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The Cost Recovery Act and Tobacco Litigation in Canada: A Model for Fast Food Litigation

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THE COST RECOVERY ACT AND TOBACCO LITIGATION IN CANADA: A MODEL FOR FAST FOOD LITIGATION

INTRODUCTION

Obesity is a growing problem in Canada.[1] One in four Canadian adults is obese, and the number of obese Canadians has doubled since the 1980s.[2] Numerous medical conditions are associated with obesity, including diabetes, hypertension, heart disease, and cancer.[3] As of 2001, obesity related illnesses cost approximately C$380 million annually in British Columbia alone.[4] This represents approximately 4.5% of British Columbia's total health care costs.[5] The health care costs associated with these diseases across Canada has also increased from C$1.55 billion in 2000 to C$1.98 billion in 2008.[6] Because Canada utilizes a universal health care system, these costs are foisted upon the public in the form of taxes.[7]

Tobacco use is also a problem in British Columbia, where approximately C$525 million are paid to treat tobacco related illnesses.[8] "If 10% of [British Columbia's] smokers quit, they would save the [British Columbia] economy approximately $2.9 billion in costs over their lifetimes" in avoided medical care

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1. *See* PUB. HEALTH AGENCY OF CAN., OBESITY IN CANADA: A JOINT REPORT FROM THE PUBLIC HEALTH AGENCY OF CANADA AND THE CANADIAN INSTITUTE FOR HEALTH INFORMATION 1 (2011) [hereinafter *Pub. Health Agency of Can.*].

2. *See id.* at 1.

3. *See id.* at 2.

4. *See* Ronald Colman, *Cost of Obesity in British Columbia*, GPI ATLANTIC 2 (2001).

5. *Id.*

6. *See Pub. Health Agency of Can*, *supra* note 1, at 29. Estimates of the total economic cost of obesity in Canada, including health care expenditures and costs in productivity, range from C$4.6 billion to C$7.1 billion annually. *Id.*

7. *See* Jay Marenko, *Canada's Health Care System: An Overview of Public and Private Participation*, MAPLELEAFWEB.COM (Oct. 22, 2010), http://www.mapleleafweb.com/features/canada-s-health-care-system-overview-public-and-private-participation [hereinafter *Marenko Overview*].

8. *See* Jennifer Bridge & Bill Turpin, *The Cost of Smoking in British Columbia and the Economics of Tobacco Control*, HEALTH CANADA 35 (2004), *available at* http://www.gpiatlantic.org/pdf/health/tobacco/costoftobacco-bc.pdf.

costs and productivity losses.[9] The British Columbia legislature devised its own way of recouping health care costs associated with tobacco use when it passed the Tobacco Damages and Health Care Cost Recovery Act ("Cost Recovery Act").[10] The statute authorized British Columbia to initiate litigation against tobacco manufacturers to recoup health care costs paid to treat tobacco related illnesses.[11] However, when British Columbia initiated a lawsuit against tobacco manufacturers under the Cost Recovery Act, the tobacco manufacturers implead the Canadian federal government.[12] On July 29, 2011, the Supreme Court of Canada dismissed the tobacco manufacturer's third-party claim.[13] This left the tobacco manufacturers as the sole defendants in the lawsuit[14] and potentially liable for billions of dollars in judgments or settlements.[15] The Cost Recovery Act and the ensuing tobacco litigation initiated pursuant to the Act demonstrate a litigation model that has found some initial success in Canadian courts.[16]

Historically, plaintiffs bringing claims against food retailers and manufacturers for contributing to their obesity have had to overcome causation and assumption of risk issues.[17] This Note examines how the Cost Recovery Act and the modern litigation strategies developed in tobacco litigation provide a blueprint for health care cost recovery lawsuits that Canadian provinces could potentially initiate against manufacturers and retailers in the food industry.

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9. *Id*. at 53–54.

10. *See* Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30 (Can.).

11. *See id.*

12. *See* R. v. Imperial Tobacco Canada Ltd., [2011] S.C.C. 42 (Can.).

13. *See id*.

14. *See* Julia Zebley, *Canada Supreme Court Rules Against Tobacco Industry in Two Major Cases*, JURIST (July 29, 2011, 12:04 PM), http://jurist.org/paperchase/2011/07/canada-supreme-court-rules-federal-government-not-liable-for-tobacco-related-ailments.php.

15. *See* Richard L. Cupp, Jr., *Does the World Still Need United States Tort Law? Or Did It Ever?*, 38 PEPP. L. REV. 283, 298 (2011) [hereinafter *Cupp World*].

16. *See, e.g.*, R. v. Imperial Tobacco Canada Ltd., [2011] S.C.C. 42 (Can.).

17. *See generally* Brooke Courtney, *Is Obesity Really the Next Tobacco? Lessons Learned from Tobacco for Obesity Litigation*, 15 ANNALS HEALTH L. 61, 73–79 (2006).

Part I of this Note will provide background on Canada's universal health care system and the tenets of the Canadian Health Act that make the Cost Recovery Act advantageous to tobacco litigants. Part II will examine how development of tobacco litigation in the United States influenced Canada's own tobacco litigation and what effect it might have on food litigation in Canada. Part III will compare the issues faced by plaintiffs in United States "fast food" litigation to the issues faced by plaintiffs in tobacco litigation, including assumption of risk and causation arguments. Part IV of this Note will examine the attributes of the Cost Recovery Act that rebut the causation and assumption of risk arguments, making the Act an attractive model for potential future food litigants in Canada.

I. HEALTH CARE IN CANADA

Canada's universal health care system currently operates as a mix of private and public entities.[18] Physicians work in private practice and bill provincial health insurance plans for their services.[19] Hospitals are run by community boards or volunteer organizations, but they are administered by regional authorities as non-profit companies, and their operating budgets are determined by provincial health plans.[20] Private insurance is effectively prohibited for coverage of any service provided for in provincial health plans and is mainly used for dental services and prescription drugs.[21]

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18. *See* Leonard J. Nelson, III, *A Tale of Three Systems: A Comparative Overview of Health Care Reform in England, Canada, and the United States*, 37 CUMB. L. REV. 513, 524 (2006/2007).

19. *See id.*

20. *See Marenko Overview*, *supra* note 7.

21. "Canada is also the only country that effectively prohibits private health insurance for hospital and physician services. Although private medical insurance is not banned specifically by the Canada Health Act, federal and provincial governments have historically interpreted the Act as intending to ban private insurance. While only six provinces legally prohibit private medical insurance for medically necessary services, all provinces have other policies in place that penalize providers who choose to bill privately for services. In practice, private insurance is generally only permitted to cover goods and services that are not covered by our universal government-run health insurance plan, mainly dental services and prescription drugs." Mark Rovere, *Why It's Time Government Called "Time Out" on the Canada Health Act*, FRASER INST. (Nov. 29, 2010), http://www.fraserinstitute.org/publicationdisplay.aspx?id=17023&terms=HOW+GOOD+IS+CANADIAN+HEALTH+CARE.

