



No. L031300
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

KENNETH KNIGHT

PLAINTIFF

AND:

IMPERIAL TOBACCO CANADA LIMITED

DEFENDANT

**STATEMENT OF DEFENCE OF
IMPERIAL TOBACCO CANADA LIMITED**

1. The Defendant, Imperial Tobacco Canada Limited ("ITCAN"), denies the allegations in the Statement of Claim, unless expressly admitted, and puts the Plaintiff to the strict proof thereof.
2. ITCAN admits that it is Canada's largest cigarette manufacturer and that it is incorporated pursuant to the laws of Canada with a registered office at 3711 St. Antoine St. West, Montreal, Quebec.
3. ITCAN admits that it is a "supplier", that the Plaintiff is a "consumer" and that the purchase by and sale to the Plaintiff of cigarettes are "consumer transactions" within the meaning of the *Trade Practice Act*, R.S.B.C. 1996, c. 457, (the "TPA").

LIGHT AND MILD PRODUCTS

4. The descriptors "Light" and "Mild" when used as part of a cigarette brand name indicate, *inter alia*, that the deliveries of tar, nicotine and other smoke constituents as measured by standard testing methods are less than the deliveries for the corresponding regular or non

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"Light" or "Mild" products within the same brand family as measured by standard testing methods.

5. There are significant differences between the "Light" and "Mild" products developed in the early to mid 1970's and those on the market today. The deliveries of tar as measured by standard testing methods for "Light" and "Mild" products sold on the B.C. market have ranged from a low of less than one milligram per cigarette to a high of 14 milligrams per cigarette.

6. There are various design features that reduce the deliveries of tar and nicotine as measured by standard testing methods. Each "Light" or "Mild" product incorporates some or all of the following design features in combination and to varying degrees:

- (a) Using specific types and grades of tobacco;
- (b) Using "puffed" or expanded tobacco (tobacco that has been expanded by air) resulting in less tobacco in each cigarette;
- (c) Using filters of different efficiencies;
- (d) Using cigarette paper of different degrees of porosity; and
- (e) Increasing ventilation in the cigarette filter.

7. ITCAN developed its first "Light" product in 1976. Since that time, all three major Canadian cigarette manufacturers have developed and introduced dozens of different "Light" and "Mild" products. There have been as many as 90 different "Light" or "Mild" products sold in B.C.

THE PURPOSE OF STANDARDIZED SMOKING TESTS

8. The tar, nicotine and other smoke constituent data found on each package of cigarettes are the standard deliveries of those smoke constituents as measured by standard testing methods. The standard delivery data are obtained through laboratory testing of cigarette under prescribed conditions.

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9. Standard testing methods set various uniform smoking parameters, including the following:

- (a) A prescribed interval between puffs;
- (b) A prescribed volume for each puff;
- (c) A prescribed duration of each puff; and
- (d) The butt length of the cigarette to remain following testing.

10. The nature of these parameters change depending on the standard testing protocol employed. The original method used in Canada to produce standard machine derived deliveries was based on the method developed by the United States Federal Trade Commission ("FTC") in the 1960s. The modified FTC standard testing protocol was used in Canada until 1989 when the ISO testing method became the prescribed standard testing protocol pursuant to the *Tobacco Products Control Act*, R.S.C. 1985, c.14.

11. Since 1976, ITCAN has published on its packages tar, nicotine and other smoke constituent yields as measured by standard testing methods. Between 1976 and 1988, ITCAN published this information at the direction and request of the Federal Government. From January 1, 1989 onwards, ITCAN has published this information pursuant to the statutory requirements found in the *Tobacco Products Control Act*. From December 2000 onwards, ranges of tar, nicotine and other smoke constituent yields as measured by standard testing devices have been published on cigarette packages. Further, in British Columbia, information about tar, nicotine and other smoke constituent yields as measured by standard testing methods has been published by the Province pursuant to the *Tobacco Testing and Disclosure Regulation*, B.C. Reg. 282/98.

12. The purpose of the standardized testing methods is to provide consumers with comparative brand information about tar and nicotine and other smoke constituent yields when cigarettes are smoked in consistent and reproducible conditions. Given the variations in individual smoking behaviour it was never the purpose of the Federal Government or other health authorities to provide individual consumers with information about the actual yields of tar, nicotine or other constituents they will obtain when smoking a particular cigarette.

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13. It is scientifically impossible to create a standard testing protocol that can predict the amount of tar, nicotine or other smoke constituents a particular individual will receive when smoking a particular cigarette. This is because smoking is a uniquely individualistic behaviour.

