IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Knight v. Imperial Tobacco Canada Limited,***
2007 BCSC 964

Date: 20070703
Docket: L031300
Registry: Vancouver

Between:

Kenneth Knight

Plaintiff

And

Imperial Tobacco Canada Limited

Defendant

And

Her Majesty the Queen in Right of Canada

Third Party

Before: The Honourable Madam Justice Satanove

Reasons for Judgment

Counsel for the Plaintiff:	D. Klein D. Lennox
Counsel for the Defendant:	D.C. Harris W.S. Beradino S. Smith
Counsel for the Third Party:	J. Tyhurst
Date and Place of Trial/Hearing:	February 15 and 16, 2006 and April 10, 2007 Vancouver, B.C.

[1] On May 11, 2006 the British Columbia Court of Appeal upheld the certification of a class proceeding under the ***Business Practises and Consumers Protection Act***, S.B.C. 2004, c. 2 ("***BPCPA***"). The suit was brought against Imperial Tobacco Canada Limited ("Imperial") for its allegedly deceptive, systematic course of conduct that was not limited by intention or effect to any one consumer.

[2] The proposed class is defined as:

> Persons who, during the Class Period, purchased the Defendant's light or mild brands of cigarettes in British Columbia for personal, family or household use. The Defendant's light and mild brands of cigarettes includes the following brands: Player's Light, Player's Light Smooth, Player's Extra Light, du Maurier Light, du Maurier Extra Light, du Maurier Ultra Light, du Maurier Special Mild, Matinee Extra Mild, Matinee Ultra Mild and Cameo Extra Mild.

The Court of Appeal reduced the commencement of the class period within which damages could be claimed to May 8, 1997, and to which any declaratory relief was available to July 4, 2004 onwards.

[3] In the meantime, the third party Canada brought a motion to strike the Third Party Notice for failing to disclose a reasonable cause of action. I heard submissions in February 2006, and then again in April 2007, after the Court of Appeal decision was handed down and after the expiry of the time to appeal to the Supreme Court of Canada.

[4] Canada relied on six grounds to support its motion to strike:

1. The Crown is immune from breaches of the ***BPCPA***;
2. The third party owes no duty of care to the plaintiff consumers;
3. The third party owes no duty of care to the Imperial manufacturers;

4. Section 4 of the ***Negligence Act*** does not apply to statutory breaches;

5. Equitable indemnity does not apply to statutory breaches; and

6. The claim for declaratory relief should not proceed alone.

[5] Imperial opposed all six grounds. The only concession made by counsel for Imperial was that if I should find the conduct of which Imperial complains to be purely a matter of policy, then Canada is immune from any third party claim by Imperial.

A. MOTION TO STRIKE

[6] The parties agree that the legal test under Rule 19(24) is whether it is plain and obvious that the claim discloses no reasonable cause of action. However, "plain and obvious" does not mean that a court is bound to refuse relief because an area of law is uncertain or complex. It is the duty of the Chambers Judge to consider carefully whether a claimant has some chance of success ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959 at para. 33 and only if he does not should the pleading be struck.

[7] Although the consideration on this application is a question of law, the factual basis of both the plaintiff's claim and the third party notice is crucial to determining such questions as to whom a duty may be owed, or whether a decision was policy making or operational.

[8] Imperial argues that a full factual record is needed to determine whether a duty of care arises. However, the decisions of ***Cooper v. Hobart***, [2001] 3 S.C.R.

537; ***Edwards v. Law Society of Upper Canada***, [2001] 3 S.C.R. 562; ***Odhavji Estate v. Woodhouse***, [2003] 3 S.C.R. 263; ***Eliopoulos v. Ontario (Minister of Health & Long-Term Care)*** (2006), 82 O.R. (3d) 321 (C.A.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 514 (QL); ***Klein v. American Medical Systems, Inc.*** (2006), 84 O.R. (3d) 217 (S.C.J. Div. Ct.)] all suggest it is the duty of the Chambers Judge to try and determine whether a duty of care exists from the facts as pleaded.

