

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JOSEPH T. BATTAGLIA

Plaintiff

- and -

IMPERIAL TOBACCO LIMITED

Defendant

P R O C E E D I N G S A T T R I A L

BEFORE THE HONOURABLE MADAM JUSTICE THOMSON
On Wednesday, November 22, 2000 at Toronto, Ontario

APPEARANCES:

MR. D. LENNOX

Solicitor for the Plaintiff

MS. D. GLENDINNING

Solicitor for the Defendant

MR. L. BARNES

Solicitor for the Defendant

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Transcript Ordered: February 20, 2001
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Wednesday, November 22, 2000

THE COURT: Good morning. Sit down, thank you.
Are we ready with Mr. Battaglia's cross-examination? Are there any preliminary matters?

MR. LENNOX: No, Your Honour.

THE COURT: Okay. Mr. Battaglia...

MR. BATTAGLIA: Your Honour, may I suggest for the sake of you being able to hear me, me being able to speak to the Lawyer, if he moved to that direction and then you can see everything as oppose to me looking at him and I am not talking into the microphone?

MR. BARNES: I am happy to do that. Just take a minute and I'll move my papers.

THE COURT: That's not a bad idea.

MR. BATTAGLIA: Because yesterday we had a bit of a problem where I was talking directly and you weren't able to hear what I was saying.

THE COURT: Why don't you just switch seats?

MR. BARNES: Do you want me to go all the way over there?

MR. BATTAGLIA: Yes. Go over there.

THE COURT: Mr. Battaglia you are still under oath.

MR. BATTAGLIA: Yes, Your Honour, I understand that.

MR. BARNES: Q. Okay. Mr. Battaglia, as I understand listening to your evidence yesterday, you started smoking in 1957?

A. '58.

Q. 1958? And you started at the time when you

began working for Rothmans as an office boy.

A. Correct.

Q. And, as I looked into your evidence yesterday, you indicated that you rose through the ranks of Rothmans to become a salesman at eighteen. Is that correct?

A. I was a salesman at eighteen, correct.

Q. And a supervisor at twenty-one?

A. A supervisor of salesmen at twenty-one, correct.

Q. And when you left Rothmans in 1969 you had become the National Sales Manager for Dunnhill.

A. That's correct.

Q. All right. And I understand that Dunnhill is a brand of Rothmans' cigarettes?

A. Correct.

Q. And if I could just go back to when you said that you were a salesman, what were you actually selling?

A. I think that was Rembrandt.

Q. Rembrandt?

A. Yep.

Q. And Rembrandt was the product that you told us yesterday was the product that had the high porosity paper.

A. Correct.

Q. And when you became the supervisor of salesman, when you were - I think you said, twenty-one years of age...

A. Correct.

Q. ...what were you supervising then?

A. Supermarkets...

Q. And what...

A. ...and special accounts.

Q. And special accounts. And what brands were you responsible for?

A. The company itself and its products.

Q. All products?

A. All products.

Q. And were there any other products other than tobacco products that you were responsible for?

A. No.

Q. All right. And, you then became responsible, as the National Sales Manager for Dunnhill, when you were - I think you said you were twenty-eight years of age?

A. '69, twenty-eight, yes.

Q. So, for the period prior to becoming the Sales Manager for Dunnhill you had general responsibility for all brands in supermarkets?

A. Yes.

Q. All right. And, what - just so I have some understanding, because I think you indicated that you said that when you went to work with Rothmans in 1957 or 1958 it was new into Canada. Is that correct?

A. It was the first day that they manufactured the product in Canada. Prior to that they were bringing it in from England.

Q. So prior to that they had been distributing their products in Canada.

A. For about three months.

Q. For, three months? Oh. All right. And during the time that you were there what was the size of the organization?

A. Very small, very loose, exciting - just - it was quite something to be there at that time.

Q. Can you just - in the sense that you say "small, loose," how many people are we talking about?

A. Well, the factory now was supplied with factory workers so we are into the, I would say, hundreds there.

Q. Right.

A. They had hired people by then and then we had executives in two different buildings. One was the head office and my guess would be they might have been twenty people there: maybe, no, not that many, maybe ten and, then in the office of which I worked out of, there were salesmen and sales managers. The sales force ranged from sometimes thirty to forty and down to twenty some times.

Q. All right. And how many salesmen would you have had working for you when you were responsible for the Dunnhill brand?

A. Twelve.

Q. All right. And you said that during this period as you rose through the ranks that even when you were a junior person, as an office boy, that you were invited to attend the conferences or the meetings of the sales force?

A. I was fortunate enough to be permitted to stay, yes.

Q. And I take it those meetings would be for the purposes of discussing how to promote the product?

A. Strategies, promotion and how to sell it.

Q. And how to sell it. Thank you. All right. And I take it that during the twelve years that you were working for Rothmans that you smoking Rothmans' brand?

A. Always.

Q. All right. And you indicated that you began

smoking the two brands that brought us here today. The first brand being the Matinée Extra Mild King size in 1994?

5 A. Well, the year could be wrong. It, it - whenever it was introduced. Whenever it came on the market and stated 4 and 4. So that's when I started. My guess is, it was 1995. You would know better.

Q. Yes. But what you do say though is I think that your action arises out of you smoking the Imperial Extra Mild....

10 A. King Size Extra Mild, right.

Q. ...brand, right?

A. Yes.

Q. And...

A. And the Slim one hundred.

15 Q. I am sorry?

A. As well as the Matinée Slim 100 mm, those two.

Q. And just coming back to that, because I want to make sure...

A. H'mm.

20 Q. ... that I understand what we are dealing with here. The allegations that you have regarding these brands, the earliest date that those allegations arise is in 1994. Isn't it?

25 A. In, 1994 the allegation of what I am saying against you was 1997 or am I missing here....

Q. Let me just...

30 THE COURT: Exactly. That's what he said yesterday. I don't know why we are doing this. I haven't heard anything that I didn't hear yesterday.

Q. I want to make sure that I understand that it is in 1994.

THE COURT: Well, he said that he is not sure..

A. It's, it'...

THE COURT: ...if it's 1994. What he is sure about is the Sixty Minutes program in 1997. That's when he said he got upset.

MR. BARNES: Right.

THE COURT: I thought he made that abundantly clear yesterday.

Q. Well, let's come back to - in 1997 program that got you upset.

A. Right.

Q. It got you upset as a result of watching a program dealing with the US tobacco companies?

A. Right.

Q. And it got you upset with the Imperial products that you were already smoking at that time?

A. It got me upset at the product I was smoking at that time and in all probability, lots of others. But, I was only concerned with the one I was smoking. And, I began to understand from what - from that information I received why I was having the worse time to quit. And then I said, "It's not my fault anymore."

Q. All right. Well, what I would like to do then, I would just like to go over with you briefly what your smoking history was prior to when you began to smoke the Matinée brands, Mr. Battaglia. And do I understand that your evidence that basically you said that yesterday, that you first tried to quit sometime in the 1970s?

A. I believe it was.

Q. At a time when you were smoking the Medallion?

A. I believe it was Medallion, right.

Q. And you then said after that, I think that's when you said you threw the pack...

A. In my fireplace.

Q. ...away. In the fireplace?

A. Yes.

Q. And after that when you went back you went to lower delivery products.

A. You couldn't go any lower than Medallions. They were one and one. They are one and two now, by the way. And, I bet you the smokers who are smoking Medallions don't know that's it double the nicotine.

Q. And what product did you go to after Medallion? What type of products?

A. Sir, I smoked every kind of cigarette that had a low tar, and low nicotine reading. But no matter what the name was, I've smoked them.

Q. So...

A. And, the best one of them all, is the one that I ended up with, and the one that I am arguing about with you today.

Q. Right. And so, if you were looking for products that had low tar and nicotine delivery, you were doing that on the basis by looking at the numbers on the pack.

A. Exactly.

Q. And your intent when you were looking at the numbers on the pack was to attempt to reduce the deliveries that you had received.

5 A. The intent was to wean myself into a position of being able to find it easier to quit. That was my intent.

Q. But in looking at the numbers, it was going to give you a comparative guide that would allow you to determine whether that was the product?

A. The word, "comparative" never entered my mind.

Q. All right.

A. "Guide" might be, to guide me, to safety.

10 Q. All right. And, I just wanted to go over with you what your brand-history was for a moment, in order to try and simplify this so that we don't spend too much time on it.

15 I understand Mr. Battaglia that you've provided information with respect to your brand histories in two forms to the Defendants in this case, once by way of an Affidavit, where you set out information with respect to brand histories and once in an information session with Counsel. Do you agree with that?

20 A. There was a point in time, when this lawsuit began where I was suing all three tobacco companies, not just Imperial Tobacco.

Q. Right.

25 A. It was only in the latter stages of the Action that we decided to go and simplify it and go after the products that I had been smoking and by luck it happened to be the product that's the King of the cheats.

Q. All right. Let me just try and help you with this and then we can simplify this. I just want to show you an Affidavit first of all, of yourself dated March, 19....

30 A. Mr. Lennox, this is stuff from the Pre

Trial conference that he - do you remember he promised that they would answer my questions. I answered only their questions. Now he is trying to use those answers...

5 THE COURT: Sir, your job is to answer questions not to argue and certainly not to start telling your Lawyer things in the middle of your evidence.

MR. BARNES: Q. First of all, let me just hand you a copy of an Affidavit.

10 THE COURT: Madam Clerk would you please get me the file in my office?

MR. BARNES: I have a copy for Your Honour.

THE COURT: I want to look and see if it's in the file. If it's not in the file, I am not interested. March 2000?

15 MR. BARNES: No. It's ...

THE COURT: I am sorry?

MR. BARNES: It's March 1999, Your Honour. I might as well put another one to them while they are getting the record, Your Honour, so we don't waste time.

20 THE COURT: I don't have the Affidavit for...

MR. BARNES: Here's the other Motion record, Your Honour, which is dated, I believed the 2000 one. Let me just see. No. Sorry. It's May of - please bear with me for a moment.

25 The Affidavit that I'm asking him to look at is dated March, - it's hard to read. I think it's March 11th or March 19th, 1999.

30 THE COURT: Well, I have a huge Affidavit of Steven Soffer (ph).

MR. BARNES: That one you would need Your Honour,
that's where the second material that we are
going to need with Mr. Battaglia.

THE COURT: That's not Mr. Battaglia's Affidavit?

MR. BARNES: No. I don't know if you had a
chance to look at that Affidavit.

THE COURT: Of course not.

MR. BARNES: That's the second document I want
to come to - to put to Mr. Battaglia.

THE COURT: And I don't have any Affidavit from
Mr. Battaglia, 1999. There was a Motion of
February, 1999. The Plaintiff withdrew the
Motion. There is plenty of correspondence, but
I don't have any Affidavits. I don't have any
Motions other than the Motion we had in October.

MR. BARNES: Q. Well, maybe I can ask the
witness some questions and we can go from there, and then
you'll perhaps see the context and we can see.... There was a
motion brought, Mr. Battaglia for information from you. Do you
agree with that?

A. Yes.

Q. Right. And in response to that Motion you
initially filed an Affidavit that you swore in March, 1999.

A. And that's the one before me now?

Q. No. That's what I am going to ask you.
Would you look at that Affidavit...

A. Yes.

Q. ...and turn to the first page and I ask you
to look at the seventh paragraph of that Affidavit and ask you
if that refreshes your memory.

A. Yes, I remember these questions and answers.

Q. That's the first Affidavit, Your Honour that was filed before Judge Godfrey.

THE COURT: I don't even have that Motion anymore. It's not...

MR. BARNES: Apparently I am instructed....

THE COURT: I know there was a Motion and it was "sorta, sorta, sorta" settled.

MR. BARNES: Q. Now the next part is the, "sorta of settled" that we are going to come to. And at the time that Motion came on, you provided an Affidavit, which is the Affidavit in front of you. Is that correct?

A. Yes.

Q. And you subsequently then had a meeting wherein you spoke with Lawyers for the three companies that were involved at that time.

A. Correct.

Q. And you had with you, your Assistant, Mr. Kesten (Ph)...

A. Correct.

Q. ...who was with you at that time.

A. Correct.

Q. And you provided certain information on that occasion.

A. Yes, I did.

Q. Right. And that information was then transcribed by Ms. Glendinning, what you disclosed. Do you agree with that?

A. Yes.

Q. And it was provided to Mr. Kesten (Ph) who was acting on your behalf at that time.

A. Yes.

Q. All right. And Mr. Kesten (Ph) then confirmed to Ms. Glendinning that in fact the information had been reviewed with you and the information was correct, but you refused to sign it. Isn't that correct?

5 A. I remember you got something like that. Yes...

Q. Yes.

A. ...because we had made a deal that you had to answer my...

10 Q. Let me, let me...

A. ... questions too.

Q. All right. But would agree with me so that the information...

A. But you never did.

15 Q. ...the information that you had provided at that time, was in fact correct?

A. It was correct - of course it would be correct. Any information I give you would be correct...

Q. All right.

A. ...to the best of my knowledge.

20 Q. And the information that we are talking about is - that's what you would find in the Soffer (Ph) Motion record, Your Honour.

A. Anyway what is it in here that you want to ask me?

25 THE COURT: Mr. Battaglia!

Q. I just want to get this information in front of you and then we don't need to go through it at seriatim, which is what we are going to have to do if we don't get this into evidence. It's just going to make things go faster. That's all. Well, we had it. We seemed to have misplaced

30

because we now have as much as...

MS. GLENDINNING: Here it is.

THE COURT: Well, I see a list of the questions in the Affidavit, but I don't see any answers.

5 MR. BARNES: No. What it is, if I can just take you through it because if you take a look at - let's start with Mr. Soffer's (Ph) Affidavit, if we might, Your Honour, that if we look at paragraph five of Mr. Soffer's (Ph) Affidavit for a moment. Mr. Soffer's (Ph) Affidavit says that he is advised by Ms. Glendinning that during a telephone conversation with Mr. Kesten on May 10th, he confirmed that he had reviewed the document attached in Exhibit "B" with Mr. Battaglia and although Mr. Battaglia agreed with its contents, Mr. Battaglia was not prepared to sign the document.

10 Now let me take you to Tab number "B" and ask you if that's the document that in fact Mr. Kesten (Ph) reviewed with you. Would you just take a look at that for a moment?

A. It's going to be a guess.

THE COURT: What am I looking at?

Q. If you look at Mr. Soffer's (Ph) Affidavit...

20 THE COURT: Yes.

Q. ...Tab number "B" you will find...

THE COURT: I don't have in it Tabs, Counsel. I don't room for such things.

25 MR. BARNES: You don't have it - I am sorry. I thought your Motion Record - all right then it's at...

THE COURT: Which Exhibit is it, because I've got my Exhibit...

MR. BARNES: It's Exhibit "B".

THE COURT: "B?"

30 MR. BARNES: Okay.

THE COURT: Yes.

MR. BARNES: Q. All right. And that's the information that was transcribed that you provided at that meeting to Ms. Glendinning and Mr. Soffer (Ph.) Isn't that correct?

A. I told you when you first put this in front of me that I was going to be guessing.

THE COURT: But this is a letter dated July 17,

A. The contexts of this....

THE COURT: 1998.

A. ...and the way that it is written is not familiar to me in the first place. It's appearance - on it's appearance.

THE COURT: Hold on. Hold on. First of all I can't hear you. You've got to speak louder. This is not an intimate setting. Secondly my Exhibit "B" is a letter dated July 20th - July the something or other, 1998. It's in the Affidavit of Mr. Soffer's (Ph).

MR. BARNES: My I see yours and just compare it to mine, Your Honour? Here's another copy for Your Honour, if I can hand it to you.

THE COURT: No, this is a different Affidavit.

MR. BARNES: All right.

THE COURT: Okay, A, B - B. Okay we are at Tab "B", which appears to be a letter, dated April 14th, 1999. Is that correct?

MR. BARNES: April 14th, yes.

THE COURT: All right.

MR. BARNES: Now, behind that letter, Your Honour, if you would look at the enclosure.

THE COURT: No enclosure; a two-page letter and then...

MR. BARNES: If you....

THE COURT: Information given by - is that what you mean?

MR. BARNES: That's - now we have....

THE COURT: Okay. There's a title page in between. I got confused. All right.

MR. BARNES: Q. That's what I was having Mr. Battaglia look at.

THE COURT: Okay.

Q. And that's the information that you've provided at that time to Counsel for the Defendant. Is it not?

A. Let me read it please.

Q. Okay.

A. Or let me peruse it, at least so that...

Q. I am sorry. I thought you didn't have it.

A. I said I have not recognized ever seeing this document as it appears on its face. So, therefore I don't even know what it says. I am not saying I haven't seen it before.

Q. Well, I don't understand the distinction.

THE COURT: Well, sit down and read it, okay, please.

Q. Your Honour, while he is doing that, if I could just give you so you understand the sequence of what happened and then we'll have the whole story while he is reading the document. The document was objected to, in front of Judge Godfrey.

THE COURT: That's probably why all of his stuff is out of the file...

MR. BARNES: No.

THE COURT: ...because he doesn't think that I should know all of this. And I am not so sure I need to.

MR. BARNES: Well, no. It was objected to and His Honour issued reasons. And he said that the document was not privileged and was admissible and it became part of the record on the Summary Judgment Motion that was brought by....

THE COURT: I've got one decision by...

MR. BARNES: That's right. And that's the decision that you would find it in Your Honour. And that's a decision dated the 27th of March, 200. And if Your Honour wants to, it is at the top of Page 3, that is the decision where the discussion takes place.

THE COURT: Well there is a limitation-period Claim that was dealt with.

MR. BATTAGLIA: Who wrote this? Did you write this for Mr. Kesten (Ph) and then have him ask me to sign it?

THE COURT: Yes. That's what he is asking you.

MR. BATTAGLIA: A. I never saw this. I never saw that. This is the first day I've seen those documents.

MR. BARNES: Q. All right. Well, let me ask you just to turn over the page.

A. Doesn't mean I can't answer questions from it. I am just telling you it's the first time I've seen this document.

Q. I'll wait until Your Honour is finished reading that decision then we'll deal with the next...

THE COURT: Okay.

A. It could have been that Mr. Kesten(Ph) says to me, "I got something in the mail. I am telling you not to sign it." And that was how it was left, because it is not addressed to me.

Q. Can I ask you then to take a look at the next Tab, Mr. Battaglia. You have the letter from Ms. Glendinning to Mr. Kesten (Ph) which is the final Exhibit in that volume.

A. Which Tab is that?

Q. Just go to the last one there.

A. I think I remember - yes, I remember this one more - yes; I remember this letter.

Q. So, if you remember that letter--and that letter is pretty specific--that obviously Mr. Kesten (Ph) had discussed the contents of that Memorandum with you. Do you agree with that? And he has advised Ms. Glendinning.

A. No. We didn't review it. He just said it's unnecessary to sign this. He advised me not to sign.

Q. Well, let's just read that a little more carefully for a moment, if we will.

THE COURT: Look, we know what the letter says. It's from Ms. Glendinning.

MR. BARNES: No, no.

THE COURT: She is not a party to the conversation between Mr. Kesten (Ph) and Mr. Battaglia.

MR. BARNES: No. I am just trying to find out.

..

THE COURT: Why don't you just ask your questions based on the information in there and stop....

MR. BARNES: That's what I was trying to do.

THE COURT: Fine. Just ask your questions.

Q. I would like to then first of all mark the Affidavit and...

THE COURT: No. I am not marking anything. I want questions first.

Q. All right. Let me tell you I have prepared a chart based on the information that was contained in the Affidavit and the Information statement, we've just looked at, with respect to what I believe to be your brand histories. And, I am just going to hand that up to you.

THE COURT: Yes.

Q. There you go - one for the courtroom. And if you could look at that and if we could go through that and see if you will agree with me that that reflects your smoking history as best you can recollection it, Mr. Battaglia. Do you have it in front of you?

A. Yes.

Q. All right. First of all, the information that you've provided to us in the Affidavit and the Information Statement is silent about the 70s. What were you smoking in the 70s?

A. I don't know. I'd be guessing.

Q. All right. We know Medallion, I guess. Do we?

A. Look, like I said, I have smoked every low tar, nicotine cigarette, on the market. So, I've smoked everything except the strong ones.

Q. All right. And what numbers do you put on when you say low tar?

A. Well, the lower they go.

Q. And, what would you say when you say you've smoked all the low products on the market. What would you define as low?

A. Benson and Hedges, the charcoal filters.

Q. The number.

A. How many types of brands?

Q. No. What would you say would be the number in your mind that would designate for you that it was low tar?

A. The lower that it got, along with, the satisfaction.

Q. Okay. But, if you were to give me milligrams of tar, what in your mind would be a low-tar product in milligrams of tar?

THE COURT: What I am hearing him say it depends on what was on the market. As things came out in the market and when down...

MR. BATTAGLIA: Some people think that....

THE COURT: ...that was the low tar and low nicotine for him.

Q. All right. Well, let's look at this then. Let me impose on this then the actual numbers that I believe...

MR. BATTAGLIA: You see....

THE COURT: I have also noticed the sentence that says, "The Defendants are conferring to confirm the dates upon which the various brands entered the market and based on that information I may be able to refine the information detailed above."

MR. BARNES: Which information was provided.

THE COURT: Was it?

MR. BARNES: Yes, it was.

THE COURT: Well, how about giving me that.

MR. BARNES: Q. We are going in stages. All right, I'll get you that. Let me provide you with the - what I believe to be the numbers of these products and ask you if you would...

THE COURT: This doesn't say when they were introduced.

Q. I'm just going to hand you that as well, Your Honour.

THE COURT: This doesn't....

Q. No, no. I am just finding that document for you.

THE COURT: All right, great.

Q. There's corresponding provided that - just digging it up.

THE COURT: Okay.

Q. And this information that we've got is based on the information I say as to the order that you've smoked these products from what you've provided in the Affidavit and your Information Statement. So, actually, Your Honour, the information is contained in the Soffer's Affidavit that you already have. So, you don't need another piece of paper.

All right. And if you look at this, now that I've put the numbers beside it for you, you would agree, looking at those numbers, that those are representative of those particular products, Mr. Battaglia - the tar numbers?

A. Listen, if you are going to use this piece of paper as evidence about my history of smoking and as a means to dispute my claim against you, I have to tell you that when I gave these answers, these answers are based on being asked a

question at a moment about years past of me trying to satisfy you because I thought I was going to get answers back from you two in return for these answers. Then you used these now against me to say that I am wrong in my claim. This is how you are going to fight me?

Q. I haven't suggested you are wrong, I am simply asking you a question, as to whether these....

A. But it is not related to my claim against you.

THE COURT: It may not be in your mind. That's up to Mr. Lennox to argue later.

A. I have to tell you, Your Honour....

THE COURT: Mr. Battaglia, I don't want you to do anything but answer the questions. I don't want you telling me anything other than answers to the questions.

Q. In that Affidavit that I put in front of you, Mr. Battaglia, if you would just take a look at that Affidavit for a moment and look at your letter that is contained in the Affidavit. That's the document on your left. All I am trying to do is just make sure I understand that I've got the evidence clearly. Do you have that Affidavit?

