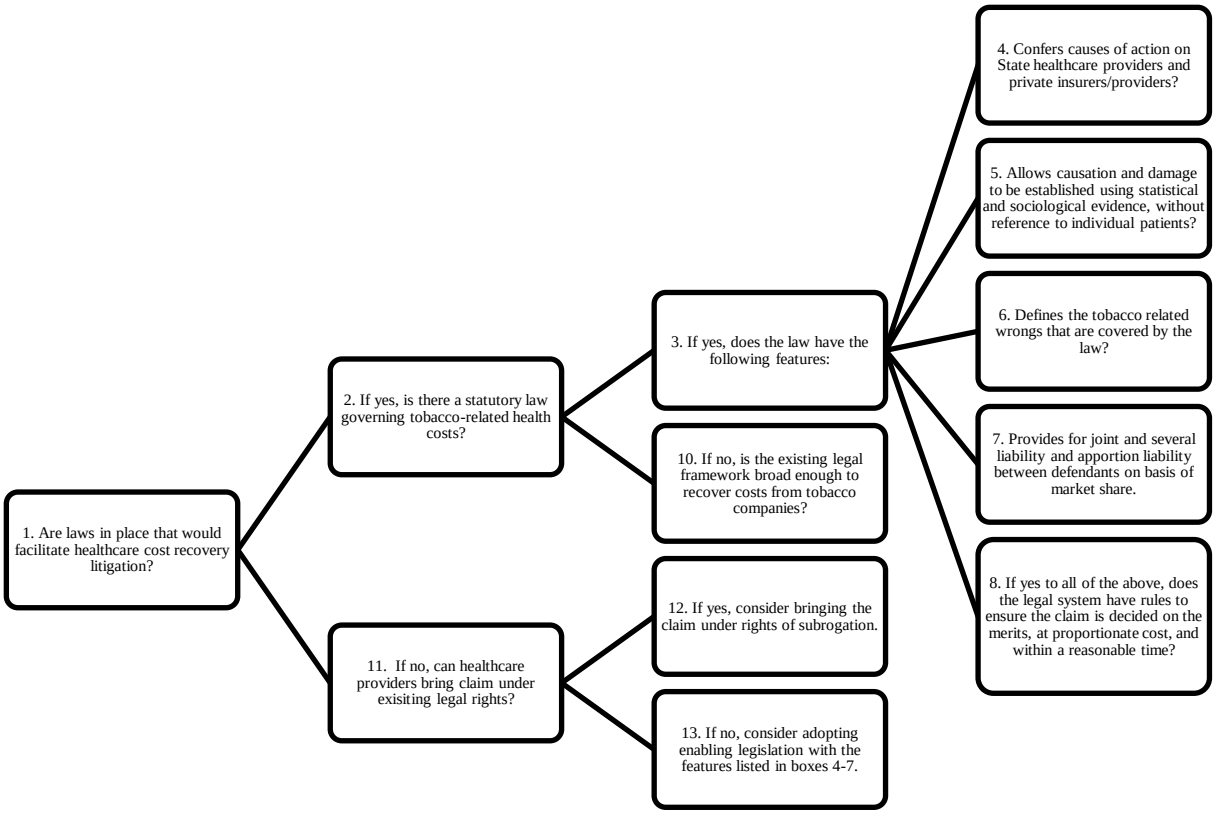
SCENARIO 3: HEALTH CARE COST RECOVERY ADDENDUM/LINK

DIAGRAM



INTERNATIONAL EXPERIENCE & REFORM OPTIONS IDENTIFIED IN REPORT TO COP 6/8.

Best Practice Reform Option

Health-care cost recovery claims are a form of civil litigation brought by either public or private health-care providers or funders in order to recover the health-care costs of tobacco-related harms. Such litigation may require enabling legislation to ensure a cause of action. Health-care cost recovery claims can counter many of the obstacles common to tobacco liability litigation, particularly by addressing the power and resource imbalance usually inherent in individual claims by giving standing to large bodies such as governments and private health insurers. In addition, claims brought by governments and health insurers remove the industry's ability to argue that the victim voluntarily consented to the risk or is partially responsible for the injuries he or she suffered. Enabling legislation for health-care cost recovery claims can also be used to address procedural and evidentiary challenges in the pursuit of liability claims.