SMOKING BEHAVIOUR IS UNIQUELY INDIVIDUALISTIC

14. Each smoker smokes differently. The yields of tar and nicotine and other smoke constituents that any individual obtains from smoking depends on a variety of factors including the number of cigarettes smoked, the number of puffs taken on a cigarette, the length of puffs, the intervals between puffs, the butt length to which the cigarette is smoked, the strength of the cigarette, whether the cigarette is ventilated and whether the smoker takes steps to alter his or her smoking behaviour to compensate for an increase or decrease in smoke yields from a particular cigarette.

15. Compensation is a phenomenon that relates to changes that may occur in an individual's smoking behaviour if that individual switches between products with different deliveries of tar and nicotine as measured by standard testing devices. Compensation (increasing or decreasing an individual's intake of smoke constituents) may occur in many ways, all of which relate to the way that an individual smoker smokes. For example, compensation may occur by increasing the number of cigarettes smoked, increasing the number of puffs on each cigarette, increasing the puff volume, decreasing the duration between puffs, or blocking filter ventilation holes.

16. Whether, to what extent, and how a smoker compensates when switching brands is an individual issue. To the extent that compensatory behaviour occurs, it varies from individual to individual, but is rarely complete or permanent. Furthermore, the effect of compensation on deliveries can only be determined by examining individual smoking behaviour.

THE ROLE OF THE CONSUMERS IN THE DEVELOPMENT OF LIGHT AND MILD PRODUCTS

17. As a result of consumer demand and as a result of the facts set out in paragraphs 18 to 27 below, ITCAN developed "Light" and "Mild" cigarettes.

THE ROLE OF THE FEDERAL GOVERNMENT IN THE DEVELOPMENT AND PROMOTION OF LIGHT AND MILD PRODUCTS

18. By the mid-1960s, the international and Canadian public health consensus was that lowering the tar content of tobacco might reduce the incidence of tobacco related disease in the population of smokers by reducing exposure to tar in cigarette smoke.
19. Based on this consensus, in the late 1960s and early 1970s, the Federal Government tested brands of cigarettes manufactured by the major Canadian tobacco manufacturers to determine the tar and nicotine deliveries of their products as measured by standard testing methods. This information was then published by the Federal Government in order to communicate comparative information to consumers which would assist them in making informed choices regarding different brands of cigarettes.
20. The Federal Government's programme to disseminate tar and nicotine information recognized that many consumers would choose to continue to smoke. The Federal Government's programme was intended to encourage continuing smokers to smoke cigarettes containing less tar and nicotine as measured by standard testing methods.
21. It was the Federal Government's view that, first, lower tar cigarettes presented a reduced risk to smokers when compared to cigarettes of higher tar as measured by standard testing methods, and secondly, that the publication of tar and nicotine figures was a necessary part of its smoking and health programme.
22. Consistent with this program, the Federal Government also requested that beginning in 1976 tar and nicotine deliveries as measured by standard testing methods be printed on cigarette packages.
23. In 1978 the Federal Government directed or requested that ITCAN and other Canadian tobacco manufacturers set targets for the reduction of tar in cigarettes sold in Canada on a global basis. ITCAN agreed to attempt to reduce the "Sales Weighted Average Tar" content of cigarettes (or "SWAT" level) in accordance with government targets. SWAT levels are a measurement of the average tar content of cigarettes as measured by standard testing methods, taking into account the sales volumes of these brands. In order to reduce SWAT levels, cigarette

DAMAGES AND RELIEF

29. ITCAN denies that it has caused any economic loss as alleged or at all capable of giving rise to a claim under the *TPA* and, in any event, relief requires proof of individual reliance and causation by each potential class member.

30. In the alternative, the existence of any claim to damages or other economic claims under the *TPA* is inherently individual and depends on individual subjective valuations and preferences of consumers, including the following individual factors:

- (a) why a particular individual smokes a certain brand of cigarette;
- (b) the smoking behaviour of a particular individual;
- (c) a particular individual's knowledge about the risks of smoking generally and the risks of smoking "Light" and "Mild" cigarettes; and
- (d) when a particular individual learned information about the risks of smoking generally and the risks of smoking "Light" and "Mild" cigarettes.

31. In the further alternative, only a small portion of the purchase price of "Light" and "Mild" cigarettes consists of monies payable to ITCAN. The majority of the purchase price has, at all material times, consisted of taxes levied by both the Provincial and the Federal Government. In these circumstances, restitution is not available as relief.

