Big Tobacco

Big Responsibilities

The Basic Principles of Civil and Criminal Liability for Canadian Corporations

by

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Preface

The overarching goal of tobacco control is to reduce illness by reducing consumption. Most programs try to reach this goal by targeting the individual smokers. But what if it was possible to reach the goal by starting at the other end of the chain, by starting at the corporation instead? This paper looks at one area where corporations can be affected – the area of law. While the corporate façade can often seemingly impenetrable and even impervious to individual consumers, there are ways to force big corporations to sit up and take notice. Some of those ways are discussed in this paper.

While the information in this booklet was taken from various sources, some of the most helpful have been "The Law of Partnerships and Corporations" by Anthony VanDuzer, and "Product Liability in Canada" by Dean Edgell. Both of these books are comprehensive texts that explain the law clearly and simply. Another excellent source of information is "Tobacco Litigation Worldwide" by Lisbeth Pedersen of the Norwegian Agency for Health and social Welfare, which gives a country-by-country overview of legal actions taken against tobacco companies.

Introduction

Overview

Events occurring in the United States over the past decade have shown tobacco companies being forced to take responsibility for their actions affecting American consumers. Just as their activities and their products extend beyond the U.S. borders, so does their legal culpability. While no two legal systems are identical in theory or in reality, every one has its own methods of imposing liability. The Canadian system is no exception.

By looking first at the principles behind corporate liability, a foundation is laid on which legal actions against tobacco manufacturers can stand. Although only truly developed in the last century, this foundation is strong enough to support findings of civil liability and criminal guilt against tobacco companies. This section includes discussion on who can bring an action, what types of liability exist, the penalties when corporations are found liable, and how they try to avoid such findings.

After establishing the legal basis for an action against corporate tobacco, the next step is deciding what type of action to take. Specific civil actions relevant to the behaviour of corporate tobacco include product liability, negligent misrepresentation, deceit, and duty to warn. Although all of these causes of action are well-settled in Canadian law, tobacco companies will follow the natural instinct of defending themselves from any possible damage to their reputation or their balance sheet. While little action has been taken against corporate tobacco in Canada, the evidence available shows they are using many of the same strategies and defences that have been successful for them through decades of American litigation.

In keeping with the nature of corporations, consumers can also take action against tobacco manufacturers under commercial law. Governed largely by statute, this option offers the opportunity to hold companies to the same contractual standards they must adhere to when dealing with other corporations.

The final area of law under which corporate tobacco can be held accountable is criminal law. The principles of corporate liability allow a corporation to be found guilty of most types of crimes. Some of the crimes most appropriate to tobacco companies' actions are criminal negligence (either causing bodily harm or causing death), smuggling, conspiracy, and fraud.

Introduction

Corporations are often seen as being invincible or above the law. But regardless of their net profit, every Canadian corporation is subject to the same legal responsibilities as the average Canadian, possibly more.

Canadian law is divided into two separate and distinct areas: civil and criminal. The genesis of both these areas lies in common law or case law, developed over the centuries by using past court decisions as the basis for new judgments. Civil law, dealing with wrongs against individuals, is divided into further categories, including tort law (individuals suing for private acts or omissions between parties) and contract law (governing formal agreements between parties), and is based on both common law and various federal and provincial statutes. Criminal law, which deals with wrongs against society, is found solely in laws passed by the federal government, most of which are contained in the Criminal Code of Canada.[1]

Whether in civil or criminal law, it is the party who brings a case to trial, the plaintiff in civil cases or the crown in criminal cases, that bears the

case, this party must prove to the judge or jury that the defendant did or omitted doing the specific elements required under the cause of action or the law. For civil cases, proof must be shown on a balance of probabilities, meaning it must be more likely than not that the defendant committed the actions in question. For criminal law, the defendant's guilt must be proved beyond a reasonable doubt before he or she can be convicted. Once the plaintiff has made out his or her case, the defendant has the opportunity to refute that evidence and when both sides have finished, the judge or jury will decide whether, overall, the plaintiff has met the burden. If so, the defendant will be held liable.

Notes

1. R.S.C. 1985, c. C-46. Under the constitution Act s. 91(27), the federal government has sole jurisdiction over criminal matters.

Chapter 1:

Corporate Liability

General

Although seen by many as a complex area of law, the basic principles governing corporate liability bear a strong similarity with those governing personal liability. The confusion between the two generally arises from the fact that a corporation is not a living person, but is made up of numerous individual employees. Certain legal theories and principles have been developed over the years that enable this dichotomy to be resolved.

The principle underlying the entire concept of corporate liability is that of a separate corporate personality. Laid out in Canadian provincial legislation, this idea allows corporations to be viewed as separate and complete legal entities instead of as the sum of their individual employees, and gives that legal person most of the same rights and responsibilities as any human person. For example, the Ontario *Corporations Act* gives corporations "the capacity of a natural person."[1] This means that, under the statute, companies are legally entitled to do whatever people do - things like buy property, hire and fire employees, pay taxes and make charitable donations. Also just like people, companies can be sued for negligence and charged with crimes.

Identification Theory

When a civil or criminal wrong has been committed, lawyers use the Identification Theory to determine whether to sue the corporation or the individual. This theory is a legal doctrine explaining when and why individual actions attach to the person that is the corporation.

The idea behind the Identification Theory can be summarized as follows; "a corporate act can always attract liability because it cannot occur without the existence of a rational decision to act on the part of the corporation."[2] This theory identifies the actions carried out or ordered by an individual directing mind with the actions of the corporation itself, making the corporation responsible for the actions of its supervisory employees. Depending on how the company is organized, there can be any number of people who are seen as directing minds. The actions of these directing minds can lead to both civil and criminal liability on the part of the corporation.

The Identification Theory uses a two-part test to determine liability:

1. ***Was the actor a directing mind at the time of the action?***
2. ***Was the actor within the scope of his or her responsibility?***

There is a two-step test used to determine liability under this theory. First of all, was the actor a directing mind? Secondly, was he or she acting within the scope of his or her responsibility?[3]

The determination of whether the actor is a directing mind is based on their responsibility within the corporation, and can only be established by asking certain preliminary questions. Did the actor have "an express or implied delegation of executive authority to *design* or *supervise* the *imple-*

mentation of corporate policy?"[4] If the court found in the affirmative on this question, the actor would be seen as a directing mind. Otherwise they would be found to be simply carrying out company policies. As implied by the title, a directing mind must have some type of control over corporate policy and be actively involved in corporate decision-making before being considered a directing mind of a company. Under this test, Presidents, Vice Presidents, research directors, regional sales representatives, members of the board of directors, managing directors, superintendents, and managers have been found to have adequate decision-making authority to be considered as directing minds.

However, there is no set list of who is or is not a directing mind. The corporate level at which one must be involved in order to be a directing mind will always depend on the level at which the negligent or illegal act took place, as well as on any external circumstances surrounding the tortious or criminal actions.

The second step of the test looks at the scope of responsibility within the corporation of the one who committed the act. Many people use the surface meaning of 'within the scope of responsibility', and say that an act only leads to liability if the act falls exactly within the person's job description. While this simple definition is relevant, the courts have said that a person can be doing something other than what they were expressly told to do and still be acting within the scope of their responsibility. As long as they are acting within the capacity of their general job description, or doing something which falls into the broad area over which they have been delegated authority, their specific actions do not need to have the corporate blessing.

While the wide net of this test catches most actions by directing minds, the courts have laid out three specific occasions when the separate corporate personality can be disregarded in favour of individual liability of a company employee. The first scenario is where the result of finding the company liable instead of only the employee would be unjust. The next two situations are related. Where the purpose of the corporate actions is objectionable such as fraud, tax avoidance or illegal actions, or where the corporation is acting as agent for someone with an objectionable purpose,[5] the courts will not impute the individual's illegal intent to the corporation, but will allow that intent to remain solely with the individual who committed the acts solely for personal gain.[6]

As legally incorporated entities, the Big Three Canadian tobacco manufacturers (Imperial Tobacco, Rothmans Benson and Hedges, and JTI-MacDonald) all have separate corporate personalities. Using the identification theory, each company has several directing minds. If it can be proven that any of the actions of those directing minds - any of the research authorized, marketing campaigns approved or ingredients condoned - were negligent or criminal, liability could attach to both individual employees as well as to any of the Big Three corporations as a whole.

Direct Liability

Action was done or authorized by a directing mind

Vicarious Liability

1. **Employer/employee relationship exists**
2. **Employee was acting in the**

Civil Liability

The area of civil law with the greatest potential effect on tobacco companies is that dealing with actions requiring negligence on the part of the defendant. Negligence can occur in many forms and in a

wide variety of situations, some of which will be discussed in greater detail in a later section. The type of liability argued by the plaintiff will depend on the circumstances surrounding the negligent actions. Under civil law there are two ways

Direct Liability

Just as an individual must take responsibility for his or her own actions, so must a corporation take responsibility for its actions. Direct liability applies both the principle of separate corporate personality and the identification theory to ensure that corporations may be held liable for actions deemed to be those of the company.

When the person committing the negligent act is a directing mind of the corporation, the act is seen as the act of the corporation. As such, the company will be held directly liable for those acts. If the actor is not a directing mind, the negligent actions will not be imputed directly to the corporate personage, making a finding of direct liability impossible.

For example, if an ad campaign that made an implicit health claim for cigarettes was published, the company could be found liable for the injuries of anyone relying on that health claim. The vice president in charge of marketing who approved the ad would be seen as a directing mind of the company, and the decision to run the ad would be a decision of the company and not just of the VP marketing.

To put this into context, if an error occurred in the company's financial reports that was not caught or corrected by the director in charge of finance, then investors based their investment decisions on the incorrect information in those reports, those investors could sue the company for negligence, and the company would be directly responsible for any losses the investors had suffered.

Vicarious Liability

As stated, the second form of responsibility is vicarious liability. This type catches actions performed by members of the corporation who are not directing minds. Liability under this head is determined by a two-part test. The two requirements for a company to be found vicariously liable are: 1) is there an employer/employee relationship between the corporation and the negligent person; and 2) was the employee acting in the course of their employment when they were neglectful?" Both parts of the test can be satisfied even if the directing minds of the corporation were completely unaware of the employee's actions.

This principle forces companies to take responsibility for the actions of all of their employees and gives the public recourse when they are injured by an employee's negligence. If an assembly line worker somehow allowed a foreign substance into the tobacco mixture which injured a smoker, even though the employee is not a directing mind, the company would still be held liable for that worker's actions because the two tests for vicarious liability are met.

Defences

Regardless of the details of the lawsuit itself, companies can attempt to escape liability by disproving the required elements for finding either direct or vicarious liability. If the lawsuit claims that that the company is directly responsible for the injury, the company can avoid liability by showing that whoever performed the action was not a directing mind of the corporation. If, on the other hand, a lawsuit were to claim vicarious responsibility, the company would need to disprove at least one part of the two-part test.

The majority of lawsuits will claim under both types of corporate responsibility in order to improve their chances of receiving a judgment against the corporation. This means that a corporation would need to be prepared to defend against allegations of both direct and vicarious liability or risk being found liable.

One of the strongest possibilities for defence lies in defining "the course of employment" or "the scope of responsibility" of the employee. As this element is present in both the Identification theory and the vicarious liability tests, by showing that the negligent actions of the employee were outside the scope of their employment, the tobacco manufacturers could escape both direct and vicarious liability.

Class Action

The tort law system was created to resolve disputes between individuals. Unfortunately, when the dispute is between a consumer and a producer, there is often such a large resource imbalance in favour of the producer that it is impossible for the consumer to justify the heavy expenses incurred by a civil action against a corporation. If the consumer was the only one injured, they would have to live with the injury or pay the entire cost of litigation on their own. However, if multiple consumers received the same injury from the same producer, the consumers may be able to share the cost of a civil action through what is known as a class action or class proceeding.

In most provinces the option of undertaking a class action lawsuit is based in common law and is given voice through a provincial rule of civil procedure allowing for any one out of a number of persons with the same interest to take action on behalf of or for the benefit of all. While this rule would seem sufficient, the Supreme Court of Canada has deemed it ineffective at setting out complete guidelines for class actions.[7] Since that decision was made, class actions have mainly been attempted in provinces where such actions are governed by specific legislation.

Both B.C. and Ontario have passed class proceedings legislation to standardize and facilitate the class action procedure.[8] Along with entrenching the basic common law principle of acting on behalf of a group, the legislation is used to increase judicial economy, improve access to justice by saving court costs, and modify the behaviour of actual or potential wrongdoers by punishing wrongdoing.

These acts are purely procedural and do not create any new causes of action. This means, in effect, that a class action can be started for any type of civil action as long as the criteria set out in the statute are met. The statutes provide rules for class certification, as well as other rules respecting settlement, distribution of proceeds, and membership in the class. The legislation also gives the courts power to manage class action cases and tailor proceedings as necessary.

To maintain the common focus of consumer protection, class action statutes have been loosely interpreted, with judges stating that they should be interpreted in the manner that favours the plaintiff and simplifies the judicial process.

When a group of plaintiffs requests class action status, the judge will look at the facts they have laid out and use those facts, referring to them as though they have been proven, in determining the suitability of the case for certification as a class action. The legislation sets out five factors to take into account when certifying a class action. When determining if a class action would meet these requirements, the courts should err on the side of protecting people's access to the courts.[9]

Factors required to sue as a class action

1. ***The facts must disclose a cause of action.***
2. ***There must be an identifiable class of two or more people.***
3. ***The claims of the individual members must raise common issues.***
4. ***Class action must be the preferred procedure in the circumstances.***
5. ***There must be a representative plaintiff who can fairly represent the interest of the class***
   - ***a) with no conflict of interest,***
   - ***b) who has a workable plan for the proceedings.***

The first requirement is that the facts as presented by the plaintiff must disclose a cause of action. The courts have laid out a test for determining whether a

cause of action exists in the pleading. Using the plaintiff's version of the facts, the judge must decide whether it is plain and obvious beyond doubt that the plaintiffs could not succeed at trial.[10] The claim must not be patently ridiculous or incapable of proof.

The second requirement is the existence of an identifiable class of at least two people. The class definition as stated by the plaintiff does not need to list the actual identify of all class members, but should be clear enough for the "court to determine if any given individual is a member of the class."[11] A class can be defined to include plaintiffs with any number of characteristics, including those who have suffered damages, or those who purchased or consumed a specific good.

