

2-15-2011

## International Tobacco Litigation's Evolution as a United States Torts Law Export: To Canada and Beyond?

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### Recommended Citation

Richard L. Cupp Jr. *International Tobacco Litigation's Evolution as a United States Torts Law Export: To Canada and Beyond?*, 38 Pepp. L. Rev. Iss. 2 (2011)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol38/iss2/5>

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# International Tobacco Litigation's Evolution as a United States Torts Law Export: To Canada and Beyond?

Richard L. Cupp, Jr.\*

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## I. INTRODUCTION

As an American who has lived in Europe several times, in my early career as a scholar I assumed that a general consensus existed in other nations that the United States torts system is one of the problems with the

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\* John W. Wade Professor of Law, Pepperdine University School of Law. I would like to thank Kendra Lounsberry and Jennifer Vagle for their outstanding research assistance, and to thank Pepperdine University School of Law for supporting my work on this article with a research grant. I would also like to thank the Honorable Allen Linden for his helpful comments on this topic, for his inspirational example as a scholar and a teacher, and for the years of encouragement and friendship he has so graciously given me.

United States.<sup>1</sup> However, in 2000 I spoke at an international conference on safety and injury prevention in India, and the experience broadened my perspective.<sup>2</sup> Most of the speakers at the conference were not torts law scholars. The speakers included many engineers, product and transportation safety specialists, and government officials responsible for safety issues in their nations. A large percentage of these safety experts were citizens of developing nations.

Prior to attending this conference I had often heard about, and had experienced personally, negative impressions of United States tort law in Western Europe and elsewhere. For example, the McDonald's hot coffee case seems to have developed iconic status internationally as a symbol of why United States tort law is something to be feared or at least avoided.<sup>3</sup>

Thus, I was surprised to discover that the reaction to United States tort law from the individuals who spoke with me at this conference seemed mostly positive rather than mostly negative. A common theme to the comments I heard was that if they could have more tort litigation like the United States in their nations, they might have far fewer tragic accidents and injuries. Safety experts from developing nations were particularly likely to complain that their nations' regulatory systems were inadequate to optimally deter accidents and that a more robust tort system would benefit injury deterrence.

Perhaps this surprisingly optimistic perspective on United States torts law was also being reflected when, in 2005, over 150 nations finalized the World Health Organization ("WHO") Framework Convention on Tobacco Control, which encourages use of U.S.-style torts litigation against sellers as a way to limit tobacco usage.<sup>4</sup> Framework conventions are technically

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1. The assertion of a British commentator in 1997 that "[i]t is a paradox that the Land of the Free is actually a land chained by excessive legislation, litigation, and pettyfoggng nannydom" is representative of the kinds of complaints I have often heard from Europeans regarding the United States torts system. Kristen Gartman Rogers, "Mad Plaintiff Disease?" *Tobacco Litigation and the British Debate over Adoption of U.S.-Style Tort Litigation Methods*, 27 GA. J. INT'L & COMP. L. 199, 200 n.9 (1998) (quoting *Yes, Smoking Kills, But Litigation Is Ruinous*, INDEPENDENT (London), June 23, 1997, at 14).

2. Fifth World Conference on Injury Prevention and Control, New Delhi, India, Mar. 2000.

3. See Eric A. Feldman, *Law Across Borders: What Can the United States Learn from Japan?*, 32 HASTINGS INT'L & COMP. L. REV. 795, 801 (2009) (presenting the McDonald's hot coffee case as one of the celebrated cases that causes the American legal system to be regularly vilified by the media within and outside of the U.S.); Allen M. Linden, *Viva Torts!*, 5 J. HIGH TECH. L. 139, 151-52 (2005) (stating that most people have heard about the McDonald's case and noting that it has caused tort law to be ridiculed and "condemned . . . as 'out of control'"); see also Anthony Ramirez, *Word for Word/Hot Water; For McDonald's, British Justice Is a Different Cup of Tea*, N.Y. TIMES, Apr. 7, 2002, <http://www.nytimes.com/2002/04/07/weekinreview/word-for-word-hot-water-for-mcdonald-s-british-justice-is-a-different-cup-of-tea.html> ("By now, the case of the \$3 million cup of coffee is securely lodged as Exhibit A in the minds of those who believe the American legal system has run amok.").

4. The World Health Organization Framework Convention on Tobacco Control was adopted in 2003 and came into force on February 27, 2005. To date, 171 countries have signed the Treaty.

binding, but they “actually fall somewhere between nonbinding resolutions and treaty law since they contain no explicit obligations.”<sup>5</sup> The framework convention approach has been described as particularly helpful in efforts to control tobacco usage internationally because “it is a continuous and dynamic process of lawmaking that can gradually and incrementally build support to reduce tobacco use.”<sup>6</sup> Efforts to reduce tobacco use are hardly novel. In 1604, King James described smoking as a “filthie no[v]eltie” that was, among other things, “dangerous to the Lungs,” and he declared that using it was “sinning against God.”<sup>7</sup> In the United States, the Surgeon General’s pronouncement that cigarette smoking is hazardous to health was made in 1964, and since then both the federal government and states have made enormous and widely publicized efforts to discourage smoking.<sup>8</sup>

The Tobacco Control Framework is novel in part because of its

World Health Organization Framework Convention on Tobacco Control, <http://www.who.int/fctc/en> (last visited Oct. 21, 2010).

5. Allyn L. Taylor, *An International Regulatory Strategy for Global Tobacco Control*, 21 YALE J. INT’L L. 257, 294 (1996).

6. *Id.*

7. King James made it clear that he was a staunch critic of tobacco use:

Haue you not reason then to bee ashamed, and to forbear this filthie noueltie, so basely grounded, so foolishly receiued and so grossely mistaken in the right vse thereof? In your abuse thereof sinning against God, harming yourselues both in persons and goods, and taking also thereby the markes and notes of vanitie vpon you: by the custome thereof making your selues to be wondered at by all forraine ciuil Nations, and by all strangers that come among you, to be scorned and contemned. [Smoking is] [a] custome lothsome to the eye, hatefull to the Nose, harmefull to the braine, dangerous to the Lungs, and in the blacke stinking fume thereof, neerest resembling the horrible Stigian smoke of the pit that is bottomelesse.

KING JAMES I, A COVNTER-BLASTE TO TOBACCO (Edmund Goldsmid ed., 1884) (1604), available at <http://www.gutenberg.org/files/17008/17008-h/17008-h.htm>.

8. Most recently, on April 1, 2009, the largest federal tobacco tax increase in history took effect, raising federal excise taxes on cigarettes from 39 cents per pack to \$1.01 per pack. Wendy Koch, *Biggest U.S. Tax Hike on Tobacco Takes Effect*, USA TODAY, Apr. 3, 2009, [http://www.usatoday.com/money/perfi/taxes/2009-03-31-cigarettetax\\_N.htm](http://www.usatoday.com/money/perfi/taxes/2009-03-31-cigarettetax_N.htm).

Of course, in a state like *California* that has been successful in reducing smoking rates, tobacco control policy is by no means restricted to tobacco tax increases. The other most effective policies seem to be very tough controls on indoor smoking at both work and leisure venues and a very aggressive antismoking advertising program.

Stephen D. Sugarman, *A Balanced Tobacco Control Policy*, 93 AM. J. PUB. HEALTH 416, 418 (2003) (emphasis added). Since California started running its anti-smoking ads in the late 1980s, the percentage of its residents that smoke has dropped from 22% to 16%. Gregg Jones, *Tobacco Firms Sue State over Ads*, L.A. TIMES, Apr. 3, 2003, <http://articles.latimes.com/2003/apr/03/local/me-mean3>. The Federal Cigarette Labeling and Advertising Act has also recently been amended by the Family Smoking Prevention and Tobacco Control Act of 2009, and it now requires, among other things, that cigarette packaging be labeled with one of several listed warnings which should comprise 50% of the front and back of the pack. See Pub. L. No. 111-31, § 201(a), 123 Stat. 1776 (codified as amended at 15 U.S.C. § 1333 (2000)).

commitment to international coordination on efforts to limit cigarette smoking. King James was presumably writing primarily for a British audience, and most subsequent undertakings to discourage smoking have also focused on citizens of individual nations. Probably the most controversial governmental anti-smoking efforts have been lawsuits to recover medical costs spent by governmental entities to pay for medical care for citizens suffering illnesses caused by smoking. Best known is the litigation initiated by most of the states in the United States, which resulted in enormous settlements totaling \$246 billion in 1998.<sup>9</sup> Critics of the government healthcare reimbursement lawsuits have often argued that the tort claims were not a good fit for governments seeking to further broaden policy goals.<sup>10</sup>

