No. L031300
Vancouver Registry

THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

KENNETH KNIGHT

Plaintiff

AND:

IMPERIAL TOBACCO CANADA LIMITED

Defendant

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Third Party

Proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

THIRD PARTY'S SUBMISSIONS

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**SUBMISSIONS OF THE THIRD PARTY,
HER MAJESTY THE QUEEN IN RIGHT OF CANADA
(Re: Certification Motion returnable October 25-29, 2004)**

PART I – NATURE OF THE MOTION

1. The Plaintiff seeks an order pursuant to section 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("CPA") that the within action be certified as a class proceeding and the Plaintiff herein be appointed as the representative plaintiff.

> ***Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("CPA"),**
> **Crown's Book of Statutes, Tab 1**

2. The Third Party opposes the Plaintiff's motion for certification on the grounds that, primarily as a result of the over-breadth of the proposed class and the breadth of the

remedies sought:

a) the pleadings fail to:

(i) disclose a cause of action;

(ii) identify an appropriate class;

(iii) raise common issues, the resolution of which will advance the proceedings;

b) that, in any event, a class proceeding would not be the preferable procedure for the resolution of the common issues; and

c) that there is not a representative plaintiff with a workable plan for advancing the proceeding including the resolution of the common issues.

PART II – OVERVIEW

3. The Plaintiff brings this proposed class action pursuant to the *Class Proceedings Act* and the *Trade Practices Act,* on behalf of all persons who made purchases in British Columbia of light and mild cigarettes manufactured, sold or distributed by the defendant Imperial Tobacco Canada Limited ("Imperial") from 1974 to an opt-out date to be set by this Court.

Statement of Claim, para. 3, Crown's Certification Record, Tab 1

Notice of Motion, para. 2, Crown's Certification Record, Tab 2

***Trade Practices Act*, R.S.B.C. 1996, c. 457 ("TPA"), Crown's Book of Statutes, Tab 2**

4. At paragraph 26 of his statement of claim, the Plaintiff seeks the following remedies pursuant to the *Trade Practices Act*:

(a) a declaration pursuant to paragraph 18(1)(a);

(b) a permanent injunction pursuant to paragraph 18(1)(e);

(c) an order requiring the defendant to advertise any adverse finding against it pursuant to subsection 18(2);

(d) disgorgement and/or restitution by the defendant pursuant to sections 18(4) and 22(1)(b);

(e) damages pursuant to paragraph 22(1)(a); and

(f) punitive and exemplary damages pursuant to paragraph 22(1)(a).

5. While the Plaintiff pleads, at paragraph 18 of the statement of claim, that the action does not seek to recover damages for personal injuries suffered by any class member, nevertheless, at paragraph 26 the Plaintiff claims damages and punitive and exemplary damages, on his own behalf and on behalf of the class, pursuant to paragraph 22(1)(a) of the *Trade Practices Act.*

6. Similarly, at paragraph 24 of the affidavit of Bojan Petrovic, the Plaintiff refers to its intention to present evidence at a common issues trial, "such that the court may have this information in order to impose such aggregate remedies as it feels appropriate under the *Trade Practices Act*, including the restitution and or disgorgement of monies, general damages, symbolic damages or punitive damages."

7. Paragraph 22(1)(a) of *The Trade Practices Act* has, however, now been repealed and replaced by paragraph 171(1)(a) of the *Business Practices and Consumer Protection Act*.

***Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("BPCPA"), Crown's Book of Statutes, Tab 3**

8. The defendant issued a third party notice against Her Majesty the Queen in Right of Canada ("the Crown" or "third party") on April 30, 2004.

Third Party Notice, Crown's Certification Record, Tab 3

9. The thrust of the third party claim, and of the defence to the main action filed by

Imperial, is to the effect that Imperial designed and developed its "light" and "mild" cigarettes at the request or direction of the Federal Government, and agreed to reduce the "Sales Weighted Average Tar" content of its cigarettes, and to market its "light" and "mild" cigarettes, to meet targets, as measured by standard testing methods, set by the federal government.

Third Party Notice, Crown's Certification Record, Tab 3

10. The Defendant alleges that the federal government is liable to indemnify it with regard to any liability to the plaintiff class. As stated by the Plaintiff at paragraph 27 of its argument on certification, "[t]he Defendant essentially argues that if its conduct has been deceptive, then liability for this conduct rests [with] the Government of Canada."