Canada's health care system has been the subject of criticism and political debate.[22] For instance, Canada's health care system has been criticized for having long wait times before a patient can receive specialized care.[23] Even though wait times have recently decreased, some Canadians still feel that they are too long.[24] In addition, there has been debate over the long term sustainability of the provincial health care system amid recent decreases in federal funding.[25]

Canada took its first step towards its current universal health care system in 1947 when Saskatchewan adopted a universal hospital care plan that featured province-wide coverage.[26] By 1950, British Columbia and Alberta had adopted similar plans,[27] and by 1961 all Canadian provinces and territories provided universal hospital coverage.[28] In 1966, Canada's federal government passed the Medicare Act, which provided federal funding to cover 50% of the provinces' health care costs and expanded the insurance coverage to include hospital and physician services.[29] By 1972, all of Canada's provinces and territories were providing the expanded coverage subsidized by the Medicare Act.[30] However, in the late 1970s, the rising costs of medical care caused Canada to stop paying 50% of the province's health care costs.[31] In the absence of federal health care reimbursement, provinces were no longer obligated to meet federal health insurance requirements and were allowed great-

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22. *See* Nelson, *supra* note 18, at 526.

23. *See* Michael M. Rachlis, *A Canadian Doctor Diagnoses U.S. Healthcare*, L.A. TIMES (Aug. 3, 2009), http://articles.latimes.com/2009/aug/03/opinion/oe-rachlis3.

24. *See* Brett J. Skinner, *Questioning Success on Health Care Wait Times*, FRASER INST. (Apr. 4, 2011), http://www.fraserinstitute.org/publicationdisplay.aspx?id=17388&terms=health+care+wait+time.

25. *See* Nelson, *supra* note 18, at 526.

26. *See Canada's Health Care System*, HEALTH CANADA (Oct. 9, 2010), http://www.hc-sc.gc.ca/hcs-sss/pubs/system-regime/2005-hcs-sss/index-eng.php.

27. *See id.*

28. *See* Nelson, *supra* note 18, at 524.

29. *See id.*

30. *See id.* at 525.

31. Jay Makarenko, *Canadian Federalism and Public Health Care: The Evolution of Federal-Provincial Relations,* MAPLELEAFWEB.COM (Jan. 30, 2008), http://www.mapleleafweb.com/features/canadian-federalism-and-public-health-care-evolution-federal-provincial-relations.

er control over the administration of their health care systems.[32] In order to cover the money that the federal government was no longer providing, some provinces implemented such controversial measures as collecting user fees and extra billing, which threatened some provincial citizens' access to health care.[33] In 1984, Canada passed the Canada Health Act, which reinstated the program for federal reimbursement of health care costs, created penalties for imposing user fees and extra billing, and imposed requirements for receiving federal reimbursement.[34] The central tenets of the Canada Health Act are public administration, comprehensive coverage of "medically necessary" services, universal coverage of all provincial citizens, continuous coverage even if the citizen is outside of the province or the country, and reasonable access to services.[35]

As will be demonstrated in Part IV, the Canada Health Act's tenet of universal access and the role of the provinces in financing the health care system are important factors in making the Cost Recovery Act beneficial to tobacco plaintiffs.

II. TOBACCO LITIGATION IN THE UNITED STATES AND CANADA

Tobacco litigation in the United States has been described as taking part in three waves.[36] The first two waves were largely unsuccessful for plaintiffs, as individual claimants struggled to make headway against a tobacco industry that refused to settle.[37] However, the states found huge success during the third wave of litigation when they entered into the Master Settle-

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32. Jay Makarenko, *The Canada Health Act: Provisions & Administration,* MAPLELEAFWEB.COM (Mar. 1, 2007), http://www.mapleleafweb.com/features/canada-health-act-provisions-amp-administration [hereinafter *Marenko Provisions*]. In order to receive the federal subsidies, provinces were required to implement their health insurance systems according to federal guidelines which included expansive coverage of hospital and physician services. Nelson, *supra* note 18, at 525.

33. *See Makarenko Provisions, supra* note 32.

34. Nelson, *supra* note 18, at 525.

35. *See id*.

36. *See* James A. Henderson, Jr. & Aaron Twerski, *Reaching Equilibrium in Tobacco Litigation*, 62 S.C. L. REV. 67, 70 (2010).

37. *See* Stephen E. Smith, *"Counterblastes" To Tobacco: Five Decades of North American Tobacco Litigation*, 14 W.R.L.S.I. 1, 6 (2002); *see also* Henderson & Twerski, *supra* note 36, at 74.

ment Agreement with tobacco manufacturers.[38] Tobacco litigation in Canada has mimicked this course of development, with British Columbia's health care cost recovery suit ultimately finding success in the Supreme Court of Canada.[39]

A. History of Tobacco Litigation in the United States

The first wave of tobacco litigation in the United States began in the 1950s and continued through the 1960s.[40] During this era of tobacco litigation, individual plaintiffs found little success,[41] in part because at the time tobacco companies could not have known about the health risks of smoking cigarettes.[42] Another obstacle to plaintiffs' success during the first wave of litigation was the need to prove specific causation.[43] Even if a plaintiff proved that cigarettes were generally harmful and contributed to cancer and other illnesses, it was very difficult for a plaintiff to prove that her particular injuries were caused by smoking.[44] The tobacco companies refused to settle any lawsuits during the first wave of litigation and forced plaintiffs to expend a great deal of personal resources in taking their claims to trial.[45]

The second wave of tobacco litigation in the United States took place from the 1980s to the early 1990s, and was equally unsuccessful for the plaintiffs.[46] This second wave was precipitated by an increased awareness in the American public regarding the dangers of cigarette smoking following the release of the U.S. Surgeon General's Report on Smoking and Health in 1964.[47] In 1965, Congress passed the Federal Cigarette La-

38. *See* Frank Sloan & Lindsey Chepke, *Litigation, Settlement, and the Public Welfare: Lessons from the Master Settlement Agreement*, 17 WIDENER L. REV. 159, 161 (2011).

39. *See* R. v. Imperial, [2011] S.C.C. 42.

40. *See* Henderson & Twerski, *supra* note 36, at 70.

41. *See* Smith, *supra* note 37, at 6.

42. *See id.* at 10–11.

43. *See* Henderson & Twerski, *supra* note 36, at 70–71.

44. *See id.*

45. *See id.* at 71.

