

## TOBACCO ROAD



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09.2000

Why our own governments are taking their tobacco litigation down the road (and south of the border) in order to get richer and more punitive legal remedies against corporate defendants? The fact that our own governments insist on using a foreign legal system

MANY THINGS ABOUT CHICAGO lawyer Fred Bartlit leave their mark. He's a big, ramrod guy with a barrel chest and gruff military voice. A West Point graduate, he's also *magna cum laude*, University of Illinois College, and editor (1960) of the University of Illinois Law Review. If that's not enough, he served four years as a U.S. Army Ranger. This alone is bound to bring a few good men to attention. Be nice to this guy-or at least be careful. One other thing about Bartlit stands out. He is, at 67, a techno-whiz who demands that his law firm is out there on the cutting-edge of information technology so that when he walks into a courtroom, he's ready.

He creates a virtual office in any city where he's pleading a case. He loads up a semi-tractor trailer with computer equipment, taxes, telephones and copying machines that he then transfers to a hotel suite where he can run a 24-hour-a-day operation. He calls it his travelling war room. And he claims it gives him a strategic edge.

His credentials as well as his respectable track record are ostensibly the reason why the Canadian government last year hired him to lead their \$1 -billion racketeering lawsuit against R.J. Reynolds Tobacco Co. and a string of affiliates and subsidiaries, including Toronto-based P.J.R.-Macdonald Inc. (now called JTI-Macdonald after it was sold last year to Japan Tobacco).

Canadian lawyers might be excused, however, for regarding Bartlit as an American carpetbagger stealing away their livelihood. The exact details of his hourly rate/contingency-fee agreement have never been made public. What is known is that so far he and his firm, Bartlit Beck, have collected \$3.76 million US, the highest single legal tab run up by Ottawa in a fiscal year. And the race hadn't even begun before U.S. Federal judge Thomas McAvoy in July dismissed the racketeering case claiming it involved interpretation of a foreign government's tax laws, which is forbidden under the common-law Revenue Rule. (McAvoy's ruling invites appeal. He stated that, in our modern global economy, he finds the rule "outdated" and the rationale "unpersuasive," and cites other judgments that share this view. He appeared, however, bound by judgments of the Second Circuit appeals court.)

But before lawyers get too upset about the southern migration of jumbo legal fees, it's important to understand where Bartlit comes from and how his hiring reflects on our own judicial system.

Though his accomplishments are considerable (44 cases tried between 1971 and 1998, 32 wins, seven settled, four lost), Bartlit is not self-made. In fact, Bartlit is no special genius. He is part of the collective experience of the entire American plaintiff bar in organizing and pleading complex cases against major corporations that take years of preparation. In this sense, he is little more than a product. One of many fashioned over more than a century of aggressive, entrepreneurial, risk-taking American plaintiff bar actions.

The fact that the federal government has to go to the U.S. to seek justice is, for many lawyers, an admission that the Canadian legal system simply fails to meet the grade for highly complex cases involving massive corporate fraud. In contrast to the bold vistas of the American bar, the Canadian judicial landscape appears as a slow-growth garden of perennially cautious, overly conservative, often lazy, chronically underfunded and all-too-elitist judiciaries. So if Canadian lawyers complain that the tobacco bonanza is not descending on their town, it's probably their own fault. But the loss is that of all Canadians.

Had the lawsuit been filed in Canada, the judicial system would have had an infusion of much more than windfall legal fees. Lawyers and judges would benefit from the experience and the law likely would advance. But that's not going to happen.

Instead, the intricacies of large litigation will be explored outside Canada. Canadians will not garner the benefits of courtroom debates that inevitably probe the strength and weakness of evolving justice systems. That will all happen in a foreign jurisdiction where American lawyers and judges will work with American legal systems to advance American laws. The only benefit Canada will ever get will be whatever money it might win from its lawsuit.

"The United States has an independent plaintiff bar that is fearless in terms of its willingness to take on powerful interests and we do not, and I think that our democracy is weaker because of that," said Toronto lawyer Doug Lennox, who is litigating two tobacco-related actions here.

The mere fact that Ottawa had filed its suit in Syracuse, N.Y., and was using 18 U.S. Code Chapter 96—the famous Racketeer Influenced and Corrupt Organizations (RICO) statute for its remedy, points to a gaping hole in our own system. Ottawa claims tobacco companies aided and abetted smuggling from 1991 to 1994, thereby defrauding the Canadian government of taxes.