The two provinces differ in their definition of class membership. In British Columbia a class implicitly includes all residents of that province who fit into the category. For anyone living outside of British Columbia to join the class they must take the necessary steps to opt in to the class, as laid out by the court. Ontario's legislation is set up in the opposite way, where a class, unless otherwise specified, includes all Canadian residents who fit the class. If an individual does not want to be a part of the action, they must take the court-required steps to opt out of the proceeding.

Next is a requirement that the claims of the individual members raise common issues. These issues can be ones of law or of fact, and do not need to be exactly identical. Although it is possible to have an unlimited number of common issues, in order for a class action to proceed, any given class only needs one common issue. In determining what amounts to a common issue, the courts will look at whether or not the resolution of the issue in favour of the plaintiffs would advance the interests of the class as a whole.[12]

The fourth requirement to certify a class action is that the class proceeding must be the preferable procedure for the resolution of those common issues. In deciding this issue, Ontario courts will look at the three objectives of class actions, namely to improve judicial economy, improve access to justice, and modify the behaviour of wrongdoers.[13]

The British Columbia courts use factors laid out in the statute when determining what the preferable procedure would be.[14] These factors include whether common issues predominate over any individual issues, whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions, whether the class proceeding would involve claims that are or have been the subject of any other proceedings, whether other means of resolving the claims are less practical or less efficient, and whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means. Both provinces will also look at whether or not the proceeding would be generally fair for all members of the class and whether any non-court remedies such as settlement programs or compensation packages exist.

The final step in the test is whether a representative plaintiff exists who can fairly and adequately represent the interests of the class without any conflicts of interest, and who has a workable plan for proceeding on behalf of the class.[15] Such a plaintiff must share the common issues, and be willing to "vigorously prosecute" the claim. In instances where there are many common issues, the main class can be divided into subclasses, which would each require a representative plaintiff.

The British Columbia legislation states that, if all the statutory requirements are met, "the court *must* certify a proceeding as a class proceeding."[16] By using the word 'must', the courts are compelled to follow the legislation. On the other hand, the wording of the Ontario act, "*shall* certify," means that certification is not compulsory under that legislation. In practice Ontario courts tend to approve class proceedings when the criteria are met.

Once a class has been certified the case will proceed with the representative plaintiff(s) acting on behalf of the class. The first act of the plaintiff will be to give notice of the proceedings to potential class members in accordance with any terms specified by the court's certification order. Common methods of giving notice include through advertisements, direct mailing, or personal contacts. After being notified of the impending action, potential members have

the choice of whether or not they want to be included in the class. Members who opt out of the class (for Ontario cases) or do not opt in (British Columbia) within the specified time period are not bound by any decision in the case and may still take individual action against the defendants. Anyone choosing to be part of the action is bound by the decision and can not bring an individual action based on the same issues at a later date.

A certified class action will proceed along the same basic path as an individual action, with the court looking at the common issues first before deciding any individual issues. A class action can be decertified at any time during the proceedings if it becomes clear that any one of the required factors is no longer present. If a class action is decertified, the plaintiffs lose the economy of scale benefits and are again faced with the choice of dropping the suit or continuing with an individual suit and shouldering the entire cost of the litigation themselves.

Class actions in both British Columbia and Ontario cannot be settled or abandoned without the approval of the court.[17] In theory, this prevents corporations from taking advantage of plaintiffs through an insufficient settlement agreement.

Although in many cases courts will approve a settlement agreement before the class action ever reaches a final court decision, defendants are still eager to avoid them. Being a defendant in a class action makes it much more difficult for manufacturers to wear out the plaintiff's resources and patience. This particularly affects tobacco manufacturers, who have traditionally adopted a strategy of financial attrition towards their legal opponents.

The class action form of lawsuit seems tailor-made to address the issue of litigation against dominating industries such as tobacco. The product sold by the tobacco companies is low cost but, as has been shown by extensive research, it causes varying levels of harm to the majority of its users. Individually, most smokers lack the funds to take on Big Tobacco, but through class actions they can band together, pool their resources and claim for all the damages they have collectively suffered due to smoking.

Numerous class action suits have been brought against Big Tobacco in the United States for health injury claims ranging from second hand smoke inhaled on airplanes to the damaging health effects of light and mild cigarettes. In Canada, two class action suits have been launched against tobacco manufacturers in Ontario, one regarding fire safe cigarettes and one dealing with the negative health effects of tobacco.[18] Both suits are pending certification.

Provincial Legislation

As smoking becomes increasingly denormalized, governments are also increasing their involvement in tobacco issues. An example of such involvement can be seen in a statute passed by the British Columbia legislature. In order to facilitate civil suits against the tobacco companies, the government enacted legislation enabling the provincial government to claim against the tobacco industry for smoking related health-care expenses.[19] As defined in the act, the costs to be recovered under such a suit are those for illnesses caused or contributed to by a tobacco related wrong. The costs recovered may be for particular individuals insured under the provincial health care scheme, or for an aggregate of the population of insured people. The act allows the government to claim for these costs even if the individuals involved have already won suits against the tobacco companies.

In order for the government to succeed in an action under the statute, they must prove four main points on a balance of probabilities. The first point to be proven is that the tobacco companies had a duty towards the people of BC who were or may have been exposed to tobacco. This duty could be anything from a duty to warn customers of the health problems caused by cigarettes to a duty to protect customers from those health problems. Once such a duty has been shown, the government must prove that the tobacco companies breached or did not meet that duty. The final points to be shown are that exposure to tobacco can cause or contribute to disease in general (although not necessarily the specific suffering of any one individual named in the suit), and that the tobacco product was offered for

sale in BC. Under the act it is unnecessary for the government to prove the actual cause of any particular individual's tobacco related injury.

In conjunction with the proof of these elements as offered by the government, the court must presume that the insured people would not have been exposed to the harmful product but for the breach of duty by the tobacco companies and that the exposure complained of caused or contributed to disease or to the risk of disease within the insured population.

Once the court has applied these presumptions, they must determine the cost of the health care benefits that were provided after the date of the breach as shown by the government. The court will then divide up the total cost between the defendant tobacco companies in proportion to their market share.

The act has been structured in such a way that the privacy of those for whom costs are being claimed would be protected. Their health history and records would not be compellable as evidence except as a statistically meaningful sample, and even then, the identity of the individuals would not be disclosed. The act also allows the government to use statistical information and information derived from epidemiological, sociological and other relevant studies, including information taken from sampling, as evidence for the purposes of establishing causation and quantifying damages. Without the specific permissive section of the act, such evidence would be inadmissible or viewed lightly in court.

The government of British Columbia has made use of this act by suing not only the major Canadian tobacco companies, but also their international parent companies, other international companies that sell cigarettes in BC, and the Canadian tobacco manufacturers' lobby group.[20]

Their suit is brought under s. 2 of the act and seeks to recover various health care costs, including;

> "the present value of the total expenditure by the government for health care benefits provided for insured persons resulting from tobacco related disease or the risk of tobacco related disease, and the present value of the estimated total expenditure by the government for health care benefits that could reasonably be expected will be provided for those insured persons resulting from tobacco related disease or the risk of tobacco related disease"[21]

caused or contributed to by the tobacco industry's wrongful actions.

In their statement of claim, the B.C. government listed a number of diseases and health conditions that they maintain are caused or contributed to by tobacco use. They claim that tobacco companies should have known since 1950 that "smoking cigarettes could cause or contribute to disease in smokers."[22] According to the government, this knowledge created a duty on the part of the tobacco companies. The tobacco manufacturers breached that duty by continuing to make cigarettes that are hazardous to health, manipulating the level of nicotine and adding proclaimed "safety" features like filters that deceive consumers into believing the cigarettes are less hazardous.

The same suit also includes claims for failure to adequately warn smokers of the dangers of cigarettes, selling cigarettes to youth, conspiracy among the manufacturers, deceit, and misrepresentation, some of which will be discussed later in this paper.

The act sets out the following factors to be used by the court in determining liability:

- The length of time a defendant engaged in the conduct that caused or contributed to the risk of disease;
- The market share the defendant had in the type of tobacco product that caused or contributed to the risk of disease;
- The degree of toxicity of any toxic substance in the type of tobacco product manufactured or promoted by a defendant;
- The amount spent by a defendant on promoting the type of tobacco product that caused or contributed to the risk of disease;
- The degree to which a defendant collaborated or acted in concert with other manufacturers in

any conduct that caused, contributed to or aggravated the risk of disease

- The extent to which a defendant conducted tests and studies to determine the risk of disease resulting from exposure to the type of tobacco product;
- The extent to which a defendant assumed a leadership role in manufacturing the type of tobacco product;
- The efforts a defendant made to warn the public about the risk of disease resulting from exposure to the type of tobacco product;
- The extent to which a defendant continued manufacture or promotion of the type of tobacco product after it knew or ought to have known of the risk of disease resulting from exposure to the type of tobacco product;
- Affirmative steps that a defendant took to reduce the risk of disease to the public;
- Other considerations considered relevant by the court.[23]

By looking at all of these different elements in light of the plaintiff's evidence, the court will decide whether the defendant tobacco manufacturers are liable and what percentage of the damages claimed must be paid by each defendant.

Individuals can also use the act to sue the tobacco companies to recover personal health-care related costs. To date, no individual has taken action under the statute.

The government of Newfoundland passed an almost identical statute, *The Tobacco Health Care Costs Recovery Act*, in 2001 which has yet to come into force.

Criminal Liability

Any basic criminal conviction requires proof of two main elements – one mental, one physical. When the criminal charge is against a corporation, there are certain additional elements of proof required that are based on the identification theory and are specific to corporations.

Anytime a company is charged under criminal law, the first factor to be proved by the government is the very existence of the corporation. While this step can be quite simple and often consists solely of presenting as evidence the papers of incorporation, without it the charges may be dismissed. If the lawyers proved every other aspect of the crime and the accused company could show that they were not incorporated and were therefore not a legal person in the eyes of the law, the government's entire prosecution would fail, as criminal charges can only be laid against a legal person.

Elements of proof required to convict a corporation:

1. ***Existence of the corporation***
2. ***The criminal act was committed***
3. ***The actor was a directing mind of the corporation at the time the act was committed***
4. ***The actor was acting within the scope of his or her responsibility***
5. ***The actor (on behalf of the corporation) had the required mental element of the crime***
6. ***The corporation received benefit from the criminal act***

Once they have proved the basic fact of incorporation as well as the commission of the criminal act, the government must show that the corporation should be found guilty, which is where the identification theory comes in to play. The two points that must be proven are the same ones discussed earlier – that the person who did the criminal act was a

directing mind of the corporation at the time the act was committed, or that the action was authorized by such a directing mind, and that he or she was acting within the scope of his or her responsibility.

The rationale behind using the identification theory for convicting companies of criminal acts is that corporate acts "cannot occur without the existence of a rational decision to act on the part of the corporation."[25] The fault or mental element of the person committing the criminal act is attributed to the corporation, meaning that "each person responsible for a discrete aspect of the corporation's business, whether defined functionally, geographically or otherwise, may incur criminal liability for the corporation."[26]

The final point that the government must prove in any corporate criminal charge is that the company received some benefit from the criminal act. This benefit can be monetary or otherwise. This requirement is connected to the second step of the Identification Theory test. If the company received absolutely no benefit from the act, the mental element of the actor is generally not attributed to the corporation but is instead retained by the actor as an individual.

Criminal charges can be laid against the employee, the company, or both for whatever crime was committed. If both the company and the employee are charged with the same crime, the employee must be found guilty or the company cannot be convicted. However, if the employee is not charged, the company can still be convicted of the crime by using proof of the employee's criminal actions.[27]

Unlike the situation under civil liability, if the individual perpetrating the crime is not a directing mind, that person can be found guilty but the corporation will be acquitted, as the requisite mental state of the corporation does not exist. [28]

Defences

Defences against corporate criminal charges are limited in number. While the basic defences open to everyone charged under the criminal code, as discussed in Chapter 4 of the paper, are always available, little can be done to defend against the corporate elements of the case. Various defences have been attempted by corporations to avoid liability, but to date few have been successful. The most basic defence is to show that the company has not bee incorporated and is therefore not a legally chargeable person. However, this defence is unavailable to any company that has actually been incorporated.

It is not a defence for the corporation to have a regulation prohibiting certain actions if the directing mind still has the ability to commit those actions within the scope of his or her executive authority. One defence which has been successful is to prove that the acts were committed completely against the interests and totally in fraud of the corporation. Such acts go against the final requirement for conviction and will therefore not be seen as acts of the corporation.[29]

For public welfare or quasi-criminal offences, corporations can use a defence of due diligence. Because these offences do not require the same degree of mental fault as regular criminal offences, a corporation could escape liability by showing that they took all possible measures to avoid committing the offence. For example, if a corporation has adequate systems for hiring, supervising and training managers, illegal acts of a manager may not be attributed to the corporation.[30]

The major Canadian tobacco firms have all been incorporated under Canadian law, making them open to criminal charges. For most of the criminal charges that will be discussed later in the paper, it would be extremely difficult, if not impossible, to show that any directing minds were acting totally against corporate interests, as tobacco revenues have steadily increased, even in the face of the carcinogenic nature of the product and the millions of tobacco related deaths annually. What the Big Three would try to show instead is that the actor is either not a directing mind, or that the criminal actions were done in fraud of the corporation.

Penalties

When an individual is convicted of a crime, they can be subject to incarceration, probation, fines, discharges, community service or conditional sentences. Of these options, incarceration and conditional sentences are not feasible for use with corporations, but all the other penalties can be used. The

most popular sentencing tool for corporations is that of the monetary fine. If both the individual and the corporation are charged and convicted, the individual will often receive a sentence of incarceration, with the corporation receiving a corresponding fine.