Third Party Notice, Crown's Certification Record, Tab 3

Statement of Defence, Crown's Certification Record, Tab 4

11. The Plaintiff, at paragraph 81 of its argument, raises the prospect of certification of a common issue as to "whether the Defendant's interactions with the Government of Canada constitute a defence to claims under the TPA."

12. There is no evidence whatsoever before the Court to suggest that the federal government endorsed or approved the use by the defendant of "light" and/or "mild" descriptors in regard to the Defendant's cigarettes. It is important to appreciate that "light" and "mild" are terms unilaterally developed by the Defendant to describe certain of its brands.

13. There is evidence before the Court which demonstrates a concern on the part of the federal government with the use of these terms, and that establishes that the federal government has requested that manufacturers, including Imperial, cease the use of such descriptors.

Exhibit "A" to Affidavit of Nancy Filancia ("Filancia Affidavit"), page 2

Letter from Allan Rock, dated May 30, 2001, Appendix "A"

14. Beginning in 1968, the federal government published annual reports on the tar and nicotine content of Canadian cigarettes. From the beginning, press releases issued with regard to these reports recommended that Canadians not smoke, and referred to ways in which smokers could reduce their intake of all cigarette smoke constituents by lengthening the period between cigarettes, lengthening the period between puffs, by not inhaling, by throwing away a very long butt and other techniques.

Exhibit "B" to Affidavit of A.J. Liston ("Liston Affidavit")

15. As early as 1972, the Minister of the Department of National Health and Welfare (now the Department of Health) ("Health Canada") noted in his annual release that "[r]eduction in tar and nicotine intake achieved by choosing low tar and nicotine brands may be nullified if more cigarettes are smoked, more puffs are taken, they are smoked more vigorously or to a shorter butt."

Exhibit "B" to Liston Affidavit, page 25

16. By 1974, such releases routinely advised that "some cigarettes are ventilated on or near the filter. Tar and nicotine deliveries may be increased if these "openings" are blocked by finger or cigarette holder."

Exhibit "B" to Liston Affidavit, pages 44-66 and 51-53

17. In his 1974 news release, the Minister recommended that "switching to low tar brands be only a step to discontinuing smoking altogether."

Exhibit "B" to Liston Affidavit, page 43

18. By 1983, the Minister's news release was cautioning that "in the process of switching, smoking behaviour may change, perhaps unconsciously. The smoker might inhale more deeply, leave shorter butts, take longer puffs and occasionally block the microscopic vents on the filter." As a result, he pointed out, the smoker may actually get more tar and be worse off for switching to lower yield brands. The same release

cautioned that "there is no guarantee that low-yield cigarettes are less hazardous."

Exhibit "G" to Liston Affidavit, pages 189-190

19. The Plaintiff's claim, as currently structured, involves a lengthy series of allegations covering at least three decades and multiple brands of cigarettes, with a proposed class of hundreds of thousands of individuals, including both smokers and non-smokers, residents and non-residents. During the more than three decades covered by the claim, there have been a number of distinct regulatory eras, significant advances in the state of scientific knowledge concerning the harmful effects of smoking, and changing public perceptions as to its acceptability.

20. The Government of Canada is on record as continually warning the Canadian public of the dangers of cigarette smoking. As is apparent from the evidence, the Government opposes the continued use of the "light" and "mild" descriptors by the tobacco industry. It opposes the certification of this action, not because it supports the position of the Defendant on the merits of the plaintiff's claim, but rather because, in its view, the class action format has never been, and is not intended to be utilised in the fashion proposed by the Plaintiff.

21. Class actions, in appropriate circumstances, enhance access to justice, increase judicial economy, and help modify the behaviour of wrongdoers. Used indiscriminately, they create "monsters of complexity"; cases which have the effect not of promoting these three objectives, but rather of over-reaching and thereby doing a disservice to the individuals they seek to represent. In the submission of the Attorney General of Canada, this is one of the latter cases, and it should not be certified.

