Supreme Court File No. 33559

IN THE 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 in the Court below)

and

IMPERIAL TOBACCO CANADA LIMITED

Respondent/Cross-Appeal Appellant
(Appellant in the Court below)

FACTUM OF RESPONDENT IMPERIAL TOBACCO CANADA LIMITED ON APPEAL
-and –
FACTUM OF APPELLANT IMPERIAL TOBACCO CANADA LIMITED ON CROSS-APPEAL

(Pursuant to Rules 42 and 43 of the *Rules of the Supreme Court of Canada*)

OSLER, HOSKIN & HARCOURT LLP
Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Deborah A. Glendinning
Tel: (416) 362-2111
Fax: (416) 862-6666
E-mail: dglendinning@osler.com

Counsel for the Respondent/Cross-Appeal
Appellant Imperial Tobacco Canada Limited

HUNTER LITIGATION CHAMBERS LAW CORPORATION
2100 – 1040 West Georgia Street
Vancouver, BC V6E 4H1

John J. L. Hunter, Q.C.

Tel: (604) 891-2401
Fax: (604) 647-4554
E-mail: jhunter@litigationchambers.com

Counsel for the Respondent/Cross-Appeal
Appellant Imperial Tobacco Canada Limited

OSLER, HOSKIN & HARCOURT LLP
Suite 1900, 340 Albert Street
Ottawa, ON K1R 7Y6

Patricia Wilson
Tel: (613) 787-1009
Fax: (613) 235-2867
E-mail: pwilson@osler.com

Agent for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

ORIGINAL TO: **THE REGISTRAR**

AND TO:

ATTORNEY GENERAL OF CANADA
MYLES J. KIRVAN
Department of Justice
234 Wellington Street, East Tower,
Room 1251
Ottawa, ON K1A 0H8

Per: John S. Tyhurst
Tel: (613) 957-4860
Fax: (613) 954-1920
E-mail: jtyhurst@justice.gc.ca

Counsel for the Appellant/Respondent on Cross-Appeal Her Majesty The Queen in Right of Canada

ATTORNEY GENERAL OF CANADA
Department of Justice
234 Wellington Street, East Tower,
Room 1251
Ottawa, ON K1A 0H8

Per: Christopher M. Rupar
Tel: (613) 941-2351
Fax: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

Agent for the Appellant/Respondent on Cross-Appeal Her Majesty The Queen in Right of Canada

AND TO: **ATTORNEY GENERAL OF BRITISH COLUMBIA**
6th Floor, 1001 Douglas St.
Victoria, BC V8W 9J7

George H. Copley, Q.C.

Tel (250) 356-8875
Fax: (250) 356-9154
E-mail: george.copley@gov.bc.ca

Counsel for the Intervener Attorney General of British Columbia

BURKE-ROBERTSON
70 Gloucester Street
Ottawa, ON K2P 0A2

Robert E. Houston, Q.C.

Tel: (613) 566-2058
Fax: (613) 235-4430
E-mail: rhouston@burkerobertson.com

Agent for the Intervener Attorney General of British Columbia

BULL, HOUSSER & TUPPER LLP
1055 West Georgia Street, Suite 3000
Vancouver, BC V6E 3R3

Daniel A. Webster, Q.C.

Tel: (604) 641-4874
Fax: (604) 646-2517
E-mail: daw@bht.com

Counsel for the Proposed Intervener Her Majesty the Queen in Right of British Columbia

BURKE-ROBERTSON
70 Gloucester Street
Ottawa, ON K2P 0A2

Robert E. Houston, Q.C.

Tel: (613) 566-2058
Fax: (613) 235-4430
E-mail: rhouston@burkerobertson.com

Agent for the Proposed Intervener Her Majesty the Queen in Right of British Columbia

BURKE-ROBERTSON
70 Gloucester Street
Ottawa, ON K2P 0A2

Robert E. Houston, Q.C.

Tel: (613) 566-2058
Fax: (613) 235-4430
E-mail: rhouston@burkerobertson.com

Agent for the Proposed Intervener Attorney General of Ontario

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Supreme Court File No. 33559

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

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Appellant/Respondent on Cross-Appeal
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and

IMPERIAL TOBACCO CANADA LIMITED

Respondent/Cross-Appeal Appellant
(Appellant in the Court below)

FACTUM OF RESPONDENT IMPERIAL TOBACCO CANADA LIMITED ON APPEAL

(Pursuant to Rules 42 and 43 of the *Rules of the Supreme Court of Canada*)

OSLER, HOSKIN & HARCOURT LLP
Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Deborah A. Glendinning
Tel: (416) 362-2111
Fax: (416) 862-6666
E-Mail: dglendinning@osler.com

Counsel for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

OSLER, HOSKIN & HARCOURT LLP
Suite 1900, 340 Albert Street
Ottawa, ON K1R 7Y6

Patricia Wilson
Tel: (613) 787-1009
Fax: (613) 235-2867
E-Mail: pwilson@osler.com

Agent for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

HUNTER LITIGATION CHAMBERS LAW CORPORATION
2100 – 1040 West Georgia Street
Vancouver, BC V6E 4H1

John J. L. Hunter, Q.C.

Tel: (604) 891-2401
Fax: (604) 647-4554

E-mail: jhunter@litigationchambers.com

Counsel for the Respondent/Cross-Appeal
Appellant Imperial Tobacco Canada Limited

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PART I: STATEMENT OF FACTS

A. Overview

1. Imperial Tobacco Canada Limited ("Imperial") opposes this appeal of the British Columbia Court of Appeal's decision in *Knight v. Imperial Tobacco Canada Limited.*[1]

2. There was no error in the majority's decision. As in the companion Costs Recovery Appeal,[2] this is an appeal of a preliminary motion to strike a pleading for failure to disclose a cause of action. This appeal involves the application of well-established legal principles to the unique pleaded facts of this case. The pleading at issue is Imperial's Amended Third Party Notice (the "Knight TPN") against Canada.

3. A three judge majority of the British Columbia Court of Appeal held that it is not "plain and obvious" that Canada cannot owe duties of care to: (i) Imperial and consumers for negligent misrepresentations, and (ii) consumers for negligent design.

4. On this appeal, however, Canada states only one central issue relating to the negligent misrepresentation claims and has effectively abandoned any appeal of the majority's refusal to strike the duty of care to consumers for negligent design. Accordingly, negligent misrepresentation is the only cause of action at issue on this appeal.

5. All of the criteria for a negligent misrepresentation claim are pleaded in the Knight TPN. The facts pleaded must be taken as true for the purposes of Canada's motion to strike the negligent misrepresentation claims against Canada.

6. The Knight TPN sets out the facts about Canada's active participation in the Canadian tobacco industry, including: that Canada designed, licensed and promoted the "light" and "mild" strains of tobacco at issue in the main action; and, Canada made misrepresentations to consumers and Imperial about the relative safety of cigarettes containing the tobacco strains

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[1] 2009 BCCA 541, 99 B.C.L.R. (4th) 93 [*Knight BCCA Decision*], **Imperial Tobacco Canada Limited's Joint Book of Authorities ("JBA"), Vol. III, Tab 40.**

[2] *British Columbia v. Imperial Tobacco Canada Limited*, 2009 BCCA 540, 98 B.C.L.R. (4th) 201 [*Costs Recovery BCCA Decision*], **JBA, Vol. I, Tab 7.**

designed by Canada; and, Canada was paid licensing fees and royalties for the tobacco strains it developed.[3]

7. Critically, despite Canada's insistence to the contrary, none of the allegations in the Knight TPN relate to Canada's role as a regulator. Given the facts pleaded in the Knight TPN, the majority correctly concluded that Imperial should not be driven from the judgment seat by speculative policy concerns in the absence of a full evidentiary record.

8. As in the companion Costs Recovery Appeal, Canada argues that there is no proximity between Canada and consumers of "light" and "mild" cigarettes by completely contradicting the facts pleaded in the Knight TPN. Canada's speculative policy arguments are likewise premised on Canada's sweeping denial of the facts pleaded in the Knight TPN. Imperial respectfully submits that this appeal should be dismissed.

B. The Facts Pleaded in the Knight TPN

9. The main action is a class proceeding against Imperial under consumer protection legislation, for the refund of the purchase price of "light" and "mild" cigarettes, excluding taxes. The plaintiff class claims that Imperial misrepresented the relative safety of "light" and "mild" cigarettes, used deceptive or misleading descriptors, and failed to disclose material facts in relation to those cigarettes.

10. Imperial filed the Knight TPN against Canada seeking contribution and indemnity, damages, and declarations, in the event that Imperial is found liable to the consumers of "light" and "mild" cigarettes. The Knight TPN sets out the facts about Canada's 50 year participation in the Canadian tobacco industry by individuals acting at the operational level – not as a regulator – but as designer, developer, manufacturer, licensor and promoter of the "light" and "mild" tobacco strains that were incorporated into Imperial's products, and that are at issue in the class action.[4]

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[3] Knight TPN at paras. 19-49, 53-66, 101-109, 124-128 and 97-98, **Appellant's *Knight* Record ("AR"), pp. 140-147, 148-150, 156-158, 161-165, 155-156.**

[4] *Ibid.* at paras. 53-66, 95-100 and 117-118, **AR, pp. 148-150, 155-156, 160.**

11. Despite its repeated assertions to the contrary, Canada's impugned conduct was never the subject of regulation. Other than legislation prohibiting the sale of tobacco products to minors, there was no federal legislation regulating the tobacco industry in Canada until 1989.[5]

C. History of the Action

12. Imperial alleges five categories of claims against Canada in the Knight TPN: (i) Canada can be liable as a "supplier" under the *Trade Practice Act*[6] by virtue of the Federal *Crown Liability and Proceedings Act*[7]; (ii) Canada breached a duty of care to consumers giving rise to liability for negligent misrepresentation, negligent design and failure to warn; (iii) Canada breached a duty of care to Imperial giving rise to liability for negligent misrepresentation, negligent design and failure to warn; (iv) Canada can be liable under the doctrine of equitable indemnity, and (v) Canada is subject to declaratory relief.

13. Canada's application to strike the Knight TPN on the basis that it discloses no reasonable claim was granted.[8] Imperial appealed on a number of grounds, in particular that the chambers judge failed to take the facts pleaded in the Knight TPN as true.

14. The majority of the Court of Appeal restored Imperial's claims that Canada is liable to consumers for negligent misrepresentations and the negligent design of tobacco strains, and that Canada is liable to Imperial for its negligent misrepresentations.[9]

15. The majority correctly held that it is not "plain and obvious" that the alleged actions of, and misrepresentations made by, Canada represented the making of governmental policy.[10]

PART II: QUESTIONS IN ISSUE

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[5] *Knight BCCA Decision, supra* note 1 at para. 13, **JBA, Vol. III, Tab 40, p. 61.**

[6] R.S.B.C. 1996, c. 457. (***Infra*, p. 82.**)

[7] R.S.C. 1985, c. C-50. (***Infra*, p. 62.**)

[8] *Supreme Court Rules*, B.C. Reg. 221/90, Rule 19(24)(a), (***Infra*, p. 76.**), made under the *Court Rules Act*, R.S.B.C. 1996 c. 80 (now Rule 9-5(1)(*a*) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009). (***Infra*, p. 70.**)

[9] *Knight BCCA Decision, supra* note 1 at paras. 60 and 89, **JBA, Vol. III, Tab 40, pp. 74, 81.**

[10] *Knight BCCA Decision, ibid.* at para. 50, **JBA, Vol. III, Tab 40, p. 71**; *Costs Recovery BCCA Decision, supra* note 2 at para. 89, **JBA, Vol. I, Tab 7, p. 102.**

16. Canada states only one central issue in its appeal factum – namely "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".[11]

17. Canada does not state any issue with respect to the claim of "negligent design" and, as discussed more fully below, has effectively abandoned any appeal of that issue.

PART III: ARGUMENT

A. The Test for Striking Pleadings

18. A recurrent theme in Canada's argument is that the majority erred in taking the facts pleaded as true. This position cannot be sustained. The test to be applied by the court on an application to strike a pleading under Rules 19(24) is well-established.

19. The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment seat. [12]

20. Neither the novelty nor the complexity of a claim shall prevent that claim from proceeding. Indeed, that is the way the common law grows and adapts itself to changing situations. That is why the standard to strike a statement of claim is so high. "Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society."[13]

B. The Test for Establishing a Duty of Care

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[11] Canada's Knight Appeal Factum, at para. 22.

[12] *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 at para. 15, **JBA, Vol. III, Tab 48, pp. 157-158.**

[13] *Mirage Consulting Ltd. v. Astra Credit Union Ltd.*, 2008 MBCA 105, 231 Man. R. (2d) 269 at para. 9, **JBA, Vol. III, Tab 47, p. 148**, citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 990-991; *Adbusters Media Foundation v. Canadian Broadcasting Corp.*, 2009 BCCA 148, 92 B.C.L.R. (4th) 9, leave to appeal refused, [2009] S.C.C.A. No. 227, **JBA, Vol. I, Tab 2.**

21. As set out in Imperial's Costs Recovery Factum, the test for determining whether a person owes a duty of care is the well-established Anns test.

> The test for determining whether a person owes a duty of care involves two questions: (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and (2) If so, are there any residual policy considerations which ought to negate or limit that duty of care?[14]

22. The Anns test is also used in determining whether a duty of care exists for negligent misrepresentation. As discussed in Imperial's Costs Recovery Factum, a *prima facie* duty of care will exist if the five elements for a negligent misrepresentation claim are present and if reasonable foreseeability is satisfied.[15]

C. Canada Owes a Duty of Care to Imperial for Negligent Misrepresentations

23. As explained in Imperial's Costs Recovery Factum, the starting point in the analysis is to determine whether the alleged duty of care falls within one of the categories of relationships in which sufficient proximity to establish a duty of care has been previously recognized. If so, a *prima facie* duty of care is established without further analysis.[16]

24. Negligent misrepresentation is one of the categories specifically cited by this Court in which proximity has been recognized. It is therefore not necessary to undergo the full promixity analysis. However, Canada asserts that this case does not fall within a previously recognized category, and submits that a full proximity analysis is required.[17] Accordingly, Imperial will respond to this argument in the following section.

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[14] Imperial's Costs Recovery Appeal Factum at para. 23, citing *Hill v. Hamilton-Wentworth Regional Police Services Board,* 2007 SCC 41, [2007] 3 S.C.R. 129 at para. 20 [*Hill*], **JBA, Vol. II, Tab 32, pp. 183-184.**

[15] Imperial's Costs Recovery Appeal Factum at paras. 28-29.

[16] Imperial's Costs Recovery Appeal Factum at para. 25.

[17] *Cooper v. Hobart,* 2001 SCC 79, [2001] 3 S.C.R. 537 at para. 36 [*Cooper*], **JBA, Vol. II, Tab 2, pp. 31-32.**

Stage One – Prima Facie Duty of Care

25. Canada does not contest the foreseeability component of the duty of care analysis on this appeal, and adopts its submissions in its Costs Recovery Appeal factum on the proximity and policy components.[18]

26. For the reasons set out in Imperial's Costs Recovery Appeal factum, Imperial submits that the majority did not err in concluding that it is not "plain and obvious" that Canada cannot owe a *prima facie* duty of care for negligent misrepresentations made to Imperial.

27. In summary, Imperial submits that the duty of care between Canada and Imperial falls within the previously recognized category of negligent misrepresentation such that proximity may be posited. The Knight TPN sets out the facts supporting all of the criteria for a negligent misrepresentation claim, including facts about the "special relationship" between Canada and Imperial, Canada's representations to Imperial, and Imperial's reasonable reliance on those representations.[19]

28. Moreover, even if a full proximity analysis were required, the Knight TPN sets out sufficient facts establishing the "close and direct" proximate relationship between Canada and Imperial. This distinguishes all of Canada's authorities, which involved claims resting solely upon statutes conferring regulatory powers, without any pleaded facts about interactions between the plaintiff and the governmental authority.

Stage Two – Policy Considerations

29. For the reasons set out in Imperial's Costs Recovery Appeal factum, Imperial submits that the majority did not err in concluding that Imperial should not be driven from the judgment seat by speculative policy arguments.

30. In summary, the evidentiary onus is on Canada to demonstrate policy reasons that must negate a *prima facie* duty of care, and it has brought nothing but rote arguments based on a systematic denial of the facts pleaded in the Knight TPN. In particular, concerns of

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[18] Canada's Knight Appeal Factum at paras. 27 and 28.

[19] Knight TPN at paras. 132-136, **AR, pp. 165-166.**

indeterminate liability do not apply to this negligent misrepresentation claim in which the unique pleaded facts that Canada designed, developed, licensed and promoted the very product at issue tightly circumscribe the ambit of care.

31. Imperial adopts its submissions in its Costs Recovery Appeal factum with respect to Canada's duty of care to Imperial for negligent misrepresentation.

D. Canada Owes a Duty of Care to Consumers for (a) Negligent Design, and (b) Negligent Misrepresentations

(a) Negligent Design

32. The majority of the Court of Appeal held that it is not "plain and obvious" that Canada cannot owe a duty of care to consumers for the negligent design of tobacco strains.[20]

33. Having properly taken the facts pleaded in the Knight TPN to be true, the majority applied settled law 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:

> It is trite that a manufacturer of a product owes a duty to purchasers of the product to take reasonable care in the manufacture of the product. ...
>
> Similarly, a person who designs a product intended for sale to the public owes a prima facie duty of care to the purchasers of the product: see, for example, *Gallant v. Beitz* (1983), 148 D.L.R. (3d) 522, 42 O.R. (2d) 86 (H.C.J.), and *Baker v. Suzuki Motor Co.*, [1993] 8 W.W.R. 1, 12 Alta. L.R. (3d) 193 (Q.B.). On the issue of foreseeability, a designer of a product ought reasonably to have purchasers of the product in contemplation as persons who will be affected by its design. On the issue of proximity, the relationship between a designer of a product and a purchaser of the product has been identified as a recognized category of sufficient proximity giving rise to a duty of care.[21]

34. On this appeal, however, Canada did not state an issue with respect to the claim of negligent design. Rather, Canada makes only two erroneous points in explaining its decision not to appeal the surviving negligent design claim.