[9] The material facts pleaded in the Third Party Notice, which I must accept as having been proved, were summarized by Imperial in its submissions, part of which are repeated here:

> 1. Officials at Health Canada, acting further to Health Canada's statutory powers and responsibilities, played a critical role in creating and implementing a smoking and health programme that was intended to influence the development and promotion of light and mild cigarettes by manufacturers and was intended to induce continuing smokers to purchase lighter products. That programme was driven by conclusions reached by those officials, beginning in the mid-1960s and maintained until approximately 2000, that continuing smokers might reduce the risk of contracting smoking related diseases if they purchased cigarettes that delivered lower tar and nicotine as measured by standard testing devices.
>
> 2. Beginning in 1968, officials at Health Canada began to disseminate information about tar and nicotine deliveries as measured by standard testing methods to continuing smokers. League tables comparing brands were published. The nature and type of the information and the manner of its disclosure were decided on by those officials. Press releases advised smokers to smoke light and mild cigarettes. Ministers made statements about the health benefits of light and mild products. Officials advised smokers about smoking behaviour. All of this was done with the objective of inducing continuing smokers to "switch down" and it worked. Smokers did switch down. They relied on information from those officials in making their purchasing decisions.

3. By the mid-1970s, officials at Health Canada had requested and secured the agreement of cigarette manufacturers to publish on behalf of Health Canada the delivery level information on cigarettes packages and other materials. This remained the situation until 1989 when regulations mandated disclosure.

4. This public information campaign was based on a full knowledge by Health Canada officials of all material facts about light and mild products, the attendant health risks of consuming them, smoking behaviour and the techniques for producing them.

5. Officials of Health Canada made representations to continuing smokers and/or gave them advice about certain of those matters that are alleged to be misrepresentations or deceptive practices in the Statement of Claim; including, representations or advice about the relative safety of light and mild products, the actual deliveries of smoke constituents, the relative levels of exposure in comparison with regular cigarettes, and the failure to disclose certain matters including that lower deliveries were unrelated to benign changes in tobacco, that smoke from light and mild products was more mutagenetic than smoke from regular cigarettes, that smoke from light and mild products is not less harmful to the smoker and that nicotine levels were increased under normal smoking conditions.

6. Officials at Agriculture Canada developed strains of tobacco that were peculiarly suitable for incorporation into light and mild products: strains that altered the ratio of tar to nicotine in the leaf, controlled for biological activity or “mutagenecity”, were acceptable to consumers and were developed and marketed as part of Health Canada’s “less Hazardous Cigarette” programme. These strains became almost the only tobacco available in Canada for manufacturing light and mild products. The Government of Canada has earned license fees and royalties from the use and consumption of these tobacco strains.

7. Officials at Health Canada requested the development of light and mild products by manufacturers with full knowledge of how that could be accomplished. They set SWAT targets to be met by the manufacturers, they monitored their performance in meeting those targets, they monitored the advertising and promotion practices of the companies, including Imperial, and requested that more resources be devoted to promoting light and mild products and introducing those products to the market.

8. Officials at Health Canada requested or directed ITCAN to develop, market and promote products that furthered the implementation of that part of Health Canada’s smoking and health programme aimed at lowering tar deliveries as measured by standard testing methods. It

> was during this period, before the resort to regulation in the late 1980's, that light and mild products were developed and introduced to the market.
>
> 9. Government officials made misrepresentations or gave negligent advice to Imperial on which it relied in developing light and mild products and in communicating with its consumers. Those misrepresentations involved the accuracy of information provided by standard measuring methods to consumers as a basis for informed purchasing decisions, the deliveries of tar and nicotine to smokers of light and mild products, the relative risks to health of consuming light and mild products and the extent of compensation by smokers of light and mild products.
>
> 10. Negligent advice covered the developing and marketing of light and mild products, the publication of machine tested tar and nicotine yields, the accuracy and utility to consumers of the information so published, the extent of compensation and the risk of disease resulting from the consumption of light and mild products.
>
> 11. These are all matters encompassed by the Statement of Claim and are all matters in respect of which officials at Health Canada and Agriculture Canada had special expertise, in respect of which they made representations and gave advice and on which Imperial and consumers relied to their detriment, if the Plaintiff is successful in its action.

B. CROWN IMMUNITY

[10] Historically, the Crown was immune from civil liability. This immunity was modified, firstly, by section 17 of the ***Interpretation Act***, R.S.C. 1985, c. I-21 which states:

> 17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

and secondly, by sections 3 and 10 of the ***Crown Liability and Proceedings Act***, R.S.C. 1985, c. C-50, which state:

> 3. The Crown is liable for the damages for which, if it were a person, it would be liable
>
> (*b*) … in respect of
>
> (i) a tort committed by a servant of the Crown, or
> (ii) a breach of duty attaching to the ownership, occupation, possession or control of property.
>
> * * *
>
> 10. No proceedings lie against the Crown by virtue of subparagraph 3(*a*)(i) or (*b*)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.

