2C. BOX 4: PROVING CAUSATION ON THE BASIS OF STATISTICAL EVIDENCE (SOLELY)

Proving a tobacco manufacturer's wrong was a cause of the claimants' exposure to tobacco smoke on the basis of statistical evidence alone or adopting a rebuttable legal presumption to that effect is crucial to facilitate access to justice for individual claims for tobacco-related disease victims. The argument that the defendant's conduct was not the cause of an individual's decision to smoke is frequently made and often successful. Yet, there is a great deal of reliable evidence to suggest that the tobacco industry has successfully increased demand for tobacco products, and slowed the rate of decline in smoking prevalence, since the dangers of smoking became first publicly known and tobacco control measures implemented.

At a population level, there is compelling evidence, supported by considerable marketing, psychology, behavioural and econometric research, that the tobacco industry efforts to conceal research on the health risks of smoking, to undermine independent evidence on the health risks including the messages on warning labels, and the marketing of tobacco products have causally contributed to greater rates of smoking than would have otherwise been the case.[1] The challenge for most individual claimants is to establish that their own experience fits within these population wide trends, especially where the industry asserts that nothing it might have done differently would have affected the individual's decision to smoke.

The tobacco damages and health-care cost recovery legislation in Canadian provinces provides solutions to these questions in health care cost recovery claims, collective claims and individual damages claims. As already mentioned Quebec allows proof of causation (both of tobacco use and disease) on the basis of statistical evidence alone. Other Canadian jurisdictions employ rebuttable presumptions as to the link between the industry's conduct and the subsequent use and damage caused by tobacco use. For example, in health care cost recovery litigation the British Columbia legislation provides that a court must presume that the tobacco manufacturer's breach caused exposure and disease (or increased the risk of disease) to a portion of the population, but the defendant can reduce the amount of their liability by proving on a balance of the probabilities that their breach did not cause exposure or the disease.[2]

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[1] Much of this research is catalogued in the many U.S. Surgeon General reports dedicated to tobacco: see eg *The Health Consequences of Smoking – 50 Years of Progress* (2014); *Preventing Tobacco Use Amongst Youth and Young Adults* (2012); *Reducing Tobacco Use* (2000).

[2] See for example, Tobacco Damages and Health Care Costs Recovery Act 2000, section 3 (British Columbia).