

**From Montreal to Minnesota:
Following the Trail of Imperial Tobacco's Documents**

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A brief legislative history

In April, 1987, the Canadian Federal Government announced a comprehensive, health-oriented, tobacco control policy that included advertising and product control legislation, as well as administrative and legislative controls on involuntary exposure to tobacco smoke in workplaces, public places and transit vehicles. The legislative centrepieces of the new policy were the *Non-Smokers' Health Act* which came into force on December 29, 1989 and the *Tobacco Products Control Act* which came into force on January 1, 1989.

The latter law, which was to be struck down by the Supreme Court seven years later, banned most forms of tobacco advertising and imposed a number of labelling and reporting requirements on tobacco manufacturers and importers. Despite its final fate in the hands of the Supreme Court, the *Tobacco Products Control Act* was to change forever the face of tobacco control in Canada and elsewhere in the world. No longer would the public health community, Canadian governments or the general public ever accept a completely unregulated tobacco marketplace.

The Canadian government replaced the *Tobacco Products Control Act* with the more complex, but more circumscribed *Tobacco Products Act*. New or revised tobacco control legislation has been introduced in most provinces.

The *Tobacco Products Control Act* has also had a marked effect internationally. It directly inspired stronger tobacco control laws in at least two countries, New Zealand and Thailand, and has had at least some direct or indirect influence in the development of new or revised tobacco control legislation in many other countries, including Australia, Sweden, France, Poland, Singapore and South Africa.

Attacks on Canada's comprehensive tobacco control policies

A number of forces, most of them related to the tobacco industry, continually seek to undermine Canada's comprehensive tobacco control policies.

One measure of the likely effectiveness of the *Tobacco Products Control Act* may be seen in the strenuous efforts employed by the tobacco industry in opposing it and in seeking to minimize its

impact. In the summer of 1988, public health advocates thought a great victory had been achieved with the passage into law of the *Tobacco Products Control Act*, and celebrated by taking long vacations. From there, they offered little public counterweight to the tobacco company lawyers, who were getting into high gear to challenge the very legitimacy of the Act. By the end of the summer of 1988, even before the Act had come into effect, each of the three largest tobacco companies had launched separate legal actions to have the law struck down as in violation of the 1982 Canadian Charter of Rights and Freedoms. The tobacco companies recruited lawyers from at least six leading law firms to present their cases.

The Government, for its part, made defending this case a high priority. The core of the Government's position was that banning tobacco product advertising represents a "reasonable limitation" on freedom of speech, as provided for in Canada's Charter of Rights and Freedoms. A team of lawyers from both the public and private sectors was recruited to defend the case. Health Canada also devoted significant resources to assist the legal team in the preparation of the Crown's defence.

Notwithstanding its eventual rejection by the Supreme Court, the *Tobacco Products Control Act* spawned other public health benefits as well. During the trial, government lawyers, in order to prepare their defence, demanded and received copies of all the tobacco company marketing documents from the 1960s to the 1980s. From these documents, a great deal of previously confidential information from the tobacco companies was selected for presentation as evidence, and was therefore placed on the public record at trial in 1989 and 1990. For example, tobacco company executives asserted they never targeted their advertising at teenagers, while it was clearly consistent with their own documents on the uptake of smoking.

The files of Imperial Tobacco, the largest tobacco company in Canada and an associate company of British-American Tobacco, revealed an endless round of theory, research, implementation, evaluation and refinement of tobacco marketing strategies, with an overwhelming emphasis on selling cigarettes to adolescents.

The story of Player's Light

It is particularly fascinating to trace the development of "Player's Light", a brand that was introduced in 1976 that has since gone on to become the largest selling brand in Canada.

In 1977, the marketing documents posit a theory of cigarette uptake that holds that cigarettes are to be sold to those of “a younger age” on the basis of “social requirements”, observed to have primacy over “taste requirements”.

“Relevant lifestyle is the key to the brand’s positioning, and the youthful emphasis is a psychological not a chronological one.”

“At a younger age, taste requirements and satisfaction in a cigarette are thought to play a secondary role to the social requirements. Therefore, taste, until a certain nicotine dependence has been developed, is somewhat less important than other things. Indeed strength of taste has not been a factor in the current creative strategy for Player’s Filter. The brand has been positioned so that people can apply their own taste qualities to it.”

