Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

APPLICANTS

APPLICATION RECORD OF THE APPLICANTS (VOLUME 2 OF 2)

March 12, 2019

OSLER, HOSKIN & HARCOURT LLP
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Deborah Glendinning (LSO# 31070N)
Marc Wasserman (LSO# 44066M)
John A. MacDonald (LSO# 25884R)
Michael De Lellis (LSO# 48038U)

Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers to the Applicants,
Imperial Tobacco Canada Limited and
Imperial Tobacco Company Limited

TO: **FTI CONSULTING CANADA INC.**

TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, ON M4K 1G8

Greg Watson
Tel: 416.649.8077
Paul Bishop
Tel: 416.649.8100
Jeffrey Rosenberg
Tel: 416.649.8073

Fax: 416.649.8101

greg.watson@fticonsulting.com
paul.bishop@fticonsulting.com
jeffrey.rosenberg@fticonsulting.com

The Proposed Monitor

AND TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**

RBC Centre
155 Wellington Street West
Toronto, ON M5V 3J7

Jay Swartz
Tel: 416.863.5520
Robin Schwill
Tel: 416.863.5502
Natasha MacParland
Tel: 416.863.5567

Fax: 416.863.0871

jswartz@dwpv.com
rschwill@dwpv.com
nmacparland@dwpv.com

Lawyers to the Proposed Monitor, FTI Consulting Canada Inc.

AND TO: **LAX O'SULLIVAN LISUS GOTTLIEB LLP**

Suite 2750, 145 King Street West
Toronto, ON M5H 1J8

Jonathan Lisus
Tel: 416.598.7873
Matthew Gottlieb
Tel: 416.644.5353

Fax: 416.598.3730

jlisus@lolg.ca
mgottlieb@lolg.ca

Lawyers to the Proposed Tobacco Claimant Representative

AND TO: **STIKEMAN ELLIOTT LLP**

5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

David Byers
Tel: 416.869.5697
Maria Konyukhova
Tel: 416.869.5230

Fax: 416.947.0866

dbyers@stikeman.com
mkonyukhova@stikeman.com

Lawyers to British American Tobacco p.l.c., B.A.T Industries p.l.c. , and British American Tobacco (Investments) Limited

TABLE OF CONTENTS

TABLE OF CONTENTS

TAB		DOCUMENT	
	R.	Exhibit "R"	Copy of the Ontario Medicaid Action (Second Amended Fresh as Amended Statement of Claim) dated May 29, 2018
	S.	Exhibit "S"	Copies of Class Actions Statements of Claim
	I.		Blais Statement of Claim
	II.		Letourneau Statement of Claim
	III.		Knight Statement of Claim
	IV.		Semple Statement of Claim
	V.		Kunta Statement of Claim
	VI.		Adams Statement of Claim
	VII.		Dorion Statement of Claim
	VIII.		Bourassa Statement of Claim
	IX.		McDermid Statement of Claim
	X.		Jacklin Statement of Claim
	XI.		Tobacco Growers Statement of Claim
	T.	Exhibit "T"	Copy of the Monitor's (FTI Consulting Canada Inc.) consent dated March 10, 2019
	U.	Exhibit "U"	ITCAN's 13-week cash flow projections and the underlying assumptions
	V.	Exhibit "V"	Copies of the first page of each of the Statements of Claim referenced in Schedule A of the Thauvette Affidavit
3.		**Affidavit of Nancy Roberts, sworn March 12, 2019**	

TAB J

THIS IS **EXHIBIT "J"** TO THE AFFIDAVIT
OF ERIC THAUVETTE, SWORN BEFORE ME
ON MARCH 12, 2019

Waleed Malik

Commissioner for Taking Affidavits
LSO # 678960

SUPERIOR COURT
(Class Action Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

N° : 500-06-000076-980
500-06-000070-983

DATE : May 27, 2015

PRESIDING: THE HONORABLE BRIAN RIORDAN, J.S.C.

N° 500-06-000070-983

CÉCILIA LÉTOURNEAU
Plaintiff

v.

JTI-MACDONALD CORP. ("**JTM**")
and
IMPERIAL TOBACCO CANADA LIMITED. ("**ITL**")
and
ROTHMANS, BENSON & HEDGES INC. ("**RBH**")
Defendants (collectively: the "**Companies**")

AND

N° 500-06-000076-980

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
and
JEAN-YVES BLAIS
Plaintiffs

v.

JTI-MACDONALD CORP.
and
IMPERIAL TOBACCO CANADA LIMITED.
and
ROTHMANS, BENSON & HEDGES INC.
Defendants

JUDGMENT

JR1353

INDEX

RÉSUMÉ DU JUGEMENT

Les deux recours collectifs contre les compagnies canadiennes de cigarettes sont accueillis en partie.

Dans les deux dossiers, la réclamation pour dommages sur une base collective est limitée aux dommages moraux et punitifs. Les deux groupes de demandeurs renoncent à leur possible droit à des réclamations individuelles pour dommages compensatoires, tels la perte de revenus.

Dans le dossier Blais, intenté au nom d'un groupe de personnes ayant été diagnostiquées d'un cancer du poumon ou de la gorge ou d'emphysème, le Tribunal déclare les défenderesses responsables et octroie des dommages moraux et punitifs. Il statue qu'elles ont commis quatre fautes, soit en vertu du devoir général de ne pas causer un préjudice à d'autres, du devoir du manufacturier d'informer ses clients des risques et des dangers de ses produits, de la Charte des droits et libertés de la personne et de la Loi sur la protection du consommateur.

Dans le dossier Blais, le Tribunal octroie des dommages moraux au montant de 6 858 864 000 $ sur une base solidaire entre les défenderesses. Puisque l'action débute en 1998, cette somme s'accroit à approximativement 15 500 000 000 $ avec les intérêts et l'indemnité additionnelle. La responsabilité de chacune des défenderesses entre elles est comme suit:

ITL - 67%, RBH - 20% et JTM - 13%.

Puisqu'il est peu probable que les défenderesses puissent s'acquitter d'une telle somme d'un seul coup, le Tribunal exerce sa discrétion en ce qui concerne l'exécution du jugement. Ainsi, il ordonne un dépôt total initial de 1 000 000 000 $ à être partagé entre les défenderesses selon leur pourcentage de responsabilité et réserve le droit des demandeurs de demander d'autres dépôts, si nécessaire.

Dans le dossier Létourneau, intenté au nom d'un groupe de personnes devenues dépendantes de la nicotine, le Tribunal trouve les défenderesses responsables sous les deux chefs de dommages en ce qui concerne les quatre mêmes fautes. Malgré cette conclusion, le Tribunal refuse d'ordonner le paiement des dommages moraux puisque la preuve ne permet pas d'établir d'une façon suffisamment exacte le montant total des réclamations des membres.

Les fautes en vertu de la *Charte* québécoise et de la *Loi sur la protection du consommateur* permettent l'octroi de dommages punitifs. Comme base pour l'évaluation de ces dommages, le Tribunal choisit le profit annuel avant impôts de chaque défenderesse. Ce montant couvre les deux dossiers. Considérant le comportement particulièrement inacceptable de ITL durant la période ainsi que celui de JTM, mais à un degré moindre, le Tribunal augmente les montants pour lesquels elles sont responsables au dessus du montant de base. Pour l'ensemble, les dommages punitifs se chiffrent à 1 310 000 000 $, partagé entre les défenderesses comme suit:

ITL – 725 000 000 $, RBH – 460 000 000 $ et JTM – 125 000 000 $.

Il faut partager cette somme entre les deux dossiers. Pour ce faire, le Tribunal tient compte de l'impact beaucoup plus grand des fautes des défenderesses relativement au groupe Blais comparé au groupe Létourneau. Ainsi, il attribue 90% du total au groupe Blais et 10% au groupe Létourneau.

Cependant, compte tenu de l'importance des dommages moraux accordés dans Blais, le Tribunal limite les dommages punitifs dans ce dossier. Ainsi, il condamne chaque défenderesse à une somme symbolique de 30 000 $. Cela représente un dollar pour la mort de chaque Canadien causée par l'industrie du tabac chaque année, tel que constaté dans un jugement de la Cour suprême du Canada en 1995.

Il s'ensuit que pour le dossier Létourneau, la condamnation totale pour dommages punitifs se chiffre à 131 000 000 $, soit 10% de l'ensemble. Le partage entre les défenderesses se fait comme suit:

ITL – 72 500 000 $, RBH – 46 000 000 $ et JTM – 12 500 000 $

Puisque le nombre de personnes dans le groupe Létourneau totalise près d'un million, cette somme ne représente que quelque 130 $ par membre. De plus, compte tenu du fait que le Tribunal n'octroie pas de dommages moraux dans ce dossier, il refuse de procéder à la distribution d'un montant à chacun des membres pour le motif que cela serait impraticable ou trop onéreux.

Enfin, le Tribunal ordonne l'exécution provisoire nonobstant appel en ce qui concerne le dépôt initial de un milliard de dollars en guise de dommages moraux, plus tous les dommages punitifs accordés. Les défenderesses devront déposer ces sommes en fiducie avec leurs procureurs respectifs dans les soixante jours de la date du présent jugement. Le Tribunal statuera sur la manière de les débourser lors d'une audition subséquente.

SUMMARY OF THE JUDGMENT

The two class actions against the Canadian cigarette companies are maintained in part.

In both actions, the claim for common or collective damages was limited to moral damages and punitive damages, with both classes of plaintiffs renouncing their potential right to make individual claims for compensatory damages, such as loss of income.

In the Blais File, taken in the name of a class of persons with lung cancer, throat cancer or emphysema, the Court finds the defendants liable for both moral and punitive damages. It holds that they committed four separate faults, including under the general duty not to cause injury to another person, under the duty of a manufacturer to inform its customers of the risks and dangers of its products, under the Quebec Charter of Human Rights and Freedoms and under the Quebec Consumer Protection Act.

In Blais, the Court awards moral damages in the amount of $6,858,864,000 solidarily among the defendants. Since this action was instituted in 1998, this sum translates to approximately $15,500,000,000 once interest and the additional indemnity are added. The respective liability of the defendants among themselves is as follows:

ITL - 67%, RBH - 20% and JTM - 13%.

Recognizing that it is unlikely that the defendants could pay that amount all at once, the Court exercises its discretion with respect to the execution of the judgment. It thus orders an initial aggregate deposit of $1,000,000,000, divided among the defendants in accordance with their share of liability and reserves the plaintiffs' right to request further deposits, if necessary.

In the Létourneau File, taken in the name of persons who were dependent on nicotine, the Court finds the defendants liable for both heads of damage with respect to the same four faults. In spite of such liability, the Court refuses to order the payment of moral damages because the evidence does not establish with sufficient accuracy the total amount of the claims of the members.

The faults under the Quebec *Charter* and the *Consumer Protection Act* allow for the awarding of punitive damages. The Court sets the base for their calculation at one year's before-tax profits of each defendant, this covering both files. Taking into account the particularly unacceptable behaviour of ITL over the Class Period and, to a lesser extent, JTM, the Court increases the sums attributed to them above the base amount to arrive at an aggregate of $1,310,000,000, divided as follows:

ITL - $725,000,000, RBH - $460,000,000 and JTM - $125,000,000.

It is necessary to divide this amount between the two files. For that, the Court takes account of the significantly higher impact of the defendants' faults on the Blais Class compared to Létourneau. It thus attributes 90% of the total to Blais and 10% to the Létourneau Class.

Nevertheless, in light of the size of the award for moral damages in Blais, the Court feels obliged to limit punitive damages there to the symbolic amount of $30,000 for each defendant. This represents one dollar for each Canadian death the tobacco industry causes in Canada every year, as stated in a 1995 Supreme Court judgment.

In Létourneau, therefore, the aggregate award for punitive damages, at 10% of the total, is $131,000,000. That will be divided among the defendants as follows:

ITL - $72,500,000, RBH - $46,000,000 and JTM - $12,500,000

Since there are nearly one million people in the Létourneau Class, this represents only about $130 for each member. In light of that, and of the fact that there is no condemnation for moral damages in this file, the Court refuses distribution of an amount to each of the members on the ground that it is not possible or would be too expensive to do so.

Finally, the Court orders the provisional execution of the judgment notwithstanding appeal with respect to the initial deposit of one billion dollars of moral damages, plus all punitive damages awarded. The Defendants must deposit these sums in trust with their respective attorneys within sixty days of the date of the judgment. The Court will decide how those amounts are to be disbursed at a later hearing.

I. THE ACTIONS

I.A. THE PARTIES AND THE COMMON QUESTIONS

[1] In the fall of 1998[1], two motions for authorization to institute a class action were served on the Companies as co-defendants, one naming Cécilia Létourneau as the class representative (file 06-000070-983: the "**Létourneau File**" or "**Létourneau**"[2]), and the other naming Jean-Yves Blais and the Conseil québécois sur le tabac et la santé as the representatives (file 06-000076-980: the "**Blais File**" or "**Blais**")[3]. They were joined for proof and hearing both at the authorization stage and on the merits.

[2] The judgment of February 21, 2005 authorizing these actions (the "**Authorization Judgment**") defined the class members in each file (the "**Class Members**" or "**Members**"). After closing their evidence at trial, the Plaintiffs moved to modify those class descriptions in order that they correspond to the evidence actually adduced. The Court authorized certain amendments and the class definitions as at the end of the trial were as follows:

For the Blais File

All persons residing in Quebec who satisfy the following criteria:	*Toutes les personnes résidant au Québec qui satisfont aux critères suivants:*
1) To have smoked, before November 20, 1998, a minimum of 5 pack/years[4] of cigarettes made by the defendants (that is the equivalent of a minimum of 36,500 cigarettes, namely any combination of the number of cigarettes smoked per day multiplied by the number of days of consumption insofar as the total is equal or greater than 36,500 cigarettes).	*1) Avoir fumé, avant le 20 novembre 1998, au minimum 5 paquets/année de cigarettes fabriquées par les défenderesses (soit l'équivalent d'un minimum de 36 500 cigarettes, c'est-à-dire toute combinaison du nombre de cigarettes fumées par jour multiplié par le nombre de jours de consommation dans la mesure où le total est égal ou supérieur à 36 500 cigarettes).*
For example, 5 pack/years equals:	*Par exemple, 5 paquets/année égale:*
20 cigarettes per day for 5 years (20 X 365 X 5 = 36,500) or	*20 cigarettes par jour pendant 5 ans (20 X 365 X 5 = 36 500) ou*
25 cigarettes per day for 4 years (25 X 365 X 4 = 36,500) or	*25 cigarettes par jour pendant 4 ans (25 X 365 X 4 = 36 500) ou*
10 cigarettes per day for 10 years (10 X 365 X 10 = 36,500) or	*10 cigarettes par jour pendant 10 ans (10 X 365 X 10 = 36 500) ou*

---

1 September 30, 1998 in the Létourneau File and November 20, 1998 in the Blais File.

2 Schedule "A" to the present judgment provides a glossary of most of the defined terms used in the present judgment.

3 In general, reference to the singular, as in "the action" or "this file", encompasses both files.

4 A "pack year" is the equivalent of smoking 7,300 cigarettes, as follows: 1 pack of 20 cigarettes a day over one year: 365 x 20 = 7,300. It is also attained by 10 cigarettes a day for two years, two cigarettes a day for 10 years etc. Given Dr. Siemiatycki's Critical Amount of five pack years, this equates to having smoked 36,500 cigarettes over a person's lifetime.

5 cigarettes per day for 20 years (5 X 365 x 20 = 36,500) or	*5 cigarettes par jour pendant 20 ans (5 X 365 x 20 = 36 500) ou*
50 cigarettes per day for 2 years (50 X 365 X 2 = 36,500);	*50 cigarettes par jour pendant 2 ans (50 X 365 X 2 = 36 500);*
2) To have been diagnosed before March 12, 2012 with:	*2) Avoir été diagnostiquées avant le 12 mars 2012 avec:*
a) Lung cancer or	*a) Un cancer du poumon ou*
b) Cancer (squamous cell carcinoma) of the throat, that is to say of the larynx, the oropharynx or the hypopharynx or	*b) Un cancer (carcinome épidermoïde) de la gorge, à savoir du larynx, de l'oropharynx ou de l'hypopharynx ou*
c) Emphysema.	*c) de l'emphysème.*
The group also includes the heirs of the persons deceased after November 20, 1998 who satisfied the criteria mentioned herein.	*Le groupe comprend également les héritiers des personnes décédées après le 20 novembre 1998 qui satisfont aux critères décrits ci-haut.*

For the Létourneau File[5]

All persons residing in Quebec who, as of September 30, 1998, were addicted to the nicotine contained in the cigarettes made by the defendants and who otherwise satisfy the following criteria:	*Toutes les personnes résidant au Québec qui, en date du 30 septembre 1998, étaient dépendantes à la nicotine contenue dans les cigarettes fabriquées par les défenderesses et qui satisfont par ailleurs aux trois critères suivants:*
1) They started to smoke before September 30, 1994 by smoking the defendants' cigarettes;	*1) Elles ont commencé à fumer avant le 30 septembre 1994 en fumant les cigarettes fabriquées par les défenderesses;*
2) They smoked the cigarettes made by the defendants on a daily basis on September 30, 1998, that is, at least one cigarette a day during the 30 days preceding that date; and	*2) Elles fumaient les cigarettes fabriquées par les défenderesses de façon quotidienne au 30 septembre 1998, soit au moins une cigarette par jour pendant les 30 jours précédant cette date; et*
3) They were still smoking the defendants' cigarettes on February 21, 2005, or until their death, if it occurred before that date.	*3) Elles fumaient toujours les cigarettes fabriquées par les défenderesses en date du 21 février 2005, ou jusqu'à leur décès si celui-ci est survenu avant cette date.*
The group also includes the heirs of the members who satisfy the criteria described herein.	*Le groupe comprend également les héritiers des membres qui satisfont aux critères décrits ci-haut.*

[5] We note that the representative member of this class, Cécilia Létourneau, lost an action against ITL for $299.97 before the Small Claims Division of the Court of Québec in 1998. In accordance with article 985 of the *Code of Civil Procedure*, this judgment is not relevant to the present cases.

[3] The Authorization Judgment also set out the "eight principal questions of fact and law to be dealt with collectively" (the "**Common Questions**"). We set them out below, along with our unofficial English translation:[6]

A. Did the Defendants manufacture, market and sell a product that was dangerous and harmful to the health of consumers?	*A. Les défenderesses ont-elles fabriqué, mis en marché, commercialisé un produit dangereux, nocif pour la santé des consommateurs?*
B. Did the Defendants know, or were they presumed to know of the risks and dangers associated with the use of their products?	*B. Les défenderesses avaient-elles connaissance et étaient-elles présumées avoir connaissance des risques et des dangers associés à la consommation de leurs produits?*
C. Did the Defendants knowingly put on the market a product that creates dependence and did they choose not to use the parts of the tobacco containing a level of nicotine sufficiently low that it would have had the effect of terminating the dependence of a large part of the smoking population?	*C. Les défenderesses ont-elles sciemment mis sur le marché un produit qui crée une dépendance et ont-elles fait en sorte de ne pas utiliser les parties du tabac comportant un taux de nicotine tellement bas qu'il aurait pour effet de mettre fin à la dépendance d'une bonne partie des fumeurs?*
D. Did the Defendants employ a systematic policy of non-divulgation of such risks and dangers?	*D. Les défenderesses ont-elles mis en œuvre une politique systématique de non-divulgation de ces risques et de ces dangers?*
E. Did the Defendants trivialize or deny such risks and dangers?	*E. Les défenderesses ont-elles banalisé ou nié ces risques et ces dangers?*
F. Did the Defendants employ marketing strategies conveying false information about the characteristics of the items sold?	*F. Les défenderesses ont-elles mis sur pied des stratégies de marketing véhiculant de fausses informations sur les caractéristiques du bien vendu?*
G. Did the Defendants conspire among themselves to maintain a common front in order to impede users of their products from learning of the inherent dangers of such use?	*G. Les défenderesses ont-elles conspiré entre elles pour maintenir un front commun visant à empêcher que les utilisateurs de leurs produits ne soient informés des dangers inhérents à leur consommation?*
H. Did the Defendants intentionally interfere with the right to life, personal security	*H. Les défenderesses ont-elles intentionnellement porté atteinte au droit à la vie,*

[6] We have modified the order in which the questions were stated in the Authorization Judgment to be more in accordance with the sequence in which we prefer to examine them.

and inviolability of the class members?	*à la sécurité, à l'intégrité des membres du groupe?*

[4] Our review of the Common Questions leads us to conclude that questions "D" and "E" are very similar and should probably be combined. While "F" is not much different from them, the specific accent on marketing there justifies its being treated separately. Therefore, marketing aspects will not be analyzed in the new combined question that will replace "D" and "E" and be stated as follows:

D. Did the Defendants trivialize or deny or employ a systematic policy of non-divulgation of such risks and dangers?	*D. Les défenderesses ont-elles banalisé ou nié ou mis en œuvre une politique systématique de non-divulgation de ces risques et de ces dangers?*

[5] Accordingly, the Court will analyze seven principal questions of fact and law in these files: original questions A, B, C, new question D, and original questions F, G, H, which now become E, F and G (the "**Common Questions**")[7]. Moreover, as required in the Authorization Judgment, this analysis will cover the period from 1950 until the motions for authorization were served in 1998 (the "Class Period").

[6] We should make it clear at the outset that a positive response to a Common Question does not automatically translate into a fault by a Company. Other factors can come into play.

[7] A case in point is the first Common Question. It is not really contested that, during the Class Period, the Companies manufactured, marketed and sold products that were dangerous and harmful to the health of consumers. Before holding that to be a fault, however, we have to consider other issues, such as, when the Companies discovered that their products were dangerous, what steps they took to inform their customers of that and how informed were smokers from other sources. Assessment of fault can only be done in light of all relevant aspects.

[8] In interpreting the Common Questions, it is important to note that the word "product" is limited to machine-produced ("tailor-made") cigarettes and does not include any of the Companies' other products, such as cigars, pipe tobacco, loose or "roll-your-own" ("fine-cut") tobacco, chewing tobacco, cigarette substitutes, etc. Nor does it include any issues relating to second-hand or environmental smoke. Accordingly, unless otherwise noted, when this judgment speaks of the Companies' "products" or of "cigarettes", it is referring only to commercially-sold, tailor-made cigarettes produced by the Companies during the Class Period.

[9] The conclusions of each action are similar, although the amounts claimed vary.

[10] In the Blais File, the claim for non-pecuniary (moral) damages cites loss of enjoyment of life, physical and moral pain and suffering, loss of life expectancy, troubles,

---

[7] Given the different make-up of the classes and the different nature of the claims between the files, not all the Common Questions will necessary apply in both files. For example, question "C", dealing with dependence/addiction appears relevant only to the Létourneau file. To the extent that this becomes an issue, the Court will attempt to point out any difference in treatment between the files.

worries and inconveniences arising after having been diagnosed with one of the diseases named in the class description (the "**Diseases**"). After amendment, it seeks an amount of $100,000 for each Member with lung cancer or throat cancer and $30,000 for those with emphysema.

[11] In the Létourneau file, the moral damages are described as an increased risk of contracting a fatal disease, reduced life expectancy, social reprobation, loss of self esteem and humiliation[8]. It seeks an amount of $5,000 for each Member under that head.

[12] The amounts claimed for punitive damages were originally the same in both files: $5,000 a Member. That claim was amended during final argument to seek a global award of between $2,000 and $3,000 a Member, which the Plaintiffs calculate would total approximately $3,000,000,000.

[13] With respect to the manner of proceeding in the present judgment, the Court must examine the Common Questions separately for each of the Companies and each of the files. Although there will inevitably be overlap of the factual and, in particular, the expert proof, during the Class Period the Companies were acting independently of and, indeed, in fierce competition with each other in most aspects of their business. As a result, there must be separate conclusions for each of the Companies on each of the Common Questions in each file.

[14] Organisationally, we provide a glossary of the defined terms in Schedule A to this judgment. As well, we list in the schedules the witnesses according to the party to whom their testimony related. For example, Schedule D identifies the witnesses called by any of the parties who testified concerning matters relating to ITL. Witnesses from the Canadian Tobacco Manufacturers Council (the "**CTMC**") were initially called by the Plaintiffs and they are identified in Schedule C as "Non-Party, Non-Government Witnesses". The schedules also list the experts called by each party and, finally, reproduce extracts of relevant external documents[9].

I.B. THE ALLEGED BASES OF LIABILITY

[15] We are in the collective or common phase of these class actions, as opposed to analyzing individual cases. At this class-wide level, the Plaintiffs are claiming only moral (compensatory) and punitive (exemplary) damages.

[16] Moral damages are claimed under either of the *Civil Codes* in force during the Class Period, as well as under the *Consumer Protection Act*[10] (the "**CPA**") and under the *Québec Charter of Human Rights and Freedoms*[11] (the "**Quebec Charter**). Faults committed prior to January 1, 1994 would be evaluated under the *Civil Code of Lower Canada*, including article 1053, while those committed as of that date would fall under the current *Civil Code of Quebec*, more specifically, under articles 1457 and 1468 and

---

8 See paragraphs 182-185 of the Amended Introductory Motion of February 24, 2014 in the Létourneau File.

9 For ease of reference, we attempt to set out all relevant legislation in Schedule H, although we sometimes reproduce legislation in the text.

10 RLRQ, c. P-40.1.

11 RLRQ, c. C-12.

following[12]. In any event, the Plaintiffs see those differences as academic, since the test is essentially the same under both codes.

[17] As for punitive damages, those are claimed under article 272 of the CPA and article 49 of the Quebec Charter.

[18] The Plaintiffs argue that the rules of extracontractual (formerly delictual) liability apply here, and not contractual. Besides the fact that the Class Members have no direct contractual relationship with the Companies, they are alleging a conspiracy to mislead consumers "at large", both of which would lead to extracontractual liability[13].

[19] And even where a contract might exist, they point out that, as a general rule, the duty to inform arises before the contract is formed, thus excluding it from the contractual obligations coming later[14]. Here too, in their view, it makes no difference whether the regime be contractual or extracontractual, since the duty to inform is basically identical under both.

[20] For their part, the Companies agreed that we are in the domain of extracontractual liability as opposed to contractual.

[21] As for the liability of the Companies, the Plaintiffs not surprisingly take the position that all of the Common Questions should be answered in the affirmative and that an affirmative answer to a Common Question results in a civil fault by the Companies. They liken cigarettes to a trap, given their addictive nature, a trap that results in the direst of consequences for the "unwarned" user.

[22] In fact, the Plaintiffs charge the Companies with a fault far graver than failing to inform the public of the risks and dangers of cigarettes. They allege that the Companies conspired to "disinform" the public and government officials of those dangers, i.e., as stated in their Notes[15], "to prevent knowledge of the nature and extent of the dangers inherent in (cigarettes) from being known and understood". The allegation appears to target both efforts to misinform and those to keep people confused and uninformed.

[23] The Plaintiffs see such behaviour as being so egregious and against public order that it should create a *fin de non recevoir*[16] against any attempt by the Companies to defend against these actions, including on the ground of prescription[17].

[24] For similar reasons, the Plaintiffs seek a reversal of the burden of proof. They argue that the onus should shift to the Companies to prove that Class Members, in spite

---

12 *An Act Respecting the Implementation of the Reform of the Civil Code*, L.Q. 1992, c. 57, article 65.

13 *Option Consommateurs c. Infineon Technologies*, a.g., 2011 QCCA 2116, para 28.

14 See Pierre-Gabriel JOBIN, *« Les ramifications de l'interdiction d'opter. Y-a-t-il un contrat ? Où finit-il ? »*, (2009) 88 R. du B. Can 355 at page 363.

15 See paragraph 54 of Plaintiffs' Notes. Mention of the "Notes" of any of the parties refers to their respective "Notes and Authorities" filed in support of their closing arguments.

16 In general terms, a *fin de non recevoir* can be found when a person's conduct is so reprehensible that the courts should refuse to recognize his otherwise valid rights. It is a type of estoppel.

17 See paragraphs 100, 105, 107 and 120 of the Plaintiffs' Notes dealing with the Companies' right to make a defence, and paragraphs 2159 and following on prescription.

of being properly warned, would have voluntarily chosen to begin smoking or would have voluntarily continued smoking once addicted[18].

[25] On the question of the *Consumer Protection Act*, the Plaintiffs argue that the Companies committed the prohibited practices set out in sections 219, 220(a) and 228, the last of which attracting special attention as a type of "legislative enactment of the duty to inform"[19]:

> **228.** No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.

[26] They argue that the Companies' disinformation campaign is a clear case of failing to mention an important fact, i.e., that any use of the product harms the consumer's health. They add that the Companies failed to mention these important facts over the entire Class Period, including after the entry into force of the Quebec Charter and the relevant sections of the CPA.

[27] The Plaintiffs note that a court may award punitive damages irrespective of whether compensatory damages are granted[20]. They argue that the CPA introduces considerations for awarding punitive damages in addition to those set out in article 1621 of the Civil Code, since "the public order nature of its Title II provisions means that a court can award punitive damages to prevent not only intentional, malicious, or vexatious behaviour, but also ignorant, careless, or seriously negligent conduct".[21]

[28] The Plaintiffs see this as establishing a lower threshold of wrongful behaviour for the granting of punitive damages than under section 49 of the Quebec Charter, where proof of intentionality is required.

[29] As for the Quebec Charter, the Plaintiffs argue that the Companies intentionally violated the Class Members' right to life, personal inviolability[22], personal freedom and dignity under articles 1 and 4. This would allow them to claim compensatory damages under the first paragraph of article 49 and punitive damages under the second paragraph.

[30] If the claims relating to the right to life and personal inviolability are easily understood, it is helpful to explain the others. For the claim with respect to personal freedom, the Plaintiffs find its source in the addictive nature of tobacco smoke that frustrates a person's right to be able to control important decisions affecting his life.

[31] As for the violation of the Class Members' dignity, the Plaintiffs summarize that argument as follows in their Notes:

---

18 See paragraph 96 of Plaintiffs' Notes.

19 Claude MASSE, *Loi sur la protection du consommateur : analyse et commentaires*, Cowansville : Les Éditions Yvon Blais Inc., 1999, page 861.

20 *Richard v. Time Inc.,* [2012] 1 S.C.R. 265 ("***Time***"), at paragraphs 145, 147. See also *de Montigny c. Brossard (succession)*, 2010 SCC 51.

21 *Ibidem, Time*, at paragraphs 175-177.

22 "The common meaning of the word "inviolability" suggests that the interference with that right must leave some marks, some *sequelae*, which, while not necessarily physical or permanent, exceed a certain threshold. The interference must affect the victim's physical, psychological or emotional equilibrium in something more than a fleeting manner": *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand* [1996] 3 SCR 211, at paras. 96-97.

> **191.** A manufacturer mindful of a fellow human being's dignity does not sell them a product that will trap them in an addiction and lead to development of serious health problems or death. Such a manufacturer does not design, sell, and market a useless, toxic product and then hide the true nature of that product. The Defendants committed these acts and omissions over decades. The Defendants thus deliberately committed an egregious and troubling violation of the Plaintiffs' right to dignity.

[32] Of the criteria for assessing the amount of punitive damages set out in article 1621 of the *Civil Code*, the Plaintiffs put particular emphasis on the gravity of the debtor's fault. This position is supported by the Supreme Court in the *Time* decision, who categorized it as "undoubtedly the most important factor"[23].

[33] Along those lines, the Plaintiffs made extensive proof and argument that the Companies marketed their cigarettes to under-age smokers and to non-smokers. We consider those arguments in section II.E of this judgment.

I.C. THE COMPANIES' VIEW OF THE KEY ISSUES

[34] The Companies, for their part, were consistent in emphasizing the evidentiary burden on the Plaintiffs. In its Notes, JTM identifies the key issues as being:

> **16.** The first issue in these cases is whether JTIM can be said to have engaged in wrongful conduct at all, given that class members are entitled to take risks and that they knew or could have known about the health risks associated with smoking.
>
> **17.** Secondly, the issue is whether this Court can conclude that JTIM committed any fault, given that throughout the class period it behaved in conformity with the strict regulatory regime put in place by responsible and knowledgeable public health authorities.
>
> **18.** Thirdly, to the extent that JTIM has committed any fault, the issue is whether that fault can engage its liability. Unless Plaintiffs show that it led each class member to make the decision to smoke or continue smoking when he/she would not otherwise have made that choice, *and* that it was the resulting "wrongful smoking", attributable to the fault of JTIM, that was the physical cause of each member's disease (sic). Without such proof, collective recovery is simply not possible or justified in these cases.
>
> **16.** (sic) Finally, with respect to punitive damages, the key issue (apart from the fact that they are prescribed) is whether a party that has conformed with public policy, including by warning consumers since 1972 of the risks of smoking in accordance with the wording prescribed by the government, can be said to have intentionally sought to harm class members that have made the choice to smoke, especially in the absence of any evidence from any class member that anything that JTIM is alleged to have done had any impact whatsoever on him or her.

[35] The Companies also underline – seemingly on dozens of occasions - that the absence of testimony of class members in these files represents an insurmountable obstacle to proving the essential elements of fault, damages and causation for each Member. The class action regime, they remind the Court, does not relieve the Plaintiffs of

---

[23] *Op. cit.*, *Time*, Note 20, at paragraph 200.

the obligation of proving these three elements in the normal fashion, as the case law consistently states. As well, the Companies point out that the case law clearly requires that those elements be proven for each member of the class and the Plaintiffs' choice not to call any Members as witnesses should lead the Court to make an adverse inference against them in that regard.

[36] As mentioned, since each Company's conduct was, at least in part, unique to it and different from that of the others, we must deal with the Common Questions on a Company-by-Company basis.

II. IMPERIAL TOBACCO CANADA LTD.[24]

[37] Given that ITL was the largest of the Companies during the Class Period, the Court will analyze the case against it first.

[38] The corporate history of ITL is quite complicated, with the broad lines of it being set out in Exhibit 20000. Through predecessor companies, ITL has done business in Canada since 1912. In 2000, two years after the end of the Class Period, it was amalgamated with Imasco Limited (and other companies) under the ITL name, with British American Tobacco Inc. ("**BAT**"), a British corporation, becoming its sole shareholder.

[39] Both directly and through companies over which it had at least *de facto* control, BAT was very much present in ITL's corporate picture during the Class Period, with its level of control of ITL's voting shares ranging between 40% and 58% (Exhibit 20000.1). As a result, the Court allowed evidence relating to BAT's possible influence over ITL during the Class Period.

[40] We now turn to the first Common Questions as it relates to ITL.

II.A. DID ITL MANUFACTURE, MARKET AND SELL A PRODUCT THAT WAS DANGEROUS AND HARMFUL TO THE HEALTH OF CONSUMERS?

[41] What is a "dangerous" product? One is tempted to say that it would be a product that is harmful to the health of consumers, but that would make the second part of this question redundant. In light of the other Common Questions, we shall take it that "harmful to the health of consumers" means that it would cause either the Diseases in the Blais Class or tobacco dependence in the Létourneau Class. The latter holding requires us to determine if tobacco dependence is dangerous and harmful to the health of consumers, a question we answer affirmatively further on in the present judgment[25].

[42] In its Notes, ITL sums up its position on this question as follows:

> **292.** The evidence overwhelmingly supports the testimony of ITL and BAT scientists who told the Court that, throughout the Class Period, they and their colleagues engaged in a massive research effort, in the face of an enormous series

---

[24] The witnesses called by any of the parties who testified concerning matters relating to ITL are listed in Schedule D to the present judgment and those called by the Plaintiffs who testified concerning non-company matters are listed in Schedule C. Schedules E and F apply to JTM and RBH respectively.

[25] See section II.C.1.

of challenges and made good faith efforts to reduce the risks of smoking (and continue to do so).

293. The work carried on in the R&D department of ITL was professional and driven by ethical considerations. In particular, Dr. Porter could name no avenues of work that were worth pursuing in the search for a less hazardous cigarette but which were not pursued by ITL or the larger BAT group.

294. Acting in good faith and in accordance with the state of the art at all relevant times, ITL took steps to reduce the hazards associated with its cigarettes. Contrary to what Plaintiffs might suggest, the mere fact that smoking continues to pose a (known) risk to consumers due to the inherent make-up of cigarettes simply does not give rise to a de facto "dangerous product" or "defective product" claim.

[43] Also, in response to a request from the Court as to when each Company first admitted that smoking caused a Disease, ITL pointed out that, early on in the Class Period, its scientists adopted the working hypothesis that there is a relationship between smoking and disease.

[44] Whatever the merits of these arguments, they contain clear admissions that ITL manufactured, marketed and sold products that were dangerous and harmful to the health of consumers.

[45] This is confirmed by the testimony of ITL's current president, Marie Polet. At trial, she made the following statements:

ON JUNE 4, 2012:

Q121: A - Well, BAT has acknowledged for many, many years that smoking is a cause of serious disease. So, absolutely, I believe that that's something that I agree with.

Q158: A- The company I have worked for, for those years, and that's BAT, yes. So I can't speak to Imperial Tobacco specifically but I can tell you that I've always recalled BAT saying that there was a risk associated to smoking and accepting that risk.

Q251: A- I think we have a duty to work on trying to reduce the harm of the products we sell; I believe we are responsible for that.

Q302: A- What I believe is that smoking can cause a number of serious and, in some cases, fatal diseases. And those diseases that I see here are commonly referred to as these diseases (referring to a list of diseases) that smoking can cause.

Q339: A- … It was very clear at that point in time, and I believe it was very clear many years before, decades before actually, and I can only speak to my own environment, and that was Europe, that smoking was a ... you know, represented a health risk. It was very clear and it had been very clear in my view for many years before I joined (in 1978).

> Q811: A- I think, as I... I think I said that earlier, as a company selling a product which can cause serious disease, it is our responsibility to work and to do as much as we can to try and develop ways and means to reduce the harm of those products. So I believe that that's the company's position at this point in time.
>
> ON JUNE 5, 2012:
>
> Q334: A- I would say that none of them (ITL's brands) is safe. I don't think any tobacco product in any form could qualify under the definition of "safe."

[46] Although she added a number of qualifiers at other points, for example, that smoking is a general cause of lung cancer but it cannot be identified as the specific cause in any individual case, Mme. Polet's candid statements provide further admissions to the effect that ITL did manufacture, market and sell a product that was dangerous and harmful to the health of consumers during the Class Period.

[47] In fact, none of the Companies today denies that smoking is a cause of disease in some people, although each steadfastly denies any general statement that it is the major cause of any disease, including lung cancer.

[48] The real questions, therefore, become not whether the Companies sold a dangerous and harmful product but, rather, when did each of them learn, or should have learned, that its products were dangerous and harmful and what obligations did each have to its customers as a result. These points are covered in the other Common Questions.

[49] Also examined in the other Common Questions is the Companies' argument that it is not a fault to sell a dangerous product, provided it does not contain a safety defect. A safety defect is described in article 1469 of the Civil Code as being a situation where the product "does not afford the safety which a person is normally entitled to expect, particularly by reason of a defect in the design or manufacture of the thing, poor preservation or presentation of the thing, or the lack of sufficient indications as to the risks and dangers it involves or as to safety precautions".

[50] The Plaintiffs, on the other hand, argue that the special rules set out in articles 1469 and 1473 shift the burden of proof on this point to the Companies. While confirming this position, article 1473 creates two possible defences, whereby the manufacturer must prove:

a. that the victim knew or could have known of the defect or

b. that the manufacturer could not have known of it at the time the product was manufactured or sold[26].

[51] We must examine both possible defences. The formulation of the second Common Question makes it appropriate to undertake that analysis immediately, though we are fully cognizant that we have not as yet been made any finding of fault by the Companies.

---

[26] The full text of these articles is set out in other parts of this judgment, as well as in Schedule "H".

II.B. DID ITL KNOW, OR WAS IT PRESUMED TO KNOW OF THE RISKS AND DANGERS ASSOCIATED WITH THE USE OF ITS PRODUCTS?

[52] The pertinence of this question flows from the two articles of the Civil Code mentioned above. Article 1469 indicates that a safety defect in a product occurs where it does not afford the safety which a person is normally entitled to expect, including by reason of a lack of sufficient indications as to the risks and dangers it involves. Nevertheless, even where a safety defect exists, the second paragraph of article 1473 would exculpate the manufacturer if he proves either that the plaintiff knew of it or that he, the manufacturer, could not have known of it at the time and that he acted diligently once he learned of it.

[53] Exactly what are the risks and dangers associated with the use of cigarettes for the purposes of this Common Question? The class descriptions answer that. The increased likelihood of contracting one of the Diseases is a risk or danger associated with smoking, as admitted by Mme. Polet. The same can be said for the likelihood of becoming dependent on cigarettes in light of the fact that they increase the probability of contracting one of the Diseases.[27]

[54] As for knowledge of the risks and dangers relating to the Diseases and dependence, the evidence indicates that both scientific and public recognition of the risks and dangers of dependence came later than for the Diseases. For example, it was not until his 1988 report that the US Surgeon General clearly identified the dependence-creating dangers of nicotine use, whereas he pointed out the health risks of tobacco smoke as early as 1964. As well, warnings on the cigarette packs began in 1972, but did not mention dependence or addiction until 1994.

II.B.1 THE BLAIS FILE

II.B.1.a AS OF WHAT DATE DID ITL KNOW OF THE RISKS AND DANGERS?

[55] In April and May 1958, three BAT scientists made an omnibus tour of the United States, with a stop in Montreal, for the purpose, *inter alia*, of seeking information on "the extent to which it is accepted that cigarette smoke 'causes' lung cancer". Their ten-page report on the visit (Exhibit 1398) portrays an essentially unanimous consensus among the specialists interviewed to the effect that smoking causes lung cancer:

> CAUSATION OF LUNG CANCER
>
> With one exception (H.S.N. Greene) the individuals with whom we met believed that smoking causes lung cancer if by "causation" we mean any chain of events that leads eventually to lung cancer and which involves smoking as an indispensable link. In the USA only Berkson, apparently, is now prepared to doubt the statistical evidence and his reasoning is nowhere thought to be sound[28].

---

[27] The Plaintiffs characterize "compensation", as discussed later in this judgment, as one of the risks and dangers of smoking. Although the Court disagrees with that characterization, it does agree that compensation is a factor that needs to be considered in the present judgment, which we do further on.

[28] At page 3 pdf.

> CONCLUSIONS
>
> 1. Although there remains some doubt as to the proportion of the total lung cancer mortality which can fairly be attributed to smoking, scientific opinion in USA does not now seriously doubt that the statistical correlation is real and reflects a cause and effect relationship[29].

[56] Given the close intercorporate and political collaboration between the tobacco industries in the US and Canada by the beginning of the Class Period[30], the state of knowledge in this regard was essentially the same in both countries, as well as in England, where BAT was headquartered. Nevertheless, except for one short-lived blip on the radar screen by Rothmans in 1958, which the Court examines in a later chapter, no one in the Canadian tobacco industry was saying anything publicly about the health risks of smoking outside of corporate walls. In fact, at ITL's instigation, it and the other Companies started moving towards a "Policy of Silence" about smoking and health issues as of 1962.[31]

[57] Within the industry's walls, however, certain individuals in ITL and BAT were finding it increasingly difficult to hold their tongue. Not surprisingly, the ones most recalcitrant in the face of this wall of silence were the scientists.[32]

[58] Prominent among them was BAT's chief scientist, Dr. S.J. Green, now deceased. In a July 1972 internal memo entitled "THE ASSOCIATION OF SMOKING AND DISEASE" (Exhibit 1395), Dr. Green goes very far indeed in advocating full disclosure. The force of his text is such that it is appropriate to cite, exceptionally, a large portion of it:

> I believe it will not be possible indefinitely to maintain the rather hollow "we are not doctors" stance and that, in due course, we shall have to come up in public with a more positive approach towards cigarette safety. In my view, it would be best to be in a position to say in public what was believed in private, i.e., to have consistent responsible policies across the board.
>
> …
>
> The basic assumptions on which our policy should be built must be recognized and challenged or accepted. A preliminary list of assumptions is suggested:
>
> 1) The association of cigarette smoking and some diseases is factual.
>
> …
>
> 6) The tobacco smoking habit is reinforced or dependent upon the psycho-pharmacological effects mainly of nicotine.

---

29 At page 9 pdf.

30 As of 1933, BAT had major shareholdings in ITL: see Exhibit 20,000.1. Later in this judgment, we discuss this collaboration, including the embracing of the scientific controversy strategy and the cross-border role of the public relations firm Hill & Knowlton.

31 This refers to the "Policy Statement" discussed in Section II.F.1 of the present judgment.

32 At trial, one of ITL's most prominent scientists, Dr. Minoo Bilimoria, stated what might seem the obvious, especially for a micro-biologist: "I've known of the hazard in smoking even before (the US Surgeon General's Report of 1979). I didn't have to have a Surgeon General report to tell me that smoking was not good for you". (Transcript of March 5, 2013 at page 208)

> …
>
> Is it still right to say that we will not make or imply health claims? In such a system of statutory control, can we completely abdicate from making judgments on our products in this context and confine ourselves to presenting choices to the consumer? In a league table position should we take advantage of a system of measurement or reporting in a way which could lead to misinforming our consumers?
>
> …
>
> … we must ensure that our consumers have a choice between genuine alternatives and are sufficiently informed to exercise their choice effectively.
>
> In my view, the establishment of league tables does not mean that the cigarette companies can contract out of responsibility for their products: league tables should be regarded only as a partial specification. We should not allow them to lead us to abdicate from making our own judgments. "We are not doctors", in my view may, through flattery, lead to short term peace with the medical establishment but will not fool the public for long.
>
> …
>
> To inform the consumer, i.e., to offer him an effective choice, health implications will have to be stated by government or industry or both and within the broader areas. Companies may well have to bring home the health implication at the least for different classes of their products.
>
> …
>
> Meanwhile, we should also study how we could inform the public directly.

[59] Dr. Green's already-heretical position actually hardened over time, as we shall see below.

[60] On this side of the Atlantic, a questioning of the conscience was also taking place. This is seen in a March 1977 memo (Exhibit 125) from Robert Gibb, head of ITL's Research and Development Department, commenting on an ITL position paper on smoking and health (Exhibit 125A) and a related document entitled "An Explanation" (Exhibit 125B). Both documents had been prepared by ITL's Marketing Department. He wrote:

> The days when the tobacco industry can argue with the doctors that the indictment is only based on statistics are long gone. I think we would be foolish to try to use "research" to combat what you term "false health claims" (item 7). Contrary to what you say, the industry has challenged the position of governments (e.g. Judy La Marsh hearings) with expert witnesses, and lost.
>
> The scientific "debate" nowadays is not <u>whether</u> smoking is a causative factor for certain diseases, but <u>how</u> it acts and <u>what</u> may be the harmful constituents in smoke. (emphasis in the original)

[61] Around the same time, Mr. Gibb distributed to ITL's upper management two papers by Dr. Green, the second of which echoed a similar concern and noted how the "domination by legal consideration … puts the industry in a peculiar position with respect to product safety discussions, safety evaluations, collaborative research " (Exhibit 29, at PDF 8):

CIGARETTE SMOKING AND CAUSAL RELATIONSHIPS

> The public position of tobacco companies with respect to causal explanations of the association of cigarette smoking and diseases is dominated by legal considerations. In the ultimate companies wish to be able to dispute that a particular product was the cause of injury to a particular person. By repudiation of a causal role for cigarette smoking in general they hope to avoid liability in particular cases. This domination by legal consideration thus leads the industry into a public rejection in total of any causal relationship between smoking and disease and puts the industry in a peculiar position with respect to product safety discussions, safety evaluations, collaborative research etc. Companies are actively seeking to make products acceptable as safer while denying strenuously the need to do so. To many the industry appears intransigent and irresponsible. The problem of causality has been inflated to enormous proportions. The industry has retreated behind impossible demands for "scientific proof" whereas' such proof has never been required as a basis for action in the legal and political fields. Indeed if the doctrine were widely adopted the results would be disastrous. I believe that with a better understanding of the nature of causality it is plain that while epidemiological evidence does indicate a cause for concern and action it cannot form a basis on which to claim damage for injury to a specific individual.

[62] Dr. Green's frank assessment of the industry's contradictory and conflicted position, and its domination by legal considerations, did not, however, totally blind him to the need to be sensitive to such issues, as reflected in his March 10, 1977 letter to Mr. Gibb commenting on the ITL position paper (Exhibit 125D):

> … and I think your paper would be a useful basis (for discussion) to start from. Of course, it may be suggested that it is better in some countries to have no such paper - "it's better not to know" and certainly not to put it in writing.

[63] Or perhaps Dr. Green was just being discreetly sarcastic, for his days at BAT were numbered.

[64] By April 1980, he "was no longer associated with BAT" (See Exhibit 31B). In fact, he was so "not" associated that he agreed to give a very forthright interview to a British television programme dealing with smoking and health issues. Here is the content of an April 1980 telex from Richard Marcotullio of RJRUS to Guy-Paul Massicotte, in-house legal counsel to RJRM in Montreal, on that topic (Exhibit 31B), another document meriting exceptionally long citation:

> Panorama TV program included following comments from Dr. S.J. Green, former BAT director of research and development:
>
> 1. He regards industry's position on causation as naïve, i.e. "to say evidence is statistical and cannot prove anything is a nonsense". He stated that nearly all evidence these days is statistical but believes that experiments can be and have been carried out that show that smoking is a very serious causal factor as far as the smoking population is concerned.
>
> 2. In response to a question as to whether he believes that cigarette smoking to be (sic) harmful he said he is quite sure it can and does cause harm. Specifically he said "I am quite sure it is a major factor in lung cancer in our

> society. In my opinion, if we could get a decrease in the prevalence of smoking we would get a decrease in the incidence of lung cancer".
>
> In addition, an anonymous quotation supposedly prepared by industry scientific advisors in 1972 was stated as follows:
>
> "I believe it will not be possible to maintain indefinitely the rather hollow 'we are not doctors' and I think in due course we will have to come up in public with a rather more positive approach towards cigarette safety. In my view it would be best to be in the position to say in public what we believe in private."
>
> Dr. Green referred briefly to ICOSI on the program and described it as representing the industry in the EEC. FYI, BAT's response has been that Dr. Green is no longer associated with BAT and his views therefore are those of a private individual. Further BAT reiterated the position that causation is a continuing controversy in scientific circles and that scientists are by no means unanimous in their views regarding smoking and health issues.
>
> As with previous telexes, please share the above information with whom you feel should be kept up to date.

[65] Robert Gibb, too, appears to have remained consistent in his scepticism of the wisdom and propriety of criticizing epidemiological/statistical research. Four years after his 1977 memo on ITL's position paper, he made the following comments in a 1981 letter concerning BAT's proposed Handbook on Smoking and Health (Exhibit 20, at PDF 2):

> The early part of the booklet casts doubt on epidemiological evidence and says there is no scientific proof. Later on epidemiology is used as evidence that filtered low tar cigarettes are beneficial. You can't have it both ways. I would think most health authorities consider well conducted epidemiology to be "scientific", in fact the only kind of "science" that can be brought to bear on diseases that are multi-factored origin, whose mechanisms are not understood, and take many years to develop. The credibility of scientists who still challenge the epidemiology is not high, and their views are ignored.

[66] Gibb was the head of ITL's science team and, to his credit, he refused to toe the party line on the "scientific controversy". On the other hand, his company, to its great discredit, not only failed to embrace the same honesty, but, worse still, pushed in the opposite direction[33].

[67] Getting back to the question at hand, to determine the starting date of ITL's knowledge of the dangers of its products one need only note that, over the Class Period, ITL adopted as its working hypothesis that smoking caused disease[34]. The research efforts of its fleet of scientists, which at times numbered over 70 people in Montreal

---

[33] This analysis unavoidably goes beyond the specific issue of the starting point of ITL's knowledge of the risks and dangers of its products. The light it casts on ITL's attitude towards divulging what it knew to the public and to government is also relevant to the question of punitive damages.

[34] See "ITL's Position on Causation Admission" filed as a supplement to its Notes.

alone[35], were at all relevant times premised on that hypothesis. It follows that, since the company was going to great lengths to eradicate the dangers, it had to know of them.

[68] Speaking of research, it should not be overlooked that one of the main research projects of the Companies, dating back even to before the Class Period, was the development of filters. Their function is to filter out the tar from the smoke, and it is from the tar, as it was famously reported by an eminent British researcher, that people die.[36]

[69] Then there is the expert evidence offered by the three Companies as to the date at which the public should be held to have known about the risks and dangers[37]. Messrs. Duch, Flaherty and Lacoursière put that date as falling between 1954 (for Duch) and the mid-1960s (for Flaherty).

[70] Although to a large degree the Court rejects the evidence of Messrs. Flaherty and Lacoursière, as explained later, there is no reason not to take account of such an admission as it reflects on the Companies' knowledge[38]. It is merely common sense to say that, advised by scientists and affiliated companies on the subject[39], the Companies level of knowledge of their products far outpaced that of the general public both in substance and in time[40]. These experts' evidence leads us to conclude that the Companies had full knowledge of the risks and dangers of smoking by the beginning of the Class Period.

[71] The Court acknowledges that little in the preceding refers directly to the Diseases of the Blais Class. For the most part, Dr. Greene and Mr. Gibb speak of "disease" in a generic way and the historians are no more specific. Nevertheless, we do not see this as an obstacle to arriving at a conclusion with regard to ITL's knowledge with respect to the Diseases. No one can reasonably doubt that the average tobacco company executive at the time would have included lung cancer, throat cancer and emphysema among the diseases likely caused by smoking.

[72] Thus, the Court concludes that at all times during the Class Period ITL knew of the risks and dangers of its products causing one of the Diseases.

[73] This conclusion not only answers the second Common Question in the affirmative with respect to ITL, but it also eliminates the second of the possible defences offered by article 1473. Hence, to the extent that ITL is found to have committed the fault of selling a product with a safety defect, its only defence would be to prove that the

---

35 ITL also had essentially unlimited access to the research conducted by BAT in England under a cost-sharing agreement.

36 M.A.H. Russell wrote in a June 1976 issue of the British Medical Journal: *"People smoke for nicotine but they die from the tar"* (Exhibit 121).

37 Later on in this judgment we show a table indicating the dates at which the various history experts opined as to that knowledge.

38 We do not accept this opinion as being accurate with respect to the knowledge of consumers, as we discuss in detail further on.

39 This applies less to JTM prior to its acquisition by RJRUS.

40 In *Hollis v. Dow Corning Corp* ([1995] 4 S.C.R. 634: "***Hollis***") the Supreme Court comes to a similar conclusion with respect to relative level of knowledge, going so far as to qualify the difference in favour of the manufacturer as an "enormous informational advantage" at paragraphs 21 and 26.

Members knew or could have known of it or could have foreseen the injury[41]. We shall deal with that aspect next.

II.B.1.b AS OF WHAT DATE DID THE PUBLIC KNOW?

[74] Although the knowledge of the public is not directly the subject of Common Question Two, it makes sense to consider it now, during the discussion of the defences offered by article 1473[42]. In that light, the proof offers two main avenues for assessing this factor: the expert reports of historians and the effect of the warnings placed on cigarette packages as of 1972 (the "**Warnings**")[43].

II.B.1.b.1 THE EXPERTS' OPINIONS: THE DISEASES AND DEPENDENCE

[75] The Companies filed three expert reports attempting to establish the date that the risks and dangers of smoking became "common knowledge" among the public. ITL filed the report of David Flaherty (Exhibit 20063), while JTM offered the opinion of Raymond Duch (Exhibit 40062.1) and shared with RBH the report of Jacques Lacoursière (Exhibit 30028.1)[44]. The Plaintiffs offered the historian, Robert Proctor, as an expert and he also testified on this issue.

[76] Mr. Christian Bourque, an expert in surveys and marketing research, testified for the Plaintiffs with respect to the information contained in, and the motivation behind, the marketing surveys conducted for the Companies. Although some of what he said touched on this issue, his evidence is not conducive to determining a cut-off date for the question at hand. In light of that, the Court will not consider the evidence of Professor Claire Durand in this context, since her mandate was essentially to criticize Mr. Bourque's work.

[77] The following table summarizes the historical experts' opinions as to the dates at which the public attained common knowledge of the danger to health and the risk of developing tobacco dependence:

---

41 We note that, even if that hurdle is overcome, there will still remains the general fault under article 1457 of failing to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another. There are also the alleged faults under the CPA and the Quebec Charter.

42 The Companies made proof as to the date at which Canada and other public health authorities knew of the risks of smoking. In light of the Court of Appeal's judgment dismissing the action in warranty against Canada, the Court finds no relevance to that question in the current context. Whether or not Canada acted diligently, for example, with respect to imposing the Warnings, does not affect the actual level of knowledge of the public.

43 For the sake of completeness, we should note that, starting in 1968, Health Canada published a series of press releases providing "League Tables" showing the tar and nicotine levels in Canadian cigarettes, the first press release being filed as Exhibit 20007.1. No one alleges that this initiative represented a significant factor in the public's gaining adequate knowledge of the risks and dangers of smoking.

44 JTM also filed the reports of Robert Perrins (Exhibits 40346, 40347) with respect to the knowledge of the government and the public health community. For reasons already noted, the Court does not find this aspect relevant given the current state of the files.

EXPERT	KNOWLEDGE OF DANGER TO HEALTH	KNOWLEDGE OF THE RISK OF ADDICTION OR "STRONG HABIT" OR "DIFFICULT TO QUIT"
David Flaherty[45]	mid-1960s	mid-1950s
Jacques Lacoursière[46]	late 1950s	late 1950s
Raymond Duch[47]	between 1954 and 1963	1979 to 1986
Robert Proctor[48]	the 1970s	after 1988

[78] Professor Flaherty was commissioned by ITL to answer two questions:

- At what point in time, if ever, did awareness of the health risks of smoking, and the link between smoking and cancer in particular, become part of the "common knowledge" of Quebecers?
- At what point in time, if ever, did awareness of the fact that smoking was "hard to quit", "habit forming" or "addictive", become part of the "common knowledge" of Quebecers?

[79] On the first question, he concludes that "Awareness of the causal relationship between smoking and cancer and other health risks was almost inescapable, and as such became common knowledge among the population of Quebec by the mid-1960s" (Exhibit 20063, at page 3).

[80] He defines "common knowledge" as "a state of generally acknowledged awareness of some fact among members of a group" (at page 5), adding that a vast majority of the group must be aware of the fact in question in order for it to be common knowledge. He also cautions that common knowledge can be either ahead of or behind the state of scientific knowledge, i.e., that scientific proof of the fact can come either before or after it has become part of common knowledge.

[81] At the request of JTM and RBH, Jacques Lacoursière produced an exhaustive report chronicling the evolution of public knowledge (*la connaissance populaire*) of Quebec residents of the risks associated with smoking, including the risk of dependence (Exhibit 30028.1). He analyzed the print and broadcast media and government publications in Quebec over the Class Period. This was essentially a duplication of the work of Professor Flaherty, although, having dismissed Professor Lacoursière as "an amateur historian", Professor Flaherty would presumably not agree that it was of the same level of scholarship.

[82] Professor Lacoursière sees awareness of the dangers of smoking among the general public arriving even earlier than Professor Flaherty. Interestingly, he is of the opinion that knowledge with respect to the risk of tobacco dependence was acquired

---

45 See pages 3 and 4 of his report: Exhibit 20063.
46 See page 3 of his report: Exhibit 30028.1.
47 Exhibit 40062.1, at page 5.
48 Transcript of November 29, 2012, at pages 34-38.

essentially at the same time as that for danger to health, while Professor Flaherty felt it came even earlier, and before knowledge related to disease. Professors Duch and Proctor, on the other hand, agreed that knowledge of dependence came much later than for danger to health. This reflects what the public health authorities were saying, as seen in the twenty-four-year gap between the two in the US Surgeon General Reports: 1964 versus 1988.

[83] Professor Lacoursière opined that during the 1950s it was very unlikely (*très peu probable*) that a person would not have been made aware (*n'ait pas eu connaissance*) of the health dangers of smoking regularly and the risk of dependence attached to it.[49] By the end of the next decade, 1960-69, his view firmed up to a point where ignorance of the danger in both cases was a near impossibility:

> **278.** I can affirm, in my role as historian, that it was nearly impossible for a person not to know of the dangers to health of regular smoking and the dependence that it can cause. (the Court's translation)[50]

[84] Not surprisingly, his opinion on the degree of awareness of the dangers of smoking and of possible dependence extant at the end of the following decades solidify to the point of it being "impossible" ("*il est devenu impossible*") not to know by the end of the 1970s (at page 69), and incontrovertible ("*incontestable*") up to the end of the Class Period (at pages 90 and 104).

[85] Both Professors Flaherty and Lacoursière based their opinions exclusively on publicly-circulated documents, such as newspapers, magazines, television and radio shows, school books and the like. Neither included the Companies' internal documents in their analysis, arguing persuasively that the public could not have been influenced by such items, since they were never circulated publicly.

[86] We can accept that logic, but they were much less persuasive in their justification for omitting to consider any of the voluminous marketing material circulated by the Companies over the Class Period. Both of them completely ignored the Companies' numerous advertisements appearing in the same newspapers and magazines from which they extracted articles and airing on the same television and radio stations that especially Professor Lacoursière referred to. As well, they took no note of billboards, signs, posters, sponsorships and the like on the level of public awareness of the dangers of smoking and of dependence.

[87] Professor Lacoursière attempted to justify this omission on his lack of expertise in evaluating the effect of advertising on the public. In cross-examination, however, he admitted that advertising can have an effect on public knowledge, noting that the ads were quite attractive, "to say the least".[51] This indicates that advertising material is

---

[49] *154. En tant qu'historien, à la suite de l'étude des documents analysés, je peux affirmer qu'il est très peu probable que quelqu'un n'ait pas eu connaissance de dangers pour la santé du fait de fumer régulièrement et de la dépendance que cela peut créer.* - Exhibit 30028.1.

[50] *Je peux affirmer, en tant qu'historien, qu'il devient presque impossible que quelqu'un n'ait pas connaissance des dangers pour la santé du fait de fumer régulièrement et la dépendance que cela peut créer.* - at page 53 of the report: Exhibit 30028.1.

[51] *C'est le moins que je puisse dire*: Transcript of May 16, 2013, at page 144.

something that should be considered in assessing common knowledge/*connaissance populaire*. It also indicates that Professor Lacoursière's report is incomplete, since it omits elements that have a real impact on his conclusions.

[88] As for Professor Flaherty, he brushed off this omission by saying that he initially intended to include an analysis of marketing material but, after long discussions with lawyers for ITL, who, he insisted, imposed no restrictions on him, he concluded that this type of communication really didn't have much of an impact on common knowledge.

[89] Professor Flaherty was remarkably stubborn on the point but seemed eventually to concede that there might be some influence, not, however, enough to bother with. This is a surprising position indeed, one that not only flies in the face of common sense, but also contradicts a view he supported several years earlier.

[90] In 1988, he sent to ITL what he described as a periodic report relating to research that was not specific to the present files (Exhibit 1561). There, in a section entitled "Remaining Research Activities", he wrote:

> 8. We have not done any explicit research on cigarette advertising, although we are aware from U. S. materials of significant episodes in advertising. My intuitive sense is that advertising is a component of any person's information environment and that it would be unwise not to think about the health claims that have been made about smoking since the 1910s, especially in terms of preparation for litigation.

[91] His "intuitive sense" that advertising is a component of any person's information environment is, as we note above, only common sense. The sole explanation he offered for the metamorphosis of his reasoning by the time he wrote his report for our files came in cross examination on May 23, 2013. There, he stated that: "I decided, early on, that the probative effect of the information content of advertising for Canadian cigarettes that I saw was not contributing anything beyond name rank and serial number to the smoking and health debate".

[92] It is difficult to reconcile that view with his statement at page 5 of his report that "The only category of material that I have intentionally not reviewed is tobacco advertising, since it is outside the scope of my area of expertise to opine on the impact of the messages inherent in such advertising". He should make up his mind. Did he ignore tobacco advertising because it is not important, or was it because it is outside of his expertise? If the latter, why did he not see it the same way in 1988?

[93] As well, it seems inconsistent, to say the least, that these experts should be so chary to opine on the effect of newspaper and magazine ads on people's perception when they have absolutely no hesitation with respect to the effect of articles and editorial cartoons in the very same newspapers and magazines in which those ads appeared. They seem to have been tracing their opinions with a scalpel in order to justify sidestepping such an obviously important factor. In doing so, they not only deprive the Court of potentially valuable assistance in its quest to ascertain one of the key facts in the case, but they also seriously damage their credibility.

[94] As if this were not enough, there is another obstacle to accepting these opinions. These are historians who purport to opine on how the publication of certain information in the general media translates into knowledge of and/or belief in that information. Neither one professed to have any expertise in psychology or human behaviour, yet their opinions invade both these areas.

[95] Professor Flaherty talks of "common knowledge", but all either he or Professor Lacoursière is showing is the level of media attention given to the issue. That is not knowledge. That is exposure. On that basis, how can they opine on anything more than surveying what was published and publicly available? It is more in the field of the survey expertise of Professor Duch where one can see indices of common knowledge.

[96] For all these reasons, the Court cannot give any credence to the reports of Professors Flaherty and Lacoursière, other than for the purpose of showing part, and only part, of the information about smoking available to the public - and to the Companies - over the Class Period.

[97] Turning to Dr. Proctor, he does not opine as to the date of knowledge by the public in his report (Exhibit 1238), his mandate being to comment on the reports of Professors Flaherty, Lacoursière and Perrins. At trial, however, he was questioned by the Court as to the likely date at which the average American knew or reasonably should have known that the smoking of cigarettes causes lung cancer, larynx cancer, throat cancer or emphysema.

[98] Having first replied that it was during the 1970s and 1980s, he later seemed to favour the 1970s, saying that "The surveys show that, by the seventies (70s), more than half of people answered yes when asked that question. And I view that … as most Americans."[52] The question was as to the date of knowledge, not belief, to the extent that that makes a difference. He also answered on the basis of surveys, which, in our view, is the appropriate measure in this context.

[99] With respect to dependence, he testified that the American public's knowledge was not "extremely common" until after the 1988 Surgeon General's Report[53].

[100] It is true that he was opining as to Americans and not Canadians, but there appears to be a high degree of similarity in the levels of awareness about tobacco in the two countries. This is echoed by one of JTM's expert, Dr. Perrins, who states that: "An examination of the understanding that the Federal Government and the public health and medical communities had of the smoking and health issue and its practice, in Canada, should take into account the histories of similar developments in both the United States and the United Kingdom".[54]

[101] Accordingly, the Court has no hesitation in deducing certain tendencies relevant to the Canadian and Quebec cases from proof adduced with respect to the US and UK situations, including those about the level of public awareness. That said, we might well

---

52 Transcript of November 29, 2012, at pages 34-38.
53 *Ibidem*, at page 47.
54 Report of Dr. Perrins, Exhibit 40346, at page 11.

find some minor differences owing to specific events occurring in one or the other of those countries.

[102] As for Professor Duch, his mandate was "to review the published public opinion data and provide my opinion on the awareness of the Quebec (and Canada) population from 1950 to 1998 of the health risks associated with smoking and of the public's view that smoking can be difficult to quit"[55]. His conclusions, as stated at page 5 of his report, are:

> 1: The Quebec population's awareness of the reports linking smoking with lung cancer or other health risks:
>
> - By at least 1963 there was an exceptionally high level of awareness, 88 percent, among the Quebec population of reports or information that smoking may cause lung cancer or have other harmful effects.
> - Even before then, in 1954, 82 percent of the Quebec population was aware of reports that smoking may cause lung cancer.
>
> 2. The population's awareness of the risk of smoking being "habit forming" or being an "addiction":
>
> - Since the first relevant survey identified in 1979, over 80 percent of the population indicated that smoking is a habit and 84 percent reported it is very hard to stop smoking (in 1979). By 1986 the majority of the population considered smoking to be an "addiction".

[103] On the Diseases, the conclusion that smoking "may cause cancer or other harmful effects" does not satisfy the Court. The minimum acceptable level of awareness should be much higher than that, for example, "is likely" or "is highly likely". The Companies have the burden of proof on this ground of defence, as stated in article 1473. In addition, we are in the context of a dangerous product and it is logical to seek a higher assurance of awareness[56]. This is reflected in the cautionary note that Professor Duch adds in paragraphs 53 through 57 of his report concerning the complexities of measuring such questions.

[104] Consequently, his date of 1963 seems unrealistic as the date by which the public acquired sufficient knowledge about smoking and the Diseases, i.e., knowledge sufficient to trigger the defence offered by article 1473. Whatever the effect of Minister LaMarsh's conference held in that year, the evidence points to a much later date.

[105] In 1963, the Canadian government had not even started its efforts at educating the public and was, in fact, still educating itself on many of the key aspects of the question. It wasn't until 1968 that Health Canada first published the tar and nicotine levels for Canadian cigarette brands through the League Tables and it was a year later that the House of Commons mandated Dr. Isabelle to study tobacco advertising, a study that by necessity spilled over into general issues of smoking and health.

[106] Upon further review, and after reasonable adjustments, the Court sees a fair amount of compatibility between the opinions of Professors Proctor and Duch.

---

55 Exhibit 40062.1, at page 5.

56 This reasoning is echoed in the higher degree of intensity of the obligation to inform in such circumstances, as discussed below.

[107] On dependence, there is, in fact, very little difference. Professor Proctor talks of "after 1988" and Professor Duch focuses on a range between 1979 and 1986, the latter year being the one by which "the majority of the population considered smoking to be an "addiction". The Companies, on the other hand, see the arrival of the 1994 Warning on addiction as the watershed event for this awareness, as discussed below.

[108] As for the Diseases, if one adds ten or fifteen years to Dr. Duch's 1963 figure in order to move from "may cause" to "is highly likely", one arrives at a date that is consistent with Dr. Proctor's "the seventies".

[109] We shall see how this reasoning is affected by our analysis of the Warnings.

II.B.1.b.2 THE EFFECT OF THE WARNINGS: THE DISEASES AND DEPENDENCE

[110] The first Warnings appeared on Canadian cigarette packages in 1972[57]. Starting out in what we would today consider to be almost laughably timid fashion, they evolved over the Class Period. The following table shows that evolution.

YEAR	INITIATOR	TEXT
1972	The Companies – under threat of legislation (Exh. 40005D)	WARNING: THE DEPARTMENT OF NATIONAL HEALTH AND WELFARE ADVISES THAT DANGER TO HEALTH INCREASES WITH AMOUNT SMOKED
1975	The Companies - under threat of legislation (Exh. 40005G)	WARNING: HEALTH AND WELFARE CANADA ADVISES THAT DANGER TO HEALTH INCREASES WITH AMOUNT SMOKED – AVOID INHALING
1988	The Parliament of Canada - Bill C-51, the "**TPCA**",[58] at subsection 9(1)(a)[59] and in section 11 of the regulations	• SMOKING REDUCES LIFE EXPECTANCY[60] • SMOKING IS THE MAJOR CAUSE OF LUNG CANCER • SMOKING IS A MAJOR CAUSE OF HEART DISEASE • SMOKING DURING PREGNANCY CAN HARM THE BABY

---

57 It is a mischaracterization to call these first Warnings "voluntary". Several Ministers of Health had threatened legislation to impose warnings (and more) and Minister Munro had even tabled Bill C-248 in 1971 (Exhibit 40347.12, section 3(3)(c)(i)) requiring "words of warning" on the package stating the amount of nicotine, tar and other constituents, although it never went beyond first reading. Consequently, the first warnings in the 1970s appear to have been implemented more under threat of legislation than on a voluntary basis.

58 *Tobacco Products Control Act* ("**TPCA**"), S.C. 1988, ch. 20.

