COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Knight v. Imperial Tobacco Canada Limited,*
2009 BCCA 541

Date: 20091208
Docket: CA035214

2009 BCCA 541 (CanLII)

Between:

Kenneth Knight

Respondent
(Plaintiff)

And

Imperial Tobacco Canada Limited

Appellant
(Defendant)

And

Her Majesty the Queen in right of Canada

Respondent
(Third Party)

Before: The Honourable Mr. Justice Hall
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice D. Smith

On appeal from: Supreme Court of British Columbia, July 3, 2007
(*Knight v. Imperial Tobacco Canada Limited*, 2007 BCSC 964, Docket L031300)

Counsel for the Appellant: J.K. McEwan, Q.C., D.A. Glendinning and B.B. Olthuis

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Place and Date of Hearing:	Vancouver, British Columbia June 5 and 8, 2009
Place and Date of Judgment:	Vancouver, British Columbia December 8, 2009

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Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Madam Justice D. Smith

Reasons dissenting in part by:
The Honourable Mr. Justice Hall (Page 36, para. 93)

Concurred in by:
The Honourable Mr. Justice Lowry

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] Imperial Tobacco Canada Limited ("ITCAN") appeals from the order of the Supreme Court of British Columbia dated July 3, 2007, striking out the third party notice issued by ITCAN against Her Majesty the Queen in right of Canada ("Canada"), as amended. The appeal was heard immediately following the hearing of the appeal in *British Columbia v. Imperial Tobacco Canada Limited*, 2009 BCCA 540 (the "Costs Recovery Appeal"), and some of the issues in this appeal are the same as, or similar to, the issues in the Costs Recovery Appeal.

[2] The underlying action is a class proceeding by Mr. Knight and other class members for the refund of monies paid by them for the purchase of cigarettes manufactured by ITCAN and designated as "light", "mild" and other similar terms. They also seek punitive or exemplary damages. At the hearing of the appeal, counsel for Mr. Knight confirmed that the class members are not seeking the return of the portion of the purchase price of the cigarettes paid to Canada as taxes. It is explicitly stated in the statement of claim that damages for personal injuries are not being sought.

[3] The claim is brought pursuant to consumer protection legislation. At the time of the commencement of the action, the legislation was the *Trade Practice Act*, R.S.B.C. 1996, c. 457, which was subsequently replaced by the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (as the pleadings refer to the former statute only, I will refer to them collectively as the "*Trade Practice Act*").

[4] The action was certified as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, by order dated February 8, 2005 (the reasons for judgment are cited as 2005 BCSC 172, 250 D.L.R. (4th) 347). An appeal was taken from that order and, in reasons for judgment dated May 11, 2006 (2006 BCCA 235, 267 D.L.R. (4th) 579), this Court upheld the certification with respect to the majority of common issues certified by the chambers judge, but, in view of the applicable

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limitation period, it restricted class membership to those individuals who purchased the cigarettes in question after May 8, 1997 (rather than July 5, 1974, the date on which the *Trade Practices Act* came into force).

[5] ITCAN issued the third party notice against Canada on April 27, 2004, claiming several declarations and, in the event it is found liable in the action, contribution and indemnity by Canada, and damages against Canada. The application by Canada to strike the third party notice was brought prior to the hearing of the appeal dealing with the certification of the action, and further submissions were made following the determination of that appeal. The chambers judge reserved her decision and issued reasons for judgment on July 3, 2007 (2007 BCSC 964, 76 B.C.L.R. (4th) 100), striking the whole of the third party notice on the basis that it was plain and obvious that the claims against Canada cannot succeed. She also declined to exercise her discretion to allow the claims for declaratory relief to stand as a means of retaining Canada as a party to the action so that ITCAN could avail itself of discovery procedures under the British Columbia *Rules of Court* against Canada in order to assist in the defence of the claims against it by the class members.

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The Pleadings

[6] The application to strike the third party notice was brought under Rule 19(24)(a) of the *Rules of Court*, which authorizes the court to strike a pleading if it discloses no reasonable claim or defence. The jurisprudence under Rule 19(24)(a) is well settled that such an application is to be decided on the basis of the pleadings as they exist or as they may reasonably be amended.

[7] In brief compass, the plaintiff alleges in his statement of claim that the description of the cigarettes at issue as “light” or “mild” and the warnings on the cigarette packages were deceptive or misleading, and seeks a refund of the monies expended to purchase the cigarettes. In its third party notice, ITCAN alleges that Canada developed and promoted the strains of tobacco used in light and mild cigarettes and that Canada dictated the warnings printed on the cigarette packages,

and seeks to recover from Canada monies it may be found liable to pay to the plaintiff (and other class members).

[8] The particulars of the deceptive acts or practices alleged by the plaintiff against ITCAN are set out in para. 11 of the statement of claim. They may be summarized as follows:

(a) the levels of tar and nicotine on the packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions and were misleading in comparison to regular cigarettes;

(b) the descriptors “light” and “mild” conveyed a deceptive or misleading message of health reassurance;

(c) ITCAN failed to disclose numerous material facts in relation to light and mild cigarettes, including the facts that (i) the smoke produced from the cigarettes was not less harmful, (ii) the techniques to reduce tar levels increased biological effects caused by the tar ingested by the consumer; and (iii) the design and content of the cigarettes increased nicotine levels delivered to the consumer under normal smoking conditions.

[9] ITCAN’s amended third party notice is lengthy, with a total of 138 paragraphs. A comprehensive summary of the allegations against Canada prepared by ITCAN was set out in para. 9 of the reasons for judgment of the chambers judge. I have taken the liberty of further summarizing the allegations, as follows:

(a) beginning in the mid-1960s and continuing until approximately the year 2000, officials at Health Canada played a critical role creating and developing a “Less Hazardous Cigarette Programme” intended to encourage the development and promotion of cigarettes that delivered lower tar and nicotine levels as measured by standard testing devices;

(b) officials at Agriculture Canada developed strains of tobacco “peculiarly suitable” for incorporation into these “light and mild” products by altering the ratio of tar to nicotine in the leaf, and licence fees and

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royalties in respect of these strains of tobacco have been paid by ITCAN to Canada;

(c) Health Canada marketed these strains of tobacco as part of its "Less Hazardous Cigarette Programme" and the strains became almost the only tobacco available in Canada for manufacturing light and mild cigarettes;

(d) officials at Health Canada made representations and gave advice to the public and to ITCAN, which they relied on, regarding the relative health risks of consuming light and mild products, including representations about the relative safety of light and mild products, the accuracy of information provided by standard measuring methods, the deliveries of tar and nicotine, and the extent of compensation made by smokers of light and mild products;

(e) by the mid-1970s, officials at Health Canada requested and obtained the agreement of cigarette companies to publish the machine-tested delivery level information on cigarette packages, which remained the situation until 1989 when regulations were enacted mandating disclosure; and

(f) officials at Health Canada failed to disclose information within its knowledge, including the extent smokers compensate for the lower delivery levels, and the facts 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, and that smoke from light and mild products is not less harmful to the smoker.

ITCAN asserts that these allegations give rise to a number of claims against Canada. I will set out the asserted claims when discussing the issues raised on this appeal.

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Legislation

[10] There are two streams of legislation relevant to this matter: the provincial consumer protection legislation and federal legislation regulating the tobacco industry. In addition, the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333, provide the basis for ITCAN's claim against Canada for contribution and indemnity.

[11] The *Trade Practices Act* was enacted in 1974 (S.B.C. 1974, c. 96) (renamed the *Trade Practice Act*, R.S.B.C. 1996, c. 406), seven years after the first consumer protection statute, the *Consumer Protection Act*, S.B.C. 1967, c. 14 (which initially dealt with lending transactions and which was expanded ten years later, in 1977, to deal with such matters as referral selling, contracts for future services, negative option schemes and unconscionable mortgage transactions). The *Trade Practices Act* dealt with deceptive and unconscionable acts and practices, and gave consumers a right of action if they suffered loss or damages in respect of a consumer transaction by reason of such acts and practices.

[12] The *Consumer Protection Act*, the *Trade Practice Act* and three other Acts were repealed at the time of the enactment of the *Business Practices and Consumer Protection Act* in 2004. That Act brought forward, in somewhat modified form, the provisions of the *Trade Practice Act* dealing with deceptive acts and practices.