If the federal attorney general believes RICO is the appropriate recourse, why does Canada not have a RICO statute that makes sense for Canadians? Perhaps it is because Canada's judiciary has not been spirited to create the kind of debate that would have given birth to a RICO statute. RICO in the U.S. did not come out of nowhere. It evolved out of a judiciary that is an active part of the American political process.

"There's a lot of hype here concerning people in the U.S. being able to hold companies to ransom and get big awards," said Toronto lawyer Andreas Seibert, who has a class-action suit in the wings against all three major tobacco companies. "But here the average guy cannot even get into court. They cannot get access to the courts because it's too expensive and the payback is too small. So lawyers will not even take the case unless it is a slam dunk."

Despite growing evidence that tobacco companies have willfully concealed the health hazards of smoking from the public, Canadians have launched only five tobacco liability lawsuits. The first was launched in British Columbia in 1988 and was finally banged out of court years later by judges who ruled it was time barred: *Perron v. R.J.R. Macdonald Inc.* (1990), 66 D.L.R. (4th) 132.

British Columbia is the only province to pursue in Canada the tobacco manufacturers for health cost recovery. The lawsuit springs from the Tobacco Damages and Health Care Costs Recovery Act that was enacted in 1998.

The legislation is modeled after an American law-Florida's highly successful 1995 Medicaid Third-Party Liability Act. The B.C. Supreme Court struck down the statute in February on the issue of extra-territoriality but recognized the essential right of the province to pursue Big Tobacco for health cost recovery. The province is therefore redrafting the legislation: *British Columbia (Attorney General) v. JTI-Macdonald Corp.* (2000), 184 D.L.R. (4th) 335.

Ontario, the nation's most populated province, has only three tobacco product liability suits, all of which are barely off the ground. Ironically, the furthest along is a mere \$6,000 small claims suit launched in 1997 by Joseph T. Battaglia, who's 58. He smoked Imperial Tobacco Ltd. brands since he was 16 when he began working as an office boy with Rothmans of Pall Mall Ltd., later rising to national sales manager.

He says the company encouraged him to smoke, claiming it would advance his career and not damage his health. Now, however, he says he has coronary heart disease directly related to smoking and, despite numerous attempts, can't cure his addiction.

Unable to find a lawyer to take his case, Battaglia initially represented himself until Doug Lennox agreed to help out. Three years after the filing, he only recently won the right to a trial. That is the furthest a tobacco case has ever advanced in this country (*see sidebar*).

"He doesn't care about the money. He wants the tobacco executives to be forced to stand up in court and explain themselves," Lennox said. "Civil litigation to my mind is not about money. I don't want to represent a client who tells me, 'I've been wronged, I want money.' I want someone to tell me 'I have been wronged and I want to make a difference.'"

"There are a lot of Canadians who have lost loved ones to the tobacco industry and they all deserve a chance to go to a Montreal courtroom, or to a Toronto courtroom or what have you, and sit there and listen to these tobacco executives who have acted so callously for so long."

Andreas Siebert filed his class-action product liability case against R.J.R.-Macdonald, Imperial Tobacco and Rothmans Benson & Hedges Inc. in 1995. The case drags on. It still has not received class-action certification. Siebert blames the delays on the flood of motions from tobacco companies seeking access to plaintiffs' medical records.

Ontario's class-action legislation is fairly liberal. It requires a cause of action that is capable of proof. A plaintiff must also show there is one or more individuals who would be recognized as a class of similarly related individuals with common cause. Finally, the lawyer must produce a workable plan of litigation.

Siebert is currently in the Ontario Court of Appeal seeking to file a separate action against the tobacco companies for destruction of documents.

Lennox also is seeking class-action approval for a suit alleging that the three major tobacco companies conspired against the production of cigarettes that carry a lower risk of fire.

Like the federal government, Ontario has chosen to seek its remedy in the U.S. Last year it filed suit, a health care cost recovery case, against Big Tobacco and retained the hugely successful South Carolina firm of Ness Motley Loadholt Richardson & Poole. The Ontario Health Insurance Plan (the province's public health insurer) claims tobacco-related illnesses have cost the province an estimated \$40 billion US.