59 **9(1)** No distributor shall sell or offer for sale a tobacco product unless
(a) the package containing the product displays, in accordance with the regulations, messages pertaining to the health effect of the product and a list of toxic constituents of the product and, where applicable, of the smoke produced from its combustion indicating the quantities of those constituents present therein;

60 The Court does not consider the "attribution" question of any significance to these files. The fact that the Companies insisted that the Warnings be attributed to Health Canada, as opposed to appearing to come directly from them, does not, in fact, diminish their impact. Not only did the attribution to Health

1994	Modifications to the TPCA regulations (Exh. 40003E)	• CIGARETTES ARE ADDICTIVE • TOBACCO SMOKE CAN HARM YOUR CHILDREN • CIGARETTES CAUSE FATAL LUNG DISEASE • CIGARETTES CAUSE CANCER • CIGARETTES CAUSE STROKE AND HEART DISEASE • SMOKING DURING PREGNANCY CAN HARM YOUR BABY • SMOKING CAN KILL YOU • TOBACCO SMOKE CAUSES FATAL LUNG DISEASE IN NON SMOKERS
1995 to end of Class Period[61]	The Companies - under threat of legislation, since the TPCA had been struck down by the Supreme Court in 1995 (Exh. 4005O)	• HEALTH CANADA ADVISES THAT CIGARETTES ARE ADDICTIVE • HEALTH CANADA ADVISES THAT TOBACCO SMOKE CAN HARM YOUR CHILDREN • HEALTH CANADA ADVISES THAT CIGARETTES CAUSE FATAL LUNG DISEASE • HEALTH CANADA ADVISES THAT CIGARETTES CAUSE CANCER • HEALTH CANADA ADVISES THAT CIGARETTES CAUSE STROKE AND HEART DISEASE • HEALTH CANADA ADVISES THAT SMOKING DURING PREGNANCY CAN HARM YOUR BABY • HEALTH CANADA ADVISES THAT SMOKING CAN KILL YOU • HEALTH CANADA ADVISES THAT TOBACCO SMOKE CAUSES FATAL LUNG DISEASE IN NON SMOKERS

[111] The effect of the various iterations of the Warnings must be analyzed in light of the atmosphere and attitudes prevailing at the time each of them appeared. Professor Viscusi, an expert for the Companies, advised the Court that the novelty of the first Warnings in 1972 would likely have caused the public to take greater notice of them than would normally be the case. He added, however, that their effect would soon have become essentially negligible, especially because they were simply repeating things that the public already knew.

[112] In the same vein, Professor Young, another of the Companies' experts, disparaged pack warnings as a means of informing consumers about a product's safety defects.

Canada not lessen the Warnings' credibility, it might well have increased it by associating the Warnings directly with a highly-credible source.

[61] The *Tobacco Act* , which was assented to on April 25, 1997, replaced the TPCA and provided for Warnings on cigarette packages. These new Warnings were not implemented until after the end of the Class Period, therefore, neither they nor the other provisions of the *Tobacco Act* are relevant for these files.

[113] That said, the Warnings are the most frequent, direct, and graphic communications that smokers receive about cigarettes. We cannot accept that they have absolutely no effect and, in this regard, we are simply following the Companies' lead.

[114] They attribute such importance to the Warnings that they submit that, as of the appearance of the Warning about addiction in 1994, no Canadian smoker can have been unaware of the dependence-creating properties of cigarettes. They go so far as to identify September 12, 1994, the date that the regulation creating that Warning came into effect, as the very day on which prescription started to run for the Létourneau Class. This shows great respect, indeed, for the impact of the Warnings, even if the Court would not go so far in that respect.

[115] As for the contents of the Warnings, we have noted how they became more and more specific over the Class Period. The question remains as to when they became specific enough, i.e., at what point can it be said that, other things being equal, the Warnings caused the Members to know of the safety defect for the purposes of article 1473.

[116] It is important to note that the test for that level of knowledge is affected by the type of product in question. Where it is a toxic one, i.e., dangerous for the physical well-being of the consumer, that test is more stringent[62]. This higher standard thus applies to both files here.

[117] With respect to the Diseases, despite its novelty in 1972, the statement that "Danger to health increases with amount smoked", as well intentioned as it might have been, is unlikely to have struck fear into the heart of the average smoker. In the same vein, the remarkably naïve admonition to avoid inhaling that was added in 1975 must have inspired either a hearty chuckle or a cynical shake of the head in most smokers, for, as President Obama is said to have responded in a different context: "Inhaling is the whole point".

[118] It appears that during the 1980s, in the absence of a legislative basis for imposing them[63], the Warnings' message dragged behind the public's knowledge. Once the powers under the TPCA were exercised in 1988, however, the Warnings started having some bite.

[119] Cancer is mentioned for the first time in the 1988 Warnings, although only lung cancer. We note that the other Diseases are not specified but, as with the Companies' executives, no one can reasonably doubt that the average smoker at the time would have included lung cancer, throat cancer and emphysema among the diseases likely caused by smoking.

[120] Getting back to the date of sufficient knowledge of the risk of contracting one of the Diseases, our analysis of the experts' reports leads us to conclude that adequate

---

62 Jean-Louis BAUDOUIN and Patrice DESLAURIERS, *La responsabilité civile*, 8ème éd., vol. 2, p. 2-354, page 370; Pierre LEGRAND, *Pour une théorie de l'obligation de renseignement du fabricant en droit civil canadien*, (1980-1981) 26 McGill Law Journal 207, pages 260 – 262 and 274; Barreau du Québec, *La réforme du Code civil*, page 97; Paul-André CRÉPEAU, *L'intensité de l'obligation juridique*, Cowansville, Éditions Yvon Blais, 1989, p. 1, page 1.

63 The TPCA came into force in 1988.

public knowledge would have been acquired well before the 1988 change to the Warnings. We favour the end of the 1970s.

[121] Consequently, the Court holds that the public knew or should have known of the risks and dangers of contracting a Disease from smoking as of January 1, 1980, which we shall sometimes term the "**knowledge date**". It follows that the Companies' fault with respect to a possible safety defect by way of a lack of sufficient indications as to the risks and dangers of smoking ceased as of that date in the Blais File.

[122] As for the Létourneau File, the public's knowledge came later. The Warnings were completely silent about dependence until 1994, while the US Surgeon General took until 1988 to adopt a firm stand on it. For their part, Professors Proctor and Duch point to the 1980s. Then there is the Companies' position favouring the adoption of the new Warning on addiction of September 1994.

[123] The Court notes that, as with the Diseases, there is a reasonable level of compatibility within the evidence of Professors Duch and Proctor, which also reflects the contents of the Warnings.

[124] To start, of Professor Duch's range of dates, i.e., 1979 and 1986, his view is that, by the latter, only "the majority of the population considered smoking to be an 'addiction'". A majority is not sufficient on this point. The "vast majority" is more along the lines that the experts, and the Court, favour.

[125] To reach that level would require a number of additional years. That being so, however, the intense publicity on the issue of dependence around the beginning of the 1990s was such that knowledge on the topic was being acquired rapidly. One need only consider the 1988 Surgeon General Report and the 1994 addiction Warning. These are key factors, but not dispositive.

[126] Although Canadians paid much attention to the Surgeon General Reports, the Court sees the new Warning on addiction as confirmation that the Quebec public did not have sufficient knowledge before its appearance. This is indirectly supported by statements made by the CTMC in its lobbying to avoid such a warning in 1988. It argued that "Calling cigarettes "addictive" trivializes the serious drug problems faced by our society, but more importantly (t)he term "addiction" lacks precise medical or scientific meaning[64].

[127] That the Companies recognize the new Warning's importance is telling, but the Court puts more importance on the fact that Health Canada did not choose to issue a Warning on dependence before it did. If the government, with all its resources, was not sufficiently concerned about the risk of tobacco dependence to require a warning about it, then we must assume that the average person was even less concerned.

[128] That said, even something as visible as a pack warning does not have its full effect overnight.

[129] The addiction Warning was one of eight new Warnings and they only started to appear on September 12, 1994. It would have taken some time for that one message to

---

[64] Exhibit 694, at pdf 10.

circulate widely enough to have sufficient force. The impact of decades of silence and mixed messages is not halted on a dime. The Titanic could not stop at a red light.

[130] The Court estimates that it would have taken one to two years for the new addiction Warning to have sufficient effect among the public, which we shall arbitrate to about 18 months, i.e., March 1, 1996. We sometimes refer to this as the "**knowledge date**" for the Létourneau Class.

[131] There is support for this date in one of the Plaintiffs' exhibits, a survey entitled "Canadians' Attitudes toward Issues Related to Tobacco Use and Control"[65]. It was conducted in February and March 1996 by Environics Research Group Limited for "a coalition" of the Heart and Stroke Foundation of Canada, The Canadian Cancer Society and the Lung Foundation. Although this is a "2M" exhibit, meaning that the veracity of its contents is not established, Professor Duch cites it at two places in his report for the Companies[66]. This should have led to the "2M" being removed and the veracity, along with the document's genuineness, being accepted.

[132] The Environics survey sampled 1260 Canadians, of which some 512 were from Quebec. When they were asked to name, without prompting, the health hazards of smoking, "only two percent mention the fundamental hazard of tobacco use which is addiction"[67].

[133] Since the Létourneau Class's knowledge date about the risks and dangers of becoming tobacco dependent from smoking is March 1, 1996, it follows that the Companies' fault with respect to a possible safety defect by way of a lack of sufficient indications as to the risks and dangers of smoking ceased as of that date in the Létourneau File.

II.B.2 THE LÉTOURNEAU FILE

[134] Despite scooping ourselves with respect to this file in the previous paragraph, there remain aspects still to be examined in Létourneau, particularly since concern over tobacco dependence developed differently from concern over the Diseases. Nevertheless, much of what we say concerning the Blais File is also relevant to Létourneau and we shall not repeat that.

II.B.2.a AS OF WHAT DATE DID ITL KNOW?

[135] Early in the Class Period, ITL executives were openly discussing "the addictiveness of smoking".[68] In October 1976, Michel Descôteaux, then Manager of Public Relations and later Director of Public Affairs[69], prepared a report for ITL's Vice President of Marketing, Anthony Kalhok, proposing new policies and strategies for dealing with the increasing

---

65 Exhibit 1337-2M.
66 Exhibit 40062.1, at pdf 56 and 160.
67 Exhibit 1337-2M, at pdf 9.
68 Exhibit 11 at pdf 5.
69 Descôteaux was an employee of ITL, and for a few years its parent company, IMASCO, for some 37 years. He was the Director of Public Affairs from 1979 until he retired in 2002, overseeing community, media and government relations, as well as lobbying.

criticism the company was encountering over its products[70]. In it, he says the following on the subject of dependence:

> A word about addiction. For some reason, tobacco adversaries have not, as yet, paid too much attention to the addictiveness of smoking. This could become a very serious issue if someone attacked us on this front. We all know how difficult it is to quit smoking and I think we could be very vulnerable to such criticism.
>
> I think we should study this subject in depth, with a view towards developing products that would provide the same satisfaction as today's cigarette without "enslaving" consumers.[71] (emphasis in the original)

[136] Today, Mr. Descôteaux tries to brush off the contents of this report as the product of youthful excess, pointing out that he was only 29 years old at the time. That might well be the case, but that is not the point. This document shows that the risk of creating tobacco dependence was known, accepted and openly discussed within ITL by 1976. They all knew how difficult it was to quit smoking, to the point of "enslaving" their customers.

[137] Indeed, some four years earlier, Dr. Green of BAT had characterized as a basic assumption that "The tobacco smoking habit is reinforced or dependent upon the psycho-pharmacological effects mainly of nicotine", as we noted above[72]. The basis for that assumption must have been present for many years, given that ITL's expert, Professor Flaherty, feels that it was common knowledge among the public since the mid-1950s that smoking was difficult to quit, and that by that time "the only significant discussion in the news media on this point concerned whether smoking constituted an addiction, or whether it was a mere habit"[73].

[138] If the public knew of the risk of dependence by the 1950s, the Court feels safe in concluding that ITL knew of it at least by the beginning of the Class Period. We so conclude.

II.B.2.b AS OF WHAT DATE DID THE PUBLIC KNOW?

[139] As explained above, the Court holds that the public knew or should have known of the risks and dangers of becoming tobacco dependent from smoking as of March 1, 1996 and that the Companies' fault with respect to a possible safety defect ceased as of that date in the Létourneau File.

[140] Let us be clear on the effect of the above findings. The cessation of possible fault with respect to the safety defects of cigarettes has no impact on the Companies' possible faults under other provisions, i.e., the general rule of article 1457 of the Civil Code, the Quebec Charter or the Consumer Protection Act. There, a party's knowledge is less relevant, an element we consider in section II.G.1 and .2 of the present judgment.

---

70 Exhibit 11.
71 At pdf 5.
72 Exhibit 1395.
73 Exhibit 20063, at page 4.

[141] In any event, the Companies' objectionable conduct continued after those dates. Moreover, the reasons for this cessation of fault had nothing to do with anything they did. In fact, the opposite is actually the case. Both by their inaction and by their support of the scientific controversy, whereby the dangers of smoking were characterized as being inconclusive and requiring further research, the Companies actually impeded and delayed the public's acquisition of knowledge.

[142] Thus, the Members' knowledge does not arrest the Companies' faults under these other provisions. Since the Companies took no steps to correct their faulty conduct, their faults continued throughout the Class Period. This, however, does not mean that the other conditions of civil liability would have been met, as they must be in order for liability to exist. As well, a Member's decision to start to smoke, or perhaps to continue to smoke, after he "knew or could have known" of the risks and dangers could be considered to be a contributory fault, a subject we analyze in a later section of the present judgment.

II.C. DID ITL KNOWINGLY PUT ON THE MARKET A PRODUCT THAT CREATES DEPENDENCE AND DID IT CHOOSE NOT TO USE THE PARTS OF THE TOBACCO CONTAINING A LEVEL OF NICOTINE SUFFICIENTLY LOW THAT IT WOULD HAVE HAD THE EFFECT OF TERMINATING THE DEPENDENCE OF A LARGE PART OF THE SMOKING POPULATION?

[143] Common Question C is actually two distinct questions:

- Did ITL knowingly market a dependence-creating product?

  and

- Did ITL choose tobacco that contained higher levels of nicotine in order to keep its customers dependent?

[144] Looming above the debate, however, is a preliminary question: Is tobacco a product that creates dependence of the sort to generate legal liability for the manufacturer? Before starting the analysis with that question, certain introductory comments are appropriate.

[145] The evidence on the issue of dependence is essentially industry wide, in the sense that most of the relevant facts cannot be sifted out on a Company-by-Company basis. The expert opinions here do not differentiate among the Companies, and the issue of the choice of tobacco leaves ends up depending almost entirely on what Canada and its two ministries were doing rather than on the actions of any one of the Companies. As a result, our analysis and conclusions will not be Company specific, but will apply in identical fashion to all three of them.

[146] Vocabulary took on excessive proportions in the discussion on dependence. The meaning of the term "addiction" in the context of tobacco and smoking evolved over the Class Period, eventually getting toned down to become, for all intents and purposes, synonymous with "dependence". The Oxford Dictionary of English reflects this, as seen by the use of the word "dependent" in its definition of "addiction": "physically and mentally dependent on a particular substance".

[147] It is of note that, since 1988, the Surgeon General of the United States has abandoned earlier appellations and now applies the term "addiction" exclusively. That position is far from unanimous, however.

[148] In its flagship diagnostic manual, the DSM[74], the American Psychiatric Association has never recommended a diagnosis termed as "addiction", this according to Dr. Dominique Bourget, one of the Companies' experts. She filed the latest DSM into the Court record (DSM-5: Exhibit 40499) and testified that the DSM is extensively used in Canada. With the publication of DSM-5 in 2013, "dependence", the term of choice in previous DSM iterations, was abandoned in favour of "disorder". Thus, the cigarette addiction of the Surgeon General is now the "tobacco use disorder" of the APA.

[149] In spite of this terminological turbulence, the Court sees little significance to the specific word used. What is important is the reality that, for the great majority of people, smoking will be difficult to stop because of the pharmacological effect of nicotine on the brain. That which we call a rose by any other name would still have thorns.

[150] In that light, the Court will simply follow the lead of Common Question C and, unless the context requires otherwise, opt for the term "dependence" or "tobacco dependence".

II.C.1 IS TOBACCO A PRODUCT THAT CREATES DEPENDENCE OF THE SORT THAT CAN GENERATE LEGAL LIABILITY FOR THE MANUFACTURER?

[151] The Plaintiffs take this as a given, but the Companies went to great lengths to contest the point. They called two experts in support of a view that seems to say that nicotine is no more dependence creating than many other socially acceptable activities, such as eating chocolate, drinking coffee or shopping.

[152] Plaintiff's expert, Dr. Juan Carlos Negrete, is a medical doctor and psychiatrist specializing in the treatment of and research on addiction. He has some 45 years of clinical experience in psychiatry, along with a teaching position in the Department of Psychiatry of McGill University since 1967. Currently, he is serving as a senior consultant in the Addictions Unit of the Montreal General Hospital, a service that he founded in 1980, and as "Honorary Staff" at the Centre for Addictions and Mental Health in Toronto.

[153] Although concentrating on alcohol dependence during much of his career, he indicates at the end of his 71-page CV that he has been acting as the "Seminar Leader for the McGill Post-Graduate Course in Psychiatry: Tobacco dependence" since March 2013. He explains that he has offered this seminar for several years but that since 2013 it has been focused solely on tobacco dependence.

[154] He testified that there is often "co-morbidity" present in an addicted person, so that, for example, alcohol addiction is generally accompanied by tobacco dependence. As a result, he often deals with both addictions in the same patient. That said, in cross examination he stated that he has treated several hundred patients for tobacco

---

[74] *Diagnostic and Statistical Manual of Mental Disorders*. In the Preface to DSM-5, it is described as "a classification of mental disorders with associated criteria designed to facilitate more reliable diagnoses of these disorders": Exhibit 40499, page xii (41 PDF).

dependence only[75]. He readily admits that it is possible to quit smoking and recognizes that a majority of Canadian smokers have succeeded in doing that, but generally with great difficulty[76].

[155] The Companies produced two experts who disputed Dr. Negrete's opinions: Professor John B. Davies (Exhibit 21060), professor emeritus of psychology at Strathclyde University in Glasgow, Scotland and Director of the Centre for Applied Social Psychology, and Dr. Dominique Bourget (Exhibit 40497), a clinical psychiatrist at the Royal Ottawa Mental Health Centre and associate professor at the University of Ottawa.

[156] The Court accepted Professor Davies as an expert in "applied psychology, psychometrics, drug use and addiction". During his career, although he has worked almost exclusively in the area of drug addiction, he sees "commonalities" between drug use and cigarette use.

[157] No friend of the tobacco industry, this was his first experience in a tobacco trial. He explained that he agreed to testify here "because there is an overemphasis on a deterministic pharmacological model of drug misuse which is frequently challenged in academic debates, and I have a number of friends who are violently opposed to the pharmacological determinist model. […] and I thought it was high time that somebody... - I don't want to sound self-congratulatory -... I thought it was time somebody stood up and put the opposite point of view. And having had this point of view since nineteen ninety-two (1992), it started to occur to me that it was probably my job to do it."[77]

[158] He admitted that he is not a qualified pharmacologist, but declared "having some knowledge of how the basic addictive process, whatever that means, comes about, in the way that different drugs bind to different receptor sites so as to affect the dopamine cycle, and those kinds of things." He thus feels that he could have "an intelligent conversation" with a qualified pharmacologist.[78]

[159] That is likely so, but the Court notes that his principal objective, one might go so far as to say his "mission", is to challenge the pharmacological model of drug misuse in favour of a socio-environmental approach. We would feel more assured were the critic a specialist in the area he was criticizing. That, however, is not all that makes us uncomfortable with his evidence.

[160] Although testifying as an expert in addiction, he was adamant to the point of obstinacy that the use of terms such as "addiction" and "dependence" must be avoided at all costs in order to assist substance abusers to change their behaviour. His theory is that such terms disparage people with a substance abuse problem and discourage them from trying to correct it. Given his fervour over that, cross examination was all but impossible. There was constant quibbling over vocabulary and searching for terms that he could agree to consider.

---

75 Transcript of March 20, 2013 at pages 68 and 78.

76 Dr. Negrete admits that a minority of smokers do not become dependent, generally because of genetic or "cerebral structural" characteristics, although he affirms that about 95% of daily smokers are dependent. See pages 8 and 20 of his report: Exhibit 1470.1.

77 Transcript of January 27, 2014, at page 81.

78 *Ibidem*, at page 75.

[161] Moreover, his almost total dismissal of the pharmacological effects of nicotine on the brain is not supported by the experts in the field. He implicitly recognized this when, after much painful cross examination, he admitted that nicotine does, in fact, have a pharmacological effect on the brain. He stated that nicotine binds to receptors in the brain, thus causing "brain changes".

[162] Such changes do not mean that the brain is damaged, in his view, because they are not permanent[79]. He cited a study (Exhibit 21060.22) showing that the brains of people who quit smoking "return to normal" after twelve weeks[80]. That this indicates that the smoker's brain was, therefore, not "normal" while he was smoking seems not to have been considered by him.

[163] Professor Davies is very much a man on a crusade, too much so for the purposes of the Court. He has a theory about drug misuse and he defends it with vehemence. That might be laudable in certain quarters, but is inappropriate and counter productive for an expert witness. It smothers the objectivity so necessary in such a role and blinds him to the possible merits of other points of view. As a result, it robs the opinion of much of its usefulness. That is the fate of Professor Davies' evidence in this trial.

[164] As for Dr. Bourget, she was recognized by the Court as "an expert in the diagnosis and treatment of mental disorders, including tobacco-use disorder, and in the evaluation of mental capacity". In hindsight, despite her extensive experience testifying in criminal matters, we have serious doubts as to her qualifications in the areas of interest in this trial. Her frank responses to questions about her tobacco-related credentials reinforce that doubt:

> 45Q- Doctor, among your patients, are there any for whom you are only treating for tobacco use disorder?
>
> A- No. (Transcript of January 22, 2014, at page 18)
>
> 244Q-Aside from that, did you do any research on addiction prior to receiving your mandate, ever, to any extent?
>
> A- Well, I did read on this topic. I was certainly familiar with the diagnosing of it. I was also familiar with, you know, dealing with people who had all sorts of substance abuse and monitoring them for their substance abuse, as was mentioned earlier. So, yes, before that time, I did have experience in that field. (Transcript of January 22, 2014, at pages 65-66)
>
> 253Q-Did you have any research projects […] that were interested ... involved in the field of addiction?
>
> A- No, as I said earlier, my experience is clinical. I did not conduct any research, nor participated, to my knowledge, in specific research studies concerning substance use. I have been involved in research certainly throughout my career, as you could see from my CV, in the area... mostly in the psychopharmacological

---

79 *Ibidem*, at pages 205-206.

80 *Ibidem*, at pages 205 and 211.

> area, and that is reflected in my CV, but not specific to addiction or substance abuse. (Transcript of January 22, 2014, at page 67)

[165] The Court's lack of enthusiasm for her evidence can only be heightened by her reply to the final question of the examination in chief:

> 656Q- … if I wanted to quit smoking, would I come to you or...?
> A- Not if you just have a smoking problem. (Transcript of January 22, 2014, at page 200)

[166] As with Professor Davies' opinion, the Court finds Dr. Bourget's evidence to be of little use. We shall nevertheless refer to both opinions where appropriate.

[167] Getting back to Dr. Negrete, in his two reports (Exhibits 1470.1 and 1470.2), he opines on the dependence-creating process of cigarette smoking and the effect of tobacco dependence on individuals and their personal lives. He provides his view on what criteria indicate that a smoker is dependent on tobacco, being essentially behavioural factors. Professor Davies and Dr. Bourget did none of that. As usual with the Companies' experts, they were content to criticize the opinions of the Plaintiffs' experts while voicing little or no opinion on the main question.

[168] One justification for this omission was Dr. Bourget's argument that the diagnosis of dependence cannot be assessed on a population-wide basis, but must necessarily include a direct examination of each individual. This leads to the conclusion, in her view, that dependence is not something that can be considered in a class action because it cannot be treated at a "collective" level. With due respect, in saying this she was overstepping the bounds of an expert by purporting to opine on a legal matter.

[169] This said, Dr. Negrete did agree that, before diagnosing tobacco dependence in any one person, he would always examine that person. Nevertheless, he did not see this as being relevant to the question in point. He had no hesitation in opining as to a set of diagnostic criteria that would indicate a state of tobacco dependence within a population for epidemiological/statistical purposes. We note below that the American Psychiatric Association shares his view in the DSM-5 (Exhibit 40499).

[170] Although it was Dr. Bourget who filed the DSM-5 into the record, she failed to approach the question from the angle espoused there, insisting on a clinical view as opposed to a population-wide one. Her argument requiring a personal examination of each Class Member fits in with the Companies' master strategy of attempting to exclude from collective recovery any sort of compensatory damages, because they are always felt on a personal level. The Court rejects this argument in a later section of the present judgment.

[171] The question here is whether tobacco creates a dependence of the sort to generate legal liability for the Companies and, for the reasons explained above, the Court prefers the evidence of Dr. Negrete in this regard.

[172] In his second report (Exh 1470.2, at page 2), he describes the effects of tobacco dependence. The most serious impact he identifies is the increased risk of "*morbidité*"

and premature death[81]. He also cites a lower quality of life, both with respect to physical and social aspects, as one of the major problems[82]. Finally, he states that the mere fact of being dependent on tobacco is, itself, the principal burden caused by smoking, since dependence implies a loss of freedom of action and an existence chained to the need to smoke – even when one would prefer not to[83].

[173] True, he used the word "slave" and the expressions "loss of freedom of action" and "*maladie du cerveau*", which the Companies translated as "disease of the brain" and "brain disease". Professor Davies and Dr. Bourget devoted much of their reports and testimony to proclaiming their fundamental disagreement with such strong language. The gist of their argument was that nicotine in no way destroys one's decision-making faculties and that, since more Canadians have quit smoking than are actually smoking now, one's freedom of action is clearly not lost.

[174] They used semantics as a way of side-stepping the real issue of identifying the harm that smoking causes to people who are dependent on tobacco. Dr. Negrete did address this issue, albeit with occasionally dramatic language. For example, his term "loss of freedom of action" really comes down to meaning that implementing the decision to quit smoking (as opposed simply to making the decision) is harder than it would otherwise be were tobacco and nicotine not dependence creating. This equates to a diminution of one's abilities, though not a total loss, the interpretation given to his words by the Companies' experts.

[175] As for the terms "disease of the brain" and "brain disease", those are the Companies' translations and, as is often the case with translations, they might not be a totally accurate reflection of what is meant by Dr. Negrete's French term: "maladie du cerveau". It could also be translated as a sickness of the brain. We have seen that even Professor Davies admits that nicotine causes brain changes. Might those changes be seen as a sickness?[84]

[176] Whatever the case, Dr. Negrete did not deny that there are other forces that also contribute to the difficulty of quitting, such as the social, sensory and genetic factors so fundamental to the theories of Professor Davies. This said, he chose to put much more emphasis on the pharmacological impact than did the other two experts. Unlike

---

81 *Face à cette évidence, on doit conclure que le risque accru de morbidité et mort prématurée constitue le plus grave dommage subi par les personnes avec dépendance au tabac*, at page 2.

82 *Une moindre qualité de vie - tant du point de vue des limitations physiques que des perturbations dans les fonctions psychique et sociale - doit donc être considérée comme un des inconvénients majeurs associes avec la dépendance tabagique*, at page 2.

83 *La personne qui développe une dépendance a la nicotine, même sans être atteinte d'aucune complication physique, subit l'énorme fardeau d'être devenue l'esclave d'une habitude psychotoxique qui régit son comportement quotidien et donne forme à son style de vie. L'état de dépendance est, en soi même, le trouble principal causé par le tabagisme.*
Cette dépendance implique une perte de liberté d'action, un vivre enchaine au besoin de consommer du tabac, même quand on préférerait ne pas fumer, at pages 2-3.

84 Even if Dr. Negrete meant brain disease, he is not alone on that. To support his statement that "*toute dépendance chimique est fondamentalement une maladie du cerveau*" (Exhibit 1470.1, page 11), he cited an article in the journal *Science* entitled "*Addiction Is a Brain Disease, and It Matters*" (Exhibit 1470.1, footnote 15, see Exhibit 2160.68).

Professor Davies, he is a medical doctor and, unlike Dr. Bourget, he has significant experience in the area of tobacco dependence, including as seminar leader of the post-graduate course in psychiatry at the McGill University Medical School. This impresses the Court.

[177] For their part, the Companies do not deny that "Smoking can be a difficult behaviour to quit", but insist that it is "not an impossible one".[85] They seem to see it as a state of benevolent dependence, one that can be conquered by ordinary will power, as witnessed by the impressive quitting rates among Canadian smokers, including those in Quebec, but to a slightly lesser degree. And the figures do impress. In 2005, there were more than twice as many ex-smokers in Canada than current smokers[86].

[178] They and their experts see the real obstacle to quitting not so much in their product as in a lack of sufficient motivation, commitment and will power by smokers to implement their decision to quit. Since many smokers eventually succeed, in the Companies' eyes those who fail have only themselves to blame.

[179] Will power certainly plays a role, but that is not the point here. Nicotine affects the brain in a way that makes continued exposure to it strongly preferable to ceasing that exposure. In other words, although it can vary from individual to individual, nicotine creates dependence. That is the point.

[180] Admitting that quitting smoking was one of the most practised pastimes of the latter half of the Class Period, and that many people succeeded, one still has to wonder why, if tobacco dependence is as benevolent as the Companies would have us believe, the American Psychiatric Association devotes so much space to the issue in its manual for diagnosing psychiatric disorders. The DSM-5 (Exhibit 40499) devotes some six pages to Tobacco Use Disorder and Tobacco Withdrawal. They shine a light directly on the issue at hand, meriting an exceptionally long citation:

> CONCERNING TOBACCO USE DISORDER
>
> **Diagnostic Criteria**
>
> A problematic pattern of tobacco use leading to clinically significant impairment or distress, as manifested by at least two of the following, occurring within a 12-month period: (followed by a description of 11 symptoms). (Page 571 – 159 pdf)
>
> Tobacco use disorder is common among individuals who use cigarettes and smokeless tobacco daily and is uncommon among individuals who do not use tobacco daily or who use nicotine medications. […] Cessation of tobacco use can produce a well-defined withdrawal syndrome. Many individuals with tobacco use disorder use tobacco to relieve or to avoid withdrawal symptoms (e.g., after being in a situation where use is restricted). Many individuals who use tobacco have tobacco-related physical symptoms or diseases and continue to smoke. The large majority report craving when they do not smoke for several hours. (page 572 – 160 pdf) (The Court's emphasis throughout)

---

85 Professor Davies' report, Exhibit 21060, at page 3.

86 *Ibidem*, at page 22: "… official statistics from 2005 show that at that date 17% of Canadians were regular (daily) smokers, compared to 38% who were ex-smokers."

Smoking within 30 minutes of waking, smoking daily, smoking more cigarettes per day, and waking at night to smoke are associated with tobacco use disorder. (page 573 – 161 pdf)

CONCERNING TOBACCO WITHDRAWAL

Diagnostic Criteria

A. Daily use of tobacco for at least several weeks.

B. Abrupt cessation of tobacco use, or reduction in the amount of tobacco used, followed within 24 hours by four (or more) of the following signs or symptoms:

1. Irritability, frustration, or anger.
2. Anxiety.
3. Difficulty concentrating.
4. Increased appetite.
5. Restlessness.
6. Depressed mood.
7. Insomnia.

C. The signs or symptoms in Criterion B cause clinically significant distress or impairment in social, occupational, or other important areas of functioning. (Page 575 – 163 pdf)

Diagnostic Features

Withdrawal symptoms impair the ability to stop tobacco use. The symptoms after abstinence from tobacco are in large part due to nicotine deprivation. Symptoms are much more intense among individuals who smoke cigarettes or use smokeless tobacco than among those who use nicotine medications. This difference in symptom intensity is likely due to the more rapid onset and higher levels of nicotine with cigarette smoking. Tobacco withdrawal is common among daily tobacco users who stop or reduce but can also occur among nondaily users. Typically, heart rate decreases by 5-12 beats per minute in the first few days after stopping smoking, and weight increases an average of 4-7 lb (2-3 kg) over the first year after stopping smoking. Tobacco withdrawal can produce clinically significant mood changes and functional impairment. (Page 575 – 163 pdf)

Associated Features Supporting Diagnosis

Craving for sweet or sugary foods and impaired performance on tasks requiring vigilance are associated with tobacco withdrawal. Abstinence can increase constipation, coughing, dizziness, dreaming/nightmares, nausea, and sore throat. Smoking increases the metabolism of many medications used to treat mental disorders; thus, cessation of smoking can increase the blood levels of these medications, and this can produce clinically significant outcomes. This effect appears to be due not to nicotine but rather to other compounds in tobacco. (Page 575 – 163 pdf)

Prevalence

Approximately 50% of tobacco users who quit for 2 or more days will have symptoms that meet criteria for tobacco withdrawal. The most commonly

> endorsed signs and symptoms are anxiety, irritability, and difficulty concentrating. The least commonly endorsed symptoms are depression and insomnia. (Page 576 - 164 pdf)
>
> **Development and Course**
>
> Tobacco withdrawal usually begins within 24 hours of stopping or cutting down on tobacco use, peaks at 2-3 days after abstinence, and lasts 2-3 weeks. Tobacco withdrawal symptoms can occur among adolescent tobacco users, even prior to daily tobacco use. Prolonged symptoms beyond 1 month are uncommon. (Page 576 – 164 pdf)
>
> **Functional Consequences of Tobacco Withdrawal**
>
> Abstinence from cigarettes can cause clinically significant distress. Withdrawal impairs the ability to stop or control tobacco use. Whether tobacco withdrawal can prompt a new mental disorder or recurrence of a mental disorder is debatable, but if this occurs, it would be in a small minority of tobacco users. (page 576 – 164 pdf)

[181] It is not insignificant that the APA believes that about half of the people who attempt to quit smoking for two or more days will experience at least four of the symptoms of tobacco withdrawal, and that withdrawal symptoms will last two to three weeks. It stands to reason that many other "quitters" will experience one, two or three of those symptoms and no expert came to deny that.

[182] Thus, the DMS-5 supports Professor Davies' admission that smoking can be a difficult behavior to quit, as well as his assertion that quitting is not impossible. More to the point, by detailing the obstacles likely to confront a smoker who wishes to stop, it underlines the high degree of nicotine dependence that is generally, but not always, created by smoking and the challenge posed by trying to quit.

[183] Dependence on any substance, to any degree, would be degrading for any reasonable person. It attacks one's personal freedom and dignity[87]. When that substance is a toxic one, moreover, that dependence threatens a person's right to life and personal inviolability. The Court has no hesitation in concluding that such a dependence is one that can generate legal liability for the Companies.

[184] To the extent that the Companies knew during any phase of the Class Period of the dependence-creating properties of their products, they had an obligation to inform their customers accordingly. The failure to do so in those circumstances would constitute a civil fault, one that has the potential of justifying punitive damages under both the Québec Charter and the Consumer Protection Act.

II.C.2 DID ITL KNOWINGLY MARKET A DEPENDENCE-CREATING PRODUCT?

[185] We have previously held that ITL knew throughout the Class Period that smoking caused tobacco dependence. As well, there is no doubt that the Companies never warned their consumers of the risks and dangers of dependence. They admit never providing any health-related information of any sort, with only the 1958 gaffe by

---

[87] See Dr. Negrete's second report, Exhibit 1470.2.

Rothmans as the exception[88]. They plead that the public was receiving sufficient information from other sources: by the schools, parents, doctors and the Warnings.

[186] We cite above extracts from Mr. Descôteaux's 1976 memo to Mr. Kalhok (Exhibit 11), which underscores the fact that "the addictiveness of smoking" was still below the radar even of tobacco adversaries. Hence, ITL knew not only that its products were dependence creating but also knew that through a good portion of the Class Period the anti-smoking movement, much less the general public, was not focusing on that danger.

[187] In light of the above, no more need be said on this question. ITL did knowingly market a dependence-creating product, and still does, for that matter. As with the previous Common Questions, whether or not this constitutes a fault depends on additional elements, ones that are examined below.

II.C.3 DID ITL CHOOSE TOBACCO THAT CONTAINED HIGHER LEVELS OF NICOTINE IN ORDER TO KEEP ITS CUSTOMERS DEPENDENT?

[188] To answer this, it is necessary to examine the role and effect of the research done at Canada's Delhi Research Station ("**Delhi**") in Delhi, Ontario starting in the late 1960s[89]. As described in a 1976 newspaper interview by Dr. Frank Marks, Delhi's Director General at the time, Delhi's role was to "(help) growers to produce the best crop possible for the most economic input expenditures to maintain a good net profit - and in addition - the type of tobacco most acceptable from a health viewpoint and for consumer acceptance"[90].

[189] One of the principal projects undertaken at Delhi was the creation of new strains of tobacco containing higher nicotine than previous strains ("**Delhi Tobacco**")[91]. This project was successful to the point that by 1983 essentially all the tobacco used in commercial cigarettes in Canada was Delhi Tobacco (Exhibit 20235). This was due in part, no doubt, to pressure by Canada on the Companies to buy their tobacco from Canadian farmers. [92]

[190] The Plaintiffs allege that the Companies controlled the research priorities at Delhi to the point of being able to dictate what type of projects would be carried out. Thus, they see the work done to develop higher-nicotine tobacco as a plot to assist the Companies in their quest to ensure and increase tobacco dependence among the populace.

[191] With respect, neither the documentary evidence nor the testimony at trial bear that out.

[192] Dr. Marks testified directly on this point:

> 196Q-Did the cigarette manufacturing companies ask Delhi to design and develop the higher nicotine strains?

---

88 See Exhibits 536 and 536A.

89 Delhi was jointly funded by Health Canada and Agriculture Canada.

90 Exhibit 20784.

91 Canada holds the patents to the various strains of Delhi Tobacco and earns royalties from their use by the Companies. The Court does not consider this fact to be of any relevance to these cases.

92 It is relevant to note that Delhi Tobacco gave a significantly higher yield per acre than previous strains, an important consideration for tobacco growers, AgCanada's main "clients".

> A- No, they did not.
>
> 197Q-Where did the idea come from?
>
> A- Part of the LHC Program and knowing... us knowing that the filtration process was going to be taking out a certain amount of the tar and, also, nicotine at the same time. So that was the impetus for going to a higher... higher nicotine type tobacco, so that when they did filter out tar, there would still be enough nicotine left for the smoker to get some satisfaction from it.[93]

[193] This explanation is consistent with the flow of evidence about Canada's approach to reducing the impact of smoking on Canadians' health in the 1970s and 1980s: "If you can't quit smoking, then smoke lower tar cigarettes".

[194] Rather than pointing to the Companies, the proof indicates that Canada was the main supporter of higher nicotine tobacco in its campaign to develop a less hazardous cigarette, i.e., one with a higher nicotine/tar ratio.[94] Health Canada assumed that by increasing the amount of nicotine inhaled "per puff", smokers could satisfy their nicotine needs with less smoking. It saw this as a way of developing a "less hazardous" cigarette, and even hoped to use the Companies' advertising as a means of promoting such products.[95]

[195] The problem was that the levels of tar and nicotine in tobacco follow each other. A reduction of, say, 20% in the tar will generally result in about a 20% reduction in the nicotine, which can leave the smoker "unsatisfied". Canada saw higher nicotine tobaccos as a way to preserve a sufficient level of nicotine after reducing the tar. In fact, this appears to have been something of a worldwide movement[96].

[196] It is true that the Companies favoured this approach, but there is no indication that they were the ones driving the Delhi bus in this direction[97]. In fact, it could be argued that higher nicotine cigarettes would permit a smoker to satisfy his nicotine needs with fewer cigarettes a day, thus reducing cigarette sales.

[197] On another point, the Plaintiffs argue at paragraph 585 of their Notes that "ITL had the ability to create a non addictive cigarette but instead chose to work to maintain or increase the addictive nature of its cigarettes". The submission is that the Companies did this in order to hook their customers on nicotine to the greatest extent possible so as to protect their market. Here again, the evidence fails to substantiate the allegation.

---

93 Transcript of December 3, 2013, at page 64.

94 Anecdotally, it is interesting to note that certain years' crops of Delhi Tobacco were so high in nicotine that it made the taste unacceptable. As a result, ITL imported low-nicotine tobacco from China to be blended with the Delhi Tobacco in order to produce cigarettes acceptable to smokers.

95 See Exhibits 20076.13, at page 2 and 20119, at page 3.

96 A useful analysis of the "high-nicotine tobacco movement" is found in a 1978 memo of Mr. Crawford of Macdonald Tobacco Inc. to Mr. Shropshire: Exhibit 647.

97 The Companies, on the other hand, certainly did cooperate. For example, Health Canada requested assistance from them in conducting smoker acceptance testing of the new tobaccos, and their cooperation in this regard was essential to the success of Delhi Tobacco.

[198] Although it is technically possible to produce a non-addictive cigarette[98], the evidence was unanimous in confirming that consumers would never choose it over a regular cigarette.

[199] Nicotine-free cigarettes were tested by several companies and consumer reaction confirmed their lack of commercial acceptance. They tasted bad and gave no "satisfaction". Even neutral government employees working at Delhi confirmed that. Furthermore, no evidence was adduced that such a cigarette would have any less tar than a regular cigarette.

[200] In light of the above, the present question loses its relevance. Accepting that they did choose tobacco with higher levels of nicotine, the Companies were in a very practical way forced to do so by Health Canada. Moreover, in the context of the time, far from being a nefarious gesture, this could actually be seen as a positive one with respect to smokers' health.

[201] Thus, by using tobacco containing higher levels of nicotine, ITL was neither attempting to keep its customers dependent nor committing a fault. This finding does not, however, negate possible faults with respect to the obligation to inform smokers of the dependence-creating properties of tobacco of which it was aware.

II.D. DID ITL TRIVIALIZE OR DENY OR EMPLOY A SYSTEMATIC POLICY OF NON-DIVULGATION OF SUCH RISKS AND DANGERS?

[202] Since Common Question "E" deals with marketing activities, the Court will limit its analysis in the present chapter to ITL's actions outside of the marketing field. This covers two rather broad areas: what ITL said publicly about the risks and dangers of smoking and what it did not say.

[203] In order to weigh these factors, it is necessary to understand what the Companies should have been saying. This requires a review of the nature and degree of the obligations on them to divulge what they knew, taking into account that the standards in force might have varied over the term of the Class Period. We shall thus consider the "obligation to inform"[99].

[204] Thereafter, we shall consider what the public knew, or could have known, about the dangers of smoking. It is also relevant to examine what ITL knew, or at least thought it knew, about what the public knew, for a party's obligation to inform can vary in accordance with the degree to which information is lacking. This analysis will apply to both files unless otherwise indicated.

[205] Before going there, however, we must, unfortunately, make several comments concerning the credibility of certain witnesses.

---

98 Such a product would have little or no nicotine, presumably being made from the mild leaves from the very bottom of the tobacco plant, versus those from higher up the stalk.

99 We treat this term as being synonymous with "duty to warn".

II.D.1 CREDIBILITY ISSUES

[206] The Court could not help but have an uneasy feeling about parts of the testimony of many of the witnesses who had been associated with ITL during the Class Period, particularly those who occupied high-level positions in management. Listening to them, one would conclude that there was very little concern within the company over the smoking and health debate raging in society at the time.

[207] Witness after witness indicated that issues such as whether smoking caused lung cancer or whether possible legal liability loomed over the company because of the toxicity of its products or whether the company should do more to warn about the dangers of smoking were almost never discussed at any level, not even over the water cooler. It went to the point of having ITL's in-house counsel, a member of the high-level Management Committee, confirm that he did not "specifically recall" if in that committee there had ever even been a discussion about the risks of smoking or whether smoking was dangerous to the health of consumers[100].

[208] How can that be? It is not as if these people were not aware of the maelstrom over health issues raging at the company's door. They should have been obsessed with it and its potentially disastrous consequences for the company's future prosperity - and even its continued existence. But one takes from their testimony that it was basically a non-issue within the marketing department and the Management Committee.

[209] If that is so, how can one explain ITL's embracing corporate policies and goals designed to respond to such health concerns, as it says it did? The company adopted as its working hypothesis that smoking caused disease, and it devoted a significant portion of its research budget to developing ways and means to reduce health risks, such as filters, special papers, ventilation, low tar and nicotine cigarettes and, through "Project Day", a "safer cigarette"?

[210] Make no mistake. There can be no question here of managerial incompetence. These are impressive men, each having decades of relevant experience in high positions in major corporations, including ITL. There must be another explanation.

[211] Might it be that the corporate policy at the time not to comment publicly on smoking and health issues carried over even to discussing them internally? This would be consistent with the BAT group's sensitivity towards "legal considerations".[101]

[212] One example of that sensitivity was provided by Jean-Louis Mercier, a former president of ITL. He testified that BAT's lawyers frowned on ITL performing scientific research to verify the health risks of smoking because that might be portrayed in lawsuits as an admission that it knew or suspected that such risks were present. Another example comes from BAT's head of research, Dr. Green, who confided to ITL's head of research in

---

[100] See the transcript of April 2, 2012, at pages 86 and 157. This 73-year-old witness professed to have a faulty memory, but he repeatedly demonstrated exact recall in responses that appeared to favour ITL's position.

[101] See Exhibit 29 at pdf 8 cited at paragraph 61 of the present judgment.

a 1977 memo that " ... it may be suggested that it is better in some countries to have no such (position) paper - "it's better not to know" and certainly not to put it in writing"[102].

[213] It simply does not stand to reason that, at the time they were getting legal advice going to the extent of limiting the type of research that ITL's large and well-staffed R&D department should perform, company executives were not discussing the hot topic of smoking and health.

[214] Either way, it goes against the Company. If false, it undermines the credibility and good faith of these witnesses. If true, it demonstrates both a calculated effort to rig the game and inexcusable insouciance. In any case, it is an element to consider in the context of punitive damages.

II.D.2 THE OBLIGATION TO INFORM

[215] Prior to 1994, the Civil Code dealt with this obligation under article 1053, the omnibus civil fault rule. The "new" Civil Code of 1994 approaches it in two similar but distinct ways, maintaining the general civil fault rule in article 1457 and specifying the manufacturer's duty in article 1468 and following. While the latter are new provisions of law, they are essentially codifications of the previous rules applicable in the area.

[216] Article 1457 is the cornerstone of civil liability in our law. It reads:

1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.	**1457.** Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.
Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.	Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.
[...]	[...]

[217] The Plaintiffs allege that the Companies failed to abide by the rules of conduct that every reasonable person should follow according to the circumstances, usage or law by the mere act of urging the public to use a thing that the Companies knew to be dangerous. Subsidiarily, they argue that it would still be a fault under this article by doing that without warning of the danger.

[218] The Court sees a fault under article 1457 as being separate and apart from that of failing to respect the specific duty of the manufacturer with respect to safety defects, as set out in article 1468 and following. The latter obligation focuses on ensuring that a potential user has sufficient information or warning to be adequately advised of the risks he incurs by using a product, thereby permitting him to make an educated decision as to whether and how he will use it. The relevant articles read as follows:

---

102 See Exhibit 125D.

1468. The manufacturer of a movable property is liable to reparation for injury caused to a third person by reason of a safety defect in the thing, even if it is incorporated with or placed in an immovable for the service or operation of the immovable. […]

1468. Le fabricant d'un bien meuble, même si ce bien est incorporé à un immeuble ou y est placé pour le service ou l'exploitation de celui-ci, est tenu de réparer le préjudice causé à un tiers par le défaut de sécurité du bien. […]

1469. A thing has a safety defect where, having regard to all the circumstances, it does not afford the safety which a person is normally entitled to expect, particularly by reason of a defect in the design or manufacture of the thing, poor preservation or presentation of the thing, or the lack of sufficient indications as to the risks and dangers it involves or as to safety precautions.

1469. Il y a défaut de sécurité du bien lorsque, compte tenu de toutes les circonstances, le bien n'offre pas la sécurité à laquelle on est normalement en droit de s'attendre, notamment en raison d'un vice de conception ou de fabrication du bien, d'une mauvaise conservation ou présentation du bien ou, encore, de l'absence d'indications suffisantes quant aux risques et dangers qu'il comporte ou quant aux moyens de s'en prémunir.

1473. The manufacturer, distributor or supplier of a movable property is not liable to reparation for injury caused by a safety defect in the property if he proves that the victim knew or could have known of the defect, or could have foreseen the injury.

Nor is he liable to reparation if he proves that, according to the state of knowledge at the time that he manufactured, distributed or supplied the property, the existence of the defect could not have been known, and that he was not neglectful of his duty to provide information when he became aware of the defect.

1473. Le fabricant, distributeur ou fournisseur d'un bien meuble n'est pas tenu de réparer le préjudice causé par le défaut de sécurité de ce bien s'il prouve que la victime connaissait ou était en mesure de connaître le défaut du bien, ou qu'elle pouvait prévoir le préjudice.

Il n'est pas tenu, non plus, de réparer le préjudice s'il prouve que le défaut ne pouvait être connu, compte tenu de l'état des connaissances, au moment où il a fabriqué, distribué ou fourni le bien et qu'il n'a pas été négligent dans son devoir d'information lorsqu'il a eu connaissance de l'existence de ce défaut.

[219] When discussing the ambit of this obligation in our law, Quebec authors have taken inspiration from at least two common law judgments: *Dow Corning Corporation v. Hollis*[103], a British Columbia case ("***Hollis***"), and *Lambert v. Lastoplex Chemicals Co. Limited*[104], an Ontario case ("***Lambert***"). Baudouin cites these two Supreme Court of Canada decisions on a number of points[105]. Hence, the issue of a manufacturer's duty to warn is one where the two legal systems coexisting in Canada see the world in a similar way, and for which we see no obstacle to looking to common law decisions for inspiration.

---

103 *Op. cit.*, Note 40.

104 [1972] R.C.S. 569.

105 See, for example, Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at para. 2-354, footnotes 62, 68 and para. 2-355.

[220] The Quebec jurisprudence on this question appears to have started with the exploding-gun case of *Ross v. Dunstall* ("***Ross***") in 1921[106]. Its ground-breaking holding was that a manufacturer of a defective product could have extracontractual (then known as "delictual") liability towards a person that did not contract directly with it.

[221] The Plaintiffs advance that it also stands for the proposition that the mere marketing of a dangerous product constitutes an extracontractual fault against which there can be no defence. They cite Baudouin in support:

> 2-346 - *Observations* – Cette reconnaissance (de l'existence d'un lien de droit direct entre l'acheteur et le fabricant) établissait, en filigrane, une distinction importante entre le produit dangereux, impliqué en l'espèce, et le produit simplement défectueux, la mise en marché d'un produit dangereux étant considérée comme une faute extracontractuelle.[107] (The Court's emphasis)

[222] The Court does not read either the *Ross* judgment or the citation from Baudouin in the same way as do the Plaintiffs. In *Ross*, it appears never to have crossed Mignault J.'s mind that the marketing of a dangerous product could constitute an automatic fault in and of itself. The closest that he comes to that is when he writes:

> […] but where as here there is hidden danger not existing in similar articles and no warning is given as to the manner to safely use a machine, it would appear contrary to the established principles of civil responsibility to refuse any recourse to the purchaser. Subject to what I have said, I do not intend to go beyond the circumstances of the present case in laying down a rule of liability, for each case must be disposed of according to the circumstances disclosed by the evidence.[108]

[223] In light of that, far from asserting that the sale of a dangerous product will always be a fault, the statement in Baudouin appears to be limited to underlining the possible extracontractual nature of marketing a dangerous product without a proper warning[109], as opposed to its being strictly contractual. That is the only rule of liability that Mignault J. appears to have been laying down in *Ross*.[110]

[224] Building on the sand-based foundation of the above argument, the Plaintiffs venture into the area of "risk-utility" theory. They argue that, "absent a clear and valid legislative exclusion of the rules of civil liability, every manufacturer must respect its duties under civil law to not produce and market a useless, dangerous product, and repair any injury caused by its failure to do so".[111] Implicit in this statement is the assumption not only that cigarettes

---

106 S.C.R. (1921) 62 S.C.R. 393.

107 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at para 2-346, p. 362.

108 *Ross, op. cit.*, Note 106, at p. 421.

109 It is important to note that, even in 1921, our courts recognized the duty to warn, a fact that disarms any argument here to the effect that imposing such a duty as of the beginning of the Class Period, some thirty years later, is an error of "hindsight".

110 Plaintiffs also cite the reflection of Professor Jobin as to whether, in the most serious of cases, an extremely dangerous item should ever be put on the market, regardless of the warnings attached: Pierre-Gabriel JOBIN, *La vente*, 3ème éd., Cowansville, Éditions Yvon Blais, 2007, pages 266-267. The question is an interesting one, flowing, as it seems to, from "risk-utility" theory, which we discuss below. That said, in our view it overstates the situation at hand.

111 At paragraph 42 of their Notes.

are dangerous, but that they are also useless and, moreover, that there exists a principle of civil law forbidding the production and marketing of useless products that are dangerous.

[225] Although the Companies now admit that cigarettes are dangerous, the proof does not unconditionally support their uselessness. Even the Plaintiffs' expert on dependence, Dr. Negrete, admits that nicotine has certain beneficial aspects, for example, in aiding concentration and relaxation[112].

[226] In any event, the Court finds no support in the case law and doctrine for a principle of civil law similar to the one that the Plaintiffs wish to invoke. In Quebec, the first paragraph of article 1473 makes it possible to avoid liability for a dangerous product, even one of questionable use or social value, by providing sufficient warning to its users. The rule is similar in the common law[113].

[227] Our review of the case law and doctrine applicable in Quebec leads us to the following conclusions as to the scope of a manufacturer's duty to warn in the context of article 1468 and following:

a. The duty to warn "serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product"[114];

b. A manufacturer knows or is presumed to know the risks and dangers created by its product, as well as any manufacturing defects from which it may suffer;[115]

c. The manufacturer is presumed to know more about the risks of using its products than is the consumer;[116]

d. The consumer relies on the manufacturer for information about safety defects;[117]

e. It is not enough for a manufacturer to respect regulations governing information in the case of a dangerous product;[118]

f. The intensity of the duty to inform varies according to the circumstances, the nature of the product and the level of knowledge of the purchaser and the degree of danger in a product's use; the graver the danger the higher the duty to inform;[119]

---

112 See Exhibit 1470.1, at page 3.

113 *Hollis, op. cit.,* Note 40, at page 658, citing *Buchan v. Ortho Pharmaceutical Canada Ltd.*, (1986) 32 D.L.R. 285 (Ont. C.A.) ("***Buchan***") at page 381, speaking of drug manufacturers.

114 *Hollis*, *op. cit.,* Note 40, at page 653.

115 *Banque de Montréal v. Bail Ltée*, [1992] 2 SCR 554 ("***Bail***"), at p. 587.

116 *Lambert*, *op. cit.,* Note 104, at pages 574-575).

117 *Bail*, *op. cit.,* Note 115, at page 587.

118 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at paragraph 2-354.

119 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at paragraph 2-354; Buchan, at page 30; Hollis, *op. cit.*, Note 40, at page 654.

g. Manufacturers of products to be ingested or consumed in the human body have a higher duty to inform;[120]

h. Where the ordinary use of a product brings a risk of danger, a general warning is not sufficient; the warning must be sufficiently detailed to give the consumer a full indication of each of the specific dangers arising from the use of the product;[121]

i. The manufacturer's knowledge that its product has caused bodily damage in other cases triggers the principle of precaution whereby it should warn of that possibility;[122]

j. The obligation to inform includes the duty not to give false information; in this area, both acts and omissions may amount to fault; and[123]

k. The obligation to inform includes the duty to provide instructions as to how to use the product so as to avoid or minimize risk.[124]

[228] Professor Jobin sums it up nicely:

> *Il faut enfin souligner l'étendue, variable, de l'obligation d'avertir d'un danger inhérent. À juste titre, la jurisprudence exige que, plus le risque est grave et inusité, plus l'avertissement doit être explicite, détaillé et vigoureux. D'ailleurs, dans un grand nombre de cas, il ne suffit pas au fabricant d'indiquer le danger dans la conservation ou l'utilisation du produit: en effet, il est implicite dans la jurisprudence qu'il doit aussi, très souvent, indiquer à l'utilisateur comment se prémunir du danger, voire comment réduire les conséquences d'une blessure quand elle survient.*[125]

II.D.3 NO DUTY TO CONVINCE

[229] Since the present analysis applies to all three Companies, the Court will consider now two connected arguments raised by JTM. The first is that "the source of the awareness and, in particular, whether it came from the manufacturer, is legally irrelevant. What matters is that consumers are apprised of the risks, not how they became so."[126]

[230] In the second[127], it contests the Plaintiffs' assertion that "If a manufacturer becomes aware that, despite the information available to consumers, they do not fully understand their products' risks, *this should be a signal to this manufacturer that it has not appropriately*

---

120 *Hollis*, *op. cit.,* Note 40, at page 655.

121 *Hollis*, *op. cit.,* Note 40, at page 654; *Lambert*, *op. cit.,* Note 104, at pages 574-575.

122 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at para 2-354; Lambert, at pages 574-575.

123 *Bail*, *op. cit.*, Note 115, at page 587.

124 Pierre LEGRAND, *Pour une théorie de l'obligation de renseignement du fabricant en droit civil canadien*, (1980-1981) 26 McGill Law Journal, 207 at page 229.

125 Pierre-Gabriel JOBIN, *La vente*, *op. cit.*, Note 110, pages 294-295, paragraph 211. He cites some six cases in support at footnote 116.

126 At paragraph 89 of JTM's Notes.

127 At paragraph 110 of JTM's Notes.

discharged its duty to inform."[128] In this regard, JTM argues that the duty to warn is not equivalent to a duty to convince.

[231] On the question of the source of the awareness, the test under article 1473 is whether the consumer knew or could have known of the safety defect, as opposed to whether the manufacturer had taken any positive steps to inform. That confirms JTM's position, but does not paint the full picture.

[232] Where the manufacturer knows that the information provided is neither complete nor sufficient with respect to the nature and degree of probable danger[129], the duty has not been met. That is the case here. We earlier held that the Companies were aware throughout the Class Period of the risks and dangers of their products, both as to the Diseases and to dependence. They thus knew that those risks and dangers far surpassed what either Canada, through educational initiatives, or they themselves, through the pack warnings, were communicating to the public. That represents a grievous fault in light of the toxicity of the product.

[233] Much of this also applies to JTM's second argument opposing the imposition of a duty to convince. Again, the test is, in general: "knew or could have known", but the bar is higher for a dangerous product. Turning that test around, in these circumstances it seems appropriate to ask whether the Companies knew or could have known if the public was being sufficiently warned. The answer is that the Companies very well knew that they were not.

[234] Putting aside specialized, scientific studies to which the public would not normally have access, the information available during much of the Class Period was quite general and unsophisticated. We include in that the pre-1988 Warnings.

[235] It is telling, for example, that Health Canada did not see the need to impose starker Warnings until 1988. This indicates that the government could not have been fully aware of the exact nature and extent of the dangers of smoking, otherwise we must presume that they would have acted sooner. This was apparent to the Companies, a fact that they essentially admit in a June 1977 RJRM memo drafted by Derrick Crawford.

[236] Reporting on a meeting between Health Canada and, *inter alia*, the Companies to discuss the project for a less hazardous cigarette, Mr. Crawford mocked the technical abilities of Health Canada in several areas and noted that "they were actually looking to us for help and guidance as to where they should go next"[130]. In his concluding paragraph, he underlines the government's shortcomings and lack of understanding:

> 7. One had to leave this meeting with a sense of frustration — so much time spent and so little achieved. On the other hand it leaves one with a degree of optimism for the future as far as the industry is concerned. They are in a state of chaos and are uncertain where to turn next from a scientific point of view. They want to be

---

128 At paragraph 365 of Plaintiffs' Notes. Emphasis in the original.

129 Theoretically, at least, incomplete information could still provide sufficient warning.

130 Exhibit 1564, at pdf 1. At pdf 6, he does state that the Companies would be willing to give guidance if the government were prepared to embark on a realistic programme, which he felt they were not ready to do.

> seen to be doing the right thing, and to keep their Dept. in the forefront of the Smoking & Health issue. However it appears they simply do not have the funds to tackle the problem in a proper scientific manner. Our continuing dialogue can continue for a long time, as they feel meetings such as these are beneficial. Pressure must be off shorter butt lengths for a considerable time[131]

[237] If the Companies knew that Health Canada was in a state of confusion, they had to assume that the public was even less up to speed. Farther on, we look at what ITL knew about what the public knew and conclude that its regular market surveys would have led it to believe that much of the public was in the dark about smoking and health realities. This should have guided ITL's assessment of whether it had met its duty to inform. It did not.

[238] Rather than taking the initiative in helping the government through the learning process, the Companies' strategy was to hold Canada back as long as possible in order to continue the *status quo*. Smoking prevalence was still growing in Canada through much of this period[132] and the Companies were reaping huge profits. It was in their financial interest to see that continue as long as possible.

[239] By choosing not to inform either the public health authorities or the public directly of what they knew, the Companies chose profits over the health of their customers. Whatever else can be said about that choice, it is clear that it represent a fault of the most egregious nature and one that must be considered in the context of punitive damages.

[240] So far in this section, the Court has focused on the manufacturer's obligation to inform under article 1468 and following but, under article 1457, a reasonable person in the Companies' position also has a duty to warn.

[241] In a very technical but nonetheless relevant sense, the limits and bounds of that duty are not identical to those governing the duty of a manufacturer of a dangerous product. This flows from the "knew or could have known" defence created by article 1473.

[242] Under that, a manufacturer's faulty act ceases to be faulty once the consumer knows, even where the manufacturer continues the same behaviour. In our view, that is not the case under article 1457. The consumer's knowledge would not cause the fault, *per se*, to cease. True, that knowledge could lead to a fault on his part, but that is a different issue, one that we explore further on.

II.D.4 WHAT ITL SAID PUBLICLY ABOUT THE RISKS AND DANGERS

[243] In its Notes, ITL dismisses Plaintiffs' arguments, and the evidence, or lack thereof, on which they are based:

---

131 Exhibit 1564, at pdf 8. The issue of shorter butt lengths was one that the Companies opposed, so this comment indicates that Health Canada's problems would keep pressure off the Companies to change their practices on that point.

132 Prevalence, i.e., the percentage of Canadians smoking, peaked in 1982, although sales did not peak until a year later because of population growth.

> **574.** Accordingly, Plaintiffs are left with a handful of statements by individuals from a 50-year period which they characterize as being "public statements" made on ITL's behalf. On their face, however, these statements were clearly not widely disseminated, and were not intended to "trivialize" smoking risks. What is more, these statements have to be contextualized by the fact that the company had long since acknowledged the risks, and had included warnings on their packs and advertisements since the early 1970s. No isolated statement made in a discrete forum could possibly even rise to the level of a footnote in the context of these background communications.
>
> **575.** Finally, and perhaps most fundamentally, this Court has not heard a single Class Member come forward to say that he/she heard any of the allegedly "trivializing" statements, let alone relied upon any of them.

[244] Before considering the impact of ITL's declarations, let us look at what was being said.

[245] In the early part of the Class Period, ITL did not hesitate to voice doubt about the link between tobacco and disease. A 1970 interview accorded by Paul Paré, then president of ITL, to Jack Wasserman, a Vancouver radio host[133], is typical of the message ITL was still delivering at that time. There, Mr. Paré makes light of the scientific evidence linking tobacco to serious disease and advances the argument so often made by Canadian tobacco executives that more research must be done by "real" scientists before being able to make any statement on the risks of smoking.

[246] Although this event did not have any direct effect in Quebec, it typifies the "scientific controversy" message that the Company and the CTMC were extolling throughout much of the Class Period and it is useful to reproduce a large part of it.

> (J. Wasserman) … All through your speech in Vancouver you have suggested that it's just a propaganda campaign against the tobacco industry, and it really ain't true that I'm liable to get lung cancer, that I'm liable to get emphysema, if I keep on smoking.
>
> (P. Paré) Well, I don't think that we have said that you're liable to get nothing if you smoke a great deal. And I don't think that we have tried to point the finger at being entirely a propaganda activity. I think, what we have said, that the finger of suspicion is pointed at the industry.
>
> (J.W.) Yes
>
> (P.P.) And the industry has, on that account, a responsibility to respond to it. The interesting feature is, there isn't a single person in the medical profession or any federal or provincial bureau that's been able to identify anything that suggests that there's a connection between smoking and any disease.
>
> (J.W.) Do you mean that the world famous scientists and medical men that make these connections, using statistical evidence, are just a bunch of needless worry warts?
>
> (P.P.) No, but I think that one would have to question the world famous scientists. I think I could demonstrate to you that there are more world famous scientists who

[133] Exhibit 25A.

have actually conducted a good deal of activity on the … on those areas of research which, we think, are probably more fruitful, for they would talk about the kind of things that speak of generic differences, or behavioural differences, or stress differences, the kind of thing that may have some meaning. What is the virtue of having a statistical association reiterated, year after year after year, without adding a single new bit of information and….

(J.W.) You said the responsibility of the industry was to answer the charges.

(P.P.) M'hm

(J.W.) Is it not the responsibility of the industry to go find out if the charges are correct and to deal with them because, if the charges are correct – and God knows there are enough charges – you are selling poison?

(P.P.) Well, I think the industry has done everything so far, within its competence to do. We have invested, as an industry (inaudible), scores of millions of dollars trying to demonstrate what it is that causes this phenomenon of a statistical association.

…

(P.P.) … I think that I can turn around and tell you about men, any number of them, we could have brought fifty (50) famous people who ...

(J.W.) You quote … you quote a number of them.

(P.P.) Just … yes, and that particular top guy is given there as a reference to what Professor *Cellier (?)*, Dr. Cellier has said. But any number of these scientists are much larger in the context of their reputation than what people generally think about the tobacco industry, and basically not, in any way, subservient to us. Indeed they've made it very clear, this is something they believe strongly in because … And I suspect, if you had a chance to see most doctors privately, you would find that they would say that this particular thing has been blown up out of proportion.

…

(P.P.) … But it would be difficult to rely – certainly I wouldn't try and rely – on any tar and nicotine relationship as between filters and non-filters, because tar and nicotine themselves have not been able to be shown to be dangerous to anything.

(J.W.) They injected it into rats and there was a higher incidence of a certain kind of cancer.

(P.P.) No, there wasn't. This is one of the curious things about it. They have tried, when I say "they", I mean the medical fraternity as a whole, have tried to induce cancer for thirty (30) years by the use of extraordinary dosages of the by-products of smoke, which are identified as tar and nicotine. It's never been able to be achieved. Now they have applied, or did apply, in a couple of experiments on mouse, on mice rather, doses of tar on their backs, and were able to develop certain skin cancers on the early experiments. Now even the doctors will confess that this is meaningless, for you can do the same thing with tomato ketchup or orange juice, or anything if you want to apply it…

> (J.W.) Have they done tests showing that, in fact … suggesting that tomato ketchup has caused skin cancer in mice?
>
> (P.P.) Oh yes, indeed, lots of different products that have been used in this way have been able to develop a skin cancer.
>
> …
>
> (P.P.) … I think that the human system is exposed to these things in cycles, and it tends to develop a resistance to them. Now, just to put it in a perspective. At the turn of the century, when lung cancer was first identified, the average age of the incidence of lung cancer was in the forties (40's). Now lung cancer today is a disease (inaudible) of the old. The average incidence of lung cancer is over sixty (60). And projecting the pattern, in ten (10) years, it will be over seventy (70).
>
> …
>
> (P.P.) … What I think a scientist would say, a real scientist would say, is that this kind of a statistical association creates a pretty important hypothesis, and one that deserves some pure research. You then will have to decide, well, what is the area of the research, for you can't look at a particular contributing factor in isolation. Obviously, even in this case, they're talking about the possibility of two (2) factors; it may very well be there are ten (10) factors, and it's possible – I suppose – that smoking be one of them, but there is no evidence to support that view…
>
> …
>
> (P.P.) … I think, what you find, and this is I think an interesting thing, in a general context, here you say, or we have had it said constantly that the morbidity rate is associated …, the morbidity rate of cigarette smokers is going to be something like eight (8) or nine (9) years less than somebody else. And I think the fact of the matter is, all these evils of smoking that are charged with visiting upon consumers (sic), tends to be, in my view at least, questioning the fact that, here we are as Canadians, living healthier and longer lives than we've ever lived, smokers or non-smokers alike. And, you know, you can go back over the years and find people three hundred (300) years ago saying that tobacco is going to kill everybody going to kill everybody.
>
> …
>
> (P.P.) Is having smaller babies a bad thing, do you know? I think there was a study done in Winnipeg by a doctor which demonstrated that smaller babies was probably a good thing; the baby has a better chance to live and lives a health … has a better chance to grow normally.

[247] Even to its own employees, ITL was denying the existence of a scientifically-endorsed link between cigarette smoking and disease and trivializing the evidence to that effect. As would be expected, the company's internal corporate newsletter, *The Leaflet*, painted a most favourable portrait of smoking[134].

[248] In the June 1969 edition of the *Leaflet*[135], ITL published a "Special Report on Smoking and Health". It highlighted Mr. Paré's comments before the Isabelle Committee

---

134 See the Exhibit 105 series.

135 Exhibit 2.

of the House of Commons studying the effects of smoking on health[136]. The following are extracts from its front page:

> Mr. Paré pointed out that in the last 15 years no clinical or experimental evidence has been found to support the statistical association of smoking with various diseases. In fact, considerable evidence to the contrary has been found and many scientist and medical people were now prepared to say so publicly.
>
> There is an emerging feeling among many people that smoking isn't really the awful sin it has been made out to be, Mr. Paré said. He attributed this to the fact that the tobacco industry has recently been able to counter the arguments of the anti-smoking advocates with the testimony of reputable scientists. More has been leaned about tobacco in the last five years, he said, and as a result the industry feels more confident of its position.
>
> Highlights of (the industry's) brief
>
> - There is no proof that tobacco smoking causes human disease.
>
> …
>
> - Statistical associations, on which many of the claims against smoking are based, have many failings and do not show causation.
>
> …
>
> - Attacks on tobacco and its users – for health and other reasons – are not new. They have been recurring for centuries.
> - The tobacco industry has diligently sought answer to the unresolved health questions.
>
> …
>
> - Although there is no proof of any health significance in the levels of so-called "tar" and nicotine in the smoke of cigarettes, the industry has responded to the demands of some of its consumers by producing brands that deliver less "tar" and nicotine.
>
> …
>
> - The industry has acted with restraint in challenging the extreme, biased, and unproved charges that cigarettes are responsible for all kinds of ailments.

[249] It is important to note that Mr. Paré's comments before the Isabelle Committee and the extracts of the 120-page brief reproduced in *The Leaflet* were all submitted on behalf of the Ad Hoc Committee of the Canadian Tobacco Industry, later to become the CTMC. Paré was the Chairman of that organisation at the time. As such, he and the brief were speaking for all the members of the Canadian tobacco industry and the extracts cited above must therefore be taken as having been endorsed by each of the Companies.

---

[136] ITL makes a claim of Parliamentary Privilege on this edition of its newsletter. Although the Court accepts that claim for Mr. Paré's actual testimony before the committee, it rejects it with respect to a voluntary restatement or "republication" of his comments outside of that body: *Jennings v. Buchanan*, [2004] UKPC 36, at pages 12 and 18 (UK Privy Council).

[250] By the time of Mr. Paré's testimony before the Isabelle Committee in 1969, the Companies had long known of the risks and dangers of smoking and yet they wilfully and knowingly denied those risks and trivialized the evidence showing the dangers associated with their products.

[251] The campaign continued. In a written reply to the question: "How can you reconcile your leadership in an industry whose product is indicted as a health hazard?" posed by the Financial Post in November 1970, Mr. Paré, speaking for ITL, writes:

> However, no proof has been found that tobacco smoking causes human disease. The results of the scientific research and investigation indicate that tobacco, especially the cigarette, has been unfairly made a scapegoat in recent times for nearly every ill that can affect mankind.
>
> In the indictment against smoking other factors such as environmental pollution, genetic factors and occupational exposures have not been adequately assessed. Attempts have been made to build up statistics to claim that smokers suffer more illnesses and loss of working days, but there is no valid experimental evidence to support this claim.[137]

[252] This reflects the standard mantra of the industry at the time, the "scientific controversy" by which the harmful effects of smoking on health were not exactly denied but, rather, were characterized as being complicated, multi-dimensional and, especially, inconclusive, requiring much further research. It insinuated into the equation the idea that genetic predisposition and "environmental factors", such as air pollution and occupational exposures, could be the real causes of disease among smokers.

[253] Seven years after the correspondence with the Financial Post, the message had not changed. In a December 1976 document entitled "Smoking and Health: The Position of Imperial Tobacco", we see the following statement:

> 6. I.T.L. is in agreement with serious-thinking consumers, whether they choose to smoke or not, who view the smoking and health question as being inconclusive, as requiring continuing research and corrective measures as definitive findings are established.[138]

[254] In fairness, ITL did permit certain research papers produced by it or on its behalf to be published in scientific journals, some of which were peer reviewed. In particular, some of Dr. Bilimoria's work in collaboration with McGill University was published[139]. This, however, does not impress the Court with respect to the obligation to warn the consumer.