[11] The Supreme Court of Canada has offered the following three point guideline for deciding when a statute has clearly conveyed an intention to bind the Crown:

> It seems to me that the words "mentioned or referred to" in section 16 [currently section 17 of the ***Interpretation Act***] are capable of encompassing: (1) expressly binding words ("Her Majesty is bound"); (2) a clear intention to bind which, in *Bombay* terminology, "is manifest from the very terms of the statute", in other words, an intention revealed when provisions are read in the context of other contextual provisions, as in *Oulette, supra*; and, (3) an intention to bind where the purpose of the statute would be "wholly frustrated" if the [g]overnment were not bound, or in other words, if an absurdity (as opposed to simply an undesirable result) were produced. (***AGT v. CRTC***, [1989] 2 S.C.R. 225 @ p. 281)

[12] In my view, nothing in the ***BPCPA*** expresses or evinces a clear intention to bind the Federal Crown, or suggests a need to infer such intention to make sense of the purpose of the statute.

[13] Imperial submits, relying on the above sections of the ***Crown Liability and Proceedings Act***, that it is not plain and obvious in the circumstances of this case

that Crown officials would not be found liable for tortious conduct under the ***BPCPA***. Counsel for Imperial submits that the ***BPCPA*** incorporates and modifies tort principles such as negligent misstatement and has created a form of "statutory tort".

[14] Some breaches of statutory duty have been regarded by courts as belonging to the field of torts, but it depends on whether the obligation being imposed by the statute is of a tortious nature.

> Some statutes expressly create a detailed scheme of civil liability of a tortious character. The Occupiers' Liability Acts of 1957 and 1984, Pt I of the Consumer Protection Act 1987 and the Animals Act 1971 are examples of this approach. The law so created is generally regarded as falling within the mainstream of tort liability. Indeed, the rules enacted in this way are often modelled closely on or are developments of common law principles. *Statutory Torts*, (London: Street & Maxwell, 2003), p.7.

[15] The ***BPCPA*** imposes an obligation to refrain from any oral, written, visual, or descriptive representations, or to refrain from engaging in any conduct that has the capability, tendency or effect of deceiving or misleading a consumer. This obligation involves elements akin to the common law torts of negligent misstatement, deceit and failure to disclose material facts. However, liability under the ***BPCPA*** may not require proof of reliance, or intention to deceive, or damage. It is therefore quite different from the classic torts of negligence, negligent misstatement and deceit. In my opinion, notwithstanding these differences, liability under the ***BPCPA*** still meets the broadest definition of tort as being "based in a civil wrongdoing, other than breach of contract, which the law will redress by an award

of damages. (Allen M. Linden, *Canadian Tort Law*, 7th ed. (Markham: Butterworths, 2001) at p. 2).

[16] I am aware that the Supreme Court of Canada in ***Saskatchewan Wheat Pool***, [1983] 1 S.C.R. 205 has held that a nominate tort of statutory breach does not exist in Canada. Breach of a statute is simply evidence of conduct which may lead to a finding of negligence or other tortious behaviour, but it does not constitute negligence *per se*. However, the court in that case was deciding whether a statutory breach alone could constitute negligence, not whether a particular statute was of a tortious nature so that its breach by an officer of the Crown would nullify Crown immunity under section 3 of the ***Crown Liability and Proceedings Act***.

[17] On balance, I cannot find it plain and obvious that Canada is immune to liability under the ***BPCPA***.

[18] However, I would still strike those paragraphs in the third Party Notice that deal with breaches of the ***BPCPA*** because I do not see how the ***BPCPA*** can apply to Canada in this case, on the facts as pleaded. Our Court of Appeal described the purpose of sections 171 and 172 of the ***BPCPA*** as

> … affording a consumer a right to damages or restoration of value given for a contravention of the statutory provisions, which right presumably is triggered if a transaction is found to be tainted by a deceptive practice … a key component to be established to afford recovery under the statutes is proof of deceptive conduct by a ***supplier*** … . [emphasis added]

(***Knight v. Imperial Tobacco Canada Ltd***., 2006 BCCA 235 para. 19).