Spitzer, Mills and Bates. *The Player’s Family: A Working Paper.*
for Imperial Tobacco Ltd., 25 March 1977, AG-33.¹

Theory is quickly followed by research on focus groups of teenagers where we learn that Imperial Tobacco knows, just as everybody else knows, that Canadian children begin smoking at ages 11-13 and are thoroughly addicted by age 16-17.

“Serious efforts to learn to smoke occur between ages 12 and 13 in most cases.”

“The adolescent seeks to display his new urge for independence with a symbol, and cigarettes are such a symbol.”

Kwechansky Marketing Research. *Project 16.* for Imperial Tobacco,
October 1977, AG-216.²

“However intriguing smoking was at 11, 12 or 13, by the age of 16 or 17 many regretted their use of cigarettes for health reasons, and because they feel unable to stop smoking when they want to.”

Kwechansky Marketing Research. *Project 16.* for Imperial Tobacco,
October 1977, AG-216.³

Research is followed by evaluation, which reveals Player’s Light to be “one of the youngest” cigarette brands in Canada, something that Donald Brown, then the Vice-President of Marketing, asserted “was not perceived to be a problem”.

“The brand [Player’s Light] profile has settled considerably younger than was originally defined for the target market, and is one of the youngest in the cigarette market as a whole.”

Spitzer, Mills and Bates. *Player's Light: Creative Development*. for Imperial Tobacco Ltd., 20 January 1978, AG-28.⁴

Q: So my question to you, Mr. Brown, is: did your company take any steps to correct this?

A: No, correct suggests there was a problem. That it was a young profile was not perceived to be problem.

Q: Oh, I see. You mean you didn't mind that it became the youngest cigarette in the country?

A: No.

Cross-examination of Donald Brown, Marketing Vice-President,
Imperial Tobacco by Roger Baker,
lawyer for the Attorney-General of Canada.
Montreal Superior Court, Quebec. *Joint Record*. Volume 7. pp. 1523-4.⁵

Having established through theory, research and evaluation that Player's Light would succeed if marketed to young people, it remained to develop and execute marketing plans. First, it would be necessary to deal with the inconvenient voluntary marketing code which forbade use of models under 25. This was dealt with expediently by hiring people who were 25, but looked much younger.

Executorial guidelines

6. *Casting for Player's scenarios*

"Models in Player's advertising must be 25 years or older, but should appear to be between 18 and 25 years of age."

Chacra A. *Player's Trademark, F'81 advertising*.
Imperial Tobacco, 1980, p. 17, AG-35.⁶

"Starter" target groups were variously defined beginning at ages 18, 16, 15, and in one case as young as 12. In this case, groups aged 12-24 and 12-17 were targeted, with media placements to be especially weighted to these youngest age groups.

"The activity shown should be one which is practiced by young people 16 to 20 years old or one that these people can reasonably aspire to in the near future."

Player's Filter '81: Creative Guidelines. Imperial Tobacco Ltd., 1981,
AG-35.⁷

PLAYER'S LIGHT - ENGLISH TARGET GROUPS

MEN	WEIGHT	WOMEN	WEIGHT
12-24	1.0	12-24	1.0
25-34	0.7	25-34	0.7
35+	0.0	35+	0.0

PLAYER'S LIGHT - FRENCH TARGET GROUPS

MEN	WEIGHT	WOMEN	WEIGHT
12-17	0.8	12-17	0.7
18-24	1.0	18-24	0.9
25-34	0.6	25-34	0.6

Imperial Tobacco Limited, Fiscal '80 Media Plans, Phase I, ITL-13.⁸

In 1982, another round of focus group research found that smoking cessation, every tobacco marketer's nightmare, was now desired even earlier, "even prior to the end of high school". Fortunately for the tobacco company, among the hapless adolescent addicts, "the desire to quit, and actually carrying it out, are two quite different things, as the would-be quitter soon learns".

"The desire to quit seems to come earlier now than before, even prior to the end of high school. In fact, it often seems to take hold as soon as the recent starter admits to himself that he is hooked on smoking. However, the desire to quit, and actually carrying it out, are two quite different things, as the would-be quitter soon learns."