The Tobacco Control Framework is remarkable not only because of its unprecedented internationalization of antismoking efforts, but also in its focus on using tort law as a form of tobacco control. Among other things, the signing nations agreed to consider expanding tort lawsuits against tobacco sellers. Article 19 of the Framework states that “[f]or the purpose of tobacco control, the Parties shall consider taking legislative action or promoting their existing laws, where necessary, to deal with criminal and civil liability, including compensation where appropriate.”<sup>11</sup> The convention also encouraged governments to share information with each other to facilitate such lawsuits. Article 19 provides that “[p]arties shall cooperate with each other in exchanging information . . . including . . . information on legislation and regulations in force as well as pertinent

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9. See Lester Brickman, *Want to Be a Billionaire? Sue a Tobacco Company*, WALL ST. J., Dec. 30, 1998, at A10; Sylvia Nasar, *The World: Smokescreen; The Ifs and Buts of the Tobacco Settlement*, N.Y. TIMES, Nov. 29, 1998, <http://www.nytimes.com/1998/11/29/weekinreview/the-world-smokescreen-the-ifs-and-buts-of-the-tobacco-settlement.html> (discussing how the multi-billion dollar award is more similar to taxes than damages); *Settlement Spurs Record Cigarette Price Hike*, L.A. TIMES, Nov. 24, 1998, <http://articles.latimes.com/1998/nov/24/business/fi-47160> (discussing the consequences of the settlement on tobacco prices); Editorial, *Spending the Tobacco Billions*, N.Y. TIMES, Dec. 1, 1998, <http://www.nytimes.com/1998/12/01/opinion/spending-the-tobacco-billions.html> (discussing where states will allocate the money they receive from the settlement).

10. See, e.g., Richard L. Cupp, Jr., *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 U. KAN. L. REV. 465, 465 (1998) (“analyz[ing] how changing social perceptions about the tobacco industry, erosion of the assumption of risk doctrine, and new evidence regarding addiction and . . . fraud will [a]ffect third wave cases”); Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897 (1998) (analyzing the role of litigation in shaping policy and considering how tobacco litigation has contributed to defining the tobacco problem and available policy alternatives); Robert L. Rabin, *Tobacco Control Strategies: Past Efficacy and Future Promise*, 41 LOY. L.A. L. REV. 1721 (2008) [hereinafter Rabin, *Tobacco Control Strategies*] (discussing the main factors contributing to the success in reducing tobacco use and the strategies that have been less effective than those factors).

11. *World Health Organization (WHO): Framework Convention on Tobacco Control*, 42 I.L.M. 518, 530 (2003).

jurisprudence.”<sup>12</sup>

In early 2010, Haik Nikogosian, the Convention Secretariat of the WHO Framework Convention on Tobacco Control, declared that the Convention “has become one of the most widely and rapidly ratified treaties in the history of the United Nations.”<sup>13</sup> Reportedly, third-world nations were especially enthusiastic about the treaty and expressed great interest in the United States’ healthcare reimbursement lawsuits.

This particular interest by third world nations is in some respects not surprising. According to the World Health Organization, tobacco companies are increasingly focusing on expanding markets in third world nations.<sup>14</sup> Groups with lower socioeconomic status have higher smoking rates than higher income groups,<sup>15</sup> and, at least with regard to males, many poorer nations have higher smoking rates than wealthier nations.<sup>16</sup> Further, effective direct governmental regulation of tobacco is probably more difficult in third world nations than in industrial nations with more thorough regulatory frameworks.<sup>17</sup> Finally, the huge amount of money paid by

12. *Id.* at 531.

13. Haik Nikogosian, *WHO Framework Convention on Tobacco Control: A Key Milestone*, 88 BULL. WORLD HEALTH ORG. 83, 83 (2010), available at <http://www.who.int/bulletin/volumes/88/2/10-075895.pdf>.

14. See Allyn L. Taylor & Douglas W. Bettcher, *WHO Framework Convention on Tobacco Control: A Global “Good” for Public Health*, 78 BULL. WORLD HEALTH ORG. 920, 924 (2000), available at [http://www.who.int/bulletin/archives/78\(7\)920.pdf](http://www.who.int/bulletin/archives/78(7)920.pdf).

15. See Rabin, *Tobacco Control Strategies*, *supra* note 10, at 1723.

16. According to the Center for Disease Control, an estimated 20.6% of Americans still smoke. *Cigarette Smoking Among Adults and Trends in Smoking Cessation—United States, 2008*, 58 MORBIDITY AND MORTALITY WKLY. 1227 (2009), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5844.pdf>. Compare this to poorer nations like Thailand, Papua New Guinea, and Nepal where over 40% of males use tobacco. Judith Mackay & Michael Eriksen, *The Tobacco Atlas*, WORLD HEALTH ORGANIZATION 24–25 (2002), <http://whqlibdoc.who.int/publications/2002/9241562099.pdf>. Rates are even higher in Malaysia where about 50% of men smoke, and Cambodia, where 67% of urban men smoke and 86% of men from rural areas smoke. *Smoking Statistics*, WORLD HEALTH ORGANIZATION, [http://www.wpro.who.int/media\\_centre/fact\\_sheets/fs\\_20020528.htm](http://www.wpro.who.int/media_centre/fact_sheets/fs_20020528.htm) (last visited Oct. 23, 2010).

17. According to the United States, the Food and Drug Administration has certain authority over the regulation of tobacco products. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009). The United Kingdom has passed the Tobacco Advertising and Promotion Act 2002 banning the advertising of tobacco products. Tobacco Advertising and Promotion Act 2002, c. 36 (U.K.). Canada has one of the most comprehensive tobacco regulation programs with solutions such as the *National Strategy on Tobacco Control* and the *Tobacco Act* of 1997 which regulates both product information and tobacco reporting. See *Best Practices in Tobacco Control: Regulation of Tobacco Products: Canada Report*, WORLD HEALTH ORGANIZATION 1–2 (2005), [http://www.who.int/tobacco/global\\_interaction/tobreg/Canada%20Best%20Practice%20Final\\_For%20Printing.pdf](http://www.who.int/tobacco/global_interaction/tobreg/Canada%20Best%20Practice%20Final_For%20Printing.pdf). Compare these regulatory schemes in wealthier nations to countries like Uzbekistan, Croatia, Czech Republic and other third world nations that do not even have a national tobacco action plan. See *Regional Office for Europe, Cross Country Profile*

tobacco companies to the states to settle reimbursement lawsuits would be especially appealing to poor nations.

Even before the Tobacco Control Framework was created, many lawsuits outside of the United States were initiated in the wake of the huge success of the states' healthcare reimbursement lawsuits in the United States. By early 2010, lawsuits had been filed in at least thirty-five nations outside of the United States.<sup>18</sup> The lawsuits in other nations have included individual lawsuits, class actions, and health care reimbursement lawsuits by governments.<sup>19</sup>

Most of these lawsuits have not succeeded thus far, and some have failed spectacularly. One colorful example is *Republic of Bolivia v. Philip Morris Companies*, a 1999 case in which the nation of Bolivia sought to sue Philip Morris for health care reimbursement in state court in Brazoria County, Texas.<sup>20</sup> The case was then removed to federal court in Texas.<sup>21</sup>

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*Database*, WORLD HEALTH ORGANIZATION (2002), <http://data.euro.who.int/tobacco/Default.aspx?TabID=2444> (last visited Oct. 24, 2010). Other third world countries such as Haiti, Ethiopia, Bhutan and the Marshall Islands still do not even require health warnings on cigarette packaging. Mackay & Eriksen, *supra* note 16, at 78–79; see also *Dolwick Tobacco Control Country Profiles 2003*, AMERICAN CANCER SOCIETY (2003), [http://www.who.int/tobacco/global\\_data/country\\_profiles/Appendix\\_B.pdf](http://www.who.int/tobacco/global_data/country_profiles/Appendix_B.pdf) (for a detailed list of tobacco control legislation by country).

18. These nations include Argentina, Australia, Bulgaria, Brazil, Canada, Chile, China, Columbia, Costa Rica, Finland, France, French Guiana, Germany, Greenland, India, Ireland, Israel, Italy, Japan, Kazakhstan, Mali, Marshall Islands, Niger, Nigeria, Norway, Pakistan, Philippines, Poland, South Korea, Spain, Sri Lanka, Uganda, United Kingdom, United States, and Venezuela. See Lawrence O. Gostin, *The "Tobacco Wars"—Global Litigation Strategies*, 298 J. AM. MED. ASS'N 2537, 2537–38 (2007); Richard A. Daynard, Clive Bates & Neil Francey, *Tobacco Litigation Worldwide*, 320 BRIT. MED. J. 111, 112 (2000); D. Douglas Blanke, *Towards Health with Justice: Litigation and Public Inquiries as Tools for Tobacco Control*, WHO TOBACCO FREE INITIATIVE, [http://www.who.int/tobacco/media/en/final\\_jordan\\_report.pdf](http://www.who.int/tobacco/media/en/final_jordan_report.pdf) (last visited Dec. 24, 2010); M.L. Flores et al., *Litigation in Argentina: Challenging the Tobacco Industry*, 15 TOBACCO CONTROL 90, 90–92 (2006), <http://www.bvsde.paho.org/bvsacd/cd42/90.pdf>; Andrew Walker, *Nigeria Takes on Tobacco Giants*, B.B.C. NEWS (Jan. 14, 2008, 0:23 AM), <http://news.bbc.co.uk/2/hi/africa/7183018.stm>; Mackay & Erikson, *supra* note 16, at 86–87.