International Experience

The United States of America is a noteworthy example of the value of health-care cost recovery litigation.

In 1994 a small number of US states initiated actions to recover tobacco-related health-care costs within their jurisdictions. These were followed by actions in more states. Successes during the process of several of these cases, including a trial in which many damaging internal industry documents were discovered, eventually led to the industry settling with four states and later entering into a Master Settlement Agreement with the remaining 46 states for a settlement which, up to 2013, had resulted in almost US$ 100 billion in actual payments from tobacco companies to the states.[1] In addition, the companies agreed to discontinue most advertising, refrain from a variety of deceptive practices, open a website including all documents produced in smoking- and health-related lawsuits, and fund a substantial counter-advertising initiative.

Most Canadian provinces have also now introduced legislation to enable the government to bring a health-care cost recovery claim, and have subsequently filed relevant claims. The two biggest provinces, Ontario and Québec, are seeking 50 billion and 60 billion Canadian dollars in compensation, respectively. While at the time of writing of this report no trial date had been set in any of the provinces' actions, the process to date illustrates notable legal tactics used by the tobacco industry, with enabling legislation subject to constitutional challenges in some provinces, and an unsuccessful attempt by the industry to add the Canadian Federal Government as a third party defendant on the grounds that it misled Canadian consumers.

The experiences of the Canadian provinces demonstrate the importance of procedural rules to facilitate litigation and ensure that cases are completed within a reasonable time and at a proportional cost. British Columbia was the first province to introduce enabling legislation in 1998, and subsequently filed a claim against the industry in 2001. Following a successful constitutional challenge, the revised legislation was upheld as constitutional by the Canadian Supreme Court in 2005.[2] Despite the enabling legislation for the health-care cost recovery litigation in Canadian provinces having been shown to be constitutional, and appearing to address all of the legal and evidentiary obstacles needed to make such litigation possible and viable, the continuing experience highlights procedural challenges.

Health-care cost recovery cases have been pursued with varying outcomes in other jurisdictions, including Israel, Marshall Islands and Saudi Arabia. In April 2014, the National health Insurance Service (NHIS) in the Republic of Korea announced that it is preparing litigation against the tobacco industry to offset treatment costs for diseases linked to smoking.[3]

[1] See Project Tobacco. "2013-11-15 Payments to States Inception thru October 29 2013". National Association of Attorneys General (2013) (http://www.naag.org/backpages/naag/tobacco/msa-payment-info/2013-11-15%20Payments_to_States_Inception_thru_October_29_2013.pdf).

[2] British Colombia v. Imperial Tobacco Canada Ltd. (2005) 2 S.C.R. 473, 2005 SCC 49.

[3] This entire section comes from ANNEX 1 FCTC/COP/6/8.

BENEFITS AND RISKS

Key Benefits	Key Risks/Costs
• **Allows for recovery of both *past and future* health care costs incurred by states and private providers** • **Avoids defences that have proved fatal to many individual claims such as consent by the smoker** • **Confers standing on entities with the resources to litigate against the industry**	• **Likely to be subject to constitutional and potentially international legal challenge (Risks of successful challenges can be minimized)** • **Considerable cost risk (unless cost and funding rules addressed)** • **Long time scales for litigation (procedural rules can ameliorate)** • **Lead to allegations of government complicity/hypocrisy**

Benefits

Health-care cost recovery litigation by health-care providers has delivered the biggest success to date in terms of securing compensation for the economic harm caused by tobacco use. The United States pioneered this form of litigation, and U.S have already recovered billions of dollars of compensation from the tobacco industry. In 1994 a small number of US states initiated actions to recover tobacco-related health-care costs within their jurisdictions. These were followed by actions in more states. Successes during the process of several of these cases, including a trial in which many damaging internal industry documents were discovered, eventually led to the industry settling with four states and later entering into a Master Settlement Agreement with the remaining 46 states for a settlement which, up to 2013, had resulted in almost US$ 100 billion in actual payments from tobacco companies to the states.2 In addition, the companies agreed to discontinue most advertising, refrain from a variety of deceptive practices, open a website including all documents produced in smoking- and health-related lawsuits, and fund a substantial counter-advertising initiative.