A. Yes.

Q. Look at Exhibit "B". Take a look at Exhibit "B", that document, the Affidavit. Do you see your letter?

A. Okay.

Q. That's your letter and your Affidavit, right?

A. M'mm. It's a letter without my signature, but it is on my letterhead. It is typed, but it has not my signature on it.

Q. It's attached to your Affidavit. Is it not

Mr. Battaglia?

A. Yes, it is. Yes, yes, yes, yes.

Q. And you sent the letter. Did you not?

A. To Ms. Glendinning? If I did I would have signed it. Do you have the signed copy?

Q. It's your Affidavit. That's why that one is not signed.

A. No. But if I sent it to her she would have not - I don't send out letters without signing it.

Q. But it is attached to your Affidavit. Isn't it?

A. As attached to the Affidavit, it makes it part and parcel of it, but I am saying I cannot specifically say that I sent that to Ms. Glendinning unless I see my signature on it because I don't send out documents without signing it. So, if I did that and sent it to her you should have a copy of my signature on this letter.

Q. I may well. But, that, I would have assumed that when you put that in your Affidavit it was your file copy. Was it not?

A. In that context, yes.

Q. Thank you. And you filed it with the Court as evidence as the information that you provided for Ms. Glendinning. Isn't that correct?

A. In that context, yes. And I don't know that she ever got this letter.

Q. Well, let's not worry about whether she got the letter.

A. Okay.

Q. The letter is there. All right?

A. Okay.

Q. And this letter says, if you just keep the letter in front of you...

A. Okay.

Q. ...because that's all I want to do here, and it's a small point, but we are taking a long time, "Each product was purchased with the intent to reduce my tar and nicotine intake with the goal to eventually making it easier to quit altogether." That was your position. Isn't that correct, Mr. Battaglia?

A. That's right.

Q. All right And now I am asking you, if you would just take a look, based on that information...

A. Right.

Q. ...that you have provided...

A. Right.

Q. ...plus the other information that you gave orally, which we have referred to, I put together the chart which is not in front of you reflecting what your information is about your brand histories in the 80s and 90s.

A. Well, from '85 to 2000, right? I said ten to fifteen years.

Q. Right.

A. Yes. Those are the brands that I have smoked.

Q. All right. And if you look now at the document that I have provided to you, the one that's on the right, which is your brand histories, all I have done in that document is transcribe the information that you provided to us in the Information Statement that we looked at and your Affidavit as to your timing. So that the information you gave, and we can go down if you disagree with it, what you told us

was that in the early 80s you smoked Medallion for two years, Bellmount and Viscount; in the mid 80s, Vantage King Size; Craven A Special Mild, three months in the 80s.

5 You said that with respect to du Maurier, the du Maurier brands, your evidence was that you smoked them over a four-year period in the order that they came on the market. Do you agree with that?

A. Say that last one again, please

10 Q. You said that you smoked the du Maurier brands over a four-year period and you smoked them in the order that they came on the market.

A. In the degree of the lowness of its nicotine and tar, right.

15 Q. Right. And then after the du Maurier brands you smoked Rothmans Extra Light in the early 90s?

A. Well, that's what it says, yes.

Q. Well, I just want you to confirm that that's correct. That's all.

20 A. Well, no, I cannot confirm that that is exactly right, exactly right.

Q. But that's what you told Ms. Glendinning.

25 A. It's not possible for any human being to be able to give you exact dates, times. I could have smoked one of these brands in a period that I may have mixed up with another which is very understandable. You can't use this to specifically....

THE COURT: Mr. Battaglia!

A. Sorry, Your Honour, I apologize.

30 Q. All right. Now coming back to that, I just set this out based on the information that you have provided. That's all, Mr. Battaglia.

A. Well, you deciphered my information and I am saying that the way you deciphered it, it cannot be perfect.

Q. Okay. It is not perfect.

A. Because I am not perfect. My memory is not perfect. There is a gap in my life. I did the best I could, but to use it, it....

Q. Well, I am not using it for anything other than trying to get your brand histories.

A. All right. Let's find out what the end of this is.

Q. There's not a trick in this. I am just trying to move along here.

A. Let's assume that this is correct.

Q. Okay. And then once again would you agree with me that the tar and nicotine numbers that I have put on are representative of what was on those packs when you chose to smoke them?

A. You would know that better than me, that I would believe that they would probably be accurate.

Q. And you would be looking at the tar and nicotine numbers. You told us that.

A. That's correct.

Q. All right. And, if we look at that, we see that it would be fair to observe that you're moving up and down depending on where you are in that period. Do you agree to that? You told us, for example that...

A. I am going to look on the nicotine side only...

Q. Well...

A. ...and review that. And it would appear from this that I have gone up and down, all over the place.

Q. And that would be true on the tar side as well?

A. Exactly, because they are comparable in a different degree. That's why I said - if you want to put....

5 Q. Can we mark that chart as an Exhibit then, Your Honour, the brand histories of Mr. Battaglia.

THE COURT: Exhibit 10.

EXHIBIT NUMBER 10:

The brand histories of Mr. Battaglia - Produced and Marked.

10 Q. So then, just to conclude, you would be aware, obviously, by looking at the packs each time you change what the tar and nicotine would be of the product that you are about to use?

15 A. I guess in hindsight I should have said to the degree of how they were lowered on the marketplace is to the flow of how I smoked them, because that's just what I did.

Q. But you would still agree with me that you would look at the pack before your selected the brand?

A. Yep.

20 Q. And you would read the numbers?

A. Yes, sir.

Q. Okay. And currently, if I heard your evidence correctly, you are smoking twenty-five to thirty cigarettes a day?

25 A. Twenty-five.

Q. Twenty-five. And your current brand is what?

A. Everyone that's not that one that's close to that one.

Q. Sorry.

30 THE COURT: I am sorry.

A. Everyone that is not that one, Matinée, but is close to that one. It's been cloned. So, in the last three years, I've been smoking as close to that as I could get. And now they are exactly like that.

5 The present one I am smoking is Number 4 Slims - Vantage Number 4 Slims. It's a new product and what's unique about it is that the "4" doesn't represent nicotine. It represents tar and the nicotine is "5".

Q. So when did you stop smoking Matinée?

A. I would say about three months ago.

10 Q. And the Matinée brands that you were smoking prior to your stopping three months ago, they have been on the market for quite sometime. Haven't there?

A. The ones what?

Q. That you were smoking prior to that time.

15 A. The trade names were on the market for a long time, not the description.

Q. Well, let's deal with the first one. The first that we have marked in as an Exhibit is Matinée Extra Mild King Size. Is that correct?

20 A. That was the one that was my baby, Matinée King Size Extra Mild.

Q. All right.

A. 4 & 4.

25 Q. And that was introduced into the market in May 1978.

A. Oh, if it was - are you saying that brand was introduced in 1978? Extra Mild - the one that's 4 & 4? No, no. Not 4 & 4 in 1978. You are wrong.

Q. All right. One moment.

30 A. Maybe Matinée King Size, but not Matinée

Ultra Mild.

Q. Extra Mild.

A. Or whatever you name, you have.

Q. Well, I am trying to just deal with the products that you were smoking.

A. Yes, yes. Well the names are confusing even to me. And I am - I brought the wrong one in to say I was smoking already.

Q. And maybe just to help to refresh your memory on this, because there is a document we can look at. If you go to the Red Volume for a moment that you have right beside you, Mr. Battaglia.

A. Okay.

Q. Take a look at Tab Number 17 which we can look at. And, that's the Press Release that was being discussed a day or two ago with Mr. Collishaw from the federal government?

A. Yes.

Q. And if you take a look at the third page...

A. Right.

Q. ...you would find Matinée Extra Mild King Size. Do you see that?

A. What number? How far down?

Q. The third page into the press release.

A. Right. That's where I am.

Q. Right. And do you see under the "Fours" on the left side?

A. Okay. Yes.

Q. And you see that Matinée Extra Mild King Size?

A. Yes.

Q. All right. At 4 and .4.

A. Right.

Q. So, page - it's behind Tab 17. It's the first page of the tar numbers.

THE COURT: Okay. And Matinée Extra Mild KSFT.

Q. Right. And that's...

THE COURT: And what does the "FT" stand for?

MR. BARNES: filter tip.

A. Filter.

Q. Correct. And that's the product that we now have in front of the Court. I believe it's Exhibit Number 8. If I am correct, Your Honour, I think it is Exhibit Number 8. "6" I am told. No, it is not 6.

THE COURT: Exhibit 8.

Q. So, we know in any event just looking at this document and as I said, I mean, my information is in 1978. But you would agree by looking at this document we certainly know that in 1982, the government's reporting on it, and it's 4 & 4 in 1982.

A. Right.

Q. Right. And, similarly the information is that the other product that you were smoking that you've been complaining about...

A. Slim 100.

Q. Slim 100 is 1984. It's been on the market since 1984.

A. Well, that must mean I wasn't to look to go to the low cigarette until that time because that was my reason for going to the brand because I was shocked to see it sitting there. And then it came out in the 100 mm with the same reading.

Q. In the 1980s you were looking at the numbers when you switched products? You told us that, right?

A. I did tell you that, yes.

Q. And this product's been on the market since 1978. Right?

A. Well, '82.

Q. No, no. All we did, we looked at a benchmark to help....

A. All right. Obviously long before I thought of it.

Q. Long before you thought about it.

A. Right.

Q. Right. So, my point is that this product has been on the market for some years. This is not a new product is it?

A. Doesn't seem to be, no.

Q. And I....

A. It's new to me. Within the last....

Q. I thought you were suggesting in your evidence yesterday that when you starting smoking it in the '94 period that it was a new product. My point to you is that it's been around for almost thirty years.

A. If it adds up to thirty, then it is thirty. But it's been out a long time.

Q. It's been out a long time.

A. Yes.

Q. And, in fact you would also agree with me that if we just keep looking at the table that's in front of you that there are products back in the early 80s with lower deliveries than the Matinée. We've got a band of products at 3, a band of products at 1, the low ones.

A. Right.

Q. Right?

A. Right.

Q. And, if I also look at the chart, I see that
5 you were smoking some Medallion ones and they at 1.

A. Yes.

THE COURT: There is nothing to say that they
stayed on the market since 1982.

Q. The evidence would come that that is right.
10 I mean, I could - we can do....

THE COURT: I am just saying that.

Q. No, no. I understand that. I mean that's
one of the difficulties. I could go through all of these. But
the witness would say that they are.

THE COURT: Okay.

Q. So, any suggestion by you that these are new
15 products doesn't appear to be correct then, Mr. Battaglia?

A. Just say that one again, please.

Q. Any suggestion by you that these are new
products doesn't appear at least...

20 A. Yes. I....

Q. ...in what you've read to be correct.

A. I agree with that.

Q. Now, you'll with agree with me that you were
certainly aware of health risks around the use of this product
25 at the time when you went to work for Rothmans when you were
sixteen years of age.

A. Well, yes.

Q. And that's as a result of what you learned
from the debate that went on with your parents?

30 A. Not really, it was from my - yes, my father,

right.

Q. Right. And that you....

A. He was pretty far ahead of himself.

Q. Right. And you then became further aware of the risk with the release of the Surgeon General's report in 1964?

A. Through that way as well, yes.

Q. Right. And then you also learned when you were working at Rothmans that when you had a meeting with Patrick O'Neil Dunn (Ph) you learned about you learn about Benzopyrine (Ph)?

A. Yes.

Q. And you remember that as you sit here today, some many years after that meeting?

A. I never heard the name up until 1997 again.

Q. But you remember hearing it in your meeting with him back in the 60s?

A. In 1957, yes.

Q. All right.

A. He admitted that that was the cancerous agent in cigarettes, and how a smoker could smoke Rothmans safely. '57.

Q. And your discussion as to how they could smoke them safely, you told us about the butt length.

A. Right.

THE COURT: About what?

Q. The butt length. Do you remember?

THE COURT: Oh yes.

Q. And that was smoking to a longer butt length?

A. Leaving a longer butt length which left the Benzopyrine (Ph) in the butt length and not in your lungs.

Q. And the use of high porosity paper?

A. It was a failure but it was tried as a means of reducing the amount of negativism in cigarettes.

Q. And he told you about the use of ventilation?

A. That was years after that, '57. That would be two or three years after that. It wasn't the same year.

Q. All right. So, you had a couple of meetings with - is it Mr. Dunn?

A. Patrick O'Neil Dunn, from South Africa.

Q. And so a couple of years later, around 1960 he told you about ventilation?

A. No. It wasn't necessarily him. I am quoting Patrick O'Neil Dunn as having used the phrase or word "Benzopyrine" at a meeting and explaining its meaning and how to get around it. There were other meetings that he had, but I don't particularly recall anything outstanding. That I do.

Q. All right. Did you not....

A. My father said they were cancer sticks. And the CEO from South Africa said it too.

Q. All right.

A. But, there was a safe way to smoke it.

Q. Didn't Dunn also say to you - you are saying that he was - as I understand it, telling you how to deal with the health risk, that you should also promote the use of charcoal filters? Did he tell you that?

A. There was a brand called Rigio (Ph) that came out that had charcoal particles in its...

Q. Right.

A. ...filters that was supposed to be revolutionary.

Q. Right. And also you told us that he taught

you about high porosity paper?

5 A. No, not him. Others, others. Just other managers, other marketers, other schemes, marketing - that way. Mr. Dunn, O'Neil Dunn was way beyond where I was on the picture.

Q. Okay. So others told you, while you were there, about high porosity paper?

10 A. Well, I was part of the meetings. That was the first brand I ever tried to sell on the streets. I used to put the bills up with paste.

Q. All right. And also on those meetings you discussed the implications of ventilation?

A. Well, in so far as Rembrandt's high porosity paper was concerned, yes.

15 Q. And the ventilation holes that...

A. Yes.

Q. ...could be used in the product, right?

A. Yes.

Q. And...

20 A. And how nicely it burned. It left a nice ash. And how much fresh air was coming in all the way through the cigarette.

Q. And the theory being that if you can get the fresh air in then you get...

A. Then you get...

25 Q. ...less harmful elements into the smoker.

A. You get a lighter smoke. And I guess you get a lower reading too, if the whole paper's got holes in it. But, it didn't work. It burnt too quickly. It had no taste. And it was a bomb.

30 Q. But you understand that the use of the

ventilation....

THE COURT: Sir, ventilation - he is talking about porosity. High porosity paper with holes in it. He is not talking about ventilation of the end...

Q. Well, let's....

THE COURT: ...or whatever we call - the filter.

Q. Now, we talked about high porosity. Did you also discuss ventilation - holes in the product?

A. Not particularly - no, no. I don't think we had a brand, during the time I was there, that ever had holes in the filter, to my knowledge. They had holes in the paper, but not in the filter. They had specially designed filters. Maybe they had holes in them, but they were like - you knew there were holes in them--like the charcoal you could see those because it had a darker filter.

Q. And what did you understand the purpose of the holes to be?

A. Well, I am not saying I knew about holes then. I knew about high porosity paper then. I never had any idea about cigarette machines, sucking on cigarettes or anything like that.

Q. Right. I just want to - all right. So, the high porosity paper the purpose was to allow air in to dilute the smoke? Do you agree with that?

A. The concept was that, yes.

Q. Right. And that would be the same concept as putting a hole in the product as well. It's dilution, isn't it?

A. Well, you found a way to do it.

Q. But you would agree with me that concept is

dilution of the smoke by air?

A. The concept is to dilute the reading by air.
Correct.

Q. It is to dilute the intake by air. The
intake of smoke is diluted by air.

A. Correct.

Q. And the theory is....

A. If the holes are in the filter your lips
don't cover them. That's correct.

Q. So, that's right. So, to the extent that
they are not covered they are going to dilute the air?

A. Absolutely right.

Q. All right.

A. Give you a good reading.

Q. That's the purpose of ventilation, isn't it?
It's to dilute the air.

A. If you put them in the filters the purpose
is to trick the smoker who is trying to quit.

Q. Let's just set that aside. It's also to
dilute...

A. But that's my claim.

Q. I know it's your claim. But, you would also
agree with me that it is there to dilute the air as well - to
dilute the smoke, sorry?

A. It's there to design a safer cigarette.

Q. By diluting the smoke?

A. That is correct.

Q. Now, you became aware of the health issue
back in the 50s and 60s and you'll agree with me that you've
been told by your doctor since the 1970s that you should quit
smoking and it's bad for your health. Do you agree with that?

A. Yes, I do agree with that.

Q. Okay. And I take it that you also, from time to time, have read the various warnings that have been placed on the products as well?

5 A. I knew they weren't voluntary. So, therefore if I believed the Tobacco companies and what they were saying about their product the message didn't mean anything to me, because they were not what the product said on the label. And you also believed that too. And I believed you.

10 Q. Well, let's just parse through this. The first warnings that went on the pack in 1972 were voluntary. Were they not?

15 A. Yes, because you have found a way to take advantage of a voluntary, a voluntary goodness. You said, "Let me put the readings on the package. I would voluntarily do this to help the people." All along we found out the other day on the screen that as far back as 1980 you guys were thinking about how to manipulate the nicotine in the readings. So, you had a plan after you said, "I volunteer that information."

20 Q. My question to you was we are talking about the warnings that are the package, not the T & N numbers.

A. You said you volunteered that information.

Q. Don't say, "I" ...

A. And I am saying why you volunteered that information.

25 Q. Let's first of all get the questions out.

A. But that's the crux of it, sir.

Q. Do you agree with me....

THE COURT: Listen carefully to the question. That's not the question you are answering.

30 Q. Do you agree with me that the warnings in

the 70s were voluntary, they were not legislated?

A. Correct. To the best of my knowledge that's correct. I don't know it as a fact but I believe that to be true.

Q. All right. And you read those warnings?

A. I don't know if I read them or not, but I am aware of them somehow.

Q. And then you certainly would have read the warnings that are on the pack as a result of the legislation in 1989?

A. You cannot miss them. Even though I don't see them anymore they are there. It's the side of the package that matters to me.

Q. The side of the package because it's got the T & N....

A. Because it's a guide to my safety, to what I intended to do. I wanted to quit and you frustrated me.

Q. Well, let me just ask you a question about that. You smoked - if you just look at the Viscount Extra Mild. Would you just look at that chart for a moment...

A. Yes.

Q. ...that's now an Exhibit? You smoked that in the early 80s. Did you not? And it's 4 & .4.

A. I've smoked it sometime during my life, yes.

Q. Right. Did you quit as a result of that?

A. I don't remember what brand I was smoking before, but it might have been Matinée too. I don't know. Give me your question.

Q. I just asked you, you smoked that for two years. It has the same number as the...

THE COURT: As the Viscount?

Q. ...as the Viscount, yes.

A. Yes.

Q. It has the same numbers as Matinée?

A. Right.

Q. Right. I just asked you, did you quit?

A. Well, I didn't smoke those, according to this for about two years and then I went to another brand, right? Vantage? Is that the order?

Q. Well, that's the order I got from you.

A. Yes.

Q. For two years.

A. So I smoked - it says here I smoked Viscount 100 Extra Mild for two years in the early 80s.

Q. Right. And my point to you is that it has the same T & N as our product...

A. Yes.

Q. ...and you are still smoking today, aren't you?

A. Yes. But, they, they don't know the trick you know. They haven't - they just found that out. That's why you got seventy percent of the market.

Q. Well, we'll just take questions and answers.

A. They didn't know what you know. They know now. You know that. You do know that.

Q. I don't know anything. Let's just come back to the questions and answers. This has the same tar and nicotine levels as the product that you are complaining about today. Does it not?

A. Yes.

Q. And you smoked this for two years. And you are still smoking today. Are you not?

A. Yes.

Q. All right. Now, when you started this lawsuit, Mr. Battaglia, would you agree with me that your principal allegation was based on addiction?

A. Correct. Manipulation of the addiction.

Q. Right. And that you stated that - I just want to make sure, that in 1999, that prior to - let me just put this in the right context. When you were making disclosure as a result of the Motion we spoke about earlier you indicated that at that point in time, which was March of 1999 that you had no health problems with respect to smoking and your only claim was with respect to addiction.

A. That's one hundred percent dead-square right. I had no idea that I had what I have now. I was trying to prevent that.

Q. Right.

A. I didn't wish it on myself. I said you are putting me in line to get potential diseases. And then we had to change because I did contract the heart disease and now I have a twenty-five percent change I'll be dead in five years. I didn't know that. I didn't wish that. I tried to stop that.

Q. Right.

A. And that's why I am mad at you...

Q. Right.

A. ...because you deliberately, with full intent, with full knowledge, the company that you represent was willing to sacrifice 30,000 lives a year for the sake of 5,000,000 smokers. You decided yourself - it's been in the newspaper, the headlines have said it. Imperial has said, "Nicotine is addiction. And in some people"....

THE COURT: Okay, okay. Just take it easy.

A. They say, "In some...."

THE COURT: No.

A. Let me finish.

THE COURT: You haven't - no. You get to do that at the end of the case, sir, through Mr. Lennox. Mr. Barnes.

MR. BARNES: Q. Thank you. In March 1999 you told us that your claim was based on addiction. You have agreed to that, correct?

A. Yes.

Q. All right. We then brought a Motion for summary Judgment based on your claim for addiction. Do you remember that?

A. I brought a Motion to dismiss, yes. Correct.

Q. And....

A. Is that the one?

Q. That's the one. That's right. And in response to that...

A. After I answered your questions and you used them against me in the Motion to dismiss.

Q. Perhaps we can just....

A. Well, that's crucial, isn't it?

Q. It's not crucial to what I am asking you.

A. That only show you the trick used against me.

Q. You've got a lawyer that can get up and ask all sorts of things.

A. No, but this is, this is my chance to speak.

Q. No, it's not.

THE COURT: Mr. Battaglia you are here to answer questions.

A. I represent a lot of people.

THE COURT: No, you are here for yourself, right now.

A. It's important to a lot of people.

5 Q. And, you have identified that there was a Motion to strike. And in response to that Motion - apparently there was a Motion for Summary judgment, you filed an Affidavit and in that Affidavit, Mr. Battaglia, and I quote from your Affidavit, you said that in response to the Motion that Imperial had brought, that you only learned in 1999 that your
10 smoking had cause you to suffer coronary heart disease. That's in your Affidavit. Would you just have a look at that?

A. Yes. That's true.

Q. All right.

A. That's true.

15 Q. And that's an Affidavit, Your Honour, that is dated...

THE COURT: Well, I don't care about the Affidavit he says it's true.

20 Q. I just wanted you to know where I was reading. All right. And so, you heard the evidence yesterday of Dr. Graham (Ph).

A. Yes, I did.

Q. And Dr. Graham indicated that he had seen
25 you in 1991?

A. That's correct.

Q. All right. And he had seen you as a result
of some discomfort that you were having during exercise?

A. That's correct.

Q. All right.

30 A. With sex.

Q. That's exercise. Is it not?

A. That was the exercise.

Q. And we agree on that.

A. That's what brought the pain on.

Q. And we agree on that. That's exercise?

A. Yes.

Q. Okay. We've agreed on something. So we are making progress. And, would you also agree with me that in 1991, Dr. Graham (Ph) diagnosed you as having coronary artery disease.

