put before the U.S. Congress. It had had significant support but did not pass. However its introduction established look-back provisions as credible tobacco control measures.

In the open letter we also pressed the governments for a new well-financed independent foundation with the freedom to fund tobacco use primary prevention and smoking cessation programs. (I was not enthused about the call for greater funding for less cost-effective cessation measures. Smoking cessation is not primary prevention but this was a goal of others.) The independent American Legacy Foundation, now called the Truth Initiative, flowed from the MSA and offered another precedent for such a foundation. The Truth Initiative created mass media that focused attention on the industrial source of the cigarette epidemic. So the U.S. settlement delivered some health components that were worth emulating in Canada.

While nine health organizations including the Canadian Public Health Association and the Canadian Lung Association endorsed the ad's open letter challenge to the premiers, the CCS and the Heart and Stroke Foundation (HSF) declined.

Although the CCS had not endorsed the ad, a few days after publication, a lawyer from the society called, praised the CJTF for the initiative and said it had been effective. He said there were signs of movement toward a trial. Because of the ad's intensity and positioning, many decision takers read the open letter.

Soon after the ad ran the Quebec Court of Appeal upheld Judge Riordan's decision and imposed $13.5 billion in damages against the manufacturers. As planned the companies did not have the financial capacity to handle such damages, never mind what might come of the $500 billion in claims filed by governments.

After being hit by multiple negative tobacco-related legal decisions in Quebec the companies undoubtedly decided they might receive a more sympathetic reception in an Ontario court. Quebecers had learned a lot from the media about the industry's wrongful behaviour from several courtroom battles. So in 2019 the tobacco companies went down the highway to Toronto, Ontario where they filed for creditor protection under the federal *Companies Creditors Arrangement Act* (CCAA).

The purpose of the CCAA, a statute perhaps modeled on U.S. Depression era legislation, is to force companies and their creditors through court-appointed

mediators to negotiate settlements that will allow the companies to continue to operate, protect jobs and diminish harm to the community from employment disruption. The bottom line statutory purpose of the CCAA then is to try to ensure that at the end of mediation companies seeking bankruptcy protection emerge as going concerns. Unfortunately the continued viability of tobacco companies flies in the face of public health.

The settlement

Five years after the mediation began the $32.5 billion settlement Plan emerged and was ultimately approved by Justice Morawetz. Many lawyers involved in the process became very wealthy.

Out of the $32.5 billion, $24.7 billion will go to the provinces and territories over roughly two decades. After paying their lawyers, the victim plaintiffs in the two Quebec class actions will divide $4.2 billion. Well not exactly all of the victims. Because their class action lawsuits were filed in 1998 and the legal process took over 25 years, hundreds of the victims have died. Any awards will go to their estates.

Another $2.5 billion will be set aside to compensate Canadian smokers victimized by the industry but who are not covered by the Quebec class action lawsuits. An exception will be smokers who developed heart disease from tobacco industry products. According to the settlement this category of victims of the fraud will not be compensated. A further $1.0 billion has been allocated to set up a foundation, the Cy-près Foundation, to fund research on treatment and cures for tobacco diseases. In total it could take up to 40 years before the damages to the governments are paid.

On first blush $24.7 billion allocated to provinces and territories was a recovery of about 5 percent of the $500 billion of losses they claimed. Compared to the American

settlement of US$246 billion for 46 American states, even a back-of-the envelope calculation will reveal that Canadian governments settled for pennies on the dollar.

When one factors in that Canadian governments provided more health care services to their citizens than US states did to theirs, when one also considers that the American MSA settlement was two decades ago and adjust the state settlements for present value dollars, the Canadian provincial and territorial governments settled for less than half of the amount per capita recovered by more aggressive American states. The Canadian settlement amounts to about two and one half cents on the dollar for the losses claimed.

My assessment of the amount of the recovery was validated when Harrison wrote:

> "Each province [and territory] will get 2.6272% of the expenses assigned to health care costs associated with smoking that began before 2016."

