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Doug Schweitzer, Minister of Justice and Solicitor
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Jim Reiter, Minister of Health
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Christine Elliott, Minister of Health
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Danielle McCann, Minister for Health and Social Services
Sonia LeBel, Minister of Justice
Government of Quebec

Hugh J.A. Fleming, Minister of Health
Andrea Anderson-Mason, Minister of Justice and
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Government of New Brunswick

Randy Delorey, Minister of Health and Wellness
Mark Furey, Attorney General and Minister of Justice
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James Aylward, Minister of Health and Wellness
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John Haggie, Minister of Health and Community Services
Andrew Parsons, Minister of Justice and Public Safety
Government of Newfoundland and Labrador

Re: Health objectives that should guide resolution of lawsuits against tobacco companies

Over the past two decades, each of Canada's provincial governments has filed lawsuits against tobacco companies to recover the costs of treating smoking-related diseases.¹ Injured smokers have also sought justice through class action suits certified in Quebec and British Columbia while many other lawsuits have been filed without progressing towards a trial.

Health organizations have long supported these efforts, recognizing that they can help to achieve justice for corporate wrongdoing, can provide compensation for the costs disbursed by the taxpayers, and can expose the truth after decades of unscrupulous industry behaviour. More importantly, these lawsuits can also serve to protect future generations from the ravaging harms of tobacco use by accelerating the end of the deadly commercial tobacco trade.

None of the provincial lawsuits has been permitted to go to trial, and they are all currently suspended as a result of a court order in Ontario. Indeed, on March 1, 2019, the tobacco companies faced a major defeat when the Quebec Court of Appeal upheld a \$13 billion ruling against them. However, companies responded by using the federal insolvency law (the *Companies' Creditors Arrangement Act, CCAA*) and convinced the Ontario court to suspend all legal actions against them and to order the parties to

¹Costed lawsuits include British Columbia [\$120 billion], Ontario [\$330 billion], Quebec [\$60 billion], Alberta [\$10 billion], and New Brunswick [\$23 billion], while the amounts claimed by the other five provinces will only be known at trial or as part of an out-of-court settlement.

participate in settlement discussions. Instead of facing open trials, companies have forced and hope to confine the resolution of the provincial and all other lawsuits against them to closed-door secret negotiations that in effect play in their favour.

Provincial governments have identified monetary objectives for these cases but have not articulated any health goals. Canadians will benefit if these suits resolve in ways which radically change the commercial tobacco market and which aim for the end of tobacco use (as lawsuits against asbestos companies did). On the contrary, Canadians will be harmed if governments agree to terms which maintain the tobacco market and its profit motive for decades to come (as happened with earlier suits by Canadian and U.S. governments).

How to resolve the tobacco lawsuits is one of the most important public policy issues of this beginning of the 21st century. Governments are not applying the standards of transparency and public consultation that are expected and routinely applied to much less significant issues. Not one of the provincial governments has yet consulted on how these cases should be resolved, and all of them have agreed to the secretive process initiated by the industry.

It is in the context of this opaque process that we feel the need to clarify our demands for non-monetary health objectives for these suits, and to warn governments against agreeing to measures which will perpetuate the tobacco epidemic.

We are therefore submitting to you the following information, which builds on a [previous letter sent last June²](#) by a collective of health groups to all provincial Ministers of Health and Justice, as well as a [letter sent to the premier of Quebec in April³](#):

A- BACKGROUND

1) The provincial damage claims vastly exceed the capacity of the companies to pay.

- Provincial government claims against the companies are now estimated to be in excess of \$500 billion. This is the equivalent of 250 years combined annual profit of the companies in Canada, or 15 years' combined annual profit of their multinational owners across the world.
- The provincial lawsuits were filed against both the multinational owners and their Canadian subsidiaries. The ability of the provinces to recover a court-ordered payment from overseas companies will be challenging given the complexities of their diffused corporate structure.

2) All but 2 provinces have out-sourced their cases to private sector law firms working on a contingency-fee basis.