A. I didn't know that.

Q. Dr. Graham, you heard his evidence yesterday.

A. I didn't know that.

Q. Well, just listen to the question.

A. Okay.

Q. You heard his evidence yesterday that he discussed it with you.

A. Mm-mm.

Q. And he seemed to be a pretty good person for making you aware....

A. Very lucky to have him here on my side.

Q. And Dr. Graham says in evidence that he discussed it with you and he talked to you about smoking and why you should stop.

A. As all doctors that I have ever seen in my life have told me to do.

Q. But at this point in time he is discussing with you a serious medical condition.

A. No, he did not, sir. I was not aware of the seriousness of that diagnosis that he gave yesterday. I did not go back to see him. There was no forwarding letter that I

ever receive to say that that was what the condition of myself was. I believed it to be anxiety attacks. Nobody ever changed that kind of thinking.

5 I already explained to you that there was a five-year gap in my life where I - when he walked in the door I hadn't the vaguest memory of ever seeing him and how I got to see him. I, I, and then he said I wore a machine on my body to measure how much my heart was beating, I completely forgot about that. So, I told you, I had a five-year gap in my life.

10 So what he says is true and all of those things that he said yesterday is true. But I did not have knowledge nor was I, was I, near aware of what he said I really had. I, I - the second I - in 1999, yes - but, everything he said yesterday was true but I have a very slim memory of it. And I've lived ten years since it.

15 Q. So you got a very slim memory of it. But you don't dispute the fact of what he said yesterday, that what he said to you was in fact true?

A. No. No what he said yesterday, was true. But, he never told me those things to my face.

20 Q. Well, could I just ask you....

A. I think I would remember that.

Q. Well, let me just ask you, so that...

A. And I never would make claims that I have if I remembered that.

25 Q. Well, take a look at, if you can, for a moment what he says in his report.

THE COURT: To the family doctor?

30 Q. To the family doctor yes. I just want to make sure. Dr. Graham gave evidence yesterday about what he said.

THE COURT: Yes.

Q. And then....

A. What page please?

Q. Could you take the...

A. White one?

Q. ...White volumes. You should have...

THE COURT: Underneath.

A. Oh. The first one or second volume.

THE COURT: Tab?

Q. Tab Number 20, Page 268.

A. Pitrie (Ph) is not even my doctor. This was my friend's doctor. I never went to see him.

Q. Well, could you just read perhaps down to the last paragraph? I am really just dealing with what he has reported back.

A. Sure.

Q. "I have discussed the results of the investigation with Mr. Battaglia, and have made the following suggestions." Do you see that paragraph?

A. Yea.

Q. Right. So he says here that he has discussed it with you and you have no reason to doubt that wouldn't be true.

A. Okay.

Q. Right. And so, if he had discussed it with you he probably would have told you what your diagnosis was?

A. Okay.

Q. Right. And then he would have gone on to tell you what you could do to perhaps improve your condition. Wouldn't...

A. Sure.

Q. ...that be a fair observation?

A. Yes.

Q. And one is that he strongly advised you to stop smoking.

A. Yes.

Q. And you heard his evidence yesterday as to what his view was on this particular disease and what might happen to somebody even at forty-one when you are diagnosed. Did you not?

THE COURT: Forty-nine, I think.

Q. I am sorry, you're are right, diagnosed at forty-nine. My point to you Mr. Battaglia, Dr. Graham (Ph) felt that this was a pretty serious thing for a forty-nine year old man. Right?

A. I got the impression that I've really deteriorated but I wasn't as bad as I was in '91. Something dramatic has happened.

Q. Well, I guess we heard....

A. Sometime during '91 to '99.

Q. We certainly went through the evidence about the risk factors for a forty-nine year old and the prognosis?

A. He did that here, yes.

Q. Right. And do you not think that when he was talking to you about what you had, what the implications would be for you in the future?

A. All right. Let's assume he did.

Q. I am just asking you to....

A. No, let's assume that he did.

Q. Well, I am not asking you to....

A. Knowing me....

Q. No, I am....

A. ...at that time...

Q. I don't really want to go into this.

A. ...the last thing I wanted was to be sick. I had so many things that had to be taken care of, that the last thing I wanted to do was to lay in a hospital bed. It is very possible that I in my own mind said, "I don't want to hear you now. I don't want to know anymore. I can't be sick, I must continue to go on." It may very well be that that's the reaction that I had, which is why I can't remember or why I didn't follow through. But I can assure you that at that time my mental state would have been, "Joe, you cannot go and lay in a hospital bed today," because the problems I had were too severe.

Q. Well, that doesn't mean though, that Dr. Graham (Ph) didn't tell you that you had coronary heart disease. Does it?

A. I can't deny that. But I would hope I would remember that I had something as bad as that, even though I didn't want to know it.

Q. You would assume though, would you not, being fair, Mr. Battaglia, that if the doctor had diagnosed you with coronary artery disease or coronary heart disease, when he is telling you what's wrong with you he'd certainly tell you that at a minimal, wouldn't he?

A. No, no. He didn't. No x-ray of my vessels were done.

Q. I am not asking whether he did any x-rays, I am just asking you whether he told you what was wrong with you.

A. No, but there is a very big difference. No. We could now see my heart and my arteries and everything and where the blockages are. Nobody did that until 1999.

Q. I am just asking you what he told you.

A. It was a diagnosis based on what my, what my, what my levels of certain things were, what my heart beat was and what, what, what a cardiograph said. But, nobody saw the picture of the disease until '99.

Q. Whatever procedures he did do, he made a determination that you had coronary artery disease.

A. He did.

Q. Right.

A. He did and that's what he said he did.

Q. All right. And it would be fair to assume that he would have told you that as well? Would it?

A. Well, I, I didn't go back to see him.

Q. I know you didn't go back to see him. I am just....

A. Listen, if you are going to use it as a big deal, I've got to be careful what I say because I - he said - what he said is true. I'd like to think I would remember that if he told me that even though I didn't want to hear, I would have understood. I wouldn't have forgotten.

Q. Well, he said that he told you that and you say you don't remember. That's really where we are at. Isn't it?

A. Not to the degree that it is now been described.

Q. We are not talking about degree, we are just talking about certain words.

A. I can't, I really cannot one hundred percent say I heard those words from him. I really can't, as serious as the words were he used yesterday.

Q. And the flip side of that is that you can't

deny it either?

A. No, I can't, for sure.

Q. Right.

A. My mental state that it was.

MR. BARNES: Would Your Honour like to take the morning recess?

THE COURT: Is this a good time?

MR. BARNES: Yes.

THE COURT: Okay. We would adjourn for ten minutes.

R E C E S S

U P O N R E S U M I N G:

MR. BARNES: Q. Mr. Battaglia you were at Rothmans at the time that the discussion were going with the federal government, in the mid to late 60s, with respect to providing the federal government with tar and nicotine levels, weren't you?

A. I wasn't privy nor was I of a high-enough nature within the company to be involved in anything that related to that other than what was provided to us through the newspapers or by the company itself after something was done.

I never was involved in any decisions that related to anything how a cigarette was made or - just how it was sold and how to sell it.

Q. All right. But you were aware that there were discussions going on with respect to the topic even though you may be told after the fact?

A. In what year?

Q. These discussions are going on in the mid

60s. And, we know that the first press release was in 1968.

A. That was one year before I left Rothmans. So, there was one year left for me to pick this up. And, I was in a turmoil at the end of Rothmans too. So I am...

Q. In 19....

A. ...not sure I know anything about that.

Q. Let's just test your memory. In 1968, you were responsible for a brand. Were you not?

A. Dunnhill, yes.

Q. Right. And what was the tar level of Dunnhill?

A. I have no idea.

Q. You don't remember what your tar level of Dunnhill was?

A. No, I wasn't concerned. I thought cigarette smoking was okay. I knew how to smoke safely. I was taught.

Q. All right. And how was to smoke safely?

A. Well, you use a butt of a longer length...

Q. All right.

A. ...because that's where the accumulation of all the carcinogens accumulate. The fire gets hotter and hotter as it gets closer to your mouth. It makes it multiply and then that's where all the bad stuff is. So, if you throw that out you don't get the bad stuff.

Q. Take a look for a moment, I want to ask you if you knew something else as well. Take a look at the press release....

A. You are giving me more credit than I deserve with regards to my position within that company at that time.

Q. Well, no....

A. I was the office boy. I was a young kid

trying to go forward with pimples on my face. I wasn't an executive.

THE COURT: Tab Number please.

Q. The Tab Number is "5."

THE COURT: In Exhibit 6 in the Red book.

Q. In the Red book. I am sorry.

THE COURT; Yes, okay.

Q. Now, first of all this is a News Release and you've heard the evidence of Mr. Collishaw (Ph) and it was discussed with him but this is the first News Release from the federal government. Do you remember hearing that evidence from Mr. Collishaw (Ph)?

A. I remember him referring to a news release, yes.

Q. Right. And you'll note, just by way of interest, that in fact the brand that you are responsible for is reported in this list which is - if you go to Table 1. Do you see that? So your brand's reported. Dunnhill is the last one on the first page, I believe.

A. Correct.

Q. Right?

A. Yes.

Q. All right. And, there is a press release. And, if you can go back you indicated that you said that you knew a safer way to smoke. I want to ask you if you would agree with me with the other propositions on Page 3. If you would have a look at the other methods that are being suggested and ask if you would agree with me that these also would be in the category of safer ways to smoke.

Could you go back - just go back to the text for a moment, Mr. Battaglia and take a look on Page 3 and there is a list of

5 suggestions. Do you see, starting at the bottom of the first paragraph? "However the smoker can reduce his intake while cigarette-smoke constituents, gases as well as tar and nicotine by reducing the amount of smoke he inhales. This can be accomplished by...." Do you see that?

A. Yes.

Q. And you've told me about the one and that's your butt length?

10 A. Right.

Q. Would you just take a look at that list and tell me if you agree that those are also ways?

15 A. I did everyone - the only one I did of those is the one where I threw away a longer butt. I also got the cigarettes free too so it was pretty easy to do.

Q. That maybe the only one you did, but you'd agree that those would be in the category of safer as well. Would you not? You didn't do them but others might have.

A. I don't know who is going to do this stuff.

20 Q. Well, obviously the government thinks that maybe somebody will.

A. Who's going to put a cigarette in the mouth and not inhale it. This is a suggestion.

25 Q. Well, let's look. Let's look at the first one though: lengthen the period between cigarettes.

A. Oh. What is it? Two years - that's good if you lengthen it two years.

Q. But, it could also be lengthened by an hour.

A. So, that means don't smoke as much.

Q. Right.

30 A. So, that's what they should say, "Don't smoke as much."

Q. Okay.

A. They also say the most effective is not to smoke at all.

Q. Right.

A. I don't remember seeing this.

Q. So, you were not aware...

A. No.

Q. ...that this discussion was going on.

A. You are giving me too much credit for where I stood in the company in 1968.

Q. I am not giving you credit.

A. I was twenty-eight years old.

Q. I just would have thought that if you were publishing tar and nicotine levels as a Brand Manager you might have had some awareness of what was going on.

A. I wasn't even interested in tar and nicotine level. It wasn't even crossing my mind about deceit and anything else. I was a family member of a company. I believed in it, believed in them, fought for them. I fought your company like hell.

Q. It's not my company, Mr. Battaglia.

A. Well, the company you represent.

Q. But the point is....

A. Since I left they took over the whole market.

Q. So at these sales meetings there were no discussions going on about the government's inquiry in tar and nicotine?

A. Well, there have been. But it was not relevant to my life or how I was living or what I needed or anything.

5 Q. You made a reference yesterday and maybe you can just tell me what it was so that I don't have it out of context. When you were talking to Mr. Lennox about this topic you said - and I had a note - that you referred to the importance of the T & N numbers and tied it to the Reader's Digest.

10 A. I mentioned the word Reader's Digest yesterday.

15 Q. Right. And what was - what context...:

A. That magazine.

20 Q. ... was that.

25 A. Well, I believed that was in '57, '60s. It would be in the 60s for sure when all "hell broke loose" with regards to the dangers of cigarette smoking in the Reader's Digest Surgeon General's Report, all of that type of stuff. That's what initiated brand like Rembrandt and Rigio (Ph) and all these special filters. Nobody ever thought about doing what you guys thought of doing. And they put real tobacco in the cigarettes in those days too, because we used to open them up and compare and make sure they looked as good. We used to buy the best tobacco money could buy.

30 Q. When you....

A. You don't have the right charter for the product you sell. You don't. You are selling chemicals in your tobacco company.

Q. I think we went over that yesterday.

A. Well, it should be said again.

35 Q. Let me just come back to when you were developing Rembrandt. That was intended to be a lower delivery product. Was it not?

A. It was intended to try and appease those

5 smokers who may now quit or do something drastic to the marketplace where they wouldn't be able to sell cigarette. So they had to come up with some idea that satisfied those who were afraid. And that was one method used. And I was part of the launching of that brand, not the design nor its understanding of what it meant.

Q. Do you have any memory as to what the tar and nicotine levels were?

10 A. No, I do not. It was never an issue. I do remember that Craven A lucked out many times in that Reader's Digest Report, along with Matinée's until Sunnybrook Hospital letter came out.

15 Q. All right. Now, Mr. Battaglia, you claimed that you're addicted to cigarettes.

A. Yes, I do.

Q. And, as I understand it you claim that you've been addiction since 1957?

20 A. I believe I've been addicted all my life. But I didn't realize that the nicotine was being manipulated in such a way as to fool me.

Q. Well that's...

A. So that I would...

Q. ...that's what I was going to ask.

A. ...not quit and could die.

25 Q. But your claim is that you have been addicted since 1957. That's all I want.

A. I must have been.

Q. All right. All right. And you first attempted to quit by going "Cold turkey" in 1970.

30 A. I've tried that, yes.

Q. All right. And at the time that you did

that in 1970 it was because you were alarmed as a result of the growing reports in the press about the health risk of smoking.

A. It might have been one of my reasons, yes.

Q. That's in your Statement of Claim.

A. Fine. That would be one of my reasons.

Q. All right. And you claimed at that time that you could not quit because of the pains and the cravings which were too excruciating.

A. I couldn't quit, no.

Q. You couldn't quit, right.

A. I couldn't quit.

Q. And at that point in time how long did you quit for?

A. Three days.

Q. And, would it be fair to say when you are talking about "Addiction" your definition of addiction is that you just can't quit?

A. My definition of addiction is that if I was a heroin or cocaine addiction I would have the same difficulty getting off those drugs as I am cigarettes and that's in black and white. So, in some ways I am not a cocaine or heroin addict, thank God. But apparently, I am in just as tough.

Q. All right. You can't quit.

A. I can't quit. And when I tried you frustrated me on purpose. On purpose...

Q. Maybe we could just go over....

A. ...with full knowledge.

Q. ...the occasions that you tried. All right? I know that you tried in the mid 70s. All right?

A. I've tried throughout my life.

Q. Let's go over the trials. You tried with

the Patch in 1992. Is that correct?

5 A. I've tried with the Patches multiple times. "Multiple times" meaning three to five times over - like three to five different times at least.

Q. And, I would like to sort of go with you into more detail, if we can, because this is an important question, isn't it, as to whether you can or cannot quit? You will agree with me?

10 A. Well, I know how I can quit. Do you want to know how I can quit?

Q. Well, not at the moment, we'll come to that. So, let's go over the occasions when you tried to quit and see what happened. So the Patch, 1992, right?

15 A. All efforts. Whatever the efforts were out there that were there to aid you in trying to quit, I tried it more than once. Some only once, some - Hypnosis twice, Nicorette (Ph) gum once, Patches multi times.

20 Q. Let's just deal with the Patch. The Patch multiple times. What was the longest time you quit when you were using the Patch?

A. Two years. Somebody said it was three. I may have bragged about it and extended a next year because of my pride, but I think it was two. It's good, pretty good.

25 Q. And when....

A. I was shocked.

Q. I am sorry.

A. I was shocked that it did that.

Q. And when was that.

30 A. Late 80s. And that was with the aid of the Patches.

Q. All right.

A. And a good life.

Q. And a good life.

A. Yes.

5 THE COURT: Did you get on with it and off with the Patch?

A. Yes. It was a miracle. But they hadn't been doing what they are doing now then either.

10 Q. And I think that the note that we saw yesterday - was it - you told Dr. Graham three years you quit?

A. Yes, he said three. I think I may have exaggerated. But hi, two years is as good as three, especially if you quit. It might give you another ten percent more chance of staying alive.

15 Q. And, coming back, so we got that some time in the late 80s. Am I correct that you quit for two years?

A. Yes.

Q. Or three years if we accept Dr. Graham's...

A. Okay three.

20 Q. ...Dr. Graham's (Ph) report.

A. It's really two.

Q. But, let's just test that for a moment. Earlier on you told us that you really didn't recall going to see Dr. Graham.

A. Right.

25 Q. But one would assume that when Dr. Graham (Ph) was making a note in 1991 about a conversation that he is having with you, he is writing down what you are telling him right?

30 A. He would be more correct than my memory. I would believe that, yes.

Q. Okay, thank you. All right. And, tell me

about the hypnosis. When was that?

5 A. When I lived in Barrie, I was living in Craighurst, and that was, maybe '78, '77, '78, '79 and I was in a little town called "Thorold" (Ph) or something like that where I had - it was small little town, where someone had recommended that I go and see this man. And then there was a Dr Weinberg (Ph) who lives on Spadina Road who was hypnotic and therapeutic at the same time.

10 Q. And...

A. And that would have been in the early 90s, I saw that hypnotist.

15 Q. And if I understand, and you can tell me if I wrong, you went to see the hypnotist in the 90s as a result of a companion that wanted you to quit smoking. She got you to got and see this hypnotist. Is that correct?

A. Yep. Yes.

20 Q. And, you had a measure of success. You, at that time, stopped for six months. Is that correct?

A. Yes. I did. Yes, I believe I did.

25 Q. All right. And as I - correct me again if I am wrong - that unfortunately or fortunately depending on the situation that relationship terminated and the motivation to stop smoking....

A. And then I went back to doing all those bad things again.

30 Q. So, perhaps if you had continued with that companion you would have continued to quit.

A. No, I wouldn't be as happy as I am today.

Q. But you'll agree with me that while you were with that person that your ability to stop was similar to when you said earlier that you stopped for two years, and you said,

to use your words that, "It was the good life at that time."
Right?

A. A better attitude of mind.

Q. A better attitude of yours. That's correct.
And you had a better attitude....

A. In the, in the early 80s, right.

Q. No, I think you told me that....

A. Not the, not the early 90s.

Q. No.

A. I can tell you that was not true of my
attitude of mind in the early 90s, late 80s. But, it was a
good attitude of mind in '89 and '90, or, you know, around that
time.

Q. No, I am just talking about, I think you
said it was a good life, the period when you quit for two or
three years.

A. Leading into the bad life. Correct. Right.

Q. Right.

A. Right.

Q. And, in fact it was the bad life that led
you to go back into smoking. Isn't that right.

A. That's the crux of the reason, yes.

Q. And similarly....

A. And certain steps that were taken.

Q. And you went through that at length
yesterday?

A. Yes.

Q. And similarly when you were with this
companion for six months, and things were fine...

A. No, I wasn't...

Q. ...it wasn't a bad time.

A. ...with her for six months. It was with her for two years.

Q. Two years.

A. Two, three years.

Q. All right. And just so I get the time frame. When is that time frame?

A. Time frame - when I was about forty-eight years old to fifty what?

Q. No, I'll have to figure that out. What years was for me?

A. Ten years ago, eleven, twelve years ago.

Q. And that's when you went to hypnosis?

A. Second time, correct.

Q. Right. And that's when you stopped for six months.

A. Well, if it says six months, it was. I don't remember. I know I quit for a little while but I know it didn't work in the end. But, I obviously had to quit because.

...

Q. She wanted you to quit, didn't she?

A. Oh, yes.

Q. Then after you stopped seeing her you went back to smoking, right?

A. Might be one of the reasons why I stopped seeing her. Isn't that terrible that I stopped seeing a woman that I thought maybe I loved because I wanted to go and smoke a cigarette?

Q. Are you telling me...

A. That's also possible.

Q. It's also possible.

A. Isn't it?

Q. Are you telling me that's the reason.

A. Yes it could very well be.

5 Q. Is this the first time you thought of that
as being a reason?

A. No. Yes, it is the first time I thought of
that right now, as a matter of fact. You've heard the doctor
say that people with foot cut off they'll still smoke. They
have their hearts pulled out and the lungs and they go outside
10 at University Avenue and smoke cigarettes.

Q. I also heard Dr.

A. Why wouldn't I leave a woman so that I could
go back to smoking cigarettes?

15 Q. I also heard Dr. Graham say that fifty
percent of his patients stop smoking too. Did you not hear
that?

A. Yes.

Q. Right. And you have already stopped for
three years. Have you not?

20 A. Fifty percent of his patients who have their
hearts torn apart and repaired, not those who just come into
his office. He is not a fifty-percent perfect person like
that. It's the people who have almost died; he got half of
them saved.

25 Q. All right. Now, am I correct that you
stopped smoking again in 1999?

30 A. I have tried to stop smoking since this
lawsuit has come out, and there are, I have - by way of
Patches, even though this suit was going on because I believe
that my suit still has strength even if I quit smoking right
this second, that my smoking right now doesn't have anything to
do with my claim against you. I could quit right now and the

strength of my story remains as strong - all we have now is an add-on by luck. I am sick. I have a bad heart.

Q. So you are telling me....

A. But, I can say I am a healthy person but you are putting me in direct line of being an unhealthy person with the potential to death, which your company has recognized as a probability in some people.

Q. Well, that's an interesting speech, but let me just come back to something you said.

A. Fine.

Q. You said that you could quit right now.

A. Yes, true.

Q. No.

A. Yes, I could quit right now. But you don't want to know how. You just want me to say that.

Q. You said it.

A. Don't you want to know how to quit.

Q. I don't smoke.

A. Don't you want to tell the world how to quit?

Q. That's not what we are here for.

A. But wouldn't the world want to know this?

Q. Well, maybe in another forum.

A. You don't really want to know how to quit.

Q. No.

A. Do you smoke?

Q. One benefit of being over here is that I get to ask the questions.

A. I know.

Q. It's probably the only benefit. In any event - so, we've got your evidence on that.

A. What evidence is that we got?

THE COURT: Don't ask questions Mr. Battaglia, just answer them.

A. Right.

Q. Now....

A. You know, maybe you don't know what I think you know. But...

Q. I haven't asked you a question.

A. You know, but you represent people who know those things. Okay. So, it is not personal against you.

Q. Well, thank you. I am relieved.

A. You just happen to be the guy representing them.

Q. Mr. Battaglia, you volunteered yesterday in your evidence some information about your web site.

A. Right.

Q. Do you remember that?

A. Right.

Q. And, I would just like to talk to you about your web site for a moment..

A. Sure.

Q. I would just like to show it to you so you've got it. Let's have a look at that for a moment. A copy for Your Honour.

A. You are going to let us get this on the record, eh?

Q. Mr. Battaglia, you raised this yesterday.

A. Good.

Q. Is that the web site that you were referring to?

A. This is part and parcel of the transcripts

that are on my web site, yes. This is not the complete web site, but it's my information.

