

2004 01 T. 2716 CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION

BETWEEN:

VICTOR TODD SPARKES

PLAINTIFF

AND:

IMPERIAL TOBACCO CANADA LIMITED

FIRST DEFENDANT

AND:

IMPERIAL TOBACCO COMPANY LIMITED

SECOND DEFENDANT

BROUGHT UNDER THE *CLASS ACTIONS ACT*  
BEFORE THE HONOURABLE MR. JUSTICE ADAMS,  
CASE MANAGEMENT JUDGE

**AMENDED STATEMENT OF CLAIM**

(Amended by Order of Justice Adams  
dated the 29<sup>th</sup> day of November, 2004)

1. The Plaintiff, Victor Todd Sparkes, resides at 188 Swansea Street, in Conception Bay South, in the Province of Newfoundland and Labrador (“the Plaintiff”).
2. The First Defendant, Imperial Tobacco Canada Limited, is a corporation incorporated pursuant to the laws of Canada, with its registered head office located at 3711 St. Antoine Street West, Montreal, Quebec (“the Defendant”). The First Defendant is Canada’s largest tobacco company, manufacturing nearly 70% of the cigarettes sold in this country. The First Defendant is not registered to do business in Newfoundland and Labrador.
3. The Second Defendant, Imperial Tobacco Company Limited, is a corporation incorporated pursuant to the laws of Canada, with its registered office in the Province of Newfoundland and Labrador located at Stewart McKelvey Stirling Scales, Cabot Place, 100 New Gower Street, St. John’s, A1C 6K3 (‘the Second Defendant’).

4. Each Defendant is a supplier of light cigarettes to consumers in this jurisdiction, within the meaning of the *Trade Practices Act*, R.S.N.L. 1990, c. T-7.
5. Alternatively, the Second Defendant is a wholly owned subsidiary of the First Defendant, and the named Defendants are referred to collectively as “Imperial Tobacco” in the First Defendant’s annual reports. The Defendants committed the acts and omissions alleged herein as a joint enterprise and each Defendant is the alter ego of the other.
6. This is a proposed class action brought pursuant to the *Trade Practices Act*, R.S.N.L.1990, c.T-7 (the “TPA”) and the *Class Actions Act*, S.N.L.2001, c. C-18.1, on behalf of persons who made purchases in Newfoundland and Labrador of “light” and “mild” cigarettes manufactured, sold and/or distributed by the Defendants. The class is intended to include persons who are “consumers” within the meaning of section 2(a) of the TPA. Excluded from the proposed class are directors, officers and employees of the Defendants.
7. The terms “light” and “mild” are descriptors the Defendants use to market certain brands of its cigarettes. In this claim, the terms “light” and “mild” encompass the following and similar descriptors: “extra light”, “ultra light”, “special mild”, “extra mild” and “ultra mild”. Cigarettes marketed by the Defendants with these descriptors are hereinafter referred to as “Light Cigarettes” or “Lights” some of which are listed in Appendix A attached to this Statement of Claim. In the course of its business, the Defendants offered and advertised the sale of its Light Cigarettes to consumers in Newfoundland and Labrador. As such, the Defendants are a “supplier” within the meaning of section 2(g) of the TPA.
8. Each sale to the Plaintiff and to class members of the Defendants’ Light Cigarettes for personal use is a “consumer transaction” within the meaning of section 2(b) of the TPA. Each offer or advertisement for sale of the Defendants’ Light Cigarettes constitutes the Defendants as “suppliers” within the meaning of section 2(g) of the TPA.

