

The Crown's Right of Recovery Act

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Introduction

The government of Alberta recently passed the *Crown's Right of Recovery Act*¹ (the *Act*), which will enable the Province to recover the costs of health services from automobile accidents, convicted persons, and, perhaps most significantly, tobacco manufacturers. Alberta's legislation received Royal Assent in November of 2009. It is the second last province to enact legislation that enables the provincial government to litigate against tobacco manufacturers in order to recoup health care costs.² Over the last several decades, tobacco litigation has had a steadfast presence in the courts, both in Canada and internationally. Health care cost recovery is the latest and, arguably, most successful, trend in tobacco litigation. The *Act* has already garnered some attention, but not for its attempt to recover costs from tobacco manufacturers.³ There has been little discussion concerning the power the *Act* confers upon the province of Alberta to sue tobacco companies. This may be a reflection of the fact that suing tobacco companies to recover health care costs, and the controversy that comes with such litigation, is "old news". Alberta's legislation was preceded over a decade earlier by legislation in British Columbia.⁴ It may also reflect the growing recognition in society that tobacco use is associated with increased health care costs, even for non-smokers.

The following article intends to situate the *Act* within the context of tobacco litigation, particularly as it pertains to the state's right of recovery. It will begin with a brief examination of the *Act* before situating it within the broader context of right of recovery legislation and litigation. This will include a discussion of the origin and development of right of recovery statutes, the challenges

and critiques that right of recovery statutes face, and of some of the possible outcomes and issues associated with litigation.

The Crown's Right of Recovery Act

In many respects, the *Crown's Right of Recovery Act* is identical to its predecessor in British Columbia, the *Tobacco Damages and Health Care Costs Recovery Act*.⁵ The Supreme Court of Canada's ruling that British Columbia's legislation is constitutional⁶ is undoubtedly the reason why Alberta and the majority of provinces have adopted legislation that is virtually identical. In light of the similarities, and the fact that British Columbia's legislation has been subject to considerable attention in the courts and in the literature, it is unnecessary to thoroughly review Alberta's legislation. Nevertheless, it is worthwhile to highlight some its key provisions.

The *Act* extends to the province of Alberta a "direct and distinct action against a manufacturer to recover the Crown's cost of health services caused or contributed to by a tobacco-related wrong" (s. 42(1)). The cost of health services is defined as the sum of the total expenditure by the province for health services provided for insured persons as well as the estimated expenditures that could be reasonably expected will be provided to insured persons that have resulted from tobacco-related disease or the risk of tobacco-related disease (s. 41(1)(a)). The term 'health services', in turn, is broadly defined and includes, among other things, in- and out-patient services, services as defined in *Alberta Health Care Insurance Act*, and public health services. The parties that the province can seek recovery from are considered manufacturers.



Under the *Act*, manufacturers include any person who “manufactures or has manufactured a tobacco product” (s. 41(1)(i)). This definition includes, among others, persons who cause the manufacturing of tobacco products (s. 41(1)(i)(i)), derive at least 10% of revenues from the manufacture or promotion of tobacco products (s. 41(1)(i)(ii)), or engage in or cause others to engage in the promotion of a tobacco product (s. 41(1)(i)(iii)). The legislation does not specifically address what is meant by disease. Instead, disease is defined simply as including “general deterioration of health” (s. 41(1)(c)).

Following British Columbia’s lead, Alberta’s legislation does not require the Crown, in an action, to identify particular individual insured persons, prove causation, or prove that they provided health services to a particular

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individual (s. 42(5)). Additionally, the legislation permits the Crown to use statistical, epidemiological, and sociological information as evidence “for the purposes of establishing causation and quantifying damages or the Crown’s cost of health services respecting a tobacco related wrong in an action brought” (s. 45).

It is unclear when Alberta will file a lawsuit against the tobacco industry.⁷ Although every province has enacted legislation permitting them to sue tobacco companies, only British Columbia, New Brunswick, and Ontario have filed lawsuits.⁸ As could be expected, the tobacco companies implicated in the suits have mounted challenges and the parties are currently before the courts. Newfoundland and Labrador, the second province to enact legislation to recoup costs from tobacco companies, has not yet filed a lawsuit. In October 2002, Newfoundland and Labrador’s government referred the constitutionality of its act to the Newfoundland and Labrador Supreme Court, but that issue was resolved

with the Supreme Court of Canada ruling that British Columbia’s legislation is constitutional. Manitoba’s government is expected to initiate its lawsuit in 2010. Undoubtedly, Alberta and the other provinces that have not yet filed are awaiting the courts’ decisions, particularly in British Columbia.