PART III – ISSUES AND LAW

22. Subection 4(1) of the *Class Proceedings Act* provides that the Court must certify a proceeding as a class proceeding if all of the following requirements are met:

a) the pleadings disclose a cause of action;

b) there is an identifiable class of 2 or more persons;

c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

e) there is a representative plaintiff who:

i) would fairly and adequately represent the interests of the class;

ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and

iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

CPA, subsection 4(1), Crown's Book of Statutes, Tab 1

23. The Plaintiff must provide some evidence on each of the factors, except on the requirement that the pleadings disclose a cause of action.

***Hollick* v. *Toronto (City)*, [2001] 3 S.C.R. 158, at para. 25**
Crown's Book of Authorities, Tab 1

24. Subsection 4(2) of the *Class Proceedings Act* provides that the Court must consider all relevant matters in determining whether a class proceeding would be the

preferable procedure for the fair and efficient resolution of the common issues, including the following specific factors:

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceedings would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient; and

(e) whether the administration of the class proceedings would create greater difficulties than those likely to be experienced if relief were sought by other means.

CPA, subsection 4(2), Crown's Book of Statutes, Tab 1

Cause of Action

25. The third party submits that the Plaintiff has failed to plead a reasonable cause of action, on behalf of the class as defined, under paragraph 22(1)(a) of the TPA, that section having now been wholly repealed and replaced by paragraph 171(1)(a) of the BPCPA.

26. Subsection 203(1) of the BPCPA provides that Parts Two to Four of the Act apply to consumer transactions taking place before the coming into force of the BPCPA. As a result, a consumer transaction will be deceptive under the Act only where it contravenes

the provisions of Part Two of the Act.

27. Section 171 of the BPCPA governs the procedure under which any claim arising under the Act is now to be brought, whether the consumer transaction in question occurred before or after the coming into force of the BPCPA.

Defendant's Argument Opposing Certification, paras. 45 -56

BPCPA, Part 15, Crown's Book of Statutes, Tab 3

27. Paragraph 171(1)(a) of the BPCPA provides that, if a person has suffered damage or loss due to a contravention of the Act or Regulations, the person who suffered the damage or loss may bring an action against a supplier.

28. The effect of paragraph 171(1)(a) is to make proof of damage or loss an essential element of the cause of action provided by the Act.

29. It is apparent from a review of the proposed class definition that it must necessarily include individuals who have not suffered damage or loss as a result of having purchased the Defendant's "light" or "mild" cigarettes, such as those who habitually smoked "light" and "mild" cigarettes, manufactured by others, prior to and at the time of purchase and who purchased without relying on any representation of the Defendant. To the extent that the class includes such individual members, no cause of action under paragraph 171(1)(a) can be made out. Further, the statement of claim as presently drafted is fundamentally flawed, since it fails to plead that the class members have suffered loss or damage as a result of having purchased "light" or "mild" cigarettes.

Identifiable Class

30. The Plaintiff defines the putative class as persons who, during the class period purchased the defendant's "light" or "mild" brands of cigarettes in British Columbia for

personal, family or household use.

Plaintiff's Submissions on Certification, para. 21

Notice of Motion, para. 2, Crown's Certification Record, Tab 2

31. The class is intended to include persons who are "consumers" within the meaning of section 1 of the TPA and to exclude directors, officers and employees of the defendant.

Statement of Claim, para. 3, Crown's Certification Record, Tab 1

32. The class period covers the period from July 5, 1974, i.e., the date the TPA came into force, to an opt-out/opt-in date set by this Court.

Notice of Motion, para. 2, Crown's Certification Record, Tab 2

33. The class, as proposed, would include individuals resident in British Columbia at the time of purchase, individuals resident in other provinces (either or both when they purchased and now) and individuals who merely transited the province at some point during the class period and purchased cigarettes while doing so, and who have no connection with British Columbia, or indeed Canada, beyond the chance purchase of the product on, perhaps, a single occasion. Among those who purchased while in transit through the province would be individuals who were then and are now resident in other countries throughout the world.

34. The class, as proposed, would include both those who at the time of initial purchase in British Columbia were habitual smokers of "light" or "mild" cigarettes in other jurisdictions, and those who never smoked, either before or after their purchase. It would include individuals who relied in some way on the representations of the Defendant, and those who did not.