46. Smith, *supra* note 37, at 14–19.

47. *See* U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964); *see also Report of the Surgeon General*, NAT'L LIBRARY OF MED., http://profiles.nlm.nih.gov/ps/retrieve/Narrative/NN/p-nid/60/p-docs/true (last visited Feb. 16, 2013).

beling and Advertising Act, which required that warning labels be displayed on cigarette packaging.[48] Ironically, Congress' efforts to educate the public regarding the dangers of tobacco would ultimately prove to protect tobacco manufacturers during the second wave of tobacco litigation.[49] Tobacco manufacturers argued in *Cipollone v. Liggett Group* that the Federal Cigarette Labeling and Advertising Act and other statutes like it (the "Cigarette Acts") preempted plaintiffs from claiming that the tobacco manufacturers had failed to warn them of the dangers of smoking. [50] In 1992, the U.S. Supreme Court preempted all failure-to-warn tort claims based on state law that post-dated the Cigarette Acts.[51] While the Court held that fraud and express warranty claims were not preempted, those claims were difficult to establish during the second wave era.[52] The tobacco manufacturers continued their "no settlement" policy during the second wave of tobacco litigation, leaving individual plaintiffs little chance of success.[53]

The third wave of tobacco litigation began in the mid-1990s.[54] At the beginning of the third wave, plaintiffs were poised to find success because documents produced from the tobacco manufacturers' files during congressional hearings strengthened plaintiffs' fraud claims that the manufacturers misrepresented the health hazards of smoking.[55] In addition, plaintiffs began utilizing class action suits to pool resources.[56] The third wave also featured state governments filing claims for recovery of Medicaid expenses paid to treat tobacco related illnesses.[57] Mississippi was the first state to file such a claim in 1994, and

48. 15 U.S.C. § 1331 (1965).

49. *See* Smith, *supra* note 36, at 14.

50. *See* Cipollone v. Liggett Group, 505 U.S. 504 (1992).

51. *See id.*

52. *See* Henderson & Twerski, *supra* note 36, at 73. In a fraud claim, the plaintiff would argue that the tobacco manufacturer fraudulently misrepresented the health hazards of smoking in their advertising. *Cipollone*, 505 U.S. at 527–29. Similarly, in breach of express warranty claims the plaintiff would argue that the tobacco manufacturer's advertising statements affirmed that their products were not dangerous to the smoker's health and therefore created an express warranty to the consumer. *Id.* at 525–27.

53. *See* Henderson & Twerski, *supra* note 36, at 74.

54. *See id.*

55. *See id.*

56. *See* Smith, *supra* note 37, at 18.

57. *See id.* at 22.

by 1998 all fifty states had filed a cost recovery lawsuit against tobacco manufacturers.[58]

In 1998, the tobacco manufacturers ended their long-held policy of refusing to settle and signed the Master Settlement Agreement ("MSA") that ended the Medicaid reimbursement lawsuits and precluded the states from bringing any similar litigation against the tobacco manufacturers in the United States in the future.[59] Florida, Mississippi, Texas, and Minnesota reached separate settlement agreements with the tobacco manufacturers.[60] As part of the MSA, tobacco manufacturers agreed to pay the states US$206 billion over twenty-five years, with subsequent additional payments determined by the amount of cigarettes sold.[61] In addition, the tobacco manufacturers agreed to fund public anti-smoking education efforts, disbanded organizations that promoted the industry's interests—such as the Tobacco Institute—and ceased advertising targeted towards young people.[62]

While the MSA may have contributed to lower rates of tobacco consumption, it is not without its flaws.[63] Some have argued that the MSA is an inefficient way of collecting a de facto cigarette excise tax.[64] This criticism inherently implicates a question of legislative primacy: does the MSA "[sidestep] the democratic process" normally required to impose taxes?[65] Others have suggested that it may violate the Social Security Act,[66] federal anti-trust law,[67] or the U.S. Constitution.[68] Another important criticism of the MSA is that it does not dedicate money

58. *See id.*
59. *See id.* at 23.
60. *See* Sloan & Chepke, *supra* note 38, at 166.
61. *See id.* at 161.
62. *See id.*
63. *See id.*
64. *See, e.g.*, Robert W. Bauer, *Sanders v. Brown: State-Action Immunity and Judicial Protection of the Master Settlement Agreement*, 34 J. CORP. L. 1291, 1291–92 (2009); Daniel A. Crane, *Harmful Output in the Antitrust Domain: Lessons from the Tobacco Industry*, 39 GA. L. REV. 321, 365 (2005); *Cupp World*, *supra* note 15, at 301–02; Sloan & Chepke, *supra* note 38, at 163.
65. *See Cupp World*, *supra* note 15, at 301–02.
66. *See* Gregory W. Traylor, *Big Tobacco, Medicaid-Covered Smokers, and the Substance of the Master Settlement Agreement*, 63 VAND. L. REV. 1081 (2010).
67. *See* Sloan & Chepke, *supra* note 38, at 179–82.
68. *See id.* at 174–79.

paid by tobacco manufacturers to smoking cessation programs or even to health care.[69] The money that the states collect can be used for any purpose, including "infrastructure, prisons, or tax cuts."[70]

Despite its criticisms, the MSA represents an important development in United States tobacco litigation. Plaintiffs, in this case states seeking recovery of health care costs, were finally able to succeed against the tobacco industry. As the next section discusses, the development of tobacco litigation in Canada followed the same path—individual plaintiffs initially struggling, with provincial health care recovery suits later finding success.

B. History of Tobacco Litigation in Canada

Until recently, tobacco litigation in Canada has seen much less activity than in the United States, and has been much more favorable to defendants.[71] The first tobacco suit in Canada, *Perron v. R.J.R. Macdonald Inc.*, was filed in 1988 but was dismissed because the statute of limitations had expired.[72] The next tobacco suit filed in Canada, *Caputo v. Imperial Tobacco Ltd*., asserted a class action claim in 1995 on behalf of "all residents of Ontario, whether living or now deceased, who have ever smoked cigarette products manufactured . . . by the defendants."[73] In 2004, the *Caputo* class was decertified because plaintiffs had "combined at least five, and possibly more, classes, not to mention innumerable subclasses, into one globally defined class for the purpose of seeking certification. In adopting this strategy, the plaintiffs ha[d] presented an action lacking a core of commonality."[74] In 1997, an individual claimant

69. *See* Smith, *supra* note 37, at 23.

70. *Id.*

71. *See* Smith, *supra* note 37, at 27; *Cupp World*, *supra* note 15, at 290–91.

72. *See* Perron v. R.J.R. Macdonald Inc., 1993 CanLII 1125 (BC SC) (Can.).

73. Caputo v. Imperial Tobacco Ltd., 2004 CanLII 24753 (ON SC) (Can.).

74. *Id.* To satisfy the commonality requirement, plaintiffs must demonstrate "a single class sharing substantial 'common issues,' the resolution of which will significantly advance the claim of each class member." *Id.* para. 45.

brought suit against tobacco manufacturers in *Spasic v. Imperial Tobacco Ltd*. and the case is still being litigated.[75]

By the time the MSA was signed in the late 1990s, tobacco litigation in Canada was relatively undeveloped compared to American tobacco litigation; only three cases had ever been filed against tobacco manufacturers for tobacco related illnesses in Canada, with none of the plaintiffs finding success.[76]

However, in 1997, the British Columbia legislature passed the Cost Recovery Act, which allowed British Columbia to sue tobacco manufacturers to recover provincial funds spent treating smoking related illnesses.[77] In 1998, the British Columbia legislature amended the Cost Recovery Act to include language that directed courts to presume that exposure to tobacco products had caused the plaintiff's illness if the defendant had breached any "common law, equitable or statutory duty or obligation owed to persons in British Columbia who have been exposed or might become exposed to the type of tobacco product."[78] Later that year, British Columbia filed the first cost recovery action brought by a provincial government against tobacco manufacturers in Canadian courts.[79] However, the British Columbia Supreme Court struck down the Cost Recovery Act in 2000, on the grounds that the British Columbia legislature lacked the constitutional authority to target legislation at companies that were not headquartered in British Columbia.[80]

The legislature subsequently amended the Cost Recovery Act to remove the unconstitutional extra-territoriality language.[81] British Columbia filed *R. v. Imperial Tobacco Canada Ltd.* the day the amended statute was enacted.[82] The tobacco manufacturers again challenged the constitutionality of the statute and argued that the amended Cost Recovery Act was ultra vires for extraterritoriality, contrary to the rule of law, and inconsistent

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75. *See* Spasic v. Imperial Tobacco Ltd., 2003 CanLII 32909 (ON SC) (Can.). *See also Tobacco Litigation: The Canadian Effort to Hold Tobacco Companies Accountable*, SMOKE-FREE.CA (last visited Apr. 2, 2013), http://www.smoke-free.ca/litigation/webpages/Spasic.htm.