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[20] *Knight BCCA Decision, supra* note 1 at para. 60, **JBA, Vol. III, Tab 40, p. 74.**

[21] *Knight BCCA Decision, ibid.* at paras. 47-48, **JBA, Vol. III, Tab 40, p. 71.**

35. First, Canada asserts that there are no negligent design allegations in the Knight TPN.[22] However, Canada is mistaken. The Knight TPN clearly alleges that Canada "owed purchasers of 'Light' and 'Mild' cigarettes duties of care in the design or development of "light" and "mild" products".[23]

36. Secondly, Canada seems to suggest that the negligent design claim cannot stand because, unlike the *Costs Recovery* proceeding, the main action does not also involve a claim of negligent design.[24] Canada is again mistaken. British Columbia's third party rules expressly permit third party claims "relating to or connected with the original subject matter of the action".[25] There is simply no legal basis for Canada's suggestion that any and all claims in the Knight TPN must be identical to the causes of action advanced in the main action, nor is one even offered by Canada.

37. On December 15, 2010, Canada wrote a letter to Imperial's counsel, purporting to clarify paragraph 30 of Canada's Knight Appeal factum which states that "what follows deals solely with the allegations of negligent misrepresentation in the third party notice". Canada advised that they do not wish "to imply that applicable arguments that follow on the Anns/Cooper analysis would not apply should the Court find that the concept of negligent design is in fact relevant and sufficiently pled."[26]

38. Imperial submits, however, that the arguments following paragraph 30 are of very limited, if any, assistance to Canada, as they relate solely to the distinct claim of negligent misrepresentation.

39. For all of the foregoing reasons, Imperial submits that Canada has failed to make any arguments for striking the negligent design claim, in respect of consumers, from the Knight TPN.

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[22] Canada's Knight Appeal factum at para. 16.

[23] Knight TPN at para. 138(e), **AR, p. 167.**

[24] Canada's Knight Appeal factum, para. 30.

[25] *Supreme Court Rules*, *supra* note 8, Rule 22(1)(b). (***Infra*, p. 78.**)

[26] Letter from John S. Tyhurst, Counsel for the Appellant/Respondent on Cross-Appeal Her Majesty The Queen in Right of Canada, to John J.L. Hunter Q.C., Counsel for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited, dated December 15, 2010. (***Infra*, p. 86-87.**)

(b) Negligent Misrepresentation

Stage One – Prima Facie Duty of Care

40. Negligent misrepresentation is the only claim at issue in this appeal. As explained above and in Imperial's Costs Recovery Factum, negligent misrepresentation is one of the categories of relationships in which sufficient proximity has been recognized, making it unnecessary to undergo the full Anns analysis.[27] This point is not controversial.

41. A duty of care exists with respect to representations when there is a "special relationship" between the representor and the representee. Such a "special relationship" exists *prima facie* when reliance by the representee is both reasonably foreseeable and reasonable in the circumstances.[28]

42. Imperial has pleaded facts about specific representations made by Canada to continuing smokers, as well as facts establishing a "special relationship" between Canada and continuing smokers.[29] These facts must be taken as true.

43. Canada makes the same arguments in this appeal as it does in the Costs Recovery Appeal. In particular, Canada asserts that there was no "special relationship" between Canada and consumers because the five general indicia of reasonable reliance identified by Professor Feldthusen and set out in Canada's Costs Recovery factum are not satisfied.[30]

44. All of these indicia of reasonable reliance are readily found in the Knight TPN. Imperial pleads that Canada received licensing fees and royalties for the use of Canada's tobacco

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[27] *Childs v. Desormeaux,* 2006 SCC 18, [2006] 1 S.C.R. 643 at para. 15 [*Childs*], **JBA, Vol. II, Tab 2, p. 13**; *Cooper, supra* note 17 at para. 36, **JBA, Vol. II, Tab 3, pp. 31-32**; *Premakumaran v. Canada*, 2006 FCA 213, [2007] 2 F.C.R. 191 at paras. 16-19, leave to appeal refused, [2006] S.C.C.A. No. 342, **JBA, Vol. III, Tab 50, pp. 186-188**; *Knight BCCA Decision, supra* note 1 at para. 45, **JBA, Vol. III, Tab 40, p. 70**; *Marlor Farms Inc. v. Ontario (Farm Products Marketing* Commission*),* 2010 ONSC 1573, [2010] O.J. No. 1702 at para. 71, **JBA, Vol. III, Tab 44, p. 121.**

[28] *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, **JBA, Vol. IV, Tab 51**; *Hercules Managements Ltd. v. Ernst & Young,* [1997] 2 S.C.R. 165 at para. 24 [*Hercules*], **JBA, Vol. II, Tab 31, pp. 167-168**; *Premakumaran, ibid.* at para. 19, **JBA, Vol. III, Tab 50, pp. 187-188.**

[29] Knight TPN at paras. 21-22, 62, 53-66, 76-78, **AR, pp. 141, 150, 148-150, 153.**

[30] Canada's Knight Appeal factum at paras. 58-62; Canada's Costs Recovery Appeal factum at paras. 67-70.

strains, such that Canada had a direct or indirect financial interest in the transaction in respect of which the representations were made.[31]

45. Imperial pleads that Canada researched, designed, developed, tested, manufactured and promoted a consumer product, and that it received license fees and royalties. These are plainly commercial activities. It cannot be "plain and obvious" that these activities were not done "in the course of the defendant's business" within the meaning of the indicia of reasonable reliance. Evidence is required to make this determination.

46. As discussed above, Imperial pleads that at all material times, Canada's officials possessed special skill, judgment, and knowledge about all matters pertaining to tobacco and tobacco consumption.[32] It is also pleaded that Canada's representations were made deliberately, and not on a social occasion.

47. In reality, Canada's argument against reasonable reliance is nothing more than an argument against the facts pleaded in the Knight TPN.[33] For example, Canada asserts that "the relationship at issue here is that between a statutory regulator and consumers of a regulated product",[34] and that the facts pleaded in the Knight TPN "[do] not transform Canada's role from that of regulator to the established category of commercial product supplier".[35] These assertions fly in the face of the facts pleaded in the Knight TPN.

48. It is pleaded in the Knight TPN that Canada was acting as a commercial product supplier – not as a regulator. The majority of the Court of Appeal agreed:

> However, on my reading of the facts alleged in ITCAN's third party notice, which must be assumed to be true for the purposes of a Rule 19(24) application, the allegations against Canada go beyond its role as a regulator. It is alleged that Canada made the decision to develop strains of tobacco that were less harmful to smokers than the strains of tobacco then being utilized (which could fairly be categorized as a policy decision) but it developed

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[31] Knight TPN at paras. 97-98, **AR, pp. 155-156.**

[32] Knight TPN at paras. 15, 53-66, 76-78, 124-126, **AR, pp. 139, 148-150, 153, 161-164.**

[33] See, in particular, paragraphs 60-62 of Canada's Knight Appeal Factum.

[34] Canada's Knight Appeal Factum at para. 34.

[35] Canada's Knight Appeal Factum at para. 37.

> strains of tobacco that were actually more hazardous to the health of smokers, and it made misrepresentations to smokers about the relative safety of cigarettes containing the strains of tobacco. It is also alleged that Canada was paid licensing fees and royalties in respect of the tobacco strains it developed.[36]

49. All of the authorities relied on by Canada are distinguishable on this basis. For example, in *Attis*, *Drady* and *Klein*, the courts expressly noted that Health Canada was not the manufacturer of the device in question, but simply the regulator.[37] By contrast, it is pleaded in the Knight TPN that Canada was the product designer in question, and not simply the regulator.

50. The cause of action against Canada in negligent misrepresentation, with all of its constituent elements, is pleaded in the Knight TPN. Canada's assertions that no special relationship is pleaded, and that there is no allegation that Canada's representations came to the attention of continuing smokers are completely baseless.

51. Imperial has pleaded facts that Canada's negligent misrepresentations came to the attention of continuing smokers. Indeed, the Knight TPN explains that one of Canada's main objectives was to bring its alleged representations to the attention of smokers.[38]

52. Imperial submits that the majority correctly concluded that this negligent misrepresentation claim against Canada falls within a previously recognized category of relationship such that proximity may be posited. However, as in the Costs Recovery Appeal, Canada argues that this case does not fall within a previously recognized category and submits that a full proximity analysis is required. Imperial responds to Canada's submissions on proximity in the next section.

Proximity

Imperial's Claim against Canada is not Grounded in Statute

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[36] *Knight BCCA Decision*, *supra* note 1 at para. 54, **JBA, Vol. III, Tab 40, p. 72.**

[37] *Attis v. Canada (Minister of Health)*, 2008 ONCA 660, 93 O.R. (3d) 35 at para. 61, leave to appeal refused, [2008] S.C.C.A. No. 491, **JBA, Vol. I, Tab 5, p. 45**; *Drady v. Canada*, 2008 ONCA 659, 300 D.L.R. (4th) 443 at para. 39, leave to appeal refused, [2008] S.C.C.A. No. 492, **JBA, Vol. II, Tab 22, p. 75**; *Klein v. American Medical Systems Inc.* (2006), 84 O.R. (3d) 217, 278 D.L.R. (4th) 722 at para. 33 (Div. Ct.), **JBA, Vol. III, Tab 39, p. 45.**

[38] Knight TPN at paras. 23, 50-66, 116, 124-127, **AR, pp. 141, 147-150, 160, 161-164.**

53. As in its Costs Recovery Appeal Factum, Canada relies on *Cooper* and *Edwards* for the proposition that a private law duty will not arise unless it is grounded in the applicable statute.[39] However, none of the cases cited by Canada support that proposition, which was expressly rejected by the Alberta Court of Appeal in *Holtslag*:

> The respondent argues that any liability founded on a sufficiently proximate relationship must be found in the provisions of the statute, and that if nothing in the statute can be said to impose a duty of care in relation to the public or any members of the public, the Court need not look to establish proximity in reference to analogous cases or the use of categories.
>
> We do not agree with these interpretations, which artificially break down the applicable test. The Supreme Court in Cooper makes clear that there is a proximity analysis involved at the first stage of the Anns test; and that this analysis focuses on factors arising from the relationship between the parties, including questions of policy in the broad sense. Proximity between the parties is examined at the outset of the inquiry, including whether there is an existing or analogous category in which a duty of care has already been recognized.
>
> The Court in the *Cooper* case, in considering whether the registrar of mortgage brokers owed a duty to investors, states that "the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed. That statute is the only source of his duties, private or public." (*Supra*, 556). The proximity inquiry at the first stage of the Anns test involves consideration of the statute, but that does not preclude examination of whether a sufficiently proximate relationship can be identified through the use of existing or analogous categories.[40]

54. Appellate courts have consistently distinguished *Cooper*, *Edwards*, *Eliopolous* and *Klein* on this basis, in refusing to strike claims involving specific allegations that Crown authorities had direct dealings with the plaintiff.[41]

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[39] Canada's Costs Recovery Appeal Factum at paras. 46-47 and Canada's Knight Appeal Factum at paras. 38.

[40] *Holtslag v. Alberta*, 2006 ABCA 51, 55 Alta. L.R. (4th) 214 at paras. 14-16, leave to appeal refused, [2006] S.C.C.A. No. 142, **JBA, Vol. III, Tab 34, pp. 3-4.**

[41] *Williams v. Canada*, 2009 ONCA 378, 95 O.R. (3d) 401 at para. 32, leave to appeal refused, [2009] S.C.C.A. No. 298 [*Williams*], **JBA, Vol. V, Tab 62, p. 12**; *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401 [*Heaslip*], **JBA, Vol. II, Tab 30**; *Sauer v. Canada (Attorney General)*, 2007 ONCA 454, 225 O.A.C. 143, leave to appeal refused, [2007] S.C.C.A. No. 454 [*Sauer*], **JBA, Vol. IV, Tab 57.**

55. In fact all of the cases cited by Canada, including *Cooper*, *Edwards*, *Eliopolous* and *Klein*, *Attis*, *Drady*, *Holtslag*, *Abarquez* and *Williams* are distinguishable because they involved claims resting solely upon statutes conferring regulatory powers, and with no facts pleaded about any interaction between the plaintiff and the statutory regulator, whatsoever – let alone in the commercial marketplace.

56. Cases like *Cooper*, *Attis* and *Drady* are further distinguishable on the basis that they involved a plaintiff alleging harm at the hands of a party involved in an activity subject to regulatory authority – that is, the plaintiff did not assert any direct relationship with the governmental authority itself.[42] Imperial also adopts its submissions in Imperial's Costs Recovery Appeal Factum with respect to the foregoing.[43]

There is no Potential for Conflicting Duties

57. As in the Costs Recovery Appeal, Canada makes sweeping and unsupportable statements about conflicting private and public law duties, and the divergent interests among smokers and the rest of the general public.

58. No one has an interest in the development of more hazardous tobacco products. There is no conflict. These concerns do not apply in this pleaded situation. The majority of the British Columbia Court of Appeal agreed:

> ... The concerns about conflicting duties and the government becoming an insurer of another's product would not appear to apply. If the alleged actions had been taken by a private body rather than Canada, it seems to me that no one would seriously argue that the *prima facie* duty of care should be negated by policy considerations. ...[44]

59. Furthermore, neither of the Ontario Court of Appeal's decisions in *Abarquez* and *Williams* assist Canada. There was no claim of negligent misrepresentation in *Abarquez* – either directly or by way of inference. Moreover, the directives at issue in that case were not even

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[42] *Heaslip*, *ibid.* at paras. 19 and 20, **JBA, Vol. II, Tab 30, pp. 154-155.**

[43] Imperial's Costs Recovery Appeal Factum at paras. 52-58.

[44] *Knight BCCA Decision*, *supra* note 1 at para. 55. **JBA, Vol. III, Tab 40, p. 73.**

representations of fact. *Williams* is distinguishable on the same basis.[45] This appeal, by contrast, only involves the claim of negligent misrepresentation and the Knight TPN clearly alleges the factual ingredients for that cause of action.

Proximity is Pleaded in the Knight TPN

60. Canada makes a number of additional arguments about the purported lack of proximity between Canada and smokers. Canada submits that "direct personal contact" is significant in the creation of proximity and a duty of care.[46]

61. However, this submission is contrary to the established authorities. In *Hill v. Hamilton-Wentworth Regional Police Services Board* this Court confirmed that:

> The most basic factor upon which the proximity analysis fixes is whether there is a relationship between the alleged wrongdoer and the victim, usually described by the words "close and direct". This factor is not concerned with how intimate the plaintiff and defendant were or with their physical proximity, so much as with whether the *actions* of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed.[47]

62. Canada also submits that a duty of care cannot be owed for general public statements "at large" but must be directed to a "limited class", and then baldly asserts that "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."[48]

63. Canada again ignores the pleaded facts in making this assertion. The alleged duty of care at issue in this case is limited to the consumers of the "light" and "mild" tobacco products designed, developed, promoted and licensed by Canada.

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[45] *Abarquez v. Ontario*, 2009 ONCA 374, 95 O.R. (3d) 414, leave to appeal refused, [2009] S.C.C.A. No. 297, **JBA, Vol. 1, Tab 1**; *Williams*, *supra* note 40, **JBA, Vol. V, Tab 62.**

[46] Canada's Knight Appeal Factum at paras. 46-47.

[47] *Hill*, *supra* note 14 at para. 29, **JBA, Vol. II, Tab 32, pp. 187-188.**

[48] Canada's Knight Appeal Factum at paras. 48-50.

64. Imperial submits that Canada's League Tables, and its other representations to continuing smokers that they should switch to "light" and "mild" products, are not representations made to the public at large, but rather are specific communications directed at a definable sub-class of the public population that shows Canada was acting with their interests in mind rather than the broad public interest:

> On the other hand, Sauer argues that he has pleaded the facts required to show sufficient proximity between Canada and commercial cattle farmers to raise a *prima facie* duty of care. In particular, he points to the many public representations by Canada that it regulates the content of cattle feed to protect commercial cattle farmers among others. He says this shows that Canada was acting with their interests in mind rather than the broad public interest. Sauer says that Canada's public assumption of a duty to Canadian cattle farmers to ensure the safety of cattle feed yields the conclusion that it is not plain and obvious that his claim of a *prima facie* duty of care will not succeed. I agree.[49]

65. Moreover, Imperial notes that the main action has already been certified on the basis that the proposed class satisfies the "identifiable class" requirement of the test for certification of a class proceeding, meaning that it is capable of definition and is not unnecessarily broad.[50]

66. For all of the foregoing reasons, Imperial submits that the majority was correct in concluding that it is not "plain and obvious" that Canada cannot owe a duty to consumers in connection with its negligent misrepresentations about the "light" and "mild" tobacco strains designed by Canada. Canada does not contest foreseeability.[51]

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[49] *Sauer, supra* note 40 at para. 62, **JBA, Vol. IV, Tab 57, pp. 124-125.**

[50] *Knight v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 235, 267 D.L.R. (4th) 579 at para. 21, **JBA, Vol. III, Tab 42, pp. 113-114.**

[51] Canada's Knight Appeal Factum at para. 27.