35. Paragraph 4(1)(b) of the CPA requires that plaintiffs satisfy the Chambers judge that there is an identifiable class before an action can be certified. The Supreme Court of Canada in *Western Canada Shopping Centres Inc.* v. *Dutton* and in *Hollick*, citing with

approval the Ontario case, *Bywater v. Toronto Transit Commission*, confirmed that all of the following factors are to be considered when assessing whether there is an identifiable class:

- The class must be capable of clear definition. The purpose of the definition is to identify the individuals who are entitled to notice, entitled to relief if relief is awarded, and bound by the judgment.

- The class definition should state objective criteria for membership.

- The criteria for membership should bear a rational relationship to the asserted common issues.

- The proposed representative plaintiff must show that the class is not unnecessarily broad. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the class definition be amended.

- The onus is on the plaintiff to show that the class is defined sufficiently narrowly, but without resort to arbitrary exclusion of others sharing a common interest

Western Canadian Shopping Centres Inc. v. _Dutton_, [2001] 2 S.C.R. 534 at 554, Crown's Book of Authorities, Tab 2

Hollick, _supra_, at 30-32, Crown's Book of Authorities, Tab 1

Bywater v. _Toronto Transit Commission_ (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at 175, Crown's Book of Authorities, Tab 3

Caputo v. _Imperial Tobacco_ (2004), 236 D.L.R. (4^{th}) 348 (Ont. S.C.J.), Crown's Book of Authorities, Tab 4

Samos Investments Inc. v. _Pattison_, [2003] 4 W.W.R. 39 (B.C.C.A.); 2003 BCCA 87, Crown's Book of Authorities, Tab 5

36. In *Mouhteros* v. *DeVry Canada Inc.*, Winkler J. rejected a class definition of "all persons who attended the [school] between September 1990 and May 1996" on the basis that a rational connection to the common issue was missing:

> In my view, there must be some connection between the class definition and the common issue. The mere fact that a group of people is identifiable is not sufficient to render them a class for the purpose of the Act. Indeed, such a connection is contemplated by the wording of 5(1)(c) which mandates that the claims or defences of the class members raise common issues.

***Mouhteros* v. *DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.) at 68, Crown's Book of Authorities, Tab 6**

***Hollick, supra*, at 31, Crown's Book of Authorities, Tab 1**

37. The definition in this case, like the class definition in *Mouhteros*, is both fatally over-broad and without rational connection to the asserted common issues. Both include class members who may have no claims, such as those, in the present case, who purchased cigarettes but did not smoke them, and those who purchased cigarettes but did not rely upon any representation of the defendant in doing so. The Plaintiff's proposed definition does not meet the primary purpose of identifying persons who are entitled to relief, because it is over-inclusive.

38. The proposition that the proposed class definition is sufficient by reference to the definition in *Rumley* v. *British Columbia* is misplaced. While the present case advances an array of highly individualistic claims, *Rumley* in the end, advanced a single type of common claim, and had fewer issues in other respects. Moreover, the class in *Rumley* was limited to those who claimed to have suffered loss and damage as a result of the conduct complained of, while the proposed class here is entirely devoid of any such unifying characteristic.

***Rumley v. British Columbia*, [2001] 3 S.C.R. 184, Crown's Book of Authorities, Tab 7**

39. The court cannot be asked to exercise its discretion to produce a more certifiable class when the plaintiffs have not or cannot do so on a principled basis, particularly where there is an inadequate evidentiary record upon which to do so.

***Caputo, supra*, at paras. 67-68, Crown's Book of Authorities, Tab 4**

40. Since the present action seeks relief with regard to a complex list of allegations, and includes claims for general, exemplary and punitive damages, it will inevitably be necessary that the circumstances and conduct of the individual class members be reviewed in order to arrive at any resolution of their claims, whether as to liability or damages.

41. It is apparent that many class members will not have experienced the same or any losses as a result of the act of purchasing "light" or "mild" cigarettes. The loss, if any, experienced by a then habituated smoker who purchased on a single occasion while on transit through the province, without relying on any representation of the Defendant, will inevitably be fundamentally different, if it exists at all, from that of a former non-smoker, resident in the province, who initially purchased a "light" or "mild" brand based upon a representation of the defendant, continued to smoke that brand for a substantial period of time and subsequently suffered damage which can be causally linked to doing so. A mere declaration that the Defendant's conduct was deceptive would leave undetermined a myriad of individual issues. The claims, as a whole, would not be meaningfully advanced by the determination of such an issue.