The Origin and Development of Right of Recovery Statutes

The enactment of cost recovery statutes by every Canadian province over the past decade illustrates the expectation that litigation against tobacco companies to recoup health care costs is a worthwhile undertaking. Undoubtedly, the settlement in the United States in 1998 for over \$200 billion between the four largest US tobacco companies and the Attorney Generals of 46 states, known as the Master Settlement Agreement, has heightened expectations. But the Master Settlement Agreement, and the litigation that prompted it, was preceded by decades of unsuccessful litigation.

Because of its impact on health, tobacco has been in the courts for over half a century.⁹ For the better part of that time, tobacco manufacturers did not pay a single penny to any plaintiffs alleging injury from tobacco use. Wave after wave of litigants ultimately failed to hold tobacco companies accountable. Arguably, the lack of success can be attributed to several factors, among them the fact that early tobacco cases in the US were often decided by juries. And, as Frank Vandall notes, “juries adopted the theory of assumption of risk: that the consumer knew the risk and voluntarily began to smoke and voluntarily continued to smoke.”¹⁰ Moreover, plaintiffs were alleging harm from the proper use of cigarettes, and not because of a harm or defect. It was feared that if the plaintiff’s arguments were to succeed it would lead to a flood of product liability litigation.¹¹ Perhaps more pernicious, however, was the strategy adopted by tobacco manufacturers: “force the plaintiffs to spend all of their assets.”¹²

Tobacco companies are estimated to have spent hundreds of millions of dollars in litigation, money undoubtedly considered well spent if it avoided the troublesome precedent of a ruling in favour of a plaintiff. Consider the following: in the nine year case of *Cipollone v. Liggett Group, Inc.*, attorneys for Rose Cipollone spent approximately \$6 million before deciding to abandon the case.¹³ Some commentators attribute the success tobacco companies in the courts more to “out spending the plaintiff rather



than the backing of persuasive law.”¹⁴ This strategy materialized in the continuous opposition to litigation that tobacco industry mounted through the filing of motions to delay or limit the proceedings. Although there were a few instances with favourable results, overall tobacco litigation had proven unsuccessful. Even attempts at class action had been thwarted, a curious thing according to Vandall, given that “cigarette-cancer cases seem to be designed for class action litigation.”¹⁵ In the late 1980s, many involved in the tobacco control movement were concerned with the overall failure of litigation, a sentiment perhaps best expressed by Donald Garner, a law professor active in the movement: “Unless there’s a victory in the next year or two, the plaintiffs’ bar is going to be finished for another twenty years.”¹⁶

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With individual lawsuits failing, attention turned to state action. A few instrumental individuals in the United States helped to develop the concept that the state could sue tobacco companies to recover the costs of treating tobacco-related illnesses and disease.¹⁷ A complaint was initially filed by the State of Mississippi in 1994, and was soon joined by 40 other states. These actions culminated in a proposed settlement of \$368.5 billion, which ultimately resulted in the Master Settlement Agreement. Most of the states filed suits relying primarily on pre-existing laws. Of particular importance for Canada was the Florida suit. Florida enacted the *Medicaid Third Party Liability Act*¹⁸, which permitted the state to recover the costs of Medicaid from those who were responsible for the expenditures. Interestingly, the statute does not specifically mention tobacco manufacturers.¹⁹ The *Medicaid Third Party Liability Act* represented a significant development as it allowed the state to introduce epidemiological evidence to prove causation, created a new cause of action, removed affirmative defences, and

permitted the allocation of responsibility on the basis of market share.²⁰ Florida’s litigation ultimately resulted in a \$11.3 billion settlement.²¹

