

Tobacco Control in Canada

The Changing Landscape

The public health landscape is rapidly changing, and with it are calls for new thinking, new actions and new goals for tobacco control.

We can celebrate the achievement of many of the goals that guided our activities over the past few decades — the reduction of advertising, protection from second hand smoke, better programs to support quitting.

There remains much to be done within our original “comprehensive framework” — plain packaging and higher taxes are two obvious priorities. But there is also a growing awareness that these measures, while necessary, may not be sufficient to end the tobacco epidemic.

The search is on for new and stronger ways to reduce the harms of smoking. Mass programming for cessation support? Harm reduction through electronic cigarettes? Integration with measures to control risk factors for other chronic diseases?

The exploration of these potential measures is shaped by a markedly different policy environment. For many years, it was the federal government and not provincial ministries of health which took primary responsibility for designing and implementing tobacco control programs and regulations. Now it is the opposite.

Health Canada’s tobacco control program has unofficially collapsed. Many dedicated and talented individuals continue to work within the department, but they currently have no mandate to move forward, or even to consult about what else needs to be done.

The resources the federal government makes available to community projects is, at \$2 million, a small fraction of what was previously invested. Programs that can be funded are narrow in scope and burdened with requirements for partnership with the private sector.

Happily, some enlightened provincial governments are picking up the slack and are pioneering new measures. Among these are British Columbia’s program which provides free stop smoking medications to anyone who wants them, and Alberta and Ontario’s new proposals to ban flavoured tobacco, as well as chewing and waterpipe tobacco.

Pressures from the marketplace are also shaping events — creating new possibilities and vulnerabilities. The success of the electronic cigarette, for example, has exposed divergent philosophies within the public community.

Class action lawsuits are another external event that has the potential to be a “game changer” for tobacco control. And it is around the current Quebec Class action suits that our organizational planning has recently been centred.

The loss of federal government support to PSC in March of last year (2012) coincided with the opening of the Montreal tobacco trials. This made it easier for us to refocus our efforts to use lawsuits against tobacco companies to reduce smoking.

Now in its second year of trial, this important trial has fallen from the front pages of the newspapers. Nonetheless, we know they are at a pivotal moment to help determine where responsibility for the harm caused by tobacco (and other commercial products) will lie.

Litigation is a recent tool for tobacco control, and it has a chequered record of success. Done poorly, it can legitimize tobacco sales and further entrench governments as enablers of the tobacco epidemic.

Several of the provincial governments that have launched suits against tobacco companies have refused to meet with the public health community in preparation for their actions. This can only be a cause for

A Merry Band of Lawyers



A Montreal courtroom is the epicentre of a seismic shock that is being administered to Canadian tobacco companies.

This force does not come from Ministers of Health, but from lawyers in four Montreal law firms that have joined together to represent sick and addicted smokers in Quebec.

Like an earthquake, the result of this pressure is hard to predict. The plaintiffs might lose, or victory may be too modest or too late to impact industry behaviour or to compensate smokers or their lawyers.

On the other hand, the landscape might forever be altered!

Contingency litigation

The four law firms involved frequently take on class action lawsuits on a contingency basis – that is, they collect their fees and expenses from a portion of the damages awarded by the court. By specializing in these sorts of cases, their businesses survive, and occasionally thrive, by using the proceeds of the last victory to help finance the next challenging class action.

On the other hand, tobacco companies specialize in dealing with lawsuits by seeking to stretch things out beyond the financial capacity of their opponents. (Or, as a lawyer for RJ Reynolds famously said: *"To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his."*)

The companies succeeded in stretching the Quebec lawsuits out for over 13 years before they finally came to trial in March 2013. They may have hoped to exhaust the plaintiffs, but they were not successful in preventing the suit from moving forward.

One reason is that the four law firms involved have been particularly successful in other cases and have been able to

finance the tobacco case from their earnings in other cases. (These lawyers also give every appearance of living a modest lifestyle—many arrive at work on a bicycle!)

Support has also come from the Quebec provincial government. The *Fonds d'aide*, helps provide "access to justice" to deserving lawsuits by financing some of the costs necessarily incurred in such trials.