42. The Plaintiff's reliance on *Bouchanskaia* v. *Bayer Inc.* is of no assistance to them. In *Bouchanskaia*, Gray, J. certified a class of "all persons resident in British Columbia who ingested Baycol". Not only was the class limited to B.C. residents, it was further limited to those who had personally ingested the product. This was in the context of a pleading which alleged that the class had suffered losses including those typically claimed in personal injury lawsuits. In the present case, neither of these limits is present.

Rather, the Plaintiff seeks to certify a world wide class intended to include both those who have suffered such loss and damage and those who have not.

***Bouchanskaia v. Bayer Inc.*, [2003] B.C.J. No. 1969 (S.C.), Plaintiff's Book of Authorities**

43. The context in which a class was certified in *Reid* v. *Ford Motor Co.*, also relied upon by the Plaintiff, is similarly remote from that of the present case. In *Reid*, the Court certified a class composed of all persons resident in British Columbia who then or in the past owned or leased a defined vehicle, during a specified time period, equipped with a specific piece of equipment, and who paid or were charged for the cost of replacing the allegedly defective part. The class was thus limited not only to B.C. residents but further to those who had allegedly suffered loss as a result of being charged for replacement of the part said to be known to be defective. The class sought to be certified by the Plaintiff is, by comparison, clearly both overbroad and unconnected, in any rational way to the common issues asserted.

***Reid* v. *Ford Motor Co.*, [2003] B.C.J. No. 2489 (S.C.), Plaintiff's Book of Authorities**

Common Issues

44. The Plaintiff has identified ten proposed common issues at paragraph 62 of its argument and has made reference to three more at paragraph 81. The third party will address only Paragraph 62(viii), which proposes an issue as to whether a monetary award should be made in favour of the class.

45. It is evident from a review of paragraph 70 of the argument, and from the litigation plan, that the Plaintiff seeks an aggregate assessment of damages in favour of the class.

46. Individual assessment is the norm. An aggregate monetary award may be made, pursuant to section 29 of the CPA, only if,

a) monetary relief is claimed on behalf of some or all class members;

b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendants monetary liability, and

c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

CPA, section 29, Crown's Book of Statutes, Tab 1

47. The third party submits that the extreme over-breadth of the proposed class definition makes it impossible for the requirements of section 29(b) and (c) to be met in regard to the Plaintiff's claim for general damages, and, that being so, no common issue can be certified with regard to a prospective aggregate monetary award for general damages suffered by the class.

48. As previously discussed, the class as proposed would include both individuals with no apparent claim, and individuals with claims which, if proved, would potentially give rise to entitlement to significant compensatory damages.

49. While the Plaintiff continues to maintain a claim for general damages, he has offered no proposed mechanism by which it might be possible for the Court to determine, on an aggregate basis, the appropriate quantum of general damages recoverable by class members at either extreme of the damage continuum, or at any point along it.

50. It is apparent that statistical evidence cannot hope to provide the proof necessary to determine the extent of the general damages suffered by any particular class member, or, if it can, that the Plaintiff has failed to provide such a rationale in its litigation plan, beyond a bare promise to lead expert economic and statistical evidence to quantify the aggregate claim. The Jeffrey Harris report, which is not in any event properly before this Court, speaks only to a theoretical diminution in value of the Defendant's product. There is no evidence whatsoever before the Court regarding Dr. Moorthy's opinions, and the

court is left to speculate as to what his evidence might be.

Jeffrey Harris Report, Exhibit "Q" to the Affidavit of Bojan Pertrovic ("Petrovic Affidavit")

Petrovic Affidavit, page 6, paras. 23-24

51. Individual assessments should be preferred where:

i) it is necessary to determine individual issues

ii) individual class members may be barred from asserting the claim as a result, for example, of limitations periods;

52. The jurisprudence establishes that applicable limitation periods must be determined on an individual basis. The Supreme Court of Canada has determined that statutes of limitations are substantive in nature. As such, the applicable limitation period for each class member can only be determined based upon a review of the facts of each individual's particular case.

