IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Knight v. Imperial Tobacco Canada Limited,*** 2005 BCSC 172

Date: 20050208
Docket: L031300
Registry: Vancouver

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

Before: The Honourable Madam Justice Satanove

Reasons for Judgment

Counsel for the Plaintiff:	D.A. Klein
Counsel for the Defendant:	D.C. Harris
Counsel for the Third Party:	Paul Vickery
Date and Place of Trial/Hearing:	October 25 – 29, 2004 Vancouver, B.C.

[1] The plaintiff applies to certify this action as a class proceeding under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50 (the "***CPA***"). The proposed class is defined 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. The Defendant's light and mild brands of cigarettes includes the following brands: Player's Light, Player's Light Smooth, Player's Extra Light, du Maurier Light, du Maurier Extra Light, du Maurier Ultra Light, du Maurier Special Mild, Matinee Extra Mild, Matinee Ultra Mild and Cameo Extra Mild.
>
> The Class Period is the period from July 5, 1974, being the proclamation into force of the *Trade Practice Act,* R.S.B.C. 1996, C. 457, up to the opt-out / opt-in date set by the Court in this proceeding.

[2] The common issues between the parties, as delineated and enumerated by the plaintiff are:

(i) Are the sales of the defendant's light and mild brands of cigarettes to class members for the class members' personal, family or household use "consumer transactions" as defined in the ***Trade Practice Act****,* R.S.B.C. 1996, c. 457 (the "***TPA***")?

(ii) Are the solicitations and promotions by the defendant of its light and mild brands of cigarettes to class members for the class members' personal, family or household use "consumer transactions" as defined in the ***TPA***?

(iii) With respect to the sales in British Columbia of the defendant's light and mild brands of cigarettes to class members for their

personal, family or household use, is the defendant a "supplier" as defined in the ***TPA***?

(iv) Are the class members "consumers" as defined in the ***TPA***?

(v) Did the defendant engage in deceptive acts or practices in the solicitation, offer, advertisement and promotion of its light and mild brands of cigarettes contrary to the ***TPA***, as alleged in the statement of claim?

(vi) If the court finds that the defendant has engaged in deceptive acts or practices contrary to the ***TPA***, should an injunction be granted restraining the defendant from engaging or attempting to engage in those acts or practices?

(vii) If the court finds that the defendant has engaged in deceptive acts or practices contrary to the ***TPA***, should the defendant be required to advertise the court's judgment, declaration, order or injunction and, if so, on what terms or conditions?

(viii) If the court finds that the defendant has engaged in deceptive acts or practices contrary to the ***TPA***, should a monetary award be made in favour of the class and, if so, in what amount?

(ix) If the court finds that the defendant has engaged in deceptive acts or practices contrary to the ***TPA***, should punitive or exemplary damages be awarded against the defendant and, if so, in what amount?

(x) Did the defendant wilfully conceal material facts relating to the causes of action asserted in this proceeding?

[3] As can be seen from the above description of the proposed class and common issues, the plaintiff's claim is not the usual type of claim against cigarette manufacturers, nor is it the type of products liability claim this court is usually asked to certify as a class action. The marketing of light and mild cigarettes is alleged to be deceptive because it conveys a false and misleading message that those cigarettes are less harmful than regular cigarettes. The plaintiff's claim is based on statute, not on common law or equitable principle. Although the claim arises from health concerns, it does not seek compensation for personal injury. It is a claim for pure economic loss. It aims to include all consumers of the defendant's product in British Columbia, not just British Columbia residents. The plaintiff does not seek damages for each class member, but rather an aggregate damage award that may be distributed in whole or in part to charitable institutions involved in researching and treating illnesses related to smoking. If the plaintiff succeeds in his allegations, the amount of damages could be significant and the ramification to the defendant's business could be serious. In addition, there are serious and sensitive social issues at stake.

[4] Although the above characteristics of the plaintiff's claim are somewhat unusual, this does not automatically mean the action is unsuitable for a class action. The ***CPA*** is a purely procedural statute that should be construed generously (***Hollick v. Toronto (City of)***, [2001] 3 S.C.R. 158). The test for certification is set out in s. 4 of the ***CPA***, and if it is met, the action must be certified. Although the

application for certification is not a determination of the merits of the proceeding, the onus is on the plaintiff to show that all of the requirements for certification have been met. Ironically, upon closer scrutiny, some of the unusual features of this action may render it appropriate to be heard as a class action.

