

SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

**APPELLANT /
RESPONDENT ON CROSS-APPEAL**
(Third Party)

- and -

IMPERIAL TOBACCO CANADA LIMITED

**RESPONDENT /
APPELLANT ON CROSS-APPEAL**
(Appellant)

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APPELLANT'S FACTUM

PART I – STATEMENT OF FACTS

A. Overview

1. This appeal raises the question whether statutory public authorities owe a duty of care in negligence to a tobacco manufacturer and smokers with respect to actions taken to address the public health risk posed by the tobacco products produced and marketed by the manufacturer. In a class action brought by consumers for economic loss, Imperial Tobacco Canada Limited (“Imperial”) seeks contribution and indemnity from Canada founded on alleged negligent misrepresentation. Policy reasons arising at both stages of the *Cooper/Anns* framework and other factors indicate that the alleged duties of care should not be recognized by this Court and that the claim should be struck out.

2. For the reasons set out in Canada’s factum in the related *Costs Recovery* appeal, it is plain and obvious that Canada’s response to the health risks posed by tobacco products does not give rise to a private law duty of care in negligence requiring it to be mindful of the economic interests of tobacco manufacturers.

3. Similarly, it is plain and obvious that no private law duty arises between Canada and smokers in the circumstances of this case. Such a duty would compromise statutory duties requiring the balancing of various interests. These interests include non-smokers and youth, as well as a myriad of others.

4. Furthermore, concerns for indeterminate liability for economic loss, and other policy concerns, such as the creation of an unintended insurance scheme, justify the negation of any *prima facie* duty of care toward smokers.

5. In the case of both duties, a common concern is that a private law duty of care would hamper and divert public authorities in their efforts to address the serious public health effects of tobacco-related disease. Given this overburdening policy concern, no such duties of care should be recognized.

B. Statement of Facts

6. This appeal arises out of the Judgment of the B.C. Court of Appeal dated December 8, 2009. The three-judge majority allowed in part Imperial's appeal from an Order striking out its third party notice against Her Majesty the Queen in Right of Canada ("Canada"). The two dissenting judges would have upheld the motions judge and struck out the third party notice in its entirety. The decision was released in conjunction with *B.C. v. Imperial Tobacco Canada Limited et al.* ("*Costs Recovery*"),¹ which was heard by the same panel and from which Canada has also appealed. That appeal will be heard together with the present matter.

The Proceedings Below

7. The main action is a class proceeding for the refund of monies paid by consumers for cigarettes purchased from Imperial. The action is based solely on statute: *The Trade Practices Act* and its successor, *The Business Practices and Consumer Protection Act*.² No common law or equitable claim is made. The claim is not based on personal injury. It is a claim for pure economic loss.³ No allegation is made against Canada.

8. The Statement of Claim identifies thirteen statutory "deceptive acts or practices" by Imperial. Ten are alleged non-disclosures or omissions in the production or marketing of its cigarettes. One relates to the use of the descriptors "light" and "mild" in marketing. Two relate to the stated tar and nicotine emission levels for "light" cigarettes.⁴

9. The action was certified as a class proceeding by the B.C. Supreme Court. On appeal, the certification was upheld, but in view of the applicable limitation period, the Court of Appeal restricted class membership to those individuals who purchased cigarettes after May 8, 1997 (rather than July 5, 1974, as in the original claim).⁵

10. On April 27, 2004, Imperial issued the third party notice against Canada, claiming:

¹ 2009 BCCA 540, **Appellant's Record ("A.R.")**, p. 71. Canada's appeal to this Court is File No. 33563.

² R.S.B.C. (1996), c. 457, ss. 18 and 22, **Appellants' Joint Book of Authorities ("A.B.A.")**, Vol. V, **Tab 89, pp. 241-243**; S.B.C. 2004, c. 2, ss. 171 and 172, **Vol. IV, Tab 59, pp. 135-136** (*infra*, pp. 29-30)

³ Statement of Claim, paras. 17, 18, **A.R.**, p. 121.

⁴ *Ibid.*, para. 11, **A.R.**, pp. 118-120.

⁵ 2006 BCCA 235, at paras. 35-36, **A.B.A.**, Vol. II, **Tab 33, pp. 145-146**.

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- (a) contribution and indemnity⁶ founded on three branches: Canada's alleged liability to the plaintiff class of smokers under trade practices statutes;⁷ Canada's alleged liability to the plaintiff smokers in negligence;⁸ and "equitable indemnity";⁹
 - (b) "damages ... measured by the extent of any liability of ITCAN to the Plaintiff" for alleged "negligent advice" and other conduct toward Imperial;¹⁰ and
 - (c) declaratory relief relating to Imperial's alleged compliance with regulatory standards mandated by Canada.¹¹

11. Canada brought a motion to strike the third party notice. On July 3, 2007, the motions Judge, Satanove J., struck it out in its entirety, on the basis that it was plain and obvious that the claims against Canada could not succeed.¹² Imperial appealed to the B.C. Court of Appeal. All five judges who heard the appeal agreed with the motions judge that the claims against Canada based upon statutory liability under B.C. trade practices legislation and equitable indemnity should be struck out. The Court was, however, divided on the claims for contribution and damages founded on common law liability in negligence.

12. Tysoe J.A. for the majority analysed the claims in negligence with respect to two potential duties alleged in the pleadings: between Canada and plaintiff smokers and between Canada and Imperial. Tysoe J.A. considered two broad categories of claim: negligent misrepresentation and "the design of tobacco strains developed for use in light and mild cigarettes", or what he termed "negligent design".

13. With respect to the alleged duty of care in negligence between Canada and the plaintiff smokers, the majority found that the claims fell within established categories and that policy considerations did not provide a basis to negate the *prima facie* duty of care without a full evidentiary foundation. The majority reached the same conclusion in respect of the alleged duty of care in negligence between Canada and Imperial, except that it held that it was plain and obvious that

⁶ Amended Third Party Notice, paras. 131 and 138 (g), and (k), **A.R.**, pp. 165, 168.

⁷ And related declarations; *ibid.*, paras. 115-116, **A.R.**, p. 160.

⁸ Amended Third Party Notice, paras. 117-118, 129-130, **A.R.**, pp. 160, 165.

⁹ Amended Third Party Notice, paras. 137, 138, **A.R.**, pp. 166-168.

¹⁰ *Ibid.*, paras. 101-109, 119-120, 138 (i), **A.R.**, pp. 156-158; 160-161, 168.

¹¹ Amended Third Party Notice, para. 138 (a), (b) and (c), **A.R.**, p. 167.

¹² 2007 BCSC 964, **A.R.**, p. 2.

any *prima facie* duty of care between Canada and Imperial with respect to negligent design was negated by policy considerations related to indeterminate liability for relational economic loss.

14. In contrast, the dissenting judgment of Hall J.A. (Lowry J.A. concurring) would have upheld the decision of the motions judge and dismissed the appeal. Hall J.A. differed from the majority on the legal significance of Canada's alleged conduct. Hall J.A. viewed such conduct as policy-related and thus immune from tort liability. He held:

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.¹³

15. Hall J.A. also identified other policy concerns which weighed against extending liability to Canada in these circumstances, including: (a) indeterminate liability for claims involving economic loss;¹⁴ (b) that Canada "is a regulator of the tobacco industry, not an insurer";¹⁵ and, (c) that "imposing a duty of care on Canada towards tobacco manufacturers ... would conflict with measures designed to encourage and curtail smoking as deleterious to health."¹⁶

The Policy, Legislative and Regulatory Context

16. The allegations in the third party notice in this case of duties of care, and of the relationship between Canada and Imperial, are substantially the same as those in respect of the relationship between Canada and tobacco manufacturers in the *Costs Recovery* proceedings, with the exception of temporal scope. The main proceeding here is limited to a claim of recovery of economic losses for deceptive practices arising from the purchase of cigarettes only after May 8, 1997. That period post-dates the passage of the first tobacco-specific regulatory statutes in 1988.

¹³ *Knight v. Imperial Tobacco*, 2009 BCCA 541, at para. 100, **A.R.**, p. 66.

¹⁴ *Ibid.*, at para. 103, **A.R.**, p. 67.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, at para. 108, relying on the reasoning of the motions judge, **A.R.**, pp. 69-70.

17. The policy, legislative and regulatory context, including the role of the relevant departments and the escalating level of federal regulation of the production and marketing of tobacco over the last several decades, is set out in Canada's *Costs Recovery* factum¹⁷ and is adopted here. Allegations relating to Canada's conduct specific to the third party notice in this case are referenced below.

18. In the late 1960s, proposed legislation was introduced in Parliament to require that cigarettes manufactured or sold in Canada not exceed certain prescribed limits of tar and nicotine.¹⁸ The third party notice alleges that, from approximately 1971 to 1984, notwithstanding that the foregoing proposed legislation did not become law, Imperial and other tobacco manufacturers, consistent with the "advice, direction, requests or standards set by Officials of Health Canada", complied with limits or targets for tar and nicotine in cigarettes established by the latter.¹⁹

19. The third party notice alleges that, on January 1, 1976, "under threat of government regulation" and "pursuant to the encouragement, advice, requests or direction of Officials of Health Canada", Imperial and other tobacco manufacturers "agreed to publish tar and nicotine information on cigarette packages". The threatened regulation included draft legislation.²⁰

20. In 1988, Parliament passed the *Tobacco Products Control Act*, which provided specific authority to regulate the marketing of tobacco products.²¹ The *Tobacco Products Control Regulations* were made pursuant to the *Act*, effective January 1, 1989.²² The third party notice alleges that, from January 1, 1989 onwards, Imperial was required under this regulatory regime to report to the Federal Government and to display on cigarette packages the emissions of tar, nicotine, carbon monoxide and other smoke constituent yields as measured by specified test methods.²³

¹⁷ See paras. 17-24 of Canada's factum in *Costs Recovery*.

¹⁸ Bill C-147, 1st Sess., 28th Parl., 1968, **A.B.A., Vol. IV, Tab 60**; Bill C-163, 1st Sess., 28th Parl., 1968-69, **Tab 61**; Bill C-248, 3rd Sess., 28th Parl., 1970-71, **Tab 63**; Bill C-46, 3rd Sess., 28th Parl., 1970-72, **Tab 62**; Bill C-125, 4th Sess., 28th Parl., 1972, **Tab 64**; Amended Third Party Notice, para. 22, **A.R., p. 141**.

¹⁹ Amended Third Party Notice, paras. 24, 26, 27, 46, 47, **A.R., pp. 142, 143, 146, 147**.

²⁰ Amended Third Party Notice, para. 69, **A.R., p. 151**; E.g., *An Act respecting the promotion and sale of cigarettes*, Bill C-248, 3rd Sess., 28th Parl., 19-20 Eliz. II, 1971, s.10(1), **A.B.A., Vol. IV, Tab 63, p. 186**.
²¹ *Tobacco Products Control Act*, S.C. 1988, c. 20, ss. 9, 17, **A.B.A., Vol. V, Tab 85, pp. 168-169, 173-174**.

²² *An Act to prohibit the advertising and promotion and respecting the labeling and monitoring of tobacco products*, Bill C-51, 2nd Sess., 33rd Parl., 1986-88; *Tobacco Products Control Regulations*, SOR/89-21, December 22, 1988, s. 11(1), **A.B.A., Vol. V, Tab 86, p. 179**.