[13] Other than legislation prohibiting the sale of tobacco products to minors, there was no federal legislation regulating the tobacco industry in Canada until 1988, but Canada says that two things must be borne in mind in respect of the period preceding 1988. First, Canada points to s. 4(1) of the *Department of National Health and Welfare Act*, R.S.C. 1985, c. N-10, and its predecessor sections in effect since at least 1919 (now found in s. 4 of the *Department of Health Act*, S.C. 1996, c. 8), by which the powers, duties and functions of the Minister of Health are expressed to extend to all matters relating to the promotion or preservation of the health of the people of Canada.

[14] Secondly, Canada says that it utilized the persuasive approach to regulation in the tobacco industry prior to 1988 (for a discussion of this approach, see I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992) at 21-27). Bills were introduced in Parliament in 1968, 1969, 1970 and 1972 to establish maximum levels of tar and nicotine in cigarettes sold in Canada, but they were never passed by Parliament. Similarly, in 1971, a bill to establish maximum levels of the contents of cigarette tobacco and to prohibit certain forms of advertising for cigarette products was introduced in Parliament, but never passed. Counsel for Canada says that it was not necessary to enact the legislation because members of the tobacco industry voluntarily complied with the proposed legislation.

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[15] In 1988, Parliament passed the *Tobacco Products Control Act*, S.C. 1988, c. 20. Its stated purpose was “to provide a legislative response to a national public health problem of substantial and pressing concern” (s. 3). The *Act* prohibited advertising of tobacco products and limited the promotional use of tobacco products. It also required packages of tobacco products to contain health warnings and to list the quantities of toxic constituents of the products, as stipulated by regulations. The *Tobacco Products Control Regulations* (S.O.R./89-21) were enacted effective January 1, 1989.

[16] The *Tobacco Products Control Act* was replaced in 1997 by the *Tobacco Act*, S.C. 1997, c. 13. It has the same stated purpose (s. 4) as the *Tobacco Products Control Act*, and deals with the regulation of the manufacture, sale, labelling and promotion of tobacco products in Canada.

[17] The final statute relevant to this appeal is the *Negligence Act*. Sections 1 and 4 of the *Act* read as follows:

> 1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
>
> (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.

(3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

* * *

4 (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.

(2) Except as provided in section 5 if 2 or more persons are found at fault

(a) they are jointly and severally liable to the person suffering the damage or loss, and

(b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

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[18] In its third party notice, ITCAN asserts that Canada owed a duty of care to itself and to consumers who purchased light and mild cigarettes, and that Canada breached the duty of care. ITCAN relies on the provisions of the *Negligence Act* in connection with the duty of care it asserts was owed by Canada to purchasers of light and mild cigarettes. ITCAN says that, if it was at fault for a loss suffered by purchasers of light and mild cigarettes, Canada was also at fault for the loss, and ITCAN is entitled to contribution and indemnity from Canada pursuant to s. 4 of the *Act*. ITCAN similarly relies on the provisions of the *Negligence Act* in connection with its claim in the third party notice that Canada was a supplier within the meaning of the *Trade Practice Act* and was at fault with respect to the deceptive acts or practices alleged by the plaintiff.

[19] As I understand the position of ITCAN, it does not rely on the provisions of the *Negligence Act* in connection with the duty of care it asserts was owed by Canada to it. Rather, it is making a direct claim against Canada for the breach of the asserted duty of care owed to it. The damages claimed in this regard are expressed in the third party notice to be damages "measured by the extent of any liability of ITCAN to the Plaintiff".

Test Under Rule 19(24)(a)

[20] In her reasons for judgment, the chambers judge referred to *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321, the leading authority on the

test to be utilized on an application under Rule 19(24)(a). The test, which is referred to as the "plain and obvious" test, was articulated in *Hunt* at 980:

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[21] At 990-91 of *Hunt*, Madam Justice Wilson commented that a pleading disclosing "an arguable, difficult or important point of law" should not be struck because the common law, particularly the law of torts, should be allowed to continue to evolve to meet the legal challenges arising in our modern industrial society. A recent example of the court declining to strike a statement of claim on the basis that the law in issue may be evolving is *Adbusters Media Foundation v. Canadian Broadcasting Corp.*, 2009 BCCA 148, 92 B.C.L.R. (4th) 9, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 227.

[22] However, the courts will not decline to strike out a pleading simply because the question of law has not been previously decided. For example, the decision in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, which held that the Registrar of Mortgage Brokers did not owe a private law duty of care to investors, was made on the equivalent of a Rule 19(24)(a) application (i.e., an application for certification under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, which, in s. 4(1)(a), requires that the pleadings disclose a cause of action). Similarly, the Ontario equivalent of a motion under Rule 19(24)(a) led to the decision in *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, where it was held that no duty of care was owed by a treatment centre for children to the members of the family of a child in the care of the treatment centre.

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Issues on Appeal

[23] On the basis of the facts alleged in the third party notice, ITCAN makes the following claims with regard to Canada:

(a) Canada was a supplier within the meaning of the *Trade Practice Act* and was at fault with respect to the deceptive acts or practices alleged by the plaintiff, and, as a result, ITCAN is entitled to contribution and indemnity from Canada pursuant to the provisions of the *Negligence Act*;

(b) Canada owed a duty of care to consumers purchasing light and mild cigarettes, and breached the duty of care giving rise to liability in negligent misrepresentation and what ITCAN's counsel referred to as product liability negligence (I will refer to it as design negligence or negligent design), and, as a result, ITCAN is entitled to contribution and indemnity from Canada pursuant to the provisions of the *Negligence Act*;

(c) Canada owed a duty of care to ITCAN and breached the duty of care giving rise to liability in negligent misrepresentation and design negligence and, as a result, ITCAN is entitled to damages against Canada measured by the extent of any liability ITCAN may have to the class members;

(d) Canada is obliged to indemnify ITCAN, pursuant to the doctrine of equitable indemnity, to the extent of any liability ITCAN may have to the class members; and

(e) if Canada is not liable to ITCAN under any of the above claims, ITCAN is nevertheless entitled to pursue declaratory relief against Canada so that it will remain a party to the action and be subject to discovery procedures under the *Rules of Court*.

[24] These claims give rise to the following issues based on the submissions of the parties:

(a) Is it plain and obvious that Canada cannot be liable under the *Trade Practice Act* on the basis that:

(i) the *Trade Practice Act* does not apply to Canada; or

(ii) Canada is immune from liability under the *Trade Practice Act* because the claim is not a tort within the meaning of s. 3 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, and a provincial legislature does not have the capability of enacting legislation that is unilaterally binding on Canada?

(b) Is it plain and obvious that Canada did not owe a duty of care to consumers who purchased light and mild cigarettes that could give rise to causes of action for negligent misrepresentation or negligent design?

(c) Is it plain and obvious that Canada did not owe a duty of care to ITCAN in connection with light and mild cigarettes that could give rise to causes of action for negligent misrepresentation or negligent design?

(d) Is it plain and obvious that ITCAN cannot have a claim against Canada for equitable indemnity?

(e) Is ITCAN entitled to pursue declaratory relief against Canada if it is plain and obvious that ITCAN has no other potentially valid claim against Canada?

Discussion

(a) Liability under the *Trade Practice Act*

[25] There are two aspects to the first sub-issue of whether the *Trade Practice Act* applies to Canada. The first aspect is whether, as a matter of statutory interpretation, the *Trade Practice Act* purports to bind Canada. This aspect is different from the constitutional question forming part of the second sub-issue as to

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whether a provincial legislature has the capability of enacting legislation that is binding on Canada. The second aspect of the first sub-issue is whether Canada falls within the definition of "supplier" in the *Trade Practice Act*.

[26] The chambers judge held that it was not plain and obvious that Canada is immune from liability under the *Trade Practice Act*, but concluded that Canada does not fit within the definition of "supplier" in the *Trade Practice Act* because regulating an industry does not equate to "supplying, soliciting, offering, advertising or promoting a product in the course of its business" (para. 20).

