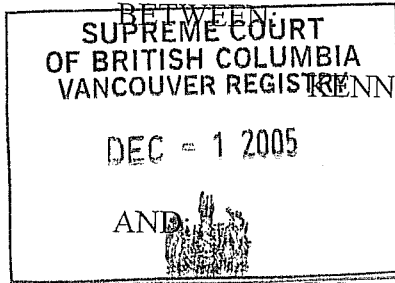


Amended pursuant to Rule 24(1)(a)

ORIGINAL FILED April 27/04

No. L031300
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA



KENNETH KNIGHT

PLAINTIFF

IMPERIAL TOBACCO CANADA LIMITED

DEFENDANT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

THIRD PARTY

AMENDED THIRD PARTY NOTICE OF IMPERIAL TOBACCO CANADA LIMITED

TO: ATTORNEY GENERAL OF CANADA

AND TO: His Solicitor

THIS ACTION has been brought by the Plaintiff, Kenneth Knight against the Defendant Imperial Tobacco Canada Limited ("ITCAN"). The Plaintiff's claim against ITCAN is set out in the Writ of Summons and Statement of Claim. None of the statements of fact or allegations contained herein are intended to be, nor should they be construed as admissions to the allegations or claims advanced by the Plaintiff. ITCAN repeats and relies on its Statement of Defence.

TAKE NOTICE that ITCAN claims against Her Majesty the Queen in Right of Canada for the relief set out in this Amended Third Party Notice.

The material facts upon which ITCAN relies are:

PART ONE

I. THE FEDERAL GOVERNMENT OF CANADA, ITS DEPARTMENTS AND OFFICIALS

A. ^

1. The Federal Government was, at material times, responsible for protecting the health of Canadians including consumers of tobacco products and was responsible for providing accurate and reliable health information to them.

2. The Federal Government acted, at material times and in ways material to this action, in carrying out its statutory duties and exercising its authority and powers, through Health Canada and Agriculture Canada.

3. ^ Health Canada, the successor to the Department of National Health and Welfare and the products safety branch of the former Department of Consumer and Corporate Affairs, is established pursuant to the *Department of Health Act*, S.C. 1996, Ch 8. At all material times Health Canada has had a statutory duty and responsibility under Section 4 of the *Department of Health Act* and predecessor sections, to promote and preserve the health of the people of Canada including:

- (a) to promote and preserve the physical, mental and social well-being of the people of Canada;
- (b) to protect the people of Canada against risks to health;
- (c) to investigate and research public health, including the monitoring of diseases;

- (d) to establish and control safety standards and safety information requirements for consumer products; ^
- (e) to collect, analyse, interpret, publish and distribute information relating to public health; and
- (f) subject to the Statistics Act to collect, analyse, interpret, publish and distribute information relating to public health.

4. At all material times and in relation to matters material to this action Health Canada has acted in making operational decisions to implement policy through its Ministers, Deputy Ministers, its Health Services and Promotion Branch and its officials, its Health Protection Branch (including at material times the Tobacco Product Section, the Tobacco Bureau and the Non-Medical Use of Drugs Directorate) and its committees and inter-departmental committees and administrative heads, its Assistant Deputy Ministers and Executive Directors General and through other officials known and unknown to ITCAN, hereinafter referred to as "Officials". Ministers of Health who acted in ways material to this action include Mrs. LaMarsh, Mr. MacEachen, Mr. Munro, Mr LaLonde, Ms. Begin and Mr. Epp. Deputy Ministers of Health include Drs. Cameron, Crawford and Morrison. Assistant Deputy Ministers of Health include Dr. A. J. Liston. Committee members include Drs. Colburn and Watkinson. Other Officials include Dr. Best, M. Palko, Dr. Pett, Dr. Chapman, Dr. Draper, J. Nightscales and G. B. Schreiber.

B. ^

5. Agriculture Canada is established pursuant to the Department of Agriculture and Agri-Food Act. R.S., 1985, c. A-9, s.4, which confers broad powers, duties and functions with respect to agriculture, agricultural products, and research related to agriculture and products derived from agriculture including the operation of experimental farms.

6. The Federal Department of Agriculture and Agri-Food at various material times operated research facilities, including the Delhi Research Station, to promote the development, growth, marketing and distribution of tobacco and otherwise support the tobacco industry.

| Agriculture Canada has also undertaken or sponsored research programmes relating to tobacco, |

smoking and health in support of the smoking and health programme developed by Health Canada as further particularized herein.

7. At all material times and in relation to matters material to this action Agriculture Canada has acted through its Ministers, Deputy Ministers and Assistant Deputy Ministers, and through its research divisions, committees and inter-departmental committees, as well as officials of Agriculture Canada known and unknown to ITCAN including those employed as research scientists at Delhi Research Station, hereinafter also referred to as "Officials". Ministers include Mr. Whelan. Committee members include Dr. Hamilton. Other Officials include B. B. Migicovsky, B. F. Zilkey, L. S. Vickery, R. Sims, P. W. Johnson, and Drs. Pandey and Court at the Delhi Research Station.

8. If ITCAN is liable to the Plaintiff, which is denied, then the Federal Government is liable to ITCAN as alleged herein based on vicarious liability for the actions of its servants as particularized herein.

II. INITIAL OPERATIONAL DECISION TAKEN BY OFFICIALS OF HEALTH CANADA AND AGRICULTURE CANADA

9. Through its Officials, and in carrying out its statutory duties and exercising its authority and powers, Health Canada has developed a smoking and health programme through which it has executed or implemented at the operational level governmental policy on smoking and health. That smoking and health programme was originally developed and implemented as a result of the first national Conference on Smoking and Health in 1963, which established that governmental policy should be to act so as to protect the public from the risks of smoking through a programme of education about the risks of smoking and research into the hazards of smoking and the possibilities of reducing those risks. The Minister of Health expressly acknowledged the responsibility of Health Canada to ensure that smokers were properly and adequately informed of the risks of smoking to health.

10. Arising out of the report from the first national Conference on Smoking and Health, two committees were established under the chairmanship of Officials of Health Canada to assist in developing a smoking and health programme to be implemented through or under the

direction of Health Canada, namely, the Technical Advisory Committee on Health Education and the Advisory Committee On Research Concerning Smoking Hazards.

11. The Advisory Committee On Research Concerning Smoking Hazards began to meet in February 1964, to determine the types of research needed to facilitate attainment of the objectives of the smoking and health programme. It was composed, under the chairmanship of Officials of Health Canada, of experts in various fields including sociology, psychology and epidemiology.

12. Similarly, the Technical Advisory Committee on Health Education began to meet in 1964. Its mandate was to review current approaches to education about smoking, recommend the components of an effective programme to inform smokers and non-smokers of the risks of cigarette smoking and to identify the role of different agencies in implementing the programme. The Committee's agenda included matters such as cigarette advertising and promotion practices, warnings, labelling of cigarette packages and smoking on television.

13. In the period up to approximately 1967, it was the view of Officials of Health Canada, including the Deputy Ministers of Health Drs. Cameron and Crawford, that it would not support an effective smoking and health programme to provide information about tar and nicotine deliveries of various brands of cigarettes to the public and that warnings of health risks generally should not be included on cigarette packages.

14. In late 1966, joint meetings of the Advisory Committees on Health Education and Research planned the development of permanent smoking and health programmes, research programmes involving all aspects of smoking and health sponsored by Health Canada and techniques for evaluating the smoking and health education programmes sponsored by Health Canada.

