

# 'BIG TOBACCO' IN COURT

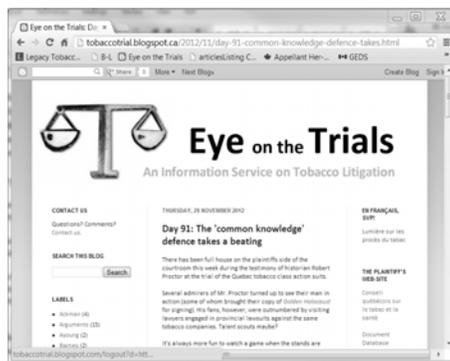
## CLASS ACTION LAWSUITS COULD BE A GAME-CHANGER

After years of delaying tactics and preliminary motions, the first trial of a Canadian class action suit against tobacco companies opened in Montreal this past March.

The lawsuits seek compensation for addiction (the *Létourneau* case) and for lung diseases (the *Blais* case). (See page 5). The official claim is for \$27 billion, but the potential could be much greater if this suit triggers a reform in the way tobacco is managed in Canada.

Canada has recently become the hot-spot of tobacco litigation. Multinational tobacco companies are facing more litigation in Canada than in any other jurisdiction (there is a corporate separation from multinational and USA operations).

The legal foundation for the Canadian suits may be less friendly to the companies than the US jurisdictions where they have developed their approach. Canada is one of the few countries to allow class action suits, which create a better economic rationale to finance these lengthy and expensive trials. The class action suits now underway in Montreal are the only such suits in the world at this stage.



PSC and the Quebec Public Health Association have partnered to provide a daily blog of the *Blais-Létourneau* trial.

[www.tobaccotrial.blogspot.ca](http://www.tobaccotrial.blogspot.ca)

**“If our product was not addictive, we would not sell a cigarette next week...”**

**Bob Bexon**  
President, 1999-2004  
Imperial Tobacco Canada Ltd.  
Exhibit 266, *Blais-Létourneau* trial

The first year of this trial has been allocated to the plaintiffs to establish their case (the defendant companies are expected to take a second year presenting their case). During the first 9 months of trial, over 30 former industry insiders were subpoenaed to testify and more than 2,000 damaging industry documents were put on record.

Justice Brian Riordan of Quebec's Superior Court has been presented with ample evidence that the answers to the questions of this trial set by the judge who certified the case are a resounding "YES".

The 8 common questions of the trial boil down to "Did the companies ... manufacture a dangerous product? know cigarettes were dangerous? hide the dangers? deny the dangers? market in ways that conveyed false information? know cigarettes were addictive and manufacture them to maintain nicotine levels sufficient to maintain addiction? Conspire to maintain a common front? Jeopardize the health of smokers?"

It may be 2014 or later before this trial winds up, and perhaps years after that before appeals are exhausted. In the meantime, there is plenty of new information from this trial to justify governments moving towards deeper and more effective control of the manufacture and supply of tobacco products.

# Population-wide Cessation Support: Challenges in reaching smokers

Providing effective community and clinical support to help smokers quit smoking has remained a challenge over decades. In recent years, some governments have stepped up their efforts, but the usage of these programs is dwarfed by the number of smokers (and quitters) who are not reached by (or don't want to use) these services.

## Ontario's varied programs reach fewer than 1 in 30 smokers.

Ontario has put an increased focus on funding a range of services for smokers. The effectiveness and efficiency of these programs is now being evaluated—but the preliminary data suggest that the use of these services remains low.

## British Columbia's subsidy of stop-smoking medications reached 1 smoker in 4 in its first year.

In early October, the British Columbia Ministry of Health reported on a remarkable success — about 1 in 4 smokers in that province had registered to receive free smoking-cessation products.

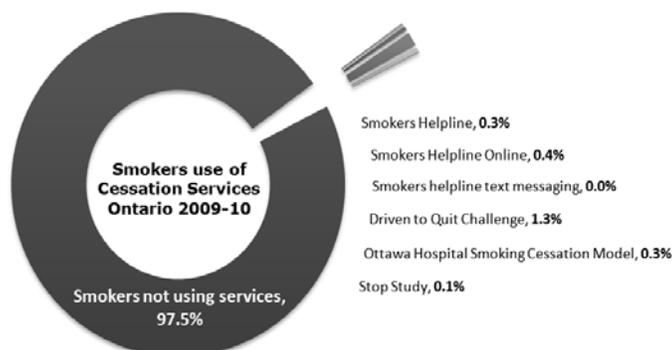
BC is not the only province to underwrite the costs of smoking cessation, but the Smoking Cessation Program it launched in September 2011

has a number of novel elements. For example, smokers can access the program by phone at any time—the service is open 24/7.