MR. LENNOX: Just before this goes into evidence. I believe Mr. Battaglia had referenced some newspaper articles as well.

MR. BATTAGLIA: Oh, well, there's lots of them.

MR. LENNOX: I don't see these attached. It's actually not....

MR. BATTAGLIA: A. You have it in three envelopes or three green files I gave you.

MR. LENNOX: It's not a complete....

Q. I think the witness just said that. I just wanted to deal with what you were talking about yesterday. You spoke yesterday....

A. Sure.

Q.about the financial arrangements, right?

A. Yes.

Q. Is that what you wanted to talk about yesterday?

A. Well, I figure you'd bring it up today.

So....

Q. Well, I might not have done so you might have made a mistake there, Mr. Battaglia. In any event, if I look at this document with you for a moment, this is a document basically, as I read it that is inviting....

THE COURT: It was printed out in May, 1998.

A. It is not related.

Q. Sorry?

THE COURT: It was printed out in May, 1998, right?

Q. Yes.

A. It is not relevant to today's case.

THE COURT: Well, I don't know.

Q. It is still up on the web site today, is it not?

A. Sure it is. I put a lot of money into this. It's like not wanting to throw something out. But it doesn't relate to this.

THE COURT: My observation was only to the point that Mr. Battaglia's probably right that you were going to bring. You've had it since 1998.

Q. Oh, I've had it since then.

THE COURT: Okay.

Q. All right, Mr. Battaglia.

A. It's not complete.

THE COURT: We'll make that Exhibit Number 11?

THE CLERK: Yes, Your Honour.

THE COURT: Let's finish the questions and then we'll mark it.

Q. Now, Mr. Battaglia, if I understand this and I look at it, what you are doing is you're inviting people that are currently smokers of a Canadian products and have attempted to quit but failed and reside in Ontario to allow you to act for them in a Small Claims Court Action. Is that correct?

A. Who fit my criteria of complaint, yes.

Q. Well, just take a look through the Claim criteria claim. Do you have that? Just so we can make sure we are talking....

A. What page?

Q. You've got a heading - I've got 2 of 2. Where is it in the one that....

A. Page 1 of 1, where all the figures are?

Q. The - actually it turns out to be the last page...

A. Okay.

Q. ...the document that you have.

A. Right.

Q. Those are the claim criteria are they not?

A. "Currently be a smoker of a Canadian manufactured cigarette. You have attempted to quit but failed and you live in Ontario."

Q. Right. And based on that they would just - they can even fax in their participation. Can't they? "To participate, please fax your request."

A. Well everything was there for them.

Q. Right.

A. I meant they didn't have to do a damn thing. That was the whole point. You just give me permission, be beside me today and if I win, you win and I win. It didn't work. And, the criteria that I used in those days, is much different than the criteria that I am using today because new information has come forward since that time and I am not suing all three companies anymore. I am suing only one.

Q. Just coming back to the point you made that "If you win they win." That was your theory.

A. Of course that was my concept that was in the paralegal business since I started in 1990 - "If We Lose, You Don't Pay." That's the name of my incorporated company. But, I work under the name of "Justice Agents at Court." And that's the first time I've ever publicize to anyone where and what the name of my company is since I began this lawsuit. I've always been recognize Joe Battaglia, paralegal. Never have I used it to promote my company.

Q. Sorry, I didn't ask you a question.

A. No. But I said what I said.

5 Q. Right. And if I just look at that if in fact you aren't successful you get a fee of \$200 and if you are successful you get a fee of \$1200. Is that correct?

10 A. If I was successful I would have gotten a fee of \$200 of which \$100 went to the file for the Trial Notice and \$100 that if I got enough it might take care of the costs of the costs of the web site.

Q. Right.

A. So, you had to give me \$200 to be beside me today. And everybody said it was "nuts."

15 Q. I think actually if you look at it, I may be reading it incorrectly - if you look at the agreement...

A. All right.

Q. ...I don't want to spend a lot of time on this - that you have to pay \$200 and then \$200, if you take a look at the agreement that you are asking.

20 A. All right. We paid the Justice for one claim - it was \$200.

THE COURT: No, no, no, he is looking at a different page, I think.

Q. If you could look at the Agreement page in that document...

25 THE COURT: Yes, the next one...

Q. ...for a moment.

A. All right.

Q. Right.

A. That was a lot of work here, right?

30 THE COURT: Registration fee of \$200, half of which can be recovered if the claim is

successful.

Q. And then if they showed up for trial a further fee of \$200 of which....

5 A. Oh, that was the instruction how I was to get paid. That's right. If I went to a Pre-trial Conference...

Q. Right.

10 A. ... I was to get \$300, if I won, not at that point in time; just if I got a Pre-trial Conference I was now entitled to \$300. I didn't collect it then I had to win first to get it.

15 Q. So, my only point is that certainly you've got your own interests at heart, but obviously if you win, then it's going to enhance this business proposition of yours. Isn't it?

A. In which way do you see that?

Q. Well, the purpose of putting this up...

A. Yes.

20 Q. ...was to solicit claims...

A. Yes.

Q. ...and if you are successful you would get \$1200 per claim.

A. Right.

Q. Do you agree with that?

25 A. Right.

Q. And, as you said....

A. I would make a living.

Q. Of the business enterprise?

30 A. Definitely. I made my anger into a business enterprise. Attempted to, with, with the hope that there were lots of people out there who would be shocked to find out what

I just found out, and be mad enough to continue to do this. But \$200 was too much. I sent faxes all downtown to their offices telling them how they could do it, nothing came back.

5 One guy....

Q. Just one minute, Your Honour.

A. Don't forget my company paid for all of this of which my son is a partner and so he had to authorize the payments to put this on the web site.

10 Q. So he would be keen to see you win this case too, wouldn't he?

A. Oh, my son?

Q. Yes.

15 A. Because I am his father? Of course he would be happy for me to win this case, not because he is going to get any financial advantage. If there is a financial advantage, it's an off shoot of, of a legitimate complaint.

20 Q. Yesterday, Mr. Battaglia, Mr. Lennox asked you a question. He said to you, "If a range of numbers would have been available, what would you have done?" He was talking to you about if there had been a range of numbers on the package, what would you have done.

25 A. I believed my answer was as my answer today is, I would smoke the ones that had the lowest readings, initially until I reached the point where that particular cigarette satisfied whatever needs I had to be satisfied. And it could say 4 to 28. It's certainly going to help me make a better decision, but I have no idea what brand I would smoke or what number I would pick. It would have to be what you people decide to put out in the marketplace.

30 Q. But the point, Mr. Battaglia is that you wouldn't have quit, would you? You would have gone...

A. I wouldn't have quit would I if?

Q. You wouldn't have quit. Your answer was is that if there had been a range you would have gone and picked one in the range and see if you liked it. Right?

A. Well, that's assuming that I am still a smoker, yes.

Q. Correct.

A. Assuming I am a smoker.

Q. Correct. But you wouldn't have quit?

A. Ah, just give me that one again.

Q. I think, I'll just move on. I think I've got your answer.

A. Well, I'll answer.

Q. Now, you also said in evidence yesterday that you were - I think you described yourself as a professional smoker.

A. Yes, I did.

Q. Right. And you gave a demonstration that you knew how you could get an....

A. An extra boost of nicotine...

Q. Right.

A. ...in your system, yes.

Q. And you did that by drawing deeply and covering all....

A. Well, just totally taking it into your mouth and covering everything.

Q. And covering everything?

A. Yes, that's right.

Q. So, that you know by covering you are going to get a greater delivery?

A. I found that out, yes.

Q. Well, you knew that.

A. No, I didn't. I found that out.

Q. How did you find that out?

5 A. By habit, by smoking it, by just keeping it in my pocket and taking it out and smoking it.

Q. Okay. But you knew that by covering the holes that you would get a greater delivery, right?

10 A. Yes, but I am not going around in my car thinking, "Oh I am going to cover the hole right now." I am smoking a cigarette that I think is 4 & 4. Now, when I am going into court, I am little nervous and it's a big huge cigarette that's a 100mm, I've got a chance now to save half of that. So, I take a big shot now that I know the holes are there and it gives me more nicotine. But, there's lots of people that don't know that.

15 Q. I am not talking about the others I am just talking...

A. Well, there are involved.

20 Q. ...about - you know that though. You know that, don't you?

A. You are involving them.

THE COURT: Oh, come on. We all know the holes are there. I don't think....

Q. I am sorry, Your Honour, I didn't....

25 A. In the sense, the simplest argument against you is the hole, never mind all the other things you are putting into the tobacco that we can't prove because we don't have all the pieces of the puzzle.

30 Q. But, you just agree with me Mr. Battaglia, that you know that when you do that and cover the holes that you are going to get a deeper...

A. Ah, that's right.

Q. ...smoke.

A. There's no doubt about that. I know it. You know it and that's why you did it.

MR. BARNES: Okay. Thank you. Those are my questions.

THE COURT: Well, I only have one question. And, you may have answered it. Dr. Graham wrote to a family doctor.

A. Dr. Petrie (Ph)

THE COURT: Okay. Did Dr. Petrie (Ph) report to you?

A. No. Dr. Petrie (Ph) is my friend's doctor, the one who wouldn't take an aspirin if they had a headache.

THE COURT: The girlfriend...

A. Yes.

THE COURT: ...not the doctor?

A. Correct.

THE COURT: All right. Did you ever consult with Dr. Petrie (Ph)?

A. No. I think she phoned him and said, "Can you recommend somebody 'so and so' and bah, bah" and off I went like little Joey and did what she asked me to do.

THE COURT: Okay. Does anybody have any questions arising out of mine, Mr. Barnes.

MR. BARNES: No.

THE COURT: Any re-examination?

MR. LENNOX: I have one question, Your Honour, and at the risk of asking it. Joe...

A. Joe, how can you quit smoking?

Q. ...how can you quit smoking today?

5 A. Put me on an island by myself and give me a gross of Patches and I got to be - I can't smoke no more. That's it. Put me on an island by myself, give me a case of Patches and I'll quit.

THE COURT: And how long are you going to stay on that island?

A. As long as I stay on that island, I'll never smoke. The conditions out there today to try and quit are so tough Your Honour - I mean you have to stop socializing.

10 So you quit, now you go out and meet a friend, right in front of your face, there it is again. Now, if you don't go out with friends anymore now, to quit, you go hide, take the nicotine out, Your Honour, and let the people make their own choice. Don't infiltrate their system with an addictive ingredient. You saw the junk that's in it.

15 THE COURT: Is that it, Mr. Lennox?

MR. LENNOX: That's it Your Honour. I am ready to call the next witness.

THE COURT: Okay. Thanks very much Mr. Battaglia.

20 MR. BATTAGLIA: Thank you very much, Your Honour.

THE COURT: Mark this Harriett, please.

EXHIBIT NUMBER 11: Copies of transcripts from Mr. Battaglia's web site.

25 MR. LENNOX: Your Honour, I would like to call Mr. Purdy Crawford to the stand please.

PURDY CRAWFORD: AFFIRM

30 EXAMINATION IN-CHIEF BY MR. LENNOX:

THE COURT: You may sit down Mr. Crawford, if you like.

MR. CRAWFORD: I think, Your Honour, I'll start standing up. If my knee bothers me, I might sit down with your leave.

THE COURT: Okay.

Q. Mr. Crawford what city do you reside in presently?

A. City of Toronto.

Q. Mr. Crawford, what is your present employer?

A. I don't really have an employer. I am Counsel of the Law Firm of Olser Hoskin & Harcourt. And, I am non-Executive chairman of AT&T Canada. And, I don't think I have an employer. I don't have any remuneration at Olser Hoskin.

Q. So your position at Olser Hoskin, is Out-Counsel?

A. Out-Counsel? Yes.

Q. And what is Olser Hoskin & Harcourt?

A. It's a Law firm.

Q. And Olser Hoskin and Harcourt is the Law firm that represents the Defendant's here today?

A. Yes.

Q. And before joining Olser Hoskin & Harcourt as Out-Counsel, what was your employment status?

A. I was the - from 1985 until 1986, I was the President and Chief operating of Imasco. In 1986, I became Chief Executive officer. And, in 1987, I became Chairman and Chief Executive Officer of Imasco. And I was Chief Executive Office until May, I believe of 1995 when I retired as an officer, in that sense, at Imasco and became Non-Executive Chairman of Imasco. And, I was Non-Executive Chairman of Imasco until we sold the various companies and ended the life

of Imasco in, I guess it concluded in February, 2000.

Q. What is Imasco or what was Imasco?

A. Imasco was a holding company that was set up by my predecessor, in the late 60s, I believe, to diversify Imperial Tobacco into other types of businesses. And, when I joined in 1985 as the President the businesses consisted of Imperial Tobacco, Shoppers Drug Mart, Hardy's Fast Foods in the US, People's Drugs stores in the US and two or three quite small businesses that I don't even remember the names of, to be honest with you.

Q. What percentage of the shares did Imasco hold in Imperial Tobacco?

A. Imasco own hundred percent of Imperial Tobacco.

Q. And who were Imasco's shareholders?

A. We had one, what we called significant shareholder, BAT. I believe British American Tobacco was what the full name was originally. I think they shortened it.

They owned - that company owned, depending on the time anywhere, from during my period, thirty-nine percent to forty-two percent of the shares of Imasco. The balance of the shares were held by, mostly in Canada, institutional investors and individual shareholders.

THE COURT: Publicly trader?

A. Yes, publicly trader on the Toronto Stock Exchange, the Montreal Exchange and the Vancouver Exchange.

Q. All right. Before 1985, when you first became an inside Director of Imasco, what was your employment status?

A. I joined the Olser firm out of Law school. I was called to the Ontario Bar in 1958. I think about eleven years before I joined Imasco, in '85, I had been an outside

Director of Imasco. And in 1985 I left Partnership at Olser to become part of Imasco as I have testified earlier.

Q. So, between 1974 and when Imasco was wind up this year you had some involvement in terms of being an inside Director or outside Director or Chairman, you had some connection with Imasco?

A. Right.

Q. And prior to 1974 did you have any connection to Imasco?

A. Yes, I believe so. I did legal work from time to time. I believe I acted for the company, as I recall. I know I did, when they acquired Shoppers Drug Mart. And, I gave advice to Mr. Perry (Ph), my predecessor, from time to time and to the legal people at Imasco, from time to time.

Q. Turn to - there's a Trial Book in front of you. If you turn to Volume 1.

A. This book?

Q. Not the Red one, the Plaintiff's book. There are two volumes.

THE COURT: Take that piece of paper. The one that's one top we can delete that and that.

A. This...

THE COURT: Yes.

A. ...this thick one?

Q. Yes, please. Add if you go to Tab 6, just the second paragraph description there of your involvement with Imasco. And it talks about how you - your success with Imasco. How accurate a statement would that second paragraph be?

A. Ah, I think, the second or third, well, okay, I think certainly the first paragraph is accurate. Let me read the second one. The second paragraph is accurate except the transformation had already started before I - before

1985.

5 MR. LENNOX: Okay. Your Honour, at this time, I would like to ask you to exercise your discretion to treat Mr. Crawford as an adverse witness and I have a case with me to argue that point.

MR. CRAWFORD: Your Honour, I don't mind. I don't think - cross-examine me. It doesn't matter..

10 MR. LENNOX: If the witness is agreeable to be cross-examined, then I don't see the issue.

MR. CRAWFORD: I'd never....

THE COURT: Go ahead and ask your questions in the manner you feel most appropriate.

MR. LENNOX: Okay.

15 THE COURT: If you want to cross-examine him you can cross-examine him. He has volunteered. He's got nothing to fear, I supposed.

MR. LENNOX: Okay.

THE COURT: The truth is not very scary.

20 MR. LENNOX: Q. In that volume you have, Mr. Crawford, if you turn to Tab 9, please, this is a memo dated July 31, 1991?

A. Yes.

25 Q. And it is reporting on changes in tar and nicotine on the packages of Matinée King Size and Matinée Filtered King Size.

THE COURT: How many years ago? Two?

A. Yes, I see that.

30 Q. And those are the numbers that prior to July 31, 1991 were on the package on those two brands and it indicate what the numbers were changed to.

A. I don't see the dates, but I'll accept that.

Q. Okay. If you turn the page over, Mr. Crawford, there's a distribution list. Do you see that?

A. Yes, and I see my name on it.

Q. Yes. And, there is a T.R. Bates (Ph) on the name, from B.A.T.?

A. I beg your pardon?

Q. There is a T.R. on the left-hand column on the top. T.R. Bates from B.A.T - he got this memo.

A. I see a B.A.T. document.

Q. There are three columns of names on this distribution list.

A. Oh, I am sorry.

Q. And the first name on the left-hand column....

A. Oh, "Bates," excuse me, yes. I see it.

Q. And two names below that there is a Bob Bexon (Ph)?

A. Yes.

Q. And he is the current president of Imperial Tobacco?

A. Correct.

Q. And there is a Don Brown, a couple names below that?

A. R.D. Brown, yes.

Q. And he was a President of Imperial Tobacco for some time?

A. Yes.

Q. And in the middle column at the top, there is a P.J. Dunn?

A. Yes.

Q. And he is a Research Scientist with Imperial Tobacco - a senior Research Scientist?

A. Yes. I am not sure whether he is retired yet or not. But, as far as I know, he is still there.

Q. Okay. And at the bottom there is a John Luis Mercier (Ph), at the bottom of the...

A. Yes.

Q. ...middle column.

A. Yes.

Q. And he was a President of Imperial Tobacco for a number years?

A. Yes, he preceded Mr. Brown.

Q. There's an awful lot of people on this distribution list, Mr. Crawford?

A. Right.

Q. And there are all very senior people on this list. Would it be fair to say then that the numbers on the tar and nicotine - the tar and nicotine numbers on the packages were very important to the company?

A. From my perspective the numbers were important, yes.

Q. All right. And, you are at Imasco and you are getting this information. Correct?

A. Yes.

Q. And there is an Executive At B.A.T. and he is getting this information. Correct?

A. Yes.

Q. Turn sir, to Tab 7, there's a letter here addressed to you, dated December 29, 1986 and it is written by a Sir Patrick Sheehy? (Ph)

A. Yes.

Q. And Sir Patrick Sheehy was the CEO of B.A.T.

A. Correct.

Q. And Sir Patrick Sheehy is referring in this letter to a meeting that you and he had?

A. Correct.

Q. And this meeting was shortly after you became CEO of Imasco?

A. Yes - a year and a half, a year. I was - oh, CEO, excuse me; CEO, six months, roughly seven months.

Q. You had only been in the job as head of Imasco for about six months?

A. I think I became CEO at the time of the 1986 Annual Meeting, which would have been in April or May of that year.

Q. And when you took over Imasco, you launched the Canadian Project.

A. I am not familiar with what you are referring to.

Q. If you turn the page to Page 106, you'll see that the pages are numbered at the top. And, you'll see the first-two paragraphs here. It's entitled, "The Canadian Project."

A. Right.

Q. Imperial Canada believe that the group should have a strategic objective that can be expressed as " To work towards the discovery of a safe cigarette; safe in the eyes of those who say that the current cigarette is unsafe." Is that a

....

A. I did not launch this project.

Q. You didn't launch this project.

A. I think, Your Honour, to properly indicate the role that the CEO played at this holding company, which I have outlined in various public speeches over the years - I

need to do that, if it's all right for me to do so.

5 The - and these things have all over time - but, I joined Imasco, in '85 as I have indicated. Imasco was then, as I have indicated, had these other companies. I got involved earlier on in a project looking at further diversification, looking at financial services companies.

10 And, in the late fall of 1985, we decided that, that we should take a look at the possibility of acquiring a company called GENSTAR, which owned 98.7% of Canada Trust and our objective was to acquire GENSTAR, or acquire Canada Trust, excuse me.

15 This was a thing that was worked back and forth a lot with our board because there were big risks involved because to acquire Canada Trust we had to acquire GENSTAR and then dispose of a lot of assets - a lot of business: Quise (Ph) management, container businesses, cement businesses and if we got a good price for those assets that we were disposing of the price of Canada Trust would be quite reasonable.

20 That occupied a lot of my time. But what evolved and was going on then in terms of what we called the "Senate" in the operation of this multi-business company, one, was to make sure that we had good succession planning and outstanding people to - in those companies. I am convinced that a good operator can run a - make a great difference in a company.

25 So, succession planning, leadership development, was part of it. The other thing was, we dealt with the cash, accepting Canada trust which had it fiduciary obligations. We managed the cash. We managed the capital investment programs and monitored the returns. We cause - made sure the companies were looking at their strategy and evolving it. And we facilitated the preparation of - they prepared their Annual Financial Plans, which became the Consolidated Financial Plans. And, we

30

facilitated incentive that would try to drive them to achieve the - be an incentive to achieve the financial plans.

We met with them on a lot of occasions about their plan and about their operations. Early on, quite frankly, the Imperial Tobacco was so well run, and continues to be well run - excellent operators, I was focused on Hardy's Fast Foods which was having some problems, focused on the acquisition of Canada Trust and focused on People's Drugs Stores. I did not run or launch programs at Imperial Tobacco.

Q. I have your answers, but if you read this page here, Page 106, and you continue to read on, "There," and I gather that's Imperial Tobacco, "believe that the goal, this goal of making a safer cigarette is essential, if decline of cigarette's usage is to be halted." And then you go on - the memo goes further, "ITL has been given limited exposure to this concept within the group. Apart from the Imasco board, and the Pat, Co-chairman, discussions have been largely confined to senior technical staff including the 1986 Research Conference." Were you on the Imasco board?

A. Yes.

Q. So, there are discussions about a Canadian project and you are privy to those discussions.

A. The Canadian Project that you are talking about is the so-called research with respect to "Safe cigarette," yes. Out board was very keen about that as was I. Mr. Luis Mercier(Ph) was heading that up. He brought it to my attention some time after I had joined Imasco. He was somewhat frustrated at his inability and he was - the company was involved in this research when I joined Imasco. How far it went back, I am not sure. As far as I know it certainly continued after this rejection by B.A.T. And as far as I know still continues.

He was frustrated in dealing with his contemporaries at B.A.T., or his people were at the research level and at the various levels, that he wasn't being able to sell B.A.T. to add their resources and their know-how to the project.

And he acquainted me with this. And I said, "Well I'll raise the matter with Mr. Sheehy(Ph). This indicates that...

Q. So you....

A. ...it had been largely confined to senior technical staff.

Q. So you raised the matter with Mr. Sheehy (Ph) Sir. Sheehy that Luis Mercier and some scientist at Imperial Tobacco wanted to try to make a safer cigarette. Correct?

A. Yes. I think I have a - you asked me to produce...

Q. Yes. I....

A. ...a piece of paper that I hope would explain it.

Q. When I served the Summons, I asked for your memos on this. And, I have your memo. Now, look at this letter from Sir Sheehy (Ph). He tells you not to make a safer cigarette. Right?

A. Oh, I don't think that's right. He didn't tell us to do anything. Let me just take you through this - very important.

Q. Yes. We are going to go through this letter.

A. Okay.

Q. We are going to go through this letter. The second paragraph he says that, "I thought I should write to explain why it is that I cannot support your contention that we should give a higher priority to projects aimed at developing a safe cigarette." Is that essentially what you understood he

was saying, why we shouldn't give it a high priority?

