

2009 01H 0010

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

VICTOR TODD SPARKES

INTENDED APPELLANT
(Plaintiff)

AND:

IMPERIAL TOBACCO CANADA LIMITED

INTENDED RESPONDENT
(First Defendant)

AND:

IMPERIAL TOBACCO COMPANY LIMITED

INTENDED RESPONDENT
(Second Defendant)

AND:

ATTORNEY GENERAL OF CANADA

INTENDED RESPONDENT
(Third Party)

INTENDED APPELLANT'S BRIEF IN REPLY - MERITS

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1. To Imperial Tobacco, the provisions of the TPA are “clear and unambiguous”, and the Appellant is asking this Court “to ignore the plain and unambiguous wording of the TPA”.

Memorandum of Intended First and Second Respondents – Merits, para. 6.

2. The plain meaning of statutory words is not a threshold question. It is a conclusion reached after consideration of all sources of meaning, which the Plaintiff says the learned judge did not do. The search for true meaning, not plain meaning, is what s. 16 of the *Interpretation Act* requires:

Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation or provision according to its true meaning.

Interpretation Act, RSNL 1990, c. I-19, Appendix B, Tab 1

3. The jurisprudence has not been better expressed than by this Court:

22 Instead of mandating some fictionalized search for a collective "legislative intention", s. 16 directs the court to consider every provision "remedial" and to interpret it so that it "best" ensures the attainment of its "objects" according to its "true" meaning. This requires a consideration, as an integral part of the interpretive exercise, of the problem or "mischief" to which the legislature directed its legislative act as a remedy and then the drawing of an inference, based on the language of the whole enactment and the court's general knowledge of the state of the pre-existing law and any information as to the broad social context in which the legislative act occurred, as to what, broadly speaking, the object or objects of the legislative act must have been. The end result is to arrive at a "true" meaning. That inevitably requires an examination of more than the bare words of the legislative enactment that is in issue, no matter how clear or unambiguous

they may at first blush appear.... "True" meaning is not plain meaning; it is a conclusion arrived at by reconciling all the appropriate indicators of meaning that the court is directed to consider.

Archean Resources Ltd. v. Newfoundland (Minister of Finance) 2002 CarswellNfld 199 (C.A.), Appendix A, Tab 1

4. But the error of law committed by the learned judge below is more radical than a failure to integrate analysis of what on "first blush" is the "plain" meaning of the controlling TPA language with other sources of meaning.

5. The more radical error is that the learned judge did not analyze even the plain meaning of the key statutory provisions and thus did not qualify himself to make a finding on the plain meaning. He acknowledged the controlling provisions of the statute and then made no attempt to explain them or to consider submissions as to alternative "plain" meanings, for example:

At para. 65 of the reasons "consumer transaction" is recognized as including "other disposition of goods for a consideration", not just "sale", but by para. 69 the learned judge is critical of the absence of a "direct relationship" between Plaintiff and Defendants, without considering the "plain" meaning of the words "disposition of goods for a consideration", and by para. 75 the judge is looking for privity of contract. There is no consideration of why the Act by s. 2(g) would abolish horizontal privity but leave vertical privity intact.

At paras. 56 and 72, the learned judge acknowledges the statutory phrase "which might reasonably have the effect" of deceiving, and the Plaintiff submission that this phrase relieves the Plaintiff from any requirement to prove individual reliance on deceptive acts, but without analysing possible alternative "plain" meanings, the judge concludes that individual reliance must be proved. The judge also does not attempt to explain how in a director's action the director may seek class relief, if the director must prove individual reliance.

At para. 71, the learned judge makes no attempt to construe the textual meaning of “damages” in s. 14(1) and 14(2)(b) where punitive damages which focus on the conduct of the Defendant, are made available “for a loss suffered by the consumer”. Also missing from the reasons is any acknowledgment that the Plaintiff claims damages in relation to a *dangerous* product or that the Plaintiff alleged the primary deception to be the marketing of the product under the descriptors light and mild, i.e. that the deception was built into the very name of the product.

Reasons of Mr. Justice Adams, dated January 14, 2009, Application for Leave to Appeal, Tab 3

6. The learned judge knew the arguments submitted as to plain or textual meaning but failed or refused to analyze them. With regret, the Plaintiff says that the evidence of the reasons is that the learned judge was result driven – driven by the desired result of dismissal of the claim. The written reasons leave the Plaintiff and the public wondering what the “real” reasons for the decision were: see *Archean Resources*, *supra*, para. 31.

7. The Plaintiff says that the judge’s *obiter* findings against the other requirements of certification were determined by his ukase respecting the need for proof of individual reliance.

8. Imperial Tobacco has placed supplementary material before this Court including a consumer protection consolidation statute containing the former TPA, and debates from Hansard as an extrinsic aide to interpretation. In sum, the responsible minister told the House that this was a consolidation enactment and no policy changes were present. In view of the fact that s. 9(2), which reverses the burden of proof on unfair business practice, is new, and that s. 2(b) defining “consumer transaction” is also new, the accuracy of this extrinsic aide may be questioned. The new definition of “consumer transaction” is muddy, and if the legislature intended it as a response to Justice Adams’ decision respecting privity, the draftsman could have done a better job. There is a

substantial possibility that a future court will conclude that if the legislature intended to overcome the decision below, it would have done so in clearer terms, and thus the interpretative dilemma continues for future cases.