***Tolofson* v. *Jensen*, [1994] 3 S.C.R. 1022, at 1066-1074, Crown's Book of Authorities, Tab 8**

***M.C.C.* v. *Canada (Attorney General)*, [2001] O.J. No. 4163 (S.C.J.), at para. 74, aff'ed (2003) 65 O.R. (3d) 492 (Div. Ct.); under appeal, Crown's Book of Authorities, Tab 9**

***Pearson* v. *Inco Ltd.*, [2002] O.J. No. 2764 (S.C.J.), at para. 126, Crown's Book of Authorities, Tab 10**

***Harrington* v. *Dow Corning* (1997), 29 B.C.L.R. (3d) 88 (S.C.), at 95-96, Crown's Book of Authorities, Tab 11**

***Hoy* v. *Medtronics, Inc.* (2001), 12 C.P.C. (5th) 370 (B.C.S.C.), at 377-378, Crown's Book of Authorities, Tab 12**

***Bittner* v. *Louisiana Pacific Corp.* (1997), 43 B.C.L.R. 324 (S.C.), at 338, Crown's Book of Authorities, Tab 13**

53. In the present case, individual class members may be subject to one or more limitation periods, depending upon their unique circumstances, including where they

reside. Depending upon the relevant limitation period, the discoverability rule may or may not be applicable to an individual class member.

54. Where discoverability is an issue, it will be necessary to determine its applicability to any individual class member on an individual basis. It is not possible to determine issues of discoverability in any global fashion as an inquiry into the state of mind of the particular claimant must be made.

***Daniels* v. *Canada (Attorney General)*, 2003 SKQB 58; application for leave to appeal to the Supreme Court of Canada dismissed [2003] S.C.C.A No. 223, Crown's Book of Authorities, Tab 14**

A class proceeding is not the preferable procedure

(a) Statutory provisions

55. The Plaintiff must establish that a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues.

CPA, paragraph 4(1)(d), Crown's Book of Statutes, Tab 1

56. In the present case, the presence of limitations issues such as discoverability and the numerosity of the class are strong indicators that a class proceeding will not be the preferable means of resolving the issues asserted. Any class action which may be certified in the context of the claims made in the statement of claim would inevitably become what the cases have referred to as a "monster of complexity".

***Caputo*, *supra*, Crown's Book of Authorities, Tab 4**

57. A review of the statistical evidence offered by the Plaintiff suggests that within the Province of British Columbia alone some 17 per cent of the population, or 574,000

people, are current smokers, while an additional 22 per cent, or 742,940 people are former smokers.

Exhibit "P" to Petrovic Affidavit, page 7

58. According to Exhibit "F" to the affidavit of Nancy Filancia, approximately 40.7 per cent of smokers now smoke "Light" or "Mild" cigarettes, while an additional 22.6 per cent smoke ultra light or mild cigarettes. That is, a total of 63.3 per cent of smokers smoke light, mild, ultra light or ultra mild cigarettes.

Exhibit "F" to Filancia Affidavit, page 596

59. The proposed class, however, is not limited to current and former smokers resident in British Columbia, but rather extends to all those who purchased cigarettes in British Columbia over a period of at least thirty years, even if such purchase was made on a single occasion by a non-smoker. In the context of the extreme numerosity of the proposed class, it is important to have particular reference to the provisions of the litigation plan filed by the Plaintiff in determining whether resolution of the common issues asserted by the Plaintiff would in fact advance the proceeding as a whole in any significant way.

60. The Plaintiff's Litigation Plan, however, fails to address this pivotal point. It appears that the Plaintiff has based its plan upon the proposition that an aggregate assessment of damages will be ordered, and that no individual assessment will therefore be necessary.

61. The failure of the Plaintiff to propose a more narrowly defined class, whose characteristics might be rationally connected to the common issues asserted means, however, that it will be impossible to determine damages on an aggregate basis.

62. Given the extreme breadth of the class, any attempt to aggregate damages will inevitably and dramatically over-compensate some and under-compensate other class

members, particularly given that some class members will have suffered no ascertainable damages whatsoever. The class as proposed demands an individual assessment process, and no such process is proposed by the Plaintiff. The litigation plan fails completely to meet the requirement of a "workable plan of advancing the proceeding" as set out in section 4(1)(e) of the CPA.