[255] Such papers were inaccessible to the average public, both because of their limited circulation and of the technical nature of their content. Moreover, the fact that the general scientific community might have been informed of certain research results does not satisfy ITL's obligation to inform. Except in limited circumstances, as under the

---

137 Exhibit 907.

138 Exhibit 28A, at page 1.

139 It is unfortunate that this "openness" on ITL's part did not apply across the board. In 1985, its president, Stewart Massey, asked BAT if it had objections or comments about the publication of certain research papers, to which Mr. Heard of BAT replied: *"I think it is unwise to publish any findings of our studies on smoking behaviour on any smoking products"*: Exhibit 1603.2.

learned intermediary doctrine, the duty to warn cannot be delegated. As the Ontario Court of Appeal states in *Buchan*:

> I think it axiomatic that a drug manufacturer who seeks to rely on the intervention of prescribing physicians under the learned intermediary doctrine to except itself from the general common law duty to warn consumers directly must actually warn prescribing physicians. The duty, in my opinion, is one that cannot be delegated.[140]

[256] On the other hand, the role played by Health Canada with respect to smoking and health issues might fit into the learned intermediary definition. In that regard, however, the Companies would have had to show that they actually warned Health Canada of all the risks and dangers that they knew of. As shown elsewhere in the present judgment, they failed to do that.

[257] Getting back to what ITL and the other Companies were telling the public, the CTMC continued the same message after Mr. Paré's departure. In a 1979 letter to the Editorial Page Editor of the Montreal Star newspaper[141], Jacques Larivière, the CTMC's head of communications and public relations, responded to an editorial by sending two documents, accompanied by the following comments on the second one:

> The second document, "Smoking and Health 1964-1979 The Continuing Controversy"[142] was produced by the Tobacco Institute in Washington in an attempt to inject some rational thinking into the debate and to replace the emotionalism with fact.

[258] The Tobacco Institute is the US tobacco industry's trade association and the document defends "the continuing smoking and health controversy" where "there are statistical relationships and several working hypotheses, but no definitive and final answers" and "scientists have not proven that cigarette smoke or any of the thousands of its constituents as found in cigarette smoke cause human disease.[143]

[259] In the opinion of Professor Perrins, one of the Companies' experts, only "outliers" were denying the relationship between smoking and disease after 1969. He defined outliers as persons who defend a position that the vast majority of the community rejected.[144] The Tobacco Institute document that the CTMC turned to "to inject some rational thinking into the debate and to replace the emotionalism with fact" was published ten years after Dr. Perrins' outlier date. It contradicted what the Companies knew to be the truth and it was sent to a newspaper, as were other similar communications at the time.

[260] The Companies argue that these types of statements had little or no play with the public and could not have caused anyone to smoke. They also point out that not a single Member came forward to testify that any of the Companies' statements in favour of their products caused him to start or to continue to smoke.

---

140 *Buchan*, at pages 31-32. The learned intermediary doctrine will often apply in the type of relationship between a doctor and his patient with respect to information provided by a pharmaceutical company to the medical community but not to the general public.

141 Exhibit 475.

142 Exhibit 475A.

143 At pdf 5-7.

144 See the transcript of August 21, 2013, at pages 70-76 and 235-236.

[261] The latter statement is true and it is one that the Companies raise time and again against the Plaintiffs' case on a number of issues, starting well before the opening of the trial. It is also one that never inspired great sympathy from the Court, and our lack of enthusiasm remains unabated.

[262] We have repeatedly held that, in class actions of this nature, the usefulness of individual testimony is inversely proportional to the number of people in the class. As we shall see, the number of people in the Classes here varies from 100,000 to 1,000,000. These proportions render individual testimony useless, a viewed shared by the Court of Appeal[145]. They also render hollow the Companies' cry for an unfavourable inference resulting from the absence of Members' testimony.

[263] In any event, the Court is of the view that the Plaintiffs are entitled to a presumption[146] that the Companies' statements (outside of marketing efforts, which are analyzed further on) were generally seen by the public and did lead to cigarette smoking.

[264] As Professor Flaherty's time lines show, the Companies' statements were widely reported in newspapers and magazines read in Quebec[147]. The Companies rely on this evidence to show that the general public was aware of the negative publicity about smoking through newspaper and magazine articles, but the knife cuts both ways. Although fewer and fewer with time, articles reporting the Companies' stance appeared in the same publications. One must presume that they would also have been seen by the general public.

[265] As well, the effect of the gradual reduction of these statements after the Companies decided to abstain from making any public statements about health, as discussed in the following chapter, is mitigated by the reality that, during the Class Period, the Companies never rescinded these statements. In fact, as late as the end of 1994 ITL was still defending the existence of the same "scientific controversy" that Mr. Paré had been preaching decades earlier[148]. As noted by Professor Flaherty, ITL's own expert:

> November/December 1994 issue of *The Leaflet*, an Imperial Tobacco publication for employees and their families, had an article entitled — Clearing the Air: Smoking and Health, The Scientific Controversy" which contained this excerpt: "The facts are that researchers have been studying the effects of tobacco on health for more than 40 years now, but are still unable to provide undisputed scientific proof that smoking causes lung cancer, lung disease and heart disease ... The fact is nobody knows yet how diseases such as cancer and heart disease start, or what factors affect the way they develop. We do not know whether or not smoking could cause these diseases because we do not understand the disease process".[149]

---

145 See Imperial *Tobacco v. Létourneau*, 2012 QCCA 2013, at parapgraph 51.

146 We present our understanding of the rules relating to presumptions in section VI.E of the present judgment.

147 See the titles of smoking and health stories in newspapers in the series of Exhibits filed under number 20063.2 and following, especially in the pre-1975 years.

148 We discuss the birth of the scientific-controversy strategy in section II.F.2 of the present judgment.

149 Exhibit 20063.10, at pdf 154.

[266] True, this article was directed principally at its own employees, presumably hundreds or even thousands of them, but it highlights the degree to which ITL's posture and message had not changed even 25 years after the first date when only outliers were denying causality, or at least the existence of a relationship between smoking and disease[150].

[267] On the other hand, many of the Companies' statements were technically accurate. Science has not, even today, been able to identify the actual physiological path that smoking follows in causing the Diseases. That, however, is neither a defence nor any sort of moral justification for denying the link. As noted in our review of the manufacturer's obligation to inform, its knowledge that its product has caused bodily damage in other cases triggers the principle of precaution whereby it should warn of that possibility.[151]

[268] Thus, one can only wonder whether the people making such comments were remarkably naïve, wilfully blind, dishonest or so used to the industry's mantra that they actually came around to believe it. Their linguistic and intellectual pirouettes were elegant and malevolent at the same time. They were also brutally negligent.

[269] ITL and the other Companies, through the CTMC and directly[152], committed egregious faults as a result of their knowingly false and incomplete public statements about the risks and dangers of smoking.

[270] As a final note on the subject, ITL and the other Companies argue that their customers were getting all the information they needed through other sources, especially the Warnings. Although these do form part of what the Companies were saying publicly, for reasons alluded to above[153] and developed more fully in the next section, it is more logical to deal with the Warnings in the context of what the Companies were not saying publicly.

II.D.5 WHAT ITL DID NOT SAY PUBLICLY ABOUT THE RISKS AND DANGERS

[271] Throughout much of the Class Period, the Companies adhered to a strict policy of silence on questions of smoking and health[154]. They justify their decision in this regard on three accounts: the Warnings gave notice enough, no one would believe anything they said anyway and, in any event, it was up to the public health authorities to do that and they did not want to contradict the message Health Canada was sending.

[272] The history of the implementation of the Warnings, even after the enactment of the TPCA, shows constant haggling between Canada and the Companies, initially, as to whether pack warnings were even necessary, and then, as to whether they should be attributed to Health Canada, and finally, as to the messages they would communicate.

---

150 See the transcript Dr. Perrins: August 21, 2013, at pages 70-76 and 235-236.

151 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at paragraph 2-354; *Lambert*, at pages 574-575.

152 We analyze the situation of the other Companies in the chapters dealing with them.

153 See section II.B.1.b.2 of the present judgment.

154 See, for example, the testimony of ITL's former Vice-President of Marketing, Anthony Kalhok, in the transcript of April, 18, 2012, at page 113.

The Companies resisted the Warnings at all stage and attempted, and generally succeeded, in watering them down.

[273] A good example of this is seen as late as August 1988 in the CTMC's comments to Health Canada on the proposed Warnings under the TPCA. Lobbying against a Warning on addiction, its president wrote the following to a Health Canada representative:

> Particularly in the absence of clear government sponsorship of the proposed messages, we have serious difficulty with the specific language of the health messages contained in your July 29th proposals. We do not accept the accuracy of their content.
> With or without attribution, we are particularly opposed to an "addiction" warning. Calling cigarettes "addictive" trivializes the serious drug problems faced by our society, but more importantly. (sic) The term "addiction" lacks precise medical or scientific meaning. (Exhibit 694, at page 10 PDF)

[274] The Warning on addiction was not introduced for another six years, presumably at least in part as a result of the CTMC's interventions.

[275] Be that as it may, the Companies maintain that the Warnings, whether voluntary or imposed, satisfied in every aspect their obligations to inform the customer of the inherent risks in using their products. In fact, they read subsection 9(2) of the TPCA as a type of injunction blocking them from saying anything more, particularly when coupled with the ban on advertising in effect as of 1988. That provision reads:

> **9(2)** No distributor shall sell or offer for sale a tobacco product if the package in which it is contained displays any writing other than the name, brand name and any trade marks of the tobacco product, the messages[155] and list referred to in subsection (1), the label required by the *Consumer Packaging and Labelling Act* and the stamp and information required by sections 203 and 204 of the *Excise Act*.

[276] Plaintiffs disagree. They correctly point out that subsection 9(3) of the TPCA rules out that argument:

> **9(3)** This section does not affect any obligation of a distributor, at common law or under any Act of Parliament or of a provincial legislature, to warn purchasers of tobacco products of the health effects of those products".

[277] This should have been notice enough to the Companies that the public health authorities were clearly not trying to occupy the field with respect to warning the public. On the other hand, it is, of course, true that the Companies should not say or do anything that would contradict Health Canada's message, but that posed no obstacle to acting properly.

[278] The "restrictions" on the Companies' statements to the public are every bit as present today as they were during the Class Period, nevertheless, for at least the last ten years each Company has been warning the public of the dangers of smoking on its

---

[155] i.e., the Warnings.

website[156]. If the kinds of statements they are making today are legal and proper, their contention that during the fifty previous years the tobacco laws - or their respect for the role of public health authorities - foreclosed them from doing more than printing the Warnings on their packages is feeble to the point of offending reason. It also leads to the conclusion that during the Class Period the Companies shirked their duty to warn in a most high-handed and intentional fashion.

[279] For these reasons, the argument that it was up to the public health authorities to inform the public of the dangers of smoking, to the exclusion of the Companies, is rejected.

[280] On the point about whether anyone would believe any smoking warning they might have tried to deliver, there is a flaw in their logic. Although it is probably true that no one would believe anything positive the Companies said about smoking, that is not necessarily the case when it comes to delivering a negative message. It is not unreasonable to think that, had the manufacturer of the product readily and clearly admitted the health risks associated with its use, as the Companies sort of do now, people might well have taken notice. But is that even relevant?

[281] The obligation imposed on the manufacturer is not a conditional one. It is not to warn the consumer "provided that it is reasonable to expect that the consumer will believe the warning". That would be nonsensical and impossible to enforce.

[282] If the manufacturer knows of the safety defect, then, in order to avoid liability under that head, it must show that the consumer also knows. On the other hand, under the general rule of article 1457, there is a positive duty to act, as discussed earlier.

[283] The argument that they would not have been believed had they tried to do more is rejected.

[284] Getting back to the obligation to inform, the Warnings appear to be not so much a demonstration of the Companies saying publicly what they knew but, rather, just the opposite.

[285] We have already held that the Companies knew of the risks and dangers of using their products at least from the beginning of the Class Period. We have also noted that the pre-TPCA Warnings conveyed essentially none of that knowledge. In fact, even in the 1998 document where ITL claims to have first admitted that smoking causes lung cancer, it fails to drive the message home:

> **What about smoking and disease?**
>
> Statistical research indicates that smoking is a risk factor which increases a person's chances of getting lung cancer, emphysema, and heart disease. Clear

---

[156] See, for example, Exhibit 561, JTM's website in 2008, which stated as the first of its six core principles: "**Openness about the risks of smoking**: public authorities have determined that smoking causes and/or is a risk factor for a number of diseases. We support efforts to advise smokers accordingly. No one should smoke without being fully informed about the risks of doing so".

> messages about risks are printed on all packs of cigarettes, and public health authorities advise against choosing to smoke.[157]

[286] Once again, the points are accurate, but one gets the distinct impression that ITL is trying to disassociate itself from them, as if it is something of an unpleasant business to have to say this.

[287] Throughout essentially all of the Class Period, the Warnings were incomplete and insufficient to the knowledge of the Companies and, worse still, they actively lobbied to keep them that way. This is a most serious fault where the product in question is a toxic one, like cigarettes. It also has a direct effect on the assessment of punitive damages.

[288] It follows that, if there is fault for tolerating knowingly inadequate Warnings, there is an arguably more serious fault during the 22 years of the Class Period when there were no Warnings at all. The Companies adduced evidence that in this earlier time it was less customary to warn in consumer matters than it is today. So be it. Nonetheless, knowingly exposing people to the type of dangers that the Companies knew cigarettes represented without any precaution signals being sent is beyond irresponsible at any time of the Class Period. It is also intentionally negligent.

[289] There is more to say on the subject of pack warnings. The Companies called two experts: Dr. Stephen Young and Dr. William "Kip" Viscusi to assist the Court on aspects of this topic.

[290] Dr. Young, a consultant on safety communications at Applied Safety & Ergonomics, Inc. in Ann Arbor, Michigan, was qualified by the Court as an expert in the theory, design and implementation of consumer product warnings and safety communications. The Companies asked him to answer three questions "from the perspective of an expert in the theory, design and implementation of product warnings":

- Was it reasonable that Defendants did not provide consumers with product warnings regarding the health risks of smoking prior to the Department of National Health and Welfare warning that was adopted in 1972?
- Was it reasonable that Defendants did not include additional/different information in their warnings such as:
  - a detailed list of all diseases potentially caused by smoking,
  - statistical information about the probabilities of various health consequences associated with smoking, and/or
  - a detailed list of known or suspected carcinogens in cigarette smoke?
- Would the adoption of an earlier warning or the provision of additional/different warning information likely have had a significant effect on smoking initiation and/or quitting rates in Quebec?[158]

[291] He answered all three in the Companies' favour, summarizing his opinion in the following terms:

---

157 Exhibit 34, at pdf 5. See also Exhibit 561, JTM's website in 2008, cited in the preceding footnote.

158 Dr. Young's report: Exhibit 21316.

> Yes, my conclusions was that... are that it was reasonable that Defendants did not provide health warnings, product warnings, regarding the health risks of smoking prior to nineteen seventy-two (1972); that it was reasonable they did not provide additional or different information on health warnings, including a detailed list of all diseases potentially caused by smoking, statistical information about the probability of various health consequences, or detailed lists of known and suspected carcinogens.
>
> And then, finally, that the adoption of earlier warning, or one with additional or different information, would not likely have had a significant effect on smoking initiation or quitting rates in Quebec.[159]

[292] Smoking is a public health risk, in his view, and public health risks should be, and generally are, controlled by the public health authorities as far as warning, education and risk management are concerned. He views the proper role of printed warnings on product packaging as being "instructional" with regard to how to use the product properly, not "informational" with regard to the possible dangers of the product.

[293] If that is the case, then the Companies' position that the Warnings provided sufficient information is impaled on its own sword.

[294] In performing his mandate, his first related to tobacco products, Dr. Young saw no need to consider any internal company documentation or, for that matter, public company documentation, such as advertising material and public pronouncements. He approached his work "entirely from a warnings perspective, and from warnings theory"[160].

[295] We note that his use of the term "warnings" relates specifically and solely to on-package warnings. He was not engaged to address the overall obligation to warn. There is a danger that these two issues could be confused. The latter is much broader than the former, as seen in this exchange before the Court:

> 459Q-I'm not talking about warning, I'm talking about telling the public one way or the other.
>
> A- Well, my opinions really only relate to what a reasonable manufacturer would do with regard to warnings. So other communications and so forth would be the judgment of others, as far as whether or not they're appropriate.[161]

[296] Thus, Dr. Young was not mandated to, nor did he, make any effort to analyze the actual degree to which the Quebec public - or the Canadian public health authorities for that matter – were ignorant of the risks and dangers of smoking at various times over the Class Period. He was not provided any of the available evidence on the internal documents of the Companies dealing with things like their marketing, advertising and public relations campaigns and the long history of their negotiations with Health Canada about the Warnings, as well as their assessment of general consumer awareness of the risks related to smoking.

---

159 Transcript of March 24, 2014, pages 83-84.

160 Transcript of March 24, 2014 at page 51. See pages 46-51 of that day's transcript. See also pages 3, 18, 26, 31 of his report.

161 Transcript of March 24, 2014 at pages 208-209.

[297] By restricting himself to theoretical questions, as he was hired to do, he saw no need to examine the level of the Companies' own knowledge of the public health risks of smoking, or the extent to which they were sharing that knowledge with their customers and with the government. Of equal importance, Dr. Young was unable to evaluate the degree to which the Companies, based on their own knowledge, realized that the government of Canada might be underestimating and thus under-reporting the risks of smoking during the first four decades of the Class Period.

[298] Pressed on the latter point in cross-examination, he did not hesitate to admit that the Companies had a duty to ensure that the public health authorities were properly informed of what the Companies knew about the risks of smoking:

> 455Q-Okay. So let's take the nineteen sixties (1960s). If the tobacco manufacturer knew that cigarettes caused lung cancer, there was no need for them to warn the public about that; that's your opinion?
>
> A- The reasons that manufacturers still would not provide warnings about residual risk would still apply. So what I would expect them to do at that point, if the Government or public health officials did not know, would be, rather than provide that as the source of a message on an on-product label, I would expect them to go to public health officials and identify what needs to be done in response to that. And the Government could decide to deal with it in terms of a warning, or they could decide to deal with that through other means.
>
> 456Q-Okay. So you would expect that the manufacturer go to the Government and tell them everything that they knew about the risk of tobacco smoke, on a regular basis, a continuous basis; correct?
>
> A- I would expect them to convey material information that they had about the risk to public health authorities.[162] (The Court's emphasis)

[299] Dr. Young's opinions, although probably correct within the confines of his terms of engagement, are of limited use to the Court. As was the case with most of the other experts called by the Companies, he was given neither the necessary background information nor the leeway to step outside the strict bounds of his mandate.

[300] Except for pack warnings, his theoretical analysis seems to assume a communications vacuum between the Companies and their customers and the government. He admits that, not being an advertising expert, "I haven't even looked into the role that that (advertising) played overall".[163] Later, he adds the following clarification:

> I've really only focused on the issue related to warnings, and the necessity of having consistency in warning messages between public health officials and the manufacturer. And I have not addressed issues related to advertising or other types of communications that may have been in play at any given point in time. And since I don't know how those other types of communications would... the extent to which they'd be seen, the influence they might have on people, I can't

---

[162] Transcript of March 24, 2014, pages 207-208.
[163] Transcript of March 24, 2014, page 126.

> really comment on that, apart to say from... that any warning information provided by the manufacturer should be consistent with government policy regarding smoking health risks.[164]

[301] By his omitting to consider the undeniable effects of the very professional advertisements and public relations campaigns that the Companies were putting forth during much of the Class Period, and admitting that he was not competent to do so, Dr. Young's evidence loses most of its usefulness for the Court. And even on the subject of pack warnings, there are gaps left unfilled.

[302] For example, he does not deal with the attitudes and actions of the Companies with respect to the conception and implementation of the Warnings, both at the initial stage of non-legislated implementation and throughout the evolution of the programme. Dr. Young was not informed by his clients of that part of the story, nor was he provided internal company documentation relating to it. He felt no need to query further because, as he was often forced to say, it was not material to his mandate.

[303] This subject is, however, very much material to the Court's mandate, as it could have a role not only with respect to the present Common Question, but also in the context of punitive damages. Hence, it is unfortunate that it was not seen fit to allow this expert "in the design and implementation of consumer product warnings and safety communications" to assist the Court on aspects of the design and implementation of the Warnings.

[304] In summary, Dr. Young's evidence was so restricted by the terms of his mandate that it was not responsive to the questions at hand. Its overall effect is more that of a red herring, distracting attention away from the real issues and directing it towards secondary ones that, although of some marginal relevance, tend to muddy the analysis of the primary ones. That said, certain of the points he made are enlightening and useful and it is possible that we could refer to some of them at the appropriate time.

[305] Dr. Viscusi, a law and economics professor at Vanderbilt University, was accepted by the Court as an expert on how people make decisions in risky and uncertain situations and as to the role and sufficiency of information, including warnings to consumers, when making the decision to smoke. In his report (Exhibit 40494), he described his mandate as addressing two subjects:

- the theory of warnings and health risk information provision in situations of risk and uncertainty and the characteristics relevant to the consumer choice process in these situations and
- the sufficiency of the publicly available information in Canada over time regarding the health risks of cigarette smoking, viewed from the standpoint of fostering rational decision making by the individual consumer.

[306] He reports the following three conclusions:

- The data demonstrate that there has been sufficient information in Canada for decades for consumers to make rational smoking decisions given the state of

---

[164] Transcript of March 24, 2014, page 210.

scientific knowledge about smoking risks.

- Consumers have had adequate information – both concerning particular diseases or particular incidence rates or constituents of smoke – to assist them in making rational smoking decisions.
- The public and smokers generally overestimate the serious risks of smoking including the overall smoking mortality risk, life expectancy loss, and the risk of lung cancer. Younger age groups overestimate the risks more than older age groups. These overall results for the population generally and for younger age groups, which are borne out in survey evidence since the 1980s, also can safely be generalized to the 1970s and perhaps earlier as well.

[307] He opined that one must consider all the information available in order to assess the impact of a warning and that advertising, including lifestyle advertising, is part of the "information environment"[165]. In spite of that, he does not examine the effect of advertising in his analysis because he does not view it as providing credible information about risk[166].

[308] His first two conclusions relating to Canadian consumer awareness of the dangers of smoking are nothing more than a recital of Dr. Duch's opinion and of Professor Flaherty's report[167]. He did not even look at the studies Dr. Duch used, but was content to rely on the summary of the results. Moreover, his use of Dr. Duch's report relates to matters that appear not to fall within his areas of competence. This part of his opinion is, thus, useless to the Court.

[309] His third conclusion seems to boil down to saying that the Warnings were not necessary because people tend to overreact to health concerns of the nature of those publicized for cigarettes. That was not contradicted and the Court accepts it. Its relevance, on the other hand, is not clear, except, as with Dr. Young's opinion, to undermine the Companies' reliance on the Warnings as an adequate source of information for the public.

[310] From the Plaintiffs' perspective, of course, the Companies should have done much more, even after 1988. They would seek the equivalent of self-flagellation in a public place, i.e., that the Companies should have sounded every siren to alert the general public that anyone who smokes will almost certainly succumb to a horrid and painful death after years of suffering from lung cancer or throat cancer or larynx cancer or emphysema, or any of a number of other horrible and dehumanizing diseases.

[311] The Court is not exaggerating. In their Notes, the Plaintiffs propose a series of "adequate warnings" of the type that the Companies should have put on the packs in order to inform the consumer[168]. Two of the Court's favourites are:

- This product is useless apart from relieving the addiction it creates; and

---

165 Transcript of January 20, 2014, at pages 76, 77 and 216.

166 The Court assumes that he is speaking of the world as it was during the Class Period, since anyone listening to a pharmaceutical ad on television today would be surprised to hear that.

167 See, for example, his footnote 11, at page 20 of Exhibit 40494.

168 See paragraph 86 of their Notes.

- This product is deadly. It contains many toxic and carcinogenic constituents and poisons every organ in the human body. It will kill half of those who do not succeed in quitting.

[312] Without going quite that far, the Companies should have done much more than they did in warning of the dangers. Today, through their websites and other current communications channels, they move in the direction of raising the alarm. Nothing was stopping them from doing that at any moment of the Class Period using the means available at the time. RBH took the step in 1958[169]. Other than that, however, the Companies chose to do nothing.

[313] Is this equivalent to trivializing or denying or employing a systematic policy of non-divulgation of the risks and dangers? Silence can trivialize and, indirectly, deny, but that is not the important question. The real question is to determine whether the Companies met their duty to warn. The Companies' self-imposed silence leads to only one possible answer there: they did not.

[314] Remaining in the context of what ITL did not say publicly about the risks and dangers of smoking, let us examine if its perception of the public's level of knowledge should flavour our assessment of its behaviour.

II.D.6 WHAT ITL KNEW ABOUT WHAT THE PUBLIC KNEW

[315] As mentioned earlier, in the context of the duty to inform, the Plaintiffs felt it important to spotlight the Companies' knowledge of what the public knew or believed about the dangers of smoking. In this regard, they filed two expert reports by Mr. Christian Bourque (Exhibits 1380 and 1380.2), an executive vice-president at Léger Marketing in Montreal and recognized by the Court as an expert on surveys and marketing research.

[316] The Companies attempted to counter Mr. Bourque's evidence through the testimony of two experts of their own: Professor Raymond Duch, recognized by the Court as an expert in the design of surveys, the implementation of surveys, the collection of secondary survey data and the analysis of data generated from survey research, and Professor Claire Durand, an expert in surveys, survey methods and advanced quantitative analysis

[317] In his principal report (the "**Bourque Report**"), Mr. Bourque stated his mandate to be:

- To determine the Companies' knowledge from time to time of the perceptions or knowledge of consumers concerning certain risks and dangers related to the consumption of tobacco products
- To identify the apparent objectives of the surveys, i.e., to determine the information relating to certain risks and dangers related to the consumption

---

[169] See our discussion of Mr. O'Neill-Dunne's initiatives in that year in section IV.B of the present judgment.

> of tobacco products that the Companies sought to obtain, as well as the reasons for the Companies' commissioning these surveys.[170]

[318] In spite of the broad wording of the first item, it is important to clarify that he was not asked to review published survey reports. His scope was limited to the internal survey data available to the Companies, especially ITL's two monthly consumer surveys: the *Monthly Monitor* and the *Continuous Market Assessment* ("**CMA**", together: the "**Internal Surveys**")[171]. He also considered a less-frequently-published report entitled *The Canadian Tobacco Market at a Glance*, which appears to cover industry-wide questions, as opposed to primarily ITL issues.

[319] Apparently exceeding the limits of his mandate, he attempts to draw conclusions from the Internal Surveys about the public's general knowledge of the dangers of smoking. For example, he sees the data on the level of agreement with the survey statement "smoking is dangerous for anyone" as an indication that smokers' knowledge of the dangers of smoking was far below universal, especially early in the Class Period. Mr. Bourque draws that conclusion from *The Canadian Tobacco Market at a Glance* of December 1991, which shows the following results [172]:

Years 1971 to 1990	71	**72**	73	**74**	75	76	77	**78**	**79**	**80**	81	82	**83**	84	85	86	87	88	**89**	90	91
Dangerous for anyone (%)	48	**59**	56	**63**	64	67	71	**72**	**72**	**74**	75	76	**76**	77	77	79	77	77	**79**	80	79

[320] As shown below, the CMAs for the same question during that period give a slightly different result, one which Mr. Bourque could not explain from the documents available to him[173]. That said, although the figures are slightly higher in 1972, 1974 and 1983, the differences are small enough so as not to affect the analysis the Court carries out below:

---

170 *Déterminer la connaissance qu'avaient ponctuellement les compagnies de tabac quant aux perceptions ou connaissances des consommateurs quant à certains risques et dangers reliés à la consommation des produits du tabac;*
Identifier le(s) but(s) apparent(s) visé(s) par les études, soit de déterminer les renseignements relatifs à certains risques et dangers reliés à la consommation des produits du tabac que les compagnies de tabac cherchaient à obtenir, ainsi que les raisons qui poussaient les compagnies de tabac à réaliser ces études.

171 The Monthly Monitors were monthly reports, eleven a year, prepared by an outside firm on the basis of some 2,000 in-home interviews designed to measure the use of various products, including tobacco, by Canadian adults, i.e., both smokers and non-smokers. They were originally called "8Ms" at the time they were conducted only 8 months a year. The CMA's were monthly telephone surveys of smokers only (people who smoked at least five cigarettes a day) in Canada's 28 largest cities. Also prepared by an outside firm, their purpose was to assess brand performance and brand switching tendencies among the various demographic segments of the smoking population.

172 From page 11 of the Bourque Report, Exhibit 1380 citing Exhibit 987.1, at pdf 7. The underlined figures correspond to the years cited by Mr. Bourque for the CMAs, as set out in the following paragraph.

173 The explanation might lie in the fact that the CMAs analyzed smokers only, while the *Canadian Tobacco Market at a Glance* could be canvassing the total population on that question: see the description of "Consumer" at the top of page 5 pdf of Exhibit 987.1.

Year	1972	1974	1978	1979	1980	1983	1989
Smoking is dangerous for anyone (%)	62	65	71	72	74	78	79[174]

[321] Transposing these results onto actual public knowledge is not necessarily advisable. They contrast sharply with published survey data cited by Professor Duch, which indicates much higher levels of consciousness at earlier dates. In fact, both he and Professor Durand were vociferous in their criticisms of the quality of the questions and the methodology followed in the Internal Surveys. They insisted that neither was in conformity with accepted survey methodology and practice and the results cannot be relied upon for the purpose of evaluating the general public's knowledge of anything.

[322] As for Mr. Bourque, it was not part of his mandate to defend the scientific integrity of the Internal Surveys, nor did he try. His task was to analyze their contents.

[323] Given that, in light of the uncontradicted testimony of Professors Duch and Durand, the Court accepts their advice to exclude the Internal Surveys as a source of reliable information as to the actual knowledge of the general public on the issues dealt with therein. Moreover, it is clear from their design and implementation that that was not the purpose these surveys were meant to serve, as discussed below.

[324] Accordingly, the Court will not rely on the first part of the Bourque Report for the purpose of ascertaining the actual level of public knowledge of the dangers of smoking. Given this conclusion, it is not necessary to analyze the generally ill-focused criticisms by Professors Duch and Durand of Mr. Bourque's analysis of the data[175].

[325] This does not mean, however, that the first part of the Bourque Report serves no useful purpose to the Court. That the Internal Surveys do not meet the highest standards of survey methodology does not render them irrelevant. They cast light on a very relevant issue: what ITL perceived and believed, accurately or not, about the public's knowledge of the dangers of smoking. In this area, the Court is convinced that ITL had confidence in the Internal Surveys.

[326] It is true that Mr. Ed Ricard, a marketing manager, stated that ITL used the CMAs more to understand trends over time than to provide an accurate snapshot at any one point. Nevertheless, when called by the Plaintiffs in May and August 2012, he gave no indication that ITL did not believe that snapshot. In fact, the opposite is the case, as we note below.

[327] When called back by ITL in October 2013, after the testimony of Professors Duch and Durand, he parroted their criticisms of the Internal Surveys. He declared that the CMAs were not representative of the total Canadian population and pointed out that the figures reported in Exhibit 988B, a 1982 CMA report, were "quota samples" of urban Canadian smokers only, as opposed to samples of all Canadians.

---

174 The Bourque Report, Exhibit 1380, at pages 12-13.

175 They both refused to consider the report from the perspective of Mr. Bourque's mandate, i.e., to analyze the Companies' knowledge, adamantly insisting on focusing only on the weaknesses of the Internal Surveys as a source of the public's knowledge, as determined from published surveys.

[328] Mr. Ricard's 2013 comments, reflecting, as they do, those of Professors Duch and Durand, appear to be correct, but they do not cohabitate well with his 2012 testimony. At that time, he expressed much more confidence in the CMAs. The transcript of May 14, 2012 shows the following exchange at page 49:

> 33Q- After this study was made, is there a reason why you didn't check with your customers if they were ... or verify the awareness of health risks with your customers?
>
> A- Mr. Justice, it was... I don't know why we would not have spent more time specifically on that question, it was... First of all, I would have to say, just from my own personal assessment, certainly during the time I was there, **based on the level of belief that we were measuring in the marketplace through the CMA, we felt that people knew and were aware of the rest**. And so, from my own personal point of view, I didn't see any need to measure it, because we felt people were aware. (The Court's emphasis)

[329] This is clear proof that, whatever their defects in terms of survey methodology, the CMAs were seen by ITL's management as providing accurate insight into what smokers were thinking[176]. They thus reflect ITL's knowledge about the smoking public's knowledge, or ignorance, of the dangers of smoking. This is relevant in the context of the duty to inform and to our analysis of the second part of the Bourque report.

[330] The Plaintiffs argue that the Companies had to ascertain the public's level of knowledge of the dangers of smoking in order to fulfill their duty to inform. To that end, they asked Mr. Bourque to opine on the apparent objectives of the Internal Surveys.

[331] He states that the Companies' objective was not to measure the level of smokers' knowledge on an ongoing basis in order to inform them of the risks and dangers of smoking but, rather, to see if the information circulating in that regard might pose a threat to the market or affect smokers' perceptions.[177] He saw the objectives of the Internal Surveys as relating almost exclusively to marketing and production planning.[178]

---

176 We remind the reader that the CMAs surveyed smokers only, not the general population.

177 *Ceci nous laisse croire que l'objectif de ces manufacturiers de tabac n'était pas de mesurer le niveau de connaissance ou la perception des fumeurs sur une base continue (afin de les informer au besoin), mais plutôt de vérifier si l'information circulant dans l'environnement devenait une menace, ou du moins en quoi elle pouvait affecter leurs perceptions*. (Exhibit 1380, at page 31).

178 Some of Mr. Bourque's comments in this regard are as follows:
En effet, nos recherches nous ont permis de comprendre que des études étaient souvent commandées en réaction à des événements externes, comme la mise en place d'une nouvelle réglementation, la publication d'un rapport lié à la santé et la cigarette ou des campagnes publicitaires anti-tabac, afin d'en mesurer les contrecoups. L'objectif de ces études réactives était de vérifier si de tels événements hors de leur contrôle pouvaient affecter négativement les perceptions des consommateurs (voir section 2.1).
Il appert aussi que le but visé par la conduite d'études à propos de certains risques et dangers reliés à la consommation des produits du tabac était de voir en quoi ces perceptions ou connaissances pouvaient avoir un impact sur les attitudes et comportements des fumeurs. En d'autres mots, on voulait savoir si et en quoi ces perceptions ou connaissances pouvaient amener les fumeurs à arrêter de fumer ou limiter leur consommation de produits du tabac. La démarche s'inscrit donc dans une logique de

[332] This is not surprising. It coincides with what ITL's representatives consistently stated. No one ever asserted that the role of the Internal Surveys was to measure customers' knowledge of the dangers of smoking. So be it, but that does not erase the Internal Surveys' message to ITL.

[333] From the figures out of *The Canadian Tobacco Market at a Glance* reproduced in the table above, ITL would have concluded that from 52% (in 1971) to 21% (in 1989) of smokers did not feel that smoking was dangerous for anyone. The CMAs over that period reflect the same level of ignorance. They also show that it was not until 1982 that the percentage of respondents who felt that smoking was dangerous for anyone surpassed 75%. This is the level of awareness that ITL's expert, Professor Flaherty, opined is required for something to be "common knowledge"[179].

[334] It is true that the technical credibility of that data might be suspect in the eyes of an expert 30, 40 or 50 years later, but we must view this through ITL's eyes at the time. Mr. Ricard was there, and he confirmed that ITL believed the data and relied on it for important business decisions.

[335] ITL's argument that its customers were already fully informed of the risks and dangers of smoking through the media, school programmes, the medical community, family pressure and, as of 1972, the Warnings loses most of its speed after hitting up against this wall of evidence. Moreover, the Internal Surveys also made ITL aware that the Warnings were far from being major attitude changers on this point.

[336] As seen in the tables above, the degree of sensitivity of smokers increased only gradually after the introduction of the Warnings in 1972. In fact, it dropped from 59% to 56% the following year. After that, it rose only about one percent a year through 1991. Thus, as far as ITL knew, the Warnings were not the panacea it is now claiming them to be.

---

suivi des mouvements du marché actuel et potentiel, afin de prévoir la demande, mais également afin d'ajuster les stratégies de marketing (voir section 2.2). (at pages 8 and 9; the Court's underlining)
À la lumière des études trouvées et présentées dans cette section, il semble que bien peu d'études mesuraient les mêmes éléments, en utilisant les mêmes questions, de manière continue dans le temps et portant spécifiquement sur la perception ou la connaissance des risques et dangers. Les compagnies de tabac dont nous avons fait mention obtenaient plutôt des données ponctuelles sur les perceptions et connaissances des consommateurs quant à certains risques et dangers reliés à la consommation de produits du tabac. (at page 29)
Ceci nous laisse croire que l'objectif de ces manufacturiers de tabac n'était pas de mesurer le niveau de connaissance ou la perception des fumeurs sur une base continue (afin de les informer au besoin), mais plutôt de vérifier si l'information circulant dans l'environnement devenait une menace, ou du moins en quoi elle pouvait affecter leurs perceptions. De plus, cette mesure permet la création et l'ajustement des stratégies marketing: les manufacturiers de cigarettes voudront positionner les différentes marques de leur portefeuille selon des dimensions relatives à la santé si celles-ci deviennent importantes pour le consommateur. (at page 31; the Court's underlining)

179 See page 5 of Professor Flaherty's Report (Exhibit 20063) for a definition of "common knowledge". In his testimony on May 23, 2013, Professor Flaherty set "more than 75%" as the threshold figure for the "vast majority" of a group to be aware of a fact, thus making it "common knowledge". In his testimony, Professor Duch preferred the figure of 85%.

[337] Yet ITL stuck to the industry's policy of silence and made no attempt to warn what it knew to be an unsophisticated public. The Plaintiffs argue that this is a gross breach of the duty to inform of safety defects and demonstrates not just ITL's insouciance on that, but also its wilful intent to "disinform" smokers. The Court agrees.

[338] Here again, ITL's attitude and behaviour portray a calculated willingness to put its customers' well-being, health and lives at risk for the purpose of maximizing profits. There is no question that this violates the principles established in the Civil Code, both with respect to contractual and to general human relations. It also goes much further than that.

[339] It aggravates the Company's faults and pushes its actions so far outside the standards of acceptable behaviour that one could not be blamed for branding them as immoral. Moreover, as seen below in our analysis of the other Companies, they, too, are guilty of similar acts, although to a lesser degree. This is a factor to be considered in our assessment of punitive damages.

II.D.7 COMPENSATION

[340] In the context of the present files, compensation is a process of "oversmoking" by which smokers who switch to a lower-yield brand of cigarette, i.e., lower tar and nicotine, modify their smoking behaviour in order to obtain levels of tar, and especially nicotine, closer to what they were getting from their previous brand[180]. It is generally thought to be an unconscious adjustment[181] made by "switchers" who do not get as much nicotine from their new lower-tar cigarette, since a reduction in the latter will result in a corresponding reduction in the former[182].

[341] In his expert's report, Dr. Michael Dixon for ITL spoke of compensation in the following terms:

> Many researchers claim compensation is based on the theory that smokers seek to maintain an individually determined nicotine level and that those who switch from a higher to a lower yield cigarette will smoke more intensively to compensate. The term "compensation", as related to cigarette smoking, only applies to those smokers who switch from one cigarette to another that has a different standard tar and nicotine yield to their original cigarette. Compensation can best be described by using the following hypothetical example.
>
> If a smoker switches from a product with a machine derived nicotine rating of 1 mg to one with a 0.5 mg rating and as a consequence of the switch halves his intake of nicotine, then this would be described as zero (or no) compensation. If a smoker following the switch did not reduce his/her intake of nicotine, then this would

---

180 Compensation can theoretically occur in the opposite direction, i.e., where a smoker moves to a higher yield cigarette he might "undersmoke" it, but this aspect is not relevant to the present cases.

181 Although the evidence did not deal directly with the point, it appears that smokers do not compensate consciously, i.e., in a pre-meditated fashion. This seems logical, since, if it was done on purpose, it would make no sense to switch to the lower-yield brand.

182 The natural tar to nicotine ratio in tobacco smoke is about ten to one and will remain at that proportion even if the tar level is reduced, so that a reduction in tar will generally result in a proportionate reduction in nicotine.

represent full, complete or 100% compensation. Partial (or incomplete) compensation would be deemed to have occurred if the reduction in intake was between the zero and full compensation levels.[183]

[342] Compensation can occur through a number of techniques, such as:

- Increased number of cigarettes smoked per day,
- Increased number of puffs per cigarette, resulting in smoking the cigarette "lower down", i.e., closer to the filter,
- More frequent puffs,
- Increased volume of smoke per puff: Dr. Dixon's choice as the most often used technique for compensation,
- Increased depth of inhalation per puff,
- Increased length of time holding the smoke in and
- Blocking of filter-tip ventilation holes by the fingers or lips.[184]

[343] Smoking machines do not compensate. It follows that machine-measured delivery of tar and nicotine, although allowing one to distinguish the relative strength of one brand compared to another, will not generally reflect the actual amount of tar and nicotine ingested by a smoker. In the same vein, since people's smoking habits and manners, including their degree of compensation, vary individually, the amount of tar and nicotine derived by any one smoker will be different from that of his neighbour.

[344] One cannot examine compensation without first examining the evolution of cigarette design during the Class Period.

[345] Very summarily, with the ostensible goal of reducing smokers' intake of tar, the Companies modified certain design features of their cigarettes during the 1960s, 70s and 80s. Filters became almost universal during this time, to which were often added ventilation holes in the cigarette paper to bring in air to dilute the smoke. More porous cigarette paper, expanded tobacco and reconstituted tobacco were also used to the same end. There is no need to delve into the details of these for present purposes.

[346] It is sufficient to note that these design features resulted in cigarettes whose tar and nicotine delivery, as measured by a smoking machine, were lower than before. These "lower-yield" products were labelled with descriptors, such as "light" or "mild"[185]. They had less tar, as measured by smoking machines, but they also had less nicotine, flavour and "impact". Enter compensation.

[347] People who switch to a "lighter" brand of cigarette can – and generally do – compensate, at least initially. As a result of compensation, although they might well ingest less of the toxic components of smoke than with their previous brand, they still

---

183 Exhibit 20256.1, pages 14-15.

184 See Dr. Dixon's report, Exhibit 20256.1, page 21 and Dr. Castonguay's report, Exhibit 1385, at pages 50 and following.

185 We discuss the effect of these descriptors below, in section II.E.2.

receive significantly more than would be expected from a linear application of the machine-measured reduction of tar content.

[348] Dr. Dixon opined that, although compensation occurred in many if not most cases, it was temporary and, even then, only partial: about half[186]. Thus, a smoker who changed to a cigarette showing a smoking-machine-measured reduction of tar and nicotine of 30% would only have reduced them by about 15% because of compensation. Rather than ingesting 70% of the previous amounts, the smoker would be taking in about 85%.

[349] Thus, lower-yield cigarettes end up having what could be called a "hidden delivery" of tar and nicotine. Replying to a question from the Court in this area, Dr. Dixon responded as follows:

> 910Q-Okay. All right. And I'm thinking of the effect of compensation on the smoker, and my question to you is, is full compensation a danger that should be associated with the use of low-yield cigarettes?
>
> A- Sorry, is it a danger?
>
> 911Q-Is it a danger? Is there a risk or danger associated with the use of low-yield cigarettes?
>
> A-I don't think there's any more risk or danger in their use than there is with the high-yield cigarettes. If full compensation was the norm, then there would be no point in having the low-tar cigarettes, because there would be no benefit in terms of exposure reduction and, therefore, one would not expect to see any benefit in terms of the health risk reduction.
> But if it's partial compensation, then you are seeing a reduction in exposure which, hopefully, would be reflected ultimately in a risk reduction for certain diseases.
>
> 17 912Q-But it wouldn't eliminate the risk.
>
> 18 A- It certainly wouldn't eliminate the risk, no.
>
> 913Q-It wouldn't eliminate the danger, smoking a low-yield...
>
> 21 A- Oh, of course. No no.
>
> 22 914Q-... even smoking a lower-yield cigarette?
>
> 23 A- No. I mean, a lower yield cigarette is dangerous, but maybe not quite as dangerous as a high-yield cigarette.[187]

[350] The arguments that compensation is generally partial and temporary, i.e., that after a while the switcher stops compensating, seem logical and the Court is convinced

---

186 See, for example, Exhibit 40362, research published by RJRUS in 1996.
187 Transcript of September 19, 2013, at pages 273 and following.

that the Companies believed that to be the case. Nevertheless, even with only partial and temporary compensation, there is still a hidden delivery.

[351] Given all this, should compensation or its hidden delivery be considered a safety defect in reduced tar and nicotine cigarettes and did ITL know, or was it presumed to know, of that risk or danger? If so, it would have had a duty to warn consumers about it, unless another defence applies.

[352] ITL does not deny that it was aware from very early in the Class Period that compensation occurred.[188] In fact, the proof shows that it was the Companies, either individually or through the CTMC, that warned Health Canada of the likelihood of this essentially from the beginning, as seen from the following paragraph in RBH's Notes:

> **664.** Defendants themselves advised the federal government that compensation would occur and negate at least some of the potential benefit of lower tar cigarettes for some smokers. Indeed, on May 20, 1971 the CTMC met with members of Agriculture Canada and National Health and Welfare's Interdepartmental Committee on Less Hazardous Smoking. At the meeting, in response to the Interdepartmental Committee's request for reduced nicotine levels, the CTMC warned the Interdepartmental Committee of compensation issues, including a tendency among smokers to "change smoking patterns to obtain a minimum daily level of nicotine when they switched to low nicotine brands at that this could increase the total intake of tar and gases."[189]

[353] In spite of its awareness, Health Canada embraced reduced tar and nicotine and put forth the message that, if you can't stop smoking, at least switch to a lower tar and nicotine cigarette.

[354] We are not saying that Canada was wrong in going in that direction. It reflects the knowledge and beliefs of the time, and its principal message: "STOP SMOKING", was incontestably well founded. On the other hand, Health Canada certainly appears to have been occupying the field with respect to information about reduced-delivery products.

[355] Once they had warned Health Canada of the situation regarding compensation, it is difficult to fault the Companies for not intervening more aggressively on that subject. To do so would have undermined the government's initiatives and possibly caused confusion in the mind of the consumer. Perhaps more importantly, at the time it was genuinely thought that reduced delivery products were less harmful to smokers, even with compensation.

[356] The defence set out in the second paragraph of article 1473 gives harbour to the Companies on this point and we find no fault on their part for not doing more than they did with respect to warning of the dangers associated with compensation.

---

188 The Court agrees with ITL's reply (in its Appendix V) to the Plaintiffs' argument at paragraph 537 of their Notes. The BAT document cited (Exhibit 391-2M) contains little more than speculative musings and there is no indication that ITL ever took any of it seriously.

189 See Exhibit 40346.244, at page 3.

II.D.8 THE ROLE OF LAWYERS

[357] The Plaintiffs made much of the fact that over the Class Period ITL seemed to seek prior approval from lawyers for almost every corporate decision regarding smoking and health. Its policies and practices relating to document retention/destruction, in particular, were scrutinized and implemented by lawyers, generally outside counsel, including those representing BAT and its US subsidiary, Brown and Williamson.

[358] There is nothing wrong with a large corporation "checking with the lawyers" within its decision-making process, especially for a tobacco company during the years when society was falling out of love with the cigarette. In fact, not to take this precaution in that atmosphere could have been outright negligent in certain cases. That said, there are, of course, limits as to how much a law firm should do for its client.

[359] In that vein, the Plaintiffs argue that ITL and its outside counsel crossed over the line on the question of the destruction of scientific research reports held in ITL's archives in the early 1990s. Some background information is necessary.

[360] In a 1985 "file note"[190], J.K. Wells, an in-house attorney for Brown & Williamson, advocated purging the company's scientific files of "deadwood", a term he used seven times in a two-page document. This smacked of overkill and seemed curiously out of the ordinary, all the more so in light of his admonition not to make "any notes, memo or lists" of the discarded "deadwood". Antennae twitch.

[361] Two years later, BAT lawyers expressed concern about certain aspects of the BAT group's internal documents, including research reports and research conference minutes[191]. Then, in a November 1989 memo[192], the same Mr. Wells presented a "synopsis of arguments that it is crucial to avoid the production of scientific witnesses and documents at this time, even if production were to occur in the indefinite future". Writing with reference to the trial of the constitutional challenge to the TPCA before the Quebec Superior Court, he identified the following points:

- The documents will be difficult for company witnesses to explain and could allow plaintiffs to argue that scientists in the company accepted causation and addiction;
- Company witnesses will not be prepared in order to explain the documents adequately and preserve credibility of management's statements on smoking and health and to deal with "sharp cross examination on smoking and health questions certain to be suggested by government experts"[193];
- The company's Canadian lawyers are unprepared to deal with the science or the language of the documents or to prepare or defend witnesses adequately or to cross examine opposing experts.

---

190 Exhibit 1467.1.
191 Exhibit 1467.3, at pdf 2: "About three years ago we took initiatives …".
192 Exhibit 1467.2.
193 Exhibit 1467.2, at page 1.

[362] Mr. Wells went on to express concern over documents from Canada and remarks that "the Canadian case is in an especially disadvantageous posture for document production. The government is likely to go directly to the heart of the Canadian and BATCo research documents most difficult to explain".

[363] About that time, BAT was attempting to repatriate to Southampton, England all copies of all research documents emanating from its laboratories there. They seemed to have concerns similar to those expressed by Brown & Williamson, in that, as explained by its former external counsel, John Meltzer, "(BAT) was concerned that those documents may be produced in litigation, or in other situations, where there wouldn't be an opportunity to put those documents in their proper context or to explain the language that was used in them by the authors of the documents"[194].

[364] To BAT's consternation, and that does not appear to be an exaggeration, ITL was not cooperating with the repatriation. ITL's head of research and development, Dr. Patrick Dunn, was furious with the command to send all BAT-generated research reports back to England, particularly since ITL had contributed to the cost of most of those and had contractual rights to them. Negotiations ensued between the two companies.

[365] Enter Ogilvy Renault. ITL's in-house attorney, Roger Ackman, testified that he hired the Montreal law firm of Ogilvy Renault to assist him in the matter. After negotiation, it was agreed that, following the repatriation to Southampton, BAT would fax back to ITL any research report that ITL scientists wished to consult. That decided, in the summer of 1992 lawyers at Ogilvy Renault supervised the destruction of some 100 research reports in ITL's possession[195].

[366] Mtre. Ackman, whose memory was either hot or cold depending on the question's potential to harm ITL[196], made the following statements concerning his engagement of an outside law firm in this context:

> 396Q-Can you give us any reason why Imperial would involve outside counsel, or counsel of any kind, to destroy research documents in its possession?
>
> A- I hired the Ogilvy Renault firm, Simon Potter, to help me in this exercise.
>
> 397Q-Which exercise?
>
> A- The destruction of the documents. And he did most of the negotiations for us.
>
> 398Q-But what negotiations?
>
> A- With BAT.

---

194 Transcript of the examination by rogatory commission of John Meltzer filed as Exhibit 510, at page 16.

195 See the series of documents in Exhibits 58 and 59. Though the documents had been destroyed, plaintiffs in other cases managed to obtain copies of all of them and they were deposited into court-created public archives, including the Legacy Tobacco Documents Library at the University of California at San Francisco used by the Plaintiffs here.

196 The Court rejected Mtre. Ackman's motion to quash his subpoena based on medical reasons. In cross examination, it came out that ITL was paying all his expenses related to that motion.

399Q-Negotiations for what?

A- You just said, the destruction of documents.

400Q-There was a negotiation of an agreement between...

A- I have no idea whether there was a negotiation; I wasn't part of that discussion. It was a long time ago, sir.

401Q-So you hired Simon Potter?

A- Yes, sir.

402Q-To destroy the documents?

A- I did not hire him... to meet with BAT and settle a matter.

403Q-Settling a matter implies that there is a matter; what was the matter?

A- I have no idea other than what I just said.

404Q-Did Simon Potter ever give you reason to believe that he had expertise in research documents, did he have any science background?

A- I don't know that, sir.[197]

[367] Much time was spent on this issue in the trial, but it interests us principally in relation to its possible effect on punitive damages. As such, its essence is contained in two questions:

- Was it ITL's intention to use the destruction of the documents as a means to avoid filing them in trials?
- Was it ITL's intention in engaging outside counsel for that exercise to use that as a means to object to filing the documents based on professional secrecy[198]?

[368] On the first point, it appears that this clearly was the intention, since that is exactly what ITL did in a damage action before an Ontario court. Lyndon Barnes, a partner in the law firm of Osler in Toronto who worked on ITL matters for many years, testified before us as follows:

A- I would think... probably the first case that we did an affidavit was in a case called *Spasic* in Ontario.

---

197 Transcript of April 2, 2012, at pages 138-139.
198 This is the Quebec term for attorney-client privilege.

> 83Q- So did you produce the documents in that case that were destroyed in this letter? That were destroyed as identified in this letter of Simon Potter's (sic) of June nineteen fifty-two (1952)... h'm, nineteen ninety-two (1992)?[199]
>
> A- I think it would have been hard to produce documents that had been destroyed.
>
> 84Q- It would have been very hard.
>
> A- Yes.
>
> 85Q- So that's when you found out that the documents didn't exist?
>
> A- Well, no. The original documents did exist, they were at BAT.
>
> 86Q- So did you produce the original BAT documents in that case?
>
> A- No, they weren't in our control and possession.
>
> 87Q- They weren't in your control or in your possession.
>
> A- No.
>
> 88Q- And therefore, they were not produced?
>
> A- No, they weren't.[200]

[369] There is thus no doubt that ITL used the destruction as a way to avoid producing the documents, based on the assertion that they were not in its control or possession. One could query as to whether, under Ontario law, the arrangement with BAT to provide copies by fax meant that the documents were, in fact, in ITL's control, but that is not necessary. There is enough for us to conclude that ITL's actions in this regard constitute an unacceptable, bad-faith and possibly illegal act designed to frustrate the legal process.

[370] As for the second question, there is no evidence that ITL has ever raised the objection based on professional secrecy. That, however, does not speak to ITL's intentions when Mtre. Ackman decided to hire lawyers to shred the research reports. That is what is relevant here.

[371] In addition to his testimony cited above on this topic at question 396 in the transcript, Mtre. Ackman, who, we remind the reader, was ITL's top person in the matter of the destruction of these research reports and who personally engaged Ogilvy Renault, provided the following "clarification":

> 391Q-Which leads me to my next question; can you give us any reason why lawyers were involved in the destruction of research documents?

---

199 Exhibit 58 in these files.
200 Transcript of June 18, 2012, at page 33.

> A- I don't have an answer for that, sir. I can't give you the specific reason, or any reason. Unless the companies agreed between themselves ... that agreement between the companies was done, that's the way it was done. [201]

[372] It is more than surprising that his recollection was so, let us say, "vague" on such a major issue, one on which he recalled many other much less important details. Later in that transcript, at page 203, he states that he hired Ogilvy Renault because "I wanted the best legal advice I could get". That was crystal clear to him, but as to why he needed such good legal advice in order to destroy research documents, he could not give specific reasons, or any reason.

[373] Mtre. Ackman's testimony cannot but leave one suspicious about ITL's motives in hiring outside attorneys to destroy documents from its research archives. Mtre. Barnes testified that Mtre. Meltzer came from England shortly before with three lists ranking the documents to be returned or destroyed. Although Mtre. Meltzer refused to answer many questions about the lists on the grounds of professional secrecy, all agreed that these lists existed.

[374] Given that, what special expertise of any sort was required to pack up the documents on the lists and ship them to BAT, much less legal expertise? Yet, instead of shipping them across the Atlantic, ITL shipped them across town. There they were held, and later destroyed, by lawyers.

[375] The litigation-based objectives of ITL in ridding itself of these documents lead inexorably to a litigation-based conclusion as to the motive for using outside lawyers to carry out the deed: ITL was attempting to shield this activity behind professional secrecy.

[376] If there could have been another plausible reason, none come to mind and, more importantly, none were offered by ITL. In fact, Mtre. Ackman, the person in charge of the exercise, and who was "concerned with the potential impact that those documents would have were they produced (in court)", as Mr. Metzer stated[202], could not suggest any other explanation.

[377] As a result, the Court is compelled to draw an adverse inference with respect to ITL's motives behind this incident. It was up to ITL to rebut this inference, yet the evidence it adduced had nothing but the opposite effect. We therefore find that it was ITL's intention to use the lawyers' involvement in order to hide its actions behind a false veil of professional secrecy.

[378] This constitutes an unacceptable, bad-faith and possibly illegal act designed to frustrate the legal process. This finding will play its part in our assessment of punitive damages.

---

201 Transcript of April 2, 2012, at page 137.

202 See Exhibit 510, Mtre. Meltzer's testimony, at pages 44 and 45.

II.E. DID ITL EMPLOY MARKETING STRATEGIES CONVEYING FALSE INFORMATION ABOUT THE CHARACTERISTICS OF THE ITEMS SOLD?

[379] The *Oxford Dictionary of English* defines marketing as "the action or business of promoting and selling products or services, including market research and advertising". Thus, the Companies' marketing activities can be divided into two main areas: market research, including surveys of various kinds, and advertising, in all its forms. We have already said much about the Companies' market research, so here we shall focus on their advertising and sponsorship activities, which seems to be the intent of the question in any event.

[380] The Plaintiffs see tobacco advertising during the Class Period as being pervasive, persuasive and fundamentally false and misleading. They explain their position in their Notes as follows:

> **695**. Tobacco promotion is inherently injurious to the consumer. The problem is the nature of the product: a useless, addictive and deadly device. It's a fault to advertise it. It's a greater fault to market it as a desirable product.
>
> **696**. It's an even greater fault to market it as a desirable product to children, who cannot be expected to have the capacity to filter out tobacco advertising from information they otherwise receive as credible and informative. The vast majority of class members became addicted while they were children. Defendants claimed that they never targeted these members when they were children, and that the only goal of their marketing was to influence their brand choice after they were over 18 and after their decision to smoke had been established (i.e. once they were addicted).
>
> **697**. The defendants used other aspects of marketing to convey false information about their products. They packaged them in colours and designs intended to undermine health concerns. They branded them with names - like "light", "smooth" and "mild" that implied a health benefit. They designed their cigarettes with features - like filters and ventilation - which changed to users' experience (sic) in ways that made smokers think these were safer products.

[381] ITL is not of the same view. Its Notes speak of the company's marketing strategies during the Class Period in the following words:

> **724**. In summary, there is no evidence that ITL employed marketing strategies which conveyed "false information about the characteristics of the items sold". Indeed, the claims asserted by Plaintiffs in support of this common question – even if they could be established on the evidence (which they cannot) – do not amount to conveyance of "false information" about cigarettes. Really, Plaintiffs' complaint is that ITL promoted cigarettes in a positive light, and committed a fault in so doing. This position has no foundation in law.
>
> **725**. The fact of the matter is that ITL's marketing of its products were at all times regulated (either by the Voluntary Codes or by legislation), were in compliance with applicable advertising standards, and contained not a single misrepresentation as to the product characteristics of cigarettes. Indeed, ITL's marketing never made any representations about the "safety" of its products, other than the express warnings that were included on all print advertising as of 1975.

> **726**. Moreover, there is absolutely no evidence in the record – from Class Members or otherwise – to substantiate Plaintiffs' bald assertions that ITL's marketing somehow misled or confused Class Members.

[382] Since it was not saying anything at all about smoking and health other than what was in the Warnings, ITL wonders how it could have conveyed false information about that. And putting that aside, what proof is there that what they did say in their advertising until it was banned in 1988 affected any person's decision to start or continue smoking?

[383] The Plaintiffs' proof on this topic was made through their expert, Dr. Richard Pollay. For the most part, the conclusions in his report (Exhibit 1381) neither surprise the Court nor particularly condemn the Companies' advertising practices. The following partial extracts are examples:

> 18.1 Advertising and promotion are selling tools – Firms spend on advertising in the belief that this will increase sales and profits over what they would be in the absence of advertising.
>
> 18.3 Advertising is carefully managed and well financed.
>
> 18.4 Ads are carefully calibrated – Some ads appeal to the young but are careful not to appear too young.
>
> 18.5 Cigarette ads are not informative – Consumers learn next to nothing about the tobacco, the filters, the health risks, etc.
>
> 18.6 Health information is totally absent – The only health information that is ever contained is just the minimum that has mandated in law (sic).
>
> 18.8 Creating "Friendly Familiarity" – Repeated exposure (to brand names and logos) would give these a "friendly familiarity" such that their risks would be under estimated.
>
> 18.9 Brand Imagery – With good advertising some brands are made to seem young, or male, or adventuresome, or "intelligent" or sophisticated, or part of the good life.
>
> 18.13 Ads designed to recruit new smokers – Strategies toward this include making brands seem "independent", "self-reliant", "adventuresome", risk-taking, etc.

[384] These are hardly troubling indictments. For the most part, they say little more than what the Companies already admit: they were not using their advertising dollars to warn consumers about the risks and dangers of smoking. As for portraying smoking in a positive light, we hold further on that advertising a legal product within the regulatory limits imposed by government is not a fault, even if it is directed at adult non-smokers[203].

[385] This said, in addition to his conclusions with respect to marketing to youth, which we consider below, the strongest accusations Professor Pollay makes are in the two following conclusions:

---

[203] See section II.E.4 of this judgment.

> 18.11 Ads designed to reassure and retain conflicted smokers – The ads for many brands seek to reassure smokers with health anxieties or to off-set their guilt for continuing to smoke. … Strategies toward this end include making brands seem "intelligent" or "sophisticated".
>
> 18.12 Ads designed to mislead. The advertising executions for many brands were explicitly conceived and designed to reassure smokers with respect to health risks. In so doing, since no cigarettes marketed were indeed safe, these ads were designed to mislead consumers with respect to their safety and healthfulness. It is also my opinion that when deployed they would indeed have a tendency to mislead.

[386] These accusations merit analysis.

[387] Concerning paragraph 18.11, a perusal of Professor Pollay's report indicates that this point centers on low-tar brands of cigarettes, for example in his paragraphs 6.6, 14.4 and 14.5. In the section of this judgment examining Delhi Tobacco[204], we conclude that Health Canada was the main advocate of reduced-delivery products in conjunction with its "if you can't stop smoking, at least switch to a lower tar and nicotine cigarette" campaign.[205] We also note that the Companies were under pressure to cooperate with that by producing low-tar brands.

[388] Under such circumstances, it was simply normal business practice to research the market for such brands. If that research showed that some smokers switched as a way of easing their guilt or anxiety about smoking, it would be normal to use that knowledge in developing advertising for them. The Court sees no fault in that.

[389] As for paragraph 18.12, Professor Pollay's analysis of ads that might have been misleading does not focus on ones that were misleading with respect to smoking and health so much as ones that could have misled with respect to certain attributes of a cigarette brand. His long study in his chapter 10 of the "less irritating" claims for Player's Première is a good example of that. He does not connect that situation to health issues.

[390] It is not the Court's mandate to evaluate the general accuracy of the Companies' ads or their degree of compliance with advertising norms and guidelines. To be relevant here, the misleading content of ads must be with respect to smoking and health.

[391] In that regard, Professor Pollay concentrates on the issue of "light" and "mild" descriptors. The Court will deal with that below.

[392] But first, one cannot examine marketing in this industry without considering the history of the restrictions imposed on the Companies' marketing activities through their own initiatives: the Voluntary Codes.

---

[204] See section II.C.3 of this judgment.

[205] See also Exhibits 20076.13 and 20119, where Health Canada foresees using the Companies' advertising to promote "less hazardous" low tar and nicotine products.

II.E.1 THE VOLUNTARY CODES

[393] The Plaintiffs see the Voluntary Codes as a gimmick that the Companies adopted principally with the goal of staving off more stringent measures by the Canadian government. As they say in their Notes:

> **698**. Peculiar to the world of cigarette marketing was the adoption by the defendants of their own set of rules to validate their marketing actions. As will be shown later, the Code was a ruse to prevent consumers from receiving genuine protection in the form of government regulation. But it was also a public relations deceit: the defendants never had the intention to follow most of its rules, nor did they follow them.

[394] Starting in 1972[206], the Companies agreed among themselves to the first of a series of four "Cigarette and Cigarette Tobacco Advertising and Promotion Codes", with the participation and approval of the Canadian Government (the "**Voluntary Codes**" or the "**Codes**")[207]. The first rule of the first Voluntary Code excluded cigarette advertising on radio and television, and that code imposed several other restrictions on advertising. Those limitations changed little over the next 16 years.

[395] In 1988 the Government passed the TPCA, which for the first time imposed a total ban on the advertising of tobacco products in Canada by section 4(1): "No person shall advertise any tobacco product offered for sale in Canada". JTM and ITL successfully challenged that law and the relevant parts of it, including section 4(1), were ruled unconstitutional in 1995.

[396] Two years later the government passed the *Tobacco Act*[208], containing what could be considered a softening of the prohibition, although it is doubtful that the Companies take much comfort from it. Section 22(1), remains in force today and reads as follows:

22.(1) Subject to this section, no person shall promote a tobacco product by means of an advertisement that depicts, in whole or in part, a tobacco product, its package or a brand element of one or that evokes a tobacco product or a brand element.[209]	**22.(1)** Il est interdit, sous réserve des autres dispositions du présent article, de faire la promotion d'un produit du tabac par des annonces qui représentent tout ou partie d'un produit du tabac, de l'emballage de celui-ci ou d'un élément de marque d'un produit du tabac, ou qui évoquent le produit du tabac ou un élément de marque d'un produit du tabac.

[397] Despite Canada's legislative initiatives as of 1988, it appears that the Codes remained in force throughout the Class Period, with modifications being made at least

---

206 There was, in fact, a 1964 "Cigarette Advertising Code": Exhibit 40005B. It is certainly the forerunner of the later Codes in several aspects, but the evidence is not clear as to whether Canada was consulted on its composition.

207 Filed as Exhibits 20001-20004. Certain extracts are reproduced in Schedule I to the present judgment.

208 S.C. 1997, c. 13.

209 The other provisions of section 22 of the Tobacco Act appear to have been used to such a limited extent that it is not necessary to analyze them for present purposes. They are reproduced in Schedule H to the present judgment.

twice, once in 1975 and again in 1984. As well, they covered more than strictly advertising. It is noteworthy that they were the vehicle through which the Warnings were introduced, and modified at least once. Concerning advertising practices, they embraced, in particular, the following concepts[210]:

- no cigarette advertising on radio and television;
- no sponsorship of sports or other popular events;
- cigarette advertising will be solely to increase individual brand shares (as opposed to growing the overall market);
- cigarette advertising shall be addressed to "adults 18 years of age and over";
- cigarette advertising shall not make or imply health-related statements, nor claims relating to romance, prominence, success or personal advancement;
- cigarette advertising shall not use athletes or entertainment celebrities;
- models used in cigarette advertising must be at least 25 years of age.

[398] The Companies' witnesses assured the Court that they scrupulously complied with the Codes and the evidence, in fact, turns up very few contraventions. Moreover, on the rare occasion when a Company did stray from the agreed-upon course, the others were quick to call it to order, since it was perceived that any delinquency in this regard could lead to an unfair advantage over one's competitors.

[399] In any event, this is not the forum to police the Companies' compliance with the Voluntary Codes. The Court's concern here is limited to the conveyance of false information about the characteristics of cigarettes with respect to smoking and health. We see nothing in the Codes that does that.

[400] There could be some truth, however, in the Plaintiffs' charge that the Codes were nothing more than "a ruse to prevent consumers from receiving genuine protection in the form of government regulation". The Companies certainly viewed the Codes as a means to avoid legislation in the area.

[401] On the other hand, the government understood that and tried to use it to the advantage of the Canadian public. Marc Lalonde, Minister of Health from 1972 to 1977, testified that he used the threat of legislation as a means of getting the Companies to publish Warnings that delivered the message that Canada thought was in the public interest[211].

[402] Although Canada had its eyes open when negotiating the Codes, it cannot be denied that the Companies were attempting to divulge through them as little as possible about the dangers of their products. It is probable that part of their overall strategy of silence included making concessions in order to avoid being obliged to say more. Those concessions form the nucleus of the Voluntary Codes.

---

210 The Voluntary Codes deal at length with Warnings.

211 See the transcript of June 17, 2013, at pages 51, 139, 153. See also footnote 57 to the present judgment concerning Minister Munro's actions.

[403] As such, we find that the Companies did not commit a fault by creating and adhering to the Voluntary Codes.

II.E.2 "LIGHT AND MILD" DESCRIPTORS

[404] The Plaintiffs argue that the Companies championed the use of descriptors, such as "light", "mild", "low tar, low nicotine", etc., in association with reduced-delivery cigarettes[212] as a marketing strategy to mislead smokers into thinking that those products were safer than ones that delivered more tar.

[405] It might surprise to learn that such terms as "light" and "mild" had no defined meaning within the industry and were not based on any absolute scale of delivery. The concepts were very much brand-family specific. All they indicated was that the "light" version of a brand delivered less machine-measured tar and nicotine than the "parent product" within that brand family. In other words, Player's Lights delivered less tar and nicotine than Player's Regulars and nothing more.

[406] As such, everything depended on the tar and nicotine contents of the parent product within that brand family. In fact, a "light" version of a very strong brand often delivered more tar and nicotine than the "regular" version of a less strong brand, whether of the same Company or of one of the other Companies.[213]

[407] The use of these descriptors within brand names affected smokers' choice of products. Fairly quickly, smokers came to rely on them more than on the tar, nicotine and carbon monoxide rankings printed on the packs. The Plaintiffs see fault in the fact that the Companies used them without explaining them and never warned smokers that reduced-delivery cigarettes were still dangerous to health. They fault the Companies as well for "colour coding" their packs: using lighter pack colours to suggest milder products[214].

[408] In his report, Professor Pollay states:

> 9.2 Perceptions are Key. Because there are no standards or conventions to the use of the terminology describing cigarettes in Canada, consumers are confused and this makes consumer "strength perceptions" at variance with, and more important than, actual tar deliveries.

[409] He opines that ITL knew that the use of the term "lights" might be misleading. He bases this on the fact that BAT had a 1982 document stating that "There are those who say that either low tar is no safer or, in fact, low tar is more dangerous". BAT expressed fear that wide publication of this type of opinion could undermine "the credibility of low tar cigarettes".[215]

---

212 Those containing lower tar and nicotine than traditional cigarettes.

213 In section II.D.7 of the present judgment we analyze the effect of compensation and how it can distort the actual amount of tar and nicotine ingested as opposed to machine-measured amounts, and we shall not repeat that here.

214 Exhibit 1381, section 9.5.

215 Exhibit 1381, section 11.2.1.

[410] Early on, Canada opposed the use of the terms "light" and "mild". Health Minister Lalonde testified that the Ministry found the terms to be confusing. A May 1977 letter from Dr. A.B. Morrison of Health Canada to Mr. Paré, representing the CTMC, presents a concise summary of the issue:

> May I suggest that the Council (the CTMC) review its position on the use of such terminology on packages and in advertising so that we may discuss it along with other matters in our forthcoming meeting. Notwithstanding the fact that there are no standards for determining the appropriateness of the terms "mild" or "light" from a public health point of view, these would appear to be inappropriate when applied to cigarettes having tar and nicotine levels exceeding 12 milligrams of tar and 0.9 milligrams of nicotine. We do not think that the appearance of tar and nicotine levels on packages or in advertisements for cigarettes which are marketed as "light" and "mild" overcomes the risk that consumers will associate these terms with a lower degree of hazard. Inevitably, I believe, some people will come to the conclusion that cigarettes with quite high tar and nicotine levels are among the more desirable from a health point of view.[216]

[411] It appears that Canada would have preferred calling reduced-delivery products something along the lines of "low tar cigarettes".[217] It is not immediately obvious that this would have been less misleading. Though they might have been lower in tar than other products within their brand family, these products were not generally low in tar in an absolute sense and they still brought risk and danger to those who smoked them.

[412] There seems to have been a fair degree of confusion among all concerned as to how to market reduced-delivery products to the consumer. Accepting that, the Court does not see any convincing evidence that the use of the descriptors "light" or "mild", in the context of the times, was any more misleading than any other accurate terms would have been, short of adding a warning containing all the relevant information that the Companies knew about their products.

[413] As such, we do not find a fault in the Companies' use of those descriptors.

II.E.3 DID ITL MARKET TO UNDER-AGE SMOKERS

[414] The Plaintiffs made much of what they allege to be a clear policy by the Companies of marketing to underage youth, i.e., to persons under the "legal smoking age" in Québec as it was legislated from time to time ("**Young Teens**")[218]. That age moved from 16 years to 18 years in 1993.[219]

[415] Two of the conclusions in Professor Pollay's report (Exhibit 1381) refer specifically to youth marketing:

---

216 Exhibit 50005.

217 See Exhibits 20076.13, at page 2 and 20119, at page 3.

218 The term "legal smoking age" is a misnomer; it is more a "legal selling age". The law does not prohibit smoking below a certain age but, rather, prohibits the sale of cigarettes to persons below a certain age. Thus, the "legal age" refers to the minimum age of a person to whom a vendor may legally sell cigarettes.