A. Yes.

Q. And that's why he was writing the letter?

A. Yes.

Q. And in the third paragraph, he says, "The BAT objective is and should be to make the whole subject of smoking acceptable to the authorities and to the public at large, since this is the real challenge facing the industry."

Do you see that, the third paragraph, first sentence?

THE COURT: It's so small to read.

A. Let me make sure I am looking at the right paragraph. There's an introductory...

MR. BARNES: I think he is on the wrong page, Your Honour.

Q. Page 103.

A. Oh, 102. I am on 106. Excuse me. Yes. Second paragraph?

Q. Third paragraph, where it says the "Objective is and should be to make the whole subject of smoking acceptable." And "acceptable" is underlined.

A. Right.

Q. So, Sir Sheehy is telling you that your job is to make people accept smoking. Is that what he is saying?

A. Sir Sheehy is telling me that the B.A.T. objective is, was - the B.A.T. objectives. He wasn't telling me anything. He didn't give me orders.

Q. He didn't give you orders.

A. No.

Q. He is just a forty-percent shareholder.

A. Let me explain that. B.A.T. had no representatives on our board. During my involvement with the company we had two relationships with them which is spelt out

in our investments Canada rule.

One was to get the benefit of their advice from time to time involving major matters. And two, to review with them our Annual Financial Plan and Five-year, Four-year, Five-year Plan and get the benefit of their advice with respect to that.

They had to consolidate our results in their Financial Plan. And, the time - and apart from that we ran our own show. And we did things that they disagreed with, like when we acquired Peoples' Drug Store, or when we - Hardy's acquired Roy Rogers.

They did not tell us what to do and I was constantly telling the people of Imperial who had a long relationship with B.A.T., because they got their orders, if any, and we didn't give orders, we facilitated change, from the Imasco and not from B.A.T.

Q. Did you tell the sixty percent of your shareholders about the Canadian Project?

A. Nope.

Q. You only told the forty-percent shareholder about the Canadian Project.

A. Well, this came up, as I made clear earlier, Imperial Tobacco in its evolution was part of B.A.T. and Imasco was set up to diversify. So we had a lot of relationships with them in the tobacco area...

Q. Yes.

A. ...much less in other areas, although they did go into financial services and we related some on financial services and retail. But - so it was quite natural to take the benefits of what they were doing and they would have taken the benefits of what we were doing since we were in the same business and achieve synergies, if we could.

Q. Turn to Page 103 to the second page of Sir

Sheehy's letter.

THE COURT: Ah, stop. I can't bear it.

MR. CRAWFORD: Sir Patrick is the right way.

THE COURT: You either say "Sir Patrick or Mr. Sheehy" Sir Sheehy is....

MR. LENNOX: It doesn't roll off my tongue, Your Honour, very well either.

THE COURT: It's like calling me, Your Majesty. It doesn't work.

MR. CRAWFORD: The English approach, I believe is Sir Patrick.

MR. LENNOX: Sir Patrick.

THE COURT: Yes.

MR. LENNOX: Oh, Sir Patrick then.

MR. CRAWFORD: Call him what you like. I don't care.

MR. LENNOX: Q. If you read the first paragraph and some sentences down, where it starts, "The group," and when Sir Patrick says "The group has several research project," and I take it when Sir Patrick refers to the group he means the B.A.T. group?

A. Yes.

Q. "The group has several research projects mainly in the combustion area that should enable us to alter our product if good reason exists. This encompasses components such as nitrophamines and free radicals, but extends to the ability to genetically alter tobacco leaf, for instance in its propensity to form tar." Do you see that?

A. Yes.

Q. So, Sir Patrick's saying the group has safer technology, isn't he?

A. He is saying others of our research term are

seeking products that reduce the burden - seeking.

Q Sir Patrick says that the B.A.T. group has the ability to genetically alter the tobacco leaf, for instance, in its propensity to form tar. Do you see that?

5 A. I am sorry, I am looking at the wrong paragraph. You are in the....

Q. I am still in the first paragraph on Page 2.

A. Oh, excuse me.

Q. The last sentence.

10 THE COURT: Well, you have to read the last sentences, but the sentence before, because the last sentence starts out with a "This."

Q. "This encompasses," those two sentences are what I am referring you to.

THE COURT: Okay. Just so that he reads both.

15 A. I read what he is saying. He is saying the group had several research projects mainly in the combustion area and should enable to alter our products. "Should." I don't know. What's your question again?

Q. Okay. Did you ask Sir Patrick, "Send me those genetically altered tobacco leaves?"

20 A. No.

Q. No.

THE COURT: First of all Mr. Lennox...

MR. LENNOX: Yes.

25 THE COURT: ...the "This" refers back to research projects. It doesn't say they haven't. It says they have research projects.

Q. Okay. Let me rephrase the question then, Your Honour. Did you ask Sir Patrick to send you the results of those research projects?

30 A. I did not. You would have to ask others,

later as to whether anybody did. As, I said, I would not be involved in a detailed way in the operations of Imperial Tobacco.

But, let me make one thing clear from this. Imperial's desire led by Mr. Mercier was to go beyond keeping ahead of the curve and to actually develop a possible safe cigarette. And, that was going on at Imperial before this, when we asked them to participate. And, as far as I know it is still going on. B.A.T. apparently didn't want to go that route.

Q. Let's just - from these two sentences we are looking at, what we can tell from this letter, at least, is that, "These research projects...should enable us," meaning the group, "to alter our product, if good reason exists." What would be a good reason to alter the product?

A. Well, if you can alter the product then Mr. Mercier used to talk about changing the way the product is grown, or changing the way the products is processed to make it a safer product. I don't know what they are referring to in this - Mr. Sheehy(Ph) referring to here.

Q. He mentions one of the research projects here is in the combustion area. He talks about changing combustion. Are you familiar with the technology to change the combustion of cigarettes?

A. I'm - can you explain what you mean by "combustion, please?"

Q. Are you familiar with a product that heats tobacco into a vapour or aerosol without actually burning it?

A. Yes. I am not overly familiar, but I am aware of what you are talking about.

Q. And what the Eclipse brand...

A. Eclipse?

Q. Yes. The Eclipse brand of cigarettes sold

in the United States, is that a cigarette with an altered combustion?

A. I - if you say it is, I'll take your word for it. But, I don't know anything about the Eclipse brand. Is that the one that was launched recently?

Q. It was launched recently.

A. I don't really know anything about it...

Q. And, he...

A. ...except that something was launched.

Q. You don't know if the Eclipse brand is safer or not?

A. No, I don't.

Q. And do you think in all your time at Imasco that you ought to have found out if there was a safer brand of cigarettes, not using combustion?

A. Well, as I say, Imperial Tobacco was doing research and they continue to do research. You have to ask Mr. Brown that question later on, I think. I just don't know.

Q. If you turn to Page 107 in this document.

A. 10....

Q. 107.

A. Thank you.

Q. And right at the top. The sentence, "The current group research program reflects the view that we believe we can anticipate the moves that regulatory authorities will ask the industry to make its products on a rolling five-year time scale." Do you see that?

A. Yes.

Q. Now, is it your understanding from reading that, that there's only a good reason to make a safer cigarette if the regulatory authorities ask for it. Is that your understanding of what that said?

A. That's what B.A.T. is saying. We didn't agree with that.

Q. You didn't agree with that. So....

A. Or, I think it's what they are saying. We didn't agree with that.

5 Q. You think it's what they are saying. You think that B.A.T. is saying...

A. We were quite disappointed...

Q. Yes.

A. ...when we got this letter.

10 THE COURT: What page are we on then?

Q. Page 107.

THE COURT: But that's not part of the letter.

Q. No.

THE COURT: On 107.

15 A. The top of Page 2, Your Honour, 107

THE COURT: Yes, but it's not the letter.

Q. In fact just...

A. What is....

20 Q. ...Pages 105 to 107 is a memo signed by Allan Heard (Ph). Is that correct?

A. And, that is correct.

Q. And that is dated October 29, 1986.

A. Correct.

25 Q. And this is Mr. Heard (Ph) at B.A.T. attempting to summarize the Canadian project.

THE COURT: Is he at B.A.T.? Do we know that?

Q. Mr. Heard's at B.A.T., yes.

THE COURT: What's the "TRST, requested the attached note on the Canadian Project?" Do we know what the TRST is on Page 105?

30 Q. It's my understanding that's the Tobacco

research study team or something like that. Perhaps Mr. Crawford know exactly what it is.

A. Your Honour, I don't see it.

THE COURT: Page 105

A. 105.

THE COURT: The first sentence. "The TR.."

A. Oh, yes.

THE COURT: "Note for EA Brule. (Ph) Who's Brule? (Ph)

A. I think he was an officer, of B.A.T.

THE COURT: Okay.

A. Something to do with tobacco research. I don't know the full acronym.

THE COURT: Okay. And Mr. Heard worked for Imasco Imperial Oil or B.A.T.?

A. Mr. Heard worked for B.A.T., if I recalled correctly.

THE COURT: Thank you. Now we are reading the first sentence, right?

Q. Yes. And you just said that...

THE COURT: On Page 107.

Q. ...you understood that sentence to mean that at least the B.A.T. group didn't believe that it needed to modify its product except if told by government and on a five-year time scale.

A. It seems that way.

Q. And, you said that you were very disappointed with that position of B.A.T.

A. Yes.

Q. What did you do to show that disappointment?

A. Well, I remember sending this letter down to the offices of Imperial Tobacco, Mr. Mercier. And, I remember

5 discussing it with him. He was a bit crestfallen, as I recalled, as I was. I can't remember the time frame, but I do recall at some point talking with Sir. Patrick and indicating that we were disappointed that they wouldn't become involved with us in their - in our initiative research to find a safer cigarettes.

Q. You didn't talk with your other shareholders about the need for research to make a safer cigarette?

A. No.

10 Q. You never shared this letter with Health Canada?

A. I don't know the answer to that. I - again the Imperial Tobacco people dealt with Health Canada, so I can't say "Yes or No" to that.

15 Q. You never told anyone at Health Canada that there are these research projects around combustion and genetically altered tobacco leaves that seem to have some ability to modify the product. You never talked to anyone at Health Canada about that, did you?

20 A. I did not personally, but it wouldn't have been my job. I don't think I ever had a meeting, all the time I was at Imasco with Health Canada. That would have been Imperial Tobacco.

Q. You didn't instruct....

A. I didn't instruct anybody.

25 Q. You didn't instruct anybody.

A. You don't lead companies these days by giving orders. You lead companies by motivating people.

Q. Yes. And Mr. Mercier was the President of Imperial at the time. He reported to you, yes?

A. Right.

30 Q. You didn't give him any instructions to share

this letter with anyone in Health Canada?

A. No.

Q. Just - we are on Page 103. And, the second Paragraph from the bottom. It begins, "Firstly, your objective is probably unattainable. No matter what can be done, in the chemical, and I believe this to be very limited, there will continue to be strong vocal fractions that seek to denigrate the product and they are likely to continue to move the goal post from whatever initial target we are able to achieve." Did you agree with statement that Sir Patrick made?

A. What he says first about "The ability to do anything in chemical terms is probably very limit," to be honest with you I wasn't enough scientist to comment on that. "...Continue to be strong vocal fractions that seek to denigrate the product." No, I didn't agree with that.

Q. You didn't agree with that?

A. No.

Q. Did you talk to anyone at - in a non-governmental organization, like the Canadian Cancer Society and ask them if they would criticize you for trying to make a safer product?

A. I certainly didn't. I don't know whether anybody in Imperial Tobacco did or not.

Q. Did you ever give any instructions to people in the Public Health - or did you ever give any instructions to anyone under you to open a dialogue with persons in the Public Health Community about whether or not they would criticize Imperial Tobacco for making a safe product?

A. No. I didn't give any instructions.

Q. The last Paragraph there, that Page, 103, says, "A second practical objection is that attempting to develop a safe cigarette you are by implication in danger of

being interpreted as accepting that the current product is unsafe and this is a position that, I think, we should not take." Do you agree with that statement that Sir Patrick made?

A. That's certainly in the letter, yes.

Q. So, so...

A. I agree it's there.

Q. Do you with agree with that statement?

A. No.

Q. No. How did you show your disagreement to that statement?

A. Well over time, from time to time, I have said that we didn't - I wasn't an expert on scientific issues, but we came to be convinced that the statistic were such that they certainly pointed to a health problem.

Q. When?

A. I think we probably - Mr. Mercier did that in the 80s.

Q. In the 80s?

A. I think so. I don't know for sure, the time frame.

Q. Okay. I would like you to go to Volume 2 of the Plaintiff's Brief.

A. Volume?

Q. You have it right there, sir. Go to Tab 23. You see at Tab 23 the first Page, Page 390, it's the Minutes of the Proceedings of Evidence on the Legislative Community of Parliament. Do you see that?

A. Right.

Q. And the date is November 24, 1987.

A. Right.

Q. And you would recall that Luis Mercier gave testimony in Parliament on that date. Do you recall that?

A. I don't recall it, but I know it happened.
I see it here.

Q. And you would have been paying attention to the fact that Mr. Mercier was testifying in Parliament. Would you not?

A. I would have known at the time he was going to, yes.

Q. And in fact it was reported in the media and what not. And if you turn to Page 394 on the left-hand column, partway down you would see there are questions from Ms. Sheila Cobbs. Do you see that?

A. Yes.

Q. And Ms. Sheila Cobbs said, "Mr. Mercier is it the position of your council that lung cancer can be caused by smoking?" And Mr. Mercier, answers, "It is not the position of the industry that tobacco causes any disease." Do you see that?

A. Yes.

Q. So, you just told me that - told me a few minutes ago that you had decided, in house, that there was a health problem with the cigarette smoking. Correct?

A. Correct.

Q. You told me that you came to that determination. And you told me that that was in the 1980s sometime.

A. Right.

Q. Well, here's Mr. Mercier in 1987 denying it.

A. Well, let me read on. "Our position, our position is that epidemiological" - is that the way you pronounce it? - "studies are essentially statistical comparisons. All they can demonstrate is an association. They cannot and will not demonstrate a cause and an effect."

I think Mr. Mercier there is talking about, what I refer to as scientific proof that it does. But certainly the statistical evidence was becoming clearer all the time that this was a factor in the health.

But in any one given case, you can't say that smoking necessarily cause cancer in an individual person. It may have or it may not have. It may have been other factors.

Q. If you came to this realization in the 1980s that there was a health issue with your product, what did you do to communicate that realization to consumers and the public?

A. Well, there was a warning on the pack - I forget what year that was put on - I think it went on before I join Imasco. There was a ...

Q. Do you recall what the warnings said?

A. No specifically, no.

THE COURT: There was a Surgeon General warning or something like that. Wasn't it the first one?

Q. Did the warning ever say, "Imperial Tobacco say smoking is bad for you?"

A. If you are quoting then I would believe but I am not trying to be difficult, I just don't remember the wording.

Q. Did the wording ever say anything to that effect?

A. I don't know what it said. But if you can read it to me, I'll tell you if that's my recollection. I don't know when the more broader warnings went on the pack. I can't remember the date if it was in the late 80s or early 90s. I can't remember. You would have to help me with that.

Q. My question though, was other than these warnings which were on the package and which were required to be on the package, by legislation between 1988 and 1995...

A. What's the date again?

Q. 1988 and 1995.

A. Okay.

Q. What did you do or what did you instruct Imperial Tobacco to do to provide warnings to consumers?

5 A. I didn't instruct them to do anything. I mean, it seemed to me self-evident that the public knew there was a health problem. It was indicated on the pack. You can talk about whether it was specific enough. Certainly when I grew up I had two older half brothers who smoked. By the way they don't smoke today, still living. I never smoked. My
10 mother didn't allow me to. She thought there was something wrong with it. I don't know whether she could articulate it the way it is being articulated today, but I would have thought any public knew there was a problem.

15 Q. And so you thought the public understood there was a problem.

A. Sure.

Q. And so the fact that you had come to some understanding of the ability of smoking to cause disease in 1980...

20 A. "Cause" is not quite the word I used. It certainly - I don't use the word "causation" in an individual case. In a broad statistical way, you can't deny the fact that there is a health problem.

25 Q. Can I take you in Volume 2 to Tab 22 and Page 340. Do you recall that in June of this year, Mr. Bexon appeared before the Senate on the issue of Tobacco and Health? Do you recall that?

A. I read about it in the newspaper.

30 Q. You read about it in the newspaper. And if you read right at the top of Page 340, Mr. Bexon is saying, "I

think we would say that in the wake of the evidence that is before us today, we would agree that cigarette smoking causes diseases in some people."

A. I would agree with that - in some people. I agree with that.

5 Q. Now, would you also agree with me that that statement from Mr. Bexon is very different from the statement that Mr. Mercier (Ph) made in 1987?

A. I would certainly agree that it was more explicit.

10 Q. It was more explicit. What did you do or what did you instruct Imperial Tobacco to do between 1987 and June 2000 to provide more explicit health warnings to the consumer?

15 A. Well, we went through process. Can you refresh my memory as to when the warnings changed, what year they changed?

Q. There was legislation in 1988. Correct?

A. 88? Okay.

Q. And it was struck down in 1995.

A. But it stayed on the pack.

20 Q. The warnings stayed on the pack.

A. We didn't take them off.

Q. You didn't take the warnings off?

A. We, being Imperial Tobacco. I didn't.

25 Q. Have you ever seen - you are a lawyer by training, Mr. Crawford, yes?

A. Yes.

Q. And you would have read the *Tobacco Products Control Act* when it was passed in 1988? Is that correct?

A. I am quite sure I would have, yes.

30 Q. If you can turn a couple pages in to s.9(3)

of this Act that was struck down. Do you see s.9(3)?

A. Mm-mm.

Q. And it reads, "This section does not affect any obligation of a distributor at common law or under any act of Parliament or of a Provincial Legislature, to warn purchasers of tobacco products of the health effects of the those products." Do you see that?

A. I read it.

Q. Now, do you agree that that says that whatever Health Canada was putting on the warning labels did not relieve you of any obligation to warn consumers?

A. I read it.

Q. Do you agree with that statement I just made?

A. Let me put it this real. If you want me to be a real lawyer, I would be a real lawyer. This is a Federal Statute. Provincial Statute Laws deal with court. And, whatever the Provincial Law would read into this would be what the result would be. I don't know what the result would be. But, I don't think court - I am being a technical lawyer here a little bit - I think the warning was there. So what do you do? Put another one on top of it?

Q. Well, let's talk about what you could do. Would you agree with me that if the tar and nicotine numbers were unclear, that you could have talked to Health Canada about changing the way the numbers were calculated?

A. I just can't comment on that.

Q. No.

A. I didn't smoke, so I didn't look carefully at the tar and nicotine numbers.

Q. So, you don't know anything about the tar and nicotine numbers?

A. Not in substance, no.

Q. No, although you are getting memos telling you what the numbers are?

5 A. Yes, I got the memos telling me what the numbers are. Don't misunderstand. I am just saying, what they mean other than a lighter cigarette, in general terms, I don't really know. I guess they mean that there's less tar in them, maybe less nicotine.

10 Q. Did you ever hear of any criticism coming from the Health Community about the tar and nicotine numbers as they were expressed on the package? Did that criticism ever reach you?

A. It probably did. But I, to be honest with you, can't remember. If you can refresh my memory somehow, I might be able to recall it.

15 Q. You heard Mr. Battaglia's evidence in Cross-examination this morning, did you not?

A. Ah, yes I did.

Q. Would you agree with me that he was confused as to what those numbers on the package actually meant?

20 A. I had trouble hearing to be honest with you. I was sitting back there, so I didn't hear it all, except when Mr. Battaglia became eloquent and I heard it then, otherwise I had trouble hearing all he was saying.

Q. Would it be a concern of yours to learn that some consumers were confused about that information on the package?

25 A. Yes, it would have been a concern.

Q. And if you had seen Marketing Studies or Reports that indicated that consumers were confused about the information on the package, would that have been a concern?

30 A. I - certainly if there was significant confusion brought to my attention I would have been concerned

about it.

Q. And if it had been brought to your attention, could you have not picked up the phone and called someone at Health Canada and said, "Let's change the numbers?"

A. If they would have talked to me.

Q. Are you saying you are afraid to talk to them?

A. No, no. I never called them, but they had a habit of not talking to the people at Imperial Tobacco.

Q. Do you have any idea why they don't like to talk to you?

A. No.

Q. No. Turn to Tab 10 of Plaintiff's Book Number 1. You see that's entitled, starting at Page 114, it's entitled "Speaking Notes for Purdy Crawford, Chairman and Chief Executive Officer - Imasco Ltd." Do you see the title?

A. Correct.

Q. And it is an Executive Mess Lunch at BAT, Monday, July 4th, 1994.

A. Yes.

Q. Did you give that speech?

A. I certainly summarized what's in here. Whether - I don't think I read it, but I would have touched the high points probably. That was a document they had obviously.

Q. Where did you give that speech?

A. I suspect the Executive Mess. My guess - I don't entirely recall, but I would expect it was at the lunch room, the lunch area at BAT in London, in their offices there. But, I could be wrong about that.

Q. And this speech as about efforts by Imperial to prevent legislation regarding the packages. Is that the gist of the speech?

A. Yes.

Q. The debate here was about plain packaging. Is that what the debate was about?

A. Yes.

5 Q. And there was an effort to require Tobacco companies to sell cigarettes in plain packages because people in the Health Community believe that might reduce smoking. Is that what it was about?

10 A. I think the people in the Health Community probably thought it would reduce smoking. We thought it would expropriate our trademarks.

Q. So, you fought legislation because you wanted to protect your trademarks?

A. Yes.

15 Q. And if you go to page 116, do you see the third bullet point there? The third bullet point is "The Campaign was quarter backed by Canadian Tobacco Manufacturers' Counsel. What is the Canadian Tobacco Manufacturers' Counsel?"

20 A. It is a group of the, I guess, the three tobacco, currently at least, the three tobacco manufactures in Canada: Imperial Tobacco, Rothmans and RJR. These notes would have been prepared for me by a conjunction, I think, of somebody at Imperial or persons in Imperial Tobacco and maybe our public relations guy in Imasco, Torrence Wilder. (Ph)

Q. And you read these in England?

25 A. I would have summarized it. I wouldn't have read them. I would have given the gist of it. Sometimes you run out of time in these things, but I would have made the point, yes.

30 Q. Yes. And right after where I stopped off with Canadian Manufacturers' Counsel it reads, "Extra staffing was added on an interim basis. There were special and

extraordinary efforts made by employees of the member companies, ourselves included. The statement - would you agree that says that a lot of staff and resources were devoted to blocking this plain-packing legislation?

5 A. That's what it says and I agree. I don't disagree with it.

Q. Would you agree that you certainly can stop information from going on packages of cigarettes, if that's what you want?

10 A. "You can stop information," who - help me a bit here.

Q. You have the ability with this extra staff of yours to prevent legislation regarding packaging and warnings.

15 A. Now, I don't whether there would have been extra staff, whether there were consultants or part-time people from internally at Imperial Tobacco, I am not sure. But yes, we had the ability.