Stage Two - Policy Considerations

67. As explained more fully in Imperial's Costs Recovery Factum, once Imperial establishes a *prima facie* duty of care, the evidentiary burden of showing countervailing policy considerations shifts to Canada.[52]

68. This Court has endorsed a restricted approach to the second stage of the Anns test, leaving the denial of a *prima facie* duty of care to cases where there is "a real potential for negative policy consequences. This reflects the view that a duty of care in tort law should not be denied on speculative grounds".[53]

69. Appellate courts have been circumspect in determining at such an early stage in an action that residual policy considerations must negate a *prima facie* duty of care.[54] It has been held inappropriate to even consider the second stage of the Anns test on a preliminary motion to strike a pleading, as the burden of proof is on the applicant, and evidence is not permitted.[55]

70. The majority of the Court of Appeal considered each of Canada's policy arguments, and held that Canada did not prove that it is "plain and obvious" that Canada cannot owe a duty of care to consumers for its representations about the tobacco strains it designed:

> The potential liability of Canada flowing from breaches of the duty of care would not appear to be indeterminate because the affected persons are identified as those who purchased the light and mild cigarettes (i.e., the class members). The concerns about conflicting duties and the government becoming an insurer of another's product would not appear to apply. If the alleged actions had been taken by a private body rather than Canada, it seems to me that no one would seriously argue that the *prima facie* duty of care should be negated by policy considerations. In my opinion, without the benefit of evidence at trial to assist in the examination of the considerations, none of the policy considerations are determinative

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[52] *Childs*, *supra* note 26 at paras. 12-13, **JBA, Vol. II, Tab 2, pp. 12-13**, Imperial's Costs Recovery Appeal Factum at paras. 64-66.

[53] *Hill*, *supra* note 14 at para. 43, **JBA, Vol. II, Tab 32, pp. 192-193.**

[54] *D.H. v. J.H. (Guardian ad litem of)*, 2008 BCCA 222, 81 B.C.L.R. (4th) 288 at para. 41, **JBA, Vol. II, Tab 19, p. 51**; *Sauer*, *supra* note 40 at para. 45, **JBA, Vol. IV, Tab 57, p. 122**; *Haskett v. Equifax Canada Inc.* (2003), 63 O.R. (3d) 577 at 587-588 (C.A.), **JBA, Vol. II, Tab 29, pp. 135-136.**

[55] *Law Society of Newfoundland and Labrador v. 755165 Ontario Inc.*, 2006 NLCA 60, 260 Nfld. & P.E.I.R. 222 at para. 19, **JBA, Vol. III, Tab 43, p. 117.**

> to negate the *prima facie* duty of care. On the basis of the pleadings alone, it is not plain and obvious that the *prima facie* duty of care owed by Canada to the class members should be negated.[56]

71. The Ontario Court of Appeal in *Sauer* also refused to strike negligent misrepresentation claims for such speculative policy reasons:

> Moving to the second stage of the analysis, Sauer pleads that these were not policy decisions but were operational, and that this therefore negates Canada's major reason for saying that Sauer's complaints cannot survive this stage of the duty of care analysis. Given that the evidentiary onus at this stage is on Canada, and that at this early point in the proceedings it has brought forward nothing, I agree.[57]

72. Imperial submits that this is the only possible conclusion in this appeal as well.

Indeterminate Liability

73. Canada makes the same arguments about indeterminate liability as it advances in the Costs Recovery Appeal. Canada again fails to acknowledge that negligent misrepresentation claims inherently address concerns of indeterminate liability by circumscribing the ambit of the duty of care.[58] Canada again misstates as the test for indeterminate liability whether a defendant can control the number of claimants or the size of claims, as opposed to whether the scope of liability can be readily circumscribed on a principled basis. Imperial adopts its submissions in the Costs Recovery Appeal on these points.[59] Imperial submits that the duty of care is tightly circumscribed by the specific facts pleaded in this case.

74. In its Knight Appeal Factum, Canada relies on the Ontario Court of Appeal's decision in *Hughes v. Sunbeam*, and implies that concerns of indeterminate liability negated a *prima facie* duty of care in negligent misrepresentation.[60] Canada's description of *Hughes v. Sunbeam* is incorrect. In fact, the motions judge gave the plaintiff leave to amend his statement

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[56] *Knight BCCA Decision, supra* note 1 at paras. 53-55. **JBA, Vol. III, Tab 40, pp. 72-73.**

[57] *Sauer, supra* note 40 at para. 63, **JBA, Vol. IV, Tab 57, p. 125.**

[58] *Hercules, supra* note 27 at para. 37, **JBA, Vol. II, Tab 31, pp. 169-170**; see also Imperial's Costs Recovery Appeal Factum at paras. 71-73.

[59] Imperial's Costs Recovery Appeal Factum at paras. 64-75.

[60] Canada's Knight Appeal Factum at para. 71.

of claim to assert a cause of action in negligent misrepresentation, which was not even before the Court of Appeal.[61] *Hughes v. Sunbeam* does not assist Canada.

75. Nor is *Holtslag v. Alberta*, the Alberta Court of Appeal decision heavily relied on by Canada, of any assistance. That case did not involve any claim of negligent misrepresentation, and is further distinguishable on the same basis as the rest of Canada's authorities, that there was no pleaded conduct of proximity whatsoever:

> 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. Listing a product as a building material under the Code cannot be seen as a transaction in which the Director is a party with an economic interest. As the Reasons of the trial judge state at para. 64:
>
> "There is no evidence of any direct relationship between the Plaintiffs and the Defendant. The Defendant did not manufacture, sell or install the untreated pine shakes, and the Plaintiffs did not contract in any way with the Defendant or seek any assistance from the Defendant or any of its employees or agents in terms of making a decision to install them as roof coverings."

76. By contrast, on the facts pleaded in the Knight TPN, the relationship between consumers of "light" and "mild" cigarettes and Canada is not only akin – but is identical – to the close and direct relationship between representor and representee, and supplier and user of a product. The Knight TPN sets out the facts about the direct and special relationship between those consumers and Canada, including the facts that Canada designed, developed, manufactured and promoted the tobacco strains at issue, and the consumers reasonably relied on Canada's special expertise with respect to those tobacco strains.

77. Imperial submits that the majority correctly concluded that Canada's potential liability is not indeterminate because the affected persons are identified as only those who

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[61] *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 O.R. (3d) 433 at para. 36 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 446, **JBA, Vol. 3, Tab 35, p. 13.**

purchased "light" and "mild" cigarettes (i.e., the class members).[62] Canada has offered nothing of substance to the contrary.

Policy Decisions versus Operational Conduct

78. Canada's argument about the distinction between policy decisions and operational conduct is equally based on Canada's mischaracterization of the facts pleaded in the Knight TPN, with Canada insisting that Imperial "attacks directly, as negligent conduct, regulations".[63]

79. Imperial's allegations against Canada long predate the eventual 1989 legislation regulating the tobacco industry. Furthermore, the design, development and promotion of "light" and "mild" products which are at the core of the allegations in the Knight TPN and Statement of Claim have never – not at any time – been the subject of regulation.

80. In considering this argument, the majority of the Court of Appeal correctly concluded that a full evidentiary record is required to determine which of the actions and statements of Canada in this case were policy decisions and which were operational decisions:

> In the present case, the policy of Canada was not set forth in a statute or a regulation. In my opinion, evidence is required to determine which of the actions and statements of Canada in this case were policy decisions and which were operational decisions. This was the approach endorsed by the Ontario Court of Appeal in *Sauer v. Canada (Attorney General)*, 2007 ONCA 454, 31 B.L.R. (4th) 20, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 454, in a claim against Canada with respect to its regulation of the cattle industry. Indeed, the court went further in *Sauer* and stated at para. 45 that, as the onus is on the government to demonstrate countervailing policy to negate a *prima facie* duty of care, the court should be circumspect in determining the issue on an application such as the one in the present case, where the claim can be dismissed without the benefit of a full evidentiary foundation.[64]

81. Imperial submits that there is no error in this reasoning.

Unintended Insurance Scheme

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[62] *Knight BCCA Decision, supra* note 1 at para. 55. **JBA, Vol. III, Tab 40, p. 73.**

[63] Canada's Knight Appeal Factum at paras. 77-83.

[64] *Knight BCCA Decision, supra* note 1 at para. 52. **JBA, Vol. III, Tab 40, p. 72.**

82. Canada adopts its submissions in its Costs Recovery Appeal Factum that a duty of care to manufacturers would create an unintended insurance scheme funded by taxpayers, and that the "industry responsible" should bear those costs. Imperial submits that while this argument might have force in the case of a truly passive regulator, it cannot defeat the facts pleaded in the Knight TPN, which include the allegations that Canada is the "industry responsible" for some of those costs.[65]

Conclusion on Stage Two

83. The facts against Canada in the Knight TPN are unique in that Canada was not, at any time, acting as a regulator. The pleaded facts are akin to the commercial dealings between private parties, and have no relation to the exercise of government power.

84. As with every other aspect of Canada's argument, its policy arguments are essentially a contradiction of the pleaded facts. For example, Canada's assertions that "Canada does not manufacture or market cigarettes" and "the manufacturer controlled product design, production and marketing" are outrageous given the facts pleaded in the Knight TPN. Imperial has clearly pleaded that Canada manufactured and marketed cigarettes,[66] and that Canada controlled the product design, production and marketing of the "light" and "mild" tobacco strains.[67] Canada does not dispute the test on this motion. These facts must be taken as true.

85. Given that the evidentiary onus at this stage is on Canada, and that at this early point in the proceedings it has brought forward nothing, Imperial submits that the majority was correct in refusing to strike the claims in negligent misrepresentation and negligent design, in the absence of a full evidentiary record.

PART IV: SUBMISSIONS RESPECTING COSTS

86. Imperial seeks its costs in this appeal, and in the courts below.

PART V: ORDER SOUGHT

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[65] Canada's Costs Recovery Appeal Factum at paras. 80-81.

[66] Knight TPN at paras. 95-100, **AR, pp. 155-156.**

[67] *Ibid.* at paras. 95-100, 110-113, **AR, pp. 155-156, 158-159**.

87. Imperial respectfully asks that this appeal be dismissed, with costs here and below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 10th day of January, 2011.

for: Deborah A. Glendinning

Counsel for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

For: John J.L. Hunter, Q.C.

Counsel for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

for: Patricia Wilson

Agent for Counsel for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

PART VI: AUTHORITIES CITED

Jurisprudence	Cited at Paragraph(s)
Abarquez v. Ontario, 2009 ONCA 374, 95 O.R. (3d) 414, leave to appeal refused, [2009] S.C.C.A. No. 297.	55, 59
Adbusters Media Foundation v. Canadian Broadcasting Corp., 2009 BCCA 148, 92 B.C.L.R. (4th) 9, leave to appeal refused, [2009] S.C.C.A. No. 227.	20
Attis v. Canada (Minister of Health), 2008 ONCA 660, 93 O.R. (3d) 35, leave to appeal refused, [2008] S.C.C.A. No. 491.	49, 55-56
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Hill v. Hamilton-Wentworth Regional Police Services Board, 2007 SCC 41, [2007] 3 S.C.R. 129.	21, 61, 68
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Law Society of Newfoundland and Labrador v. 755165 Ontario Inc., 2006 NLCA 60, 260 Nfld. & P.E.I.R. 222.	69
Marlor Farms Inc. v. Ontario (Farm Products Marketing Commission), 2010 ONSC 1573, [2010] O.J. No. 1702.	40

Jurisprudence (continued)	**Cited at Paragraph(s)**
Mirage Consulting Ltd. v. Astra Credit Union Ltd., 2008 MBCA 105, 231 Man. R. (2d) 269.	20
Odhavji Estate v. Woodhouse, 2003 SCC 69, [2003] 3 S.C.R. 263.	19
Premakumaran v. Canada, 2006 FCA 213, [2007] 2 F.C.R. 191, leave to appeal refused, [2006] S.C.C.A. No. 342.	40-41
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Williams v. Canada, 2009 ONCA 378, 95 O.R. (3d) 401, leave to appeal refused, [2009] S.C.C.A. No. 298.	54, 55, 58

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Trade Practice Act, R.S.B.C. 1996, c. 457.	12

PART VII: PROVISIONS CITED

PLEASE SEE TAB C

Supreme Court File No. 33559

IN THE 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 in the Court below)

and

IMPERIAL TOBACCO CANADA LIMITED

Respondent/Cross-Appeal Appellant
(Appellant in the Court below)

FACTUM OF APPELLANT IMPERIAL TOBACCO CANADA LIMITED ON CROSS-APPEAL

(Pursuant to Rules 42 and 43 of the *Rules of the Supreme Court of Canada*)

OSLER, HOSKIN & HARCOURT LLP
Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Deborah A. Glendinning
Tel: (416) 362-2111
Fax: (416) 862-6666
E-Mail: dglendinning@osler.com

Counsel for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

OSLER, HOSKIN & HARCOURT LLP
Suite 1900, 340 Albert Street
Ottawa, ON K1R 7Y6

Patricia Wilson
Tel: (613) 787-1009
Fax: (613) 235-2867

HUNTER LITIGATION CHAMBERS LAW CORPORATION
2100 – 1040 West Georgia Street
Vancouver, BC V6E 4H1

John J. L. Hunter, Q.C.

Tel: (604) 891-2401
Fax: (604) 647-4554
E-mail: jhunter@litigationchambers.com

Counsel for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

E-Mail: pwilson@osler.com

Agent for the Respondent/Cross-Appeal
Appellant Imperial Tobacco Canada Limited

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PART I: STATEMENT OF FACTS

A. Overview

1. Imperial Tobacco Canada Limited ("Imperial") brings this cross-appeal of the British Columbia Court of Appeal's decision in *Knight v. Imperial Tobacco Canada Limited*,[1] striking the following claims from Imperial's Amended Third Party Notice against Canada (the "Knight TPN"):

(a) Canada can be liable as a "supplier" under the *Trade Practice Act*[2], and the *Business Practices and Consumer Protection Act*[3] by virtue of the Federal *Crown Liability and Proceedings Act*[4];

(b) Canada breached private law duties of care to (i) Imperial and consumers for failure to warn, and (ii) Imperial for negligent design; and

(c) Canada can be liable to Imperial under the doctrine of equitable indemnity.

2. If the facts pleaded in the Knight TPN are properly taken as true, and these tort claims against Canada are struck on a preliminary pleadings motion, then the implication is that Canada, like any other product designer, can fully participate in the commercial marketplace, but, unlike any other product designer, may be shielded from liability for its negligence.

3. This is not a case against Canada in its capacity as a passive regulator of consumer products. This is a case against Canada as the designer and developer of the very consumer product at issue. The Knight TPN sets out the facts about Canada's role in the tobacco industry – not as a regulator – but as the researcher, designer, promoter and licensor of the very same "light" and "mild" tobacco strains at issue in the underlying class proceeding.

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[1] 2009 BCCA 541, 99 B.C.L.R. (4th) 93 [*Knight BCCA Decision*], **Imperial Tobacco Canada Limited's Joint Book of Authorities ("JBA"), Vol. III, Tab 40.**
[2] R.S.B.C. 1996, c. 457. (***Infra*, p. 82.**)
[3] S.B.C. 2004, c. 2 [BPCPA]. (***Infra*, p. 59.**)
[4] *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 [Federal CLPA]. (***Infra*, p. 62.**)

4. The facts pleaded against Canada in the Knight TPN are unique as against Canada – and must be taken as true. There is no "radical defect" in any of the claims against Canada in the Knight TPN. It is not "plain and obvious" that the struck claims are doomed to fail.

5. Imperial submits that the Court of Appeal erred in striking the claim that Canada can be liable as a "supplier" under the *Trade Practice Act*, erring both in its interpretation of the statutory definition, and in failing to consider whether the *Trade Practice Act* creates a form of statutory tort such that the Federal CLPA applies.

6. Imperial submits that the Court of Appeal further erred in failing to consider the failure to warn claims against Canada in respect of both Imperial and consumers. Imperial submits that these claims are clearly pleaded in the Knight TPN, which must be read broadly and generously, either as it exists or as it may be amended.

7. Lastly, Imperial submits that the majority erred in concluding that the *prima facie* duty of care owed to Imperial for negligent design must be negated for policy reasons, erring both in its analysis of pure economic loss, and in failing to recognize that the specific nature of the claim against Canada precludes the possibility of indeterminate liability.

8. Appellate courts caution against negating duties of care for policy reasons at such an early stage of an action. The burden of proof is on Canada to establish that negative policy consequences must negate the *prima facie* duty of care. Canada has brought nothing. Imperial submits that the pleaded facts negate any prospect of indeterminate liability.

9. There is literally no risk of Canada's exposure to indeterminate liability if a duty of care to Imperial is recognized in this case. The specific operational acts and the close and direct relationship of proximity pleaded in the Knight TPN are the foundation of the duty of care owed to Imperial. The ambit of the duty of care is very tightly circumscribed by these pleaded facts, such that indeterminate liability will not arise.

10. Imperial submits that majority also erred in its analysis of pure economic loss, proving that this issue is far from "plain and obvious".

11. Imperial submits that it was improperly driven from the judgment seat on the basis of flawed statutory interpretation, and purely speculative policy arguments, and that the Court of Appeal erred in striking claims from the Knight TPN at this early stage of the action, in a factual and evidentiary vacuum.

B. The Facts Pleaded in the Knight TPN

12. The underlying action is a certified class proceeding against Imperial brought by purchasers of Imperial's "light" and "mild" cigarettes. The representative plaintiff, on behalf of the class of consumers (the "plaintiff" or the "consumers"), alleges that Imperial breached consumer protection legislation, and seeks recovery of the purchase price of those "light" and "mild" cigarettes, (excluding taxes), as well as punitive damages.

13. When the class action was commenced, the applicable legislation was the *Trade Practice Act*, which was subsequently repealed and replaced by the BPCPA.[5]

14. The plaintiff alleges that Imperial engaged in deceptive acts and practices in marketing and promoting "light" and "mild" cigarettes, by misrepresenting the relative safety and actual intake of tar and nicotine and by printing misleading content figures on cigarette packages.