²³ Amended Third Party Notice, para. 70, **A.R., p. 151**.

21. In 1997, Parliament passed the *Tobacco Act*,²⁴ which expanded the authority in the predecessor legislation. In 2000, the *Tobacco Products Information Regulations* were made pursuant to that *Act*. Sections 8 and 9 of those *Regulations* specified the test methods and packaging display requirements for toxic emissions and expanded the requirements of the earlier *Tobacco Products Control Regulations* by, for example, requiring that additional toxic emissions be listed.²⁵

PART II – QUESTIONS IN ISSUE

22. The central issue in this appeal is whether the claims alleging negligent misrepresentation in the third party notice should also have been struck out, because it is plain and obvious that no duty of care arises between Canada and Imperial or Canada and smokers on the facts as pleaded.

23. No duty of care is owed either to Imperial or to smokers because:

- (a) there is no proximity given the regulatory context and other considerations; and
- (b) any *prima facie* duty of care should be negated by policy concerns.

PART III – ARGUMENT

A. The Test for Striking Pleadings

24. As noted in Canada's factum in the *Costs Recovery* case, the test for striking pleadings from *Hunt v. Carey Canada* is, taking the facts in the claim as proven, whether it is "plain and obvious" that the claim discloses no cause of action. The question of whether or not a duty of care arises from pleadings raises an issue of law.²⁶

B. The Duty of Care Assessment Framework

25. The "*Cooper/Anns*" framework for the assessment of the existence of a duty of care in negligence was summarized in *Hill* as follows:

²⁴ *Tobacco Act*, S.C. 1997, c. 13, s. 4, **A.B.A., Vol. V, Tab 75, p. 33** (*infra*, p. 35).

²⁵ *Tobacco Products Information Regulations*, SOR/2000-272, ss. 8, 9, **A.B.A., Vol. V, Tab 87, pp. 200-201.**

²⁶ Canada's *Costs Recovery* factum, paras. 29-30.

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 negative or limit that duty of care.²⁷

26. As stated in Canada's *Costs Recovery* factum, and elaborated on there in more detail,²⁸ there are several reasons why these third party claims require particularly close scrutiny in respect of the existence of a duty of care at both stages of the *Cooper/Anns* framework:

- (a) they are for pure economic loss, an area of circumscribed recovery;
- (b) they allege negligent misrepresentation, which relates to words, not deeds, and therefore invoke a particular framework requiring a "special relationship" designed to contain the undue extension of duties of care; and
- (c) they involve actions of a statutory public authority, which gives rise to unique issues, such as in respect of the interplay between private and public law duties.

C. No Duty of Care Arises Between Canada and Imperial

27. Canada does not contest, for the purposes of the motion to strike in this case, the foreseeability component of the duty of care analysis. However, with respect to the remaining aspects of that test, for the reasons set out in Canada's *Costs Recovery* factum,²⁹ a duty of care should not be extended to the relationship between Canada and Imperial in this case. In summary:

- (a) First, with respect to the issue of proximity, Canada's role in addressing the health risks posed by tobacco products, as reflected in the applicable statutory scheme, involves responsibilities to the general public only. Furthermore, private law duties owed to tobacco manufacturers would conflict with such public law duties. Finally, no "special relationship", which is required in cases of alleged negligent misrepresentation, arises in this context.

²⁷ *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, at para. 20, **A.B.A., Vol. II, Tab 21, p. 16.**

²⁸ Canada's *Costs Recovery* factum, paras. 32-35.

²⁹ See paras. 41-103 of Canada's *Costs Recovery* factum.

- (b) Second, any *prima facie* duty of care is negated by “Stage II” policy considerations, such as concerns for the creation of indeterminate liability to an indeterminate class, the creation of an unintended insurance scheme, and the shifting of the burden for economic losses from the manufacturer, the party which controls production and marketing and is responsible for the monitoring and safety of the product.
28. Canada adopts the submissions in the *Costs Recovery* factum with respect to the foregoing points.

D. No Duty of Care Arises Between Canada and Smokers

There are no “Negligent Design” Allegations in the Third Party Notice

29. As noted above, Tysoe J.A. dealt with the allegations in the third party notice in this proceeding in two broad categories: negligent misrepresentation and what he termed “negligent design”. He did not identify by paragraph what specific allegations in the third party notice he was referring to. In respect of the latter, he commenced his analysis by stating the issue as “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”.³⁰ He went on to conclude that “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... 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.”³¹

30. Aside from errors in Tysoe J.A.’s reasoning (including treating Canada as a commercial product supplier, which it was not), the third party claim here simply makes no allegation of “negligent product design” at all. The main claim alleges certain statutory “deceptive practices” by Imperial. The third party notice alleges that Canada contributed to Imperial’s damages through the former’s negligent misrepresentations to consumers. Unlike the *Costs Recovery* proceeding, where there is a negligent product design allegation made in both the main claim and the third party notices (an allegation struck by the majority there as disclosing no reasonable cause of action), no

³⁰ *Knight, supra*, at para. 46, **A.R.**, p. 47.

³¹ *Ibid.*, at para. 48, **A.R.**, p. 47.

such claim is made here. For this reason, what follows deals solely with the allegations of negligent misrepresentation in the third party notice.

(a) No *Prima Facie* Duty of Care Arises Between Canada and Smokers

31. As described in Canada's *Costs Recovery* factum, proximity identifies relationships "of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs".³² The assessment of proximity plays a critical initial phase in the evaluation of the existence of a duty of care in negligence, a phase that includes the consideration of policy factors.

32. In this case, as in the case of the alleged duty between Canada and tobacco manufacturers, the majority of the Court of Appeal erred in by-passing this assessment by treating the alleged conduct as though it fell within "one of the recognized categories of proximity": negligent misrepresentation.³³ Given the novelty of the claim in view of the alleged actions being those of a statutory public authority, a full consideration of proximity should have occurred. Such a consideration reveals that no duty of care arises in the circumstances.

(i) The Alleged Duty is Novel

33. As it did in its decision in *Costs Recovery*, the majority of the Court of Appeal erred in failing to analyze the relationship between Canada and smokers for the purpose of determining whether it fell within a category which had already been recognized as creating sufficient proximity for a duty of care to be imposed. This Court held in *Childs*, "if a case does not clearly fall within a *relationship previously recognized* as giving rise to a duty of care, it is necessary to carefully consider whether proximity is established".³⁴

34. The relationship at issue here is that between a statutory regulator and consumers of the regulated product. A duty of care has not been recognized in such circumstances. Indeed, a duty of care has been rejected by the courts in similar circumstances. In *Klein*, at issue was the existence of a duty of care in negligence between the federal Crown and an individual who suffered

³² See Canada's *Costs Recovery* factum at para. 41, citing *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24, **A.B.A., Vol. II, Tab 20, pp. 4-5**.

³³ *Knight, supra*, at paras. 66, 45, **A.R., pp. 53, 46-47**.

³⁴ *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, at para. 15 (emphasis added), **A.B.A., Vol. I, Tab 9, p. 124**.

physical harm from a medical device approved pursuant to federal regulatory authority. The Ontario Divisional Court struck out the claim against Canada. In doing so, it noted:

...the courts have not previously recognized a private law duty of care on the part of the federal government to individual members of the public with respect to the regulation of medical devices...³⁵

35. In *Kimpton*, the owner of a condominium unit brought a class action against the Province and Canada for negligence, including negligent misrepresentation, in respect of the promulgation of the B.C. Building Code and the National Building Code respectively. In striking out those claims, Macaulay J. held:

In *Cooper* (at para. 36), McLachlin C.J. reviewed generally the categories of claims, including those against government authorities, in which proximity had been recognized. In my view, none of the claims advanced against the Province or Canada fit within any of those categories. Accordingly, both stages of the *Anns* test must be applied here.³⁶

36. A duty of care between a statutory regulator and consumers or members of the public has been rejected in cases involving medical devices,³⁷ building products,³⁸ prescription drugs,³⁹ and environmental regulation.⁴⁰ A duty was also rejected in respect of a non-government consumer product standard-setting organization.⁴¹ These cases confirm that a proximity analysis is required in order to determine whether a duty of care should be recognized here.

37. The presence of allegations in the pleadings relating to the involvement of Health Canada and Agriculture Canada in research into the toxic constituents of tobacco products and the development and licencing of lower delivery tobacco strains to support same does not transform Canada's role from that of regulator to the established category of commercial product supplier. As described below, these actions were taken further to a general policy decision in pursuit of

³⁵ *Klein v. American Medical Systems Inc.* (2006), 278 D.L.R. (4th) 722 (ON S.C.), at para. 22, **A.B.A., Vol. II, Tab 32, p. 134.**

³⁶ *Kimpton v. Canada (Attorney General)*, 2002 BCSC 1645, at para. 35, aff'd 2004 BCCA 72, **A.B.A., Vol. II, Tab 31, p. 121.**

³⁷ *Attis v. Canada (Minister of Health)*, 2008 ONCA 660, at para. 51, **A.B.A., Vol. I, Tab 4, p. 79.**

³⁸ *Holtslag v. Alberta*, 2006 ABCA 51, at paras. 20-32, **A.B.A., Vol. II, Tab 23, pp. 31-35.**

³⁹ *Wuttunee v. Merck Frosst Canada Ltd.*, 2007 SKQB 29, at para. 91, **A.B.A., Vol. III, Tab 51, p. 62.**

⁴⁰ *Pearson v. Inco Ltd.* (2001), 16 C.P.C. (5th) 151 (ON S.C.), at paras. 19-24, **A.B.A., Vol. II, Tab 38, pp. 181-183.**

⁴¹ *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 219 D.L.R. (4th) 467 (ON C.A.), at paras. 43-45, **A.B.A., Vol. II, Tab 25, p. 67.**

statutory mandates to reduce the level of toxic constituents in tobacco products and to address the risks to public health, not as an aspect of commercial product design, as Tysoe J.A. erroneously viewed it.

(ii) No Proximity Arises Under the Statutory Scheme

38. As noted in Canada's *Costs Recovery* factum, consideration of the governing statutory schemes is central to the question of whether or not proximity exists between a plaintiff and a statutory public authority. The same statutory schemes are at play in this case. They do not reveal a statutory duty owed to smokers any more than they are suggestive of a duty owed to tobacco manufacturers, for the reasons canvassed in the *Costs Recovery* factum.⁴²

(iii) Conflict With Statutory Duties

39. As noted in the *Costs Recovery* factum, the potential for conflicting private and public law duties is a policy concern that has been considered at the proximity stage of the duty of care analysis in several cases, both by Canadian courts, and in other Commonwealth jurisdictions. While this factor is commonly raised at this stage of the duty of care assessment, it can also form part of "Stage II" considerations.⁴³

40. Here, a duty to smokers would conflict with Canada's statutory responsibility to the general public to consider, weigh and implement various policy approaches to the public health problem of tobacco-related disease. Certain constituencies within the general public, such as tobacco manufacturers, smokers, non-smokers or youth, may have divergent or differing interests. As in cases such as *Cooper*, the creation of a private law duty to the plaintiff class of smokers here would conflict with Health Canada's statutory duty to "balance a myriad of competing interests" in serving the general public.⁴⁴ In *Edwards*, this Court held that Ontario's *Law Society Act* did not impose a private law duty of care toward third parties who had invested in an allegedly fraudulent scheme involving funds paid into a solicitor's trust account:

... The *Law Society Act* is geared for the protection of clients and thereby the public as a whole, it does not mean that the Law Society owes a private law duty of care to

⁴² See paras. 46 to 52.