Notes to Chapter 1

1. *Corporations Act*, R.S.O. 1990, c. C-38 s. 274. Each province has a statute similar in content to that of Ontario. The principle is also contained in s. 15 of the *Canada Business Corporations Act* R.S.C. 1985 C-44. Note: this principle applies only to legally incorporated companies.
2. J. A. Quaid, *The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis* (1998) 43 McGill L.J. 67 at p. 104.
3. See *Canadian Dredge & Dock Co. Ltd. v. The Queen* (1985), 19 D.L.R. (4th) 314, 19 C.C.C. (3d) 1 (S.C.C.). (hereineafter *Canadian Dredge & Dock*)
4. *"Rhone" (The) v. 'Peter A.B. Widener" (The),* [1993] 1 S.C.R. 497. at 521, emphasis added.
5. J. A. VanDuzer, *The Law of Partnerships and Corporations*, (IrwinLaw; Toronto, 1997). Courts will look at whether the shareholder has extensive control over the corporation and for what purpose the corporation was incorporated.
6. *Canadian Dredge & Dock supra.*
7. *Naken v, General Motors of Canada Ltd.* (1983), 144 D.L.R. (3d) 385, [1983] 1 S.C.R. 72.
8. See *Class Proceedings Act* R.S.B.C. 1996 c. 50, *Class Proceedings Act 1992*, S.O. 1992 c. 6.
9. *Bendall v. McGhan Medical Corp.* (1993), 106 D.L.R. (4th) 339 (Ont. Gen. Div.), leave to appeal to C.A. refused (November 26, 1993).
10. *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331, 127 D.L.R. (4th) 552 (Gen. Div.) leave to appeal to Div. Ct. refused (1995), 25 O.R. (3d) 331 at 347, 129 D.L.R. (4th) 110.
11. D.F. Edgell, *Product Liability Law in Canada*, (Butterworth; Toronto, 2000), p. 187.
12. *Endean v. Red Cross Society* (1997), 148 D.L.R. (4th) 158 (B.C.S.C.), rev'd on appeal on a different issue (1998), 157 D. L.R. (4th) 465 (B.C.C.A.).
13. As described by the Attorney General's Advisory Committee on Class Action Reform in its 1990 report.
14. B.C. *Class Proceedings Act* supra s. 4(2)
15. Edgell, *supra* p. 184., see also s. 5(1) of the Ontario *Class Proceedings Act*, s. 4(1) of the B.C. *Class Proceedings Act*.
16. B.C. *Class Proceedings Act* supra s. 4, emphasis added.
17. BC *Class Proceedings* Act supra s. 35, Ontario *Class P:roceedings Act* supra s. 29
18. See Appendix 2, *Ragoonanan* and *Caputo*.
19. *Tobacco Damages and Health Care Costs Recovery Act*, SBC 2000, c- 30 (hereinafter *Tobacco Damages Act*).
20. *British Columbia (Attorney General) v. Imperial Tobacco*. The lawsuit also names as defendants Rothmans Benson & Hedges Inc., Rothmans Inc., JTI-Macdonald Corp, Canadian Tobacco Manufacturers' Council, B.A.T. Industries p.l.c.,

British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris Incorporated, Philip Morrsi International Inc., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International In., Rothmans International Research Division, and Ryesekks p.l.c.

21. *B.C. v. Imperial Tobacco Canada Ltd*. Statement of Claim at para. 1.

22. *Ibid.* at para.45.

23. *Tobacco Damages Act, supra* s. 7(3).

24. S.N.F. 2001 c- T-4.2.

25. Quaid *supra* at p. 104 "A corporate act can always attract liability because it cannot occur without the existence of a rational decision to act on the part of the corporation. Even where the corporation is imputed with responsibility for the illegal acts of its agents, these must have been either condoned tacitly or ratified. Both cases involve a conscious decision based on knowledge of the illegal activity."

26. VanDuzer *supra*. at p. 149.

27. *R. v. Dawson City Hotels Ltd.* (1986), 1 Y.R. 3 (C.A.). A hotel was charged with defrauding the power commission of payment for electricity when the hotel manager tampered with the electrical meter. During the trial the crown established that the hotel manager was indeed a directing mind of the corporation. The trial judge acquitted the manager but found the hotel guilty. On appeal, the judge clarified that a corporation cannot be found guilty of a crime unless the directing mind is also guilty.

28. *R. v. Kimco Steel Sales Ltd.* (1988), 43 C.C.C. (3d) 104 (Ont. Dist. Ct.). A salesman for the steel company was forging certificates of quality construction for a number of his steel sales. When his fraud was discovered, the company was charged with fraud. Throughout the course of the trial it was discovered that the salesman had acted entirely on his own and without direction from senior management. They had no knowledge of his actions, nor were they purposely ignoring his criminal conduct. As he was not a directing mind of the corporation, the corporation was acquitted of all charges. The salesman, who had perpetrated a fraud on his customers and his employer, was convicted.

29. K. Roach, *Criminal Law* 2nd ed. (2000) Quicklaw.

30. *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299. The city of Sault Ste. Marie was charged with dumping chemicals near a river, which chemicals caused the river to become polluted. In their defence, the city claimed that it was not them who dumped the chemicals, but someone they had contracted out to. They stated that among the city employees, there was proper training such that the offence would not have occurred. The supreme court responded by saying, "Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself."

Chapter 2:

Tortious Acts of Corporations

Civil law covers all aspects of the law that are not criminal. The section of civil law dealing with personal lawsuits for individual damage is that of tort law. In this branch of civil law, the main issue is usually negligence, where the plaintiff brings an action against the defendant because of a belief that they did not properly carry out whatever actions are being questioned. Tort law provides a remedy for injuries flowing from the negligence of another, enabling individuals to sue the negligent actor, be it an individual or a corporation.

Product Liability

Product liability is one of the few areas of civil law created to deal specifically with claims against manufacturers. Analogous to a claim against an individual for negligence, product liability allows an injured person or class of persons to sue a negligent manufacturer. The structure of the tort action enables injured people to recover directly from the one who caused the injury, which places the cost of the injury on the manufacturer, generally the party with the most resources and the greatest ability to pay for the injury.

As defined in common law, product liability includes certain assumptions and definitions that ease the burden on the plaintiff and correct the power and knowledge imbalances that exist between the injured consumer and the manufacturer. These assumptions will be discussed separately at the appropriate stage of the claim.

Tests for Negligence

As in any negligence claim, a product liability suit requires three main aspects to be proven before a company will be held liable for a plaintiff's injury. First, the plaintiff must show that the company had a duty to act with reasonable care towards him;[1] next they must show that the company breached or did not meet the required level of care (that they were negligent); and finally, that the company's negligence caused the injury to the plaintiff.

General Test for Negligence / Product Liability

1. ***Did the defendant owe a duty of care to the plaintiff?***
2. ***Did the defendant breach that duty?***
3. ***Did the defendant's breach cause the plaintiff's injury?***

a) Duty of Care

In a negligence suit against a manufacturer, there is a common law assumption that manufacturers have a basic duty to design their products in a way that minimizes losses or injuries to consumers. As a result of this assumption, consumers do not need to prove the existence of a duty between manufacturers and consumers, they only need to prove that they fall within the class of people the manufacturer would expect to use their products, and that the defendant company could be classed

In keeping with the low requirements for proving that a company owes a duty of care to a person, the courts have broadly defined the categories of both consumers and manufacturers. After a wide variety of court cases,[2] the legal definition of consumer now includes everyone from the initial purchaser to their family members, and anyone else who would reasonably come in contact with the product. The definition for manufacturers is equally broad, including everyone from bottlers, assemblers,[3] repairers, producers, wholesalers and distributors, to inspectors. These extensive definitions continue to be expanded and clarified as new cases are brought to trial, but for most cases, they are already broad enough.

Once the plaintiff has established that both he or she and the company fall within the prescribed classes of consumers and manufacturers, they need to show that the risk of their being injured by the product was evident to the company. Again, the onus on the plaintiff is relatively low, as indicated by the Supreme Court of Canada in the case of a woman suing the manufacturer of her breast implants after they had unexplainably ruptured. According to the court,

> When manufacturers place products into the flow of commerce, they create a relationship of reliance with consumers, who have far less knowledge than the manufacturers concerning the dangers inherent in the use of the products and are therefore put at risk if the product is not safe.[4]

The court found that, as the manufacturers of the implants, the company was in a much better position to know of the actual and potential dangers of the product, meaning that consumers, like the woman bringing the suit against them, would rely on the company to provide safe implants.

Similarly, tobacco manufacturers work with cigarettes all day every day, undertaking individual and collaborative research on a wide variety of aspects of cigarettes and smoking. As manufacturers, they know more about cigarettes than any consumer could ever know, which creates a responsibility towards smokers. Manufacturers are aware not only of the risks consumers learn about through package warnings, but also numerous other risks that the companies have not shared with the public. There are potentially cases where a tobacco related illness or injury might be so rare or unexpected that the company would never imagine it could happen. However, in most cases to date, tobacco companies are well aware of the type of injuries to which cigarettes contribute. This means that cigarette manufacturers should owe a duty to their consumers to design cigarettes to be as safe as possible.

b) Breach of Standard

After the elements of the first step have been proven, the court will use the evidence brought forward to define the standard of care required under that duty. The duty of care is determined based on the relationship between the two parties, following which the standard of care sets out a norm of actions required from the defendant in that particular situation. It holds out a standard of behaviour to which manufacturers must conform at all stages of the process, from product design to packaging. Once this standard has been defined, the plaintiff must prove that the company's actions did not meet that standard.

i) Reasonable Person

The standard of care in product liability is most commonly defined in reference to the actions of the "reasonable manufacturer". Extrapolating from the description of the reasonable person used in numerous tort cases,[5] the reasonable manufacturer "is not possessed of unusual powers of foresight." He will, however, "act in accord with general and approved practice [and allow his conduct to be] guided by considerations which ordinarily regulate the conduct of human affairs."[6]

All manufacturers are held to the knowledge and skill of an expert in their field. "They are obliged to keep abreast of any scientific discoveries and are presumed to know the results of all such advances."[87] This imputed knowledge base directly affects tobacco manufacturers, who conduct vast amounts of research and have in some cases avoided doing research in the hope of avoiding liability by claiming ignorance of the risks.

the industry standards or customs. The manufacturer can attempt to rebut the plaintiff's evidence on negligence by offering proof that they acted according to standard industry practices. When a pedestrian slipped on an icy sidewalk, the owner of the property tried to avoid liability by claiming that it was the local custom was not to sand or salt icy walks. Her defensive claim was unsuccessful, in part because she did not produce any evidence besides her own testimony showing what the local custom was. After finding her liable, the judge made these comments on the role of standard practice or custom in negligence law.

> In short, no amount of general community compliance will render negligent conduct "reasonable … in all the circumstances. … The existence of customary practices which are unreasonable in themselves or which are not otherwise acceptable to courts in no way ousts the duty of care owed.[8]

A judge or jury can find the industry standard to be too low in cases where the industry practice is unreasonable. While this is uncommon, courts have nevertheless set out guidelines for when a standard practice can be found negligent.

> The consensus of the recognized experts in a field on what is safe does not absolutely bind the courts. Neither does the uniform practice of a profession or industry. But they are very strong evidence. … It is not enough for a plaintiff to show that other precautions were possible, if they were not commonly used by the profession or trade in question, unless their omission was clearly very unreasonable. … The court can override expert evidence and brand a universal practice as negligent only in a strong case; the experts' thinking or the profession or trade's practice, properly understood, must offend logic or common sense, or flow from a gross error in weight.[9]

With this direction from the court, it is possible that tobacco industry standards of testing for tar and nicotine or ventilation hole placement could be seen as unreasonable and 'offensive to logic'.

What is reasonable for a particular manufacturer will depend on what product they manufacture. The standard for tobacco manufacturers would likely be higher than that of a clothing manufacturer. Again quoting from the Supreme Court in the case of the ruptured breast implants,

> The courts in this country have long recognized that manufacturers of products that are ingested, consumed or otherwise placed in the body, and thereby have a great capacity to cause injury to consumers, are subject to a correspondingly high standard of care under the law of negligence.[10]

This seems to place tobacco manufacturers under a 'correspondingly high standard of care', making them legally responsible for the ill effects of their products. However, although cigarettes are a product that is 'ingested, consumed or otherwise placed in the body' and they definitely have ' a great capacity to cause injury to consumers', courts have not yet applied this high duty of care to tobacco manufacturers.[11]

ii) Risk Utility Test

Once the standard of care has been set out, courts will use various tests to decide whether or not the manufacturer has breached that standard. One such test, the risk utility test, is a negligence test that focuses on the conduct of the manufacturer and is used to determine when a product is defective. It establishes liability for the effects of a defective product and is used to determine whether the defendant's conduct has breached the relevant standard of care. If the standard of care was breached, then the producer was negligent.

The overall effect of this test is to determine whether the risk of harm created by the use of any given product outweighs the utility of the particular design used on that product.

Courts have used the risk utility test to establish liability, looking at factors such as the nature and utility of the product, the availability of a safer design, the ability to avoid injury through careful use, and the ability of the manufacturer to make a safer product.[13] In the case of *Rentway Canada Ltd. v.*

Laidlaw Transport Ltd., the Supreme Court of Ontario adopted the American test for negligence in product liability. In this case, the lights on a Laidlaw owned tractor-trailer malfunctioned at night, making the truck invisible to oncoming traffic the driver crossed the median. He collided with a Rentway truck, killing both drivers and destroying both vehicles. Rentway sued Laidlaw for the cost of the vehicle and for other damages incurred through the accident. The court's final decision was in favour of the plaintiff, stating that the defendant manufacturer knew of the risk that the lights would malfunction, and needed to take the extra step necessary to make their product safe for consumers. As stated by the court, "the design must be reasonably safe for the environment in which it is to be used."[14]

The seven-part test laid out by the court in the *Laidlaw* case was described by Toronto-area lawyer Doug Lennox in his closing submissions for one of Canada's leading tobacco cases.