As noted above, British Columbia was the first Canadian jurisdiction to enact legislation to recoup health care costs from tobacco manufacturers. Using the Florida legislation as a template²², the British Columbia legislature adopted the *Tobacco Damages Recovery Act* in 1997, later renamed the *Tobacco Damages and Health Care Costs Recovery Act*. British Columbia followed Florida’s lead, for example, by allowing for the province to introduce epidemiological evidence in order to prove causation (s. 5).²³ In a 1998 press release, British Columbia’s Health Minister Penny Priddy noted that the legislation did not intend to punish smokers, but was about “making the industry, and not taxpayers, pay for the prevention and cessation programs needed to prevent future generations of British Columbians from becoming victims of tobacco addiction and smoking-caused illnesses.”²⁴ In 2005, it was suggested that the estimated health care costs to treat tobacco-related illness totalled \$4 billion annually in Canada, with British Columbia estimating its costs at more than \$430 million in 2004.²⁵ The province intended to hand the tobacco industry a hefty bill. Currently the province of British Columbia is seeking to recover \$10 billion. In September 2009, Ontario filed its own statement of claim for \$50 billion.²⁶ Recently, it has been suggested that the total cost for the health care cases could be \$100 billion.²⁷

Critiques and Challenges Facing Right of Recovery Statutes

Right of recovery legislation has been controversial and subject to considerable critique. In addition to mirroring Florida’s legislative approach, British Columbia’s legislation was similar in another significant way: it has been subject to numerous constitutional challenges. The tobacco industry alleged that the Florida legislation violated the “due process” protections provided by Florida’s constitution, a claim ultimately rejected by the Supreme Court of Florida. The constitutionality of the *Tobacco Damages and Health Care Costs Recovery Act* was challenged almost immediately after it was enacted. The British Columbia Supreme Court determined the act to be unconstitutional due to its extra-territorial scope²⁸, which is to say that the court determined that aspects of the legislation exceeded the territorial limitations on provincial jurisdiction.²⁹ The legislature revised the act,



removing the extra-territorial provisions, and resubmitted its claim. Again, the legislation was challenged and once again the British Columbia Supreme Court found the act to be unconstitutional on the basis of the legislation's extra-territorial scope.³⁰ The province appealed and the British Columbia Court of Appeal unanimously reversed the lower court's decision.³¹ Ultimately, in September 2005, the Supreme Court of Canada upheld the validity of the legislation.³² The court battle continues, however. A visit to the Supreme Court of Canada is expected in September 2011 to rule on Imperial Tobacco's third party notice to involve the government of Canada in the lawsuit.³³ This is not surprising, given the statement by

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Imperial Tobacco's vice president of law, Don McCarty, that "BC can expect longwinded and bad-tempered litigation."³⁴

Both statutes have also been subject to vociferous opposition from commentators suggesting the legislation violates the rule of law.³⁵ Frederick DeCoste, for example, has referred to the Supreme Court's reasoning in 2005 as "monstrous" for "fundamentally misunderstanding the Rule of Law and misconstruing its place and purpose in our law."³⁶ The Supreme Court, in its judgment, contended that the tobacco manufacturers conception of "the unwritten constitutional principle of the rule of law would render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers."³⁷ The Court held that "[t]he rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text."³⁸ According to DeCoste, the Court ignores

that the rule of law is the Constitution's vassal. In its judgment, the Court indicates that the rule of law "exists solely to serve and to protect the Constitution. It has, and can have, no existence beyond the Constitution."³⁹ The Court's understanding of the rule of law represents such a distortion historically and conceptually that DeCoste suggests, "the meager, indeed puny, remainder does not warrant our devotion as a political ideal."⁴⁰

Critics of the state's attempt to recover health care costs from tobacco have also suggested that the government, by collecting taxes on tobacco, has no legitimate claim to seek recovery for health care costs.⁴¹ As Sandra Gravanti argues,

The government should either continue benefitting from the revenue raised by cigarette taxes, thereby forfeiting any rights it may have to recover damages for medical costs caused by the sale and consumption of cigarettes, or the government should seek recovery for medical costs and declare that cigarettes are illegal. The government should not be able to pursue both.⁴²

Like the United States, Canada collects revenue from tobacco taxes. Why this should preclude the government from suing to recoup health care costs, as suggested by Gravanti, is not entirely clear. It is not an uncommon refrain, however; it is a sentiment often closely linked with arguments that tobacco is a legal industry. By authorizing the sale of what is known to be a dangerous product, exemplified by the required warning labels on tobacco products asserting the dangers of tobacco use, it has been suggested that the state has assumed the risks.⁴³