⁴³ See Canada's factum in *Costs Recovery*, paras. 53-54, 60-61.

⁴⁴ *Cooper v. Hobart*, 2001 SCC 79, at para. 49, **A.B.A., Vol. I, Tab 10, p. 139**.

a member of the public who deposits money into a solicitor's trust account. *Decisions made by the Law Society require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties.*⁴⁵

41. In *Abarquez* and *Williams*, the Ontario Court of Appeal stuck out claims against the Province of Ontario in respect of measures taken in response to the SARS outbreak of 2003. The actions were brought by nurses and patients, respectively, who had contracted SARS. In both cases, the Court of Appeal held, relying on this Court's decisions in *Cooper* and *Edwards*, that the statutory duties owed to the general public were inconsistent with a private law duty to a particular individual or group, such as the plaintiffs. Sharpe J.A. held for the Court in *Williams*:

When assessing how best to deal with the SARS outbreak, Ontario was required to address the interests of the public at large rather than focus on the particular interests of the plaintiff or other individuals in her situation. Decisions relating to the imposition, lifting or re-introduction of measures to combat SARS are clear examples of decisions that must be made on the basis of the general public interest rather than on the basis of the interests of a narrow class of individuals.⁴⁶

42. In *Abarquez*, Sharpe J.A. held:

The protection of the health of the public at large was by law the dominant concern of the Chief Medical Officer of Health when he issued the Directives. He and others exercising statutory powers to deal with SARS had to weigh and balance a myriad of competing interests and endeavour to arrive at a position that best satisfied the interests of the public at large.

When developing a public policy and elaborating standards in relation to the containment of SARS, the interests of Ontario's compassionate and courageous nurses were but one of the myriad of factors to be weighed and balanced. As has been held in the long line of cases considered in *Williams*, *the very nature of a duty by a public authority to the public at large is ordinarily inconsistent with the imposition of a private law duty of care to any individual or group of individuals.*⁴⁷

43. Decisions on the policy response to public health risks such as those posed by tobacco-related disease require the balancing of numerous differing interests. Legislation such as the *Department of Health Act* grants officials broad discretion. Such discretion is necessary to permit a

⁴⁵ *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, at para. 14 (emphasis added), **A.B.A., Vol. I, Tab 14, p. 179-180.**

⁴⁶ *Williams v. Ontario*, 2009 ONCA 378, at para. 31, leave to appeal denied [2009] S.C.C.A. No. 298, **A.B.A., Vol. III, Tab 49, p. 41.** See also paras. 24-28, **pp. 38-40.**

⁴⁷ *Abarquez v. Ontario*, 2009 ONCA 374, at paras. 25-26 (emphasis added), leave to appeal denied (2009), 403 N.R. 400 (S.C.C.), **A.B.A., Vol. I, Tab 2, p. 18.**

balancing of numerous interests, including those of smokers and non-smokers, young persons, anti-tobacco organizations, tobacco industry employees, agricultural interests and the tobacco manufacturers themselves, in the determination of the appropriate measures to protect public health.

44. A private law duty to smokers, like a duty to investors in *Cooper*, users of legal services in *Edwards*, nurses in *Abarquez* or patients in *Williams*, would hamper the fair weighing of such competing interests intended by the applicable statutory schemes. For this reason, no duty of care should be found to exist between Canada and individual smokers in this case.

No “Close and Direct” Relationship with Smokers and no Proximity

45. The third party notice alleges that Canada's officials made representations to the general public and engaged in research in the course of their regulatory mandate to protect the public.⁴⁸ It does not, however, allege conduct that provides a close factual nexus with the plaintiff class. The relationship between Canada's officials and the plaintiff class was the same as its relationship with any member of the public, as any member of the public is a potential smoker, a recipient of tobacco marketing, or influenced or affected by the smoking of others. Given the nature of this social problem and the relationship between the parties, no proximity and no duty of care arises.

46. In *Fallowka*, this Court considered the relationship between mining inspectors and miners killed by an intentional criminal act. The Court noted the significance of “personal contact” in the creation of proximity and a duty of care, and held:

... the relationship between the miners and the inspectors was much more personal and direct than the relationship between the undifferentiated multitude of lawyers' clients and the Law Society as considered in *Edwards* or the undifferentiated customers of mortgage brokers as considered in *Cooper*.⁴⁹

47. In this case, there is no allegation that a representation came to the attention of particular consumer, let alone of any direct “personal contact”. The third party notices allege representations made through press releases and public announcements to “the undifferentiated multitude of” consumers of tobacco products by Health Canada as part of its general mandate for public

⁴⁸ E.g., Amended Third Party Notice, paras. 53-75, 126, **A.R.**, pp. 148-152, 164.

⁴⁹ *Fallowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, at para. 44, **A.B.A.**, Vol. I, Tab 18, p. 208.

awareness and public health. Such a relationship is not sufficiently close and direct to create proximity.

48. Furthermore, negligent misrepresentation is at issue here. In *Hedley Byrne*, the case which first recognized this cause of action, Lord Reid considered that a duty of care should not be owed for general public statements “at large”, but only when it could be said to be that the statements were directed to a “limited class”:

It would be one thing to say that the speaker owes a duty to a limited class, but it would be going very far to say that he owes a duty to every ultimate "consumer" who acts on those words to his detriment.⁵⁰

49. This Court in *B.D.C. Ltd. v. Hofstrand Farms Ltd.* accepted that such a limitation is required in the extension of a duty of care. Estey J. held:

It is a stretching of concept to conclude that anyone who might conceivably be affected by a failure by the Province of British Columbia to register a Crown grant within the calendar year, constitutes a “limited class” the existence of which is known to a courier employed to deliver the Crown grant to a registry office. In the words of Lord Reid in *Hedley Byrne, supra*, “...it would be going very far to say that [the defendant] owes a duty to every ultimate ‘consumer’”⁵¹

50. The case at bar is unlike those in which the Crown’s actions are alleged to have focused on the plaintiff as the member of a “limited class” or a “discrete class, or group”, giving rise to proximity.⁵²

51. In *Eliopoulos*, at issue was Ontario’s 2001 West Nile virus prevention plan. The plan included the provision of information to the public and local governments on the risk of West Nile virus and on measures to mitigate the risk. It was alleged that Ontario was operationally negligent in issuing the plan, by, *inter alia*, “its failure to provide accurate information to the public about the threat of WNV”.⁵³ The Ontario Court of Appeal distinguished the case from other situations in which a duty of care was found to arise. The key distinguishing factor, also present here, was that

⁵⁰ *Hedley Byrne & Co. Ltd. v. Heller*, [1964] A.C. 465 (UK H.L.(E.)), at p. 483, **A.B.A., Vol. I, Tab 19, p. 230.**

⁵¹ [1986] 1 S.C.R. 228, at para 19, **A.B.A., Vol. I, Tab 6, p. 100.**

⁵² *Finney v. Barreau du Québec*, 2004 SCC 36, at para. 46 (“operational decisions... made in a relationship of proximity with a clearly identified complainant”), **A.B.A., Vol. I, Tab 17, pp. 202-203**; *James v. British Columbia*, 2005 BCCA 136, at para. 38 (Minister exercised his powers with respect to a specific forest licence involving “a high degree of “closeness of relationship’.”), **A.B.A., Vol. II, Tab 28, p. 102**; *755162 Ontario Inc. v. Parsons*, 2006 NLCA 60 (clearly identified and specific complainant), **A.B.A., Vol. I, Tab 1.**

⁵³ *Eliopoulos v. Ontario (Minister of Health & Long Term Care)* (2006), 276 D.L.R. (4th) 411, at para. 4, **A.B.A., Vol. I, Tab 15, pp. 184-186.**

the Crown's actions were in respect of public health generally, and not directed to a specific or narrow group of individuals. The Court held:

The Ministry merely provided others with information and recommendations. In my view, the Plan falls well short of policy decision to do something about a particular risk that triggers a private law duty of care to implement such policy at the operational level in a non-negligent manner.

I cannot accept the contention that the facts pleaded here bring the case within the principle identified in *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*. Here, the appellant bears general responsibility for promoting the health of all the province's residents but no facts are pleaded to distinguish the risk faced by Eliopoulos from the risk faced by everyone else in the province.⁵⁴

52. In *Drady*, the Ontario Court of Appeal struck out a claim against Health Canada in respect of its role in the regulation of jaw implants. The plaintiffs had alleged representations by Health Canada to the public concerning the probable safety of the device in question. The Court of Appeal held:

The pleadings do not allege that any of the three communications came to the appellant's attention or to the attention of any specific member of the public. Nowhere does the appellant plead a specific representation made to him by Health Canada. Moreover, nowhere does the appellant assert reliance, other than by pleading that members of the public generally relied on Health Canada to implement its public law duties. In the absence of a specific representation or reliance on Health Canada regarding the safety of the implant, in my view, it is plain and obvious that the appellant cannot establish a direct and close relationship of proximity that makes it just and fair to impose a private law duty of care on Health Canada.⁵⁵

53. Similarly, in *Williams*, the Ontario Court of Appeal noted in striking out the plaintiff's claim relating to Ontario's response to the SARS crisis:

Here, no facts are pleaded to suggest that the plaintiff had any direct contact or dealings with Ontario, and the allegations of negligence relate to the manner in which Ontario dealt with the risk SARS posed to the public at large...⁵⁶

⁵⁴ *Eliopoulos, supra*, at paras. 25-26, **A.B.A., Vol. I, Tab 15, pp. 193-194**.

⁵⁵ *Drady v. Canada*, 2008 ONCA 659, at para. 54, **A.B.A., Vol. I, Tab 12, p. 153**. See also *Attis v. Canada (Minister of Health)*, *supra* at paras. 45, 69, **A.B.A., Vol. I, Tab 4, pp. 77, 82**: "the fact that Health Canada's only method of notification to the public would be by public notice supports the conclusion that the duty was public, rather than private, in nature."

⁵⁶ *Williams, supra*, at para. 33, **A.B.A., Vol. III, Tab 49, pp. 41-42**.

54. In *Holtslag v. Alberta*, the Alberta Court of Appeal held that no duty of care arose between the Alberta Director of Building Standards and users of untreated pine shakes. The shakes were approved by the Director as compliant with the relevant Building Code. The Court found that the alleged “representations” to consumers through the Building Code were insufficient to ground a duty of care:

The relationship between consumers of building materials and the Director in this case is not akin to the close and direct relationship between representor and representee; or supplier and user of a product.⁵⁷

55. Similarly, in *McMillan v. Canada Mortgage & Housing Corp.*, Smith J. of the British Columbia Supreme Court held that a duty of care did not arise on the basis of representations made by the CMHC “to the public at large”, which she held insufficient to create the necessary “special relationship” between the representor and representee.⁵⁸

56. Here, as in cases such as *Eliopoulos, Drady, Williams, Holtslag* and *McMillan*, the Appellant has not alleged facts which distinguish the position or risks of any smoker allegedly harmed from those of any other. The representations and reliance alleged by Imperial are not specific to any particular smoker. In the absence of such particular alleged facts, there is insufficient proximity to ground a duty of care between Canada and individual smokers.