THE PLAINTIFF

32. The Plaintiff was at all times aware of the risks of smoking generally and the risks of smoking "Light" and "Mild" cigarettes. Aside from having information about the risks of smoking, which has been widely known and disseminated at all material times to this action, the Plaintiff's spouse has had involvement with an anti-smoking activist group which has published information about the risks of smoking and second hand smoke for nearly twenty years. The facts relating to a particular individual's knowledge about the health risks of smoking and from what source that information was obtained will vary from individual to individual and will vary

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over time. Further, many individuals will continue to smoke even if they have knowledge about the risks of smoking generally and the risks of smoking "Light" and "Mild" cigarettes.

33. The Plaintiff chose to smoke "Light" and "Mild" cigarettes of his own free will. ITCAN pleads and relies on the doctrine of *volenti non fit injuria*.

34. ITCAN denies that its use of the descriptors "Light" and "Mild" or the communication of the delivery levels of tar and nicotine yields as measured by standard testing methods on the packages of cigarettes caused or in any way contributed to the Plaintiff purchasing ITCAN's products. ITCAN made no express representation that "Light" or "Mild" products reduced the risk of disease in the Plaintiff. The Plaintiff did not rely on any representation (express or implied) made by ITCAN as alleged or at all. The facts relating to a particular individual's reliance on an alleged representation about "Light" and "Mild" cigarettes will vary from individual to individual and will vary over time.

35. In the alternative, if the Plaintiff relied on any representation at all, then the representation was made by the Federal Government or other public health authorities or medical professions in Canada. The facts relating to a particular individual's reliance on an alleged representation about "Light" and "Mild" cigarettes made by the Federal Government or other public health authorities or medical professionals will vary from individual to individual and will vary over time.

36. If the Plaintiff believed that smoking "Light" and "Mild" cigarettes have health benefits when compared to smoking regular cigarettes, which is denied, his beliefs derive from information disseminated by the Federal Government or other public health authorities or medical professionals and not from ITCAN.

37. ITCAN denies that the Plaintiff "compensated" or "compensated fully" when smoking ITCAN's products. The facts relating to a particular individual's smoking habits will vary from individual to individual and will vary over time.

38. In the alternative, the Plaintiff knew or ought reasonably to have known all facts material to his claim from the time he began to smoke and ITCAN pleads and relies on the *Limitation Act*, R.S.B.C. 1996, c. 266. The facts relating to a particular individual's knowledge

of all the facts material to this claim and when knowledge of those facts was acquired will vary from individual to individual and will vary over time.

39. The Plaintiff's claim discloses no cause of action under the *TPA*.

40. The Plaintiff has suffered no damages nor does he have a claim for restitutionary relief under the *TPA*. The facts relating to a particular individual's claim for relief will vary from individual to individual and will vary over time.

41. ITCAN says if the Plaintiff has suffered damage, which is denied, then such damage was caused or contributed to, in whole or in part, by the Plaintiff's own acts or omissions and not any act or omission of ITCAN. The facts relating to a particular individual's acts and omissions will vary from individual to individual and will vary over time. ITCAN pleads and relies upon the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333.

42. In the alternative, and in further answer to the whole of the Statement of Claim, if the Plaintiff has suffered loss as alleged or at all, the Plaintiff has failed to mitigate such loss. The facts relating to a particular individual's effort to mitigate will vary from individual to individual and will vary over time.

GENERAL PLEADINGS

43. ITCAN denies that the allegations in paragraphs 20, 22, 23 and 24 of the Statement of Claim disclose a cause of action under the *TPA*.

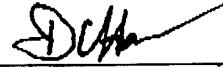
44. ITCAN pleads the provisions of the *Limitations Act*, R.S.B.C. 1996, c. 266.

45. ITCAN objects to the certification of the action on the basis that it does not meet the certification requirements in the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

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WHEREFORE the Defendant Imperial Tobacco Canada Limited submits that the Plaintiff's claim should be dismissed with costs to the Defendant.

Dated at Vancouver on April 29, 2004



Solicitors for the Defendant, Imperial
Tobacco Canada Limited

This Statement of Defence is filed by Berardino & Harris, the Solicitors for the Defendant Imperial Tobacco Canada Limited, whose office address and address for delivery is Suite 14 - 1075 West Georgia Street, Vancouver, BC V6E 3C9. Telephone 604.647.4557. (Reference: David C. Harris/030185)