Q. Hiring staff to....

20 A. This is - let's understand this. The value of Imperial Tobacco is its trademarks. And, there are not on the books, but they are valuable like any trademark in the consumer products area. And, to take away the ability without the compensation to use your trademark is pretty fundamental.

Q. And this is in the Charter, isn't it, when you say, "fundamental?"

25 A. No, I am just saying it is pretty important.

Q. Okay. Did you direct that any staff by hired or used to improve the information on the packages?

A. I beg your pardon?

30 Q. Did you devote any of your company's resources to coming up with ways to improve the information on

the packages?

A. You would have to ask Mr. Brown that question.

Q. You don't know?

A. I don't know.

Q. You didn't give any directives in that regard?

A. No.

MR. LENNOX: Your Honour it is quarter after one, I don't want to tire Your Honour. So, if you want to have a break for lunch.

THE COURT: You are not close to finish?

MR. LENNOX: I don't believe so.

THE COURT: Okay. Well, we adjourn to 2:00 o'clock.

MR CRAWFORD: Thank you.

L U N C H

U P O N R E S U M I N G:

THE COURT: Now, where were we? Mr. Crawford?

MR. LENNOX: Q. Mr. Crawford, you told us before the Break that you knew in 1987 that there was a health issue, as you called it, with cigarettes. And you also told us before the Break that you went to Court to protect the trademarks in Imperial Tobacco's products?

THE COURT: In the sense of attacking the Act. Is that what you mean?

Q. Yes, yes.

A. I was actually talking plain packaging issue. I don't think - if my recollection is right that was not an issue before the Court. I don't know whether I told you we

went to Court but we did, yes, we did.

Q. You went to court attacking the Tobacco Products Control Act.

A. Correct.

Q. And that Court Proceeding began in 1988?

A. I've no reason to think otherwise. I just don't recall the date.

Q. And that Proceeding ultimately ended up in the Supreme Court of Canada in 1995?

A. Right.

Q. And the Defendant here today argued that the Health Warning on the cigarettes packages should be unattributed or should not be attributed - let me phrase it another way. The position that the Defendant took was that the health warning should be attributed to Health Canada they should not be unattributed. Is that true?

A. The defendant....

THE COURT: He wasn't the Defendant. They were the Applicants.

A. Yes. Anything. It doesn't matter. Yes,

Q. Imperial Tobacco.

A. Yes, okay.

Q. Imperial Tobacco took the position that the health warnings should not be unattributed.

A. It's a double negative. "Should not be attributed to Imperial."

Q. Yes.

A. Okay.

THE COURT: Or even unattributed....

A. Yes.

THE COURT: That is should be attributed to Health Canada.

A. Okay.

THE COURT: There are three choices.

Q. Yes.

THE COURT: A warning without anything, a warning by....

5 A. I don't recall that specially, but I accept...

Q. You don't...

A. ...that as an argument.

10 Q. ...recall - you don't recall the case specially?

A. Not that part of it, no.

Q. Right. But, you....

A. I am not denying that that argument was made.

15 Q. You do accept that Imperial Tobacco went to Court and the result was that the message on the package says, "Health Canada says, that smoking causes disease." You do accept that?

20 MR. BARNES: I think, I must rise on this. I think that my friend is making a point, but there were two cases before the Supreme Court of Canada: one by Imperial and one by RJR. These arguments were not made by Imperial. The arguments that my friend is addressing Imperial did not attack this part of the Statute.

25 THE COURT: Point being, you just shared the argument between the two of you.

MR. BARNES: No. Absolutely not.

THE COURT: Oh.

30 MR. BARNES: There were two separate cases before the Supreme Court of Canada, two separate

Briefs and that was not part of the Imperial Brief.

THE COURT: Okay.

MR. BARNES: And they did not adopt those arguments.

THE COURT: Thank you. I think you should bring yourself a little more forward in the history of these things. In 1988....

MR. LENNOX: Q. You mentioned, Mr. Crawford, that it was your understanding when you decided in '87 that there was a health issue with cigarettes, is it your understanding that the information was out there and that it was adequate? Is that what you said yesterday?

A. Yes. I said it this morning.

Q. You said this morning.

THE COURT: It wasn't that long a lunch hour, Mr. Lennox.

MR. CRAWFORD: No, it wasn't Your Honour.

THE COURT: I don't have a share in the cafeteria next door. It's pretty good, if you want to stand and eat.

MR. LENNOX: Q. Are there any documents that you came across in your position as Director of Imasco that predate 1987 in terms of smoking and health?

A. Came across at what period of time?

Q. Let's say documents that predate your conclusion in 1987 that there was a health issue with smoking. Are there any documents that predate that?

A. That I came across?

Q. Yes.

A. I don't really know the answer to that. I didn't go back and research documents for being here today.

So, I can't, can't answer that. It could be or it could not be.

Q. Turn to Tab 12. Do you see that document at "Report on Visit USA and Canada" dated May 12th, 1958? Do you see that?

A. Right.

Q. Have you ever seen that document before today?

A. Ah, I don't know...

Q. You don't know.

A. ... whether I have or not.

Q. Do you see on Page 145 there is a - in the middle of the Page there's Headline, "Causation of Lung Cancer?" and it reads, "With one exception the individuals whom we met believe that smoking causes lung cancer." Have you ever seen a document like that in all your time with Imasco prior to 1987?

A. I can't honestly say whether I have or have not, or did or did not.

Q. Turn to Tab 8 please.

THE COURT: Sorry?

Q. Tab 8 please. Page 108. The letter from Don Brown dated 1993 to an Oliver Carter (Ph) at BAT Industries. Do you see that?

A. Yes.

Q. And first, the second paragraph it starts with "The last TSG meeting you asked for a report on the structure of local markets with regard to tar and nicotine content level. There are no regulated tar bans or structures or maximum levels in Canada. Manufacturers use descriptor such as mild, light, extra light, et cetera as they decide usually for brand positioning reason. Do you agree that Imperial

Tobacco decides what to call its products?

A. That's what it appears to be saying here.

Q. Yes. Do you agree that the people that report to you, Don Brown and Mercier, et cetera come up with names like Matinée extra mild?

A. Yes.

Q. Turn over the page, sir. Page 109. The first paragraph; it reads, "Although tar and nicotine and Co numbers are printed on all packs and used by consumers for reference, perceived strength measured through image studies is a more important brand positioning measure for us." Do you see that?

A. What would you like me to say?

Q. Do you agree with the statement that consumers use the numbers for reference?

A. I don't disagreed with the statement.

Q. Do you agree with the statement that consumers rely on the numbers of the package? That statement is not in the letter, I am putting that to you, sir.

A. I think they do - did.

Q. Turn the page. Sir, this is entitled "ITL Treatment of Actual Versus Perceived Strength." Have you ever seen one of these studies of actual versus perceived strength before.

A. I can't be sure but I would suspect I have.

Q. And these studies were undertaken by ITL to gain understanding about what consumers thought about the strength about their product. Is that right?

A. Right. I assume that to be right. I mean the whole marketing partly actual partly perception, certainly in brands.

Q. And how consumers perceive a brand is

important to your business.

A. Sure.

Q. Turn over the page, sir. Do you see that there is a list of brands on this page?

A. Yes.

Q. And you see that there is a comparison of the tar and nicotine numbers between brands?

A. Yes.

Q. And there is also a column called "Perceived Strength." Do you see that?

A. Yes.

Q. And this column is ranked from one to nine. That's actually explained on the page that we just left.

A. Okay, I'll accept that.

Q. So, that a brand that has a perceived strength of one is perceived as very mild by consumers.

A. Yes.

Q. Do you agree with that? And a brand that has a strength of nine is perceived as very harsh by consumers.

A. Yes.

Q. Do you see that the Matinée Extra Mild has a score of 2.2?

A. Yes.

Q. And that's the lowest brand on that chart.

A. Yes.

Q. Do you agree that it was advantageous for your business for consumers to perceive the Matinée as lower in strength than other brands?

A. Yes.

Q. And when consumers perceive the product as lower in strength than other brands would you agree that they also perceive it as safer?

A. Probably. The reality is the Matinée family never became a big market share as compared to some of the other brands. But, I think they would perceive it as safer. Some people would, sir.

5 Q. Some people would perceive it as safer? And did it not concern you that some people perceived it as safer?

A. No.

Q. Would you agree that the light cigarettes sold by Imperial Tobacco are an important part of its business?

A. Yes.

10 Q. Would you agree that considerable revenue is generated through the sale of light cigarettes?

A. I don't know the numbers, but I think they would be, yes.

15 Q. Would you agree that people who are interested in quitting smoking often switch to light cigarettes as an alternative to quitting?

A. Certainly some would, yes. I can't give you the numbers, but some people would do that.

20 Q. Would you agree that Imperial Tobacco did considerable consumer studies of these persons who were interested in quitting smoking?

A. Certainly Imperial Tobacco did a lot of market research. I just can't say yes or no as to how much they focused in on studying people who were interested in quitting smoking.

25 Q. Did you ever see reports of Market Focus groups where questions were asked about people's interest in quitting smoking?

30 A. I probably - I no doubt did. And no doubt when you do a Focus Group you have a lot of questions. And I wouldn't - I can't remember. But I am sure I probably did see

them.

Q. Would you turn to Tab 11. Is This a paper written by Bob Bexon?

A. Yes.

Q. Have you ever seen this paper before?

A. I don't believe.

Q. To your knowledge was Mr. Bexon ever disciplined for writing a paper that did not reflect company policy?

A. Not to my knowledge. But I wouldn't discipline Bob Bexon. I don't know where Mr. Bexon was in 1999. I think he was at Brown and Williamson. But, if anybody disciplined it would have been either Don Brown if he was at Imperial Tobacco or whoever was running Brown and Williamson.

Q. And just so that you have a history, Bob Bexon was with Imperial Tobacco for a...

A. Yes he was.

Q. ...period of time.

A. Yes.

Q. And then between '95 and '99 he was in the United States?

A. I don't recall the exact dates but I'll accept that.

Q. Then he returned in '99 to become - and now he is President of Imperial Tobacco?

A. Yes.

Q. And so, if I told you this paper was written at a structured Creativity Conference in 1984 would you have any reason to disagree with that?

A. 198?

Q. 1984.

A. I have no reason to agree or disagree.

Q. No reason to agree or disagree. But, to your knowledge there is nothing that Bob Bexon ever wrote that resulted in his career path being set back?

A. I have no knowledge of that, no.

Q. If you could just turn to Page 122. At the top Mr. Bexon paper reads, "The proportion of smokers who agreed with the statement, 'Smoking is dangerous for anyone' rose steadily from 48% in 1971 to 67% in 1976. They did not indite specific brands, products or immoderate use, they indited smoking. Almost one in two, 46% when asked how many cigarettes a day could be safely smoked answered none." Do you see that?

A. Yes.

Q. Doesn't that passage tell you that almost one in two of your consumers think that they can safely smoke?

A. You would have to develop that for me. I don't see it there.

Q. Okay. "Almost one in two when asked how many cigarettes a day could be safely smoked answered none - 46%.

A. Okay.

Q. The flip side of that sir, 56% of your consumers don't have that perception.

A. That seems to be the logic, but I am not sure that's right.

Q. If that was right would that concern you?

A. What I mean you are leaving the whole area. You are trying to move me in an area, like one cigarette a day two a week or something. That doesn't concern me one way or another to be honest with you.

Q. If you had information that some of your consumers thought they could smoke safely don't you think you

had an obligation to correct that misperception?

A. I don't see that information here.

Q. If you read down a little bit further. "Fortunately for the Tobacco industry nine of these two approaches proved very successful for smokers. In 1976 although 41% had tried to quit, and 26% were ready to give it another go, the actual rate of quitting within the past six months was fairly stable at less than 2% per year. Does that - do you agree with that statement?

A. Now, I don't - Mr. Bexon put it together. I assume it's right based on their consumer research.

Q. Does that statement tell you that it is very hard to quit?

A. Yes.

Q. Does that statement tell you that almost none of your consumers quit?

A. You know as well as I do Counselor, that more people quit smoking than smoke. Some people don't have a problem quitting, but others do. I agree with that.

Q. Would you agree that for some of your consumers they are addicted?

A. I don't know what "addiction" is. Certainly for some of - put this in the right tense. 1999 I was non-Executive Chairman of Imasco, Mr. Levitt (Ph) was the CEO, so I am sort of looking back at this a bit - historical. And would you mind repeating your question?

Q. The question - I would make it very simple is, do you agree that some of consumers are addicted?

A. I don't know what "addiction" is. I am not an addiction expert. Doctors tell me all the time that if I lose some weight, I'll live longer. I don't seem to be able to come to grips with it very well. But, am I addicted? I don't

know. That's an expert's role, that's not mine.

Q. That's an expert's role you say. That question isn't of interest to you?

A. Oh, it's of interest sure. But I just don't know....

Q. You don't know what?

A. I mean, there's an issue of willpower. There maybe an issue, in certain people, a physical aspect. I just don't know. Mental aspect - you have to talk to the experts.

Q. Would you agree though that if it's really hard for some of your consumers to quit, that it's important to provide them with fair and accurate information about the risks of smoking?

A. It depends on what you mean by "fair and accurate." As far as I know, we were providing them with fair and accurate information during my period.

Q. Did you ever take out any advertisements to explain how the tar and nicotine calculations worked on the packages?

A. Not to my knowledge.

Q. Did you ever issue any press releases on how the tar and nicotine numbers actually worked on the packages?

A. Not to my knowledge.

Q. Did you ever set up a web site to explain how....

A. No.

Q. No.

A. I don't set up web sites. I don't take out press releases. That wasn't my role. But....

Q. Did you ever instruct anyone to do those things?

A. No.

Q. Mr. Crawford have you ever seen a package like this before?

A. No, I haven't.

5 Q. Have you ever made any inquiries about a product called "Eclipse."

A. I said earlier, other than what I read in the paper, I did not make inquiries. I am not sure when it was launched.

10 Q. What did you read in the paper about the product?

A. All I remembered reading is some sort of a different burning chemistry or something.

Q. Do you recall reading anything about how the Eclipse was safer?

15 A. I assumed that was the purpose of it. I can't say whether I recall or don't.

Q. Did you ever contact makers of the Eclipse in the United States and asked to license this product in Canada?

20 A. I don't know when it was launched. As far as I know, I wasn't around. You'd better ask that question to Mr. Brown. I just don't know.

Q. I show you another package. Have you ever seen this package before?

A. No. Is it a US product?

25 Q. It's a US product.

A. No.

Q. Do you know what tobacco nitrophamines are Mr. Crawford?

A. No.

30 Q. Have you ever heard about tobacco

nitrophamines before?

A. It seems to me I have read about it but you have to refresh my memory on what it means.

Q. Well, let's refresh your memory. Do you recall that letter from Sir Patrick?

A. Yes.

Q. Do you recall in that letter that he mentioned nitrophamines?

A. Which Tab is that?

Q. That's at Tab 7.

A. I think he did. I....

Q. And that was in 1986.

A. Yes. You are asking me today, do I know what it means?

Q. Do you know what nitrophamines are?

A. That's an advantage of getting older. You forget things, but I don't - can't tell you what it means today.

Q. You can't tell me what it means. Did you ever contact the makers of this product "Gold Smoke" in the United States and ask to license their technology for cigarettes without nitrophamines?

A. I did not.

Q. Did you ever give such instructions to anyone who reported to you?

A. No.

Q. Did you ever give instructions to anyone who reported to you to license available safer cigarette technologies that were available in other countries?

A. I did not give any instructions.

Q. I would ask to tender these - I know you have many packages.

THE COURT: Not yet. No.

Q. Okay. Mr. Crawford could you turn to Tab 18?
Do you know Nicolas Brooks? (Ph)

5 A. I've met him. I don't know him well, but I
have met him.

Q. And Brown and Williamson, that's the sister
company of Imperial Tobacco?

A. I wouldn't describe it as sister company.

Q. It's....

10 A. It's a wholly owned subsidiary of BAT.

Q. Yes. Okay. So Brown and Williamson is part
of the BAT empire?

A. Yes.

15 Q. And if you read down, 1, 2, 3, 5 paragraphs,
Mr. Brooks says, "I do have regrets. I have sincere regrets
that many of the things we are now embarked on doing could have
be done sooner." And then skip a paragraph. He says, "The
extent any of those things either change your decision not to
quit or would have allowed you to quit smoking sooner, or not
20 to have taken up smoking in the first place, then I sincerely
apologize to you." Mr. Crawford, do you want to apologize to
my client here today?

A. No, I don't want to apologize to your
client.

25 MR. LENNOX: Those are my questions, Your
Honour.

MR. CRAWFORD: Thank you.

THE COURT: I now give you the opportunity to
Cross-examine.

MR. BARNES: I hope that wouldn't be....

30 THE COURT: If you dare.

CROSS-EXAMINATION BY MR. BARNES:

5 Q. I hope that wouldn't be necessary. I just have a couple of questions, Mr. Crawford. You were speaking about Investment Canada earlier on in your evidence and basically you indicated that in order to get an Investment Canada Ruling you had to satisfy and maintain two aspects. One was that you could get the benefit of their advice and you could provide financial information to them. Is that what you were saying with respect to Investment Canada?

10 A. Well, what we wanted was a ruling that we were a "Canadian Company," under Investment Canada for was actually so that if and when we were doing acquisition or other activities that had to be reviewed under that *Investment Canada* Act we would be regarded as exempt from it. And to establish that we had to establish that the majority of our shares were
15 owned in Canada and that BAT did not exercise control of our company.

Q. You had....

A. And...

20 Q. Sorry.

A. And we did establish that. And it's in the public record that we did.

Q. You had to establish for Investment Canada that you were not foreign controlled.

A. Right.

25 Q. Right. And you've had that status since what year?

A. I recall working on it when I went to Imasco or being involved in it in '85. And, I think - I can't say the precise year, but I think probably thereabouts. Shortly after
30 the *Investment Canada* Act was enacted.

Q. And you have continued to have that...

A. Status throughout.

Q. ...status through out until February of this year.

A. Yes.

Q. All right.

A. I should, yes - we continue to have the status throughout. And we even went so far as to keep close contact with our non-BAT shareholders, so that if we ever had to have a proxy fight, even though we were starting with a 40% against us, it wouldn't have been easy. I always found if we were performing well, we could well win a proxy fight against BAT.

So, we were alert to these issues. But, they were not exercising control in any way

Q. The other question I wanted to ask you, on a couple of occasions Mr. Lennox put to you that you weren't sharing with your other shareholders the information that you were sharing...

A. Yes.

Q. ...with BAT. I am wondering if perhaps you can tell the Court why that was.

A. Sure. The - it's quite common, Your Honour, to - if you have an insider under the laws to share information with them. They are prohibited from taking advantage of that information. It's not public. That's not unique to Imasco or to BAT. It exists throughout the world.

There are a lot of companies with major shareholders in Canada. I have even gone so far as to get an institutional shareholder, even though they didn't own 10%, to commit that they would act as an insider so we could talk to them about getting a higher bid from BAT for example...

Q. And would you agree with me that some of the information that you were talking to BAT about would be competitively sensitive information to the market place in Canada.

A. Yes.

Q. And there would be no restrictions on other shareholders disseminating that information.

A. That's right.

MR. BARNES: Those are my questions.

MR. CRAWFORD: Thank you.

THE COURT: I am always curious. So what happened in February 2000?

MR. CRAWFORD: We went through, Your Honour a long struggle. "Struggle" is the wrong word - quest to get value for our shareholders. BAT wanted out of our other business: Shoppers Drug Mart, Canadian Trust, Genstar Development, et cetera. And, we ultimately, our board, decided that they were prepared to make a high-enough offer. We had a fiduciary obligation to put it to our shareholders.

And, we established an independent committee of the board to relate to BAT. And, ultimately throughout the late fall, early winter negotiated with BAT and got an offer for Imasco that was one that our independent committee of our board and our directors as a whole and our investment dealers advisors were prepared to recommend to our shareholders.

So, sometime in, I think it was early January, we held a special meeting of our shareholders. Part of the deal was we sold Canada Trust to TD bank, sold Shoppers Drug Mart to a Buyout Group. And this deal resulted in Imperial Tobacco becoming wholly owned by BAT and we got a great price for our shareholders. We were pleased about it, although it had a certain amount of nostalgia to break up a company that had been

performing so well.

THE COURT: Thank you very much.

MR. CRAWFORD: Thank you very much. Thank you.

THE COURT: You can go and have the second half of your lunch now.

MR. LENNOX: That's the Plaintiff's case, Your Honour.

THE COURT: Okay.

MR. BARNES: We'll start by calling Mr. Don Brown.

ROY DONALD BROWN: AFFIRM

EXAMINATION IN-CHIEF BY MR. BARNES:

THE COURT: Mr. Brown why don't we start by tidying up here.

MR. BROWN: Very well.

THE COURT: Put those two white books in one pile and the red book in the other and take that one away. It's on top.

Q. Mr. Brown you are presently the non-Executive Chairman of Imperial Tobacco of Canada. Is that correct.

A. That's correct.

Q. And you held that position since August of this year?

A. That's correct.

Q. And you retired really from the operation of Imperial in an executive level at the end of August. Isn't that correct?

A. That's correct.

Q. Right. And, prior to that time from 1993

you were the Chief Executive officer until your retirement?

A. Correct.

Q. And prior to that time you were the Chief Operating Officer.

A. Yes sir.

Q. And going back in time just so we get the benchmark in time, you actually started with Imperial back in 1963?

A. Correct.

Q. All right. And probably the career path that's important to us is you became the National Sales Director in 1984 and in that position you would be responsible for Imperial's sales organization?

A. Correct.

Q. And in 1987 you became the Vice President of Marketing?

A. Correct.

Q. And then you became the Chief Operating Officer in '92 and then the C.E.O. in '93?

A. That's correct.

Q. Okay. And, perhaps you could just tell the Court, dealing with your position in 1984 as National Sales Director what would your functions and responsibilities be?

A. I would be managing the sales organization and operating the sales organization responsible for the distribution of products and the point of sale of advertising, promotion, communication of marketing plans to the sales organization.

Q. All right. And did you have additional responsibilities as the Vice President of marketing?

A. Yes. I was responsible for the management of a number of groups within the marketing organization, which

included the sales organization, consumer research, communications being advertising and promotion and sponsorships and sales and distribution as I mentioned.

5 Q. And Mr. Brown you basically have been at Imperial throughout the period when the discussions with the government respecting the T & N numbers began in the 60s right through the development with those discussions until the present moment, haven't you?

A. Pretty well, I came to the company in '63 and it started about that time.

10 Q. All right. First off all, I would just like to ask you, we've heard something about the numbers that are on the packs and deliveries that come from those numbers over the 30 years that you've basically been with the company. What has happened to those numbers?

15 A. The average tar, nicotine numbers on average have reduced significantly.

Q. All right. And could you give us some benchmark as to what they were reduced from?

20 A. I expect in the 60s and 70s they would have been in the area of 22-25 mg of tar to 1984, I believe it was, an average target of 12 mg was reached. And, I believe that on probably average it's somewhat lower today.

Q. All right. And what about with respect to the nicotine?

25 A. Nicotine declined pretty well in parallel, as a general rule of thumb, roughly 1 to 10 ratio between tar and nicotine, in general.