57. Furthermore, unlike cases involving physical harm arising from the defendant's conduct, this case involves damage in the form of alleged consequential economic loss. The relationship between parties in such circumstances is not as “close and direct” as where the defendant's actions are alleged to have created physical harm. The courts have been less inclined to find a duty of care in cases involving purely economic loss than in those alleging physical harm.⁵⁹ Taylor J.A. of the B.C. Court of Appeal in *Kripps* referred, for example, to “the very small proportion of cases of pure economic loss *simpliciter* in which the law will permit recovery”.⁶⁰ *Eliopoulos, Williams* and the above-noted medical device decisions (*Drady, Attis* and *Klein*) involved allegations of physical harm. Nonetheless, the claims in

⁵⁷ *Holtslag v. Alberta, supra*, at para. 23, see also paras. 26-27, **A.B.A., Vol. II, Tab 23, pp. 33-34.**

⁵⁸ *McMillan v. Canada Mortgage & Housing Corp.*, 2007 BCSC 1475, at para. 97, aff'd 2008 BCCA 543, **A.B.A., Vol. II, Tab 37, p. 178.**

⁵⁹ See e.g., *Martel Building Ltd. v. Canada*, 2000 SCC 60, at para. 37, **A.B.A., Vol. II, Tab 36, p. 167.**

⁶⁰ See *Kripps v. Touche Ross & Co.* (1992), 94 D.L.R. (4th) 284 (BC C.A.), at pp. 297-298, see also p. 295, leave to appeal denied (1993), 101 D.L.R. (4th) vii, **A.B.A., Vol. II, Tab 34, pp. 151-152, 149.**

these cases were struck out. The fact that purely economic loss, not physical harm, is alleged is a further consideration which indicates no duty of care should be recognized.

(iv) No “Special Relationship” is Present

58. This Court in *Hercules Management Ltd.* held that where negligent misrepresentation is alleged, the requirement of proximity can only be satisfied by a “special relationship”. Such a relationship arises where, “(a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representations; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable”.⁶¹ In this case, Tysoe J.A. for the majority concluded that the requirements of negligent misrepresentation might be made out in the pleadings in respect of the alleged duties between Canada and consumers,⁶² but provided no analysis of the existence of a “special relationship”.

59. In *Hercules Management Ltd.*, La Forest J. for the Court noted the following “five general indicia of reasonable reliance” as identified by Professor Feldthusen and set out in Canada’s *Costs Recovery* factum.⁶³ Those indicia are not satisfied here.

60. Canada is not alleged here to have had a commercial motivation in the alleged “advice, requests or direction” given to the public. Canada’s officials are not alleged to have been operating as professional advisors or to have made representations in the course of operating a business. The representations are not alleged to have been made in response to any specific enquiry or request. While the “advice, requests or direction” of Canada’s officials is alleged to have been deliberate, this was part of a series of policy responses to attempt to alter the behaviour of both consumers and manufacturers to protect the public health. These actions were not taken in an advisory capacity.

61. Furthermore, there is no allegation that the alleged representations came to the attention of any individual consumer, a consideration found relevant by the Ontario Court of Appeal in its rejection of proximity between Health Canada and users of medical devices in *Attis*.⁶⁴ As the motions judge held, “the misrepresentations alleged by Imperial in the Third Party Notice are in

⁶¹ *Hercules Management Ltd.*, *supra*, at para. 24, A.B.A., Vol. II, Tab 20, pp. 4-5.

⁶² *Knight*, *supra*, at para. 45, A.R., pp. 46-47.

⁶³ See para. 67 of Canada’s *Costs Recovery* factum.

⁶⁴ *Attis v. Canada*, *supra*, at paras. 45, 67-69, A.B.A., Vol. I, Tab 4, pp. 77, 82. See also *Drady v. Canada*, *supra*, at para. 54, A.B.A., Vol. I, Tab 12, p. 153.

the form of broad public announcements or reports consistent with the policy I have described of publicizing information with respect to tar and nicotine levels.”⁶⁵

62. For the foregoing reasons, it is plain and obvious that the essential requirement applying to negligent misrepresentation allegations of a “special relationship” is not made out in the pleadings.

(b) “Stage II” Policy Considerations

Introduction

63. As noted in Canada’s *Costs Recovery* factum, this Court held in *Cooper* that “Stage II” policy considerations “... 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.”⁶⁶ The same general policy concerns arise from the potential recognition of a *prima facie* duty of care in this case as in *Costs Recovery*. These are:

- (a) the potential creation of indeterminate liability to an indeterminate class;
- (b) permitting recovery in tort in relation to policy decisions;
- (c) the creation of an unintended insurance scheme; and
- (d) transferring responsibility from the manufacturer, who is best positioned to address liability for economic loss.

64. Canada adopts its submissions in the *Costs Recovery* factum with respect to a duty to manufacturers on the foregoing points,⁶⁷ and makes the following additional submissions which are specific to the relationship and duty alleged between Canada and smokers in this matter.

(i) Indeterminate Liability

65. In this case, Tysoe J.A. for the majority in the Court of Appeal simply summarily dismissed policy concerns for indeterminate liability, such as in respect of any duty toward consumers for economic losses:

⁶⁵ *Knight v. Imperial Tobacco Limited*, 2007 BCSC 964, at para. 44, **A.R.**, pp. 18-19.

⁶⁶ *Cooper, supra*, at para. 37, **A.B.A.**, Vol. I, Tab 10, p. 136.

⁶⁷ Canada’s *Costs Recovery* factum, paras. 73-103.

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). ... 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.⁶⁸

66. The foregoing passage fails to refer to, or apply, key considerations which have been recognized by this Court and other appellate courts in respect of indeterminate liability: the inability of a statutory authority to control the number of potential claimants and hence the scale and scope of liability, and the impact of the extension of a duty of care on a statutory authority's other responsibilities.

The Inability to Control Claims is an Important Policy Consideration

67. As noted in Canada's *Costs Recovery* factum, indeterminate liability concerns can arise where a defendant lacks control over the number of parties who may make potential claims against it. In *Cooper v. Hobart*, the concern for indeterminate liability was among the factors which negated any *prima facie* duty of care between the regulator and individual investors.⁶⁹

68. *Holtslag v. Alberta*, like this case, involved alleged "representations" to consumers. There, such representations were allegedly through the *Building Code*. The Alberta Court of Appeal rejected a duty of care between the Alberta Director of Building Standards and users of untreated pine shakes approved by the Director as compliant with the *Building Code*. In respect of the policy concern of indeterminate liability, the Court held that "the Director would have no means of controlling the number of homeowners who used the various approved products in their residences; thus, potential liability would be virtually indeterminate as would potential litigation costs."⁷⁰

69. This policy concern applies squarely to Health Canada and Agriculture Canada in the case at bar. The departments had no control over the number of cigarettes offered for sale by the tobacco industry, or the number of smokers who might suffer economic losses and seek recovery under provincial trade practices legislation.

⁶⁸ *Knight, supra*, at para. 55, **A.R.**, pp. 49-50.

⁶⁹ *Cooper, supra*, at para. 54, **A.B.A.**, Vol. I, Tab 10, p. 140.

⁷⁰ *Holtslag v. Alberta, supra*, at para. 44, leave to appeal denied: [2006] S.C.C.A. No. 142, **A.B.A.**, Vol. II, Tab 23, p. 37.

70. Tysoe J.A. for the majority failed to address this concern. Hall J.A., in dissent, however, did analyse this factor, and concluded:

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. This comment seems apposite to me in the context of the present litigation.⁷¹

71. Hall J.A. went on to refer to the Ontario Court of Appeal's judgment in *Hughes v. Sunbeam Corporation*, a class action brought by purchasers of smoke alarms against the manufacturer, as well as Underwriters Laboratories of Canada ("ULC"), an independent product testing and certification company. ULC made representations to the public through its certification program but, as in this case, it had no control over the number of products sold or the extent of claims. Laskin J.A. held in that case that concerns, *inter alia*, for indeterminate liability negated any *prima facie* duty of care toward the plaintiff owed by ULC.⁷²

Indeterminate Liability Arising from the Statutory Authority's Mandate

72. In *Cooper*, this Court recognized that "Stage II" policy considerations include "the effect of recognizing a duty of care on other legal obligations."⁷³ In *Holtslag v. Alberta*, discussed above, the Alberta Court of Appeal noted that policy concerns for indeterminate liability are not restricted to the impact on the specific product or case at issue, but extend to the impact of extending a duty of care to cover other responsibilities of the statutory authority.⁷⁴

73. In *Costs Recovery*, the policy concern relates to the impact of recognizing a duty of care between Canada and regulated manufacturers on Canada's other statutory responsibilities. The analogous policy concern here relates to the impact of recognition of a duty to the end users of the regulated product: smokers.

⁷¹ *Knight, supra*, at para. 103, **A.R.**, p. 67.

⁷² (2002), 219 D.L.R. (4th) 467 (Ont. C.A.) at paras. 48-50, leave to appeal denied, [2003] 1 S.C.R. xi, **A.B.A.**, Vol. II, Tab 25, p. 68.

⁷³ *Cooper, supra*, at para. 37, **A.B.A.**, Vol. I, Tab 10, p. 136.

⁷⁴ *Holtslag v. Alberta, supra*, at para. 43, **A.B.A.**, Vol. II, Tab 23, p. 37.

74. In *Attis v. Canada*, the Ontario Court of Appeal considered a claim by an end user arising from the regulation of a medical device and rejected the extension of a duty of care (in respect of personal injury) due to this policy concern. The Court held:

Indeterminate liability, in my view, is the most relevant policy consideration because the imposition of a duty of care in this case may result in the government becoming the virtual insurer of medical devices. The appellants argue that indeterminate liability is not a concern because the number of affected consumers in this proceeding is relatively contained. *However, Health Canada's responsibilities extend far beyond the regulation of the specific devices at issue in this case to the regulation of thousands of other devices. In addition, potential liability could extend for medical devices to other products regulated under the FDA [Food and Drugs Act], such as food, drugs and cosmetics, as well as many other regulatory regimes.* It follows that the imposition of liability on the public purse would place an indeterminate strain on available resources. Accordingly in my view, the prospect of indeterminate liability weighs against the imposition of liability in this case.⁷⁵

75. As in *Attis*, the concern for extension of liability here goes beyond the instant case. It is magnified because what is claimed here is economic loss. The recognition of a duty of care would lead to the expansion of potential liability for the economic losses of consumers of many other products (pharmaceuticals, cosmetics, medical devices, food, etc.) subject to regulatory action by Health Canada and Agriculture Canada, and indeed to duties in respect of such losses arising from commercial products subject to regulation by other departments and other governments.⁷⁶ The majority failed to consider this.

76. The indeterminate nature of such liability is not an issue which reasonably requires the provision of evidence at trial for its determination. Its nature is apparent on the face of the pleadings and should properly be resolved at a preliminary stage.