> Number one is the utility of the product to the public as a whole and to the individual user. It's a balancing test, you consider all these factors and you decide on a cost benefit analysis whether the product was defective or not. If you apply this test to the Ford Pinto case you'd say you could make a safer Pinto for eight dollars. That was the difference between the Pinto that exploded and the Pinto that wouldn't explode. … So, if you figured out that eight dollars for a safer gas tank versus all the lives that were lost, that's how you decide that it's a defective product. Now, in this case, stage number one is the utility of the product to the public as a whole and to the individual user. … I would submit that the utility for cigarettes is very low. They neither feed, nor clothe nor house. They're not something that's fundamental that people need. … In the balancing test for cigarettes, low utility.
>
> Number two, of the nature of the product, that is, the likelihood that it will cause injury. Well, in the balancing test, cigarettes are very likely to cause injury so that factor is high and that factor weighs in favour of the plaintiff.
>
> Number three, the availability of a safer design. …
>
> Number four, the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced. It is true that you can look at whether a safer design would have been acceptable to consumers. That's something that you balance. Is a Ford Pinto with a non-exploding gas tank acceptable to consumers? Well, that's how you do the balancing test. In this case, you don't really know if a safer design would be acceptable to consumers because a safer design hasn't been test marketed in Canada. We don't know how Canadians would respond to it …

Risk Utility Test[12]

1. ***What is the utility of the product to the public as a whole and to the individual user? (cost benefit analysis)***
2. ***What is the nature of the product or the likelihood that it will cause injury?***
3. ***What is the availability of a safer design?***
4. ***What is the potential for designing and manufacturing a safer product that is still functional and reasonably priced?***
5. ***Is the plaintiff able to have avoided injury by careful use of the product?***
6. ***What degree of awareness of the potential danger of the product can the plaintiff be expected to have?***
7. ***Was the manufacturer able to spread costs related to improving the safety of the design?***

> Number five is the ability of the plaintiff to avoid injury by careful use of the product. … Used as intended, the current product kills. There's no safe way to smoke it. …
>
> Number six, the degree of awareness of the potential danger of the product, which can be reasonably attributed to the plaintiff. Well, [the plaintiff] is confused about the risks of the product and the defendant is, in part, responsible for that confusion …
>
> And then the last factor, number seven, is the manufacturer's ability to spread any cost.[15]

If it is found, either under the risk utility test or under any other test, that the manufacturer did not meet the standard of care and the products were in fact defective in some way, there is one final hurdle for the plaintiff to leap before a favourable decision is reached.

c) Causation

The third and final element of a product liability claim, and in most civil suits, is causation. Did the defendant's breach of duty cause the plaintiff's injury?

In establishing causation, courts use what is known as the "but for" test. But for the negligence of the company, the consumer would not have been injured. If that statement is true, the plaintiff will have proved causation. If not, the claim will fail. No matter how negligent the company was, if the injury cannot be traced back directly to the company's actions or lack thereof, they will not be held liable for that injury.

If the "but for" test is satisfied, courts will also verify that the type of injury was reasonably foreseeable to the manufacturer.[16] The courts will look at the circumstances of the injury and determine whether the manufacturer should have seen that an injury could occur in those circumstances. The manufacturer also needs to be able to tell if those circumstances could occur.

A leading case on foreseeability of causation dealt with a young boy driving a snowmobile who crashed into a pipeline outside a school. The pipe broke; gas from the pipe entered the school ventilation system and caused an explosion, leading to extensive damage to the school. While both the boy driving the snowmobile and his father who allowed him to drive knew that there was a risk of some type of physical injury or property damage if the boy drove, neither of them could have imagined that a school would blow up as a result of the boy's driving. They tried to avoid liability by saying that, although the explosion at the school was a result of the boy's driving, it was impossible for them to foresee such an occurrence, therefore they could not have avoided it and should not be held responsible. The Supreme Court rejected this argument, saying that as long as the general type of damages was foreseeable, in this case physical damage to property, the specific type of damage, the explosion, need not be anticipated.[17]

As physical damage from first and second hand tobacco smoke is always foreseeable, it would not matter if a plaintiff's specific injury or illness was rare or unexpected. Tobacco companies should still be found to reasonably foresee injury to active and passive smokers.

Provincial Legislation

New Brunswick and Quebec are the only two Canadian provinces that have enacted legislation regarding product liability. The main section of the New Brunswick legislation states:

> A supplier of a consumer product that is unreasonably dangerous to person or property because of a defect in design, materials or workmanship is liable to any person who suffers a consumer loss in the Province because of the defect, if the loss was reasonably foreseeable at the time of his supply as liable to result from the defect.[18]

The wording of this section would seem quite beneficial to anyone in New Brunswick wanting to sue a tobacco company for smoking related injuries or

illnesses. The required elements are the same as those for a regular product liability suit, yet are clearly set out in legislation which makes them very difficult for courts to ignore or circumvent.

In *Peterson v. J. Clark & Son Ltd.*,[19] the only case to date in which this section of the statute has been pled, a woman brought an action against her car dealer following a car accident where she lost control of her car after it hydroplaned, claiming a breach of section 27 of the New Brunswick *Consumer Product Warranty and Liability Act*. The trial judge found for the car dealer, stating there was no evidence to show that the dealership had breached any duty of care, nor was there any evidence of causation between the dealer's actions in not replacing the tires and the accident itself.

A New Brunswick smoker could try to sue under this legislation, however, the law seems to deal mainly with those who sell the product and not those who manufacturer them. Also, other than section 27 many sections in the statute would likely be interpreted against the smoker. The main one of these is found in section 10(2), which states there is no implied warranty if the defect (such as being carcinogenic) is known to the buyer before the purchase is complete. The current package warnings would alert customers of the defects in cigarettes before they have actually purchased the cigarettes, thus negating liability under the statute.

If a retailer could prove some form of injury from cigarettes, it is possible that they, as a bulk purchaser of cigarettes, could sue the tobacco manufacturers (who sell cigarettes directly to retailers) under this act. But even if an injury could be shown such a suit is unlikely to occur, as most retailers earn substantial amounts of money by selling tobacco products and would be unwilling to sue the companies who pay them that money.

Negligent Misrepresentation

Unlike product liability, negligent misrepresentation focuses on the oral and written representations that companies make about their products rather than on the product itself. The representation in question must be untrue, inaccurate, or misleading, and can include situations such as literal falsity, misleading by implication or lack of communication, and failure to divulge.

According to a recent Supreme Court case,[20] liability in negligent misrepresentation should be determined using the same tests as those for product liability. The same three issues of duty of care, breach of standard, and causation must be proved.

a) Duty of Care

The duty of care for negligent misrepresentation is determined according to the two-step test set out in *Anns v. Merton London Borough Council.*[21] The first step looks at the proximity of the relationship between the two parties, asking whether there was sufficient proximity between the two that the wrongdoer would be able to reasonably contemplate injury to the other person based on his actions. This takes into account elements such as the profession of the one making the representation, the circumstances surrounding the misrepresentation, the position within the corporation of the one making the representation, and whether the company has assumed responsibility for the accuracy of the information. In answering this first test, the courts look at whether the injury is reasonably foreseeable to the defendant, and whether it was reasonable for the plaintiff to rely on the representation. The reasonable reliance requirement allows an adjustment for any knowledge imbalance existing between the parties.

If the first part of the test is met, a duty of care will exist. The courts will then go on to the second step, which is used to limit the scope of potential liability to a known class of plaintiffs. Under this phase the court will look for any relevant social concerns or other considerations that would negate or limit the duty of care.

A final element under the duty of care test is that the representation was used for the purpose for which it was intended.

b) Breach of Standard

As its title suggests, a breach of the standard of care can be proved by showing that the misrepresentation was negligently made. Proof of negligence will depend on the circumstances in which the representation was made, and may include showing a lack or proper care, lack of research, or improper research on the part of the company.

c) Causation

Two main elements are required to satisfy the causation test. First, the plaintiff must have reasonably relied on the misrepresentation, and secondly, that reliance must have been the cause of the injury. If

the plaintiff is unable to prove that they relied on the representation, the defendant will not be found liable. This demonstrates that the plaintiff would have been injured regardless of any representation made by the defendant.

There are five general indicia used to determine the reasonableness of reliance. These elements look at the relationship between the defendant and the plaintiff, as well as the way in which the representation was given. If the majority of the following elements exist in any particular case, the court will take that as a strong indication that the reliance was reasonable.

1. The defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made.
2. The defendant was a professional or someone who possessed special skill, judgment or knowledge.
3. The advice or information was provided in the course of the defendant's business.
4. The information or advice was given deliberately and not on a social occasion.
5. The information or advice was given in response to a specific inquiry or request (not always required).

There are a number of different representations by tobacco companies which could be seen as negligent, from the various brand names, to the ingredient measurements, to statements made in advertisements, speeches, press releases or on websites.

Elements of Negligent Misrepresentation

1. ***Duty of Care***
2. ***Breach of Standard of Care***
3. ***Causation***

Deceit

A close relative to the tort of negligent misrepresentation is that of deceit. Created in common law long before negligent misrepresentation existed, liability under this head requires not only that the manufacturer is "reckless as to the falsity of the statement," but also that the statement is made "without a belief in its truth,"[22] or with the knowledge that the representation is untrue. As with a negligence claim, the deceitful misrepresentation may be oral, written, or implied by actions and must be made in relation to the nature or quality of the product.

The purpose of the tort of deceit is to avoid the possibility of one person or corporation being unjustly enriched at the expense of another. In fulfilling this purpose the law is careful to avoid branding a person or corporation as dishonest without clear proof of such wrongdoing.

Due to the central element of dishonesty and the stigma created by a finding of liability, courts require the plaintiff to provide proof of actual dishonesty on the part of the defendant, as opposed to the requirement of carelessness that satisfies the burden

that the representation was false, the plaintiff must show that the company did know of the misleading and fictitious nature of the statements.

An Ontario case on deceit explained how to define deceitful representations.[23] In the case, various members of an extended family held shares in a newspaper company. Mr. Dingman purchased all the shares owned by Mr. Francis and Ms. Block on the condition that if he resold the shares within ten years he would pay them an amount approximately equal to the difference between what he paid for them and what he sold them for. When he sold the shares after only three years, Mr. Dingman paid them a settlement amount but did not reveal the sale price to Mr. Francis and Ms. Block, saying that the new buyer wanted the price kept secret. All was well until Mr. Francis and Ms. Block discovered that Mr. Dingman had paid them less than half of what he owed them under condition of the original sale. They sued Mr. Dingman for deceit, claiming that his statement that the new buyer wanted the share price to remain confidential was false.

After hearing all the evidence, the trial judge agreed that Mr. Dingman had been false in his representation but found against the plaintiffs for other reasons. On appeal, the Ontario court of appeal overturned the ruling and found for Mr. Francis and Ms. Block. The judgment outlined the elements of the tort of deceit as follows:

> A representation in order to be fraudulent must be one (1) which is untrue in fact; (2) which defendant knows to be untrue or is indifferent as to its truth; (3) which was intended or calculated to induce the plaintiff to act upon it; and (4) which the plaintiff acts upon and suffers damage.[24]

They further defined "fraudulent" by quoting a previous judgment which said "if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false."[25] Therefore in order for a representation to be deceitful, the person making the representation can either know it is wrong or make a conscious effort to avoid finding out if it is wrong.

When suing any one of the Big Three tobacco companies for deceit, a plaintiff must prove that the tobacco company made a false representation, that they knew it was false, and that they intended the plaintiff (either specifically or as a member of a group of potential consumers) to rely on the representation. As well, the plaintiff must have actually relied on the tobacco company's misrepresentation, and must prove that the deceitful representation caused his injury. Depending on the evidence available, plaintiffs could sue in deceit for the same issues addressed under negligent misrepresentation.

Elements of Deceit

1. ***False representation by defendant***
2. ***Defendant's knowledge of falsity***
3. ***Defendant intended the plaintiff (either specifically or as a member of a group of potential consumers) to rely on the representation.***
4. ***Actual reliance on the deceitful representation,***
5. ***Causation***

Duty to Warn

Along with their duty to manufacture a safe product, companies have a duty to warn consumers of the dangers inherent in the use of their product. Such a duty arises whenever a manufacturer places a product on the market that is dangerous when used for its intended purpose (like cigarettes), and the manufacturer knows or ought to know of the danger. A final requirement for liability under this head is that the manufacturer's knowledge or awareness of the danger must be greater than that of the consumer.

The three tests are the same as those used in product liability: was there a duty to warn; was that duty breached; and did the breach of that duty to warn lead to the plaintiff's injuries?

a) Duty of Care

The leading Canadian case on required warnings is *Lambert v. Lastoplex Chemicals*.[26] Mr. Lambert was using a varnish product in his basement and, according to the warning on the package, kept the product away from open flames. However, the fumes from the varnish spread through the basement, coming in contact with the furnace pilot light and creating a major explosion that severely burned Mr. Lambert. His claim against the company was that their warnings did not specify all of the dangers inherent in the use of the product. The reason for the Supreme Court's decision in favour of Mr. Lambert described the manufacturer's duty of care as follows:

> Where manufactured products are put on the market for ultimate purchase and use by the general public and carry danger, although put to the use for which they are intended, the manufacturer, knowing of their hazardous nature, has a duty to specify the attendant dangers, which it must be taken to appreciate in a detail not known to the ordinary consumer or user. …The required explicitness of the warning will vary with the danger likely to be encountered in the ordinary use of the product.[27]

The manufacturer's duty to warn extends to all foreseeable users. Once the product has been sold, the duty to warn does not end, but remains with the manufacturer for any new dangers that are discovered relating to that product

b) Breach of Standard

For many products, including cigarettes, the type of warning required is set out by regulations. (cigarette warnings are currently regulated under the *Tobacco Act* S.C. 1997 c-13) While courts will look at compliance with regulations when determining if the duty to warn was fulfilled, compliance with regulations may not discharge the common law duty to warn.[28]

Manufacturers must take reasonable steps to warn consumers of the dangers of their products. What determines reasonableness will depend on the nature and degree of danger inherent in their product. Warnings given must be clear, complete and easily seen by the consumer, and should take into account the degree of product knowledge of the average consumer.[29] The explicitness of the warning required will depend on the danger likely to be encountered in the ordinary use of the product.[30]

Any warning given by the tobacco manufacturers must not be negated or neutralized by any of their other actions such as media advertising, in store displays, package inserts or designs, or press releases.

Taking all of these requirements into consideration, one would think that, since cigarettes are used by such a large number of people and the danger to health from smoking is very strong, tobacco companies, with their wealth of knowledge on the effects and properties of cigarettes and tobacco, would need to give large, explicit warnings on each and every pack of cigarettes sold detailing the many dangers of smoking, including the effects of compensation. However, the courts have not yet found this to be the case.[31]

This can be seen by the decision in Canada's first real tobacco claim. In *Letourneau v. Imperial Tobacco Ltd.*,[32] a Quebec woman who had smoked for 34 years sued Imperial Tobacco for the cost of the nicotine patches she used to finally overcome her addiction. She claimed that Imperial had a duty to warn of the addictive nature of cigarettes.