[19] Section 4 of the ***BPCPA*** defines “supplier” as:

> "**supplier**" means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by
>
> (a) supplying goods or services or real property to a consumer, or
>
> (b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",

[20] In my view, just because Canada regulates an industry does not mean it is "supplying, soliciting, offering, advertising or promoting a product in the course of its business".

[21] I find that Canada does not fit within the definition of supplier and therefore, the ***BPCPA*** can have no application to it. The paragraphs in the Third Party Notice seeking contribution and indemnity for alleged breaches by Canada of the ***BPCPA*** should be struck out.

C. DUTY TO THE PLAINTIFF

[22] In paragraphs 124 – 128 of the Amended Third Party Notice, Imperial pleads that officials of Health Canada and Agriculture Canada, two departments of the Federal Crown, breached duties of care to the plaintiffs including such things as:

> a. failing to warn or misinforming them about the properties and health risks of light and mild cigarettes;
>
> b. misrepresenting the purpose of standard testing methods and the use to which the resulting tar and nicotine measurements could be put;

c. negligently promoting light and mild cigarettes as associated with reduced incidence of tobacco related diseases;

d. misrepresenting information of actual delivery of tar and nicotine levels compared to regular cigarettes; and

e. failing to disclose material information that it knew or ought to have known would reasonably affect or influence the choices of consumers in purchasing light and mild cigarettes.

[23] In short, Imperial says if the allegations in the statement of claim were correct, which is denied, then officials of Health Canada and Agriculture Canada were negligent and knew, or ought to have known, that such products would not reduce exposure to smoke constituents, or reduce the risk of contracting smoke related diseases, and that the development of such products would encourage smokers to continue smoking and purchasing light and mild products in preference to regular products.

[24] Thus Imperial alleges that Canada is vicariously liable to the plaintiff for economic loss suffered from negligent misrepresentation and advice, and failure to warn.

[25] The Supreme Court of Canada in ***Cooper*** (*supra*), ***Edwards*** (*supra*) and ***Kamloops (City) v. Nielsen***, [1984] 2 S.C.R. 2 has confirmed that the test to be applied in Canada when determining whether an independent duty of care exists on

the part of statutory regulators in economic loss cases is the test that is found in ***Anns v. Merton London Borough Council***, [1978] A.C. 728 (H.L.).

[26] Stage one of the ***Anns*** test requires firstly, that the harm complained of must be a reasonably foreseeable consequence of the alleged breach, and secondly, that there must be sufficient proximity between the parties that it would be fair and just to impose a duty of care on Imperial. Stage two requires no policy reasons to exist to negative or restrict that duty.

[27] For the purpose of this application to strike the Third Party Notice, the third party does not contest the reasonable foreseeability aspect of stage 1. However reasonable foreseeability alone is not sufficient to establish a duty of care, (***Cooper***, ***Edwards)*** and the third party submits that the requisite proximity and absence of policy reasons do not exist in the case at bar.

1. Proximity

[28] Proximity can be established in two ways. One way is where the relationship between the parties falls within a category of relationship in which it has been found previously that a duty of care exists. The relationship at issue here would be between the plaintiff and Canada, that is, consumers of a regulated product and the Crown regulator. Canada submits that this type of relationship does not fall within any category of proximate relationship heretofore recognized. In fact, such a regulatory relationship was found not to give rise to a duty of care in ***Cooper*** and ***Edwards***. ***Pearson v. Inco Ltd.***, [2001] O.J. No. 4990 at para. 21 (S.C.J.) (QL); ***Morgis v. Thomson Kernaughan & Co.*** (2003), 65 O.R. (3d) 321

(C.A.), leave to appeal to S.C.C. denied, [2003] S.C.C.A. No. 400 (QL); ***Rogers v. Faught*** (2002) 212 D.L.R. (4th) 366 (Ont. C.A.); ***Kimpton v. Canada (Attorney General)*** (2002), 9 B.C.L.R. (4th) 139, 2002 BCSC 1645, aff'd 2004 BCCA 72; ***Hughes v. Sunbeam*** (2002), 61 O.R. (3d) 433 at para. 43 (C.A.).

[29] Imperial argues that these cases should be distinguished because the proximity in the case at bar is not derived from the statutory powers and duties imposed on Health Canada and Agriculture Canada, but from the conduct of government officials in carrying out government policy.