⁷⁵ *Attis v. Canada (Minister of Health)*, *supra*, at para. 74 (emphasis added), leave to appeal denied, [2008] S.C.C.A. No. 491, **A.B.A., Vol. I, Tab 4, p. 83**.

⁷⁶ See, e.g. Medical device regulation under the *Food and Drug Act*, R.S.C. (1985), c. F-27 and the regulations under that *Act*; *Attis v. Canada (Minister of Health)*, *supra*, **Vol. I, Tab 4**; *Drady v. Canada*, *supra*, **Vol. I, Tab 12**; *Klein*, *supra*, **Vol. II, Tab 32**; Issuance of the *National Building Code for Canada* pursuant to the general authority of the *National Research Council Act*, R.S.C. (1985), c. N-14 and distributed by CMHC: *Kimpton v. Canada (Attorney General)*, *supra*, **Vol. II, Tab 31**; *Canada Mortgage and Housing Corporation Act*, R.S.C. (1985), c. C-7 and *National Housing Act: McMillan v. Canada Mortgage & Housing Corp.*, *supra*, **Vol. II, Tab 37**; *Strata Plan VR 2275 v. Davidson*, 2008 BCSC 77, at para. 38, **Vol. II, Tab 43, p. 239**; Regulation of other dental and medical products by Health Canada: *Holland v. British Columbia.*, 2008 BCSC 965, at paras. 72-73, **Vol. II, Tab 22, pp. 25-26**.

(ii) Policy Decisions

77. As noted above, the main proceeding here is limited to recovery for deceptive practices arising from the purchase of cigarettes after May 8, 1997, well after the passage of the first tobacco-specific regulatory statutes in 1988. The fact that this legislation expressly incorporated the same policy approach which had informed Canada's tobacco policy for many years underlines that Canada's relevant actions in its response to the public health risks posed by tobacco products, as alleged in the pleadings here, were policy decisions which do not give rise to tort liability.

78. The third party notice attacks directly, as negligent conduct, regulations made under the *Tobacco Products Control Act* and *Tobacco Act*. It is alleged, for example:

- (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*. ...
- (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.⁷⁷

79. The use of "standard smoking methods", the "publication of tar and nicotine and other smoke constituent yields" and the provision of "information concerning tar and nicotine levels" are matters dealt with in regulations.⁷⁸

80. As discussed in Canada's *Costs Recovery* factum, the majority erroneously held, relying upon *Sauer v. Canada*,⁷⁹ that evidence was required to determine whether such allegations relate to policy decisions and should be struck out. For the reasons discussed there,⁸⁰ evidence is not necessary to determine that a claim which attacks legislative decisions as reflected in regulations is not actionable.

⁷⁷ Amended Third Party Notice, para. 124, emphasis added, **A.R.**, pp. 161-164.

⁷⁸ *Tobacco Products Control Regulations*, SOR/89-21, December 27, 1988, s. 11(1), **Vol. V, Tab 86, p. 179**; *Tobacco Products Information Regulations*, SOR/2000-272, ss. 8, 9, **Vol. V, Tab 87, pp. 200-201**.

⁷⁹ 2007 ONCA 454, leave to appeal denied [2007] S.C.C.A. No. 454, **Vol. II, Tab 42**.

⁸⁰ See paras. 87-91 of Canada's *Costs Recovery* factum.

81. The dissent in *Knight* correctly recognized that Canada's conduct reflected "a policy decision taken by Canada at the ministerial level with a view to diminish the health risks of consumers of tobacco products".⁸¹ Hall J.A. concluded that while Canada "arguably could have undertaken other or more efficacious interventions ... these largely political and social decisions based on broad health concerns were for government"⁸² are not subject to action in tort.

82. The Chambers Judge and minority in the Court of Appeal in *Knight* correctly found that Canada's alleged conduct which did not directly take the form of regulations "reflects the policy of Canada to lower tar and nicotine in cigarettes and to require tar and nicotine information for itself and for publication". Hall J.A. correctly held:

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.⁸³

83. As canvassed in greater detail in the *Costs Recovery* factum, the claim should be struck for the reasons set out in the dissent of Hall J.A.

(iii) A Duty of Care to Smokers Would Create an Unintended Insurance Scheme

84. Imposing a duty of care here would make Canadian taxpayers the effective insurers of all risks relating to the defendant's tobacco products. This policy concern should also negate any *prima facie* duty of care found to exist. Canada adopts its submissions in the *Costs Recovery* factum in this respect.

(iv) The Manufacturer is Best Positioned to Address Liability for Economic Loss

85. Canada adopts its submissions in the *Costs Recovery* factum in this respect. Furthermore, in the context of the alleged duty between Canada and smokers, the law already provides remedies to smokers, in the form of the very kind of class proceedings brought here against the manufacturer

⁸¹ Reasons of Hall J.A., *Knight, supra*, at para. 99, **A.R., p. 65**.

⁸² *Ibid.*, at para 99, **A.R., p. 65**.

⁸³ *Ibid.*, at para. 100, **A.R., p. 66**.

under provincial trade practices legislation. The presence of such alternative remedies is a factor considered by this Court as weighing against the recognition of a private law duty.⁸⁴

86. Canada does not manufacture or market cigarettes and did not create the public health risks posed by these products. Its role was directed towards mitigating the effects of the public health problems arising from tobacco products. The manufacturer controlled product design, production and marketing. It bears legal responsibility for warning the consumer in respect of risks posed, and is responsible to them in tort, or for breaches of provincial trade practices legislation. As held in *Klein*, “[t]he proper defendant in such cases is clearly the manufacturer who is responsible for the careful monitoring and long-term safety of” the product.⁸⁵

Conclusion – “Stage II” Policy Considerations

87. For the foregoing reasons, if the Court finds that a *prima facie* duty of care arises between Canada and smokers, such duty ought nonetheless to be negated by policy considerations.

PART IV – COSTS

88. The appellant seeks its costs of this appeal and in the courts below.

PART V – ORDER SOUGHT

89. The appellant seeks an order striking out the third party notices in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa,
this 27th day of October, 2010.

John S. Tyhurst
Department of Justice Canada
Of Counsel for the Appellant

⁸⁴ See, e.g., *Edwards, supra*, at para. 15, **A.B.A., Vol. I, Tab 14, p. 180.**

⁸⁵ *Klein, supra*, at para. 37, **A.B.A., Vol. II, Tab 32, p. 137.**

PART VI – ALPHABETICAL TABLE OF AUTHORITIES

<i>Jurisprudence</i>	<i>Paragraph(s)</i>
<i>755162 Ontario Inc. v. Parsons</i> , 2006 NLCA 60	.....50
<i>Abarquez v. Ontario</i> , 2009 ONCA 374	.....41, 42, 44
<i>Anns v. Merton London Borough Council</i> , [1978] A.C. 728 (UK H.L.(E.))	.....1, 25, 26
<i>Attis v. Canada (Minister of Health)</i> , 2008 ONCA 660	.....36, 52, 57, 61, 74, 75
<i>B.D.C. Ltd. v. Hofstrand Farms Ltd.</i> , [1986] 1 S.C.R. 228	.....49
<i>Childs v. Desormeaux</i> , [2006] 1 S.C.R. 643	.....33
<i>Cooper v. Hobart</i> , 2001 SCC 79	... 1, 25, 26, 40, 41, 44, 63, 67, 72
<i>Drady v. Canada</i> , 2008 ONCA 659	.....52, 56, 57, 61, 75
<i>Edwards v. Law Society of Upper Canada</i> , 2001 SCC 80	.....40, 41, 44, 85
<i>Eliopoulos v. Ontario (Minister of Health & Long Term Care)</i> (2006), 276 D.L.R. (4 th) 411	.....51, 56, 57
<i>Finney v. Barreau du Québec</i> , 2004 SCC 36	.....50
<i>Fullowka v. Pinkerton’s of Canada Ltd.</i> , 2010 SCC 5	.....46
<i>Hedley Byrne & Co. Ltd. v. Heller</i> , [1964] A.C. 465 (UK H.L.(E.))	.....48
<i>Hercules Management Ltd. v. Ernst & Young</i> , [1997] 2 S.C.R. 165	.....31, 58, 59
<i>Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board</i> , 2007 SCC 41	.....25
<i>Holland v. British Columbia</i> , 2008 BCSC 965	.....75
<i>Holtslag v. Alberta</i> , 2006 ABCA 51	.....36, 54, 56, 68, 72
<i>Hughes v. Sunbeam Corp. (Canada) Ltd.</i> (2002), 219 D.L.R. (4 th) 467 (ON C.A.)	.....36, 71
<i>Hunt v. Carey Canada Inc.</i> , [1990] 2 S.C.R. 959	.....24

<i>Jurisprudence (cont’d)</i>	<i>Paragraph(s)</i>
<i>James v. British Columbia</i> , 2005 BCCA 136	.....50
<i>Kimpton v. Canada (Attorney General)</i> , 2002 BCSC 1645	.....35, 75
<i>Klein v. American Medical Systems Inc.</i> (2006), 278 D.L.R. (4 th) 722 (ON S.C.)	.....34, 57, 75, 86
<i>Kripps v. Touche Ross & Co.</i> (1992), 94 D.L.R. (4 th) 284 (BC C.A.)	.....57
<i>Martel Building Ltd. v. Canada</i> , 2000 SCC 60	.....57
<i>McMillan v. Canada Mortgage & Housing Corp.</i> , 2007 BCSC 1475	.....55, 56, 75
<i>Pearson v. Inco Ltd.</i> (2001), 16 C.P.C. (5 th) 151 (ON S.C.)	.....36
<i>Sauer v. Canada</i> , 2007 ONCA 454	.....80
<i>Strata Plan VR 2275 v. Davidson</i> , 2008 BCSC 77	.....75
<i>Williams v. Ontario</i> , 2009 ONCA 378	.....41, 44, 53, 56, 57
<i>Wuttunee v. Merck Frosst Canada Ltd.</i> , 2007 SKQB 29	.....36
 <i>Statutes and Regulations</i>	
<i>An Act to prohibit the advertising and promotion and respecting the labeling and monitoring of tobacco products</i> , Bill C-51, 2 nd Sess, 33 rd Parl., 1986-88	.....20
<i>Canada Mortgage and Housing Corporation Act</i> , R.S.C. (1985), c. C-7	.....75
<i>Cigarette Poison Content Control Act</i> , Bill C-147, 1 st Sess., 28 th Parl., 1968	.....18
<i>Cigarette Tar and Nicotine Content Act</i> , Bill C-163, 1 st Sess., 28 th Parl., 1968-69	.....18
<i>Cigarette Products Act</i> , Bill C-248, 3 rd Sess., 28 th Parl., 1970-71	.....18, 19
<i>Cigarette Tar and Nicotine Content Act</i> , Bill C-46, 3 rd Sess., 28 th Parl., 1970-72	.....18
<i>Cigarette Tar and Nicotine Content Act</i> , Bill C-125, 4 th Sess., 28 th Parl., 1972	.....18

<i>Statutes and Regulations (cont'd)</i>	<i>Paragraph(s)</i>
<i>The Business Practices and Consumer Protection Act</i> , R.S.B.C. 1996, c. 457	.....7
<i>The Business Practices and Consumer Protection Act</i> , S.B.C. 2004, c. 2	.....7
<i>Department of Health Act</i> , S.C. 1996, c. 8	.....43
<i>Food and Drug Act</i> , R.S.C. (1985), c. F-27	.....75
<i>Law Society Act</i> , R.S.O. (1990), c. L-8	.....40
<i>National Research Council Act</i> , R.S.C. (1985), c. N-14	.....75
<i>Tobacco Act</i> , S.C. 1997, c. 13	.....21, 78
<i>Tobacco Products Control Act</i> , S.C. 1988, c. 20	.....20, 78
<i>Tobacco Products Control Regulations</i> , SOR/89-21, December 22, 1988	.....20, 79
<i>Tobacco Products Information Regulations</i> , SOR/2000-272	.....21, 79
<i>The Trade Practices Act</i> , R.S.B.C. (1996), c. 457	.....7

PART VII
STATUTES AND REGULATIONS

This Act is Current to October 6, 2010

BUSINESS PRACTICES AND CONSUMER PROTECTION ACT

[SBC 2004] CHAPTER 2

Assented to March 31, 2004

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Damages recoverable

171 (1) Subject to subsection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a

- (a) supplier,
- (b) reporting agency, as defined in section 106 [*definitions*],
- (c) collector, as defined in section 113 [*definitions*],
- (d) bailiff, collection agent or debt pooler, as defined in section 125 [*definitions*], or
- (e) a person required to hold a licence under Part 9 [*Licences*]

who engaged in or acquiesced in the contravention that caused the damage or loss.

