

Will litigation become part of public health arsenal in Canada's war against smoking?

Barbara Sibbald

Mammoth US legal settlements against the tobacco industry, such as a recent \$6.9-million award in Florida that opens the door to a \$300-billion payout for 500 000 smokers, are good news for Canada antismoking advocates. Why? Because the US lawsuits have pried loose some 39 million pages of internal tobacco company documents (www.cctc.ca/nctn/guildford) that are essential to a Canadian class-action suit and suits brought individually. As a result, the law may eventually become as big a weapon in the public health war against smoking in Canada as it is in the US.

These internal documents include 7 million pages from the British-American Tobacco Co. Ltd. (BAT), which owns Canada's leading cigarette manufacturer, Montreal-based Imperial Tobacco Ltd. Imperial controls about 70% of the Canadian market with brands such as du Maurier and Player's.

These documents show, among other things, that cigarette manufacturers deliberately engineered cigarettes to be the most efficient "nicotine delivery device" possible. According to a 1995 Health Canada report, nicotine levels in Canadian cigarettes have increased by 53% since the early 1970s.

Although US courts award settlements based on these kinds of facts, Canadians are just starting to adopt the litigation process. Andreas Seibert, a lawyer with Sommers & Roth (www.sommersandroth.com) of Toronto, devotes all his time to a smoking-related class-action suit and 2 private lawsuits that dovetail with the class action.

Seibert is "very confident" about the ultimate success of the class-action suit. *Caputo et al v Imperial Tobacco Limited et al*, filed in 1995 and maintained by 4 plaintiffs, including David Caputo, could ultimately benefit about 2 million Ontario smokers and their families. (Everyone who fits the definition and is approved by the court will automatically benefit from the decision at trial. There is no need to contact the law firm.)

A number of pre-trial procedural hearings have already taken place, and a judge is expected to decide by year's end whether to certify the lawsuit as a class action. The defendants, Imperial Tobacco Ltd., RJR-MacDonald (now JTI-

MacDonald) and Rothmans, Benson & Hedges Inc., are all controlled by foreign tobacco multinationals.

Seibert is also counsel for 2 individual liability lawsuits for the same party. *Spasic v Imperial Tobacco and Rothmans, Benson & Hedges Inc.* was Ontario's first individual tobacco-products liability lawsuit when it was launched in May 1997; a second

suit was brought against British-American Tobacco and its Montreal subsidiary, Imperial Tobacco, in September 1997 after new evidence was revealed about the relationship between the companies. Mirjana Spasic died of smoking-related lung cancer in February 1998 but her estate is pursuing the lawsuits. Seibert says Spasic launched the suit because she was in poor health and didn't want to wait for the class action to proceed.

In all 3 cases, the plaintiffs are alleging negligence, negligent misrepresentation, deception, conspiracy and strict product liability (which means that the product used was defective). Seibert doesn't expect the defendants in any of the cases to settle without a trial. And if he proves liability, it will set a "strong Canadian precedent."

He plans to rely on the tobacco documents, which he says suggest that cigarette manufacturers had "sophisticated understanding of their product and its risks . . . and that they failed to disclose to their customers.

"From what I've seen, they've misleadingly stated the state of affairs regarding their knowledge and internal beliefs about the product. They knew, they've known [about the dangers] for a long time."

The tobacco companies deny this. In fact, their principal argument in the US cases was that they do not know of proof that smoking causes disease. At the same time, they also argued that the complainants knew smoking caused disease so they shouldn't be allowed to take action.

"We intend to hold them to this duality," Seibert said in an interview. "We don't intend to let them get away with this argument. I find it repugnant."

His cases aren't the only Canadian civil actions being brought against cigarette manufacturers. Quebec courts are



Barbara Sibbald photo

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looking at a potential class-action suit, *Fortin v Imperial Tobacco*, and provincial governments in BC and Ontario are also trying to win civil suits against cigarette manufacturers (see *CMAJ* 162(10);2000:1468). The BC case against 3 Canadian tobacco companies was recently relaunched.

The federal government is also gathering information. Last November federal Health Minister Allan Rock hired Dr. Jeffrey Wigand, former head of research at the US subsidiary of British-American Tobacco Co. Ltd. and the famous whistleblower in the movie *The Insider*, to interpret the tobacco documents.

The US government and 47 states sued the industry to recover Medicaid costs for treating sick smokers, and reached a settlement worth \$246 billion in 1998. "The fact that they settled, and that it was the biggest settlement ever in business history, indicates they didn't want to be exposed at trial," says Garfield Mahood, executive director of the Ottawa-based Non-Smokers' Rights Association.

He says the lower awards in Canada is one reason fewer resources are put into this type of litigation. The massive US government case involved 50 law firms, which put up \$100 000 each per year, thus "leveling the playing field" with

the profitable tobacco industry. He says Canadians haven't made litigation a priority; instead they've focused on increasing tobacco taxes, controlling advertising and other ways of addressing smoking behaviour itself, rather than the results of that behaviour. Recent cases indicate, however, that Cana-

dians may be getting more litigious. "If [Seibert] is successful [litigation] could attract a lot more attention as a public health strategy," says Mahood.

He urges physicians to tell their patients who are diagnosed with terminal smoking-

related diseases that they have the legal right to compensation from the tobacco industry. "For years the tobacco industry had common law duty to warn customers of all the risks of tobacco — 20 terminal diseases — and the magnitude of that danger," he added. The RCMP are currently investigating several possible charges of criminal negligence against the tobacco industry.

Meanwhile, Canada's \$3.8 billion tobacco industry continues to profit. Imperial Tobacco had annual sales of \$1.7 billion in 1998 and profits of \$815 million. Its profit per pack of cigarettes increased from 32 cents in 1991 to 60 cents in 1998.

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