Ness Motley (the same firm dramatized in the film *The Insider*) represented 30 of the 50 U.S. states in the \$254-billion US settlement in 1997 with U.S. tobacco companies. The firm stands to earn as much as \$12 billion US in contingency fees from that case. Ontario has agreed to pay Ness Motley a 20-percent contingency fee, meaning the firm stands to earn as much as \$8 billion US from a successful prosecution. Ron Motley has agreed to spend \$20 million US to prosecute the action. It's a can't-lose situation for Ontario. But what does it mean for the Canadian judicial system?

Lawyers like Lennox claim Ontario's decision to seek justice outside Canada is an admission that the Canadian system is a failure.

The only other tobacco-related action is in Quebec where lawyers Bruce Johnston and Philippe Trudel are seeking the right to file a health-related class action against the three major Canadian tobacco companies. The case was filed in 1998: See *Fortin c. Imperial Tobacco ltée* [1999] J.Q. no 2593.

The tobacco companies contested the capacity of the two lawyers to act on the file because a partner at a previous law firm had once acted for a tobacco company. The Quebec Appeals Court recently denied Big Tobacco's motion to dismiss.

"I would say the plaintiff bar in Canada as a whole is much more timid than it is in the States," Johnston said. "I think there is an important element of corporate responsibility that is lacking in this country because of this. [Tobacco companies] market a product that addicts and kills people and virtually no one has thought to bring

them to justice." Johnston calculates that he and his partner have spent about \$200,000 in time and disbursements on the case so far.

Most of the provinces have declared that they intend to file health care cost recovery cases. The intended venues have not been announced. The bandwagon is getting crowded, but little action is evident.

## **The Small Claim That Wouldn't die**

A case in small claims court that Imperial Tobacco Ltd. Could have settled for \$1 and an apology will now lead to a costly trial next November. The company has had numerous opportunities to resolved the three-year-old civil suit that alleges Imperial misled the public and failed to warn smokers about the health risks of its so called "mild" cigarettes.

Last June, a week after the head of Imperial admitted to a Senate committee that cigarettes are addictive and dangerous, the company remained resolute that it would not settle. Joseph Battaglia, the company's former cigarette salesman, filed a civil suit against Imperial in June 1997.

Battaglia alleges that Imperial was negligent when it misrepresented the levels of tar and nicotine on its extra mild cigarette packages as being four milligrams and 0.4 milligrams per cigarette respectively. The actual levels were 26 milligrams a cigarette for tar and 2.24 milligrams a cigarette for nicotine, the document states. Last February, Battaglia offered to settle the lawsuit for \$1 and a letter from Imperial apologizing for withholding vital information about health risks and for its efforts to mislead the public through its development and marketing of low-tar cigarettes.

In its statement of defense, Imperial Tobacco rejects Battaglia's allegations and denies "that it is now or has ever been involved in any conspiracy as alleged, or otherwise." Imperial also denies that Battaglia is addicted to nicotine, as he claims, and states "that millions of smokers quit every year."

Battaglia is represented by Toronto lawyer Douglas Lennox, while Imperial has Osler Hoskin & Harcourt's Deborah Glendinning.

Contrast this with the U.S., where tobacco litigation goes back decades and literally hundreds of cases have been filed. The first was in 1953 and was quickly tossed out. But that didn't stop the American plaintiffs' bar. It continued to chase the tobacco companies until it finally found the winning formula in 1994 with a settlement in Mississippi. Since then, the floodgates have opened culminating in the massive \$246-billion US settlement in 1997 creating a windfall for American lawyers and state treasuries.

Yet the money is hardly the point. The long history of American tobacco litigation ultimately served a higher purpose. It was a massive dose of truth serum injected into the muscular arm of a strapped-down industry. Millions of corporate and scientific documents chronicling tobacco company research and the behavior of tobacco executives throughout the last century have been forced into the public realm and are, in countless ways, breathtakingly revealing.

In fact they are so revealing that they serve as the basis for more and more suits and criminal investigations not only in the U.S., but also in Canada and throughout Europe. The tobacco industry, which prided itself on never losing lawsuits and spent hundreds of millions of dollar in the process, is at bay. Its Achilles heel is its own extensive documentation and databases, revealed thanks to an undeterred American bar for whom the big score offers the necessary incentive to seek truth and restitution.

This is why Canada chose to take its anti-racketeering case to JL Syracuse, NY. To deal with a more sophisticated judiciary, well practiced in such complex cases.