Potential Outcomes of Successful Right of Recovery Litigation

Despite the vociferous opposition mounted by the tobacco industry, trials in several provinces are on the immediate horizon. While success in British Columbia, New Brunswick, or Ontario would certainly trigger settlements with other provinces, tobacco manufacturers may opt to settle prior to any court having the opportunity to rule. The tobacco industry historically has opted to settle rather than allow the courts to determine the outcome, since a dangerous precedent in one jurisdiction is more unwieldy than a negotiated settlement. Additionally, settlements have typically allowed the tobacco industry



more control. Vandall has suggested that in the United States, tobacco manufacturers agreed to a settlement so they could influence the outcome by taking it to “their playing field: Congress.”⁴⁴ As he notes, “tobacco manufacturers apparently felt that they were losing before the press and before the public, and therefore, wanted to take the debate before Congress where they have won in the past and anticipate winning in the future.”⁴⁵ Although there are important differences between American and Canadian governance, and the political response to tobacco has changed significantly since the Master Settlement Agreement, some commentators still contend that the Canadian government is too soft on the tobacco industry and that this is reflected in negotiated settlements.

It has been suggested that tobacco manufacturers do not have any option but to settle. In 2000, Gravanti commented that successful outcomes in lawsuits in the US “could effectively destroy the tobacco industry.”⁴⁶ Allowing the matter to be decided by the courts could result in hefty judgments. Litigation could potentially bankrupt tobacco companies. Citigroup has suggested that if British Columbia’s lawsuit is successful, it could bankrupt Imperial Tobacco.⁴⁷ When Quebec sought roughly \$1.36 billion in unpaid taxes on allegedly smuggled cigarettes from JTI-MacDonald in 2004, JTI-MacDonald responded by seeking bankruptcy-court protection.⁴⁸ Several provinces joined Quebec in attempting to recover unpaid taxes, bringing the total amount sought to around \$9 billion.⁴⁹ Unsurprisingly, JTI-MacDonald remained in bankruptcy protection until recently. In April 2010, a settlement between several major tobacco companies and both levels of government was reached.⁵⁰

Realistically, settlements might represent the only way that the government may recover any money. Unfortunately, they are often for significantly less than what is being sought. In the case of JTI-MacDonald, the settlement was for pennies on the dollar, coming in at a relatively low sum of \$550 million, particularly compared to the \$9 billion originally sought. Neil Collishaw, research director for Physicians for a Smoke-Free Canada, says the settlement with JTI-MacDonald is not only a rotten deal for Canadian taxpayers, he also described it as a “get-out-of-jail-free card” for tobacco companies and their executives, as most of the charges, including criminal charges, associated with the contraband litigation were dropped in the settlement.⁵¹

While settlements may prove unsatisfactory financially, they do harness considerable potential. Settlements in the United States, including the Master Settlement Agreement (which, itself, was finalized at a significantly lower figure than initially anticipated), typically have included requirements that the industry change behaviours, such as advertising and marketing, as well as address health concerns. In 2005, Garth Mahood, executive director of Non-Smokers Rights Association, suggested that in the process of settling with JTI-MacDonald, the government was in the position to negotiate “major concessions from

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the company that benefit public health.”⁵² When the settlement was reached in April, Mahood characterized it as “ugly” and a “cave-in” because it did not address health or seek any industry changes.⁵³

Determining the loss of revenue from unpaid taxes is relatively straightforward when compared to the task of establishing the actual cost tobacco imposes on the health care system. Despite the large settlement reached in the United States, few commentators feel that it came close to the true cost to treat tobacco related illnesses. Some tobacco control advocates have expressed concerns that the various states were simply blinded by a “short-sighted interest in money.”⁵⁴ Given that risks associated with tobacco use are not uniform across all smokers, it is likely impossible to fully appreciate the impact tobacco has, particularly given the increase of co-morbidities, such as obesity. In addition to the more common chronic diseases associated with tobacco uses, such as cancer, emphysema, and cardiovascular disease, tobacco’s impact can be transient yet devastating. Individuals who suffer from asthma or allergies, for example, may be especially susceptible to the negative impact of tobacco. Second-hand tobacco smoke may trigger asthma attacks, increase the severity of attacks, and is a risk factor for



new cases of asthma in children.⁵⁵ Non-smokers may not be able to appreciate the impact that second-hand smoke has on their health. Research examining the rates of admission to hospitals in Toronto from 1996 until 2006, three years prior to the implementation of a smoking ban and two years after the last phase of the implementation, found significant decreases in hospital admissions for cardiovascular conditions (39%) and respiratory conditions (33%).⁵⁶ Research in the United States recently suggested that a nation-wide smoking ban in public places could result in nearly 19,000 fewer hospitalizations, a cost savings of \$92 million.⁵⁷