CAUSE OF ACTION

[5] Section 4(1)(a) of the ***CPA*** requires that the pleadings disclose a cause of action. The applicable test is akin to the test under s. 19(24) of our ***Rules of Court.*** Unless it is "plain and obvious" that the statement of claim discloses no reasonable cause of action, this test should be considered satisfied. Neither the length and complexity of the issues, nor the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his case. Unless there is some radical defect amounting to an abuse of the court's process such that the claim should be struck, the action should proceed to trial (***Elms v. Laurentian Bank of Canada*** (2001), 90 B.C.L.R. (3rd) 195 (C.A.)).

Statement of Claim

[6] The plaintiff alleges that by the late 1960s, scientific studies suggested that smoking cigarettes with higher tar and nicotine levels might be correlated with an increased risk of developing smoking related diseases. The defendant tobacco company responded by designing, developing and marketing certain brands of cigarettes as "light" or "mild", allegedly suggesting that they are less harmful than regular cigarettes because they release significantly fewer toxic emissions. The

plaintiff alleges that these light or mild cigarettes are not less harmful, nor do they transmit significantly fewer toxic emissions. The allegation is that the defendant designed these cigarettes in such a way that the standard testing machines used to measure toxic emissions would record lower levels because of the addition of tiny vents on or around the cigarette filter, as well as the alteration of the materials used in filter and cigarette papers, so that the toxic emissions of smoke per puff were diluted. However, it is alleged that the level of toxic emission that is actually delivered to the smoker was much higher because of a phenomenon known as "compensation". Compensation is a tendency of smokers to block the vents with their lips or fingers, inhale more deeply, puff more frequently, hold the smoke in their lungs for longer, and smoke more cigarettes.

[7] The basis of liability alleged by the plaintiff is that the defendant engaged in numerous deceptive acts or practices in the solicitation, offer, advertisement and promotion of its light cigarettes, contrary to the provisions of the ***TPA***. The plaintiff sets out thirteen paragraphs of particulars of these alleged deceptive acts and practices, which include positive misrepresentations and failures to disclose material facts. The remedies which the plaintiff seeks are pursuant to sections 18(1)(a), 18(1)(b), 18(2), 18(4) and 22(1) of the ***TPA.*** The plaintiff pleads that relief under these sections does not require it to prove causation or actual reliance; alternatively, reliance should be assumed or inferred; or in the final alternative, he and the class members did act in reliance on the defendant's misrepresentations to their detriment when purchasing the light cigarettes. The plaintiff seeks declaratory relief, a permanent injunction, publication of adverse findings against the defendant,

disgorgement or restitution by the defendant, general damages, punitive and exemplary damages, the cost of administering and distributing an aggregate damage award, costs under the ***CPA,*** and interest under the ***Court Order Interest Act***, R.S.B.C. 1996, c. 79.

[8] The defendant submits that the action, as pleaded in the Statement of Claim, is flawed for three reasons:

1. it is barred by s. 41 of the ***CPA***;

2. the ***TPA*** has been repealed and replaced by the ***Business Practices and Consumer Protection Act,*** S.B.C. 2004, c. 2, enacted on July 4, 2004 (the "***BPCPA***"); and

3. the Statement of Claim alleges that causation and reliance are not necessary elements of the claim.

Section 41 of the ***CPA***

[9] Section 41 of the ***CPA*** states that the ***CPA*** does not apply to, among other things, a proceeding that may be brought in a representative capacity under another Act. Section 18(3) of the ***TPA*** states that an action for certain declaratory relief or an injunction pursuant to s. 18(1) of the ***TPA*** may be brought by any person on behalf of consumers generally, or on behalf of a designated class of consumers in British Columbia. Therefore, the defendant submits, the ***CPA*** cannot apply to claims brought under s. 18(1) of the ***TPA.*** If the defendant is correct in this submission, then the plaintiff's action under s. 18(4) of the ***TPA*** is also barred by s. 41 of the

CPA because the restoration order sought in s. 18(4) is only available in an action for relief under s. 18(1).

[10] In ***Crawford v. London (City)*** (2000), 47 O.R. (3d) 784 (S.C.J.), the court found that the equivalent section to s. 41 in the Ontario ***Class Proceedings Act***, 1992, S.O. 1992, c. 6 (s. 37) did not prevent the plaintiff from bringing a class action for claims under the ***Condominium Act***, R.S.O. 1990, c. 26. The reasoning of the court was that although the ***Condominium Act*** provided for a representative action by the condominium corporation, the plaintiff as an individual owner could not maintain an action on behalf of other individual owners.