15. In the Knight TPN, Imperial alleges that all of the plaintiff's claims against Imperial relate to conduct by Canada – that it was Canada, and not Imperial, who researched, designed, licensed and promoted the "light" and "mild" tobacco strains complained of by the plaintiff. If the plaintiff's allegations are correct (which is denied), then it was Canada – and not Imperial – who created the standard testing methods and misrepresented the relative safety and actual intake to consumers and Imperial.

16. The Knight TPN sets out the facts about Canada's 50 year active participation in the Canadian tobacco industry at the operational level, and explains that Canada became a major

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[5] Mr. Justice Tysoe, in his majority judgment, refers to these two statutes collectively as the "*Trade Practice Act*": *Knight BCCA Decision, supra* note 1 at para. 3. **JBA, Vol. III, Tab 40, p. 58.**

participant in the tobacco business, in designing, promoting and licensing the same "light" and "mild" tobacco strains incorporated into Imperial's products, and complained of by the plaintiff.[6]

17. The Knight TPN pleads the following facts:

- Canada independently conducted tobacco research and determined that lower delivery products were safer and less hazardous.[7]
- Canada built a Tobacco Research Station at Delhi where it researched and developed tobacco varieties and cultural, curing and processing techniques for producing "light" and "mild" tobacco strains.[8]
- Canada mandated the standard testing protocol for measuring tar and nicotine deliveries.[9]
- Canada set "Sales Weighted Average Tar" targets that it required the tobacco companies to meet. The tobacco companies had to develop new products to produce lower tar deliveries as measured by Canada's mandated testing protocol.[10]
- At Delhi, Canada manufactured cigarettes from the tobacco varieties it designed and developed for evaluation by tobacco manufacturers.[11]
- Canada licensed and promoted the tobacco strains that it designed and developed for use by all Canadian tobacco growers and manufacturers.[12]
- Imperial paid licensing fees and royalties to Canada for the use of Canada's tobacco varieties.[13]
- By 1982, Canada's tobacco strains were virtually the only tobacco varieties available to the Canadian manufacturers. Canada's tobacco strains are the tobacco strains that were purchased and consumed by the class members.[14]

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[6] Amended Third Party Notice, paras. 53-66, 95-100 and 117-118 [Knight TPN], **Appellant's *Knight* Record ("AR"), pp. 148-150, 155-156, 160.**
[7] *Ibid.* at para. 21, **AR, p. 41.**
[8] *Ibid.* at paras. 32-33, **AR, p. 144.**
[9] *Ibid.* at paras. 20, 24-25 and 51, **AR, pp. 140, 142, 147.**
[10] *Ibid.* at para. 46, **AR, p. 146.**
[11] *Ibid.* at para. 95, **AR, p. 155.**
[12] *Ibid.* at para. 96, **AR, p. 155.**
[13] *Ibid.* at para. 98, **AR, p. 156.**
[14] *Ibid.* at para. 97, **AR, p. 155.**

- Canada publicly promoted the use of its tobacco varieties by Imperial in producing "light" and "mild" cigarettes for consumers.[15]

- Canada promoted the consumption of "light" and "mild" cigarettes over other kinds of cigarettes to consumers thereby participating in consumer transactions.[16]

- Canada publicly took credit for the availability of "light" and "mild" products on the Canadian market.[17]

- Canada developed, licensed and promoted the use of its tobacco strains used in Imperial's "light" and "mild" products during the material period.[18]

- Canada regularly published League Tables, press releases and other information encouraging smokers to switch to "light" and "mild" products.[19]

- Canada did not pass any legislation or regulations mandating tar and nicotine levels as measured by standard testing methods before 1989. Canada independently created the standard testing methods and set maximum limits for tar and nicotine levels in tobacco products.[20]

18. Critically, none of the facts pleaded in the Knight TPN relate to Canada's role as a regulator. Moreover, other than legislation prohibiting the sale of tobacco products to minors, there was no federal legislation regulating the tobacco industry in Canada until 1989.[21]

19. Imperial alleges five categories of claims against Canada in the Knight TPN: (i) Canada can be liable as a "supplier" under the *Trade Practice Act*, by virtue of the Federal CLPA, entitling Imperial to contribution and indemnity under the *Negligence Act*;[22] (ii) Canada breached duties of care to consumers giving rise to liability for negligent misrepresentation, negligent design, and failure to warn, entitling Imperial to contribution and indemnity; (iii) Canada breached duties of care to Imperial for negligent misrepresentation, negligent design, and failure to warn, giving rise to liability in damages; (iv) Canada can be liable to indemnify

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[15] *Ibid.* at para. 100, **AR, p. 156.**
[16] *Ibid.* at para. 117, **AR, p. 160.**
[17] *Ibid.* at para. 48, **AR, p. 147.**
[18] *Ibid.* at para. 118, **AR, p. 160.**
[19] *Ibid.* at paras. 54-57 and 64-65, **AR, pp. 148-149, 150.**
[20] *Ibid.* at paras. 22 and 24-25, **AR, pp. 141-142.**
[21] *Knight BCCA Decision, supra* note 1 at para. 13. **JBA, Vol. III, Tab 40, p. 61.**
[22] R.S.B.C. 1996, c. 333. (***Infra*, p. 66.**)

Imperial under the principle of equitable indemnity; and (v) Canada is subject to declaratory relief.

C. History of the Action

20. Canada brought an application to strike the Knight TPN under Rule 19(24)(a) of the British Columbia *Supreme Court Rules*, which authorizes the court to strike a pleading if it discloses no reasonable claim.[23]

21. The chambers judge struck the Knight TPN in its entirety.[24] Imperial appealed the decision on numerous grounds, including the patent failure to take the facts pleaded in the Knight TPN as true.

22. A three judge majority of the British Columbia Court of Appeal restored the claims that Canada breached private law duties of care to (i) consumers and Imperial for negligent misrepresentations and, (ii) consumers for negligent design of the tobacco strains created by Canada.

23. The majority struck the claim that Canada owed a duty of care to Imperial for negligent design on the basis that the *prima facie* duty of care was negated by the policy concern of indeterminate liability.[25]

24. The Court of Appeal did not address the pleaded claims that Canada failed to warn Imperial and consumers.

25. With respect to the claim that Canada can be liable as a "supplier" under the *Trade Practice Act* and the BPCPA, the Court of Appeal held that Canada enjoys common law immunity from the application of the *Acts*, and further, that Canada does not fall within the statutory definition of "supplier". Given this finding, the Court of Appeal did not consider whether the *Trade Practice Act* and the BPCPA create or modifies an action in tort, for the

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[23] *Supreme Court Rules*, B.C. Reg. 221/90, (***Infra*, p. 76.**), made under the *Court Rules Act*, R.S.B.C. 1996 c. 80 (now Rule 9-5(1)(*a*) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009). (***Infra*, p. 70.**)

[24] *Knight v. Imperial Tobacco Canada Ltd.*, 2007 BCSC 964, 76 B.C.L.R. (4th) 100, per Satanove J. [*Knight Chambers Decision*], **JBA, Vol. III, Tab 41.**

[25] *Knight BCCA Decision*, *supra* note 1 at paras. 60 and 89. **JBA, Vol. III, Tab 40, pp. 74, 81.**

purposes of section 3 of the Federal CLPA, which would make the *Trade Practice Act* apply to Canada.[26]

26. The majority set aside the order striking the Knight TPN, and substituted the following order:

> ...striking only the portions of the amended third party notice relating to the claims of ITCAN that (i) it is entitled to contribution and indemnity from Canada on the basis that the *Trade Practice Act* and *Business Practices and Consumer Protection Act* apply to Canada, (ii) Canada owed it a duty of care with respect to the design of the tobacco strains used in light and mild cigarettes, and (iii) it is entitled to be indemnified by Canada on the basis of the doctrine of equitable indemnity.[27]

27. In the result, the remaining claims against Canada in the Knight TPN are for: (i) breached private law duties of care to consumers for negligent misrepresentation and negligent design, (ii) a breached private law duty of care to Imperial for negligent misrepresentation, and (iii) declaratory relief.

PART II: QUESTIONS IN ISSUE

28. The issue on this cross-appeal is whether it is "plain and obvious" that the following claims against Canada in the Knight TPN are doomed to fail:

(d) Canada can be liable as a "supplier" under the *Trade Practice Act* and the BPCPA, by virtue of the Federal CLPA;

(e) Canada breached private law duties of care to (i) Imperial and consumers for failure to warn, and (ii) Imperial for negligent design; and

(f) Canada can be liable to Imperial under the doctrine of equitable indemnity.

PART III: ARGUMENT

A. The Test for Striking Pleadings

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[26] Federal CLPA, *supra* note 4. (***Infra*, p. 65.**)
[27] *Knight BCCA Decision*, *supra* note 1 at para. 92, **JBA, Vol. III, Tab 40, p. 82.**

29. The test to be applied on an application to strike a pleading under British Columbia's Rule 19(24)(a) is well-established.

30. The test is a stringent one.[28] Every fact pleaded must be taken to be true unless patently ridiculous or incapable of proof.[29] When so taken, the question to be determined is whether it is "plain and obvious" that the action must fail. It must be clear that the claim cannot succeed if it goes to trial, or it must not be struck.[30]

31. The standard to strike a statement of claim is very high:

> Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.[31]

32. In addition, it has been held inappropriate to engage in complex statutory interpretation issues on motions to strike a pleading, since evidence is not admissible. Complex, contentious matters of statutory interpretation must be considered on the basis of a complete evidentiary record, particularly where extrinsic evidence may be required to aid in interpretation.[32]

B. Canada can be Liable under the *Trade Practice Act* and the *BPCPA*

33. Imperial claims that Canada can be liable under the *Trade Practice Act* and the BPCPA (collectively, the "*Trade Practice Act*"), which gives rise to a claim for contribution and indemnity under the *Negligence Act*.

34. The majority framed the issues arising from this claim as follows:

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[28] *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 at para. 15, **JBA, Vol. III, Tab 48, pp. 157-158.**

[29] *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 at 23 (C.A.), **JBA, Vol. III, Tab 46, p. 143**; *Brogaard v. Canada (Attorney General)*, 2002 BCSC 1149, 7 B.C.L.R. (4th) 358 at para. 33 (C.A.), **JBA, Vol. 1, Tab 14, p. 196.**

[30] *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551 at para. 16, **JBA, Vol. 2, Tab 33, p. 200.**

[31] *Mirage Consulting Ltd. v. Astra Credit Union Ltd.*, 2008 MBCA 105, 231 Man. R. (2d) 269 at para. 9, **JBA, Vol. III, Tab 47, p. 148**, citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 990-991; *Adbusters Media Foundation v. Canadian Broadcasting Corp.*, 2009 BCCA 148, 92 B.C.L.R. (4th) 9, leave to appeal refused, [2009] S.C.C.A. No. 227, **JBA, Vol. I, Tab 2.**

[32] *Apotex Inc. v. Eli Lilly and Co.*, 2001 FCT 636, 13 C.P.R. (4th) 78 at paras. 11, 13 and 14, aff'd 2002 FCA 389, **JBA, Vol. I, Tab 4, pp. 35-36**, citing *Pfizer Canada Inc. v. Apotex* (1999), 172 F.T.R. 81 at paras. 33-35 (T.D.); *Rhône-Poulenc Canada Inc. v. Reichhold Ltd.*, (1998), 71 O.T.C. 18 at paras. 17-19 (Gen. Div.), **JBA, Vol. IV, Tab 53, p. 70.**

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

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

(ii) Canada is immune from liability under the *Trade Practice Act* because the claim is not tort within the meaning of s. 3 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, and a provincial legislature does not have the capacity of enacting legislation that is unilaterally binding on Canada?[33]

35. With respect to issue (i), the majority considered two sub-issues – first, whether, as a matter of statutory interpretation, the *Trade Practice Act* purports to bind Canada, and, second, whether Canada falls within the definition of "supplier" under the *Trade Practice Act.*

36. The majority held that (a) the *Trade Practice Act* does not bind Canada either expressly or by necessary implication, and (b) Canada cannot be a "supplier" under the statutory definition.

37. Given its conclusion on issue (i), the majority did not consider issue (ii) and whether the *Trade Practice Act* applies to Canada by virtue of the Federal CLPA.

38. To clarify its argument before this Court, Imperial does not submit (for the purposes of this specific argument) that the *Trade Practice Act* applies to Canada by virtue of a provincial statute. Imperial submits that the *Trade Practice Act* applies to Canada by virtue of a federal statute – the Federal CLPA. Imperial submits that: (a) Canada falls within the definition of "supplier" in the *Trade Practice Act*, and (b) the *Trade Practice Act* is a "tort" for the purposes of the Federal CLPA, which makes Canada liable as a "supplier" under the *Trade Practice Act.*

39. For the reasons set out below, Imperial submits that: (a) the Court of Appeal erred in concluding that it is "plain and obvious" that Canada cannot fall within the definition of "supplier" under the *Trade Practice Act*; and (b) it is not "plain and obvious" that the Federal CLPA cannot apply to make Canada liable under the *Trade Practice Act.*

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[33] *Knight BCCA Decision, supra* note 1 at para. 24, **JBA, Vol. III, Tab 40, pp. 64-65.**

Canada Falls Within the Definition of "Supplier" on the Facts Pleaded in the Knight TPN

40. Imperial submits that the Court of Appeal erred in concluding that it is "plain and obvious" that Canada cannot be a "supplier" under British Columbia's consumer protection legislation.[34]

41. Imperial submits that the majority erred both in its analysis of the consumer protection statutes, and in summarily disposing of complex statutory interpretation issues on a preliminary motion to strike a pleading.

42. Section 1 of the *Trade Practice Act* defines "supplier" as follows:

> "**supplier**" means a person, whether in British Columbia or not, other than a consumer, who in the course of the person's business solicits, offers, advertises or promotes the disposition or supply of the subject of a consumer transaction or who engages in, enforces or otherwise participates in a consumer transaction, whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of the supplier;[35]

43. Section 4 of the BPCPA defines "supplier" as follows:

> **"supplier"** means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by
>
> (a) supplying goods or services or real property to a consumer, or
>
> (b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",
>
> whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person...[36]

44. The majority held that while Canada's activities could fall within "promotion" in both definitions of "supplier", these activities were not done "in the course of ... business" as required under the definition. The majority's explanation was that the allegations against Canada

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[34] *Knight BCCA Decision, supra* note 1 at paras. 35 and 96, **JBA, Vol. III, Tab 40, pp. 67, 83.**
[35] *Trade Practice Act, supra* note 2. (***Infra*, pp. 83 and 85.**)
[36] BPCPA, *supra* note 3. (***Infra*, p. 60.**)

were "not alleged to have been done by Canada in the course of a business carried on for the purpose of earning a profit".[37] (emphasis added)

45. However, neither statutory definition of "supplier" contains the requirement that the impugned activities must be "carried on for the purpose of earning a profit" as suggested by the majority.

46. The Knight TPN alleges that Canada researched, designed, developed, tested, manufactured and promoted a consumer product, for which it received license fees and royalties.

47. These are plainly commercial activities. It cannot be "plain and obvious" that these activities were not done "in the course of ... business". Evidence is clearly required to make this determination.

48. In any event, it is not "plain and obvious" that Canada does not carry on its tobacco business for the purpose of earning a profit. Canada made a lot of money from its tobacco. Evidence at trial is required to determine just how much.

49. Imperial notes that the chambers judge also concluded that Canada cannot be a "supplier" under the statutory definitions, but submits that her reasoning was flatly incompatible with the facts pleaded in the Knight TPN, as she stated only that: "In my view, just because Canada regulates an industry does not mean it is 'supplying, soliciting, offering, advertising or promoting a product in the course of its business'".[38]

50. Imperial's claims in the Knight TPN do not relate in any way to Canada's regulation of an industry. Imperial's claims in the Knight TPN relate only to Canada's negligent participation in the consumer marketplace as the designer, licenser, promoter, and "supplier" of impugned consumer goods.

51. At a minimum, the facts pleaded in the Knight TPN constitute "promotion" in the statutory definitions. It is pleaded that Canada publicly promoted the use of its tobacco varieties

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[37] *Knight BCCA Decision, supra* note 1 at para. 35, **JBA, Vol. III, Tab 40, p. 67.**
[38] *Knight Chambers Decision, supra* note 24 at para. 20, **JBA, Vol. III, Tab 41, p. 99.**

by Imperial in producing "light" and "mild" cigarettes for consumers,[39] and that Canada promoted the consumption of "light" and "mild" cigarettes over other kinds of cigarettes to consumers, thereby participating in consumer transactions.[40]

52. For all of the foregoing reasons, Imperial submits that it is not "plain and obvious" that Canada cannot be a "supplier" as defined in the *Trade Practice Act* or the BPCPA.

Canada can be Liable under the *Trade Practice Act* and the BPCPA by Virtue of the Federal CLPA

53. The next issue in determining whether Canada can be liable under the *Trade Practice Act*, is whether the *Trade Practice Act* is a "tort" for the purposes of the Federal CLPA.

54. Section 3 of the Federal CLPA modifies the common law rule shielding Canada from tort liability, and makes Canada liable for the torts of its servants.[41]

55. This tort liability was imposed through legislative reform to remedy a "serious defect in the law" by making the Federal Crown liable for breaches of duty by its servants in the same way as a private citizen.[42] Canada's liability for the torts of its servants includes not only common law torts, but also "provincial statutes creating or modifying tortious or delictual liability".[43]

56. In order to attract the application of the Federal CLPA, the *Trade Practice Act* must be a form of statutory tort.

57. Imperial submits that consumer protection statutes are widely accepted as falling within the mainstream of tort liability. This point is not controversial.

> Some statutes expressly create a detailed scheme of civil liability of a tortious character. The Occupiers' Liability Acts of 1957 and 1984, Pt I of the Consumer Protection Act 1987 and the Animals Act 1971 are examples of this approach. The law so created is generally regarded as falling within the mainstream of tort liability.