In an article in *The Walrus*, (see CJTF website post, Oct. 30, 2024)

https://thewalrus.ca/canadas-32-5-billion-tobacco-settlement-is-a-hollow-victory/

I called the $32.5 billion proposed settlement a "cave-in." That was my charitable assessment.

The failure of the Canadian settlement was not just a monetary one. American states led by Minnesota forced 35 million internal industry documents into the public domain revealing mountains of "ruthless" behaviour, a huge public health win. Our governments failed to obtain agreement for the public release of any.

The CCAA settlement set aside $1.0 billion for the purportedly independent Cy-près Foundation. But this money will not permit programs designed for prevention, harm reduction and the protection of youth. It will be limited to research into treating tobacco diseases:

> "research, programs and initiatives focused on improving outcomes in Tobacco-related Diseases… research programs and initiatives regarding tobacco-related cancers, Emphysema/COPD and other illnesses and conditions which are reasonable and rationally connected to tobacco-related harms."

Having the funding restricted to curative disease research, having both primary prevention and even tertiary prevention (smoking cessation efforts) blocked, must have had industry executives clapping their hands in glee. Quite a gift to Big Tobacco. Such research won't affect sales, youth recruitment or reduce harm to already addicted smokers. This foundation, according to a law professor who reviewed this critique, has to be one of the most scandalous components of an irresponsible settlement.

I am certain "look-back" provisions were not even discussed in mediation. Such a goal would fly in the face of the CCAA statute mandate. No disease prevention. No justice. No fairy tale happy ending here.

This writer spent over four decades trying at various times to promote actions that would result in tobacco manufacturers being held civilly and criminally responsible for their repugnant behaviour. After all tobacco industry products and predatory marketing have caused or contributed to the deaths of well over a million Canadians.

The CJTF, the non-profit I head, and the Non-Smokers' Rights Association (NSRA) that I led for decades, raised funds, published advertisements (see CJTF website *www.justiceontobaccofraud.ca* post, February 26, 2019), organized ad hoc coalitions to promote campaigns, wrote news releases and hundreds of letters to premiers, attorneys general and health ministers (see CJTF website post, June 2014) all designed to bring the predators to justice.

The NSRA, Quebec Coalition for Tobacco Control (QCTC), Physicians for a Smoke-Free Canada (PSC), Ontario Campaign for Action on Tobacco and the Alberta-based ASH Canada (ASH) were just five of the tobacco control advocacy groups that put their

shoulders to the justice and accountability wheel. Of course the CQTS led the way with its lawsuit.

After all of this, I have to admit that I was not successful on the litigation component of my work. And I am not alone. The CCS, to its credit, devoted time and money to the cost recovery litigation process. Unfortunately without any significant success.

The HSF certainly failed. Its eleventh hour attempt to become part of the mediation process was rejected by the Court. There was some justice here. While other health groups were trying to secure justice and health benefits from the litigation, in the years leading up to the settlement, HSF was usually sitting in the spectator stands.

The process was so delay-ridden it made me suspect that the provinces were engaged in endless negotiations with the manufacturers in order to avoid going to trial. After all government hands were not clean and, in defense of the suits, lawyers for the companies could bring embarrassing government negligence to the attention of the public.

The CJTF was responsible for the most dramatic and arguably the most powerful single initiative designed to press the provinces to speed up the litigation leading to a trial. Nevertheless the health side of which my organizations were leaders failed to ensure through adequate advocacy that the cost-recovery lawsuits produced real health benefits.

What went wrong?

First, major health charities and health professions failed to mount a serious five-year advocacy campaign at the start of or even before the mediation similar to campaigns that corporations mount when their interests are involved. Such a campaign would have involved lobbyists in each province, lobbyists who are connected, who run political campaigns at election time, not campaigns by inexperienced staff of the agencies who run feel-good smoking cessation programs. Such a commitment would have created whole-of-government campaigns in each province targeting health ministers and premiers to attain the health objectives of the litigation, one way or another.

Ministers of health were nowhere to be seen in the five years of mediation. Again, why? The health community did not create sufficient pressure to make their absence unacceptable. There were health concessions that could have been part of the settlement that would not have affected the viability of the manufacturers. Disclosure of industry documents could have acted as a deterrent to future damaging "ruthless" behaviour without affecting the industry's viability under the CCAA.