15. During the period up to 1968, Health Canada, through its Officials, asserted leadership in developing and executing smoking and health programmes and acquired special expertise in all material aspects of smoking and health issues including epidemiology, basic medical science and the aetiology of disease, smoke chemistry and composition, measuring smoke constituents, smoking behaviour, the development of different techniques for

manufacturing and developing cigarettes and the effects of smoking behaviour on the intake of tar and nicotine by smokers. Health Canada has retained both its leadership role in developing smoking and health programmes and its special expertise in issues relating to smoking and health throughout the material period.

16. In or about late 1966, Dr. Pett of Health Canada began to collect information about the deliveries of different brands of Canadian cigarettes in order to analyse the implications of that information in the context of Health Canada's smoking and health programme.

17. During 1967, Officials at Health Canada, including Dr. Pett, Dr. Colburn, Deputy Minister Crawford and Minister of Health MacEachen, began to examine whether the smoking and health programme should be changed in a variety of ways including providing information about tar and nicotine deliveries to smokers, setting maximum tar and nicotine deliveries for Canadian cigarettes, restricting cigarette advertising and altering the price of different brands of cigarettes by means of differential taxation to influence smokers in their choice of brands.

18. Health Canada has, through its Officials, continued to develop and implement its smoking and health programme in ways material to this action as further particularized below.

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III.

THE EFFECT OF THE CONDUCT OF FEDERAL GOVERNMENT OFFICIALS ON THE DEVELOPMENT OF "LIGHT" AND "MILD" CIGARETTES

19. For the purposes of this Amended Third Party Notice, light and mild cigarette products, hereinafter "light and mild products" are lower delivery products, including those bearing the descriptors "Light" or "Mild".

20. In or about 1967, Officials at Health Canada concluded that a portion of current smokers would choose to continue to smoke and that a portion of non-smokers would choose to begin to smoke. Officials at Health Canada began to devise a programme to provide relevant and accurate information to continuing smokers, to guide them in making choices about their smoking behaviour including inducing them to choose brands of cigarettes with lower deliveries

of tar and nicotine as measured by standard testing methods (the light and mild products). This programme, as further particularised below, involved providing information and advice to continuing smokers about tar deliveries as measured by standard testing methods; information and advice to continuing smokers about smoking behaviour; guidance, requests, advice or direction to the tobacco industry about the development and promotion of light and mild products and the use of standard testing machines; and co-operation with Officials at Agriculture Canada to develop strains of tobacco peculiarly suitable for use in light and mild products.

21. By the mid-1960s, the international and Canadian scientific consensus was that lowering the tar content of tobacco smoke might reduce the incidence of tobacco related diseases in the population of smokers. This view was shared by Officials in Health Canada based on their independent assessment of the epidemiological evidence correlating the risk of contracting smoking relating diseases to the deliveries of tar as measured by standard testing methods, their independent analysis of studies of smoking behaviour and its effect on deliveries of tar and their acceptance of the proposition that a likely dose/response relationship existed between deliveries of tar and the risk of contracting disease.

22. In the mid-1960s, the Federal Government, in furtherance of its responsibility for protecting the health of continuing smokers, and through its Officials at Health Canada and Agriculture Canada, explored ways to reduce tar in tobacco smoke. This approach reflected the conclusion of Officials at Health Canada that a programme of identifying and removing specific toxic constituents from tobacco smoke was unlikely to yield satisfactory results, and that a programme of general reduction of tar exposure might reduce the incidence of disease on a population or average basis. ^ As a result, Officials at Health Canada decided in 1967 to limit the maximum amount of tar and nicotine cigarettes could contain as measured by standard testing methods. Legislation was introduced into Parliament to achieve that objective. While the Bill did not become law, the rationale for the Bill was to encourage continuing smokers to switch to light and mild products. Rather than pursue legislation, Officials of Health Canada decided to implement specific programmes.

23. Beginning in late 1968, Officials of Health Canada, including the Minister of Health began to execute a programme, as further particularized below, to induce continuing

smokers to select light and mild products. In 1969, a report of the Parliamentary Committee on Health and Welfare endorsed the practice of Officials of Health Canada of encouraging smokers who cannot stop smoking to use low tar, low nicotine cigarettes. The objectives of the programme to bring information regarding tar and nicotine deliveries to the attention of smokers were: (a) to encourage the avoidance of high tar and nicotine brands, and (b) to encourage continuing smokers to switch to light and mild products.

24. In or about 1971, ITCAN agreed, at the ^ encouragement, advice, direction or request ^ of Officials of Health Canada to comply with maximum limits for tar and nicotine in cigarettes as measured by standard testing methods that were approved by Officials of Health Canada. The maximum limits allowable were subsequently lowered in stages until 1984.

25. The standard testing methods used to determine smoke deliveries on a consistent and reproducible basis were originally suggested and recommended by Officials at Health Canada in or about January, 1969, and ultimately agreed to by representatives of the cigarette manufacturers.

26. At the request or direction and with the active guidance and assistance of Officials of Health Canada ^, ITCAN designed and developed cigarettes that complied with the maximum limits established by Officials at Health Canada and as a result delivered lower average tar content as measured by standard testing methods. In different ways, the design and composition features, all of which were known to ^ Officials at Health Canada and Agriculture Canada, that lowered the tar content of cigarettes as measured by standard testing methods, were applied to all cigarettes so that the tar and nicotine yields of all cigarettes decreased materially from the early 1970's to the mid 1980's.

27. The encouragement, advice, requests or directions to ITCAN to lower the tar and nicotine content of cigarettes occurred during a series of meetings between representatives of the tobacco industry and Officials of Health Canada between 1969 and 1971, during which period legislation was also being considered to impose such requests or directions by regulation. Relevant meetings include those on November 3, 1970 with Dr. LeClair, the then Deputy Minister of Health, Dr. Watkinson, Director General of Health, and Dr. Colburn (of Tobacco

Studies) at which scientific research into bioassays, smoking behaviour and compensation were discussed, and on March 31, 1971 with the Minister of Health, Mr. Munro.

28. Representatives of the Canadian Tobacco Manufacturers Council (the "CTMC"), which represented ITCAN in these discussions, attended a meeting of the Inter-departmental Committee on Less Hazardous Smoking on May 20, 1971. This Inter-departmental Committee included Officials from Health Canada including Drs. Colburn and Watkinson, and Officials of Agriculture Canada including Dr. Hamilton and B. F. Zilkey. Officials of Health Canada again requested agreement to a tar reduction programme. Representatives of CTMC raised the issue of smoker compensation. Officials of Health Canada represented to the representatives of the CTMC that the evidence was that smokers did not compensate fully or permanently when smoking light and mild products and that there were still health benefits from choosing to smoke them. That continued to be the position of Health Canada until approximately 2000 and was repeated to representatives of ITCAN on subsequent occasions as the basis for the low tar programme as further particularized herein.

29. As further particularized herein, in or about 1971, Agriculture Canada became involved in the programme to develop light and mild products. On July 14, 1971, Dr. Hamilton, Assistant Director, General Eastern Division of the Research Branch of Agriculture Canada, asserted that Agriculture Canada would assume an important role in developing programmes related to the "smoking and health" issue, by undertaking research into the factors which affect the tobacco plants physiology and chemistry that controls tar and nicotine in smoke. He outlined a programme of research involving Agriculture Canada, Health Canada, the tobacco growers, exporters and manufacturers working together to produce cigarettes with less hazardous tar and nicotine levels (the light and mild products).