Kwechansky Marketing Research. *Project Plus/Minus*. for Imperial Tobacco, May 1982, AG-217.⁹

By 1989, Imperial Tobacco makers of Player's Light, held 50% of the Canadian cigarette market; its share of the teenage market was 60%. By 1992, Imperial had increased its market share to 66%, and sold all five of the five most popular brands. Player's Light, still the undisputed market leader, had grown to 14% of the market, far ahead of its nearest rivals. By 1998, both Imperial Tobacco, the company, and Player's Light, the brand, increased their leading positions even more. Donald Brown, the Vice-President of Marketing, who didn't see selling cigarettes to adolescents as a problem in 1990,

was promoted to President and Chief Operating Officer of Imperial Tobacco in 1991, and later promoted to Chief Executive Officer.

More truth about tobacco

From the 1960s to the early 1980s, low tar cigarettes were often publicly touted as less hazardous products. However, they seemed to have had the more important benefit to the tobacco companies of having “retained some potential quitters in the cigarette market.”

“We have evidence of virtually no quitting among smokers of these brands, and there are indications that the advent of ultra low tar cigarettes has actually retained some potential quitters in the cigarette market by offering them a viable alternative.”

Response of the market and of Imperial Tobacco to the smoking and health environment. Imperial Tobacco Ltd., AG-41.¹⁰

As late as 1988, Imperial Tobacco’s annual overview was still asserting that a company “philosophy” was to “support the continued social acceptability of smoking”.

1988 OVERVIEW

“The following philosophies have effectively governed ITL marketing planning and activities. They remain valid.”

• • •

4. “Support the continued social acceptability of smoking through industry and/or corporate actions.”

1988 Overview. Imperial Tobacco Ltd., 1988, AG-51.¹¹

By the mid-1980’s, Imperial Tobacco was clearly feeling embattled and embarked on a major market research project, Project Viking, “to combat those forces aligned in an attempt to significantly diminish the size of the tobacco market in Canada”, and to direct effort to “expanding the market, or at the very least forestalling its decline”. Efforts were to be intensified to meet the “unmet needs of

smokers” and to find the Holy Grail of tobacco marketing, “products which could delay the quitting process”.

While “reducing quitting” was clearly desirable, it was recognized that the Holy Grail of “a product solution” might not be found, and that “an advocacy thrust may be necessary”. After all, “disaffected smokers do need some reassurance that they are not social pariahs”.

FOREWORD

Background and Objectives

“Perhaps for the first time, the mandate under consideration is not limited simply to maximizing the ITL franchises; it is now to include as well serious attempts to combat those forces aligned in an attempt to significantly diminish the size of the tobacco market in Canada.

“This is the underpinning of *Project Viking*. There are, in fact, two components to the program...

- *Project Pearl* is directed at expanding the market, or at very least forestalling its decline...
- *Project Day* represents the tactical end by which ITL may achieve competitive gains within the market of today and in the future. Unmet needs of smokers that could be satisfied by new or modified products, products which could delay the quitting process, are pursued.”

“Strategically, it would seem that reducing quitting is the most viable approach. But it would also seem that a product solution may not be sufficient on its own. An advocacy thrust may be necessary; disaffected smokers do need some reassurance that they are not social pariahs.”

Creative Research Group. *Project Viking*. for Imperial Tobacco, 1986, AG-21A-D.¹²

These passages from *Project Viking* were cited by the Quebec Court of Appeal in their judgement of 15 January 1993 upholding the *Tobacco Products Control Act*, as evidence that market preservation and expansion are central aims of tobacco advertising. The Court went on to conclude that the *Tobacco Products Control Act* was “a reasonable solution to an important public health problem”.

“The legislator has adopted a reasonable solution to an important public health problem, while still respecting social and economic realities. We are faced with an example of the difficulties of government action in contemporary Canadian society. The respect of the courts for the legislative decisions thus taken are justified in this case.”

Rothman ML, LeBel L, Brossard A. *Judgement*, Montreal Court of Appeal, 15 January, 1993.¹³

Later the Supreme Court, while divided, was to reach the opposite conclusion.