(2) A person must not bring an action under this section if an application has been made, on the person's behalf, to the court in respect of the same defendant and transaction under section 192 [*compensation to consumers*].

(3) The Provincial Court has jurisdiction for the purposes of this section, even though a contravention of this Act or the regulations may also constitute a libel or slander.

Court actions respecting consumer transactions

172 (1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:

- (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
- (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.

(2) If the director brings an action under subsection (1), the director may sue on the director's own behalf and, at the director's option, on behalf of consumers generally or a designated class of consumers.

(3) If the court grants relief under subsection (1), the court may order one or more of the following:

(a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;

(b) if the action is brought by the director, that the supplier pay to the director the actual costs, or a reasonable proportion of the costs, of the inspection of the supplier conducted under this Act;

(c) that the supplier advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section.

(4) The director may apply, without notice to anyone, for an interim injunction under subsection (1) (b).

(5) In an application for an interim injunction under subsection (1) (b),

(a) the court must give greater weight and the balance of convenience to the protection of consumers than to the carrying on of the business of a supplier,

(b) the applicant is not required to post a bond or give an undertaking as to damages, and

(c) the applicant is not required to establish that irreparable harm will be done to the applicant, consumers generally or any class of consumers if the interim injunction is not granted.

(6) If the director applies, without notice to anyone, for an interim injunction under subsection (1) (b), the court must grant the interim injunction, on the terms and conditions it considers just, if the court is satisfied that there are reasonable grounds for believing there is an immediate threat to the interests of consumers dealing with the supplier because of an alleged contravention of this Act or the regulations in respect of a consumer transaction.

(7) In an action brought under subsection (1), or an appeal from it, the plaintiff is not required to provide security for costs.

Notice to director

173 (1) A person who

(a) brings an action under section 171 [*damages recoverable*] must serve the director with,



CANADA

CONSOLIDATION

CODIFICATION

Tobacco Act

Loi sur le tabac

S.C. 1997, c. 13

L.C. 1997, ch. 13

Current to October 6, 2010

À jour au 6 octobre 2010

OFFICIAL STATUS
OF CONSOLIDATIONS

CARACTÈRE OFFICIEL
DES CODIFICATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1^{er} juin 2009, prévoient ce qui suit :

Published
consolidation is
evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Codifications
comme élément
de preuve

Inconsistencies
in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

Incompatibilité
— lois



1997, c. 13

1997, ch. 13

An Act to regulate the manufacture, sale, labelling and promotion of tobacco products, to make consequential amendments to another Act and to repeal certain Acts

Loi réglementant la fabrication, la vente, l'étiquetage et la promotion des produits du tabac, modifiant une autre loi en conséquence et abrogeant certaines lois

[Assented to 25th April 1997]

[Sanctionnée le 25 avril 1997]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

SHORT TITLE

TITRE ABRÉGÉ

Short title

1. This Act may be cited as the *Tobacco Act*.

1. *Loi sur le tabac*.

Titre abrégé

INTERPRETATION

DÉFINITIONS

Definitions

2. The definitions in this section apply in this Act.

2. Les définitions qui suivent s'appliquent à la présente loi.

Définitions

"accessory"
« accessoire »

"accessory" means a product that may be used in the consumption of a tobacco product, including a pipe, cigarette holder, cigar clip, lighter and matches.

«accessoire» Produit qui peut être utilisé pour la consommation d'un produit du tabac, notamment une pipe, un fume-cigarettes, un coupe-cigare, des allumettes ou un briquet.

« accessoire »
"accessory"

"additive"
« additif »

"additive" means an ingredient other than tobacco leaves.

«additif» Ingrédient autre que les feuilles de tabac.

« additif »
"additive"

"analyst"
« analyste »

"analyst" means a person designated as an analyst under subsection 34(1).

«analyste» Personne désignée à titre d'analyste aux termes du paragraphe 34(1).

« analyste »
"analyst"

"blunt wrap"
« feuille
d'enveloppe »

"blunt wrap" means a sheet, including one that is rolled, that is composed of natural or reconstituted tobacco and that is ready to be filled.

«détaillant» Personne qui exploite une entreprise consistant en tout ou en partie dans la vente de produits du tabac au consommateur.

« détaillant »
"retailer"

"brand element"
« élément de
marque »

"brand element" includes a brand name, trademark, trade-name, distinguishing guise, logo, graphic arrangement, design or slogan that is reasonably associated with, or that evokes, a product, a service or a brand of product or service, but does not include a colour.

«élément de marque» Sont compris dans les éléments de marque un nom commercial, une marque de commerce, un logo, un signe distinctif, un dessin ou un slogan qu'il est raisonnablement possible d'associer à un produit, à un service ou à une marque d'un produit ou d'un service ou qui les évoque, à l'exception d'une couleur.

« élément de
marque »
"brand element"

"emission"
« émission »

"emission" means a substance that is produced when a tobacco product is used.

<p>“entity” « entité »</p>	<p>“entity” includes a corporation, firm, partnership, association, society, trust or other organization, whether incorporated or not.</p>	<p>« emballage » [Abrogée, 2009, ch. 27, art. 2]</p> <p>« émission » Substance qui est produite quand un produit du tabac est utilisé.</p>	<p>« émission » “emission”</p>
<p>“furnish” « fournir »</p>	<p>“furnish” means to sell, lend, assign, give or send, with or without consideration, or to barter or deposit with another person for the performance of a service.</p>	<p>« entité » Personne morale, firme, société de personnes, fiducie, association ou autre organisation, dotée ou non de la personnalité morale.</p>	<p>« entité » “entity”</p>
<p>“ingredient” « ingrédient »</p>	<p>“ingredient” means tobacco leaves and any substance used in the manufacture of a tobacco product or its components, including any substance used in the manufacture of that substance.</p>	<p>« fabricant » Est assimilée au fabricant de produits du tabac toute entité qui a des liens avec lui, notamment qui le contrôle ou qui est contrôlée par lui ou qui est contrôlée par la même entité que celle qui le contrôle.</p>	<p>« fabricant » “manufacturer”</p>
<p>“inspector” « inspecteur »</p>	<p>“inspector” means a person designated as an inspector under subsection 34(1).</p>	<p>« fabriquer » Est assimilé à l’acte de fabriquer le produit du tabac le fait de le distribuer, de l’importer, de l’emballer ou de l’étiqueter pour le vendre au Canada.</p>	<p>« fabriquer » “manufacture”</p>
<p>“little cigar” « petit cigare »</p>	<p>“little cigar” means a roll or tubular construction that</p> <p>(a) is intended for smoking;</p> <p>(b) contains a filler composed of natural or reconstituted tobacco;</p> <p>(c) has a wrapper, or a binder and a wrapper, composed of natural or reconstituted tobacco; and</p> <p>(d) has a cigarette filter or weighs no more than 1.4 g, excluding the weight of any mouthpiece or tip.</p> <p>It includes any tobacco product that is prescribed to be a little cigar.</p>	<p>« feuille d’enveloppe » Feuille, y compris une feuille roulée, prête à être remplie et composée notamment de tabac naturel ou reconstitué.</p> <p>« fournir » Vendre, prêter, céder, donner ou expédier à un autre, à titre gratuit ou onéreux, ou échanger contre un produit ou un service.</p> <p>« ingrédient » S’entend des feuilles de tabac et de toute substance utilisée dans la fabrication d’un produit du tabac ou de ses composants et vise notamment les substances utilisées dans la fabrication d’une telle substance.</p> <p>« inspecteur » Personne désignée à titre d’inspecteur aux termes du paragraphe 34(1).</p>	<p>« feuille d’enveloppe » “blunt wrap”</p> <p>« fournir » “furnish”</p> <p>« ingrédient » “ingredient”</p> <p>« inspecteur » “inspector”</p>
<p>“manufacture” « fabriquer »</p>	<p>“manufacture”, in respect of tobacco products, includes the packaging, labelling, distributing and importing of tobacco products for sale in Canada.</p>	<p>« jeune » Personne âgée de moins de dix-huit ans.</p>	<p>« jeune » “young person”</p>
<p>“manufacturer” « fabricant »</p>	<p>“manufacturer”, in respect of tobacco products, includes any entity that is associated with a manufacturer, including an entity that controls or is controlled by the manufacturer or that is controlled by the same entity that controls the manufacturer.</p>	<p>« ministre » Le ministre de la Santé.</p>	<p>« ministre » “Minister”</p>
<p>“Minister” « ministre »</p>	<p>“Minister” means the Minister of Health.</p> <p>“package” [Repealed, 2009, c. 27, s. 2]</p>	<p>« petit cigare » Rouleau ou article de forme tubulaire qui remplit les conditions suivantes :</p> <p>a) il est destiné à être fumé;</p> <p>b) il comporte une tripe composée notamment de tabac naturel ou reconstitué;</p> <p>c) il comporte soit une sous-cape et une cape, soit une cape qui sont composées notamment de tabac naturel ou reconstitué;</p> <p>d) il comporte un bout-filtre de cigarette ou pèse au plus 1,4 gramme, sans le poids des embouts.</p>	<p>« petit cigare » “little cigar”</p>
<p>“prescribed” <i>Version anglaise seulement</i></p>	<p>“prescribed” means prescribed by regulation.</p>	<p>La présente définition vise aussi les produits du tabac que les règlements désignent comme des petits cigares.</p>	
<p>“retailer” « détaillant »</p>	<p>“retailer” means a person who is engaged in a business that includes the sale of a tobacco product to consumers.</p>		
<p>“sell” « vendre »</p>	<p>“sell” includes offer for sale and expose for sale.</p>		