30. In or about late September 1971, ITCAN through CTMC agreed to act pursuant to the representations, advice, requests or directions of the Officials of Health Canada to produce light and mild products.

31. On or about November 18, 1971, Dr. Chapman of Health Canada confirmed to representatives of the tobacco growers and ITCAN that Health Canada Officials were interested

in protecting the health of continuing smokers by, amongst other things, reducing the tar and nicotine content of cigarette smoke and producing light and mild products.

32. On January 22, 1973, the Ministers of Agriculture, Mr. Whelan, and Health, Mr. LaLonde, announced the construction of new laboratories at the Tobacco Research Station at Delhi, the purpose of which was to develop tobacco varieties and cultural, curing, and other processing techniques that could contribute to the production of light and mild products. The contemplated tobacco strains were ones containing a much lower percentage of tar producing constituents than the existing varieties. The goal was that new types of tobacco when combined with improvements in manufacturing processes, such as the production of reconstituted tobacco sheet and advancements in filter design, would enable further steps to be taken in the production of light and mild products that would expose smokers to fewer harmful substances.

33. Agriculture Canada Officials at Delhi were to undertake research into the chemistry and physiology of tobacco smoke at the laboratories that were being funded by Health Canada. Officials of Health Canada also contracted with the University of Waterloo, where tar delivery tests were conducted for studies into the chemical characteristics of tobacco smoke.

34. On January 22, 1973, the Minister of Health announced a three-way programme of cooperative research between two government departments, namely, Health Canada and Agriculture Canada, and a university (the University of Waterloo) to contribute to international efforts to produce less hazardous light and mild products and to facilitate Health Canada's guidance of the tobacco industry in matters affecting health. The Minister confirmed the continuance of regular communications on these matters between the two government departments and the tobacco manufacturers. The Minister confirmed that the joint research programme was one component of a broad programme to reduce the hazards of cigarette smoking in which Health Canada was involved and which included public education, studies of ways to help Canadians avoid or discontinue smoking and surveillance of light and mild products on the market.

35. In the fiscal year preceding March 31, 1973, Health Canada transferred responsibility for its smoking and health programme to the Use of Tobacco Bureau of the Non-Medical Use of Drugs Directorate.

36. In or about April 1973, Minister of Health LaLonde accepted that the development of a "less hazardous cigarette", in this context light and mild products, was a continuing responsibility of Health Canada and stated that Health Canada supported research into a "safer" cigarette and that Officials at Health Canada were doing research with Agriculture Canada towards developing tobacco plants that would lead to lower "tar" content in cigarettes.

37. On or about May 16, 1973, Officials of Health Canada confirmed, *inter alia*, to the cigarette manufacturers that they were still encouraging Agriculture Canada and the cigarette manufacturers to direct research efforts into lowering the tar content in cigarette smoke.

38. On or about October 15, 1973, Minister of Health LaLonde announced publicly that Health Canada was financing research into a "safer" cigarette and that Health Canada's research efforts should be coordinated with that of the manufacturers.

39. In or about February, 1974, the smoking and health research financed by Health Canada at Delhi to further the production of light and mild products was discussed with ITCAN.

40. In January, 1975, the representations, advice, request or direction to ITCAN to develop and promote light and mild products was reiterated by the Minister of Health, Mr. LaLonde.

41. In March, 1976, the Minister of Health, Mr. LaLonde, wrote to ITCAN, requesting a listing of "tar" and nicotine levels in advertisements, the use of posters in tobacco sales outlets to draw attention to the "tar" and nicotine levels printed on packages, the reduction of "tar" and nicotine maximums in Canadian cigarettes, the elimination of the promotion of higher "tar" brands, and the preparation of a report on the potential effectiveness of using differential pricing of cigarettes according to "tar" and nicotine levels.

42. A comprehensive public report was prepared by Officials of Health Canada in March, 1977, entitled "Smoking and Health in Canada" which encouraged cigarette manufacturers to continue developing light and mild products. The report stated that cigarettes with very low "tar" and nicotine levels would be safer to the consumer. The report also warned that smokers of low "tar" products might lose the health benefits of such products if they changed their manner of smoking.

43. In published reports following a meeting of the federal and provincial Health Ministers in June, 1977, the participants (including Health Canada Officials) stated that it was a goal of all government health departments in Canada to encourage negotiation with the cigarette manufacturers to lower the level of "tar" and nicotine in cigarettes. The participants also wished to examine ways to modify the federal excise tax on cigarettes so that those with higher "tar" levels would be taxed at a higher rate. The participants represented that the introduction of "light cigarettes" by cigarette manufacturers was an appropriate reaction to Health Canada's campaign to warn Canadians of the health risks of smoking. The participants noted the increase in sales of "light" products with approval.

44. In June, 1977, Health Minister Mr. LaLonde publicly stated that Health Canada continued to have the objective of reducing "tar" and nicotine levels in cigarettes.

45. In 1978, CTMC met with Officials at the Health Protection Branch of Health Canada, at which time Dr. Morrison informed CTMC that the greatest issue of concern to Health Canada was further reductions in tar and nicotine deliveries of commercial cigarettes. Dr. Morrison requested and encouraged efforts from the industry to set goals for tar/nicotine reduction over the next six years that went beyond endeavours to influence consumer preferences.

46. In 1978, the Federal Government advised, directed or requested that ITCAN and other Canadian tobacco manufacturers set targets for the reduction of tar in cigarettes sold in Canada on a global basis. ITCAN agreed to attempt to reduce the "Sales Weighted Average Tar" content of cigarettes (or "SWAT" level) in accordance with government targets, namely, to reduce SWAT to 12 milligrams by December 31, 1984. SWAT levels are a measurement of the average tar content of cigarettes as measured by standard testing methods, determined in accordance with the facts alleged in paragraphs 25 and 50 - 52 herein, taking into account the sales volumes of these brands. In order to reduce SWAT levels, cigarette manufacturers had to (a) introduce into the market brands with lower tar deliveries and (b) promote the lower tar brands so they had higher sales volumes than those with higher tar and nicotine yields as measured by standard testing methods.

47. ITCAN successfully reduced the SWAT levels of its brands between 1978 and 1984 and did so in a manner that was consistent with the advice, direction, requests ^ or standards set by Officials of Health Canada, ^ although ITCAN did not promote its brands on the basis that cigarettes containing lower levels of tar as measured by standard measuring methods were “safer” or “less hazardous” than cigarettes containing higher levels of tar. SWAT levels were reduced from 17 milligrams in 1973 to 12 milligrams in 1984 and have continued to fall in line with Health Canada’s smoking and health programme since that time.

48. In 1978, the Minister of Health, Ms. Begin, took credit for the availability of light and mild products on the market asserting the fact that their availability was in response to the efforts of Health Canada triggered initially by publication in 1968 of the first comprehensive tar and nicotine report on levels in Canadian cigarettes.

49. Officials at Health Canada have publicly acknowledged that Health Canada at material times has actively and persistently encouraged, guided, requested or directed both the production and marketing of light and mild products.

IV. THE PURPOSE OF STANDARDIZED SMOKING TESTS

50. On November 20, 1968, Officials of Health Canada ^ for the first time released to the press a table showing the tar and nicotine content of 84 cigarette brands sold in Canada. This information was released to encourage smokers to switch to lower tar products and to enable them to compare the tar and nicotine content of cigarette smoke on a brand basis. Officials of Health Canada ^ continued to publish the tar and nicotine tables until 1986 (the “League Tables”).