219 See *Tobacco Sales to Young Persons Act*, section 4(1) – Exhibit 40002B.

> 18.4 Ads are carefully calibrated. Guided by research and experience ads are carefully crafted. For examples, some ads appeal to the young, but are careful not seem too young; some ads portray enviable lifestyles, but rely on those which consumers aspire to and believe to be attainable; some ads show people associated with athletic activities, but are careful to show them in a moment of repose, lest the ad invoke associations of breathlessness.
>
> 18.13 Ads designed to recruit new smokers. The marketing and advertising strategies of Canadian firms were conceived to attract viewers to start smoking. This was done primarily by associating some brands of cigarettes with lifestyle activities attractive to youth, and to associate these brands with brand images resonant with the psychological needs and interests of youth. Strategies toward this end made brands seem "independent", "self-reliant", "adventuresome," "risk-taking," etc.

[416] Professor Pollay accurately notes that the "younger segment" of the population is one that was of particular interest for all the Companies. He cites a number of internal documents attesting to that, including the following extracts from 1989 memos, the first from ITL and the second from RJRUS:

> I.T.L. has always focused its efforts on new smokers believing that early perceptions tend to stay with them throughout their lives. I.T.L. clearly dominates the young adult market today and stands to prosper as these smokers age and as it maintains its highly favorable youthful preference.
>
> The younger segment represents the most critical source of business to maintain volume and grow share in a declining market. They're recent smokers and show a greater propensity to switch than the older segment. Export has shown an ability to attract this younger group since 1987 to present.[220]

[417] There are many documents in which the Companies underline the importance of the "young market" or the "younger segment", without specifying what that group encompasses. Several documents do, however, show that it can extend below the legal smoking age. For example, Dr. Pollay cites a 1997 RBH memo discussing "Critical Success Factors" that states: "Although the key 15-19 age group is a must for RBH, there are other bigger volume groups that we cannot ignore".[221]

[418] ITL denies ever targeting Young Teens and indicates that to do so would be neither appropriate nor tolerable (Notes, para. 614). Nevertheless, they query the legal relevance of the issue in the following terms (Notes, para. 611):

> However, as a preliminary matter, the legal significance of such an allegation is not plainly evident. [ ] There is no free-standing civil claim for "under-age marketing". No fault can be established on such a practice alone, and thus no liability can be imposed. [ ] Rather, they apparently urge this Court to find that "youth marketing" is both a fault and an injury – in and of itself – without any legal or factual basis for advancing such a position.

---

220 Exhibit 1381, at page 14.
221 Exhibit 1381, at page 14.

[419] The evidence is not convincing in support of the allegation of wilful marketing to Young Teens. There were some questionable instances, such as sponsorships of rock concerts and extreme sports but, in general, the Court is not convinced that the Companies focused their advertising on Young Teens to a degree sufficient to generate civil fault.

[420] This said, the evidence is strong in showing that, in spite of pious words[222] and industry marketing codes[223] to the contrary, some of the Companies' advertising might have borne a sheen that could appeal to people marginally less than 18 years of age[224]. That, however, cannot be an actionable fault, given that the federal and provincial legislation in force allowed the sale of cigarettes to anyone 16 years of age or older until 1993 and that from 1988 to 1995 the Companies were not advertising at all.

[421] It is true that the Companies sought to understand the consumption practices of Young Teens in studies such as RJRM's Youth Target Study in 1987 and ITL's Plus/Minus projects and its Youth Tracking Studies. In fact, the 1988 version of the latter looked into "the lifestyles and value systems of young men and women in the 13 to 24 age range"[225]. As well, a number of the Companies' marketing-related documents and surveys include age groups down to 15-year-olds[226].

[422] The Companies explain that this was to coincide with Statistics Canada's age brackets, which appears to be both accurate and reasonable. They also explain that, in the face of the reality that many young people under the legal purchasing age did nonetheless smoke[227], they needed to have an idea of the incidence in that age group in order to plan production amounts, as they did with all other age groups. This is not, in itself, a fault.

[423] There is also the fact that, as discussed above, the Voluntary Codes stipulated that "Cigarette advertising shall be addressed to adults 18 years of age and over". None of the Companies would permit a competitor to gain an advantage by breaking the rules

---

222 See the discovery of John Barnett, president of RBH, at Exhibit 1721-080529, at Question 63 and following.

223 See, for example, Rule 7 of the 1975 Voluntary Code at Exhibit 40005G-1975: "Cigarette or cigarette tobacco advertising will be addressed to adults 18 years of age or over and will be directed solely to the increase of cigarette brand shares". The latter point implies that it will not target non-smokers.

224 Company marketing executives were adamant that the Companies always respected the provisions of the Voluntary Codes, including the prohibition against advertising to persons under 18 years age as of 1972. They also admitted that it is inevitable that "adult" advertising would be seen by Young Teens.

225 See Exhibit 1381, at pages 40-41.

226 ITL's two monthly surveys, the Continuous Marketing Assessment and the Monthly Monitor, regularly canvassed smokers as young as 15 years old, at least until the legal age of smoking was increased to 18. One 1991 survey relating to Project Viking shows that consultants for ITL compiled statistics on age segments going as low as "eight or under", but this is clearly an anomaly. See Exhibit 987.21A, pages 33 and 35.

227 Table 18-1 of Exhibit 987.21A (page 35 PDF) indicates that about 24% of Quebec smokers started smoking "regularly" at 14 years of age or less, with another 11.1% and 15.7% starting at 15 and 16 years old, respectively, for a total of 50.8%. Another ITL study (Exhibit 139) indicates that "2. Although about 20% start before 15, 30% start after the age of 18", i.e., that 70% start at 18 years of age or less.

imposed by the Codes and the inter-company policing in that regard was most attentive, as was the surveillance done by groups like the Non-Smokers Rights Association[228].

[424] This said, it is one thing to measure smoking habits among an age group and another to target them with advertising. Here, the proof does not support a finding that ITL, or the other Companies, were guilty of such targeting.

[425] Let us be clear. Were there adequate proof that the Companies did, in fact, target Young Teens with their advertising, the Court would have found that to be a civil fault. If it is illegal to sell them cigarettes, by necessary extension, it must be, if not exactly illegal, then certainly faulty - dare one say immoral - to encourage them to light up[229].

II.E.4 DID ITL MARKET TO NON-SMOKERS

[426] Dr. David Soberman was called by the Companies as an expert witness in the area of marketing[230]. His task was to advise whether JTM's advertising over the Class Period had the goal of inducing youth or non-smokers to start smoking, and whether that advertising had the intention or effect of misleading smokers about the risks of smoking.

[427] On "starting" generally, he states at page 2 of his report (Exhibit 40560) that there is no suggestion that JTM designed marketing to target adult non-smokers and that there is "no support for the premise that JTIM's marketing had any impact on decisions made by people in Quebec to start smoking when they would not otherwise have done so". He attributes "no statistically significant role" to tobacco marketing in the decision to start smoking: "the evidence is consistent with the expected role of marketing in a mature market".

[428] His sees the exclusive role of advertising in a mature market, like the one for cigarettes, as being to assist a company in "stealing" market share from competitors, as well as in maintaining its own market share. This is reflected in the Voluntary Codes' provision to the effect that advertising should be "directed solely to the increase of cigarette brand share"[231].

[429] He refused to believe that attractive cigarette ads, even though they might have the primary goal of increasing market share, would also likely have the effect of attracting non-smokers – of all ages – to start smoking. He reasons at page 3 that "Tobacco marketing is unlikely to be relevant to, and is therefore likely largely to be ignored by, non-smokers (unless they have an independent, pre-existing interest in the product category)".

[430] After reviewing much of JTM's advertising planning and execution during the Class Period for which there was documentation, i.e., after RJRUS's acquisition of the company, he opines at page 4 that he does "not believe that it was either the intention or the

---

228 See, for example, Exhibits 40407 and 40408.

229 The witnesses, including essentially all the former executives of the Companies, were unanimous in declaring that it would be wrong to encourage Young Teens to start smoking. In fact, John Barnett, the president of RBH, extended this taboo even to adult non-smokers: "Because it wouldn't be the right thing to do" (Exh 1721-080529, at Question 63 and following).

230 Although he was called by JTM, his evidence is relevant to the situation of all the Companies.

231 See, for example, Rule 7 of the 1975 code: Exhibit 40005K-1975. All the codes are produced in the 40005 series of exhibits.

effect of JTIM's marketing to mislead smokers about the risks of smoking, to offer them false reassurance, or to encourage those who were considering quitting not to do so".

[431] The Court cannot accept Dr. Soberman's view, although much of what he says, in the way he phrases it, is surely true. It is simply too unbelievable to accept that the highly-researched, professionally-produced and singularly-attractive advertising used by JTM under RJRUS, and by the other Companies, neither was intended, even secondarily, to have, nor in fact had, any effect whatsoever on non-smokers' perceptions of the desirability of smoking, of the risks of smoking or of the social acceptability of smoking. The same can be said of the effect on smokers' perceptions, including those related to the idea of quitting smoking.

[432] His testimony boils down to saying that, where a company finds itself in a "mature market", it loses all interest in attracting any new purchaser for its products, including people who did not use any similar product before. This flies so furiously in the face of common sense and normal business practice that, with respect, we must reject it.

[433] Hence, the Court finds that, perhaps only secondarily, the Companies' targeted adult non-smokers with their advertising. So be it, but where is the fault in that? Not only did the law allow the sale of cigarettes to anyone of a certain age, but also the Companies respected the government-imposed limits on the advertising of those products.

[434] There is no claim based on the violation of those limits or, for that matter, on the violation of any of the Voluntary Codes in force from time to time. Consequently, we do not see how the advertising of a legal product within the regulatory limits imposed by government constitutes a fault in the circumstances of these cases.

[435] This is not to say that the Companies' marketing of their products could not lead to a fault. The potential for that comes not so much from the fact of the marketing as from the make-up of it. For a toxic product, the issue centers on what information was, or was not, provided through that marketing, or otherwise. That aspect is examined elsewhere in this judgment, for example, in section II.D.

II.E.5 DID THE CLASS MEMBERS SEE THE ADS?

[436] The Companies insist that the Plaintiffs must prove that each and every Member of both Classes saw misleading ads that would have caused him or her to start or to continue smoking. Like a tree falling in an abandoned forest, can advertising that a plaintiff does not hear make any noise? Or cause any damage?

[437] In view of the meagre findings of fault on this Common Question, it is not necessary to go into great detail as to why we reject the Companies' arguments on this point. Summarily, let us say that we would simply follow the same logic the Companies' historians espoused: there were so many newspaper and magazine articles about the dangers of smoking that people could not have avoided seeing them. For the same reason, it seems obvious that people could not have avoided seeing the Companies' ads appearing alongside those articles in the very same newspapers and magazines.

II.E.6 CONCLUSIONS WITH RESPECT TO COMMON QUESTION E

[438] We find no fault on the Companies' part with respect to conveying false information about the characteristics of their products. It is true that the Companies' ads were not informative about smoking and health questions, but that, in itself, is not necessarily a fault and, in any event, it is not the fault proposed in Common Question E.

II.F. DID ITL CONSPIRE TO MAINTAIN A COMMON FRONT IN ORDER TO IMPEDE USERS OF ITS PRODUCTS FROM LEARNING OF THE INHERENT DANGERS OF SUCH USE?

[439] The relevance of this question is not so much in determining fault as in finding the criteria to justify a solidary (joint and several) condemnation among the Companies under article 1480 of the Civil Code.[232]

[440] As to the facts, if there was a "common front" among the Companies, it seems logical to assume that the CTMC, the successor to the Ad Hoc Committee, would have served as the principal vehicle for it. We shall thus analyze the role of the CTMC in some detail but, before going there, let us examine an event that took place even before the creation of the Ad Hoc Committee in 1963 that, in hindsight, appears to have been the genesis of inter-Company collaboration in Canada: the "Policy Statement".

II.F.1 THE 1962 POLICY STATEMENT

[441] In October 1962 the presidents of all eight (at the time) Canadian tobacco products companies signed a document entitled the "Policy Statement by Canadian Tobacco Manufacturers on the Question of Tar, Nicotine and Other Tobacco Constituents That May Have Similar Connotations" (Exhibits 154, 40005A). Among the signatories were ITL, Rothmans of Pall Mall Canada Limited, Benson & Hedges (Canada) Ltd. and Macdonald Tobacco Inc.

[442] The Policy Statement followed closely on the heels of the publication by the Royal College of Physicians in Great Britain of its report on Smoking and Health in 1962 (Exhibit 545). The Royal College's analysis concluded that:

> 41. The strong statistical association between smoking, especially of cigarettes, and lung cancer is most simply explained on a causal basis. This is supported by compatible, though not conclusive, laboratory and pathological evidence …[233]

[443] Reflecting the heightened awareness of a potential causal link between smoking and disease, two companies, Benson & Hedges and Rothman, who were not yet merged, started advertising certain of their brands with reference to their relatively lower levels of tar compared with other companies' products. This appears to have been the fuse that ignited the move by ITL's president, Edward Wood, to embark on the Policy Statement initiative.

---

[232] The Plaintiffs also refer to the collaboration between the Companies and their respective parent or *de facto* controlling companies in England and the United States. The obvious collaboration between such related companies is not relevant to the consideration at play for the application of article 1480 and the Court will not analyze that aspect in the present context.

[233] Exhibit 545, at page 27.

[444] For its part, the "Policy Statement" is a one-paragraph undertaking, with a five-point preamble and a six-point appendix. It reads as follows:

> We, the undersigned, (company name) conceive it to be in the public interest to agree to refrain from the use, direct or implied, of the words tar, nicotine or other smoke constituents that may have similar connotations, in any and all advertising material or any package, document or other communication that is designed for public use or information.[234]

[445] The reason behind such a policy is ostensibly set out in the preamble to the document, particularly at item 5 thereof. The preamble reads:

> 1. Whereas there has been wide publicity given to studies and reports indicating an association between smoking and lung cancer;
> 2. Whereas the conclusions reached in these studies and reports are based essentially on statistical data;
> 3. Whereas no cause-and-effect relationship has been found through clinical or laboratory studies;
> 4. Whereas research on an international basis is being continued on an intensified scale to determine the true facts about smoking;
> 5. Whereas any claim, reference or use in any manner in advertising of data pertaining to tar, nicotine or other smoke constituents that may have similar connotations may be misleading to the consumer and therefore contrary to the public interest;

[446] The primary concern expressed there refers to misleading the consumer and acting contrary to the public interest. That, however, do not appear to be the dominant motivator of Mr. Wood. In his letter urging the presidents of the other companies to adopt the proposed policy (Exhibit 154A), he seems much more preoccupied with avoiding both the suggestion that the industry knew there was a connection between smoking and hazards to health as well as the spectre of government intervention:

> There is no doubt in my mind that we as manufacturers contribute to the public apprehension and confusion by reference to tar and nicotine in our advertising. If our desire is to reassure the smoker, there is the real danger of misleading him into believing that we as manufacturers know that certain levels of tar and nicotine remove the alleged hazard of smoking. In so doing I believe we are performing a disservice to the smoker and to ourselves for we are assisting in the creation of a climate of fear that is contrary to the public interest and, incidentally, damaging to the entire industry.
>
> Moreover, I am quite clearly of the conviction that to permit tar and nicotine and the public apprehension associated with it to become an area of competitive advertising will, in due course, compel government authority to take a firm stand on this matter. In the hope that we as leaders of our industry can prevent such intervention by agreeing to take the necessary steps to keep our own house in order, I have drafted and attach to this letter a statement of policy to which I would urge your agreement.

---

[234] Exhibit 154.

[447] The Appendix to the Policy Statement opens with the question: "If asked by the press or other media to comment on specific 'Health Attacks' on the industry what is the action to be taken?".[235] Its contents are also relevant to the issue of collusion among the Companies in that, as the sixth point specifies, these documents "form the common basis for comments at the present time". The Appendix reads as follows:

> 1. Individual companies are completely free to comment on the general subject of smoking and health, as their knowledge dictates and as prudence indicates, when asked by responsible outside sources. Volunteering or stimulating comment will be avoided.
> 2. Any comments will deliberately avoid the association of a brand or a group of brands with health benefits.
> 3. Any comments will deliberately avoid the promotion of health benefits of types of tobacco products (i.e. pipe tobacco or cigars) as compared to cigarettes, or vice versa.
> 4. Information on smoke constituents of a particular brand or a group of brands will not be given.
> 5. Some consideration will be given to Canadian comments as they relate to the smoking and health problem in the English-speaking world and elsewhere.
> 6. The attached Memorandum on Smoking and Health will form the common basis for comments at the present time.

[448] The Policy Statement was renewed in October 1977, although not in the exact form as in the original. Appearing to confirm the Plaintiffs' assertion that this was a "secret agreement", the Companies specified that the agreement was binding on them but it would not become part of the Voluntary Codes[236].

[449] Thus, it appears to be incontrovertible that, by adhering to the Policy Statement, these companies colluded among themselves in order to impede the public from learning of health-related information about smoking, a collusion that continued for many decades thereafter. They thereby jointly participated in a wrongful act that resulted in an injury, which is a criterion for solidary liability under article 1480 of the Civil Code.

[450] The preamble to the Policy Statement also provides a preview of the industry's mantra for the coming decades: studies and reports based on statistical data do not provide proof of any cause-and-effect relationship between smoking and disease - only clinical or laboratory studies can credibly furnish such proof. In fact, even when the CTMC began to admit that smoking "caused certain health risks" in the late 1980s[237], it and the Companies continued to sow doubt by insisting that science had never identified the physiological link between smoking and disease.

---

235 Exhibit 154B-2M.
236 Exhibit 1557, at page 12.
237 Testimony of William Neville: transcript of June 6, 2012, at page 45.

II.F.2 THE ROLE OF THE CTMC

[451] The Ad Hoc Committee appears to have been created at a meeting of the Canadian tobacco industry held at the Royal Montreal Golf Club in August of 1963. The purpose of the meeting was to prepare the industry's representations to the conference on smoking and health convened by Health and Welfare Canada for November of that year: the LaMarsh Conference.

[452] The US public relations firm, Hill & Knowlton, attended and counselled the Companies, as it had already been doing for years in the United States. In fact, the same representative, Carl Thompson, also attended the now-infamous meeting at the Plaza Hotel in 1953 where the scientific-controversy strategy was created by the US tobacco presidents[238].

[453] At the LaMarsh Conference, several executives of Canadian tobacco companies, mostly from ITL, presented the position of the Canadian tobacco industry on the question of the link between smoking and disease. As opposed to the Policy Statement, which was not announced in the media, in making these presentations the industry was publicly acting with one voice[239].

[454] As appears from the press release issued by the Ad Hoc Committee on November 25, 1963 (Exhibit 551A), its spokesperson, John Keith, the president of ITL, toed the industry line and preached the scientific controversy and the lack of hard scientific proof of causation. Here is the summary of the committee's presentation, as reported in that press release:

> Any causal relationship of smoking to these diseases is a disputed and open question, according to the Industry which cited the findings of scores of medical scientist throughout the world. Among the points made were:
>
> - Exaggerated charges against smoking are frequently repeated but remain unproved.
> - Knowledge of lung cancer is scanty.
> - Statistical studies on smoking and disease are of questionable validity.
> - Many environmental factors affect lung cancer incidence and mortality.
> - Chemical and biological experiments have completely failed to support an association between smoking and lung cancer.
> - Examination of smokers' lungs after death from causes other than lung cancer usually reveals no evidence of pre-cancerous conditions.

[455] In light of the Companies' numerous objections as to the relevance of the situations in the US and UK, it is ironic to note that both the trade associations and the Companies regularly sought out the assistance and expertise of US and British tobacco industry representatives and consultants in preparing the Canadian industry's position, *inter alia*, for presentation to government inquiries. A good example of this is seen in a 1964 memo by Leo Laporte of ITL:

---

238 Transcript of November 28, 2012, Professor Proctor, at pages 30 and following.
239 See Exhibit 551C, at pdf 2.

> In the preparation of the pertinent scientific information, we will undoubtedly use the services of Carl Thompson of Hill & Knowlton, Inc., New York. H & K were largely responsible for the preparation of our brief on scientific perspectives presented on behalf of the Canadian Tobacco Industry to the Conference on Smoking and Health of the Department of National Health and Welfare in 1963. We will also seek whatever information and guidance we can obtain from the Council for Tobacco Research in New York, as well as from our friends in the U.S. and, if necessary, the U.K.[240]

[456] Some five years later, in front of the Isabelle Committee of the House of Commons, the Companies once again acted in unison through the Ad Hoc Committee, with regular assistance from US industry representatives. There the Ad Hoc Committee, this time through the mouthpiece of ITL's then president, Paul Paré, continued the same message that the industry had been voicing for several years, as seen in a press release issued the day of Paré's testimony:

> In a fully-documented brief to the Standing Parliamentary Committee on Health, Welfare and Social Affairs, the Industry made these points:
>
> 1 - There is no scientific proof that smoking causes human disease;
>
> 2 - Statistics selected to support anti-smoking health charges are subject to many criticisms and, in any case, cannot show a causal relationship.
>
> 3 - Numerous other factors, including environmental and occupational exposures, are suspect and being studied in relation to diseases allegedly linked with smoking;
>
> 4 – "Significant beneficial effects of smoking," as recognized by the US Surgeon General's report, are usually overlooked and should be given consideration.
>
> 5 - Measures being proposed for control of tobacco and its advertising and marketing are not warranted, would have serious adverse effects, and would create dangerous precedents for the Canadian economy and public.[241]

[457] Some of these types of statements, carefully worded as they are, are technically true when taken on a point-by-point basis. For example, it is accurate to say that other factors are suspected as causes of certain smoking-associated diseases and that science had not, and still has not, explained the specific causal mechanism between smoking and disease. On the other hand, some of them are only partly true or, on the whole, patently false.

[458] It is the overall look and feel of the message, however, that most violates the Companies' obligation to inform consumers of the true nature of their products. By attempting to lull the public into a sense of non-urgency about the health risks, this type of presentation, for there were many others, is both misleading and dangerous to people's well-being.

---

240 Exhibit 1472, at pdf 1-2; see also Exhibits 544D, 544E, 603A, 745 and 1336 at pdf 2. It is also revealing that the CTMC often circulated, cited and relied on publications of the Tobacco Institute, the US tobacco industry's trade association. See, for example, Exhibits 486, 964C and 475A.

241 Exhibit 747, at pdf 1-2.

[459] Strong evidence existed at the time to support a causal link between cigarettes and disease and it was irresponsible for the Canadian tobacco industry to attempt to disguise that Sword of Damocles. By working together to this end, the Companies conspired to impede the public from learning of the inherent dangers of smoking and thereby committed a fault, a fault separate and apart from – and more serious than - that of failing to inform.

[460] As for the Isabelle Committee, in spite of the industry's polished representations, it issued a report (Exhibit 40347.11) advocating recommendations that read like a list of the Companies' worst nightmares, at least for the time. Yet Dr. Isabelle and the other members did nothing much more than consider evidence easily available to anyone wishing to consider the question. In applying that evidence, their common sense approach to the risks of smoking - and the conclusions to which this so obviously led - defy rebuttal even over forty years later:

> However, it is perhaps best to consider the relationship between cigarette smoking and disease in its simplest terms - the fact that cigarette smokers have an increased overall death rate. This observation, made in various studies in different parts of the world, depends only on counting deaths, is completely independent of diagnosis and, thereby, any argument about improved diagnostic skills and errors or changes in reporting and classification of deaths between various places and times. It is only necessary to compare the numbers of deaths among smokers and non-smokers.[242]
>
> […]
>
> These findings would appear to be sufficient, from a public health viewpoint, to decide that cigarette smoking is a serious hazard to health and should be actively discouraged. They are, nevertheless, buttressed by the fact that the increased death rates of cigarette smokers are largely due to diseases of the respiratory and circulatory systems which are the systems that are intimately exposed to cigarette smoke or its components. Also, death rates from lung cancer, chronic bronchitis and emphysema and coronary heart disease increase with the number of cigarettes smoked and decrease when smoking is discontinued, thus indicating a dose-response relationship[243].

[461] One cannot but be amazed that the truly brilliant minds running the Companies at the time were apparently unable, even when grouping their wisdom and intelligence together within the CTMC, to work out such a straightforward syllogism. In fact, it mocks reason to think that they did not.

[462] Nevertheless, the publication of that report in December 1969 renewed and refined the message of the LaMarsh Conference of some six years earlier. In addition, it contained pages of recommendations and proposed legislation to assist in moving towards, if not a solution, then at least a lessening of the problem that was causing the sickness and death of thousands of Canadians every year.

---

242 Exhibit 40347.11, at pdf 22.
243 *Ibidem*, at pdf 25.

[463] The reaction of the Canadian tobacco industry, through the CTMC[244], was to continue its efforts not only to hide the truth from the public but, as well, to delay and water down to the maximum extent possible the measures that Canada wished to implement to warn consumers of the dangers of smoking. The Plaintiffs' Notes cite the following example of Canada's frustration with the industry's attitude some ten years after the Isabelle Report:

> **1171**. Another two years hence, in November of 1979, the deputy minister in turn informed the Minister that their "experience with CTMC is that its members do no more than they have to, to carry out voluntary compliance" and that for the department the "essential question is whether to continue with the present frustratingly slow and only marginally effective slow process of negotiation and voluntary compliance with the CTMC or whether to take a more aggressive stance and introduce legislation".[245]

[464] In a January 1975 memo discussing a research proposal from an outside scientist to the CTMC Technical Committee, Mr. Crawford of RJRM states: "I stressed that we are following the same attitude here as in the U.S. - namely that the link between smoking and lung cancer has not been proven"[246]. This shows not only that the Companies, through the CTMC, were still sticking to their position at the time, but also that they were marching in step with the US industry's strategy.

[465] The CTMC also spearheaded the industry's rearguard campaign on the question of addiction. The keystone document on that issue was the 1988 Surgeon General report entitled "*Nicotine Addiction*". The Companies knew that this US document would receive broad publicity in Canada and that they had to deal with it.

[466] Rather than embracing its findings, the industry, centralizing its attack through the CTMC, chose to make every effort to undermine its impact. The May 16, 1988 memo to member companies capsulizing the CTMC's media strategy with respect to the report (Exhibit 487) merits citation in full:

> It has been agreed that the CTMC (either Neville or LaRiviere) will handle any media queries on the S-G' s Report on Nicotine Addiction.
>
> The comments fall into three broad categories:
>
> 1- The report flies in the face of common sense -
>
> - Thousands of Canadians and millions of people all over the world stop smoking each year without assistance from the medical community.
> - How can you describe someone who lights up a cigarette only after dinner as an "addict"?

---

244 The CTMC was formally incorporated by federal Letters Patent only in 1982 as the industry's trade association (Exhibit 433I), but an unincorporated version had replaced the Ad Hoc Committee as of around 1971. As with most trade associations, its mandate was to coordinate the Companies' activities on industry-wide issues and to share the work and the cost thereof. It did not deal in matters related to the business competition among the Companies.

245 Citing Exhibit 21258 at pdf 2-3.

246 Exhibit 603A.

- The word addiction has been overextended in the non-scientific world: some people are "addicted" to soap operas, to chocolate and to quote Saturday's Montreal Gazette, "to love".

2- The S-G's Report is another example of how the smoking issue has been politicized. This is another transparent attempt to make smoking socially unacceptable by warming up some old chestnuts. We don't think the S-G is adding to his credibility by trading on the public confusion between words like "habit" and "dependence" and "addiction".·

3- The S-G's Report also trivializes the very serious illegal drug problem in North America. It is (ir)responsible to suggest that to use tobacco is the same as to use Crack? (sic)

[467] This posture was continued in the CTMC's reaction to the passage of the *Tobacco Products Control Act* later in 1988. In a letter to Health Canada in August, it vigorously opposed adding a pack warning concerning addiction, stating that "(c)alling cigarettes 'addictive' trivializes the serious drug problems faced by our society, but more importantly, the term 'addiction' lacks precise medical or scientific meaning"[247].

[468] In August 1989, the Royal Society of Canada issued its report mandated by Health Canada entitled: "Tobacco, Nicotine, and Addiction".[248] The Smokers' Freedom Society had commissioned Dr. Dollard Cormier, professor emeritus and Head of the Research Laboratory on Alcohol and Drug Abuse at the Université de Montréal, to write a critique of the report.[249]

[469] The SFS was a close ally, the Plaintiffs would say a puppet, of the tobacco industry and the CTMC circulated Professor Cormier's report widely, especially to members of the Canadian government and the opposition. This critique served as a foundation for the CTMC's aggressive campaign against adding a Warning about tobacco dependence. Its approach is reflected in an April 1990 letter from the CTMC president to Health Canada:

> Suffice it to say here that we regard the Royal Society report as a political document, not a credible scientific review, and we look upon any attempt to brand six million Canadians who choose to smoke as 'addicts' as insulting and irresponsible.
>
> While we do not and would not support any health message on this subject, we would note that the proposed message on addiction misstates and exaggerates even the Royal Society panel conclusion [...][250].

[470] Concerning the issue of whether or not to attribute the Warnings to Health Canada, the CTMC's attitude on behalf of the Companies is summarized in its 1986 letter to Minister Epp:

---

247 Exhibit 694 at pdf 10.
248 Exhibit 212.
249 Exhibit 9A.
250 Exhibit 845 at pdf 6. See also Exhibit 841-2M, a 1986 letter from the CTMC to Minister Epp, at page 5.

> More specifically, we do not agree that your proposed health warnings are "scientifically correct" as stated in Appendix I to your letter of October 9, 1986. Such a proposal not only amounts to asking us to condemn our own product, but also would require us to accept responsibility for statements the accuracy of which we simply do not accept. Any admission, express or implied, that the tobacco manufacturers condone the health warnings would be inconsistent with our position.[251]

[471] On the subject of sponsoring research, the Plaintiffs criticize the CTMC for funding scientific "outliers" who dared question the long-accepted position that smoking caused disease and dependence. What is wrong with that? Some of the greatest discoveries in science have come from people who were considered "outliers" and "crackpots" because of their willingness to challenge the scientific establishment. That is not, in itself, a fault.

[472] Nor do we see it necessarily as a fault for a company not to fund research to further and refine current scientific understanding of a question. That is its prerogative. On the other hand, depending on the circumstances, a line can be crossed that turns such a practice into a fault.

[473] The circumstances here, according to the Plaintiffs, is that the Companies were publicly calling for additional objective research and yet were funding research that was anything but objective. The Court is uncomfortable in accepting such a proposition without a comprehensive analysis of all the research funded by the Companies, an exercise that goes beyond our capabilities and for which no expert's report was filed.

[474] As a result, we do not see Company or CTMC-sponsored research as playing a critical role in a finding of fault in the present affair. Where fault can be found, however, is in the failure or, worse, the cynical refusal to take account of contemporaneous, accepted scientific knowledge about the dangers of the Companies' products and to inform consumers accordingly.

[475] On the basis of the preceding and, in particular, the clear and uncontested role of the CTMC in advancing the Companies' unanimous positions trivializing or denying the risks and dangers of smoking[252], we hold that the Companies indeed did conspire to maintain a common front in order to impede users of their products from learning of the inherent dangers of such use. A solidary condemnation in compensatory damages is appropriate.

II.G. DID ITL INTENTIONALLY INTERFERE WITH THE RIGHT TO LIFE, PERSONAL SECURITY AND INVIOLABILITY OF THE CLASS MEMBERS?

[476] This Common Question mirrors the language of the second paragraph of section 49 of the Quebec Charter and is a call for an award of punitive damages under that statute. This, however, does not cover the Plaintiffs' full argument for punitive damages, since they claim them also under the *Consumer Protection Act*.

---

[251] Exhibit 841-2M, at page 5.

[252] We are not unaware of RBH's withdrawal from the CTMC for a short time during the Class Period but consider that immaterial for these purposes.

[477] Although the CPA portion of their actions is not technically part of Common Question G, it makes sense to examine all phases of the punitive damages issue at the same time. We shall, therefore, analyze the claim under the CPA in the present chapter.

[478] In order to do that under both statutes, it is first necessary to determine if the Companies would be liable for compensatory damages under them. It is therefore logical within the present analysis of punitive damages to consider that question also.

II.G.1 LIABILITY FOR DAMAGES UNDER THE QUEBEC CHARTER

[479] This Common Question is based on sections 1 and 49 of the Quebec Charter. They read:

> **1.** Every human being has a right to life, and to personal security, inviolability and freedom.
>
> **49.** Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.
>
> In case of unlawful and intentional interference (with a right or freedom recognized by the Charter), the tribunal may, in addition, condemn the person guilty of it to punitive damages.

[480] In this context, the Quebec Charter does not target the intentionality of defendant's conduct so much as the intentionality of the consequences of that conduct. The defendant must be shown to have intended that his acts result in a violation of one of plaintiff's Quebec Charter rights. As the Supreme Court stated in the *Hôpital St-Ferdinand* decision:

> Consequently, there will be unlawful and intentional interference within the meaning of the second paragraph of s. 49 of the *Charter* when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause.[253]

[481] Thus, this question must be examined in two phases: Did the Companies' actions constitute an unlawful interference with the right to life, security and integrity of the Members and, if so, was that interference intentional? A positive response to the first opens the door to compensatory damages whether or not intentionality is proven.

[482] To start, the Court held above that the Companies manufactured, marketed and sold a product that was dangerous and harmful to the health of the Members. As noted, that is not, in itself, a fault or, by extension, an unlawful interference. That would depend both on the information in the users' possession about the dangers inherent to smoking and on the efforts of the Companies to warn their customers about the risk of the Diseases or of dependence, which would include efforts to "disinform" them.

---

[253] *Le syndicat national des employés de l'Hôpital St-Ferdinand et al. v. le Curateur public du Québec et al.*, EYB 1996-29281 (S.C.C.), at paragraph 121. See also paragraphs 117-118.

[483] We have held that the Companies failed under both tests, and this, for much of the Class Period. With respect to the Blais Class, we held that the Companies fault in failing to warn about the safety defects in their products ceased as of January 1, 1980, but that their general fault under article 1457 continued throughout the Class Period. In Létourneau, the fault for safety defects ceased to have effect as of March 1, 1996, while the general fault also continued for the duration of the Class Period.

[484] Given the consequences of these faults on smokers' health and well-being, this constitutes an unlawful interference with the right to life, security and integrity of the Members over the time that they lasted. Compensatory damages are therefore warranted under the Quebec Charter.

[485] On the second question, we found that the Companies not only knowingly withheld critical information from their customers, but also lulled them into a sense of non-urgency about the dangers. That unacceptable behaviour does not necessarily mean that they malevolently desired that their customers fall victim to the Diseases or to tobacco dependence. They were undoubtedly just trying to maximize profits. In fact, the Companies, especially ITL, were spending significant sums trying to develop a cigarette that was less harmful to their customers.

[486] Pending that Eureka moment, however, they remained silent about the dangers to which they knew they were exposing the public yet voluble about the scientific uncertainty of any such dangers. In doing so, each of them acted "with full knowledge of the immediate and natural or at least extremely probable consequences that (its) conduct will cause".[254] That constitutes intentionality for the purposes of section 49 of the Quebec Charter.

[487] Common Question G is therefore answered in the affirmative. Punitive damages are warranted under the Quebec Charter.

[488] We look in detail at the criteria for assessing punitive damages in Chapter IX of the present judgment. At that time we also consider the fact that the Quebec Charter was not in force during the entire Class Period, having come into force only on June 28, 1976.

II.G.2 LIABILITY FOR DAMAGES UNDER THE CONSUMER PROTECTION ACT

[489] Section 272, *in fine*, of the CPA creates the possibility for an award of extracontractual and punitive damages[255]. The full provision reads:

272. If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the	**272.** Si le commerçant ou le fabricant manque à une obligation que lui impose la présente loi, un règlement ou un engagement volontaire souscrit en vertu de l'article 314 ou dont l'application a été étendue par un décret pris en vertu de l'article 315.1, le consommateur, sous réserve des autres recours prévus par la

254 Ibidem.

255 The *Consumer Protection Act* was first enacted in 1971, at which time it did not include the provisions on which Plaintiffs rely: articles 215-253 and 272. Those came into force on April 30, 1980.

other recourses provided by this Act,

(a) the specific performance of the obligation;
(b) the authorization to execute it at the merchant's or manufacturer's expense;
(c) that his obligations be reduced;
(d) that the contract be rescinded;
(e) that the contract be set aside; or
(f) that the contract be annulled.

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

présente loi, peut demander, selon le cas:

(a) l'exécution de l'obligation;
(b) l'autorisation de la faire exécuter aux frais du commerçant ou du fabricant;
(c) la réduction de son obligation;
(d) la résiliation du contrat;
(e) la résolution du contrat; ou
(f) la nullité du contrat,

sans préjudice de sa demande en dommages-intérêts dans tous les cas. Il peut également demander des dommages-intérêts punitifs.

[490] In claiming those damages, the Plaintiffs allege that the Companies contravened three provisions of the CPA:

- failing to mention an important fact in any representation made to a consumer, in contravention of section 228;
- making false or misleading representations to a consumer, in contravention of section 219; and
- ascribing certain special advantages to cigarettes, in contravention of section 220(a).

[491] As a preliminary question, there are five conditions to meet in order for the CPA to apply. They are:

a. A contract must be entered into;
b. One of the parties to the contract must be a "consumer";
c. One of the parties must be a "merchant";
d. The "merchant" must be acting in the course of his or her business; and
e. The contract must be for goods or services.[256]

[492] Although in these files the "merchants" involved in the contracts with the Members are not the Companies, that is not an obstacle. The Supreme Court cast that argument aside in *Time* when it stated that

> To be clear, this means that a consumer must have entered into a contractual relationship with a merchant or a manufacturer to be able to exercise the recourse provided for in s. 272 C.P.A. against the person who engaged in the prohibited practice.[257] (the Court's emphasis)

---

[256] *Op. cit., Time*, Note 20, at paragraph 104, citing Claude MASSE, *Loi sur la protection du consommateur* : *analyse et commentaires*, (Cowansville : Les Éditions Yvon Blais Inc., 1999) at page 72.

[257] *Op. cit., Time*, Note 20, at paragraph 107.

[493] Thus, the initial hurdle to a claim damages under the CPA is vaulted. The Companies, however, see several others.

II.G.2.a THE IRREBUTTABLE PRESUMPTION OF PREJUDICE

[494] In *Time*, the Supreme Court supports the existence of an absolute or irrebuttable presumption of prejudice under section 272 once four threshold conditions are met. In the Plaintiffs' view, those conditions are met here and the Companies are without defence to a claim for compensatory damages.

[495] The four conditions are:

a. that the merchant or manufacturer failed to fulfil one of the obligations imposed by Title II of the Act;

b. that the consumer saw the representation that constituted a prohibited practice;

c. that the consumer's seeing that representation resulted in the formation, amendment or performance of a consumer contract, and

d. that a sufficient nexus existed between the content of the representation and the goods or services covered by the contract, meaning that that the prohibited practice must be one that was capable of influencing a consumer's behaviour with respect to the formation, amendment or performance of the contract.[258]

[496] These conditions represent the cornerstones of an action in damages under the CPA. One might wonder as to what more is needed once they are met; in other words, of what use is a presumption of prejudice once these four elements are proven? The Supreme Court had this to say on the subject:

> [123] We greatly prefer the position taken by Fish J.A. in *Turgeon*[259], namely that a prohibited practice does not create a *presumption* that a merchant has committed fraud but in itself *constitutes* fraud within the meaning of art. 1401 C.C.Q. (para. 48). […] In our opinion, the use of a prohibited practice can give rise to an absolute presumption of prejudice. As a result, a consumer does not have to prove fraud and its consequences on the basis of the ordinary rules of the civil law for the contractual remedies provided for in s. 272 C.P.A. to be available. As well, a merchant or manufacturer who is sued cannot raise a defence based on "fraud that has been uncovered and is not prejudicial".[260] (Emphasis in the original)

[497] It thus appears that the only practical effect of this presumption is to ease the consumer's burden of proof concerning fraud: "the consumer does not have to prove that the merchant intended to mislead, as would be required in a civil law fraud case."[261]

---

258 *Op. cit., Time*, Note 20, at paragraph 124.
259 *Turgeon v. Germain Pelletier Ltée*, [2001] R.J.Q. 291 (QCCA), ("***Turgeon***") at paragraph 48.
260 *Op. cit., Time*, Note 20, at paragraph 123.
261 *Op. cit., Time*, Note 20, at paragraph 128.

[498] The Companies contest the establishment of an irrebuttable presumption of any use to the Plaintiffs here. They argue that such a presumption can apply only with respect to the contractual remedies set out in sub-sections "a" through "f" of section 272, and not to a claim in damages and punitive damages mentioned in the final paragraph of the section. In its Notes, RBH explains as follows:

> **1255.** Under the CPA, a plaintiff must prove fault, causation, and prejudice in order to succeed on a claim. As discussed earlier in Section I.C.2., at paras. 207-209, proving the four elements set forth in *Richard v. Time Inc.* leads to a presumption of prejudice sufficient to support an award of the contractual remedies provided in CPA Section 272(a) - (f). But those are not the remedies sought here. To recover compensatory damages, Plaintiffs must prove that their injuries were the result of the CPA violation, and to recover punitive damages, Plaintiffs must also prove some need for deterrence.

[499] The Supreme Court's language in *Time* appears at first sight to support RBH's contention limiting the effect of the presumption to the contractual remedies enumerated. For example, in paragraph 123 the court specifies "the contractual remedies provided for in s. 272 C.P.A.", and in the last sentence of paragraph 124 one reads: "This presumption thus enables the consumer to demand, in the manner described above, one of the contractual remedies provided for in s. 272 C.P.A." So be it, but, to the extent that such a presumption has any relevance to these cases, it is not obvious why such a restriction should exist.

[500] Where a presumption of prejudice is established, why should its benefit to the consumer be limited to only some of the sanctions mentioned in article 272? This seems to go against "the spirit of the Act", something the Supreme Court is clearly desirous of preserving and advancing[262]. We see no justification for excluding extracontractual remedies from the ambit of the presumption, not to mention contractual remedies other than those enumerated in subsections "a" through "f", should any exist.

[501] *Time* is a case between the two contracting parties and, in it, the Supreme Court decided only what needed to be decided. In doing so, it did not rule out a broad application of the presumption.

[502] In fact, such a broad application is supported in several places in the decision. In paragraph 113, admittedly after it has spoken of a consumer obtaining "one of the contractual remedies provided for in s. 272 CPA", the Supreme Court goes on to cite the Quebec Court of Appeal in *Beauchamp*[263] to the effect that "(t)he legislature has adopted an absolute presumption that a failure by the merchant or manufacturer to fulfil any of these obligations causes prejudice to the consumer, and it has provided the consumer with the range of recourses set out in s. 272".

[503] There is also its statement at the end of paragraph 123 in *Time* that "The severity of the sanctions provided for in s. 272 *C.P.A.* is not variable: the irrebuttable presumption of prejudice can apply to all violations of the obligations imposed by the Act." As we have noted above, the obligations imposed by the Act include extracontractual ones, for example, where the merchant is not the person who engaged in the prohibited practice.

---

262 *Op. cit., Time*, Note 20, at paragraph 123.

263 *Beauchamp v. Relais Toyota inc.*, [1995] R.J.Q. 741 (C.A.), at page 744.

[504] This tendency is carried through in paragraph 128 of *Time*:

> According to the interpretation proposed by Fish J.A. in *Turgeon*, a consumer to whom the irrebuttable presumption of prejudice applies has also succeeded in proving the fault of the merchant or manufacturer for the purposes of s. 272 C.P.A. The court can thus award the consumer damages to compensate for any prejudice resulting from that extracontractual fault.

[505] As for punitive damages, they would seem, again at first sight, to be excluded, given that the presumption is one of prejudice, and prejudice is not directly relevant to this type of damages. That, however, is misleading. As noted, the presumption's true effect is with respect to the merchant's fraudulent intentions: "the consumer does not have to prove that the merchant intended to mislead, as would be required in a civil law fraud case.[264]"

[506] We noted earlier that section 49 of the Quebec Charter targets the intentionality of the consequences of faulty conduct and not of the conduct itself. We also noted that "intention" in that context refers to "a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct".[265] To the extent that an analogy can be made between the two statures, a merchant's intention to mislead a consumer, i.e., to commit a fraud, meets that test. The irrebuttable presumption thus touches on issues relevant to punitive damages and can assist the consumer in a claim for those.

[507] Consequently, to the extent that it is necessary to decide this case, the Court holds that the irrebuttable presumption of prejudice, where it applies, assists with respect to all the types of damages mentioned in section 272 of the CPA. In harmony with that, we shall model our analysis of the alleged violations under the CPA around the four-part test for establishing this presumption.

[508] Before turning to that analysis, we note that one of the Companies' principal arguments against the award of any sort of damages under the CPA is that the Members lack sufficient interest. ITL puts it this way in its Notes:

> **134.** ITL submits that the requirement to demonstrate "legal interest" is an insurmountable hurdle for Plaintiffs to overcome in relation to the positive representations or advertisements that are alleged to be at issue in these proceedings. Plaintiffs simply assert that the legal interest requirement is satisfied because "the class members have all purchased cigarettes". And yet they make no attempt whatsoever to demonstrate that there is any temporal connection, however loose, between the purchase of cigarettes by particular class members and the existence of any misleading representation in the market at any particular time. In fact, there is no evidence at all that any class member read or saw any particular representations.

[509] Since the structure of the analysis we conduct below of the alleged contraventions, based on the four conditions precedent to the irrebuttable presumption, considers the Companies' concerns over the Members' interest, no more need be said about that at this point.

---

264 *Op. cit., Time*, Note 20, at paragraph 128.

265 *Le syndicat national des employés de l'Hôpital St-Ferdinand et al. v. le Curateur public du Québec et al.*, EYB 1996-29281 (S.C.C.), at paragraph 121

II.G.2.b THE ALLEGED CONTRAVENTION UNDER SECTION 228 CPA

[510] Section 228 reads as follows:

> **228.** No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.

[511] The Plaintiffs sum up their position on this allegation in their Notes, which specifies that this argument applies to both Classes:

> **153.** The evidence further reveals that the Defendants never voluntarily provided any information on the dangers inherent in the use of their products because they had adopted a joint strategy to deny these important facts. This systematic, intentional omission violates article 228 *CPA*. As a systematic failure to communicate, this violation reaches every member in both classes and extends in time from the entry into force of the *CPA* until the class period ends.

[512] In sections II.D.5 and 6 of the present judgment, we hold that the Companies were indeed guilty of withholding critical health-related information about cigarettes from the public, i.e., important facts. Since a "representation" includes an omission[266], the Companies failed to fulfil the obligation imposed on them by section 228 of Title II of the CPA. We also hold that their failure to warn lasted throughout the Class Period, including some twenty years while the relevant portions of the CPA were in force.

[513] On the question of whether the Members saw the representations, the Companies insist that the Plaintiffs must prove that every member of both classes saw them. Whether or not that is true, an omission to inform must be approached from a different angle, since, by definition, no one can see something that is not there. Every member of society was thus subjected to the omission to mention these important facts. Hence, the condition is met, even according to the Companies' standard.

[514] The question of whether the Members' "seeing" the representation resulted in the formation of the contract to purchase cigarettes is similar to the one examined in sections VI.E and F of the present judgment in the context of causation. There we hold, based on a presumption of fact, that the Companies' faults were one of the factors that caused the Members to smoke and that this presumption was not rebutted by the Companies. A similar presumption and rebuttal process apply here.

[515] Based on the reasoning in the above-mentioned sections, the Court accepts as a presumption of fact that the absence of full information about the risks and dangers of smoking was sufficiently important to consumers that it resulted in their purchasing cigarettes. Since there is no proof to the contrary, the third condition is met.

[516] The final condition is also met. The Companies' omission to pass on such critical, life-changing information about the dangers of smoking was incontestably capable of influencing a consumer's behaviour with respect to the decision to purchase cigarettes. It need not be shown that no one would have smoked had the Companies been

---

[266] Section 216 of the CPA: "For the purposes of this title, representation includes an affirmation, a behaviour or an omission".

forthcoming. It suffices to find that proper knowledge was capable of influencing a person's decision to begin or continue to smoke. How could that not be the case?

[517] Consequently, there is a contravention of section 228 CPA here and the Members may claim moral and punitive damages pursuant to section 272 CPA, subject to the other holdings in the present judgment.

II.G.2.c THE ALLEGED CONTRAVENTION UNDER SECTION 219 CPA

[518] Section 219 reads as follows:

> **219.** No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.

[519] Section 218 is also relevant for these purposes. It reads:

> **218.** To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.

[520] With respect to the general impression mentioned there, it is "the impression of a commercial representation on a credulous and inexperienced consumer".[267]

[521] The Plaintiffs argue at paragraph 154 of their Notes that "Throughout the class period, (the Companies) contrived and executed an elaborate strategy that used affirmations, behaviour, and omissions to deny the true nature of their toxic, useless product or mislead consumers about these important facts". In paragraph 155, they add:

> **155.** Throughout the class period, the Defendants not only failed to inform consumers but also used every form of public interaction available to them to deny the harms and extent of risk associated with cigarette consumption. In the rare circumstances where they acknowledged that cigarettes could be dangerous or harmful, the Defendants trivialized those harms and the intensity of the risk. They further falsely represented cigarettes as providing smokers with benefits when they knew that were selling a pharmacological trap.

[522] For reasons that are not clear, the Plaintiffs do not focus on marketing activities under this section of the CPA, reserving that for their arguments under section 220(a). In our view, that discussion should occur in the present section, and we shall proceed accordingly.

[523] The extent of the Companies' representations to consumers during the part of the Class Period when this provision was in force was to advertise their products between 1980 and 1988, as well as between 1995 and 1998, and to print Warnings on the packages. This was the period of their Policy of Silence, so they were making no direct comments about smoking and health.

[524] In section II.E.6 of the present judgment, we found no fault on the Companies' part with respect to conveying false information about the characteristics of their products. That is relevant to this question but, in light of sections 216 and 218, it is not conclusive. A different test is called for under the CPA.

---

[267] *Op. cit., Time*, Note 20, at paragraph 70.

[525] In similar fashion, our rulings in section II.B.1 that the Companies' faults with respect to the obligation to inform about safety defects ceased as of January 1980 for the Blais File and March 1996 for the Létourneau File is not relevant to the CPA-based claims. Under the CPA, the consumer's knowledge of faulty representations does not exculpate the merchant.

[526] As stated in *Turgeon*, the CPA is "a statute of public order whose purpose is to restore the contractual [balance] between merchants and their customers".[268] Its method is to sanction unacceptable behaviour on the part of merchants, regardless of the effect on the consumer[269]. Hence, the defence of consumer knowledge open to a manufacturer under article 1473 of the Civil Code is not available.

[527] Even though the Companies' ads did not convey false information, since they conveyed essentially no information, under the CPA the question is whether their representations would have given a false or misleading impression to a credulous and inexperienced consumer. For that, it would not be necessary for them to go so far as to say that smoking was a good thing. The test is whether the general impression is true to reality[270]. It would be enough if they suggested that it was not harmful to health.

[528] ITL and RBH plead a lack of proof, coupled with a complaint about overly general allegations and lack of interest. JTM argues in its Notes as follows:

> **215.** As will be demonstrated below, there is nothing misleading or inappropriate with lifestyle advertising. The methods used by JTIM for its marketing were legitimate and similar to those used by other companies in other areas. JTIM's advertisements did not make any implicit or explicit health claims, and there is no evidence whatsoever that any class member was misled by any of JTIM's advertisements.

[529] JTM cites a 2010 Court of Appeal decision dealing with the purchase of a motor home that supports the position that banal generalities in advertising do not constitute false or misleading representations.[271] Although not directly on point, that reasoning is relevant here.

[530] The Companies' argument about overly general allegations is well founded. The Plaintiffs point to few if any specific incidents in support of their argument. Their reference to paragraph 18.12 of Professor Pollay's report does them little good. We have already concluded that it is unconvincing on this question.

[531] The Plaintiffs accuse the Companies of using "labelling and lifestyle advertising to create a 'friendly familiarity' with (the Companies') product in order to falsely convince consumers that cigarette smoking was consistent with a healthy, successful lifestyle"[272], without explaining

---

268 *Op. cit., Turgeon*, Note 259, at paragraph 36.

269 *Op. cit., Time*, Note 20, at paragraph 50.

270 In *Time*, the Supreme Court calls for a two-step analysis for questionable representations: describe the general impression on a credulous and inexperienced consumer and then determine whether that general impression is true to reality: *Op. cit.*, Note 20, at paragraph 78.

271 *Martin v. Pierre St-Cyr auto caravans ltée*, EYB 2010-1706, at paragraphs 24 and 25.

272 Plaintiffs' Notes at paragraph 157.

how they see that process working. In the absence of further explanation, the Court does not see the evidence as supporting this general statement.

[532] All this seemingly leads to a conclusion that the Companies did not violate section 219. The problem is that none of it looks directly at the evidence in the record, i.e., the typical ads used by the Companies since 1980. It is by viewing them – through the eyes of a credulous and inexperienced consumer – that the Court can assess whether there is a contravention of this provision.

[533] It should not be controversial to assert that every single cigarette ad since 1980 for every single brand of the Companies' products attempted to portray those cigarettes in a favourable light. That does not necessarily mean that they all suggested that smoking was not harmful to health.

[534] A good example of a "neutral" ad is Exhibit 40480. It simply shows the packages of the three sub-brands of Macdonald Select cigarettes, with a short message aimed at "those who select their pleasures with care". There are other ads of this sort and none of them constitute violations of section 219 CPA. They, however, are the exception.

[535] As a general rule, the ads contain a theme and sub-message of elegance, adventure, independence, romance or sport. As well, they use attractive, healthy-looking models and healthy-looking environments, as seen in the following exhibits:

- Exhibit 1381.9 – Macdonald Select ad of 1983 showing an elegantly-dressed couple apparently about to kiss;
- Exhibit 1040B – Export A 1997 ad portraying extreme skiing
- Exhibit 1040C – Export A 1997 ad portraying mountain biking
- Exhibit 1381.33 – Belvedere 1988 ad showing young adults on a beach
- Exhibit 152 – two Player's Light 1979 ads[273] portraying horseback riding and canoeing in the Rockies
- Exhibit 1532.4 – Belvedere 1984 ad from *CROC* magazine showing a tanned couple on the beach
- Exhibit 243A – Vantage 1980 ad from *The Gazette*, text only, explaining how Vantage delivers taste but "cuts down substantially on what you may not want"
- Exhibit 40436 – two Export A 1980 ads showing loggers and truckers
- Exhibit 40479 – two Export A 1982 ads showing a mountain lake and a man on top of a mountain
- Exhibit 573C – Export A 1983 ad portraying a windsurfer
- Exhibit 771A – Player's Light 1987 ad seeming to portray a windsurfer in Junior Hockey Magazine
- Exhibit 771B – Export A 1985 ad in Junior Hockey Magazine portraying alpine skiing and Viscount 1985 vaunting it as the mildest cigarette

[273] Although this ad is from 1979, we assume it carried over at least into the next year.

[536] From the viewpoint of a "credulous and inexperienced" consumer, ads such as these would give the general impression that, at the very least, smoking is not harmful to health. In this manner, the Companies failed to fulfil one of the obligations imposed by Title II of the CPA.

[537] As for each and every Member of both Classes seeing the infringing representations, we dealt with this issue in an earlier section. The Companies admit that all Members would have seen newspaper and magazine articles warning of the dangers of smoking. Since the ads appeared, *inter alia*, in the same media, it is reasonable to conclude that all Members would have seen them, as well.

[538] We come to the third condition: that seeing the representation resulted in the Members' purchasing of cigarettes. In their proof, the Companies consistently emphasized that the purpose of their advertising was to win market share away from their competitors. To that end, they spent millions of dollars annually on marketing tools and advertising. Moreover, the Court saw the result of such marketing efforts, particularly through the success of ITL at the expense of MTI in the 1970s and 80s.

[539] This is sufficient proof to establish the probability that the Companies' ads induced consumers to buy their respective products. The third condition is met.

[540] The same evidence and reasoning shows that the final condition: that the prohibited practice was capable of influencing a consumer's behaviour with respect to the decision to purchase cigarettes, is also met.

[541] As a result, there is a contravention of section 219 CPA here. The Members may claim moral and punitive damages pursuant to section 272 CPA, subject to the other holdings in the present judgment.

II.G.2.d THE ALLEGED CONTRAVENTION UNDER SECTION 220(a) CPA

[542] Section 220(a) reads as follows:

> **220**. No merchant, manufacturer or advertiser may, falsely, by any means whatever,
>
> (a) ascribe certain special advantages to goods or services**;**

[543] Concerning this section, the Plaintiffs allege that the Companies' faults were in falsely ascribing a healthy, successful lifestyle to cigarette smoking and, especially, in marketing "light and mild" cigarettes as a healthier alternative to regular cigarettes, while knowing all along that this was not true. The Plaintiffs describe this assertion as follows in their Notes:

> **158.** Finally, each Defendant clearly violated article 220 a) of the CPA by deliberately employing a variety of marketing techniques to falsely ascribe a healthy, successful lifestyle to cigarette consumption. They notably consistently marketed "light and mild" cigarettes as a healthier alternative to their "regular" cigarettes. The Defendants knew all along that the attribution of this advantage was absolutely false.

[544] We reject the Plaintiffs' arguments under section 220(a). In addition to the fact that we have already dismissed their claims relating to light and mild cigarettes, we simply do not see how mere lifestyle advertising, to the extent it was used, constitutes the act of falsely ascribing special advantages to cigarettes. The special advantages referred to there go beyond the "banal generalities" conveyed in lifestyle advertising.

III. JTI MACDONALD CORP.[274]

[545] JTM was acquired by Japan Tobacco Inc. of Tokyo from R.J. Reynolds Tobacco Inc. of Winston-Salem, North Carolina ("**RJRUS**") in 1999. RJRUS had owned the company since 1974, when it purchased it from the Stewart family of Montreal. The company, then known as Macdonald Tobacco Inc., had been in business in Quebec for many years prior to the opening of the Class Period.

III.A. DID JTM MANUFACTURE, MARKET AND SELL A PRODUCT THAT WAS DANGEROUS AND HARMFUL TO THE HEALTH OF CONSUMERS?

[546] As mentioned earlier, none of the Companies today denies that smoking can cause disease in some people, although each steadfastly denies any general statement that it is the major cause of any disease, including lung cancer.

[547] In section II.A, we explain our interpretation of what is a "dangerous" product. We conclude that a product that is "harmful to the health of consumers" means that it would cause either the Diseases in the Blais Class or tobacco dependence in the Létourneau Class. We also conclude in section II.C that tobacco dependence is dangerous and harmful to the health of consumers. These rulings apply to all three Companies.

[548] In its Notes, JTM sums up its position on this Common Question as follows:

> **369.** JTIM admits that cigarettes can cause numerous diseases, including the class diseases at issue in *Blais*. However, class members were at all material times throughout the class period aware of serious health risks associated with smoking, including the fact that it can be difficult for some to quit.
>
> **370.** JTIM admits that cigarettes may be "addictive" in accordance with the common usage of that term. There was, however, no consensus in the public health community as to whether smoking should be labelled an "addiction" until at the earliest 1989. Indeed, the various editions of the most authoritative diagnostic manual, the DSM-V, have rejected the use of that term.

[549] In response to a request from the Court as to when each Company first admitted that smoking caused a Disease, JTM stated that during the Class Period it never denied that smoking could be risky for some people and could be habit forming. Nor did it deny that there was a "statistical association" between smoking and certain diseases, but it did not accept that this constituted "cause".[275]

---

[274] The witnesses called by any of the parties who testified concerning matters relating to JTM are listed in Schedule E to the present judgment.

[275] This document is not an exhibit. In JTM's case, it is entitled: "JTIM'S RESPONSE TO THE COURT'S NOVEMBER 21, 2014 QUESTION".

[550] It added in the same series of admissions that "(i)n 2000, in a public statement before a Senate Committee, Mr. Poirier acknowledged the serious incremental risks to health from smoking and that different combination of risks can cause cancer, expressly acknowledging that smoking is one of those risks." This appears to be the first public admission by this Company that smoking can cause a Disease, putting aside the government-imposed Warnings of 1988 and 1994.

[551] Michel Poirier is JTM's current president and, before us, he made the following statements:

> ON SEPTEMBER 18, 2012:
>
> Q58: A- … because there is no such thing as a safe cigarette.[276]
>
> Q85: A- Since the year two thousand (2000), since I became president, I did say publicly that there's a long list of diseases associated or that consumers... Sorry, let me rephrase that. Smokers incur risk such as lung cancer, heart disease, et cetera. There's a long list.
>
> Q87: A- We've always said that there is risk attached with smoking. When I say "always"... you know, in my tenure anyway, we always said that there is risk attached to smoking and we do spell out that there is strong risk associated with lung cancer, et cetera. So there's a long list.
>
> Q120: A- Well, again, I... from my perspective, the health risks attached to smoking have been known since the early sixties (60s), even late fifties (50s). This was all over the media. I remember growing up in Montreal as a five (5)-year old, the expression at the time... – this is going back fifty (50) years now, or forty-nine (49) years - the expression at the time in Montreal, in my surroundings anyway, was that every cigarette is a nail in your coffin. So I think, from that, that people knew about the risks of smoking, that it was not good for your health.
>
> Q127: A- The position of our company: that there (are) serious risks and people should be informed of those risks, as adults, before they smoke.
>
> Q200: Do you agree that cigarette smoking causes cancer, lung cancer?
>
> A- I agree that it does, in some smokers, yes.
>
> Q201: What about heart conditions, do you agree that smoking causes heart attacks?
>
> A- It causes heart disease, heart attack, yes, in some of the smokers, yes.
>
> Q202: And what about emphysema, do you agree that smoking causes emphysema?
>
> A- In some smokers, yes.

---

[276] "There is no safe cigarette": Exhibit 562, the website of JTI.

Q203: And this finding or... is it your personal opinion or is it the position of JTI-MacDonald?

A- Both.

[552] Although he added a number of qualifiers at other points in the same way that Mme. Pollet did for ITL, Mr. Poirier's candid admissions provide a clear answer to this first question. JTM clearly did manufacture, market and sell a product that was dangerous and harmful to the health of consumers during the Class Period[277].

[553] Since we have already established the date at which the public knew or should have known of the risks and dangers of smoking, the issue now is to determine when JTM learned, or should have learned, that it was dangerous and harmful and what obligations it had to its customers as a result. We deal with those points below.

III.B. DID JTM KNOW, OR WAS IT PRESUMED TO KNOW OF THE RISKS AND DANGERS ASSOCIATED WITH THE USE OF ITS PRODUCTS?

III.B.1 THE BLAIS FILE

III.B.1.a AS OF WHAT DATE DID JTM KNOW?

[554] The testimony of Peter Gage was both enthralling and enlightening[278]. He is a spry and dapper nonagenarian who emigrated from England in 1955 to work at Macdonald Tobacco Inc. Initially working under Walter Stewart, the owner, and his son, David, he became the number two man there after Walter's death in 1968. He remained in that position until 1972, when he moved to ITL.

[555] By the time David Stewart took over the reins of the company from his father, he was sensitive to and deeply concerned about the effect of smoking on health. Mr. Gage reports a meeting that David Stewart organized with a number of doctors from the Royal Victoria Hospital in 1969:

Q And what was the relationship between the hospital and the Stewart family or Macdonald that you witnessed?

A David Stewart called a meeting of the leading doctors in the hospital. We had a meeting at his mother's home on Sherbrooke Street. And it was just David and myself and I think Bill Hudson was there and about seven or eight doctors.

And David more or less said he wanted to know what Macdonald Tobacco could do to combat the health problem and smoking. And he made it clear that Macdonald Tobacco would finance it to a very high figure. I can't remember if he mentioned a figure at the meeting or not. I know he told me that he was quite prepared to put $10 million into it.

Q He was prepared to put $10 million?

---

277 The epidemiological proof of the likelihood that smoking causes the Diseases was discussed in the chapter of the present judgment examining the case of ITL. That analysis and our conclusions apply to all three Companies.

278 Mr. Gage testified by videoconference from Victoria, British Columbia, where he lives.

A M'mm-hmm.

Q Okay.

A I don't think he said that at the meeting. I can't remember. It was - it was a significant meeting because the doctors were very frank in their speeches and answers. And they really told David that the only sure way was to just stop people smoking. And although research was going on, they personally didn't feel optimistic about the results.
It had a big influence on David.

Q What do you mean it had a big influence on David Stewart?

A I think the first time he recognized (sic) that the health factor was all important, and it bothered him. I think at first -- that was when he first thought of selling the business.[279]

[556] It is thus clear that MTI knew of the risks and dangers associated with its products by at least 1969 - and likely earlier. Although there was testimony to the effect that the company had done no research on the question, David Stewart's concerns must have been present for some time prior to this meeting. His motivation for convening it did not hatch overnight. That said, the doctors' words appear to have genuinely shaken him, crystallizing his worst fears and pushing him to sell the company a few years later.

[557] There is also evidence of earlier concern by the Stewarts. Although MTI might not have been doing any smoking and health research on its own, it appears that it had a hand in financing some as early as the 1950's. In a 1962 press release, ITL states that "For some years, Imperial Tobacco Company of Canada Limited and W.C. Macdonald, Inc. have provided financial grants for support of independent research in Canada into questions of smoking and health".[280] One does not spend money on scientific research into smoking and health unless one believes that smoking is a danger to health.

[558] All this tends to confirm MTI's awareness of a link between smoking and disease from very early on in the Class Period.

[559] For the twenty-five years following its acquisition of MTI in 1974, RJRUS was at the helm of its Montreal subsidiary, RJRM. RJRUS's current Executive Vice President of Operations and Chief Scientific Officer, Jeffrey Gentry, came from North Carolina to testify. He stated that, based on his review of company records and on conversations with colleagues, RJRUS was aware that smoking was linked to chronic diseases as of the 1950s. He also testified, as was confirmed by Raymond Howie, a Montreal-based JTM witness, that RJRUS shared its technical knowledge with RJRM through its "Center of Excellence" program.

[560] Mr. Poirier admits that "the health risks attached to smoking have been known since the early sixties (60s), even late fifties (50s). This was all over the media". If that was the case

---

279 Transcript of September 5, 2012 at pages 39-40.
280 Exhibit 546 at pdf 2.

for the general public, as is confirmed by Professors Flaherty and Lacoursière, we must assume that any tobacco company executive or scientist worth his salt would also have known by then, and undoubtedly a good while earlier. JTM's knowledge of its products was surely far in advance of that of the general public both in substance and in time[281].

[561] Thus, the Court concludes that at all times during the Class Period JTM knew of the risks and dangers of its products causing one of the Diseases.

III.B.1.b AS OF WHAT DATE DID THE PUBLIC KNOW?

[562] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

III.B.1.b.1 THE EXPERTS' OPINIONS: THE DISEASES AND DEPENDENCE

[563] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

III.B.1.b.2 THE EFFECT OF THE WARNINGS: THE DISEASES AND DEPENDENCE

[564] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

III.B.2 THE LÉTOURNEAU FILE

III.B.2.a AS OF WHAT DATE DID JTM KNOW: TOBACCO DEPENDENCE?

[565] In the Chapter of the present judgment on ITL, we cited Professor Flaherty to the effect that, since the mid-1950s, it was common knowledge that smoking was difficult to quit, and that by that time "the only significant discussion in the news media on this point concerned whether smoking constituted an addiction, or whether it was a mere habit"[282].

[566] Consistent with our reasoning throughout, we conclude that if the Companies believed that the public knew of the risk of dependence by the 1950s, each of the Companies had to have known of it at least by the beginning of the Class Period.

III.B.2.b AS OF WHAT DATE DID THE PUBLIC KNOW: TOBACCO DEPENDENCE?

[567] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

III.C. DID JTM KNOWINGLY PUT ON THE MARKET A PRODUCT THAT CREATES DEPENDENCE AND DID IT CHOOSE NOT TO USE THE PARTS OF THE TOBACCO CONTAINING A LEVEL OF NICOTINE SUFFICIENTLY LOW THAT IT WOULD HAVE HAD THE EFFECT OF TERMINATING THE DEPENDENCE OF A LARGE PART OF THE SMOKING POPULATION?

[568] The analysis and conclusions set out in Chapter II.C of the present judgment apply to all three Companies.

---

281 In *Hollis, op. cit.,* Note 281, at paragraphs 21 and 26, the Supreme Court comes to a similar conclusion with respect to relative level of knowledge, going so far as to qualify the difference in favour of the manufacturer as an "enormous informational advantage".

282 Exhibit 20063, at page 4.

III.D. DID JTM TRIVIALIZE OR DENY OR EMPLOY A SYSTEMATIC POLICY OF NON-DIVULGATION OF SUCH RISKS AND DANGERS?

III.D.1 THE OBLIGATION TO INFORM

[569] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

III.D.2 NO DUTY TO CONVINCE

[570] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

III.D.3 WHAT JTM SAID PUBLICLY ABOUT THE RISKS AND DANGERS

[571] In section II.D.4 of the present judgment, we analyze what ITL told the public about the risks and dangers of smoking. Given the dominant role of ITL in the CTMC, especially early on, we included a number of examples of public statements made by ITL executives on behalf of that trade association. In chapter II.F, we find that, in light of the clear and uncontested role of the CTMC in advancing the Companies' unanimous positions trivializing or denying the risks and dangers of smoking[283], the Companies conspired to maintain a common front in order to impede users of their products from learning of the inherent dangers of such use.

[572] JTM played down its role on the Ad Hoc Committee, arguing that it made little if any input to its positions and that its representatives attended only one or two meetings[284]. Nevertheless, its Mr. DeSouza did attend the planning meeting for the LaMarsh Conference presentations at the Royal Montreal Golf Club in 1964 (see Exhibit 688B), Mrs. Stewart signed the 1962 Policy Statement (see Exhibit 154) and it never disassociated itself from anything either that committee or the CTMC ever said or did. As well, Messrs. Crawford and Massicotte, among others, played active roles in the CTMC.

[573] The Court thus rejects JTM's argument and finds that its ruling in chapter II.F of the present judgment applies to JTM. It follows that the factual analysis in section II.D.4 referring to representations by the Ad Hoc Committee or the CTMC also apply to it.

[574] In general, JTM followed the path of the industry-wide Policy of Silence. It confirms this in its Notes:

> **1347.** In fact, JTIM rarely communicated directly with the public on the subject of smoking, health or addiction, and generally expressed its positions and beliefs when requested to do so by the relevant authorities. Moreover, from 1972 to 1989, and again from 1995 until 2000, JTIM voluntarily included a Federal Government-approved warning on all of its packages sold in Quebec. This was also true for its advertising from 1973.

[575] We have dealt with all these arguments in the ITL Chapter of the present judgment and our findings there also apply here.

---

283 We are not unaware of RBH's withdrawal from the CTMC for a short time during the Class Period but consider that immaterial for these purposes.

284 See paragraphs 1357-1358 of its Notes.

[576] Nevertheless, we must cite a glaring example of the attitude of the RJ Reynolds group towards the scientific controversy even quite late in the Class Period. In a 1985 memo, Mr. Crawford reported on a visit to RJRM by two of the head people in RJRUS's R&D Department. He states that they advised that one of the five goals of that department was "Promotion of all aspects that relate to the statement that "There is a body of information that is contrary to the hypothesis that smoking causes diseases."[285]

[577] That JTM's parent company's head scientists would sign on to such a mandate at that late date defies comprehension. Admittedly, this was not JTM directly, but the link was clear and strong, as was the controlling power that RJRUS wielded over its Canadian subsidiary.

III.D.4 WHAT JTM DID NOT SAY ABOUT THE RISKS AND DANGERS

[578] As JTM specifies above, it rarely said anything to the public about smoking's risks and dangers. It followed this practice in spite of its knowing more about that than either the public or the government throughout the Class Period.

[579] Within the company, the interest of upper management on this subject focused almost exclusively on how to stave off government measures that might threaten the bottom line. There appears to have been a total absence of concern over the fact that its products were harming its consumers' health.

[580] An example of this attitude appears in Exhibit 1564, a report by Derrick Crawford, RJRM's director of research and development, on a two-day meeting called by NHWCanada in June 1977 and attended by the CTMC member companies. The subject was Canada's efforts to develop a "less hazardous cigarette".