Allowing the planned foundation to fund tobacco disease primary prevention would not have prevented these companies from being going concerns. It would only have made it more difficult for them to carry on by exploiting youth. To be precise, while

major charities and health professions failed to turn up the heat, the small tobacco control advocacy groups that campaigned for many of Canada's tobacco laws pressed for health outcomes from the litigation. Their efforts were not enough.

Unfortunately some undermined their own credibility by campaigning for a settlement that would have brought an end to the industry itself. Such a goal flew in the face of the statutory purpose of the CCAA. The court-appointed mediation monitors had to work with the law they had. It would have made more sense to lobby for a change in Canada's bankruptcy law than to expect those involved to ignore the core mandate of the legislation.

Second, the provinces and territories did not put the manufacturers' backs against the wall. They could have done so without threatening the viability of the companies. Once more, why? The CJTF and other critics say the provinces and territories were conflicted out by dependence upon billions of dollars each year from tobacco taxation. These governments did not want to interrupt the revenue flow being generated by Big Tobacco, a conflict that author Josh Knelman in his book *Firebrand* called the "tobacco paradox."

Third, all but two of the governments were represented by lawyers acting on contingency, undoubtedly for very significant fees. Contingency fees may have been as much as 20 to 30 percent of the settlements in the American litigation. And judging by the fees paid out to the Quebec class action lawyers, fees in this range may have been

the same for lawyers acting for some of the provinces and for the Knight class plaintiffs. After years of litigation many of the lawyers involved would be on the verge of retirement. Either they or their law firms would have wanted to bring this litigation to a conclusion, not to send the settlement Plan, negotiated over five years, back for amendment as requested by the CCS and HSF charity stakeholders.

As well, class action victims were elderly and dying. They and their contingency lawyers would have wanted to settle, for good reason. The victims deserved to receive their court-awarded damages. The contingency lawyers for the Quebec victims deserved payment as well. They "bet the firm" risking financial viability for almost two decades to secure some justice for the victims they represented.

The law firm involved in the Knight class action, acting for the victims of the "light and mild" fraud, had also been litigating for more than two decades and deserved payment. In contrast the manufacturers could wait and outlast the plaintiffs and insist on a settlement that would not impact negatively on their sales. And the predators did precisely that.

Politicians in the provinces and territories, finally having sensed a settlement, anticipated political wins from an influx of dollars, however inadequate the amount. They planned politically favourable announcements. For example Manitoba announced the construction of a new hospital related to the funding before the settlement was even confirmed, to considerable applause. Their constituents had

virtually no understanding of the lost potential of the litigation, the issues involved or the miniscule amount of the recovery.

Fourth, few in the health community were aware of a scenario where the companies would seek bankruptcy protection that would have as its main goal the maintenance

of the viability of the manufacturers. Had organizations in the health community with budgets in the millions funded legal research oriented to advocacy and prevention as recommended by various experts in the past, instead of disease research (i.e. curative medicine), we might have been more aware of the CCAA legal threat and how to respond.

Misdirected attempts to intervene

When industry protection under the bankruptcy statute was secured, CCS put a motion before the Court to be allowed to become an intervenor in the mediation. The Court rejected this idea. But the judge granted the CCS "stakeholder status." This kept the society out of the secret deliberations but allowed it to comment in court on any plan that emerged from the mediation. It also took the CCS out of any potential oppositional advocacy outside the court for the goals of the health community.

HSF declined at the start of the mediation to join the CCS motion to intervene. Four years later, at the eleventh hour in the CCAA deliberations, HSF put a motion before the court asking to now be allowed to enter the mediation, to be representative counsel for addicted Canadian smokers ("FTH Stakeholders") in the market whom HSF claimed were not being adequately represented in the deliberations.

It would have been absurd for the Court to grant this request for a number of reasons. There was no way after years of mediation the Court would give HSF, at that eleventh hour, the very status and right to participate in the secret mediation that CCS had been denied nearly four years earlier.