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[39] Knight TPN at para. 100, **AR, p. 156.**
[40] *Ibid.* at para. 117, **AR, p. 160.**
[41] Federal CLPA, *supra* note 4. (***Infra*, p. 65.**)
[42] Peter W. Hogg & Patrick J. Monahan, *Liability of the Crown*, 3d ed. (Toronto: Carswell, 2000) at 7, **JBA, Vol. V, Tab 70, p. 145.**
[43] Hogg & Monahan, *ibid.* at 309, **JBA, Vol. V, Tab 70, p. 152.**

> Indeed, the rules enacted in this way are often modelled closely on or are developments of common law principles.[44]

58. Commentators agree that consumer protection legislation cannot be seen in isolation from the broader framework and functions of tort law.[45]

59. Consumer protection legislation meets this Court's broad definition of tort:

> The law of tort covers a much wider field than does contract or quasi-contract. It provides a means whereby compensation, usually in the form of damages, may be paid for injuries suffered by a party as a result of the wrongful conduct of others.[46]

60. The *Trade Practice Act* very obviously provides a means whereby consumers may be compensated for injuries suffered as a result of the wrongful conduct of others (i.e. Canada).

61. The chambers judge agreed that it is not "plain and obvious" that the BPCPA does not modify tort for the purposes of the Federal CLPA:

> The *BPCPA* imposes an obligation to refrain from any oral, written, visual, or descriptive representations, or to refrain from engaging in any conduct that has the capability, tendency or effect of deceiving or misleading a consumer. This obligation involves elements akin to the common law torts of negligent misstatement, deceit and failure to disclose material facts. However, liability under the *BPCPA* may not require proof of reliance, or intention to deceive, or damage. It is therefore quite different from the classic torts of negligence, negligent misstatement and deceit. In my opinion, notwithstanding these differences, liability under the *BPCPA* still meets the broadest definition of tort as being "based in a civil wrongdoing, other than breach of contract, which the law will redress by an award of damages. (Allen M. Linden, Canadian Tort Law, 7th ed. (Markham: Butterworths, 2001) at p. 2).[47] (emphasis added)

62. Indeed, over a decade ago, Chief Justice McLachlin anticipated that the rules that govern proof of causation in tort law would change in this way.

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[44] Keith Stanton et al., *Statutory Torts* (London: Sweet & Maxwell, 2003) at 7, **JBA, Vol. V, Tab 68, p. 116.**

[45] Anthony M. Dugdale and Michael A. Jones, eds., *Clerk and Lindsell on Torts*, 19th ed., (London: Sweet & Maxwell, 2006) at para. 1-18, **JBA, Vol. V, Tab 64, p. 42.**

[46] *Hall v. Hebert*, [1993] 2 S.C.R. 159 at 200, **JBA, Vol. II, Tab 28, p. 122.**

[47] *Knight Chambers Decision*, *supra* note 24 at paras. 14-15, per Satanove J, **JBA, Vol. III, Tab 41, p. 98.**

> We can reasonably predict that the rules that govern proof of causation in tort will change. What we cannot predict is the pace of the change. Will the common law process of change by small incremental steps suffice? Or will advancing public views about responsibility push the courts and/or the legislatures toward a more rapid and fundamental reappraisal?[48]

63. On the facts pleaded in the Knight TPN, Canada negligently designed, licensed, and promoted a consumer product – "goods" under consumer protection legislation.

64. Consumer protection legislation is remedial legislation, which should be liberally construed. Imperial respectfully submits that it is wildly premature to conclude that consumers have no recourse against Canada when its servants negligently design consumer products. Imperial submits that to dismiss such claims on the basis of a preliminary pleadings motion would be to fail to recognize the remedial and protective features of the legislation.

65. For all of the foregoing reasons, Imperial submits that the Court of Appeal erred in concluding that it is "plain and obvious" that Canada cannot be liable as a "supplier" under the *Trade Practice Act* and the BPCPA. Imperial respectfully submits that this claim is not doomed to fail and should not have been struck in the absence of a full factual and evidentiary record.

C. Canada can be Liable for Breached Private Law Duties of Care to (i) Imperial and Consumers for Failure to Warn and to (ii) Imperial for Negligent Design

66. Among the private law duty of care claims asserted against Canada in the Knight TPN, Imperial claims that Canada can be liable for breaches of duty to (i) Imperial and consumers for failure to warn in respect of the tobacco strains it developed, and (ii) to Imperial for the negligent design of Canada's "light" and "mild" tobacco strains.

67. The Court of Appeal did not even address, let alone consider, the private law claims that Canada failed to warn Imperial and consumers.

68. With respect to the negligent design claim, the majority held that the *prima facie* duty of care owed to Imperial was negated by policy considerations of indeterminate liability.

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[48] Hon. B. McLachlin, "Negligence Law – Proving the Connection", in Mullany & Linden, eds., *Torts Tomorrow, A Tribute to John Fleming* (Sydney: LBC Information Services, 1998) at 35, **JBA, Vol. V, Tab 67, p. 107.**

69. Imperial will first discuss the test for establishing a duty of care, followed by an analysis of (i) the failure to warn claims, and (ii) the negligent design claim, against Canada in the Knight TPN.

The Test for Establishing a Duty of Care

70. The test for determining whether a person owes a duty of care (the "Anns test") is well-established.

> The test for determining whether a person owes a duty of care involves two questions: (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and (2) If so, are there any residual policy considerations which ought to negate or limit that duty of care?[49]

71. The starting point in the analysis is to determine whether the alleged duty of care falls within one of the categories of relationships in which sufficient proximity to establish a duty of care has been previously recognized. If so, a *prima facie* duty of care is established without further analysis.[50]

72. Once the plaintiff establishes a *prima facie* duty of care, the evidentiary burden of showing countervailing policy considerations shifts to the defendant.[51] However, no evidence is permitted on a motion to strike.

73. Accordingly, many courts have held that it is inappropriate to determine on a preliminary pleadings motion that policy considerations plainly and obviously negate a duty of care, and that this determination should be made at trial, on the basis of a full evidentiary record.[52]

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[49] *Hill v. Hamilton-Wentworth Regional Police Services Board,* 2007 SCC 41, [2007] 3 S.C.R. 129 at para. 20 [*Hill*], **JBA, Vol. II, Tab 32, pp. 183-184.**

[50] *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 at para. 15 [*Childs*], **JBA, Vol. II, Tab 2, p. 13**; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 at para. 36, **JBA, Vol. II, Tab 3, pp. 31-32.**

[51] *Childs, ibid.* at paras. 12-13, **JBA, Vol. II, Tab 2, pp. 12-13.**

[52] *Law Society of Newfoundland and Labrador v. 755165 Ontario Inc.*, 2006 NLCA 60, 260 Nfld. & P.E.I.R. 222 at para. 19 [*Law Society of Newfoundland*], **JBA, Vol. III, Tab 43, p. 117**; *Sauer v. Canada*, 2007 ONCA 454, 31 B.L.R. (4th) 20 at para. 45 [*Sauer CA*], **JBA, Vol. IV, Tab 57, p. 122**, leave to appeal refused, [2007] S.C.C.A. No. 454; *Haskett v. Equifax Canada Inc.* (2003), 63 O.R. (3d) 577 at 587-588 (C.A.) [*Haskett*], **JBA, Vol. II,**

74. This Court itself has affirmed that tenuous or speculative policy arguments cannot negate a *prima facie* duty of care, and that a duty of care in tort should not be denied on speculative grounds.[53]

(ii) FAILURE TO WARN

75. The Court of Appeal did not make reference to any of Imperial's failure to warn claims against Canada in the Knight TPN.

76. In the Costs Recovery Appeal, however, the majority held that Imperial did not sufficiently plead a failure to warn claim in respect of Canada's tobacco strains, and that it only alleged failure to warn in respect of regulatory warnings.[54]

77. For the same reasons set out in Imperial's Costs Recovery Cross-Appeal factum[55], Imperial submits that it has sufficiently pleaded failure to warn in the Knight TPN – both in respect of duties to consumers[56] and to Imperial.[57]

78. The British Columbia Court of Appeal itself has repeatedly confirmed that it is not necessary to plead specific causes of action. It is only necessary to plead material facts that can support one or more causes of action.[58]

79. Moreover, it is well-established that the factors to be considered in the "plain and obvious" test include whether the pleadings may be *amended.*[59] That is, as long as the Knight

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Tab 29, pp. 135-136; *Ring v. Canada (Attorney General)*, 2007 NLTD 146, 268 Nfld. & P.E.I.R. 204, 51 C.C.L.T. (3d) 260 at paras. 92-104, **JBA, Vol. IV, Tab 54, pp. 76-79**.

[53] *Hill, supra* note 49 at paras. 40-41, 43 and 48, **JBA, Vol. II, Tab 32, pp. 192-194**.

[54] *British Columbia v. Imperial Tobacco Canada Limited*, 2009 BCCA 540, 98 B.C.L.R. (4th) 201 at para. 88 [*Costs Recovery BCCA Decision*], **JBA, Vol. 1, Tab 7, p. 102**.

[55] Imperial's Costs Recovery Cross-Appeal Factum at paras. 143-163.

[56] Knight TPN at paras. 53-66, 124-128, **AR, pp. 148-150, 161-165**. See also *Knight Chambers Decision, supra* note 24 at paras. 22-24, **JBA, Vol. III, Tab 41, pp. 99-100**.

[57] *Ibid.* at para. 101-109, **AR, p. 156-158.**

[58] *Strauss v. Jarvis*, 2007 BCCA 605, 76 B.C.L.R. (4th) 90 at para. 6, **JBA, Vol. IV, Tab 59, p. 158.**, citing *Alford v. Canada (Attorney General)*, [1998] B.C.J. No. 2965 at para. 5 (C.A.).

[59] *AMS Homecare Inc. v. TSX Venture Exchange Inc.* 2007 BCSC 86, 67 B.C.L.R. (4th) 42 at para. 28, **JBA, Vol. I, Tab 3, p. 32**, citing *Berscheid v. Ensign* (1999), 88 A.C.W.S. (3d) 580 at para 33 (B.C.S.C.).

TPN discloses a triable issue, either as it exists, or as it may be amended, then the claim should go to trial.[60]

80. Imperial submits that the broad allegations of negligence against Canada in the Knight TPN[61] should be interpreted as raising the issue of failure to warn.[62]

81. Imperial submits that the failure to warn claims are sufficiently pleaded against Canada in the Knight TPN, and that for all of the following reasons, it is not "plain and obvious" that these failure to warn claims are doomed to fail.

Stage One – Prima Facie Duty of Care

82. Imperial submits that, for the same reasons the majority found a *prima facie* duty of care with respect to the claims of negligent misrepresentation and negligent design, it is not "plain and obvious" that Canada cannot owe duties of care to Imperial and consumers for failure to warn in respect of the tobacco that Canada negligently designed and promoted.

83. In particular, Imperial submits that it cannot be seriously contested that a person who designs a product intended for sale to the public owes a *prima facie* duty of care to both the purchasers of the product,[63] and the manufacturer who uses the product in goods sold to the public.[64]

84. On the issue of foreseeability, a designer of a product ought reasonably to have purchasers of the product in contemplation as persons who will be affected by its design.

85. Canada does not contest the foreseeability component of the duty of care analysis with respect to the duties owed to Imperial on its appeal.[65] In any event, Imperial submits that it would be reasonably foreseeable to the designer of the product that a manufacturer of goods

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[60] *Haeck v. British Columbia (Attorney General)*, 2005 BCSC 139, [2005] B.C.J. No. 198 at para. 57, **JBA, Vol. II, Tab 27, pp. 111-112**, citing *Wayneroy Holdings Ltd. v. British Columbia (Minister of Environment, Lands and Parks)*, 2002 BCSC 1510, [2002] B.C.J. No. 2472 at para. 12.

[61] Knight TPN at para. 101-109, **AR, pp. 156-158**.

[62] *Elias v. Headache and Pain Management Clinic*, [2008] O.J. No. 4055 at para. 6 (S.C.J.), **JBA, Vol. II, Tab 23, p. 78**; see also *Day v. Central Okanagan (Regional District)*, 2000 BCSC 1134, 79 B.C.L.R. (3d) 36 at para. 68-69, **JBA, Vol. 2, Tab 20, p. 59**.

[63] *Knight BCCA Decision, supra* note 1 at para. 48, **JBA, Vol. III, Tab 40, p. 71**, citing *Gallant v. Beitz* (1983), 42 O.R. (2d) 86 (H.C.J.), and *Baker v. Suzuki Motor Co.*, 12 Alta. L.R. (3d) 193 (Q.B.).

[64] *Knight BCCA Decision, ibid.* at para. 67. **JBA, Vol. III, Tab 40, p. 76.**

[65] Canada's Knight Appeal Factum at paras. 27 and 28.

incorporating the product could be required to refund the purchase price paid by the consumers if the designer failed to warn that the design of the product did not accomplish that which it was intended to accomplish.[66]

86. On the issue of proximity, Imperial submits that 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, and that it follows that there is likewise sufficient proximity in the relationship between the designer of a product and a manufacturer who uses the product in goods sold to the public.

87. Accordingly, given the facts pleaded in the Knight TPN, Imperial submits that it is not "plain and obvious" that Canada cannot owe a *prima facie* to duty to Imperial and consumers for failure to warn in respect of the tobacco strains designed and promoted by Canada.

Stage Two – Policy Considerations

88. Given that the evidentiary onus at this stage is on Canada, and that it has offered nothing, it cannot be "plain and obvious" that the *prima facie* duty of care for failure to warn claim is negated for policy reasons.

89. Notwithstanding Canada's failure to discharge its onus, Imperial will address the policy concerns relating to the immunity of policy decisions, and indeterminate liability.

Canada's Failure to Warn is Operational Conduct – Not Policy

90. Imperial submits that it is not "plain and obvious" that the failure to warn claims against Canada in the Knight TPN are based on policy decisions rather than operational conduct.

91. The Supreme Court of Canada distinguished between policy decisions and operational conduct in this way:

> True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a

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[66] *Knight BCCA Decision, supra* note 1 at para. 67. **JBA, Vol. III, Tab 40, p. 76.**

> balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.
>
> The operational area is concerned with the practical implementation of the formulated policies; it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.[67]

92. There is no bright line between policy decisions and operational conduct – particularly not on a preliminary pleadings motion.

93. Imperial submits that a failure to warn is arguably an operational act, just as it has been held that making a representation as to a state of facts is, arguably, an operational act, and is therefore not immune from tort liability.[68]

94. At a minimum, it is not "plain and obvious" which of Canada's alleged actions were policy and which were operational.[69] A full evidentiary record is required to make this determination. Moreover, there has never been any regulation or contemplated regulation of warnings about "light" and "mild" cigarettes that could relate to Canada's duty to Imperial for failure to warn.

Indeterminate Liability

95. This Court recently confirmed that while the policy concern over indeterminate liability has often held sway in negligence cases for economic loss, "even in that context, it has not always carried the day to exclude a duty of care". What is required is a principled basis upon which to draw the line between those to whom the duty is owed and those to whom it is not.[70]

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[67] *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 at 441, **JBA, Vol. II, Tab 15, p. 6**.

[68] *Marlor Farms Inc. v. Ontario (Farm Products Marketing Commission)*, 2010 ONSC 1573, [2010] O.J. No. 1702 at para. 71, **JBA, Vol. III, Tab 44, p. 121**.

[69] *Sauer CA*, *supra* note 52 at paras. 61-63, **JBA, Vol. IV, Tab 57, pp. 124-125**.

[70] *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132 at paras. 70-71, **JBA, Vol. II, Tab 25, p. 98-99**.

96. The principled basis for drawing that line, in this case, is that the allegations against Canada in the Knight TPN are not related to its role as a regulator. Canada's conduct in entering the commercial tobacco business was never the subject of regulation.

97. With respect to the duty owed to consumers, Imperial submits that the potential liability of Canada is clearly not indeterminate because it extends only to those persons who purchased the "light" and "mild" tobacco strains designed, licensed, and promoted by Canada.

98. Indeed, the underlying class action has already been certified on the basis that the proposed class satisfies the "identifiable class" requirement of the test for certification of a class proceeding, meaning that it is capable of definition and is not unnecessarily broad.[71]

99. With respect to the duty owed to Imperial, the potential liability of Canada is not indeterminate because it extends only to those manufacturers who incorporated the "light" and "mild" tobacco strains designed and promoted by Canada into their goods that were then sold to the public.

100. As correctly stated by the majority with respect to Canada's *prima facie* duties to consumers for negligent misrepresentations and negligent design:

> The potential liability of Canada flowing from breaches of the duty of care would not appear to be indeterminate because the affected persons are identified as those who purchased the light and mild cigarettes (i.e., the class members). The concerns about conflicting duties and the government becoming an insurer of another's product would not appear to apply. If the alleged actions had been taken by a private body rather than Canada, it seems to me that no one would seriously argue that the *prima facie* duty of care should be negated by policy considerations. In my opinion, without the benefit of evidence at trial to assist in the examination of the considerations, none of the policy considerations are determinative to negate the *prima facie* duty of care. On the basis of the pleadings alone, it is not plain and obvious that the *prima facie* duty of care owed by Canada to the class members should be negated. [72]

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[71] *Knight v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 235, 267 D.L.R. (4th) 579 at para. 21, **JBA, Vol. III, Tab 42, p. 113-114.**

[72] *Knight BCCA Decision*, *supra* note 1 at para. 55. **JBA, Vol. III, Tab 40, p. 73.**

101. Imperial submits that this analysis applies equally to the failure to warn claims against Canada in the Knight TPN.

102. For all of the foregoing reasons, Imperial submits that it is not "plain and obvious" that the failure to warn claims against Canada in the Knight TPN in respect of private law duties of care owed to consumers and Imperial, are doomed to fail.