In dismissing her claim, the judge found that, when Ms. Letourneau began smoking in 1964, the tobacco company had no duty to warn that smoking was habit-forming because that was a well-known fact. The judge expressed it in the following words:

> It is clear from the journal clippings and scientific documents filed with the Court that, from 1964 onwards, anyone with even minimal exposure to the information could

not have been unaware that tobacco use was harmful to one's health. Consequently, neither the petitioner who smoked cigarettes, nor the respondents who manufactured and marketed them could have been unaware of this fact.[33]

The objective is to place the customer in the position of the normally prudent, knowledgeable and well-informed person. If the substance or object is universally recognized as being dangerous or the user is aware of the dangerous nature of a product or has used it for a sufficiently long period that any additional information would be superfluous, the failure to warn or inform will not be deemed a fault of the manufacturer.

In other words, manufacturers are under no obligation to warn end users of their products with respect to facts which are generally known, that is so well known in the community that they are more or less beyond dispute.[34]

Defences

There are two basic defences available in every tort case. The first of these, voluntary assumption of risk, is a full defence, meaning that if a defendant can prove the elements of voluntary assumption of risk, they will escape all liability for the injury. For a company to show that the plaintiff voluntarily assumed the risks inherent in the use of their product, they must show first that he or she assumed the physical risks, and secondly that he or she assumed the legal risks. Showing assumption of physical risk is relatively simple, and can be done merely by showing that the plaintiff chose to use the product in whatever state it was sold, taking into account any warnings delivered with the product. Assumption of legal risk is more difficult to show, and can only be satisfied by a complete waiver of the right to sue. In order to waive the right to sue a plaintiff must fully understand the ramifications of such a decision, that they will never be able to sue that manufacturer for any injuries stemming from that product.[35] Due to the difficulty in proving assumption of legal risk, this defence is rarely successful and is often not even attempted.

A less onerous defence is that of contributory negligence, where the defendant only need show that the plaintiff's own actions contributed in some way to the injury. If the defendant is able to show this, the court will then apportion liability between the plaintiff and the defendant according to their individual responsibility for the injury.

In most of the suits brought against them in the United States, tobacco companies have managed to avoid liability by using this defence, stating that it was still the plaintiff's choice to smoke, and it was that choice more than anything else which caused the injury. They have been so successful in their claims of contributory negligence that many courts have found the smokers to be responsible for 100% of their own injuries. When raising such a defence, the burden of proving that the smoker contributed to his or her own illness rests entirely on the tobacco company. If they are able to prove the plaintiff contributed to the cause of the injury, exposed themselves to the risk of injury or failed to take reasonable precautions to minimize injuries, the court will apportion liability based on the degree of responsibility of each party. While this defence has been quite effective for tobacco companies in the United States, as more cases are brought by non-smokers for ETS related illnesses, the tobacco companies need to focus on other areas to avoid liability.

In Canada, tobacco liability claims are just beginning, meaning that the contributory negligence defence has not yet worn thin. It was used by Imperial Tobacco in their defence of the *Letourneau* case. According to the judge, the existence of a duty between Ms. Letourneau and Imperial was immaterial, as her loss was caused not by their actions but by her own.

> [A]ny reasonable person who acts, undertakes an activity or engages in behaviour of any nature is presumed to assume the consequences of his or her choice, which implies a minimal duty to educate oneself in

advance of the risks and benefits at stake.

> If the petitioner did not do so and voluntarily or carelessly ignored the consequences of smoking, including the subsequent difficulty of stopping, instead considering only its pleasant aspects, she must now assume the consequences of such a choice.[36]

Even though the judge had previously dismissed the case for a lack of duty on the part of Imperial, he continued in his reasons to explain why the defence was currently effective. His statements imply that contributory negligence is effective as long as a plaintiff is aware of the risks of the product.

> When a person is engaged in an activity which proves over time or through prolonged use to entail certain risks of which she was unaware initially, she must cease the activity. If not, she shall be presumed to accept the consequences arising out of the awareness of the risks which have become known.
>
> The fact that she continued to smoke in full knowledge of the risks which had become foreseeable constitutes, in our view, an acceptance which no longer allows the petitioner to today attempt to have the respondents assume the consequences of her decision to continue smoking, nor does it allow her to have them pay damages she has suffered, including the cost of treatment.37

In another Canadian case against Big Tobacco, Imperial Tobacco used other methods and raised different issues in their statement of defence to escape liability. After switching to light cigarettes in a failed effort to quit smoking, Joe Battaglia sued Imperial Tobacco under the above listed causes of action. The first defence mechanism used by Imperial was denial – whatever Joe claimed they did, they claimed they didn't. Next they tried to shift any blame to the government, saying they would not accept responsibility for their actions because they were acting according to government direction. Because they were following federal government directions, Imperial claimed they should be relieved of their duty of care, specifically, the health warnings on packages should fulfill or negate any duty to warn smokers of the dangers of smoking.

Imperial also used the defence of contributory negligence, saying that Joe was always aware of the risk that smoking could result in a difficulty of quitting – he knew that because of his alleged failed attempts to quit starting in the mid 70's. Yet even with this knowledge Joe continued to smoke, therefore whatever happened to him must have been his own fault. According to Imperial, Joe was not addicted to nicotine or cigarettes. The only reason Joe could not quit smoking was that he lacked sufficient motivation.

Civil Defences

Voluntary assumption of risk:

1. ***Did the plaintiff assume the physical risk? and***
2. ***Did the plaintiff assume the legal risk?***

- ***If proved, defendant will completely avoid liability***

Contributory negligence:

- ***If proved defendant will only be found partially liable***

Notes to Chapter 2

1. *Anns v. Merton London Borough Council*, [1977] 2 All E.R. 492 (H.L.). (hereinafter *Anns v. Merton*) Affirmed in Canada by *Kamloops v. Nielsen et al*., [1984] 5 W.W.R. 1. This case lays out the following 2-step test for determining whether there is a duty of care. 1) Is there a sufficient relationship of proximity between the parties (was the plaintiff foreseeable, was the risk of injury foreseeable, and was the plaintiff's reliance on the defendant reasonable)? 2) Are there any policy considerations that would negate the duty of care (would finding a duty of care in the situation open up the defendant to an unlimited number of lawsuits for which they could not have possibly prepared)?

2. The groundbreaking products liability case of *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) was brought by a woman who got sick from drinking a ginger-beer containing a decomposed snail. The reason this case was so important was that the bottle of ginger-beer had been purchased for her by a friend. Prior to this case, purchasers could recover from sellers of defective products under contract law, but anyone who did not actually purchase the product and was then injured by it had no recourse. It was in the case of Donoghue that the courts defined neighbours, or consumers, to be "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." (at 580) This quote by Lord Atkin changed the face of products liability law by allowing people other than the actual purchaser to recover for injuries suffered from a product.

3. A.M. Linden *Canadian Tort Law* 6th ed. (Butterworths; Toronto 1997) p. 576 "because the public relies on their advertising, because they have the opportunity to inspect each part for safety, and because of the difficulty in discovering which one of the many components is to blame for an accident … [assemblers] labour under this duty [to use care]."

4. *Hollis v. Dow Corning Corp.,* [1995] 4 S.C.R. 634 at 653. (hereinafter *Hollis v. Dow*).

5. See *Arland v. Taylor*, [1955] O.R. 131, [1955] 3 D.L.R. 358 (Ont. C.A.). In this Ontario case, Arland was injured in a car accident and sued Taylor, who was the other party. On appeal, the judge explained that negligence cases must be decided on what the "reasonable person" would do, and not what the defendant or what an individual jury member would do. His definition of the reasonable person re-confirmed the objective standard used in deciding negligence cases.

6. *Ibid.*at 366.

7. *Dartez v. Fibreboard Corp.*, 765 F. 2d 456 (5th Cir. 07/15/1985).

8. *Waldick v. Malcolm*, [1991] 2 S.C.R. 456 at 473-4.

9. *Warren v. Camrose* (1989), 64 Alta. L.R. (2d) 289 at 295-6.

10. *Hollis v. Dow supra* at 655.

11. See Appendix B.

12. See *Voss v. Black & Decker Manufacturing Co.*, 450 N.E. 2d 204 (N.Y. C.A. 1983).

13. *Rentway Canada Ltd. V. Laidlaw Transport Ltd.* (1989), C.C.L.T. 150. (hereinafter *Rentway*).

14. *Ibid.* at 163. "The manufacturer has a duty to make reasonable efforts to reduce any risk to life and limb that may be inherent in the design." at 158.

15. *Battaglia* transcript *supra* at 37-41.

16. *Assiniboine South School Division, No. 3 v. Greater Winnipeg Gas Co.*, [1971] 4 W.W.R. 746 (Man. C.A.) [Aff'd. [1973] 6 W.W.R. 765 (S.C.C.)].

17. *Ibid.*

18. *Consumer Product Warranty and Liability* Act S.N.B. 1978 c. C-18.1, s. 27(1).

19. (1998), 206 N.B.R. (2d) 246, 526 A.P.R. 246 (N.B. C.A.).

20. *Hercules Management Ltd. v. Ernst and Young* (1997), 146 D.L. R. (4th) 577 (S.C.C.). Prior to this case, the leading

Canadian case on negligent misrepresentation was *Queen v. Cognos*, where the Supreme Court had laid down a five-step process to follow. In placing this cause of action under the product liability umbrella, the court amalgamated the five steps into the existing product liability process.

21. *Anns v. Merton supra,* see footnote 19.
22. *Francis v. Dingman* (1983), 43 O.R. (2d) 641, 23 D.L.R. 234 (Ont. H.C.).
23. *Ibid.*
24. *Ibid* at 658.
25. *Ibid.* at 650.
26. [1972] S.C.R. 569, 25 D.L.R. (3d) 121 (S.C.C.). (hereinafter *Lambert*)
27. *Ibid* at 573.
28. *Buchan v. Ortho Pharmaceuticals (Canada) Ltd.* (1986), 35 C.C.L.T. 1, 25 D.L.R. (4th) 658 (Ont. C.A.). Shortly after she started taking oral contraceptives manufactured and distributed by the defendant, the plaintiff, then 23, suffered a stroke which left her partially paralysed. Before the stroke, the plaintiff was a non-smoker and in excellent health. The evidence established that the stroke was caused by the oral contraceptives and that the defendant was aware of the risk of stroke. The Ontario Court of Appeal found that the drug company had failed in its duty to warn Ms. Buchan of the danger of stroke inherent in the use of the oral contraceptive and that failure caused or materially contributed to her injuries.
29. *Labrecque v. Saskatchewan Wheat Pool* (1980), 110 D.L.R. (3d) 686 (Sask. C.A.)
30. *Lambert supra.*
31. See *Letourneau v. Imperial Tobacco Ltd.* (1998), 162 D.L.R. (4th) 734 (C.Q.). (hereinafter *Letourneau*), *Battaglia supra*. To date, Canadian courts have not found this doctrine to fit in with the history of tobacco manufacturing in Canada.
32. *Letourneau supra.*
33. *Ibid* at p. 739.
34. *Ibid* at p. 744-5.
35. See *Crocker v. Sundance Northwest Resorts Ltd.* (1988), 44 C.C.L.T. 225 (S.C.C.), where the Supreme Court found that signing a waiver of liability is not enough to show that the plaintiff assumed the legal risks.
36. *Ibid* at p. 747.
37. *Ibid* at p. 749.

Chapter 3:
Commercial Law

Commercial law covers all business transactions where goods and services are exchanged for money. Some of the laws in this area have developed through case law in conjunction with common business practices, while other areas are governed by legislation. The overall regulation of trade and commerce falls under the jurisdiction of the federal government, but individual sales transactions are regulated by the provinces.

The principle elements of a contract can be found in any sale – namely an offer of the goods, an acceptance of that offer, and the transfer of goods in exchange for consideration (money). Formal contracts include various other elements, such as warranties and limitations. For sales that occur without a formal, written contract, these same elements are regulated by provincial legislation in an effort to allow everyday consumers the same basic protection afforded by written contracts. A major form of commercial legislation is the Sale of Goods Act, which exists in almost identical form in every common law province of Canada.

Breach of Implied Warranty

One of the protections offered by the *Sale of Goods* acts is that of an implied warranty. According to the acts, every time a sale occurs, the seller gives an implied warranty that the goods being purchased are fit for their normal use. If the goods do not meet that standard, the acts offer remedies to consumers.

The relevant section of the act formalizes what was for years a common law relationship, giving the customer a ready avenue of recourse against the seller in cases of defective goods where there was no written contract for sale or no

Sale of Goods Act

15. Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

2. Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed. …

4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith. R.S. O. 1990, c. S.1, s. 15.

In order for a corporation to be found liable under this statute, the consumer must have relied on the seller's skill or judgment when they bought the product. This creates an implied warranty that the product is reasonably fit for the purpose for which it was sold. There is also an implied warranty that the product will be of a good enough quality to be sold. Once the implied warranties have been created through the customer's reliance, the consumer must prove that the seller violated that warranty, showing either that the product was not fit to be used as it was meant to be used, or not good enough quality to be sold. The consumer needs to show that some defect in the product makes it unmerchantable, and this defect must be what caused the consumer's injury.

It is no defence for the seller to show that reasonable care was used or that the defect in the goods was undiscoverable

Remedies

The statute sets out the remedies available for a consumer when a seller has breached the implied warranty of quality. Under the statute, when the goods do not meet the implied warranty, a consumer can sue for the difference between the price paid and the actual value of the goods. They can also sue for damages sustained as a result of the defective product. The damages include 'the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty.' In the case of a tobacco suit, damage to health results in the ordinary course of events following the tobacco company's breach of the warranty that their cigarettes were fit to be smoked.

In the Battaglia case, Joe claimed that the tar levels printed on the package were an implied warranty by Imperial Tobacco that their Extra Mild cigarettes would not deliver yields of tar any higher than what was printed on the package. This claim was based on results of intense method smoking tests, which showed yields of up to 650% more tar than was listed on the package. For reasons not explained, this claim was not pursued during the trial.

Sale of Goods Act

51.
(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat a breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but may,

> (a) set up against the seller the breach of warranty in diminution or extinction of the price; or
>
> (b) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

(3) In the case of breach of warranty of quality, such loss is, in the absence of evidence to the contrary, the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty...