19. Individual lawsuits against tobacco companies have been brought in numerous countries, some of which include Argentina, Ireland, Israel, Finland, France, Japan, Norway, Sri Lanka, Thailand, and Turkey. Daynard, Bates & Francey, *supra* note 18, at 111. One famous individual case was filed in Norway by Robert Lund who developed lung cancer from working in a smoky bar for fifteen years. See Blanke, *supra* note 18, at 40. Two other illustrations of these types of cases are *Spasic v. Imperial Tobacco* and *Spasic Estate v. B.A.T. Industries p.l.c.*, filed in Canada, demanding millions in damages. See *Tobacco-Related Litigation in Canada*, NON-SMOKERS' RIGHTS ASSOCIATION 22 (2009), [http://www.nsra-adnf.ca/cms/file/pdf/Tobacco\\_Related\\_Litigation\\_in\\_Canada\\_2009.pdf](http://www.nsra-adnf.ca/cms/file/pdf/Tobacco_Related_Litigation_in_Canada_2009.pdf). As of 2002, there were four private class actions pending in the Canadian Provinces of Ontario, Quebec and British Columbia. See Blanke, *supra* note 18, at 40. Class actions have also been filed in Australia against the major Australian tobacco companies. Daynard, Bates & Francey, *supra* note 18, at 112. Health care reimbursement lawsuits have been filed in the Canadian Province of British Columbia, as well as by the governmental health insurance body in France. *Id.* at 111. The government of the Republic of the Marshall Islands has brought a health care reimbursement case against international tobacco companies that supply the local market. *Id.* Other countries, including Guatemala, Bolivia, Nicaragua, and Venezuela, also have reimbursement suits pending in federal court in the United States. *Id.*

20. 39 F. Supp. 2d 1008 (S.D. Tex. 1999).

21. *Id.* at 1008.

The court noted that this was “one of at least six similar actions brought by foreign governments in various courts throughout the United States.”<sup>22</sup> In addition to Bolivia, the court cited similar lawsuits in the United States filed by Guatemala, Panama, Nicaragua, Thailand, and Venezuela.<sup>23</sup> Not surprisingly, these are all relatively poor nations, and they may not have civil tort systems that are as sophisticated or as generous as those found in the United States.

The court exercised its authority and discretion to transfer the case sua sponte to the United States District Court for the District of Columbia, as “a much more logical venue for the parties and witnesses in this action,” noting that Bolivia had an embassy and governmental representatives there.<sup>24</sup> However, the court in Brazoria County, Texas, chose not to send Bolivia away quietly. Rather, it opted to unleash a few broadsides to accompany the plaintiff out of its jurisdiction. First, the court declared that “[w]hy none of these countries seems to have a court system their own governments have confidence in is a mystery to this [c]ourt.”<sup>25</sup> Turning to humor, or perhaps mockery, the court went on to state that it “seriously doubts whether Brazoria County has ever *seen* a live Bolivian . . . even on the Discovery Channel.”<sup>26</sup> By the time the court noted that “there isn’t even a Bolivian restaurant anywhere near here,” it was clear that the case was not deemed worthy of serious analysis.<sup>27</sup> As a coup de grace, the court mentioned that it has a somewhat dated globe on its premises, and that

[w]hile the [c]ourt does not therefrom profess to understand all of the political subtleties of the geographical transmogrifications ongoing in Eastern Europe, the [c]ourt is virtually certain that Bolivia is not within the four counties over which this [c]ourt presides, even though the words Bolivia and Brazoria are a lot alike and caused some real, initial confusion until the [c]ourt conferred with its law clerks. Thus, it is readily apparent, even from an outdated globe such as that possessed by this [c]ourt, that Bolivia, a hemisphere away, ain’t in south-central Texas, and that, at the very least, the District of Columbia is a more appropriate venue (though Bolivia isn’t located there either).<sup>28</sup>

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22. *Id.* at 1009.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* (emphasis added).

27. *Id.*

28. *Id.* at 1009–10.

Following this send-off, the case apparently died on the vine in the District of Columbia.<sup>29</sup>

## II. CANADA AS A POTENTIAL COUNTER-ILLUSTRATION

Although it is too early to predict with any certainty, significant litigation in progress in Canada may ultimately provide a counter-illustration to the trend of tobacco litigation outside of the United States failing to gain traction. Canada has been described as playing a “lead role” in creation and enactment of the WHO Tobacco Control Framework.<sup>30</sup> This Canadian enthusiasm for the Framework is interesting given Canada’s historical track record in tobacco litigation. In 2004 a Canadian scholar noted that, in contrast to tobacco litigation in the United States, Canadian tobacco lawsuits “cannot be described in terms of successive ‘waves,’ or even ‘ripples.’ The simple fact is that there has never been successful tobacco-related litigation in Canada.”<sup>31</sup> Although by 2010 this record of no successful tobacco-related

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29. After the case was transferred, it was consolidated with similar cases filed by Guatemala, Nicaragua, Venezuela and Thailand. *In re Tobacco/Governmental Health Care Costs Litig.*, No. 1279, 1999 U.S. Dist. LEXIS 8803 (J.P.M.L. June 10, 1999). Plaintiff Guatemala’s claim was thereafter dismissed with prejudice because the injury claimed was too remote to be proximately caused by the defendants’ misconduct. *Republic of Guatemala v. Tobacco Institute (In re Tobacco/Governmental Health Care Costs Litig.)*, 83 F. Supp. 2d 125, 135 (D.D.C. 1999). Plaintiff Venezuela’s claim was then remanded to state court where it was originally filed due to lack of federal jurisdiction. *In re Tobacco/Governmental Health Care Costs Litig.*, 100 F. Supp. 2d 31 (D.D.C. 2000). Defendant British American Tobacco’s motion to dismiss for lack of personal jurisdiction was granted because Plaintiff failed to show required minimum contacts or conspiracy between defendant holding company and defendant subsidiaries and non-affiliated co-defendants. *United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 116, 130 (D.D.C. 2000). Defendants’ motions to dismiss MCRA and MSP claims were granted, but the motion to dismiss RICO claims was denied. *United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 155 (D.D.C. 2000). After numerous other objections, motions, and decisions, including some that involved sanctions for misconduct by the tobacco interests during proceedings, the D.C. District Court ruled in favor of the government on the RICO claims, and found that there had been a fifty-year conspiracy to deceive the American public about the health effects and addictiveness of cigarettes. See *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 937–45 (D.D.C. 2006). The court awarded remedies that included permanent enjoinder of certain activities and promotions in connection with cigarette sales in the United States, publication and dissemination of corrective statements, and restriction of the sale of tobacco businesses without court involvement. *Id.* The District Court’s decision was partially overturned on appeal, but the RICO violations as to the manufacturers were upheld. *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1150 (D.C. Cir. 2009). A petition for certiorari was filed in this case on February 19, 2010, but was denied on June 28, 2010. *Philip Morris USA Inc. v. United States*, 130 S. Ct. 3501 (2010).

30. See Jeff Berryman, *Canadian Reflections on the Tobacco Wars: Some Unintended Consequences of Mass Tort Litigation*, 53 INT’L & COMP. L.Q. 579, 594 (2004).

31. *Id.* at 581.

litigation in Canada is no longer perfect, successes have thus far remained rare.<sup>32</sup>

In 1998, the Canadian Province of British Columbia began protracted litigation that may have the effect of changing Canada's tobacco litigation landscape. In that year, British Columbia filed a healthcare reimbursement lawsuit against tobacco manufacturers seeking billions of dollars.<sup>33</sup> As with many other international lawsuits, this action was filed in the wake of the huge settlement with the states in the United States, and it bears striking resemblances to the states' claims in many respects. The Canadians even hired some United States lawyers with experience in the United States litigation.<sup>34</sup>

Although British Columbia's lawsuit was inspired by the healthcare reimbursement lawsuits in the United States, British Columbia's lawsuit has many advantages over the successful United States lawsuits. These advantages primarily stem from a statute enacted in British Columbia authorizing the lawsuit and considerably easing British Columbia's task in establishing liability.<sup>35</sup> The original British Columbia statute empowering the lawsuit was enacted in 1997.<sup>36</sup> However, the Supreme Court of British Columbia struck down the original statute in 2000 as *ultra vires*.<sup>37</sup> The British Columbia legislature then enacted the statute currently in force in 2001.<sup>38</sup> The current statute, titled the Tobacco Damages and Health Care Costs Recovery Act, provides that "[t]he government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong."<sup>39</sup>

Under the statute, the government must prove that tobacco

32. The most prominent example of successful tobacco-related litigation in Canada to date is the government's lawsuit against tobacco sellers based on smuggling cigarettes into Canada from the United States. The Government of Canada filed the lawsuit against several major tobacco companies on December 21, 1999, seeking to recover one billion dollars in lost tax revenue. *Government of Canada Launches Legal Action in Major Tobacco Smuggling Operation*, DEP'T OF JUSTICE CAN., (Dec. 21, 1999), [http://www.collectionscanada.gc.ca/webarchives/20071206004212/http://canada.justice.gc.ca/en/news/nr/1999/doc\\_24494.html](http://www.collectionscanada.gc.ca/webarchives/20071206004212/http://canada.justice.gc.ca/en/news/nr/1999/doc_24494.html). After over ten years of litigation, the case finally settled on April 13, 2010 for \$550 million dollars. *Tobacco Firms to Pay \$550 Million Over Smuggling*, CANADIAN BROAD. CORP., <http://www.cbc.ca/canada/story/2010/04/13/tobacco-smuggling-lawsuit-settled.html> (last updated Apr. 14, 2010).