This is crucial primarily because Canada's case opens a whole new area of tobacco litigation. It's not about health or fire safety-it's about corporate fraud and racketeering at a international level. (The Republic of Ecuador and 23 states in Colombia have since filed two similar lawsuits in the U.S. claiming huge tax loses against Philip Morris Companies Inc., Reynolds and British American Tobacco Co. Ltd.)

These cases will rely heavily on company documents and, in Canada's case, on testimony from corporate insiders such as former R.J.R. executives Les Thompson and Stan Smith. Thompson is the sales manager at R. J.R.-Macdonald who from 1991 to 1994 was in charge of organizing tobacco shipments into the smuggling networks of Akwesasne Indian Reserve near Cornwall, Ont. He pleaded guilty last year in Syracuse to money laundering charges and is currently serving a four-year sentence in federal prison. He also pleaded guilty in Toronto in February to one charge of conspiring to defraud the federal government. He received a suspended sentence.

Smith was R.J.R.-Macdonald's vice-president of sales during the smuggling era. He was never charged in the U.S. and has since resigned from the company and moved to England. He was expected to testify on behalf of the plaintiff and support Thompson's evidence that R.J. R. conspired at the highest levels to aid and abet smuggling. The government is also negotiating with other former senior executives at R.J.R.

Justice department lawyer Duff Friesen, who is managing the five-man tobacco legal team in Ottawa, says the government might include Imperial Tobacco and Rothmans as defendants. Like R.J.R., these companies also had a network in place that supplied cigarettes to smugglers. All three companies have stated that they broke no laws.

R.J.R.'s permanent retainer, New York lawyer C. Steven Heard Jr., will quarterback its defense. Heard is the same lawyer who debriefed Thompson when he learned in June 1998 that he was under investigation for smuggling related charges. Company lawyers urged him to stand tall, no wobbly legs needed here. But when Thompson was arrested last year at the Windsor-Detroit border crossing and sent to Syracuse to stand trial on conspiracy to defraud and money laundering charges, his company-paid lawyers advised him to negotiate a plea. Now he feels like the company's sacrificial lamb. So there's no love lost between Thompson and his former employers.

Heard's first move was to file a motion to dismiss the entire case. He claimed:

- the case is essentially a tax recovery case and under revenue rules, U.S. courts cannot interpret foreign tax laws;

- the case is time-barred under RICO and the Canadian government is not a "person" as defined by the statute;
- most of the alleged illegal actions took place in Canada and therefore Syracuse is not a *forum conveniens*, and
- The Canadian Tobacco Manufacturers' Council is based exclusively in Canada, and is therefore not subject to New York jurisdiction.

The motion was debated June 23 before U.S. federal Judge Thomas McAvoy in the sleepy university town of Binghamton, NY. R.J.R. brought in 11 lawyers. Canada's Fred Bartlit had five, two of whom sat behind Bartlit with open laptops. Auditing the procedure was a lawyer representing the Colombian lawsuit.

The questions of sovereign tax law interpretation and of time bar are crucial. The government alleges its injuries took place between 1991 and 1997. RICO requires that it file no less than four years after discovery of its injury. R.J.R. claims the government knew of its injury in 1994 when it rolled back tobacco taxes.

In its arguments, the attorney general claimed that equitable tolling permits a plaintiff to toll the statute of limitations during the time in which it is unable to obtain "vital information bearing on the existence of his claim." This includes the identify of the wrongdoer, which Canada claims was only revealed, at the earliest on June 20, 1997, when a U.S. grand jury indicted Thompson and 20 co-conspirators including R.J.R. subsidiary, Northern Brands International Inc.

One key issue is whether the government applied due diligence in attempting to discover who was responsible for its injury. Given its vast investigative resources, Ottawa might find it difficult to convince a U.S. federal judge it wasn't clever enough to uncover the truth until a task force of U.S. police and prosecutors succeeded in 1997. Essentially, Ottawa claims it was hoodwinked by the tobacco companies and their agent, the Canadian Tobacco Manufacturers Council (CTMC).

Canada argues that the U.S. venue is appropriate because most of the conspiracy occurred in the U.S. and many of the defendants and potential witnesses are in the U.S. Syracuse was convenient because it served as the venue for the criminal charges against Thompson and Northern Brands, the R.J. R. company through which tobacco was funneled to the smugglers. Even the judge is the same. Thomas McAvoy presided over the criminal trials, so Syracuse is a judicial environment well-versed in the facts of the case.