- Only Quebec and Ontario are using lawyers from their own Justice departments and directly managing their lawsuits. The other eight provinces are represented by consortia of [American](#) and Canadian private law firms working on a contingency fee arrangement.
- Under such a contingency-fee arrangement, the provinces do not pay for the costs of going to trial, but instead agree to pay the firms with a percentage of any financial outcome. [New](#)

² Action on Smoking & Health (Alberta), Campaign for Justice on Tobacco Fraud, Coalition québécoise pour le contrôle du tabac, Ontario Campaign for Action on Tobacco, Physicians for a Smoke-Free Canada, *Letter to provinces health ministers*, June 25th 2019. http://www.smoke-free.ca/eng_home/2019/Letter_to_ministers_re_CCAA-June25-2019.pdf

³ Coalition québécoise pour le contrôle du tabac, *Letter to Quebec premier François Legault*, April 3rd 2019. http://cqct.qc.ca/Documents_docs/DOCU_2019/MAIL_19_04_03_PoursuiteQc_CoutsSoinsSante_Tabagisme.pdf

Brunswick⁴ has agreed to pay the lawyers 18 cents on every dollar it receives, and Newfoundland and Labrador⁵ has agreed to pay the lawyers 30 cents per dollar. The contracts with the other 6 provinces have not been made public.

- The lawyers representing the 8 contingency-fee provinces have no incentive to negotiate non-monetary outcomes, and every incentive to maximize financial outcomes as quickly as possible, as they bear the burden of ongoing fees up until any payment occurs, in an already lengthy process.

3) The provinces have the power to control – or even stop - the insolvency process.

- The current settlement discussions and the insolvency protection which provides for them are not mandatory or permanent. If a sufficient majority of the parties agree, they can dissolve the insolvency proceedings. To date the province of Ontario is the only jurisdiction to have raised any concerns⁶ with the industry's use of insolvency to delay the lawsuits.
- Any resolution to the proceedings requires the consent of “a majority in number representing two thirds in value of the creditors” (s. 6.1 of the CCAA⁷) This means that the provinces of Ontario or Quebec, which have the largest affected populations, will have to support any resolution.
- If the provinces wish to enter into discussions for a settlement, they can do this without the CCAA process.
- The CCAA Orders which protect the companies will expire on March 12th. On that date, a hearing will be held in Toronto regarding the future of the CCAA process. This is an opportunity to establish a more democratic process to resolve the suits.

4) The *Companies' Creditors Arrangement Act (CCAA)* is an unnecessary and harmful basis for settlement discussions.

- The purpose of the federal insolvency law is to allow companies which are in financial difficulty to come to an arrangement with their creditors so that they can avoid going bankrupt. Keeping tobacco companies in business should not be a goal for provincial governments and need not be the basis of settlement discussions.
- Using this law, tobacco companies in Canada are now mandated to maintain “business as usual”, even though doing so will continue to addict and harm Canadians and will add to the health-care costs for which the companies do not have the resources to pay. The CCAA process, for example, authorizes them to continue promoting the use of their products.
- Under the CCAA process, all legal actions against the companies are suspended, including actions for damages from vaping products. The rights of consumers who continue to be injured

⁴ New Brunswick Justice and Consumer Affairs / Health, *The Province of New Brunswick has retained a consortium of lawyers to sue tobacco companies for health-care costs of tobacco-related illnesses*, September 12th 2007.

<https://www.gnb.ca/cnb/news/jus/2007e1138ju.htm>

⁵ CBC News, *Law firm tobacco contract under fire*, April 12th 2011. <https://www.cbc.ca/news/canada/newfoundland-labrador/law-firm-tobacco-contract-under-fire-1.1008554>

⁶ Ontario Supreme Court of Justice, *Court File No. CV-19-616077-00CL*, March 29th 2019.

<http://cfcanada.fticonsulting.com/imperialtobacco/docs/Motion Record - ITCAN.pdf>

⁷ Canada Justice Laws, *Companies' Creditors Arrangement Act R.S.C., 1985, c. C-36*, updated on January 16th 2020. <https://laws.justice.gc.ca/eng/acts/C-36/FullText.html>

by these companies' actions to seek justice are being blocked. The CCAA process, for example, protects the companies from lawsuits related to their misleading advertising of vaping products.

- Injured Quebec smokers have now been before the courts for 21 years. By blocking the Supreme Court from being able to decide whether it will hear an appeal, the CCAA process is further delaying their right to have a final judgment on their case or to receive compensation.