All BC smokers are eligible to receive a course of non-prescription NRTs (which can be mailed to them). Those covered by BC's PharmaCare program can alternatively receive a course of prescription products (varenicline or bupropion). Smokers are entitled to one course of treatment per calendar year.

The original budget forecast for the program was \$15 million to \$25 million per year.

It is too early to know the impact of this program, but the reach of this program is wide enough that population surveys should be able to capture the effects. The same cannot be said of services elsewhere in the country.



Source: OTRU – Smoke-Free Ontario Strategy Evaluation Report, 2011.

**Fewer than 3% of Ontario Smokers took advantage of any of the funded public programs to assist smoking cessation efforts in 2009-2010.**

**The following year, British Columbia reported attracting one-quarter of smokers to its free-NRT program**

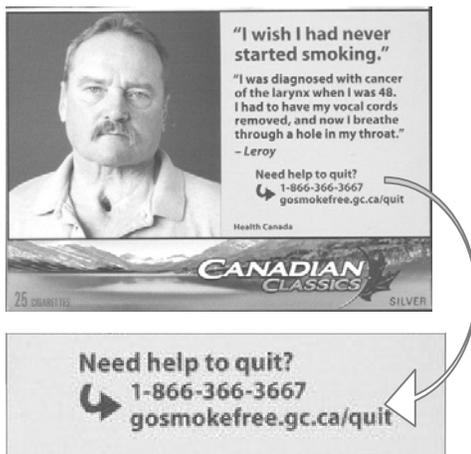
## USAGE AND COSTS OF QUITLINE AND ASSOCIATED WEB-BASED CESSATION SERVICES, 2011

Jurisdiction	Year started	Smokers (CCHS)	Quitline Calls	Service users	Registered Web-users	Estimated Cost	Cost per caller/user
British Columbia	2005	617,970	3,511	1,749	5,030	\$1,219,000*	\$118
Alberta	2002	675,966					
Saskatchewan	2003	198,230	552	242	221	\$318,000\$	\$313
Manitoba	2003	198,837	614	299	209	\$378,000\$	\$337
Ontario	2000	2,191,502	8,015	4,733	7,035	\$1,673,000*	\$85
Quebec	2002	1,428,422	8,535	4,759	705	\$763,000*	\$54
New Brunswick	2002	139,523	405	325	182	\$301,000\$	\$330
Nova Scotia	2002	176,224	527	411	486	\$317,000\$	\$222
Prince Edward Is.	2003	26,116				\$277,000\$	
Newfoundland	2000	90,734	1,674	1,147	378	\$293,000\$	\$92
Yukon	2010	8,722		124		\$100,000\$	\$806
Nunavut	2010	10,275				\$75,000\$	
Northwest Terr.	2010	12,232				\$44,000\$	
<b>Canada</b>		<b>5,764,843</b>	<b>23,833</b>	<b>14,246</b>	<b>38,079</b>	<b>\$5,758,000</b>	<b>\$75</b>

Source of inputs to estimate costs:

\*NAOC profile, [www.nacquitline.org/profile/can](http://www.nacquitline.org/profile/can); \$Health Canada funding reported to the FCTC.

Beginning in 2012, every package of cigarettes displays the phone number where smokers can receive advice and/or assistance free-of-charge.



### New Health Warnings may improve Quitline usage

For about a decade, Canadian governments and health charities have supported free telephone services to assist Canadians in their efforts to quit smoking.

Many provinces provide information on the use of their telephone and web-based Quitline services through the North American Quitline Consortium. This agency reports that in 2011, there were almost 24,000 calls made to quitlines, and about 14,000 smokers accepted the offer of services other than self-help material from these agencies.

This suggests that use of the quitlines was limited to considerably fewer than 1% of all smokers. (Using the estimated number of smokers from the Canadian Community Health Survey, about 1 in 200 smokers called the quitline, and 1 in 400 use their services.

Provincial and federal governments have now collaborated in setting up a pan-Canadian quitline number which has appeared on the packages of all cigarettes sold in Canada since mid-2012. Although the number is the same, smokers will continue to be referred to the services in their own jurisdiction.