(ii) NEGLIGENT DESIGN

103. The majority held that it was not "plain and obvious" that Canada could not owe a *prima facie* duty to Imperial for negligent design, but held that any such duty must be negated by policy concerns of indeterminate liability.[73]

104. Imperial submits that the majority erred in concluding that speculative and inapplicable policy concerns negate the *prima facie* duty of care owed to Imperial, for the reasons set out below.

Stage One – *Prima Facie* Duty of Care

105. The majority considered both proximity and foreseeability in light of the pleaded facts that Canada designed the "light" and "mild" tobacco strains that were incorporated into Imperial's products, and correctly held that it is not "plain and obvious" that Canada could not owe a *prima facie* duty of care to Imperial for negligent design:

> If sufficient proximity exists in the relationship between a designer of a product and a purchaser of a product, it would seem to me to follow that there is sufficient proximity in the relationship between the designer of a product and a manufacturer who uses the product in goods sold to the public. Also, the designer of the product ought reasonably to have the manufacturer in contemplation as a person who would be affected by its design in the context of the present case. It would have been reasonably foreseeable to the designer of the product that a manufacturer of goods incorporating the product could be required to refund the purchase price paid by the consumers if the design of the product did not accomplish that which it was intended to accomplish.[74]

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[73] *Costs Recovery BCCA Decision, supra* note 54 at para. 86, **JBA, Vol. 1, Tab 7, p. 102.**

[74] *Knight BCCA Decision, supra* note 1 at para. 67. **JBA, Vol. III, Tab 40, p. 80.**

106. It has been stated as an obvious principle that "[o]f course, if the producer of a specific component part could be proved negligent, it would undoubtedly also be held liable to the consumer or will be required to indemnify the assembler for any damages the latter had to pay as a result of the former's fault".[75]

107. Imperial submits that the majority was correct in concluding that it is not "plain and obvious" that Canada cannot owe a *prima facie* duty of care to Imperial for the negligent design of "light" and "mild" tobacco strains.

Stage Two – Policy Considerations

108. In turning to the second stage of the Anns test, the majority held that the policy concern of indeterminate liability negates the *prima facie* duty owed by Canada in connection with the claim of negligent design.[76]

109. The onus is on Canada to demonstrate a real potential for policy reasons to negate a *prima facie* duty of care. For this reason, appellate courts have repeatedly held that they should not determine at such an early stage in an action that policy considerations negate a *prima facie* duty of care,[77] and that it is generally inappropriate to consider the second stage of the Anns test on a motion to strike, as the burden of proof is on the applicant, and evidence is not permitted.[78]

110. Imperial respectfully submits that the majority erred both in its analysis of pure economic loss, and in its conclusion that a recognition of the duties claimed in the Knight TPN will give rise to indeterminate liability. Imperial will address each of these errors in turn.

It is Not Plain and Obvious Which Category of Recoverable Economic Loss Applies

111. In considering the negligent design claim, the majority identified, as a relevant factor in the stage two analysis, that the loss claimed by Imperial is pure economic loss.

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[75] Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Markham, Ont.: Butterworths, 2006) at 626, **JBA, Vol. V, Tab 63, p. 20**.

[76] *Knight BCCA Decision, supra* note 1 at para. 83. **JBA, Vol. III, Tab 40, p. 80.**

[77] *D.H. v. J.H. (Guardian ad litem of),* 2008 BCCA 222, 81 B.C.L.R. (4th) 288 at para. 41, **JBA, Vol. II, Tab 19, p. 51**; *Sauer CA, supra* note 52 at paras. 45, **JBA, Vol. IV, Tab 57, p. 122**; *Haskett, supra* note 52 at 587-588 (C.A.), **JBA, Vol. II, Tab 29, pp. 135-136**.

[78] *Law Society of Newfoundland, supra* note 52 at para. 19, **JBA, Vol. III, Tab 43, p. 117.**

112. However, as discussed below, the majority erred in its analysis of pure economic loss, proving that this issue cannot be "plain and obvious".

113. The majority identified five categories of claims potentially giving rise to recoverable economic loss: (i) negligent misrepresentation; (ii) negligent performance of a service; (iii) defective products or building structures; (iv) relational economic loss; and (v) failure by statutory public authorities.

114. The majority focussed exclusively on the relational economic loss claim, and cited this Court's decision in *Design Services* as providing the correct description of relational economic loss:

> In *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737 at para. 33, the Supreme Court of Canada accepted the following situational definition of relational economic loss:
>
> ... the defendant negligently causes personal injury or property damage to a third party. The plaintiff suffers pure economic loss by virtue of some relationship, usually contractual, it enjoys with the injured third party or the damaged property.[79]

115. However, the majority erred in concluding that Imperial's claim "represents a claim for relational economic loss, because the loss claimed is consequent upon injury to the class members."[80]

116. As stated in *Design Services*, the specific requirement is "personal injury or property damage" to a third party.

117. Indeed, this Court emphasised this very point in *Design Services*:

> The appellants do not fit within the relational economic loss category because no property of Olympic was actually damaged in this case. From its origin, relational economic loss has always stemmed from injury or property damage to a third party.
>
> The reason appears to be that physical damage tends "to ensure a reassuringly proximate nexus between tortious act and recoverable

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[79] *Knight BCCA Decision*, *supra* note 1 at para. 72. **JBA, Vol. III, Tab 40, p. 77.**
[80] *Knight BCCA Decision*, *ibid.* at para. 73 (emphasis added). **JBA, Vol. III, Tab 40, p. 77.**

> damage" (*Caltex Oil (Aust.) Pty. Ltd. v. The Dredge "Willemstad"* (1976), 11 A.L.R. 227 (H.C.), at p. 255). This is not to say that in the development of new categories under the *Anns* test, physical injury or property damage would necessarily be a requirement to justify a finding of proximity. However, insofar as the existing category of relational economic loss is concerned, injury or property damage to a third party has been a requirement.[81] (emphasis added)

118. In fact, this Honourable Court concluded in *Design Services* that the trial judge erred in law by failing to first consider whether property damage was suffered, and that had he done so, he would have found that the claim did not fit within the relational economic loss category because there was no property damage.[82]

119. Likewise, in this case, Imperial submits that the majority erred in law in failing to first consider whether there was property damage suffered by the plaintiff, and further, had it done so, it would have found that the claim did not fit within the relational economic loss category because there was no property damage suffered by the plaintiff or any of the class members.

120. Imperial submits that its negligent design claim does not fit within the relational economic loss category because no "property" was actually damaged. The plaintiff purchasers are not alleging personal injury or property damage. They are seeking the recovery of the price paid for a consumer product, based on allegations that the suppliers of that product engaged in deceptive acts and practices. They are not complaining that their property was damaged, but rather, that their property was inaccurately described.

121. It is not "plain and obvious" that the category of relational economic loss even applies to the negligent design claim, rendering irrelevant the majority's observation that relational economic losses are generally not recoverable.[83] Imperial submits that it is not "plain and obvious" whether one of the existing categories of recoverable economic loss applies to Imperial's claim, such as the category of defective products.

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[81] *Design Services Ltd. v. Canada,* 2008 SCC 22, [2008] 1 S.C.R. 737 at paras. 34-35 [*Design Services*], **JBA, Vol. II, Tab 21, p. 67.**

[82] *Design Services, ibid.* at para. 43, **JBA, Vol. II, Tab 21, p. 70.**

[83] *Knight BCCA Decision, supra* note 1 at para. 87. **JBA, Vol. III, Tab 40, p. 81.**

122. In *Design Services*, this Court explained that if the present situation does not fit within one of the five pre-existing categories of pure economic loss, it is necessary to assess whether a new category of pure economic loss should nonetheless be established, which requires consideration of the Anns test.[84]

123. The majority correctly found that on the facts pleaded in the Knight TPN, Canada owes a *prima facie* duty of care to Imperial for the negligent design of "light" and "mild" tobacco strains. Imperial submits that it cannot be "plain and obvious" that this unique case against Canada – as the negligent designer of the very product in respect of which Imperial may be held liable for the related pure economic losses of the plaintiff – does not merit the establishment of a new category of recoverable, pure economic loss.

124. There is clearly a strong public interest in deterring product designers from designing defective products.

125. Moreover, there is not now, and never was historically, any blanket rule that precluded the recovery of pure economic loss in negligence. The categories are not exclusive, and are not closed. They are merely analytical tools. It is well-accepted that new categories may be emerging.[85]

126. Indeed, this Honourable Court has endorsed looking "beyond the traditional bar against recovery of pure economic loss in favour of a case-specific analysis that seeks to weigh the unique policy considerations which arise".[86]

127. For this reason, the Nova Scotia Court of Appeal refused to strike a novel claim for the recovery of pure economic loss in respect of non-dangerous goods, even though no Canadian case had previously recognized a claim in tort for a non-dangerous product defect. The

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[84] *Design Services*, *supra* note 81 at para. 45, **JBA, Vol. II, Tab 21, p. 70.**

[85] *Design Services*, *ibid.* at para. 31, **JBA, Vol. II, Tab 21, pp. 65-66**; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860 at para. 45 [*Martel*], **JBA, Vol. III, Tab 45, p. 134**; Bruce Feldthusen, *Economic Negligence*, 5th ed. (Toronto: Carswell, 2008) at 15, **JBA, Vol. V, Tab 65, p. 60.**

[86] *Martel*, *ibid.* at para. 40, **JBA, Vol. III, Tab 45, p. 132**, referring to *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189 at 1211-12, *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2 at 33, *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 at 1054 (per La Forest J.) and 1155 (per McLachlin J.), *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 at para. 32 and *D'Amato v. Badger*, [1996] 2 S.C.R. 1071 at paras. 31-34.

Court of Appeal held this did not make it "plain and obvious" that the claim would fail, distinguishing the earlier cases on the basis that they were all decided on unique sets of facts.[87]

128. The Court emphasized both the very high burden on a party seeking to strike a claim, and the essential role of detailed and complex findings of fact in determining whether a cause of action should be recognized:

> However, the test on a motion to strike pursuant to Rule 14.25 is not whether the recent trend in the law seems to disallow the cause of action, but whether the action is absolutely unsustainable or certain to fail. In my view that cannot be said of the Sable claim against Ameron, and the chambers judge did not err in coming to that conclusion. ...
>
> In declining the appellant's request in this respect, I endorse the statements of Lord Bridge of Harwich in *Lonrho*, *supra*, p. 470 indicating that it was rarely appropriate to answer a difficult question of law on hypothetical or disputed facts stated in general terms. He continued by quoting Lord Wilberforce in *Allen v. Gulf Oil Refining Ltd.*, [1981] A.C. 1001:
>
> ... The fact is that the result of the case must depend upon the impact of detailed and complex findings of fact upon principles of law which are themselves flexible. There are too many variables to admit of a clear-cut solution in advance.[88]

129. Imperial submits that this reasoning applies equally in this case, and that the unique facts pleaded against Canada in the Knight TPN mandate the case-specific analysis endorsed by this Honourable Court.

130. Imperial respectfully submits that for all of the foregoing reasons, policy considerations involving recovery for pure economic loss should be considered at trial, on the basis of a full factual and evidentiary record.

Indeterminate Liability is Not A Concern Given the Facts Pleaded in the Knight TPN

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[87] *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2007 NSCA 70, [2007] N.S.J. No. 246, leave to appeal refused, [2007] S.C.C.A. No. 425 [*Sable*], **JBA, Vol. IV, Tab 56**. See also *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 28 Alta. L.R. (4th) 233, **JBA, Vol. II, Tab 49**.

[88] *Sable, ibid* at paras. 30 and 33-34, **JBA, Vol. IV, Tab 56, p. 112**.

131. Where the loss claimed is a pure economic loss, courts will scrutinize whether the claim raises the potential for "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[89]

132. Mr. Justice Tysoe referred to this Court's decisions in *Martel* and *Design Services* in concluding that policy concerns of indeterminate liability negate the *prima facie* duty of care for negligent design because:

> .. there may be innumerable other persons who suffer economic loss as a result of the injury to the third party in question ... or damage to or loss of property of the third party. For example, employers of key employees who became incapacitated as a result of smoking light and mild cigarettes could claim for lost profits. Suppliers of the employer may suffer a financial loss. Persons having contracts with smokers of light and mild cigarettes could claim for economic loss occasioned by the incapacity of the smokers. Family members of a smoker of light and mild cigarettes could suffer financial loss.[90]

133. With respect, there is no merit to this argument about the potential for indeterminate liability, given the specific facts pleaded in the Knight TPN. There is absolutely no basis whatsoever for suggesting that proximity could be established by any of those "innumerable other persons", giving rise to a *prima facie* duty of care. The facts pleaded in the Knight TPN, by contrast, fall within recognized categories of proximity. It is pleaded that Canada designed, promoted, and licensed to Imperial the very same "light" and "mild" tobacco strains at issue.

134. As this Honourable Court found in *Martel*, the specific pleaded relationship (in this case of product designer and product manufacturer) places clearly definable limits on the ultimate extent of liability so that concerns of indeterminacy are not determinative in this appeal:

> The scope of indeterminate liability remains a significant concern underlying any analysis of whether to extend the sphere of recovery for economic loss. In this appeal, however, the inherent nature of negotiations in this case place definable limits on the

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[89] Canada's Costs Recovery Appeal Factum, citing *Ultramares Corp. v. Touche*, 174 N.E. 441 (NY C.A. 1931) at 1145, **ABA, Vol. III, Tab 47, p. 7.**

[90] *Knight BCCA Decision, supra* note 1 at para. 82. **JBA, Vol. III, Tab 40, p. 80.**

> ultimate extent of liability so that concerns of indeterminacy are not determinative in this appeal.
>
> Here, the class of potential claimants is limited to those persons that the Department directly negotiated with. Although both La Forest and McLachlin JJ. rejected the "knowledge of the plaintiff" test in *Norsk* as noted in *Hercules Managements*, *supra*, at para. 37, knowledge of the plaintiff remains a policy factor that may militate against indeterminacy.[91]

135. The expressed policy concern that imposing a private law duty of care to Imperial by Canada would give rise to indeterminate liability to an indeterminate class simply does not withstand scrutiny. Tobacco manufacturers who licensed the tobacco strains designed and developed by Canada outside of its regulatory capacity are not an "indeterminate class". They are a small and readily identifiable class.

136. Imperial submits that the duty of care at issue is tightly circumscribed by the specific facts pleaded in the Knight TPN.

137. This reasoning is also consistent with the recent decision of the Ontario Court of Appeal in *Heaslip,* in which it refused to strike a negligence claim against Ontario on the basis of indeterminate liability:

> The motion judge's concerns regarding the risk of indeterminate liability suffers from the same difficulty as his duty of care analysis, namely, he failed to take into account the very specific nature of the claim. As I have indicated, I would strike the broad allegations complaining of the failure to provide an adequate system of air ambulance services. When stripped to its essentials, the allegation of specific acts of negligence in response to a specific request for air ambulance services, any risk of indeterminate liability evaporates.[92]

138. In this case, the pure economic loss was caused by Imperial's liability under consumer protection legislation for the "light" and "mild" tobacco strains designed by Canada and incorporated into Imperial's products. The category of persons who suffer economic loss as

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[91] *Martel, supra* note 85 at paras. 57-58, **JBA, Vol. III, Tab 45, pp. 137-138**.

[92] *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401 at para. 33, **JBA, Vol. II, Tab 30, p. 157**.

a result of incurring statutory liability for a product that was negligently designed by Canada is, obviously, not indeterminate.

139. Moreover, the fact that many cigarettes were sold and consumed does not mean that Canada faces indeterminate liability. Canada faces extensive liability. Extensive liability is not the same as indeterminate liability.[93]

140. Canada voluntarily entered the tobacco industry as a manufacturer and promoter of the tobacco strains that it researched, designed and developed. Canada licensed its products and profited from these commercial activities. Canada should not be permitted to escape liability at this early stage of the proceedings on the basis that the damage it caused through its negligence is potentially really significant.

141. It is the very nature of tort law that seemingly insignificant acts can have catastrophic consequences in the context of a proximal relationship. The policy analysis is intended to ensure that a balancing of the competing interests takes place but there is no indication that a disparity between the conduct and the consequences of the conduct must result in the negating of a duty of care.[94]

142. Imperial has pleaded sufficient proximity to establish a *prima facie* duty of care owed by Canada for negligent design. In these circumstances, it is inappropriate for a court to negate that duty on the basis of speculative policy concerns of indeterminate liability. Such a determination should not be made in the absence of evidence, on a preliminary pleadings motion.

143. Imperial respectfully submits that, for all of the foregoing reasons, the majority erred in striking the claim in negligent design from the Knight TPN. It is not "plain and obvious" that Canada cannot owe a duty of care to Imperial given the facts pleaded in the Knight TPN. It is not "plain and obvious" that this claim is doomed to fail.

D. Canada can be Obliged to Indemnify Imperial under the Doctrine of Equitable Indemnity

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[93] *Sauer v. Canada (Attorney General)* (2006), 79 O.R. (3d) 19 at para. 84 (S.C.J.) [*Sauer SC*], aff'd 2007 ONCA 454, leave to appeal refused, [2007] S.C.C.A. 454, **JBA, Vol. IV, Tab 58, p. 150**.

[94] *Sauer SC, ibid.*

144. In the interest of avoiding unnecessary duplication, Imperial adopts the submissions of the Defendants in the companion Costs Recovery Appeal on this issue, and submits that it is not "plain and obvious" that Canada cannot be liable to indemnify Imperial under the doctrine of equitable indemnity.

PART IV: COSTS

145. Imperial seeks its costs in this cross-appeal, and in the courts below.

PART V: ORDER SOUGHT

146. Imperial respectfully asks that this cross-appeal be allowed, with costs here and below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 10th day of January, 2011.

per: Deborah A. Glendinning

Counsel for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

for: John J.L. Hunter, Q.C.