[11] By analogy to the case at bar, the ability of the Director of Trade Practices to bring a representative action under s. 18 of the ***TPA*** would not affect the right of the plaintiff as an individual consumer to bring a class proceeding. However, s. 18(3) of the ***TPA*** specifically grants the right to an individual plaintiff to bring a representative proceeding under s. 18. Therefore, the court's reasoning in ***Crawford*** would suggest that it is not open to an individual plaintiff to bring an action under the ***CPA*** for relief under s. 18 of the ***TPA.***

[12] In the case before me the plaintiff has not restricted his claim to seeking relief under s. 18 of the ***TPA*** but has also claimed for damages under s. 22, which does not provide for a representative action and therefore would not be subject to s. 41 of the ***CPA.*** Were I to accept the defendant's submission, the result would be the plaintiff could bring his s. 22 claim as a class action, but would have to pursue his s. 18 claims in his individual capacity. It seems an inefficient administration of

justice to require the plaintiff to bring two separate actions because of a strict technical interpretation of s. 41 of the ***CPA***. It also seems contrary to the policy objectives underlying the ***CPA,*** which are meant to facilitate the administration of justice in redressing civil wrongs.

[13] In ***Stern v. Imasco Ltd.,*** (1999), 38 C.P.C. (4th) 347 (Ont. S.C.J.), Cumming J. held that although an oppression action could be brought under the ***Canada Business Corporations Act*** as a representative proceeding, this did not preclude the plaintiff bringing such a claim as part of a class action seeking other non-representative relief as well. He stated that the Ontario equivalent of s. 41 of the ***CPA*** should be given a purposive interpretation and that the ***Canada Business Corporations Act*** and ***CPA*** were complimentary and could supplement each other.

[14] In my view the reasoning in ***Stern*** is applicable to the workings of the ***CPA*** and ***TPA*** as well. The broad claims of the plaintiff under the ***TPA***, some of which may be representative and some of which may not be representative, should be allowed to proceed together as a single class action, provided all the tests for certification are met.

TPA vs. ***BPCPA***

[15] The parties spent a lot of time and effort arguing whether parts or all of the plaintiff's claim had to be brought under the ***BPCPA*** and not the ***TPA.*** The plaintiff conceded that all those causes of action arising after July 4, 2004 would be subject to the ***BPCPA***, but submitted that this did not affect the suitability of the plaintiff's claim to be brought as a class action.

[16] The defendant insisted that the ***BPCPA*** repealed and replaced the ***TPA***. It relied on the transition provision in s. 203 of the ***BPCPA*** and submitted that the ***BPCPA*** is expressly retrospective because it expressly changes substantive rights. The defendant submitted that any rights existing or accruing under the ***TPA*** are preserved, but the procedures and remedies of the ***BPCPA*** must be applied.

[17] There are several flaws in the defendant's argument. Firstly, with the exception of s. 203, the ***BPCPA*** does not expressly state that it is intended to have retrospective effect on existing causes of action. Secondly, s. 203 (which states that Parts 2 – 4 of the ***BPCPA*** apply to contract and consumer transactions entered into before, on, or after the coming into force of those parts), does not apply to Part 15 wherein the ***TPA*** is repealed, nor does it apply to Part 10, which creates the statutory causes of action which the plaintiff is alleging. Thirdly, in the absence of a clear legislative directive, the repeal of a statute does not affect a right or obligation acquired, accrued or incurred under the enactment so repealed (***Interpretation Act,*** R.S.B.C. 1996, c. 238, s. 35(1)(c); and *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) p. 566). In *Re* ***Fraser***, [1986] B.C.J. No. 2376 (S.C.) (QL) the court held that once a member of the community takes a procedural step to enforce or establish his particular right, he becomes the possessor of an accrued or accruing right under a given statute. Thus any rights of the plaintiff in the case at bar under the ***TPA*** were acquired by or accrued to the plaintiff by May 8, 2003 when this action was started.

[18] Section 36(1)(b) of the ***Interpretation Act*** requires a proceeding commenced under a former enactment to continue under the new enactment in so far as it is

consistent with the new enactment. This is merely a reflection of the common law principle of statutory construction that rules of procedure may have retrospective effect but a statute that interferes with or destroys a previously acquired right is presumed not to be retrospective.