33. *JTI-Macdonald Corp. v. British Columbia* (Att'y Gen.), 2000 BCSC 312 (Can. B.C.).

34. See Rob Linke, *U.S. Lawyer Says N.B. Has Leg Up in Tobacco Lawsuit*, THE DAILY GLEANER (FREDERICTON), Mar. 24, 2008, at A4.

35. Tobacco Damages Recovery Act, S.B.C. 1997, c. 41 (Can.), repealed by Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30 (Can.).

36. *Imperial Tobacco Can. Ltd. v. British Columbia*, [2005] 2 S.C.R. 473 (Can.).

37. *JTI-Macdonald Corp.*, 2000 BCSC 312.

38. *Imperial Tobacco Can. Ltd.*, 2 S.C.R. 473, at para. 17.

39. Tobacco Damages and Health Care Costs Recovery Act § 2(1).

manufacturers breached a duty owed to persons in British Columbia under common law, statute, or equity, and that exposure can cause or contribute to disease.<sup>40</sup> This part of the statute does not seem controversial; it sets forth that the standard of liability is negligence (the notion of strict products liability, allowed in most United States jurisdictions, is not permitted), and that causation is necessary. However, the statute also contains more interesting and provocative provisions.

For example, the statute provides that for healthcare recovery claims, the government does not need to identify particular individual insured persons or prove individual causation.<sup>41</sup> Further, if breach of duty is proven, under the statute, the court is to shift the burden of proof to manufacturers regarding persons would have been exposed to tobacco but for the breach, and regarding causation of disease in a portion of the population due to exposure to tobacco.<sup>42</sup> The statute also allows population-based statistical, sociological, or epidemiological studies to prove and quantify damages.<sup>43</sup> Under the statute, manufacturers found liable are responsible for healthcare expenditures in proportion to their market share for cigarettes in British Columbia, calculated between the time of their first breach and trial.<sup>44</sup> All provisions of the statute apply retroactively.<sup>45</sup>

These provisions substantially ease the government's case against tobacco manufacturers, effectively removing some of the most difficult causation and proof stumbling blocks to finding healthcare reimbursement liability for a governmental plaintiff. Indeed, the Supreme Court of Canada described the statute's provision allowing for liability on an aggregate basis for a population of persons for whom the government has made or can reasonably be expected to make expenditures as "crucial."<sup>46</sup>

Finally, the statute disallows statute of limitations defenses for any action brought within two years of the statute's enactment.<sup>47</sup> Reflecting an admirable devotion to punctuality, British Columbia's government filed suit the day the statute came into force rather than waiting two years.<sup>48</sup>

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40. *Id.* § 7(2). Significantly, the statute utilizes negligence language rather than strict liability. "Despite calls from leading academics to adopt the US approach, Canada has resolutely opted to stay with an essentially negligence driven model requiring proof of a failure to exercise reasonable care." Berryman, *supra* note 30, at 582 (citing ALLEN LINDEN, *CANADIAN TORT LAW* 599 (Butterworths, 7th ed. 2001); S. M. WADDAMS, *PRODUCTS LIABILITY* 231 (Thomson Carlson, 4th ed. 2002); and W. Linden, *The Potential for a Tort Action Against Tobacco Manufacturers in Canada*, 6 *ADVOC. SOC. J.* 25 (1987)).

41. Tobacco Damages and Health Care Costs Recovery Act § 2(5).

42. *See id.* § 3.

43. *Id.* § 5.

44. *Id.* §§ 3(3)(b), 1(6).

45. *Id.* § 10.

46. *Imperial Tobacco Can. Ltd. v. British Columbia*, [2005] 2 S.C.R. 473, para. 8 (Can.).

47. Tobacco Damages and Health Care Costs Recovery Act § 6(1).

48. *See Imperial Tobacco Can. Ltd.*, 2 S.C.R. 473, at para. 17.

After passage of the current statute, its constitutionality was fiercely debated.<sup>49</sup> The Supreme Court of Canada ultimately upheld the statute's constitutionality in 2005 in *Imperial Tobacco Canada Ltd. v. British Columbia*.<sup>50</sup> In upholding the statute, the court first addressed a challenge that it violates territorial limitations on provincial legislative competence.<sup>51</sup> In analyzing this issue the court determined that the statute's essential character—its “pith and substance”—was the creation of a civil cause of action,<sup>52</sup> and that there were “strong relationships among [British Columbia], the subject matter of the law . . . [,] and the persons made subject to it” with due respect for the sovereignty of other jurisdictions.<sup>53</sup> The court rejected “undue” emphasis on whether acts creating liability under the cause of action must occur within British Columbia for two reasons.<sup>54</sup>

First, the court described compensation for health care costs, rather than remediation of breaches of duty, as the “driving force” behind the cause of action.<sup>55</sup> Thus, questions regarding whether the breaches of duty might have taken place outside of British Columbia “have little or no bearing on the strength of the relationship between the cause of action and the enacting jurisdiction.”<sup>56</sup> Second, the court emphasized that any breaches of duty that took place were owed to persons in British Columbia, were related to tobacco, and were matters that created health care expenditures by British Columbia's government—thus, any breaches of duty owed under the cause of action were “strongly related to British Columbia.”<sup>57</sup>

The court next analyzed whether the statute unduly interfered with judicial independence, which is a “foundational principle” of Canada's constitution.<sup>58</sup> The manufacturers argued that the statute forced courts to make “irrational presumptions” (i.e., the presumptions that persons in British Columbia exposed to tobacco products would not have been exposed but for the manufacturers' breaches of duty, and that the exposure caused or contributed to disease or risk of disease in a portion of the population).<sup>59</sup> The manufacturers also argued that portions of the statute “impinge on the

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49. *See id.* at para. 2.

50. *Id.* at para. 3.

51. *See id.* at para. 25–43.

52. *Id.* at para. 32.

53. *Id.* at para. 37.

54. *See id.* at para. 39.

55. *See id.* at para. 40.

56. *Id.*

57. *Id.* at para. 41.

58. *See id.* at para. 25, 44–56.

59. *Id.* at para. 48, app. § 3(2).

court's fact-finding function, and virtually guarantee the government's success in an action brought pursuant to the [Tobacco Damages and Health Care Costs Recovery] Act."<sup>60</sup>

In responding to these arguments the court may have tipped its hand regarding the public policy merits of the statute and of British Columbia's lawsuit. The court asserted that the statute's rules "are not as unfair or illogical as the appellants submit."<sup>61</sup> Rather, "[t]hey appear to reflect legitimate policy concerns of the British Columbia legislature regarding the systematic advantages tobacco manufacturers enjoy when claims for tobacco-related harm are litigated through individualistic common law tort actions."<sup>62</sup> The apparent perception by the Supreme Court of Canada that the statute seems reasonably fair may be significant in future matters that may come before that court related to British Columbia's lawsuit, statute, or the lawsuits or statutes of several other Canadian provinces that are similar to those of British Columbia.<sup>63</sup> If the court believes that the statute's exceptionally helpful pro-plaintiff rules are reasonably fair, this perspective may color future issues that the court might face related to the statute or similar statutes.

The court did not, however, base its judicial independence analysis on whether the statute is fair or logical. Despite its language favorable to British Columbia on those questions, the court concluded that they are in any event "beside the point."<sup>64</sup> Rather, the court emphasized that the issue is whether the statute's rules "interfere with the court's adjudicative role."<sup>65</sup> The court found that the statute does not fundamentally interfere with or alter "the relationship between the courts and the other branches of government."<sup>66</sup> Under the statute, the courts are still permitted to independently determine whether the statute is applicable to the government's claim, assess the evidence, and determine whether the evidence supports a finding of liability.<sup>67</sup>

The manufacturers also asserted that the statute violates the "rule of law."<sup>68</sup> The Court noted controversy between experts regarding when violation of "rule of law" renders a statute unconstitutional, and quoted a lower court judge's observation that "[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of

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60. *Id.* at para. 48.