76. *See* Smith, *supra* note 37, at 26–28.

77. *See id.* at 28.

78. *Id*.

79. *See Cupp World*, *supra* note 15, at 291.

80. *See* JTI-MacDonald v. AG-BC, [2000] BCSC 0312 (Can.).

81. *See* Smith, *supra* note 37, at 29.

82. *See Cupp World*, *supra* note 15, at 292.

with judicial independence.[83] In 2005, the Supreme Court of Canada upheld the amended Cost Recovery Act as constitutional.[84] The court held that, because of the "strong relationships among the enacting territory (British Columbia), the subject matter of the law (compensation for the government of British Columbia's tobacco-related health care costs) and the persons made subject to it (the tobacco manufacturers ultimately responsible for those costs)," the Cost Recovery Act was "meaningfully connected to the province" and therefore not unconstitutional for extraterritoriality.[85]

In addition to the extraterritoriality challenge, the tobacco manufacturers challenged the Act for interfering with judicial independence, alleging that it interfered with the adjudicative role of courts.[86] They argued that by forcing the court to presume that the injured British Columbians "would not have been exposed to the [tobacco] product but for the [breach of common law, equitable, or statutory duty] . . . and the exposure . . . caused or contributed to the disease,"[87] the statute compelled the court to make "irrational presumptions."[88] The defendants attacked this section of the Cost Recovery Act because it eliminated one of their defenses.[89]

The tobacco manufacturers also argued that the Cost Recovery Act was inconsistent with judicial independence because it "[subverted] the court's ability to discover relevant facts."[90] They argued that the Cost Recovery Act hindered the court's fact finding ability by not requiring the plaintiff to "identify

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83. *See* F.C. DeCoste, *Tradition and the Rule of Law in British Columbia v. Imperial Tobacco Canada Ltd.*, 24 WINDSOR Y.B. ACCESS JUST. 327, 329 (2006).

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

85. *Id.* para. 37. The tobacco companies argued "that the rule of law requires that legislation: (1) be prospective; (2) be general in character; (3) not confer special privileges on the government, except where necessary for effective governance; and (4) ensure a fair civil trial." *Id.* para. 63. However, the court held that "none of these requirements enjoy constitutional protection in Canada." *Id.* para. 64.

86. *Id.* para. 48.

87. Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, §3(2).

88. British Columbia v. Imperial, [2005] 2 S.C.R. 473, para. 48.

89. As will be discussed in Part IV, this section of the Cost Recovery Act addresses the tobacco manufacturer's causation arguments.

90. *See* British Columbia v. Imperial, [2005] 2 S.C.R. 473, para. 48.

particular individual insured persons, to prove the cause of tobacco related disease in any particular individual insured person, or to prove the cost of health care benefits for any particular individual insured person."[91] Again, the defendants were attacking a section of the Cost Recovery Act that attenuated one of their strongest defenses—their assumption of risk argument.

The court noted that the Cost Recovery Act was "not as unfair or illogical" as the tobacco manufacturers claimed because the rules in the Cost Recovery Act "[reflected] legitimate policy concerns of the British Columbia legislature regarding the systemic advantages tobacco manufacturers enjoy when claims for tobacco-related harm are litigated through individualistic common law tort actions."[92] The crucial question addressed by the supreme court was "not whether the Act's rules [were] unfair or illogical . . . but whether they interfere[d] with the court's adjudicative role, and thus judicial independence."[93] The court found the statute was constitutional, despite the fact that it shifted the burden of proof and limited the tobacco manufacturer's ability to compel discovery of an individual's medical records, because it did not interfere with the court's central function of adjudicating disputes.[94] In so holding, the Canadian Supreme Court affirmed two important sections of the Cost Recovery Act that lend themselves favorably to provincial plaintiffs in tobacco litigation.[95] The ruling also provided a judicial blueprint for upholding similar legislation in the future.[96] If Canada were to pass a statute similar to the Cost Recovery Act aimed at food litigation, the Canadian courts would have a strong precedent in upholding the statute from similar attacks.

C. The Canadian Supreme Court's Decision in R. v. Imperial Tobacco Canada Ltd.

Though the tobacco manufacturer's arguments failed to render the Cost Recovery Act unconstitutional in 2005, the manu-

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91. Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, §2(5).

92. British Columbia v. Imperial, [2005] 2 S.C.R. 473, para. 49.

93. *Id.*

94. *Id.* at para. 55.

95. *See Cupp World*, *supra* note 15, at 296–97.

96. *See* British Columbia v. Imperial, [2005] 2 S.C.R. 473.

facturers continued trying to limit their liability.[97] Tobacco manufacturers would next attempt to divert blame by impleading the Canadian federal government.[98]

In the 1950s and 1960s, as worldwide awareness of the health risks of smoking began to grow, Canada adopted a public health policy to encourage citizens to smoke light cigarettes. It was commonly believed at the time that light cigarettes were less harmful than regular cigarettes.[99] Pursuant to this policy, the Canadian government advised and assisted tobacco manufacturers in developing strains of low-tar tobacco.[100]

In light of Canada's former policy, on June 6, 2007, the tobacco manufacturers filed a third-party claim impleading the Canadian federal government in *R. v. Imperial Tobacco Canada Ltd.*, British Columbia's cost recovery suit.[101] The tobacco companies argued that Canada should be held liable as a "manufacturer"[102] under the Cost Recovery Act for the role it played

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97. *See* R. v. Imperial, [2011] S.C.C. 42.

98. *See id*.