[19] Sections 18 and 22 of the ***TPA*** allow the plaintiff to claim relief for "deceptive acts or practices" of the defendant. Deceptive acts or practices are defined in s. 3 of the ***TPA*** as oral, written, visual, descriptive or other representations, including a failure to disclose. Sections 171 and 172 of the ***BPCPA*** also allow the plaintiff to claim relief for deceptive acts or practices of the defendant, but s. 4 of the ***BPCPA*** has amended the definition of deceptive acts or practices so that a failure to disclose is no longer included. If the ***BPCPA*** were to be given retrospective effect for all purposes, the plaintiff would be foreclosed from seeking relief for many of the complaints which he has particularized in paragraph 13 of his Statement of Claim.

[20] The right of the plaintiff to sue the defendant for allegedly failing to disclose material facts which have the capability, tendency or effect of misleading a person is a substantive right, not a procedural one, and cannot be "expropriated" by the legislature in the absence of explicit and clear language (***Sullivan and Dreidger,*** p. 569).

[21] In my view, neither the substantive provisions of the ***BPCPA***, nor its transitional provision can operate to deprive the plaintiff of continuing the action that he commenced on May 8, 2003 under the provisions of the ***TPA.***

Causation and Reliance

[22] The defendant submits that regardless of whether it is the ***TPA*** or the ***BPCPA*** that governs the plaintiff's claim, the plaintiff has no cause of action without proof of causation and reliance with respect to each individual member of the class. This is the main thrust of the defendant's objection to certification. Simply put, the defendant says that the assertion of a common cause of action alleging deceptive acts or practices by the defendant does not give rise to a common issue because the cause of action is not complete without the elements of causation and reliance. The defendants submit these are individual issues, making this case inappropriate for certification.

[23] During oral submissions, the defendant conceded that the definition of deceptive acts or practices under s. 3 of the ***TPA*** does not require evidence of individual reliance. However, the defendant maintained that any remedy under ss. 18(4) or 22 of the ***TPA,*** or s. 171 of the ***BPCPA,*** does require evidence of individual reliance to prove the causal link between the allegedly deceptive act and the alleged loss for which compensation is claimed.

[24] The plaintiff conceded that the wording of ss. 18(4) and 22(1)(a) of the ***TPA*** and ss. 171(1) and 172(3) of the ***BPCPA*** suggested causation needs to be established, but argued that this could be proved by means other than demonstrating individual reliance.

[25] In light of the above concessions, I accept that the plaintiff's claim under ss. 18(1) and (2) is properly pleaded and I need only consider the claims made under

ss. 18(4) and 22 of the ***TPA,*** together with the post-July 2004 claims made under s. 171 of the ***BPCPA.***

(i) *Section 18(4) of the **TPA** and s. 172(3) of the **BPCPA***

[26] Section 18(4) of the ***TPA*** states:

> In an action for a permanent injunction under subsection (1)(b), the court may restore to any person who has an interest in it any money or property that may have been acquired because of a deceptive or unconscionable act or practice by the supplier.

[27] The words “because of” in s. 18(4) require a causal link between the money or property acquired by the defendant and the deceptive act or practice.

[28] “Deceptive act or practice” is defined in s. 3 of the ***TPA*** as:

> (a) an oral, written, visual, descriptive or other representation, including a failure to disclose, and
>
> (b) any conduct
>
> having the capability, tendency or effect of deceiving or misleading a person.

[29] It is common ground that no actual deception of the plaintiff is required to establish a deceptive act. The focus is on the conduct of the defendant and the capability or tendency or effect of the defendant’s conduct to deceive, not whether a particular plaintiff was deceived or not. Similarly, the causal connection referred to in s. 18(4) arises out of the defendant’s conduct in both deceiving and acquiring a benefit through its deception. Once again the focus is on the defendant’s conduct and what it has been able to acquire in breach of the statute.

[30] In ***Collette v. Great Pacific Management Co.***, (2004), 26 B.C.L.R. (4th) 252 (C.A.), Mackenzie J.A. pointed out that if causation can be established otherwise, individual reliance may not be required. If the mortgage units at issue in that case had not met a due diligence standard, they would not have been offered for sale by the defendant to the members of the proposed class of investors. The breach of the duty of due diligence caused the investors' loss, independent of any individual reliance by them.

[31] The wording of s. 172(3) of the ***BPCPA*** is similar to s. 18(4) of the ***TPA***:

> (3) If the court grants relief under subsection (1), the court may order one or more of the following:
>
> > (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;

[32] As mentioned earlier, the main difference between the ***BPCPA*** and the ***TPA*** is in the definition of deceptive act or practice. The ***BPCPA*** definition states, among other things, that a representation by a supplier that fails to state a material fact is a deceptive act or practice *if the effect is misleading**.*** Although this revised definition suggests a higher onus of proof with respect to misrepresentation by silence or omission as opposed to misrepresentation by express statement, it does not materially alter the causation requirement in s. 172(3). A restoration order under this section will still be contingent on the supplier's in breach of the statute that resulted in the supplier's acquisition of benefits from the consumer.