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent the buyer from maintaining an action for the same breach of warranty if further damage has been suffered. R.S.O. 1990, c. S.1, s. 51.

52. Nothing in this Act affects the right of the buyer or the seller to recover interest or special damages in a case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed. R.S.O. 1990, c. S.1, s. 52.

Chapter 4:

Criminal Acts of Corporations

Background

Canada's legal system, like the rest of our governing institutions and traditions, is based largely on the British system. In 1867, the Constitution Act gave the federal government jurisdiction over criminal law.[1] They used that power to pass various statutes detailing criminal behaviour. Eventually, that collection of criminal legislation was compiled and integrated with a British prototype to become the Criminal Code of Canada.[2] The Code contains the vast majority of criminal offences, as well as any maximum or minimum penalties, including fines and jail terms, set out for specific offences. Other criminal offences are contained in legislation such as the Firearms Act[3] and the Controlled Drugs and Substances Act.[4]

When an act is committed that violates any of these legislative provisions, the police or the crown lawyers will, on behalf of the government of Canada, charge the accused wrongdoer with whatever crime they are said to have committed. As previously discussed, criminal charges can be laid against both individuals and corporations. The charge as laid must include the specific criminal violation that has allegedly occurred and transaction information such as time, place, victims' names and other relevant details of the offence. If a charge does not have sufficient details, the accused can apply to the court to have the charge resubmitted with an appropriate level of detail. This is done to allow the accused "the possibility of a full defence and a fair trial."[5]

Another element of ensuring that the accused receives a fair trial is disclosure of evidence. Once the crown has reviewed the evidence to determine which pieces are necessary to meet each element of the case, all such relevant evidence must be disclosed to the defendant. This shows the defendant what is contained in the case against him or her and allows them to prepare a relevant defence.

Charter Issues

A fundamental component of any criminal trial in Canada is its conformity with the basic principles of justice. These principles, developed to protect the accused through guaranteed fairness in the criminal process, are based on common law traditions and were entrenched in the Canadian Charter of Rights and Freedoms[6] in 1982. They are mainly concerned with the rights of the accused, including the right to a fair trial, the right to legal representation, and the presumption of innocence.

The courts have interpreted section 7 of the Charter, which guarantees rights to life, liberty and security of the person in accordance with the principles of fundamental justice, as affecting a number of areas of the criminal trial process. The rights of s. 7 can only be enjoyed by human beings and not by corporations. However, in cases where a corporation can successfully argue that a provision would violate an individual's right to life, liberty or security of the person, the court can declare that provision to be of no force or effect, making it inapplicable to anyone, be it an individual or a corporation.[7]

One of the most important of these, falling under the principles of fundamental justice, is the right to a fair trial. In order for the accused to have a fair trial, they must have the right to full disclosure of evidence, as well as the right to defend against all issues brought forward by the crown. A proper application of this section will balance

Canadian Charter of Rights and Freedoms

7. **Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.**

8. **Everyone has the right to be secure against unreasonable search or seizure.**

9. **Everyone has the right not to be arbitrarily detained or imprisoned.**

10. **Everyone has the right on arrest or detention**
    - ***a*) to be informed promptly of the reasons therefor;**
    - ***b*) to retain and instruct counsel without delay and to be informed of that right; and**
    - ***c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.**

11. **Any person charged with an offence has the right**
    - ***a*) to be informed without unreasonable delay of the specific offence;**
    - ***b*) to be tried within a reasonable time;**
    - ***c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;**
    - ***d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;**
    - **…**
    - ***h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and**
    - ***i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.**

12. **Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.**

13. **A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.**

the interests of the individual accused with the protection of society.[8]

This section has also been interpreted as giving the accused the right to silence, meaning they can choose whether or not they testify in court. If an accused chooses not to testify, or, in the case of a corporate accused, not to have anyone testify on behalf of the company, the judge or jury cannot make any negative inferences from their silence.

Section 8 offers protection against unreasonable search or seizure, which would most often apply during the police investigation prior to the trial. Section 9 gives rights against arbitrary detention or imprisonment. This means that the police must have reasonable grounds to detain a suspect. It also implies that one cannot be imprisoned without cause, or without a finding of guilt. Sections 10 and 11 secure various rights for the accused on or following their arrest. They must be informed of the reason for their arrest or charged with an offence, and promptly be given the opportunity to retain legal representation. Under section 11 the accused also has the right to be tried within a reasonable time and the right not to be tried twice for the same offence.

This same section specifically guarantees the presumption of innocence until proven guilty through the process of a fair and impartial trial. This presumption works in conjunction with the section 7 right to silence. Under this mandate, an accused cannot be forced to testify at trial. For corporations,

this means that directors and heads of companies cannot be forced to testify, as they are seen as a part of the corporation and their testimony might affect the presumed innocence of the corporation.[9] The crown's burden of proving guilt beyond a reasonable also doubt falls under this right.[10]

Section 13 of the Charter gives people the right not to have their testimony from one set of proceedings used against them in any other criminal proceedings. This right is very important for individuals testifying on behalf of their corporation. If the corporation was charged with an offence but no individual employees of the corporation were charged, those individuals can testify on behalf of their corporation without fear that their words will later be used in a charge against them.

Elements of the Offence

Always acting in accordance with the principles of justice set out in the Charter, the crown must prove two essential aspects of every crime charged in order to establish guilt of the accused. Both the physical act, or the actus reus, and the mental state or fault, known as mens rea, must be shown to exist at the time of the criminal offence, or the accused will be acquitted.

The physical act is made up of different pieces that vary depending on which offence is charged. The relevant pieces for any crime can be defined by looking at the specific section of the Criminal Code defining the offence. A typical section will plainly set out what actions are needed to complete the offence. If any clarification is required, it can be found in the definition sections of the Criminal Code or in case law interpreting the section.

Take, for example, the offence of drunk driving. As set out in s. 253 of the Criminal Code, the offence of "operating a motor vehicle while impaired" contains two physical requirements.

> **253.** Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,
>
> (*a*) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or
>
> (*b*) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred milliliters of blood.

The first of these two requirements, found in the section header, is that the accused operated or had care or control of a motor vehicle, which the code has defined to include cars, trucks, vans, motorcycles, boats and anything of like sort.[11] The second part of the physical act can be met in two ways, either through the impairment, or intoxication, of the accused by drugs or alcohol, or through consuming alcohol such that the blood alcohol content exceeds the prescribed limit.

If the crown were to prosecute someone under this section, they would need to prove to the judge that both of these requirements existed at the same time. If the accused had a blood alcohol level of greater than 0.08 but was only standing beside the car holding the keys, that would not be enough for a conviction. Or, if the crown could prove that the accused was driving the vehicle but could not prove what their blood alcohol level was at the time they were driving, the accused would also be acquitted.

Along with the pieces of the physical act, the crown also needs to prove that the accused had the required mental state. The tests for this state also vary depending on the crime. For many offences in the Criminal Code the mens rea is written into the section with words like "intend" and "wilfully". Courts use a subjective standard in interpreting these words and look at what the accused was actually thinking at the time of the offence. Using the subjective test helps avoid convictions for those who did not have a guilty mind. In general, criminal intent is required in relation to the actual act it-

self and not the consequences of the act. Ignorance of the law will not negate the mens rea requirement; even if the accused did not intend to commit a criminal act, if they intended to do the act, they can be found guilty.

Other sections of the Code remain silent on the question of mental element. In situations like that, case law often defines what mental element is required for that charge. For serious criminal offences, courts generally require a subjective mental element in order to best maintain the principles of justice as previously explained.

When intent is not explicitly required, courts may look to other forms of mens rea, such as wilful blindness or recklessness. These categories of mens rea are often used for offences requiring a specific consequence, such as assault causing bodily harm.

Wilful blindness occurs when "a person who has become aware of the need for some inquiry declines to make the inquiry because he does not want to know the truth."[12] It has also been explained as "deliberately failing to inquire when he knows there is a reason to inquire". This type of mens rea is used when an offence requires knowledge of something, like assaulting a police officer requires the knowledge that the person one is assaulting is in fact a police officer.

For a corporation, "Wilful blindness might also be found where a corporation undertakes an activity while deliberately refraining from investigating the consequences of the action."[13]

The other category of mens rea is that of recklessness. The Supreme Court has explained that recklessness "is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risks and takes the chance."[14] "Recklessness involves knowledge of a danger or risk and persisting in a course of conduct which creates a risk that the prohibited result will occur."[15]

Corporate recklessness is "dependant upon the existence of tacit policies which the corporation adopted despite a known risk that prohibited conduct could occur as a result."[16]

The lowest mens rea requirement is that of negligence, which uses the objective test of the reasonable person. While the standard of the reasonable person is the same in both civil and criminal law, the application of that standard is more rigorous for criminal negligence. In this case, the crown must prove that the accused showed a "marked and substantial departure from the conduct of a reasonable person."[17] This objective test looks at what the accused should have known, and how far they deviated from what was reasonable in the circumstances.

Types of Offences

Under Canadian law, there are three basic categories of criminal offences.[18] The first is that of true criminal offences, with which most people are familiar. It is this type of offence where both the actus reus and the mens rea are required for a finding of guilt to attach to an accused. Most offences in the criminal code fall under this type. The scope of this paper deals only with true criminal offences, however, descriptions of the other two types have been included for reference and comparison.

The second type of offence is that of strict liability. More a regulatory than a true criminal offence, strict liability offences have lower requirements for a finding of guilt. As with true criminal offences, the crown must prove the act beyond a reasonable doubt. It is in proving the mental element that the two types of offences differ. For strict liability, mens rea must only be proven objectively, meaning the court will look at what the accused should have known. This leaves the accused with a defence of due diligence, where they must prove that they took all available steps to avoid committing the offence. If this cannot be proved, they will be found guilty.

The third classification is absolute liability offences. The lowest on the ladder in terms of criminality,

these offences carry with them the least degree of stigma on a finding of guilt. Once the crown has proved that the accused committed the act, there is no defence available to the accused.

Criminal offences are also classified according to their severity, with less severe offences being termed summary, and more severe offences known as indictable offences. A summary conviction carries with it a maximum sentence of less than 2 years, while an indictable offence has no maximum sentence. . In general, only true criminal offences will be seen as indictable.

Criminal Negligence

Many feel that tobacco manufacturers should be held accountable for the thousands of smoking related deaths that occur each year. There are two possible charges which deal with this issue, both of which have the same requirements for proving guilt. Criminal negligence causing death, as described in s. 219-221, and manslaughter, described in s. 222-234 as causing death through criminal negligence, would both catch tobacco companies' relevant actions and omissions. While there is a larger stigma associated with a manslaughter conviction, both charges carry maximum sentences of life imprisonment

Through reviewing the relevant sections of the Code, the required elements of the offence of criminal negligence can be determined. First, the crown must prove that the accused was under a legal duty towards the victim(s). This element is relatively simple to prove in the case against tobacco companies, as s. 216 of the Criminal Code clearly lays out such a duty:

> "Every one who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing."

Selling cigarettes is a lawful act that obviously endangers the lives of smokers and non-smokers, placing the tobacco companies under a legal duty to have and to use "reasonable knowledge, skill and care" when selling cigarettes.

The second element to be proved by the crown is that the accused did something or omitted to do something, in other words, that they breached the legal duty. Somewhat comparable to the civil law breach of duty, this element can occur by acts of omission or commission.

Criminal Code

219. (1) Every one is criminally negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section, "duty" means a duty imposed by law.

The final requirement of the act is that of causation – that the breach of duty, or the negligence of the accused, caused the death of the victim(s). While the tests used to prove causation vary depending on the severity of the offence, the test for criminal negligence is that the breach of duty was more than a minimum cause of death. In order to verify this, the court will use the but for test explained earlier in the section on civil law. The difference will be in the standard of proof required. As this is a criminal action, the crown will need to prove beyond a reasonable doubt that, but for the negligence of the accused, the victim's death would not have occurred.[19]

As the name of the charge implies, the standard required for mental guilt in either of these charges is that of negligence. Whether it is by commission or omission, in order to prove criminal negligence, the crown must prove that the accused showed "wanton or reckless disregard for the lives or safety of other persons"[20] when they breached their duty before such a breach would be deemed criminal negligence.

The intention to cause death or injury is not required for a finding of guilt. However, there must be an objective foreseeability of the risk of serious bodily harm arising from the actions of the accused – if a "reasonable tobacco company" could have anticipated that smokers would be injured by smoking their cigarettes, that would be enough to establish foreseeability.

An accused individual can defend a charge of criminal negligence by showing incapacity to appreciate the nature and quality of the prohibited conduct and its consequences. This will negate mens rea. However, this defence would not work for a corporation, as there is no possible way a corporation, with all its mentally capable employees, could not understand and appreciate the nature and quality of the offence. As previously discussed, mistake of law, or ignorance thereof, is no defence. However, an accused can claim a mistake of fact. If they could show, on a standard of reasonableness, that they were mistaken as to the facts of the situation in a way that affected their actions, the judge may find that there was not a marked and substantial departure from the reasonable person standard according to those mistaken beliefs.

Smuggling and other Customs Related Charges

Another criminal offence which likely applies to tobacco company actions is that of smuggling. The smuggling charge is listed not in the Criminal Code, but as a part of the Customs Act. Although not defined in the act, smuggling is generally taken to mean bringing goods into a country or taking them out of a country without permission of the government and without payment of the lawful duties required for those goods. One definition which is included in the Customs Act is that of 'person', which is defined to include corporations, meaning that tobacco companies could be held liable under this act.

159. Every person commits an offence who smuggles or attempts to smuggle into Canada, whether clandestinely or not, any goods subject to duties, or any goods the importation of which is prohibited, controlled or regulated by or pursuant to this or any other Act of Parliament.[21]

The language of the section clearly lists the requirements for a smuggling charge. The goods must be subject to a duty or to import controls or prohibitions. Under s. 23, Schedule II of the Excise Tax Act,[22] cigarettes are subject to export duties. The crown would then need to prove that the accused tobacco companies brought or tried to bring cigarettes into Canada without paying those duties.

The mental element required for smuggling is subjective, meaning that an accused must have intended to bring goods into Canada without paying the applicable duties.