Q. And, what was the reason behind this move to a reduction that you had seen over your years at Imperial?

30 A. Well, I mean, it was a consumer demand for milder products which came out of an increased public awareness

of tar and nicotine numbers and their import which come from government and media in general, in other countries as well as Canada, I might add.

THE COURT: As you go along your voice is getting quieter...

A. I beg your pardon

THE COURT: ...and quieter. You are running a board meeting. You got to keep your voice up please..

Q. All right. So, you said that it was increased consumer demand for milder products?

A. That's correct.

Q. All right. And, what was the creation of that demand? Where did that demand come from?

A. Well, in the mid to late 60s the issue of tar and nicotine became quite public. The government officials wanted measurements of tar and nicotine. They wanted them published, which they did when they received them with the suggestion that smoking lower tar and nicotine cigarettes, among other things, would render smoking less hazardous.

Q. And this started, you say, in the early to mid 60s.

A. Yes, I believe so.

Q. And, at that time were there any discussions that Imperial had directly with the federal government regarding this issue?

A. Yes, they did.

Q. All right. And, can you tell us what the nature of those discussions were?

A. There were discussions going on around tar and nicotine and its measurement with the government, leading to the government's request that the tar and nicotine be

measured; and those measurements be submitted.

Q. And, when the government was suggesting that the tar and nicotine levels be measured did Imperial offer any observations on this suggestion to the federal government?

5 A. Principally there was a concern that the companies might use different methods of measurement, and therefore the readings couldn't be relatively compared. And the request was by the government and the companies together that a standardized method be developed.

10 Q. And I am going to ask you to take a look at the Red volume, if you might, and turn to the first Tab.

THE COURT: Tab?

Q. Tab 1

THE COURT: 1. Thank you.

15 Q. Now, first of all, this a document that you have looked at before, Mr. Brown?

A. Yes, I have.

Q. All right. And first of all, what does this document purport to be?

20 A. It's notes on a visit to someone in the Health and Welfare, a Dr. Tett (Ph) by Mr. Leo Laporte, (Ph) I believe. They are reporting on - I am sorry - I mean it's a reporting on a meeting; notes on his meeting with the Health Canada Official.

25 Q. And, what is the Ad Hoc Committee on Smoking and Health referred to in the preamble?

A. I believe that's a committee of the Canadian Tobacco Manufacturer's Counsel or its predecessor, I should say.

30 Q. Right. And you see here, that, if we look at the first paragraph that this is a fact-finding by the Ad Hoc committee.

A. Correct.

Q. And, you indicated that you had some concerns about the way that the numbers might be calculated. And, I ask you to turn to the second page and ask you if that is the concern being expressed in the first full paragraph on the second page?

A. Yes, I believe that is the case.

Q. All right. And as a result of expressing this concern what is your understanding as to what happened?

A. It's my understanding that as a result, the Health and Welfare people with the companies developed a standard measurement that was used to measure tar and nicotine.

Q. And, as a result of developing that standard measurement, did Imperial provide information to the federal government with respect to the tar and nicotine levels?

A. Yes, it did. It measured its product, as did the other companies, and reported that to the Health and Welfare branch.

Q. And, if we turn then to the next Tab, is that letter communicating certain information with respect to the tar and nicotine levels?

A. Yes, it is a report that attaches the tar and nicotine levels measured of cigarettes.

Q. Now, what was Imperial's understanding as to why the federal government had become interested at this point and time in the tar and nicotine figures?

A. Well, my understanding was tar and nicotine measurements in tobacco products was a growing phenomena of growing interests to the Health and Scientific Community; and it was also with the Health Department of Canada, of course.

I think a big stimulus for it was first ranking by Reader's Digest in the States, in the late 50s. And, the

Health Department wanted to have measurements of the tar and nicotine levels in Canadian cigarettes. The objective, I believe, was to publish those, so they would be made available to consumers.

5 Q. And, what was the purpose of making this information available to consumers achieve?

A. I believe it was a view that consumers - smokers rather - could make a brand choice based on the tar and nicotine levels of cigarette.

10 Q. And at that point in time in the mid 50s - pardon me - mid 60s in the discussions that Imperial was having with the federal government, was there any suggestion being made by federal government as to whether the lower tar and nicotine cigarettes would in fact be "safer?"

15 A. Yes, there was. The Minister, on more than one occasion, suggested that choosing a lower tar and nicotine brand was one of several ways that smokers should consider to reduce their risk from smoking.

20 Q. Now in the early stages when you are discussing the T & N numbers with the government did Imperial express any reservations about whether or not these products might be so-called "safer?"

A. It's my understanding that there were reservations expressed by one of my predecessor actually, Mr. Perry (Ph).

25 Q. And where were those expressions or/and reservations expressed?

A. I think in discussions with the department, probably in written communications, but I am not certain.

Q. And, what was the nature of the reservation?

30 A. Well, the industry was concerned about, I guess, the validity of the acceptance that lower tar and

nicotine was less hazardous.

Q. And what was the industry's concern in that respect?

A. Well, I guess, it couldn't be demonstrated that they were less hazardous.

5 Q. And what was the government's response to the concern that Imperial was expressing?

A. I presume they didn't share it because they continued to communicate the information and communicate their view that a lower tar and nicotine cigarette may be chosen because it may be less hazardous, until about probably the mid 80s.

10 Q. And, was the basis for that communication through types of things that we saw with Mr. Collishaw being those press releases?

15 A. The publishing of Tables with press releases, I guess through the Media.

Q. And, if I could just ask you to go back, for a moment, to the Tab number 2. At Tab number 2, do you have any understanding as to who the "Foster D. Snell" (Ph) is that's referred to in the third paragraph?

20 A. I presume it's the name of a laboratory or a technician who measured the tar and nicotine levels of the brands.

Q. So, the actual measurements were not done by Imperial Tobacco?

25 A. Not in this particular case and I believe not at that time in general.

THE COURT: And, you've lost me. I don't see any names here. The letter of March 31, 1967, which is Tab 2?

30 MR. BARNES: I am on Tab 2.

MR. BROWN: Second sentence, Your Honour.

MR. BARNES: Second sentence. "Foster D. Snell. "Further to my letter of December 14, 1966, herewith is a copy of a report from Foster D. Snell."

THE COURT: Yes, I see it. Sorry.

MR. BARNES: Q. It's getting late in the day. So your understanding is that they were done by an independent lab for the federal government at that time, Mr. Brown.

A. It's my understanding they were done at an independent lab for the tobacco industry to be reported to the federal government, yes.

Q. All right. And, we saw yesterday or the day before a press release, which is at Tab Number 5, which appears to be the first press release, that was put out by the federal government. And, that reports on the numbers that you've provided. Do you see that?

A. Yes, I do.

Q. And, we see at the bottom of that first page the reference to, "The main purpose in releasing this information," says Mr. Munroe, who was the Health Minister at the time, "is to allow people to know the tar and nicotine levels of the cigarettes they smoke so that may, if they wish, avoid those with high and chose those with low levels." Do you see those words?

A. I do, yes.

Q. And, is that reflective of what you said when the government, was at that time, intent on pursuing low tar and nicotine delivery cigarettes at a safer alternative?

A. Yes, it's one of several suggestions they made. That's correct.

Q. And, one of the questions or the observation

5 that was made was a good observation the other day. It was that press releases sometimes don't get into the newspaper. I just want to show to you a copy of the Toronto Star from November 1968. And ask if that newspaper article - take a moment to read it - in fact picks up the Press Release and reports it in the Star of November 20, 1968? Does that pick up the Press Release that we just looked at, at Tab 5?

A. I believe it's produced with this.

10 Q. Okay. And in fact if you look at the first column on the second page of that document, it actually picks up the language that I read to you starting, "Monroe said that the main purpose in releasing the report is to allow people to know tar and nicotine levels of the cigarettes they smoke so they may, if they wished, avoid those with high levels and choose those with lower level."

15 A. Correct.

Q. And, they also put down at the bottom of that same paragraph the other suggestions that Mr. Monroe has in his press release for safer smoking.

A. Correct.

20 Q. Might that be the next Exhibit?

THE COURT: Number 12.

EXHIBIT NUMBER 12: Article from the Toronto Star dated November 20, 1968 - Produced and Marked.

25 Q. Now, as well, did Imperial issue a News Release in response to the Minister's Press Release?

A. I believe that's correct, yes.

Q. Could you take a look at Tab Number 6 in your volume? And that's the press release that Imperial put out?

30 A. Correct.

Q. And was there anything in this press release by Imperial that suggested smokers ought to consider Imperial's delivery products as safer products?

A. No, it does not.

5 Q. And then we've heard through the evidence of Mr. Collishaw that there were a series of further Releases. And, as I understand it, Mr. Brown, so we don't need to go through them all, that these releases continued until sometime in the mid 1970s. Is that correct?

10 A. I think that's correct, yes. And perhaps it was later than that. No sorry, it was until the numbers were on the pack. That's correct.

15 Q. I think actually there were some that were later than that, Mr. Brown. And, for example, if you take a look at Tab Number 17, there are still issuing in 1983. Do you see that?

A. Yes, I do.

20 Q. Now, I would like to ask you whether the government other than asking for the information about tar and nicotine made any demands on the industry as to the maximum deliveries that Imperial could in fact manufacture?

A. Yes, there was a request by the government that a maximum tar yield be put on Canadian cigarettes.

Q. All right. And when did that come about?

25 A. In the late 60s, I think it started. I can't recall the exact date that the first maximum was agreed. But, I believe it was towards the late 60s.

Q. Did you agree to a maximum?

A. We did, yes, eventually.

30 Q. And what was the government's stated purpose in asking you to agree to a maximum?

A. It was part of the program to reduce tar and

nicotine in Canadian cigarettes.

Q. And when you were first into discussions with the Federal Government about maximums did Imperial have any reservations?

A. Yes, they did.

Q. And what was the nature of those reservations?

A. The biggest concern was that if the maximum tar level was set arbitrarily and too low that smokers would go to non-Canadian products to satisfy their taste, and subsequently the Health and Welfare people understood that point and there was eventually an agreed maximum tar level.

Q. And, I take it that if they went to another product that it would sort of defeat the intent of trying to get the products down.

A. Correct.

Q. Right. And that was expressed - I believe we have a document that expresses that. Could you turn for a moment to Tab Number 8. And, so we just get the benchmark in time, we've got discussions about the T & N numbers with the Government in the mid 60s, with the publication of the T & N numbers in 1968, and then in 1971 we are now talking about maximums with the government. Is that correct?

A. That's correct.

Q. And, could you just turn to the second page of this letter and maybe, by this time the Ad Hoc Committee has now become the Canadian Tobacco Manufacturer's Counsel?

A. Correct.

Q. And, so if you look at the third paragraph of this document on the second page...

A. Correct.

Q. ...so, they are providing the government

basically with the information that you just were discussing?

A. That's correct.

Q. And, you then subsequently agreed with the government to a maximum level. And did you evidenced that Agreement?

5 A. That was incorporated in the Voluntary Code of the Canadian Manufacturer's Counsel.

Q. And, if we could have a look for a moment at the Tab. If you look at Tab Number 34 - as we go to Tab Number 34, we've now turned up a document that says "The Cigarette Advertising Code of the Canadian Tobacco Manufacturer's Counsel. Perhaps you could just explain the geneses of this particular code. How did they come about?

10 A. In the 60s there was growing concern about the regulation of the advertising promotion of tobacco products in the many jurisdictions, not just Canada. And the Canadian manufacturers through discussions with Health Canadian created a code of protocol for certain restrictions on the advertising and promotion of tobacco products. And that started about '64, I think the first one was. The one we are looking at now is 1972.

15 There were subsequent additions of the Voluntary Code until, I guess, 1988 when the *Tobacco Products Control Act* was legislated rendering the Voluntary code useless really.

20 Q. And, if we perhaps just look at the Code at Tab 34, is it Rule 4 that reflects the Agreement that you had with the federal government responding to their request to a maximum level tar and nicotine?

25 A. That's correct. It sets the maximum of 22 mg of tar and 1.6 mg of nicotine.

30 Q. And, that was the number that they asked you to set?

A. Ah, yes. That was the number Industry and the Federal authorities had agreed to.

Q. Now, as well as a maximum did the government have any discussions with the Industry in asking them to go to a low reduction? Did they set a target as to where they wanted the products reduced to?

A. They did. They set a target based on Sales, weighted Average Tar.

Q. Perhaps we can pause there and explain, "Sales, Weight and Average Tar."

A. Simply, the average tar level of all the sold cigarettes considering the volume by tar level, was set at 12. And, I believe it was a 1.2 for nicotine under the mathematical process.

Q. And....

A. The target date was, I believe.

Q. The target date was 1984?

A. Yes.

Q. And you first started working on this back in the early 70s - responding to the government's request?

A. In the early 70s.

Q. And, for example if we turn to Tab Number 12, being one of the News Releases - you see in the second paragraph of that particular News Release that the Health Minister is complimenting the manufacturers for their efforts to reduce tar and nicotine. And he pointed to substantial reduction for some brands over recent years and all manufacturers have kept within the voluntary maximums that they have established. Do you see that?

A. I do.

Q. All right. And those maximums that you have established are the ones we've just looked at Rule 4 in your

Code?

A. Correct.

Q. Okay. Just jumping ahead so we can complete the story on lowering the deliveries - if you go to Tab 16, for a moment, there is a letter from Health and Welfare to Mr. Mercier (Ph). Do you have that?

A. I do.

Q. Right. And that's the reference that I think you just addressed to the targets that had been set by the Federal Government for 1984. Do you see that in the second paragraph?

A. Yes, I do.

Q. And that's the slot numbers that you were just explaining to the Court - Sales, Weighted Average Tar.

A. Correct.

Q. Now, when did the numbers come to - the tar and nicotine numbers come to be placed on the packs?

A. 1974, I believe.

Q. And how did that come about that they came to be on the packs in 1974?

A. It was the desire of the government and something that had been discussed for a few years. And then it was done voluntarily by the industry by incorporating it in a revision of the Voluntary Code.

Q. And, you've talked earlier about the Industries concern about having some form of standardization or methodology for reporting these numbers and that had been agreed with the Federal Government in the late 1960s?

A. Correct.

Q. Right. And when you agreed to put the tar and nicotine numbers on the pack what was the methodology that was going to be used in the calculation of those numbers?

5 A. Ah, well it was the - I don't know the name for it frankly. It was a methodology that was agreed that considered standards for puff duration and butt length and things we've heard about before. It was standardized and accepted by the companies in the industry and the government.

Q. Was there any change in the methodology between when you started providing your samples for testing in the later 60s and when you started putting the numbers on the pack in 1974?

A. Ah, not to my knowledge, no.

10 Q. So, that was the methodology that had been discussed and accepted with the Federal Government?

A. That's my understanding, yes.

Q. All right. Now, what information is provided to the consumer by putting these numbers on the pack?

15 A. Well, just a broader distribution of information to all smokers of the same type of information that the Health Ministry was putting out through the media by press releases.

20 They gave them the information of the tar and nicotine rating - the average tar and nicotine rating of the cigarettes of the brand they were purchasing or considering.

Q. Were the numbers intended to represent the actual yields obtained by a smoker?

A. No, they were not.

25 Q. So, why was that not so?

A. Well, there would be really no way to measure - to find a measurement that could represent how smokers smoked, because everybody smokes differently, a little bit or to quite a degree, at different times. So that's why they chose a standard measurement.

30 Q. When the industry put these numbers on the

pack in 1974 had there been any threats by the government that if they failed to put these numbers on the pack that there would in fact be legislation introduced requiring the manufacturers to do so?

5 A. I think legislation was introduced at one time earlier, not that much early, that didn't pass but suggested that had the Industry not voluntarily acceded to that request that it could have been legislated, yes.

10 Q. Did the Industry, at any point, discuss with the governments any concerns that it had that these numbers, these comparative numbers, might not reflect what the consumer was actually getting?

15 A. Yes, there was a discussion with the government about the concern of smokers compensating with a lower tar cigarette - that some smokers would do that. That was brought to the attention of the Government officials, I understand.

Q. And, if we go back and look in the Red Book at Tab Number 9 - do you have that?

A. I do, yes.

20 Q. And Tab Number 9, if we look at the first page purports to be the Draft Minutes that had been prepared by a "Mr. Cobourne Ph)," MD of a meeting and it was attended by several people including a "Mr. Leo Laporte (Ph)" who is an Imperial employee. Is he not?

25 A. He was and then he became Executive Director of the Canadian Tobacco Manufacturer's Counsel.

Q. So earlier on when he was a member of the Ad Hoc Committee he was employed by Imperial and then...

A. Correct.

30 Q. ...he went over to join the CTMC?

A. That's my understanding.

Q. And, so Mr. Cobourne (MD) is at Health Canada?

A. That's my understanding.

Q. And he circulated these Draft Minutes. And, I would ask you to turn over to the third page of these Minutes, if you might. And, is this one example on the bottom of page 3 where the Industry is expressing its concern?

A. Yes, that's correct.

Q. And what was Health and Welfare's response to the Industry's concern about this issue?

A. As I see from this, at the very bottom line and onto the next page, their view was that there were other studies done that suggested that the issue of compensation was a minor issue.

Q. Were there other occasions when this was made known and repeated to the government?

A. I believe so, yes.

Q. And, government still in 1974 was requesting that you put these numbers on the pack?

A. That's correct.

MR. BARNES: Your Honour, this would be an appropriate time if you were going to take an afternoon recess.

THE COURT: By not taking one? I am having such a good time. Okay. I'll take one for ten minutes.

MR. BARNES: What time would Your Honour like to sit to this afternoon? We will not finish Mr. Brown, I don't think.

THE COURT: It would be nice if you could finish. I am prepared to sit until five but not much after that.

MR. BATTAGLIA: Is Friday an open day?

THE COURT: Ten minutes.

R E C E S S

U P O N R E S U M I N G:

THE COURT: Okay.

Q. Mr. Brown you testified that the T & N numbers were not printed on the pack until 1974. I want to know prior to 1974, and then we'll come forward, were the tar and nicotine yields of Imperial's product ever used in advertising?

A. No, they were not?

Q. And why was that?

A. It's a policy of the Industry dating back, oh, I guess the early 60s, if not before, that the companies would not make health claims in cigarette advertising.

Q. And do we find that policy by turning to Tab 33?

A. Ah, that's the '64 policy, I think, personally.

THE COURT: Mm-mm.

Q. And could you tell us where in that policy we find that?

A. Rule Number 4.

Q. Could you just read that please.

A. "No cigarette advertising shall state that smoking a brand advertised promotes physical health or that smoking a particular brand is better for health than smoking any other brand of cigarette."

Q. And did Imperial adhere to that rule?

A. Yes.

Q. Now, I said in my question, pre '74 that's

before they went on the packages. After the numbers went on the packages has Imperial made any advertising claims with respect to it's T & N product?

A. We have not. I go back to the question you asked before. We have not used tar and nicotine numbers in advertising.

Q. At any time?

A. No.

Q. And....

THE COURT: This is in Canada we are talking about?

A. Correct. That's right.

Q. We talked, briefly, about discussions that the Industry has had with the government about concerns that consumers may in fact compensate. I just would ask you to turn to Tab Number 18.

THE COURT: 18?

Q. Tab Number 18 please...

THE COURT: Thank you.

Q. ...and ask you, first of all, to put this in context because we haven't talked about this before.

Just before I comment just so we could put this in context for Her Honour, this is a press release talking about carbon monoxide. Was there also a carbon monoxide story going on as well? We talked about the T & N one, was there a carbon monoxide story?

A. Yes, a similar type of program, yes. And as I....

Q. Same levels for carbon?

A. And as we see here the Minister says she asked the company to reduce the average tar yield to 12 and to assure the level of carbon monoxide does not exceed the level

of tar. So in other words it's the same number - which is a 12 mg target for 1984.

Q. And did you accept the ministry's direction?

A. We did, yes.

Q. And turning over the page for a moment, we'll see, if you could just read the page very quickly, then I could ask you a couple of questions about - just do that for a moment rather than read it out loud.

A. Yes, I've read it.

Q. And this document is talking about published projects that have been done for the Department of National Health by Labstat (Ph) that deal with the question of cigarettes being intensively smoked. Do you see that?

A. Yes, I do.

Q. Right, and as a result of the product being intensively smoked, the yields have doubled. Do you see that?

A. I do, yes.

Q. Right. And the Minister's conclusion is - set out in the next paragraph. And, even with this knowledge, you would agree with me that the Minister's conclusion is that the tar and nicotine values printed on the packages as far as satisfactory buyer's guide to cigarettes with lower average yields of toxic substance.

So even with the knowledge that the Minister has about the intensive method she is still persuaded - is it a she, let me check it. Yes, it is. Madame Bejing (Ph) is still persuaded that the present way of reporting the numbers is a satisfactory way for the buyers.

A. Correct.

Q. All right. Now, this is a - so we are putting the numbers on our packs through the 80s and then we heard that a change occurs in the late 1988 or 1989 with the

interruption of some legislation...

A. Correct.

Q. ...referred to as the TPCA - *The Tobacco Products and Control Act*. Is that correct?

A. That's correct.

Q. And, what happens then to the requirement that you previously had in your *Voluntary Code* with respect to T & N numbers?

A. They are legislated to be placed on a package in a prescribed form and manner. We are required now by law to test and report tar and nicotine and carbon monoxide tests of all products and report them to the Federal authorities.

Q. And just pausing there for a moment, can you offer any observation - up until 19 somewhere, prior to 1989, it seems from your evidence that everything that you have been doing with the federal government has been on a conciliatory basis. And, you have been able to work out agreements with the government. Is that correct?

A. I think, generally, that's correct and accepted.

Q. What happened that in 1989 legislation was required to deal with this issue that up until this point in time seemed to have been dealt with satisfactorily from what we have read in the various press releases?

A. I think there was a change in government and a change in Minister. I think there was a growing influence of the anti-tobacco collective at the government level, growing media - anti-tobacco media. This is a judgment but they decided to legislate rather than continue with the *Voluntary Code*.

Q. And did the legislation in 1989 then prescribe the methodology for the reporting of the numbers that

were now required by Statute to be placed on the packages?

A. It did, yes.

Q. All right. And just generally, what if any were the differences from the methodology that was used prior to the introduction of the legislation and the methodology required by the legislation?

A. If I recall correctly, that legislation prescribed what is known as the "ISO" (Ph) Method for measuring tar and nicotine and Co. And I think the only difference - I believe I am correct - was that the butt length was shortened, so that in fact more cigarette was smoked and the numbers actually all jumped up a little bit.

Q. So, that was the only difference?

A. To my knowledge, yes.

Q. There was no requirement at that time for the intensive smoking method to be used?

A. No, there was not.

Q. And, we've looked at one particular document where the government's aware of the results of tests that have been done for them. One, I am sorry I forgot to take you to - if I could just ask you to go back to Tab 15, because I am sorry, I should have dealt with that as well. Can you go back to Tab 15 for a moment? And, this one actually starts, if we read it by going to the last document of the sequence and then coming forward because this how this one gets put together.

And this is an article that appears in the Toronto Star. Is it not, Mr. Brown?