[33] None of the cases cited to me specifically considered what needs to be proved in order to obtain a restoration remedy under s. 18(4) of the ***TPA*** or s. 172(3) of the ***BPCPA.*** However, I am of satisfied on a plain reading of the statutes that the necessary proof of causation under these sections does not mandate proof of reliance on the deceptive act or practice by the individual consumer.

(ii) *Section 22(1) of the **TPA** and s. 171(1) of the **BPCPA***

[34] Section 22(1)(a) of the ***TPA*** and s. 171(1) of the ***BPCPA*** clearly require a consumer to prove loss or damage suffered by the consumer (as an individual) in reliance upon the alleged deceptive act or practice (***McKay v. CDI Career Development Institutes Ltd.*** (1999), 64 B.C.L.R. (3d) 386 (S.C.); ***Rushak v. Henneken*** (1991), 84 D.L.R. (4th) 87 (B.C.S.C.); and ***Robson v. Chrysler Canada Inc.*** (2002), 2 B.C.L.R. (4th) 1 (C.A.)).

[35] The plaintiff submits that he can satisfy the onus of proof in s. 22(1)(a) of the ***TPA*** or s. 171 of the ***BPCPA*** without the need for individual evidence, by tendering economic and statistical evidence showing that the entire market place was distorted by the defendant's deceptive practice, and that all class members paid too much for a product which did not truthfully exist. In other words, the plaintiff expects to show that all purchasers of the defendant's light cigarettes paid an amount which exceeded the product's true market value (i.e. what purchasers would have paid had they known the truth).

[36] I am not at all convinced that this theory of causation of damages which has had some measure of success in American jurisdictions would succeed in a British

Columbia action under the ***TPA,*** but I am not prepared at the certification stage to pronounce it plain and obvious that it will fail. The cause of action under s. 22(1)(a) and s. 171(1) should be allowed to proceed to trial as framed, and for the purposes of certification I will assume that the plaintiff will not be proving reliance on the alleged deceptive acts and practices of the defendant by individual members of the proposed class.

[37] Furthermore, s. 22(1)(b) and (c) of the ***TPA*** do not necessarily import an element of individual reliance (there is no equivalent in the ***BPCPA***, so these sections would not apply to the plaintiff's claims after July 2004). In ***Bouchanskaia v. Bayer Inc.***, 2003 BCSC 1306, Gray J. stated that it was at least arguable that detrimental reliance is not required under s. 22(1)(b) and (c), and I agree. If, for example, the allegation concerns a failure to disclose, reliance may not be necessary (***Reid v. Ford Motor Co.***, 2003 BCSC 1632). In certain circumstances reliance may be assumed as all purchasers would expect to be told of a known defect in a product (***Olsen v. Behr Process Corp.***, 2003 BCSC 429).

[38] In conclusion, I find that the plaintiff's statement of claim discloses a viable cause of action under ss. 18 and 22 of the ***TPA*** for all claims before July 4, 2004, and a viable cause of action under ss. 171 and 172 of the ***BPCPA*** for all claims from July 4, 2004 onwards. Due to the mixed representative nature of all these claims, I do not think it would be in keeping with the policy objectives of the ***CPA*** to apply s. 41 of the ***CPA*** as a bar to any of the claims in this action.

IDENTIFIABLE CLASS

[39] The plaintiff defines the proposed 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.

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

[41] The class period covers the period from July 5, 1974, (the date the ***TPA*** came into force) to an opt-out/opt-in date set by this court.

[42] The defendant more or less adopted the third party's objection to certification on the ground that the proposed class is overly broad and unmanageable. However, the majority of the third party submissions on over breadth have no relevance to this purely economic claim. The third party endeavours to characterize the nature of the plaintiff's cause of action as a claim for personal injury to health resulting from smoking. It complains that the class would include those who purchased but never smoked the product and those who did not rely on representations by the defendant in purchasing the product. These submissions fail to understand the real nature of the plaintiff's claim which is to obtain the disgorgement of revenues and profits earned by the defendant through the alleged deceptive marketing of the product. The benefit to the defendant is measured by the sales of the product in British Columbia to the end user, the consumer. The actual use made of the product by each individual consumer has no bearing on the plaintiff's claim that the defendant

manipulated the market by falsely creating a value for the product that exceeded its true value. Therefore, the class is defined by the act of purchasing the product in British Columbia. According to the affidavit evidence, these purchases have likely been recorded and can be measured by sales statistics. The challenge to this proposed class will be to establish economic injury to its members' wallets as a result of their purchases, not personal injury to their health.