The penalties for conviction under this section will depend on the seriousness of the offence. They range from fines of $50,000 - $500,000, and imprisonment from 6 months to 5 years. The fines can be given alone, or can be used together with incarceration.

If an individual or corporation is found guilty of smuggling, they could also be charged under s.

163.1 of the customs act, which states that "No person shall possess any property or any proceeds of any property knowing that all or any part of the property or of those proceeds was obtained or derived directly or indirectly as a result of the commission of an offence … under section 159, in relation to … tobacco products." The penalties for this offence are the same as those for smuggling.

Section 158 of the customs act specifies that, if a corporation commits an offence such as smuggling, which is covered by the act, the officers and directors of the company can also be charged with being parties to the offence if they "directed, authorized, assented to, acquiesced in or participated in the commission of the offence."[23] It also allows for the possibility that the officers and directors could be convicted of these charges even if the company as a whole is never brought to trial for its actions. If an officer or director was convicted of the crime under the Customs Act, he or she would be liable to the same fines and prison terms listed above.

Conspiracy, Parties and more

For almost all offences, what can be done by one can just as easily be done by two or more. It is for situations such as these, where multiple actors work together to plan an unlawful act, that the crime of conspiracy was enacted. Based on common law, the penalties for conspiracy can be found in the Criminal Code. However, like smuggling, there is no definition of conspiracy included in the code. A basic definition can be taken from the case law surrounding the penalty section.

The recent Canadian Supreme Court case of *United States v. Dynar*[24] clarified the requirements for a charge of conspiracy. In their judgment, the Supreme Court clearly defined all of the required physical and mental elements.

> A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. … There must be an intention to agree, the completion of an agreement, and a common design. … There must exist an intention to put the common design into effect.[25]

The physical element described by the court is that of completing the agreement to do an unlawful act. The mental element requires the intention to agree and the intention to carry out the agreement.

Section 465 of the Criminal Code sets out the punishment structure for conspiring to commit a crime. It states that, if a person is found guilty of conspiring to commit any criminal offence, they can be sentenced to a portion of the maximum sentence available for the initial crime they planned to commit.

Should both the person and the company be charged and convicted of the specific crime, they cannot be convicted of conspiracy to commit that crime, as they are seen as the same person for conspiracy purposes, and it is impossible to conspire with yourself.

The section itself refers to "everyone who conspires with an one to commit an indictable offence" that is not murder or malicious prosecution. This means that offences not included in the code but still classified as indictable (such as smuggling) may be used to justify a charge under s. 465.

After the planning, the next step in committing an offence is the attempt. As stated in the criminal code, the mental element for an attempted crime is the "intent to commit the offence."[26] The actus reus is met by the act or omission of the accused in attempting to commit a criminal act. In order to constitute an attempt, the act or omission must be more than mere preparation and must be done for the purpose of carrying out the substantive offence.[27] The final element required for a conviction under this section is that the offence was not actually committed (otherwise the accused would be charged under the section for the relevant offence). A determination of what constitutes more than mere preparation is left to the judge, who will look at the relationship between the nature and quality of the act and the nature of the completed offence.[28] Once the judge

has decided whether the physical requirements for an attempt exist, the jury will decide whether the accused had the mental element necessary for a conviction.

The same Supreme Court case that set out the principles of conspiracy also reviewed the law of attempts. "In our view, s. 24(1) is clear: the crime of attempt consists of an intent to commit the completed offence together with some act more than merely preparatory taken in furtherance of the attempt."[29]

The punishments for attempts are explained in s. 463. There are no fines laid out, only prison sentences, with a maximum sentence of 14 years, and further sentences given as half of the sentence that would be imposed had the actual offence been committed.

Once an illegal act has been committed, the crown can charge other companies or individuals with being a party to an offence.[30] The section imposes criminal liability on all participants who knew or ought to have known that the criminal offence would be a natural outcome of their unlawful actions.

The tobacco companies could all be convicted under this charge for the same criminal act if they had actually committed the act, if they had done or avoided doing anything in order to aid another company commit the crime, or if they had abetted another company's criminal acts in any way.

To aid is to help another in the commission of an offence. The accused must intend to help the principal offender[31] and must intend the consequences that follow the aid.[32] The court has defined 'abet' as encouraging the initial offender with acts or words, which fills the physical act requirement. To fill the mental requirement, the accused must also intend to encourage the offender.

The first element the crown must show to prove an attempt is that there were two or more people involved, all of who held a common intention to carry out an unlawful purpose. The second element is that an actual offence was committed. The offence in question must be separate from the mere intent, meaning that you cannot be a party to a conspiracy, where the intent is the offence.

Criminal Code

21. (1) Every one is a party to an offence who

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

24. (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence. R.S., c. C-34, s. 21.

Fraud

This offence moves away from the physical harm at issue in many criminal offences and focuses instead on actions that hurt people financially. Because it deals with a different type of injury, fraud also affects different victims, often ones whose connection to the accused is less apparent. In terms of tobacco companies, an act of fraud would affect corporate

shareholders rather than individual smokers or those exposed to ETS.

The main precept underlying the offence of fraud is that business dealings should be conducted honestly. This purpose is set out in s. 380 of the Criminal Code.

To satisfy the physical act requirements for a fraud conviction, the crown must prove first that the accused acted deceitfully or dishonestly, then, that the public or any member of the public was defrauded by that act through a loss of property, money, valuable security or service, or through a falsely regulated market price.

The Supreme Court stated that the essence of dishonesty is the wrongful use of something in which another has an interest in such a manner that the other's interest is extinguished or put at risk.[33] They also clarified that dishonest acts include acts of omission and of commission. Determined objectively, the standard used in determining dishonesty is "what a reasonable person would consider to be a dishonest act."[34]

Proving the second of the two physical requirements is slightly less onerous than it first appears. In a typical fraud case like selling the Brooklyn Bridge, the accused profits through his dishonest acts while his victims suffer a loss. However, according to the courts' interpretation of the fraud section of the Criminal Code, the crown does not need to prove that the accused actually benefited from the transaction or that the victim suffered an actual loss. All that must be proved is that the dishonest actions of the accused put the financial interests of their victims at risk.[35]

The mental element required for fraud is a subjective one, meaning the crown must prove that the accused meant to defraud the public. They must have been deliberately dishonest,[36] or have been reckless in committing the dishonest acts.[37]

The Supreme Court has interpreted the fraud section, laying out its physical and mental elements as follows:

The actus reus of the offence of fraud will be established by proof of:

1 The prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and

Criminal Code

380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

(*a*) is guilty of an indictable offence and liable to a term of imprisonment not exceeding ten years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or

(*b*) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction,

where the value of the subject matter of the offence does not exceed five thousand dollars.

(2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

2 Deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.

Correspondingly, the mens rea of fraud is established by proof of:

1 Subjective knowledge of the prohibited act; and

2 Subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

Where the conduct and knowledge required by these definitions are established, the accused is guilty whether he actually intended the prohibited consequence or was reckless as to whether it would occur.[38]

Realizing that certain of the terms within the section itself needed defining, the Supreme Court explained the meaning and use of "other fraudulent means."

Actions that may fall under the term "other fraudulent means" include "the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property."[39]

After fully defining the various elements of the act requirements of fraud, the Supreme Court went on to describe the necessary mental element.

> [T]his inquiry has nothing to do with the accused's system of values. A person is not saved from conviction because he or she believes there is nothing wrong with what he or she is doing. The question is whether the accused subjectively appreciated that certain consequences would follow from his or her acts.
>
> The mens rea would then consist in the subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk. If this is shown, the crime is complete. The fact that the accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what he or she was doing, provides no defence.[40]

Under this section the corporation and its directing minds could be charged with fraud in relation to their investors, or a directing mind could be charged with fraud against the corporation. The same basic factors described above are used in determining liability in both instances.

In order for a corporation to be convicted, the two-step test of the identification theory must be satisfied; in other words, the directing mind must be acting within the scope of his or her responsibility, or for the benefit of the company. Such acts must be done to the detriment of those outside the corporation.

If a directing mind is acting outside the scope of his or her responsibility, or is acting entirely against the interests of the company, that individual may be found guilty of fraud against the company, meaning the corporation itself will not be liable for the individual's criminal acts, as the second step of the identification test will not be met. This becomes a sort of corporate defence against a charge of fraud if the corporation is able to distance themselves from the directing mind and show that they received absolutely no benefit from the illegal actions.

Defences

One of the most effective methods of avoiding a finding of guilt on a charge of manslaughter, criminal negligence causing death, or fraud is to refute the crown's evidence on causation. By showing that their actions did not cause the deaths in question, or did not defraud anyone, the accused would

force the judge to find that not all the elements of the act requirement had been proved, leading to an acquittal. Even if their actions did contribute to the required consequences, the accused could always attempt to show a break in the chain of causation, an act that occurred after theirs to cause the death or the defrauding.

The accused might also try to use the Mistake of Fact defence. Under such a defence, an accused must prove that they reasonably believed the facts were different than they were (like saying they believed that cigarettes were not harmful, although they would need to be able to give reasons as to why they held this belief and why it should be reasonable). The judge assesses a mistake of fact claim using an objective standard, meaning that any such mistaken belief raised by the accused must be reasonably and honestly held. [41]

Outside of these two defences, an accused can only avoid a finding of guilt by raising a reasonable doubt regarding either the physical or the mental element of the crime.

Notes to Chapter 4

1. *Constitution Act 1867 supra* s. 91.
2. R.S.C. 1985, c. C-46.
3. S.C. 1995, c. 39.
4. S.C. 1996, c. 19.
5. *R. v. Cote* (1977), 40 C.R.N.S. 308 (S.C.C.). at 313.
6. *Constitution Act, 1982*, R.S.C. 1985.
7. *R. v. Wholesale Travel Group Inc.* (1991), 8 C.R. (4th) 145, 67 C.C.C. (3d) 193 (S.C.C.).
8. *Cunningham v. Canada* (1993), 80 C.C.C. (3d) 492 (S.C.C.).
9. *R. c. Cie John de Kuyper*, [1980] C.S.P. 1049 (Que).
10. *R. v. Pearson* (1992), 17 C.R. (4th) 1, 77 C.C.C. (3d) 124 (S.C.C.).
11. *Criminal Code supra* s. 2.
12. *Sansregret v. R.* (1985), 45 C.R. (3d) 193 (S.C.C.). (hereinafter *Sansregret*) at 206. "Where wilful blindness is shown, the law presumes knowledge on the part of the accused." at 206.
13. Quaid *supra.*
14. *Sansregret supra.* at 204.
15. *Ibid.* at 206.
16. Quaid *supra.*
17. *R. v. Hundal* (1993), 79 C.C.C. (3d) 97 at 108.
18. The three categories were first laid out and explained in *R. v. Sault Ste. Marie (City)* (1976), 30 C.C.C. (2d) 257 (Ont. C.A.); aff'd on other grounds (1978), 40 C.C.C. (2d) 353 (S.C.C.).

19. This test was first applied in *R. v. Smithers,*[1978] 1 S.C.R. 506, 40 C.R.N.S. 79, 15 N.R. 287, 34 C.C.C. (2d) 427, 75 D.L.R. (3d) 321. Smithers had been convicted of manslaughter after kicking another young man in the stomach. The young man died from aspiration, not from the actual kick, but the jury found that Smithers' kick was more than a minimal contribution to the death, meaning that he was guilty of manslaughter.

20. *Criminal Code supra* s. 219.

21. *Customs Act* R.S., 1985, c. 1 (2nd Supp.).

22. R.S.C. 1985. c. E-15.

23. *Customs Act supra* s. 158.

24. [1997] 2 S.C.R. 462, 8 C.R. (5th) 79, 115 C.C.C. (3d) 481 (S.C.C.). (hereinafter *Dynar*) In a sting operation led by the FBI, Mr. Dynar was asked by an FBI informant if he would be able to launder some drug money. He quickly agreed to the plan and brought in his friend Mr. Cohen to complete the arrangements. Although the actual money transfer never occurred, Mr. Dynar was accused of conspiring with Mr. Cohen to launder money.

25. *Ibid* at 500.

26. *Criminal Code supra* s. 24.

27. *Dynar supra.*

28. *R. v. Deutsch* (1986), 52 C.R. (3d) 305, 27 C.C.C.(3d) 385 (S.C.C.).

29. *Dynar supra* at 485.

30. *Criminal Code supra* s. 21.

31. *R. v. Morgan* (1993) 80 C.C.C. (3d) 16 (Ont. C.A.).

32. *R. v. Greyeyes* (1997), 8 C.R. (5th) 308, 116 C.C.C. (3d) 334 (S.C.C.).

33. *R. v. Zlatic* (1993), 19 C.R. (4th) 230, 79 C.C.C. (3d) 466 (S.C.C.).

34. *Ibid* at 458.

35. *R. v. Theroux* (1993), 19 C.R. (4th) 194, 79 C.C.C. (3d) 449 (S.C.C.). (hereinafter *Theroux*).

36. *R. v. Sebe* (1987), 57 C.R. (3d) 348, 35 C.C.C. (3d) 97 (Sask. C.A.), *R. v. Wendel* (1992), 78 C.C.C. (3d) 279, [1993] 2 W.W.R. 481 (Man. C.A.).

37. *Theroux* supra.

38. *Ibid* at 460. A businessman involved in residential construction in Quebec, Mr. Theroux was charged with fraud following a failed housing development. As the directing mind of a financing company, he led prospective home-buyers to believe their deposits were insured by a provincial insurance corporation, when in fact they were not insured at all. After Mr. Theroux's company had obtained a number of deposits, the builder become insolvent. The houses were not built, and the financing company went bankrupt and was unable to repay most of the deposits.

    Mr. Theroux was found guilty of fraud for misleading his investors. He appealed the ruling, claiming had had not committed fraud because, although he was aware of the risk of losing the money, he always thought that the houses would be built and there would be no need to return the deposits to the buyers. In their judgement, the Supreme Court gave a clear, complete explanation of the crime of fraud. They began by describing the physical and mental requirements listed in the section, then continued with a more detailed explanation of the various elements of fraud.

39. *Ibid.*

40. *Ibid* at 459.

41. *R. v. Tutton and Tutton*, [1989] 1 S.C.R. 1392, 69 C.R. (3d) 289, 13 M.V.R. (2d) 161.