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[27] There are several aspects of Crown immunity at common law. One aspect involves the Crown being immune at common law from the operation of statutes. As explained by Mr. Justice Dickson in *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551, 4 D.L.R. (4th) 193, there were limits on the extent of the immunity, and the doctrine evolved into a presumption that a statute did not bind the Crown unless it was expressly named in the statute or bound by necessary implication. Mr. Justice Dickson also pointed out that the common law doctrine has been codified in s. 16 of the *Interpretation Act*, R.S.C. 1970, c. I-20 (now s. 17 of the *Interpretation Act*, R.S.C. 1985, c. I-21), but without the necessary implication exception, and that the courts must give effect to this statutory provision despite any reservations they may have.

[28] The Legislature of British Columbia took a different course than Parliament. Rather than codifying the common law immunity, in whole or in part, the Legislature enacted s. 14(1) of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which reads as follows:

> (1) Unless it specifically provides otherwise, an enactment is binding on the government.

The term "government" is defined in s. 29 of the provincial Act to mean "Her Majesty in right of British Columbia".

[29] Consequently, Canada continues to enjoy the common law immunity from the operation of statutes enacted by the British Columbia Legislature. As the *Trade*

Practice Act does not expressly name Canada and as Canada is not bound by necessary implication, it is plain and obvious the *Trade Practice Act* does not apply to Canada.

[30] A submission was made by B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited in the Costs Recovery Appeal, and implicitly adopted by ITCAN in this appeal, that effect should not be given to the definition of "government" in the *Interpretation Act* of the 1996 *Revised Statutes of British Columbia*. Reference was made to the *Interpretation Act* as it was most recently enacted as a whole in 1974 (c. 42), where s. 13, the predecessor to s. 14(1), made reference to "Her Majesty" instead of the "government" and where "Her Majesty" was defined to mean "the Sovereign of the United Kingdom, Canada, and Her other realms and territories, and Head of the Commonwealth". It is argued the Chief Legislative Counsel may only make minor amendments and the change in the 1996 *Revised Statutes of British Columbia* on this point was substantive, with the result that the definition of "government" continues to include Canada.

[31] In my opinion, there is no merit to this submission. Section 2 of the *Statute Revision Act*, R.S.B.C. 1996, c. 440, empowers the Chief Legislative Counsel to, among other things, make minor amendments to clarify the intent of the Legislature. Although limited by the use of the word "minor", the amendments effected by revisions may be substantive in nature. This is illustrated by s. 8(3) of the *Act*, which provides that if a revised provision does not have the same effect as a provision replaced by the revision, the replaced provision governs until the time of the revision and the revised provision governs thereafter.

[32] Further, the *Act* provides that a revision must be approved by a select standing committee of the Legislative Assembly (ss. 3 and 4) and that when a revision comes into force, the official copy of it "must be considered to be the original of the statutes of British Columbia replaced by the revision" (s. 5(4)). At a minimum, this provision creates a presumption that a revision approved by the standing

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committee has been validly made by the Chief Legislative Counsel. That presumption has not been rebutted in this case.

[33] In accordance with the decision of this Court on the appeal from the certification order, the class period in this proceeding does not commence until May 8, 1997. The interpretation of the *Trade Practice Act* is therefore governed entirely by the 1996 revision of the *Interpretation Act*, with the result that the common law presumption of immunity applies. The *Trade Practice Act* does not apply to Canada.

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[34] In any event, I agree with the chambers judge that Canada does not fall within the definition of the term "supplier" used in the *Trade Practice Act*. The relevant portion of the definition in s. 1 of the *Trade Practice Act* reads as follows:

> "**supplier**" means a person, other than a consumer, who in the course of the person's business solicits, offers, advertises or promotes the disposition or supply of the subject of a consumer transaction or who engages in, enforces or otherwise participates in a consumer transaction, whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of the supplier.

[35] It is alleged that Canada developed strains of tobacco for incorporation into light and mild cigarettes and promoted the use of the cigarettes. While the alleged activities of Canada could fall within the category of promotion under clause (b) of the definition, the activities were not done in the course of business. The encouragement given to smokers to use light and mild cigarettes was alleged to have been done by Health Canada out of health considerations. It was not alleged to have been done by Canada in the course of a business carried on for the purpose of earning a profit.

[36] As a result, the chambers judge was correct in striking out the paragraphs in the third party notice relating to the claim for contribution and indemnity against Canada on the basis of allegations of breaches by Canada of the *Trade Practice Act*. It is not essential to deal with the second sub-issue containing the constitutional question, and the jurisprudence is clear that courts should not decide constitutional

issues that are not necessary to a resolution of the case or the appeal: see, for example, *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, 124 D.L.R. (4th) 129.

(b) Duty of Care to Consumers

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[37] It is the position of ITCAN that Canada is liable to the class members for negligent misrepresentation and negligent design, and that, if ITCAN is found to be liable to the class members, ITCAN is entitled to contribution and indemnity from Canada under the *Negligence Act* on the basis that the loss of the class members will have been caused by the fault of both Canada and ITCAN. The negligent misrepresentations that ITCAN alleges were made by Canada are similar to the statements the class members claim are the deceptive acts or practices on the part of ITCAN. In contrast to the Costs Recovery Appeal, it is not contended in this appeal that ITCAN is unable to avail itself of the provisions of the *Negligence Act*.

[38] The chambers judge concluded that the actions of officials of Canada are not justiciable because the actions constituted the making of policy decisions, and no duty of care exists when a government body makes policy decisions. She rejected ITCAN's argument that a private law duty of care was owed by Canada to the class members on the basis that the government officials were acting at the operational level of implementing policy. The judge did not deal specifically with the claim of negligent misrepresentation other than commenting that the alleged misrepresentations were in the form of broad public announcements or reports consistent with the governmental policy.

[39] The test to be utilized to determine whether a defendant (or third party) owes a duty of care to a plaintiff was formulated in the British decision *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), which was first followed by the Supreme Court of Canada in *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, 66 B.C.L.R. 273.

[40] The *Anns* test was succinctly stated by Chief Justice McLachlin in the following terms in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129:

> [20] The test for determining whether a person owes a duty of care involves two questions: (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and (2) If so, are there any residual policy considerations which ought to negate or limit that duty of care?

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[41] In discussing the element of foreseeability in *Hill*, McLachlin C.J.C. made reference at para. 22 to the comments of Lord Atkin in the seminal case of *Donoghue v. Stevenson*, [1932] A.C. 562 at 580 (H.L.):

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. . . . Who, then, in law is my neighbour? The answer seems to be – <u>persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question</u>.
>
> [Emphasis of McLachlin C.J.C.]

[42] In *Cooper v. Hobart*, at paras. 31-36, Chief Justice McLachlin and Mr. Justice Major discussed the concept of proximity. Among other things, they said:

> [31] On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.
>
> [32] On the first point, it seems clear that the word "proximity" in connection with negligence has from the outset and throughout its history been used to describe the type of relationship in which a duty of care to guard against foreseeable negligence may be imposed.
>
> * * *
>
> [34] Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether

> it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.
>
> * * *
>
> [36] What then are the categories in which proximity has been recognized? First, of course, is the situation where the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property. … Yet other categories are liability for negligent misstatement: *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.), and misfeasance in public office. A duty to warn of the risk of danger has been recognized: *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189. … governmental authorities who have undertaken a policy of road maintenance have been held to owe a duty of care to execute the maintenance in a non-negligent manner: *Just v. British Columbia*, [1989] 2 S.C.R. 1228, *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445, etc. …

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[43] Chief Justice McLachlin and Mr. Justice Major discussed the second stage of the *Anns* test at paras. 37 to 39 of *Cooper*. The residual policy considerations negating a *prima facie* duty of care involve such things as unlimited liability, liability to an indeterminate class of persons and the existence of another remedy. They commented that this second stage generally arises only in cases where the duty of care asserted does not fall within a recognized category. They also said the following with respect to the distinction between government policy and operational decisions:

> [38] It is at this second stage of the analysis that the distinction between government policy and execution of policy falls to be considered. It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy. In our view, the exclusion of liability for policy decisions is properly regarded as an application of the second stage of the *Anns* test. The exclusion does not relate to the relationship between the parties. Apart from the legal characterization of the government duty as a matter of policy, plaintiffs can and do recover. The exclusion of liability is better viewed as an immunity imposed because of considerations outside the relationship for policy reasons – more precisely, because it is inappropriate for courts to second-guess elected legislators on policy matters. …

It is this consideration upon which the chambers judge in the present case relied in holding that Canada did not owe a duty of care to the class members.