Tabac — 6 octobre 2010

"tobacco product" « produit du tabac »	"tobacco product" means a product composed in whole or in part of tobacco, including tobacco leaves and any extract of tobacco leaves. It includes cigarette papers, tubes and filters but does not include any food, drug or device that contains nicotine to which the <i>Food and Drugs Act</i> applies.	« produit du tabac » Produit fabriqué à partir du tabac, y compris des feuilles et des extraits de celles-ci; y sont assimilés les tubes, papiers et filtres à cigarette. Sont toutefois exclus de la présente définition les aliments, drogues et instruments contenant de la nicotine régis par la <i>Loi sur les aliments et drogues</i> .	« produit du tabac » "tabacco product"
"young person" « jeune »	"young person" means a person under eighteen years of age. 1997, c. 13, s. 2; 2009, c. 27, s. 2.	« vendre » Est assimilé à l'acte de vendre le fait de mettre en vente ou d'exposer pour la vente. 1997, ch. 13, art. 2; 2009, ch. 27, art. 2.	« vendre » "sell"
GOVERNOR IN COUNCIL'S POWERS		POUVOIRS DU GOUVERNEUR EN CONSEIL	
Regulations — little cigar	2.1 (1) The Governor in Council may make regulations prescribing any tobacco product to be a little cigar for the purpose of the definition "little cigar".	2.1 (1) Le gouverneur en conseil peut, par règlement, désigner tout produit du tabac comme petit cigare pour l'application de la définition de ce terme.	Règlements — petit cigare
Order in council — little cigar	(2) The Governor in Council may, by order, amend the definition "little cigar" by replacing the weight set out in that definition by a weight that is not less than 1.4 g. 2009, c. 27, s. 3.	(2) Le gouverneur en conseil peut, par décret, remplacer le poids qui figure à la définition de «petit cigare» par un poids égal ou supérieur à 1,4 gramme. 2009, ch. 27, art. 3.	Décret — cigare
HER MAJESTY		SA MAJESTÉ	
Binding on Her Majesty	3. This Act is binding on Her Majesty in right of Canada or a province.	3. La présente loi lie Sa Majesté du chef du Canada ou d'une province.	Obligation de Sa Majesté
PURPOSE		OBJET	
Purpose of Act	4. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular, (a) to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases; (b) to protect young persons and others from inducements to use tobacco products and the consequent dependence on them; (c) to protect the health of young persons by restricting access to tobacco products; and (d) to enhance public awareness of the health hazards of using tobacco products.	4. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave et d'envergure nationale et, plus particulièrement : a) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant, de façon indiscutable, un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles; b) de préserver notamment les jeunes des incitations à l'usage du tabac et du tabagisme qui peut en résulter; c) de protéger la santé des jeunes par la limitation de l'accès au tabac; d) de mieux sensibiliser la population aux dangers que l'usage du tabac présente pour la santé.	Santé publique

Tobacco Products Control Regulations, SOR/89-21, C. Gaz. 1988.II.57, ss. 1-9, 17

18/1/89 *Canada Gazette Part II, Vol. 123, No. 2*

Gazette du Canada Partie II, Vol. 123, N° 2 SOR/DORS/89-21

Registration
SOR/89-21 27 December, 1988

Enregistrement
DORS/89-21 27 décembre 1988

TOBACCO PRODUCTS CONTROL ACT

LOI RÉGLEMENTANT LES PRODUITS DU TABAC

Tobacco Products Control Regulations

Règlement sur les produits du tabac

P.C. 1988-2789 22 December, 1988

C.P. 1988-2789 22 décembre 1988

Her Excellency the Governor General in Council, on the recommendation of the Minister of National Health and Welfare, pursuant to section 17 of the Tobacco Products Control Act*, is pleased hereby to make the annexed Regulations respecting the control of tobacco products, effective January 1, 1989.

Sur avis conforme du ministre de la Santé nationale et du Bien-être social et en vertu de l'article 17 de la Loi réglementant les produits du tabac*, il plaît à Son Excellence le Gouverneur général en conseil de prendre, à compter du 1^{er} janvier 1989, le Règlement concernant les produits du tabac, ci-après.

REGULATIONS RESPECTING THE CONTROL OF
TOBACCO PRODUCTS

RÈGLEMENT CONCERNANT LES PRODUITS DU
TABAC

Short Title

Titre abrégé

1. These Regulations may be cited as the *Tobacco Products Control Regulations*.

1. *Règlement sur les produits du tabac*.

Interpretation

Définitions

2. In these Regulations,

2. Les définitions qui suivent s'appliquent au présent règlement.

“Act” means *Tobacco Products Control Act; (Loi)*

«concours» À l'égard d'une activité ou manifestation culturelle ou sportive, l'ensemble des dépenses engagées par le fabricant ou l'importateur de produits du tabac, à l'exclusion des salaires et avantages sociaux versés à ses employés permanents. (*contributions*)

“contributions” means, in respect of a cultural or sporting activity or event, all expenditures made by a manufacturer or importer of tobacco products, but does not include the salaries and benefits paid to regular employees of the manufacturer or importer; (*concours*)

“principal display panel” means,

«espace principal»

(a) in the case of a package that is mounted on a display card, that part of the label applied to all or part of the principal display surface of the package or to all or part of the side of the display card that is displayed or visible under normal or customary conditions of sale or use, or to both such parts of the package and the display card, and

a) S'il s'agit d'un emballage fixé sur une carte réclame, la partie de l'étiquette qui recouvre entièrement ou partiellement la principale surface exposée de l'emballage ou le côté de la carte réclame qui est exposé ou visible dans les conditions normales ou habituelles de vente ou d'utilisation, ou encore ces deux parties de l'emballage et de la carte réclame;

(b) in the case of all other packages, that part of the label applied to all or part of the principal display surface; (*espace principal*)

b) s'il s'agit de tout autre emballage, la partie de l'étiquette qui recouvre entièrement ou partiellement la principale surface exposée. (*principal display panel*)

“principal display surface” means,

«Loi» La *Loi réglementant les produits du tabac*. (Act)

«principale surface exposée»

(a) in the case of a package that has a side or surface that is displayed or visible under normal or customary conditions of sale or use, the total area of such side or surface excluding the top, if any,

a) S'il s'agit d'un emballage dont un côté ou une surface est exposé ou visible dans les conditions normales ou habituelles de vente ou d'utilisation, la superficie totale de ce côté ou de cette surface, à l'exclusion du dessus, le cas échéant;

(b) in the case of a package that has a lid that is the part of the container displayed or visible under normal or customary conditions of sale or use, the total area of the top surface of the lid,

b) s'il s'agit d'un emballage dont le couvercle est la partie du contenant qui est exposée ou visible dans les conditions normales ou habituelles de vente ou d'utilisation, la superficie totale de la surface supérieure du couvercle;

(c) in the case of a package that does not have a side or surface that is displayed or visible under normal or customary conditions of sale or use, any 40 per cent of the

* S.C. 1988, c. 20

* L.C. 1988, ch. 20

total surface area of the package, excluding the top and bottom, if any, if such 40 per cent of the total surface area can be displayed or visible under normal or customary conditions of sale or use,

(d) in the case of a package that is a bag with sides of equal dimensions, the total area of one of the sides,

(e) in the case of a package that is a bag with sides of more than one size, the total area of one of the larger sides, and

(f) in the case of a package that is a wrapper or confining band that is so narrow in relation to the size of the product contained that it cannot reasonably be said to have any side or surface that is displayed or visible under normal or customary conditions of sale or use, the total area of one side of a ticket or tag attached to such package; (*principale surface exposée*)

“retail price” means the price, including taxes, at which an article or a tobacco product is sold or offered for sale by a retailer; (*prix de détail*)

“toxic constituent” means,

(a) in the case of all tobacco products, nicotine, and

(b) in the case of the smoke produced by the combustion of cigarettes, cigarette tobacco, cigars or pipe tobacco,

(i) tar,

(ii) nicotine, and

(iii) carbon monoxide. (*substance toxique*)

Advertising

3. Subject to subsection 4(4), every sign used in the advertisement of a tobacco product shall comply with section 15.

4. (1) Subject to subsection (4), every sign used in the advertisement of cigarettes or cigarette tobacco shall display, effective July 1, 1989, in English or in French in accordance with the language displayed elsewhere on the sign, the following health warning, namely,

“Smoking causes lung cancer, emphysema and heart disease.

L'usage du tabac cause le cancer du poumon, l'emphysème et la cardiopathie.”

(2) Subject to subsection (4), every sign used in the advertisement of cigars or pipe tobacco shall display, effective July 1, 1989, in English or in French in accordance with the language displayed elsewhere on the sign, the following health warning, namely,

“This product can cause cancer.

Ce produit peut causer le cancer.”

(3) Subject to subsection (4), every sign used in the advertisement of smokeless tobacco shall display, effective July 1, 1989, in English or in French in accordance with the language displayed elsewhere on the sign, the following health warning, namely,

c) s'il s'agit d'un emballage dont aucun côté ou aucune surface n'est exposé ou visible dans les conditions normales ou habituelles de vente ou d'utilisation, 40 pour cent de la superficie totale de l'emballage, à l'exclusion du dessus et du dessous, le cas échéant, si ces 40 pour cent peuvent être exposés ou visibles dans les conditions normales ou habituelles de vente ou d'utilisation;

d) s'il s'agit d'un emballage qui est un sac aux côtés d'égaux dimensions, la superficie totale de l'un des côtés;

e) s'il s'agit d'un emballage qui est un sac aux côtés de dimensions différentes, la superficie totale de l'un des plus grands côtés;

f) s'il s'agit d'un emballage qui est une enveloppe ou une bande si étroite par rapport aux dimensions du produit emballé qu'on ne peut vraisemblablement pas prétendre qu'il a un côté ou une surface exposé ou visible dans les conditions normales ou habituelles de vente ou d'utilisation, la superficie totale d'un côté de l'étiquette fixe ou volante fixée à cet emballage. (*principal display surface*)

«prix de détail» Prix, taxes comprises, auquel un article ou un produit du tabac est vendu ou mis en vente par le détaillant. (*retail price*)

«substance toxique»

a) Pour tous les produits du tabac, la nicotine;

b) pour la fumée dégagée par la combustion des cigarettes, du tabac à cigarettes, des cigares ou du tabac à pipe :

(i) le goudron,

(ii) la nicotine,

(iii) l'oxyde de carbone. (*toxique constituant*)

Publicité

3. Sous réserve du paragraphe 4(4), toute affiche servant à la publicité en faveur des produits du tabac doit être conforme à l'article 15.

4. (1) Sous réserve du paragraphe (4), toute affiche servant à la publicité en faveur des cigarettes ou du tabac à cigarettes doit, à compter du 1^{er} juillet 1989, comporter la mise en garde suivante dans la langue officielle utilisée pour l'affiche :

«L'usage du tabac cause le cancer du poumon, l'emphysème et la cardiopathie.

Smoking causes lung cancer, emphysema and heart disease.»

(2) Sous réserve du paragraphe (4), toute affiche servant à la publicité en faveur des cigares ou du tabac à pipe doit, à compter du 1^{er} juillet 1989, comporter la mise en garde suivante dans la langue officielle utilisée pour l'affiche :

«Ce produit peut causer le cancer.

This product can cause cancer.»

(3) Sous réserve du paragraphe (4), toute affiche servant à la publicité en faveur du tabac sans fumée doit, à compter du 1^{er} juillet 1989, comporter la mise en garde suivante dans la langue officielle utilisée pour l'affiche :

«Ce produit peut causer le cancer de la bouche.