[30] The categories of proximate relationships are not closed and the law of negligence must keep an open mind to new categories. New categories may be appropriate where the expectations, reliance, representations, or other factors create a closeness and direct link between the parties.

[31] In the case at bar, the question is whether the proximity can be found from: (a) the legislation that empowers the officials of Health Canada and Agriculture Canada to regulate the tobacco industry and take steps to promote public health; or (b) the decisions and actions of the officials to promote certain products, provide information and advice about them, and to develop tobacco strains that were incorporated into the impugned product.

a) Legislated Proximity

[32] It seems clear from reading ***Cooper*** and ***Edwards*** that the Supreme Court of Canada has said that the proximity required to establish a duty of care by a

statutory authority to consumers suffering pure economic loss **must** (not may), be found in the legislation which empowers the statutorily appointed official to take the allegedly negligent steps he or she took. Even the cases relied upon by Imperial: ***Williams v. Canada (Attorney General)*** (2005), 76 O.R. (3d) 763 at paras. 68-72 (C.A.) and ***James v. British Columbia*** (2005), 38 B.C.L.R. (4th) 263, 2005 BCCA 136 at para. 40 concede that if the empowering statute does not create a private duty of care to individuals, then the only conduct for which a government official may be held liable is at the operational level where his conduct may be said to fall outside of his statutory powers and within the common law tort of negligence.

[33] The relevant legislation to examine here is the ***Department of Health Act,*** S.C. 1996, c. 8; ***Department of Agriculture and Agri-Food Act***, R.S.C. 1985, c. A-9***, Tobacco Products Control Act***, S.C. 1988, c. 20; or ***Tobacco Act*** S.C. 1997, c. 13.

[34] The ***Department of Health Act*** empowers the Minister and his delegates to deal with all matters over which Parliament has jurisdiction relating to the promotion and preservation of the health of the people of Canada not assigned to any other department or agency.

[35] Similarly, the ***Department of Agriculture and Agri-Food Act*** gives the Minister of Agriculture broad powers, duties and functions with respect to agriculture, agricultural products, and research related to agriculture and products derived from agriculture including the operation of experimental farm stations.

[36] The ***Tobacco Products Control Act*** and its successor, ***The Tobacco Act***, state that their purpose is to provide a legislative response to a "national public health problem" of substantial and pressing concern and, in particular:

> (*a*) to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (*b*) to protect young persons and others from inducements to use tobacco products and the consequent dependence on them;
>
> (*c*) to protect the health of young persons by restricting access to tobacco products; and
>
> (*d*) to enhance public awareness of the health hazards of using tobacco products.

[37] Canada submits that the ***Department of Health Act*** and both ***Tobacco Acts*** are thus directed toward the protection of the health interests of the general public, or broad constituency within the public, such as consumers and young persons.

[38] As I have stated, Imperial does not really disagree with this submission or the conclusion that the enabling statutes disclose public duties only. Imperial argues, however, that there is nothing in the express statutory language or intent of any of these statutes that precludes or is inconsistent with a private law duty of care. Where the action of the officials was taken pursuant to enabling statutes, that conduct is sufficient to create the necessary proximity to establish a private law duty of care.

[39] It is not clear to me on a reading of the authorities that our Court of Appeal in ***James*** has not derogated from the Supreme Court of Canada's pronouncement in

Cooper and ***Edwards***. Fortunately, I do not believe that the outcome of this application turns on answering the question whether in all cases a private law duty must be found within the enabling statute, because in my opinion the actions taken by the government officials in this case were proper policy decisions and thus not justiciable.

b) Policy v. Operational Decision

[40] Imperial relied upon two cases, ***James*** and ***Williams***, to support its proposition that it was up to the Government officials in the case at bar to decide what policy decisions to make, however, once it had made a decision to develop a smoking and health program, the Government had a private law duty to exercise reasonable care in implementing that policy. Imperial argues that the specific communications of Health Canada directed to a specific class of persons within the public (smokers) for the purpose of affecting their conduct, together with the development of light and mild products by Agriculture Canada, constitutes operational or administrative conduct capable of creating a common law duty of care to consumers.