With occasional help from other specialist colleagues, young lawyers and articling students, these seven lawyers have managed this case against dozens of lawyers employed by the three companies they are suing. In this game, however, bigger does not appear to be better.

Beyond money

The plaintiffs' lawyers are looking beyond the sums being requested to the larger goal of getting rid of tobacco.

As Bruce Johnston said in court on April 30, 2013: *"(A tobacco industry lawyer) understood our case on opening day. He said then that we were seeking a judgement that will ban the sale of cigarettes. That is and always has been part of our case."*

The lawyers working on the CQTS-Blais and Létourneau cases are lawyers and businesspeople. Like other businesses, they need revenue streams to support their salaries and expenses.

For this case, however, business considerations seem to have taken second place to their zeal to call the tobacco industry to account and to seek redress for half a century of wrongdoing to the smokers of Quebec.

After almost 200 days of trial, their commitment to this goal is in daily view.

These men and women deserve to be recognized as modern-day public health heroes.

One of the longest trials in Canadian history. (and almost unique in the world)

The two class action trials that are being heard simultaneously in Montreal are not only the first such trials in Canada—they are one of the first in the world. And one of the longest-running lawsuits in Canadian history.

It took more than 13 years for this case to find its way to court—and 16 years will have passed before the first judgment is given. (After that, appeals may add a further 2 to 5 years before the case is ultimately resolved).

One reason this case is unique to Quebec is because few other jurisdictions have legal systems that provide for class action suits, contingency fees, or provide financing for suits in the public interest.

Worldwide, there are no other class actions against tobacco companies that have reached the trial stage—and only 4 other countries where they have started. (Brazil, Italy, the USA and Venezuela).

Trial by numbers (December 31, 2013)

48,000	Pages of transcript
26,000+	Exhibits
2,420	Objections
197	Days of trial to date
97	Written judgements
67	Witnesses
41	Remaining days of trial scheduled
33	Appeal Court Rulings



Cecilia Létourneau

A claim on behalf of an estimated 1 million addicted smokers in Quebec.

Seeks \$5,000 compensatory and \$5,000 punitive damages for each smoker.

= \$10 billion

Jean-Yves Blais

A claim on behalf of an estimated 90,000 Quebecers whose emphysema, lung or throat cancer was caused by smoking.

Seeks \$100,000 per victim in compensation and \$5,000 per smoker in punitive damages.

= \$9.4 billion

The *Blais* and *Létourneau* Class Actions

Inching towards the Finish

Decades of public health experience have shown that even the most rapid advances in public policy can take a long time to put in place. It is no different with legal decisions.

It is only now that the first finishing line in the *Blais/Létourneau* cases is coming into sight.

The hearing of witnesses and legal arguments is expected to be finished by June of next year (2014). Justice Brian Riordan's decision will come in the following months.

It is likely that whichever side he rules against will seek a second-chance before the Court of Appeal. This process could take a year or more and there is one more potential step in the process—the Supreme Court of Canada.

In this complex and lengthy trial, the work of Justice Riordan is challenging and tricky. The companies are clearly on the look-out for opportunities to provoke him into "judicial errors" that they can cite when appealing his decisions.

Despite their efforts to date, the Court of Appeal has supported Justice Riordan. It has refused to consider all but a few of the

dozens of preliminary "interlocutory" judgements that the companies tried to appeal.

In its length, the magnitude of its evidence and its focus on government policy and industry actions, this trial frequently resembles a public inquiry. But it is both less and more than such a body. Justice Riordan has no official role in making recommendations to government, but he has the authority to impose penalties on companies.

Planning ahead

Long before this court case is finished, tobacco companies will be developing options to respond to various potential outcomes. We know at least one of the companies has restructured its operations so that it leaves no money in Canada that might be made available to pay its victims.

The health community can also use the months until the ruling to prepare a response to a ruling that may—or may not—find the companies guilty.

This decision—however it falls — can be a catalyst for further measures to the tobacco epidemic. But only if we make it happen.