This product can cause mouth cancer.»

"This product can cause mouth cancer.
Ce produit peut causer le cancer de la bouche."

(4) Every sign erected on or before June 30, 1989 that is used in the advertisement of a tobacco product and that does not comply with the requirements of subsection (1), (2) or (3) shall display, in English or in French in accordance with the language displayed elsewhere on the sign, any health warning that would have been displayed on the sign immediately before the coming into force of the Act.

5. For the purposes of paragraphs 4(5)(a) and (b) of the Act, the amount expended by a manufacturer or importer of a tobacco product shall be the aggregate of all amounts paid to any third party by the manufacturer or importer in the preparation of materials for use in signs and in the presentation of signs.

6. A retailer may post in the retailer's place of business no more than four signs, including one sign in respect of every customer entrance and one other sign elsewhere in the retailer's place of business, that indicate the tobacco products offered for sale where

- (a) the total surface area of each sign is not greater than one square metre; and
- (b) any information displayed on the signs is clearly legible and prominently displayed.

7. A person who operates a vending machine that dispenses tobacco products may identify or depict those products and their prices on the exterior of the vending machine where

- (a) the information being displayed is clearly legible and prominently displayed; and
- (b) the area used to identify or depict any one product and its price does not exceed 200 cm².

Promotion

8. For the purpose of subsection 6(2) of the Act, the value of contributions shall be the aggregate of all contributions made towards each cultural or sporting activity or event during a calendar year.

9. For the purpose of subsection 8(3) of the Act, the retail value of

- (a) cigarettes shall be estimated by multiplying the total sales volume in cigarettes in 1986, for every brand of cigarette sold by a manufacturer or importer of tobacco products, by \$0.1005;
- (b) all tobacco products, other than cigarettes, shall be estimated by multiplying an estimate of the total volume of the tobacco products sold by a manufacturer or importer of tobacco products in 1986 by an estimate of the retail price of those tobacco products; and
- (c) articles, other than tobacco products, bearing the trade mark of a tobacco product shall be estimated by multiplying an estimate of the total volume of the articles sold by a manufacturer or importer of tobacco products in 1986 by an estimate of the retail price of those articles.

(4) Toute affiche installée au plus tard le 30 juin 1989 qui sert à la publicité en faveur d'un produit du tabac et qui ne satisfait pas aux exigences des paragraphes (1), (2) ou (3) doit porter, dans la langue officielle utilisée pour l'affiche, toute mise en garde qui y aurait figuré avant l'entrée en vigueur de la Loi.

5. Pour l'application des alinéas 4(5)a) et b) de la Loi, le montant dépensé par le fabricant ou l'importateur d'un produit du tabac est égal à la somme de tous les montants versés par lui à des tiers pour la préparation de la publicité relative à des affiches et la présentation de ces affiches.

6. Le détaillant peut, aux fins de signaler les produits du tabac mis en vente dans son établissement, y apposer au plus quatre affiches à raison d'une affiche par porte d'accès des clients et une autre ailleurs dans l'établissement, lorsque les conditions suivantes sont réunies :

- a) la superficie totale de chaque affiche ne dépasse pas un mètre carré;
- b) tout renseignement figurant sur l'affiche est facilement lisible et bien en évidence.

7. L'exploitant d'un distributeur automatique de produits du tabac peut représenter ou nommer ces produits et en indiquer le prix sur celui-ci lorsque les conditions suivantes sont réunies :

- a) tout renseignement figurant sur le distributeur est facilement lisible et bien en évidence;
- b) la surface utilisée pour représenter ou nommer le produit et en indiquer le prix ne dépasse pas 200 cm².

Promotion

8. Pour l'application du paragraphe 6(2) de la Loi, la valeur des concours est égale à la somme de tous les concours apportés à la réalisation de toute activité ou manifestation culturelle ou sportive pendant une année civile.

9. Pour l'application du paragraphe 8(3) de la Loi, la valeur estimative des ventes au détail est calculée de la façon suivante :

- a) s'il s'agit de cigarettes, en multipliant par 0,1005 \$ le volume des ventes totales de cigarettes en 1986 pour chaque sorte de cigarettes vendue par le fabricant ou l'importateur de produits du tabac;
- b) s'il s'agit de tout autre produit du tabac, en multipliant le prix de détail approximatif de ce produit par le volume total approximatif de ce produit vendu en 1986 par le fabricant ou l'importateur de produits du tabac;
- c) s'il s'agit d'un article, autre qu'un produit du tabac, portant la marque d'un produit du tabac, en multipliant le prix de détail approximatif de l'article par le volume total approximatif de cet article vendu en 1986 par le fabricant ou l'importateur de produits du tabac.

displayed in contrasting colours on the package in such a manner that

- (a) the area in which the message is displayed is not less than 20 per cent of the total surface area of the package;
- (b) the type size of the text of the message accounts for not less than 60 per cent of the area in which the message is displayed; and
- (c) the text of the message is displayed in the Helvetica Bold type style, using upper-case lettering for the first letter of the text of the warning or message and lower-case lettering for the remainder of that text.

Reporting

17. (1) For the purposes of subsection 10(1) of the Act, the following classes of tobacco products are prescribed, namely,

- (a) cigarettes and cigarette tobacco; and
- (b) smokeless tobacco.

(2) For the purposes of subsection 10(2) of the Act, the following classes of tobacco products are prescribed, namely,

- (a) cigarettes and cigarette tobacco;
- (b) cigars and pipe tobacco; and
- (c) smokeless tobacco.

18. Where a manufacturer or importer of a prescribed class of tobacco products referred to in subsection 17(1) has total sales in a calendar year of less than one per cent of the total sales in Canada of that class in that calendar year, the manufacturer or importer is exempt from the application of subsection 10(1) of the Act.

19. (1) Every manufacturer or importer of a prescribed class of tobacco products referred to in subsection 17(1) shall provide the Minister with the reports referred to in subsection 10(1) of the Act

(a) in the case of cigarettes and cigarette tobacco, on July 1, 1989 and within 30 days after the expiration of each quarterly period of every calendar year commencing on or after July 1, 1989; and

(b) in the case of smokeless tobacco, within 60 days after the expiration of each calendar year commencing on or after January 1, 1989.

(2) The reports referred to in subsection (1) shall be in writing and shall identify, in respect of each brand of tobacco products sold during the quarterly period,

(a) any constituents of the tobacco product, indicating in respect of each constituent, where applicable,

- (i) the common name and any common name synonyms,
- (ii) the biological origin, in standard Latin nomenclature,
- (iii) the chemical name and any chemical name synonyms,
- (iv) the brand name, and
- (v) the registry number assigned to the constituent in accordance with the Chemical Abstracts Service of the American Chemical Society;

(b) the quantity of each constituent referred to in paragraph (a), expressed as a proportion of the total weight of the product; and

lisible, bien en évidence et de couleurs contrastantes et être présenté sur l'emballage de façon :

- a) que l'espace où il figure représente au moins 20 pour cent de la superficie totale de l'emballage;
- b) qu'il soit en caractères tels que le texte occupe au moins 60 pour cent de l'espace qui lui est réservé;
- c) que le texte du message figure en caractères gras helvétique, la première lettre du texte étant une majuscule et le reste des minuscules.

Rapports

17. (1) Pour l'application du paragraphe 10(1) de la Loi, les catégories de produits du tabac sont les suivantes :

- a) les cigarettes et le tabac à cigarettes;
- b) le tabac sans fumée.

(2) Pour l'application du paragraphe 10(2) de la Loi, les catégories de produits du tabac sont les suivantes :

- a) les cigarettes et le tabac à cigarettes;
- b) les cigares et le tabac à pipe;
- c) le tabac sans fumée.

18. Est soustrait à l'application du paragraphe 10(1) de la Loi le fabricant ou l'importateur d'une catégorie de produits du tabac visée au paragraphe 17(1), dont les ventes totales pour une année civile représentent moins de un pour cent des ventes totales au Canada de cette catégorie de produits pour cette année.

19. (1) Le fabricant et l'importateur d'une catégorie de produits du tabac visée au paragraphe 17(1) sont tenus de transmettre au ministre les rapports visés au paragraphe 10(1) de la Loi dans les délais suivants :

a) s'il s'agit de cigarettes et de tabac à cigarettes, le 1^{er} juillet 1989 et, par la suite, dans les 30 jours suivant la fin de chaque trimestre à compter du 1^{er} juillet 1989;

b) s'il s'agit de tabac sans fumée, dans les 60 jours suivant la fin de chaque année civile à compter de 1989.

(2) Les rapports visés au paragraphe (1) doivent être présentés par écrit et contenir, à l'égard de chaque sorte de produits du tabac vendue pendant le trimestre visé, les renseignements suivants :

a) les substances contenues dans le produit du tabac et, pour chacune d'elles, selon le cas :

- (i) le nom usuel et tout synonyme de ce nom,
- (ii) l'origine biologique, selon la nomenclature latine normalisée,
- (iii) le nom chimique et tout synonyme de ce nom,
- (iv) le nom de la sorte,
- (v) le numéro d'enregistrement attribué à la substance selon le *Chemical Abstracts Service* de l'*American Chemical Society*;

b) la quantité de chaque substance visée à l'alinéa a), exprimée en tant que proportion du poids total du produit;

TRADE PRACTICE ACT

CHAPTER 457

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Definitions

1 In this Act:

“business premises” does not include a dwelling house;

“consumer” means an individual, other than a supplier, who participates in a consumer transaction, and includes a guarantor or donee of that individual;

(e) maintain public records of all of the following:

- (i) enforcement proceedings taken under this Act or the regulations;
- (ii) judgments and interim or permanent orders or injunctions rendered under this Act;
- (iii) written undertakings or assurances entered under this Act.

(2) The director may attempt to resolve complaints under subsection (1) (b) by mediation or by other methods acceptable to the parties.

Research, hearings

6 The director may conduct research, hold public hearings, make inquiries and publish studies about consumer transactions.

Advisers

7 The minister may, or, if authorized by the minister in writing, the director may, notwithstanding the *Public Service Act*, retain specialists, consultants or advisers considered necessary to assist the minister and the director in the administration of this Act, and may determine their remuneration.

Name to be kept confidential

8 The director must not publicly disclose the name of a person investigated under this Act unless the name is a matter of public record under section 5 (1) (e) in respect of the matter investigated, or the person consents to the disclosure.

Director's investigation of deceptive or unconscionable acts

9 (1) If, by the director's own inquiries, or as a result of complaints, the director has reason to believe that a person has engaged in, is engaging in or is about to engage in a deceptive or unconscionable act or practice respecting a consumer transaction, the director may investigate the matter and request that the person provide information to the director about the matter.

(2) The request under subsection (1) must give reasonable particulars of the consumer transaction and indicate the nature of the inquiry or complaint.

Investigation by order of director

10 (1) If the director believes, on reasonable and probable grounds, that a person has contravened, is contravening or is about to contravene this Act or the regulations or an order made under this Act, or an undertaking or assurance made or given under this Act, the director may order a full investigation of the matter by himself or herself or a person appointed by the director to investigate the matter.

(2) For the purposes of subsection (1)

- (a) reasonable particulars of the matter to be investigated must be set out in the order, and