[43] The third party also complains that the proposed class would include persons all over the world who may have briefly passed through British Columbia and bought the defendant's products while in transit. I had considered limiting the class to residents of British Columbia, but upon reflection this seemed an arbitrary exclusion. Sheer size of a class and the inability to name each individual member should not be sufficient to prevent certification as long as the class is clearly definable by objective criteria (***Western Canadian Shopping Centres Inc. v. Dutton***, [2001] 2 S.C.R. 534; and ***Hollick***, *supra).*

[44] As the plaintiff is seeking an aggregate damage award the defendant will not be involved in the distribution of compensation to individual plaintiffs. That is an administrative task with which the plaintiff will have to contend in the event that his suit is successful. As mentioned earlier, the residue of any unclaimed compensation will be donated to charitable and non-profitable organizations as per s. 34 of the ***CPA.***

[45] In conclusion, I find that there is an identifiable class of plaintiffs over and above the two named plaintiffs, Mr. Knight and his proposed alternate Ms. Leskun.

COMMON ISSUES

[46] The plaintiff has proposed ten common issues to be tried as a class proceeding (listed in para. 2, p. 2 herein), four of which have been admitted by the defendant. The remaining six issues deal with:

1. whether the defendant engaged in deceptive acts or practices in the solicitation, offer, advertisement, and promotion of its product contrary to the ***TPA;*** and if so, whether the defendant should:

    a. be enjoined from continuing those deceptive acts or practices;

    b. be required to advertise the court's judgment, declaration, order or judgment, and if so, upon what terms;

    c. pay a monetary award in favour of the class;

    d. pay punitive or exemplary damages; and

2. whether the defendant wilfully concealed material facts relating to the cause of action asserted in this proceeding (which would have a bearing on the limitation defence raised by the defendant).

[47] The defendant submits that these issues are neither common nor relevant, and do not meet the test of commonality as described by the Supreme Court of Canada in ***Western Canadian Shopping Centers Inc.,*** *supra,* and ***Hollick,*** *supra.* The defendant submits that resolution of these issues is not necessary for the resolution of each member's claim and that these issues do not form a substantial

ingredient of each member's claim. Therefore the resolution of these issues would not move the litigation significantly forward.

[48] Once again, the defendant advances the above submissions based on a misconception of the nature of the plaintiff's claim. In summary, the defendant argues that the particular circumstances applicable to each representation and the recipient of the information need to be examined to determine whether a class member has actually been misled. The defendant also says that each individual's method and pattern of smoking must be analyzed to determine the extent to which the individual may have "compensated", and to determine the amount of tar actually delivered.

[49] As discussed under heading of cause of action, I have found that it may not be necessary for the plaintiff to show individual reliance on the conduct of the defendant to establish certain breaches of the ***TPA*** or ***BPCPA.*** With the exception of a failure to disclose contrary to the ***BPCPA***, the defendant's conduct does not have to actually mislead consumers to be actionable. Evidence from individual class members will not be required to determine the extent of the defendant's knowledge about the deceptive nature of its product and whether it kept silent about the alleged defects.

[50] As early as 1977, this court decided in ***Stubbe v. P. F. Collier & Son Ltd.*** (1977), 74 D.L.R. (3d) 605 (B.C.S.C.), var'd on other grounds (1978), 85 D.L.R. (3d) 77 (B.C.S.C.), that the provisions of the ***TPA*** must be construed so as to protect not only alert potential customers, but also those who are not alert, and are

unsuspicious and credulous. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. The best element of the business community has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.

[51] Common issue numbers eight and nine deal with a form of monetary award. The plaintiff submits that ss. 29 and 30 of the ***CPA*** permit aggregate monetary awards and the use of statistical evidence to determine the amount of an aggregate monetary award and how it should be distributed. The plaintiff has tendered some affidavit evidence to indicate that the quantum of restitution or disgorgement can be established through the defendant's business records and statistical evidence. Alternatively, the plaintiff proposes to prove that the defendant's alleged deceptive practices have distorted the entire marketplace for tobacco products through the defendant's creation and sale of a supposedly safer cigarette, a product which the plaintiff says does not exist. The plaintiff's theory is that the fair market price of the defendant's product would have been different but for the defendant's alleged deceptive conduct. Therefore all class members paid too much for the product. There is no need for individual trials when the quantum of such an economic claim can be proved for the class as a whole.