[41] I disagree. In my view, the heart of the plaintiff's allegations is that Canada was negligent in instituting its policy to create and promote a form of light or mild tobacco product that hopefully would deliver less toxic substances to existing smokers, and perhaps wean them off smoking all together. The plaintiffs may be right that it was an ineffectual policy, a "stupid decision" on the part of the Government of the time, nonetheless it was a stupid decision it was entitled to

make. This was put more eloquently by Macaulay J. in ***Kimpton***, *supra*, at paragraph 63:

> The legislative policy decision that led to the enactment of the B.C.P.C. was intended to benefit the public. It was an act of governing. To the extent that the province negligently governs, the voting public may impose a political consequence at an election as stated in *A.O. Farms Inc. v. Canada,* [2000] F.C.J. No. 1771 (T.D.), however, "government when it legislates, even wrongly, incompetently, stupidly or misguidedly is not liable in damages".

[42] This is not a case where the government officials implemented on their own accord certain requirements, or failed to ensure that regulatory requirements were met. In fact, Imperial's complaint is that the officials enforced the requirements that they had been mandated to do under the ***Tobacco Products Control Act***.

[43] Since l988, the regulations passed under the ***Tobacco Products Control Act*** and appearing in expanded form in 2000 as the *Tobacco Products Information Regulations* under the ***Tobacco Act***, required Imperial to display on cigarette packages the emissions of tar, nicotine, carbon monoxide and other smoke constituent yields as measured by specified methods. These regulations also required Imperial to report this information to Canada. The regulations passed in 2000 specified the test methods and packaging display requirements for toxic emissions.

[44] Canada submits, and I agree, that these regulations and the corresponding actions of Government officials reflects the policy of Canada to lower tar and nicotine content in cigarettes and to require tar and nicotine information for itself and for publication. The misrepresentations alleged by Imperial in the Third Party

Notice are in the form of broad public announcements or reports consistent with the policy I have just described of publicizing information with respect to tar and nicotine levels.

[45] Imperial concedes that to the extent Canada acted "by using its law making power", it is immune from tort liability. I have found that the actions of Government officials as pleaded, were in furtherance of Canada's power to make law through regulation and are therefore not actionable in this instance.

[46] Thus it follows that under the ***Anns*** test Imperial has not established the necessary criteria to create a duty of care between Canada and the plaintiff. The Third Party Notice should be struck with respect to these allegations.

D. DUTY TO IMPERIAL

[47] The Third Party Notice alleges that Canada owed a common law duty to Imperial and that Imperial has acted reasonably in reliance on negligent misrepresentations and negligent advice in ways that have exposed it to liability to the plaintiff.

[48] In addition to the reasons set out above that negate a private law duty between Canada and the plaintiff, s. 16 of the ***Tobacco Act*** expressly places the onus on the manufacturer to ensure that it complies with other applicable standards, such as the ***BPCPA***:

> This Part does not affect any obligation of a manufacturer or retailer at law or under an Act of Parliament or of a provincial legislature to warn

> consumers of the health hazards and health effects arising from the use of tobacco products or from their emissions.

[49] It is incongruous in light of the above statutory admonition, for Imperial to plead that it was reasonably foreseeable to Canada that Imperial could come under statutory liability for breaches of the ***BPCPA***. There is no pleading that Canada promoted or marketed cigarettes, or advised Imperial precisely how to do so. Imperial controlled the marketing, packaging and promotion and had the ultimate responsibility for providing adequate warnings to the consumer, regardless of Canada's regulatory standard.

[50] Furthermore, imposing a duty of care on Canada towards tobacco manufacturers would be highly inconsistent with the duty to protect the interests of the public at large. If Canada were to protect the commercial interests of Imperial it would conflict with measures designed to discourage and curtail smoking as deleterious to health.

[51] In ***Granite Power Corp. v. Ontario*** (2004), 72 O.R. (3d) 194 (C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 409 (QL), the Court of Appeal of Ontario considered the duty of a regulator towards the regulated and concluded that the Minister's recommendations were not justiciable having regard to the statutory scheme under which the Minister was operating and the many competing interests he was required to weigh and balance.

[52] It is important to remember in the case at bar that Canada did not create the risk to health, it merely attempted to regulate and reduce it. Once again, if it has

been wrong or careless in how it has gone about it, that is for the political arena to determine. I find that Canada's decision to promulgate standards for information and content of toxic constituents of cigarettes was a policy decision put into effect by regulation and thus removed from tort liability (***Kimpton***, *supra*). Those paragraphs of the Third Party Notice seeking contribution and indemnity for a breach of duty toward Imperial should be struck out.