(b) Determining liability in the absence of a class

63. One of the primary purposes that the class definition serves is to identify persons who are entitled to relief. As the class is currently defined, it cannot be known whether any particular member of the putative class has any legal claim whatsoever.

> ***Western Canadian Shopping Centres Inc.* v. *Dutton*, *supra*, at 554, Crown's Book of Authorities, Tab 2, followed by *Hollick*, *supra*, at para. 17, Crown's Book of Authorities, Tab 1**

64. A class proceeding is not, moreover, the preferable procedure by which to obtain the bulk of the relief which the Plaintiff seeks. In assessing whether a class proceeding is the preferable procedure for the resolution of the common issues, a court should consider whether the three policy objectives of class proceedings legislation would be met through certification; namely, access to justice, judicial economy, and modification of behaviour.

65. Refusal to certify a class proceeding here would result neither in a denial of access to justice, nor in any loss of judicial economy. The declaration, injunction and order as to advertising which the Plaintiff seeks would have equal effect if made in an individual action, such as that provided for in the BPCPA. The resolution of such claims would not, however, advance the damage claims made in this proposed class proceeding in any significant way, given the extreme over-breadth of the class as proposed and the myriad of individual issues generated by such over-inclusiveness.

66. The courts will not permit certification of a class action where the individual issues predominate over the common issues so as to make a class action unwieldy or

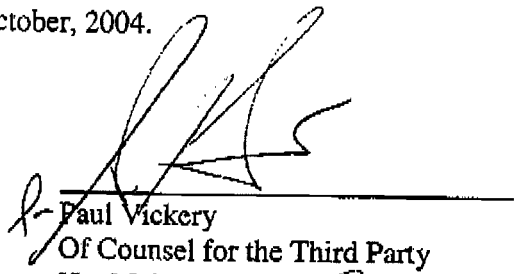
counter-productive, or where the determination of the common issues would not move the litigation along considerably. Nor will it do so where the issues in the case seem likely to break down into multiple sub-issues.

PART IV – ORDER REQUESTED

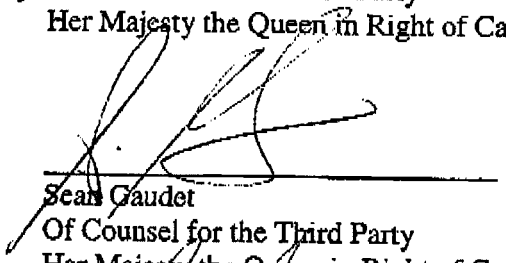
67. The Third Party requests that the Plaintiff's motion for certification of the within proceeding be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

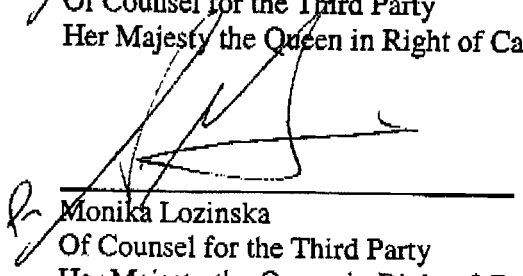
Dated at Vancouver, this 14th day of October, 2004.



Paul Vickery
Of Counsel for the Third Party
Her Majesty the Queen in Right of Canada



Sean Gaudet
Of Counsel for the Third Party
Her Majesty the Queen in Right of Canada



Monika Lozinska
Of Counsel for the Third Party
Her Majesty the Queen in Right of Canada

SCHEDULE "A" - AUTHORITIES

1. *Hollick* v. *Toronto (City)*, [2001] 3 S.C.R. 158; 2001 SCC 68

2. *Western Canadian Shopping Centres Inc.* v. *Dutton*, [2001] 2 S.C.R. 534; 2001 SCC 46

3. *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.)

4. *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.)

5. *Samos Investments Inc. v. Pattison* [2003], 4 W.W.R. 39 (B.C.C.A.); 2003 BCCA 87

6. *Mouhteros* v. *DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.)

7. *Rumley v. British Columbia*, [2001] 3 S.C.R. 184; 2001 SCC 69

8. *Tolofson* v. *Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022

9. *M.C.C. v. Canada (Attorney General)*, [2001] O.J. No. 4163 (S.C.J.); aff'd (2003), 65 O.R. (3d) 492 (Div. Ct.); under appeal to the Ontario Court of Appeal

10. *Pearson* v. *Inco Ltd.* (2002), 33 C.P.C. (5th) 264 (Ont. S.C.J.); aff'd (2004), 44 C.P.C. (5th) 276 (Div. Ct.)