Health care cost recovery litigation avoids one of the major obstacles to recovery by individuals in litigation against tobacco manufacturers, namely the perception of the blameworthiness of the victim.[4] In third party recovery actions, the claimant is not the smoker but rather the government, institution or insurer obligated to pay for the medical care of those whose illness was caused by the manufacturers' products. Although the industry has raised allegations of government complicity, health care providers (public or private) did not 'consent' to incurring the costs of smoking of related disease.

Finally, health care cost recovery litigation eliminates (or minimizes) the power balances between claimants and the industry that has made it very difficult to hold the industry legally accountable for their conduct. While industry can litigate individual claimants into withdrawing bankruptcy through abusive legal tactics, governments and health insurers usually have the resources to withstand and even prevent such tactics.

[4] R Daynard and M Gottlieb, 'Casting blame on the tobacco victim: Impact on assumption of the risk and related defenses in The United States tobacco litigation' Norwegian Ministry of Health and Care Services (2000). Accessible at: http://www.regjeringen.no/en/dep/hod/dok/nouer/2000/nou-2000-16/22.html?id=359483.

Risks

The most immediate risk in any health care cost recovery litigation is any enabling legislation would be subject to constitutional challenge.[5] Every country has its own written or unwritten constitution and has developed its own legal principles in interpreting its constitution. It is not possible to engage in a country by country analysis of whether health-care cost recovery enabling legislation might give rise to constitutional issues. What can be said is that the principal thrust of any constitutional challenge by the tobacco industry would centre on whether the legislation interferes with judicial independence or due process of law. Provided the laws do not amount to a decree that the defendant is liable, do not direct the court as to how to assess the evidence, and do give the defendants an adequate opportunity to defend the claims being made against them, the legislation is highly unlikely to fall foul of due process requirements or raise concerns about judicial independence.

The Supreme Court of Canada dismissed the industry's constitutional challenge to British Columbia's revised enabling legislation which, inter alia, conferred a direct cause of action on the government, and amended the rules of evidence and procedure for determining a claim brought by the government. This does not undermine the independence of the judiciary. The Court stated:

> *It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government. […]No such fundamental alteration or interference was brought about by the legislature's enactment of the [Health-care Cost Recovery] Act. A court called upon to try an action brought pursuant to the Act retains at all times its adjudicative role and the ability to exercise that role without interference. It must independently determine the applicability of the Act to the government's claim, independently assess the evidence led to support and defend that claim, independently assign that evidence weight, and then independently determine whether its assessment of the evidence supports a finding of liability. The fact that the Act shifts certain onuses of proof or limits the compellability of information that the appellants assert is relevant does not in any way interfere, in either appearance or fact, with the court's adjudicative role or any of the essential conditions of judicial independence. Judicial independence can abide unconventional rules of civil procedure and evidence.*[6]

Health care cost recovery might also give rise to international legal challenges, although none has been filed to date.

[5] As the experience in Canada demonstrates.

[6] British Columbia v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473, 2005 SCC 49 [54]- [55].