All of the documents cited here were placed on the public record at the trial in Montreal in 1989 and 1990. They created a minor stir at the time, but there was little subsequent public interest until 1998, nearly a decade later.

Canadian tobacco market research documents resurface in Minnesota

On 8 May 1998, the State of Minnesota reached a historic settlement with the tobacco industry.* Among many terms of the settlement favourable to public health was the agreement extracted by the plaintiffs from the tobacco industry to place nearly all the tobacco industry documents produced during the trial discovery proceedings on the public record, some 40 million pages of documents in all, 33 million at a document depository in Minnesota and another 7 million at a depository in Guildford, England.

During the trial, the judge made several rulings that the tobacco industry had systematically abused attorney-client privilege to hide documents that should have been available to the plaintiffs, and ordered the documents to be made so available. This had the effect of putting the tobacco industry in a relatively weak bargaining position when it came to negotiating a settlement. Making the documents public was no doubt a hard point to get them to concede, but concede they did, and the public health community is much richer as a result.

Let us examine some of the events leading up to the settlement. In a series of increasingly stern judicial orders, Judge Fitzpatrick expressed his dissatisfaction with the abuse of attorney-client privilege, and ordered documents released to the plaintiffs. In the last of these rulings, 7 March 1998, he cited a document for which Brown and Williamson had claimed attorney-client privilege.† The document in question bore the following title:

* To see the full text of this settlement agreement, visit website <http://www.rkmc.com/settlement.pdf>

† To view the full text of Judge Fitzpatrick's order of 7 March 1998, visit website <http://www.rkmc.com/tobacco.order3798lit.cfm>

“Series B, ITL Documents: Apparent difficulties and relevant facts, Volume II, Project 16 and Project Plus-Minus.”

It was labelled “for internal use within the B.A.T. group of companies”. One of the headings in the document was “Apparently problematic research.”¹⁴ The document referred to by Judge Fitzpatrick is not available on the Brown and Williamson website, but its structure may be inferred from a similarly titled document which is available on the website. The similar document is entitled:

“Series B, ITL Documents: Apparent difficulties and relevant facts, Volume I, ITL’s fiscal 1980 and fiscal 1981 national media plans”¹⁵

Assuming that Volume II has a structure similar to Volume I, what probably followed in Volume II were some explanatory notes prepared by Ogilvy Renault (the Canadian law firm acting on behalf of Imperial Tobacco Limited), and the full texts of Project 16 and Project Plus-Minus cited earlier. To support his contention that the document was about children and not something protected by attorney-client privilege, Judge Fitzpatrick referred to the following citations from Project 16:

- ◆ “The research was conducted among 16-17 year olds.”
- ◆ “The research examined the behaviour of youth towards starting, smoking and quitting and their attitudes to these activities.”
- ◆ “The studies reported on youngsters’ motivation for starting, their brand preferences, etc. as well as the starting behaviour of children as young as 5 years old.”
- ◆ “The studies examined examination [sic] of young smokers’ attitudes towards ‘addiction’ and contain multiple references to how very young smokers at first believe they cannot become addicted, only to later discover, to their regret, that they are.”¹⁶

Ironically, Judge Fitzpatrick, although he did not do so, could have cited an even more straightforward reason for making Project 16 and Project Plus Minus public. They were already public and had been so since 1990 when they were presented in evidence by the government lawyers in Montreal.

Brown & Williamson must have hoped that, somehow, attorney-client privilege could be claimed for documents already in the public domain.

A public health challenge: Find more truth about tobacco

Whatever the route that saw these documents originally presented in evidence in Montreal also cited in the Minnesota case, both cases have contributed mightily to public health. The documents simply tell the truth about tobacco. More truth can be found in the complete trial record from Montreal, available at the National Clearinghouse on Tobacco and Health in Ottawa.

And even more truths await discovery by public health workers in 40 million pages of documents in the depositories in Minnesota and Guildford. Judges and lawyers got things started. Now it is up to public health workers from around the world to find the truth and use it to help create the policies that will strengthen global tobacco control.

References

¹ Spitzer, Mills and Bates. *The Player's Family: A Working Paper*. Prepared for Imperial Tobacco Ltd., 25 March 1977. p. 12 (14408). Montreal Court of Appeal, Case Numbers 500-09-001296-912 and 500-090001297-910. 1991. Joint Record, Exhibit Number AG-33. Volume 73, pp. 14396-14465.

