

No.  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Between:

JOHN SMITH

Plaintiff

AND:

IMPERIAL TOBACCO CANADA LTD.

Defendant

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

**STATEMENT OF CLAIM**

**Nature of the Action**

1. This is a proposed class action brought pursuant to the *Trade Practices Act*, R.S.B.C. 1996, c. 457 (the “TPA”) on behalf of British Columbia residents who purchased “light” cigarettes manufactured, sold and/or distributed by the Defendant.

2. It is alleged that the Defendant’s marketing of “light” cigarettes is a “deceptive trade practice” contrary to section 3 of the TPA. The Plaintiff seeks declaratory relief pursuant to s. 18(1)(a), injunctive relief pursuant to s. 18(1)(b), disgorgement and/or restitution pursuant to ss.18(4) and 22(1)(b) and damages pursuant to s.22(1)(a) of the TPA.

3. “Light cigarettes” are generally defined as cigarettes containing between seven and fifteen milligrams of tar. The Defendant manufacturers light cigarettes under the brands Player’s Light, DuMaurier Light and Matinee Light (“Light Cigarettes” or “Lights”). The Defendant distributes its Light Cigarettes in British Columbia and across Canada.

4. By the late 1960’s, scientific studies revealed that higher tar and nicotine levels correlated with a significantly increased risk of developing smoking-related diseases. These studies threatened the Defendant’s continued profitability. The Defendant responded by publicly denying that smoking caused disease and by undertaking public misinformation campaigns which sought to create doubt in the public mind about the negative effects of smoking.

5. The Defendant further responded by designing, developing and marketing its Light Cigarettes. Each of its Light Cigarettes contains the descriptor “light” in its brand name. This descriptor is intended by the Defendant to convey, and does convey, to the Plaintiff and Class Members an implicit message of health reassurance. This message is that the Defendant’s Light Cigarettes are safer and less harmful than regular cigarettes, that they contain less toxins, and that smokers who are worried about their health may switch to Lights instead of quitting.

6. The Defendant’s Lights however were not less harmful, nor did they contain less toxins. While promoting decreased tar and nicotine deliveries, the Defendant *designed* its Lights to deliver higher levels of tar and nicotine than could be measured by the standard testing apparatus. The Defendant thereby achieved apparent support for its claim that its cigarettes were “light” and contained lowered tar and nicotine. Additionally, the Defendant failed to disclose

that the smoke produced by its Lights was also more genotoxic (causing genetic and chromosomal damage) per milligram of tar than 'regular' cigarettes.

7. The Defendant engaged in deceptive and unlawful conduct contrary to the TPA by:

(a) falsely and/or deceptively claiming that its Lights had lowered tar and nicotine in comparison to regular cigarettes;

(b) using the descriptor "light" in the marketing of its products when it knew and intended for this descriptor to convey a false message of health reassurance to its customers and failing to take any steps to counter-act this false message;

(c) failing to disclose the material fact that the so-called lowered tar and nicotine deliveries to its product were unrelated to benign changes in the content of the tobacco in its Lights, but rather depended on deceptive changes in cigarette design and composition. These changes include the addition of microscopic vent holes on or around the cigarette filter that theoretically dilute the tar and nicotine content of smoke per puff as measured by the industry standard testing apparatus, and alteration of the materials used in filters and cigarette papers.

(d) failing to disclose the material fact that the Defendant intentionally manipulated the design and content of its Lights in order to maximize nicotine delivery while falsely and/or deceptively claiming lowered tar and nicotine;

(e) failing to disclose that these changes in design and composition were intended by the Defendant to fool the machine tests that the Defendant uses as a basis to market its cigarettes as “light”; and

(f) failing to disclose the material fact that the techniques employed by the Defendant that purportedly reduce the levels of tar in its Light Cigarettes actually increase the harmful biological effects, including mutagenicity (genetic or chromosomal damage) caused by the tar ingested by the consumer.

8. The Defendant’s purpose in controlling the tar and nicotine delivery of its Light Cigarettes under machine testing conditions is to achieve artificially low tar and nicotine ratings to lend credence to their claim that its products are “light” and contain lowered tar and nicotine. In fact, the Defendant conducted its own internal tests to ensure that the actual amounts of tar and nicotine delivered under normal use remained at higher levels.