[44] ITCAN says Canada made negligent misrepresentations to the class members and refers to *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110, 99 D.L.R. (4th) 626 as authority for the elements of the cause of action, namely:

(a) there must be a duty of care based on a "special relationship" between the representor and the representee;

(b) the representation in question must be untrue, inaccurate or misleading;

(c) the representor must have acted negligently in making the misrepresentation;

(d) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and

(e) the reliance must have been detrimental to the representee in the sense that damages resulted.

[45] Although the cause of action of negligent misrepresentation is often considered separately from general negligence, the *Anns* approach must still be utilized in determining whether a duty of care exists: see *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, 146 D.L.R. (4th) 577 at para. 21. A *prima facie* duty of care will exist if the above five elements are present and the damages suffered by the representee were reasonably foreseeable to the representor. In that regard, the requirement for a "special relationship" will be satisfied if (a) the representor ought reasonably to foresee that the representee will rely on his or her representation, and (b) reliance by the representee would be reasonable: see *Hercules* at para. 24. As noted by McLachlin C.J.C. and Major J. at para. 36 of *Cooper*, negligent misstatement is one of the recognized categories of proximity. In the present case, it is not plain and obvious that the allegations made by ITCAN fail to establish the existence of a *prima facie* duty of care owed by Canada to the class members because it is not plain and obvious that ITCAN will be unable to prove that the five elements set out in *Cognos* with respect to

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representations made by Canada to consumers are satisfied and that the harm suffered by the consumers was reasonably foreseeable by Canada.

[46] The policy considerations to be taken into account at the second stage of the *Anns* test for considering whether a *prima facie* duty of care should be negated are the same for claims of negligent misrepresentation and claims of negligence generally. As a result, before dealing with those policy considerations in connection to the claim of negligent misrepresentation, I will address the issue of whether Canada owed a *prima facie* duty of care to the class members in connection with the development of the strains of tobacco used in light and mild cigarettes.

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[47] It is trite that a manufacturer of a product owes a duty to purchasers of the product to take reasonable care in the manufacture of the product. As Madam Justice Saunders stated in *D.H. v. British Columbia*, 2008 BCCA 222, 81 B.C.L.R. (4th) 288 at para. 31:

> In most private disputes the threshold question [of whether a duty of care is owed] is not troublesome – a driver owes a duty of care to others on roadways, a doctor owes a duty of care to his or her patient, a manufacturer owes a duty of care to those who may buy the product.

[48] Similarly, a person who designs a product intended for sale to the public owes a *prima facie* duty of care to the purchasers of the product: see, for example, *Gallant v. Beitz* (1983), 148 D.L.R. (3d) 522, 42 O.R. (2d) 86 (H.C.J.), and *Baker v. Suzuki Motor Co.*, [1993] 8 W.W.R. 1, 12 Alta. L.R. (3d) 193 (Q.B.). On the issue of foreseeability, a designer of a product ought reasonably to have purchasers of the product in contemplation as persons who will be affected by its design. On the issue of proximity, the relationship between a designer of a product and a purchaser of the product has been identified as a recognized category of sufficient proximity giving rise to a duty of care.

[49] Hence, it is not plain and obvious that Canada did not owe a *prima facie* duty of care to the class members in connection with the development of the strains of tobacco used in light and mild cigarettes. I turn now to the second stage of the *Anns*

test dealing with the policy considerations that may negate a *prima facie* duty of care.

[50] As mentioned above, one of the considerations at the second stage of the *Anns* test is whether the act in question constituted the making of government policy or an operational activity. The chambers judge held that the development of the strains of tobacco used in light and mild cigarettes was not operational conduct capable of creating a duty of care to consumers and that the actions of the governmental officials reflected the policy of Canada to lower tar and nicotine content in cigarettes and to require publication of tar and nicotine information. She also held that the alleged misrepresentations were in the form of broad public announcements or reports consistent with that policy. With respect, it is my view that it is not plain and obvious that the alleged actions of, and misrepresentations made by, Canada represented the making of governmental policy.

[51] Distinguishing between governmental policy and operational decisions can be a difficult task. In *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 at 441, 112 D.L.R. (4th) 1, Mr. Justice Cory summarized the factors to be considered in distinguishing between policy decisions and operational decisions:

> True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.
>
> The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

[52] In the present case, the policy of Canada was not set forth in a statute or a regulation. In my opinion, evidence is required to determine which of the actions and statements of Canada in this case were policy decisions and which were operational decisions. This was the approach endorsed by the Ontario Court of

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Appeal in *Sauer v. Canada (Attorney General)*, 2007 ONCA 454, 31 B.L.R. (4th) 20, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 454, in a claim against Canada with respect to its regulation of the cattle industry. Indeed, the court went further in *Sauer* and stated at para. 45 that, as the onus is on the government to demonstrate countervailing policy to negate a *prima facie* duty of care, the court should be circumspect in determining the issue on an application such as the one in the present case, where the claim can be dismissed without the benefit of a full evidentiary foundation.

[53] On this appeal, Canada also argues that there are other policy considerations to negate the *prima facie* duty of care. It raises the topics of indeterminate liability, conflicting duties, other remedies and the government becoming an insurer. It says these policy reasons bear on the central point that Canada does not manufacture or market cigarettes and did not create the public health risks posed by the product. It also says no duty of care is appropriate given its regulatory role and duties to the general public.

[54] However, on my reading of the facts alleged in ITCAN's third party notice, which must be assumed to be true for the purposes of a Rule 19(24) application, the allegations against Canada go beyond its role as a regulator. It is alleged that Canada made the decision to develop strains of tobacco that were less harmful to smokers than the strains of tobacco then being utilized (which could fairly be categorized as a policy decision) but it developed strains of tobacco that were actually more hazardous to the health of smokers, and it made misrepresentations to smokers about the relative safety of cigarettes containing the strains of tobacco. It is also alleged that Canada was paid licensing fees and royalties in respect of the tobacco strains it developed.

[55] The potential liability of Canada flowing from breaches of the duty of care would not appear to be indeterminate because the affected persons are identified as those who purchased the light and mild cigarettes (i.e., the class members). The concerns about conflicting duties and the government becoming an insurer of

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another's product would not appear to apply. If the alleged actions had been taken by a private body rather than Canada, it seems to me that no one would seriously argue that the *prima facie* duty of care should be negated by policy considerations. In my opinion, without the benefit of evidence at trial to assist in the examination of the considerations, none of the policy considerations are determinative to negate the *prima facie* duty of care. On the basis of the pleadings alone, it is not plain and obvious that the *prima facie* duty of care owed by Canada to the class members should be negated.

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[56] In contending that the chambers judge was correct in finding that it did not owe a duty of care, Canada points to the statement at para. 43 of *Cooper* that one must examine the statutory scheme to determine if a private law duty of care is owed by a government official. It also cites the decisions in *Eliopoulos v. Ontario (Minister of Health and Long-Term Care)* (2006), 276 D.L.R. (4th) 411, 82 O.R. (3d) 321 (C.A.); *Klein v. American Medical Systems, Inc.* (2006), 278 D.L.R. (4th) 722, 84 O.R. (3d) 217 (S.C.J. Div. Ct.); and *Attis v. Canada (Minister of Health)*, 2008 ONCA 660, 300 D.L.R. (4th) 415, as examples of claims against government that have been struck out.

[57] As Mr. Justice Esson pointed out in *James v. British Columbia*, 2005 BCCA 136, 38 B.C.L.R. (4th) 263 at para. 33, the statement in *Cooper* was made in the context of a claim that a registrar of mortgage brokers failed to exercise his powers in a timely fashion for the benefit of investors who lent monies through a mortgage broker. In the present case, the complaint is that after making a policy decision to develop strains of tobacco that were less hazardous to the health of smokers, Canada was negligent in carrying out that policy and made negligent misrepresentations to smokers with respect to light and mild cigarettes.

[58] On this point, I respectfully agree with the comments of Mr. Justice Cullity in *Taylor v. Canada (Minister of Health)* (2007), 285 D.L.R. (4th) 296 (Ont. S.C.J.), leave to appeal denied (2007), 289 D.L.R. (4th) 567, 233 O.A.C. 111:

> [44] Inaction by governmental bodies with statutory powers conferred for the protection of the public will not ordinarily engage a duty of care even though

> harm to individuals is reasonably foreseeable. Absent a statutory provision, or implication, to the contrary, any duty to exercise the powers will be owed to the public and not to private individuals. The missing element – proximity – may, however, be supplied if, by a course of conduct in a purported exercise of the powers, the agency creates, or contributes to, a foreseeable risk of harm to a discrete group.