The questions* Justice Riordan must rule on

1. Did the defendants manufacture, market, commercialize a product that was dangerous and harmful to consumers' health?

2. Did the defendants know and were they presumed to know the risks and dangers associated with the consumption of their products?

3. Did the companies trivialize or deny, or employ a systematic policy of non divulgation, of such risks and dangers?

4. Did the defendants set up marketing strategies conveying

false information on the characteristics of the goods sold?

5. Did the defendants knowingly place on the market an addictive product and did they purposely refuse to use parts of tobacco with nicotine levels low enough to end the addiction of a large number of smokers?

6. Did the defendants conspire amongst themselves to prevent the users of their products from being



Justice Brian Riordan

informed of the dangers inherent to the consumption of their products?

7. Did the defendants intentionally infringe upon the right to life, safety

and integrity of the members of the group?

** These questions were set down by Justice Jasmin in 2005, when he certified the two class actions and ordered that their trials be held simultaneously. They were subsequently refined by Justice Riordan.*

PSC on the front-line

PSC's two staff members are both working full-time in support of the *Blais-Létourneau* tobacco trials.

In his position as PSC research director, Neil Collishaw, helps the plaintiff lawyers who filed these suits on behalf of Quebec smokers.

Neil's three-decade career in tobacco control has included some important "firsts": —the first Canadian laws to control how tobacco was sold, the first 100% smoke-free laws, the world's first public health treaty to manage tobacco.

He says that this trial is another important first — the first tobacco trial where "there is a real possibility that this trial will unleash events that will rid us of tobacco and the industry that supplies it, once and for all."

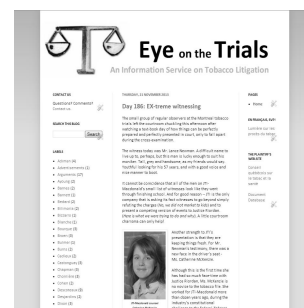
"If you want to stop it from poisoning people, you have to cut off the head of the snake," says Neil. "And I am proud to help the team that holds the axe."

PSC's executive director, Cynthia Callard, provides a public health perspective on the daily events of the trial through regular updates on a blog about trial developments.

(www.tobaccotrial.blogspot.ca)

"The testimony may be focused on the tragic events of the past," she says "but the thinking is about how to overcome these in the future."

Cynthia predicts that this case will clarify how to improve consumer protection laws. "Win or lose, the plaintiffs will help establish who ultimately bears responsibility when consumer products kill. — This can only help us design better laws to protect public health."



Eye on the Trials
www.tobaccotrial.blogspot.com

WARNING!

Provincial suits against tobacco companies could be hazardous to our health

Fifteen years have passed since British Columbia filed the first government lawsuit against tobacco companies to recover the costs of treating tobacco-caused disease. Eight other provinces (all but Nova Scotia) have now 'followed suit'.

Yet in all that time, none of the governments involved has stated how – or *indeed whether* – these suits will help reduce the number of Canadians who smoke. Only one province has accepted our invitation to meet to discuss these issues. We have learned that in some provinces even the Health Ministries are not meaningfully consulted.

The usual channels of communication with government are firmly shut on this file. Lawsuits are managed in utmost secrecy, and are exempt from provisions for transparency, like Freedom of Information laws or legislative review.

Where will the money come from?

The amounts involved in the government claims sound enormous. The amounts claimed by Quebec, Ontario, New Brunswick and Alberta are \$60, \$50, \$19 and \$10 billion respectively.

Some might consider that this sum is too small—and that it does not reflect the damage to the health care system imposed by the tobacco industry's wrongdoings. It is only slightly more than the annual health-care bill for each province concerned.

Unlike the Quebec class action suits, these lawsuits are not aimed at providing redress for the smokers who have been harmed, but only for the health care systems that have paid for the treatment of their diseases.

A more important consideration than **how much**, we suggest, is knowing **where** such payments will come from and **whether** they can be made without causing the tobacco epidemic to spread further or last longer.

Tobacco companies cannot make such large payments without selling more cigarettes. Their past earnings have long been distributed to shareholders, who are by law exempt from any impact beyond the value of their shares.