The Civil Code of Québec, section 1477, provides that "The assumption of risk by the victim, although it may be considered imprudent having regard to the circumstances, does not entail renunciation of his remedy against the author of the injury." The section was adopted in 1994 and the purpose was to settle a controversy that existed in the jurisprudence. The purpose of section 1477 was well summarized by the lead counsel of Imperial Tobacco (IT), Suzanne Côté, on November 13, 2014, in her final oral pleading before Justice Riordan in the Québec class actions, in the following terms:

> *"So it's true, Mr. Justice, that article 1477, which is reproduced under slide 3... on slide 3, sets out the rule that the assumption of risk by a victim does not entail renunciation of these remedies against the author of the injury, but this article does not mean that the defence of assumption of risk can never be a complete defence. This provision, article 1477, was adopted to put an end to a controversy in the jurisprudence as to whether a Defendant should be absolutely exonerated from any liability each time the victim engages in full knowledge into an activity that carries a certain danger.And it was adopted precisely to permit the person, in some instances, to avoid that a Defendant would be totally exonerated."*

IT's counsel (Suzanne Côté) was nominated at the Supreme Court of Canada two weeks later on November 27, 2014. Although the tobacco companies including IT, now argue in their factum before the court of Appeal that knowledge is always a full defense, a simple reading of section 1477 C .c.Q. supports IT's pleading before Justice Riordan. The issue is not whether knowledge is a full defense in a product liability case but rather in what circumstances it is not. Having concluded that the tobacco companies lied about the risks of their product and used advertising to induce them to smoke an addictive product, Justice Riordan simply applied section1477 C.c.Q..[7]

The Court of Appeal of Québec will eventually decide on the scope of section 1477 C.c.Q. and its application to tobacco class actions in Québec. The tobacco industry has also demonstrated a willingness to employ politically questionable, and legally spurious, arguments against health care cost recovery litigation. These arguments have included that smoking related death and disease saves government health care costs; that governments already recover the costs of smoking related disease through excise taxes and that governments have been complicit in permitting the sale of tobacco products.

In comparison, all U.S courts have rejected the smoking death 'benefit' argument as incompatible with respect for human life. As for the claim that a government cannot complain about the costs of a lawful product which it taxes, this argument is unconvincing. As a point of law, it amounts to a suggestion that no government has civil rights (at least non-contractual rights) in relation to any conduct they have not banned. On this view individuals and private companies would be free to engage in fraudulent or negligent behaviour causing losses to the public without having to compensate the public. On the specific issue of taxation, paying taxes has never been a basis upon which a wrongdoer can avoid legal liability, nor can a person seek to have a civil or criminal penalty or damages award offset against their tax bill. One distinct advantage of litigation is that it holds out the prospect of governments successfully recovering both *past and future* tobacco-related health-care costs caused by the industry's negligence and/or fraud;[8] this is something that excise increases cannot do alone.

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[7] British Columbia v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473, 2005 SCC 49 [240]- [242], [824] – [829].

[8] For example, the Ontario healthcare cost recovery lawsuit filed in the Ontario Superior Court of Justice against Imperial Tobacco Canada Ltd., JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., the Canadian Tobacco Manufacturers' Council and others, including foreign parent companies, seeks to recover the cost of treating tobacco-related illnesses going back to 1955.

A Salutory Lesson About Cost and Delay – Litigation is Still Ongoing in Canada

Outside of the United States, Canada has been the country most active in pursuing health care cost recovery litigation. However, no Canadian health-care cost recovery litigation has reached trial, not even the very first action by British Columbia which was initially launched in the 1990s. As outlined above in part 2 (b), this is due to the industry's stalling tactics. In addition to an attempt to add the Canadian Federal Government as a third party defendant; the industry has also publicly claimed that they do not have sufficient assets to pay a large damages award. In the last few years the overwhelming majority of Canadian provinces have passed enabling legislation and/or launched their own proceedings against the industry. In 2012 the Ontario Superior Court of Justice dismissed jurisdictional objections to Ontario's claim and ruled that it could proceed.[9] The lesson from the Canadian experience is that while enabling legislation may be necessary to support health-care cost recovery legislation, it is not sufficient to guarantee success especially within a reasonable time and at proportionate cost. To secure that objective requires a series of complementary reforms to reduce cost and delay.

[9] Updates on the Ontario proceedings, based on legislation passed in 2009, are posted here: http://www.attorneygeneral.jus.gov.on.ca/english/tobacco_litigation.asp.