

# McCabe v. British American Tobacco Australia Services Ltd: A protracted conspiracy exposed

Ruby Rankin  
1 May 2002

The Supreme Court of Victoria's judgment in the case of McCabe v British American Tobacco (BAT) highlights the culture of conspiracy and secrecy that has existed within the tobacco industry and among its legal representatives for years.

The Australian court found that British American Tobacco Australia Services Ltd with the advice and assistance of its lawyers Clayton Utz systematically and massively destroyed documents, CDs, computer disks—indeed anything containing records and any other evidence about the chemical effects of nicotine, health effects of smoking, marketing and other aspects of the tobacco industry. Tobacco company employees were even instructed not to write anything down unless absolutely necessary and to principally rely on verbal communication.

The tobacco giant's defence denied that McCabe's lung cancer was caused by her cigarette smoking and asserted that "smoking is a behaviour of choice, and does not impair the ability of a smoker to assess the risks of smoking and to make an informed decision." The defence also claimed that BAT "did not have any knowledge about the risk of lung cancer or any difficulty associated with quitting smoking which was not in the public domain."

Various tobacco industry giants had successfully avoided damaging verdicts by employing the most ruthless tactics to prevent potential claimants from even starting proceedings. For plaintiffs who ran the gauntlet and sued for their suffering, the companies made sure that the trial process was as lengthy, expensive and embarrassing as possible. The *Australian Financial Review* reported on April 18 that a previous plaintiff, Ruth Scanlon, withdrew a claim against the American Cigarette Company and Rothmans of Pall Mall in 1986 after she received an anonymous phone call. Threats were made to disclose her sexual history to her family. That history, along with the tobacco industry's accountability for the damage done to Scanlon through cigarette smoking, died with her just three months later.

Rothmans later merged with BAT. The law firm Clayton Utz represented Rothmans at that time and BAT in the McCabe case. The court heard evidence that Clayton Utz hired a private investigation company to investigate Ms McCabe's life, including a former boyfriend and former employer. A private investigation company had also conducted an extensive and intrusive investigation into Ruth Scanlon's past.

The McCabe ruling could see actions launched in many parts of the world against the tobacco companies, with plaintiffs able to avoid lengthy, expensive and vicious trials by ordeal. The precedent has been established that a fair trial on the question of liability is impossible due to the wilful destruction of evidence by the tobacco industry. Other courts may also find that the tobacco industry has lost its right to even present a defence, because it has so seriously and deliberately subverted the course of justice.

The tobacco industry has known for decades that it was only a matter of time before it would face potentially massive awards of damages to sick and dying cigarette smokers. Indeed, in 1985 Clayton Utz was quoted as anticipating a "wave of litigation" and was instructed by W D & H O Wills (Wills) (later purchased by British-American Tobacco Co Ltd "BATCO" the English parent company of BAT) to "take steps to prepare the Industry, and Wills in particular, for litigation". The result was the so-called "document retention policy". Begun in 1985, the court found it to be "a means of destroying damaging documents under the cover of an apparently innocent house-keeping arrangement..." Judge Eames went on to say, after reviewing the origins of the policy, and "the critical role played by litigation lawyers in its development and implementation, it is clear that the post-1985 policy documents reflect the acute consciousness of their authors (and explain their attempts to disguise the fact) that the Document Retention Policy was primarily directed towards the risks of litigation." The judge had no doubt that the policy, if not actually drafted by Clayton Utz, "was considered and approved [by them] prior to its implementation".

Judge Eames found that "the advice was, in effect, get rid of the documents but claim an innocent intention". The court received evidence of a meeting on April 2, 1990 attended by F.T. Gulson, then legal counsel and secretary of Wills, Nick Cannar, legal counsel of BATCO, Brian Wilson, a partner of Clayton Utz and John Oxland another Clayton's lawyer. Wilson's advice was, "Keep all research docs which became part of public domain and discover them. As to other documents, get rid of them, and let other side rely on verbal evidence of people who used to handle such documents". Apparently the decision made on the day was "to shred all docs in Aust more than 5 years old (docs will still be available off-shore, though)."

The BATCO executives were particularly worried that any documents discovered in Australian courts could be used against the parent company in the UK and the US affiliate. The company was so concerned that damaging information could reach the light of day that it severed its computer link between the UK parent and the Australian subsidiary. In order to create an innocent intention ruse for severing the computer link, Clayton Utz advised its client to ensure that the termination of computer access be seen to have resulted from a "unilateral decision" by BATCO.

In his judgment, Judge Eames noted: "One outstanding feature of this case is the extent to which, after 1985, the terms of the Document Retention Policy, and the implementation of a program of destruction of documents, were the product of advice, decision and supervision by an army of litigation lawyers, from several countries, and being both retained private practitioners and in-house lawyers. The relationship between the defendant and its retained solicitors was so close that solicitors employed by private firms sometimes became employees of Wills and then

continued to work alongside members of their former firm, and employees of the legal firms sometimes spent months working on the premises of Wills. Private practitioners and in-house lawyers travelled together to conferences of litigation lawyers, organised by companies in the BAT Group, to discuss litigation tactics.”

Brian Wilson, Richard Travers and Glenn Eggleton of Clayton Utz were not the only lawyers at the receiving end of the judgment, although Clayton Utz was the hardest hit. Robyn Chalmers, a partner at Mallesons Stephen Jaques in Australia, Graham Maher, an in-house counsel for BAT, David Schechter, in-house counsel for BATUS, the US affiliate, Bob Northrip from the Kansas City firm of Shook, Hary & Bacon, Andrew Foyle from the English firm of Lovell White Durrant, the Australian firm of Allen Allen & Hemsley as well as barristers briefed in the McCabe case were also acknowledged for the part they played in assisting the tobacco machines to keep on rolling.