51. The information contained in the League Tables was generated by a ^ protocol approved by Officials at Health Canada that measured a cigarette’s average tar and nicotine consistently and reproducibly over time.

52. Given the variations in individual smoking behaviour, it was never the purpose of the testing protocol to measure tar and nicotine yields to particular individual smokers. Rather, the protocol created a single, standardized test to ensure consistency and reproducibility and to provide consumers with comparative brand information. This testing protocol became a basis of

tar and nicotine information provided to consumers by or at the direction of Officials of Health Canada ^, throughout the material period, even though ^ those Officials ^ knew or ^ ought to have known that the machine-measured yield did not and could not measure the tar and nicotine yields to particular individuals and groups of individuals.

V. THE DISSEMINATION OF INFORMATION TO CONSUMERS ABOUT “LIGHT” AND “MILD” CIGARETTES BY OFFICIALS OF THE FEDERAL GOVERNMENT

53. ^ Officials at Health Canada with the assistance initially of the University of Waterloo played the principal role in the collection of tar and nicotine information, in the publication of such information and in encouraging, advising, requesting or requiring that it be printed on cigarette packaging and advertising.

54. ^ Officials at Health Canada published League Tables disclosing the tar and nicotine yields of various brands of Canadian cigarettes between 1968 and 1986 and the parameters of the standard testing protocol used. That information was widely publicized in the media and elsewhere and was used by health professionals and others in advising smokers on the health risks of smoking and in encouraging continuing smokers to switch to light and mild products.

55. The publications of the League Tables were accompanied by press releases in which representations or advice were given to continuing smokers. In particular, continuing smokers were advised, typically by the Minister, not to be concerned about small differences in tar and nicotine levels, that brands could be compared within test periods by ranking brands in relation to others, that the tables were to be used by smokers to help reducing exposure to smoke constituents, but that smokers should not rely on the brand of cigarette as the only way to reduce exposure to smoke constituents, and that smokers could reduce exposure by changing the manner in which they smoked a cigarette.

56. Continuing smokers were also advised or it was represented to them that the amount of tar and nicotine inhaled by a smoker depends upon how the smoker smokes the cigarette as well as the tar and nicotine level of the cigarette, and that reduction in tar and nicotine intake achieved by choosing low tar and nicotine brands may be nullified if more

cigarettes are smoked, more puffs taken, or cigarettes smoked more vigorously or to a shorter butt.

57. In February, 1973, and again in March, 1974, the Minister of Health in publishing the League Tables and reiterating the representations and advice that was typical on the occasion of such publication commended the manufacturers for their efforts to bring down levels of tar and nicotine and for the voluntary establishment of maximum tar and nicotine delivery levels in cigarettes. Health Minister, Mr. LaLonde, in repeating the advice that switching to low tar and nicotine brands is only one way for smokers to reduce exposure also recommended that switching to low tar brands be only a step to discontinuing smoking altogether. Continuing smokers were also advised that some brands of cigarettes were ventilated on or near the filter and that tar and nicotine deliveries might be increased if the "openings" were blocked. This advice continued in subsequent publications of the League Tables.

58. As further particularized herein, publication of League Tables by Health Canada was suspended when, at the encouragement, advice, request or direction of Officials of Health Canada, the cigarette manufacturers agreed to publish tar and nicotine deliveries, as measured by the standard testing protocol approved by Officials of Health Canada, on packages of light and mild products.

59. In March 1981, Minister of Health, Ms. Begin, advised continuing smokers that they could reduce their intake of harmful substances by switching to a brand with lower tar and nicotine levels if they did not compensate by smoking more cigarettes per day or smoking more intensively.

60. On January 23, 1984, Minister of Health, Ms. Begin, released a press release to advise smokers of the tested deliveries of carbon monoxide in brands of Canadian cigarettes. She advised the public of her requests to reduce SWAT to 12 milligrams by the end of 1984, approved of the continuing efforts by cigarette manufacturers to reduce tar and nicotine deliveries, and repeated the advice, based now on tests conducted for Health Canada, that actual deliveries are affected by the way in which cigarettes are smoked. Her advice or representation to the public was that tar and nicotine values printed on packages were a satisfactory buyer's guide

to cigarettes with lower average yields but that Health Canada's studies showed that actual intake depended at least as much on how the cigarette was smoked as the published delivery levels.

61. On August 1, 1985, Officials of Health Canada again publicly confirmed its programme of encouraging the production of light and mild products and lowering tar and nicotine deliveries as measured by standard testing methods.

62. ^ Health Canada's programme to disseminate tar and nicotine information recognized that many consumers would choose to continue to smoke. The ^ programme was intended to encourage continuing smokers to smoke cigarettes containing less tar and nicotine as measured by standard testing methods. Officials at Health Canada knew or ought to have known that continuing smokers would reasonably rely on the representations or advice of Health Canada. Continuing smokers did so rely.

63. It was the ^ view of Officials of Health Canada that, first, lower tar cigarettes presented a reduced risk to smokers when compared to cigarettes of higher tar as measured by standard testing methods, and secondly, that the publication of tar and nicotine figures was a necessary part of its smoking and health programme.

64. ^ Officials of Health Canada regularly published and widely disseminated other information, beyond the League Tables, all with an aim to encouraging continuing smokers to switch to lower tar and nicotine cigarettes as measured by standard testing methods. Whatever views consumers have had about the health risks associated with "Light" and "Mild" cigarettes have resulted ^ from the dissemination of information to consumers by ^ Officials of Health Canada and other sources, but not the defendant.

65. ^ Health Canada's website continued, until August 2003, to encourage smokers to switch to ^ light and mild products in the event that they would not quit smoking.

66. ^ Health Canada published the League Tables and encouraged smokers to switch to ^ light and mild products ^ when its Officials had or ought to have had full knowledge of the relevant epidemiology and scientific research pertaining to the smoking of tobacco, its effects on health and the methods by which the tar and nicotine content of tobacco smoke was or could be reduced.

VI. THE DISSEMINATION OF INFORMATION ABOUT “LIGHT” AND “MILD” CIGARETTES BY ITCAN AT THE REQUEST OF OFFICIALS OF THE FEDERAL GOVERNMENT OR BY REGULATION

67. In 1962 and again in 1964, ITCAN agreed not to promote cigarettes on the basis of any express or implied health claims. These agreements were in furtherance of an ongoing policy of Canadian tobacco manufacturers not to make health claims about cigarettes and precluded advertising, promoting or the publishing the tar and nicotine content of particular brands of cigarettes. [^] Officials at Health Canada and, in particular, the Deputy Minister, Dr. Cameron, endorsed this practice.

68. Subsequently, in or about 1967 or 1968, Officials at Health Canada [^] changed [^] Health Canada’s programme and began encouraging, advising, requesting or directing [^] the publishing by tobacco manufacturers of information relating to tar and nicotine yields of cigarettes as measured by standard testing methods. Such encouragement, advice, requests or direction to ITCAN occurred on multiple occasions beginning in the early 1970’s and was part of Health Canada’s programme to develop and promote light and mild products. On or about March 16, 1973, Minister of Health, Mr. LaLonde, confirmed the utmost importance of Canadian cigarette manufacturers helping continuing smokers know the tar and nicotine content of different brands of cigarettes by printing the numbers on packages, cartons and on vending machines. This was in order to enable smokers to make a choice among competing brands.

69. On January 1, 1976, [^] under threat of government regulation, ITCAN and other members of the [^] CTMC [^] agreed to publish tar and nicotine information on cigarette packages pursuant to the encouragement, advice, requests or direction of Officials of Health Canada.