Counsel for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

per: Patricia Wilson

Agent for Counsel for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

PART VI: AUTHORITIES CITED

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Legislation

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Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50.	1, 5, 24, 37-39, 53-54, 56, 61
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PART VII: PROVISIONS CITED

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IMPORTANT INFORMATION

This Act is Current to December 29, 2010

This Act has "Not in Force" sections. *See* the Table of Legislative Changes.

Business Practices and Consumer Protection Act

[SBC 2004] CHAPTER 2

Part 1 — Definitions and Application

Definitions

1 (1) In this Act:

"administrative authority" means the Business Practices and Consumer Protection Authority established under the *Business Practices and Consumer Protection Authority Act*;

"administrative penalty" means a penalty imposed under section 164;

"associate", if used to indicate a relationship with a person, means

(a) a spouse, parent, child, sibling or business partner of the person, or

(b) a corporation of which a sufficient number of shares to elect a majority of the corporation's directors is beneficially owned, directly or indirectly, by

(i) the person,

(ii) one or more of the persons referred to in paragraph (a), or

(iii) the person and one or more of the persons referred to in paragraph (a);

"compensation fund" means a compensation fund established under section 130 or the Travel Assurance Fund continued under section 130;

"compliance order" means an order issued under section 155 by an inspector;

"consumer" means an individual, whether in British Columbia or not, who participates in a consumer transaction, but does not include a guarantor;

"Consumer Advancement Fund" means the Consumer Advancement Fund established under section 139;

"consumer transaction" means

(a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or

(b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a),

and, except in Parts 4 and 5, includes a solicitation of a consumer by a supplier for a contribution of money or other property by the consumer;

"direct sales prohibition order" means an order issued under section 156 by the director;

"director", except in reference to a director of a corporation, means, subject to the restrictions specified in a designation, the individual or administrative authority designated under section 175 as director;

"goods" means personal property, fixtures, credit and prepaid purchase cards, but does not include a security as defined in the *Securities Act* or contracts of insurance under the *Insurance Act*;

"goods or services" means goods or services or both;

"inspector" means the director or a person designated as an inspector under section 176;

"licence" means a licence issued under section 145 and includes a renewal of the licence;

"payday loan" has the meaning given to it in section 112.01 *[definitions]*;

"prepaid purchase card" has the meaning given to it in section 56.1 *[definitions]*;

"private dwelling" means a

(a) a structure that is occupied as a private residence, or

(b) if only part of a structure is occupied as a private residence, that part of the structure;

"property freezing order" means an order made under section 159 (2) by the director;

"publish" means make public in any manner, including by or through any media;

"services" means services, whether or not the services are together with or separate from goods, and includes a membership in a club or organization;

"supplier" means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by

(a) supplying goods or services or real property to a consumer, or

(b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",

whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person and, except in Parts 3 to 5 *[Rights of Assignees and Guarantors Respecting Consumer Credit; Consumer Contracts; Disclosure of the Cost of Consumer Credit]*, includes a person who solicits a consumer for a contribution of money or other property by the consumer;

"supply" includes, in respect of the supply of goods or services or real property to a consumer, a sale, lease, assignment, award by chance or other disposition;

"time share contract" means a contract by which the consumer acquires the right to use property, whether or not the property is located in British Columbia,

(a) for a period of time each year or other interval, and

(b) as part of a plan that provides for the use of the property to circulate, in any year or other interval, among persons participating in the plan,

but does not include a time share plan as defined in the *Real Estate Development Marketing Act*;

"total cost of credit" has the meaning given to it in section 57 *[definitions]*;

"total price" means the total obligation or amount that is payable, given, undertaken or assumed by a consumer under a consumer transaction;

"undertaking" means an undertaking accepted under section 154 by the director.

(2) Subject to subsection (3), the definitions in the *Cremation, Interment and Funeral Services Act*, except where a contrary definition is set out in this Act or the regulations, apply to this Act.

(3) The definition of "register" in the *Cremation, Interment and Funeral Services Act* does not apply to this Act.

Application of this Act

2 (1) Parts 6 *[Credit Reporting]* and 7 *[Debt Collection]* apply to transactions, matters or things, regardless of whether they involve a consumer.

(2) Except for the following, this Act does not apply to a sale, lease, mortgage of or charge on land or a chattel real:

(a) Parts 2 *[Unfair Practices]* and 5 *[Disclosure of the Cost of Consumer Credit]*;

(b) section 3 and Parts 3 *[Rights of Assignees and Guarantors Respecting Consumer Credit]*, 8 to 10 *[Compensation Funds and Consumer Advancement Fund; Licences; Inspections and Enforcement]*, 13 *[Offences and Penalties]* and 14 *[Regulations]*, as those Parts relate to Parts 2 and 5.

Waiver or release void except as permitted

3 Any waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act.

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CANADA

CONSOLIDATION

CODIFICATION

Crown Liability and Proceedings Act

Loi sur la responsabilité civile de l'État et le contentieux administratif

CHAPTER C-50

CHAPITRE C-50

Current to December 2, 2010

À jour au 2 décembre 2010

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OFFICIAL STATUS OF CONSOLIDATIONS

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

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.

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.

CARACTÈRE OFFICIEL DES CODIFICATIONS

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

Codifications comme élément de preuve

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.

Incompatibilité — lois

(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.

CHAPTER C-50

CHAPITRE C-50

An Act respecting the liability of the Crown and proceedings by or against the Crown

Loi relative à la responsabilité civile de l'État et aux procédures applicables en matière de contentieux administratif

SHORT TITLE

Short title

1. This Act may be cited as the *Crown Liability and Proceedings Act*.

R.S., 1985, c. C-50, s. 1; 1990, c. 8, s. 21.

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur la responsabilité civile de l'État et le contentieux administratif*.

L.R. (1985), ch. C-50, art. 1; 1990, ch. 8, art. 21.

INTERPRETATION

Definitions

2. In this Act,

"Crown" « *État* »

"Crown" means Her Majesty in right of Canada;

"Crown ship" « *navire de l'État* »

"Crown ship" means a Crown vessel as defined in section 140 of the *Canada Shipping Act, 2001*;

"liability" « *responsabilité* »

"liability", for the purposes of Part 1, means

(*a*) in the Province of Quebec, extracontractual civil liability, and

(*b*) in any other province, liability in tort;

"servant" « *préposés* »

"servant" includes agent, but does not include any person appointed or employed by or under the authority of an ordinance of the Northwest Territories or a law of the Legislature of Yukon or of the Legislature for Nunavut;

"tort" [Repealed, 2001, c. 4, s. 34]

R.S., 1985, c. C-50, s. 2; 1990, c. 8, s. 22; 1993, c. 28, s. 78; 1998, c. 15, s. 21; 2001, c. 4, s. 34, c. 26, s. 295; 2002, c. 7, s. 151.

DÉFINITIONS

Définitions

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

« délit civil » [Abrogée, 2001, ch. 4, art. 34]

« État » Sa Majesté du chef du Canada.

« État » "*Crown*"

« navire de l'État » Bâtiment appartenant à Sa Majesté, au sens de l'article 140 de la *Loi de 2001 sur la marine marchande du Canada*.

« navire de l'État » "*Crown ship*"

« préposés » Sont assimilés aux préposés les mandataires. La présente définition exclut les personnes nommées ou engagées sous le régime d'une ordonnance des Territoires du Nord-Ouest, ou d'une loi de la Législature du Yukon ou de celle du Nunavut.

« préposés » "*servant*"

« responsabilité » Pour l'application de la partie 1 :

« responsabilité » "*liability*"

a) dans la province de Québec, la responsabilité civile extracontractuelle;

b) dans les autres provinces, la responsabilité délictuelle.

L.R. (1985), ch. C-50, art. 2; 1990, ch. 8, art. 22; 1993, ch. 28, art. 78; 1998, ch. 15, art. 21; 2001, ch. 4, art. 34, ch. 26, art. 295; 2002, ch. 7, art. 151.

Definition of "person"

2.1 For the purposes of sections 3 to 5, "person" means a natural person of full age and capacity other than Her Majesty in right of Canada or a province.

2001, c. 4, s. 35.

Définition de « personne »

2.1 Pour l'application des articles 3 à 5, « personne » s'entend d'une personne physique majeure et capable autre que Sa Majesté du chef du Canada ou d'une province.

2001, ch. 4, art. 35.

PART I

LIABILITY

Liability and Civil Salvage

Liability

3. The Crown is liable for the damages for which, if it were a person, it would be liable

(*a*) in the Province of Quebec, in respect of

(i) the damage caused by the fault of a servant of the Crown, or

(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and

(*b*) in any other province, in respect of

(i) a tort committed by a servant of the Crown, or

(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

R.S., 1985, c. C-50, s. 3; 2001, c. 4, s. 36.

Motor vehicles

4. The Crown is liable for the damage sustained by anyone by reason of a motor vehicle, owned by the Crown, on a highway, for which the Crown would be liable if it were a person.

R.S., 1985, c. C-50, s. 4; 2001, c. 4, s. 37.

Civil salvage

5. (1) Subject to subsection (2), the law relating to civil salvage, whether of life or property, applies in relation to salvage services rendered in assisting any Crown ship or aircraft, or in saving life from a Crown ship or aircraft, or in saving any cargo or apparel belonging to the Crown, in the same manner as if the ship, aircraft, cargo or apparel belonged to a private person.

Claims in Federal Court

(2) All claims against the Crown under subsection (1) shall be heard and determined by a judge of the Federal Court.

R.S., 1985, c. C-50, s. 5; 2001, c. 4, s. 38, c. 26, s. 296.

6. [Repealed, 2001, c. 6, s. 113]

Limitation period for salvage proceedings

7. (1) Section 145 of the *Canada Shipping Act, 2001* applies in respect of salvage services rendered to Crown ships or aircraft as it applies in respect of salvage services rendered to other ships or aircraft.

PARTIE I

RESPONSABILITÉ CIVILE

Responsabilité et sauvetages civils

Responsabilité

3. En matière de responsabilité, l'État est assimilé à une personne pour :

a) dans la province de Québec :

(i) le dommage causé par la faute de ses préposés,

(ii) le dommage causé par le fait des biens qu'il a sous sa garde ou dont il est propriétaire ou par sa faute à l'un ou l'autre de ces titres;

b) dans les autres provinces :

(i) les délits civils commis par ses préposés,

(ii) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.

L.R. (1985), ch. C-50, art. 3; 2001, ch. 4, art. 36.

Véhicules automobiles

4. L'État est également assimilé à une personne pour ce qui est de sa responsabilité à l'égard du dommage que cause à autrui, sur une voie publique, un véhicule automobile lui appartenant.

L.R. (1985), ch. C-50, art. 4; 2001, ch. 4, art. 37.

Sauvetage civil

5. (1) Sous réserve du paragraphe (2), le droit régissant le sauvetage civil de personnes ou de biens s'applique aux services de sauvetage effectués pour prêter assistance à des navires ou aéronefs de l'État, ou aux personnes se trouvant à leur bord, ou pour sauver les cargaisons ou les accessoires de ces navires ou aéronefs, l'État étant assimilé à un particulier.

Juridiction compétente

(2) Les réclamations exercées contre l'État au titre du paragraphe (1) sont présentées à un juge de la Cour fédérale pour instruction et décision.

L.R. (1985), ch. C-50, art. 5; 2001, ch. 4, art. 38, ch. 26, art. 296.

6. [Abrogé, 2001, ch. 6, art. 113]

Prescription en matière de sauvetage

7. (1) L'article 145 de la *Loi de 2001 sur la marine marchande du Canada* s'applique à tous les services de sauvetage, qu'ils aient été rendus aux navires ou aéronefs de l'État ou à d'autres.

Negligence Act

[RSBC 1996] CHAPTER 333

Contents

Apportionment of liability for damages

1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

(2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.

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

Awarding of damages

2 The awarding of damage or loss in every action to which section 1 applies is governed by the following rules:

(a) the damage or loss, if any, sustained by each person must be ascertained and expressed in dollars;

(b) the degree to which each person was at fault must be ascertained and expressed as a percentage of the total fault;

(c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss is entitled to recover from that other person the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person;

(d) as between 2 persons each of whom has sustained damage or loss and is entitled to recover a percentage of it from the other, the amounts to which they are respectively entitled must be set off one

against the other, and if either person is entitled to a greater amount than the other, the person is entitled to judgment against that other for the excess.

Apportionment of liability for costs

3 (1) Unless the court otherwise directs, the liability for costs of the parties to every action is in the same proportion as their respective liability to make good the damage or loss.

(2) Section 2 applies to the awarding of costs under this section.

(3) If, as between 2 persons, one is entitled to a judgment for an excess of damage or loss and the other to a judgment for an excess of costs there is a further set off of the respective amounts and judgment must be given accordingly.

Liability and right of contribution

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

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

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

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

Negligence of spouse in cause of action that arose before April 17, 1985

5 (1) In an action founded on fault or negligence and brought for loss or damage resulting from bodily injury to or the death of a married person, if one of the persons found to be at fault or negligent is the spouse of the married person, no damages, contribution or indemnity are recoverable for the portion of loss or damage caused by the fault or negligence of that spouse.

(2) The portion of the loss or damage caused by the fault or negligence of the spouse referred to in subsection (1) must be determined although that spouse is not a party to the action.

(3) This section applies only if the cause of action arose before April 17, 1985.

Questions of fact

6 In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

Actions against personal representatives

7 (1) If a person dies who, because of this Act, would have been liable for damages or costs had the person continued to live, an action or third party proceedings that, because of this Act, could have been brought or maintained against the person who has died may be brought and maintained or, if pending, may be continued against the personal representative of the deceased person.

(2) The damages and costs recovered under subsection (1) are payable out of the estate of the deceased person in similar order of administration as the simple contract debts of the deceased person.

(3) If there is no personal representative of the deceased person appointed in British Columbia within 3 months after the person's death, the court, on the application of a party intending to bring or continue an action or third party proceedings under this section, and on the notice to other parties, either specially or generally by public advertisement, as the court may direct, may appoint a representative of the estate of the deceased person for all purposes of the intended or pending action or proceedings and to act as defendant in them.

(4) The action or proceedings brought or continued against the representative appointed under subsection (3) and all proceedings in them bind the estate of the deceased person in all respects as if a duly constituted personal representative of the deceased person were a party to the action.

(5) An action or third party proceeding must not be brought against a personal representative under subsection (1), or against a representative of the estate appointed under subsection (3), after the time otherwise limited for bringing the action.

Further application

8 This Act applies to all cases where damage is caused or contributed to by the act of a person even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so.

IMPORTANT INFORMATION

B.C. Reg. 168/2009
O.C. 302/2009

Deposited July 7, 2009
effective July 1, 2010

Court Rules Act

Supreme Court Civil Rules

[includes amendments up to B.C. Reg. 241/2010, July 30, 2010]

Point in Time

Part 1 — Interpretation

Rule 1-1 — Interpretation

Definitions

(1) In these Supreme Court Civil Rules, unless the context otherwise requires:

"accessible address" means an address that describes a unique and identifiable location in British Columbia that is accessible to the public during normal business hours for the delivery of documents;

"action" means a proceeding started by a notice of civil claim;

"address for service", in relation to a party to a proceeding, means an address that is, under Rule 4-1, the party's address for service in the proceeding;

"case plan order" means an order referred to in Rule 5-3 (3);

"Chief Justice" means the Chief Justice of the Supreme Court of British Columbia;

"court" means the Supreme Court of British Columbia and, if a master has jurisdiction, includes a master of the Supreme Court;

"document" has an extended meaning and includes a photograph, film, recording of sound, any record of a permanent or semi-permanent character and any information recorded or stored by means of any device;

"family law case" means a proceeding in which one or more of the following orders is sought:

(a) an order under the *Divorce Act*;

(b) an order under the *Family Relations Act*;

(c) an order in relation to an agreement between persons who are or have been married or who are or have been in a marriage-like relationship, including a marriage agreement within the meaning of the *Family Relations Act*;

Scandalous, frivolous or vexatious matters

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be,

(b) it is unnecessary, scandalous, frivolous or vexatious,

(c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

(d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[am. B.C. Reg. 119/2010, Sch. A, s. 22.]

Admissibility of evidence

(2) No evidence is admissible on an application under subrule (1) (a).

Powers of registrar

(3) If, on the filing of a document, a registrar considers that the whole or any part of the document could be the subject of an order under subrule (1),

(a) the registrar may, despite any other provision of these Supreme Court Civil Rules,

(i) retain the document and all filed copies of it, and

(ii) refer the document to the court, and

(b) the court may, after a summary hearing, make an order under subrule (1).

Reconsideration of order

(4) If the court makes an order referred to in subrule (3) (b),

(a) the registrar must give notification of the order, in the manner directed by the court, to the person who filed the document,

(b) the person who filed the document may, within 7 days after being notified, apply to the court, and

(c) the court may confirm, vary or rescind the order.

Rule 9-6 — Summary Judgment

Definitions

(1) In this rule:

"answering party", in relation to a claiming party's originating pleading, means a person who serves, on the claiming party, a responding pleading that relates to a claim made in the originating pleading;

"claiming party" means a party who filed an originating pleading.

Application

(2) In an action, a person who files an originating pleading in which a claim is made against a person may, after the person against whom the claim is made serves a responding pleading on the claiming party, apply under this rule for judgment against the answering party on all or part of the claim.

Response to application

(3) An answering party may respond to an application for judgment under subrule (2) as follows:

(a) the answering party may allege that the claiming party's originating pleading does not raise a cause of action against the answering party;

(b) if the answering party wishes to make any other response to the application, the answering party may not rest on the mere allegations or denials in his or her pleadings but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

Application by answering party

(4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

Power of court

(5) On hearing an application under subrule (2) or (4), the court,

(a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,

(b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,

(c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and

(d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

Claiming party may proceed

(6) If, under this rule, a claiming party obtains judgment against a person on a claim made against that person in the originating pleading, the judgment is without prejudice to the right of the claiming party to

(a) proceed with the action in respect of any other claim made, in the originating pleading, against the

Province of British Columbia

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RULE 19 – PLEADINGS GENERALLY

Contents

(1) A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.