If, as suggested, the total amount sought from tobacco manufacturers in Canada could reach \$100 billion, additional problems will be encountered. In addition to the likely outcome of tobacco manufacturers declaring bankruptcy, it is entirely possible that the tobacco industry will be completely eliminated in Canada. While some tobacco control advocates would certainly laud this, it is not necessarily a desirable option. For one, it would have a detrimental impact on millions of smokers who are addicted to nicotine. While nicotine replacement therapies might prove effective, forcing smokers to quit would be poor public policy, not to mention politically unpalatable. It would also have a detrimental impact on second- and third-world nations. If the markets for tobacco in Canada were eliminated, tobacco manufacturers would simply attempt to increase their markets in developing countries.⁵⁸

To be sure, it is unclear what the real impact of the elimination of the tobacco industry in Canada would be. Certainly, there would be a negative impact on smokers in the short-term, but what would happen in the long term? Would it simply promote contraband, as higher taxation did in the 1990s?⁵⁹ What impact would the eradication of tobacco companies have on jobs and the economy? Would it actually save the state money? If the tobacco industry were eliminated it would necessarily result in a decrease in tax revenues⁶⁰ and, possibly, higher health care costs. Albeit a crass argument, smokers tend to die sooner than non-smokers. While smokers do accrue health care costs, arguably these costs may be higher with an increase in life expectancy combined with the chronic diseases they will inevitably get. Phillip Morris, for example, has argued that smokers do their countries a favour “by boosting tax revenue, dying early, and not drawing a pension”.⁶¹

If the government is successful, new problems emerge. A court ordered judgment or a negotiated settlement would still require the money to be recovered. This in itself may prove difficult. Once any funds have been recovered, the question will turn to how the money should be spent? Does it simply return to the government’s coffers? The Master Settlement Agreement did not simply reimburse the health care system. Some money was put aside for public awareness campaigns, some money went to the National Association of Attorneys General, and some went into a state enforcement fund. Determining how the money is to be distributed will undoubtedly raise new issues to be resolved, particularly given the public nature of Canada’s health care system. Ultimately, taxpayers have footed the bill for tobacco related illness and there will likely be more than a few who will consider tax rebates to be in order.

Conclusion

With Alberta’s *Crown’s Right of Recovery Act* a further chapter in tobacco litigation has begun. While the outcome of health care costs recovery litigation will likely be evident in the near future, the long-term impact of tobacco litigation may not be known for decades. Has tobacco litigation begun to erode the rule of law, as critics suggest? Will the tobacco industry continue to exist in Canada, or will it be eradicated, and ultimately transplanted into second- and third-world nations? Where might this leave the state with other industries responsible for disease, such as the food industry or the petro-chemical industry? For now, more questions remain than answers. One thing is for certain, with the advent of the *Crown’s Right of Recovery Act* in Alberta, the final showdown between the provincial governments and the tobacco industry is imminent.