70. From January 1, 1989 onwards, ITCAN was required under the *Tobacco Products Control Act*, S.C. 1988, c. 20 to report to the Federal Government and to publish on packages the emissions of tar, nicotine and carbon monoxide and other smoke constituent yields as measured by the standard testing methods approved by Officials of Health Canada.

71. At material times, [^] Officials of Health Canada encouraged, advised, requested or directed that ITCAN use its promotional expertise to market so-called “Light” and “Mild” cigarettes to meet its SWAT and SWAN targets and thereafter monitored ITCAN’s promotional

activities. Particulars include advice or requests by Drs. Colburn and Draper of Health Canada in February 1974 for ITCAN to use its skills to advertise and promote light and mild products, and advice or requests by Minister of Health Mr. LaLonde in February 1973 to decrease the promotion of higher tar brands, reduce tar levels in widely available higher tar products and to develop and promote light and mild products in preference to higher tar products. Such advice or requests were repeated at meetings that took place between Officials of Health Canada and ITCAN on a regular basis over the material period.

72. Officials at Health Canada monitored the introduction of “milder” versions of popular brands by tobacco manufacturers and their increasing market share noting that, in 1977, their introduction had been made in response to public demand, government pressure in the form of continuing negotiations and the possibility of stringent government regulation.

73. Officials at Health Canada at all material times endorsed and encouraged the cigarette advertising and promotion codes agreed to from time to time by the CTMC. These codes prohibited advertising or promotion on the basis of relative health claims for different brands of cigarettes. Officials at Health Canada monitored compliance by CTMC companies including ITCAN with the codes and brought any infractions to the attention of the companies. Until, approximately 2001, Officials at Health Canada raised no objections to the use of the descriptors “Light” and “Mild” on ITCAN products.

74. Beginning in or about 1976, Officials at Health Canada endorsed the use of the descriptors “Light” and “Mild” in its marketing and promotion practices.

75. Officials at Health Canada also monitored the advertising budgets of the Canadian cigarette manufacturers on a regular basis until advertising and promotion was banned by legislation. Officials at Health Canada requested that resources devoted to advertising and promoting light and mild products be increased.

**VII. ^KNOWLEDGE OF FEDERAL GOVERNMENT OFFICIALS IN
RELATION TO SMOKING AND HEALTH ISSUES**

A. Knowledge of Officials of Health Canada and Agriculture Canada

76. At material times ^ Officials at both Health Canada and Agriculture Canada knew and kept abreast of every advance in medical and scientific knowledge on all matters pertaining to the smoking of tobacco and its effects on health including matters relating to cigarette design. Without limiting the generality of the foregoing, ^ those Officials knew and kept abreast of research relating to the so-called phenomenon of smoker “compensation”.

77. Further, ^ Officials at Health Canada and Agriculture Canada were or ought to have been aware at material times of the design and composition changes to ITCAN’s cigarettes which lowered the tar and nicotine yields of “Light” and “Mild” cigarettes as measured by standard testing methods.

78. ^ Officials at Health Canada and Agriculture Canada also knew and kept abreast of every advance in chemical, biological, medical and technical knowledge and technique concerning the growing, harvesting, curing and manufacture of tobacco and tobacco products.

**B. ^ Attempt to Design a “Less Hazardous Cigarette” by Officials of the
Federal Government**

79. Officials of Agriculture Canada ^ particularly ^ those at the Delhi Research Station ^ undertook a comprehensive research and development programme in support of the Canadian tobacco industry from 1963 to 2000. The purpose of this research and of the programme was to improve the quality and marketability of Canadian tobacco having regard to the desires and preferences of tobacco consumers and was in furtherance of Health Canada’s “Less Hazardous Cigarette” programme as particularized in paragraphs 19 - 49 herein.

80. In or about 1968 ^, Officials at Delhi Research Station ^ initiated research into smoking and health issues by attempting to identify allegedly hazardous components in tobacco smoke.

81. In or about 1971, Officials at Agriculture Canada ^ and Health Canada established ^ the Inter-departmental Committee on Less Hazardous Smoking in order to attempt to develop a

cigarette capable of being marketed as "less hazardous" than alternative or pre-existing cigarettes.

82. Beginning in 1971, as one component of the "Less Hazardous Cigarette" programme, Officials at Agriculture Canada funded by Health Canada in part began research into the development of less hazardous tobacco.

83. Research by Officials at Delhi was an integrated component of Health Canada's smoking and health programme. The focus of that research in ways material to this action was to develop strains of tobacco peculiarly suitable to incorporate into light and mild products, to examine curing practices and other techniques, including the development and use of reconstituted tobacco and tobacco sheet, and to develop tobacco with acceptable levels of biological activity or mutagenicity that would be acceptable to continuing smokers.

84. In 1972, CTMC joined with Agriculture Canada in a research agreement to develop reconstituted sheet tobacco.

85. The four leading cigarette manufacturers assisted Delhi Research Station in evaluating tobacco produced by it.

86. In 1973, Health Canada through, *inter alia*, Dr. Colburn and Dr. Forbes at the University of Waterloo, undertook studies at material times of smoking behaviour and the responses of smokers to modified cigarettes.

87. In 1975, the Non-Medical Use of Drugs Directorate of Health Canada sponsored research into mutagenicity of Canadian experimental cigarettes.

88. In 1977, Officials at Delhi Tobacco Research Station and Health Canada conducted a project entitled "Delhi Tobacco and Health Bio-Assay Programme" as part of the Less Hazardous Cigarette Programme.

89. The research programme at Delhi was influenced by the view that Officials at Health Canada, particularly Dr. Colburn, and Officials at Delhi took of the work of Dr. M. A. H. Russell. Dr. Russell in the mid-1970s expounded the view that the development of a low tar/medium nicotine cigarette would be less hazardous to the health of continuing smokers.

90. In 1977, Officials at Health Canada in a published report identified the potential need for cigarettes low in tar and carbon monoxide but which contain higher quantities of nicotine.
91. In June 1977, representatives of the manufacturers were advised by Officials of both Health Canada and Agriculture Canada that Health Canada was sponsoring research into developing strains of tobacco consistent with this objective that when combined with suitable filtering technology would be suitable for use in light and mild products.
92. In June, 1977, meetings were held between, *inter alia*, Officials of Health Canada, Agriculture Canada and CTMC to discuss progress in product developed at Delhi Research Station, studies into mutagenicity of tobacco leaf, the effects of nicotine concentration on dose/response reaction, options to obtain reductions of maximum constituent levels in biological activity and long range research and development.
93. At material times in the 1970's, Officials at Delhi Research Station and/or Health Canada sponsored research at the University of Guelph into developing methods for biological evaluation of different tobacco types with the objective of producing a less hazardous cigarette.
94. In or about 1977 and thereafter, the Federal Government publicized the results of its research.
95. The Delhi Research Station manufactured cigarettes from the tobacco varieties that it had developed for evaluation by various tobacco manufacturers including ITCAN.
96. The result of the ^ tobacco development and production programme was that ^ Agriculture Canada Officials at Delhi created by 1980 varieties of tobacco with a lower tar to nicotine ratio, which included Nordel, Delgold, Newdel and Candel which ^ those Officials licensed and promoted for use by all growers of tobacco in Canada, and which ^ those Officials recommended for use by Canadian tobacco manufacturers including ITCAN.
97. The tobacco varieties so developed by ^ the Agriculture Canada Officials at Delhi became, by 1982, almost the only tobacco varieties available to the Canadian tobacco

manufacturers and the tobacco products manufactured from the said varieties then became the tobacco products consumed in British Columbia. ^

98. Licensing fees and royalties earned on those tobacco strains have been paid by ITCAN to the Federal Government.

99. The tobacco strains created by the Agriculture Canada Officials at Delhi were tested by those Officials to determine whether they were consistent with acceptable levels of biological activity or mutagenicity and whether they were acceptable to consumers when manufactured into cigarettes.