[581] The overall tone of the memo is one of ridicule and condescendence by the author, but that is not the point that most draws the Court's attention. What is of real concern is the fact that, after spending some seven pages detailing the inefficiency of Canada's efforts, he concludes as follows:

> 7. One had to leave this meeting with a sense of frustration — so much time spent and so little achieved. On the other hand it leaves one with a degree of optimism for the future as far as the industry is concerned. They are in a state of chaos and are uncertain where to turn next from a scientific point of view. They want to be seen to be doing the right thing, and to keep their Dept. in the forefront of the Smoking & Health issue. However it appears they simply do not have the funds to tackle the problem in a proper scientific manner. Our continuing dialogue can continue for a long time, as they feel meetings such as these are beneficial. Pressure must be off shorter butt lengths for a considerable time.
>
> I am far more optimistic in answering the Morrison technical questions in the way we have, as a result of this meeting. They have not presented any scientific evidence which need cause us concern, and I consider that the programme that all companies are pursuing, namely of more and more low tar brands is an adequate reflection of the moves we are making to satisfy the Dept of Health & Welfare and that they appreciate this. (The Court's emphasis)

---

[285] Exhibit 587.

[582] Admittedly, Canada wished to maintain its independence from the Companies on this project and would not have accepted strong participation on the tobacco industry's part, but that does not justify or explain the fact that JTM would essentially rejoice at the government's problems. JTM obviously felt that Canada was its adversary on this topic. But what was the topic? It was the programme to develop a less hazardous cigarette in order to protect the health of smokers: JTM's customers.

[583] One would have expected JTM to lament the fact that the development of a safer cigarette was not progressing well and that its customers would not have access to its possible benefits. In an environment of collaboration – and concern for one's customers - it would have been normal to search for ways to assist the process, for example, by offering to help, or at least by providing all the information in its possession. Instead, JTM expressed joy at the chaos within the project and relief that pressure was off shorter butt lengths! More importantly, it chose to keep to itself the broad range of relevant information in its possession.

[584] The gravity of such conduct is magnified by the reality that, at the time, everyone believed that this "safer-cigarette" project would likely have positive consequences for the health and well-being of human beings. Hence, the longer it took to progress toward that end, the longer smokers would be exposed to greater – and unnecessary - health risks. These are circumstances that must be considered in the context of assessing punitive damages.

[585] In summary, JTM argues that it had no legal obligation to say anything more than what it did. The Quebec public was aware of the risks and dangers of smoking, and "There is no obligation to warn the warned"[286]. As well, it alleges that it did not know any more than Canada did on that.

[586] We have rejected these arguments elsewhere in the present judgment and we reject them anew here.

III.D.5 COMPENSATION

[587] The analysis and conclusions set out in the corresponding section of chapter II of the present judgment concerning ITL apply to all three Companies.[287]

III.E. DID JTM EMPLOY MARKETING STRATEGIES CONVEYING FALSE INFORMATION ABOUT THE CHARACTERISTICS OF THE ITEMS SOLD?

[588] The analysis and conclusions set out in chapter II.E of the present judgment apply to all three Companies.

---

286 See paragraph 1492 of its Notes.

287 An indication of JTM's level of knowledge about compensation is found in the 1972 confidential "Research Planning Memorandum on a New Type of Cigarette Delivering a Satisfying Amount of Nicotine with a Reduced "Tar"-to-Nicotine Ratio": Exhibit 1624, in particular, at PDF 8.

III.F. DID JTM CONSPIRE TO MAINTAIN A COMMON FRONT IN ORDER TO IMPEDE USERS OF ITS PRODUCTS FROM LEARNING OF THE INHERENT DANGERS OF SUCH USE?

[589] The analysis and conclusions set out in chapter II.F of the present judgment apply to all three Companies.

III.G. DID JTM INTENTIONALLY INTERFERE WITH THE RIGHT TO LIFE, PERSONAL SECURITY AND INVIOLABILITY OF THE CLASS MEMBERS?

[590] The analysis and conclusions set out in chapter II.G of the present judgment apply to all three Companies.

IV. ROTHMANS BENSON & HEDGES INC.[288]

[591] RBH was created in 1986 by the merger of Rothmans of Pall Mall Canada Inc. ("**RPMC**"), a subsidiary of the Rothmans group of companies based in London, England, and Benson & Hedges Canada Inc. ("**B&H**"), a subsidiary of the Philip Morris group of companies based in New York City. Through the balance of the Class Period, the Rothmans interests owned 60% of the shares of RBH, while the Philip Morris group owned 40%[289].

[592] As well, we note that RPMC began doing business in Canada in 1958, some eight years after the beginning of the Class Period. For its part, B&H had apparently been doing business in Canada since before 1950.

IV.A. DID RBH MANUFACTURE, MARKET AND SELL A PRODUCT THAT WAS DANGEROUS AND HARMFUL TO THE HEALTH OF CONSUMERS?

[593] As mentioned earlier, none of the Companies today denies that smoking can cause disease in some people, although each steadfastly denies any general statement that it is the major cause of any disease, including lung cancer.

[594] In section II.A, we explain our interpretation of what is a "dangerous" product. We conclude that a product that is "harmful to the health of consumers" means that it would cause either the Diseases in the Blais Class or tobacco dependence in the Létourneau Class. We also conclude that tobacco dependence is dangerous and harmful to the health of consumers. These rulings apply to all three Companies.

[595] In its Notes, RBH sums up its position on this Common Question as follows:

> **686.** RBH did not manufacture, market, and sell a product that was more dangerous than class members were entitled to expect in light of all the circumstances because:
>
> - Knowledge of the health risks from smoking, including the difficulty of quitting, has been widely known and common knowledge since at least when the class period began, and RBH does not have any legal duty to inform those who already knew of the risks, and indeed overestimated them;

---

288 The witnesses called by any of the parties who testified concerning matters relating to RBH are listed in Schedule F to the present judgment.

289 Since 2008, the Philip Morris group, as a result of the acquisition by Philip Morris International Inc. of Rothman's Inc., controls all the shares of RBH.

- The level of safety that the class members were entitled to expect was set by their government – a government that has understood the health risks from smoking since at least the 1950s or early 1960s and with that knowledge decided that, instead of banning cigarettes, the risk was acceptable so long as (1) the government informed the public of those risks so that individuals could decide whether or not to accept those risks (and the class members chose to do so), and (2) the government worked to develop a safer alternative traditional cigarette, which occurred in the form of lower tar cigarettes manufactured by Defendants;
- RBH's has always complied with the government's requests and direction relating to the smoking and health issue, including voluntary restrictions, legislative-mandated warnings, and the manufacturing and promotion of a lower tar cigarette – and the government commended RBH for doing so;
- RBH developed and implemented product modifications to reduce the health risks posed by smoking, primarily by producing lower and lower tar cigarettes, and reduction of TSNAs; and
- Plaintiffs have conceded that there is nothing RBH could have done to make its product safer.

687. RBH sold a legal product heavily regulated by the government and for which the risks were known, or should have been known, by the class members. The court has been told of no practical way in which these risks could likely have been reduced further. RBH's manufacturing, marketing and selling of cigarettes is not – in light of the circumstances – a civil fault.

688. The government agreed that smokers were responsible for their own behaviour. According to former Health Minister Lalonde, "*en autant que la cigarette n'était pas déclarée un produit illégal, les citoyens finalement étaient responsables de leur propre conduite à ce sujet.*"[657] The law in Québec does not permit consumers knowingly to take a risk to health and then, when the foreseen risk materializes, (with or without a backward look over half a century) sue the manufacturer on the ground the risk should not have been offered.

[596] These representations go well beyond the scope of Common Question A and are dealt with in other parts of the present judgment.

[597] In its response as to when it first admitted that smoking caused a Disease, it asserted that "It has been RBH's publicly disclosed position since 1958 that smoking is a risk factor for lung cancer and other serious diseases and that the more one smokes the more likely one is to get such diseases". It is referring to a 1958 incident created by Patrick O'Neill-Dunne, the president of Rothmans of Pall Mall Canada Limited. We look at that in the following section.

[598] Getting to the substance of Common Question A, as with the other Companies, the Court considers the testimony of their top executives to be conclusive.

[599] John Barnett, RBH's current president and CEO, testified before the Court on November 19, 2012. At that time, the following exchange took place:

72Q- It says on your website[290] that cigarettes are dangerous and addictive; correct?

A- Yes.

73Q- Do you have any reason to believe that cigarettes are less dangerous or less addictive than they were in the nineteen sixties (1960s)?

A- I've got no basis for saying that they are less dangerous or less addictive today than they were in the sixties (60s), no.

74Q- In the second sentence, under the "Smoking and Health" paragraph it states - for the record, I'm always referring to the same exhibit, Your Lordship - that, "There is overwhelming medical and scientific evidence that smoking causes lung cancer, heart disease, emphysema, and other serious diseases". Let's deal first with that part of the sentence that says there is overwhelming medical and scientific evidence that smoking causes lung cancer; do you have any reason to believe that smoking, which causes lung cancer today according to the statement on your website, did not cause lung cancer in the nineteen sixties (1960s)?

A- No, I don't. I started smoking when I was in England. I started smoking in front of my parents when I was seventeen (17), when I started to work, and incurred the wrath of my mother …

And cigarettes were known as coffin nails and cancer sticks in England in nineteen sixty-one (1961) when I started smoking. That was my basis of saying that I don't believe there was any difference in nineteen sixty-one (1961) as towards today.

77Q- And would your answer be the same... with respect to overwhelming medical and scientific evidence that smoking causes heart disease, emphysema and other serious diseases, it would have been the same in the nineteen sixties (1960s) as it is today according to your website statement?

A- Yes, sir.

[600] Mr. Barnett's candid testimony, coupled with the contents of the website, provide a clear answer to the first Common Question. RBH clearly did manufacture,

---

290 The document referred to is Exhibit 834, which is actually the RBH page from the website of Philip Morris International as at October 22, 2012. The copyright information on it appears to date from 2002, four years after the end of the Class Period. The text referred to reads as follows:

Smoking and Health - Tobacco products, including cigarettes, are dangerous and addictive. There is overwhelming medical and scientific evidence that smoking causes lung cancer, heart disease, emphysema and other serious diseases.

Addiction - All tobacco products are addictive. It can be very difficult to quit smoking, but this should not deter smokers who want to quit from trying to do so.

market and sell a product that was dangerous and harmful to the health of consumers during the Class Period[291].

[601] As with the other Companies, it remains to be determined when RBH learned, or should have learned, that its products were dangerous and harmful and what obligations it had to its customers as a result. The other Common Questions deal with those points.

IV.B. DID RBH KNOW, OR WAS IT PRESUMED TO KNOW OF THE RISKS AND DANGERS ASSOCIATED WITH THE USE OF ITS PRODUCTS?

IV.B.1 THE BLAIS FILE

IV.B.1.a AS OF WHAT DATE DID RBH KNOW?

[602] In its Notes, RBH sums up its position on this question as follows:

> **713.** Yes, RBH knew of the risks associated with its product, just as the public, including the class members, government, and public health community knew. But the relevant legal question is whether, in light of all the circumstances, class members were entitled to expect a safer cigarette than RBH manufactured, marketed, and sold. The answer to that question is "no" for the reasons summarized in Section IV.A., at paras. 261-265. As a result, RBH's knowledge of the risks – which was not materially greater than that of the public, government and public health community – cannot equate to a civil fault.

[603] William Farone testified for the Plaintiffs. From 1976 to 1984, he was the Director of Applied Research at Philip Morris Inc. in Richmond, Virginia. He declared that, over that period, it was generally accepted by the scientific personnel at PhMInc. that smoking caused disease.

[604] John Broen, who worked for over 30 years in RBH-related companies starting in 1967, testified that it was generally believed in the industry that smoking was risky and bad for you, although not necessarily dangerous to all people. He added that the government had assumed the responsibility for warning smokers of that fact and that the Companies kept silent in order to avoid "muddying the waters".

[605] Steve Chapman, who started with RBH in 1988 and remains there today, was the designated spokesperson for the company in these files. In that role, he reviewed corporate documents and interviewed long-term employees with respect to the issues in play here. His research convinced him that the "operating philosophy" of the company from the beginning of his employment, and well before, was that there are risks associated with smoking and that this philosophy was the motor behind RBH's efforts going back to the 1960s to develop lower tar cigarettes. RBH, like Health Canada, believed that low tar is "less risky". He also confirmed that company records show that RBH's "parent companies" shared their scientific information with it.

[606] In fact, there is documentary proof that the major shareholder of this company was of this belief well before the dates mentioned above. In 1958, the year that

---

[291] Proof of the likelihood that smoking causes the Diseases was discussed in the chapter of the present judgment examining the case of ITL. That analysis and our conclusions apply to all three Companies.

Rothmans of Pall Mall Canada Limited started doing business in Canada, Rothmans International Research Division issued at least one press release and published several full-page "announcements of major importance" in Canadian publications. They speak volumes of what the Rothmans group of companies knew of the risks and dangers associated with smoking at that time and it is worth quoting from them at length.

[607] In one advertisement, which ran in *Readers' Digest* (Exhibit 536A), the following appears:

> On July 6-12th in London, England, 2,000 scientists from 63 countries attending the 7th International Cancer Congress - an event held every four years - were given the latest data on cancer and smoking by the world's foremost cancer experts. Rothmans Research scientists were also there and have examined the papers submitted along with their own findings,
>
> 1. Rothmans Research accepts the statistical evidence linking lung cancer with heavy smoking. This is done as a precautionary measure in the interest of smokers.
> 2. The exact biological relationship between smoking and cancer in mankind is still not known and a direct link has not been proved.
>
> …
>
> 9. Some statistical studies indicate a higher mortality rate from lung cancer among cigarette smokers than among smokers of cigars and pipes. However, in laboratory experiments, the carcinogenic activity from cigar and pipe smoke was found to be greater than in cigarette smoke, because, burning at a high temperature for a longer time, combustion is more complete in cigars and in pipes.
> 10. The tobacco-cancer problem is difficult and nebulous. It has brought forth many conflicting theories and evidences. But great knowledge and a better understanding have been gained through research. The controversy is a matter of public interest. The tar contents of the world's leading brands of cigarettes are today under the scrutiny of medical and independent research.
>
> Rothmans Research Division welcomes this opportunity to reiterate its pledge:
>
> (1) to continue its policy of all-out research,
>
> (2) to impart vital information as soon as it is available, and
>
> (3) to give smokers of Rothmans cigarettes improvements as soon as they are developed.
>
> In conclusion, as with all the good things of modern living, Rothmans believes that with moderation smoking can remain one of life's simple and safe pleasures.
>
> (The Court's emphasis)

[608] In another advertisement published in *The Globe and Mail* on June 21, 1958 (Exhibit 536), one finds the following statements:

> On June 18th, at Halifax, N.S., 1500 delegates attending the annual meeting of the Canadian Medical Association were shown a graphic display which suggested a link between smoking and lung cancer.

> THIS IS NOT the first time that a warning has been issued by Canadian doctors but, hitherto, it appears to have gone comparatively unheeded by Canadian smokers and the Canadian tobacco industry.
>
> Since 1953, similar pronouncements of varying intensity have also been made by medical associations in Britain and in the U.S.A., where such warnings have been more generally accepted.
>
> Rothmans would like it known that the problem of the relationship between cancer and smoking has for many years engaged the attention of the Research Division or its world-wide organization.
>
> Several years ago the Rothmans Research Division had already accepted the thesis that:
>
> "*The greater the tars reduction in tobacco smoke, the greater the reduction in the possible risk of lung cancer."*
>
> Therefore, as an established and leading member of the industry, Rothmans accepts that it is its duty to find a solution to the problem, either through co-operation with independent medical research-or, if necessary, alone.
>
> …
>
> Finally, if in addition to all the foregoing, smokers will practise moderation, Rothmans Research Division believes that smoking can still remain one of life's simple and safe pleasures. (The Court's emphasis)

[609] In an August 1958 letter to Sydney Rothman, the chairman of the Rothmans board in London[292], Patrick O'Neill-Dunne defended the audacious statements of Rothmans of Pall Mall Canada:

> The upshot of my recent P.R. release, however irritating it might have been to you, Plumley and Irish, has made front-page news in certain British papers, most of the Canadian and Australian papers and front page, second section in the New York Times. You cannot buy this for any money. …
>
> I am certain that the stand I have chosen will be copied by the leading U.S.A. manufacturers shortly as the only way of getting themselves out of the rat race of deceit into which they have plunged themselves at a cost of $30 million per annum in advertising per brand to remain alive as a major seller. (The Court's emphasis)

[610] As alluded to in the letter, Rothmans' announcements raised the ire of a number of tobacco executives and led to a colourful exchange of correspondence between some of them and Mr. O'Neill-Dunne that, in earlier times, could likely have culminated in duelling pistols at dawn[293].

[611] Although it is not clear what happened to Mr. O'Neill-Dunne as a result of his campaign of candour, the proof indicates that for the rest of the Class Period Rothmans, and later RBH, never reiterated the position Rothmans so famously took in 1958. Thereafter, it toed the industry line, crouching behind the Carcassonnesque double wall of

---

292 Exhibit 918.
293 Exhibits 536C through 536H.

the Warnings, backed up by the "scientific controversy" of no proven biological link and the need for more research.

[612] Nonetheless, based on Rothmans' 1958 announcements and Mr. O'Neill-Dunne's comments, it is clear that the company knew of clear risks and dangers associated with the use of its products and that this knowledge was gained well before 1958, in all probability going back to at least the beginning of the Class Period. That answers this Common Question, but there is more to be learned from this incident.

[613] It demonstrates that by 1958 RBH was able to accept publicly "the statistical evidence linking lung cancer with heavy smoking" even though "the exact biological relationship between smoking and cancer in mankind is still not known and a direct link has not been proved"[294]. This is significant. It shows that the lack of a complete scientific explanation was not an impediment to admitting – publicly - that smoking is dangerous to health.

[614] In any case, incomplete scientific knowledge of such a danger is no defence to a failure to warn. Once again, the *Hollis* breast implant case provides guidance on the point:

> … "unexplained" ruptures, being unexplained, are not a distinct category of risk of which they could realistically have warned. In my view, these arguments fail because both are based upon the assumption that Dow only had the obligation to warn once it had reached its own definitive conclusions with respect to the cause and effect of the "unexplained" ruptures. This assumption has no support in the law of Canada. Although the number of ruptures was statistically small over the relevant period, and the cause of the ruptures was unknown, Dow had an obligation to take into account the seriousness of the risk posed by a potential rupture to each user of a Silastic implant. Indeed, it is precisely because the ruptures were "unexplained" that Dow should have been concerned.[295]

[615] Nonetheless, all three Companies rely on the scientific uncertainty as to how smoking specifically causes disease as a justification for not saying more about the risks and dangers of their products[296]. The Rothmans announcements of 1958 puncture the hull of that argument. What sinks the ship is the admission by all the current company presidents that cigarettes are dangerous, and they admit this in spite of the fact that, even today, the exact biological cause has still not been identified.

[616] In summary, there is no reason to believe that Mr. O'Neill-Dunne, in spite of what appears to have been a prodigious ego, knew any more about the question – or knew it any earlier - than other tobacco executives of the time. In that light, his characterization of the American position in 1958 as a "rat race of deceit" leads one to

---

294 Exhibit 536A.

295 *Op. cit.*, *Hollis*, Note 40, at paragraph 41.

296 An example of this for RBH is presented in Exhibit 758.3. There, citing the "latest figures" of the American Cancer Society, Mr. O'Neill-Dunne in the conclusions to his "Sales Lecture No. 3" under the heading "What is known", notes that studies show that the death rate from lung cancer is 64 times greater among heavy smokers than among nonsmokers, and that a nonsmoker has 1 chance in 275 of getting lung cancer, whereas a heavy smoker has 1 chance in 10. Under "What is not known" he lists "the exact relationship between smoking and lung cancer". A year later, he did not let the latter impede him from issuing the statements we have already seen.

presume that the industry insiders were far from ignorant of the dangers of their products as early as the beginning of the Class Period in 1950.

[617] The Court thus concludes that at all times during the Class Period RBH knew of the risks and dangers of its products causing one of the Diseases.

IV.B.1.b AS OF WHAT DATE DID THE PUBLIC KNOW?

[618] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

IV.B.1.b.1 THE EXPERTS' OPINIONS: THE DISEASES AND DEPENDENCE

[619] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

IV.B.1.b.2 THE EFFECT OF THE WARNINGS: THE DISEASES AND DEPENDENCE

[620] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

IV.B.2 THE LÉTOURNEAU FILE

IV.B.2.a AS OF WHAT DATE DID RBH KNOW: TOBACCO DEPENDENCE?

[621] In the chapter of the present judgment analyzing the case of ITL, we cited Professor Flaherty to the effect that since the mid-1950s it was common knowledge that smoking was difficult to quit, and that by that time "the only significant discussion in the news media on this point concerned whether smoking constituted an addiction, or whether it was a mere habit"[297].

[622] Consistent with our reasoning throughout, we conclude that if the Companies believed that the public knew of the risk of dependence by the 1950s, each of the Companies had to have known of it at least by the beginning of the Class Period.

IV.B.2.b AS OF WHAT DATE DID THE PUBLIC KNOW: TOBACCO DEPENDENCE?

[623] The analysis and conclusions set out in the corresponding section of chapter II of the present judgment concerning ITL apply to all three Companies.

IV.C. DID RBH KNOWINGLY PUT ON THE MARKET A PRODUCT THAT CREATES DEPENDENCE AND DID IT CHOOSE NOT TO USE THE PARTS OF THE TOBACCO CONTAINING A LEVEL OF NICOTINE SUFFICIENTLY LOW THAT IT WOULD HAVE HAD THE EFFECT OF TERMINATING THE DEPENDENCE OF A LARGE PART OF THE SMOKING POPULATION?

[624] The analysis and conclusions set out in chapter II.C of the present judgment apply to all three Companies.

---

[297] Exhibit 20063, at page 4.

IV.D. DID RBH TRIVIALIZE OR DENY OR EMPLOY A SYSTEMATIC POLICY OF NON-DIVULGATION OF SUCH RISKS AND DANGERS?

IV.D.1 THE OBLIGATION TO INFORM

[625] The analysis and conclusions set out in the corresponding section of chapter II of the present judgment concerning ITL apply to all three Companies.

IV.D.2 NO DUTY TO CONVINCE

[626] The analysis and conclusions set out in the corresponding section of chapter II of the present judgment concerning ITL apply to all three Companies.

IV.D.3 WHAT RBH SAID PUBLICLY ABOUT THE RISKS AND DANGERS

[627] Similar to the case for JTM, the factual analysis in section II.D.4 referring to representations by the Ad Hoc Committee and the CTMC applies to RBH.[298]

[628] The other evidence reveals precious few public pronouncements by RBH about the risks and dangers of smoking. RBH does shine much light on the 1958 hiccup emanating from Mr. O'Neill-Dunne, but we have already said what we have to say on that. Otherwise, it expends most of its energy denying that it officially and publicly said anything that could be misleading or false. In its conclusion to this section in its Notes, RBH puts it succinctly:

> After 1958, RBH did not make any statements intended for the public, did not publish any statements and did not run any marketing campaigns on the smoking and health issue;[299]

[629] Recognizing that this is true, its near-perfect silence on the issues does not assist RBH in defending against the principal faults we find that it committed. It is revealing, however, to note the manner in which that silence was broken in a 1964 speech by its then-president, Mr. Tennyson, to the Advertising and Sales Association in Montreal. It is difficult, and demoralizing (among other sensations), to read his concluding remarks:

> As tobacco people, we have a three-fold interest in this matter.
>
> 1. As human beings, we are, of course, concerned with the health of our fellow man and we would certainly voluntarily refrain from contributing to their detriment.
>
> 2. But, as citizens, we have a natural interest in protecting the economic welfare of the many people who are dependent on tobacco, from irresponsible and hasty actions on the part of well-meaning but misguided people.
>
> 3. As businessmen, we have a responsibility to our personnel and to our shareholders and I do not think that we may sacrifice their interests on the flimsy evidence which has thus far been presented.
>
> [...]

---

298 We are not unaware of RBH's withdrawal from the CTMC for a short time during the Class Period but consider that immaterial for these purposes.

299 At paragraph 895.

> The good things in life are simple. A variety of small pleasures make up living, as one learns to recognize and enjoy them. Smoking has been and will continue to be one of these uncomplicated and simple pleasures of life.[300]

[630] Spoken only six years after the company's "coming-out" under Mr. O'Neill-Dunne, these comments smack of hypocrisy, dishonesty and blind self-interest at the expense of the public. They are typical of what the Companies were saying throughout most of the Class Period and show why punitive damages are warranted here.

IV.D.4 WHAT RBH DID NOT SAY ABOUT THE RISKS AND DANGERS

[631] In its Notes, RBH essentially lauds its compliance with the Policy of Silence.

> **886.** RBH's policy to refrain from making statements directly to the public about smoking and health cannot be deemed a trivialization or denial of health risks where those risks have been common knowledge since the early 1950s and where the government occupied the field on whether, when, and what information of health risks was disseminated to the public. If RBH had made any statements to the public about the smoking and health issue after 1958, Plaintiffs surely would contend that those statements were insufficient or otherwise trivialized the risks. Plaintiffs cannot have it both ways.
>
> **889.** […] there is no civil fault for not warning of risks that are already generally known ... the best, and only available course of action, was not to say anything to the public which might muddy the waters of the clear and dire warnings preferred by government and public health authorities.

[632] This reflects the defence enunciated in the first paragraph of article 1473 of the Civil Code: consumer knowledge. We have previously held that this is a valid argument as of January 1, 1980 for the Blais File, and March 1, 1996 for Létourneau, but only insofar as the fault with respect to a safety defect is concerned. It is not a full defence to the other three faults.

IV.D.5 COMPENSATION

[633] The analysis and conclusions set out in the corresponding section of chapter II of the present judgment concerning ITL apply to all three Companies.

IV.E. DID RBH EMPLOY MARKETING STRATEGIES CONVEYING FALSE INFORMATION ABOUT THE CHARACTERISTICS OF THE ITEMS SOLD?

[634] The analysis and conclusions set out in chapter II.E of the present judgment apply to all three Companies.

IV.F. DID RBH CONSPIRE TO MAINTAIN A COMMON FRONT IN ORDER TO IMPEDE USERS OF ITS PRODUCTS FROM LEARNING OF THE INHERENT DANGERS OF SUCH USE?

[635] The analysis and conclusions set out in chapter II.F of the present judgment apply to all three Companies.

---

300 Exhibit 687, at pdf 21.

IV.G. DID RBH INTENTIONALLY INTERFERE WITH THE RIGHT TO LIFE, PERSONAL SECURITY AND INVIOLABILITY OF THE CLASS MEMBERS?

[636] The analysis and conclusions set out in chapter II.F of the present judgment apply to all three Companies.

[637] In its Notes, RBH sums up its position on this question as follows:

> **1071.** Nothing RBH did was intentional inference with the right to life, personal security and inviolability of the class members, and all of it was at the behest or with the approval of the government. As already explained, simple proof of erroneous statements or sales of a dangerous product is not sufficient to prove the element of fault under the Charter. As the Supreme Court stated in *Bou Malhab*, "conduct that interferes with a right guaranteed by the Charter does not necessarily constitute civil fault. The interference must also violate the objective standard of conduct of a reasonable person under art. 1457 CCQ." Intent alone cannot be the basis for liability, and as already shown, RBH's conduct does not satisfy the fault element of any conceivable cause of action or claim.
>
> **1072.** No industry has ever been more tightly regulated and closely scrutinized or done more to comply with every law, voluntary and legislated, and to remain out of sight and mind, while researching ways to make a safer product. Plaintiffs have offered no evidence that the class members were even exposed to RBH's alleged misconduct – let alone that such exposure caused an infringement of their right to life under Section 1 or dignity under Section 4.

[638] The Court has dealt with these arguments earlier in the present judgment and there is nothing new to add. There is, however, an additional factual element that should be considered in the present context: the timing of RBH's use of "indirect-cured" tobacco.

[639] In indirect curing, the tobacco does not come into contact with heat-generating elements, as is the case for direct curing. By this "new" technique, the heat comes from a heat exchanger, so no combustion residue touches the tobacco, as compared to direct curing.

[640] Mr. Chapman testified that near the end of the Class Period it was discovered that indirect curing dramatically reduced the presence of carcinogenic nitrosamines in tobacco, often called "TSNA". The reduction of TSNA was in the order of 87%.[301] Later the same day, he replied to the Court's questions as follows:

> 752Q- But don't I have to assume that, by your going full blown to indirect-cured tobacco at some point, the company made the decision that this was going to reduce the nitrosamines in its cigarettes; is that not a fair assumption?
> A- We did do that for that reason, absolutely.
>
> 753Q- And therefore, it's a less hazardous cigarette as a result; is that a fair statement?
> A- We had no way to know, sir. But it was just the right thing to do, because it had been identified as a component of smoke that could be...

[301] Transcript of October 23, 2013, at page 21.

754Q- All right. So why didn't you do right away, go as whole as a bullet (sic) right away with what you looked at as...
A- Because we had...

755Q- a potentially safer cigarette?
A- We didn't know for sure it would be safer, and we had inventories of tobacco to deplete.[302]

[641] The "inventories of tobacco to deplete", it must be remembered, consisted of tobacco that had been cured using direct heat, and thus contained 87% more carcinogenic nitrosamines. The Court recognizes that RBH's use of those inventories took place just after the end of the Class Period, but the incident casts light on the Company's general attitudes and priorities at the time. It was more important to use up its inventories than to protect the health of its customers.

[642] This is just one example among many of the Companies' lack of concern over the harm they were causing to their customers and goes directly to intentionality. It is consistent with the attitudes of the Companies throughout the Class Period and with our conclusions in Chapter II.F of the present judgment.

V. SUMMARY OF FINDINGS OF FAULT

[643] To recapitulate, the Court finds that the Companies committed faults under four different headings:

a. the general rules of civil liability: article 1457 of the Civil Code;

b. the safety defect in cigarettes: articles 1468 and following of the Civil Code;

c. an unlawful interference with a right under the Quebec Charter: article 49;

d. a prohibited practice under the Consumer Protection Act: articles 219, 228.

[644] We find further that their faults under article 1468 ceased at the knowledge date in each file: January 1, 1980 for Blais and March 1, 1996 for Létourneau. The other faults continued throughout the Class Period.

[645] All four faults potentially give rise to compensatory damages, subject to other considerations, such as proof of causation and prescription issues. The last two faults also permit an award for punitive damages.

[646] As alluded to above, fault alone does not lead to liability for compensatory damages. The Companies correctly point out that proof of causation is a particularly critical element in these cases. There is also the possibility of an apportionment of liability between the Companies and the Members. We examine these and more in the following sections.

VI. CAUSATION

[647] Proof of causation in these files is a multi-link chain involving several intermediate steps. We choose to start from the damages and work back towards the

---

[302] Transcript of October 23, 2013, at pages 255-256.

faults. Hence, the following questions must be analyzed in order to determine if the moral damages claimed were caused in the juridical sense by the Companies' faults:

- Were the Members' moral damages caused by the Diseases or by tobacco dependence?
- Were the Diseases or the dependence caused by smoking the Companies' products?
- Was a fault of the Companies a cause of the Members' starting or continuing to smoke?

[648] In order for the Plaintiffs to succeed, all must be answered in the affirmative, but even that will not be enough. The third question has another side to it that could influence liability: by starting or continuing to smoke in spite of adequate knowledge of the risks and dangers of smoking, certain Members would have accepted those risks and dangers. Was this a fault of the type to lead to a sharing of liability?

[649] Before following each of these paths, we shall deal with a type of omnibus argument made by the Plaintiffs to the effect that a *fin de non recevoir* should be applied to block the Companies from even attempting to make a defence in light of the gravity of their faults.

[650] The principle of *fin de non recevoir* is of a nature similar to estoppel in the common law, as further explained in the Plaintiffs' Notes:

> **2163.** A "*fin de non-recevoir*" prevents a party from benefitting from a right which they may be entitled to by law,[303] but which they acquired through their own misconduct: "no one should profit from his own fault or seek the aid of the courts in doing so," wrote Beetz J. in *Soucisse.*[304]

[651] The Plaintiffs' argument is essentially that the mere selling of cigarettes constitutes a violation of the Companies obligation to exercise their rights in good faith[305] and that such violation was so egregious that it should be heavily sanctioned. The sanction they would apply would be to bar the Companies from advancing any defence to the Members' claims.

[652] Even accepting the allegations concerning the Companies' lack of good faith and the gravity of their faults, the Court frankly cannot see how this could justify contravening one of the most sacred rules of natural justice: *audi alteram partem*. Many of the acts of which the Companies are accused were both permitted by law and committed with the full knowledge of, and under direct regulation by, the governments of Canada and Quebec.

[653] In that light, the Court cannot see how it can acquiesce to the Plaintiffs' arguments, all the more so given the fact that the law already provides for a heavy sanction in cases such as these in the form of punitive damages.

---

303 See Didier LLUELLES et Benoît MOORE, *Droit des obligations*, 2nd édition, Montréal, Éditions Thémis, 2012, paragraph 2031, page 1159.

304 *National Bank v. Soucisse et al.,* [1981] 2 SCR 339 at p. 358.

305 Articles 6 and 1375 of the Civil Code.

VI.A. WERE THE MORAL DAMAGES IN THE BLAIS FILE CAUSED BY THE DISEASES?

[654] Let us start by noting that causation relates only to compensatory and not to punitive damages. The latter need not be shown to have been caused to a plaintiff.

[655] We also note that the Plaintiffs' proof of the nature and the degree of the general prejudice suffered by victims of the Diseases was not contradicted by the Companies, nor was the causal link between those injuries and the various Diseases. Hence, the Court need not go into a detailed analysis of each aspect of the evidence in this regard.

[656] This said, in spite of the Companies' assertions that there is no proof on an individual basis, the Court is satisfied that the uncontradicted evidence of the Plaintiffs' experts as to the injuries typically suffered by a person having one of the Diseases or tobacco dependence corresponds to the injuries claimed by the Plaintiffs in each file. The value to be placed on those injuries is a separate issue and will be dealt with in a later section of the present judgment.

[657] As noted earlier, the moral damages claimed in the Blais File are for loss of enjoyment of life, physical and moral pain and suffering, loss of life expectancy, troubles, worries and inconveniences arising after having been diagnosed with one of the Diseases. To prove the occurrence of such moral damages among the victims of the Diseases, the Plaintiffs turned to experts.

[658] In a later section, we look in detail at these experts' reports with respect to the effect of each Disease and tobacco dependence on their victims. That level of detail is not necessary for the specific issue being dealt with at this stage, since we need ascertain nothing more than the causal link between the type of damages claimed and the Diseases or dependence.

[659] For lung cancer, the Plaintiffs filed the expert's report of Dr. Alain Desjardins (Exhibit 1382 - 1382.2 is the English translation). At pages 72 through 79, he describes in detail the physical and mental prejudice typically suffered by persons with lung cancer. As is the case for all the Diseases, the prejudice caused by the treatment itself, both curative and palliative, is a major factor in the diminution of quality of life and in the physical and emotional suffering of the victim. His evidence is uncontradicted and the Court holds that the causal link between that prejudice and lung cancer is established.

[660] For throat and larynx cancer, the Plaintiffs filed the expert's report of Dr. Louis Guertin (Exhibit 1387). It is true that his report considers cancers of the oral cavity, as well as of the larynx and pharynx, while the amended Class description in Blais is restricted to cancers of the larynx, the oropharynx and the hypopharynx. Nevertheless, the Court does not hesitate to apply his broader analysis to the more limited definition. His explanation of the troubles and inconveniences of victims at pages 5 through 8 makes it clear that the nature of the prejudice is similar in all cases.

[661] In that section, Dr. Guertin describes in detail the physical and mental prejudice typically suffered by persons with cancer of the larynx or pharynx, covering both treatable and untreatable cases, and the suffering and loss of quality of life resulting from the

various treatments. His evidence is uncontradicted and the Court holds that the causal link between that prejudice and those cancers is established.

[662] For emphysema, the Plaintiffs again counted on the report of Dr. Desjardins (Exhibit 1382 - 1382.2 in English). As with Dr. Guertin's report, Dr. Desjardins' opinion covers a broader scope than the Disease at issue. He analyzed the case of COPD, Chronic Obstructive Pulmonary Disease, which includes both emphysema and chronic bronchitis. As with the case of throat cancer, based on his explanation of the troubles and inconveniences of COPD victims, the Court does not hesitate to apply his broader analysis to the specific case of emphysema.

[663] Dr. Desjardins describes in detail the physical and mental prejudice typically suffered by persons with emphysema and the suffering and loss of quality of life resulting from the various treatments. He uses what is known as the "GOLD Guidelines" to rank the impact on the quality of life to the relative gravity of the sickness.

[664] His evidence is uncontradicted and the Court holds that the causal link between that prejudice and emphysema is established.

VI.B. WERE THE MORAL DAMAGES IN THE LÉTOURNEAU FILE CAUSED BY DEPENDENCE?

[665] In Létourneau, the moral damages claimed are for an increased risk of contracting a fatal disease, reduced life expectancy, social reprobation, loss of self esteem and humiliation. Here, too, the Plaintiffs relied on an expert to make their proof and filed two reports by Dr. Juan Negrete (Exhibit 1470.1 and 1470.2). The description of the damages is contained in the latter document of some five pages in length and, as above, both that description and the causal link between those damages and tobacco dependence are uncontradicted.

[666] Dr. Negrete describes the physical and mental prejudice suffered by dependent smokers, including that related to the problems typically encountered when trying to break that dependence. He is of the view that the effect of tobacco dependence on one's daily life and lifestyle is such that it can be said that the state of being dependent is, in and of itself, the principal problem caused by smoking.[306]

[667] His evidence is uncontradicted and the Court holds that the causal link between that prejudice and tobacco dependence is established.

VI.C. WERE THE DISEASES CAUSED BY SMOKING?

[668] This is generally known as "medical causation". Given its scientific base, this question must be answered at least in part through experts' opinions. To that end, the Plaintiffs relied on two types of experts: specialists on each Disease and an epidemiologist. They also sought assistance through Quebec's *Tobacco-Related Damages and Health Care Costs Recovery Act* of 2009 (the "**TRDA**")[307], a law created especially for tobacco litigation.

---

306 "*L'état de dépendance est, en soi même, le trouble principal causé par le tabagisme*": Exhibit 1470.2, page 2

307 RSQ, c. R-2.2.0.0.1.

[669] On medical causation between both smoking and lung cancer and smoking and emphysema, the Plaintiffs made their proof through Dr. Alain Desjardins. For smoking and throat and larynx cancer, the Plaintiffs relied on Dr. Louis Guertin.

VI.C.1 THE EVIDENCE OF DRS. DESJARDINS AND GUERTIN

[670] At page 62 of his report (Exhibit 1382 - 1382.2 in English), Dr. Desjardins notes that epidemiological studies report that smoking is the cause of 85 to 90 percent of new lung cancer cases. He also cites the Cancer Prevention Study of the American Cancer Society that states that smoking is responsible for 93 to 97% of lung cancer deaths in males over 50 and 94% in females. As we discuss further below, figures of this magnitude are either admitted or not contested by two of the Companies' experts.

[671] Based on Dr. Desjardins' full opinion, and in the absence of convincing proof to the contrary, the Court is satisfied that the principal cause of lung cancer is smoking at a sufficient level. Determining that "sufficient level" for lung cancer, as for the other Diseases, was the mandate of the Plaintiffs' epidemiologist. We examine his opinion below.

[672] For cancer of the larynx, the oropharynx and the hypopharynx, Dr. Guertin states the following at page 24 of his report (Exhibit 1387):

> For all these reasons, it is clear that the cigarette is the principal etiological agent causing the onset of about 80 to 90 percent of (throat cancers). Moreover, for a number of reasons, it results in an unfavourable prognostic in a great number of patients. Finally, some 50% of patients with a throat cancer will eventually die from it. Those who are cured will undergo a significant change in their quality of life before, during and after treatment.[308]

[673] Based on Dr. Guertin's full opinion, and in the absence of convincing proof to the contrary, the Court is satisfied that the principal cause of cancer of the larynx, the oropharynx and the hypopharynx is smoking at a sufficient level, to be determined through epidemiological analysis.

[674] Dr. Desjardins deals with emphysema in his report through an analysis of COPD, which includes both emphysema and chronic bronchitis. He justifies that approach by noting that a high percentage of individuals with COPD have both diseases, but not all[309]. He opines that "among the risk factors known for COPD, smoking is by far the most important"[310].

[675] Based on Dr. Desjardins' full opinion, and in the absence of convincing proof to the contrary, the Court is satisfied that the principal cause of emphysema is smoking at a sufficient level, to be determined through epidemiological analysis.

---

[308] Dr. Guertin's report is in French. Although this English citation from it is accurate, the Court must admit that it has no idea whence it comes.

[309] Exhibit 1382, at page 12.

[310] Exhibit 1382, at page 14: "*Parmi les facteurs de risque établis de la MPOC, le tabagisme est de loin le plus important, […]*".

[676] As indicated, these opinions are not effectively contradicted by the Companies, who religiously refrain from allowing their experts to offer their own views on medical causation between smoking and the Diseases. In spite of that, the Plaintiffs did manage to squeeze certain admissions out of Doctors Barsky and Marais with respect to lung cancer. In and of themselves, however, these opinions are but a first step to proving the Plaintiffs' case.

[677] It remains to determine what "smoking" means in this context, i.e., how many cigarettes must be smoked to reach the probability threshold on each of the Diseases. For that, the Plaintiffs turn to their epidemiologist, Dr. Jack Siemiatycki. However, before going there, it is necessary to deal with two arguments advanced by the Companies: that section 15 of the TRDA does not apply to these cases and that the Plaintiffs failed to make evidence for each Member.

VI.C.2 SECTION 15 OF THE TRDA

[678] This provision is designed to facilitate a plaintiff's burden in proving causation in tobacco litigation. It reads as follows:

> **15.** In an action brought on a collective basis, proof of causation between alleged facts, in particular between the defendant's wrong or failure and the health care costs whose recovery is being sought, or between exposure to a tobacco product and the disease suffered by, or the general deterioration of health of, the recipients of that health care, may be established on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies, including information derived from a sampling.

[679] Although it appears to be made directly applicable to class actions by the last paragraph of section 25, which states that "Those rules (including section 15) also apply to any class action based on the recovery of damages for the (tobacco-related) injury", ITL submits that section 15 does not apply at all in these files.

[680] It points out that the TRDA creates an exception to the general rule and, therefore, must be interpreted restrictively. Based on that, it argues that section 15 cannot apply to a class action pending on June 19, 2009 because that provision does not contain language similar to that of section 27, which states that it (that section) applies to a class action "in progress on June 19, 2009"[311]. ITL would thus convince the Court that the only provisions of the TRDA that can apply to a class action pending on that date, as are these, are those that specifically say so. Section 15 does not say so.

[681] The Court rejects this submission for five reasons.

[682] On the one hand, it confronts and contradicts the clear intention of section 25 that the rules in question should assist "any" such class action, which we take to mean "all" such class actions. This interpretation is bolstered by the French version, which

---

[311] **27.** An action, including a class action, to recover tobacco-related health care costs or damages for tobacco-related injury may not be dismissed on the ground that the right of recovery is prescribed, if it is in progress on 19 June 2009 or brought within three years following that date.

speaks of "*tout recours collectif*"[312]. To override such otherwise unequivocal language would take an even more unequivocal indication of a contrary intention, a test that ITL's "nuancical" reasoning fails to meet.

[683] As well, section 25 opens with the words "Despite any incompatible provision". This is a further indication that the legislator intended that no argument or belaboured interpretation should stand in the way of the application of these rules to all actions to recover damages for a tobacco-related injury.

[684] In addition, the purpose of section 27 is to establish new rules for the prescription of tobacco-related claims, as the title of Division II of the act indicates. To do that, it had to specify the date from which prescription would henceforth run for such actions. That appears to be the sole reason for mentioning that date and it is obvious that it is not meant to serve as a restriction on the application of the other provisions.

[685] Moreover, dates are not mentioned in any other relevant provision of the act. In light of that, to accept ITL's argument would be to strip the TRDA of any effect with respect to actions in damages. This would be a nonsensical result.

[686] Finally, there is the not inconsequential fact that the Court of Appeal has already stated that it applies to these cases at paragraph 48 of its judgment of May 13, 2014[313].

VI.C.3 EVIDENCE FOR EACH MEMBER OF THE CLASSES

[687] The Companies characterize the Plaintiffs' decision not to establish causation for each member of the Classes as a fatal weakness. The case law is to the effect that, for both medical causation and conduct causation (discussed below), "(i)n order to make an order for collective recovery, both of these causal elements (medical and conduct) must be demonstrated with respect to each member of the class".[314] On that basis, the Companies insist that the Plaintiffs had to prove that each and every Member of a Class had suffered identical damages to those of the other Members of that Class.

[688] Taken to the degree that the Companies would impose, essentially each Class member would have had to testify in one way or another in the file. For them, the fact that no Members of either Class testified means that it is impossible to conclude that adequate proof of Class-wide damages has been made.

[689] It is not difficult to see how this approach is totally incompatible with the class action regime. Nevertheless, at first glance the case law appears to favour that position.

[690] The Companies omitted, however, to discuss the effect of the statement that opens paragraph 32 in the *St-Ferdinand* decision. We cite it below in both languages for the sake of greater clarity, noting that, in that Québec-based case, the judgment of the Court was delivered by L'Heureux-Dubé, J. We thus assume that it was originally drafted in French.

---

312 *Ces règles s'appliquent, de même, à tout recours collectif pour le recouvrement de dommages-intérêts en réparation d'un tel préjudice.*

313 *Imperial Tobacco v. Létourneau*, 2014 QCCA 944.

314 Notes of JTM at paragraph 2367. See, for example, *Bou Malhab c. Métromédia C.M.R. Montréal inc.*, [2011] 1 SCR 214 and *Bisaillon c. Université Concordia*, [2006] 1 SCR 666.

32. These general rules of evidence are applicable to any civil law action in Quebec and to actions under statutory law of a civil nature, unless otherwise provided or indicated.[315]

(The Court's emphasis)

32. Ces règles générales de preuve sont applicables à tout recours de droit civil au Québec ainsi qu'aux recours en vertu du droit statutaire de nature civile, à moins de disposition ou mention au contraire.

(The Court's emphasis)

[691] In none of the Supreme Court decisions cited by the Companies did the TRDA apply. That distinction is critical, since section 15 thereof appears to correspond to what Judge L'Heureux-Dubé envisioned when she wrote of a "*disposition ou mention au contraire*"[316]. As such, and in light of the fact that the TRDA does apply here, the Plaintiffs may prove causation solely through epidemiological studies.[317] This has a direct impact on the need for proof for each class member, given that epidemiology deals with causation in a population and not with respect to each member of it.

[692] The objective of the TRDA is to make the task of a class action plaintiff easier, *inter alia*, when it comes to proving causation among the class members[318]. When the legislator chose to favour the use of statistics and epidemiology, he was not acting in a vacuum but, rather, in full knowledge of the previous jurisprudence to the effect that each member of the class must suffer the same or similar prejudice. It thus appears that the specific objective of the act is to move tobacco litigation outside of that rule.

[693] The Court must therefore conclude that, for tobacco cases, adequate proof of causation with respect to each member of a class can be made through epidemiological evidence. The previous jurisprudence calling for proof that each member suffered a similar prejudice is overridden.[319]

[694] Although this rebuts the Companies' plaint over the use of epidemiological evidence to prove causation within the class, it does not relieve the Plaintiffs from making epidemiological proof that is reliable and convincing to a degree sufficient to establish probability. This brings us to an analysis of Dr. Siemiatycki's work and an assessment of the degree to which it is reliable and convincing.

---

315 *Québec (Curateur public) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211.

316 Those words can also be translated as "a provision of law or indication to the contrary".

317 We must point out that, even without section 15 of the TRDA, we see no obstacle to considering statistical and epidemiological studies in ascertaining causation in these files. ITL concurs with this position at paragraph 1015 of its Notes, while correctly cautioning that "this evidence still needs to be reliable and convincing".

318 See: Lara KHOURY, *« Compromis et transpositions libres dans les législations permettant le recouvrement du coût des soins de santé auprès de l'industrie du tabac »*, (2013) 43 R.D.U.S. 611, at page 622: "*En d'autres termes, les gouvernements n'ont qu'à démontrer que, selon les données de la science, le tabagisme peut causer ou contribuer à la maladie, et non qu'il l'a fait dans le cas particulier de chaque membre de la collectivité visée. Il s'agit donc d'une preuve allégée de la causalité, confirmant ainsi la perspective collectiviste adoptée pour ces recours*.
Pursuant to section 25 of the TRDA, these provisions apply equally to class actions.

319 It will be interesting to see if the National Assembly eventually chooses to broaden the scope of this approach to have it apply in all class actions. Although such a move would inevitably be challenged constitutionally, its implementation would go a long way towards removing the tethers currently binding class actions in personal injury matters.

VI.C.4 THE EVIDENCE OF DR. SIEMIATYCKI

[695] Dr. Siemiatycki is a highly-respected member of the world scientific community. A professor of epidemiology at both McGill University and l'Université de Montréal, he has published nearly 200 peer-reviewed articles and is ranked at the top of "Canadian public health research"[320]. He has served in various capacities with the International Agency for Research on Cancer of the WHO in France and sat on the boards of directors of both the American College of Epidemiology and the National Cancer Institute of Canada.

[696] His research areas make his opinions particularly valuable to the Court, since he has worked on a number of studies dealing with smoking-caused cancers over the past twenty years, including an oft-cited 1995 study of the Quebec population[321].

[697] Here, he did not have the luxury of being able to apply standard epidemiological techniques. In his report (Exhibit 1426.1), he describes his mandate as follows:

> The overall purpose of this report is to provide evidence and expert opinion regarding the causal links between cigarette smoking and each of four diseases: lung cancer; larynx cancer; throat cancer; and emphysema. For each disease, the following questions will be addressed:
>
> - Does cigarette smoking cause the disease?
> - How long has it been known in the scientific community that cigarette smoking causes the disease?
> - What is the risk of the disease among smokers compared with non-smokers?
> - What is the dose-response relationship between smoking and the disease?
> - At what level of smoking does the balance of probabilities exceed 50% that smoking played a contributory role in the etiology of an individual's disease?
> - Among all smokers who got the disease in Quebec since 1995, for how many did the balance of probabilities of causation exceed 50%?

[698] He admits that he was obliged to develop a "novel" approach by which he sought to calculate the "critical dose" of smoking at which it is probable that a Disease contracted by the smoker was caused by his or her smoking. At page 33 of his report he describes his methodology in general terms:

> "Using all the studies that provided results according to a given metric of smoking (e.g. pack-years), we needed to derive a single common estimate of the dose-response relationship between this metric and disease risk. There is no standard textbook method for doing this; we had to innovate."

[699] The Companies argue that Dr. Siemiatycki's analysis is insufficient and unreliable because it does not meet recognized scientific standards. Here are some of JTM's comments from its Notes:

---

320 See exhibit 1426, page 2.

321 J. SIEMIATYCKI, D. KREWSKI, E. FRANCO and M. KAISERMAN (1995), *Associations between cigarette smoking and each of 21 types of cancer: a multi-site case-control study*, International Journal of Epidemiology 24(3): 504-514.

> **2426.** No court of which JTIM is aware has ever accepted epidemiological evidence alone, whether in the form offered by Dr. Siemiatycki or some analogous form, as sufficient proof of specific causation. As the cases referenced above demonstrate, the courts approach epidemiological evidence with caution.
>
> **2427.** There is all the more reason to approach Dr. Siemiatycki's analysis with caution. Dr. Siemiatycki admitted in cross-examination that his method was "novel" and that the notion of a "critical amount" of smoking was previously unknown in the literature. He invented it, and a method of deriving it, for the purposes of this case. Neither Dr. Siemiatycki's "critical amount" nor his "legally attributable fraction" is part of received scientific methodology. It is a novel science devised exclusively for the purposes of these proceedings.

[700] Although much of what JTM says above is accurate, it appears to go too far in the following paragraphs when it asserts:

> **2429.** There is an additional reason to approach Dr. Siemiatycki's analysis with real caution. Not only was Dr. Siemiatycki's "critical amount" method novel, he had no experience in the techniques required to carry it out. Indeed, Dr. Siemiatycki had to admit on cross examination that he had virtually no experience with meta-analysis - the very technique upon which he relied to produce his critical amount.
>
> **2430.** In short, Dr. Siemiatycki was not an expert, either in the specific method that he employed in the techniques he used to employ the method (sic). That being so, as Dr. Marais pointed out, Dr. Siemiatycki lacked the experiential basis upon which to assess, even subjectively, what he later called his "plausible ranges of error".

[701] Dr. Siemiatycki's cross examination on this point does not lead the Court to the same conclusion with respect to his expertise in applying meta-analyses, to the contrary:

> I would say that, compared to ninety-nine point nine nine nine percent (99.999%) of the world, I'm an expert in meta-analyses. And, that there are people who have more experience in that particular procedure, I would not deny, it's absolutely true, some people spend their careers just doing that now, but I know how to carry one out.[322]

[702] In any event, in their numerous criticisms of Dr. Siemiatycki's methodology, the Companies focused especially on what they saw as omissions.

[703] For example, they chide him for not attempting to show a possible causal connection between a fault by the Companies and the onset of a Disease in any Member, what ITL qualified as a "fatal flaw" (Notes, paragraph 1027). With due respect, as far as Dr. Siemiatycki's work is concerned, this is neither fatal nor a flaw. Although it is a critical issue, it is not something than can be evaluated using epidemiology, nor was it part of his mandate. The Plaintiffs choose to deal with that through other means, as we analyze further on.

[704] The Companies also criticize his work because it does not constitute proof with respect to each member of the Class. The Court has already dismissed that argument.

---

[322] Transcript of February 18, 2013, at page 45.

[705] With respect to the other omissions raised by the Companies, such as the failure to account for genetics, the occupational environment, age at starting, intensity of smoking and the human papillomavirus[323], the evidence is to the effect that, although these might have some effect on the likelihood of contracting a Disease, they all pale in comparison with the impact of having smoked cigarettes. As such, the fact that Dr. Siemiatycki does not build them into his model is not a ground for rejecting his analysis outright.

[706] There remains, however, what the Court considers the most important "omission" from his analysis, what we call the "**quitting factor**". This refers to the salutary effect of quitting smoking and its increasing benefit the longer the abstinence.

[707] The proof is convincing that the quitting factor can significantly reduce the likelihood of contracting a Disease by allowing the body to heal from the smoking-related damage it has suffered. And the longer the abstinence, the greater the recovery. In fact, after a number of smokeless years, in many cases there remain practically no traces of smoking-related damage to the body and no Disease will likely be caused by the previous smoking.

[708] No one denies that. Accordingly, the Companies make much of the fact that Dr. Siemiatycki's model does not take such an important element into account. They would have the Court reject his opinion, *inter alia*, for that reason.

[709] Although it is true that his model ignores the quitting factor, it is not completely omitted from his overall calculations. It is indirectly, but effectively, accounted for through the second condition of the Blais Class definition: to have been diagnosed with one of the Diseases.

[710] The principal use of Dr. Siemiatycki's model is to identify the amount of smoking necessary to contract one of the Diseases. This is then used to determine the number of persons in the Class. To that end, he uses the *Registre des tumeurs du Québec* as a base.

[711] It is there, in the make-up of that registry, that the quitting factor has its effect. Former smokers whose quitting has allowed their bodies to heal won't be counted in the *Registre des tumeurs* because they will never have been diagnosed with a Disease. *Ergo*, they won't be included in the Blais Class.

[712] Thus, the requirement of diagnosis with a Disease as a condition of eligibility for the Blais Class assures that the quitting factor is taken into account. Accordingly, the Companies' criticism of the Siemiatycki model on that point is ungrounded and does not present an obstacle to using his work for the purposes proposed by the Plaintiffs.

---

[323] Dr. Barsky, an expert in pathology and cancer research called by JTM, noted that the latest studies indicate that the human papillomavirus is present in two to five percent of lung cancers, but with a much higher presence in head and neck cancers, including at the back of the tongue (Transcript of February 17, 2014, page 148). Dr. Guertin for the Plaintiffs stated that where HPV is present in a smoker, the primary cause of any ensuing throat cancer is the smoking (Transcript of February 11, 2013, pages 108 ff.). Dr. Barsky's long comment on that (pages 144-147) does not seem to contradict Dr. Guertin's opinion on that.

[713] This still leaves the question of whether his "novel" analysis is sufficiently reliable and convincing for it to be adopted by the Court.

VI.C.5 THE USE OF RELATIVE RISK

[714] Dr. Siemiatycki's thesis is that, by determining the critical amount of smoking for which the relative risk of contracting a Disease is at least 2, one can conclude that the probability of causation of a Disease meets the legal standard of "probable", i.e., greater than 50%. Perhaps the Court should defer to Dr. Siemiatycki's own language:

> The mandate that I received was to estimate under what smoking circumstances we can infer that the balance of probabilities was greater than 50% that smoking caused these diseases. It turns out that this is equivalent to the condition that PC (probability of causation) > 50%, and that there is a close relationship between PC and RR, such that PC > 50% when RR > 2.0. This means that in order to answer the mandate, it is necessary to determine at what level of smoking the RR > 2.0. This is not a well-known question with a well-known answer. It required some original research to put together the available published studies on smoking and these diseases in a way to answer the questions.[324]

[715] The Companies wholeheartedly disagree with such an approach, with ITL citing a judgment by Lax J. of the Ontario Superior Court of Justice that supposedly rejects "the concept that a RR (sic) in excess of 2.0 necessarily translates to a probability of causation greater than 50%".[325]

[716] With respect, the Court searched in vain for such rejection.

[717] What we did find was the judge adopting an RR of 2.0 as a presumptive threshold in favour of the claimant in that case:

> [555] […] It is apparent to me, as the plaintiffs point out, that the WSIAT (Ontario Workers Safety and Insurance Tribunal) employs a risk ratio of 2.0[326] as a presumptive threshold, as opposed to a prescriptive threshold, for individual claimants.
>
> [556] Where the epidemiological evidence demonstrates a risk ratio above 2.0, then individual causation has presumptively been proven on a balance of probabilities, absent evidence presented by the defendant to rebut the presumption. On the other hand, where the risk ratio is below 2.0, individual causation has presumptively been disproven, absent individualized evidence presented by the class member to rebut the presumption. That is, whether or not the risk ratio is above 2.0 determines upon whom the evidentiary responsibility falls in determining individual causation. […]
>
> ...
>
> [558] This approach is entirely consistent with the case law. The defendants did not present any case law that supported their contention that I should use a risk ratio of 2.0 as a prescriptive standard without regard to the potential for

---

[324] Exhibit 1426.1, pages 2-3.

[325] *Andersen v. St. Jude Medical*, 2012 ONSC 3660, ("***Andersen***"), at paragraphs 556-558.

[326] Lax J.'s risk ratio corresponds to RR or relative risk in the Siemiatycki model.

> individualized factors relevant to particular class members. In fact, as detailed above, *Hanford Nuclear, Daubert II*, the U.S. *Reference Manual on Scientific Evidence*, and the procedure employed by the WSIAT all support the use of a risk ratio of 2.0 as a presumptive, rather than prescriptive, standard for individual causation.
>
> [559] As such, this is this approach that I believe is appropriate. (Emphasis added)

[718] Thus, rather than depreciating Dr. Siemiatycki's methodology, this judgment encourages us to embrace it as at least creating a presumption in favour of causation. Since that presumption is rebuttable, we must consider the countervailing proof the Companies chose to make.

VI.C.6 THE COMPANIES' EXPERTS

[719] On that front, the Companies studiously avoided dealing with the base issue of the amount of smoking required to cause a Disease. Their strategy with almost all of their experts was to criticize the Plaintiffs' experts' proof while obstinately refusing to make any of their own on the key issues facing the Court, e.g., how much smoking is required before one can conclude that a smoker's Disease is caused by his smoking. The Court finds this unfortunate and inappropriate.

[720] An expert's mission is described at article 22 of the new Quebec Code of Civil Procedure, which comes into force in at the end of this year. It reads:

> **22.** The mission of an expert whose services have been retained by a single party or by the parties jointly or who has been appointed by the court, whether the matter is contentious or not, is to enlighten the court. This mission overrides the parties' interests.
>
> Experts must fulfill their mission objectively, impartially and thoroughly.

[721] This is not new law. For the most part, it merely codifies the responsibilities of an expert as developed over many years in the case law[327]. As such, the Companies' experts were bound by these terms and, for the most part, failed to respect them.

[722] The Court would have welcomed any assistance that the Companies' experts could have provided on this critical question, but they were almost always compelled by the scope of their mandates to keep their comments on a purely theoretical or academic level, never to dirty their hands with the actual facts of these cases. This was all the more disappointing given that the issues in question fell squarely within the areas of expertise of several of these highly competent individuals. It is also quite prejudicial to their credibility.

[723] Before looking at the evidence of the Companies' experts, let us start by dealing with a constant criticism levelled at Dr. Siemiatycki's work: that his model and methodology do not conform to scientific or academic standards and sound scientific practice.

---

[327] See the magisterial analysis of the issue done by Silcoff J. in his judgment in *Churchill Falls (Labrador) Corporation Ltd. v. Hydro Québec*, 2014 QCCS 3590, at paragraphs 276 and following, wherein he analyzes Quebec, Canadian common law and British precedents on the point.

[724] The Court recognizes that sound practice in scientific research rightly imposes strict rules for carrying out experiments and arriving at verifiable conclusions. The same standards do not, however, reflect the rules governing a court in a civil matter. Here, the law is satisfied where the test of probability is met, as recognized in Québec by article 2804 of the Civil Code:

> **2804**. Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof.

[725] Here, there is clear demonstration that smoking is the main cause of the Diseases. We have also found fault on the Companies' part. Given that, and the fact that the law does not require "more convincing proof" in this matter, we must apply the evidence in the record to assess causation on the basis of juridical probability, using article 2804 as our guidepost.

[726] Baudouin notes that a plaintiff is never required to prove the scientific causal link, but need only meet the simple civil law burden.[328] He further notes that the requirements of scientific causality are much higher than those for juridical causality when it comes to determining a threshold for the balance of probabilities.[329]

[727] In the case of *Snell c. Farrell*, Sopinka J. of the Supreme Court of Canada provided valuable guidance in this area:

> The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. […] It is not therefore essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law.[330]

[728] Hence, it is not an answer for the experts to show that the Plaintiffs' evidence is not perfect or is not arrived at by "a method of analysis which has been validated by any scientific community" or does not conform to a "standard statistical or epidemiological method"[331].

[729] Given its unique application, Dr. Siemiatycki's system has never really been tested by others and thus cannot have been either validate or invalidated by any scientific community. He, on the other hand, swore in court that its results are probable, even to the point of being conservative. We place great confidence in that.

---

328 Jean-Louis BAUDOUIN and Patrice DESLAURIERS, *La responsabilité civile (7th Édition)*, Wilson & Lafleur, Montréal, at pages 635-636: "*le demandeur n'est jamais tenu d'établir le lien causal scientifique et qu'il suffit pour lui de décharger le simple fardeau de la preuve civile*".

329 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile, Op. cit*, Note 62, at page 105: "*la jurisprudence actuelle éprouve de sérieuses difficultés à distinguer causalité scientifique et causalité juridique, la première ayant un degré d'exigence beaucoup plus élevé quant à l'établissement d'un seuil de balance de probabilités*".

330 *Snell v. Farrell*, [1990] 2 S.C.C. 311, page 330 ("***Snell***"). See also: *Laferrière v. Lawson*, [1991] 1 SCR, 541, at paragraph 156.

331 Expert report of Dr. Marais, Exhibit 40549, at pages 12 and 18.

[730] The Court found Dr. Siemiatycki to be a most credible and convincing witness, unafraid to admit weaknesses that might exist and forthright in stating reasonable convictions, tempered by a proper dose of inevitable incertitude. He fulfilled the expert's mission perfectly.

[731] As for the Companies' evidence in this area, they called three experts to counter Dr. Siemiatycki's opinions: Laurentius Marais and Bertram Price in statistics and Kenneth Mundt in epidemiology.

[732] Dr. Marais, called by JTM, was qualified by the Court as "an expert in applied statistics, including in the use of bio-statistical and epidemiological data and methods to draw conclusions as to the nature and extent of the relationship between an exposure and its health effects". In his report (Exhibit 40549) he describes his mandate as being "to conduct a thorough review of Dr. Siemiatycki's report".

[733] He strenuously disagrees with Dr. Siemiatycki's methods and conclusions. At pages 118 and following of his report, he summarizes the reasons for that as follows:

> (a) As I set forth in Section 3, Dr. Siemiatycki premises his analysis in part on an *ad hoc* measure of "dose" (pack-years) and ambiguous measures of "response" (relative risk of disease) in circumstances where these measures do not permit a dose-response relationship to be defined with sufficient precision to support a valid conclusion with a measurable degree of error.
>
> (b) As I also set forth in Section 3, Dr. Siemiatycki incorrectly supposes that the smoking conduct of individual Class members is measured with sufficient precision by a metric ("pack-years") that ignores important aspects of smoking behavior, including starting age, intensity of smoking (i.e., cigarettes per day), and time since quitting, each of which materially affects the risks faced by an individual ever smoker.
>
> (c) As I set forth in Sections 3 and 4, Dr. Siemiatycki focuses his analysis on the risk profile of a hypothetical "average" smoker, when in fact the risk profiles of individual smokers in the Class will vary widely depending on the factors which he ignores.
>
> (d) As I set forth in Section 4, Dr. Siemiatycki's analysis gives no weight to the fact that smokers face other Class disease risks, and that any individual case may be caused by risks other than smoking.
>
> (e) As I set forth in Sections 5 and 6 and Appendix "B", Dr. Siemiatycki's meta-analysis, by which he claims to compute his overall relative risks and Critical Amounts, fails to conform to accepted scholarly standards, and he fails to account coherently for error and uncertainty in his resulting estimates; properly conducted and interpreted, meta-analysis of the data on which he relied cannot estimate what Dr. Siemiatycki tries to use it to estimate, namely a Critical Amount of smoking for the four Class diseases, for the reasons. (sic)
>
> (f) As I set forth in Section 7, in order to reach the conclusions he does, Dr. Siemiatycki asserts without comment or reservation the equivalence between the legal "balance of probabilities" and the epidemiological proposition of a relative risk greater than 2.0; the validity of this equivalence is a matter of considerable controversy in epidemiology and statistics; and, more

importantly, it mischaracterizes the nature and proper means of the determination of causation in individual cases of the Class diseases.

(g) As I set forth in Section 8. Dr. Siemiatycki erroneously equates the epidemiological concept of the probability of causation with the legal concept of the balance of probabilities.

[734] Dr. Marais's first point rests essentially on an insistence on the scientific level of proof, an argument that the Court rejects for reasons discussed above. For the same reasons, the Court rejects his point "e".

[735] His point "b" has already been rejected in our discussion around the "quitting factor", while his point "c" is disarmed as a result of the applicability of epidemiological studies via section 15 of the TRDA. His point "d" is basically a restatement of the two previous ones and is rejected for the same reasons.

[736] The parts of points "f" and "g" criticizing his equating juridical probability with a relative risk greater than 2 are rejected for the reasons expressed in our earlier discussion of Lax J.'s judgment in *Andersen v. St. Jude Medical*. Finally, his additional criticism in point "f", relating to the mischaracterization of "the nature and proper means of the determination of causation in individual cases of the Class diseases", falls to section 15 of the TRDA.

[737] As a general comment, the Court finds a "fatal flaw" in the expert's reports of all three experts in this area in that they completely ignored the effect of section 15 of the TRDA, which came into effect between 18 and 24 months prior to the filing of their respective reports. Dr. Marais and his colleagues preferred to blinder their opinions within the confines of individual cases, even though they should have known (or been informed) of the critical role that this provision plays with respect to the use of epidemiological evidence in cases such as these.

[738] Thus, the Court will never know how, or if, their opinions would have changed had they applied their expertise to the actual legal situation in place. That cannot but undermine our confidence in much of what they said.

[739] Finally on Dr. Marais, his bottom-line view of Dr. Siemiatycki's method, which is to apply meta-analysis to existing studies in order to estimate the numbers of persons in the Blais Class, was basically that "you can't get there from here". He stated that the only way to arrive at the number of persons in each Class or sub-Class would be to conduct a research project examining "only a handful of thousands of people".[332]

[740] To be sure, such a study would have made the Court's task immeasurably easier. That does not mean that it was absolutely necessary in order for the Plaintiffs to make the necessary level of proof at least to push an inference into play in their favour. In fact, it is our view that they succeeded in doing that through Dr. Siemiatycki's work. Thus, "an inference of causation", as Sopinka J. called it in *Snell*, is created in Plaintiffs' favour.

---

[332] Transcript of March 12, 2014 at page 324 and 325.

[741] In the same judgment, he noted that where such an inference is drawn, "(t)he defendant runs the risk of an adverse inference in the absence of evidence to the contrary".[333] Here, the Companies presented no convincing evidence to the contrary. Logically, once the inference is created, rebuttal evidence must go beyond mere criticism of the evidence leading to the inference. That tactic is exhausted in the preceding phase leading to the creation of the inference.

[742] Thus, to be effective, rebuttal evidence must consist of proof of a different reality. The Companies did not allow their experts even to try to make such evidence. Moreover, Dr. Marais said it was impossible to do so using proper scientific practices. That might be, but that does not make the inference go away once it is drawn.

[743] For all the above reasons, the Court finds no use for Dr. Marais's evidence.

[744] Dr. Price is a statistician called by ITL. In his report (Exhibit 21315, paragraph 2.2), he sets out the three questions that he was asked to address, which, as usual, focus on criticizing the opposing expert rather than attempting to provide useful answers to the questions facing the Court:

- Would Dr. Siemiatycki's cases likely include cases that the court could find were not caused by the alleged wrongful conduct of the defendants?
- Would Dr. Siemiatycki's cases likely include cases that the court could find were not caused by the alleged wrongful conduct of the defendants?
- (Does) the Siemiatycki Report contain sufficient information to determine which, if any, of the cases of, or deaths from, the four diseases diagnosed or occurring from 1995 to 2006 among smokers resident in Quebec were caused by the alleged wrongful conduct of the defendants?

[745] He answers the first two questions in the affirmative, which is not surprising. Epidemiological analysis, being based on the study of a population, will inevitably include a certain number of cases that would not qualify were individual analyses to be done. That, however, becomes irrelevant, since section 15 of the TRDA renders that type of evidence sufficient. He did not consider this.

[746] His negative response to the third question is based on Dr. Siemiatycki's failure to consider cases individually and to take account of cancer-causing elements other than smoking. He closes by criticizing the Plaintiffs for "implicitly assuming that all of Dr. Siemiatycki's cases were caused by the alleged wrongful conduct of the defendant".

[747] None of this sways the Court. We have previously rejected the first two points and the third is disarmed by the acceptability of epidemiological proof alone via the TRDA. His report thus offers no assistance to the Court[334], something that could have been

---

[333] *Op. cit.*, *Snell*, Note 330, at page 330. Lax J. is of the same view in *Andersen, op. cit,* Note 325.

[334] In his testimony on March 18, 2014, he stated that he accepts that, based on the Surgeon General's conclusions, smoking causes the Diseases (Transcript at pages 212-213). The next day, he admitted that, with respect to the proportion of all lung cancers for which smoking is responsible, "the estimates that one sees are in the upper eighties (80s) to ninety percent (90%)", adding that, although he

remedied had he been allowed to perform the type of study that he said Dr. Siemiatycki should have done[335]. That page, however, was left blank.

[748] For all these reasons, the Court finds no use for Dr. Price's evidence.

[749] Dr. Mundt, called by RBH, was the sole epidemiologist who testified for the Companies. In his report (Exhibit 30217), he describes the two main aspects of his mandate as being:

- to evaluate Dr. Siemiatycki's report in which he attempts to estimate the number of people in Quebec who between 1995 and 2006 developed lung cancer, laryngeal cancer, throat cancer and emphysema 1 specifically caused by smoking cigarettes and
- to offer his opinion on Dr. Siemiatycki's approaches, methods and conclusions, based on his review of Dr. Siemiatycki's reports and testimony and his own review and synthesis of the relevant epidemiological literature.

[750] He feels that Dr. Siemiatycki's approach and methods are "substantially flawed" and that the probability of causation estimates that he claims to derive are "unreliable for their intended purpose, and cannot be scientifically or convincingly substantiated"[336]. Summarily, his specific conclusions are:

a. Dr. Siemiatycki's model and conclusions are wrong because they do not adequately take account of sources of bias;

b. Dr. Siemiatycki's conclusions are wrong because his model over-simplifies scientific understanding of the impact of risk factors other than smoking, such as smoking history, including the quitting factor, occupational exposures and lifestyle factors;

c. Dr. Siemiatycki's rationale for selection of the published epidemiological studies used in his meta-analysis is not clearly explained and, in any event, few of the ones he relied upon included Quebecers and he made no attempt to assure that the assumption of comparability was valid;

d. Dr. Siemiatycki's results cannot be tested in accordance with standard scientific methodology and good practices;

e. Dr. Siemiatycki uses COPD statistics rather than those specifically for emphysema and very few of those describe COPD in terms of relative risk and, as well, he fails to take account of other risk factors;

f. Dr. Siemiatycki's reliance on 4 pack-years as the critical value for balance of probabilities[337] is contrary to the scientific literature, which shows little to no

---

accepts the numbers as calculated, he does not see that as determining causality (Transcript at pages 70-71).