A. I believe that's correct.

Q. And, if you turn the page to the second page of the article in this particular Brief; it's a story dealing with "Tar and nicotine figures on packages not telling the whole story, Test Show." Is that correct?

A. That's correct, yes.

Q. And, if we just go over to the right hand column, if we might for a moment, and try and see what's going on here. I am sorry, let's start on the top left. We see that the story's reporting: "That Tar and Nicotine yields," and I am reading from the upper left-hand corner, "printed on Canadian cigarette packages do not reflect actual dosages that individual smokers receive according to test done by Pricewatch (Ph) by the laboratory that test cigarette smoke for the Federal government." Do you see that?

A. I do.

Q. And at that time would that be LABSTAT that was doing the testing?

A. I would, I would have to guess so, I don't, I don't know for sure.

Q. And, then the tests...

A. I believe so.

Q. ...that this laboratory has done indicate, "Many smokers are getting twice the tar and nicotine from regular filter-tip cigarette that is listed on package and some who smoke so-called light or ultra light with the vented filters maybe getting 10 to 15 times the dosages the packages list." Right?

A. I see that, yes.

Q. And if we go over to the right - the column on the right, just above the heading "Toxic Chemicals," "For the ventilated cigarettes we block the vents to simulate the maximum hazards these cigarettes present." Do you see those words?

A. I do.

Q. And, then dropping down a paragraph, dealing with - the first paragraphs deals with non-ventilated and talks

about the ventilated. "For the ventilated brands, the results are far more spectacular. For example the two brands which yield one mg of tar on their standard smoking machine conditions, increase at least tenfold under modified conditions for both tar and nicotine. But, carbon monoxide yields increased as much as 23 fold." Do you see that?

A. I do, yes.

Q. And so this story get published in the Toronto Star and then as a result of that it gets raised in the House of Commons. And that's the next document; that's the middle one now. Your Honour I think you might have shifted yours around. That's the one that's very hard to read. And..

THE COURT: "Hazardous Substance - The Commons Debates?"

Q. Right.

THE COURT: M'hmm.

Q. And just so that you know, that very fine type that I certainly cannot read has been reproduced at the bottom for you. So that - do you see that tiny, weenie print.

THE COURT: M'hmm.

Q. ...under the first paragraph at the left? That's been typed at the bottom so that you can now read it.

THE COURT: Thank you.

Q. So, all right Mr. Brown, what we have here is a member in the House asking the Minister, based on now what he has seen in this Toronto Star article, we see that, to bring in legislation. Right?

A. Correct.

Q. And then, if we go over the page, we see the Briefing that's prepared for the Minister to respond to this

Motion by Mr. Bill Blakey (Ph) in the House in 1981.

A. I see that.

Q. And what that says is that the "Should a question arise the Minister might say, the potential answer," 'The health of cigarette smokers has been a concern and a priority of mine for many years. My department annually monitors the tar and nicotine delivered by popular brands and more recently also publishes the carbon monoxide levels. The 1980 results were published in the News Release of January 12."

"My department is fully aware of tests conducted by the Toronto Star, which gave higher tar and nicotine and carbon monoxide levels than reported in my Press Release. Even though both the tests reported by the Toronto Star and my department were conducted by the same laboratory, the tests conditions were different."

"In the Toronto Star all of the vents in the cigarettes were blocked. As could be expected, tar, nicotine carbon monoxide levels under these conditions are increased." Pausing there, I take it that wouldn't surprise you, would it Mr. Brown?

A. No, it doesn't.

Q. All right. "Smokers who use vented cigarettes in ways which block the vents put themselves in greater danger. While the safest course of action is for smokers to stop smoking, those who cannot stop can reduce their intake of harmful substances by switching to a lower-tar brand if they do not compensate by smoking more cigarettes per day or smoking each one more intensively by more puffs or deeper inhalation." Right?

A. Correct.

Q. And so this legislation that was purposed did not go forward?

A. That's correct.

Q. Right. And despite that this information that we see that the Department of Health and Welfare has in this period through the 80s, when they passed the legislation in 1989 they only mandate the ISO Method for the reporting of the tar and nicotine deliveries on the packages.

A. Correct.

Q. And those regulated numbers that are on the packages in this period are the numbers that would have been on the packages when Mr. Battaglia started smoking the two brands in 1994 that he was complaining about?

A. Yes, in 1994 the markings on the packages would have been measured by that ISO standard. That's correct.

Q. And, coming forward in time, we have heard some evidence that certain sections of the TPCA were struck down by the Supreme Court of Canada in 1995.

A. Correct.

Q. And, in 1995 what happened to the provisions with respect to tar and nicotine levels as a result of provisions of the Act being struck down?

A. The regulations that cigarette brands must be tested and reported remained in force. They were not struck down. The provision or regulations that tar and nicotine numbers so reported be printed on packages were part of a clause that included the health warnings and that part was struck down.

Q. So, we were required to report?

A. To test and report.

Q. To test and report but we were not required to print on the packages?

A. Correct.

Q. All right. And what was the methodology

that we would be required to test and report? It continued to be the same methodology.

A. That was prescribed - the ISO Method, yes.

Q. Right. And then what did Imperial do as a result of the provision being struck down - the regulating-making provision being struck down with respect to numbers on the packages?

A. It continued to provide the numbers on the package in the same manner that was prescribed?

Q. All right.

A. That, that provision wasn't challenged. It just happened to be caught in the same clause that went down.

Q. And, so you continued to leave the numbers on the package and the methodology continued to be the same?

A. Correct.

Q. Right. And did you evidenced that decision in writing?

A. It - yes. It was in a - yet another CTMC Voluntary Code...

Q. All right.

A. ...that Canada put into...

Q. And maybe what we could do is look at Tab Number 37. I am told that we might be missing a page out of the Schedule. So, if we might just find it.

Your Honour it's the second to last page. The last page is number 2. There should be a "1" in front of it, being the first page of the Schedule. So, if I could just ask you to slip sheet that out and I'll punch holes in it for you. There you go.

THE COURT: No problem.

Q. Could we slip sheet the Exhibit Binder, Your Honour?

THE COURT: Okay. Are we talking about Number 37?

Q. Yes. It's Tab 37 and it should now be - the page I've handed you should be the second to last page.

THE COURT: Second to last page.

Q. You should now have a page that says, "Schedule" and Page 2 should be behind it. That's correct.

THE COURT: After Page 4 but before Page 2.

Q. That's right.

THE COURT: Thank you.

Q. Mr. Brown you said that this was the document that evidenced the agreement to continue to put the numbers on the same way that there were on the packs prior to the regulation-making power being struck down?

A. Yes, I did.

Q. And we just looked at the provisions and just - first of all this one has a press release. What was the purpose of putting the press release out at that time, Mr. Brown?

A. It was to communicate principally to the media and subsequently to the public that the manufacturers although they had won a case in court and the Supreme court had struck parts of the *Tobacco Products Control Act*, we were immediately to impose self restriction, and to continue on some of the government mandated positions that were in the previous bill.

Q. So, basically the Code had fallen away in 1988 or 1989 with the introduction of the legislation?

A. Correct.

Q. Parts of the legislation fell away in 1995?

A. Correct.

Q. And a new Code comes back in?

A. Correct.

Q. All right. And the provisions of this Code that specifically deal with the reporting of the T & N numbers and would those be found at Page 7, Section 9.1?

A. Yes, that's correct.

5 Q. And, then the methodology that continues to be used by the industry is then set out - and that takes us Your Honour to the Schedule at the back and that was why it was important to get you the first page of the back so that we get the requirement at 9.1 and then the methodology for doing it is set out in the Schedule which is at the back on Page 2 in Section 4 under the heading "The Determination of Tar and Nicotine and Carbon Monoxide." Is that correct?

A. Correct.

THE COURT: It looks like Algebraic....

15 Q. I am sorry?

THE COURT: It looks like an Algebra problem. "N shall be greater than or equaled to 100" and so on and so forth.

Q. As long as you have the right answer. And you operated under this guideline, Mr. Brown?

20 A. That's correct.

Q. And, what is the current situation today?

25 A. Currently, the regulations of the Tobacco Act, that are now coming into force - and I don't know precisely what the dates are at the moment, will require a range to be placed on the pack which ranges from a measurement by the ISO standard to a measurement by what is referred to as "The Extreme Smoking Method." I don't know if that is a technical reference.

THE COURT: "Intense," I think...

30 A. "Intense," that's correct.

THE COURT: ...is the one I've been using.

A. Correct, yes.

Q. I think actually we might be able to keep the technical description...

THE COURT: M'hmm.

Q. ...as it is a modified procedure.

THE COURT: Okay.

Q. I think - would that be perhaps correct?

A. That's correct. That's correct, yes.

Q. It's a modified procedure. And, so the ISO portion would basically continue to be the same. Is that correct?

A. That's my understanding, yes.

Q. And that would be the same as what we see in your Exhibit 37 at Schedule...

A. Correct.

Q. ...the Schedule in Section 4. So that's going to be the same.

A. Correct.

Q. And, now we are going to have a modified procedure as what? To give the range?

A. That's correct.

Q. Now, we've heard the evidence, the testing methodology for the modified is significantly different than the ISO. Do you agree with that?

A. Yes. That's correct.

Q. In general terms, what is it that makes it so different?

A. My understanding is the principal difference is that the - and we've heard - that the holes in the ventilated tip are completely blocked by taping or whatever, some equal thing. And then the cigarette is smoked.

Q. And, we've talked for a moment about - this is the regime about to come into place in Federal regulations. Did something happen in BC that imposed an earlier requirement for a different form of compliance as well?

5 A. Yes. BC's legislature brought through legislation that required a similar type of measurement.

Q. And, if we look for a moment at the White Volume, Exhibit Number 1, and take a look at Tab Number 2, this reporting that we see at Tab Number 2 is a result of information that you, Imperial supplied to the BC Government. Is that correct?

10 A. That's correct.

Q. And, that's with respect to their modified procedure as well.

A. Correct.

15 Q. Okay. And, Mr. Brown, this information, as I understand it, was taken off the BC web site, but it's true that it was also posted on the Imperial web site?

A. That's correct.

20 Q. If we take a look at the first page for a moment, we see that the difference between the standard measurement is - not the difference, but the standard measure for tar - just dealing with Page 13 since we are there, is 5.29 and then with the Intense Method it's 28.8. Do you see that?

A. I do.

25 Q. Right. And, would it be fair to say that if you took any other product, whether it be Imperial's or Rothmans' or RJR's, if it also was a ventilated product with that particular tar level that it would get the same reading on the Intense Method?

30 A. I don't know that it would get exactly the same proportion, but it would definitely be considerably higher

in tar. It would depend on how much of the tar reduction in the standard test was provided through ventilation and how much was through, through more porous paper or whatever. But, definitely it would be a considerably higher reading.

5 Q. And, I would just like to ask you, your observations as to whether you think based on your experience that these intense numbers or these modified numbers are more reflective of the deliveries of a smoker as opposed to the ISO method?

10 A. In my view, that would be the case. I can't imagine somebody smoking cigarettes in that manner all the time.

Q. And what would that manner be?

15 A. Well, the Intense method requires the holes be completed covered. Certainly not most people in my view would not smoke that way.

20 Q. Now, Mr. Brown I just want to talk to you about compensation for a moment. You indicated that there had been discussions over the years with the Federal Government about compensation. And, we've looked at a couple instances of where we have documents dealing with that. But, what I would like to ask you, Mr. Brown, has Imperial ever designed a commercial product that would facilitate compensation by the smoker?

A. No. I mean, unknowingly, do you mean or...

25 Q. Unknowingly.

A. No, not unknowingly.

Q. Why is that?

30 A. It would be against our business practices. We, we - it is in our interest and it was a law and it would be again to make that the products are designed to meet the measurements prescribed. To design a product to do otherwise,

I think would be a wrong thing to do and would certainly put the trademark at great risk. So, from a business perspective it wouldn't be very bright.

Q. And, dealing with products that concern us here today we've heard lots of information about the vent holes being visible, Mr. Brown and you'll agree with that?

A. Yes.

Q. What I would like to know is, has Imperial ever put the vent holes in a place on the product that would facilitate vent blocking by the consumer?

A. No. There are within the company prescribed specifications. The designers are not allowed to place the ventilation holes any closer than 12 ½ mm from the tip in. The smoking machine regime, I believe, requires an insert of 9 mm. So, our standards are beyond that. And then, they, they, must stay below that and they must stay on the filter because the ventilation has to be on the filter, it's my understanding.

Q. And you indicated that your specification is no closer than 12½ mm to the end of the cigarette?

A. Yes.

Q. And how did that specification of 12.5 mm come to be determined?

A. I just - I think it was determined when they made the specs for product development that we wanted to make sure, considering the possibility of drift in high-speed manufacture, that there was never an occasion when the ventilation holes got any closer than the measurement. So, they just left a little bit of extra margin there.

Q. Would it be possible to place the holes any further down the product?

THE COURT: Down? Which way is down?

Q. Away from the end so that rather than having

your standard of 12.5 you move it to 20?

5 A. Ah, there would be a limit in that if you got down as far as where the overlap of the filter attached to the cigarette then, (a) you would decrease the efficiency of the ventilation, but you would put the cigarette at risk of breakage. It probably would all break off. 12½ mm specification doesn't specify they have to be there. They can't get any closer than that.

10 Q. And so, you have intentionally set that specification to avoid the possibility of vent-blockage?

A. That's right.

15 Q. And the other question I want to ask you, with respect to the two products that we are dealing with here, we know that there are visible holes for ventilation. Are there any other holes for ventilation on those Matinée products that you cannot see?

A. No, there are not.

20 Q. Okay. Now, I want to talk for a moment, Mr. Brown about the promotion of lower-delivered products. I would just like to ask you, going back in time, your evidence was that the government was putting pressure on the industry to reduce the tar and nicotine deliveries and subsequently carbon monoxide deliveries. Were they having discussions with the industry about promoting these products?

25 A. Well yes. I think the promotion of those products was a way to achieve the targets that were set. Promoting lower tar products disproportionate to other existing brands.

Q. And how did you do this?

30 A. Well, when I say 'promoting' I am talking about (a) producing them, developing them and then marketing them. And spending marketing funds behind those brands.

I might add that it was a considerable demand for those products in the early to mid 70s, as it was, Your Honour, for a lot of products.

5 It was the time when light beer was popular. And people were getting away from red meat, dark liquors were no longer selling and people were drinking wine spritzers. It was all part of a "light" phenomenon anyway; and it coupled with the recommendation from the Health authorities that smoking milder cigarettes was a good think to do.

10 Q. And, in the promotion of those products you never made out any reference to the tar and nicotine deliveries?

A. No. That's correct.

15 Q. And, just dealing with advertising itself generally, am I correct that the section in the legislation -- pardon me. Let's come at it the another way. Am I correct that the legislation in 1988 or 1989 banned any advertising of tobacco products?

A. That's correct.

20 Q. All right. And that legislation was in place at the time that Mr. Battaglia started to smoke these Medallion - oh pardon me, these Matinée products in or about 1994?

A. That would have been in place then, yes.

25 Q. All right. So there was no advertising of tobacco products of any kind between 1989 and when in fact the legislation was struck down in, I think it was late 1995?

A. I believe that's correct, yes.

Q. All right. And, what advertising, if any, was there after the legislation was struck down?

30 A. Advertising was permitted under the guidelines of the Canadian Manufacturers' Council Voluntary

Code--the new one that we saw a few minutes ago. It restricted some of the forms of media, some of the locations of outdoor. Some of the types of content in the advertising were restricted.

5 Q. All right. And when you say in accordance with the provisions of the Code, the Code that we were just looking at t Tab 37, actually has "Chapter and verse" on advertising guidelines for the industry. Does it not?

A. It does.

10 Q. And these were put in place to fill the void that resulted with the legislation being struck down?

15 A. Ah - that's correct. The industry felt that, and always has, that its advertising should be restricted. And so in the absence of what we have been working under, and that was legislation, we again reenacted a Code for guidelines for what we considered appropriate ways to advertised tobacco products.

20 Q. And then we heard that new legislation came in and not only does it deal with the requirement to put numbers on the packs but the new legislation also deals with restrictions on advertising again.

A. Correct.

Q. So, once again we are now governed by a legislation in the advertising area?

A. That's correct.

25 Q. Now, did any of the advertising that you were doing in the period when you could advertise, and this was prior to 1988, were you telling the consumers that the products, the low tar delivery products were safer?

A. No, we were not.

Q. And why was that?

30 A. Well, as I said, earlier, that was - making

any sort of health claim was prohibited by the Code of the industry.

Q. Did you have any understanding as to whether the consumers were getting a message that the products were safer?

A. We have an understanding that consumers accepted that lower tar and nicotine cigarettes were less hazardous. Yes.

Q. And, what was your understanding as to where they were getting that information to come to that conclusion?

A. We believed it was - we knew from research that it was communicated by Government and Health Authorities.

Q. I just want to deal with a couple of other issues with respect to your packaging. Am I correct that there prior to the legislation that introduced specific warnings in 1988, there had been warnings on the package since approximately, 1972...

A. That's correct.

Q. ...with respect to health warnings. And we can talk about for a moment.

A. Correct, yes.

Q. All right. And, how had those health warnings come into existence?

A. The same as the tar and nicotine numbers on packs had came in later, the warnings were voluntarily placed on the packages after consulting with the government. They agreed, the government.

Q. And if we turn to - I would just ask you was this once again reflected in one of your Codes?

A. Yes, it was.

Q. In that one - perhaps more in that one at Tab Number 34. And the warning that goes on pursuant to that

Code is found in Rule 2?

A. Correct.

Q. All right. And, I see this Code as well, if we look at Rule 11 as a prohibition on any claims with respect to health matters?

A. That's correct.

Q. Right. And, was there as subsequent change in the warning that was discussed with the government that went on the pack in the 70s?

A. The warning we see there is the original one.

Q. Right. And I think there was one more, wasn't it not?

A. I think subsequently it was changed. That's something I - "Avoid inhaling" at a later day. I don't recall the exact date.

Q. And that would have been reflected again - I don't know if I actually see...

THE COURT: At Tab 35 second page, I don't know if it's exactly the same or not.

Q. Yes. Thank you, Your Honour. I think, let me just see if that. . .

THE COURT: Well they've changed their name. The government's changed their name. So there is a difference. In the first one the warning is "Danger to Health Increases with Amounts...

MR. BARNES: Right.

THE COURT. ...Smoked." And then at Tab 35 it's added "Avoid Inhaling..."

MR. BARNES: That's right.

THE COURT: is new.

MR. BARNES: Q. Right.

A. That's right.

Q. And that appears at Tab 35 and that again was after discussions with the government?

A. Correct.

Q. And, this - you indicated that earlier in your evidence Mr. Brown, that at one point legislation was threatened against the industry, and I believe that was in the late 60s. And, I believe that that was Bill C248?

A. I believe that's correct, yes.

Q. And, am I correct that the language in the warning that appears in Tab 34, being the first warning, is very similar to the warning that was in the Bill that introduced into the House which would have mandated the warning?

A. Yes, I believe that's correct; it's quite similar.

Q. I would like to talk to you for a moment about your descriptors that you use on your packs. We've heard some reference to the use of the word "Mild and Light, Mr. Brown.

A. Yes.

Q. What is it that you intend to convey when you use those words to describe your products?

A. Ah, when used with a trademark it is to reflect a product that is lower in tar and nicotine than the parent or the trademark that's used. We refer to it as the parent brand--the original brand.

Q. So it's relative to the brand family?

A. Relative to the trademark before - yes, the parent, the original brand: Players and then Players light is lighter than Players was. It's the idea.

Q. Is there any difference in the use of the

word "Mild" as opposed to the use of the word "Light?"

5 A. Ah - not in that sense. Consumer perceptions were a little different. "Mild" tends to suggest milder from tobaccos in taste as opposed to a more abrupt reduction of tar and nicotine. But, they are chosen almost interchangeable depending on the brand name: chosen by consumer research.

Q. Your Honour, I am wondering if we could rise. I've got some notes that I would like to shuffle through. I think I've probably got about fifteen minutes that I could do first thing in the morning, if that would be...

10 THE COURT: Okay.

MR. BARNES: ...appropriate.

THE COURT: Well, while we are on "Mild" and "Light," what the difference between "Extra" and "Ultra?"

15 A. They designate another step down and consumers understand that in about relatively the same scale. If I could demonstrate by way of example.

20 When cigarettes - I'll take Players cigarettes, and Export, which were about the strongest, prior to '76 when these "Light" brands were launched. And, consumers in product development said they wanted a milder cigarette but not a cigarette that was - had no taste to it.

25 So, the "Light" brands were launched from a parent that was about 18mg to 4 or 5mg lower. And each then subsequent descriptor suggested a gap, a further gap of about the same amount. So, "Light" would be 4 or 5mg less than Players and Players Extra Light would be another 4 or 5mg down. If there were a Players Ultra Light the consumer would figure that's going to be another 4 or 5mg down.

30 The actually gap between them has shrunk and that's simply because the brands from the top have shrunk down as we achieve

the Sales Weighted Average Tar Targets. So - but it positions them to the consumers in steps down in tar and nicotine.

THE COURT: If there a difference between "Extra Mild" and "Extra Light" or is there such a thing as "Extra Light?"

A. There is "Extra Light" there are just...

THE COURT: Is it different from "Extra Mild?"

A. No. It's relative to the brand and it's a choice. Matinée chose "Mild" ...

THE COURT: M'hmm.

A. ...and Extra Mild" ...

THE COURT: Players had "Light."

A. ...Players and du Maurier chose "Light" to do the same thing. But they don't suggest an absolute tar level. It's only relative to the brand it's attached to.

Interestingly in the case of Matinée because the Matinée Extra Mild brand was launched at the level it was there was not a Matinée Mild. So it was launched actually what would be two levels down at the Extra Mild level at the tar positioning that consumers would expect with that designation and it was understood that way.

THE COURT: How old is the Matinée trademark brand?

A. The trademark Matinée goes back to the - oh, I would expect the 30s. I don't really know the actually year, but it's very, very old. Matinée Extra Mild was launched, I think, in '76 or ...

THE COURT: I have the dates here somewhere.

A. '78, somewhere in there. Yes.

THE COURT: And what's "Slim" in all these descriptions?

A. Well "Slim" is a configuration. It's a

cigarette that is actually slimmer in diameter, smaller in diameter, in circumference. That has a different connotation to people. It tends to suggest more femininity and elegance.

THE COURT: What was the first word?

A. "Femininity" and elegance. Usually they are synonymous.

THE COURT: And of course "Slim 100" are even more feminine and more elegant?

A. Yes, they are. That's the perception of the 100mm cigarette, longer cigarette.

THE COURT: Okay, we stop now.

MR. BARNES: Thank you, Your Honour.

THE COURT: I'll see you tomorrow.

THE CLERK: This court is now adjourned.

THIS IS TO CERTIFY THAT THE FOREGOING
IS A TRUE AND ACCURATE PARTIAL TRANSCRIPTION
FROM THE RECORD MADE BY SOUND RECORDING
APPARATUS, TO THE BEST OF MY SKILL AND ABILITY.

Harriett Bynoe
Harriett Bynoe, Court Reporter