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In that case, Cullity J. certified a class proceeding against Canada in respect of a claim that the conduct of Health Canada in connection with implants intended for insertion in temporomandibular joints increased the risk to the health of the consumers of the implants. Here, it is similarly alleged that the conduct of Canada increased the risk of health to cigarette smokers who purchased light and mild cigarettes.

[59] In my opinion, the present case is distinguishable from *Eliopoulos*, *Klein* and *Attis*. In *Eliopoulos*, the claim was similar to the one made in *Cooper* in the sense that it was alleged that the governmental body (the Ministry of Health and Long-Term Care) failed to take action in a timely fashion to prevent something from occurring (the outbreak of the West Nile Virus). In both *Klein* and *Attis*, the governmental body was acting solely in its capacity as regulator, unlike the present case where Canada is alleged to have become a participant in the tobacco industry.

[60] As it is not plain and obvious that ITCAN's claims that Canada is liable to the class members for negligent misrepresentations and the negligent development of the tobacco strains will fail, the chambers judge ought not to have struck out the portions of the third party notice pertaining to those claims.

(c) <u>Duty of Care to ITCAN</u>

[61] In asserting that Canada owed a duty of care to consumers of cigarettes, ITCAN is seeking contribution and indemnity from it pursuant to the *Negligence Act*. In claiming the existence of a duty of care owed to it by Canada, ITCAN is not relying on the *Negligence Act*, as I understand its position, but is seeking damages from Canada "measured by the extent of any liability" of ITCAN to the class

members. ITCAN asserts the existence of a duty of care in connection with both negligent misrepresentations allegedly made by Canada and design negligence.

[62] In dealing with ITCAN's assertion that a duty of care was owed to it by Canada, the chambers judge dealt expressly with the claim of negligent misrepresentations, but she did not address the claim of negligent design. The judge stated that in light of s. 16 of the *Tobacco Act* it was incongruous for ITCAN to plead that it was reasonably foreseeable to Canada that ITCAN could come under statutory liability for breaches of the *Trade Practice Act*. She also commented that imposing a duty of care on Canada towards tobacco manufacturers would be highly inconsistent with the duty of Canada to protect the interests of the public at large. She concluded that Canada's decision to promulgate standards for information and content of toxic constituents of cigarettes was a policy decision for which Canada could not be liable.

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[63] Section 16 of the *Tobacco Act* reads as follows:

> This Part does not affect any obligation of a manufacturer or retailer at law or under 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.

With respect, I fail to see how s. 16 is relevant to the issue of foreseeability on the part of Canada. All that section provides is that other obligations of a manufacturer are not affected by the requirements of Part III of the *Tobacco Act* with respect to the display of prescribed information on packages of tobacco products. Section 16 has no impact on the issue of whether Canada ought reasonably to have foreseen that ITCAN would be in contravention of the *Trade Practice Act* if it repeated to consumers incorrect information provided to it by Canada. In my opinion, it is not plain and obvious that Canada ought not to have reasonably foreseen this consequence.

[64] The reasoning of the chambers judge in this regard appears to be based on a perception that ITCAN is taking the position that compliance with Part III of the *Tobacco Act* placed it in breach of the provisions of the *Trade Practice Act*. That is

not the position of ITCAN as I understand it. Rather, ITCAN asserts that Canada represented to it that the tobacco strains developed and licensed by Canada for use in light and mild cigarettes were less hazardous to the health of smokers than regular cigarettes. The class members are alleging that the same representation made to them by ITCAN was deceptive and misleading, thereby contravening the *Trade Practice Act*. ITCAN's position is that if the class members are correct, Canada should be liable to ITCAN because ITCAN's contravention of the *Trade Practice Act* was a consequence of its reasonable reliance on the representation made by Canada. While the labelling on the cigarette packages is one of the complaints of the class members, it is not an isolated complaint but is part of the overall complaint that light and mild cigarettes were promoted to be less harmful than regular cigarettes.

[65] Similarly, ITCAN is not basing its claim against Canada solely on the promulgation of regulations prescribing the information required to be displayed on packages of tobacco products, which the chambers judge correctly characterized as a policy decision. As I understand it, ITCAN does not complain that it was required to display the prescribed information on the packages. Its complaint is that Canada made misrepresentations to it about the tobacco strains developed and licensed by Canada for use in light and mild cigarettes, including the accuracy of information provided by standard measuring methods, the deliveries of tar and nicotine, and the extent of compensation made by smokers of light and mild cigarettes.

[66] In my opinion, it is not plain and obvious that Canada did not owe a *prima facie* duty of care to ITCAN with respect to representations made by it to ITCAN in connection with the tobacco strains developed for use in light and mild cigarettes. As with the *prima facie* duty of care potentially owed to consumers, it is not plain and obvious that ITCAN will be unable to prove that the five elements set out in *Cognos* with respect to representations made by Canada to it are satisfied and that Canada ought reasonably to have foreseen that ITCAN could be required to refund the purchase price of cigarettes to consumers if it passed on to consumers incorrect information about light and mild cigarettes provided to it by Canada.

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[67] In my view, it is also not plain and obvious that Canada did not owe a *prima facie* duty of care to ITCAN with respect to the design of the tobacco strains developed for use in light and mild cigarettes. If sufficient proximity exists in the relationship between a designer of a product and a purchaser of the product, it would seem to me to follow that there is sufficient proximity in the relationship between the designer of a product and a manufacturer who uses the product in goods sold to the public. Also, the designer of the product ought reasonably to have the manufacturer in contemplation as a person who would be affected by its design in the context of the present case. It would have been reasonably foreseeable to the designer of the product that a manufacturer of goods incorporating the product could be required to refund the purchase price paid by consumers if the design of the product did not accomplish that which it was intended to accomplish.

[68] Turning to the second stage of the *Anns* test, there is a factor applicable to the duty of care alleged to be owed to ITCAN that was not present in the consideration of the duty of care alleged to be owed to the consumer: the loss claimed by ITCAN is a pure economic loss, which is a claim not accompanied by physical damage to the claimant or loss of or damage to property owned by the claimant (see *D'Amato v. Badger*, [1996] 2 S.C.R. 1071, 137 D.L.R. (4th) 129 at para. 13, and *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860 at para. 34). ITCAN is not alleging that Canada caused loss or damage in relation to any of its property and, as ITCAN is a corporation, it cannot sustain physical damage. The loss claimed by ITCAN is its potential financial liability to the class members (which ITCAN denies).

[69] Historically, the common law did not permit the recovery of economic loss if the plaintiff did not also suffer physical harm or property loss or damage. The reasons for this approach were summarized in *Martel* at para. 37:

> First, economic interests are viewed as less compelling of protection than bodily security or proprietary interests. Second, an unbridled recognition of economic loss raises the spectre of indeterminate liability. Third, economic losses often arise in a commercial context, where they are often an inherent business risk best guarded against by the party on whom they fall through such means as insurance. Finally, allowing the recovery of economic loss

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> through tort has been seen to encourage a multiplicity of inappropriate lawsuits.

[70] In *Martel* at para. 38, and in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 at 1049, 91 D.L.R. (4th) 289, there was acceptance of the categorization by Professor Feldthusen in his article "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1990-91), 17 Can. Bus. L.J. 356, of claims that potentially give rise to recoverable economic loss (he uses the same basic categories in his book, *Economic Negligence: The Recovery of Pure Economic Loss*, 5th ed. (Scarborough: Thomson Carswell, 2008)). Those categories, as set out at p. 2 of the most recent edition of Professor Feldthusen's text, are as follows:

(a) negligent misrepresentation;
(b) negligent performance of a service;
(c) defective products or building structures;
(d) relational economic loss; and
(e) failure by statutory public authorities.

[71] The categories of interest in this appeal are those relating to negligent misrepresentation and relational economic loss. Generally speaking, the cause of action for negligent misrepresentation represents a significant exception to the exclusionary rule against recovery of economic loss. Pure economic loss is generally recoverable by a plaintiff who proves that the defendant made a negligent misrepresentation. The cause of action for negligent misrepresentation, and the ability to recover resulting economic loss without physical harm or property damage or loss, was first recognized in the well-known decision of *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575, [1964] A.C. 465 (H.L.). However, the exception is not unqualified, and I will return to this topic after discussing relational economic loss.