335 See Transcript of March 19, 2014, at pages 41 and following.

336 See paragraph 112 of his report.

337 The Plaintiffs "round off" their critical dose at five pack years, but this does not counter the criticism made here.

> excess risk of lung cancer among smokers with exposures of less than 10 or 15 pack-years.

[751] Of these comments, only the first and last raise elements that we have not dealt with, and dismissed, elsewhere.

[752] With respect to sources of bias, Dr. Siemiatycki did, in fact, consider that, albeit not in a scientifically precise way. He testified that he used his "best judgment" to account for problems of bias and error englobing "statistical and non-statistical sources of variability and error". His exact words are as follows:

> Now, these procedures and these estimates involved various types and degrees of potential error, or wiggle room, or variability; some of it what we call stochastic, sort of statistical variability, and some of it variability that is non-statistical, that's related to things like the definitions or diseases or problems of bias, potential biases in estimating parameters, and so on.
>
> Using my best judgment, I thought: for each disease, what is the plausible range of error that englobes statistical and non-statistical sources of variability and error? And I've indicated it in this table (Table D3), in a lower estimate and a higher estimate of a range of plausibility; now, this is not a technical term and I didn't pretend it to be so. And in the second footnote, it states clearly this is based on my professional opinion and it is what... that's what it is.[338]

[753] The footnotes to Table D3, entitled "Numbers of incident cases attributable to smoking* in Quebec of each disease in the entire period 1995 to 2006, with ranges of plausibility**", read:

> * This is the number of cases for which it is estimated that the probability of causation (PC) exceeds 50%.
>
> ** This is based on the author's professional opinion and uses as a guideline that the best estimates may be off by the following factors: for lung cancer, from -10% to +5%; for larynx cancer, from -15% to +7.5%; for throat cancer, from -20% to +10%; for emphysema, from -50% to +25%.

[754] In his report, he states that it is "most unlikely" that the true values of the number of cases would fall outside of the ranges he estimated for each Disease (Exhibit 1426.1, page 49).

[755] Dr. Mundt's criticism that this does not adequately take sources of bias into account is based on the scientific standard for such exercises. In that context, Dr. Siemiatycki's "best estimate" would surely fall short of acceptable. In the context of Quebec civil law, on the other hand, it meets the probability test and the Court accepts it in general, although with certain reservations concerning emphysema, as discussed below.

[756] Dr. Mundt's final point speaks of the number of pack years required to cause lung cancer. He indicates that the scientific literature that he has reviewed shows little or

---

338 Transcript of February 19, 2013, page 144.

no risk of lung cancer below 10 to 15 pack years[339]. This is interesting from at least two angles.

[757] First, such a statement from the Companies' only expert in epidemiology confirms that "pack years" is, in fact, considered a valid unit of measure by the epidemiological community in relation to the onset of cancer. The other defence experts spent much time criticizing the appropriateness of that metric, but this removes any doubt from the Court's mind.

[758] As well, we finally see one of the Companies' experts providing a helpful response to one of the questions before us, i.e., what is a plausible minimum figure for the "critical dose". Dr. Barsky, while steering clear of actually providing useful guidance to the Court, also criticized "the low levels of smoking exposure" used by Dr. Siemiatycki[340]. Moreover, the Plaintiffs do not fundamentally contest Dr. Mundt's figures, having mentioned 12 pack years as a not unreasonable alternative on several occasions.

[759] Since Dr. Siemiatycki's method necessarily ignores several relevant, albeit minor, variables and, in any event, is not designed to calculate precise results, the Court will pay heed to Dr. Mundt's comments. Accordingly, we shall set the critical dose in the Blais File at 12 pack years, rather than five. The Class description shall be amended accordingly.

[760] It is important to note that nothing in Dr. Mundt's evidence in any way counters the inference of causation we have drawn in the Plaintiffs' favour here. That inference thus remains intact.

[761] On the other hand, we have a problem when it comes to Dr. Siemiatycki's figures for emphysema. The second footnote to Table D3.1 of Exhibit 1426.7 indicates a range of possible error from -50% to +25% for that Disease. This leaves the Court uncomfortable with respect to his best estimates of 24,524 for males and 21,648 for females, giving a total of 46,172. Because of the size of the possible-error range, and considering that his emphysema analysis includes cases of chronic bronchitis through use of COPD figures, we prefer to adopt his lower estimates for emphysema: Males – 12,262, Females – 10,824, for a total of 23,086[341].

[762] Overall, and stepping back a bit from the forest, we cannot but be impressed by the fact that Dr. Siemiatycki's results are compatible with the current position of essentially all the principal authorities in the field.

[763] At his recommended critical amount of 4 pack years for lung cancer, his probabilities of causation of 93% in men and 80% in women[342] reflect findings reported in a National Cancer Institute document that states that "Lung cancer is the leading cause of cancer death among both men and women in the United States, and 90 percent of lung cancer deaths among men and approximately 80 percent of lung cancer deaths among women are due to smoking." (Exhibit 1698 at pdf 2) As well, a 2004 monograph of the International Agency

---

339 Exhibit 30217, at page 23.
340 Exhibit 40504, at pdf 19.
341 Exhibit 1426.7, Table D3.1.
342 Exhibit 1426.7, Table A.1.

for Research on Cancer states that "the proportion of lung cancer cases attributable to smoking has reached 90%" (Exhibit 1700 at pdf 55).

[764] Moreover, those figures are not seriously contested by the Companies' experts. On February 18, 2014, Dr. Sanford Barsky, JTM's expert in pathology and cancer research, agreed that "roughly 90% of the lung cancer cases are attributable to smoking" (Transcript, at page 41). Several weeks later, Dr. Marais testified that Dr. Siemiatycki's calculation of the attributable fraction for each of the four Diseases, as shown at page 44 of his report, were within the range of estimates that he had seen in reviewing the literature, noting that a couple of them were even slightly lower[343].

[765] In the end, and after shaking the box in every direction, we opt to place our faith in the "novel" work of Dr. Siemiatycki in this file, with the adjustment for the number of pack years that we indicate above. It is not perfect, but it is sufficiently reliable for a court's purposes and it inspires our confidence, particularly in the absence of convincing proof to the contrary.

[766] In making this decision, we identify with the challenge faced by most judges forced to wade into controversial scientific waters, a challenge whose difficulty is multiplied when the experts disagree. The essence of that challenge was captured in the following remarks by Judge Ian Binnie of the Supreme Court of Canada, as he then was, in a 2006 speech at the University of New Brunswick Law Faculty:

> There is a further problem. The judge may not have the luxury of waiting until scientists in the relevant field have reached a consensus. The court is a dispute resolution forum, not a free-wheeling scientific inquiry, and the judge must reach a timely decision based on the information available. Even if science has not figured it out yet, the law cannot wait.[344]

[767] For obvious reasons, we cannot wait. The Court finds that each of the Diseases in the Blais Class was caused by smoking at least 12 pack years before November 20, 1998, and the Class definition is modified accordingly[345].

VI.D. WAS THE TOBACCO DEPENDENCE CAUSED BY SMOKING?

[768] On this point, the Létourneau case differs significantly from Blais. There, it was possible to argue that the Diseases could be caused by factors other than smoking, whereas no such an argument can be made in the case of tobacco dependence.

[769] As such, the Court finds that the tobacco dependence of the Létourneau Class was caused by smoking.

[770] That, however, does not put an end to this question. The Authorization Judgment does not provide a definition of dependence and the Class Amending

---

343 Transcript of March 12, 2014 at pages 128-129.

344 Ian BINNIE, "*Science in the Courtroom: the mouse that roared*", University of New Brunswick Law Journal, Vol. 56, at page 312.

345 By moving from 5 pack years to 12, the number of eligible class members is reduced by about 25,000 persons: see Tables D1.1 through D1.4 in Exhibit 1426.7,

Judgment's attempt to fill that void does not spare the Court from having to evaluate it in light of the proof adduced. ITL explains its view on the matter in its Notes as follows:

> **1086.** Despite its central importance to their case, Plaintiffs have not proffered a clear and objective, scientifically-accepted definition of addiction that would allow the Court to determine on a class-wide basis that smoking caused all Class Members to become addicted. ITL submits that no such definition is available.
>
> **1087.** Nor have Plaintiffs advanced any meaningful theory or methodology for determining who is "addicted" and what injury follows from any such determination. Instead, Plaintiffs have variously attempted to extrapolate statistics and averages from sources not intended for the purposes they now advance (as discussed below), with no guidance as to how these would be applied to determine liability even if they were reliable.

[771] It is essential to have a "workable definition" of tobacco dependence (or addiction) in order to decide several key questions, not the least of which being how to determine who is a Class Member. Individuals must be able to self-diagnose their tobacco dependence and, consequently, their possible membership in the Class. As the Supreme Court has noted: "It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria"[346].

[772] With this goal in mind, when amending the Class description the Plaintiffs adopted criteria mentioned in the testimony of their expert on dependence, Dr. Negrete[347]. The criteria they favour are:

1) To have smoked for at least four years;
2) To have smoked on a daily basis at the end of that four-year period.[348]

[773] The four-year gestation period is not mentioned in either of Dr. Negrete's reports[349] but, rather, came from his testimony in response to a question as to how long it takes for a person to become tobacco dependent. Commenting on an article on which Dr. Joseph Di Franza[350] was the lead author (Exhibit 1471), he opined that the first verifiable symptoms of dependence, according to clinical diagnostic criteria, appear within three-and-a-half to four years of starting to use nicotine.[351]

[774] The Companies objected to the filing of the DiFranza article, complaining that Dr. Negrete should have produced it with one of his reports. They argued that the Plaintiffs' attempts to file it in this manner, after having sent an email that very morning

---

346 *Western Canadian Shopping Centres c. Dutton*, [2001] 2 R.C.S. 534, at paragraph 138.

347 We discuss his qualifications and our evaluation of his evidence in Chapter II.C.

348 The third condition found in the amended definition, that of smoking on February 21, 2005 or until death, is not technically part of the "medical" definition proffered by Dr. Negrete.

349 Dr. Negrete filed two reports in this file, one in 2006: Exhibit 1470.1, and one in 2009: Exhibit 1470.2. Unless otherwise indicated, where we speak of his "report", we will be referring to the first report.

350 Di Franza is a specialist in the area of tobacco dependence and the creator of the *"Hooked on Nicotine Checklist"*, commonly known as the HONC!

351 Transcript of March 20, 2013 at pages 115-118. See also Dr. Negrete's second report, which cites a study at page 3 where, after only two years of smoking, 38.2% of children who started smoking around 12 years old met the criteria for a clinical diagnosis of dependence.

advising the Companies of their intention to use it, equated to producing a new (third) expert report by Dr. Negrete without prior notice, something that should not be allowed.

[775] The Court dismissed the Companies' objections and permitted the Plaintiffs to file and use the DiFranza report. In doing so, it noted that the Companies would have all the time necessary for their experts to review the report and counter it, since those experts would probably not be testifying for another year or so.[352] The Court's prediction turned out to be uncharacteristically accurate. The Companies' experts on dependence testified in January 2014, some ten months later.

[776] Returning to the four-year initiation period to nicotine dependence, the Court accepts Dr. Negrete's opinion on that. In fact, on all matters dealing with dependence, the Court prefers his opinions to those of the two experts in this area called by the Companies.

[777] As pointed out earlier, one of them, Dr. Bourget, had little relevant experience in the field and had, for the most part, simply reviewed the literature, much of which was provided to her by ITL's lawyers. The other, Professor Davies, was on a mission to change the way the world thinks of addiction. The torch he was carrying, despite its strong incendiary effect, cast little light on the questions to be decided by the Court.

[778] Getting back to Dr. Negrete, he did identify daily smoking as being one of two essential conditions for dependence, with lighting the first cigarette within 30 minutes of waking as the other.[353] That said, neither his report nor his testimony in court directly define what constitutes daily smoking, much less that it constitutes smoking the "at least one cigarette a day" required by the current class definition.

[779] It remains to be seen whether smoking one cigarette a day was sufficient to constitute daily smoking for dependence purposes in September 1998. If one-a-day cannot be the test, then we must see if there is adequate proof to determine what other level of consumption should be taken as the 1998 threshold of daily smoking.

[780] As for the one-a-day smoker, Dr. Negrete, himself, does not appear to consider such a low level of smoking as being enough to constitute dependence. At numerous places in his report, he refers to a level of smoking that obviously exceeds one a day: "smoking a higher number of cigarettes a day", at page 6 and "progressively increasing his consumption", at page 12 and "the need to increase the quantity consumed", at page 13 and "the daily total of cigarettes consumed is a direct measure of the intensity of the compulsion to smoke", at page 17.

---

352 Transcript of March 20, 2013, at page 122.

353 At pages 19-20, in commenting on the Fagerstrom Test for Nicotine Dependence: "*Toutefois, ce sont les questions No 1 et 4 (of the Fagerstrom Test) celles qui semblent définir le mieux les fumeurs dépendants, car elles évoquent parmi eux le plus haut pourcentage de réponses à haut pointage. Pratiquement toute personne (95%) qui fume de façon quotidienne présente une dépendance tabagique à des différents degrés; mais le problème est le plus sévère chez les fumeurs qui ont l'habitude d'allumer la première cigarette du jour dans les premières 30 minutes après leur réveil. C'est le critère adopté par Santé Canada dans les enquêtes de prévalence de la dépendance tabagique dans la population générale.*"

[781] Although he does not pinpoint what he considers to be the average number of daily cigarettes required to constitute dependence, a useful indication of that comes from his references, in particular, from a 2005 survey by Statistics Canada[354]. It shows that Canadian smokers self-reported consuming an average of 15.7 cigarettes a day between February and December 2005, up from 15.2 cigarettes a year earlier (at page 4 PDF). For Quebec, the figure was 16.5 cigarettes a day in 2005, with no information for 2004.

[782] Can such information be reasonably translated into a number of cigarettes that would constitute a threshold for persons dependent on nicotine on September 30, 1998? The Court believes it can, in spite of the fact that these figures do not deal with the exact time period in issue or with the specific topic of tobacco dependence.

[783] Almost never does a court of civil law have the luxury of a record that is a perfect match for every issue before it. Nevertheless, it must render justice. Thus, where there is credible, relevant proof relating to a question, it may, and must, use that in a logical and common-sense manner to arbitrate a reasonable decision.

[784] What is the average number of cigarettes a tobacco-dependent smoker in Quebec smoked on September 30, 1998? In that regard, we know that:

a. Tobacco dependence results from smoking;

b. It is a function of time and amount smoked;

c. 95% of daily smokers are nicotine dependent, albeit to differing degrees;

d. The average daily smoker in Quebec smoked around 16 cigarettes a day in 2005;

e. In general, smokers were cutting back on their consumption in the period we are examining[355].

[785] It is probable, therefore, that Quebecers who smoked an average of 16 cigarettes a day in 2005 were nicotine-dependent. That said, it appears likely that dependency sets in before a smoker reaches "average consumption".[356] Given the absence of direct proof on the point, the Court must estimate what that figure should be.

[786] Based on the above, the Court holds that the threshold of daily smoking required to conclude that a person was tobacco dependent on September 30, 1998 is an average of at least 15 cigarettes a day. The Companies steadfastly avoided making any evidence at all on the point, so there is nothing to contradict such a finding.

---

354 Exhibit 1470.10. This is footnote 27 to Dr. Negrete's report. Note that there is a typographical error at page 20 that indicates that this is footnote 26. The error was corrected at trial.

355 Overall smoking prevalence dropped from about 25% to below 20% in that period (Exhibit 40495.33). See also: Exhibit 1550-1984, at PDF 45. In 1984 average cigarette consumption in the United States was estimated at between 18.9 and 24.2 cigarettes and declining annually. The evidence shows that, in general, smoking trends in Canada were similar to those in the United States.

356 At page 21 of his report, Dr. Negrete associates simple "smoking every day" ("*fument tous les jours*") with tobacco dependence. This indicates to the Court that he supports something less than average daily smoking as a minimum for dependence.

[787] There remains the third criterion set out in the Class description: "They were still smoking the defendants' cigarettes on February 21, 2005, or until their death, if it occurred before that date".[357] This raises the questions of how many cigarettes a day is meant by "smoking the defendants' cigarettes", a question that our previous reasoning makes relatively easy to answer. We have determined that tobacco dependence means daily consumption of 15 cigarettes and logic compels that this threshold should apply to this condition as well.

[788] Consequently, the Court finds that medical causation of tobacco dependence will be established where Members show that:

a. They started to smoke before September 30, 1994 and since that date they smoked principally cigarettes manufactured by the defendants; and

b. Between September 1 and September 30, 1998, they smoked on a daily basis an average of at least 15 cigarettes manufactured by the defendants; and

c. On February 21, 2005, or until their death if it occurred before that date, they were still smoking on a daily basis an average of at least 15 cigarettes manufactured by the defendants.[358]

[789] The Class description will be amended accordingly. We should also point out here that, in light of the manner in which the Plaintiffs cumulate the criteria in this description, most eligible Létourneau Members will have smoked for all or the greater part of 10 years and five months: September 30, 1994 to February 21, 2005. Although there will inevitably be some quitting periods for certain people, it would be hard even for the Companies to assert that smokers meeting these criteria are not dependent.

[790] As important as this is, it relates only to medical causation. The effect of legal causation and, should it be the case, prescription is not yet taken into account. That will occur in the following sections.

VI.E. WAS THE BLAIS MEMBERS' SMOKING CAUSED BY A FAULT OF THE COMPANIES?[359]

[791] The Companies embrace the "but-for-never" approach, arguing that the Plaintiffs should have to prove that, but for the Companies' faults, the Members would never have started or continued to smoke. As such, they would take issue with the title of this section. They would argue that the expression "a fault of the Companies" should be replaced by "the sole fault of the Companies".

---

357 The Plaintiffs explain that this third condition is necessary in order to comply with the conditions of the original Class definition.

358 The qualification that the cigarettes must be those made by the Companies is meant to tie any damages to acts of the Companies and exclude those caused by other producers' cigarettes.

359 This is often called "conduct causation", although, in the annals of tobacco litigation, it apparently has become known as "wrongfully induced smoking causation" or, simply, "WIS causation". As well, there is a third type of causation that must be proved: "abstract" or "general" causation: See ITL's Notes at paragraphs 971 and following. This amounts to a type of preliminary test to prove that smoking cigarettes may cause cancer, emphysema and addiction (in the abstract). This is not disputed by the Companies – paragraph 1020 of ITL's Notes. Hence, the Court will not deal further with that element.

[792] The Plaintiffs do not see it that way. Seeking to make their proof by way of presumptions, they prefer the "it-stands-to-reason" test. This would have the Court presume, in light of the gravity of the Companies' faults, that it stands to reason that such faults were the cause of people's starting or continuing to smoke, even if there is no direct proof of that.

[793] This opens the question of whether the Companies' fault must be shown to have been "the cause" of smoking or merely "a cause" and, if the latter, how important a cause must it be compared to all the others. In the first case, it comes down to determining whether it is probable that the Members would not have smoked had they been properly warned. The second requires more an appreciation of whether their smoking is a logical, direct and immediate consequence of the faults[360].

[794] Proving a negative, as the first case would require, is never an easy task and the Court does not believe that it is necessary to go that far in a claim for tobacco-related damages. If there is reason to conclude that the Companies' faults led in a logical, direct and immediate way to the Members' smoking, that is enough to establish causation, even if those faults coexist with other causes. Professor Lara Khoury provides a useful summary of the process in this regard:

> This theory (adequate causation) seeks to eliminate the mere circumstances of the damage and isolate its immediate cause(s), namely those event(s) of a nature to have caused the damage in a normal state of affairs (*dans le cours habituel des choses*). This theory necessarily involves objective probabilities and the notions of logic and normality. The alleged negligence does not need to be the sole cause of the damage to be legally effective however.[361]

[795] Where the proof shows that other causes existed, it might be necessary to apportion or reduce liability accordingly[362], but that does not automatically exonerate the Companies. We consider that possibility in a later section of the present judgment.

[796] JTM argues that the Plaintiffs' claim for collective recovery in Blais should be dismissed for a number of reasons.

- lack of proof that each Member's smoking was caused by its actions;
- lack of proof that the smoking that caused by JTM was actually the smoking that caused the Diseases;
- lack of proof of the number of disease cases caused;

---

360 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at paragraph 1-683.

361 Lara KHOURY, *Uncertain causation in medical liability*, Oxford, Hart Publishing, 2006, at page 29. See also Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at paragraph 1-687: "*Dans l'esprit des tribunaux, cette demarche n'implique pas nécessairement la découverte d'une cause unique, mais peut les amener à retenir plusieurs faits comme causals*".

362 See article 1478 C.C.Q., which foresees the possibility of contributory negligence and an apportionment of liability.

- lack of proof in Professor Siemiatycki's work of the number of Members for whom all three elements of liability apply;
- lack of proof of the quantum of individual damages for each Class Member.[363]

[797] Of these, we shall deal with the first one in this section. The second is countered by the condition in the Class definition that the pack years of smoking must be of cigarettes "made by the defendants". The final three arguments are responded to in other sections of the present judgment.

[798] The Plaintiffs readily admit that they did not even try to prove the cause of smoking on an individual basis, recognizing that that would have been impossible in practical terms. Thus, they turn to presumptions of fact in order to make their proof.

[799] They point out that the Court has a large discretion in tobacco cases to apply factual presumptions arising from statistical and epidemiological data in deciding a number of points. Although the Court does not disagree, it does not see this as a matter of exercising judicial discretion. Presumptions are a valid means of making evidence in all cases, as article 2811 of the Civil Code makes clear. That said, certain conditions must be met before they can be accepted.

[800] Article 2846 of the Civil Code describes a presumption as being an inference established by law or the court from a known fact to an unknown fact. Here, the known facts is the Companies' faults in failing to warn adequately about the likelihood of contracting one of the Diseases through smoking - and going further by way of creating a scientific controversy over the dangers - and then enticing people to smoke through their advertising. The unknown fact is the reasons why Blais Members started or continued to smoke.

[801] The inference the Plaintiffs wish to be drawn is that the Companies' faults were one of the factors that caused the Members to start or continue to smoke.

[802] Article 2849 requires that, to be taken into consideration, a presumption must be "serious, precise and concordant[364]" (in French: *graves, précises et concordantes*). The exact gist of this is not immediately obvious and we are fortunate to have some enlightenment on the subject in the reasons in *Longpré v. Thériault*[365]. The Court takes the following guidance from that judgment:

- Serious presumptions are those where the connections between the known fact and the unknown fact are such that the existence of the former leads one strongly to conclude in the existence of the latter;
- Precise presumptions are those where the conclusion flowing from the known fact leads directly and specifically to the unknown one, so that it

---

363 JTM's Notes, paragraphs 2674 and 2675.

364 "Concordant" is defined in the Oxford English dictionary as: "in agreement; consistent".

365 [1979] CA 258, at page 262, citing L. LAROMBIÈRE, *Théorie et pratique des obligations*, t. 7, Paris, A. Durand et Pedone Laurier, 1885, page 216.

is not reasonably possible to arrive at a different or contrary result or fact;

- Concordance[366] among presumptions is relevant where there is more than one presumption at play, in which case, taken together, they are all consistent with and tend to prove the unknown fact and it cannot be said that they contradict or neutralize each other.[367]

[803] With respect to the first, who could deny the seriousness of a presumption to the effect that the Companies' faults were a cause of the Members' smoking? The existence of faults of this nature leads strongly to the conclusion that they had an influence on the Members' decision to smoke. Mere common sense dictates that clear warnings about the toxicity of tobacco would have had some effect on any rational person. Of course, that would not have stopped all smoking, as evidenced by the fact that, even in the presence of such warnings today, people start and continue to smoke.

[804] Can the same be said about the "precision" of the presumption sought, i.e., is it reasonably possible to arrive at a different conclusion? In that regard, the text cited above can be misleading. To say that "it is not reasonably possible to arrive at a different or contrary result or fact" does not necessarily mean that the faults have to be the only cause of smoking, or even the dominant one. Nor is absolute certainty required.

[805] Ducharme is of the view that the test is one of simple probability and that it is not necessary for the presumption to be so strong as to exclude all other possibilities.[368]

[806] In the end, it comes down to what the party is attempting to prove by the presumption. The inference sought here is that the Companies' faults were one of the factors that caused the Members to smoke. The Court does not see how it would be reasonably possible to arrive at a different or contrary result, all the while recognizing that there could be other causes at play, e.g. environmental factors or "social forces", like peer pressure, parental example, the desire to appear "cool", the desire to rebel or to live dangerously, etc.

[807] In spite of those, this conclusion is enough to establish a presumption of fact to the effect that the Companies' faults were indeed one of the factors that caused the Blais

---

366 The third condition does not apply here since there is not more than one presumption to be drawn.

367 Les présomptions sont **graves**, lorsque les rapports du fait connu au fait inconnu sont tels que l'existence de l'un établit, par une induction puissante, l'existence de l'autre [...]
*Les présomptions sont **précises**, lorsque les inductions qui résultent du fait connu tendent à établir directement et particulièrement le fait inconnu et contesté. S'il était également possible d'en tirer les conséquences différentes et mêmes contraires, d'en inférer l'existence de faits divers et contradictoires, les présomptions n'auraient aucun caractère de précision et ne feraient naître que le doute ou l'incertitude.*
*Elles sont enfin **concordantes**, lorsque, ayant toutes une origine commune ou différente, elles tendent, par leur ensemble et leur accord, à établir le fait qu'il s'agit de prouver […] Si elles se contredisent […] et se neutralisent, elles ne sont plus concordantes, et le doute seul peut entrer dans l'esprit du magistrat.* (The Court's emphasis)

368 Léo DUCHARME, *Précis de la preuve*, 6th édition, Montréal, Wilson & Lafleur, 2005, para. 636: *Il faut bien remarquer qu'une simple probabilité est suffisante et qu'il n'est pas nécessaire que la présomption soit tellement forte qu'elle exclue toute autre possibilité.*

Members to smoke. This, however, does not automatically sink the Companies' ship. It merely causes, if not a total shift of the burden of proof, at least an unfavourable inference at the Companies' expense.[369]

[808] The Companies were entitled to rebut that inference, a task entrusted in large part to Professors Viscusi and Young. We have examined their evidence in detail in section II.D.5 of the present judgment and we see nothing there, or in any other part of the proof, that could be said to rebut the presumption sought.

[809] Consequently, the question posed is answered in the affirmative: the Blais Members' smoking was caused by a fault of the Companies.

VI.F. WAS THE LÉTOURNEAU MEMBERS' SMOKING CAUSED BY A FAULT OF THE COMPANIES?

[810] Much of what we said in the previous section will apply here. The only additional issue to look at is whether the presumption applies equally to the Létourneau Class Members.

[811] In its Notes, ITL pleads a total lack of proof on this aspect:

> **1128.** Plaintiffs have not even attempted to connect the addiction (however defined) of any Class Member, or any alleged injury, to any fault or wrongful conduct of ITL. In particular, Plaintiffs have made no attempt to establish a causal link between any acts or omissions of ITL and the smoking behaviour of any Class Members (or any alleged injuries). This alone is fatal to their entire addiction claim.

[812] RBH, with JTM adopting similar points[370], raises three arguments in opposition:

> **1099.** […] First, Plaintiffs failed to prove that a civil fault of the Defendants caused all – or indeed any – of the class members to start or continue smoking. Second, Plaintiffs failed to prove that each member of the *Létourneau* class has the claimed injury of addiction. Third, they failed to prove that this alleged addiction necessarily entails any injurious consequences given that addicted smokers may not want to quit smoking, may not have ever tried to quit, or may not have any difficulty in quitting if they do try. Certainly, there is no proof of anyone's humiliation or loss of self-esteem or of the gravity of either. Thus, the class will include people who are not smoking because of any wrong committed by the Defendants, who are not addicted to nicotine, and who, even if they are addicted, have not, and will not, necessarily suffer any cognizable injury as a result of their alleged "state of addiction."

[813] The first point is rebutted on the basis of the same presumption we accepted with respect to the Blais Class in the preceding section, i.e., that the Companies' faults were indeed one of the factors that caused the Members to smoke. Our conclusions in that regard apply equally here.

[814] As for the second, sufficient proof that each Class Member is tobacco dependent flows from the redefinition of the Létourneau Class in section VI.D above. Dr. Negrete

---

369 Jean-Claude ROYER, *La preuve civile*, 3rd édition, Cowansville, Québec, Éditions Yvon Blais, 2003, pages 653-654, para. 847.

370 See paragraphs 2676 and following of JTM's Notes.

opined that 95% of daily smokers are nicotine dependent and the new Class definition is constructed so as to encompass them. This makes it probable that each Member of the Létourneau Class is dependent.

[815] We recognize that there might be some individuals in the Class who are not tobacco dependent in light of this new definition. We consider that to be *de minimis* in a case such as this where, in light of the number of Class Members, a threshold of perfection is impossible to cross. Such a minor discrepancy can be adjusted for in the quantum of compensatory damages, thus permitting "the establishment with sufficient accuracy of the total amount of the claims of the members"[371], with no injustice to the Companies. In fact, the Plaintiffs reduce the size of the Létourneau Class accordingly in the calculation of the class size done in Exhibit 1733.5.

[816] As for "entailing injurious consequences", the arguments RBH raises are covered by Dr. Negrete's opinion concerning the damages suffered by dependent smokers. The Companies made no proof to contradict that and the Court finds Dr. Negrete's testimony to be credible and dependable. We reject the third point.

[817] Consequently, the question posed is answered in the affirmative: the Létourneau Members' smoking was caused by a fault of the Companies.

VI.G. THE POSSIBILITY OF SHARED LIABILITY

[818] The Civil Code foresees a possible sharing of liability among several faulty persons, including the victim of extracontractual fault:

> **Art. 1477.** The assumption of risk by the victim, although it may be considered imprudent having regard to the circumstances, does not entail renunciation of his remedy against the person who caused the injury.
>
> **Art. 1478.** Where an injury has been caused by several persons, liability is shared by them in proportion to the seriousness of the fault of each.
>
> The victim is included in the apportionment when the injury is partly the effect of his own fault.

[819] We must, therefore, consider whether the Companies' four faults were the sole cause of the Members' damages at all times during the Class Period.[372]

[820] In Blais, we found that the public knew or should have known of the risks and dangers of contracting a Disease from smoking as of the knowledge date: January 1, 1980. We have held that it takes approximately four years to become dependent, so persons who started smoking as of January 1, 1976 (the "**smoking date**" for the Blais File) were not yet dependent when knowledge was acquired in 1980. Hence, they would not have been unreasonably impeded by dependence from quitting smoking as of the knowledge date.

---

371 Article 1031 CCP.

372 The general rules of the Civil Code apply to cases under the Quebec Charter and the Consumer Protection Act, unless overridden by the terms of those statutes.

[821] Similar reasoning applies in Létourneau, albeit with different dates. The public knew or should have known of the risks and dangers of becoming tobacco dependent as of the knowledge date: March 1, 1996. Hence, Létourneau Class Members who started to smoke as of March 1, 1992 (the "**smoking date**" for the Létourneau File) were not yet dependent when knowledge was acquired in 1996. They, too, would not have been unreasonably impeded by dependence from quitting smoking as of the knowledge date.

[822] This points to a sharing of liability and an apportionment of the damages for some of the Members.

[823] In that perspective, the Plaintiffs seek total absolution for the Members in any apportionment of fault:

> **134.** In the case at bar, the Defendants, who create a pharmacological trap and invite children into it, have committed faults whose gravity exceeds by orders of magnitude that of any fault committed by a victim of that trap. It offends public order and common decency for a manufacturer to claim that using its product as intended is anywhere near as grave as its fault of designing, marketing and selling its useless, toxic product without adequate warnings or instructions and while constantly lying about its dangers. Even if the members committed a fault, its gravity is overwhelmed by the egregious faults committed by the Defendants and should attract no liability.[373]

[824] The Companies are correct in contesting this, but only with respect to the fault under article 1468. There, article 1473 creates a full defence where the victim has sufficient knowledge[374]. The case is different for the other faults here.

[825] Pushing full bore in the opposite direction from the Plaintiffs, JTM cites doctrine[375] to argue in favour of a plenary indulgence for the Companies on the basis that "a person who chooses to participate in an activity will be deemed to have accepted the risks that are inherent to it and which are known to him or are reasonably foreseeable"[376]. That article of doctrine, however, does not support this proposition unconditionally.

[826] There, the author's position is more nuanced, as seen in the following extract:

> *Dès qu'une personne est informée de l'existence d'un risque particulier et qu'elle ne prend pas les précautions d'usage pour s'en prémunir, elle devra, en l'absence de toute faute de la personne qui avait le contrôle d'une situation, assumer les conséquences de ses actes.*[377] (The Court's emphasis)

[827] As we have shown, the Companies fail to meet this test of "absence of all fault" and thus must share in the liability under three headings of fault. This seems only reasonable and just. It is also consistent with the principles set out in article 1478 and with the position supported by Professors Jobin and Cumyn:

---

373 Plaintiffs' Notes, at paragraph 134.
374 See JTM's Notes, at paragraphs 135 ff.
375 P. DESCHAMPS, "*Cas d'exonération et partage de responsabilité en matière extracontractuelle*" in JurisClasseur Québec: *Obligations et responsabilité civile*, loose-leaf consulted on July 25, 2014 (Montréal : LexisNexis, 2008) ch. 22.
376 JTM's Notes, at paragraph 138.
377 JTM's Notes, at paragraph 39.

> **212.** […] *On notera uniquement que la responsabilité du fabricant, telle que définie par le législateur lors de la réforme du Code civil, s'écarte, sur ce point, du régime général de responsabilité civile, dans lequel la connaissance du danger d'accident par la victime constitue habituellement une faute contributive conduisant, non à l'exonération de l'auteur, mais à un partage de responsabilité*.[378]

[828] Based on the preceding, we find that any Blais Class Member who started to smoke after the smoking date in 1976 and continued smoking after the knowledge date assumed the risk of contracting the Diseases as of the knowledge date[379]. This constitutes a fault of a nature to call in the application of articles 1477 and 1478 of the Civil Code, resulting in a sharing of liability for those Members.[380]

[829] We should underline a basic assumption we make in arriving at this ruling. It is true that, as of the knowledge date, even smokers who were then dependent should have tried to quit smoking, and this in both files. While recognizing that, we do not attribute any fault to dependent smokers who did not quit for whatever reason.

[830] The evidence shows that for the majority of such smokers it is quite difficult to stop and that they need several tries over many months or years to do so – and even then. It also shows that some long-time smokers are able to quit fairly easily. Some of these might have chosen not even to try to stop and, for that reason, should be considered to have committed a fault leading to a sharing of liability. It is not possible to carve them out from the dependent Members who could not be blamed for continuing to smoke.

[831] In any event, it makes little difference in light of our calculating the amount of the Companies' initial deposit at 80% across the board, as explained further on. In addition, in Blais, many would have already accumulated 12 pack years of smoking by the knowledge dates and, in Létourneau, by being dependent they would have already suffered the moral damages claimed.

[832] For the Létourneau Class, we find that any Member who started to smoke after the smoking date in 1992 and continued smoking after the knowledge date assumed the

---

[378] P-G JOBIN and Michelle CUMYN, *La Vente*, 3rd Edition, 2007, EYB2007VEN17, para. 212. The Court agrees that the present situation is not one where a *novus actus interveniens* can arise.

[379] This is based on what the authors qualify as "implicit consent". Professor Deslauriers notes that this is essentially a question of fact and presumption: "*Comme l'explique la doctrine, le consentement est 'implicite lorsque l'on peut présumer qu'un individu normal aurait eu conscience du danger avant l'exercice de l'activité'*" (reference omitted): Patrice DESLAURIERS et Christina PARENT-ROBERTS, *De l'impact de la création d'un risque sur la réparation d'un préjudice corporel*, Le préjudice corporel (2006), Service de la formation continue du Barreau du Québec, 2006, EYB2006DEV1216, at page 23. This notion of acceptance of the risk is raised by the Companies in their arguments regarding the autonomy of the will of Canadians who chose to smoke in spite of the dangers. It is true that Canadians have the right to smoke even if they choose to do so unwisely, but this does not excuse certain of the Companies' faults.

[380] Given the long gestation period for the Diseases, it is highly unlikely that a person who started after January 1976 could have contracted one of the Diseases before January 1, 1980. He would have had to have smoked 12 pack years within those four years. The Court therefore discards this possibility. Concerning the longer gestation period, see the report of Dr. Alain Desjardins (Exhibit 1382) at pages 26, 62 and 68.

risk of becoming dependent as of the knowledge date. This fault leads to a sharing of liability for those Members.

[833] As for the relative liability of each party, this is a question of fact to be evaluated in light of all the evidence and considering the relative gravity of all the faults, as required by article 1478. In that regard, it is clear that the fault of the Members was essentially stupidity, too often fuelled by the delusion of invincibility that marks our teenage years. That of the Companies, on the other hand, was ruthless disregard for the health of their customers.

[834] Based on that, we shall attribute 80% of the liability to the Companies for the compensatory damages suffered by Members in each Class who started to smoke after the smoking dates and continued to smoke after the knowledge dates, with 20% of the liability resting on those Members.

[835] Other than for the Members of both Classes described above, there is no sharing of liability. Members who started to smoke prior to the respective smoking dates are not found to have committed a contributory fault even though they continued to smoke after the knowledge dates. There, the Companies must bear the full burden.

[836] Finally, concerning punitive damages, given the continuing faults of the Companies and the fact that awards of this type are not based on the victim's conduct, these elements do not reduce the Companies' liability. They will bear the full burden.

VII. PRESCRIPTION

[837] The usual prescription under the *Civil Code* for actions to enforce personal rights, as is the case here, is three years: article 2925. However, in June 2009, during the case management phase of these files, the Québec National Assembly passed the Tobacco-Related Damages and Health Care Costs Recovery Act. Section 27 thereof has a direct bearing on the issue of prescription in the present files. It reads:

> **27.** An action, including a class action, to recover tobacco-related health care costs or damages for tobacco-related injury may not be dismissed on the ground that the right of recovery is prescribed, if it is in progress on 19 June 2009 or brought within three years following that date.

[838] The Companies contested the constitutionality of the TRDA by way of a Motion for Declaratory Judgment shortly after its promulgation. Rather than suspending these files until final judgment on that motion, the Court chose to start this trial in March 2012 and, if necessary, allow the parties to make proof and argument with respect both to the possibility that the TRDA applied and to the possibility that it did not and that the general rules of the *Civil Code* applied.

[839] We say "if necessary" because the assumption was that a motion for declaratory judgment would surely proceed through the courts sufficiently quickly for a final judgment on it to be pronounced well before this Court was to render its judgment in these files. That seemingly cautious optimism proved to be ill founded. It took over four years to obtain judgment in first instance on the Motion for Declaratory Judgment. It came down on March 5, 2014, dismissing the Companies' motion.

[840] That judgment has been appealed and it appears that the appeal process will not be completed prior to the signing of the present judgment. Accordingly, although the Court must and will assume that the TRDA does apply, it will analyze the other alternative. Not surprisingly, it is a fairly complicated analysis to perform in both cases.

[841] Before going there, however, the Court will examine four preliminary arguments, one by ITL and three by the Plaintiffs.

[842] ITL argues that the "Plaintiffs have effectively conceded that the claims of Blais Class Members who were diagnosed prior to November 20, 1995 are prescribed"[381], citing paragraphs 2168 and 2169 of the latters' Notes. Those paragraphs could indicate that the Plaintiffs concede prescription, but only if the TRDA does not apply. We have already held that it does.

[843] Consequently, as we conclude later in this chapter, pre-November 20, 1995 claims for moral damages in Blais are not prescribed. Independently, and presumably for reasons related to the availability of relevant statistics, Dr. Siemiatycki based his calculations of the number of eligible Blais Class Members on persons diagnosed with a Disease as of January 1, 1995[382].

[844] In any event, the Plaintiffs' calculation to reduce the 1995 figures to cover only the 41 days after November 20th of that year is not necessary[383]. None of the claims of persons diagnosed in 1995 are prescribed.

[845] Moreover, the current class definition includes anyone diagnosed before March 12, 2012, which, in this context, translates to all persons diagnosed between January 1, 1950 and that date. To restrict this class to coincide with Dr. Siemiatycki's calculations, it would be necessary to amend the class description, something that was neither specifically requested nor entirely the Plaintiffs' decision. In its role as defender of the class's interests, the Court has the final word there[384].

[846] And our hypothetical final word is that, were such an amendment requested, we would not be inclined to accept it.

[847] The 1995 cut-off date seems to be inspired more by a desire to facilitate the calculation of the number of class members, and thus the initial deposit, than by juridical concerns. We understand and accept that, but see no justification there to exclude otherwise eligible Disease victims from claiming compensation.

[848] We recognize that this theoretically could render the initial deposit ultimately insufficient to cover all claims made. That is an acceptable risk, as we explain later in the context of setting that deposit at 80% of the maximum amount of moral damages. As in that case, should more funds be required, the Plaintiffs will have the right to petition the court for additional deposits.

---

381 ITL's Notes, at paragraph 1411.
382 See Exhibit 1426.7.
383 See Plaintiffs' Notes, at paragraph 2169 and footnote 2592.
384 See, for example, *Bouchard* c. *Abitibi-Consolidated Inc.,* REJB 2004-66455 (C.S.Q.)

[849] We shall thus maintain this part of the class definition as it stands and allow any Blais Member who meets those criteria to make a claim.

[850] As for the Plaintiffs' preliminary arguments, they would have the effect that, even if the TRDA is ultimately declared invalid and the general rules of prescription apply, none of the claims in these files would be prescribed. Their points in this regard come under the following headings:

a. the effect of article 2908 C.C.Q. and the definition of the Blais Class;

b. the principle of *fin de non recevoir;*

c. the Companies' continuing and uninterrupted faults over the entire Class Period.

[851] Before examining those points, a quick word on terminology. In this judgment, we use the terms "moral damages" and "compensatory damages" interchangeably. That is because, at the Class level, the only compensatory damages claimed are in the form of moral damages. That would not be the case, however, at the individual level. There, Class Members would necessarily have to be claiming compensatory damages other than moral, since the latter are covered by this judgment.

[852] Therefore, where this judgment speaks of "moral damages", that will apply to all forms of compensatory damages.

VII.A. ARTICLE 2908 C.C.Q. AND THE DEFINITION OF THE BLAIS CLASS

[853] Occupying a privileged status on several points, a class action also benefits from special rules relating to prescription. Those are set out in article 2908 of the *Civil Code*:

Art. 2908. A motion for leave to bring a class action suspends prescription in favour of all the members of the group for whose benefit it is made or, as the case may be, in favour of the group described in the judgment granting the motion. (The Court's emphasis)	**Art. 2908.** La requête pour obtenir l'autorisation d'exercer un recours collectif suspend la prescription en faveur de tous les membres du groupe auquel elle profite ou, le cas échéant, en faveur du groupe que décrit le jugement qui fait droit à la requête. (Le Tribunal souligne)
The suspension lasts until the motion is dismissed or annulled or until the judgment granting the motion is set aside; however, a member requesting to be excluded from the action or who is excluded therefrom by the description of the group made by the judgment on the motion, an interlocutory judgment or the judgment on the action ceases to benefit from the suspension of prescription.	Cette suspension dure tant que la requête n'est pas rejetée, annulée ou que le jugement qui y fait droit n'est pas annulé; par contre, le membre qui demande à être exclu du recours, ou qui en est exclu par la description que fait du groupe le jugement qui autorise le recours, un jugement interlocutoire ou le jugement qui dispose du recours, cesse de profiter de la suspension de la prescription.
In the case of a judgment, however, prescription runs again only when the judgment is no longer susceptible of appeal.	Toutefois, s'il s'agit d'un jugement, la prescription ne recommence à courir qu'au moment où le jugement n'est plus susceptible

d'appel.

[854] The class definition thus plays a critical role in determining prescription in a class action and it was amended for the Blais Class some eight years after the Authorization Judgment[385]. This opens the door to the Companies' argument that claims accruing in the gap between the authorization and three years prior to the Class Amending Judgment, a period that we shall call the "**C Period**"[386], are prescribed. If correct, this would result both under the normal rules and under the TRDA.

[855] ITL captures the essence of the issue in its supplemental Notes on prescription when it queries how an individual, who was diagnosed with lung cancer during the year 2008 and who was not a class member as per the Motion for Authorization filed in 1998, could benefit from the suspension of prescription provided by Article 2908.

[856] The only case submitted that was directly on point is the Superior Court judgment of Gascon, J. (now at the Supreme Court of Canada) in *Marcotte v. Fédération des caisses Desjardins du Québec*.[387] Although that case ultimately made it to the Supreme Court of Canada, its holdings with respect to the effect of article 2908 were challenged neither before the Court of Appeal nor before the country's highest court.

[857] In that file, an identical situation to ours arose when a period corresponding to the C Period occurred as a result of a modification of the class description. The Defendants there, like here, contended that the claims of the new members that accrued during their C Period were prescribed. Gascon J. rejected that argument based on article 2908 and on an analysis of "the group described in the judgment granting the motion", as mentioned in that provision.

[858] That class description in *Marcotte*, like the one for Blais, contained no closing date for class eligibility. The judge there reasoned that, since (a) such an omission should not prejudice the class members and (b) prescription is a ground of defence and, thus, up to the defendant to prove and (c) any doubt should be resolved in favour of the class members and (d) the original class had no closing date, then the "ambiguity" resulting from the absence of a closing date in the original description does not lead to a conclusion that the C Period claims are prescribed.[388]

[859] ITL argues that Gascon J. erred in this holding in that he "ignored the fundamental consideration of legal interest to sue contained in Art. 55 CCP, and failed to consider the Court's holding, undisturbed by the Court of Appeal, in *Billette* and *Riendeau*. This constituted an error."[389]

[860] The cases there cited can be distinguished from *Marcotte* and ours on two grounds. The class descriptions were never amended and both plaintiffs argued that the

---

385 This discussion applies only to the Blais File.

386 This term comes from the diagrams that we later use to analyze the situation in the Blais File. As explained below, the Court prefers to calculate the upper date based on the date of service of the Motion to Amend the Class rather than the Class Amending Judgment that came several months later.

387 2009 QCCS 2743.

388 *Ibidem*, paragraphs 427-434.

389 At paragraph 28 of its supplemental Notes.

closing date should be the date of final judgment, which would have had the effect of depriving potential members of their right to request exclusion from the class.

[861] In *Billette*[390], an amendment was, in fact, requested with the objective of closing the class as of the final judgment. It was refused because it sought to include persons who, at the time of the amendment, had not then financed their automobile through one of the defendants. This is far from the situation in the Blais File, where we allowed an amendment to add a closing date as of the start of the trial in first instance, which was over a year before the motion to amend.[391]

[862] In *Riendeau*[392], where the class definition omitted a closing date, the absence of an amendment seemed to be central to the judge's reasoning, as she stated:

> *[85] Il n'est pas dans l'intérêt de la justice d'exiger le dépôt de nouvelles procédures judiciaires concernant des situations similaires au seul motif que de nouveaux membres ont acquis l'intérêt nécessaire pour poursuivre entre la requête pour autorisation et le jugement d'autorisation ou le jugement du fond. Par ailleurs, il faut respecter les exigences du Code de procédure civile relatives à l'existence d'un intérêt et à la possibilité de s'exclure.*
>
> *[86] La procédure d'amendement s'avère le moyen approprié pour pallier à cette difficulté.*[393]

[863] In line with that, ITL admits that "it is always possible post-authorization to extend the class definition to include members who have gained a legal interest. However, the only way to do so is by amendment." It adds that the normal rules of prescription would apply to the members added by the amendment, with the result that three-year prescription could render some of the claims inadmissible.

[864] That argument overlooks the effect of article 2908. It also overlooks the policy considerations referred to in paragraph 85 of *Riendeau*: it is in the interest of justice that people who subsequently acquire the necessary interest to sue before the final judgment be added to an existing class action rather than being forced to institute separate proceedings. The same view is reflected in the Court of Appeal's judgment in the *Loto* Québec class action where the court emphasized the need to favour access to justice and to avoid the unnecessary multiplication of suits[394].

[865] This said, if prescription applies to disqualify some original class members' claims, why should it not apply to disqualify the otherwise prescribed claims of persons added subsequently?

---

390 *Billette v. Toyota Canada Inc.*, 2007 QCCS 319.

391 This is a similar situation to that in a third case cited by ITL: *Desgagné v. Québec (Ministre de l'Éducation, du Loisir et du Sport)*, 2010 QCCS 4838. There, as in *Riendeau (*2007 QCCS 4603, affirmed 2010 QCCA 366), the plaintiffs in an open-ended class asked the judge to close the class as of the date of judgment on the merits. The judge refused, principally because to do so would be to deprive new members of their right of exclusion – see paragraphs 63 and 64.

392 *Riendeau c. Brault & Martineau inc., Ibidem*.

393 Faced with the plaintiff's inaction on the point, the judge amended the class of her own accord, to close it as of the date of the authorization judgment.

394 *La Société des loteries du Québec c. Brochu*, 2007 QCCA 1392, at paragraph 8. See also: *Marcotte v. Banque de Montréal* 2008 QCCS 6894, at paragraphs 49-53.

[866] The answer is that it does - or does not - depending on the wording of the class definition.

[867] The suspension of prescription created by article 2908 depends on the definition of the group described in the authorizing judgment. If the authorizing judge sees fit not to stipulate a closing date, then the suspension should continue until one is imposed one way or another, presumably concurrently with an opportunity for new members to exclude themselves, as was done in the present files.

[868] We hasten to add that, in light of the policy considerations mentioned above, there will be cases where it will make good sense not to stipulate a closing date initially, recognizing that it will eventually be necessary. A good example of that is found in the Blais File.

[869] There, it must have been obvious in February 2005 that, in light of the long gestation period of the Diseases[395], people would continue to contract them as a result of smoking that occurred during the Class Period. Such persons should be given the opportunity to join the existing class action rather than being forced to institute a new one, or to forego their right to claim damages. Hence, by leaving the class open in Blais, the Authorization Judgment was favouring access to justice and avoiding the unnecessary multiplication of suits.

[870] Article 2908, as interpreted in *Marcotte*, facilitates that process by making it possible to add all such persons at once, without concern for prescription once the original class action is launched. This is the interpretation that we shall apply here.

[871] In this regard, we must consider the original description of the Blais Class as approved in the Authorization Judgment. It specifically includes people who "since the service of the motion" developed a Disease. This is dispositive. Membership in the Class is left open in time, as was the case in *Marcotte v. Desjardins*. In fact, one of the express purposes of the Class Amending Judgment was to create a closing date. Consequently, Blais Class claims arising in the C Period are not prescribed.

VII.B. *FIN DE NON RECEVOIR*

[872] Again relying on the principle of *fin de non recevoir*, the Plaintiffs argue that the defence of prescription should not be available to the Companies in light of the egregious nature of their behaviour over the Class Period. Referring to *Richter & Associés inc. v. Merrill Lynch Canada Inc.*[396], they reason at paragraph 2167 of their Notes that the Companies "are essentially claiming that the plaintiffs should have seen through their (the Companies') lies in time to realize they had a cause of action against them. The (Companies') illegal conduct is directly linked to the benefit they are seeking to invoke", i.e., the benefit of prescription.

[873] Although most of the case law on the question deals with a faulty plaintiff, the Plaintiffs here cite authority to the effect that a *fin de non-recevoir* can be raised against a

---

395 See the report of Dr. Alain Desjardins (Exhibit 1382) at pages 26, 62 and 68.
396 2007 QCCA 124.

defence, including a defence of prescription[397]. While the Court agrees with that position, this does not resolve the issue in the Plaintiffs' favour.

[874] Where one is led by the opposing party to believe falsely that he need not act within a certain delay, a *fin de non recevoir* can protect him against a claim of prescription by the opposing party. That is the situation that Morissette J.A. dealt with in the *Loranger* decision[398] cited by the Plaintiffs. There, the government's behaviour could be seen as an indication that it had agreed not to apply the prescriptive delays otherwise governing the situation. That behaviour related directly to the issue of delays and there was no independent reason for Madam Loranger to believe otherwise.

[875] The Plaintiffs go well beyond that. Their theory would abolish prescription not only where the defendant's behaviour leads a plaintiff to believe that he need not act but, effectively, in every case where the defendant has lied to him, even about non-delay-related questions.

[876] That is a stretch that the Court is not willing to make. For a *fin de non recevoir* to be raised against prescription, a link between a party's improper conduct and the prescription invoked is necessary but, to be sufficient, that conduct must be shown to have been a cause for the failure to act within the required delays. Where there is nothing specific to induce a plaintiff to think that he need not exercise his right of action in a timely manner, there can be no *fin de non recevoir*.

[877] In these files there is nothing in the proof to indicate that the Companies' "disinformation" had any effect whatsoever on the Plaintiffs' decision not to sue earlier. Accordingly, the Court rejects the Plaintiffs' argument based on the principle of *fin de non recevoir*.

VII.C. CONTINUING AND UNINTERRUPTED FAULTS

[878] Where there is continuing (continuous) and uninterrupted damages and/or fault, an argument made only in the Létourneau File, the doctrine and the case law recognize that prescription "starts running each day"[399]. According to Baudouin and Deslauriers, as cited in English by the Supreme Court in the *Ciment St-Laurent* decision, "(continuing damage is) a single injury that persists rather than occurring just once, generally because the fault of the person who causes it is also spread over time. One example is a polluter whose conduct causes the victim an injury that is renewed every day".[400]

---

397 See Jean-Louis BAUDOUIN, *Les obligations*, 7th edition, *op. cit.,* Note 328, at paragraph 730, page 854-855; Didier LLUELLES et Benoît MOORE, *Droit des obligations, op. cit.*, Note 303, at paragraph 2032, page 1160; *Fecteau c. Gareau*, [2003] R.R.A. 124 (rés.), AZ-50158441, J.E. 2003-233 (C.A.); *Loranger c. Québec* (Sous-ministre du Revenu), 2008 QCCA 613, paragraph 50.

398 *Ibidem, Loranger*.

399 *Ciment du Saint-Laurent inc.* v. *Barrette,* [2008] 3 S.C.C. 392, at paragraph 105.

400 *Ibidem*. *Ciment du Saint-Laurent inc.,* citing Jean-Louis BAUDOUIN and Patrice DESLAURIERS, *La Responsabilité Civile*, 7th edition, vol. 1, *op. cit.,* Note 328, paragraph 1-1422, *"Dommage continu – Il s'agit en l'occurrence d'un même préjudice qui, au lieu de se manifester en une seule et même fois, se*

[879] The fact that a fault and a prejudice might be continuing does not automatically make the case subject to a daily restart of prescription, what we shall call "daily prescription". For that to occur, there must not only be a continuing fault, but, more to the point, that fault must cause additional or "new" damage that did not exist previously: in essence.

[880] Seen from a different perspective, daily prescription will occur in cases where the cessation of the fault would result in the cessation of new or additional damages. In such cases, the continuation of the fault on Day 2 causes separate and distinct damages from those caused on Day 1, damages that would not have resulted had the fault ceased on Day 1. It is as if a new cause of action were born on Day 2[401].

[881] On the other hand, where the damage has already been done, in the sense that it is not increased or created anew by the continuing fault, daily prescription is not appropriate. This is logical. Most damages are continuing, in that they are felt every day, but that does not call daily prescription into play. If that were the case, daily prescription would apply in almost all cases.

[882] In the Blais File, the Plaintiffs rightly do not allege that daily prescription applies, since those damages were crystallized at the moment of diagnosis of a Disease. The fact that the fault and the moral damages continued thereafter, literally until death, does not open the door to daily prescription.

[883] Is the situation any different in the Létourneau File? There, the crystallization of the Companies' faults might be harder to pinpoint in time but, in light of the Class definition, it is no less determinable.

[884] By that definition, a Member must be "addicted" to the nicotine in the Companies' cigarettes as of September 30, 1998, meaning that he started to smoke those cigarettes at least four years earlier and, during the 30 days preceding September 30, 1998, he smoked at least one cigarette a day[402]. This formula thus determines the date at which a Member's dependence was established.

[885] By meeting the criteria for dependence, the Létourneau Member is in the same situation as the Blais Member at the moment of diagnosis. Once a person is dependent on nicotine, the damage resulting from that would not cease were the Companies to correct their failure to inform. Accordingly, daily prescription does not apply and the Court rejects Plaintiffs' argument in this regard.

---

perpétue, en général parce que la faute de celui qui le cause est également étalée dans le temps. Ainsi, le pollueur qui, par son comportement, cause un préjudice quotidiennement renouvelé à la victime".

401 In *Ciment St-Laurent*, *ibidem*, where the plaintiffs complained of air pollution caused by the operation of a cement factory near where they lived, there was no fault present, given that the cement plant was operating legally. Nevertheless, that case is still useful as an example of a situation where the damages complained of would have ceased had the defendant ceased its offending behaviour.

402 This is the definition in place before we amend it in the present judgment. The amendment does not affect the present analysis. The third wing of that test, that of still smoking those cigarettes as of February 21, 2005, is not relevant for the analysis of prescription.

[886] Before conducting a detailed review of the effect of prescription, first under and then outside of the TRDA for the Blais File, we shall look first at the Létourneau File in light of the knowledge date there.

VII.D. THE LÉTOURNEAU FILE

[887] Since this action was taken on September 30, 1998, under the normal rules a Member's cause of action must have arisen after September 30, 1995 in order not to be prescribed. This must be viewed in light of the knowledge date there, which is March 1, 1996.

[888] The knowledge date is the earliest date at which a Member is deemed to have known that smoking the Companies' products caused dependence. Such knowledge is an essential factor to instituting a claim. Consequently, no Létourneau cause of action could have arisen before the knowledge date. Since it is after September 30, 1995, it follows that none of the Létourneau claims are prescribed, and this, whether under the normal rules or under the special rules of the TRDA.

[889] We have not forgotten that during oral argument the Plaintiffs admitted that claims for punitive damages arising before September 30, 1995 were prescribed. That, however, does not affect this finding, which is predicated on the fact that the claims did not arise before March 1, 1996.

[890] As for the Blais Class, the knowledge date of January 1, 1980 falls well before the date the action was taken in 1998. As a result, there is a possibility of prescription, a question we examine in the following sections of the present judgment.

VII.E. THE BLAIS FILE UNDER THE TRDA

VII.E.1 MORAL/COMPENSATORY DAMAGES

[891] For this analysis, we have expanded on a diagrammatic format relating to the Blais File first developed by RBH in Appendix F to its Notes and later expanded at the Court's request to cover all cases. For Blais, those diagrams use the following dates, keeping in mind that the beginning of the Class Period is January 1, 1950:

a. November 20, 1995: three years prior to the institution of the action;

b. February 21, 2005: the date of the Authorization Judgment;

c. July 3, 2010: three years prior to the Class Amending Judgment;

d. March 12, 2012: the end date for membership in the Class (the first day of trial);

e. July 3, 2013: the date of the Class Amending Judgment.

[892] For points "c" and "e", the Court prefers the date that the Motion to Amend the Classes was served by the Plaintiffs over the date of the resulting Class Amending Judgment. Prescription is interrupted by the service of an action and the service of that type of motion can be likened to that[403]. It was first served on April 4, 2013, so three

[403] See *Marcotte v. Bank of Montreal* [2008] QCCS 6894, at paragraph 39.

years prior to that is April 4, 2010. These are the dates the Court will use for this analysis, with the C Period becoming the time between February 21, 2005 and April 4, 2010.

[893] Diagram I depicts the prescription scenario for the claim for moral damages in the Blais File under the TRDA.

I - BLAIS FILE: COMPENSATORY DAMAGES - WITH THE TRDA

1950	1995/11/20	2005/02/21	2010/04/04	2012/03/12	2013/04/04
I-A	I-B	I-C	I-D	I-E	
not prescribed	not prescribed	**contested**	not prescribed	outside the Class	

[894] The only contestation relates to the I-C Period. The Companies argue that the TRDA has no application to any of the claims added by the Class Amending Judgment and that the normal rules of prescription apply to those. As such, claims accruing in period I-C would be prescribed because suit was not brought within three years.

[895] Although the TRDA might not cover this period, article 2908 of the Civil Code does. Accordingly, for the reasons set out in Section VII.A above, the Court rejects the contestation and reiterates that claims accruing in the C Period are not prescribed.

[896] As a result, under the TRDA none of the Blais Class claims for moral damages are prescribed.

VII.E.2 PUNITIVE DAMAGES WITH THE TRDA — AND WITHOUT IT

[897] The Companies argue that the TRDA has no impact on punitive damages. The Plaintiffs do not contest that position and neither does the Court. The use of the term "to recover damages" (In French: "*pour la réparation d'un préjudice*") in section 27 indicates that this provision does not encompass punitive damages, since they are not meant to compensate for injury suffered. Hence, claims for those fall outside the ambit of section 27 and will be governed by the normal rules of prescription.

[898] In that light, Diagram II depicts the situation with respect to claims for punitive damages in the Blais File in all cases, i.e., whether or not the TRDA applies.

II - BLAIS FILE: PUNITIVE DAMAGES – IN ALL CASES

1950	1995/11/20	2005/02/21	2010/04/04	2012/03/12	2013/04/04
II-A	II-B	II-C	II-D	II-E	
prescribed	not prescribed	**contested**	not prescribed	outside the claim	

[899] The only contestation relates to the C Period. The parties' arguments with respect to that period are the same now as under Diagram I for moral damages and the Court's ruling is also the same. Applying article 2908, we rule that the claims in period III-C are not prescribed, irrespective of the application of the TRDA.

[900] Consequently, whether or not the TRDA applies, Blais claims for punitive damages in period II-A are prescribed, whereas those arising in periods II-B, II-C and II-D are not.

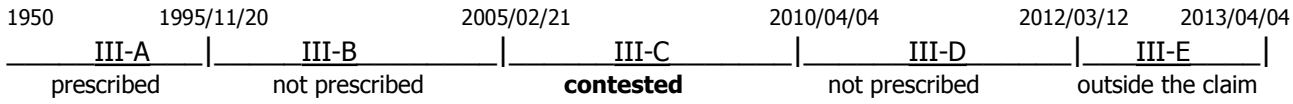
[901] To sum up, under the TRDA, the only claims that are prescribed for the Blais Class are those for punitive damages that accrued prior to November 20, 1995.

[902] Since the Court must assume that the TRDA does apply for the purposes of this judgment, to the extent that prescription is a factor, it will follow the holdings shown in the above diagrams and later clarified for the C Period. Nevertheless, we shall briefly examine the case where the TRDA would ultimately be ruled invalid.

VII.F. IF THE TRDA DOES NOT APPLY

[903] Diagram III depicts the prescription scenario for the claim for moral damages in the Blais File under the normal rules, i.e., those set out in the Civil Code.

III - BLAIS FILE: COMPENSATORY DAMAGES - WITHOUT THE TRDA



[904] This is the same situation as in case II above for punitive damages. For the reasons described there, the Court would follow that ruling and declare the claims accruing in the III-C period not to be prescribed. Consequently, the only Blais claims for moral damages that would be prescribed are those accruing in period III-A.

[905] In summary, under the ordinary rules, the Blais claims that are prescribed are all those, i.e., for both compensatory and punitive damages, accruing prior to November 20, 1995.

VII.G. SUMMARY OF THE EFFECTS OF PRESCRIPTION ON SHARED LIABILITY

[906] To this point we have made a number of rulings, many of which influence each other. It will be useful to attempt to portray the result of all of these in practical and manageable terms. We base this recapitulation on the rules of prescription under the TRDA.

[907] There is no prescription of moral damages in either file. With respect to their safety-defect fault under article 1468, the Companies have a complete defence against the claims for moral damages of Members who started to smoke after the smoking date in each file. This has no practical effect, since the potential moral damages under that fault are duplicated under the others. Nonetheless, the Companies' liability is reduced to 80 percent with respect to Members who started to smoke after the smoking date in each file.

[908] For punitive damages in Blais, claims accruing prior to November 20, 1995 are prescribed. This affects only the Members diagnosed with a Disease before that date. The claims of those diagnosed after that are not affected by the date on which they started to smoke. The 80% attribution to the Companies for compensatory damages does not apply to punitive damages.

[909] No Létourneau claim is prescribed but there will be an apportionment of liability for moral damages only as of the date on which the Member started to smoke.

[910] Table 910 summarizes these results:

TABLE 910

MORAL DAMAGES	LIABILITY
Blais Member started smoking before January 1, 1976	Companies – 100%
Blais Member started smoking as of January 1, 1976	Companies – 80% // Member 20%
Létourneau Member started smoking before March 1, 1992	Companies – 100%
Létourneau Member started smoking as of March 1, 1992	Companies – 80% // Member 20%
PUNITIVE DAMAGES	LIABILITY
Blais claim accruing before November 20, 1995	Prescribed
Létourneau claim accruing before September 30, 1995	Companies – 100%
Blais claim accruing as of November 20, 1995	Companies – 100%
Létourneau claim as of September 30, 1995	Companies – 100%

VIII. MORAL DAMAGES - QUANTUM

[911] In a class action, it is necessary, but not sufficient, to prove the three components of civil liability, fault, damages and causality. In addition, collective recovery must be possible, as stipulated in article 1031 of the Code of Civil Procedure:

> **1031.** The court orders collective recovery if the evidence produced enables the establishment with sufficient accuracy of the total amount of the claims of the members; it then determines the amount owed by the debtor even if the identity of each of the members or the exact amount of their claims is not established.

[912] JTM explains it this way in its Notes:

> **2389.** In order to obtain collective recovery, Article 1031 requires that Plaintiffs satisfy the Court that the evidence establishes the total amount of the claims of the members of the class with "*sufficient accuracy*". In order to establish the total *amount* of the proven claims of members with sufficient accuracy, the court must of necessity know the total *number* of members of the class for whom fault, prejudice, and causation have been proven as well as the damages of each. Sufficient accuracy in both the number of members of the class for whom such proof has been given and the amount of their claims is the *sine qua non* of collective recovery. (Emphasis in the original)

[913] For its part, ITL argues at paragraph 1143 of its Notes that the Plaintiffs have failed to make acceptable proof of the elements required under article 1031, i.e.:

> a. Class size (particularly with respect to the Létourneau proceedings);

b. The nature and degree of the Class Members' "individual injuries" from which a total amount of recovery can be accurately determined;

c. The presence of Class-wide injuries which are causally linked to Defendants' faults and which are shared by each and every member of the Class (even if they vary as to degree); and

d. The existence of an average amount of recovery that is meaningful to a majority of Class Members, taking into account their individual circumstances and the defences that are particular to each individual claim.

[914] Some of these points have already been rejected, but others merit review now, especially in the Létourneau File.

[915] Earlier, we found fault, damages and causation in both files. What remains for purposes of collective recovery is to estimate the amount of the damages for the Létourneau Class and for each subclass in Blais, and to determine if this estimate can be done with "sufficient accuracy". For that estimate, we shall have to find the number of persons in each group and multiply that by the moral damages we are willing to grant to them.

[916] Moral damages were incurred to differing degrees in both files, as reflected in the different amounts claimed: $100,000 for Blais Class Members with lung or throat cancer and $30,000 for those with emphysema versus a universal amount of $5,000 in Létourneau.

[917] The Companies oppose these claims on several grounds, one of which applies to all categories of Class Members. Their experts uniformly opined that epidemiological evidence was not appropriate. They argue that, before any person can be diagnosed with one of the Diseases or with tobacco dependence, it is essential that an individual medical evaluation be done. The Companies argue that this step is necessary even on a class-wide level.

[918] In Blais, a medical evaluation will have been done for each Member. Since eligibility is conditional upon proving that he has been diagnosed medically with one of the Diseases, each Member will necessarily have undergone a medical evaluation and will have medical records supporting his eligibility. The Companies' argument in this regard is thus not relevant to the Blais Class.

[919] The situation is quite different for Létourneau, since a Member's tobacco dependence will generally not be documented. Nevertheless, earlier in this judgment we established measurable criteria for determining tobacco dependence in a person:

a. Having started to smoke before September 30, 1994 and since that date having smoked principally cigarettes made by the defendants; and

b. Between September 1 and September 30, 1998, having smoked on a daily basis an average of at least 15 cigarettes made by the defendants; and

c. On February 21, 2005, or until death if it occurred before that date, continuing to smoke on a daily basis an average of at least 15 cigarettes made by the defendants.[404]

[920] To be accepted into the Létourneau Class, an individual will have the burden of proving all three elements. The Court considers the practical difficulties of making that proof later in the present judgment, while at the same time examining whether there is adequate proof of "the existence of an average amount of recovery that is meaningful to a majority of Class Members, taking into account their individual circumstances", as ITL insists.

[921] This said, a new issue arises around establishing the total amount of the claim as a result of our introduction of the smoking dates. A smoking date adjustment will not influence punitive damages in either file. As well, since we eventually refuse collective recovery of moral damages in Létourneau, the smoking-date question has no practical effect in that file. In Blais, however, it does play a role.

[922] Since the smoking date there is January 1, 1976, at least half, and likely more, of eligible Blais Members will have the right to claim only 80% of their moral damages from the Companies. At first glance, this impedes the Court from establishing with sufficient accuracy the total amount of the claims, since that cannot be determined until the number of Members in each smoking period is determined.

[923] It poses a problem as well for the assessment of punitive damages. Article 1621 of the Civil Code requires us, when doing that, to consider the amount of other damages for which the debtor is already liable. If we cannot ascertain the extent of compensatory damages, we will not be able to assess punitive damages in accordance with the law.

[924] Stepping back a bit, these problems seem to have fairly simple practical solutions.

[925] On the one hand, we could simply divide the Blais group in proportion to the number of years of the Class Period at 100% liability for the Companies versus 80% liability. That would be sufficiently accurate in our view.

[926] On the other, we could adopt an approach that is even simpler, and more favourable to the Companies.

[927] In nearly every class action, especially ones with a large number of class members, only a small portion of the eligible members actually make claims. Thus, the remaining balance, or "*reliquat*", could often be greater than the amount actually paid out. Hence, it is not unreasonable to proceed on the basis that the full amount of the initial deposits might not be claimed.

[928] We thus feel comfortable in ordering the Companies initially to deposit only 80% of the estimated total compensatory damages, i.e., before any reduction based on the smoking dates. If that proves insufficient to cover all claims eventually made, it will be possible to order additional deposits later, unless something unforeseen occurs and all

---

[404] See section VI.D of the present judgment.

three Companies disappear. The Court is willing to assume that this will not happen. We shall thus reserve the Plaintiffs' rights with respect to such additional deposits.

[929] Admittedly, this will likely result in a smaller balance or *reliquat* at the end of the day, but our first duty is to provide compensation to wronged plaintiffs, not to maximize the *reliquat*. We would not be fulfilling that role were we to allow this type of technical obstacle to thwart proceeding to judgment now.

[930] Finally, let us deal with the Plaintiffs' argument that the condemnation for moral damages should be made on a solidary (joint and several) basis among the Companies.

[931] Article 1526 of the Civil Code states that reparation for injury caused through the fault of two or more persons is solidary where the obligation is extracontractual. Article 1480 explains some of the other sources of solidary liability. It reads as follows:

> **Art. 1480.** Where several persons have jointly taken part in a wrongful act which has resulted in injury or have committed separate faults each of which may have caused the injury, and where it is impossible to determine, in either case, which of them actually caused it, they are solidarily liable for reparation thereof.

[932] The Companies contest the claim for solidary liability. In its Notes, RBH argues as follows:

> **1325.** Indeed, in order to apply Article 1480 CCQ on a class-wide basis in these Actions, this Court would have to: (a) rule in favour of Plaintiffs' conspiracy claims (i.e. rule that Defendants jointly participated in the same wrongful act(s) which resulted in injury to all class members), OR (b) determine that some wrongful conduct by each Defendant caused each class member's injuries (i.e. every single class member smoked cigarettes manufactured by all three of these Defendants), AND (c) conclude that in either case, it is impossible to determine which of these Defendants caused the injury (which could only be the case if each Defendant engaged in conduct which, in and of itself, would have been sufficient to cause injury to each and every class member). (Emphasis in the original)

[933] They add that the Plaintiffs have failed to provide the necessary proof of these elements, i.e., that the Companies conspired together or that each and every Class Member smoked cigarettes made by all three Companies.

[934] We disagree.

[935] The conditions under article 1480 have been met in both Classes. As discussed in Section II.F hereof, the collusion among the Companies represents "a wrongful act which has resulted in injury". As well, given the number of Members and the fact that the relevant proof may be and was made by way of epidemiological analysis, it is a practical impossibility to determine which Company caused the injury to which Members of either Class or subclass.