9. The Defendant has unfairly and unjustly profited from its failure to adequately disclose to consumers the true nature and future of its so-called “light” cigarettes.

10. The Plaintiff seeks statutory damages and other relief pursuant to the TPA, including an order that the Defendant refund all sums that class members paid to purchase the Light Cigarettes, or that the defendants disgorge all profits which they made on account of any Light

Cigarettes purchased by class members, together with any further relief which may be available under the TPA, including permanent injunctive relief sufficient to inform consumers of:

- (a) the existence and location of ventilation holes in the Defendant's product;
- (b) the need to refrain from obstructing these holes or from increasing puff volume or frequency in order to achieve the claimed lowered tar of the Light Cigarettes;
- (c) the Defendant's manipulation of nicotine content in its Lights; and
- (d) the fact that smoke obtained from the Light Cigarettes is actually more mutagenic than regular tobacco smoke.

11. The Plaintiff does not seek to recover damages for himself or for the Class on account of any personal injuries suffered by any of them.

### **The Parties**

12. The plaintiff, John Smith, ("Smith") is a resident of Vancouver, British Columbia.

13. The defendant, Imperial Tobacco Canada Ltd. ("Imperial Tobacco") is Canada's largest tobacco company, manufacturing nearly 70% of the cigarettes sold in this country.

14. The Plaintiff brings this action on behalf of a proposed class of British Columbia residents. Without prejudice to later expansion, the Class that the Plaintiff seeks to represent consists of all resident consumers of British Columbia who purchased the Defendant's Light Cigarettes (the "Class") during the Class Period. The Class period commences on the first date that the Defendant placed its Light Cigarettes into the stream of commerce in British Columbia, and runs until the date of trial. Excluded from the Class definition are individuals who are directors and officers of the Defendant or its affiliates. Also excluded is any judge presiding in this case.

15. The Plaintiff, Smith, purchased and consumed approximately one and a half packs a day of the Defendant's Light Cigarettes in British Columbia for a period of approximately seven years. Smith was without knowledge of the conduct by the Defendant alleged in this claim, or of any facts from which it might reasonably be concluded that the Defendant was so acting, or which would have lead to the discovery of such actions, until shortly prior to the commencement of this action. Through longstanding conduct, the Defendant willfully concealed its manipulations of "light" cigarette design and composition.

16. The packaging of the Light Cigarettes purchased by the Plaintiff and all Class members contained the descriptor "light". The Light Cigarettes purchased by the Plaintiff and all Class Members contained no disclosures, markings or instructions regarding (1) the ventilation holes in the filter; (2) the need to refrain from obstructing these holes and form increasing puff volume or frequency in order to achieve the claimed lowered tar of the Lights; (3) the increased

mutagenicity of “light” cigarette smoke; or (4) the manipulation by the Defendant of nicotine levels in the Light Cigarettes.

### **Material Facts**

17. The Plaintiff and Class members are “consumers” within the meaning of s.1 of the TPA.

18. The Defendant is a “supplier” within the meaning of s.1 of the TPA. In the course of its business, it solicited, offered, advertised and promoted the sale of its Light Cigarettes to the Plaintiff and Class members.

19. The purchase by the Plaintiff and Class members of the Light Cigarettes is a “consumer transaction” within the meaning of s.1 of the TPA.

20. The Defendant engaged in a deceptive practice contrary to s.3 of the TPA in respect of its marketing of the Light Cigarettes to the Plaintiff and Class members. In particular, it:

(a) incorrectly advertised and made false claims that its Light Cigarettes, when smoked under normal use, contained lowered tar and nicotine than regular cigarettes;

(b) failed to disclose that the design and composition of its Light Cigarettes are intended to deliver lowered tar and nicotine levels under machine testing conditions and to deliver higher tar and nicotine levels to consumers who smoke its Light Cigarettes;

(c) placed vent holes on the filter of light cigarettes in a location where they are covered or blocked by the smoker's lips and/or fingers under normal use, thereby negating the claim of lowered tar and nicotine;

(d) failed to mark the vent holes or to make them visible to the naked eye, or otherwise to disclose their existence or location, so that smokers could attempt to smoke the cigarettes in a manner that would allow them to obtain the claimed reductions in tar and nicotine;