[72] Relational economic loss is described by Professor Feldthusen in the following manner at 207-208:

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> There are two important points to note about this exclusionary rule. First, it applies only to relational loss; that is, when the loss claimed is consequent upon an injury to a third party ... Second, it applies only to pure economic loss, and will not preclude the plaintiff from recovering for physical damage consequent upon an injury to a third party.

In *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737 at para. 33, the Supreme Court of Canada accepted the following situational definition of relational economic loss:

> ... the defendant negligently causes personal injury or property damage to a third party. The plaintiff suffers pure economic loss by virtue of some relationship, usually contractual, it enjoys with the injured third party or the damaged property.

See A.M. Linden and B. Feldthusen, *Canadian Tort Law*, 8th ed. (Markham, Ont.: LexisNexis Butterworths, 2006) at 477.

[73] In the present case, the claim of ITCAN against Canada represents a claim for relational economic loss because the loss claimed is consequent upon injury to the class members. It is seeking damages from Canada "measured by the extent of any liability" of ITCAN to the class members.

[74] In *Norsk*, the judges of the Supreme Court of Canada differed on the issue of relational economic loss. In that case, the plaintiff had a contractual right to use a rail bridge and suffered economic loss when the bridge was damaged by the defendant. Three of the judges wrote reasons for judgment: Madam Justice McLachlin (as she then was), on behalf of herself and two others; Mr. Justice La Forest, on behalf of himself and two others; and Mr. Justice Stevenson.

[75] Madam Justice McLachlin analyzed the issue by relying on the requirement for proximity as part of the first stage of the *Anns* test. She felt that proximity could be considered on a case-by-case basis, and would have the effect of excluding recovery for economic loss in situations of indeterminate liability. She held that the necessary proximity had been established in that case and ruled in favour of the recovery of the economic loss. Mr. Justice La Forest favoured a limited exclusionary rule against the recovery of contractual economic loss. He proposed that recovery

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of relational economic loss be restricted to situations where the plaintiff could address the problem of indeterminate liability and show that no other means of protection was available in the circumstances. He would not have allowed the recovery of the economic loss in that case. Mr. Justice Stevenson broke the tie in favour of allowing the plaintiff to recover the economic loss, but the approach he advocated was not accepted by any of the other six judges.

[76] The Supreme Court of Canada next confronted the issue of relational economic loss in *D'Amato*. The Court did not resolve the conflict between the two main competing theories in *Norsk* because the economic loss in that case was not recoverable under either theory.

[77] The conflict was resolved a year later in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, 153 D.L.R. (4th) 385. In that case, a fire occurred on an oil drilling rig that put the rig out of commission while it was being repaired. Two companies which had hired the rig from its owner sued the manufacturer of the rig for the economic loss they suffered while it was being repaired.

[78] Madam Justice McLachlin wrote the Court's judgment on the issue of economic loss. She adopted the approach of La Forest J. in *Norsk*. As the claim did not fall within any of the recognized categories of recoverable economic loss (namely, where the plaintiff had a possessory or proprietary interest in damaged property, general average cases and joint venture cases), McLachlin J. proceeded to consider whether it fell within a new category that should be recognized. She reviewed the reasons of La Forest J. in *Hercules Managements*, where the *Anns* two-stage test had been utilized to conclude that the policy concerns surrounding indeterminate liability negated the *prima facie* duty of care found to exist at the first stage of the test. Madam Justice McLachlin concluded that the same approach should be applied to the economic loss claim before the Court in *Bow Valley*.

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[79] Madam Justice McLachlin found that a *prima facie* duty of care was established, but held, for the following reasons, that it was negated by policy considerations:

> [62] The next question is whether this *prima facie* duty of care is negatived by policy considerations. In my view, it is. The most serious problem is that seized on by the Court of Appeal – the problem of indeterminate liability. If the defendants owed a duty to warn the plaintiffs, it is difficult to see why they would not owe a similar duty to a host of other persons who would foreseeably lose money if the rig was shut down as a result of being damaged. Other investors in the project are the most obvious persons who would also be owed a duty, although the list could arguably be extended to additional classes of persons. What has been referred to as the ripple effect is present in this case. A number of investment companies which contracted with HOOL are making claims against it, as has BVI.
>
> [63] No sound reason to permit the plaintiffs to recover while denying recovery to these other persons emerges. To hold otherwise would pose problems for defendants, who would face liability in an indeterminate amount for an indeterminate time to an indeterminate class.

[80] *Martel* and *Design Services* are two subsequent decisions of the Supreme Court of Canada that have considered the topic of relational economic loss, but neither involved contractual economic loss. In *Martel*, the issue was whether there was a duty of care in the context of negotiations in respect of a renewal of a commercial lease. The Court utilized the two-stage *Anns* test and concluded that, while there was not a serious concern regarding indeterminate liability on the facts of that case, other policy considerations negated the *prima facie* duty of care.

[81] In *Design Services*, the issue was whether an owner of land, who tendered the construction of a building on the land, owed a duty of care to subcontractors associated with the contractor which failed to win the bid, because the contract was awarded to a non-compliant bidder. In concluding that even if a *prima facie* duty of care had been found at the first stage of the *Anns* test, it would be negated at the second stage because of indeterminate liability concerns, Mr. Justice Rothstein made the following observations:

> [65] That the facts here suggest indeterminacy is, I think, symptomatic of a more general concern in the construction contract field. Even where subcontractors are named and known by an owner, those subcontractors will have employees and suppliers and perhaps their own subcontractors who

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> also could suffer economic loss. And these suppliers and subcontractors will have their own employees and suppliers who might claim for economic loss due to the wrongful failure of the owner to award the contract to the general contractor upon which they were all dependant. The construction contract context is one in which the indeterminacy of the class of plaintiffs can readily be seen.

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[82] As illustrated by the above passage, the concern regarding indeterminate liability is not limited to those persons in the same position as the claimant who may also put forward a claim for economic loss. The concern is that there may be innumerable other persons who suffer economic loss as a result of the injury to the third party in question (here, the class members) or damage to or loss of property of the third party. For example, employers of key employees who became incapacitated as a result of smoking light and mild cigarettes could claim for lost profits. Suppliers of the employer may suffer a financial loss. Persons having contracts with smokers of light and mild cigarettes could claim for economic loss occasioned by the incapacity of the smokers. Family members of a smoker of light and mild cigarettes could suffer financial loss.

[83] In my view, therefore, the claim of ITCAN for recovery of pure economic loss from Canada gives rise to indeterminate liability, and this consideration is sufficient to negate the *prima facie* duty of care found to be owed by Canada at the first stage of the *Anns* test. Evidence at trial would not affect this conclusion, and a decision can be made on the claim at this stage of the proceedings.

[84] I am not aware of any cases where, as here, the relational economic loss sought to be recovered by the claimant was its financial liability to the third party who suffered the injury. The reason for this may be the existence of legislation like the *Negligence Act,* which allows a party in the position of ITCAN to claim contribution and indemnity from another party who contributed to the damage or loss. With the assistance of such legislation, the party in the position of ITCAN may effectively recover economic loss from the other party by having the court apportion liability between the parties. Hence, there is usually no need for the party in the position of

ITCAN to endeavour to recover its economic loss by claiming that the other party breached a duty of care owed to it.

[85] Accordingly, it is plain and obvious that the *prima facie* duty of care owed by Canada to ITCAN with respect to the design of the tobacco strains developed for use in light and mild cigarettes is negated by the policy consideration of indeterminate liability. I turn now to the claim of negligent misrepresentation.

[86] As I mentioned above, the cause of action for negligent misrepresentation is an exception to the limited exclusionary rule against recovery of economic loss. However, it is still necessary to utilize the *Anns* test to determine if a duty of care in the particular circumstances of the case should be recognized: see *Hercules Managements* at para. 24. In *Hercules Managements*, the Supreme Court of Canada utilized the concern regarding indeterminate liability to circumscribe the ambit of the duty of care. It held that the purpose of preparing an auditors' report in respect of a company was to assist its shareholders in their task of overseeing the management of the company, and that a duty of care existed in that regard. However, as the report was not prepared to assist the shareholders in making personal investment decisions, it was held that no duty of care was owed by the auditors to the shareholders in that regard.