Idem

(2) The effect of any document or the purport of any conversation referred to in a pleading, if material, shall be stated briefly and the precise words of the documents or conversation shall not be stated, except in so far as those words are themselves material.

Idem

(3) A party need not plead a fact if it is presumed by law to be true or if the burden of disproving it lies on the other party.

Idem

(4) A party need not plead the performance of a condition precedent necessary for the party's case, unless the other party has specifically denied it in that other party's pleadings.

Form

(5) A pleading shall be divided into paragraphs numbered consecutively, each allegation being contained in a separate paragraph.

Matters arising since commencement

(6) A party may plead a matter which has arisen since the commencement of the proceeding.

Inconsistent allegations

(7) A party shall not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading.

Alternative allegations

(8) Subrule (7) does not affect the right of a party to make allegations in the alternative or to amend or apply for leave to amend a pleading.

Objection in point of law

(9) A party may raise in a pleading an objection in point of law.

[en. B.C. Reg. 10/92, s. 3.]

Pleading conclusions of law

(9.1) Conclusions of law may be pleaded only if the material facts supporting them are pleaded.

[en. B.C. Reg. 10/92, s. 3.]

Status admitted

(10) Unless the incorporation of a corporate party or the office or status of a party is specifically denied, it shall be deemed to be admitted.

Where particulars necessary

(11) Where the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or where particulars may be necessary, full particulars, with dates and items if applicable, shall be stated in the pleading. If the particulars of debt, expenses or damages are lengthy, the party may refer to this fact and instead of pleading the particulars shall deliver the particulars in a separate document either before or with the pleading.

Further particulars

(11.1) Particulars need only be pleaded to the extent that they are known at the date of pleading, but further particulars may be delivered after they become known, and shall be delivered within 10 days of a demand being made in writing.

[en. B.C. Reg. 55/93, s. 8 (a).]

Particulars in libel or slander

(12) In an action for libel or slander,

(a) where the plaintiff alleges that the words or matter complained of were used in a derogatory sense other than their ordinary meaning, the plaintiff shall give particulars of the facts and matters on which the plaintiff relies in support of that sense, and

(b) where the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and that in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, the defendant shall give particulars stating which of the words complained of the defendant alleges are statements of fact and of the facts and matters relied on in support of the allegation that the words are true.

Set-off or counterclaim

(13) A defendant in an action may set off or set up by way of counterclaim any right or claim, whether the set-off or counterclaim is for damages or not, so as to enable the court to pronounce a final judgment on all claims in the same action.

Filing and delivery of pleadings

(14) A pleading shall be filed and a copy delivered to all parties of record and shall contain the style of proceeding, the description of the pleading, and the name and address for delivery of the party delivering the same.

[am. B.C. Reg. 95/96, s. 8.]

Pleading after the statement of claim

(15) In a pleading subsequent to a statement of claim a party shall plead specifically any matter of fact or point of law that

(a) the party alleges makes a claim or defence of the opposite party not maintainable,

(b) if not specifically pleaded, might take the other party by surprise, or

(c) raises issues of fact not arising out of the preceding pleading.

Order for particulars

(16) The court may order a party to deliver further and better particulars of a matter stated in a pleading.

Demand for particulars

(17) Before applying to the court for particulars, a party shall demand them in writing from the other party.

Demand for particulars not a stay of proceedings

(18) A demand for particulars does not operate as a stay of proceedings or give an extension of time, but a party may apply for an extension of time for delivering a pleading on the ground that the party cannot answer that pleading until particulars are provided.

Denial required if fact not admitted

(19) An allegation of fact in a pleading, if not denied or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant or mentally incompetent person.

General denial sufficient except where proving different facts

(20) It is not necessary in a pleading to deny specifically each allegation made in a preceding pleading and a general denial is sufficient of allegations which are not admitted, but where a party intends to prove material facts that differ from those pleaded by an opposite party, a denial of the facts so pleaded is not sufficient, but the party shall plead his or her own statement of facts if those facts have not been previously pleaded.

[en. B.C. Reg. 55/93, s. 8 (b).]

Substance to be answered

(21) If a party in a pleading denies an allegation of fact in the previous pleading of the opposite party, the party shall not do so evasively but shall answer the point of substance.

Denial of contract

(22) If a contract, promise or agreement is alleged in a pleading, a bare denial of it by the opposite party shall be construed only as a denial of fact of the express contract, promise or agreement alleged, or of the matters of fact from which it may be implied by law, and not as a denial of the legality or sufficiency in law of that contract, promise or agreement.

Allegation of malice

(23) It is sufficient to allege malice, fraudulent intention, knowledge or other condition of the mind of a person as a fact, without setting out the circumstances from which it is to be inferred.

Scandalous, frivolous or vexatious matters

(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence as the case may be,

(b) it is unnecessary, scandalous, frivolous or vexatious,

(c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or

(d) it is otherwise an abuse of the process of the court,

and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Idem

(25) Where on the filing of a document a registrar considers that the whole or any part of an endorsement, pleading, petition or other document could be the subject of an order under subrule (24), the registrar may, notwithstanding any other provision of these rules, retain it and all filed copies of it, and refer it to the court and the court may, after a summary hearing as the court directs, make an order under subrule (24).

Idem

(26) Where the court makes such an order, the registrar shall give notification of the order, in the manner directed by the court, to the person who filed the document, and that person may, within 7 days of being notified, apply to the court and the court may confirm, vary or rescind the order.

Idem

(27) No evidence is admissible on an application under subrule (24) (a).

General relief

(28) A pleading need not ask for general or other relief.

General damages shall not be pleaded

(29) Where general damages are claimed, the amount of the general damages claimed shall not be stated in the originating process or in any pleading.

RULE 22 – THIRD PARTY PROCEDURE

Filing a third party notice

(1) A party of record who is not a plaintiff may file a third party notice in Form 17 if the party of record alleges against any person (in this rule called "the third party"), whether or not the third party is a party to the action, that

(a) the party is entitled to contribution or indemnity from the third party in respect of a claim made against the party in the action,

(b) the party is entitled to any relief against the third party relating to or connected with the original subject matter of the action, or

(c) a question or issue relating to or connected with any relief claimed in the action or with the original subject matter of the action is substantially the same as a question or issue between the party and the third party and should properly be determined in the action.

[en. B.C. Reg. 95/96, s. 9.]

Contents of a third party notice

(2) A third party notice must contain a statement in summary form of

(a) the material facts on which the party issuing it relies, and

(b) the relief that that party seeks against the third party.

[en. B.C. Reg. 95/96, s. 9.]

When leave is required

(3) A party of record may file a third party notice

(a) at any time with leave of the court, or

(b) without leave of the court,

(i) at any time before a notice of trial is delivered, or

(ii) if a notice of trial has been delivered, at least 120 days before the scheduled trial date.

[en. B.C. Reg. 95/96, s. 9.]

Application for leave

(4) Notice of an application for leave under subrule (3) (a) shall be

(a) served on the proposed third party, and

(b) delivered to all parties of record.

[en. B.C. Reg. 95/96, s. 9.]

Service and delivery of a third party notice

(5) A party who files a third party notice shall forthwith

(a) serve on each person named as a third party in the third party notice

(i) copies of that third party notice, and

(ii) if the third party was not a party of record at the time of the filing of the third party notice, copies of any pleadings that have previously been delivered by any party to the action, and

(b) deliver a copy of the third party notice to each party of record.

[en. B.C. Reg. 95/96, s. 9.]

Application to set aside notice

(6) At any time, on application, the court may set aside a third party notice.

[en. B.C. Reg. 95/96, s. 9.]

Appearance

(7) A third party may enter an appearance in accordance with Rule 14 and shall forthwith deliver a copy of the appearance to each other party of record.

[en. B.C. Reg. 95/96, s. 9.]

Statement of defence

(8) A third party who has entered an appearance shall file and deliver to each other party of record a statement of defence to the third party notice within 14 days after the later of

(a) the time limited for appearance, and

(b) the service of the third party notice.

[en. B.C. Reg. 95/96, s. 9; am B.C. Reg. 165/97, s. 8.]

Reply

(9) The party who issued the third party notice shall file and deliver any reply within 7 days after the statement of defence to the third party notice has been delivered.

[en. B.C. Reg. 95/96, s. 9.]

Default of appearance

(10) If a third party has not entered an appearance to a third party notice and the time for doing so has expired, the party who filed the third party notice may apply for judgment in default of appearance against the third party and notice of that application shall be delivered to each other party of record.

[en. B.C. Reg. 95/96, s. 9.]

Default of statement of defence

(11) If a third party has filed an appearance to the third party notice but has not filed a statement of defence and the time for filing the statement of defence has expired, the party who filed the third party notice may apply for judgment in default of statement of defence against the third party and notice of the application shall be delivered to each other party of record.

[en. B.C. Reg. 95/96, s. 9.]

Relief

(12) On an application under subrule (10) or (11), the court may grant any or all of the relief claimed in the third party notice.

[en. B.C. Reg. 95/96, s. 9.]

Statement of defence to statement of claim

(13) A third party who has entered an appearance may file and deliver a statement of defence to the plaintiff's statement of claim, raising any defence open to a defendant.

[en. B.C. Reg. 95/96, s. 9.]

Contribution or indemnity claimed under the *Negligence Act*

(14) A defendant who claims contribution or indemnity under the *Negligence Act* from a person shall do so,

(a) if the person is a plaintiff, by counterclaim, or

(b) in any other case, whether or not the person is a party to the action, by third party notice.

[en. B.C. Reg. 95/96, s. 9.]

Apportionment of liability claimed under the *Negligence Act*

(15) A defendant who does not claim contribution or indemnity under the *Negligence Act* but who does claim an apportionment of liability under that Act shall claim that apportionment in the statement of defence.

[en. B.C. Reg. 95/96, s. 9.]

When statement of defence to third party notice not required

(16) A defendant against whom a third party notice is filed need not deliver a statement of defence to the third party notice and is deemed to deny the allegation of fact made in the third party notice and to rely on the facts pleaded in that party's statement of defence to the plaintiff's claim if

(a) the third party notice contains no claim other than a claim for contribution or indemnity under the *Negligence Act,*

(b) the defendant has filed and delivered a statement of defence to the plaintiff's claim, and

(c) the defendant intends, in defending against the third party claim, to rely on the facts pleaded in that statement of defence and on no other facts.

[en. B.C. Reg. 95/96, s. 9.]

Application for directions

(17) A party affected by a third party procedure may apply to the court for directions.

[en. B.C. Reg. 95/96, s. 9.]

Third party procedure not to prejudice the plaintiff

(18) The court may impose terms on any third party procedure to limit or avoid any prejudice or unnecessary delay that might otherwise be suffered by the plaintiff as a result of that third party procedure.

[en. B.C. Reg. 95/96, s. 9.]

Trial

(19) An issue between the party filing the third party notice and the third party may be tried at the time the court may direct.

[en. B.C. Reg. 95/96, s. 9.]

TRADE PRACTICE ACT

CHAPTER 457

Contents

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;

"**services**" means services that are the subject of a consumer transaction, either together with, or separate from, any kind of personal property;

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

"**unit**" includes an identifiable part, portion or instalment of the entire consumer transaction or the consideration for or the subject matter of it.

Advertising

2 (1) A supplier who, on behalf of another person, prints, distributes, broadcasts, telecasts or otherwise publishes a deceptive or misleading advertisement is not liable under section 18, 22, or 25 if the supplier proves that the supplier

(a) received the advertisement for printing, distributing, broadcasting, telecasting or otherwise publishing in the ordinary course of business, and

(b) did not know and had no reason to suspect that its publication would contravene this Act.

(2) A person who accepts an advertisement for printing, distributing, broadcasting, telecasting or otherwise publishing in the ordinary course of the person's business must, for each advertisement, maintain a record of the name and address of the person who provides the advertisement.

Deceptive acts or practices

3 (1) For the purposes of this Act, a deceptive act or practice includes

(a) an oral, written, visual, descriptive or other representation, including a failure to disclose, and

(b) any conduct

having the capability, tendency or effect of deceiving or misleading a person.

(2) A deceptive act or practice by a supplier in relation to a consumer transaction may occur before, during or after the consumer transaction.

(3) Without limiting subsection (1), one or more of the following, however expressed, constitutes a deceptive act or practice:

(a) a representation that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that it does not have;

(b) a representation that the supplier has a sponsorship, approval, status, affiliation or connection that the supplier does not have;

(c) a representation that the subject of a consumer transaction is of a particular standard, quality, grade, style or model if it is not;

ATTORNEY GENERAL STATUTES AMENDMENT ACT, 1998

CHAPTER 23

Assented to July 30, 1998

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Consumer Protection Act

1 Section 1 of the Consumer Protection Act, R.S.B.C. 1996, c. 69, is amended

(a) by repealing the definition of **"contract for future services"** *and substituting the following:*

"contract for future services" means any of the following:

(a) an executory contract that includes a provision for services of a prescribed type or class to be rendered in the future on a continuing basis;

(b) a contract for dance lessons under which the consideration, excluding the cost of borrowing, is greater than an amount set by regulation;

(c) a contract for health studio services under which the consideration, excluding the cost of borrowing, is greater than an amount set by regulation;

(d) a contract for travel club services under which the consideration, excluding the cost of borrowing, is greater than an amount set by regulation; ***, and***

(b) by adding the following definition:

"contract for travel club services" means an executory contract by which the buyer acquires the right, by membership in a travel club, vacation club, or by other means, to discounts or other benefits on the purchase of transportation, accommodation or other services related to travel; .

2 Section 77 (3) is repealed and the following substituted:

(3) A regulation under subsection (1) (l) ceases to have effect after the last day of the next session of the Legislative Assembly after the regulation is made.

3 In section 1 of the Supplement to the Act, all the provisions enacted by that section, except the part enacting section 6.1 of the Act, are repealed.

4 Sections 2 and 3 of the Supplement to the Act are repealed.

15 Section 90 (2) is amended

(a) by repealing paragraph (n) and substituting the following:

(n) prescribing standard park rules to govern a manufactured home park or class of manufactured home parks, the circumstances under which those rules apply and the process for changing the rules in force in a park; *, and*

(b) by adding the following paragraphs:

(p) prescribing matters related to the assignment and sublet of a manufactured home park tenancy agreement, including but not limited to the criteria and procedures for withholding or granting consent to an assignment or sublet;

(q) defining a word or phrase used but not defined in the Act;

(r) governing applications for and the determination of the appropriate amounts of rent increases respecting manufactured homes and, for that purpose, providing that particular provisions of this Act apply to disputes respecting those rent increases;

(s) governing kinds and levels of services to be provided by the landlord in manufactured home parks.

16 The following section is added:

Limitation period: offences

91.1 A prosecution of an offence under this Act must not be commenced more than 2 years after the facts on which the proceeding is based first come to the knowledge of the registrar.

Trade Practice Act

17 Section 1 of the Trade Practice Act, R.S.B.C. 1996, c. 457, is amended

(a) in the definition of **"consumer"** *by adding* "whether in British Columbia or not," *after* "an individual,",

(b) by repealing the definition of **"consumer transaction"** *and substituting the following:*

"consumer transaction" means any of the following:

(a) a sale, lease, rental, assignment, award by chance or other disposition or supply of any kind of personal property or real property to an individual for purposes that

(i) are primarily personal, family or household, or

(ii) relate to a first time business opportunity scheme;

(b) a solicitation or promotion by a supplier with respect to a transaction referred to in paragraph (a);

(c) a solicitation of a consumer by a person requesting any of the following:

Department of Justice Canada / Ministère de la Justice Canada

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Name / Nom:	John J.L. Hunter Q.C.	**Name / Nom:**	John S. Tyhurst
Address / Addresse:	Hunter Litigation Chambers Law Corporation 2100 - 1040 West Georgia Street Vancouver, BC V6E 4H1	**Address / Addresse:**	Department of Justice Canada Civil Litigation Section 234 Wellington Street East Tower, Room 1251 Ottawa, ON K1A 0H8
Fax # / No du télécopieur:	(604) 647-4554	**Tel. No. / No du Tél:**	(604) 891-2400
Fax # / No du télécopieur:	(613) 954-1920	**Tel. No. / No du Tél:**	(613) 957-4860

c.c.

Comments / Commentaires:

Re: Attorney General of Canada v. Imperial Tobacco, SCC File No. 33559

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Ministère de la Justice
Canada

234 Wellington Street
East Tower, Room 1251
Ottawa, Ontario
K1A 0H8

Telephone: (613) 957-4860
Fax: (613) 954-1920

December 15, 2010

Our File Number: 2-294163-33-27-6

BY FAX

John J.L. Hunter Q.C.
Hunter Litigation Chambers Law Corporation
2100 - 1040 West Georgia Street
Vancouver, BC V6E 4H1

Attention: John J.L. Hunter Q.C.

Dear Sir:

Re: Attorney General of Canada v. Imperial Tobacco, SCC File No. 33559

In reviewing the Crown's factum on the appeal in this matter, we wish to clarify a statement that appears in paragraph 30 to the effect that "what follows deals solely with the allegations of negligent misrepresentation in the third party notice".

We have argued in that paragraph that the concept of negligent design does not properly arise in the pleadings. We did not wish the above statement to imply that applicable arguments that follow on the *Anns/Cooper* analysis would not apply should the Court find that the concept of negligent design is in fact relevant and sufficiently pled. While we believe this should be self-evident from specific references to the "tobacco strains" allegations in subsequent paragraphs such as 37 and 82, we write to avoid any potential uncertainty which could be created by the language in paragraph 30 above.

Thank you for your cooperation,

Sincerely,

John S. Tyhurst
General Counsel

Canada