E. CONTRIBUTORY NEGLIGENCE

[53] Imperial bases its claim for contributory negligence under s. 4 of the ***Negligence Act***, R.S.B.C. 1996, c. 333 and Rule 22 of the *Supreme Court Rules.* However, I have found that Canada cannot be held liable under the ***BPCPA*** because it is not a "supplier" of cigarettes. I have found further that no independent duty of care exists between Canada and the plaintiff. Therefore, there can be no apportionment of "fault" as that term is used under the ***Negligence Act***. The claim for contribution and indemnity under this heading has no foundation and should be struck out.

F. LEGAL AND EQUITABLE INDEMNITY

[54] The principle of legal and equitable indemnity is described by Underhill in *The Law of Torts*, 14th ed., at p. 43:

> If one person does an act at the request of or under directions of another, which is neither manifestly tortious nor tortious to his knowledge, he will be entitled to be indemnified by that other against all liability which may incur by reason of that act proving to be a tort, whether he be a servant or agent of that other or not.

[55] Imperial submits that this principle can be applied to the facts as pleaded in this way:

> (a) Canada made requests and demands, and gave directions to Imperial respecting the development, marketing and promotion of its light and mild products;
>
> (b) To the knowledge of Imperial, the requests, demands and directions were not manifestly tortious or in violation of consumer protection legislation;
>
> (c) If in following the requests, demands and directions of Canada, Imperial comes under liability to the class, Canada is required to indemnify Imperial to the extent of the liability so incurred.

[56] At first glance, the Third Party Notice appears to provide a basis for this type of indemnity claim, but on closer examination it does not.

[57] The starting point for the broad proposition put forward by Imperial is a decision of the Privy Council in ***Secretary of State for India v. Bank of India, Ltd.***, [1938] 2 All E.R. 797 (P.C.). In that case, a broker forged the endorsement of a government promissory note to himself, then endorsed it to the Bank of India. The bank subsequently presented the note for renewal by the government, and received a renewed note. The original holder of the note became aware of the fraud and successfully sued the Secretary of State in conversion. The Secretary of State then sought to recover from the Bank of India on the basis of an implied indemnity because the renewed note had been issued at the request of the bank. The court held that a promise to indemnify on the part of the bank should be implied in the circumstances.

[58] Lord Wright stated at page 802 that the acts of claiming to be entitled to a government promissory note, applying to the prescribed officer, and satisfying him of the justice of the claim, constituted a "request" from which the common law indemnity could properly be implied. In the circumstances of that case, the primary function of the implied indemnity was to shift the risk of fraud from the government to the bank, who carried on its business for profit, and who had presented the forged note to the governments' officer as if it were the rightful owner.

[59] The principle of implied indemnity was first discussed in Canada in ***Parmley v. Parmley***, [1945] S.C.R. 635. That case involved a claim for indemnity by a dentist against a doctor, where the dentist had been sued by a patient for removing several of her teeth while she was anaesthetized for other purposes. The doctor had indicated to the dentist that some of the patient's teeth should be removed; however, the dentist had never met with the patient to discuss the operation or which teeth should be removed. Estey, J. at page 647 relied on the above passage from Underhill and added that:

> The basis for an indemnity based upon a request is set forth as follows:
>
> > The law implies from the request an undertaking on the part of the principal to indemnify the agent if he acts upon the request. It is true that this is not confined only to the case of principal and agent, there are other cases which it is not necessary to examine now. But they all proceed upon the notion of a **request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so.** [emphasis added]

[60] Thus, there must be something in the circumstances of the making of the request such that both parties understand that the party who acts upon the request is to be indemnified. Estey, J. held that neither the type of request, nor the relations that existed between the doctor and dentist, provided a foundation to imply a promise to indemnify.

[61] The third case of importance on this principle is ***Reference re Goods and Services Tax (CAN)***, [1992] 2 S.C.R. 445. In that case the Alberta Court of Appeal concluded that the Federal Government could be liable to indemnify those responsible for collecting GST in certain limited circumstances. However, the Supreme Court of Canada disagreed, holding at paragraph 46 that:

> … a right of indemnification for tortious liability operates in favour of agents who inadvertently cause tortious injury to others in the course of their agency. This right of indemnity does not, contrary to the submission of the Attorney General for Alberta, arise on the facts assumed on this reference. It is difficult to see how a vendor of taxable supplies could cause tortious injuries to third parties by complying with its obligations under the GST Act. Indeed, compliance with a statutorily imposed duty would constitute a defence in the unlikely event that such claims of liability were to arise.