61. *Id.* at para. 49.

62. *Id.*

63. *See infra* notes 85–101 and accompanying text.

64. *Imperial Tobacco Can. Ltd.*, 2 S.C.R. 473, at para. 49.

65. *Id.*

66. *Id.* at para. 54 (quoting *Babcock v. Canada (Att'y Gen.)*, [2002] 3 S.C.R. 3, para. 57).

67. *Id.* at para. 55.

68. *Id.* at para. 25.

what the law should be.”<sup>69</sup> For their part, the manufacturers argued that concern for the rule of law “requires that legislation: (1) be prospective; (2) be general in character; (3) not confer special privileges on the government, except where necessary for effective governance; and (4) ensure a fair civil trial.”<sup>70</sup> The manufacturers also argued that the statute violated each of these requirements.<sup>71</sup>

The Supreme Court of Canada gave little credence to the manufacturers’ interpretation of rule of law requirements, finding that it falls “at one extreme of the spectrum of possible conceptions.”<sup>72</sup> First, the court held that neither the provisions of the Canadian Constitution nor rule of law concerns prohibit retroactive or ex post facto laws except in the area of criminal law.<sup>73</sup> This is so “despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust.”<sup>74</sup> Further, although in this case statutory provisions were at issue, “[i]t might also be observed that developments in the common law have always had retroactive and retrospective effect.”<sup>75</sup>

Regarding the manufacturers’ arguments that legislation must be general in character and must not generally confer special benefits to the government, the court cited two earlier cases that had upheld legislation despite its being aimed at a specific industry or group, and despite having the purpose of benefitting the government.<sup>76</sup> Finally, the court assured the manufacturers that they would receive a fair trial “in the sense that the concept is traditionally understood: they are entitled to a public hearing, before an independent and impartial court, in which they may contest the claims of the plaintiff and adduce evidence in their defence.”<sup>77</sup>

In late 2009, over British Columbia’s objections, the tobacco manufacturers’ situation was potentially improved to some extent when the British Columbia Court of Appeal approved adding a seemingly unlikely third party defendant to the lawsuit: the Canadian federal government. In *British Columbia v. Imperial Tobacco Canada Ltd.*,<sup>78</sup> the British Columbia

69. *Id.* at para. 62.

70. *Id.* at para. 63.

71. *See id.*

72. *Id.*

73. *Id.* at para. 69.

74. *Id.* at para. 71.

75. *Id.* at para. 72.

76. *Id.* at para. 74–75 (citing *Air Can. v. British Columbia*, [1989] 1 S.C.R. 1161 (Can.) , and *Autherson v. Canada (Att’y Gen.)*, [2003] 2 S.C.R. 40 (Can.)).

77. *Id.* at para. 76.

78. *British Columbia v. Imperial Tobacco Can. Ltd.*, 2009 BCCA 540 (Can. B.C.). On the same day, the court also decided *Knight v. Imperial Tobacco Canada Ltd.*, 2009 BCCA 541 (Can. B.C.),

Court of Appeal held that the tobacco manufacturers could add a third party contribution and indemnity claim against Canada's federal government, based in part on an argument that the federal government helped to develop "light" strains of tobacco and light cigarettes, which may have given consumers a false sense of safety.<sup>79</sup> Regardless of whether this ruling is upheld on appeal by the Supreme Court of Canada, it seems unlikely to derail British Columbia's lawsuit. Rather than removing tobacco manufacturers from liability, it only adds a potential additional party to share in damages payments. Further, the tobacco manufacturers would have to prove their argument that the federal government acted improperly and that such improper conduct caused harm before deflecting any amount of damages payments to the federal government.

Beyond its significance in permitting the British Columbia litigation to move forward, *British Columbia v. Imperial Tobacco Canada Ltd.* may become exceptionally important both to other tobacco-related healthcare reimbursement lawsuits in Canada, and to tobacco litigation in other nations, for at least two reasons. First, the Tobacco Damages and Health Care Costs Recovery Act's strong pro-government provisions may put manufacturers at a significant disadvantage in the litigation compared with previous lawsuits, including the healthcare reimbursement lawsuits in the United States that ultimately proved to be spectacularly successful. The cigarette manufacturers themselves have said as much.<sup>80</sup> As noted above, one of the manufacturers' arguments against the statute's constitutionality was that, if upheld, the statute would "virtually guarantee the government's success in an action brought pursuant to the [Tobacco Damages and Health Care Costs Recovery] Act."<sup>81</sup> Indeed, if the manufacturers' arguments before the court were made in good faith, one must wonder about their apparent signals that they will not settle. Even after the Supreme Court of Canada rejected the manufacturers' challenge to the statute's constitutionality, a representative of Imperial Tobacco Canada Ltd. insisted regarding a related lawsuit by Ontario that "[t]here's not going to be any settlement."<sup>82</sup> If sincere, this is quite a gritty strategy for a case in which manufacturers believe the government's success is, by the manufacturers' own admission, "virtually guarantee[d]."<sup>83</sup> After the court's decision, Imperial Tobacco Canada Ltd.

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in similar fashion.

79. See *Imperial Tobacco Can. Ltd.*, 2009 BCCA 540, at para. 69–91. For further discussion of Justice Tysoe's reasoning, see *Knight*, 2009 BCCA 541, at para. 37–60.

80. See *supra* notes 59–60 and accompanying text.

81. *Imperial Tobacco Can. Ltd.*, 2 S.C.R. 473, at para. 48.

82. Referencing the Ontario litigation modeled on the British Columbia litigation, Imperial Tobacco Canada Ltd. director of external communications was quoted as saying: "There's not going to be any settlement." Rob Ferguson, *Big Tobacco Sued for \$50 Billion*, TORONTO STAR, Sept. 30, 2009, <http://www.thestar.com/news/ontario/article/703031> [hereinafter Ferguson, *Big Tobacco Sued*].

83. *Imperial Tobacco Can. Ltd.*, 2 S.C.R. 473, at para. 48.

vice-president Don McCarty was quoted as stating that “BC can expect long-winded and bad-tempered litigation,” and that “[i]t could be the biggest case in the history of Canadian jurisprudence.”<sup>84</sup>

In addition to placing British Columbia in a seemingly favorable litigation position, the *British Columbia v. Imperial Tobacco Canada Ltd.* decision provides important precedent and intellectual ammunition for other governmental entities, both in Canada and beyond, that have or may in the future wish to adopt similar pro-government legislation to pursue cigarette manufacturers for healthcare reimbursement costs. The Tobacco Damages and Health Care Costs Recovery Act’s provisions are fairly stunning in their boldness, and yet Canada’s highest court has thoughtfully articulated a position that they are basically fair and permissible. The court’s reasoning in upholding the statute is certain to be referenced and relied upon in similar lawsuits in the future.

Second, *British Columbia v. Imperial Tobacco Canada Ltd.* will not only strengthen future tobacco reimbursement lawsuits, it will also inspire them. This snowball effect is already well under way within Canada. Several other Canadian provinces have now joined British Columbia in suing tobacco manufacturers in healthcare reimbursement lawsuits. In November 2005, less than two months after the Supreme Court of Canada upheld British Columbia’s healthcare recovery statute, the *Canadian Medical Association Journal* reported that all of Canada’s provinces were likely to “jump on the litigation bandwagon” in light of the court’s decision.<sup>85</sup> Although not all of Canada’s provinces have yet filed lawsuits, most of them have.<sup>86</sup> Not surprisingly, the provinces have also enacted pro-government statutes similar to British Columbia’s Tobacco Damages and Health Care Costs Recovery Act upheld in the *British Columbia v. Imperial Tobacco Canada Ltd.* case. Thus, the other provinces will enjoy the same dramatic causation and proof advantages that British Columbia will enjoy in its trial.

The snowballing of statutes and lawsuits by provinces in Canada has recently accelerated. New Brunswick was the first province to follow

84. Barbara Sibbald, *All Provinces Likely to Join Tobacco Litigation*, 173 CAN. MED. ASS’N. J. 1307, 1307 (2005).

85. *Id.*

86. British Columbia was the first Canadian province to file a lawsuit against big tobacco companies. Anthony DePalma, *In Canada, One Province Stands Alone Vs. Tobacco*, N.Y. TIMES, Nov. 22, 1998, <http://www.nytimes.com/1998/11/22/world/in-canada-one-province-stands-alone-vs-tobacco.html>. In 2009, Canada’s largest two provinces, Ontario and Quebec announced that they were going to court and seeking \$80 billion to pay for health care costs associated with smoking. Anita Elash, *Canadian Provinces Sue Tobacco Companies*, NATIONAL PUBLIC RADIO NEWS (Oct. 12, 2009), <http://www.npr.org/templates/story/story.php?storyId=113670571>.

