1A. BOXES 2, 6 & 7: Are tobacco claims eligible for determination in a class action?

The inability of victims of smoking-related diseases to join forces to sue tobacco manufacturers has been a major obstacle to successfully obtaining compensation for the harm caused by tobacco. Even in jurisdictions that have class action procedures, courts are often reluctant to certify tobacco-related class actions, or allow such actions to continue as a class action because they are considered too unwieldy or raise too many individual issues.

An illustrative example is provided by the first class action against the tobacco industry filed in Ontario in 1995: *Caputo v. Imperial Tobacco.*[1] The case purported to represent "all residents of Ontario, whether living or deceased, who have ever smoked cigarette products manufactured, marketed or sold by the defendants". The estimated size of the group exceeded many millions of persons. The causes of action were numerous and notably included failure to warn, concealment of the addictive nature of tobacco and the targeting of young adults. The Ontario Court denied certification and the class action did not proceed any further. On the basis of the size of the group and the number of causes of action, the Court concluded that it was impossible to describe a single class that shared substantial common issues.[2] The court further held that "individual issues will remain to be decided before the liability of the defendants to individual class members can be ascertained".[3] Having so concluded, the court decided that aggregation of damages was not possible before the assessment of liability to each class member.[4]

Smoking and health litigation against the tobacco industry is suitable for class action treatment

There is no reason, in principle, why multiple tobacco claims would be unsuitable for a class action, given that all tobacco claims give rise to at least some common issues, including *inter alia*:

a) Whether and when tobacco manufacturers knew or ought to have known that their products were harmful to health including the health of non-smokers;
b) Whether and when tobacco manufacturers knew or ought to have known that their products were addictive;
c) Whether and when tobacco manufacturers were required to inform consumers and would-be consumers about the harmful effects of tobacco use;
d) Whether tobacco manufacturers adequately warned consumers and would be consumers about the harmful effects of tobacco use;
e) Whether tobacco manufacturers' public statements about the harmful effects of tobacco use were misleading;
f) Whether tobacco manufacturers suppressed research into the harmful effects of tobacco use;
g) Whether tobacco manufacturers' marketing of their tobacco products was misleading;
h) Whether tobacco manufacturers deliberately targeted adolescents and young adults in their marketing strategies;
i) Whether tobacco marketing influences adolescents and young adults to start smoking
j) Whether marketing of tobacco products influenced regular smokers to continue smoking rather than quit;
k) Whether marketing of "light" and "mild" tobacco products was misleading;
l) Whether the way in which tobacco companies manufactured tobacco products was negligent; and/or
m) Whether tobacco companies destroyed internal documents with the aim of avoiding their use in legal proceedings.

In almost every tobacco-related class action at least one of the above questions will be common to every class member's claim, and contested by the industry. Resolving common issues on a class-wide basis, rather than determining them again and again in individual proceedings, would save significant resources for class members and the courts hearing those claims, while also minimizing the risk of inconsistent judgments (a basic objective of all legal systems).

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[1] *Caputo v. Imperial Tobacco,* 2004 CanLII 24753 (ON SC).
[2] *Caputo* at para 45.
[3] *Caputo* at para 50.
[4] The Federal Court of Australia reached a similar conclusion in the case of *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 refusing permission to allow the proceeding to continue as a class action.

The certification of tobacco-related class actions involving very large numbers of claimants both in the United States[5] and Canada[6] demonstrate that tobacco class actions can be successfully case managed and common issues determined at trial, in a manner that significantly advances the resolution of thousands of claims in an efficient and orderly manner.

For these reasons legislation specifically recognizing that tobacco claims are ordinarily suitable for class action treatment should be considered. Class actions should not be decertified merely because the resolution of the common questions will not finally resolve every individual claim, or because individual issues predominate over common questions. Neither Canada nor Australia (unlike the United States) require common issues to predominate over individual issues as a prerequisite to the commencement of class actions. This approach is best practice in the context of tobacco control given the existence of common questions is, by itself, sufficient to justify aggregation of claims.

[5] Such as the *Engle* action in Florida where common issues decided on a class wide basis only, discussed above at part 2 (a).
[6] *Létourneau v. JTI-MacDonald Corp. et al.*; *Conseil québécois sur le tabac et la santé and Blais v. JTI-MacDonald Corp. et al,* discussed above at part 2 (b).