[52] This model of damages is not without precedent in Canada (***Kerr v. Danier Leather Inc.*** (2004), 23 C.C.L.T. (3d) 77 (Ont. S.C.J.) and ***Hague v. Liberty Mutual Insurance Co.***, [2004] O.J. No. 3057 (S.C.J.) (QL)).

[53] Sections 31 – 33 of the ***CPA*** detail the procedure for distribution of aggregate monetary awards to class members. Where it would be impractical or inefficient to determine the exact amount owing to individual class members, the court can order that all or part of the aggregate award be shared on an average or proportional basis. Section 34 of the ***CPA*** permits an order that any undistributed portion of an aggregate award may be applied in any manner that may reasonably be expected to benefit class members, such as distribution to charitable organizations treating or researching smoking related disease.

[54] The defendant's objection to aggregate monetary damages is based on its approach to causation and reliance, which I have already found inapplicable to the plaintiff's claim.

[55] Common issue number nine deals with punitive damages, which are an appropriate common issue because they focus on the defendant's conduct and do not require individual class member participation or assessment (***Rumley v. British Columbia,*** [2001] 3 S.C.R. 184).

[56] Common issue number ten is more problematic. The plaintiff submits that the defendant wilfully concealed material facts and therefore the limitation period for its claims has been postponed under s. 6(3)(e) of the ***Limitation Act***, R.S.B.C. 1996, c. 266. The defendant argues that discoverability is an individual issue and the question of wilful concealment cannot be easily severed from it. I am not satisfied that the limitations defence as a whole can be tried as a common issue. However, the question of whether the defendant wilfully concealed material facts is an issue

common to the class, and, if established, would be of significance in a decision regarding postponement of the limitation period. In that sense, resolution of common issue number ten would move the litigation forward.

[57] The defendant pleads, among other things, conformity with federal government requirements, *volenti non fit injuria*, and contributory negligence. It submits that all these issues require individual examination at a trial on the merits. The plaintiff submits that these defences raise the following common issues which could be resolved in these proceedings were they to be certified:

1. whether the defendant's interactions with the Government of Canada constitute a defence to claims under the ***TPA***;

2. whether the doctrine of *volenti non fit injuria* constitutes a defence to claims under the ***TPA***;

3. whether the provisions of the ***Negligence Act*** R.S.B.C. 1996, c. 333 relating to the defence of contributory negligence have any application to a claim under the ***TPA.***

[58] I agree that the legal question of whether any of these defences can apply to the plaintiff's claim under the ***TPA*** is common to all parties, and answering it would be a desirable if not necessary step in moving the litigation forward.

[59] Therefore, I find that the list of common issues proposed by the plaintiff, together with the three legal questions I have listed above, meet the requirements of

s. 4(1)(c) of the ***CPA***. However, all these common issues are still subject to the preferability test under s. 4(1)(d).

PREFERABILITY

[60] The preferability test is at the heart of the judicial discretion to grant or decline certification under the ***CPA***. When exercising this discretion, the legislative goals and objectives of access to justice, judicial economy and behaviour modification must be kept in mind:

> The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres* (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. … In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters. (*Hollick, supra,* para*. 15).*

[61] It is common ground between the parties that access to justice is the overriding consideration. The cost of proving common issues is often a complete deterrent to modest individual claims such as that of the plaintiff in this case (***Bouchanskaia,*** *supra;* ***Endean v. Canadian Red Cross Society*** (1998), 48 B.C.L.R. (3rd) 90 (C.A.)). Given the broad time span and multitude of acts and practices which the plaintiff alleges constitute breaches of the ***TPA***, together with the

expert scientific and economic evidence which will be required at trial, there is no doubt that the litigation expenses would be prohibitive for a single individual.

[62] Behaviour modification, while a less important factor, may also have a bearing in this case.

[63] Section 4(2) of the ***CPA*** sets out the list of factors a court must consider in determining whether a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues:

> (2) In determining whether a class proceeding would be preferable for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> > (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;
> >
> > (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Common Issues Predominant

[64] The defendant submits that any finding on the common issues proposed by the plaintiff cannot be applied to the substantive rights of the parties because the

plaintiff's cause of action necessarily involves analysis of a multitude of communications in changing circumstances over thirty years, made to ever changing, evolving and diverse persons. In other words, the defendant submits that the transaction specific nature of the plaintiff's claim should predominate over any common issues and it would be unfair to decide liability in a global manner.