B - RECOMMENDATIONS

1- The provinces should reject the CCAA process as the basis to resolve their claims:

- Ideally, provinces should collapse the CCAA process and allow lawsuits against the companies to continue. If they wish to discuss a settlement with the companies, they can do so without protecting the industry from bankruptcy or accountability for wrongdoings.

2- The provinces should reject any settlement that perpetuates the tobacco industry.

- Each province should recognize its responsibility to refuse to support an inadequate agreement, even if other parties support it.
- No province or party should agree to a settlement which spreads financial compensation over several years or which otherwise distracts from the public health goal of eliminating tobacco use.
- The companies do not have any money saved to pay even a small proportion of the billions of dollars spent by provincial governments as a result of the industry's wrongdoings. Consequently, any payments made by the companies will be done as a result of future sales to smokers and be intrinsically connected with additional health and economic harm to these individuals.

3- The provinces should not cause further injury to smokers.

- Quebec courts have upheld demands for \$100,000 payment to smokers suffering from lung or throat cancer and a lesser amount for emphysema. Only those smokers who started using cigarettes during the time that the companies were lying about the health effects are eligible. A resolution which nullifies this judgement will exacerbate the injustice done to them.
- At a minimum, at the next CCAA comeback motion, the provinces should oppose the renewal of any litigation stay, unless there is unanimous agreement of all parties to do so.

4- The provinces should give priority to non-monetary outcomes which promote health

Litigation can result in non-monetary outcomes which are otherwise difficult to achieve.

- a) The principal goal of a litigation outcome should be significant and permanent changes to the foundation of the companies and their business practices. The companies should not come out of this process with the continued capacity to profit from tobacco sales.**
- b) This should be achieved through a mandatory and enforceable timetable for the rapid phase out of combustible cigarettes, followed by a phase out of non-licensed nicotine products⁸.**

⁸ The accelerated phase-out of a product is not tantamount to its prohibition, but a common practice employed by industry, with or without regulator interventions, to modernize operations with the objective of better efficiency, increased productivity, environmental targets, or more generally to reduce negative outcomes and harms to workers and society.

c) Examples of secondary non-monetary outcomes include:

- i. An end to industry expenditures on promotion. The CCAA process has confirmed that these expenditures are significant: [JTI-Macdonald](#)⁹ spends \$ 2.5 million a week on promotion in Canada, about 20% of its sales revenue, exclusive of excise and sales taxes.
- ii. An end to industry interference with health policies (i.e. termination of lobbying, public relations, litigation, disinformation campaigns, etc.).
- iii. Disclosure of the industry documents produced during these lawsuits, as was done in the United States' court cases.
- iv. Establishment of an independent health trust dedicated to reducing tobacco use, similar to the American Legacy Foundation.

See [appendix](#) for more information regarding these examples as well as relevant precedents.

We hope we can count on our governments to defend the public interest with respect to all tobacco-related litigation.



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Att: Appendix on non-monetary outcomes

⁹ Ontario Superior Court of Justice, Court File No. CV-19-615862-00CL, September 25th 2019.
<https://www.insolvencies.deloitte.ca/en-ca/Documents/en-ca-insolv-JTI-FifthReportoftheMonitordatedSeptember252019.pdf>

APPENDIX

Precedents for non-monetary litigation outcomes

Primary objective: A mandatory and enforceable timetable for the rapid phase-out of combustible cigarettes, followed by a phase-out of non-licensed nicotine products significant and permanent changes to the foundation of the companies and their business practices.

The optimal outcome of the provincial lawsuits would be an agreement requiring Canadian tobacco companies and their parent company to contribute to tobacco reduction efforts and implement an accelerated phase-out for cigarettes sold on the Canadian market targeted at the federal objective of less than 5% smoking prevalence by 2035. Under such an agreement, the defendants in these suits would be subject to penalties that exceed their annual revenues if they failed to meet interim targets.

Precedents

We are not aware of any direct precedents for this type of requirement for tobacco products. There are, however, direct parallels with requirements to reduce production and marketing of harmful products, such as coal-fired power generation. Under the 2018 [Canada's Climate Plan](#), the federal government set regulations which phase out conventional coal-fired electricity units by December 31, 2029. This strategy also sets a more general ceiling on greenhouse gases (GHG) to limit the growth of greenhouse gas emissions that could result from alternative energy production. The [Carbon Market Agreement between Quebec and California](#) also adopts the use of decreasing ceilings on production.