[62] In my view, it cannot be said that the fulfillment of a statutory requirement constitutes a “request” that carries with it an implied promise to indemnify. The allegations of liability against Imperial relate to deceptive acts on the part of Imperial. To the extent that these relate to Imperial’s compliance with regulations providing for the publication of tar and nicotine information, Imperial may be protected from liability by reason of its compliance with the statutory duty to publish such information. To the extent that these allegations relate to the manner in which

the act requested by Canada was done by Imperial, rather than to a direct and probable consequence of the act itself, Imperial cannot recover on the basis of an implied indemnity.

[63] Furthermore, it is important to note that this type of indemnity claim is not the same as between concurrent tortfeasers. The liability arises from the indemnitor making the request to the indemnitee to perform a service which causes injury to a third person. When the alleged indemnitor is the Federal Crown, the issue of Crown immunity arises once again. As stated earlier the Crown is immune to suit unless expressly provided for by statute or by virtue of the ***Crown Proceedings and Liability Act***. The claim by Imperial for legal and equitable indemnity is not legislated, nor does it come within the type of actions described in s. 3 of the ***Crown Proceedings and Liability Act***. The request of the Crown is not claimed to be of a tortious nature, rather that it results in tortious conduct by Imperial. Therefore, in my opinion, it is not caught by s. 3(b)(i) of the ***Crown Proceedings and Liability Act***.

[64] In my opinion, it would be inconsistent to find that Canada bears no duty of care to either the plaintiffs or Imperial for the passing of regulatory controls that Imperial claims caused it harm, and also to find that Canada could be liable to indemnify Imperial for any damages it may suffer. In the result, I think it is plain and obvious that this claim could not succeed either and should be struck.

[65] There is a further claim for indemnity by Imperial for taxes paid to Canada in respect of the sale of cigarettes. It is not clear to which taxes Imperial is referring

and I agree with the submission of Canada that Imperial has not specified any material facts or basis to support a reasonable claim in fact or law under this heading.

G. DECLARATIONS

[66] The Third Party also seeks a series of Declarations to assist in its defense against the claims of the plaintiff class. These include

> declarations that the Federal Government defined and mandated the standards applicable to the publication by ITCAN of tar and nicotine yields, mandated and approved the communications by ITCAN with consumers respecting the use of descriptors such as “Light” and “Mild” to describe brands of its cigarettes, and a declaration that ITCAN complied with those mandated and approved standards.

[67] Canada submits that the declarations should not be made in the absence of possible liability on the part of the Third Party. They can serve no useful purpose here because there is no *lis* between Canada and Imperial. The Declarations repeat the positions taken by Imperial in defense of the claim by the plaintiffs. If Imperial wishes to make arguments respecting causation or other defences based upon Canada’s conduct, it can do so within the context of the main action.

[68] The Third Party relies on ***B.C. Ferry Corporation v. T & N. PLC*** (1995), 16 B.C.L.R. (3d) 115 (C.A.) as support for the proposition that this Court can and should use Third Party proceedings to determine a defendant’s true liability to losses that were caused by it and not some third party. However, the Court of Appeal in ***B.C. Ferry Corporation*** was dealing with the inequity created by the private agreement between the plaintiff and the third party that could have worked

to deprive the defendant of the ability to establish an element of proof essential to a just resolution of the action on which all parties had joined issue.

[69] In the case before me I have found that the Crown is immune from liability to the defendant or plaintiff and therefore should not properly be a party. The defendant has not established that it needs Canada in the litigation for procedural reasons. It can still obtain documents and witness testimony through the *Rules of Court*. It can still advance a full defense that it was merely complying with mandatory regulations and therefore its actions could not be capable of, or have the tendency or effect of deceiving or misleading consumers. There would be no additional purpose served to have the court pronounce hollow declarations against a party which is immune to suit, not by private agreement but by operation of law. The cost to Canada of remaining in the litigation would be great and the benefit to a just and proper outcome would be little. I would exercise my discretion against allowing the Third Party claim for declarations to continue.

[70] In conclusion, I strike the whole of the Third Party Notice for the reasons I have given. Subject to any arrangements between counsel or application of the *Rules of Court*, I grant Canada its costs.

"The Honourable Madam Justice Satanove"