Tobacco is one of the world's most profitable industries. But even if all of the profits were funneled to make payments to Canadian governments and none were funneled to shareholders, it would take the global companies involved more than 6 years to comply. (And if only the profits from Canadian smokers were re-directed, it would take 200 years!).

Selling without profit is not in the shareholders' best interests, so multinational tobacco companies are highly unlikely to rely on this approach.

An outcome based on future tobacco sales?

With no other ways to generate the funds to pay for a financial settlement, tobacco companies will have to choose between declaring bankruptcy or trying to increase their revenues from cigarette sales.

(This will require selling more cigarettes, and/or selling cigarettes more profitably. At current profit levels, the number of cigarettes sold to generate \$1 billion for payments would be the equivalent of the lifetime consumption of 150,000 smokers—and 75,000 premature deaths.

But this will only perpetuate the problem that the lawsuits should be solving! The companies will be in the unacceptable position of creating new harms in order to pay for previous wrongdoing.

In addition to public health concerns, a financial award to 3rd party insurers (like governments) which is funded through

cigarette sales does raise concerns about justice for the primary victims of the tobacco industry—smokers.

Such a settlement will do nothing to address the harms done to them, while forcing them to foot the bill. (Many of these smokers will live outside of Canada.)

Alternatives which give priority to health

The subject of how best to use litigation against tobacco companies to achieve health goals is under active review by Parties to the Framework Convention on Tobacco Control.

Some have proposed non-financial outcomes that are aimed at shutting the industry down, or at forcing it to meet public health objectives.

An EU-commissioned study found that *"More health gains would result, for example, from requiring a phase-out of the most deadly forms of nicotine delivery, including cigarettes. Their compliance would prevent harm from occurring rather than try and compensate the victims once the harm has already occurred."*

The way forward

Government lawsuits against the tobacco industry are more likely to result in healthy outcomes if it is based on the principles of priority for public health, transparency of process, and consideration for impact on other victims.

Lessons from the American experience

After state governments in the USA sued tobacco companies, a settlement was reached which imposed financial and non-financial penalties on the companies. The companies agreed to curb advertising, disclosure industry documents and disband some of their associations. Financial concessions included annual payments to states, special funds for anti-smoking advocacy activities (the Legacy Foundation), compensation for affected

farmers, lawyers' fees, and other and payments which will total about \$250 billion between 1997 and 2025.

The companies raised the money to make their payments by increasing the price of their cigarettes, initially by about \$0.45 per pack.

This price increase had the expected result, and the volume of cigarettes sold following the MSA fell. Tobacco company earnings did not fall, however, and

nor did share prices. The industry emerged from the settlement on a sounder financial footing than it had been in the previous decade.

Tobacco litigation in the United States did not result in a reduction in smoking rates among Americans greater than that found in other similar countries during the same period, and less than was experienced in Canada in the same period.

New Policy Challenges

Smoke without nicotine

Hookah, Shisha, Narghile ... by any name, this is an ancient practice turned into a worldwide fad among young people.

The attractive flavours, exotic atmosphere and easy inhalation contribute to the mistaken belief that inhaling smoke through a waterpipe is not harmful—especially when it is sold as “non-tobacco molasses”.

The absence of health warnings, and the regulatory loopholes (in many provinces, bans on smoking in restaurants do not apply to hookah bars), also contribute to the users’ view that this is a harmless pastime.

Two recent Canadian studies say otherwise. Edmonton researchers tested the chemicals found in unsmoked ‘herbal’ shisha, in the smoke emissions and also in the café venues where it was being found. They found that the levels of carcinogens

in some shisha products and the smoke they produced were greater than those found in cigarettes. The air quality in the hookah cafés they tested would have failed standard health levels.

Toronto-based researchers tested the air quality of shisha bars in that city. Even though tobacco-based shisha may not be smoked in those bars, the researchers found high levels of nicotine in the ambient air, the quality of which would be considered hazardous to human health.