9. As to the dangerousness of the product, notice may be taken of s. 2.1 of the *Tobacco Control Act*, as amended on May 28, 2009 and to come into force on January 1, 2010:

2.1 The purpose of this Act, in light of conclusive evidence that tobacco use causes premature death and disease, is to protect the health of Newfoundlanders and Labradorians and in particular young people by restricting access to tobacco and tobacco related products and to protect them from inducements to use tobacco.

Statutes of Newfoundland and Labrador 2009, Chapter 15 - *Tobacco Control (Amendment) Act*,
<http://www.assembly.nl.ca/legislation/sr/annualstatutes/2009/0915.chp.htm>

10. Of further note, s. 4.2(1) inserted by amendment, states that “in this section, “tobacco” includes the package in which the tobacco is sold.”

11. The present action was brought for the purpose of holding the principal manufacturer and marketer of a dangerously deceptive product category financially accountable in this jurisdiction. This use of the TPA should be viewed in the broad setting of tobacco control. A provincial consensus has arisen that an important component of a comprehensive smoking reduction strategy is that tobacco companies should be held civilly accountable for wrongdoing.

(a) ON: *Tobacco Damages and Health Care Costs Recovery Act, 2009*, S.O. 2009, c. 13, <http://www.canlii.org/en/on/laws/stat/so-2009-c-13/latest/>

(b) QB: *Tobacco-Related Damages and Health Care Costs Recovery Act*, R.S.Q. c. R-2.2.0.0.1, <http://www.canlii.org/en/qc/laws/stat/rsq-c-r-2.2.0.0.1/latest/>

- (c) BC: *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C., 2000, c. 30, <http://www.canlii.org/en/bc/laws/stat/sbc-2000-c-30/latest/>.
- (d) SK: *Tobacco Damages and Health Care Costs Recovery Act*, Chapter T-14.2, <http://www.qp.gov.sk.ca/documents/english/Chapters/2007/T14-2.pdf>. **This Act is not yet proclaimed.**
- (e) MB: *The Tobacco Damages and Health Care Costs Recovery Act*, SM 2006, c. 18, <http://web2.gov.mb.ca/laws/statutes/2006/c01806e.php>. **This Act is not yet in force. It is to come into force on a date to be fixed by proclamation.**
- (f) NB: *Tobacco Damages and Health Care Costs Recovery Act*, S.N.B. 2006, c. T-7.5, <http://www.canlii.org/en/nb/laws/stat/snb-2006-c-t-7.5/latest/>
- (g) NS: *Tobacco Damages and Health-care Costs Recovery Act*, S.N.S. 2005, c. 4, <http://www.canlii.org/en/ns/laws/stat/sns-2005-c-46/latest/>
- (h) NL: *Tobacco Health Care Costs Recovery Act*, S.N.L. 2001, c. T-4.2, <http://www.canlii.org/nl/laws/sta/t-4.2/20090324/whole.html>

12. In interpreting the TPA, the learned judge below exercised a limited law-making power: *Archean Resources, supra*, para. 28. He made a policy choice to reinforce the longstanding imbalance of power between manufacturers and consumers. The Plaintiff respectfully submits that this choice was not, on either a “plain” or a “true meaning” construction of the enactment, the choice of the legislature, and in the interests of justice it should be corrected to produce an outcome that is “just and reasonable” and that “respects the important values of society”: *Archean Resources, supra*, para. 26.

13. Should this Court reverse the learned judge below on the issues of construction of the “true” meaning of the TPA, including the issue of individual proof, the Plaintiff has a grounded fear that the learned judge has expressed a strongly held prejudgment against the Plaintiff’s action. Reasonably well informed members of the public would share this fear. This fear is reinforced by the judge’s ungenerous and hypercritical reading of the pleadings. Indeed, Canada agrees that “there is no reason to believe that Justice Adams would come to any different consideration on the same record.”

14. With respect to para. 85 of Canada's Memorandum above, the Plaintiff has no intention of filing further evidence should the matter be sent back for reconsideration. (The judge's comment at para. 120 of his reasons, *supra*, is based on a misapprehension. The plaintiff in the B.C. application attempted to file material from a U.S. expert on an economic theory of recovery but withdrew it on objection.) The present claim rests on the remedies granted by s. 14(2) of the TPA, and no supplementary evidence is needed or intended.

15. In the interests of the public perception of justice, the Plaintiff respectfully submits that whether this Court certifies the action or remits it for further case management, this Court should request the Chief Justice of the Trial Division to refer further case management to an alternate judge.

ALL OF WHICH is respectfully submitted this

day of August, 2009

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Solicitors for the Plaintiff/Intended
Appellant

APPENDIX A – AUTHORITIES CITED

Tab

- 1 *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 CarswellNfld 199 (C.A.)

APPENDIX B – STATUTES CITED

Tab

- 1 *Interpretation Act*, RSNL 1990, C. I-19