[936] A second reason to rule in this manner is found in article 1526[405]. All parties agree that we are in the domain of extracontractual liability. Given that we hold that the

---

[405] **1526.** The obligation to make reparation for injury caused to another through the fault of two or more persons is solidary where the obligation is extra-contractual.

Companies colluded to "disinform" the Members, this resulted in injury caused through the fault of two or more persons, as foreseen in that provision.

[937] There could also be a third reason in support of this position: section 22 of the TRDA. In essence, it edicts that, if it is not possible to determine which defendant caused the damage, "the court may find each of those defendants liable for health care costs incurred, in proportion to its share of liability for the risk". Section 23 of the TRDA provides guidelines for that apportionment.

[938] These provisions apply equally to class actions for damage claims (TRDA, section 25). As well, given the circumstances in these files, the damage award for each member cannot for practical reasons be tied to a specific co-defendant. The members must be allowed to collect from a common pool of funds resulting from the deposits. This type of class action could not function otherwise.

[939] Accordingly, to the extent that moral damages are awarded, solidary liability applies to them in both files.

VIII.A. THE LETOURNEAU FILE[406]

[940] This Class claims a universal amount of $5,000 for the following moral damages:

a. Increased risk of contracting smoking-related diseases;

b. Reduced life expectancy;

c. Loss of self esteem resulting from her inability to break her dependence;

d. Humiliation resulting from her failures in her attempts to quit smoking;

e. Social reprobation;

f. The need to purchase a costly but toxic product.

[941] The Companies do not attack so much the Plaintiffs' characterization of the moral damages suffered by a dependent smoker as they do the lack of evidence with respect to Létourneau Class Members' having suffered such damages. They also complain that, at the stage of final argument, the Plaintiffs attempted to change the types of moral damages claimed from those set out in the original action.

[942] Earlier, the Court held that it cannot rely on the expert reports of Professor Davies and Dr. Bourget[407]. Consequently, the only proof of the effect that tobacco dependence has on individuals is provided by Dr. Negrete.

[943] The Court disagrees with the Companies' assertions that the Plaintiffs have adduced no evidence describing any of the alleged injuries for which moral damages are claimed. We previously saw that, in his second report (Exhibit 1470.2), Dr. Negrete mentions the increased risk of "morbidité" and premature death[408] and a lower quality of

---

406 In light of our decision on the Létourneau Class's claims for moral damages, we shall deal with this class first.

407 See section II.C.1 in the ITL chapter of this judgment.

408 *Face à cette évidence, on doit conclure que le risque accru de morbidité et mort prématurée constitue le plus grave dommage subi par les personnes avec dépendance au tabac*: at page 2

life, both with respect to physical and social aspects.[409] He opined that the mere fact of being dependent on tobacco is, itself, the principal burden caused by smoking, since dependence implies a loss of freedom of action and an existence chained to the need to smoke – even when one would prefer not to[410].

[944] Thus, based on Dr. Negrete's second report, we hold that dependent smokers can suffer the following moral damages:

- The risk of a premature death is the most serious damage suffered by a person who is dependent on tobacco (Exhibit 1470.2, page 2);
- The average indicator of quality of life is lower for smokers than for ex-smokers, especially with respect to mental health, emotional balance, social functionality and general vitality (page 2);
- There is a direct correlation between the gravity of the tobacco dependence and a lower perception of personal well-being (page 2);
- Dependence on tobacco limits a person's freedom of action, making him a slave to a habit that permeates his daily activities and restricts his freedom of choice and of decision (pages 2-3);
- When deprived of nicotine, a dependent person suffers withdrawal symptoms, such as irritability, impatience, bad moods, anxiety, loss of concentration, interpersonal difficulties, insomnia, increased appetite and an overwhelming desire to smoke (page 3).

[945] What is more difficult to discern from the evidence, however, is the extent to which all dependent smokers suffer all these damages and to what degree.[411]

[946] Based on the first report of Dr. Negrete, the Plaintiffs estimate the number of Létourneau Class Members at 1,200,000 people in the first half of 2005 (Exhibit 1470.1, page 21). By the end of the trial, that number had been reduced to about 918,000[412]. In such a large group, the Companies see wide variation in the nature and degree of moral damages that will be incurred. The Court does, as well.

---

409 *Une moindre qualité de vie - tant du point de vue des limitations physiques que des perturbations dans les fonctions psychique et sociale - doit donc être considérée comme un des inconvénients majeurs associes avec la dépendance tabagique*: at page 2.

410 *La personne qui développe une dépendance a la nicotine, même sans être atteinte d'aucune complication physique, subit l'énorme fardeau d'être devenue l'esclave d'une habitude psychotoxique qui régit son comportement quotidien et donne forme à son style de vie. L' état de dépendance est, en soi même, le trouble principal causé par le tabagisme.*
Cette dépendance implique une perte de liberté d'action, un vivre enchainé au besoin de consommer du tabac, même quand on préférerait ne pas fumer: at pages 2-3.

411 The Court of Appeal judgment in *Syndicat des Cols Bleus Regroupés de Montréal (SCFP, section locale 301) v. Boris Coll*, 2009 QCCA 708, points out the difficulty of analyzing moral damages across a large number of class members, in that case, caused by a time delay resulting from an illegal strike: see paragraphs 90 and following, especially paragraphs 99, 103 and 105.

412 Exhibit 1733.5. It is possible that the amendment to the Létourneau Class description ordered in the present judgment could affect this number, although the Court is not of that opinion. This, in any event, becomes moot in light of our decision to dismiss the claim for compensatory damages in Létourneau and to refuse to proceed with distribution of punitive damages to the individual Members.

[947] As witness to that, the proof indicates that the level of difficulty experienced by smokers attempting to quit varies greatly, with some people succeeding with little or no difficulty and others repeatedly failing. Spread over more than a million people, that will affect the intensity, and even the existence, of several of the potential damages identified by Dr. Negrete.

[948] In its Notes, RBH pounds home the point that "Plaintiffs have not given the Court sufficient evidence from which it could conclude that all class members have suffered substantially similar injuries, such that it could award moral damages on a collective basis".[413] In other words, as they say later, there is no evidence that "all class members are similarly situated such that the court could select a common dollar amount to fairly compensate every class member"[414].

[949] The Court agrees to a large extent. It also agrees in principle with the Companies' point that a grant of moral damages on a collective level would require proof that all Class Members actually wanted to quit and suffered humiliation as a result of not being able to do so. The record is devoid of proof of that, as well. This is a critical element and neither can it be assumed nor can the Court see any basis on which to draw a presumption in that respect.[415]

[950] Despite the presence of fault, damages and causality, the Court must nevertheless conclude that the Létourneau Plaintiffs fail to meet the conditions of article 1031 for collective recovery of compensatory damages. Notwithstanding our railing in a later section against the overly rigid application of rules tending to frustrate the class action process, we see no alternative. The inevitable and significant differences among the hundreds of thousands of Létourneau Class Members with respect to the nature and degree of the moral damages claimed make it impossible to establish with sufficient accuracy the total amount of the claims of the Class. That part of the Létourneau action must be dismissed.

[951] There is an additional obstacle. Even if we were able to award compensatory damages to the Létourneau Class, it would be "impossible or too expensive" to administer the distribution of an amount to each of the members[416]. Proof of dependence would almost always be subjective, with little or no independent substantiation available, and, therefore, open to potentially rampant abuse. Moreover, the relatively modest amount that could be awarded to any individual Member[417] would rival the cost of administering the distribution process for that person. It would simply not make sense to undertake such an exercise.

---

413 At paragraph 1207.

414 At paragraph 1211.

415 As discussed in the case of *Infineon Technologies AG v. Option consommateurs*, [2013] SCR 600, at paragraph 131, some types of damages are more easily assessed class wide, than others. Moral damages for tobacco dependence fall more in the latter category, as were those for defamation in the case of *Bou Malhab*, [2011] 1 SCR 214.

416 Article 1034 CCP.

417 Were we to grant moral damages in Létourneau, we would have opted for an amount in the vicinity of $2,000 per Member.

[952] Article 1034 of the Code of Civil Procedure grants the Court the discretion to refuse to proceed with the distribution of an amount to each of the members in such circumstances and that is what we would have done in Létourneau had we been able to order collective recovery.

[953] For punitive damages, since they are not tied to the effect on the victim, the wide diversity among the Létourneau Members' situations does not pose a problem. This is a start, but it does not alleviate the concern raised under article 1034.

[954] For the same reasons mentioned with respect to compensatory damages, we must refuse to proceed with the distribution of punitive damages to the Létourneau Members. That does not mean, however, that we cannot condemn the Companies to such damages on a collective basis. We shall do so and, as foreseen in that article, shall provide for the distribution of that amount after collocating the law costs and the fees of the representative's attorney. We look into the distribution question in a later section.

[955] Dealing with what has now become a moot issue, at least with respect to moral damages, we would have declared Mme. Létourneau eligible to collect damages on the same basis as any other eligible Member of the Létourneau Class. The Code of Civil Procedure makes it clear that the judgment in Small Claims Court refusing her action for reimbursement of certain expenses related to her attempts to break her tobacco dependence has no relevance to the present case[418].

[956] Finally, where the Court rejects a claim for which fault and damages have been proven, it would normally proffer its best estimate of the amount it would have granted in the event of a different opinion in appeal. Here, we are unable to do that. To attempt to put a number to the moral damages actually suffered by the Létourneau Class would be pure conjecture on our part.

VIII.B THE BLAIS FILE

[957] We shall follow Dr. Siemiatycki's segregation of the Diseases in his work and, thus, analyze the case of each Disease subclass separately.

[958] Before going there, let us say a word about the Plaintiffs' argument in favour of using an "average amount" of moral damages within a class or subclass. In their Notes, they submit:

> **2039.** In a class action, the quantum of damages can be evaluated based upon a presumption of fact, itself based upon an average, as long as it does not increase the debtor's total liability.[419]

---

418 See article 985 CCP.

419 The following is the Plaintiffs' footnote #2493, which appears at the end of their paragraph 2039: *St. Lawrence Cement Inc. v. Barrette*, 2008 C.S.C. 64, at paras 115-116, referring to *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211; Denis FERLAND, Benoît EMERY et Kathleen DELANEY-BEAUSOLEIL, « *Le recours collectif – Le jugement* (art. 1027 à 1044 C.p.c.) » in *Précis de procédure civile du Québec,* Volume 2, 4e édition, (Cowansville : Éditions Yvon Blais, 2003) at para 133; *Conseil pour la protection des malades* c. *Fédération des médecins spécialistes du Québec*, EYB 2010-183460 (C.S), EYB 2010-183460, at para 115 reversed in part, but not on the question of evaluating moral injury by EYB 2014-234271 (C.A.), at paras 114-115.

> **2062.** As established by case-law, injuries of this nature are impossible to quantify in dollar amounts. Calculating moral damages thus remains an arbitrary exercise. The damages claimed, though insufficient in certain cases, represent an average amount accounting for the variations in symptoms and consequences of the disease on each class member.

[959] We agree with much of what is said there, but not all.

[960] Below, we opt to apply a "uniform amount" of moral damages across the Blais subclasses. This is not the same as an average, which evokes a mathematical calculation. We perform no such calculation in arriving at our uniform amount. It simply represents our best estimate of the typical moral damages that a Blais subclass Member suffered as a result of contracting the Disease in question.

[961] Let us now examine the personal claim of Mr. Blais.

[962] In Dr. Desjardins' examination of him, it is indicated that he smoked only JTM products[420]. Accordingly, the other Companies argue that his claim against them should be rejected. Since moral damages are awarded on a solidary basis, that argument fails. For punitive damages, however *de minimis* the amount, it has merit, but no effect. The amounts deposited as punitive damages for each subclass must be pooled for practical reasons, so it is not possible to isolate payments on a Company-by-Company basis.

[963] There is also the fact that Dr. Barsky identifies a number of mitigating factors with respect to the causes of Mr. Blais's lung cancer and emphysema. He notes that the type of emphysema could have been caused by other things than smoking and that there were several occupational factors besides smoking that could have led to his lung cancer[421].

[964] Nevertheless, although stating that "it cannot be said that Mr. Blais would not have developed lung cancer in the absence of cigarette smoking", he opines that "considering the magnitude of Mr. Blais' exposure to cigarette smoking, I cannot exclude it as having played a role in his lung cancer".[422] This does not contradict the opinions of Dr. Desjardins that the most probable cause of the Diseases in Mr. Blais was smoking[423]. We accept that opinion.

[965] Mr. Blais's estate will be eligible to collect damages on the same basis as any other eligible Member of the Blais subclasses.

VIII.B.1 LUNG CANCER

[966] Dr. Barsky contested Dr. Siemiatycki's methods and results. He opined that there were four different histological types of lung cancer tumours having varying degrees of association, and therefore relative risk, with smoking: small cell carcinoma, squamous cell carcinoma, large cell undifferentiated carcinoma and adenocarcinoma, which can be further subdivided into bronchioloalveolar lung cancer (BAC), and traditional adenocarcinoma (Exhibit 40504, page 5).

---

420 Export A and Peter Jackson cigarettes: Exhibit 1382, at page 89.
421 Exhibit 40504, at page 32.
422 Exhibit 40504, at page 32.
423 Exhibit 1382, at pages 94 and 95.

[967] He cites studies to the effect that:

- small cell carcinoma bears a strong relationship with smoking;
- of the non small cell types, squamous cell carcinoma bears a strong association; large cell undifferentiated bears an inconsistent association, and adenocarcinoma, a less well defined and more complicated association;
- lymphoma, sarcoma, mucoepidermoid carcinoma, carcinoid, atypical carcinoid, bronchioloalveolar lung cancers have an uncertain association with smoking, while other types such as adenocarcinoma, large cell undifferentiated carcinoma, and adenosquamous carcinoma have weak to modest associations. Still other cell types, including squamous cell carcinomas and small cell carcinoma have strong to very strong associations;
- some other types of lung cancer appear not to be associated with smoking at all or do not have a consistent association with smoking. (Exhibit 40504, pages 6-7 and 19-20; references omitted)

[968] Dr. Barsky's evidence on these points, although not contradicted, does not take the Court very far. It is fine to say that certain cancers have "an uncertain association" or "weak to modest associations", but he does not specify what that means. Nor does he specify the percent of all lung cancers that each type of cancer represents. Nor, of course, does he do the calculations that logically are required so as to correct the figures advanced by Dr. Siemiatycki.

[969] The red flags he wishes to raise are of no use to the Court in the absence of presenting a way around those obstacles, something the Companies' experts, alas, never do. His testimony does not shake our confidence as to the accuracy of Dr. Siemiatycki's results.

[970] He also points out that there is "some evidence for the involvement of human papillomavirus in lung cancers"[424], estimating it to be a factor in about two to five percent of lung cancers but higher in oropharyngeal cancers[425]. The Court does not reject that opinion, but does not see that it has much effect on the acceptability of Dr. Siemiatycki's work. Smoking need not be the only cause of a Disease in order for it to be considered as a cause.

VIII.B.1.a THE SIZE OF THE SUBCLASS

[971] As for the size of the lung-cancer subclass, we have earlier indicated our confidence in Dr. Siemiatycki's work, and this includes his calculations with respect to these figures. As noted in section VI.C.6, Dr. Siemiatycki's original probability of causation figures for lung cancer were in accord with those published by the US National Cancer Institute, and several of the Companies' experts agreed that they were within a reasonable range. This supports our confidence in the quality of his work.

---

424 Exhibit 40504, at pdf 22.
425 Transcript of February 18, 2014, at pages 47 and 108.

[972] In Table A.1 of Exhibit 1426.7[426], he sets out the probability of causation (PC) by smoking of each of the Diseases for both males and females at four different critical amounts (CA). At the CA that we have chosen, 12 pack years, the PC averaged for both sexes is remarkably similar among the Diseases, about 71%. We note, however, that Dr. Siemiatycki does not use the average for each Disease but does his calculation using the CA for each gender within each Disease.

[973] Anecdotally, his figure of 81% for male lung cancer victims goes well with the "85 Percent Formula" cited by Mr. Mercier, ITL's former president: 85% of lung cancers occur in smokers, but 85% of smokers do not have lung cancer[427].

[974] In his updated Tables D1.1, D1.2 and D1.3[428], Dr. Siemiatycki applies the CA to the total number of cases for the period claimed (1995-2011[429]) to establish the number of victims by gender of each of the Diseases. This is part of the equation for computing the number of Members in the Blais subclasses for the purpose of determining the size of the deposit to cover damages. In the absence of alternative estimates by the Companies, the Court accepts Dr. Siemiatycki's figures.

[975] We do, however, recognize that it is possible that under Dr. Siemiatycki's method some people might be included in the classes, and thus compensated, incorrectly. But should that be a concern with classes of the size here?

[976] The courts should not allow the spirit and the mission of the class action to be thwarted by an impossible pursuit of perfection. While respecting the general rules of the law, the courts must find reasonable ways to avoid allowing culpable defendants to frustrate the class action's purpose by insisting on an overly rigid application of traditional rules. This is particularly so where the fault, the damages and the causal link are proven, as they are here.

[977] In the instant case, the Companies will not be penalized by an adjustment of the size of the classes in the manner proposed. By assessing "uniform amounts" within the subclasses of Members in Blais, the total amount of damages will be "sufficiently accurate" after such an adjustment. The primary objective of civil liability is to compensate reasonably for damages incurred. This process satisfies that and also ensures that the Companies are paying no more than a fair amount.

[978] The lung-cancer subclass in Blais has 82,271 Members.

VIII.B.1.b THE AMOUNT OF DAMAGES FOR THE SUBCLASS

[979] The evidence of moral damages for the lung-cancer subclass is found in the report of Dr. Alain Desjardins (Exhibit 1382), recognized by the Court as an expert chest and lung clinician. He outlines the treatment options for the three types of cancer covered by the Class description in the Blais File, those options being surgery, radiation therapy, chemotherapy and long-term pharmacological treatment. The treatments are relevant

---

426 This is an update to Table A in his original report using 12 pack years as the Critical Amount.

427 Transcript of April 18, 2012, at pages 303 and following.

428 Exhibit 1426.7. For lung cancer with a Critical Amount of 12 pack years, incident cases are: males 54,375, females 27,896, TOTAL = 82,271.

429 The period actually goes until March 12, 2012.

because, in addition to the damages caused by the cancer itself, the secondary effects of the treatments cause additional significant hardship that can last for years.

[980] Given that the same treatments are prescribed for each of the three cancers, the Court will assume that the same secondary effects from the treatments apply to each Disease. In addition, there will be other effects related to the location of the tumours in the body.

[981] In his report at pages 75 through 78, Dr. Desjardins describes the temporary secondary effects of radiation therapy and chemotherapy in the context of lung cancer as follows:

- headaches, nausea, vomiting, fatigue, sores in the mouth, diarrhoea, deafness;
- inflammation of the esophagus;
- skin burns;
- stiffness and joint pain;
- radical pneumonitis causing fever, coughing and los of breath;
- loss of body hair;
- swelling of the lower members;
- increased susceptibility to infection.

[982] As for lung cancer itself, at page 80 of his report he notes that a person living with cancer is affected both physically and psychologically, as well as spiritually, with certain patients experiencing significant stress as a result of being diagnosed with lung cancer. He goes on to cite the following specific affects:

- rapid fluctuations in the state of physical health;
- fatigue, lack of energy and weakness;
- loss of appetite;
- pain;
- loss of breath;
- paralysis in one or more members;
- depression.

[983] The Companies did not challenge the Plaintiffs' characterization of the moral damages, nor the amount claimed for each Member in the most serious cases of any of the Diseases. The contestation in this area was directed more at the Plaintiffs' use of one single amount for such damages across the subclasses for each Disease.

[984] The evidence of Drs. Desjardins and Guertin convinces us that few cases of lung and throat cancer fall below very serious. As well, the amount proposed is not excessive in the context of life-threatening, and life-ruining, illnesses. Accordingly, we accept a

uniform figure of $100,000 for individual moral damages in the lung cancer and throat cancer subclasses[430].

[985] For emphysema, the Plaintiffs did admit that the degree to which a patient's life is affected depends on the degree of severity of the case. We deal with this issue below, in the section on emphysema.

[986] After reducing the number of incidents identified by Dr. Siemiatycki between 1995 and 2011[431] by 12% to account for immigration, and applying a uniform figure of $100,000 for individual moral damages in the lung cancer subclass, the total moral damages for it are calculated as follows:

Members[432]	-12% for immigration	Total moral damages	80% of total
82,271	72,398 x $100,000 =	$7,239,800,000	$5,791,840,000

VIII.B.2 CANCER OF THE LARYNX, THE OROPHARYNX OR THE HYPOPHARYNX

VIII.B.2.a THE SIZE OF THE SUBCLASS

[987] Dr. Siemiatycki analyzes this subgroup in two parts: cancer of the larynx and "throat cancer"[433]. He specifies at page 24 of his report that "For our purpose we have taken as the definition of throat cancer, those that fall into ICD categories 146 and 148, cancers of the oropharynx and hypopharynx." The combination of the two corresponds to the subclass definition.

[988] Tables D1.2 and D1.3 show that for the period 1995 through 2011 there were 5,369 smokers in Québec with cancer of the larynx and 2,862 with cancer of the oropharynx and hypopharynx caused by tobacco smoke. The throat-cancer subclass in Blais thus has 8,231 Members.

VIII.B.2.b THE AMOUNT OF DAMAGES FOR THE SUBCLASS

[989] For Blais Class Members with cancer of the larynx or the pharynx, the evidence of moral damages is found in the report of Dr. Louis Guertin, an expert on chemistry and tobacco toxicology[434]. It is not the Court's practice to reproduce lengthy extracts of documents in a judgment, however, it is appropriate to make an exception for the following paragraphs of Dr. Guertin's report[435]:

> *… En effet, le site d'origine de ces cancers, à la jonction des tractus respiratoire et digestif, fait en sorte que les patients présentent rapidement, dès les premiers*

---

430 The theoretical maximum allowed for moral damages was set at $100,000 in 1981 by the Supreme Court. The actualized value of that is $356,499 as of January 1, 2012: Plaintiffs' Notes, at paragraph 2042.

431 Dr. Siemiatycki updated his figures to the end of 2011 for 12 pack years in Exhibit 1426.7.

432 Siemiatycki Table D1.1 in Exhibit 1426.7.

433 Tables D1.2 and D1.3 of Exhibit 1426.7.

434 Dr. Guertin analyzes cancers he calls "CE des VADS", which can be loosely translated as: "epidermoidal carcinoma of the upper aero-digestive paths", and includes cancers of the larynx, oropharynx, hypopharynx and the oral cavity. In our decision on the amendment of the class descriptions, we excluded cancer of the oral cavity from consideration in this file.

435 Exhibit 1387.

> *symptômes de leur cancer, une atteinte de leur qualité de vie : atteinte de la parole, troubles d'alimentation et difficultés respiratoires. Les premiers symptômes peuvent aller d'un changement de la voix, d'une douleur à l'oreille ou à la gorge ou d'une masse cervicale jusqu'à une obstruction des voix respiratoires ou une incapacité à avaler toute nourriture si le diagnostic n'est pas précoce.*
>
> *Lorsque le patient consulte, il devra subir une biopsie et anesthésie générale pour confirmer la présence de la tumeur et son extension. Il devra aussi se présenter à de nombreux rendez-vous pour des consultations médicales ou des tests diagnostiques. Comme pour tous les autres cancers, cette période d'investigation vient ajouter le stress du diagnostic de cancer et l'incertitude de l'étendue de la maladie aux symptômes que le patient présente.*
>
> *Une fois le bilan terminé si la tumeur est trop avancée pour être traitée ou si la patient est incapable, secondairement à son état de santé général, de supporter un traitement à visée curative, le patient sera orienté en soins palliatifs pour des soins de confort. Il décédera habituellement en dedans de six mois mais aura auparavant présenté une détérioration sévère de sa qualité de vie. Graduellement il deviendra incapable d'avaler toute nourriture et parfois même sa salive. On devra lui installer un tube pour l'alimenter soit par son nez ou directement dans l'estomac à travers sa paroi abdominal. Sa respiration sera progressivement plus laborieuse, ce qui entraînera fréquemment la nécessité d'une trachéostomie (trou dans le cou pour respirer). Le patient ne pourra alors plus parler ce qui rendra la communication difficile avec les gens qui l'entourent. La trachéostomie nécessite des soins fréquents et s'accompagne de sécrétions colorées abondantes qui auront souvent pour effet d'éloigner l'entourage du patient qui se retrouvera alors isolé. Le patient présente alors une atteinte importante de la perception de son image corporelle et devient déprimé. À tout ceci vient s'ajouter les douleurs importantes que ressentira le patient secondairement à l'envahissement de nombreuses structures nerveuses qui se retrouvent au niveau cervical. Ces douleurs sont classiquement difficiles à contrôler et demandent des ajustements fréquents de l'analgésie. Il ne fait aucun doute que mourir d'un CE des VADS qui progresse localement est l'une des morts les plus atroces qui existe. (Pages 5 et 6).*

[990] In the pages that follow, Dr. Guertin chronicles the various treatments that are usually attempted when there is indication that the cancer might be curable: surgery, chemotherapy and radiation therapy. He describes the possible secondary effects of each one of those treatments, a veritable litany of horrors, including:

- open sores on the mucous membranes,[436]
- swelling in the legs (oedema),
- nasal intubation or tracheotomy for weeks, months or even permanently,
- cutaneous changes, cervical fibrosis, loss of the ability to taste,
- chronic dry-mouth leading to elocution problems and difficulty in swallowing,

---

[436] It is clear that each patient will not necessarily suffer all of the listed problems, but it is to be expected that each patient treated will suffer a number of them.

- removal of all teeth,
- surgery-induced mutilation of the face and neck, elocution problems and difficulty in swallowing and the inability to eat certain foods,
- loss of the vocal chords,
- chronic pain and diminution of shoulder strength.

[991] Death ultimately ends the torture, but at what price? At page 8 of his report, Dr. Guertin writes that "the patients who die from a relapse of their original cancer will experience a death that is atrociously painful, unable even to swallow their saliva or to breathe" (the Court's translation).

[992] This makes it clear that the uniform figure of $100,000 for individual moral damages in the throat cancer subclass is well justified. Thus, the total moral damages for the subclass are calculated as follows:

Members[437]	-12% for immigration	Total moral damages	80% of total
8,231	7,243 x $100,000 =	$724,300,000	$579,440,000

VIII.B.3 EMPHYSEMA

[993] Dr. Alain Desjardins' report (Exhibit 1382) opines on the moral damages suffered as a result of emphysema as well as lung cancer. He deals with emphysema through an analysis of COPD, which includes both emphysema and chronic bronchitis. He notes that a high percentage of individuals with COPD have both diseases (page 12), but not all.

[994] There is no serious contestation by the Companies that Dr. Desjardins' description of the impact of COPD on the quality of life accurately portrays the impact that emphysema alone would have. As such, his is a useful analysis for the purpose of evaluating moral damages caused to emphysema sufferers by smoking and the Court accepts it as sufficient proof of that..

[995] Dr. Siemiatycki follows Dr. Desjardins in basing his analysis of emphysema on information available for COPD. He explains his reasons for this as follows:

> Many epidemiologic and statistical studies are now focused on COPD as the clinical end-point. Fewer focus explicitly on emphysema. Indeed, much of the evidence we now have on the epidemiology of emphysema comes from studies on COPD. Consequently, in this report I will use the term COPD/emphysema to signify that the conditions we are describing and analysing include a mixture of COPD and emphysema, in some unknown ratio. Where possible I have focused on evidence and studies that have been able to address emphysema specifically, but usually it has been some combination of emphysema and chronic bronchitis.[438]

[996] The Companies attack the accuracy of Dr. Siemiatycki's report on this ground, arguing that, by doing so, he greatly overstates the number of individuals with emphysema only. On that point, Dr. Marais states that "I understand that the prevalence of

---

437 Siemiatycki Tables D1.2 and D1.3 in Exhibit 1426.7.
438 Exhibit 1426.1, at page 6.

chronic bronchitis in the population is likely twice that of emphysema"[439]. Although this criticism has merit, it is not fatal to this portion of Dr. Siemiatycki's report.

[997] Given that we have proof of fault, damages and causation for this subclass, we feel that we must arbitrate certain figures to fill out the portrait. We have already reduced Dr. Siemiatycki's figure for the size of the subclass by about half[440]. We also accept a lower individual damage figure than originally claimed. We are satisfied that these adjustments bring us to an acceptable approximation of the values in question.

VIII.B.3.a THE SIZE OF THE SUBCLASS

[998] As mentioned, we reject Dr. Siemiatycki's best estimate for the number of new cases of emphysema in Quebec attributable to smoking between 1995 and 2011 in favour of his lower estimate, for a total of 23,086.[441].

VIII.B.3.b THE AMOUNT OF DAMAGES FOR THE SUBCLASS

[999] On the impact of COPD, and thus emphysema, on the quality of life a person afflicted with it, Dr. Desjardins' report (Exhibit 1382) indicates that:

- Over 60% of individuals with COPD report significant limitations in their daily activities caused by shortness of breath and fatigue (page 48);
- Specific activities affected include sports and leisure, social life, sleep, domestic duties, sexuality and family life (Figure J on page 48; see also page 34);
- These limitations, when experienced daily, eventually result in social isolation, loss of self esteem, marital problems, frustration, anxiety, depression and an important reduction in the overall quality of life (pages 48-49);
- A person with emphysema can expect to suffer from a persistent cough, spitting up of blood, loss of breath and swelling in the lower members (pages 26-28).

[1000] Added to the above, of course, is the likelihood, or rather the near certainty, of a premature death (pages 18 and 19). The anticipation of that cannot but contribute to a loss of enjoyment of life.

[1001] As mentioned, the Plaintiffs admit that the degree to which a patient's life is affected by emphysema depends on the degree of severity of the case. Taking that into consideration, Dr. Desjardins used the "GOLD Guidelines", which divide the degree of severity of COPD into five levels, from Level 0, indicating cases "at risk," through Level 4, indicating cases with very severe emphysema (Exhibit 1382, page 41). Dr. Desjardins estimated the percentage of impairment or diminution of the quality of life for each level as 0%, 10%, 30% 60% and 100%. This is in line with the figures used by the U.S. Veteran's Administration (Exh. 1382, pages 51-53).

---

439 Exhibit 40549, at page 23.
440 See section VI.C.6 of the present judgment.
441 Exhibit 1426.7, Table D3.1.

[1002] In an attempt to simplify the file, the Plaintiffs amended the amount claimed for the emphysema subclass to a universal amount of $30,000, arguing that such a compromise was most conservative and ensured that the award would not unfairly penalize the Companies. This seems reasonable. In fact, if the Court had to arbitrate an amount for this subclass, it would likely have landed a bit higher.

[1003] Another advantage to adopting such a low figure is that it serves to correct the distortion in this analysis caused by using COPD statistics, which include chronic bronchitis and emphysema, in lieu of figures for emphysema alone.

[1004] Consequently, we accept a uniform figure of $30,000 for individual moral damages for the emphysema subclass. The total moral damages for the subclass are calculated as follows:

Members[442]	-12% for immigration	Total moral damages	80% of total
23,086	20,316 x $30,000 =	$609,480,000	$487,584,000

VIII.B.4 APPORTIONMENT AMONG THE COMPANIES

[1005] Table 1005 shows the amount of moral damages in the Blais File for all subclasses, based on 80%. It comes to $6,858,864,000[443].

TABLE 1005

Disease	Moral Damages for subclass at 80%
Lung Cancer	$5,791,840,000
Throat Cancer	$579,440,000
Emphysema	$487,584,000
TOTAL	$6,858,864,000

[1006] Since the Companies are solidarily liable for moral damages, it is necessary to determine the share of each therein for possible recursory purposes[444]. This will also indicate the amount to be deposited initially by each Company.

[1007] The Plaintiffs propose dividing this total among the Companies according to their respective average market shares over the Class Period. That would result in the following percentage share for each Company:

- ITL: 50.38%
- RBH: 30.03%
- JTM: 19.59%

---

442 Siemiatycki Table D3.1 in Exhibit 1426.7.

443 The total amount of moral damages for the Class will actually be higher, since some Members will have the right to claim 100% of those damages.

444 Article 469 of the Code of Civil Procedure.

[1008] On this question, section 23 of the TRDA states that, in apportioning liability among a number of defendants, "the court may consider any factor it considers relevant". It then suggests nine possible factors, one of which is market share (ss. 23(2)). Many of the others apply equally to all the Companies, for example, the duration of the conduct (ss. 23(1)) and the degree of toxicity of the product (ss. 23(3)). Others, however, seem to point more in the direction of one of the Companies: ITL. For example:

> (6) the extent to which a defendant conducted tests and studies to determine the health risk resulting from exposure to the type of tobacco product involved;
>
> (7) the extent to which a defendant assumed a leadership role in the manufacture of the type of tobacco product involved;
>
> (8) the efforts a defendant made to warn the public about the health risks resulting from exposure to the type of tobacco product involved, and the concrete measures the defendant took to reduce those risks[445].

[1009] Our analysis of the Companies' activities over the Class Period underlines the degree to which ITL's culpable conduct surpassed that of the other Companies on factors similar to these. It was the industry leader on many fronts, including that of hiding the truth from – and misleading - the public. There is, for example:

- Mr. Wood's 1962 initiatives with respect to the Policy Statement;
- the company's refusal to heed the warnings and indictments of Messrs. Green and Gibb, as described in section II.B.1.a of the present judgment;
- Mr. Paré's vigorous public defence over many years of the cigarette in the name of both ITL and the CTMC;
- the company's leading role in publicizing the scientific controversy and the need for more research;
- the extensive knowledge and insight ITL gained from its regular Internal Surveys such as the CMA and the Monthly Monitor; and
- more specifically with respect to the Internal Surveys, its awareness of the smoking public's ignorance of the risks and dangers of the cigarette, and its absolute lack of effort to warn its customers accordingly.

[1010] We have not forgotten ITL's bad-faith efforts to block court discovery of research reports by storing them with outside counsel, and eventually having those lawyers destroy the documents. This seems to the Court to be something that would more influence the quantum of punitive damages, but it is not entirely irrelevant to the analysis we are now performing.

[1011] All this separates ITL out from the other Companies and requires that it assume a portion of the damages in excess of its market share. We shall exercise our discretion in this regard and assign to it 67% of the total liability.

---

[445] We take this item to include the efforts made not to warn the public of the health risks.

[1012] As for the other Companies, we see nothing that justifies varying from the logical basis of market share for this apportionment. Since RBH's share was slightly more than one and one-half times that of JTM's, we shall round their respective shares to 20% and 13%.[446]

[1013] Table 1013 summarizes the condemnation of each Company for moral damages in the Blais file, at 80%[447].

TABLE 1013

COMPANY	TOTAL DAMAGES x %	PRE-INTEREST AWARD
ITL	$6,858,864,000 x 67%	$4,595,438,800
RBH	$6,858,864,000 x 20%	$1,371,772,800
JTM	$6,858,864,000 x 13%	$891,652,400

[1014] To calculate the actual value of the condemnation, however, it is necessary to increase the figures in the third column by interest and the additional indemnity. Given the lifespan of these files to date, that total surpasses the 15 billion dollar mark[448]. This brings us to consider the amount of the initial deposit for moral damages in Blais.

[1015] Normally, we would simply order the Companies to deposit the full amount into some sort of trust account and that would be that. In the instant case, however, this would be counter-productive to the principal objective of compensating victims. We do not see how the Companies could come up with such amounts and stay in business. Moreover, to risk the Companies' demise to that degree would be something of a pointless exercise. As mentioned earlier, it is unlikely that actual claims will come to anything more than a fraction of the total amount and our goal is not to maximize the *reliquat*.

[1016] The Code of Civil Procedure provides for a high degree of flexibility when it comes to issues relating to the execution of the judgment in a class action[449]. On that basis, we shall set the total initial deposit for all the Companies at what appears to be the "manageable amount" of one billion dollars ($1,000,000,000), i.e., approximately one year's average aggregate before-tax profit, a calculation we make in the following chapter

---

446 The Plaintiffs seek solidary condemnations for the compensatory damages. We deal with that issue in Chapter VIII of the present judgment.

447 Although specified by Company, the moral damages in Blais will be awarded on a solidary basis among the Companies for reasons we have explained above. We also remind the reader that the total moral damages for the Class will actually be higher, since some Members will have the right to claim them at 100%.

448 Since 1998, combined interest and additional indemnity averaged approximately 7.5% a year. Since these amounts are not compounded, i.e., there is no interest on the interest, the base figure is increased by about 127% over the seventeen-year period.

449 See articles 1029 and 1032, in part, which read;

1029. The court may, *ex officio* or upon application of the parties, provide measures designed to simplify the execution of the final judgment.

1032. […] The judgment may also, for the reasons indicated therein, fix terms and conditions of payment.

of this judgment. That total will be divided among them along the same lines applying to their respective liability for moral damages: 67% to ITL for a deposit of $670,000,000, 20% to RBH for a deposit of $200,000,000 and 13% to JTM for deposit of $130,000,000. Should these amounts not suffice, the Plaintiffs will have the right to return to court to request additional deposits.

IX. PUNITIVE DAMAGES - QUANTUM

[1017] Earlier in the present judgment, we ruled that an award for punitive damages against each of the Companies was warranted here. That ruling is based on the following analysis.

[1018] The Supreme Court of Canada favours granting punitive damages only "in exceptional cases for 'malicious, oppressive and high-handed' misconduct that 'offends the court's sense of decency'": *Hill v Church of Scientology of Toronto*[450]. Seven years later in *Whiten*, that court further defined the type of misconduct that needed to be present, being one "that represents a marked departure from ordinary standards of decent behaviour"[451].

[1019] In its decision in *Cinar*, the Quebec Court of Appeal notes that the Supreme Court's judgment in *Whiten* has only limited application in Quebec in light of the codification of the criteria in article 1621. Nevertheless, it appears to be in full agreement both with *Whiten* and *Hill* when it states:

> *… il (Whiten) aide à en préciser les balises d'évaluation. Les dommages punitifs sont l'exception. Ils sont justifiés dans le cas d'une conduite malveillante et répréhensible, qui déroge aux normes usuelles de la bonne conduite. Ils sont accordés dans le cas où les actes répréhensibles resteraient impunis ou lorsque les autres sanctions ne permettraient pas de réaliser les objectifs de châtiment, de dissuasion et de dénonciation.*[452]

[1020] Specifically under the CPA, the Supreme Court in *Time* examines the criteria to be applied, including the type of conduct that such damages are designed to sanction:

> [180] In the context of a claim for punitive damages under s. 272 C.P.A., this analytical approach applies as follows:
>
> - The punitive damages provided for in s. 272 C.P.A. must be awarded in accordance with art. 1621 C.C.Q. and must have a preventive objective, that is, to discourage the repetition of undesirable conduct;
> - Having regard to this objective and the objectives of the C.P.A., violations by merchants or manufacturers that are intentional, malicious or vexatious, and conduct on their part in which they display ignorance, carelessness or serious negligence with respect to their obligations and consumers' rights under the C.P.A. may result in awards of punitive damages. However, before awarding such damages, the court must consider the whole of the merchant's conduct at the time of and after the violation.[453]

---

450 [1995] 2 S.C.R. 1130, at para. 196.
451 *Whiten v. Pilot Insurance Co.*, [2002] S.C.R. 595, at para. 36.
452 2011 QCCA 1361, at paragraph 236 ("***Cinar***").
453 *Op. cit., Time*, Note 20, at paragraph 180.

[1021] The faults committed by each Company conform to those criteria. The question that remains is to determine the amount to be awarded in each file for each Company and the structure to administer them, should that be the case.

[1022] We should point out that the considerations leading to the 67/20/13 apportionment for moral damages also have relevance for the amount of punitive damages for each Company. Other factors could also affect those amounts, as mentioned in article 1621 of the Civil Code. We shall analyze that aspect on a Company-by-Company basis below.

IX.A THE CRITERIA FOR ASSESSING PUNITIVE DAMAGES

[1023] Article 1621 sets out guidelines for an award of punitive damages in Quebec. It reads:

1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.	**1621.** Lorsque la loi prévoit l'attribution de dommages-intérêts punitifs, ceux-ci ne peuvent excéder, en valeur, ce qui est suffisant pour assurer leur fonction préventive.
Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.	Ils s'apprécient en tenant compte de toutes les circonstances appropriées, notamment de la gravité de la faute du débiteur, de sa situation patrimoniale ou de l'étendue de la réparation à laquelle il est déjà tenu envers le créancier, ainsi que, le cas échéant, du fait que la prise en charge du paiement réparateur est, en tout ou en partie, assumée par un tiers.

[1024] Quebec law provides for punitive damages under the Quebec Charter and the CPA and we have ruled that in these files such damages are warranted under both. We recognize that neither one was in force during the entire Class Period, the Quebec Charter having been enacted on June 28, 1976 and the relevant provisions of the CPA on April 30, 1980. Consequently, the punitive damages here must be evaluated with reference to the Companies' conduct only after those dates.

[1025] Admittedly, this excludes from 50 to 60 percent of the Class period but, barring issues of prescription, it makes little difference to the overall amount to be awarded. The criteria of article 1621 are such that the portion of the Class Period during which the offensive conduct occurred is sufficiently long so as to render the time aspect inconsequential.

[1026] On another point, the amount of punitive damages to be awarded would not necessarily be the same under both statutes. The very different nature of the conduct targeted in one versus the other could theoretically give different results, in particular, with respect to the gravity and scope of the Companies' faults and the seriousness of the

infringement of the Members' rights[454]. In this instance, though, that distinction is not relevant.

[1027] The Companies' liability under both statutes stems from the same reprehensible conduct. True, it deserves harsh sanctioning, but it cannot be sanctioned twice with respect to the same plaintiffs. Given the gravity of the faults, the assessment process for punitive damages arrives at the same result under either law. Accordingly, it is neither necessary nor appropriate to analyze quantum separately by statute.

[1028] The same applies to a possible assessment between the two Classes. It is proper to assess one global amount of punitive damages covering both files, rather than separate assessments for each. Like for the statutes, the liability in both files results from the same conduct and faults. In fact, the connection between the two is such that the Létourneau class could have actually been a subclass of Blais.

[1029] As for the factors to consider in assessing quantum, the Supreme Court has made it clear that the gravity of the debtor's fault is "*undoubtedly the most important factor*"[455]. This is the element that the Plaintiffs emphasize, along with ability to pay.

[1030] That said, other criteria must also be factored into the calculation, including without limitation those mentioned in article 1621. We must also keep in view that the purposes for which punitive damages are awarded are "prevention, deterrence (both specific and general) and denunciation".[456] Hovering over all of these is 1621's guiding principle that "such damages may not exceed what is sufficient to fulfil their preventive purpose".

[1031] This guiding principle, as we shall see, is not unidimensional.

[1032] The Companies make much of the fact that, even if they had wanted to mislead the public about the dangers of smoking, which they assure that they did not, current governmental regulation of the industry creates an impermeable obstacle to any such activity. All communication between them and the public, in their submission, is prohibited, thus assuring that absolute prevention has been attained. It follows, in their logic, that there can be no justification for awarding any punitive damages.

[1033] They overlook the objectives of general deterrence and denunciation.

[1034] In paragraph 1460 of ITL's Notes, its attorneys reproduce part of a sentence from paragraph 155 in *Time*: "An award of punitive damages is based primarily on the principle of deterrence and is intended to discourage the repetition of similar conduct …". They stopped reading too soon. The full citation is as follows:

> An award of punitive damages is based primarily on the principle of deterrence and is intended to discourage the repetition of similar conduct both by the wrongdoer and in society. The award thus serves the purpose of specific and general deterrence.[457] (The Court's emphasis)

---

454 *Op. cit., Time*, Note 20, at paragraph 200.
455 *Op. cit.*, *Time*, Note 20, at paragraph 200.
456 *Cinar*, *op. cit.*, Note 451, at paragraph 126 and 134.
457 *Op. cit.*, *Time*, Note 20, at paragraph 155.

[1035] The full text of this passage confirms that the deterrence effect of punitive damages is not aimed solely at the wrongdoer, but is equally concerned with discouraging other members of society from engaging in similar unacceptable behaviour. Similar reasoning is found in the Supreme Court's decision in *DeMontigny*[458].

[1036] A need for denunciation is clearly present in our files. The two final sentences of the same paragraph in *Time* make that clear:

> In addition, the principle of denunciation may justify an award where the trier of fact wants to emphasize that the act is particularly reprehensible in the opinion of the justice system. This denunciatory function also helps ensure that the preventive purpose of punitive damages is fulfilled effectively.[459]

[1037] Over the nearly fifty years of the Class Period, and in the seventeen years since, the Companies earned billions of dollars at the expense of the lungs, the throats and the general well-being of their customers[460]. If the Companies are allowed to walk away unscathed now, what would be the message to other industries that today or tomorrow find themselves in a similar moral conflict?

[1038] The Companies' actions and attitudes over the Class Period were, in fact, "particularly reprehensible" and must be denounced and punished in the sternest of fashions. To do so will be to favour prevention and deterrence both on a specific and on a general societal level. We reject the Companies arguments that there is no justification to award punitive damages against them.

[1039] On another point, it seems evident that the nature of the damages inflicted in Blais versus Létourneau is not the same. The harm suffered by dependent persons is serious, but it is not on a level of that experienced by lung and throat cancer patients, nor by persons suffering from emphysema. Hence, the gravity of the fault is not the same in both files.

[1040] It is also relevant to note that we refuse moral damages in the Létourneau File, whereas in Blais we grant nearly seven billion dollars of them, plus interest. Thus, the reparation for which the Companies are already liable is quite different in each and a separate assessment of punitive damages must be done for each file, as discussed further below.

[1041] As for which periods of time the Court should consider the Companies' conduct, the Plaintiffs argue at paragraph 2158 of their Notes that "even if claims for punitive damages in respect of conduct prior to 1995 were prescribed, the Court's award of punitive damages would still have to reflect the Defendants' egregious misconduct throughout the entire class period". They cite the *Time* decision in support:

> 174. […] it is our opinion that the decision to award punitive damages should also not be based solely on the seriousness of the carelessness displayed at the time of

---

458 *Op. cit.*, Note 20, at paragraph 49.

459 *Op. cit.*, *Time*, Note 20, at paragraph 155.

460 As stated below, ITL and RBH have each earned close to half a billion dollars a year before tax in the past five years, while JTM's figure is around $100,000,000. We discuss the issue of "disgorgement" of profits further on.

> the violation. That would encourage merchants and manufacturers to be imaginative in not fulfilling their obligations under the *C.P.A.* rather than to be diligent in fulfilling them. As we will explain below, our position is that the seriousness of the carelessness must be considered in the context of the merchant's conduct both before and after the violation[461].

[1042] The Plaintiffs would thus have us consider the Companies' conduct not only before the violation of the CPA, but also before the CPA came into force - and in spite of the prescription of some of the claims. Their position is similar with respect to the Quebec Charter.

[1043] Strictly speaking, we cannot condemn a party to damages for the breach of a statute that did not exist at the time of the party's actions. That said, this is not an absolute bar to taking earlier conduct into account in evaluating, for example, the defendant's general attitude, state of awareness or possible remorse[462].

[1044] In any event, it is not necessary to go there now. The period of time during which the two statutes were in force during the Class Period and the gravity of the faults over that time obviate the need to look for further incriminating factors.

[1045] The final argument we shall deal with in this section is ITL's submission that deceased Class Members' claims for punitive damages cannot be transmitted to their heirs under the rules of either Civil Code in force during the Class Period.

[1046] Concerning the "old" code, the CCLC, which was in force until January 1, 1994, at paragraph 184 of its Notes, ITL cites the author Claude Masse to assert that the CCLC "did not provide for a claim for punitive damages for a breach of a personality right to be transmitted to the heirs of a deceased plaintiff. As a result, the heirs of the Class Members who died before January 1, 1994 of both Classes cannot assert such a claim in this proceeding." Although the first sentence is technically not incorrect, ITL's use of it is misleading.

[1047] Professor Masse merely states that the transmissibility of that right was not "clearly established" prior to the "new" CCQ[463]. This is not particularly surprising. Punitive damages were a relatively recent addition to Quebec law at the time the Civil Codes changed and it is possible that the question had not yet been answered in our courts.

[1048] Whatever the case, given that the doctrine cited does not stand for the principle advanced, ITL offers no relevant authority to support its position. We reject its argument with respect to the CCLC both for that reason and for the policy consideration mentioned in the following paragraphs. The claims for punitive damages of Members who passed away before January 1, 1994 are transmissible to their heirs.

---

461 *Op. cit*, *Time*, Note 20, paragraph 174.

462 See Claude DALLAIRE and Lisa CHARMANDY, *Réparation à la suite d'une atteinte aux droits à l'honneur, à la dignité, à la réputation et à la vie privée*, JurisClasseur Québec, coll. "Droit Civil", Obligations et responsabilité civile, fasc. 27, Montréal, LexisNexis Canada, at paragraphs 74 and 75.

463 "*clairement établie*": Claude MASSE, « *La responsabilité civile* », dans La réforme du Code civil - Obligations, contrats nommés, vol. 2, Les Presses de l'Université Laval, 1993, at page 323.

[1049] As for the CCQ, ITL expends much ink attempting to explain away the Supreme Court's decision in *DeMontigny*[464] accepting the transmission of a deceased claim for punitive damages to her heirs. The court expressed itself as follows:

> [46] For these reasons, the fact that no compensatory damages were awarded in the instant case does not in itself bar the claim for exemplary damages made by the appellants in their capacity as heirs of the successions of Liliane, Claudia and Béatrice. In my opinion, that claim was admissible.[465]

[1050] This could not be clearer in favour of the heirs, a result that makes fundamental good sense in the context of punitive damages. Why should the victim's death permit a wrongdoer to avoid the punishment that he otherwise deserves? What logic would there be to such a policy – especially when the death is a direct result of the defendant's faulty conduct, as is often the case in these files?

IX.B QUANTIFICATION ISSUES

[1051] The Plaintiffs initially sought a solidary (joint and several) condemnation for punitive damages among the Companies, but later recognized that solidarity for punitive damages among co-defendants is not normally possible. They thus amended their claims to request that each Company be assessed solely in accordance with its market share over the relevant period. That approach does not work either.

[1052] There is little connection between factors such as those suggested in article 1621 and market share. Where there is more than one defendant, the Court must examine the particular situation of each co-defendant. That is the only way to examine "all appropriate circumstances":

> Both the objectives of punitive damages and the factors relevant to assessing them suggest that awards of punitive damages must be individually tailored to each defendant against whom they are ordered.[466]

[1053] This will be a delicate exercise, to be sure. For example, a defendant with a third of the market might, on the one hand, be guilty of behaviour far more reprehensible than that of the others, thus meriting more than one third of the overall amount of punitive damages. At the same time, its shaky patrimonial situation or a heavy award of compensatory damages against it might require that the punitive damages be reduced.

[1054] We should add that the assessment of punitive damages in cases like these is not completely divorced from considering the plaintiff's side. The gravity of the debtor's fault is to be "assessed from two perspectives: 'the wrongful conduct of the wrongdoer and the

---

464 *Op. cit.,* Note 20, at paragraph 46.

465 *DeMontigny* is often cited as authority for the position that punitive damages can be granted even where there are no compensatory damages. This situation does not arise in Létourneau, although no compensatory damages are granted, because we hold that the Members did, in fact, suffer moral damages on the basis of fault and causality. We refuse to award any for reasons related strictly to the requirements for collective recovery.

466 *Op. cit., Cinar*, Note 451, at paragraph 127.

seriousness of the infringement of the victim's rights'"[467]. The presence of a multitude of co-plaintiffs is something that can affect both of those.

[1055] There is also the fact that there are about nine times as many persons affected in Létourneau than in Blais: 918,218[468] compared to 99,957[469]. Since we calculate a total amount of punitive damages covering both files, this arithmetic could have an influence on the division of that total between the files.

[1056] The combined effect of the above factors requires the Court not only to judge each Company separately, but also to assess the punitive damages in each file separately. The same logic could be seen to apply to the three subclasses in Blais, but we do not believe that to be the case.

[1057] The Companies' wrongful conduct for all the Blais subclasses was similar. They were knowingly harming smokers' quality and length of life. The fact that one victim might survive longer than the other, or be less visibly mutilated by surgery, makes little difference as to the gravity of the fault and the infringement of the Members' rights. In all cases, the Companies' conduct is inexcusable to the highest degree and to try to draw distinctions among such situations would be to overly fine-tune the process.

[1058] As for the total amount of punitive damages to be granted, during oral argument, the Plaintiffs adjusted their aim to claim a level of $3,000,000,000 globally, described as being between $2,000 and $3,000 a Member. Following on what we discussed above, it is not appropriate to approach this question on a "per class member basis".[470] The analysis must be individually tailored to each Company. We must establish the appropriate Company amounts and add them up to arrive at the total, as opposed to starting from the total and dividing that among the Companies.

[1059] As well, the Companies correctly insist that, since article 1621 requires the Court to take into consideration "the extent of the reparation for which (the debtor) is already liable to the creditor", we cannot order collective recovery of punitive damages until the amount of compensatory damages is known, including those resulting from the adjudication of all the individual claims.

[1060] That may be true, but the Members of both Classes have renounced their individual claims and are content to be compensated solely under a collective order. As a result, having determined the amount of collective recovery of moral damages in both Files, we are thus in a position to order collective recovery of punitive damages.

[1061] Finally, we take note of the Supreme Court's message in *Time* with respect to the limits of our discretion in this matter:

> [190] It should be borne in mind that a trial court has latitude in determining the quantum of punitive damages, provided that the amount it awards remains within rational limits in light of the specific circumstances of the case before it. […] An

---

467 *Op. cit., Time*, Note 20, at paragraph 200.

468 Exhibit 1733.5.

469 After reduction of 12% for immigration: 72,398 + 7,243 + 20,316 = 99,957.

470 See: *Dion v. Compagnie de services de financement automobile Primus Canada*, 2015 QCCA 333, at paragraph 127.

> assessment will be wholly erroneous if it is established that the trial court clearly erred in exercising its discretion, that is, if the amount awarded was not rationally connected to the purposes being pursued in awarding punitive damages in the case before the court (…).[471]

IX.C THE COMPANIES' "PATRIMONIAL SITUATION"

[1062] For the purpose of evaluating the Companies' "patrimonial situation" as mentioned in article 1621, the Plaintiffs agreed to limit their proof to summaries of each Company's before-tax earnings taken from the financial statements filed and later withdrawn from the record. Five or seven-year summaries of both before and after-tax earnings were filed for each Company, which we shall refer to as the "**Summaries**".[472]

[1063] All the Summaries were preliminarily declared to be confidential. In Sections XI.C.2 and XI.D.2 of the present judgment, we rule that the Summaries corresponding to the earnings category on which we choose to base our analysis of the Companies' patrimonial situation will become public.

[1064] The Companies' position is that, should there be an award of punitive damages against them, their patrimonial situation should be based on their after-tax earnings. They also feel that those amounts for fiscal year 2008 should be reduced by the hundreds of millions of dollars of fines they paid to the federal government for what RBH euphemistically characterized as the "mislabelling" of their products.

[1065] The Plaintiffs insist on before-tax earnings and refuse to accept granting any consideration for the fines. Like them, the Court is not inclined to allow the Companies to benefit from the fines they were obliged to pay in 2008 for breaking the law. That, however, is not a factor here, as explained below.

[1066] As for the choice of earnings, we shall use before-tax figures, since they more accurately reflect the reality of a party's patrimonial situation[473]. GAAP-compliant accounting allows access to perfectly legal tax operations that can skew a company's financial portrait. A good case in point is the deductibility of the 2008 fines by the Companies. Such "adjustments" should not be allowed to reduce a defendant's patrimonial situation.

[1067] There is also the possible deductibility of amounts paid pursuant to this judgment, whether for moral or punitive damages or for costs. Article 1621 already takes account of those expenses in its mention of the reparation due under other heads.

[1068] On a related point, it makes good sense to base the assessment of punitive damages on average earnings over a reasonable period, because they reflect on a defendant's capacity to pay. We keep in mind that the objective is not to bankrupt the wrongdoer, in spite of the Plaintiffs' cry for the Companies' heads. Nevertheless, within that limit, the award should hurt in a manner as much as possible commensurate with the

---

471 *Op. cit*, *Time,* Note 20, paragraph 190.

472 Exhibits 1730-CONF 1730A-CONF and 1730B-CONF for ITL and Exhibits 1732-CONF, 1732A-CONF and 1730B-CONF for RBH and Exhibit 1747.1, Annexes A, C and D for JTM.

473 The corresponding exhibits are Exhibits 1730A, 1732A and Annex A to Exhibit 1747.1.

gravity of the ill deed and the need for specific and general deterrence, as well as the other applicable criteria.

[1069] Concerning the period of averaging, we have ITL's earnings for seven years: 2007 through 2013, so we are able to do either a seven-year or a five-year average. ITL's five-year average of $483,000,000 is some $22 million a year less than the seven-year one of $505,000,000. This might sound like a lot, but it is not. It represents a little over 4% of ITL's half-billion dollars in annual before-tax earnings.

[1070] As a general rule, we are inclined to use five-year averages. In addition, the figures filed for JTM cover only the five years of 2009 through 2013, inclusively, and the Plaintiffs do not contest that filing. We shall therefore base the average on those five fiscal years. Hence, the "fine-reduced" year of 2008 does not come into play.

[1071] For ITL, the five-year average of before-tax earnings between 2009 and 2013 is $483,000,000. For RBH, it is $460,000,000. JTM's "Earnings from operations" for the period average $103,000,000.

[1072] Another factor to consider is the extent to which a defendant benefited from his actions. A violator of either the CPA or the Quebec Charter who deserves to be condemned to punitive damages should not be allowed to profit from his wrongdoing. This principle is embraced by the Supreme Court in a number of decisions, including *Cinar* (at paragraph 136) and *Whiten* (at paragraph 72). Here, we quote from *Time*:

> [206] Also, in our opinion, it is perfectly acceptable to use punitive damages, as is done at common law, to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than an expense paid to earn greater profits while flouting the law (*Whiten*, at para. 72).[474]

[1073] Average earnings are relevant in the context of disgorging ill-gained profits. Here, those profits were immense to the point of being inconceivable to the average person. ITL and RBH earned nearly a half billion dollars a year over the past five years, with ITL earning over $600 million in 2008. The $200 million dollar fine it paid that year looks almost like pocket change.

[1074] Over the averaging period alone, the Companies' combined before-tax earnings totalled more than five billion dollars ($5,000,000,000). Recognizing that a dollar today is not worth what it was in 1950 or 1960, or even 1998, we still must assume that the profits earned by them over the 48 years of the Class Period were massive[475].

[1075] That said, and although one view of justice might require it, it is not possible to disgorge all that profit by way of punitive damages here. Nonetheless, the objective of disgorgement is compelling. It inspires us to adopt as a base guideline that, other things being equal, each Company should be deprived of one year's average before-tax profits. Working from that base, we shall adjust the individual amounts depending on the particular circumstances of each Company.

---

474 *Op. cit*, *Time*, Note 20, paragraph 206.

475 The fact that Quebec sales likely represented from 20 to 25 percent of those earnings is not relevant to the Companies' overall patrimonial situation.

IX.D ITL'S LIABILITY FOR PUNITIVE DAMAGES

[1076] In our preceding analysis, we have found that all three Companies were guilty of reprehensible conduct that warranted an award of punitive damages against them under both the Quebec Charter and the CPA. We also pointed out a number of elements that distinguish the case of ITL from that of the others.

[1077] In that analysis we referred to the guidelines set out in the section 23 of the TRDA for apportioning liability for compensatory damages among several defendants. There, we considered the following elements:

- Mr. Wood's 1962 initiatives with respect to the Policy Statement;
- the company's refusal to heed the warnings and indictments of Messrs. Green and Gibb, as described in section II.B.1.a of the present judgment;
- Mr. Paré's vigorous public defence over many years of the cigarette in the name of both ITL and the CTMC;
- the company's leading role in publicizing the scientific controversy and the need for more research;
- the extensive knowledge and insight ITL gained from its regular Internal Surveys such as the CMA and the Monthly Monitor;
- more specifically with respect to the Internal Surveys, its awareness of the smoking public's ignorance of the risks and dangers of the cigarette, and its absolute lack of effort to warn its customers accordingly; and
- ITL's bad-faith efforts to block court discovery of research reports by storing them with outside counsel, and eventually having those lawyers destroy the documents.

[1078] As well, there is ITL's "outlier" status throughout the Class Period. In spite of overwhelming scientific acceptance of the causal link between smoking and disease, ITL continued to preach the sermon of the scientific controversy well into the 1990's, as we saw earlier[476]. All these points are relevant to the assessment of punitive damages. They weigh heavily on the gravity of ITL's faults and require a condemnation higher than the base amount.

[1079] Exercising our discretion in the matter, we would have held ITL liable for overall punitive damages equal to approximately one and one-half times its average annual before-tax earnings, an amount of seven hundred twenty-five million dollars ($725,000,000).[477] As noted earlier, this covers both classes.

[1080] Let us immediately underscore that, not only is this amount within the rational limits that the Supreme Court rightly imposes on this process, but also, viewed in the perspective of these files, it is actually rather paltry.

---

476 See Exhibit 20063.10, at pdf 154.

477 We should point out that our use of the conditional tense of the verb in this analysis is intentional, for reasons that we explain below.

[1081] Since there are about 1,000,000 total Members in both Classes, the average amount from ITL on a "per member" basis would be about $725. Adding in the awards from the other two Companies, as established below, the total punitive damages averaged among all Members would come to a mere $1,310, hardly an irrational amount. True, we do not assess punitive damages on the basis of an amount "per member", but viewing them from this perspective does provide a sobering sense of proportionality.

[1082] This global total must be divided between the two Classes and possibly among the Blais subclasses, a process that applies to the three Companies.

[1083] As between the Classes, the circumstances in Blais justify a much larger portion for its Members. In spite of the fact that there are about nine times more Members in Létourneau than in Blais[478], the seriousness of the infringement of the Members' rights is immeasurably greater in the latter. Reflecting that, the $100,000 of moral damages for lung and throat cancer in Blais is 50 times greater than what we would have awarded in Létourneau.

[1084] Consequent with the preceding, we shall attribute 90% of the total punitive damages to the Blais Class and 10% to Létourneau. Ten percent of ITL's share of $725,000,000 is $72,500,000.

[1085] Turning now to the Blais subclasses, the Court would have followed the pattern proposed for compensatory damages and award the Members of the emphysema subclass 30% of the amount of punitive damages granted to the lung and throat cancer subclasses. Given that punitive damages are not based on a per-member or per-class metric, this does not affect the amount of the deposit the Companies must make.

[1086] All this said, we must now ask to what degree the size of the award for compensatory damages in Blais should affect the amount to be granted for punitive damages[479]. The response is that it should affect it very much indeed.

[1087] We have condemned the Companies to almost seven billion dollars of moral damages, which comes to more than 15 billion dollars once interest and the additional indemnity are accounted for. That is a sizable bite to swallow, even for corporations as profitable as these. However much it might be deserved, we cannot see our way fit to condemn them to significant additional amounts by way of punitive damages.

[1088] What we feel we can and should do is to make a symbolic award in this respect. That is why we shall condemn each Company to $30,000 of punitive damages in the Blais File. This represents one dollar for each Canadian death this industry causes in Canada every year.[480]

[1089] The total of $90,000 represents less than one dollar for each Blais Member. Rather than foreseeing a payment of that amount to claiming Members, we shall order

---

478 Parenthetically, it is probable that all the Blais Members would also belong to the Létourneau Class.

479 A reminder: since we have dismissed the claim for compensatory damages in Létourneau, this question is not relevant there.

480 See the reasons of Laforest, J. in *RJR-Macdonald Inc. v. A.G. Canada*, [1995] 3 S.C.R. 199, at pages 65-66.

that it be dealt with in the same manner as the punitive damages payable in the Létourneau File.

IX.E RBH'S LIABILITY FOR PUNITIVE DAMAGES

[1090] Concerning RBH, the only element that appears to stand out is Rothmans' efforts to stifle the initiative of Mr. O'Neill-Dunne in 1958, as discussed in section IV.B.1.a. That type of behaviour is not exclusive to RBH. It typifies what all the Companies and their predecessors were doing and is part of the fundamental reason for awarding punitive damages in the first place. As such, we do not see that it warrants a condemnation beyond the base amount.

[1091] We shall condemn RBH to punitive damages equal to its average annual before-tax earnings, an amount of $460,000,000. The division of this amount between the two files shall be the same as for ITL: The 10% for Létourneau represents $46,000,000.

IX.F JTM'S LIABILITY FOR PUNITIVE DAMAGES

[1092] As further discussed in section XI.D, JTM's situation takes a different turn as a result of the Interco Contracts. The Plaintiffs' position is the same with respect to using before-tax earnings as a base, but JTM's case differs from that of the other Companies.

[1093] It argues that the payments due under the Interco Contracts, totalling some $110 million a year in capital, interest and royalties (the "**Interco Obligations**"), should be accepted at face value. The result would be to reduce JTM's annual earnings to a deficit, since its average before-tax earnings are "only" $103 million. This would also have the advantage of rendering the choice between before and after-tax figures moot, although JTM favours the latter.

[1094] As a result of our approving the Entente in Chapter XI below, paragraphs 2138-2145 of the Plaintiffs' Notes become public[481]. There we find many of the relevant facts around how the Interco Contracts work to impose, artificially in the Plaintiffs' view, the Interco Obligations on JTM.

[1095] For example, the Japan Tobacco group caused JTM to transfer its trade marks valued at $1.2 billion to a new, previously-empty subsidiary, JTI-TM, in return for the latter's shares. This "Newco" charges JTM an annual royalty of some $10 million for the use of those trade marks. It is hard to conceive of a more artificial expense.

[1096] There is also a loan of $1.2 billion from JTI-TM to JTM for which JTM is charged $92 million a year in interest. One of the curious aspects of this loan is that JTM appears never to have received any funds as a result of it[482], although we must admit that Mr. Poirier's clear answer in this regard at page 115 of the transcript[483] became less clear later in his testimony.

---

[481] Paragraphs 2138-2145 of the Plaintiffs' Notes are reproduced in Schedule J to the present judgment.

[482] Testimony of Michel Poirier, May 23, 2014, at page 115.

[483] 189Q-Is it not a fact, sir, that JTIM never received one dollar ($1) of a loan in respect of that one point two (1.2) billion dollars of debentures?
A- Yes, I think that's correct.

[1097] Our analysis of this matter leads us to agree with Mr. Poirier who, when reviewing some of the planning behind the Interco Contracts, was asked if "that sounds like creditor proofing to you". He candidly replied: "Yes".[484]

[1098] Shortly thereafter, the following exchange ensued in Mr. Poirier's cross examination:

> [172]Q." […]The modifications suggested will enhance our ability to protect our most valuable assets." Most valuable assets in this context are the trademarks valued at one point two (1.2) billion dollars?
>
> A- Yes. Yes.
>
> [173]Q-And it's to protect your most valuable assets from creditors, creditors like perhaps the plaintiffs in this lawsuit?
>
> A- Perhaps the plaintiffs. It's a tobacco company.
>
> [174]Q-It's a what?
>
> A- It's a tobacco company.[485]

[1099] To be clear, no one has attacked the validity or the legality of the tax planning behind the Interco Contracts, or the contracts themselves, for that matter. That is not necessary for the point the Plaintiffs wish to score. Because something might be technically legal for tax purposes, something on which we give no opinion, does not automatically mean that it cannot be one of "the appropriate circumstances" that article 1621 obliges us to consider.

[1100] The Interco Contracts affair is clearly an appropriate circumstance to consider when assessing punitive damages against JTM and we shall consider it, not once, but twice: quantitatively and qualitatively.

[1101] In the first, we cannot but conclude that this whole tangled web of interconnecting contracts is principally a creditor-proofing exercise undertaken after the institution of the present actions by a sophisticated parent company, Japan Tobacco Inc., operating in an industry that was deeply embroiled in product liability litigation. Even Mr. Poirier could not deny that. And on paper, the sham may well succeed.

[1102] Unless the Interco Contracts are overturned, something that is not the subject of the present files, JTM appears to be nothing more than a break-even operation. So be it, but that is an artificial state of affairs that does not reflect the company's true patrimonial situation. Absent these artifices, JTM is earning an average of $103,000,000 a year before taxes and that is the patrimonial situation that we will adopt for the purpose of assessing punitive damages.

[1103] Then there is the qualitative side. The Interco Contracts represent a cynical, bad-faith effort by JTM to avoid paying proper compensation to its customers whose health and well-being were ruined, and the word is not too strong, by its wilful conduct.

---

484 Testimony of Michel Poirier, May 23, 2014, at page 108.
485 *Ibidem*, at pages 108-109.

This deserves to be sanctioned and we shall do so by setting the condemnation for punitive damages above the base amount[486].

[1104] We shall thus condemn JTM to punitive damages equal to approximately 125% of its average annual before-tax earnings, an amount of $125,000,000.[487] The division of this amount between the two files shall be the same as for ITL: The 10% for Létourneau represents $12,500,000.

[1105] Before closing on JTM, the Court will deal with its argument that it never succeeded to the obligations of MTI, as set out in paragraphs 2863 and following of its Notes.

[1106] Summarily, it argues that, in light of the contracts signed when the RJRUS group acquired it in 1978 and of the dissolution of MTI in 1983, the provisions of the Quebec Companies Act and the applicable case law dictate that "Plaintiffs' right of action, assuming they have any, can only be directed at MTI's directors and not its successor".[488] This applies in its view to "any alleged wrongdoing that could have been committed on or before (October 27, 1978) by MTI".[489]

[1107] The Court does not see how this can assist JTM in avoiding liability under the present judgment, and this, for two reasons.

[1108] First, under a General Conveyancing Agreement of October 26, 1978 (Exhibit 40596), MTI "transfers, conveys, assigns and sets over" the essential parts of its business to an RJRUS-controlled company, RJR-MI. At page 4 of that agreement, RJR-MI "covenants and agrees to assume and discharge all liabilities and obligations now owing by MTI", which included specifically:

> (e) all claims, rights of action and causes of action, pending or available to anyone against MTI.

[1109] In connection with the phrase "now owing" in that contract, in 1983, both MTI and RJRUS had long known that MTI's customers were being poisoned by its products, as discussed at length above. As such, any reasonable executive of those companies had to realize that the other shoe would soon be dropping and lawsuits would start appearing in Canada, as had already happened in other countries. The future Canadian lawsuits can thus be seen to be part of the "claims, rights of action and causes of action … available to anyone against MTI" in 1978. These were assumed by RJR-MI.

[1110] Moreover, the General Conveyancing Agreement foresees the dissolution of MTI in its opening clause. The potential liability of the directors of a dissolved company would have been well known to MTI and its legal advisors. It could not have been the intention

---

[486] See Claude DALLAIRE and Lisa CHARMANDY, *Réparation à la suite d'une atteinte aux droits à l'honneur, à la dignité, à la réputation et à la vie privée*, op. cit., Note 462, at paragraph 97, referring to *Gillette v. Arthur* and G.C. v. L.H. (references omitted).

[487] The fact that the sum of the condemnations for the three Companies comes to a round number of $1.3 billion is pure coincidence.

[488] Paragraph 2889 of JTM's Notes.

[489] Paragraph 2890 of JTM's Notes.

of the very people who were approving the deal to transfer the risk of inevitable and onerous product liability litigation to themselves.

[1111] In any event, even if JTM could escape liability for MTI's obligations, it makes no similar assertion with respect to RJRM's liability as of 1978. All of the faults attributed to the Companies in the present judgment continued throughout most of the Class Period, including the years where JTM was operating as RJRM.

[1112] We reject JTM's submissions on this point.

X. DEPOSITS AND DISTRIBUTION PROCESS

[1113] Table 1113 incorporates the deposits for moral damages in Blais with the condemnations for punitive damages in both files[490] to show the amounts to be deposited by each Company by file and by head of damage.

TABLE 1113

1 COMPANY	2 MORAL DAMAGES BLAIS	3 PUNITIVE DAMAGES BLAIS	4 PUNITIVE DAMAGES LÉTOURNEAU
ITL	$670,000,000	$30,000	$72,500,000
RBH	$200,000,000	$30,000	$46,000,000
JTM	$130,000,000	$30,000	$12,500,000

[1114] On the issue of interest and the additional indemnity, for punitive damages they run only from the date of the present judgment. They must be added to the deposits indicated in columns 3 and 4 of the table when the deposits are made. For the Blais moral damages, although they run from the date of service of the action, they do not affect the amount of the deposits indicated in column 2 for reasons already explained.