When drafting tobacco regulations, Health Canada has mostly ignored shisha. The restrictions on flavourings in cigarettes and little cigars, for example, were not extended to other forms of smoked tobacco (or oral tobacco).

Two million reasons to be worried.

On the other hand, Health Canada has begun to monitor the use of waterpipe

tobacco. The most recent CTUMS results for 2012 show that 3 in 10 young adults (28%) have tried a waterpipe, twice as many as 6 years earlier. **Two million more Canadians report having tried smoking a waterpipe in 2012 than in 2006.**

Some provincial governments are now moving—slowly—to fill the gap. Recent legislative proposals by Alberta and Ontario will extent bans on smoking to hookah bars.

This fall PSC filed a complaint under the Consumer Product Safety Act, asking the government to take action to remove herbal shisha from the market. (This act bans the sale of products which are harmful to human health, but does not apply to tobacco products).

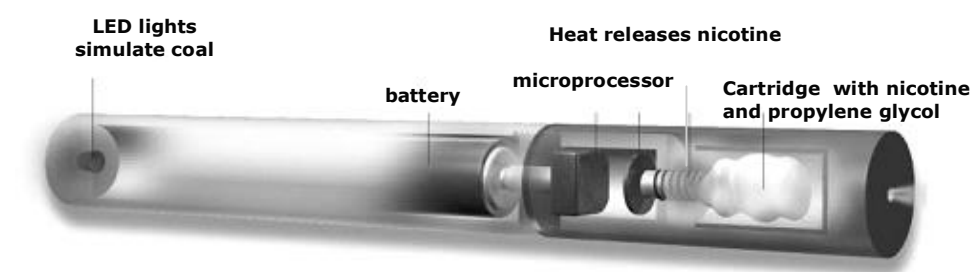
Nicotine without smoke

Electronic cigarettes have emerged as one of the most pressing – and most controversial – policy issues in tobacco control.

Do these products herald the opportunity to move smokers to a less harmful way of form of nicotine use or are they the harbingers of a renewed tobacco epidemic? It depends on whom you ask.

Almost a decade has passed since the current generation of electronic cigarettes were launched in the Chinese market. Time enough for about 100 health studies to be published, but not yet sufficient time for a consensus within the public health community about how these products should be regulated or managed.

Health Canada is among those who continue to sit on the fence. While it is illegal to sell electronic cigarettes containing nicotine in Canada (they are not permitted under the Food and Drugs Act), there is no apparent enforcement effort behind the ban. (A store dedicated to selling nicotine cigarettes operates openly within two blocks of Parliament



Hill). Vaporizers which do not contain nicotine are not illegal and are regulated like other consumer products. They can be found in most corner stores across Canada.

Electronic cigarettes containing nicotine are widely available in other countries – including in the United States and Europe, where governments are similarly grappling to define a good public health response. Investment analyst Morgan Stanley believes that sales of these products are equivalent to 1% of the cigarette market, and Nielsen estimates that the revenue from sales in the U.S. this year were \$1.7 billion.

Although these products were pioneered and first marketed by independent companies, “Big Tobacco” has entered in the field, either with their own products or by acquiring other companies.

In early June, Health Canada conducted a rushed consultation on e-cigarettes, but has not made any subsequent announcements about its policy intentions. PSC’s submission stressed that there was still insufficient knowledge to establish policy goals, and that the government must give priority to filling these knowledge gaps before the policy is set by corporate interests.

2013

The year in review

March

New Brunswick raises the taxes on cigarettes by \$4 per carton.

Newfoundland increases tobacco taxes by \$3 per carton.

April

Quebec announces that smoking will be banned in provincial prisons. The ban will take effect in the spring of 2014.

May

The Alberta legislature gives second reading approval to Bill 206. The private member's bill gives legislative authority to ban flavours in all tobacco products.

Ontario Court of Appeal rejects foreign tobacco company request to be exempt from government lawsuit.

Manitoba ban on sale of cigarettes in pharmacies and health-care facilities comes into force. **British Columbia is the only province to allow cigarette sales in pharmacies.**

June

Fiftieth anniversary of Health Canada's acknowledgement that smoking caused cancer.