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Endnotes

- 1 S.A. 2009, c. C-35.
- 2 Prince Edward Island was the last province to enact such legislation in December of 2009, *Tobacco Damages and Health Care Costs Recovery Act*, R.S.P.E.I. 2009, c. 22.
- 3 As Christie McLaren observes, through the *Act*, “the province of Alberta is poised to become the first jurisdiction in the world that will try to make crime pay – literally – by suing convicted people for the cost of treating injuries they sustain committing a crime,” Christie McLaren, “Alberta to seek recovery of health costs associated with criminal activity” (2009) 181:3-4 C.M.A.J. E41 at E41. The attempt to recover cost from individual criminals has been criticized, with suggestions that this act will not deter criminal activity and may end up costing taxpayers money, *ibid.*
- 4 As noted above, Alberta was the second last province to enact such legislation, although the legislation has not come into force in every jurisdiction. The provincial legislation in chronological order: British Columbia, *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30; Newfoundland and Labrador, *Tobacco Health Care Costs Recovery Act*, S.N.L. 2001, c. T-4.2; Nova Scotia, *Tobacco Damages and Health-care Costs Recovery Act*, S.N.S. 2005, c. 4; Manitoba, *Tobacco Damages and Health Care Costs Recovery Act*, C.C.S.M. c. T70; New Brunswick, *Tobacco Damages and Health-care Costs Recovery Act*, S.N.B. 2006, C. T-7.5; Saskatchewan, *Tobacco Damages and Health Care Costs Recovery Act*, April 2007, c. T-14.2; Ontario, *Tobacco Damages and Health Care Costs Recovery Act*, S.O. 2009, c. 13; Quebec, *Tobacco-related Damages and Health Care Costs Recovery Act*, R.S.Q. c. R-2.2.0.0.1; Alberta, *Crown’s Right of Recovery Act*, S.A. 2009 c. C-35, and; Prince Edward Island, *Tobacco Damages and Health Care Costs Recovery Act*, R.S.P.E.I. 2009, c. 22.
- 5 *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30.
- 6 *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49 [*British Columbia v. Imperial Tobacco*, 2005].
- 7 Arguably, it is not clear even if the Alberta government will proceed. As reported by the CBC, “Health minister Ron Liepert has said no policy decision has been made on whether to actually move ahead with tobacco company lawsuits because that would require a debate within government on how to proceed”, “Alberta passes bill to recoup health costs from criminals, big tobacco” (November 20, 2009), online: CBC News <www.cbc.ca/health/story/2009/11/20/calgary-bill-48-tabacco-lawsuits.html#ixzz0qHGPMmsn>. Unlike its equivalent in other provinces, Alberta’s *Crown’s Right of Recovery Act* extends beyond the issue of tobacco damages. Thus, even without initiating a lawsuit against tobacco manufacturers, the Alberta legislation will continue to serve a purpose. Other jurisdictions have enacted legislation that allows them to recoup health care costs unrelated to tobacco damages. For example, British Columbia enacted the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27.
- 8 British Columbia filed its claim in November 1998, New Brunswick filed in March 2008, and Ontario filed in September 2009.
- 9 In addition to litigation by individuals against tobacco companies, tobacco companies in Canada and the United States have been in the courts to defend against class action lawsuits and litigation by governments for contraband and tax evasion. The tobacco industry has also mounted numerous challenges to legislative restrictions on the sale, advertising, and use of tobacco. Recently, in Canada, a tobacco manufacturer sued the federal government for failing to enforce federal tobacco tax laws on First Nations reserves, see: *Grand River Enterprises Six Nations Ltd. v. Canada (Attorney General)*, 2010 ONSC 2911 (CanLII).
- 10 Frank J. Vandall, “The Legal theory and the Visionaries that led to the Proposed \$368.5 Billion Tobacco Settlement” (1997-1998) 27 Sw. U.L. Rev. 473 at 477 [Vandall].
- 11 V. Han, “History of Tobacco Litigation” (1988) Burson-Marsteller Position Paper, online: Tobacco Documents Online <http://tobaccodocuments.org/bliley_lor/92347651-7658.html>, at 3-4 [Han].
- 12 Vandall, *supra* note 10 at 475.
- 13 See: Raymond E. Gangarosa, Frank J. Vandall & Brian M. Willis, “Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol” (1994) 22 Fordham Urb. L.J. 81.
- 14 Eric LeGresley, *Recovering Tobacco-Caused Public Expenditures from the Tobacco Industry: Options for Provincial Government* (Non-Smokers’ Rights Association, 1998), online: Non-Smokers’ Rights Association, <http://www.nsra-adnf.ca/cms/index.cfm?group_id=1300> [LeGresley].