The display on packages of this service is expected to greatly increase the reach of these services, which to date has been very modest.

Financial support for Quitlines is one of the few tobacco-use programs not cut by Health Canada in 2012.

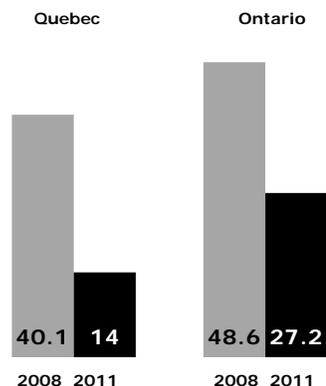
## Tobacco Taxes, Contraband and Smoking Rates

Illicit tobacco sales have continued to challenge governments in central Canada, but the good news is that the impact on public health seems to have been less than feared.

Federal and provincial governments have avoided providing estimates of the volume of cigarettes that are illegally sold. Industry estimates shareholders follow the same downward trend that we calculate based on the number of smokers and their expected consumption. Euromonitor now estimates that about 16% of cigarettes sales in Canada are illicit.

Because these sales have been concentrated in Ontario and Quebec, one might have expected that reductions in tobacco use would have suffered compared with other provinces. This does not appear to be the case.

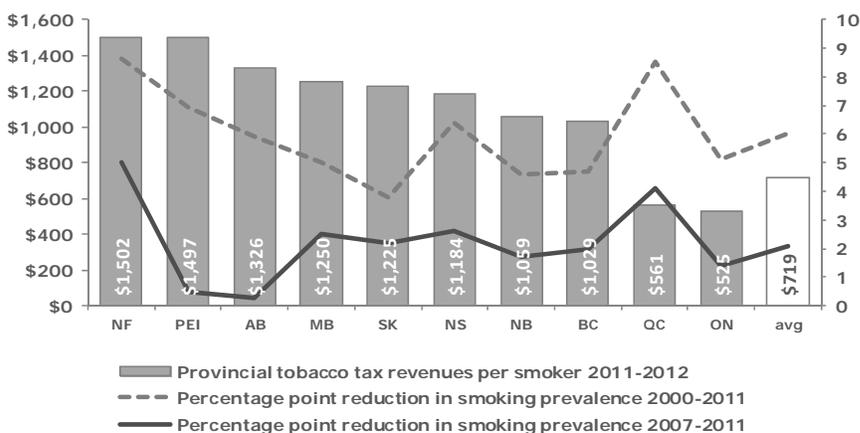
Between 2000 and 2011, Canada experienced a decline in smoking prevalence from 26% to 20% (using data from the Canadian Community Health Survey). Provinces with higher rates of illicit tobacco AND lower tobacco prices did not necessarily experience less success in reducing smoking rates. Quebec experienced the most improvement during this period (including after the peak of



Market share of illicit cigarette manufacturers 2008 and 2011 (PMI, 2012)

contraband in 2007-2009). It would be hard to say that contraband and low taxes have had no effect — Ontario which has experienced the highest rates of contraband and has almost the lowest tax rates has seen less success in reducing smoking than many other provinces.

There is no simple or quick fix to tobacco use or illicit tobacco sales. Implementing other policies may help substitute when governments lose the use of taxes as a public health tool.



# Government response to novelty smoking products

## Health authorities caught flat-footed

### VAPORIZERS AND E-CIGARETTES

It's hard not to notice them, pressed up against the cash registers at convenience stores across Canada. They are displayed at eye-level. They are colourful. They are cheap. They come in attractive flavours—cherry—apple—mocca—cinnamon.

But what are these new e-cigarettes and who is using them? Are they a risk to public health? Do they help smokers quit or do they help recruit young people to more harmful forms of smoking?

Surprisingly, there seems to be no process in place to answer these questions.

### Nicotine-delivering e-cigarettes are banned in Canada.

Almost 4 years have passed since Health Canada issued an advisory to Canadians not to use these products. In March 2009 it ruled that electronic devices intended to deliver nicotine fell under the authority of the *Food and Drugs Act* and could not be marketed without approval.

So, unlike the United States and other countries, electronic cigarettes which deliver nicotine have not been legal for sale. (They are reportedly easy to acquire through internet sales).

The non-nicotine versions now on sale across Canada fall into a regulatory void. They are not covered under the *Tobacco Act* or the *Food and Drugs Act*, and Health Canada has offered no insights into whether or how they will assess the risks or benefits of these products.