July

Ontario courts certify a class action suit against Pfizer. It is alleged that the company failed to adequately warn about side-effects caused by this drug.

August

Quebec National Assembly holds hearings on changes to Tobacco Act.

October

Saskatchewan Queen's Bench and Quebec's Court of Appeal reject foreign tobacco company bids for exemption from government lawsuits.

Canadian Cancer Society study finds more than half of high school students had tried flavoured tobacco products.

November

Federal government re-introduces legislation to increase penalties for contraband tobacco.

Alberta passes legislation to ban smoking in vehicles carrying children, the use of waterpipe tobacco in public places and single sale of cigarillos.

Ontario introduces law to ban smoking on patios, hospital grounds, sports fields and government facilities—and ban some flavourings in tobacco products.

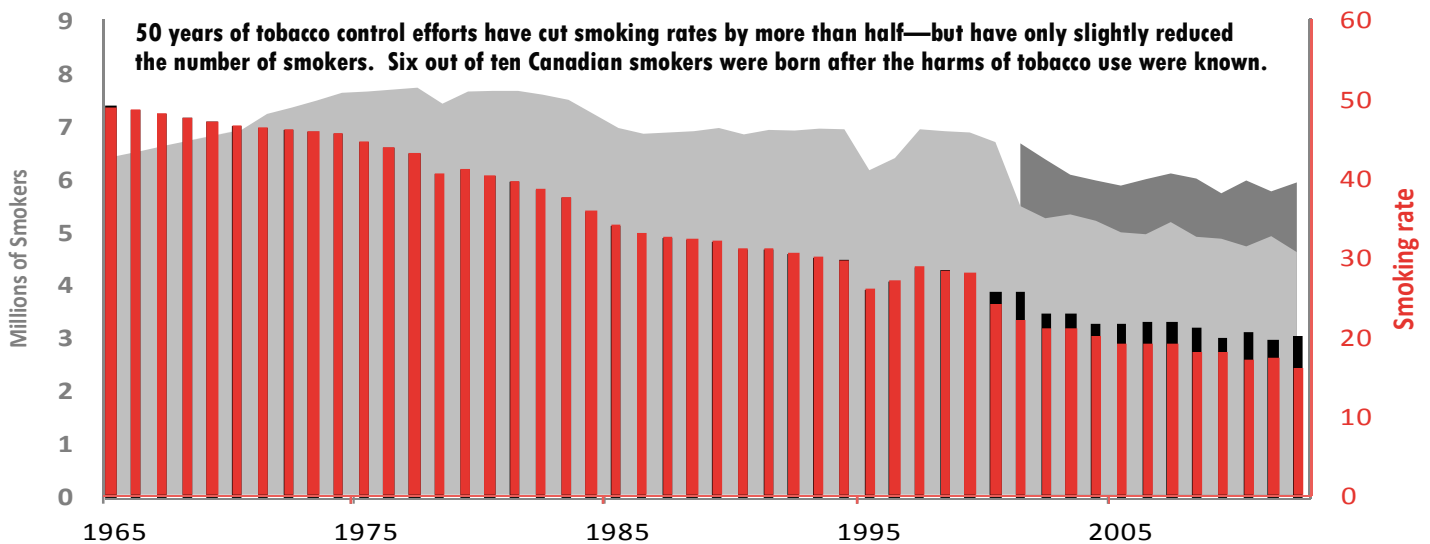
December

Quebec legislative committee encourages provincial government to strengthen tobacco laws.

For more information, contact:

Physicians for a Smoke-Free Canada
1226A Wellington Street
Ottawa, Ontario
K1Y 3A1

613 233 4878
www.smoke-free.ca



Five decades after governments' acknowledged that smoking caused lung cancer, rates of smoking have fallen in half—from a high of 50% of adult Canadians to the current smoking prevalence between 16% (CTUMS) or 20% (CCHS) depending on which large government survey is relied on.

Because of population growth, the number of actual smokers has not fallen at all (by CCHS data, dark grey), or has fallen by 1.4 million people (CTUMS, light grey).