100. By the summer of 1980, Officials at Agriculture Canada were advising the public and ITCAN that the new varieties of tobacco "could be tailor-made for today's light cigarette brands, combining low-tar and high nicotine." By Spring 1981, Officials at Health Canada advised or represented to the public and ITCAN in published material that, "The relatively low-tar/nicotine ratio of Canadian tobacco offers manufacturers greater flexibility in producing lighter cigarettes and still maintains sufficient nicotine and flavour to satisfy consumer demands." Similar statements were made on multiple occasions including in Volumes 53, 54 and 55 of "The Lighter", a publication of Agriculture Canada.

VIII. REPRESENTATIONS AND ADVICE OF OFFICIALS OF THE FEDERAL GOVERNMENT TO ITCAN

101. ^ Officials of Health Canada and Agriculture Canada have made representations to ITCAN and provided it with advice in relation to matters now alleged to involve deceptive acts or practices.

102. The representations made by ^ those Officials to ITCAN include the following:

- (a) that tar and nicotine measuring standards provided accurate information to consumers on which consumers could make informed smoking decisions;
- (b) that deliveries of tar and nicotine to smokers of "Light" and "Mild" cigarettes are reduced relative to regular cigarettes;

- (c) that "Light" and "Mild" cigarettes would reduce the incidence of tobacco related diseases in the population of smokers;
- (d) compensation, to the extent it occurs, is partial and temporary; ^
- (e) consumption of lower tar cigarettes reduces the risk of contracting tobacco related diseases; and
- (f) there are no increased health risks associated with or caused by the design or development of tobacco strains by Officials at Agriculture Canada.

103. The representations set out above were made by Officials of Health Canada and Agriculture Canada at multiple times during meetings and on occasions, certain of which are particularized in paragraphs 19 - 49 herein.

104. The representations began in and around 1967 and continued until at least the mid 1980's, during which time ITCAN's "Light" and "Mild" products were developed and marketed, and were intended by Officials of Health Canada and Agriculture Canada to be relied on by ITCAN and to influence its conduct.

105. ITCAN did reasonably rely on all of the aforesaid representations, including those representations from Health Canada and Agriculture Canada Officials in developing light and mild products, publishing tar and nicotine deliveries as measured by standard testing methods, and marketing and promoting "Light" and "Mild" products.

106. If ITCAN is liable to the Plaintiff, as alleged or at all, then some or all of the representations were known or ought to have been known to the Officials of Health Canada and/or Agriculture Canada to have been false and ITCAN has relied on those representations to its detriment.

107. ^ Officials of Health Canada and Agriculture Canada, drawing upon ^ their expertise in smoking and health matters, provided advice to ITCAN as follows:

- (a) that "Light" and "Mild" products should be developed and marketed by the tobacco companies;

- (b) that machine tested tar and nicotine yields of cigarettes should be published to consumers having regard to the fact that those numbers do not and could not reflect actual intake by individual smokers;
- (c) that the tar and nicotine measuring standards provided accurate information to consumers which consumers could use to make informed smoking decisions and compare brand information;
- (d) compensation, to the extent it occurs, is partial and temporary; ^
- (e) that the use of "Light" and "Mild" cigarettes by continuing smokers would reduce the incidence of tobacco related disease; and
- (f) that the tobacco strains designed and developed by Officials of Agriculture Canada would not increase health risks to consumers or otherwise be harmful to them.

108. ITCAN ^ relied on the expertise of the Officials of Health Canada and Agriculture Canada in smoking and health matters, and reasonably relied upon the ^ advice provided by ^ those Officials in developing light and mild products, publishing tar and nicotine deliveries as measured by standard testing methods, and marketing and promoting "Light" and "Mild" products.

109. If ITCAN is liable to the Plaintiff, as alleged or at all, then the advice given by Officials of Health Canada and/or Agriculture Canada to ITCAN was negligent, and ITCAN has relied on that negligent advice to its detriment.

IX. THE SUPERVISION AND REGULATION OF ITCAN BY ^ FEDERAL GOVERNMENT OFFICIALS

110. At material times, the right to manufacture, promote and distribute cigarettes, including "Light" and "Mild" cigarettes was authorized and sanctioned by the Federal Government and its Officials and ITCAN's activities were monitored, and directed by it. In material matters, ITCAN acted on the advice ^ or at the request of Officials of the Federal Government.

111. The Federal Government through its Officials also monitored ITCAN's advertising, marketing and promotional activities in relation to "Light" and "Mild" cigarettes to ensure they complied with its overall objectives and health programmes.

112. Through its advice ^, requests ^ or direction ^ to ITCAN, the Federal Government and its Officials ^ have defined the standards applicable to ITCAN's communications with its consumers. The ^ Officials of Health Canada and Agriculture Canada ^ have monitored and directed ITCAN in matters relating to smoking and health and ^ have requested ITCAN to act in certain ways or refrain from acting in certain ways now alleged by the Plaintiff to be deceptive acts or practices under the *Trade Practice Act*, R.S.B.C. 1996, c. 457.

113. The Federal Government or its Officials, in particular, defined and delineated the standard applicable to communications with consumers in relation to, *inter alia*:

- (a) the promotion, distribution and sale of cigarettes containing lower amounts of tar and nicotine as measured by standard testing methods (the light and mild products);
- (b) what "health claims", if any, could or should be made by ITCAN to its consumers; and
- (c) what information should be disclosed to consumers about "Light" and "Mild" cigarettes including their tar and nicotine content when measured by standard testing methods.

X. THE FEDERAL GOVERNMENT COLLECTED TAXES ASSOCIATED WITH THE SALE OF "LIGHT" AND "MILD" CIGARETTES

114. At material times the purchase price of "Light" and "Mild" cigarettes has included Federal Government taxes. At material times a substantial component of the purchase price was made up of taxes and paid by ITCAN to the Federal Government.

PART TWO

XI. ^DUTIES TO CONSUMERS

A. ^Duty of Care to Consumers in Negligence

115. ^ Officials of Health Canada and Agriculture Canada had, at material times, a duty of care to individual consumers deriving from ^ the public health responsibilities of Health Canada and Agriculture Canada and more particularly by reason of the development and implementation of operational programmes respecting smoking and health as particularized in paragraphs 53 - 66 herein ^. Without limiting the generality of the foregoing, ^ Officials of Health Canada and Agriculture Canada assumed a duty of care to the Plaintiff to take reasonable care in the development and implementation of those smoking and health initiatives and programmes.

116. ^ Officials of Health Canada including the Minister of Health have acknowledged, at material times, ^ a duty to smokers to implement programmes to ensure that they are adequately informed of the risks of smoking and the properties of cigarettes.

B. ^ Duty to Consumers as a “supplier” within the Meaning of the *Trade Practice Act*

117. The Federal Government’s various programmes were intended to and did encourage continuing smokers to smoke cigarettes containing less tar and nicotine as measured by standard testing methods and to encourage them to switch to lower tar and nicotine cigarettes. In promoting the consumption by consumers of “Light” and “Mild” cigarettes over other kinds of cigarettes, the Federal Government has participated in consumer transactions and was at material times a “supplier” within the meaning of the *Trade Practice Act* and accordingly owed consumers a statutory duty.