99. In the 1950s, an emerging awareness of the dangers of cigarette smoking started to grow and Canada, recognizing the health risk, began funding research into the link between cigarettes and cancer. *See* British Columbia v. Imperial Tobacco Canada Limited, [2009] B.C.C.A. 540, para. 18 (Can.). In 1963, Canada began an anti-smoking program designed to "encourage people to limit or stop smoking, to take steps to inform the public of smoking risks and to conduct research into manufacturing a less hazardous cigarette." *Id.* para. 19. In the mid-1960s, Canada determined that, despite the public awareness of the dangers of smoking, some people would continue to smoke. *Id.* para. 22–23. At the time, it was believed that cigarettes with lower levels of tar and nicotine (light cigarettes) were less harmful. *Id.*

100. Relying on this theory, Canada "gave advice, made requests or gave directions to cigarette manufacturers about the development and promotion of light and mild products" and helped to "develop strains of tobacco particularly suitable for use in light and mild products that were eventually sold to consumers in British Columbia." *Id.* In 1973, the Canadian Minister of Health "announced that officials of Health Canada and Agriculture Canada along with the tobacco industry were endeavoring to develop strains of tobacco that would lower tar and nicotine levels in cigarettes." *Id.* para. 24. Between 1979 and 1983, Canada developed several varieties of low tar tobacco. *Id.* para. 25. By 1983, 95% of tobacco available to manufacturers was developed by Agriculture Canada and "nearly all tobacco products consumed in British Columbia were manufactured from these varieties." *Id.*

101. *See* Third Party Notice of Imperial Tobacco Canada Limited, British Columbia v. Imperial Tobacco Canada Limited, 2008 BCSC 419 (Can.).

102. Under the Cost Recovery Act, a "manufacturer" is defined as "a person who manufactures or has manufactured a tobacco product and includes a

in the development of low-tar tobacco.[103] They also argued that if they were found liable to British Columbia for reimbursement of health care costs, they were "entitled to compensation from Canada for negligent misrepresentation, negligent design, and failure to warn."[104] In filing this third-party petition, the tobacco manufacturers were falling back onto the tactic of prolonging the litigation; a tactic that had proved successful for

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person who currently or in the past (a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product, (b) for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons, (c) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or (d) is a trade association primarily engaged in (i) the advancement of the interests of manufacturers, (ii) the promotion of a tobacco product, or (iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product." Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, §1.

103. *See* R. v. Imperial, [2011] S.C.C. 42, para. 12–13. Regarding the tobacco companies' argument that Canada qualified as a "manufacturer" under the Cost Recovery Act, the court held that the statute's reference to "revenue percentage" and "market share" showed that the British Columbia "legislature did not intend to include the federal government as a potential manufacturer." *Id*. para. 124–25. The court determined that "holding Canada accountable under the *CRA* would defeat the legislature's intention of transferring the health-care costs resulting from tobacco related wrongs from taxpayers to the tobacco industry." *Id*. para. 120.

104. *See id*. para. 2. The court dismissed the tobacco companies' negligent design and failure to warn claims against Canada on the same theory of sovereign immunity that they applied to the negligent misrepresentation claim. *Id*. para. 105, 111. However, the court failed to reconsider the conduct at issue when deciding whether to dismiss those claims. *Id*. The court could have separated the two types of conduct, and applied the most appropriate conduct to each claim, which would have greatly affected the court's analysis of the different conduct at issue. For instance, in deciding the negligent design claim, the court held that "the decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada's health policy. It was a decision based on social and economic factors." *Id.* para. 116. It is interesting to consider whether this claim would have been dismissed for policy considerations under Canada's previously dominant "policy/operational test." It could be argued that the decision to advocate light cigarettes as more healthy was a policy decision, and that developing and selling strains of tobacco were operational actions designed to carry out the overall policy of healthier smoking.

the tobacco industry in the past when plaintiffs with fewer resources were unable to maintain years of litigation.[105]

On July 29, 2011, the Supreme Court of Canada dismissed the federal government as a third party.[106] In deciding whether to dismiss the tobacco companies' claim for negligent misrepresentation, the court first examined whether policy concerns outweighed Canada's duty of care in its role as advisor to the tobacco manufacturers.[107] The court focused its policy discussion on Canada's assertions regarding the health benefits of smoking light cigarettes over regular cigarettes, rather than Canada's "role in developing and growing a strain of low-tar tobacco and collecting royalties on the product."[108] Canada argued that its statements were made in support of its policy decision to encourage healthier smoking habits and that "[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon

105. *See* Henderson & Twerski, *supra* note 36, at 74.

106. *See* R. v. Imperial, [2011] S.C.C. 42.

107. *See id.* para. 47. The court first determined whether the claim had a "reasonable prospect of success." *Id.* para. 17. To determine the prospect of success, the court considered whether "the general requirements for liability in tort are met." *Id.* para. 38. The first part of this test asks "whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff." *Id.* para. 39. On this first issue, the court held that such a relationship did exist because "Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials." *Id.* para. 53. The court went on to hold that "Canada's regulatory powers over the manufacturers, coupled with its specific advice and its commercial involvement" made the tobacco manufacturers' reliance on Canada reasonable. *Id.* para. 54.

108. *Id.* para. 67. In determining the conduct at issue for the negligent misrepresentation claim, the court found that the tobacco manufacturers had "merged the two types of conduct [Canada's representation that low-tar tobacco was less harmful and Canada's role in developing low-tar tobacco], emphasizing aspects that cast Canada in the role of business operator in the tobacco industry." *Id.* The court held that "in considering negligent misrepresentation, only the first type of conduct—conduct relevant to statements and representations made by Canada—is at issue." *Id.* By focusing solely on Canada's statements regarding the health impact of low-tar tobacco, the court was able to effectively ignore the impact that Canada's actions had on the issue of state immunity.

social, political or economic factors."[109] The tobacco manufacturers argued that Canada's assertions represented "operational acts" designed to carry out the overall policy to support healthier smoking habits.[110]

D. Sovereign Immunity in R. v. Imperial Tobacco Canada Ltd.

In reaching its decision in *R. v. Imperial Tobacco Canada Ltd.*, the Canadian Supreme Court triggered a subtle but important shift in sovereign immunity doctrine.[111] Generally, in common law countries, "government policy decisions are not justiciable and cannot give rise to tort liability."[112] However, "governments may attract liability in tort where government agents are negligent in carrying out prescribed duties. The problem is to devise a workable test to distinguish these situations."[113] Accordingly, the court first looked to Canadian precedent to determine an appropriate test.[114]

The first test, the "discretionary decision" approach, "holds that public authorities should be exempt from liability if they are acting within their discretion, unless the challenged decision is irrational."[115] The court noted that, because "many decisions can be characterized as to some extent discretionary," this test "has the potential to create an overbroad exemption for the conduct of governmental actors."[116] While it can be tempered to "narrow the scope of the discretion,"[117] this test did not

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109. *See* R. v. Imperial, [2011] S.C.C. 42, para. 63 (*citing* Just v. British Columbia, [1989] 2 S.C.R. 1228, para. 1240 (Can.)).

110. R. v. Imperial, [2011] S.C.C. 42, para. 64.

111. *Id.*

112. *Id*. para. 72.

113. *Id*. The court recognized the issue of policy considerations as "vexing," noting that "much judicial ink has been spilled" analyzing the problem. *Id.* The court noted, "[o]n the one hand, it is important for public authorities to be liable in general for their negligent conduct in light of the pervasive role that they play in all aspects of society. Exempting all government actions from liability would result in intolerable outcomes. On the other hand, 'the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions.'" *Id*. para. 76 (*citing* Just v. British Columbia, [1989] 2 S.C.R. 1228, para. 1239 (Can.)).