The first major breach of the tobacco industry’s combined fortress occurred in the US in November 1998, when large numbers of internal documents entered the public domain as a result of a huge court settlement with the majority of US states. In the state of Minnesota alone, 35 million pages of tobacco industry documents became public. A series of cases in Australia had previously begun, but were discontinued, between 1990 and 1998. With each case the tobacco company was subject to a “hold order”; an order of the court that forbids the destruction of any documents. Thus the 1985 “document retention policy” was put on hold for eight years.

In 1996 Phyllis Cremona commenced proceedings in Australia against BAT. As a result of the discovery process, an enormous database was created with the advice of Robyn Chalmers and Graham Maher (first as a solicitor with Mallesons Stephen Jaques and then as in-house counsel at BAT). The Cremona data base consisted of 30,000 documents imaged on computer discs, indexed, usually summarised and rated on a scale of one to five on the basis of helping or hurting the tobacco company’s defence. It included some 23,000 documents from the Wills Technical Centre library on smoking and health. The process extended over two years and cost in the vicinity of \$2 million.

The Cremona case was discontinued on March 5, 1998 and with it the last of the hold orders. In a flurry of activity the army of lawyers was once again mobilised over the issue of what to do about the damaging documents. As the judge put it a “window of opportunity” between lawsuits and hold orders appeared. At the direction of BATCO lawyer Nick Cannar, the Cremona database was destroyed, apparently by April 15 of that year. Maher conceded in evidence that the “effect of the policy was to obliterate knowledge of the fact of the existence of documents.” Not only were documents destroyed but also lists of what they were, summaries, CDs, and so on, so that there was no way to determine what might have existed. A database of internal scientific reports was retained but it is impossible to know how much of this category was likewise destroyed in the blitz.

When Rolah McCabe requested discovery in her case, none of the Cremona documents were produced and there was no explanation as to where they might be. The judge described the affidavit of documents filed on behalf of BAT as “coy”, “conveying different meanings to different readers...” Robyn Chalmers, who gave advice in 1998 on the destruction of the Cremona documents, prepared the affidavit of documents and subsequent affidavits on the issue of discovery or lack thereof.

The court heard evidence that Clayton Utz and barristers briefed in the case also vetted all the affidavits filed in court on the issue of discovery. The court found: “It was a very deliberate strategy designed to avoid exposure of the significant level of destruction of documents, and to avoid, in turn, exposure of the broader strategy which had been put in place to deny a fair trial to the plaintiff. The Affidavit of Documents was deceptive or misleading in a number of ways.”

Although advising their client on the best way to destroy documents, the

lawyers did warn that negative consequences could arise, for instance a court inference that any document destroyed would have harmed the defence, or a contempt of court finding. One prescient lawyer even suggested that the company’s defence could be struck out.

Fifteen studies on child smoking, discovered in the Cremona case, disappeared. All documents relating to the advertising of BAT’s cigarettes disappeared. No correspondence between BAT and other tobacco companies or their affiliates on the pharmacological effect of nicotine on the human body or indeed any other topic ever surfaced. The judge concluded, “It must be assumed that the defendant regarded the damage which the defence would suffer if the inferences were drawn against it, as being outweighed by the extent of the damage which it would suffer if the plaintiff had access to the documents.”

Not only did BAT destroy documents. The company has continued to deny that it has consistently targeted youth in a bid to recruit new smokers as older ones die or quit. One is reminded of the 1994 spectacle of the “Seven Dwarfs”, the heads of the giant tobacco companies, testifying before the US Congress and denying any marketing towards young people.

An article detailing the results of an investigation into the claim that the tobacco industry does not market its products to youth concluded “Industry documents show that the cigarette manufacturers carefully monitored the smoking habits of teenagers over the past several decades. Candid quotes from industry executives refer to youth as a source of sales and as fundamental to the survival of the tobacco industry. The documents reveal that the features of cigarette brands (that is, use of filters, low tar, bland taste, etc), packaging (that is, size, colour and design), and advertising (that is, media placements and themes and imagery) were developed specifically to appeal to new smokers (that is, teenagers). Evidence also indicates that relevant youth-oriented marketing documents may have been destroyed and that the language used in some of the more recent documents may have been sanitised to cover up efforts to market to youth” (*Marketing to America’s youth: evidence from corporate documents*, by K.M. Cummings, C.P. Morley, J.K. Horan, C. Steger and N-R. Leavell, Tobacco Control 2002;11:i5-i17).

An ironical twist to this story is the participation of British American Tobacco, among many others (Shell International, Deutsche Bank Group, Anglo American, British Telecommunications and British Airways), in the Ethical Corporation Europe 2002 conference on April 24, 25 and 26 in London. The promotional material promises to “provide companies with practical advice on how to manage social and environmental responsibility and measure ethical performance”.

The judgment in the case of McCabe versus BAT will be the subject of an appeal. Clayton Utz lawyers are asserting that it is *they* who have been treated unfairly, notwithstanding the fact that the judge specifically warned them he was coming to adverse findings and invited them to give evidence in their own defence. Neither Travers nor Wilson chose to do this.

BAT is fighting a rearguard action to try and prevent documents from the McCabe case from being sent to the US Department of Justice. For its part, Clayton Utz is desperately trying to hold on to major clients, such as a national medical indemnity insurer, now reportedly under considerable pressure to sack its lawyers.



To contact the WSWs and the Socialist Equality Party visit:

**[wsws.org/contact](http://wsws.org/contact)**