118. The Federal Government has developed, licensed and promoted the use of the strains of tobacco used in ITCAN’s “Light” and “Mild” products during the material period.

XII. ^ DUTIES TO ITCAN AT COMMON LAW AND AT EQUITY

119. ^ As particularized herein, Officials of Health Canada and Agriculture Canada assumed a duty of care to ITCAN in giving advice, directions and making representations and

requests to ITCAN, based on ^ their expertise in health related matters, which ITCAN reasonably acted on or complied with.

120. ^ Officials of Health Canada and Agriculture Canada knew or ought to have known that ITCAN was reasonably relying on its advice, direction, requests ^ or representations and that it was deferring to ^ their expertise in matters of public health.

XIII. ITCAN COMMITTED NO DECEPTIVE ACTS OR PRACTICES

121. ITCAN says that the Federal Government through the acts of its Officials defined the duties and set the standard applicable to ITCAN's communications with consumers and that in complying with those duties and standards it committed no deceptive acts or practices within the meaning of the *Trade Practice Act* as alleged or at all.

122. The conduct of ITCAN in researching, developing and designing "Light" and "Mild" cigarettes complied with the duties defined by and the standards set by Officials of the Federal Government. Furthermore, those standards did not breach any duties owed to consumers.

123. The monitoring, supervision and requests of Officials of the Federal Government set the standards to be met by ITCAN in its promotional and marketing practices in relation to "Light" and "Mild" cigarettes and in complying with those standards ITCAN committed no deceptive acts or practices. The publishing by ITCAN of tar and nicotine yields as measured by standard testing methods at the request of Officials of the Federal Government complied with standards set by the Federal Government, and ITCAN did not commit any deceptive acts or practices as alleged or at all. The standards referred to herein were reasonable in all the circumstances.

XIV. ^ IF ITCAN IS LIABLE TO THE PLAINTIFF, OFFICIALS OF THE FEDERAL GOVERNMENT BREACHED DUTIES TO CONSUMERS

A. ^ Federal Government Officials Breached the Standard of Care in Negligence

124. If certain allegations in the Statement of Claim are correct, which is denied, and consumers were misinformed about the properties of "Light" and "Mild" cigarettes and the

health risks of smoking “Light” and “Mild” cigarettes, then Officials of the Federal Government breached the standard of care and their duty in the operation of ^ government smoking and health programmes ^ including the programme to provide accurate information to consumers ^. The conduct or fault of Officials of Health Canada and Agriculture Canada caused or contributed to damages allegedly suffered by the Plaintiff. If certain allegations in the Statement of Claim are correct, ITCAN says as follows:

- (a) Consumers in British Columbia relied on ^ Officials of Health Canada for accurate information about the purpose of standard testing methods and the use to which information could be put about the tar and nicotine deliveries of cigarettes as measured by standard testing methods.
- (b) Consumers in British Columbia relied on ^ Officials of Health Canada for accurate information about the health risks of smoking generally and the risks of smoking “Light” and “Mild” cigarettes. If consumers were misinformed about the health risks of smoking it was because ^ those Officials negligently failed to provide adequate information to consumers or misrepresented information to them.
- (c) ^ Officials of Health Canada promoted “Light” and “Mild” cigarettes over higher tar and nicotine cigarettes as measured by standard testing methods. If cigarettes containing low tar and nicotine are not associated with the reduced incidence of tobacco related diseases in the population of smokers this fact was known or ought to have been known to ^ those Officials and ^ they negligently promoted “Light” and “Mild” cigarettes.
- (d) ^ Officials of Health Canada published and encouraged the publication of tar and nicotine and other smoke constituent yields as measured by standard smoking methods. If the publication of such information misinformed or misled consumers of the properties of “Light” and “Mild” cigarettes and the health risks of smoking them, then that is because of the conduct ^ or fault of ^ Officials of Health Canada and ^ they knew or ought to have known that consumers would be misled.

- (e) In particular, Officials of Health Canada misrepresented information to consumers that it knew or ought to have known would mislead consumers and that consumers would reasonably rely upon, including:
 - (i) information concerning tar and nicotine levels in “Light” and “Mild” cigarettes that did not reflect actual deliveries to smokers under normal smoking conditions;
 - (ii) information concerning tar and nicotine levels in “Light” and “Mild” cigarettes as to their relative levels in comparison with regular cigarettes;
 - (iii) information containing messages of health reassurances to consumers in the course of promoting light and mild products including ITCAN’s “Light” and “Mild” cigarettes; and
 - (iv) information concerning the relative and overall safety of light and mild products including ITCAN’s “Light” and “Mild” cigarettes.
- (f) In particular, Officials of Health Canada failed to disclose to consumers material information that it knew or ought to have known would reasonably affect or influence the choices of consumers in purchasing ITCAN’s “Light” and “Mild” cigarettes, including:
 - (i) the failure to disclose that lower toxic emission deliveries were unrelated to benign changes in the content of the tobacco in the “Light” and “Mild” cigarettes but rather dependent upon changes in cigarette design and composition that would continue to deliver high levels of toxic emissions to smokers under normal smoking conditions;
 - (ii) the failure to disclose that the techniques employed to reduce the levels of tar in the “Light” and “Mild” cigarettes increased the

harmful biological effects, including mutagenicity, caused by ingestion of the tar;

- (iii) the failure to disclose that the smoke from the "Light" and "Mild" cigarettes was not less harmful to smokers or persons exposed to second-hand smoke;
- (iv) the failure to disclose that the design and content of the "Light" and "Mild" cigarettes had been manipulated to increase the nicotine levels delivered to consumers under normal smoking conditions; and
- (v) the failure to disclose the effects of the manipulation of the nicotine content of the "Light" and "Mild" cigarettes.

125. The existence of the duty of care to consumers arises from the development and implementation of the smoking and health programme as set forth in paragraphs 9 - 49 herein. If certain allegations in the Statement of Claim are correct, which is denied, then Officials of both Health Canada and Agriculture Canada were negligent and knew or ought to have known that such products would not reduce exposure to smoke constituents or reduce the risk of contracting smoking relating diseases, and that the development of such products would encourage continuing smokers to continue smoking and/or purchase light and mild products in preference to regular products.

126. Based on their special expertise in smoking and health matters, Officials at Health Canada made representations and provided information and advice to continuing smokers as particularized in paragraphs 53 - 66 herein intending that continuing smokers would rely on such representations, information and advice, when those Officials knew or ought to have known that such representations were false and that their information and advice was negligent.

127. If certain allegations in the Statement of Claim are correct, which is denied, consumers in British Columbia reasonably relied on Officials of Health Canada to their detriment, and the negligence of those Officials has caused them loss.

128. If certain allegations in the Statement of Claim are correct, which is denied, ITCAN claims contribution and indemnity pursuant to the *Negligence Act*, RSBC, 1996, c. 333 measured to the extent of any liability of ITCAN to the Plaintiff.

B. The Federal Government Committed Deceptive Acts or Practices

129. If certain allegations in the Statement of Claim are correct, which is denied, and consumers were misinformed about the properties of “Light” and “Mild” cigarettes and the health risks of smoking “Light” and “Mild” cigarettes, then the Federal Government through its Officials engaged in deceptive acts or practices under the *Trade Practice Act* in developing its health programmes and its conduct or fault caused or contributed to damages allegedly suffered by the Plaintiff.