Canadian governments have required producers to phase-out their use of various substances, including [pesticides](#), [lead](#) and harmful chemicals like [polychlorinated biphenyls](#). They have imposed phase-outs on certain consumer products. The [2014 federal marketing ban](#) on incandescent lightbulbs was preceded by restrictions in British Columbia, showing that provincial governments can lead by example.

Governments can use their legislative power to impose the same type of requirements on all tobacco manufacturers operating in Canada. This would ensure that all tobacco suppliers in Canada are treated equally. This approach was used in the United States following the agreement between state governments and tobacco companies, and was upheld against a NAFTA challenge by [Grand River Enterprises](#).

Imposing a phase-out on combustible cigarettes should not be seen as a prohibition on smoking, but rather as a progressive reduction which is adapted to the market. As leading [tobacco control researchers have currently written](#)¹, it would align tobacco sales with standard consumer protection practices. This approach would strengthen other prevention and cessation efforts by incentivizing suppliers to contribute to their success.

Secondary objectives:

There are other desirable non-monetary outcomes for the lawsuits, although they would be of lesser public health value than a phase-out of combustible products.

¹ Elizabeth A Smith, Ruth E Malone from the *British Medical Journal*, *An argument for phasing out sales of cigarettes*, September 21st 2019. <https://tobaccocontrol.bmj.com/content/early/2019/09/27/tobaccocontrol-2019-055079>

i. End direct and indirect tobacco promotions.

Governments should demand the end of all tobacco-related promotional spending. Such expenditures are a harmful, but incidental, part of the tobacco market and are not necessary. They are also staggering: [Japan Tobacco International \(JTI\) for example recently reported²](#) that it spent \$ 2.5 million per week on promotion in Canada (about 20% of its sales revenue). Tobacco manufacturers:

- a) Should not be allowed to deduct promotional expenses from their income in order to reduce their corporate income tax bill
- b) Should not be able to provide any consideration to retailers and other retail intermediaries, including money, price discounts or other advantages in exchange for business practices (storage, display, prices, etc.)
- c) Should be required to make public all those with whom they have contracts, in order to provide transparency of those with a potential conflict of interest on issues associated directly or indirectly with tobacco.

ii. End industry public relations and lobbying

Under the U.S. [Master Settlement Agreement \(MSA\)](#), [tobacco companies](#) undertook to close the Tobacco Institute, through which they had worked to distort science and prevent the adoption of effective tobacco control measures. A Canadian agreement should similarly end efforts by the companies to defending its profits at the expense of public health. Legislative and regulatory measures should be put in place to ensure this also applies to tobacco and nicotine companies which are not part of the lawsuits, such as National Smokeless, Casa Cubana and JUUL.)

iii. Disclose industry documents

Public health authorities have benefitted from the knowledge contained in millions of pages of tobacco industry documents previously made public following lawsuits in the United States and Canada, including [those produced during the Constitutional challenges](#) to Canadian law and the Blais-Létourneau class action suits. The documents disclosed during the provincial lawsuits can be expected to shed additional light on industry practices, and the relationship between the companies and other stakeholders, such as retail associations, chambers of commerce, think tanks and political associations.

iv. Finance an independent fund to prevent smoking

History shows that the government response to the tobacco epidemic has been too slow and the regulatory measures put in place have been too weak, and that this has led to hundreds of thousands of premature deaths in Canada. Inadequate resources have hampered civil society in countering the armies of lawyers, lobbyists and economic partners of the industry and has hindered the ability of public interest groups to counter tobacco industry lobbying and misinformation. Even today, funding for tobacco control activities is minimal compared to the severity of the challenge of addressing the primary cause of preventable illness and death in Canada. Provincial governments could remedy this situation by ensuring adequate and sustained resources for tobacco programs are funded by (but not controlled by) tobacco companies. The US "[Truth Initiative](#)" campaign is an example of such an approach, and was implemented as part of the Master Settlement Agreement. Other examples of tobacco industry funding of public health programs under government administration are [French Fund to Fight Addiction](#) and the [Thai Health Promotion Foundation](#).

² **Ontario Superior Court of Justice**, *Court File No. CV-19-615862-00CL*, September 25th 2019. <https://www.insolvencies.deloitte.ca/en-ca/Documents/en-ca-insolv-JTI-FifthReportoftheMonitordatedSeptember252019.pdf>