[87] Thus, there is a tool in claims of negligent misrepresentation to address, in whole or in part, the concerns of indeterminate liability. In this case, however, the claim of ITCAN against Canada is for relational economic loss, in respect of which there exists the limited exclusionary rule. The fact that the *Negligence Act* allows a party in the position of ITCAN to generally be entitled to contribution and indemnity from another party who contributed to the damage or loss is arguably a policy consideration militating against the expansion of the exclusionary rule because there is another avenue of recovery. In my view, the assessment of policy considerations relevant to the issue of whether the *prima facie* duty of care should be negated in these circumstances ought not be concluded at this early stage without the benefit of evidence exploring Canada's actions in developing the tobacco strains for which it

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has received licence fees and royalties. In the result, I am not persuaded that it is plain and obvious that the *prima facie* duty of care for negligent misrepresentation should be negated at this stage of the proceeding.

[88] The chambers judge believed that imposing a duty of care on Canada in favour of ITCAN would be highly inconsistent with its duty to protect the interests of the public. I do not disagree with her view as it relates to the regulation of the tobacco industry by Canada but, as I expressed above, the allegations against Canada appear to go beyond its role as a regulator. It does not necessarily seem inconsistent to its duty to protect the interests of the public to require Canada to take reasonable care in providing accurate information about the strains of tobacco developed by it.

[89] Consequently, while Canada did not owe a duty of care to ITCAN with respect to the design of the tobacco strains developed for use in light and mild cigarettes, the chambers judge ought not to have struck the portions of the third party notice relating to ITCAN's claim against Canada for negligent misrepresentation.

(d) Equitable Indemnity

[90] The issue with respect to the doctrine of equitable indemnity is identical to the corresponding issue in the Costs Recovery Appeal. For the reasons given in the Costs Recovery Appeal, the chambers judge was correct in striking this claim.

(e) Declaratory Relief

[91] As I would not strike out the entirety of the claims against Canada alleged in the third party notice, it is not necessary to consider whether the third party notice should be allowed to remain in place solely for the purpose of enabling ITCAN to seek declaratory relief against Canada.

Conclusion

[92] I would allow the appeal by setting aside the order of July 3, 2007, striking the amended third party notice in its entirety, and by substituting in its place an order

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striking only the portions of the amended third party notice relating to the claims of ITCAN that (i) it is entitled to contribution and indemnity from Canada on the basis that the *Trade Practice Act* and *Business Practices and Consumer Protection Act* apply to Canada, (ii) Canada owed it a duty of care with respect to the design of the tobacco strains used in light and mild cigarettes, and (iii) it is entitled to be indemnified by Canada on the basis of the doctrine of equitable indemnity.

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"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Madam Justice D. Smith"

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Reasons for Judgment of the Honourable Mr. Justice Hall:

[93] The background circumstances of this case are helpfully set out in the reasons of Tysoe J.A., which I have read in draft. I adopt his narrative of the litigation.

[94] By a Third Party Notice, the appellant Imperial Tobacco Canada Limited ("ITCAN") seeks contribution and indemnity from Canada for any liability that may be found against it in favour of the plaintiff class. As particularized in the Third Party Notice, it was appreciated by the 1960s that there could be a linkage between smoking and cancer, particularly lung cancer. Officials at Health Canada and Agriculture Canada directed initiatives to endeavour to reduce both the incidence of smoking and the toxicity of tobacco products consumed by individuals who continued to smoke. Together with industry, Canada was seeking ways to alleviate such health risks, and the Federal government set up an interdepartmental committee charged with the task of diminishing the health dangers to the public associated with smoking. Out of these initiatives came tobacco strains used in light and mild cigarettes as well as the publication, to smokers in particular and the public generally, of information concerning the tar and nicotine contents of cigarettes. Although it was appreciated that smokers might try to employ compensatory techniques to ingest more nicotine or tar when smoking new cigarette varieties, it was the general view of Canada that potential health problems of smokers could be diminished by the use of cigarettes lower in toxic substances such as tar. Canada for a time published its own tables of tar and nicotine yields of different cigarette brands but eventually required that members of the industry such as ITCAN take up this responsibility. In the early 1970s Federal ministers advised the public that Canada was engaged in research to develop "a less hazardous cigarette".

[95] The plaintiff class alleges that light and mild cigarettes were if anything more toxic than ordinary cigarettes and that the claims made by suppliers such as ITCAN for the superiority of such products from a health point of view were misleading and

deceptive. The class seeks compensation from ITCAN under the terms of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2. The defendant ITCAN pleads in its Third Party Notice that because Canada was involved as alleged with the efforts to create lighter tobacco strains used in light and mild cigarettes, advised ITCAN about the qualities of tobacco and cigarettes and required certain information to be provided to consumers about the contents of the cigarettes, it ought to be entitled to seek indemnity from Canada for any liability found against it to the plaintiff class. It alleges that it relied upon representations of officials of Canada as to the quality of tobacco and the alleged less toxic nature of lighter cigarettes in marketing such products to the public.

[96] I am in agreement with my colleague Tysoe J.A. that Madam Justice Satanove did not err in striking out those portions of the Third Party Notice of the appellant claiming relief on the basis of allegations of breaches by Canada of provisions of the consumer protection legislation. I am also in agreement with the decision of Satanove J. that Canada should be held not to be a “supplier” under the terms of the legislation and thus immune from liability to consumers under the statutory provisions.

[97] The claims of the plaintiff class advanced in the Statement of Claim seek relief solely under the provisions of the legislation. Since Canada cannot be liable to the plaintiff class under these provisions, based on the same reasoning as set forth in the reasons in the companion costs recovery action, I consider it is doubtful that the defendant ITCAN could successfully advance a third party claim for contribution and indemnity against Canada under the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333. That is so because Canada could not be found liable to the plaintiff class in the present class action. See *Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346, 84 D.L.R. (3d) 344. However, I do not consider it is open to us to dispose of the matter in this fashion because the third party, Canada, did not argue for such a result.

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[98] It also seems anomalous to me that ITCAN can seek to found a claim for third party relief on an alleged duty to consumers when no consumer is seeking relief in this action against Canada. In the present action, unlike the situation in cases such as *Sauer v. Canada (Attorney General)*, 2007 ONCA 454, 49 C.C.L.T. (3d) 161, leave to appeal to S.C.C. dismissed, [2007] S.C.C.A. No. 454, and *James v. B.C.*, 2005 BCCA 136, 38 B.C.L.R. (4th) 263, no claim is advanced by a plaintiff against Canada. Rather, ITCAN seeks via a third party claim to have Canada held liable in whole or in part for any liability that may be found against it in this action. As no relief is sought against Canada for a tort on the pleadings of the plaintiff, I do not consider that it should be open to the defendant ITCAN to seek contribution and indemnity from Canada for breach of a tort duty to the plaintiff class. This case is quite a different situation factually from cases such as *Sauer* and *James*.

[99] In any event, on a more fundamental basis, I consider the third party claims of ITCAN against Canada are not sustainable because at all times Canada was acting in a policy mode when dealing with issues concerning smokers and smoking. The decision to intervene in tobacco design and to instruct companies like ITCAN to modify advertising was a policy decision taken by Canada at the ministerial level with a view to diminish the health risks of consumers of tobacco products. Tobacco was increasingly being viewed as a carcinogen by the 1960s. Because of the perceived threat to the health of Canadians, government might have felt it appropriate to ban tobacco but the unhappy experience in the United States with prohibition made this a course of doubtful efficacy. Instead, government chose to intervene by modalities it expected to diminish the use of tobacco and lessen the toxicity of the product to those who chose to continue the use of tobacco products. It arguably could have undertaken other or more efficacious interventions but these largely political and social decisions based on broad health concerns were for government. As Cory J. observed in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, 64 D.L.R. (4th) 689 at 1240:

> True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors.

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When government takes such initiatives as a matter of policy, it is entitled to immunity from tort claims.