- 15 Vandall, *supra* note 10 at 476.
- 16 Han, *supra* note 11 at 8.
- 17 See Vandall, *supra* note 10, for a discussion of the development of public litigation.
- 18 Fla. Stat. Ch. 409.910 (1995).
- 19 Vandall, *supra* note 10 at 480.
- 20 LeGresley, *supra* note 14.
- 21 Vandall, *supra* note 10 at 481, citing *See Up to Speed, The Week's Top Stories, That Settles That*, Atlanta Const. (August 31, 1997) at C2.
- 22 Elizabeth Edinger, "The Tobacco Damages and Health Care Costs Recovery Act: JTI-Macdonald Corp. v. British Columbia (Attorney General)" (2001) 35 Can. Bus. L.J. 95 at 97 [Edinger].
- 23 Other countries have also followed the United State's lead, some even relying on the US courts. For a discussion on this, see Brian S. Appel, "The Developing World Takes on the Tobacco Industry: An Analysis of Recent Litigation and its Future Implications" (2000-2001) 16 Am. U. Int'l L. Rev. 809.
- 24 British Columbia, Ministry of Health, "Press Release: Historic tobacco legislation holds manufacturers accountable for prevention and health care costs" (June 11, 1998), online: Physicians for a Smoke-Free Canada, <<http://www.smoke-free.ca/litigation/webpages/British Columbia.htm>>
- 25 Barbara Sibbald, "All provinces likely to join tobacco litigation" (2005) 173:11 CMAJ 1307 at 1307 [Sibbald].
- 26 Ontario, Ministry of the Attorney General, "Ontario Seeks \$50 Billion In Tobacco-Related Health Care Costs" (September 29, 2009), online: Ontario, Ministry of the Attorney General, <<http://www.attorneygeneral.jus.gov.on.ca/english/news/2009/20090929-tobacco-nr.asp>>.
- 27 Laura Payton, "Feds fight to avoid tobacco lawsuit" *Winnipeg Sun* (May 21, 2010) online: *Winnipeg Sun*, <<http://www.winnipegsun.com/news/canada/2010/05/20/14024946.html>>.
- 28 *JTI-Macdonald Corp. v. British Columbia (Attorney General)*, (2000), 184 D.L.R. (4th) 335, [2000] 6 W.W.R. 227 (B.C.S.C.).
- 29 For a detailed discussion of this court's decision, including a discussion of extra-territorial scope, see: Edinger *supra* note 22.
- 30 *JTI-Macdonald Corp. v. British Columbia (Attorney General)* (2003), 227 D.L.R. (4th) 323, [2003] B.C.J. No. 1309 (QL) (B.C.S.C.). Justice Holmes noted in his decision that he did not find "the basic purpose and effect of the 2000 Act, its pith and substance in constitutional terms, has varied essentially from the predecessor 1997 Act" (*ibid.* at para. 222). Despite the amendments by government of British Columbia, Homles J. found that "the dominant purpose of the 2000 Act is essentially unchanged from the 1997 Act. The pith and substance of the 2000 Act continues to be the pursuit nationally and internationally of the tobacco industry for the health care costs the government has incurred on behalf of persons who suffer a tobacco related disease" (*ibid.* at para. 245). Therefore, he concluded the revised legislation to be unconstitutional as "[t]he extraterritorial reach of the Act again exceeds the Province's constitutional competence" (*ibid.* at para. 246).
- 31 *JTI-Macdonald Corp. v. British Columbia (Attorney General)*, (2004), 239 D.L.R. (4th) 412, [2004] 9 W.W.R. 230 (B.C.C.A.).
- 32 *British Columbia v. Imperial Tobacco*, 2005, *supra* note 6.
- 33 *British Columbia v. Imperial Tobacco Canada Ltd.* (2008), 292 D.L.R. (4th) 353, [2008] 12 W.W.R. 241.
- 34 Sibbald, *supra* note 25 at 1307.
- 35 For example, see: Robert A. Levy, "Tobacco Medicaid Litigation: Snuffing out the Rule of Law" (1997) CATO Policy Analysis No. 275, online: CATO Institute, <http://www.cato.org/pubs/pas/pa-275.html#FOOTNOTE_18> and F.C. DeCoste, "Smoked: Tradition and the Rule of Law in *British Columbia v. Imperial Tobacco Canada Ltd.*" (2006) 24 Windsor Y.B. Access Just. 327 [DeCoste].
- 36 DeCoste, *ibid.* at 327, 359.
- 37 *British Columbia v. Imperial Tobacco*, 2005, *supra* note 6 at para. 65.
- 38 *Ibid.* at para. 67.
- 39 DeCoste, *supra* note 35 at 350.
- 40 *Ibid.* at 351. For a detailed discussion on the rule of law in the context of tobacco litigation, see DeCoste, *ibid.*; Robin Elliot, "British Columbia's Tobacco Litigation and the Rule of Law" in Patricia Hughes & Patrick A. Molinari, eds., *Participatory Justice in a Global Economy: The New Rule of Law* (2004) 459, online, Social Sciences Research Network, <<http://ssrn.com/abstract=1520740>>, and; Devrin Froese, "Professor Raz, the Rule of Law, and the *Tobacco Act*" (2006) 19:1 Canadian J.L. & Juris. 161.
- 41 However, some estimate that Canada's tobacco taxes recover only about one quarter of the costs imposed on society, see LeGresley, *supra* note 14.