In my opinion, this was an attempted Heart "money grab," an attempt by the charity to establish itself in the eyes of the Court, falsely, as a major player deeply involved in tobacco control just as the $1.0 billion Cy-près Foundation was about to be rolled out and research money to flow. HSF had not been a major player in the past.

In the more than ten-year campaign for cost recovery lawsuits and health gains from any litigation the CJTF, CCS and other health groups had explained earlier that the need for a well-funded independent tobacco control foundation was to inject *additional money* into the struggle to address the tobacco epidemic. I stress, *additional money.* There was very little serious funding available in Canada for tobacco control at the time and this shortage of funds for primary prevention remains to this day.

Given this history of the campaign for new money I was surprised when the Heart motion put to the Court sought permission to represent and care for smokers

remaining in the market. Its motion flew in the face of efforts to secure *new additional money.* The disease charity said:

> "Ensuring that any Proposed Plan provides for an appropriate and well-governed Fund will allow HSF to spend less money on public

> education/information, advocacy, and research to address tobacco-related health issues …. ”

Knowing that its motion might be criticized by others in the health community, the lawyers for the HSF asked the Court to keep its outrageous plea secret behind the closed doors of the mediation process:

> “It is preferable that the FTH Stakeholders’ interests are addressed now [in the secrecy of the mediation process] rather than in any potential future public opposition to a Proposed Plan.”

When I read the HSF motion, I wrote to the Ontario attorney general and health minister and explained two things. Many, perhaps most of the smokers who then remained in the market were hard core or hard-to-reach smokers, as government health departments are inclined to call them, those heavily addicted to the nicotine in combustion cigarettes. Obviously, in the past, these smokers had not responded with success to the kind of smoking cessation promotions on which HSF put emphasis. HSF had invested little in primary prevention initiatives, again, smoking cessation programs being only tertiary prevention, striving to prevent disease after smokers had become addicted.

The CJTF letter to the health minister and attorney general explained that it was out of this addicted group of smokers that most tobacco-related deaths would flow in the future. I said that it is harm reduction measures and products designed to deliver the nicotine that addicted and habituated smokers need without the disease-causing tars in combustion cigarettes that have the greatest potential to prevent tens of thousands of future tobacco-related deaths.

It is important to emphasize that harm reduction policies and interventions could be introduced at the same time that measures are implemented to prevent youth from becoming addicted to nicotine resulting from any availability of reduced-risk, harm reduction products. The health community should be able to walk and chew gum at the same time.

Unfortunately, while HSF argued before the Court that it was best suited to represent the interests of existing and future smokers, I held in our submission to the Ontario government that HSF had never advocated for harm reduction, even though pressed to do so.

As I had predicted, the judge later rejected the charity’s attempt to intervene but, perhaps because HSF is a prominent charity, he granted the agency stakeholder status like the CCS.

When the barriers to prevention in the Cy-près Foundation were revealed in 2024 in the proposed CCAA settlement, I knew that the chance of changing elements of the mediated Plan were dead-in-the-water. Nevertheless, a year after the Court had

rejected its first motion, HSF appeared before the Court again, at 15 minutes to midnight, and tried to remove the restrictions on the operation of the Cy-près Foundation, a desirable but unattainable goal at that stage.

Counsel for the Province of Ontario, post my critical letter, delivered a scathing denunciation of the HSF motion, calling it "an abuse of process." This was a serious accusation. I could not believe the naivety at the core of the HSF motion. In the face of

the overwhelming number of parties to the litigation urging Justice Morawetz to approve the settlement, HSF pressed on with its motion to amend the Plan.

Counsel for CCS had argued earlier among health organizations, with a straight face, that there was still a potential to change the Plan. The CCS lawyer put together a rationale for support for public health outcomes. But in the absence of interest by the provinces and territories throughout the process, the CCS arguments came to naught as expected. And when it became obvious in open court where the HSF motion was going the CCS wisely decided to remain silent. Using a sports analogy, the CCS and HSF pleadings amounted to a "Hail Mary Pass."