A typical counter-top display for nicotine-free e-cigarettes sold in Canada

### SHISHA / NARGHILE / WATERPIPE

Over the last decade, these exotic smoking implements have grown in popularity around the world. What has not grown is a public health response to this dangerous fad.

Many municipalities and provinces have allowed shisha bars to escape requirements for smoke-free public and workplaces. Requirements on cigarette sales—like health warnings—are missing for these products. These imported products are often sold without tobacco taxes being applied because customs officials permit them to be labelled as food products, even when they contain tobacco.

The federal ban on flavoured tobacco does not apply to shisha.

The Youth Smoking Survey released this year found that 1 in 15 Canadian high school students had smoked a water-pipe (compared with 1 in 3 for cigarettes and 1 in 6 for little cigars).



### Oman requires health warnings on shisha tobacco.

Although such warnings are required under the Framework Convention on Tobacco Control, the Canadian government has not put any such regulations in place.

### A SOLUTION IN THE WAITING: IMPOSE A MORATORIUM ON NEW SMOKING PRODUCTS

One way to prevent novelty smoking fads from becoming full-fledged public health issues is to pre-empt the marketing of new smoking or tobacco products.

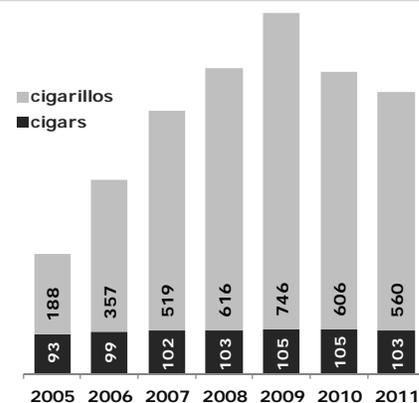
A moratorium on new tobacco products has been proposed by Physicians for a Smoke-Free Canada and the Quebec Coalition for Tobacco Control.



Governments were slow to clamp down on youth-friendly novelty flavoured cigarillos.

The law passed in 2009 reversed the growth of these products, but did not succeed in removing them from the market.

A moratorium on new products could prevent a recurrence.



Millions of cigars / cigarillos sold source: Euromonitor

# \$150 billion in claims

## Growing momentum in tobacco lawsuits

### THE PROVINCIAL SUITS

All of the Canadian provinces have passed laws that provide a way for the costs of treating diseases caused by tobacco products to be aggregated and apportioned according to market share of the companies. All but Nova Scotia have initiated proceedings against the companies.

More than a decade has passed since British Columbia filed the first suit. During that time, the industry's challenges to those suits have been eroded by court decisions. The enabling laws were found to be constitutional, the industry's claim that the federal government should be held liable was dismissed, and the ability of the governments to engage the foreign-based parent companies was maintained. The guidance of the Supreme Court on these questions has hastened their application to other jurisdictions, but not without the industry trying to invent new forms of delay.

Provincial governments seem to be somewhat coordinating their efforts, although they have taken different policy directions on some key issues, such as the engagement of law firms that will work on a contingency basis. (This approach risks putting financial outcomes ahead of health outcomes in the management of settlement discussions).

Disturbingly, there have been no efforts to engage the tobacco control community or public health experts in setting goals for these efforts.

### THE FACES BEHIND THE CASES



**Cécilia Létourneau**

**Cécilia Létourneau** started smoking in 1964 when she was 19 years of age. At that time she saw smoking as an expression of a new found freedom as an adult, not knowing that the cigarettes she bought were likely to create an addiction she could not break.

In 1998, she went to Quebec's small claims court to demand reimbursement for the cost of nicotine patches. Although unsuccessful, this action was the spark to her becoming the class representative for a class action suit against addiction launched later that year.

The **Létourneau** class action suit seeks \$5,000 for each of an estimated 2 million Quebec smokers, as well as an equivalent sum in punitive damages. The total claim is just under \$18 billion.



**Jean-Yves Blais**

**May 29, 1944—August 3, 2012**

**Jean-Yves Blais** started smoking at the age of 10. Forty-three years later (in October 1997) his complaint about a sore back led to a diagnosis of lung cancer.

Unlike many victims of lung cancer, Mr. Blais survived. His case was brought to the attention of the Quebec Council on Tobacco and Health, which launched a class action suit against tobacco companies with him as the representative class member.