British Columbia's lead. After enacting a statute similar to and based on British Columbia's statute, New Brunswick filed a lawsuit modeled after British Columbia's lawsuit in 2008.<sup>87</sup> Interestingly, New Brunswick retained United States lawyers with experience in the states' healthcare reimbursement lawsuits to assist the province with the lawsuit.<sup>88</sup> One of these United States lawyers estimated that New Brunswick had paid \$10 billion or more in healthcare costs related to tobacco use.<sup>89</sup> This highlights the potential for a huge reimbursement recovery by New Brunswick.

Ontario, Canada's largest province, initially ruled out suing tobacco manufacturers for healthcare reimbursement costs.<sup>90</sup> However, in 2009 the province shifted course, enacting legislation modeled on the British Columbia statute and filing a lawsuit similar to the British Columbia lawsuit.<sup>91</sup> Michael Perley of the Ontario Campaign for Action on Tobacco estimated that the Ontario reimbursement lawsuit may be worth \$50 to \$60 billion dollars.<sup>92</sup> In addition to asserting that Imperial Tobacco Canada Ltd. will not settle the case, a representative of the company responded that "[t]he biggest losers here are going to be Ontario taxpayers."<sup>93</sup>

By October 2009, eight Canadian provinces had introduced legislation modeled on the British Columbia statute.<sup>94</sup> In that month Quebec announced its plans to file a lawsuit.<sup>95</sup> Although not confirmed, one of the figures cited for the amount Quebec hopes to recover in the lawsuit is \$30 billion.<sup>96</sup> Repeating a response provided to the Ontario lawsuit, an Imperial Tobacco Canada Ltd. representative asserted, "At the end of the day, the biggest losers are Quebec taxpayers."<sup>97</sup> Proponents of Canadian healthcare reimbursement lawsuits disagreed. A policy analyst for the Canadian Cancer Society observed that "tremendous momentum had developed for

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87. Linke, *supra* note 34.

88. *Id.*

89. *Id.* Presumably this estimate is for Canadian dollars rather than U.S. dollars, although as of the writing of this article the exchange rate between the two is fairly close to equal.

90. Rob Ferguson, *Ontario to Sue Big Tobacco for Health Costs*, TORONTO STAR, Mar. 5, 2009, <http://www.thestar.com/article/596884> [hereinafter Ferguson, *Ontario to Sue*].

91. Ferguson, *Big Tobacco Sued*, *supra* note 82; Ian Austin, *Seeking Billions, Ontario Sues Tobacco Companies*, N.Y. TIMES, Sept. 30, 2009, [http://www.nytimes.com/2009/09/30/business/30tobacco.html?\\_r=1](http://www.nytimes.com/2009/09/30/business/30tobacco.html?_r=1).

92. Ferguson, *Ontario to Sue*, *supra* note 90. Presumably this reference is to Canadian dollars rather than U.S. dollars, although as of the writing of this article the exchange rate between the two is fairly close to equal.

93. Ferguson, *Big Tobacco Sued*, *supra* note 82.

94. Mike King & Aaron Derfel, *Suit Has Tobacco Firms Fuming; Quebec Action; Move to Recover Health Care Costs Called 'Sheer Hypocrisy'*, MONTREAL GAZETTE, Oct. 6, 2009, at A1.

95. *Id.*

96. *Id.* Presumably this reference is to Canadian dollars rather than U.S. dollars, although as of the writing of this article the exchange rate between the two is fairly close to equal.

97. *Id.*

provincial action in 2009.”<sup>98</sup>

The snowballing momentum of the Canadian provinces initiating lawsuits or lawsuit enabling legislation modeled on the British Columbia statute seems undeniable. Interestingly, snowballing of claims seemed to play a significant factor in the United States healthcare reimbursement lawsuits. In the early 1990s, at first only a few southern states filed healthcare reimbursement lawsuits against cigarette manufacturers.<sup>99</sup> The manufacturers originally took a firm no-settlement stance in reaction to these lawsuits. However, as the cases progressed, more and more states joined the litigation, ultimately creating the specter of massive liability potential for cigarette manufacturers.<sup>100</sup> In the face of this snowballing of potentially huge healthcare reimbursement claims, the cigarette manufacturers lost their resolve and accepted a settlement to help ensure their long-term survival.<sup>101</sup> The analogy between the snowballing of states’ reimbursement lawsuits in the United States and provinces’ reimbursement lawsuits in Canada may not be perfect, but it is certainly worth noting.

British Columbia’s trial is scheduled to go forward in fall 2011,<sup>102</sup> and its success or failure may play a pivotal role in decisions regarding whether to enact similar legislation and initiate similar lawsuits in other nations. If British Columbia’s lawsuit is successful, the snowballing of governmental healthcare recovery statutes and lawsuits that has taken place in Canada could easily spread—particularly among nations that are enthusiastic about the WHO’s Tobacco Control Framework litigation provisions.

### III. EVALUATING THE MERITS OF THIS EXPORT OF UNITED STATES TORTS LAW

This Part considers implications of this dramatic export of United States tort law concepts. This Part will focus on healthcare reimbursement lawsuits, as they offer the greatest potential for significant tort damages and potential impact on public policy. This is another way of saying that these lawsuits have the strongest potential to make a real difference in the world.

There are many grounds for discomfort with tobacco healthcare

98. *Id.*

99. Karen E. Meade, *Breaking Through the Tobacco Industry’s Smoke Screen: State Lawsuits for Reimbursement of Medical Expenses*, 17 J. LEGAL MED. 113, 124–28 (1996).

100. See Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 337–38 (2001) [hereinafter Rabin, *The Tobacco Litigation*].

101. See *id.* at 338–39.

102. Laura Payton, *Feds Fight to Avoid Tobacco Lawsuits*, TORONTO SUN, May 20, 2010, <http://www.torontosun.com/news/canada/2010/05/20/14024861.html>.

reimbursement lawsuits. Some reasons for this include the inefficiency of the litigation system in promoting the lawsuits' goals of deterrence, and the erosion of democratic processes that may accompany heavy regulation by litigation. Regarding efficiency, it has been noted that the deterrence benefits of tobacco lawsuits are difficult to measure.<sup>103</sup> For example, if smoking rates decline in the aftermath of significant tort litigation, it is difficult to know how much the decline is attributable to general societal trends, how much is attributable to negative publicity associated with the litigation, how much is attributable to higher cigarette prices necessitated by the expense of the litigation to manufacturers, and how much is attributable to any number of other potential causes. Direct regulation by government is, at least in theory, a much more efficient form of deterrent.<sup>104</sup> In addition to obvious measures such as prohibiting sales of cigarettes to minors, governments can tax cigarettes heavily to force higher prices and thus reduce demand.<sup>105</sup> Increasing direct taxes to reduce demand is also somewhat controversial, at least with regard to reducing demand among adults rather than minors. Tobacco taxes are regressive and disproportionately burden the poorest segment of society in the United States.<sup>106</sup> Further, if the taxes are high enough they arguably become in effect a paternalistic ban on smoking.<sup>107</sup> However, despite such concerns, direct taxation is (again, at least in theory) at least a more linear approach to restricting consumption, and it bypasses the expense and uncertainty of litigation.

Specific to lawsuits outside of the United States, additional problems with using litigation to control consumption arise. First, many nations do not have contingency fees, making these lawsuits more difficult to fund.<sup>108</sup> The use of contingency fees to avoid up-front payments by the states probably significantly enhanced the attractiveness of the reimbursement lawsuits in the United States.<sup>109</sup> Not having this option would entail political costs for many nations considering reimbursement lawsuits, as they would have to risk a significant amount of taxpayers' money to fund their claims. Indeed, tobacco manufacturers have sought to exploit this

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103. See Rabin, *Tobacco Control Strategies*, *supra* note 10, at 1737.

104. See *id.* at 1747 (“[I]t seems apparent that tort liability is an exceedingly blunt weapon for doing battle with tobacco on the consumer demand front.”).

105. See *infra* notes 147–49 and accompanying text. However, governments must also consider the level of taxation at which higher legal prices will lead to an unacceptable degree of black market sales. Canada, which has high cigarette taxation rates, has struggled with this problem. See, e.g., Althia Raj, *Smuggled Smokes Cost Tobacco Makers \$550M in Deal*, *TORONTO SUN*, Apr. 13, 2010, <http://www.torontosun.com/news/canada/2010/04/13/13570521.html>.

106. See Rabin, *Tobacco Control Strategies*, *supra* note 10, at 1730.

107. See *id.*

108. See Basil C. Bitas & Pedro P. Barros, *Tobacco Control and the Role of Litigation: A Survey of Issues in Law, Policy, and Economics*, 16 *U. MIAMI INT'L & COMP. L. REV.* 1, 29 (2008) (citing “[t]he relative absence of contingent fee arrangements” as one of the factors that has in effect restricted tobacco litigation outside the United States).