In his ruling on the HSF manoeuver, Chief Justice Morawetz said he agreed with the denunciation of HSF by counsel for Ontario. He said, "… Ontario's abuse of process concern was not without merit … in my view, Heart and Stroke's submissions were ill-advised and are rejected." He said, charitably, that he "would let it go with that." One was left imagining what he might have said if the offending body was not a major charity. The CCS written arguments to amend the plan did not merit a mention.

What could have happened?

Then followed Justice Morawetz's endorsement of the $32.5 billion mediated Plan with the flawed industry-friendly Cy-près Foundation being the only nod, a very faint nod, to public health. The CJTF and health interests across Canada had pressed governments – obviously not hard enough – for health benefits and changed industry behaviour from the litigation. Could these governments have negotiated a different outcome? I will argue "yes."

The provinces and territories had leverage. After all the mediation was in secret. They had the freedom to talk behind closed doors about and advocate for any health remedies they wanted even though those health benefits might have had to be delivered outside the limits of the CCAA statute and the viability-of-the-industry dictate.

The governments had the ability to talk turkey with the manufacturers and to say:

> "We are under political pressure from the health community. We are going to have to produce *quid pro quo* health outcomes from this negotiation in response to the damage to public health that you have caused. Those health benefits can be outcomes of this mediation where you have some say or they can be produced in legislation afterwards where you will have less input. There has to be a financial settlement to repair the damage but also a

> commitment to change your behaviour that will satisfy the health community. Which will it be? In the mediation? Or in a heavier legislative response later?"

That's what could have taken place either in talks within the mediation process or outside of it if health ministers had taken the public health potential of the litigation seriously and had not ducked the settlement talks. But that didn't happen. As a result, aside from awards to the Quebec class action victims and other smokers in Canada, and those who qualify for compensation under the Knight class action, there will be no real health benefits or justice for Canadians from the lawsuits.

The CJTF and other small advocacy groups as well as the large charities did not see the bankruptcy protection strategy coming. And Canadian doctors, nurses and other health professionals were not sufficiently engaged if they were engaged at all. Some of the major health interests did not appear to even recognize the health potential of the litigation. From a public interest perspective, the inadequate advocacy directed at government litigants was a failure by almost any measure. And subsequent to the settlement, in discussions about what the governments should do with settlement funds, I have not heard the banned words "harm reduction" pass any cancer, heart and stroke or lung charity lips.

Once again, the failure of governments to address an epidemic: a summary

Governments failed to negotiate a meaningful recovery of the $500 billion in losses to which, they argued in their lawsuits, they were entitled. They failed to produce any health measures or any recognizable change in industry behaviour. With regard to document disclosure the lawsuits may have taught the companies the importance of storing documents offshore or to not put incriminating positions in writing.

At a minimum, not being able to persuade the defendants to agree to an independent health foundation that would fund primary prevention, the provinces and territories could have, outside the CCAA process, put in trust $1 billion or more of the $24.7 billion recovered for precisely the foundation campaigned for by health groups. Such a foundation could have been announced at the same time that the settlement was approved. Such a health outcome never crossed their political minds.

One law professor who reviewed this critique – for the record a legal scholar with whom I have had no professional relationship – offered a humorous comment in the midst of a scathing criticism of the settlement. He opined:

> "The provinces have endless legislative power and taxation authority at their disposal which they didn't use. A manager of a Tim Hortons [coffee shop outlet] could have crafted a better deal on the back of a napkin."

Setting his joking aside, in the absence of aggressive health lobbying these governments decided that there would be no political price to pay related to the embarrassing outcome. And they were right. One would have thought there would be much stronger criticism of an outrageous settlement by the CCS, HSF and CLA charities. And by the Canadian Medical Association and other health professions. Instead there was only muted criticism or silence about the outcome.

With the Cy-près Foundation there is now money on the horizon. This may have caused charities focused on research and fund-raising to be conflicted out. If so, they ducked, rationalizing that they had other irons in the fire with the Cy-près Foundation created by these same governments.

After the settlement the tobacco manufacturers undoubtedly brought out the champagne. Business as usual. Tragic!