9. By the late 1960's, scientific studies suggested that smoking cigarettes with higher tar and nicotine levels might be correlated with an increased risk of developing smoking-related diseases. These studies threatened the Defendants' continued profitability. The Defendants 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 health effects of smoking, the magnitude of the risk of smoking, and the relative safety of their 'filtered' brands versus cigarettes generally.
10. The Defendants further responded by designing, developing and marketing its Light Cigarettes. All cigarettes release numerous harmful toxins into the cigarette smoke including, but not limited to, tar, nicotine, carbon monoxide, formaldehyde, hydrogen cyanide and benzene (herein referred to collectively as "toxic emissions"). Each of the Defendants' Light Cigarettes contains the descriptor "light" or "mild" in the brand name. This descriptor is intended to convey, and does convey, to consumers an implicit message of health reassurance. This message is that the Defendants' Light Cigarettes are safer or less harmful than regular cigarettes, that they release significantly less toxic emissions, and that smokers who are worried about their health may switch to Lights instead of quitting or as a graduated step in the consumer's effort to quit smoking.
11. The Defendants' Lights are not less harmful, nor do they transmit significantly fewer toxic emissions to the smoker. The Defendants designed its Lights in such a way that the standard testing machines used to measure toxic emissions would record lower levels than the levels that are actually delivered to the smoker. The Defendants thereby achieved apparent support for its claim that its Light are "light" or "mild" and that they deliver significantly lower levels of toxic emissions, including tar and nicotine, as compared to regular cigarettes. The designation of the Defendants' Light Cigarettes as "light" or "mild" had the capability, tendency, or effect of being deceptive or misleading. The Defendants published the machine read toxic emission levels, and specifically the levels of tar and nicotine, of its Light Cigarettes in promotional material and on cigarette

packages. The publication of those levels had the capability, tendency or effect of being deceptive or misleading.

12. The so-called lowered toxic emission deliveries of the Defendants' Light Cigarettes were unrelated to benign changes in the content of the tobacco in its Lights, but rather depended on changes in cigarette design and composition that deliver lower levels of toxic emissions under machine testing conditions while continuing to deliver high levels of toxic emissions to smokers under normal smoking conditions. The changes include the addition of tiny vent holes on or around the cigarette filter and the alteration of the materials used in filters and cigarette papers in order to dilute the toxic emissions of smoke per puff as measured by the industry standard testing machines. These changes are negated by smokers of Light Cigarettes through a phenomenon known as "compensation". Compensation is the tendency of smokers of Light Cigarettes to block the vent holes with their lips and fingers, inhale more deeply, puff more frequently, hold the smoke in their lungs for longer and smoke more cigarettes.
13. The Defendants conducted its own tests of its Light Cigarettes that revealed that the actual amounts of toxic emissions delivered to the smoker under normal use are substantially higher than the levels read by the testing machines. The Defendants failed to make timely disclosure to consumers of the existence and results of those tests. Additionally, the Defendants failed to disclose that the smoke produced by its Light is more genotoxic (causing genetic and chromosomal damage) per milligram of tar than regular cigarettes. The failure to make these disclosures has the effect, or might reasonably have the effect, of deceiving or misleading a consumer.
14. The Defendants engaged in numerous unfair trade practices in the offer and advertisement of its Light Cigarettes contrary to the provisions of the TPA. In particular, the Defendants:
  - (a) stated numbers for toxic emissions levels, and specifically levels of tar and nicotine, for its Light Cigarettes that did not reflect the actual deliveries of toxic

emissions to smokers under normal smoking conditions and that thereby has the effect, or might reasonably have the effect, of deceiving or misleading a consumer;

- (b) stated numbers for toxic emissions levels, and specifically levels of tar and nicotine, for its Light Cigarettes that has the effect, or might reasonably have the effect, of deceiving or misleading a consumer as to the relative levels of toxic emissions, including tar and nicotine, of the Defendants' Light Cigarettes in comparison with regular cigarettes;
- (c) used the descriptor's "light" and "mild" in the marketing of its Light Cigarettes which has the effect, or might reasonably have the effect, of deceiving or misleading a consumer by conveying a deceptive or misleading message of health reassurance to consumers;
- (d) failed to disclose the material fact that the so-called lowered toxic emission deliveries to its Light Cigarettes were unrelated to benign changes in the content of the tobacco in its Lights, but rather depended on changes in cigarette design and composition that deliver lower levels of toxic emissions under machine testing conditions while continuing to deliver high levels of toxic emissions to smokers under normal smoking conditions;
- (e) failed to disclose the material fact that the techniques employed by the Defendants that purportedly reduce the levels of tar in its Light Cigarettes increase the harmful biological effects, including mutagenicity (genetic or chromosomal damage) caused by the tar ingested by the consumer;
- (f) failed to disclose the material fact that the vent holes on Light Cigarettes are in locations where they might be covered or blocked by the smoker's lips and/or fingers under normal use, thereby increasing the level of toxic emissions delivered to the consumer;