114. R. v. Imperial, [2011] S.C.C. 42, para. 72–78.

115. *Id*. para. 73.

116. *Id*. para. 77.

117. *Id.*

become the predominant approach in Canadian jurisprudence.[118]

The second test, the "policy/operational test" seeks to determine "which 'true' policy decisions are distinguished from 'operational' decisions, which seek to carry out settled policy."[119] While the policy/operational test became the dominant approach in Canada, it is not always easy to determine when a decision should be characterized as a policy decision or an operational decision.[120] As the court noted,

> Even low-level state employees may enjoy some discretion related to how much money is in the budget or which of a range of tasks is most important at a particular time. Is the decision of a social worker when to visit a troubled home, or the decision of a snow-plow operator when to sand an icy road, a policy decision or an operational decision?[121]

With this difficulty in mind, the court also considered the approaches to sovereign immunity in the United Kingdom,[122] Australia,[123] and the United States[124] in determining an appropriate test for protected policy decisions.[125]

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118. *See* R. v. Imperial, [2011] S.C.C. 42, para. 74.

119. *Id.*

120. *See id.* para. 78.

121. *Id.*

122. In the United Kingdom, the House of Lords adopted a justiciability test in *Barrett v. Enfield London Borough Council*. *Id.* para. 79. This test seeks to determine "whether the court is institutionally capable of deciding on the question, or 'whether the court should accept that it has no role to play.'" *Id.* (*citing* Barrett v. Enfield London Borough Council, [2001] 2 A.C. 550, 571 (appeal taken from Eng.)). The *Imperial* court recognized that this test may be as unworkable as the discretionary decision and policy/operational approaches when it noted that the "long judicial voyage" ended with "a test that essentially restates the question. When should the court hold that a government decision is protected from negligence liability? When the court concludes that the matter is one for the government and not the courts." R. v. Imperial, [2011] S.C.C. 42, para. 79

123. The two leading Australian cases on the issue, *Sutherland Shire Council v. Heyman* and *Pyrenees Shire Council v. Day*, both found a court split on which approach to take. *Id.* para. 80. In *Sutherland Shire Council v. Heyman*, Chief Justice Gibbs and Justice Wilson "adopted the *Dorset Yacht* rule that all discretionary decisions are immune," and "endorsed the policy/operational distinctions as a logical test for discerning which decisions should be protected." *Id.* Justice Mason adopted an approach which the *Imperial* court dubbed a "core policy," *id.*, approach when he held that "the dividing line between [policy and operation] will be observed if we recognize that a public authority

The *Imperial* court synthesized their multinational tour of sovereign immunity law into three basic observations. First, because "even routine tasks . . . like driving a government vehicle" involve discretion, tests "based simply on the exercise of government discretion . . . [cast] the net of immunity too broad-

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is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints." *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424, para. 39 (Austl.). In *Pyrenees Shire Council v. Day*, the court was again divided with three justices adopting the *Dorset Yacht* rule and two justices adopting "different versions of the policy/operational distinction." R. v. Imperial, [2011] S.C.C. 42, at para. 80.

124. In 1946, the United States waived immunity from tort claims in the Federal Tort Claims Act. *Id.* para. 81. The Act created exemptions for discretionary functions, excluding liability in tort for "any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680 (a)(2006). In *Berkovitz by Berkovitz v. United States*, the Supreme Court held that the discretionary function exception "protects only governmental actions and decisions based on considerations of public policy," because it "was Congress' desire to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Berkovitz by Berkovitz v. U.S., 486 U.S. 531, 536–37 (1988) (*citing* United States v. Varig Airlines, 467 U.S. 797, 814 (1984)). In 1991, the Supreme Court in *U.S. v. Gaubert* held that the "focus of the inquiry is . . . on the nature of the actions taken and on whether they are susceptible to policy analysis." U.S. v. Gaubert, 499 U.S. 315, 325 (1991). In concurrence, Justice Scalia supported a policy/operational distinction as "*relevant* to the discretionary function inquiry," but felt that the decision maker's position of authority should influence the court's discretionary function analysis. *Id.* at 335 (Scalia, J., concurring). Scalia wrote:

> [N]ot only is it necessary for application of the discretionary function exception that the decision maker be an official who possesses the relevant policy responsibility, but also the decision maker's close identification with policymaking can be strong evidence that the other half of the test is met—*i.e.,* that the subject matter of the decision is one that ought to be informed by policy considerations . . . This immunity represents an absolute statutory presumption, so to speak, that all regulations involve policy judgments that must not be interfered with. I think there is a similar presumption, though not an absolute one, that decisions reserved to policymaking levels involve such judgments—and the higher the policymaking level, the stronger the presumption.

Id. (Scalia, J., concurring).

125. *See* R. v. Imperial, [2011] S.C.C. 42, para. 79–83.

ly."[126] Second, all jurisdictions support immunity from tort for "core policy" decisions.[127] Finally, defining a core policy decision as "not operational" can be problematic because "decisions in real life may not fall neatly into one category or the other."[128] With these observations in mind, the court concluded that "core policy government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith."[129]

Applying this new "core policy" test to the negligent misrepresentation claim, the court asked "whether the alleged representations of Canada to the tobacco companies that low-tar cigarettes are less harmful to health are matters of policy, in the sense that they constitute a course or principle of action of the government."[130] The court dismissed the tobacco manufacturer's third-party claim because Canada's representations were "part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes."[131]

In *R. v. Imperial Tobacco*, the tobacco manufacturers were attempting to strategically muddy the waters of the litigation. Impleading the Canadian federal government benefited the tobacco manufacturers not only by potentially limiting their liability for repayment of the provincial medical costs, but also by prolonging any ultimate judgment on those central issues. By introducing complex legal questions unrelated to their own liability, the tobacco manufacturers were able to derail the litigation for over four years. However, the court's decision refocused

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126. *Id*. para. 84.

127. *Id*. para. 85.

128. *Id.* para. 86.

129. *Id.* para. 90. The court noted that this "core policy" approach was not a "black and white test" because "difficult cases may be expected to arise from time to time here it is not easy to decide whether the degree of 'policy' involved suffices for protection from negligence liability." *Id*. Nevertheless, the court was confident that "core policy" decisions would be "readily identifiable." *Id.*

130. *Id*. para. 92.