109. See *id.*

vulnerability by emphasizing in media interviews the high cost of the reimbursement lawsuits to taxpayers.<sup>110</sup> Unlike in the United States, many nations have loser pays rules for civil litigation, making risks higher for governments.<sup>111</sup> Damages awarded in many other nations tend to be smaller than damages awarded in United States torts lawsuits, making lawsuits less attractive.<sup>112</sup> Particularly in developing nations, the amount government spends on healthcare for its citizens may be much less than in the United States, making reimbursement lawsuits less lucrative. Recordkeeping in developing nations may be less advanced than in the United States, making estimates of the amount spent on tobacco-related healthcare more speculative. Finally, particularly in developing nations, civil liability may be unreliable and adequate process to safeguard justice may be elusive.<sup>113</sup> This could lead to unfairness either for tobacco sellers or for government plaintiffs.

Despite all of these concerns and limitations, there are also a number of considerations that may favor the export of U.S.-style healthcare reimbursement lawsuits by other nations. Some of these considerations have not received sufficient attention and are addressed below.

#### *A. Lawsuits that Are a Product of Democratic Processes Rather than an Evasion of Democratic Processes*

In Canada, the provinces' enactment of specific legislation authorizing healthcare reimbursement lawsuits mitigates, but does not eliminate, concerns about sidestepping democratic processes. The states' reimbursement lawsuits in the United States were justifiably criticized as a circumvention of the democratic process.<sup>114</sup> Particularly given that the settlement payments were spread out over many years,<sup>115</sup> many of the United States lawsuits in a sense represented a tax enacted without legislative supervision or approval. In Canada, by contrast, the lawsuits are a product of the democratic process. Each of the lawsuits was authorized by a vote of a provincial legislature.<sup>116</sup> If the Canadian lawsuits are successful,

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110. See, e.g., *supra* note 93 and accompanying text.

111. Blanke, *supra* note 18, at 11.

112. See Bitas & Barros, *supra* note 108, at 29.

113. See generally Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, 70 LAW & CONTEMP. PROBS. 109 (2007).

114. See Peter D. Jacobson & Soheil Soliman, *Litigation as Public Health Policy: Theory or Reality?*, 30 J.L. MED. & ETHICS 224, 226 (2002).

115. See Rabin, *Tobacco Control Strategies*, *supra* note 10, at 1737.

116. See *supra* notes 85–101 and accompanying text.

given the significant evidentiary benefits they provide the government,<sup>117</sup> one might assume that other nations inspired to pursue reimbursement lawsuits might enact similar legislation as well.

This does not completely eliminate concerns about compromising democratic processes. Legislatures may feel that they have better political “cover” in authorizing lawsuits that will have the indirect effect of raising the “taxation” level on cigarettes than they would in authorizing more direct tax hikes on cigarettes. Although they may have similar financial costs to consumers, a legislator’s vote to hike taxes on consumers may not be popular, while her or his vote to force tobacco sellers to pay money to the government may be cheered. Thus, reimbursement lawsuits may provide a vehicle for sidestepping meaningful debate on whether additional taxation on the whole benefits society. However, the potential messiness in the making of statutes enabling tobacco reimbursement lawsuits is hardly unique to this form of legislation. Otto von Bismarck is often quoted as having observed that “[l]aws are like sausages . . . it is better not to see them being made.”<sup>118</sup> Any concerns that statutes enabling healthcare reimbursement lawsuits might be influenced by political posturing are hardly sufficient to negate their status as a legitimate product of democratic political processes.

#### *B. The Role of Governmental Torts Lawsuits Against Tobacco Sellers as Ombudsman*

Research increasingly affirms that tort law can influence public perceptions and policy as an ombudsman and educator. Governmental reimbursement lawsuits may play an important role in educating and reminding the public about the need to be wary regarding cigarettes and cigarette manufacturers. The eminent torts scholar and jurist Justice Allen Linden introduced the concept of torts law as ombudsman in 1973,<sup>119</sup> and the eminent torts scholar John Wade supported the concept in 1986.<sup>120</sup> The ombudsman concept promotes the role of tort law as a source of education and publicity that may influence both private actors and public policy.<sup>121</sup>

In the 2008 book *Holding Bishops Accountable*, Professor Timothy Lytton studied the media impact of litigation on shaping public policy and perceptions, using the Catholic priest molestation scandals as an

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117. See *supra* notes 41–48 and accompanying text.

118. See, e.g., Derek Wallbank, *Legislative Sausage-Making: How a Bill Does Not Become a Law*, MINN. POST, Jan. 12, 2010, [http://www.minnpost.com/stories/2010/01/12/14823/legislative\\_sausage-making\\_how\\_a\\_bill\\_does\\_not\\_become\\_a\\_law](http://www.minnpost.com/stories/2010/01/12/14823/legislative_sausage-making_how_a_bill_does_not_become_a_law).

119. Allen M. Linden, *Tort Law as Ombudsman*, 51 CAN. B. REV. 155 (1973) [hereinafter Linden, *Tort Law as Ombudsman*].

120. John W. Wade, *Tort Law as Ombudsman*, 65 OR. L. REV. 309 (1986).

121. See generally Linden, *Tort Law as Ombudsman*, *supra* note 119.

illustration.<sup>122</sup> Some of Professor Lytton's findings have implications for the educational role of tobacco litigation as well. He thoughtfully argued that there is a close correspondence between the strategic considerations guiding how plaintiffs' lawyers will frame a tort claim and journalists' criteria of newsworthiness.<sup>123</sup> Plaintiffs seek to frame tort claims as clear and straightforward morality tales about right and wrong.<sup>124</sup> Journalists are more likely to find stories with this kind of framing newsworthy.<sup>125</sup>

Professor Lytton also documented that journalists have a tendency to favor stories that are based on litigation documents, because official documents are perceived as having more credibility than other sources.<sup>126</sup> Further, stories with continuity are often considered more newsworthy than other stories, and litigation provides an ongoing, unfolding story.<sup>127</sup>

One might respond that in Western nations we have already been educated enough about tobacco, and the risks are already known. However, as children become teens and adults, there is a perpetual new audience in need of the message. Most smokers initially become addicted to cigarettes while they are teenagers.<sup>128</sup> As addressed below, governmental efforts to minimize cigarette smoking may be most effective when directed at children,<sup>129</sup> and governmental paternalism is less controversial in the context of protecting children than in the context of protecting adults. Further, even with regard to adults who have already been exposed to information about the dangers of smoking and the conduct of the tobacco industry, being exposed to information repeatedly probably enhances the effectiveness of the message.<sup>130</sup> Repeatedly disseminating information probably has diminishing returns, but that does not mean that it has no returns at all.

Finally, the educational impact of healthcare reimbursement lawsuits against cigarette sellers likely would be particularly strong in third world populations with limited experience and information regarding addiction and smoking-related illness. This may argue in favor of third world nations, many of whom have expressed interest in the WHO Tobacco

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122. TIMOTHY D. LYTTON, *HOLDING BISHOPS ACCOUNTABLE* (2008).

123. *Id.* at 84, 94–101.

124. *Id.* at 85.

125. *Id.* at 84–94.

126. *Id.* at 84.

127. *Id.* at 98–99.

128. See Joni Hersch, *Teen Smoking Behavior and the Regulatory Environment*, 47 *DUKE L.J.* 1143, 1143 (1998).

129. See *infra* notes 139–49 and accompanying text.

130. See *infra* notes 139–46 and accompanying text.

Control Framework's encouragement of litigation as a tobacco regulation tool,<sup>131</sup> going forward with such lawsuits. Indeed, media impact and framing were specifically contemplated in a paper written for WHO early in the process of considering enactment of the Framework on Tobacco Control.<sup>132</sup>

C. *The Importation of United States Torts Litigation by Other Nations in Tobacco Healthcare Reimbursement Lawsuits May Not Lead to Overuse of Other Types of United States Torts Litigation Abroad*

In many ways, the states' tobacco healthcare reimbursement lawsuits are singular.<sup>133</sup> More than twelve years after the 1998 settlement, they have not led to a flood of successful torts litigation by United States governmental entities against other industries.<sup>134</sup> Probably the most notable governmental tort claims that have followed the tobacco settlement are lawsuits against lead paint manufacturers and handgun manufacturers.<sup>135</sup> These lawsuits have met with only limited success.<sup>136</sup> As addressed above, the legal systems and societal conditions in many other nations make importation of torts lawsuits that have been successful in the United States problematic.<sup>137</sup> "U.S.-style litigation cannot be imported, ready-made, into other legal systems and cultures."<sup>138</sup> Although any successful torts litigation against an industry may to some extent encourage lawsuits against other industries, it is far from a foregone conclusion that the lawsuits would lead to a wide-scale importation of other types of U.S.-style torts litigation.

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131. Cf. Gostin, *supra* note 18, at 2539 ("Now that the tobacco industry is aggressively seeking new markets in the poorest, least-regulated countries, litigation will take on new importance.").

132. Blanke, *supra* note 18, at 13, 26.

133. Cf. Micah L. Berman, *Smoking Out the Impact of Tobacco-Related Decisions on Public Health Law*, 75 BROOK. L. REV. 1, 5 (2009) (arguing that tobacco regulation cases in general are exceptional because "courts tend to be unusually skeptical of attempts to regulate tobacco and of plaintiffs' claims against the tobacco industry").