- (g) failed to mark the vent holes or otherwise 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 reduction in toxic emissions;
- (h) failed to disclose the material fact that smoking the Defendants' Lights with the vent holes blocked results in the smoker receiving an increased amount of toxic emissions, including tar and nicotine, and that those levels might not be significantly lower than the amounts of those substances the smoker would receive from a 'regular' cigarette;
- (i) failed to disclose the material fact that smoking the Defendants' Lights with increased puff volume, frequency or duration results in the smoker receiving an increased amount of toxic emissions, including tar and nicotine, and that those levels might not be significantly lower than the amounts of those substances the smoker would receive from a 'regular' cigarette;
- (j) failed to instruct the smoker, on the packaging or elsewhere, on how to smoke the cigarettes correctly in order to obtain the claimed lowered toxic emissions, including avoidance of blocking the vent holes and increased puff volume, frequency and duration;
- (k) failed to disclose the material fact that the smoke produced from its Light Cigarettes is not less harmful to the smoker, nor is it less harmful to persons exposed to second-hand smoke;
- (l) failed to disclose the material fact that the Defendants manipulated the design and content of its Light Cigarettes so as to increase the nicotine levels delivered to the consumer under normal smoking conditions; and

- (m) failed to disclose the material fact of the effects of the Defendants' manipulation of the nicotine content of its Light Cigarettes.
15. The Plaintiff pleads that the acts and omissions above were violations of the *Trade Practices Act* and pleads and relies on section 5(1) of the TPA. In particular, the Plaintiff pleads that the acts and omissions described above amounted to representations that Light cigarettes had (and have) characteristics, quantities, uses or benefits that they did not (and do not) have (s.5(1)(a)), and/or representations using exaggeration, innuendo or ambiguity as to a material fact (s.5(1)(w)).
16. The Plaintiff began smoking in or about 1985, at age 16. The Plaintiff smoked the Defendants' regular cigarettes, but switched to Lights in or about 1989. The Plaintiff purchased and consumed approximately one and a half packs a day of the Defendants' Light Cigarettes in Newfoundland and Labrador for a period of approximately 11 years, until February 2000.
17. The Plaintiff had no knowledge of the conduct of the Defendants alleged in this claim with respect to the marketing of Light cigarettes, or of any facts from which it might reasonably have been concluded that the Defendants was violating the provisions of the *Trade Practices Act* and/or misleading the Plaintiff. Further, the Plaintiff was not aware of facts which would have lead to the discovery of such actions, until a few months prior to the commencement of this action. The Defendants willfully and successfully concealed the material facts relating to the cause of action asserted in this claim and in particular willfully concealed the facts alleged in paragraph 11 of this Statement of Claim.
18. The Defendants have unfairly and unjustly profited from its unfair trade practices with regard to its offer and advertisement of Light Cigarettes.
19. In bringing this action against the Defendant suppliers, the Plaintiff relies on section 14(1) of the TPA. Alternatively, the Plaintiff relies on section 7 prohibiting unfair trade

practices, and on section 14(2), and brings another action concerning a supplier where an unfair trade practice is alleged to have occurred.

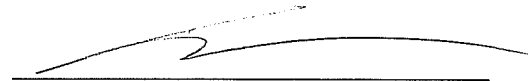
20. The Plaintiff seeks a declaration pursuant to section 14(2)(a) of the TPA that the Defendants' acts or practices as described in paragraph 11 of this Statement of Claim are unfair trade practices.
21. The Plaintiff seeks a permanent injunction pursuant to section 14(2)(d) of the TPA restraining the Defendants from engaging or attempting to engage in the unfair trade practices described in paragraph 11 of this Statement of Claim.
22. The Plaintiff seeks an order pursuant to section 18 of the TPA requiring the Defendants to advertise to the public the particulars of any judgment, declaration, order or injunction against it in this action on terms or conditions the court considers reasonable and just.
23. The Plaintiff seeks statutory compensation for the class pursuant to sections 14(2) of the TPA, including an order that the Defendants refund all sums that class members paid to purchase the Light Cigarettes, or that the Defendants disgorge all revenue or profits which it made on account of Light Cigarettes purchased by class members, together with any further relief which may be available under the TPA.
24. The Plaintiff does not seek to recover damages for personal injuries suffered by any class member.
25. Smoking causes or contributes to numerous diseases and health problems including, but not limited to, coronary heart disease, cancer, vascular disease, bronchitis, emphysema, pneumonia, ulcers, gum disease, thyroid disease, miscarriages and impotence. Over 20% of all deaths in Canada are attributable to smoking. The health problems caused by smoking afflict not only smokers but also those exposed to second hand smoke. The economic and social cost to the class and society in general has been substantial. The Defendants' conduct, as outlined in this Statement of Claim, has been sufficiently high

handed, callous and reprehensible that an award of punitive damages is justified pursuant to s.14(2)(b) of the TPA.