Mr. Blais was present when the trial of this suit finally reached court—more than 13 years later. He did not survive to see the case resolved—he died 5 months later at the age of 68.

The **Blais / CQTS** class action suit demands \$100,000 for each of the estimated 50,000 Quebec smokers suffering from lung cancer, larynx cancer, throat cancer or emphysema. It also seeks punitive damages. The estimated total claim is greater than \$5 billion.

The claims made against tobacco companies are of a scale beyond previous Canadian experience.

Including the classactions, almost \$150 billion in damages are being sought. The largest settlement to date in Canada has been the \$2 billion payment for victims of residential schools.

Jurisdiction	Year tobacco lawsuit filed	Amount of Claim
British Columbia	2000	Unspecified
Alberta	2012	\$10 billion
Saskatchewan	2012	Unspecified
Manitoba	2012	Unspecified
Ontario	2009	\$50 billion
Quebec	2012	\$60 billion
New Brunswick	2008	Unspecified
Nova Scotia		
Prince Edward Island	2012	Unspecified
Newfoundland	2011	Unspecified

# 2012

## The year in review

### January

**Ontario Superior Court** rules that foreign parent tobacco companies must remain as defendants in Ontario's \$50 billion lawsuit against the industry.

### February

Cigarette taxes in **Nunavut** are increased \$8 per carton.

Cigarette packages displaying new warnings begin appearing on store shelves.

### March

The Canadian Taxpayers Federation gave their annual worst of government waste award to **Agriculture Canada** for the \$284 million tobacco transition program, which the auditor general found increased the number of tobacco farmers, rather than reducing it.

The **Blais and Létourneau class** action trials open in Montreal

The **federal government** informs public health stakeholders that it has cut funding for tobacco control programs by about \$10 million a year.

### April

**Manitoba** increases cigarette taxes by \$5 per carton.

Ban on smoking in city parks and on bar and restaurant patios comes into effect in **Ottawa**.

**Imperial Tobacco** files a legal challenge against new warning labels—other companies soon join suit.

### May

Ban on selling cigarettes in pharmacies in **Manitoba** takes effect. **British Columbia** is now the only

Canadian jurisdiction to permit this profession to sell cigarettes.

### June

**Quebec, Alberta** and **Saskatchewan** governments file lawsuits against tobacco companies.

All cigarette packages are required to display new health warnings according to **federal regulations**.

Statistics Canada reports that according to the Canadian Community Health Survey, smoking prevalence fell in 2011. This is the first time that this survey has reported a rate of daily and occasional smoking below 20%.

### July

An **Ottawa** apartment co-operative becomes first to vote to be 100% smoke-free.

### August

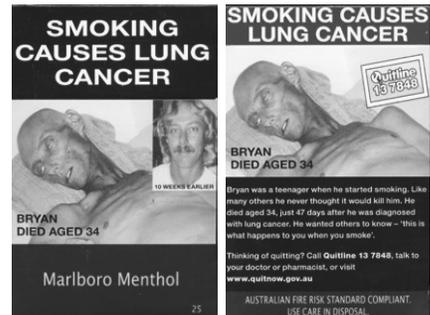
Lung cancer victim **Jean-Yves Blais** dies, 5 months after the trial of the class action suit named after him opens in Montreal.



**Canada's new cigarette warnings are among the world's largest**

(measured as percentage of principal display surface)

Country	Total	Font	Back
Australia	82.5%	75%	90%
Uruguay	80%	80%	80%
Sri Lanka	80%	80%	80%
Brunei	75%	75%	75%
Canada	75%	75%	75%
Mauritius	65%	60%	70%
Mexico	65%	30%	100%



**Australia's plain packaging of cigarettes became mandatory on December 1, 2012**

### September

**Prince Edward Island** files a lawsuit against tobacco companies.

**British Columbia** celebrates the one-year anniversary of its smoking cessation program. Of its 618,000 smokers, 150,000 have signed up for free NRT or stop-smoking medication.

### October

**Toronto** city council rejects proposal from health staff to license (and limit) water pipe establishments.

### November

The Fifth Conference of the Parties to the **Framework Convention on Tobacco Control** meets in Korea.

**Alberta** announces a 10-year strategy "Creating Tobacco Free Futures."

**Quebec** increases tobacco taxes by \$4 per carton.

### December

**Australian** law on plain packaging of cigarettes comes into force.

For more information, contact:

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