11. *Harrington* v. *Dow Corning Corp.* (1997), 29 B.C.L.R. (3d) 88 (S.C.)

12. *Hoy* v. *Medtronic Inc.* (2001), 12 C.P.C. (5th) 370 (B.C.S.C.)

13. *Bittner* v. *Louisiana-Pacific Corp.* (1997), 43 B.C.L.R. 324 (S.C.)

14. *Daniels v. Canada (Attorney General)*, 2003 SKQB 58; application for leave to appeal to the Supreme Court of Canada dismissed [2003] S.C.C.A No. 223

SCHEDULE "B" – LEGISLATION

1. *Class Proceedings Act*, R.S.B.C. 1996, c. 50, ss. 4, 29
2. *Trade Practices Act*, R.S.B.C. 1996, c. 457, ss. 18, 22
3. *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2

APPENDIX "A"

Letter from Allan Rock to Bob Bexon, President and Chief Executive Officer, Imperial Tobacco Canada Limited, dated May 30, 2001

Minister of Health / Ministre de la Santé

Ottawa, Canada K1A 0K9

Allan Rock

MAY 30 2001

Mr. Bob Sexon
President and Chief Executive Officer
Imperial Tobacco Canada Limited
3810 St-Antoine St. West
Montréal, Quebec
H4C 1B5

Dear Mr. Sexon:

As you are well aware, tobacco use is the leading cause of premature death and disease in Canada, with over 45 000 Canadians dying from tobacco use each year. The Government of Canada is determined to see tobacco use reduced in our country so that this tragic toll can be lessened. A key component of our strategy is to educate Canadians of the health risks of tobacco and provide them with the information and assistance necessary to quit.

Because cigarette smoking is addictive, many smokers cannot quit, even after they have been informed that smoking is harmful to their health. Some smokers try to cut back on their exposure to tobacco smoke by switching to brands of cigarettes that are advertised as "light," "mild" and other such brands. Such smokers may postpone indefinitely further attempts to quit smoking.

We know that many Canadian smokers have switched to smoking "light" brands in the mistaken belief that such cigarettes are less harmful to their health. Furthermore, we know that smokers consciously or unconsciously adjust the amount of smoke that they inhale through a variety of mechanisms including inhaling deeper and longer or covering the ventilation holes.

.../2

Internal tobacco industry documents point to the marketing of "light" cigarettes as a strategy to keep people smoking, not as a strategy to help them quit. For example, the following citation obtained from the Guilford archive is illustrative:

> It is useful to consider lights as a third alternative to quitting and cutting down - a branded hybrid of smokers' unsuccessful attempts to modify their habit on their own. (Bob Bexon, New Brand Development - "Post-Lights". Research and Development/Marketing Conference. Imperial Tobacco (Canada) Limited, British-American Tobacco, United Kingdom, 1984)

The Canadian tobacco industry now claims that smoking should be an informed decision, made by adults, and that youth should not smoke. Meanwhile, we know that many adult smokers confuse "light" or "mild" cigarettes with a safer cigarette and that the leading selling brand among youth in Canada is a "light" brand. The truth is, of course, that smoking any cigarette is harmful to health and inhaling a "light" or "mild" cigarette is not safer.

The time has come to dispel the myths that exist around such terms as "light " and "mild" on cigarette packages. I have asked my officials and advisors to further investigate this issue, to gather the science and other evidence, and to advise me on a course of action, which could include regulation or prohibition.

Meanwhile, I am soliciting your co-operation in carrying out two voluntary actions immediately, actions which will make a major contribution to a solution to this problem. Specifically, I respectfully make the following two requests of Canada's tobacco manufacturers:

1. For the sake of public health, please remove all confusing descriptors such as "light," "mild," "special," and "medium" from the brand names and packages of your cigarettes;

.../3

2. Please inform your customers and potential customers that the reason for this removal is that smoking "light" or "mild" or similarly named cigarettes is not safer for their health.

In the interest of public health, I look forward to an early and positive reply.

Yours very truly,

Allan Rock