[65] I have already dealt with this submission to some extent but it bears repeating that the defendant's submission in this regard is predicated on an assumption that the plaintiff would have to establish individual reliance and causation for each class member in order to succeed on liability. I have found that this is not necessarily so, and that the plaintiff should be allowed the opportunity to try its allegations as common issues. The defendant is not estopped from proving at trial that commonality has not been demonstrated on the facts of the case, so in that sense, the procedure is not unfair (***Reid,*** *supra;* ***Price v. Phillip Morris***, 341 Ill. App. 3d 941).

[66] On my analysis, the common issues predominate over any individual issues such as postponement of limitation periods or contributory negligence.

No Class Members have Interest in Separate Action

[67] There is no evidence of any other class member having filed a ***TPA*** claim against this defendant.

Claims are Not Subject of Other Proceedings

[68] The Minister of Health of British Columbia is suing a number of cigarette manufacturers for health care costs, but the Province makes no claim on behalf of any individual consumers such as the plaintiff herein. Although there may be elements of similarity, I am not persuaded that the Ministry of Health action overlaps the plaintiff's claim.

Other Means of Resolving the Claim

[69] Although the ***TPA*** authorizes the Director of Trade Practices to commence an action on behalf of consumers generally, there has been no indication that the Director intends to do so, despite being served with this writ and statement of claim in February 2004.

Administration of Class Proceedings

[70] If the plaintiff is correct in his theory and allegations, then determination of the proposed common issues could dispose of the entire case. There would be no need for individual suits and administration of the award would not involve the defendant. The claim is focused on a specific product and specific pieces of legislation, and although the relevant time period is lengthy, this should not constitute undue difficulty for the court.

[71] The defendant relies heavily on the finding of Mr. Justice Winkler in ***Caputo v. Imperial Tobacco*** (2004), 236 DLR (4th) 348 (Ont. S.C.) that a certified class proceeding for smokers' claims is unmanageable. However, ***Caputo*** involved a claim by smokers for personal injury damages. It included claims for addiction,

injury and death based on common law torts which required proof of individual reliance and causation.

[72] The case at bar is more akin to a product liability suit. It is a claim for pure economic loss brought by purchasers of a "defective" product. The ***TPA*** and ***BPCPA*** are forms of general consumer protection legislation which have superseded the common law doctrines of privity of contract, parole evidence and restricted remedies. (See E. Belobaba, "Unfair Trade Practises Legislation: Symbolism and Substance in Consumer Protection" (1977) 15(2) Osgoode Hall L.J. 327). Unlike the suit in ***Caputo***, this suit will be more than merely bringing together a number of disparate claims; it is structured in a way that should be truly common to all class members. I am satisfied that this class action as contemplated is the preferable procedure for a fair and efficient resolution of the proposed common issues.

REPRESENTATIVE PLAINTIFF

[73] The final requirement for certification is that the plaintiff must propose a representative who can adequately represent the class and produce a reasonable litigation plan, and who does not have a conflict with other class members on the common issues.

[74] The defendant's objection under this heading is that the plaintiff has not produced a workable litigation plan. The defendant also submits it would have been impossible to do so because of the plethora of individual issues for this enormous class. In effect, the defendant submits that the plaintiff cannot in fact create a

feasible plan to deal with the multitude of individual claims which would be included in this class action.

[75] As already stated, I do not agree with the defendant's characterization of the plaintiff's claims. I am of the view that the plaintiff's litigation plan as proposed is adequate to try the common issues. The plan provides for notice to the class, pre-trial discovery, case management, trial of the common issues and distribution of any aggregate award. The plaintiff proposes to proceed first with respect to the defendant's two highest selling brands of light cigarettes, Player's Light and Du Maurier Light. If the plaintiff is unsuccessful in establishing liability for these brands, it is unlikely he would succeed with the other brands, and therefore he would not pursue the litigation further. This will provide a narrower focus to the common issues which should make the litigation more manageable.

CONCLUSION

[76] In summary, I find that the plaintiff's claim as pleaded and the common issues as presented by the plaintiff and supplemented with the three common issues arising from the statement of defence, are amenable to certification, meet the criteria of s. 4 of the ***CPA***, and should be certified as a class proceeding. I do not find that the plaintiff is barred by s. 41 of the ***CPA*** or the provisions of the new ***BPCPA***. All claims prior to July 4, 2004 will be governed by the ***TPA,*** and all claims after that date to the date of judgment will be governed by the ***BPCPA***.

"D.A. Satanove, J."
The Honourable Madam Justice D.A. Satanove