(e) failed to disclose to consumers that smoking the Defendant's Lights with the vent holes blocked results in the smoker receiving an increased amount of tar and nicotine that may be as much as, or more than, the amounts of those substances the smoker would receive from a 'regular' cigarette;

(f) failed to instruct smoker, on the packaging or elsewhere, on how to smoke the cigarettes correctly in order to obtain the claimed lowered tar and nicotine, including avoidance of (i) blocking the vent holes and (ii) increased puff volume and frequency;

(g) failed to disclose to consumer that the techniques the Defendant employs to purportedly reduce the levels of tar in Player's Lights actually increase the mutagenicity of the smoke produced by those cigarettes;

(h) manipulated the nicotine levels in its light cigarettes;

- (i) failed to inform consumers of the Defendant's manipulation of nicotine levels in Player's Lights or the effects of such manipulation or Defendant's reasons for such manipulation;
- (j) intended for its use of the descriptor "light" to convey a message of health reassurance to consumers which it did in fact convey;
- (k) represented that its Light cigarettes were of a particular standard, quality, grade, style or model when they were not, contrary to s.3(c) of the TPA;
- (l) represented that its Light Cigarettes offered an advantage, which they did not, contrary to s.3(j) of the TPA;
- (m) marketed its Light Cigarettes, while omitting to state material facts, rendering such marketing deceptive contrary to s.3(r) of the TPA;
- (n) its marketing of its Light Cigarettes had a tendency to deceive consumers, whether or not this tendency was intentional; and
- (o) it failed to discharge a statutory duty of candour in its marketing of its Light Cigarettes to consumers.

21. The Plaintiff and Class members purchased the Light Cigarettes.
  
22. The Plaintiff and Class members entered into a consumer transaction with the Defendant involving a deceptive practice contrary to s.3 of the TPA when they purchased the Light Cigarettes such that they are entitled to a remedy under ss.18 and 22 of the TPA.
  
23. The Plaintiff pleads and relies upon s.23 of the TPA and states that where a finding that the Defendant has engaged in a deceptive trade practice is conclusive proof of the Defendant's liability to the Plaintiff and to all Class members.
  
24. The Plaintiff pleads that it is unnecessary for the Plaintiff or any Class member to prove that the deceptive practice caused such persons to purchase the Light Cigarettes in order to make out a claim for relief under ss.18(1)(a) and (b), 18(2) and 22(b) and (c) of the TPA.
  
25. Nevertheless, the Plaintiff pleads that the Defendant's deceptive practice did cause the Plaintiff and Class members to purchase the Light Cigarettes such that a claim for relief is made out under ss. 18 and 22 of the TPA.
  
26. The Plaintiff further pleads that individual reliance is not a required element of a cause of action under s.3 of the TPA, nor is it required to establish a remedy under ss. 18 and 22 of the TPA.

27. Nevertheless, the Plaintiff pleads that the Plaintiff and Class members did act in reliance on the Defendant's deceptive practice, to their detriment, when they purchased the Defendant's Light Cigarettes.

28. The Plaintiff further pleads that the Defendants deceptive practices in the marketing of its Light Cigarettes was intended to convey, and did convey, a universally positive and desirable product attribute to the Plaintiff and to all Class members in the form of a health reassurance. The nature of the Defendant's misrepresentation, that light cigarettes were safer and less harmful than regular cigarettes, was such that the Plaintiff and all Class members relied upon it.

29. The Plaintiff further pleads that the Plaintiff and all Class members expected and relied on the Defendant to candidly communicate all material information regarding the health risks of its Light Cigarettes and that the Defendant failed to communicate such information to the Plaintiff and Class members.

30. The Plaintiff pleads that the Defendant's conduct has been sufficiently high handed and callous such that an award of punitive damages is justified under s.22(1)(a) of the TPA.

### **Properties of the Light Cigarettes**

31. The Defendant has omitted and suppressed the fact that it manipulates the tar and nicotine deliveries of its Light Cigarettes through a variety of design parameters, including but not limited to the inclusion of microscopic ventilation holes in or around cigarette filters and the modification of tobacco blends.