Conclusion

In the continuing struggle against tobacco manufacturers, effective use of the Canadian legal system can add ammunition to the arsenal of tobacco control advocates. While there are no guarantees in any legal action, many of the rules and laws developed by Canadian courts appear to be more favourable to plaintiffs than to manufacturers if used in actions against Big Tobacco.

The rules regarding corporate liability create the possibility of finding both the Big Three Canadian tobacco manufacturers and their directors and senior officers and managers liable. In order to take advantage of this opportunity for either civil or criminal liability, it is necessary to provide strong evidence, both scientific and documentary, of the negligence or purposeful misrepresentations and misdeeds of the tobacco companies. In addition to showing misdeeds, the evidence used in any court case against tobacco manufacturers must also show that those misdeeds caused the damage alleged, either to active or passive smokers or to anyone else injured by tobacco.

The standards of proof used in civil and criminal cases are different, with civil suits requiring proof only on a balance of probabilities, and a criminal case requiring proof beyond a reasonable doubt. This means that a successful civil suit might not translate into a successful criminal prosecution. Also, due to the varying elements that must be shown in a civil case depending on the cause of action claimed, evidence used in finding tobacco manufacturers criminally liable would not necessarily be effective in a civil suit.

While product liability claims have been extremely successful in the United States, Canadian law has not evolved in the same direction. Canadian courts are much more reluctant to find corporations liable unless the negligence or product defect is blatantly obvious or easily avoidable. The same goes for criminal charges against corporations, although the law in this area continues to advance towards finding corporations guilty on the same grounds as individuals.

Any individual, organization or group bringing a claim against a tobacco company must be fully informed of the requirements for a successful claim. If proof of any of the elements is missing or is not substantial, the potential litigant should seriously consider waiting until such time as the missing element is available.

Even when a plaintiff has all the required proof, there is one final element in tobacco lawsuits of which plaintiffs must be aware. The financial resources available to tobacco manufacturers far exceeds those readily accessible by most plaintiffs. Manufacturers use those resources to try and drag out litigation until the plaintiff has no money or energy left Taking on Big Tobacco is no small thing, but it is possible for those who are truly committed and willing to endure what will certainly be a lengthy process.

Appendix A:
Glossary

Burden of proof	A party's duty to prove a disputed assertion or charge. P. 190
Conspiracy	An agreement by two or more persons to commit an unlawful act p. 305
Deceit	The act of intentionally giving a false impression p. 413
Fraud	A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment p. 670
Liability:	To be legally responsible or accountable for one's acts or omissions
Negligence:	The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. Any conduct that falls below the legal standard established to protect others against the unreasonable risk of harm, except for conduct that is intentionally, wantonly or wilfully disregardful of others' rights p. 1056
Standard of proof	The degree or level of proof demanded in a specific case p. 1413
Tort	A civil wrong for which a remedy may be obtained; a breech of a duty that the law (common or statutory) imposes on everyone in the same relation to one another as those involved in a given transaction p. 1496

**Definitions taken from *Black's Law Dictionary 7th ed.*, Bryan A. Garner editor in chief, (West Group; St. Paul Minnesota, 1999).

Appendix B:

History of Canadian Tobacco Litigation

Ragoonanan[1]

Following a 1998 house-fire caused by a smouldering cigarette, the relatives of the three people who died in the fire brought an action against Imperial Tobacco, Rothmans Benson & Hedges, and JTI-MacDonald. The claim alleges that the injuries, death and property loss suffered in the fire could have been avoided or reduced if the defendants' cigarettes had been fire-safe. The claims against RBH and JTI-Macdonald have been dismissed, as they have no immediate connection to the fire at issue (the cigarette was made by ITL). The plaintiffs are attempting to have the suit certified as a class action that will include relatives of victims of other cigarette-caused fires. Imperial Tobacco will likely argue that insufficient scientific evidence exists, making it impossible for the plaintiffs to prove their case, so the case should be dismissed.

The claims in the case currently include a breach of the company's duty to produce a safe product, and of their duty to warn of hazards of their products.

Battaglia[2]

In 1997, long-time smoker Joseph Battaglia launched a suit against Imperial Tobacco claiming for damages caused by the difference between the actual yields of tar, nicotine and other cigarette ingredients and the yields stated on the packages of the light and mild cigarettes he had switched to in an effort to quit smoking. The main causes of action claimed by Joe were negligence, failure to warn, negligent misrepresentation, and deceit. He also claimed breach of implied warranty, but did not argue that cause before the court.

After a number of years of various motions by the defendants, the case was finally heard in an Ontario Small Claims court in June 2001. Six months later the decision was rendered in favour of the tobacco company. While the judge found that Imperial Tobacco had been negligent in their representations on the packages, she did not find that negligence to be a cause of Joe's loss – either his monetary loss or his loss of health.

BC Statutory Claim[3]

As one of the most progressive anti-tobacco governments in the country, British Columbia was the first province to sue the tobacco companies. They brought their suit under the Tobacco Damages Recovery Act, passed in by the provincial government in 1997 to facilitate just such a claim. The tobacco companies counterclaimed, stating that the legislation was invalid as it allowed the province to sue companies that were completely outside of its jurisdiction, and as such must be struck down. The courts found for the tobacco companies on this narrow issue, and the law was struck down.

In 2000 the law was re-enacted with the offending sections removed, renamed the Tobacco Damages and Health Care Costs Recovery Act. Under the new act the government again filed a claim against the tobacco companies. As in the initial action, the tobacco companies have filed a constitutional challenge to the validity of the new act. Neither claim has yet been heard.

Letourneau[4]

In a Quebec court action, Ms. Letourneau sued Imperial Tobacco for the cost of the patch she used to quit smoking. The basis for her claim was a breach of duty to warn of the health hazards of tobacco products and of their addictive nature. Her claim was denied, with the court finding that the tobacco companies had no duty to warn of ad-

her loss (the amount paid for the patch) was not caused by any failure to warn, as she had continued to smoke even after learning of the risks of tobacco use. In a final blow to Ms. Letourneau, the court found that the cost of the patch would not be recoverable in any instance because its use was not required in order for smokers to quit smoking.

Spasic[5]

In 1997, Mirjana Spasic, sick with lung cancer, brought an individual product liability action against Imperial Tobacco and Rothmans Benson & Hedges. When she died the following year, her estate carried on the lawsuit on her behalf. In her suit, she claims the defendant tobacco companies were negligent and deceitful in their manufacture and distribution of cigarettes, and conspired together to deceive the public about the dangers of cigarettes. In addition to these arguments that are traditionally used against tobacco companies, she also claimed intentional spoliation of evidence – a claim that the tobacco companies had destroyed evidence of their tortuous actions.

Originally filed in 1997, the industry has managed to drag out the proceedings so much that, even today, the basic form of the statement of claim is still at issue, and the actual hearing of the case remains a far distant event.

The main thrust of the tobacco companies' delay tactics has been an attack of her claim for intentional spoliation of evidence. Their motion to strike that portion of her claim was granted by the Ontario superior court, but overturned by the appeal court, who stated that this was a valid claim in Canadian courts. Leave to appeal this decision to the Supreme Court of Canada was denied, meaning that the decision of the appeal court stands. This ruling supports the principle that intentional destruction of evidence, if proven, can be considered by the court when determining damages.

Caputo[6]

In 1995 four Ontario smokers filed a claim against Imperial Tobacco, Rothmans, Benson & Hedges and RJR MacDonald on their own behalf and also on behalf of all Ontario residents, whether living or dead, who had ever smoked cigarette products manufactured, tested, marketed, distributed, sold or otherwise placed into the stream of commerce by the defendant tobacco companies. Their action claims that the tobacco companies have intentionally concealed the fact that nicotine is a highly addictive and dangerous substance, thereby misleading the public to induce people to start smoking. Those people would then become addicted and suffer serious damage to their mental and physical health. In this case the plaintiffs have alleged negligence, misrepresentation, deception, conspiracy, suppression of research, and defective products against the tobacco companies. The case has not yet been heard on its merits, as the plaintiffs are still in the process of becoming certified as a class under the Ontario Class Proceedings act.

This procedure, while not extremely difficult or complex, has been dragged out by the tobacco companies as they are constantly filing various motions to block the plaintiffs. The first such issue to reach the court was the level of detail contained in the smokers' statement of claim. The tobacco companies said the statement was too vague and wanted further information from each plaintiff including specific details on health problems, what brands were smoked, when they were smoked, and how often.

On that issue the judge allowed the tobacco companies' motion in part, stating that more detailed information was required in order for them to be able to fully respond to the claims against them. However, the judge also noted that any order for particular information should not be so onerous that it would prevent the smokers from continuing with their action. Particulars as to which plaintiffs smoked which brands of cigarettes on what dates were not necessary to allow the defendants to plead. Such a demand was unrealistic and unreasonable. Particulars of unsuccessful attempts to quit smoking by the plaintiffs were ordered because such information was within the knowledge of each plaintiff. Particulars were also ordered with respect to what the plaintiffs alleged that the defendants' research established, and what was alleged to have been said that constituted misinformation including the means of communication such as press, adver-

knowledge of the defendants themselves were not ordered.

The defendants then sought a motion that all the plaintiffs make themselves available for individual direct examination by tobacco company lawyers. This motion was granted in 1997, but the tobacco motion in 1999 to prevent plaintiffs from sitting in on each other's examinations was denied. The plaintiffs are still awaiting certification as a class.

The year after the Caputo claim was filed, Imperial Tobacco started a lawsuit against two of its insurance companies, asking the court to order them to pay its legal costs and damages if the class action is successful.

McIntyre Estate[7]

Following her husband's death due to lung cancer in 1999, Mrs. McIntyre started a wrongful death action against Imperial Tobacco. Her main impediment to date has been lack of funds. She signed a contingency agreement with a law firm, but since such an agreement is not legal under Ontario law, brought a motion before the Ontario court to have them declare the payment arrangement as valid.

When the court allowed this motion, the government of Ontario appealed the judgment. On appeal, ITL applied for intervener status in Mrs. McIntyre's motion, claiming that they had an interest in the outcome of the decision. The court of appeal found that the issue before them, namely the proposed fee arrangement between the plaintiff and her counsel, had nothing to do with ITL, therefore their request for intervener status has been denied.

The appeal decision on the validity of the payment arrangement has not yet been given, nor has any specific action been taken in her case against ITL.

Perron[8]

After losing both of his legs to Buerger's disease, one in 1980, the other in 1983, Mr. Perron brought an action against RJR Macdonald alleging that their negligence had led to the loss of his legs. HE also claimed that RJR had breached its duty to warn him of Buerger's disease, and had breached an implied warranty with him.

Perron initially filed suit in 1988, twelve years after he first noticed symptoms of the disease. His reason for the delay is that he was unaware of his right to bring action against the tobacco companies until hearing of an American action for smoking related injuries in 1988. The court found this reasoning for the delay unjustifiable, and the case was eventually dismissed because the two-year limitation period following the time when the cause of action arose had expired before the claim was commenced.

Canadian Cases brought in the US

Ontario Government[9]

In March of 2000 the Ontario government filed a Medicare cost recovery lawsuit against the major tobacco manufacturers in U.S. federal court. The suit claimed $40 billion US in damages for health care costs due to smoking related illnesses.

The case was dismissed in August of that year on the grounds that Ontario had no standing to bring a case before the US court. Ontario has appealed this decision.

Federal government[10]

The federal government also brought an action against big tobacco in the New York District court, but on different grounds. The federal civil suit was laid against RJR Reynolds (the claim also includes JTI-MacDonald, who has since purchased RJR-MacDonald) to recover lost duties and taxes and other costs incurred due to cigarette smuggling.

The district court used a common law doctrine known as the revenue rule to dismiss the case. This rule states that no court shall enforce the tax laws of another country. Canada appealed the decision, stating that their claim was not for tax enforcement, but was a civil action as allowed under the US Racketeer Influenced Corrupt Organizations act (RICO). The appeal court did not accept the argument, instead following the lead of the district court

and dismissing the case based on the apparent conflict with the revenue rule. The Canadian government has applied for leave to appeal the case to the Supreme Court of the United States.

Notes to Appendix B

1. *Ragoonanan v. Imperial Tobacco*, [2000] O.J. No. 4597
2. *Battaglia v. Imperial Tobacco*, [2001] O.J. No. 5541 (Ont. Sup. Ct.).
3. The amended BC claim has not yet been argued in court.
4. *Letourneau v. Imperial Tobacco Ltd.* (1998), 162 D.L.R. (4th) 734 (C.Q.).
5. *Spasic v. Imperial Tobacco Ltd.*, [1998] O.J. No. 125.
   Spasic Estate v. Imperial Tobacco Ltd. (1998), 42 O.R. (3d) 391, [1998] O.J. No. 4906.
   Spasic Estate v. Imperial Tobacco Ltd. (2000), 49 O.R. (3d) 699, [2000] O.J. No. 2690.
   Spasic Estate v. Imperial Tobacco Ltd., [2001] O.J. No. 4985.
6. *Caputo v. Imperial Tobacco Ltd.*, [1996] O.J. No. 1396.
   Caputo v. Imperial Tobacco Ltd. (1997), 34 O.R. (3d) 314, [1997] O.J. No. 2576.
   Caputo v. Imperial Tobacco Ltd. (1999), 44 O.R. (3d) 554, [1999] O.J. No. 1655.
7. *McIntyre Estate v. Ontario (Attorney General),* [2001] O.J. No. 713.
   McIntyre Estate v. Ontario (Attorney General), [2001] O.J. No. 3206.
8. *Perron v. RJR Macdonald*, [1988] B.C.J. No. 2262 (B.C. C.A.).
   Perron v. RJR Macdonald, [1990] B.C.J. No. 226, (B.C. C.A.).
   Perron v. RJR Macdonald, [1993] B.C.J. No. 613 (B.C. S.C.).
   Perron v. RJR Macdonald, [1996] B.C.J. No. 1701 (B.C. C.A.).
   Perron v. RJR Macdonald, [1996] B.C.J. No. 2093 (B.C. C.A.).
9. *A.G. Ontario v. R.J.R. Tobacco Holdings*
10. *.A.G. Canada v. R.J.R. Tobacco Holdings* 103F.Supp. 2d 134; 2000 U.S. Dist.
    A.G. Canada v. R.J.R. Tobacco Holdings 268 F.3d 103; 2001 U.S. App.

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