- 42 Sanda L. Gravanti, "Tobacco Litigation: United States Versus Big Tobacco – An Unfiltered Attack on the Industry" (2000) 52 Fla. L. Rev. 671 at 685 [Gravanti].
- 43 Gravanti notes: "The question that arises, then, is how the states can assert that, while they authorized the sale of this known dangerous product, the states did not assume the risk that under their own law, they would have to pay for the damages caused when the risk became a reality? It seems that the states authorized the tobacco companies to sell their products, despite the fact that the states knew of the potential health risks and required a warning label on each box of cigarettes, and the state and federal governments are now suing the tobacco companies for the injuries caused by those cigarettes sold", *ibid.* at 684-685.
- 44 Vandall, *supra* note 10 at 484-485.
- 45 *Ibid.*
- 46 Gravanti, *supra* note 42 at 691.
- 47 Non-Smokers' Rights Association, *Tobacco-Related Litigation in Canada (2010 Edition)*, (2010), online: Non-Smokers' Rights Association, <http://www.nsr-aadnf.ca/cms/index.cfm?group_id=1905> at 7.
- 48 "JTI-Macdonald seeks shelter against tax claim" (August 24, 2004), online: CTV News, <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20040824/JTI_Macdonald_040824?s_name=&no_ads>.
- 49 William Marsden, "Tobacco giant hit with huge tax bills" (July 21, 2005) *The Gazette* at A.10, online: Physicians for a Smoke-Free Canada, <<http://www.smoke-free.ca/litigation/webpages/QuebecRevenue.htm>> [Marsden].
- 50 Richard Blackwell, "Tobacco giants to pay \$550-million settlement" (April 13, 2010), *The Globe and Mail*, online: *Globe and Mail*, <<http://www.theglobeandmail.com/news/national/tobacco-giants-to-pay-550-million-settlement/article1533485/>> [Blackwell].
- 51 *Ibid.*
- 52 Marsden, *supra* note 49.
- 53 Blackwell, *supra* note 50.
- 54 "Master Settlement Agreement :: 1998", online: Tobacco Freedom.org, <www.tobaccofreedom.org/msa>.
- 55 United States, Environmental Protection Agency, "Secondhand Smoke", online: U.S. Environmental Protection Agency, <<http://www.epa.gov/asthma/shs.html>>.
- 56 Alisa Naiman, Richard H. Glazier & Rahim Moineddin, "Association of anti-smoking legislation with rates of hospital admission for cardiovascular and respiratory conditions" (2010) 182:8 C.M.A.J. 761.
- 57 "Nationwide Smoking Ban Would Help Reduce Heart Attack Admissions, Slash Costs" (May 22, 2010) *ScienceDaily*, online: *ScienceDaily*, <<http://www.sciencedaily.com/releases/2010/05/100520212603.htm>>.
- 58 It has been observed that "[w]ith the decrease in smoking prevalence in developed countries, the multinational tobacco companies are now moving massive resources to boosting sales in developing countries", Judith Mackay & John Crofton, "Tobacco and the developing world" (1996) 52:1 *British Medical Bulletin* 206 at 206.
- 59 In an editorial in the *Edmonton Sun*, Eric Gagnon, manager of external communications for Imperial Tobacco Canada, alleges that "[t]he only people who will benefit from provincial governments suing tobacco companies will be lawyers and the criminal organizations that traffic in illegal tobacco", Eric Gagnon, "Suing Big Tobacco will only benefit lawyers" (January 30, 2010) *Edmonton Sun*, online: *Edmonton Sun*, <www.edmontonsun.com/comment/editorial/2010/01/30/12678391.html>.
- 60 The tobacco industry is quick to point out that the Canadian government profits most from tobacco. As noted by Sibbald in 2005, "Canadian tobacco companies, with annual profits of about \$1.5 billion, have said judgments in these lawsuits could ultimately bankrupt them. Industry spokespeople say the big profit-makers in tobacco are the federal and provincial governments, which collected \$9 billion in tobacco taxes last year", *supra* note 25 at 1307.
- 61 Zosia Kmietowicz, "Tobacco company claims that smokers help the economy" (2001) 323(7305) *B.M.J.* 126 at 126. Research in the Czech Republic showed that the country saves money because of the premature deaths of smokers – a claim that lead some sardonic media to contemplate whether it would make for good policy to freely disburse cigarettes among the sick and elderly.