[100] It seems clear to me from the pleadings that at all material times Canada acted as a regulator in relation to members of the tobacco industry such as ITCAN who sold and advertised these products to consumers. Canada was not in the business of advertising and selling cigarettes nor did it have any commercial interaction with consumers of tobacco products. It had a responsibility, as pleaded in the Third Party Notice, to protect the health of the Canadian public including smokers. Any initiatives it took to develop less hazardous strains of tobacco, or to publish the tar and nicotine yields of different cigarette brands were directed to this end. While the development of new strains of tobacco involved Agriculture Canada, in my view the government engaged in such activities as a regulator of the tobacco industry seeking to protect the health interests of the Canadian public. Policy considerations underlaid all of these various activities undertaken by departments of the federal government.

[101] The learned chambers judge struck out claims of ITCAN advanced in the Third Party Notice on the basis that the activities of Canada were of a "policy" as opposed to an "operational" nature. She adverted in her reasons to *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 SCR 537, a case much discussed in argument before us. In its reasons in that case, the Supreme Court said this:

> 37 This brings us to the second stage of the *Anns* test. As the majority of this Court held in *Norsk*, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability in *Hercules Managements*, *supra*, on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.
>
> 38 It is at this second stage of the analysis that the distinction between government policy and execution of policy falls to be considered. It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that

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policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy. In our view, the exclusion of liability for policy decisions is properly regarded as an application of the second stage of the *Anns* test. The exclusion does not relate to the relationship between the parties. Apart from the legal characterization of the government duty as a matter of policy, plaintiffs can and do recover. The exclusion of liability is better viewed as an immunity imposed because of considerations outside the relationship for policy reasons – more precisely, because it is inappropriate for courts to second-guess elected legislators on policy matters. ...

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[102] The Supreme Court went on in *Cooper* to note that considerations additional to the policy nature of the governmental activity in that case militated against a finding of liability.

54 Further, the spectre of indeterminate liability would loom large if a duty of care was recognized as between the Registrar and investors in this case. The Act itself imposes no limit and the Registrar has no means of controlling the number of investors or the amount of money invested in the mortgage brokerage system.

55 Finally, we must consider the impact of a duty of care on the taxpayers, who did not agree to assume the risk of private loss to persons in the situation of the investors. To impose a duty of care in these circumstances would be to effectively create an insurance scheme for investors at great cost to the taxpaying public.

[103] These types of considerations are in my opinion also of significance in the present action. Canada had and has no control over the quantity of cigarettes sold by ITCAN and other vendors of tobacco products. Indeterminate liability is an obvious concern if Canada is to be required to indemnify participants in the industry such as ITCAN against claims in actions by consumers. Canada is a regulator of the tobacco industry, not an insurer. In *Eliopoulos v. Ontario (Minister of Health & Long-Term Care)* (2006), 82 O.R. (3d) 321, 276 D.L.R. (4th) 411 (C.A.), leave to appeal to S.C.C. dismissed [2006] S.C.C.A. No. 514, the Ontario Court of Appeal observed at para. 33 that “Public health authorities should be left to decide where to focus their attention and resources without the fear or threat of lawsuits.” This comment seems apposite to me in the context of the present litigation.

[104] The following passage from *Hughes v. Sunbeam Corp. (Canada)* (2002), 61 O.R. (3d) 433, 219 D.L.R. (4th) 467 (C.A.), leave to appeal to S.C.C. dismissed [2002] S.C.C.A. No. 446, is also apposite. In *Hughes*, the plaintiff, a purchaser of an allegedly defective smoke alarm, sought to bring a class action against the manufacturer of the product as well as against Underwriter's Laboratories of Canada ("ULC"). ULC is an independent company that engages in the testing and certification of fire alarms as well as other devices.

> 47 The position of ULC can be contrasted with that of First Alert. As a supplier of ionization smoke alarms First Alert presumably profited from their sale in proportion to the number of units sold. Thus, the danger of imposing indeterminate liability, though present, is a less compelling policy consideration in the claim against it than in the claim against ULC.
>
> 48 A second and related consideration is that imposing a duty of care on ULC would effectively create an insurance scheme for dissatisfied purchasers, a scheme for which the purchasers have paid nothing.
>
> 49 Finally, manufacturers are better positioned to ensure the supply of safe products and provide a more efficient target for redress if their products prove to be unsafe. The law should not expand duties of care at the price of encouraging needless and expensive litigation.

[105] The claim by ITCAN in this action that it can seek indemnity from Canada, its regulator, appears to me to be novel. Canada was at all material times in the position of seeking to fulfill an obligation to protect a vital public interest by safeguarding the health of all Canadians. As observed by the Ontario Court of Appeal citing *Eliopoulos* in *Williams v. Canada (Attorney General)*, 2009 ONCA 378, 95 O.R. (3d) 401, at para. 35, public health priorities should be based on the general public interest and the authorities should not be faced with the threat of lawsuits in deciding on such issues.

[106] In *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, Abella J., after referring to the cases of *Cooper* and *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562, observed:

> 30 Depending on the circumstances of the case, the factors to be considered in the proximity analysis include the parties' expectations, representations and reliance (*Cooper*, at para. 34). There is no definitive list.
>
> 31 If a *prima facie* duty of care is found to exist based on reasonable foreseeability and proximity, it is still necessary for a court to submit this

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> preliminary conclusion to an examination about whether there are any residual policy reasons which make the imposition of a duty of care unwise. As noted in *Cooper*, "the *Donoghue v. Stevenson* foreseeability-negligence test, no matter how it is phrased, conceals a balancing of interests. The quest for the right balance is in reality a quest for prudent policy" (para. 29).
>
> 32 This means, the Court recognized, that policy is relevant at both the "proximity" stage and the "residual policy concerns" stage of the *Anns* test. The difference is that under proximity, the relevant questions of policy relate to factors arising from the particular relationship between the plaintiff and the defendant. In contrast, residual policy considerations are concerned not so much with "the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" (*Cooper*, at para. 37).
>
> 33 The possibility of some blending of policy considerations was noted by McLachlin C.J. and Major J. in *Cooper*:
>
>> Provided the proper balancing of the factors relevant to a duty of care are considered, it may not matter, so far as a particular case is concerned, at which "stage" [policy is considered]. The underlying question is whether a duty of care should be imposed, taking into account all relevant factors disclosed by the circumstances. [para. 27]

[107] *Syl Apps* was a case involving the apprehension of a child by child protection authorities. Later, family members alleging negligent conduct sought to sue various parties including the treatment centre where the child was sent and several professionals involved in the care of the apprehended child. A motions judge granted a motion to strike the statement of claim on the basis that it disclosed no reasonable cause of action. By a majority, the Ontario Court of Appeal held that the matter should be allowed to proceed to trial. On further appeal, the Supreme Court of Canada allowed the appeal and dismissed the action.

[108] While there could arguably be found to exist a *prima facie* duty of care owed to ITCAN by Canada (see para. 31 of *Syl Apps*, *supra*) it seems strange that a participant in the industry like ITCAN should be allowed to offload on Canada any potential liability it faces to parties such as the plaintiff class. As I earlier observed, Canada is and was a regulator, not an insurer, to ITCAN and other sellers of tobacco products. I would not be inclined, as was the chambers judge, to place any particular reliance upon s. 16 of the *Tobacco Act*, S.C. 1997, c. 13, but I do endorse

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the reasoning set forth from the following passage in paragraphs 50 to 52 of the reasons of Satanove J.

> [50] ... 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*], 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. ...

[109] I am of the opinion that policy considerations should militate against finding any potential liability on the part of Canada based on an alleged breach of duty to ITCAN. As I noted above, the rationale for actions undertaken by Canada was to find a safer type of cigarette and to inform smokers about the toxicity of cigarettes. The policy may have been flawed or not particularly successful, but when government is acting in a policy mode, what I consider to be the situation in the instant case, it is not appropriate for such policy decisions to be questioned in the courts. For that reason, I consider the third party relief claimed against Canada based on alleged breaches of duty to consumers or ITCAN is not available. Although not for exactly the same reasons, I, like Satanove J., consider that the third party claims based on such alleged duties should be struck out. Concerning the claims advanced by ITCAN against Canada for equitable indemnity and declaratory relief, I would strike out these portions of the Third Party Notice for the reasons I enunciated in the companion case of *British Columbia v. Imperial Tobacco Canada Limited*.

[110] I would therefore dismiss this appeal.

"The Honourable Mr. Justice Hall"

I agree:

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"The Honourable Mr. Justice Lowry"

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