32. The Defendant's Light Cigarettes are manufactured with ventilation holes in the filter. The holes are designed to allow the smoker to draw in additional air when inhaling. In theory, the additional air mixes with the tar and nicotine in cigarette smoke and thereby reduces the relative levels of these substances per volume of smoke that enters the human body.

33. The vent holes on the Defendant's Light Cigarettes however are obstructed during the normal use of the product because the holes are placed in the area of the filter that is covered by the smoker's lips or fingers. This blocking problem is exacerbated because the vent holes on the Defendant's Light Cigarettes are virtually invisible to the naked eye. The Defendant's vent holes are not marked (e.g. with a coloured band or some other method), to reveal their existence or location.

34. Blocking the vent holes dramatically increases the levels of tar and nicotine delivered to the smoker. The Defendant has long been aware of this fact yet has neglected to take any steps to warn its customers against blocking.

35. The vent holes are not obstructed when the Defendant tests its Light Cigarettes on standardized smoking machines. This enables the Defendant to obtain low readings of tar and nicotine for its Light Cigarettes when they are tested on smoking machines. These low readings are then printed by the Defendant on its packages of Light Cigarettes, and used by the Defendant to position its product in the marketplace as "light".

36. The Defendant has long known that deliveries of tar and nicotine described on its packages of Light Cigarettes do not reflect the actual doses of tar and nicotine delivered to smokers but has neglected to take any steps to warn its customers.

37. Further, even if it were possible for a smoker not to block the vent holes, the Defendant's design of its Light Cigarettes enables smokers to achieve total tar and nicotine deliveries greater equivalent to or greater than that of a regular cigarette simply by increasing puff volume and/or frequency. The Defendant has long known of this fact but has neglected to warn its customers.

38. Further, the Defendant has long known of the phenomenon of "compensation". That is, that a smoker will subconsciously alter her or her smoker behaviour when smoking the Defendant's Light Cigarettes, by, among other things, increasing puff volume and/or frequency and hole blocking, in order to obtain sufficient nicotine from the cigarette to satisfy the smoker's addiction. The Defendant failed to warn its customers about compensation and that its Light Cigarettes were not a way for its customers cut back on their intake of tar and nicotine, nor was it a way for them to wean themselves off addiction.

39. Instead, the Defendant designed its Light Cigarettes to be effective at delivering nicotine to its customers so as to develop and maintain the smoker's addiction. The Defendant tested its Light Cigarettes to ensure that they were effective at delivering nicotine to its customers and it carefully selected blends of tobacco for its Light Cigarettes which achieved this design objective.

40. The Defendant has closely studied smoker behaviour and motivation over many years in formulating its marketing strategies. It knows that many smokers are conflicted about their smoking, that they are worried about health concerns, and are anxious to quit but that they find quitting very difficult, even painful. The Defendant knows that consumers view the Light Cigarettes as safer. It intends for its Light Cigarettes to provide a message of health reassurance to smokers as means of keeping its customers from quitting.

### **Relief**

41. The Plaintiff claims, on his own behalf, and on behalf of the Class:

- (a) an order certifying the proceeding as a class proceeding;
- (b) general damages pursuant to s.22(1)(a) of the TPA;
- (c) disgorgement and/or restitution by the Defendant pursuant to ss.18(4) and 22(1)(b) of the TPA;
- (d) a declaration that the Defendant has engaged in a deceptive practice pursuant to s.18(1)(a) of the TPA;
- (e) a permanent injunction pursuant to s.18(1)(b) of the TPA
- (f) punitive and exemplary damages pursuant to s.22(a) of the TPA;

- (g) costs pursuant to s.37(2) of the *Class Proceedings Act*, RSBC 1996, c. 50;
- (h) interest pursuant to the *Court Order Interest Act*, RSCB 1996, c. 79; and
- (i) such further and other relief this Honorable Court may find just.

PLACE OF TRIAL: Vancouver, British Columbia.

Dated at Vancouver, British Columbia, this <sup>th</sup> day of April, 2003.

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Solicitor for the Plaintiff

This statement of claim is filed and served by David A. Klein of the firm of Klein, Lyons, Barristers and Solicitors, whose place of business and address for service and delivery is at 1100 – 1333 West Broadway, Vancouver, B.C. V6H 4C1.

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