Yet the same argument for holding the case in the U.S. can also be made for holding it in Canada. The alleged fraud is against the Canadian government and was allegedly hatched on Canadian soil by a Canadian-based company and its Canadian executives.

Big awards are a major incentive to litigation in the U.S. A RICO suit, for example, awards treble damages. Canada's relatively paltry settlements are largely the reason most Canadians do not have access to justice, thereby stunting the nation's judicial growth, lawyers say.

Caps on damages are a huge disincentive for a lawyer to accept most cases. The Supreme Court in 1977, in the famous "damages trilogy" of cases, capped general damages at \$100,000, which has since risen, through indexation, to about \$250,000.

"The irony is if you are Brian Mulroney and there are allegations against you, you can file a lawsuit and you can get \$2 million," Lennox said. "But if you are a quadriplegic you can get \$250,000. So why take on a big company for \$250,000?"

There's an abundance of cases demonstrating the folly of suing even if you eventually win. Trial lawyers like Montreal's Brahm Campbell know only too well how quickly protracted suits can drain treasuries. Campbell fought an action for 13 years before he won a case where the Supreme Court of Canada ruled on the question of constructive dismissal: *Farber v. Royal Trust* (1997), 145 D.L.R. 4th 1. His client's award including claim, interest, indemnity and all judicial costs totaled only \$350,000. Did he recover his costs? Not even close, Campbell says.

"Unless a counsel believes in the principle and his client stands four-square with him, then it's possible [to get justice]," he says. But "for the vast majority of our population it's an impossible dream to go for that long for that meager sum."

In addition to the problem of puny awards, Campbell claims judges lack administrative backup to help cases proceed quickly through the system. "We spend \$100 million on an Olympic Stadium roof but we scrimp and save on judicial expenditures where the true debates of society should be held-and they are not being held because we don't spend the money," he said. "The machinery of justice has been left rusting and it's not fair to the judiciary.

"The average citizen does not have the wherewithal to wait years before truth will out and his damages are properly compensated," he said. "He doesn't have the money. So what restriction is there for a large corporation to stop abuse in our system? There is none."

Punitive damages, or the lack thereof, is another problem. In the recent insurance case of *Whiten v. Pilot Insurance Co.*, the plaintiff was awarded \$1 million after its family home burned down and the insurance company refused to pay the indemnity. The company charged arson even though there was no evidence to support the claim.

The award was meant to punish the company for its unreasonable conduct. But the Ontario Court of Appeal last year reduced the award to \$100,000. Justice John I. Laskin wrote a strong dissent claiming large punitive damages are needed to counter corporate misconduct: (1999), 170 D.L.R. (4th) 280. The Supreme Court has given leave to appeal and scheduled the case for a hearing in the fall.

Furthermore, costs can quickly bury a litigant and Ontario had until recently forbidden contingency fees, although the Ontario attorney general plans to introduce them in the fall.

Large awards have allowed U.S. firms like Ness Motely to accumulate massive war chests. They can afford to absorb the high cost of litigation anticipating a big payday. But Canadian courts frown on war chests. Consequently, large companies can bankrupt an individual with cost motions.

Montreal lawyer Leonard Siedman would love to have a war chest to continue his battle against the federal government on behalf of a translator who suffers from multiple chemical sensitivity or sick building syndrome as a result of working in a federally administered building poisoned by toxins. Siedman sued in 1997. The case

still has not gone to court. The federal government has used all its resources to try to obtain a declinatory exception. Losers in the Quebec Superior Court and the Court of Appeal, Ottawa has taken the case to the Supreme Court. Siedman is basically working *pro bono*. Siedman views our justice system as little more than an "ornament for the rich."

Aggressive tobacco litigation has not simply been a windfall for U.S. lawyers and state treasuries. It has educated the public about the dangers of smoking. It has also directly reduced smoking. Tobacco companies have had to increase prices to pay off the awards. Escalating prices are a main reason why young people decide not to smoke. Michael Szymarczyk, Philip Morris CEO, told a Florida jury in June that those higher prices have reduced his company's sales volume 13 percent.

For many lawyers, tobacco litigation and Canada's journey south for justice serve to highlight crucial issues concerning access to justice. They beg the crucial question of how can people obtain justice without a more entrepreneurial legal system?

William Marsden is an investigative reporter for The Gazette in Montreal He has reported extensively on smuggling and the tobacco industry and this year won his second National Newspaper Award.