131. *Id*. para. 95. The court noted that the "course of action was adopted at the highest level in the Canadian government . . . involved social and economic considerations," and was "developed . . . out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease." *Id.*

the course of the litigation on the parties at the heart of the Cost Recovery Act—provincial plaintiffs seeking health care costs from tobacco manufacturers.[132]

III. ISSUES IN FAST FOOD LITIGATION

In claims against food manufacturers or retailers, plaintiffs seeking damages for the food's contribution to their obesity have faced difficult issues involving causation and assumption of risk.[133] An examination of food litigation in the United States will demonstrate the issues involved in fast food litigation, including causation and assumption of risk arguments. As discussed in Part II, these are the same arguments that were utilized by the tobacco manufacturers in tobacco litigation.[134]

One of the most well-known fast food litigation cases in the United States is *Pelman v. McDonald's Corp*.[135] In *Pelman*, two minors sued the fast food restaurant McDonalds claiming, among other things, that "McDonalds acted at least negligently in selling food products that are high in cholesterol, fat, salt and sugar when studies show that such foods cause obesity and detrimental health effects."[136]

One of the weaknesses of the plaintiffs' claims in *Pelman*[137] is common to food litigation in general. The *Pelman* court elegantly expressed this issue, asking "where should the line be drawn between an individual's own responsibility to take care of herself, and society's responsibility to ensure that others shield her?"[138] The court held that "if consumers know (or reasonably should know) the potential ill health effects of eating at McDonalds, they cannot blame McDonalds if they, nonetheless, choose to satiate their appetite with a surfeit of supersized McDonalds products."[139] The *Pelman* court dismissed the plaintiffs' negligence claim, holding that "it is well-known that fast food in general, and McDonalds' products in particular, contain high levels of cholesterol, fat, salt, and sugar, and that such

132. *See generally id.*
133. *See* Pelman v. McDonald's Corp., 237 F.Supp.2d 512 (S.D.N.Y. 2003).
134. *See* Courtney, *supra* note 17, at 99.
135. *See Pelman*, 237 F.Supp.2d.
136. *Id.* at 520.
137. *See id.* at 516.
138. *Id.*
139. *Id.* at 517–18.

attributes are bad for one."[140] In so holding, the *Pelman* court is essentially addressing a problem of assumption of risk.[141] The plaintiff is barred from recovery if he or she knew that eating certain foods would lead to obesity, yet chose to continue eating them despite the risk of adverse health implications.[142] This same issue has arisen in tobacco litigation where the health hazards of smoking have long been well known.[143] Tobacco manufacturers have made the same argument that the food manufacturer made in *Pelman*: if a plaintiff knew about the health hazards of smoking and continued to smoke, they should be barred from recovery.[144]

The *Pelman* court pointed out another issue that plaintiffs face in food litigation when it noted that "a number of factors other than diet may come into play in obesity and the health problems of which plaintiffs complain."[145] Essentially, the *Pelman* court was addressing the issue of causation; that is, when an injury has several possible causes, courts may have difficulty assigning liability to one possible cause over another.[146] For instance, in addition to diet, obesity can also be influenced by genetic factors.[147] Therefore, McDonalds argued in *Pelman* that the plaintiffs' obesity was hereditary, as opposed to being caused by eating McDonald's food.[148] Obesity can also increase the risk of heart disease;[149] however, propensity for heart disease can be hereditary.[150] Coincidentally, smoking also contrib-

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140. *Id.* at 532.

141. *See id.*

142. *See id.*

143. *See* Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 864 (1992).

144. *See* Courtney, *supra* note 17, at 99.

145. *See* Pelman, 237 F.Supp.2d at 539.

146. *Id.*

147. *See Health Lifestyles: Obesity*, UNIV. OF MICHIGAN HEALTH SYSTEM (last visited Oct. 29, 2011), http://dwb4.unl.edu/Chem/CHEM869P/CHEM869PLinks/www.med.umich.edu/1libr/primry/life13.htm.

148. *See* Pelman, 237 F.Supp.2d at 539.

149. *See Obesity Information*, AM. HEART ASS'N (last updated May 5, 2011), http://www.heart.org/HEARTORG/GettingHealthy/WeightManagement/Obesity/Obesity-Information_UCM_307908_Article.jsp#.TqwwqJuIm0s.

150. *See* William Haynes, *Risk Factors for Heart Disease: Frequently Asked Questions*, UNIV. OF IOWA HOSP. & CLINICS (Jan. 2004), http://www.uihealthcare.com/topics/medicaldepartments/internalmedicine/heartriskfactors/index.html.

utes to heart disease.[151] Therefore, both tobacco manufacturers and fast food retailers could argue that a plaintiff's heart disease was hereditary, as opposed to being caused by smoking cigarettes or eating hamburgers.

Another causation issue that the *Pelman* court addressed was that "any number of other factors then potentially could have affected the plaintiffs' weight and health . . . the more often a plaintiff had eaten at McDonalds, the stronger the likelihood that it was the McDonalds' food (as opposed to other foods) that affected the plaintiffs' health."[152] Unless an obese plaintiff only ate at one fast food restaurant in his or her life, any single fast food manufacturer will have an argument similar to the previous causation argument. In *Pelman*, McDonalds argued that the plaintiffs' obesity was not caused by McDonald's food, but rather by the food from a different fast food restaurant.[153] Again, defendants in food litigation and tobacco litigation have the same argument at their disposal. For instance, the Newport cigarette company could have argued that a plaintiff's cancer was caused by smoking Marlboro cigarettes.

The *Pelman* court dismissed the plaintiffs' claims holding that the complaint failed "to allege with sufficient specificity that the McDonalds' products were a proximate cause of the plaintiffs' obesity and health problems."[154] In *Pelman*, issues of assumption of risk and proximate causation represented stumbling blocks for plaintiffs in food litigation.[155] However, just as defendants in food litigation and tobacco litigation can use these arguments to rebut a plaintiff's claim, the Cost Recovery Act and the subsequent tobacco litigation can be used to overcome food and tobacco defendants' assumption of risk and proximate causation defenses.

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151. *See, e.g.*, *Why Quit Smoking?*, AM. HEART ASS'N, http://www.heart.org/HEARTORG/GettingHealthy/QuitSmoking/QuittingSmoking/Why-Quit-Smoking_UCM_307847_Article.jsp#.TqwysZuIm0s (last updated Aug. 30, 2011).

152. Pelman, 237 F.Supp.2d at 538-539.

153. *See id.* at 539.

154. *Id.* at 540.

155. *See id.*

IV. PROVISIONS OF THE COST RECOVERY ACT THAT ARE BENEFICIAL TO FOOD LITIGATION PLAINTIFFS

The current Cost Recovery Act contains several provisions that would benefit plaintiffs in food litigation by reducing their vulnerability to assumption of risk and causation arguments. The first provision specifically authorizes Canadian provinces to initiate cost recovery suits on behalf of patients treated for tobacco related illnesses.[156] The Cost Recovery Act section 2(1) provides that "the government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong."[157] Section 2(4)(b) provides that "in an action under subsection (1), the government may recover the cost of health care benefits . . . on an aggregate basis, for a population of insured persons as a result of exposure to a type of tobacco product."[158]

This was an important provision for plaintiffs in overcoming the assumption of risk defense raised by tobacco manufacturers. There are two theories that address how cost recovery suits involving government entities rebut the assumption of risk argument in tobacco cases.[159] The first theory posits that the suit places the assumption of risk "one step removed because the states were suing on behalf of smokers."[160] Because it is the provincial government that is bringing the lawsuit seeking reimbursement for health care costs, the cause of action is "one step removed" from the injured smoker who chose to use tobacco products.[161]

The second theory of how cost recovery suits involving government entities rebut the assumption of risk argument in tobacco cases is the unjust enrichment theory.[162] This theory differs from the "one-step-removed" theory in that it does not as-

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156. *Cupp World*, *supra* note 15, at 291.

157. Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, §2(1).

158. *Id.* §2(4)(b).

159. *See* Richard L. Cupp, Jr., *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game?*, 27 PEPP. L. REV. 685, 696 (2000) [hereinafter *Cupp Domino*]; *see also* Traylor, *supra* note 66, at 1097 n.107.

160. *See Cupp Domino*, *supra* note 159, at 696.

161. *Id.* at 689.

162. *See* Traylor, *supra* note 66, at 1097 n.107.

sume that "the states were suing on behalf of smokers."[163] Instead, it posits that, "the states were suing on behalf of taxpayers who bore the financial burden of Medicaid-covered smokers' health care."[164] The unjust enrichment theory argues that these taxpayers "expended hundreds of millions of dollars in caring for their fellow citizens," and tobacco manufacturers were "unjustly enriched to the extent that [the] taxpayers have had to pay these costs."[165]

Both the "one step removed" theory and the unjust enrichment theory serve to introduce a counter-argument to tobacco manufacturers' assumption of risk argument. The two theories share the same underlying premise: regardless of whether the province was suing on behalf of the smokers or the taxpayers, it is the province that has the cause of action to recover health care costs.[166] The injury suffered by the smoker (illness) is susceptible to the assumption of risk argument if the smoker knew about the health hazards associated with tobacco use.[167] However, the injury suffered by the province (payment for medical care) would not be affected by the smoker's knowledge.[168] As was discussed in Part I, one of the central tenets of Canada's health care system is universal access: even smokers who knew the health risks and still smoked are entitled to treatment.[169] By assigning the injury to the province that paid the health care costs, the Cost Recovery Act has removed the smoker that was the target of the assumption of risk defense.[170]

If a statute similar to the Cost Recovery Act were enacted to provide provinces with a direct cause of action against food retailers to recover medical costs associated with obesity, the same counter-argument could be used by plaintiffs in food liti-

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163. *Id.*

164. *Id.*

165. Traylor, *supra* note 66, at 1097 n.107 (*citing* Complaint at 79 & 82 *Moore ex rel. State v. Am. Tobacco Co.*, No. 94–1429 (Miss. Ch. Ct. Jackson County May 23, 1994).

166. *See, e.g.*, *Cupp Domino*, *supra* note 159, at 689; Traylor, *supra* note 66, at 1097 n.107.

167. *See id.*

168. *See id.*

169. *See* Nelson, *supra* note 18, at 524. Because the tenet of "universality" guarantees health care to all citizens, even Canadian smokers would be entitled to health care.

170. Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, §2(1).

gation. If such legislation was enacted, provinces could rebut food retailers' assumption of risk argument by responding that the province did not choose to eat foods high in fat and calories, rather they are seeking reimbursement for health care costs paid by provincial taxpayers to treat obesity related illnesses.

Another provision of the Cost Recovery Act that would be beneficial to food litigation plaintiffs in Canada is section 2(5)(a).[171] Under section 2(5)(a) of the Cost Recovery Act,

> If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis, it is not necessary to identify particular individual insured persons, to prove the cause of tobacco related disease in any particular individual insured person, or to prove the cost of health care benefits for any particular individual insured person.[172]

This section of the Cost Recovery Act also limits the discovery access to any individual patient's testimony or medical documents, and allows the government to prove health care benefits through "a statistically meaningful sample of documents."[173] It also provides clear separation between the smoker's physical injury, and the province's financial injury in paying medical costs. By elucidating this distinction, section 2(5)(a) further attenuates the tobacco companies' assumption of risk arguments as discussed above. In addition, this section generally "[eases] the government's case against tobacco manufacturers" by lowering the burden of proof.[174]

If legislation similar to the Cost Recovery Act were passed with a provision like section 2(5)(a), provinces could sue food retailers to recover health care costs associated with obesity without having to prove any individual consumer's injury. If such legislation were passed, it would also certainly "ease the government's case" against food manufacturers and fast food retailers.[175]

Finally, the Cost Recovery Act also addresses the causation issues in tobacco litigation.[176] Under the Cost Recovery Act, if

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171. *See Cupp World*, *supra* note 15, at 525.

172. Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, §2(5)(a).

173. *Id.* §2(5)(b)-(e).

174. *Cupp World*, *supra* note 15, at 292.

175. *Id.*

176. *See id.*

the tobacco manufacturer "breached a common law, equitable or statutory duty . . . the court must presume that the population of insured persons who were exposed to the . . . tobacco product . . . would not have been exposed but for the breach."[177] In addition, if the court finds a breach, it must presume that "the exposure . . . caused or contributed to the disease or risk of disease."[178] In other words, if there is a breach of duty, the court assumes the causation requirement has been met. This section of the Cost Recovery Act is important to provincial plaintiffs in the tobacco litigation because it effectively nullifies the tobacco manufacturer's two strong causation arguments: that the disease was caused by something other than smoking, and that the disease was caused by the cigarettes of a different tobacco manufacturer.[179] A similar provision could be passed by a provincial legislature authorizing provincial health care cost recovery against food manufacturers and retailers. In the fast food litigation context, this would eliminate a defendant's argument that a different factor (such as heredity) caused the plaintiff's obesity or heart disease, or that a different fast food restaurant (such as Burger King) caused the plaintiff's obesity.

These provisions in the Cost Recovery Act substantially assisted the provincial plaintiff's case against tobacco manufacturers by eliminating the tobacco defendant's assumption of risk and causation arguments.[180] Similar legislation aimed at food litigation in Canada would provide a great advantage to provincial plaintiffs seeking health care cost recovery.

CONCLUSION

The pattern of litigation in the United States began with individual plaintiffs having little success against tobacco manufacturers with better resources.[181] As the litigation evolved to include class action claims and cost recovery suits, plaintiffs were able to find success in the MSA.[182] Canadian provinces learned a valuable lesson from United States tobacco litigation when the provinces initiated their own cost recovery suits

177. Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, §3(1)–(2).
178. *Id.*
179. *See id.*
180. *See Cupp World*, *supra* note 15, at 292.
181. *See* Henderson & Twerski, *supra* note 36, at 74.
182. *See* Smith, *supra* note 37, at 23.

against tobacco manufacturers.[183] The Cost Recovery Act and the subsequent tobacco litigation in Canada demonstrated a litigation model that has found initial success in Canadian courts. This litigation model also provides a blueprint for health care cost recovery lawsuits that Canadian provinces could initiate against manufacturers and retailers in other industries, such as the food industry.

By initially commencing health care reimbursement suits against food manufacturers, provincial plaintiffs will be able to immediately take advantage of the benefits of class action suits that the tobacco plaintiffs spent decades developing in the United States and Canada. And with strong precedent focusing cost recovery cases in Canadian courts on the central liability of the manufacturer, provincial plaintiffs may ultimately be successful in recouping health care costs paid to treat obesity related illnesses.

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183. *See Cupp World*, *supra* note 15, at 292.

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