26. The Plaintiff pleads that it is unnecessary for the Plaintiff or any class member to prove that the Defendants' unfair trade practices caused such persons to purchase the Light Cigarettes in order to make out a claim for relief under sections 14(2)(a), 14(2)(c), 14(2)(d), 14(2)(e) and 14(2)(f) of the TPA.
27. In the alternative, the Plaintiff pleads that the Defendants' unfair trade practices did cause the Plaintiff and class members to purchase the Light Cigarettes such that a claim for relief is made out under section 14 of the TPA.
28. The Plaintiff pleads that even if causation is a required element of a claim under section 14 of the TPA, individual reliance on the unfair trade practices is not a required element of a cause of action under that section.
29. In the alternative, the Plaintiff pleads that he and the class members relied on the Defendants to disclose all material facts regarding the Defendants' Light Cigarettes. The failure of the Defendants to state material facts as alleged in this Statement of Claim creates an assumption of reliance for the purpose of maintaining an action under the TPA.
30. In the further alternative, the Plaintiff pleads that the Defendants' unfair trade practices were calculated or would naturally tend to induce the Plaintiff and class members to act upon the unfair trade practices when purchasing the Defendants' Light Cigarettes and that reliance on the Defendants' unfair trade practices may be inferred.
31. In the still further alternative, the Plaintiff pleads that he and the class members acted in reliance on the Defendants' unfair trade practices, to their detriment, when they purchased the Defendants' Light Cigarettes.

32. The Plaintiff pleads that the acts and omissions of the Defendants as pleaded in paragraph 11 above amounted to a willful concealment of material information regarding the existence of a cause of action from the Plaintiff and class members sufficient to stop the running of any applicable limitation period as against the Plaintiff and class members. In the alternative, the Plaintiff pleads and relies on the common law rules respecting discoverability of a cause of action, and on the *Limitations Act*, S.N.L. 1995, c. L-16.1, sections 13, 14, and 24(1).
33. The Plaintiff claims, on his own behalf, and on behalf of the Class:
- (a) an order certifying the proceeding as a class proceeding;
  - (b) a declaration pursuant to section 14(2)(a) of the TPA;
  - (c) a permanent injunction pursuant to section 14(2)(d) of the TPA;
  - (d) an order requiring the Defendants to advertise any adverse findings against it pursuant to section 18 of the TPA;
  - (e) disgorgement and/or restitution by the Defendants pursuant to section 14(2)(c) and 14(2)(e) of the TPA;
  - (f) damages pursuant to section 14(2)(b) of the TPA;
  - (g) punitive and exemplary damages pursuant to section 14(2)(b) of the TPA;
  - (h) costs pursuant to section 37(2) of the *Class Actions Act*, SNL 2001, c. C-18.1;
  - (i) interest pursuant to the *Judgment Interest Act*, R.S.N.1990, c. J-2, and as damages at common law or equity; and
  - (j) such further and other relief this Honorable Court may find just.

**DATED** at St. John's, in the Province of Newfoundland and Labrador this 30<sup>th</sup> day of November, 2004.

  
**CHES CROSBIE BARRISTERS**  
 Solicitors for the Plaintiff  
 Whose address for service is:  
 169 Water Street, 4<sup>th</sup> Floor

St. John's, NL A1C 1B1  
*Per: Chesley F. Crosbie, Q.C.*

**TO: THE DEFENDANT**  
Imperial Tobacco Canada Limited  
3711 St. Antoine Street West  
Montreal, Quebec

**TO: THE SECOND DEFENDANT**  
Stewart McKelvey Stirling Scales  
Cabot Place, Suite 1100  
100 New Gower Street  
St. John's, NL A1C 6K3

Appendix A**The Defendants' Light Cigarettes**

1. du Maurier Extra Light
2. du Maurier Ultra Light
3. du Maurier Special Mild
4. Matinée Extra Mild
5. Matinée Slims Extra Mild
6. Player's Light
7. Player's Light Smooth
8. Player's Extra Light