130. ITCAN repeats paragraph ^ 124 ^ herein.

131. If certain allegations in the Statement of Claim are correct, which is denied, ITCAN claims contribution and indemnity pursuant to the *Negligence Act*, RSBC, measured to the extent of any liability of ITCAN to the Plaintiff.

XV. ^ IF ITCAN IS LIABLE TO THE PLAINTIFF, THE FEDERAL GOVERNMENT IS LIABLE TO ITCAN FOR BREACH OF DUTY BY ITS OFFICIALS OWED TO ITCAN

132. ^ Officials of Health Canada and Agriculture Canada knew or ought to have known that ITCAN would reasonably rely on ^ their representations and advice and would comply with ^ their direction or requests respecting the development, marketing and promotion of “Light” and “Mild” cigarettes. Without limiting the generality of the foregoing, those Officials knew or ought to have known that ITCAN would reasonably rely on ^ their representations, advice, ^ directions or requests in relation to those matters particularized in paragraphs 102 and 107 herein.

133. It is alleged that ITCAN committed deceptive acts or practices in relation to those matters in respect of ^ which Officials of the Federal Government provided ITCAN with representations, direction, advice and regulatory directives.

134. It was reasonably foreseeable to the ^ Officials of Health Canada and Agriculture Canada that ITCAN could come under statutory liability if in acting on the representations and following the advice of ^ those Officials, it breached duties to consumers in relation to “Light” and “Mild” cigarettes.

135. If certain allegations in the Statement of Claim are correct, which is denied, then the representations as particularized herein made by ^ Officials of Health Canada and Agriculture Canada in furtherance of ^ the smoking and health programme were false and were made negligently and in breach of ^ their duty of care owed to ITCAN, whereby ITCAN has suffered loss ^ or damage measured by the extent of any liability to the Plaintiff.

136. If certain allegations in the Statement of Claim are correct, which is denied, then the advice given by Officials at Health Canada and Agriculture Canada as particularized herein was negligent and in breach of their duty of care owed to ITCAN, whereby ITCAN has suffered loss or damage measured by the extent of any liability to the Plaintiff.

XVI. IN THE ALTERNATIVE, THE FEDERAL GOVERNMENT IS LIABLE TO ITCAN FOR LEGAL OR EQUITABLE INDEMNITY

137. ITCAN at material times acted at the request of ^ Officials of the Federal Government as particularized herein. The requests or recommendations made by Officials of the Federal Government reasonably resulted in ITCAN acting in a manner that was not manifestly tortious or apparently illegal to ITCAN. If in so doing, ^ ITCAN comes under a liability to the Plaintiff, the Federal Government is required to indemnify ITCAN to the extent of the liability so incurred.

138. Further, only a small portion of the purchase price of “Light” and “Mild” cigarettes consists of moneys payable to ITCAN. The majority of the purchase price has, at material times, consisted of taxes levied by both the Provincial and the Federal Government. In these circumstances, the Federal Government is liable to ITCAN in equity to indemnify ITCAN to the extent of any liability of ITCAN to the Plaintiff for amounts received by the Federal Government in taxes.

WHEREFORE ITCAN claims against the Federal Government as follows:

- (a) A declaration that Officials of the Federal Government defined and mandated standards applicable to the publication by ITCAN of tar and nicotine yields as measured by standard testing methods;
- (b) A declaration that the Federal Government and its Officials mandated and approved communications by ITCAN with consumers respecting the use of descriptors such as “Light” and “Mild” to describe brands of its cigarettes;
- (c) A declaration that ITCAN complied with the mandated and approved standards of the Federal Government and its Officials in relation to “Light” and “Mild” cigarettes and thereby committed no deceptive acts or practices within the meaning of the *Trade Practice Act*;
- (d) A declaration that the Federal Government is a supplier within the meaning of the *Trade Practice Act*;
- (e) A declaration that Officials of the Federal Government owed purchasers of “Light” and “Mild” cigarettes duties of care in the design or development of light and mild products and to provide reliable information to consumers about the deliveries of tar and nicotine and about the health risks associated with the use of “Light” and “Mild” cigarettes;
- (f) ^ If ITCAN is liable to the Plaintiff, a declaration that Officials of the Federal Government breached ^ their common law, equitable and statutory duties owed to

purchasers of “Light” and “Mild” cigarettes thereby causing or contributing to damage or loss to the Plaintiff in this action;

- (g) ^ If ITCAN is liable to the Plaintiff, an award of contribution and indemnity pursuant the provisions of the *Negligence Act*;
- (h) ^ If ITCAN is liable to the Plaintiff, a declaration that Officials of the Federal Government owed and breached duties to ITCAN;
- (i) ^ If ITCAN is liable to the Plaintiff, damages against the Federal Government measured by the extent of any liability of ITCAN to the Plaintiff;
- (j) If ITCAN is liable to the Plaintiff, an Order that the Federal Government indemnify in law or in equity, in whole or in part, ITCAN to the extent of any liability of ITCAN to the Plaintiff;
- (k) In the alternative, an Order for contribution by the Federal Government to the extent of taxes collected in respect of ITCAN’s “Light” and “Mild” products;
- (l) Costs; and
- (m) Such other relief as to this honourable court seems just.

IF YOU INTEND TO DEFEND this claim against you, or if you have a set off or counterclaim that you wish to have taken into account at the trial, **YOU MUST**

- (a) **GIVE NOTICE** of your intention by filing a form entitled “Appearance” in the above registry of this court, at the address shown below, within the Time for Appearance provided for below and **YOU MUST ALSO**

DELIVER a copy of the Appearance to the Defendants' address for delivery, which is set out in this Third Party Notice, and

- (b) **FILE** a Statement of Defence in the above registry of this court within the Time for Defence provided for below and **DELIVER** a copy of the Statement of Defence to the Defendants' address for delivery.

YOU OR YOUR SOLICITOR may file the Appearance and the Statement of Defence. You may obtain a form of Appearance at the registry.

JUDGMENT MAY BE TAKEN AGAINST YOU IF

- (a) **YOU FAIL** to file the Appearance within the Time for Appearance provided for below, or
- (b) **YOU FAIL** to file the Statement of Defence within the Time for Defence provided for below.

TIME FOR APPEARANCE

If this notice is served on a person in British Columbia, the time for appearance by that person is 7 days from the service (not including the day of service).

If this notice is served on a person outside British Columbia, the time for appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

TIME FOR DEFENCE

A Statement of Defence must be filed and delivered to ITCAN's solicitors within 14 days after the end of the Time for Appearance provided for above.


(1)	The ADDRESS OF THE REGISTRY is: 800 Smithe Street, Vancouver, B.C. V3M 1C9
(2)	The Defendant's ADDRESS FOR DELIVERY is: Suite 14 - 1075 West Georgia Street Vancouver, B.C. V6E 3C9 Fax number for delivery: n/a

(3)	<p>The NAME and OFFICE ADDRESS of the Defendant's SOLICITORS are:</p> <p>Berardino & Harris Suite 14 - 1075 West Georgia Street Vancouver, B.C. V6E 3C9</p>
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Dated: April 29, 2004

Solicitors for Imperial Tobacco Canada
Limited

Dated: December 1, 2005


Solicitors for Imperial Tobacco Canada
Limited

(Reference: D.C. Harris/030185)

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

KENNETH KNIGHT

PLAINTIFF

AND:

IMPERIAL TOBACCO CANADA LIMITED

DEFENDANT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

THIRD PARTY

AMENDED THIRD PARTY NOTICE

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