134. See Bitas & Barros, *supra* note 108, at 39 (arguing that, regarding tobacco litigation generally, "it appears that the U.S. litigation experience is unlikely to be replicated abroad").

135. See Jacobson & Soliman, *supra* note 114, at 224 (describing gun control litigation, along with tobacco litigation, as being one of "the two main areas where advocates have developed litigation as a policy strategy"). The article concluded that "gun litigation has not succeeded at all." *Id.* at 233; see also Sandra Torry, *Lead Paint: The Next Big Legal Target*, WASH. POST, June 10, 1999, <http://www.washingtonpost.com/wp-srv/national/daily/june99/leadpaint0610.htm> (predicting lawsuits that will "mount a major assault on the former makers of lead paint," and that "[t]he potential battle borrows much of its inspiration from the recent legal assault on big tobacco").

136. See Bitas & Barros, *supra* note 108, at 39; J. Russell Jackson, *Products Liability: Lead Paint Litigation*, NAT'L L.J., July 14, 2008 (noting that losses in key court battles have led many commentators to declare "the death knell for litigation against manufacturers of lead pigment and paint in America," but asserting that litigation may continue).

137. See *supra* notes 20–29 and accompanying text.

138. Blanke, *supra* note 18, at 61.

*D. Inefficient but Active Deterrence Offers Some Advantages Over  
Deterrence that Is Theoretically Superior but Less Likely to Be Active*

Evidence indicates that tobacco usage declines following media campaigns.<sup>139</sup> Further, demand for cigarettes is at least somewhat sensitive to price changes.<sup>140</sup> Children and young adults are even more sensitive to price than are adults.<sup>141</sup> Smoking rates have dropped in the United States since the \$246 billion settlement heightened publicity and raised prices, with the biggest drop being in teenage smoking.<sup>142</sup> Although a precise causal connection to the United States healthcare reimbursement lawsuits would be impossible to establish,<sup>143</sup> from 1997 to 2009, adult smoking rates in the United States dropped a little more than four percent.<sup>144</sup> As of 2009, the adult smoking rate was down to 20.4%; it had been 24.7% in 1997.<sup>145</sup> From 1997 to 2007, U.S. high school smoking rates dropped about sixteen percentage points, from 36.4% to 20%.<sup>146</sup>

Professor Robert Rabin has noted that a 2007 study of smoking rates among teenagers in New York City showed a significant drop when high taxes added three dollars to the cost of a pack of cigarettes, leading to a retail price of seven dollars or more.<sup>147</sup> If more governmental entities were willing to adopt this aggressive a level of taxation, probably fewer children would become addicted to smoking, and, over time as they grow older, smoking rates among the general population would likely also decline.<sup>148</sup> In

139. See, e.g., Anita Kumar, *Underage Smoking in Virginia Drops*, WASH. POST, Sept. 14, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/10/AR2008091001001.html> (stating that officials in Virginia “credit the Virginia Tobacco Settlement Foundation for spending millions of dollars on education, marketing and other programs to curb youth smoking” in explaining a sharp decline in underage smoking in Virginia).

140. See Rabin, *Tobacco Control Strategies*, *supra* note 10, at 1729–31.

141. See *id.* at 1765.

142. See *Health Risk Factors and Disease Prevention: Tobacco Use*, NAT’L CTR. FOR BIOTECHNOLOGY INFO., (Jan. 2010), <http://www.ncbi.nlm.nih.gov/bookshelf/br.fcgi?book=healthus09&part=healthriskfactors>.

143. In addition to educational and publicity benefits, Professor Rabin notes that the states’ settlement is estimated to have increased the price of a pack of cigarettes by thirty-nine cents. Rabin, *Tobacco Control Strategies*, *supra* note 10, at 1738.

144. “The prevalence of current smoking among U.S. adults generally declined from 24.7% in 1997 to 20.4% for the period January through June 2009.” P.M. Barnes, J.S. Schiller & K.M. Heyman, *Early Release of Selected Estimates Based on Data From the January–June 2009 National Health Interview Survey*, NAT’L CTR. FOR HEALTH STATISTICS 52 (Dec. 2009), <http://www.cdc.gov/nchs/data/nhis/earlyrelease/earlyrelease200912.pdf>.

145. *Id.*

146. *Health Risk Factors and Disease Prevention: Tobacco Use*, *supra* note 142.

147. See Rabin, *Tobacco Control Strategies*, *supra* note 10, at 1766.

148. Jacobson & Soliman, *supra* note 114, at 229 (arguing that over time, raised prices resulting from the states’ tobacco-related healthcare reimbursements lawsuits “should have the desired effect

addressing what states in the United States can do to stop “[t]he tobacco use epidemic,” in 2010, the Centers for Disease Control and Prevention placed “[i]ncrease the unit price of tobacco products” at the top of its list.<sup>149</sup> However, at present most governmental entities have not chosen to engage in this level of direct taxation deterrence. Although in theory aggressive direct taxation may be a more efficient deterrent than indirect taxation and publicity through healthcare reimbursement lawsuits, in the absence of higher direct taxation, healthcare reimbursement lawsuits provide at least some real-world deterrence. Although a hammer may be more effective than a rock at driving a nail into wood, in the absence of a hammer, use of a rock may be worthy of consideration.

#### IV. CONCLUSION

In his support of the tort as ombudsman theory, Justice Linden emphasized that tort law may have important educational benefits even though the damages may often be small, as they often are in Canada and many other nations.<sup>150</sup> However, tobacco-related healthcare reimbursement lawsuits are not among those small damages situations. With many billions of dollars at stake, publicity and education are far from the only significant consequences in the reimbursement lawsuits. On the other hand, the larger the damages that are awarded in these lawsuits, the stronger the publicity and education functions they will provide.

Justice Linden has explained that despite his love for the subject, “[t]here are still some warts on torts.”<sup>151</sup> For example, the ombudsman and educational benefits of tort law are by their nature difficult to measure.<sup>152</sup> With the stakes in multibillion dollar lawsuits as a regulatory tool undeniably high, the imprecision and uncertainty of costs and benefits of tort law as an educator are troubling.

As noted above, tobacco companies have stated that they will not settle

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of reducing smoking prevalence rates among adults, along with reducing prevalence and incidence rates among children”).

149. *Tobacco Use: Targeting the Nation's Leading Killer: At a Glance 2010*, NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, CTRS. FOR DISEASE CONTROL & PREVENTION 2 (2010), [http://www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2010/tobacco\\_2010.pdf](http://www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2010/tobacco_2010.pdf).

150. Linden, *Tort Law as Ombudsman*, *supra* note 119, at 156 (stating that tort lawsuits may have a salutary effect on government and corporate defendants' conduct “even though the amount of damages they must actually pay is insignificant”).

151. Allen M. Linden, *The Joy of Torts*, in STEPHANE BEAULAC, STEPHEN G.A. PITEL & JENNIFER L. SCHULTZ, *THE JOY OF TORTS* 474 (Butterworths 2003) [hereinafter Linden, *The Joy of Torts*].

152. See Linden, *Tort Law as Ombudsman*, *supra* note 119, at 158. However, Justice Linden notes that this uncertainty has deterrence advantages, because “the amount of penal fines and damage awards are often easy to forecast, whereas the result of bad publicity is nearly impossible to prophecy.” *Id.*

with the Canadian provinces.<sup>153</sup> This may be hyperbole. However, if the tobacco companies do not settle, the pro-plaintiff statutes enacted by the Canadian provinces will give the provinces significant litigation advantages. Although the litigation's success is not "virtually guaranteed" as the tobacco companies asserted in trying to convince the Supreme Court of Canada to dismiss British Columbia's lawsuit,<sup>154</sup> the possibility of dramatic success is real. If the provinces settle for a significant amount or win at trial, the victories will probably not spark another large general wave of individual or class action tobacco lawsuits. However, a victory or even a strong showing in a loss could encourage other nations to jump or re-jump into the pool with healthcare reimbursement lawsuits against tobacco companies. With cigarette companies relying on developing nations as markets for expansion, the possibility of a new wave of healthcare recovery lawsuits in several nations must be a matter of deep concern to the industry.

Because of the concerns addressed above, the prospect of success and further expansion of healthcare reimbursement lawsuits should be a matter of concern for all of us as well. However, along with this concern, we might find some hope that these lawsuits could also provide imprecise but pragmatic deterrence and educational benefits. There is characteristic wisdom in Justice Linden's reminder that "[o]ur reach may exceed our ability to grasp. But what we grasp for in the tort system is noble and beautiful, a reflection of much that is beautiful in our society."<sup>155</sup>

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153. See *supra* note 82 and accompanying text.

154. See *supra* note 83 and accompanying text.

155. Linden, *The Joy of Torts*, *supra* note 151, at 474.

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