² Kwechansky Marketing Research. *Project 16*. for Imperial Tobacco, October 1977. pp. i-ii (39285-6). Montreal Court of Appeal, Case Numbers 500-09-001296-912 and 500-090001297-910. 1991. Joint Record, Exhibit Number AG-216. Volume 190, pp. 39280-39392.

³ Kwechansky Marketing Research. *Project 16*. for Imperial Tobacco, October 1977. p. vi (39290). Montreal Court of Appeal, Case Numbers 500-09-001296-912 and 500-090001297-910. 1991. Joint Record, Exhibit Number AG-216. Volume 190, pp. 39280-39392.

⁴ Spitzer, Mills and Bates. *Player's Light: Creative Development*. for Imperial Tobacco Ltd., 20 January 1978, p. 1 (14169). Montreal Court of Appeal, Case Numbers 500-09-001296-912 and 500-090001297-910. 1991. Joint Record, Exhibit Number AG-28. Volume 71, pp. 14169-14175.

⁵ Cross-examination of Donald Brown, Marketing Vice-President, Imperial Tobacco by Roger Baker, lawyer for the Attorney-General of Canada. Montreal Court of Appeal, Case Numbers 500-09-001296-912 and 500-090001297-910. 1991. Joint Record, Volume 7. pp. 1523-4.

⁶ Chacra A. *Player's Trademark, F'81 advertising*. Imperial Tobacco, 1980, p. 17 (14868). Montreal Court of Appeal, Case Numbers 500-09-001296-912 and 500-090001297-910. 1991. Joint Record, Exhibit Number AG-35. Volume 75, pp. 14817-14939.

⁷ Player's Filter '81: Creative Guidelines. Imperial Tobacco Ltd., 1981, p. 1 (14817). Montreal Court of Appeal, Case Numbers 500-09-001296-912 and 500-090001297-910. 1991. Joint Record, Exhibit Number AG-35. Volume 75, pp. 14817-14939.

⁸ Imperial Tobacco Limited, Fiscal '80 Media Plans, Phase I, 1980, pp. 27,30 (46862, 46865). Montreal Court of Appeal, Case Numbers 500-09-001296-912 and 500-090001297-910. 1991. Joint Record, Exhibit Number ITL-13. Volume 228, pp. 46836-46929.

⁹ Kwechansky Marketing Research. *Project Plus/Minus*. for Imperial Tobacco, May 1982, p. i (39395). Montreal Court of Appeal, Case Numbers 500-09-001296-912 and 500-090001297-910. 1991. Joint Record, Exhibit Number AG-217. Volume 191, pp. 39393-39611.

¹⁰ *Response of the market and of Imperial Tobacco to the smoking and health environment*. Imperial Tobacco Ltd., p. 2 (15102). Montreal Court of Appeal, Case Numbers 500-09-001296-912 and 500-090001297-910. 1991. Joint Record, Exhibit Number AG-41. Volume 76, pp. 15101-15110.

¹¹ *1988 Overview*. Imperial Tobacco Ltd., 1988. Montreal Court of Appeal, Case Numbers 500-09-001296-912 and 500-090001297-910. 1991. Joint Record, Exhibit Number AG-51. Volume 77, p. 15335.

¹² Creative Research Group. *Project Viking*. for Imperial Tobacco, 1986, pp. 13423-4, 13781. Montreal Court of Appeal, Case Numbers 500-09-001296-912 and 500-090001297-910. 1991. Joint Record, Exhibit Numbers AG-21A-D. Volumes 68-71, pp. 13420-14041.

¹³ Rothman ML, LeBel L, Brossard A. *Judgement*, Montreal Court of Appeal, Case Numbers 500-09-001296-912 and 500-090001297-910. 15 January, 1993.

¹⁴ Fitzpatrick KJ, *Order*. County of Ramsey District Court, Second Judicial District, State of Minnesota, Court File No. C1-94-8565, 7 March 1998.

¹⁵ <http://www.bw.aalatg.com>. Document pp. 689453864-693454088. Citations: 689453864-867.

¹⁶ *Ibid.*