[1115] A question remains as to the possible effect of prescription on these amounts. Since we assume that the TRDA applies, there is no prescription of claims for moral damages. We have also held that the Létourneau claims for punitive damages are not prescribed. We shall therefore analyze this issue only with respect to punitive damages in Blais.

[1116] From Table 910 we see that Blais claims for punitive damages that accrued before November 20, 1995 are prescribed. This effectively "wipes out" 45 years of

[490] A reminder: punitive damages do not vary by subclass in Blais and no moral damages are awarded in Létourneau.

possible punitive damages, leaving 17 years of those claims in that file[491]. Should this affect the amount of global punitive damages to be assessed?

[1117] From a purely mathematical viewpoint, it should. From a common sense and legal viewpoint, it does not.

[1118] As pointed out by Laforest J. in his dissent in the first Supreme Court decision on the constitutionality of Canadian tobacco legislation, the educated view is that in 1995 tobacco was responsible for nearly 100 deaths a day in Canada, over 30,000 premature deaths annually[492]. This means that, during the 17 years while non-prescribed punitive damages were amassing in Blais, the Companies products and conduct ruined the lives of Blais Class Members and their families and, in the process, caused the death of more than half a million Canadians, of which we estimate that there were some 125,000 Quebecers.

[1119] If every life is priceless, what price 500,000 lives … or even "only" 125,000?

[1120] Our reply to that question is shown in columns 3 and 4 of Table 1113. We see no justification for reducing those amounts beyond the level to which they have already been reduced in light of the purposes and objectives of punitive damages and the remarkable profits made by the Companies every year.

[1121] In Table 1113, columns 2, 3 and 4 show the initial deposits to be made by each Company in each file in accordance with article 1032 CCP. Should these amounts not suffice to cover all claims made by eligible Members, the Plaintiffs may petition the Court to issue an order for the deposit of a further sum.

[1122] Finally in this area, in light of our rulings above, it will be necessary to foresee a method for distributing the amounts due to the Blais Members and to establish a practical and equitable plan of distribution of the punitive damages awarded but not distributed. We shall reconvene the parties at a later date to hear them on that.

[1123] In preparation, we shall order the Plaintiffs to submit a detailed proposal on all issues related to distribution of damages within sixty (60) days of the date of the present judgment, with copy to the Companies. Should they so desire, the Companies may reply in writing within thirty (30) days of their receipt of the Plaintiffs' proposal

XI. DECISIONS ON OBJECTIONS UNDER RESERVE AND CONFIDENTIALITY

[1124] During the course of the trial, the Court attempted to avoid taking objections under reserve, although certain exceptions were necessary. Even there, the Court advised counsel that, in order to obtain a ruling on an objection taken under reserve, they would have to argue it specifically in their closing pleadings, failing which the Court would assume that the objection was withdrawn.

---

491 The amended class description in Blais "expanded" the class to include anyone who had been diagnosed with a Disease before March 12, 2012.

492 *RJR-Macdonald Inc. v. A.G. Canada*, [1995] 3 S.C.R. 199, at pages 65-66.

[1125] The parties renew a small number of objections or similar questions at this stage, mostly claims by the Companies that certain documents be declared confidential and kept under seal. The questions to be decided are[493]:

a. The admissibility of Exhibit 1702R in the face of JTM's objection on the basis of professional secrecy;[494]

b. The general admissibility of reserve or "R" documents that were allowed to be filed subject to subsequent authorizations as a result of testimony, a motion or otherwise;

c. The confidentiality of certain of the Companies' internal documents: coding information, cigarette design/recipes, insurance policies and financial statements;

d. The confidentiality of exhibits relating to JTM's Interco Contracts in light of its agreement with the Plaintiffs on this subject.

XI.A. THE ADMISSIBILITY OF EXHIBIT 1702R

[1126] On July 30, 1986, Anthony Colucci wrote a letter to James E. Young that the Plaintiffs wish to file into the court record and which received the provisional exhibit number of 1702R: "R" for "under reserve of an objection" (the "**Colucci Letter**"). Mr. Colucci, described as "an RJR scientist working on behalf of the legal department"[495], was the director of the Scientific Litigation Support Division of the Law Department of RJRUS. Mr. Young was an attorney in a Cleveland law firm.

[1127] On that basis, JTM objected to the admissibility of the document on the ground of what is known in Quebec as "professional secrecy", as codified in section 9 of the Quebec Charter.

[1128] At trial, the Court dismissed the objection (the "**1702R Judgment**") for reasons set out in a judgment it had rendered on March 25, 2013 dealing with other documents. In that 2013 judgment, which was not appealed, the Court held that professional secrecy did not apply to an otherwise "privileged" document that had been published on the Internet in compliance with valid American court orders, as is the case with Exhibit 1702R. The Court specifically refrained from expressing any opinion on the effect of "an

---

493 In its Notes, at paragraphs 1465 and following, ITL identifies a number of additional objections for which it requests a decision. Since nothing in those affects the present judgment and, in fact, several were decided during the trial, e.g., the relevance of diseases not covered by the class descriptions, the Court will not deal further with those.

494 In addition, the Companies objected to the production of a number of documents based on Parliamentary Privilege. Since their contents are not confidential, the Court allowed them to be produced under reserve with a "PP" annotation and stipulated that we would limit their use to that which is not prohibited by that privilege. Although the Plaintiffs refer to several of them in their Notes, the Court relies on none of them in the present judgment. Consequently, the question of whether the Plaintiffs' proposed use of such documents contravenes Parliamentary Privilege or not is moot and we shall say nothing further on the subject.

495 Exhibit 1702.1.

improper publication", i.e., one that was done without colour of right, and we shall maintain our silence on that now.

[1129] JTM chose to appeal the 1702R Judgment, a process that might have caused some delay in the present proceedings. To avoid that, the lawyers for JTM and the Plaintiffs applied their ingenuity to conceive an alternative process. The Plaintiffs desisted from the 1702R Judgment and JTM desisted from its appeal. They agreed to re-plead the point in their final arguments and asked that the Court reconsider the issue in the judgment on the merits. Since confidentiality of the document is not an issue, they agreed that, should the Court dismiss the objection, it could refer to the exhibit in the final judgment. The Court agreed to proceed in that manner.

[1130] We should add that, in light of our not referring to this exhibit in our judgment, the question borders on being moot. Nevertheless, we do not wish to impede any of the parties' strategies in appeal, should there be one, and we feel we must rule on the objection now.

[1131] On this subject, the parties signed a series of admissions relating to this exhibit, which were filed as Exhibit 1702.1. These admissions essentially confirm that, although the Colucci Letter is available on Legacy plus at least two RJRUS-related web sites "as compelled by court order", it was never disclosed voluntarily and the company never waived its claim of privilege with respect to it and continues to assert that claim at all times.

[1132] In its Notes, JTM argues as follows:

> **2953.** Accordingly it is respectfully submitted that the determinative factor to decide whether a document covered by professional secrecy of the attorney can be used in litigation should be whether its use has been authorized by the beneficiary (including through a waiver) or by an express provision of law. Whether the document has been seen by 1, 10, 1,000 or even 100,000 individuals is irrelevant, so long as no such authorization exists.

[1133] For their part, the Plaintiffs raise the following arguments against JTM's claim of professional secrecy:

a. The document was never covered by professional secrecy because of the nature of its contents and the status of its author, who appears not to have been a lawyer;

b. Even if it had been covered by professional secrecy originally, it lost that protection as a result of its being publicly available on the Internet for more than ten years.

[1134] Further to its argument that the involuntary or unauthorized disclosure of a privileged document to a third party does not result in the loss of privilege, JTM argues that "the fact that Exhibit 1702-R has been made accessible to the public as a result of U.S. Court orders does not affect its privileged nature under Quebec law, nor does it render it admissible into evidence in Quebec proceedings".

[1135] Concerning the US proceedings, it is not every day that one sees orders of this sort[496]. It is quite simply extraordinary for a court to require the worldwide publication of documents potentially covered by solicitor-client privilege. Yet, we understand that more than one US court has done so in the context of "tobacco litigation" in that country.

[1136] This Court need neither analyze nor comment on those orders. Our interest is to examine how they might affect the admissibility of a single document in this trial. We emphasize their exceptional nature solely to underline our conviction that, to our knowledge, this facet of solicitor-client privilege has no parallel in Canadian legal history. The only precedent in Canadian jurisprudence of which we are aware comes from our own previous judgments in relation to this and other documents published on the Legacy Tobacco Documents Library website.

[1137] We dealt with that question in a March 25, 2013 judgment[497], as well as in a May 17, 2012 judgment dealing with litigation privilege[498]. Analyzing the effect of the divulgation being made against the party's will, but licitly, as is the case with Exhibit 1702R, on both occasions we ruled that the document lost any right to professional secrecy. In doing so, we relied on simple common sense, as well as on an *obiter dictum* from the Court of Appeal. Here are the relevant passages of the more recent judgment wherein we explain our reasoning.

> [7] Though there might be other motives for refusing professional secrecy protection to the Documents, the Court sees no need to look beyond the fact that they are available on Legacy in compliance with valid American court orders. From a practical and common-sense point of view, such a widespread and licit publication empties the issue of professional secrecy of all its relevance.
>
> [8] In our judgment of May 17, 2012, we provided our view on the effect of a widespread publication of a document that would otherwise be subject to professional secrecy. There, albeit dealing with a document subject to litigation privilege and not, strictly speaking, professional secrecy, we wrote:
>
> > [11] In its decision in *Biomérieux*[499], the Court of Appeal clearly limited the future application of *Chevrier*[500]. Before doing that, however, it noted that in its 1994 decision in the case of *Poulin v. Prat*[501] it had clarified the role of article 9 of the *Quebec Charter of Human Rights and Freedoms*[502] in such questions. The *Poulin* judgment provides guidance here not so much for its recognition of the professional secret as a fundamental right but, rather, for the door that it opened, or perhaps left open, in cases "according to the circumstances, when the document or information is already in the hands of the adverse party"[503].

---

496 Exhibit 1702.1 refers to the order of Madam Justice Kessler in the District of Columbia, file 99-CV-2496.
497 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2013 QCCS 4903.
498 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2012 QCCS 2181
499 *Biomérieux Inc. v. GeneOhm Sciences Canada Inc.,* 2007 QCCA 77.
500 *Chevrier v.Guimond*, [1984] R.D.J. 240, at page 242.
501 AZ-94011268; [1994] R.D.J. 301.
502 R.S.Q., ch. C-12.
503 Reference omitted.

> [12] Thirteen years later, the Court of Appeal in Biomérieux clarified what is meant by "the circumstances" in *Poulin v. Prat*. It said: "For example, if information subject to the professional secret has been divulged to the general public, I have difficulty in seeing how it could be protected by the court or otherwise. On the other hand, if its divulgation was of limited scope and the circumstances do not lead to the conclusion that the divulgation was done as the result of a waiver of privilege, it seems to me that the court must impose the measures necessary to ensure the protection of a fundamental right arising from article 9 of the Charter"[504].
>
> [13] It is paramount to note that the court made it clear that the qualification that the divulgation not be done as the result of a waiver of privilege applies only to the case of a limited divulgation. By isolating that mention in a sentence separate from the one dealing with a general divulgation, the Court of Appeal sets aside any consideration of waiver where there has been a broad divulgation of the document.
>
> …
>
> [15] Consequently, in circumstances such as these, particularly where the widespread divulgation was made legally (as the result of a court order), as opposed to by way of an illicit act, the common sense approach of the Court of Appeal is the only logical alternative available - even in the face of a rule of such importance as the one governing privilege. (The Court's emphasis)
>
> [9] We still favour the common sense approach of *Biomérieux*, and this, whether the document be subject to litigation privilege or to professional secrecy, provided that the divulgation has not been done improperly, i.e., illegally, unlawfully or illicitly. We need not and do not express any opinion on the effect of an improper publication of a document subject to professional secrecy, since the divulgations which concern us here were the result of court orders and, arguably, settlement agreements.
>
> [10] Consequently, professional secrecy does not apply to the Documents.[505]

[1138] We still adhere to this reasoning. Thus, we hold that Exhibit 1702R is not subject to professional secrecy and dismiss JTM's objection. It follows that the "R" should be removed from the exhibit number, which now becomes Exhibit 1702.

[1139] As a result, it is not necessary to deal with the Plaintiffs' first argument referring to the nature of the contents and the status of the document's author.

XI.B. THE ADMISSIBILITY OF "R" DOCUMENTS

[1140] At paragraphs 1481-1488 of its Notes, ITL requests the withdrawal from the record of all "R" exhibits that were allowed to be filed under reserve, subject to subsequent authorization as a result of testimony, a motion, an admission or otherwise[506].

---

504 Reference omitted.

505 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, *op. cit.,* Note 491.

506 There is a second category of "R" documents, being ones filed subject to an objection based on relevance. The only documents in that category are those discussed in Section XI.D below. The Court

At the time of filing, and on subsequent occasions, the Court made it clear that, in the absence of such subsequent authorization, the document would be removed from the record. We have not changed our position on that.

[1141] Consequently, all "R" exhibits for which no authorization was obtained shall be struck from the evidentiary record. The struck exhibits include the five such documents mentioned in the Plaintiffs' Notes: Exhibits 454-R, 454A-R, 613A-R, 623A-R and 1571-R.[507]

[1142] In furtherance of that, we shall reserve the parties' rights to obtain a further judgment specifying the struck exhibits, should that be required.

XI.C. THE CONFIDENTIALITY OF CERTAIN INTERNAL DOCUMENTS:

[1143] The documents in question are marketing documents, such as consumer surveys, cigarette designs and recipes, insurance policies and financial statements.

[1144] Preliminary to analyzing the cases of the documents for which confidentiality is claimed by the Companies, it is useful to examine the state of the law on the subject of confidentiality orders with respect to documents.

[1145] In order to justify an infringement of the public's right to freedom of expression and grant a confidentiality order, the Supreme Court in its decision in *Sierra Club* expressed the view that the applicant has the burden of showing necessity and proportionality:

> a) Such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> b) The salutary effects of the confidentiality order, including the effects on the right or civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[508] (The Court's emphasis)

[1146] In the following paragraphs, the court underlined "three important elements" affecting the first branch of the test, i.e., necessity:

- The risk must be real, substantial and well grounded in the evidence and pose a serious threat to the commercial interest in question;
- The important commercial interest cannot merely be specific to the party but the confidentiality must be of public interest in the sense of representing a general principle;

---

will not comment on ITL's paragraphs 1479 and 1480, since the issues there were resolved among the parties.

[507] ITL also makes submissions with respect to Exhibit 1740R. The Court has this exhibit as having been withdrawn. In any event, our general ruling on this matter would apply to it, if it is still in the record.

[508] *Sierra Club v. Canada (Minister of Finance),* [2002] 2 SCR 522, at paragraph 53.

- Reasonably alternative measures include the possibility of restricting the order as much as is reasonably possible while preserving the commercial interest in question.[509]

[1147] These are the principles that will guide our evaluation of the requests for confidentiality orders in this matter.

[1148] As well, we see no sense in analyzing the potential confidentiality of documents that are not referred to by any of the parties in their arguments[510]. Hence, we instructed counsel to limit their submissions to such documents, which ITL identified. We shall deal only with those documents now.

[1149] Finally, we analyzed this question in depth in our June 5, 2012 judgment in these files[511], where we refused to grant confidential status to a number of documents, *inter alia*, because they contained outdated information. We have not lost sight of what we ruled there, nor have we changed our view on that specific topic since then.

[1150] That said, we must point out that our 2012 judgment came after "only" three months of hearing, what for these files can be qualified as "very early on". More than two years of trial have followed and, at this juncture, the judgment is essentially written. Our current perspective thus provides us a complete view of the contents and the nuances of the evidence, something that we did not have in June 2012.

XI.C.1 GENERAL DOCUMENTS, INCLUDING CODING INFORMATION

[1151] In paragraphs 1506 and following of its Notes, ITL advises that eleven confidential documents of this type were referred to in Plaintiffs' argument, four of which are no longer confidential: Exhibits 1149-2M, 1196, 1258 and 1540.

[1152] Of the remaining seven "CONF" exhibits in issue, all appear to have been filed both in complete and in "redacted" form, i.e., where the confidential text is hidden. The first bears a "CONF" suffix, with the second having no "CONF". ITL also refers to one "CONF" document in its Notes.

[1153] Let us make it clear at the outset not only that we did not see the need to refer to a single one of these documents in the present judgment but also that the Plaintiffs did not see the need to refer to any of the redacted portions of these exhibits in their pleadings. The mere fact that a company is involved in litigation is no justification for rendering its entire corporate archives public. The public hearing rule should apply only to information that is relevant to the case.

[1154] On the other hand, as a general rule it is best not to carve up a document by nipping out bits and leaving in others[512]. That is a dangerous exercise, since one almost never knows what portions will eventually prove to be relevant. That becomes less dangerous, however, where the parties agree in advance to the portions to be exorcised, as is the case here.

---

509 *Ibidem*, paragraphs 55-57.
510 It is not irrelevant to note in this context that over 20,000 exhibits were filed in these cases.
511 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2012 QCCS 2581.
512 The French term "*charcuter*" captures the essence of this process.

[1155] The remaining exhibits are the following, as described in ITL's Notes at paragraphs 1510 and following:

- 529-CONF - a 1988 memo entitled "Cigarette Component Rationalization". Plaintiffs quote from this memorandum in their Notes and Submissions, and the quote they rely on is contained in the redacted copy: Exhibit 529.
- 530C-CONF – a 1981 document entitled "List of additives no longer used on Cigarettes and Fine Cuts", identifying the additives by their "K" Numbers, a confidential code, as described below.
- 530E-CONF – a listing of codes, called "K" Numbers, used by ITL to identify potential additives to cigarettes. ITL advises that Plaintiffs made an undertaking to file only the redacted version of this exhibit.
- 532-CONF – an attachment to a 1981 letter from ITL to Health Canada entitled "Type of Product in Which Additive Used". ITL indicates that the only redactions relate to fine-cut or roll-your-own tobacco, a subject that is outside the scope of the present actions. As well, the information that the Plaintiffs refer to is the use of coumarin in some of ITL's American style cigarettes. That information is also contained in the redacted copy: Exhibit 532.
- 992-CONF - a 1974 document entitled "List of active K-numbers by location", identifying a number of additives by their "K" Numbers.
- 999-CONF – a 1981 document entitled "K-Numbers Active List". ITL advises that Plaintiffs made an undertaking to file only the redacted version of this exhibit.
- 1000-CONF - a document entitled "K-No Identification". ITL advises that Plaintiffs made an undertaking to file only the redacted version of this exhibit.
- 20186-CONF – a Scientific Research and Experimental Development Information Return for fiscal 1990, as filed with Revenue Canada". It was referred to by ITL as an example of the disclosure that was made to the Canadian government on a regular basis.

[1156] Two other exhibits, 361-CONF and 1225-CONF, were the subject of an agreement with the Plaintiffs whereby only the redacted versions would be public. Failing disavowal of such agreement by the Plaintiffs, these exhibits will remain under seal.

[1157] ITL advises that Plaintiffs undertook to file only the redacted versions of exhibits 530E-CONF, 999-CONF and 1000-CONF and ask us to enforce that undertaking. We note that the proof indicates that the coding in these documents might still be in use by ITL. Hence, failing disavowal of such agreement by the Plaintiffs, these exhibits will remain under seal. In any event, the Court is satisfied that they meet the *Sierra Club* test.

[1158] Following in the path of the previous three, Exhibits 530C-CONF and 992-CONF contain confidential coding information that is of no use either to the Plaintiffs or to the

Court in these files. We are satisfied that they meet the *Sierra Club* test. Accordingly, they shall remain under seal.

[1159] The excluded portions of Exhibit 529-CONF refer either to American cigarettes, which are not the subject of these cases or to design features. Neither of these aspects is of direct relevance to these cases. The exhibits will remain under seal.

[1160] The excluded portions of Exhibit 532-CONF refer to products that are not the subject of these cases and for which the Court consistently refused to hear evidence. It will remain under seal.

[1161] The excluded portions of Exhibit 20186 are of no relevance to these cases and the exhibit will remain under seal.

XI.C.2 FINANCIAL STATEMENTS

[1162] For the purposes of assessing punitive damages, article 1621 C.C.Q. states that the debtor's "patrimonial situation" is relevant. Accordingly, the Court ordered the Companies to file their financial statements as of 2007 under a temporary sealing order.

[1163] After having reviewed those, the Plaintiffs agreed to allow ITL and RBH to withdraw their financial statements from the court record and replace them with the Summaries of earnings before and after tax: Exhibits 1730A-CONF and 1730B-CONF, respectively, for ITL and Exhibits 1732A-CONF and 1732B-CONF for RBH.

[1164] The Plaintiffs are content to limit the proof on this point to the Summaries, to which they add their own slightly different interpretation of the figures in the financial statements: Exhibits 1730-CONF for ITL and 1732-CONF for RBH.

[1165] RBH and the Plaintiffs agreed that the RBH Summaries would remain confidential unless and until a judgment awarding punitive damages is rendered against RBH. Depending on whether the Court bases its decision on earnings before or after tax, the corresponding exhibit would become public, with the other remaining under seal. Given that such a judgment is rendered herein, and that we have opted for earnings before tax, Exhibit 1732A-CONF is no longer confidential and is re-numbered as Exhibit 1732A, while Exhibit 1732B-CONF stays under seal.

[1166] ITL did not agree to a similar arrangement for its Summaries, although it was allowed to withdraw its financial statements from the record. Its position is that all these exhibits should remain under seal under all circumstances.

[1167] On this question, as well as with respect to the confidentiality of its insurance policies, ITL advises in paragraph 1496 of its Notes that it repeats and relies upon its Plan of Argument of November 21, 2014 in support of its Motion for a Sealing Order. We note that this motion refers to the actual financial statements and not to the Summaries.

[1168] In that Plan of Argument, ITL cites a number of decisions refusing production of financial information at a "*less advanced stage of the trial*", in ITL's words, on the ground that it is premature to file that evidence until it is essential to establish certain elements of the case. As such, it argues that this evidence should not be adduced unless and until a

judgment ordering punitive damages has been rendered. Given our judgment herein awarding punitive damages, this argument loses any relevance and is dismissed.

[1169] ITL also argues that the three "important elements" of the necessity test of *Sierra Club* apply so as to warrant a confidentiality order. The Court need not analyze in detail the arguments made in this regard, because they are all based on the possible filing of full financial statements. The substitution of the Summaries for the financial statements assuages any concerns that might have existed under either the first two "important elements" or the proportionality test.

[1170] As well, this "reasonably alternative measure" removes any possible serious risk to an important commercial interest of ITL, though we hasten to add that we are not convinced that any such risk existed. RBH's acceptance of the publication of its Summaries would seem to confirm that.

[1171] Accordingly, given that we have opted for earnings before taxes, Exhibit 1730A-CONF is no longer confidential and is re-numbered as Exhibit 1730A. Exhibit 1730B-CONF now becomes irrelevant and we shall make permanent the temporary confidentiality order in place with respect to it and order that it remain under seal unless and until a further order changes its status.

[1172] Plaintiffs' Exhibits 1730-CONF and 1732-CONF contain the same information shown in the two opened exhibits as well as other information that is not necessary for these cases. We shall thus make permanent the temporary confidentiality order in place with respect to them and order that they remain under seal unless and until a further order changes their status.

XI.C.3 INSURANCE POLICIES

[1173] The next series of documents to consider are insurance policies that could result in the payment of the damages being "wholly or partly assumed by a third person", as foreseen in article 1621. The Plaintiffs argue that the Companies made no proof to support a claim of confidentiality for the nearly 150 insurance policies filed for ITL and RBH[513]. For its part, JTM "stated that it had none to cover the two claims".[514]

[1174] The analysis done of these rather dense policies is quite sparse and the Court is not the one who should be filling in the blanks. The Plaintiffs assert that they need not refer to any confidential part of the policies in their arguments on punitive damages, but do not go on to indicate what policies or parts thereof are relevant to those arguments.

[1175] They merely point out that numerous policies "could theoretically cover, to some extent, these two claims but that no insurance company has confirmed that so far. They either reserved their decision or, in some cases, already denied coverage"[515]. They add that the

---

513 Exhibits 1753.1-CONF through 1753.81-CONF for RBH and 1754.1-CONF through 1754.60-CONF for ITL.

514 Plaintiffs' Notes, at paragraph 2134.

515 Plaintiffs' Notes, at paragraph 2135. Since article 1621 requires us to consider the extent of the reparation for which the Companies are already liable to the creditor, the fact that insurance covers compensatory damages is relevant to the assessment of punitive damages.

possibility that some compensatory damages might be covered by insurance should not weigh against granting punitive damages. That is fine, but it does not take us very far.

[1176] The Plaintiffs point to no specific insurance policy of ITL or RBH that would cover a condemnation for punitive or even compensatory damages. ITL, on the other hand, provided proof by affidavit that, in response to the claims it has submitted, their insurers have either denied coverage or not yet taken a position. [516] Hence, no insurer has to this date accepted that its policy covers the damages claimed in these files.

[1177] There is thus no proof that the Companies are insured against any condemnation made in this judgment, whether for compensatory or for punitive damages. It follows that there is no need to refer to any of these policies beyond what we have said above; the policies themselves are unnecessary and irrelevant.

[1178] As such, the Companies have satisfied the burden of proof on them in order to maintain the confidentiality of their insurance policies. We shall make permanent the temporary confidentiality order in place with respect to them and order that they remain under seal unless and until a further order changes their status.

XI.D. THE RELEVANCE AND CONFIDENTIALITY OF THE INTERCO CONTRACTS

[1179] Citing a number of inter-company transactions within the Japan Tobacco Inc. group shortly after it acquired JTM in 1999 (the "**Interco Contracts**"), the Plaintiffs allege that JTM's financial statements do not reflect the reality of its patrimonial situation. For that reason, they contest those financials and insist that the effect of the Interco Contracts be purged.

[1180] The facts behind this issue are presented in paragraphs 2138 to 2144 of Plaintiffs' Notes, which are reproduced in Schedule J. JTM's president, Michel Poirier, was questioned at length on this and numerous documents were filed, all under reserve of an objection as to relevance. JTM continues that objection as to all aspects of this evidence and seeks a sealing order for the exhibits relating to it. It was, nonetheless, willing to be practical and cooperative in order to avoid unnecessary debate, as we explain below.

[1181] We should note at the outset that the Interco Contracts question was studied in a recent judgment by one of our colleagues and by a judge of the Court of Appeal. They both refused Plaintiffs' Motion for a Safeguard Order to prohibit JTM from paying annual amounts of some $110 million to related companies as capital, interest and royalties under the Interco Contracts. JTM argues that these judgments decide the issue once and for all and that the Plaintiffs should not be allowed to reopen it now. JTM thus objects as to the general relevance of this information, plus as to its relevance in light of the two above-mentioned judgments.

[1182] Since we are on the subject, let us rule on that objection now.

---

[516] Exhibit 1754-CONF for ITL, at paragraph 6; Exhibit 1753-CONF for RBH. The RBH affidavit is referred to in Plaintiffs' Notes, but it does not seem to deal with insurance coverage.

XI.D.1 OBJECTION AS TO RELEVANCE

[1183] The judgments mentioned above certainly do decide in final fashion the Motion for a Safeguard Order, but only for the questions raised therein and for the remedy sought by it. They do not purport to examine the amount of punitive damages to be awarded under a future judgment on the merits and cannot automatically have the effect of rendering all aspects of the Interco Contracts affair irrelevant for that purpose.

[1184] Article 1621 edicts that "Punitive damages are assessed in the light of all the appropriate circumstances, in particular …". The items that follow that phrase are not limitative. It thus stands to reason that the Interco Contracts affair will be relevant if we feel that it is an appropriate circumstance to consider in our adjudication on punitive damages, in which case we must consider it.

[1185] We do and we already have. The objection as to relevance is dismissed.

XI.D.2 CONFIDENTIALITY OF RELATED EVIDENCE

[1186] Earlier, we referred to JTM's practical and cooperative approach on this issue. In laudable, albeit labyrinthine fashion, it and the Plaintiffs arrived at an agreement settling many of the evidentiary aspects raised: the "*Entente sur la confidentialité de certaines informations entre les demandeurs et JTIM*" (the "**Entente**": Exhibit 1747.1). It deals mainly with the designation of a number of pieces of evidence relating to the Interco Contracts as being either confidential or not.

[1187] Subject to the Court's ratification of it, the Entente has JTM withdrawing its request for confidentiality for the redacted parts of paragraphs 2138 through 2144 of the Plaintiffs' Notes, previously under seal by consent. Notwithstanding the opening of those paragraphs to the public, JTM and the Plaintiffs request that the exhibits and the testimony referred to therein remain under seal. We note that, since those paragraphs reproduce and paraphrase parts of those exhibits and testimony, those portions could no longer be treated as confidential.[517]

[1188] In the end, the decision on the ratification of the Entente comes down to deciding whether or not the confidential status should be maintained as requested. This request, although technically made by JTM, is indirectly made jointly with the Plaintiffs, since they both request the Court to ratify the Entente. The effect of ratification would be to declare the testimony and the Annexe B documents confidential.

[1189] Annexe B is comprised of a series of some 40 exhibits filed under reserve of JTM's objection as to relevance and as "CONF", this being by consent of the Plaintiffs. In it, we find numerous financial statements dating back to 1998, along with documents related to them. There are also a number of documents explaining the tax planning that was done within the Japan Tobacco group at the time of the formation of the Interco

---

[517] Annexe A, the summary of JTM's "Earnings from operations" for the years 2009 through 20013, would also become public, provided that the Court chooses that measure for evaluating punitive damages. That is, in fact, the measure that we prefer. JTM undertook to file two other summaries covering after-tax earnings and results after payments under the Interco Contracts. They came in the form of Annexes C and D to Exhibit 1747.1.

Contracts. They are for the most part quite technical and go into much greater detail than is necessary for the Plaintiffs to tell the story that they feel needs to be told.

[1190] They are the masters of their evidence, subject to any proper intervention the Court feels is required. Here, they confirm that all that they wish to say about the Interco Contracts is found in paragraphs 2138 through 2145 of their Notes, and that there is no need to refer to the underlying exhibits or to render them public[518]. That is confirmed by the fact that the only reference to them in the pleadings that the Court could find is in those eight paragraphs.

[1191] We see no justification for forcing the Plaintiffs to adduce any further proof than that which they choose to make. It is their decision and they will live or die by it. For our part, we see no need to state any other facts than those set out there, or to examine in detail any other documents. These exhibits are unnecessary for the adjudication of this matter.

[1192] We shall therefore ratify the Entente and render a confidentiality order with respect to the documents listed in Annexe B and the testimony of Mr. Poirier of May 23, 2014 and order that they remain under seal unless and until a further order changes their status. Exhibit 1747.1, on the other hand, becomes public, including Annexe A, JTM's earning from operations.

XII. INDIVIDUAL CLAIMS

[1193] The Plaintiffs displayed an impressive sense of clairvoyance in their Notes when they opted to renounce to making individual claims, declaring that "Outside of collective recovery, recourses of the members against the defendants are just impossible".[519] The Court agrees.

[1194] The Companies are of two minds about this. While no doubt rejoicing in the knowledge that there will be no need to adjudicate individual claims in the present files, they wish to avoid the possibility of any new actions being taken by current Class Members, a highly unlikely event, to be sure. That is why they insisted that the Plaintiffs not be allowed to remove the request for an order permitting individual claims and that the Court rule on it. The Plaintiffs do not object.

[1195] Consequently, we shall dismiss the request for an order permitting individual claims of the Members against the Companies in both files.

XIII. PROVISIONAL EXECUTION NOTWITHSTANDING APPEAL

[1196] The Plaintiffs seek a judgment declaring that the Companies were guilty of "improper use of procedure", one result of which would be the possibility of an order for provisional execution notwithstanding appeal under article 547(j) of the Code of Civil Procedure. The Court put over the question of procedural abuse until after judgment on the merits, but this did not stop the Plaintiffs in their quite understandable quest for some immediate payment of damages.

---

518 Transcript of November 21, 2014, at page 104.
519 Plaintiffs' Notes, at paragraph 2329.

[1197] They changed strategy and requested provisional execution on the basis of the penultimate paragraph of article 547, which reads:

> In addition, the court may, upon application, order provisional execution in case of exceptional urgency or for any other reason deemed sufficient in particular where the fact of bringing the case to appeal is likely to cause serious or irreparable injury, for the whole or for part only of a judgment. (The Court's emphasis)

[1198] In light of the delays in these cases, it takes no great effort to sympathize with the plight of the Members, particularly in the Blais file. Initiated some 17 years ago, these cases are far from being over. The Plaintiffs estimate that the appeals process will likely take another six years. The Court finds that optimistic, but possible.

[1199] In the meantime, Class Members are dying, in many cases as a direct result of the faults of the Companies. In our opinion, this represents serious and irreparable injury in light of the time required for the appeals. And there are other reasons sufficient to require an order of provisional execution.

[1200] Besides the simple, common-sense notion that it is high time that the Companies started to pay for their sins, it is also high time that the Plaintiffs, and their lawyers, receive some relief from the gargantuan financial burden of bringing them to justice after so many years.

[1201] There is also the appeal phase, a process that will be far from economical both in terms of time and of money. It is critical in the interest of justice that the Plaintiffs have the financial wherewithal to see this case to the end. Finally, the Fonds d'aide aux recours collectifs, which has been carrying part of that financial burden over these many years, also deserves consideration at this point.

[1202] Thus, it is fair and proper to approve provisional execution for at least part of the damages awarded, and we shall so order, limiting the immediate-term execution to the initial deposits and punitive damages. We do this in full knowledge of the Court of Appeal's statement to the effect that provisional execution for moral and punitive damages is very exceptional[520]. There is very little in these files that is not very exceptional, and this is no exception.

[1203] In this regard, there is precedent for a type of *sui generis* provisional execution in a class action. In the case of *Comartin v. Bodet*[521], the defendants were required to deposit a portion of damages on a provisional basis. The money was held by the prothonotary pending appeal and not distributed to the members until the judgment was final. We are inclined to follow similar lines here, although not identical. We are open to the possibility of distributing certain amounts immediately.

[1204] We shall, therefore, order each Company to deposit into its respective attorney's trust account, within sixty (60) days of the date of the present judgment, an amount equal to its initial deposit of moral damages plus both condemnations for punitive damages. In their proposal concerning the distribution process, the Plaintiffs should

---

520 *Hollinger v. Hollinger* [2007] CA 1051, at paragraph 3.

521 [1984] Q.J. No. 644 (Superior Court), at paragraphs 154 and following.

include suggestions for dealing with that amount pending final judgment, a question that will be decided after hearing the parties at a later date. The Companies may also provide written representations on this question within thirty (30) days of receiving the Plaintiffs' proposal.

XIV. CONCLUDING REMARKS

[1205] It is customary for our court to draft its judgments in the language of what is colloquially called "the losing party". Although the Companies succeeded on several of their principal arguments in these files, it seemed reasonable to draft in English, being the language that they clearly prefer. The Court will request a French translation of this judgment in the days following its publication.

[1206] Finally, the Court wishes to thank those lawyers whose professionalism, coupled with their sense of practicality and cooperation, made it possible ultimately to complete this journey in spite of the many obstacles cluttering its path.

IN COURT FILE #06-000076-980 (THE BLAIS FILE) THE COURT:

[1207] **GRANTS** the Plaintiffs' action in part;

[1208] **AMENDS** the class description as follows:

All persons residing in Quebec who satisfy the following criteria:	*Toutes les personnes résidant au Québec qui satisfont aux critères suivants:*
1) To have smoked, before November 20, 1998, a minimum of 12 pack/years of cigarettes manufactured by the defendants (that is, the equivalent of a minimum of 87,600 cigarettes, namely any combination of the number of cigarettes smoked in a day multiplied by the number of days of consumption insofar as the total is equal to or greater than 87,600 cigarettes).	*1) Avoir fumé, avant le 20 novembre 1998, au minimum 12 paquets/année de cigarettes fabriquées par les défenderesses (soit l'équivalent d'un minimum de 87 600 cigarettes, c'est-à-dire toute combinaison du nombre de cigarettes fumées dans une journée multiplié par le nombre de jours de consommation dans la mesure où le total est égal ou supérieur à 87 600 cigarettes).*
For example, 12 pack/years equals:	*Par exemple, 12 paquets/année égale:*
20 cigarettes a day for 12 years (20 X 365 X 12 = 87,600) or	*20 cigarettes par jour pendant 12 ans (20 X 365 X 12 = 87 600) ou*
30 cigarettes a day for 8 years (30 X 365 X 8 = 87,600) or	*30 cigarettes par jour pendant 8 ans (30 X 365 X 8 = 87 600) ou*
10 cigarettes a day for 24 years (10 X 365 X 24 = 87,600);	*10 cigarettes par jour pendant 24 ans (10 X 365 X 24 = 36 500);*
2) To have been diagnosed before March 12, 2012 with:	*2) Avoir été diagnostiquées avant le 12 mars 2012 avec:*
a) Lung cancer or	*a) Un cancer du poumon ou*
b) Cancer (squamous cell carcinoma) of the throat, that is to say of the larynx, the oropharynx or the hypopharynx or	*b) Un cancer (carcinome épidermoïde) de la gorge, à savoir du larynx, de l'oropharynx ou de l'hypopharynx ou*
c) Emphysema.	*c) de l'emphysème.*

The group also includes the heirs of the persons deceased after November 20, 1998 who satisfied the criteria mentioned herein.

Le groupe comprend également les héritiers des personnes décédées après le 20 novembre 1998 qui satisfont aux critères décrits ci-haut.

[1209] **CONDEMNS** the Defendants solidarily to pay as moral damages an amount of $6,858,864,000 plus interest and the additional indemnity from the date of service of the action;

[1210] **CONDEMNS** the Defendants solidarily to pay the amount of $100,000 as moral damages to each class member diagnosed with cancer of the lung, the larynx, the oropharynx or the hypopharynx who started to smoke before January 1, 1976, plus interest and the additional indemnity from the date of service of the action;

[1211] **CONDEMNS** the Defendants solidarily to pay the amount of $80,000 as moral damages to each class member diagnosed with cancer of the lung, the larynx, the oropharynx or the hypopharynx who started to smoke as of January 1, 1976, plus interest and the additional indemnity from the date of service of the action;

[1212] **CONDEMNS** the Defendants solidarily to pay the amount of $30,000 as moral damages to each member diagnosed with emphysema who started to smoke before January 1, 1976, plus interest and the additional indemnity from the date of service of the action;

[1213] **CONDEMNS** the Defendants solidarily to pay the amount of $24,000 as moral damages to each member diagnosed with emphysema who started to smoke as of January 1, 1976, plus interest and the additional indemnity from the date of service of the action;

[1214] **DECLARES** that, as among the Defendants, ITL shall be responsible for 67% of the solidary condemnations for moral damages pronounced in the present judgment, including all costs; RBH shall be responsible for 20% thereof and JTM shall be responsible for 13% thereof;

[1215] **ORDERS** Defendant Imperial Tobacco Canada Ltd. to make an initial deposit for compensatory damages of $670,000,000 into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1216] **ORDERS** Defendant Rothmans, Benson & Hedges Inc. to make an initial deposit for compensatory damages of $200,000,000 into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1217] **ORDERS** Defendant JTI Macdonald Corp. to make an initial deposit for compensatory damages of $130,000,000 into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1218] **RESERVES** the Plaintiffs' right to request orders for additional deposits should the above initial deposits prove insufficient to cover all claims made by eligible Members of the Class;

[1219] **CONDEMNS** Defendant Imperial Tobacco Canada Ltd. to pay a total of $30,000 as punitive damages for the entire class, plus interest and the additional indemnity from the date of the present judgment;

[1220] **ORDERS** Defendant Imperial Tobacco Canada Ltd. to deposit the amount of the condemnation for punitive damages into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1221] **CONDEMNS** Defendant Rothmans, Benson & Hedges Inc. to pay a total of $30,000 as punitive damages for the entire class, plus interest and the additional indemnity from the date of the present judgment;

[1222] **ORDERS** Defendant Rothmans, Benson & Hedges Inc. to deposit the amount of the condemnation for punitive damages into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1223] **CONDEMNS** Defendant JTI Macdonald Corp. to pay a total of $30,000 as punitive damages for the entire class, plus interest and the additional indemnity from the date of the present judgment;

[1224] **ORDERS** Defendant JTI Macdonald Corp. to deposit the amount of the condemnation for punitive damages into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1225] **WITH COSTS**, including, with respect to the Plaintiffs' experts, the costs related to the drafting of all reports, to the preparation of testimony, both on discovery and in trial, and to the remuneration for the time spent testifying and attending trial;

[1226] **ORDERS** that the fees of the representative's attorneys be paid in full out of the amounts deposited, subject to the rights of Le Fonds d'aide aux recours collectifs;

[1227] **DISMISSES** the Plaintiffs' request for an order permitting individual claims against the Defendants;

[1228] **GRANTS** the Plaintiffs' request for provisional execution notwithstanding appeal with respect to the initial deposits of each Defendant for moral damages plus the full amount of punitive damages;

[1229] **DECLARES** that, with respect to any balance of the amounts recovered collectively after the distribution process is completed, the Court will invite the parties to make representations as to its disposition;

IN COURT FILE #06-000070-983 (THE LÉTOURNEAU FILE) THE COURT:

[1230] **GRANTS** the Plaintiff's action in part;

[1231] **GRANTS** the portion of the Plaintiff's action seeking punitive damages;

[1232] **DISMISSES** the portion of the Plaintiffs' action seeking moral damages;

[1233] **AMENDS** the Class description to read as follows:

All persons residing in Quebec who, as of September 30, 1998, were addicted to the nicotine contained in the cigarettes made by the defendants and who otherwise satisfy the following criteria:	*Toutes les personnes résidant au Québec qui, en date du 30 septembre 1998, étaient dépendantes à la nicotine contenue dans les cigarettes fabriquées par les défenderesses et qui satisfont par ailleurs aux trois critères suivants:*
1) They started to smoke before September 30, 1994 and since that date have smoked principally cigarettes manufactured by the defendants;	*1) Elles ont commencé à fumer avant le 30 septembre 1994 et depuis cette date fumaient principalement les cigarettes fabriquées par les défenderesses;*
2) Between September 1 and September 30, 1998, they smoked on a daily basis an average of at least 15 cigarettes manufactured by the defendants; and	*2) Entre le 1er et le 30 septembre 1998, elles fumaient en moyenne au moins qunize cigarettes fabriquées par les défenderesses par jour; et*
3) On February 21, 2005, or until their death if it occurred before that date, they were still smoking on a daily basis an average of at least 15 cigarettes manufactured by the defendants.	*3) En date du 21 février 2005, ou jusqu'à leur décès si celui-ci est survenu avant cette date, elles fumaient toujours en moyenne au moins qunize cigarettes fabriquées par les défenderesses par jour.*
The group also includes the heirs of the members who satisfy the criteria described herein.	*Le groupe comprend également les héritiers des membres qui satisfont aux critères décrits ci-haut.*

[1234] **CONDEMNS** Defendant Imperial Tobacco Canada Ltd. to pay the amount of $72,500,000 as punitive damages, with interest and the additional indemnity from the date of the present judgment, in accordance with the following orders;

[1235] **ORDERS** Defendant Imperial Tobacco Canada Ltd. to deposit the amount of the condemnation for punitive damages into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1236] **CONDEMNS** Defendant Rothmans, Benson & Hedges Inc. to pay the amount of $46,000,000 as punitive damages, with interest and the additional indemnity from the date of the present judgment, in accordance with the following orders;

[1237] **ORDERS** Defendant Rothmans, Benson & Hedges Inc. to deposit the amount of the condemnation for punitive damages into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1238] **CONDEMNS** Defendant JTI Macdonald Corp. to pay the amount of $12,500,000 as punitive damages, with interest and the additional indemnity from the date of the present judgment, in accordance with the following orders;

[1239] **ORDERS** Defendant JTI Macdonald Corp. to deposit the amount of the condemnation for punitive damages into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1240] **WITH COSTS**, including, with respect to the Plaintiffs' experts, the costs related to the drafting of all reports, to the preparation of testimony, both on discovery and in trial, and to the remuneration for the time spent testifying and attending trial;

[1241] **REFUSES** to proceed with the distribution of punitive damages to each of the Class Members;

[1242] **ORDERS** that the fees of the representative's attorneys be paid in full out of the amounts deposited as punitive damages, subject to the rights of Le Fonds d'aide aux recours collectifs;

[1243] **ORDERS** that the balance of punitive damages awarded hereunder in both files be distributed according to the procedure to be established at a later hearing;

[1244] **DISMISSES** the Plaintiff's request for an order permitting individual claims against the Defendants;

[1245] **GRANTS** the Plaintiffs' request for provisional execution notwithstanding appeal with respect to the full amount of punitive damages;

[1246] **DECLARES** that, with respect to any balance of the amounts recovered collectively after the distribution process is completed, the Court will invite the parties to make representations as to its disposition;

WITH RESPECT TO BOTH FILES, THE COURT:

[1247] **ORDERS** the Plaintiffs to submit to the Court within sixty (60) days of the date of the present judgment, with copy to the Companies, a detailed proposal for the distribution of all amounts awarded herein, both with respect to punitive damages and to moral damages for Blais Class Members, including provisions for the publication of notices, for time limits to file claims, for adjudication mechanisms and any other relevant issues, as well as with respect to the treatment of any amounts resulting from provisional execution;

[1248] **STRIKES** the following exhibits from the court record:

- 454-R;
- 454A-R;
- 613A-R;
- 623A-R;
- 1571-R; plus
- All other "R" exhibits for which no subsequent authorization for filing was obtained, subject to the others provisions of the present judgment confirming the confidential status of an "R" exhibit, and **RESERVES** the parties rights to obtain a further judgment from this Court specifying the struck exhibits, should that be required;

[1249] **DISMISSES** the requests for confidentiality orders with respect to Exhibits 1730A-CONF and 1732A-CONF and **DECLARES** that those exhibits are no longer under seal and **RENUMBERS** them as Exhibits 1730A and 1732A;

[1250] **DISMISSES** JTM's objection based on professional secrecy with respect to Exhibit 1702R and **RENUMBERS** it as Exhibit 1702;

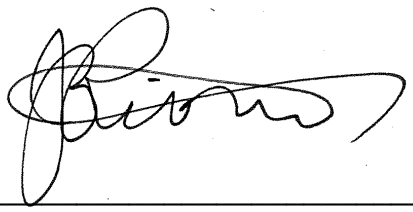
[1251] **DISMISSES** JTM's objection based on relevance for the evidence relating to the Interco Contracts;

[1252] **RATIFIES** the "*Entente sur la confidentialité de certaines informations entre les demandeurs et JTIM*" filed as Exhibit 1747.1;

[1253] **DECLARES** that the following exhibits and transcripts are confidential and shall remain under seal unless and until a further order changes their status:

- 361-CONF;
- 529-CONF;
- 530C-CONF;
- 530E-CONF;
- 532-CONF;
- 992-CONF;
- 999-CONF;
- 1000-CONF;
- 1225-CONF;
- 1730-CONF;
- 1730B-CONF;
- 1732-CONF;
- 1732B-CONF;
- 20186-CONF;
- 1731-1998-R-CONF through 1731-2012-R-CONF;
- 1748.1-R-CONF;
- 1748.1.1-R-CONF;
- 1748.1.3-R-CONF through 1748.1.6-R-CONF;
- 1748.2-R-CONF;
- 1748.4-R-CONF;
- 1750.1-R-CONF;
- 1751.1-R-CONF;
- 1751.1.1-R-CONF through; 1751.1.10-R-CONF;
- 1751.2-R-CONF;
- 1755.2-R-CONF;
- 1753.1-CONF through 1753.81-CONF;
- 1754.1-CONF through 1754.60-CONF;

- The documents listed in Annex B of Exhibit 1747.1, including any mentioned above.
- Annex D of Exhibit 1747.1
- Transcript of the testimony of Michel Poirier on May, 23, 2014;



BRIAN RIORDAN, J.S.C.

Hearing Dates: 251 days of hearing between March 12, 2012 and December 11, 2014

SCHEDULE A - GLOSSARY OF DEFINED TERMS

In cases such as these, it is a necessary evil from several perspectives to use abbreviated names for certain persons and things. Although the Court identifies most of those definitions in the text, it might prove helpful to the reader to have a complete glossary of defined terms readily available for easy reference.

- 1702R Judgment – The judgment rendered by the Court dismissing the objection to the production of Exhibit 1702R based on professional secrecy
- Ad Hoc Committee – A committee formed in 1963 by the four companies comprising the Canadian tobacco industry at the time, which became the CTMC in 1971
- AgCanada – Canadian Ministry of Agriculture; sometimes referred to as "CDAg" in exhibits
- Authorization Judgment - The judgment of February 21, 2005 authorizing the present class actions
- BAT – British American Tobacco Inc.; head office in the United Kingdom; the most important single shareholder of ITL over the Class Period (at least 40% of the voting shares) and sole shareholder since 2000
- B&H – Benson & Hedges Canada Inc.; the company that was merged with RPMC in 1986 to form RBH
- Blais Class – the members of the class in the Blais File
- Blais File – Court file #06-000076-980
- Bourque Report – the expert's report of Christian Bourque: Exhibit 1380
- Brown & Williamson – BAT's US subsidiary located in Louisville, Kentucky
- Canada – the Government of Canada and its ministries and agencies
- CDAg - AgCanada
- Civil Code – either of the *Civil Code of Lower Canada* or the *Civil Code of Quebec*, unless otherwise specified.
- Class Amending Judgment – Judgment of July 3, 2013 amending the definition of each Class
- Class Member - a member of the defined class in either file
- Class Period - 1950 - 1998
- CLP Act - the *Crown Liability and Proceedings Act*, R.S.C. 1985 c. C-50
- CMA – ITL's monthly Continuous Market Assessment survey of smokers only, measuring especially brand market share

- Codes - Cigarette Advertising and Promotion Codes adopted by the Companies as of 1972
- Colucci Letter – a letter dated July 30, 1986 from Anthony Colucci of RJRUS to James E. Young, outside counsel
- Common Questions - The "principal questions of fact and law to be dealt with collectively", as identified in the Authorization Judgment and redefined in the present judgment
- Council for Tobacco Research – the successor organisation to the Tobacco Institute in the United States as the US tobacco industry's trade association
- COPD - Chronic Obstructive Pulmonary Disease
- *CPA* - the *Consumer Protection Act*, RLRQ, c. P-40.1
- CTMC - Canadian Tobacco Manufacturers' Council / Conseil canadien des fabricants de produits du tabac; the trade association of the Canadian tobacco industry and the successor to the Ad Hoc Committee as of 1971
- Delhi / Delhi Research Station – CDA's experimental farm in Delhi, Ontario
- Delhi Tobacco – New tobacco strains developed by CDA at Delhi during the late 1970s and 1980s
- Diseases – lung cancer, squamous cell carcinoma of the larynx, the oropharynx or the hypopharynx and emphysema
- Entente - "*Entente sur la confidentialité de certaines informations entre les demandeurs et JTIM*": Exhibit 1747.1
- Health Canada – Canadian Ministry of Health; new name of NHWCanada
- ICOSI – International Committee on Smoking Issues
- Imasco – Imasco Limited; incorporated in 1912 under the name "Imperial Tobacco Company of Canada, Limited", this is the company through which ITL carried out its main tobacco operations in Québec throughout the Class Period, apparently directly until 1970 and thereafter until 2000 through a division; it was amalgamated with other companies in 2000 under ITL's name, with BAT as the sole shareholder
- INFOTAB – successor to ICOSI as of 1981
- Interco Contracts - a number of inter-company transactions within the Japan Tobacco Inc. group shortly after it acquired JTM in 1999
- Interco Obligations - payments due by JTM under the Interco Contracts, totalling some $110 million a year in capital, interest and royalties
- Internal Surveys - ITL's regular internal surveys known as "Monthly Monitors", done on a monthly basis, and "CMAs", done at various times throughout the year
- Isabelle Committee – hearings in 1968 and 1969 before the House of Commons Standing Committee on Health chaired by Dr. Gaston Isabelle.

- ITL – Defendant Imperial Tobacco Canada Limited, created in 2000 through an amalgamation of Imasco and other companies
- JTM – Defendant JTI-MacDonald Corp.; formerly MTI until 1978 and RJRM until 1999
- JT International – Japan Tobacco International, S.A.; head office in Geneva, Switzerland; parent company of JTM
- JTT – Japan Tobacco Inc. – head office in Tokyo, Japan; parent company of JTI; acquired RJRI and RJRM in 1999
- Knowledge date – January 1, 1980 in the Blais File and March 1, 1996 in Létourneau
- LaMarsh Conference - the conference on smoking and health held by Health and Welfare Canada in November 1963 and chaired by Judy LaMarsh
- Legacy – Legacy Tobacco Documents Library: a website at the University of California, San Francisco Library and Center for Knowledge Management, established pursuant to the order of a US court and containing documents from tobacco companies' files that the companies are compelled to divulge
- Létourneau Class – the members of the class in the Létourneau File
- Létourneau File – Court file #06-000070-983
- Member –a member of the defined class in either file
- Monthly Monitor – ITL's monthly survey of the general population (smokers and non-smokers) measuring smoking incidence and daily usage; originally called "8M"
- MTI – Macdonald Tobacco Inc.; former name of RJRM and JTM
- NHWCanada – Canadian Ministry of National Health and Welfare; name changed to Ministry of Health ("Health Canada")
- NSRA – Non-Smokers Rights Association
- Pack Year - the equivalent of smoking 7,300 cigarettes, expressed in terms of daily smoking, i.e., 1 pack (of 20) cigarettes a day over one year: 20 x 365 = 7,300
- PhMInc. – Philip Morris Inc.; head office in New York City; parent company of B&H until 1986; 40% shareholder of RBH until 1987 when it transferred those shares to PhMIntl
- PhMIntl – Philip Morris International Inc.; 40% shareholder of RBH from 1987 through 1998
- Policy Statement – Policy Statement by Canadian Tobacco Manufacturers on the Question of Tar, Nicotine and Other Tobacco Constituents That May Have Similar Connotations, signed in 1962
- Quebec Charter - *Québec Charter of Human Rights and Freedoms*, RLRQ c. C-12
- RBH – Defendant Rothmans, Benson & Hedges Inc.

- RJRUS – R.J. Reynolds Tobacco Company; head office in Winston-Salem, North Carolina; acquired MTI in 1974
- RJRM – RJR-Macdonald Corp.; new name of MTI as of 1978; former name of JTM until 1999
- Rothmans IG - Rothmans International Group; parent company of RPM until 1985 and thereafter majority shareholder of Rothmans Inc. through 1998
- Rothmans Inc. – parent company of RPM as of 1985; 60% shareholder of RBH from 1986 through 1998
- RPMC – Rothmans of Pall Mall Canada Inc.; subsidiary of Rothmans Inc. that was merged with B&H in 1986 to form RBH
- SCC Judgment - *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42
- SFS - Smokers Freedom Society
- Smoking date – January 1, 1976 in the Blais File and March 1, 1992 in Létourneau
- Summaries – Lists of before and after tax earnings of ITL and RBH for the years 2009 through 2013: Exhibits 1730A-CONF, 1730B-CONF, 1732A-CONF, 1732B-CONF
- *Tobacco Act* – S.C. 1997, c. 13
- Tobacco Institute – the trade association of the US tobacco industry; later called the Council for Tobacco Research
- TPCA – *Tobacco Products Control Act*, S.C. 1988, c. 20
- TRDA - the *Tobacco-Related Damages and Health Care Costs Recovery Act*, R.S.Q., c. R-2.2.0.0.1
- Trx – transcript of the trial, e.g., Trx 20120312 refers to the transcript of March 12, 2012
- Voluntary Codes – Cigarette Advertising and Promotion Codes adopted by the Companies as of 1972
- Warnings – the warning notices printed on all cigarette packs sold in Canada
- Young Teens - persons under the age at which it was legal to furnish tobacco products from time to time during the Class Period

SCHEDULE B - IMPORTANT DATES OVER THE CLASS PERIOD AND BEYOND

BAT obtains corporate control of ITL

1938 Reader's Digest article on cigarette holders and the harm caused by the nicotine and resins in cigarettes

1953 Meeting at the Plaza Hotel in New York City between the heads of US tobacco companies and the public relations firm of Hill & Knowlton

1958 RPM commences doing business in Canada

B&H commences doing business in Canada

Reader's Digest and Consumer Reports articles on the dangers of smoking

1962 The Companies sign the "Policy Statement by Canadian Tobacco Manufacturers on the Question of Tar, Nicotine and Other Tobacco Constituents That May Have Similar Connotations", an agreement to refrain from using the words tar, nicotine or other smoke constituents that may have similar connotations in any advertising, packaging or other communication to the public (Exhibit 40005A)

The Royal College of Physicians in Great Britain publishes its report on Smoking and Health (Exhibit 545)

Meeting at the Royal Montreal Golf Club between ITL executives and US tobacco industry leaders, along with the US public relations firm of Hill & Knowlton

1963 LaMarsh Conference on smoking and health is held in Ottawa

The Ad Hoc Committee, the forerunner of the CTMC, is formed by the Canadian tobacco industry

1964 The Companies agree to the first Voluntary Code (Exhibits 20001-20004 + 40005B-40005S)

The first United States' Surgeon General's Report on smoking and health is published

1968 Health Canada publishes the level of tar and nicotine contained in cigarette brands in League Tables

1969 The House of Commons' Standing Committer on Health, Welfare and Social Affairs, under the chairmanship of Dr. Gaston Isabelle, holds hearings on "the subject matter of tobacco advertising" and publishes its report entitled "CIGARETTE SMOKING – THE HEALTH QUESTION AND THE BASIS FOR ACTION" in December of that year (Exhibit 729B)

1971 CTMC is formed to replace the Ad Hoc Committee

Bill C-248, *An act respecting the promotion and sale of cigarettes*, is introduced

The Consumer Protection Act is first enacted, but without the provisions on which the Plaintiffs base their claims in these files

1972 The first warnings appear on cigarette packs, on a voluntary basis (Exhibits 666)

Health Canada and AgCanada jointly fund research at Delhi for a less hazardous cigarette

1974 RJRUS acquires MTI;

NSRA formed

Tar and nicotine figures are printed on cigarette packages

1975 Tar and nicotine figures are indicated in all cigarette advertising

1978 MTI changes name to RJRM

Health Canada ceases to fund AgCanada research at Delhi for a less hazardous cigarette

1980 The *Consumer Protection Act* is amended to add, i*nter alia*, articles 215-153 and 272, on April 30th

1982 CTMC is incorporated (Exhibit 4331)

1985 Physicians for a Smoke-Free Canada (PSC) founded

College of Pharmacists of Canada urged its members to stop selling cigarettes

1986 RBH formed as the result of the merger of RPM and B&H, with 60% shareholding to Rothmans Inc. and 40% to PhMI.

1987 Quebec's Bill 84, an Act Respecting The Protection Of Non-Smokers In Certain Public Places, becomes law

1988 The TPCA imposes a ban on most cigarette advertising and dictates new warnings to appear on cigarette packs as of January 1, 1989

Surgeon General's Report on "Nicotine Addiction" is published (Exhibit 601-1988)

1989 Federal *Non-Smokers' Health Act* came into force, prohibiting smoking on domestic flights

Report of the Royal Society of Canada on "Tobacco, Nicotine and Addiction" is published (Exhibit 212)

1991 Quebec College of Pharmacists bans the sale of cigarettes in pharmacies

1995 The Supreme Court of Canada overturns parts of the TPCA (Exh. 75)

1996 The Companies implement a new Voluntary Code after the Supreme Court judgment of 1995

1997 The *Tobacco Act* imposes a new ban on most cigarette advertising

1999 JT International acquires RJRM; name changes to JTM

2007 The Supreme Court of Canada upholds the *Tobacco Act* (Exh. 75A)

SCHEDULE C - NON-PARTY, NON-GOVERNMENT WITNESSES

NAME	PRINCIPAL TITLE	CALLED BY AND DATES
1. Michel Bédard	Founder and first President of the SFS	Plaintiffs – April 30, May 1, 2012
2. William Neville	President of CTMC: 1987-1992 Consultant to CTMC: 1985-1987 & 1992-1997	Plaintiffs – June 6 and 7, 2012
3. Jacques Larivière	Consultant to CTMC: 1979-1989 Employee of CTMC: 1989-1994	Plaintiffs – June 13, 14, 20, 2012 and April 4, 2013
4. Jeffrey Wigand	Vice President Research and Development and Environmental Affairs at Brown and Williamson: 1989-1993	Plaintiffs – December 10 and 11, 2012 and March 18, 2013
5. William A. Farone	Director of Applied Research at Philip Morris Inc.: 1976-1984	Plaintiffs – March 13, 14, 2013
6. James Hogg	Outside researcher under contract to the CTMC	ITL – December 16, 2013

SCHEDULE C.1 - EXPERTS CALLED BY THE PLAINTIFFS

NAME	POSITION AND AREA OF EXPERTISE	DATES
1. Robert Proctor	Recognized by the Court as an expert on the History of Science, the History of Scientific Knowledge and Controversy and the History of the Cigarette and the American Cigarette Industry	November 26, 27, 28 and 29, 2012
2. Christian Bourque	Recognized by the Court as an expert on surveys and marketing research	January 16 and March 12, 2013
3. Richard Pollay	Recognized by the Court as an expert on marketing, the marketing of cigarettes and the history of marketing	January 21, 22, 23 and 24, 2013
4. Alain Desjardins	Recognized by the Court as an expert chest and lung clinician (*pneumologue clininicien*)	February 4 and 5, 2013
5. André Castonguay	Recognized by the Court as an expert on chemistry and tobacco toxicology (*chimie et toxologie du tabac*)	February 6, 7 and 13, 2013
6. Louis Guertin	Recognized by the Court as an expert in ear, nose and throat medicine (*oto-rhino-laryngologie*) and cervico-facial oncological surgery	February 11, 2013
7. Jack Siemiatycki	Recognized by the Court as an expert in epidemiological methods (including statistics), cancer epidemiology, cancer etiology and environmental and lifestyle risk factors for disease	February 18, 19, 20, 21 and March 19 2013
8. Juan C. Negrete	Recognized by the Court as an expert psychiatrist with a specialization in addiction (*Médecin psychiatre expert en dependence*)	March 13 and 21 and April 2, 2013

SCHEDULE D - WITNESSES CONCERNING MATTERS RELATING TO ITL

NAME	PRINCIPAL TITLE	CALLED BY AND DATES
1. Michel Descôteaux	Director of Public Affairs: 1979-2000; Employee: 1965-2002	Plaintiffs - March 13, 14, 15, 19, 20, 21, 22 and May 1, 2, 2012
2. Simon Potter	Former outside counsel to ITL	Plaintiffs - March 22, 2012
3. Roger Ackman	Vice President of Legal Affairs: 1972-1999; Employee: 1970-99	Plaintiffs – April 2, 3, 4 and May 28, 2012
4. Anthony Kalhok	Vice President of Marketing: 1975-1979; Employee: 1962-79, then with IMASCO until 1983	Plaintiffs – April 10, 11, 12, 17, 18 and May 8, 2012 and March 6, 2013 ITL – October 7, 2013
5. Jean-Louis Mercier	President: 1979-91 Employee: 1960-93	Plaintiffs – April 18, 19 and May 2, 3 and 7, 2012
6. Edmond Ricard	Division Head in Charge of Strategy Planning and Insights: 2001-2011 Employee: 1982-2011	Plaintiffs – May 9, 10, 14, 15 and August 27, 28 and 29, 2012 ITL – October 9, 2013
7. David Flaherty	University professor	Plaintiffs - May 15, 2002
8. Carol Bizzaro	Manager Administrative Services - R&D Division Employee: 1968-2004	Plaintiffs - May 16, 2012
9. Jacques Woods	Senior Planner in the Marketing Department: 1980-1984 Employee: 1974-84	Plaintiffs - May 28 and June 12 and 20, 2012
10. Andrew Porter	Principal Research Scientist (Chemistry): 1985-2005	Plaintiffs - May 29, 30, 31 and June 20, 2012

	employee: 1977-2005, then with BAT until 2007	ITL – August 27 and 28, 2013
11. Marie Polet	President: October 2011 to present Employee of BAT in Europe: 1982-2011	Plaintiffs – June 4 and 5 2012
12. Lyndon Barnes	Outside counsel to ITL: 1988-2007	Plaintiffs – June 18 and 19, 2012
13. Pierre Leblond	Assistant Product Development Manager and Product Development Manager: 1978-mid 1990s; BAT project: mid 1990s-2002 Employee: 1973-2002	Plaintiffs – August 31 and November 15, 2012
14. Rita Ayoung	Supervisor R&D Information Centre: 1978-2000 Employee: 1973-2000	Plaintiffs – September 17 and November 15, 2012
15. Wayne Knox	Marketing Director: 1967-1985 Outside Consultant, *inter alia*, to ITL: 1990-2011 Employee: 1967-1985	Plaintiffs – February 14 and March 11, 2013
16. Wolfgang Hirtle	R&D Manager Employee: 1980-2010	Plaintiffs – December 19, 2012 ITL – October 15, 2013
17. Minoo Bilimoria	Researcher on the effect of tobacco on cell systems Seconded to McGill University: 1975-1991 Employee: 1969-1995	Plaintiffs – March 4 and 5, 2013
18. Graham Read	BAT Head of Group R&D Employee of BAT: 1976-2010	ITL – September 9, 10 and 11, 2013
19. Gaetan Duplessis	Manager of Product Development then Head of R&D Employee: 1981-2010	ITL – September 12 and 16 and October 10, 2013

20. Neil Blanche	Marketing Communications Manager Employee: 1983-2004 BAT Employee: 2004-2012	ITL – October 16, 2013
21. Robert Robitaille	Division Head of Engineering Employee: 1978-2011	December 19, 2013
22. James Sinclair	Plant Manager – reconstituted tobacco Employee: 1960-1999	April 8, 2013

SCHEDULE D.1 - EXPERTS CALLED BY ITL

NAME	POSITION AND AREA OF EXPERTISE	DATES
1. David H. Flaherty	Recognized by the Court as an expert historian on the history of smoking and health awareness in Québec	May 21, 22 and 23 and June 20, 2013
2. Claire Durand	Recognized by the Court as an expert in surveys, survey methods and advanced quantitative analysis (*en sondages, méthodologie de sondages et analyse quantitative avancée*)	June 12 and 13, 2013
3. Michael Dixon	Recognized by the Court as an expert in smoking behaviour, cigarette design and the relation between smoking behaviour and cigarette design	September 17, 18 and 19, 2013
4. John B. Davies	Recognized by the Court as an expert in applied psychology, psychometrics, drug abuse and addiction	January 27, 28 and 29 2014
5. Bertram Price	Recognized by the Court as an expert in applied statistics, risk assessment, the statistical analysis of health risks and the use and interpretation of epidemiological methods and data to measure statistical associations and	March 18 and 19, 2014

	to draw causal inferences	
6. Stephen Young	Recognized by the Court as an expert in the theory, design and implementation of consumer product warnings and safety communications	March 24 and 25, 2014
7. James Heckman	Recognized by the Court as an expert economist, an expert econometrician and an expert in the determinants of causality	April 14 and 15, 2014

SCHEDULE E - WITNESSES CONCERNING MATTERS RELATING TO JTM

NAME	PRINCIPAL TITLE	CALLED BY AND DATES
1. Peter Gage	Vice-Director of MTI: 1968-1972 Employee of MTI: 1955-1972	JTM – September 5, 6 and 7, 2012
2. Michel Poirier	President of JTM: 2000-present; Regional President for the Americas Region of JTI: 2005-present Employee: 1998-present	Plaintiffs – September 18 and 19, 2012 and May 23, 2014
3. Raymond Howie	Manager of Research and Analytical Services: 1977-1988; Director of Research and Development: 1988-2001 Employee: 1974-2001	Plaintiffs – September 20, 24, 25 and 26, 2012 JTM – November 4, 2013
4. Peter Hoult	VP Marketing RJRM: December 1979–1982; Executive VP Marketing, R&D, Sales: 1982-March 1983; VP International Marketing RJRI in US: March 1983–January 1987; President/CEO RJRM: January 1987–August 1988; Executive Chairman RJRM in US: August 1988–1989	Plaintiffs – September 27, October 1, 3 and 4, 2012 JTM – January 13, 14, and 15, 2014
5. John Hood	Research Scientist Employee: May 1977–May 1982	Plaintiffs – October 2, 2012
6. Mary Trudelle	Associate Product Manager: 1982; Product Manager for Vantage: 1983; Product Manager and Group Product Manager for Export A: 1984-1988; Marketing Manager: 1988-1990; Director of Strategic Planning and Research: 1992;	Plaintiffs – October 24 and 25, 2012

	Director of Public Affairs: 1994; VP Public Affairs: 1996-1998; Outside consultant to CTMC: 1998 Employee: 1982-1998	
7. Guy-Paul Massicotte	In-house counsel, Corporate Secretary and Director of RJRM: October 1977–October 1980	Plaintiffs – October 31 and November 1, 2012
8. Jeffrey Gentry	Executive Vice President - Operations and Chief Scientific Officer of R.J. Reynolds Tobacco Co. Employee of R.J. Reynolds since 1986	JTM – November 5, 6 and 7, 2013
9. Robin Robb	Vice President Marketing Employee of RJRM: 1978-1984	JTM – November 18, 19 and 20, 2013
10. Lance Newman	Director Marketing Development and Fine Cut Employee: 1992-Present	JTM – November 20 and 21, 2013 and January 30, 2014

SCHEDULE E.1 - EXPERTS CALLED BY JTM

NAME	POSITION AND AREA OF EXPERTISE	DATES
1. Jacques Lacoursière	Recognized by the Court as an expert on Quebec popular history (*l'histoire populaire du Québec)*	May 13, 14, 15 and 16, 2013
2. Raymond M. Duch	Recognized by the Court as an expert in the design of surveys, the implementation of surveys, the collection of secondary survey data and the analysis of data generated from survey research	May 27 and 28, 2013
3. Robert Perrins	Recognized by the Court as an expert historian with expertise in the history of medicine, the history of smoking and health in Canada as it relates to	August 19, 20 and 21, 2013

	the federal government, to the public health community and to the Canadian federal government's response	
4. W. Kip Viscusi	Recognized by the Court as an expert on how people make decisions in risky and uncertain situations and as to the role and sufficiency of information, including warnings to consumers, when making the decision to smoke	January 20 and 21, 2014
4. Dominique Bourget	Recognized by the Court as an expert in the diagnosis and treatment of mental disorders, including tobacco use disorder, as well as in the evaluation of mental	January 22 and 23, 2014
5. Sanford Barsky	Recognized by the Court as an expert in pathology and cancer research	February 17 and 18, 2014
6. Laurentius Marais	Recognized by the Court as an expert in applied statistics, including in the use of bio-statistics and epidemiological data and methods to draw conclusions as to the nature and extent of the relationship between an exposure and its health effects	March 10, 11 and 12, 2014
7. David Soberman	Recognized by the Court as an expert in marketing, marketing theory and marketing execution	April 16, 17, 22, 23 and 24, 2014

SCHEDULE F - WITNESSES CONCERNING MATTERS RELATING TO RBH

NAME	PRINCIPAL TITLE	CALLED BY AND DATES
1. John Barnett	President/CEO of RBH: 1998–Present: President/CEO of Rothmans Inc.: 1999–Present:	Plaintiffs – November 19, 2012
2. John Broen	Executive VP Export Sales at B&H/PhMI: 1967-1975 President B&H Canada: 1976–May 1978; VP Marketing RPM: 1978–1986 VP Marketing RBH: 1986–1988 VP Corporate Affairs RBH: 1988 – 2000	Plaintiffs – October 15, 16 and October 30, 2012
3. Ronald Bulmer	B&H Senior Product Manager: 1972–1974: B&H National Sales Manager: 1974–1976; B&H Vice President and Director of Marketing: 1976–March 1978; Employee of B&H: 1972-1978	Plaintiffs – October 29, 2012
4. Steve Chapman	Scientific Advisor, Manager of Product Development and Regulatory Compliance Employee: 1988-present	RBH – October 21, 22 and 23, 2013
5. Norman Cohen	Chief chemist RPM: 1968-1970s; Head of R&D Labs RPM: 1970s-1986; Scientific Advisor RBH: 1986-2000	Plaintiffs – October 17 and 18, 2012
6. Patrick Fennel	President/CEO RPM: June 1985; President Rothmans Inc: August 1985; Chairman/CEO RBH: December 1986 (after merger) until September 1989;	Plaintiffs – October 22 and 23, 2012

SCHEDULE F.1 - EXPERTS CALLED BY RBH

NAME	POSITION AND AREA OF EXPERTISE	DATES
1. Jacques Lacoursière	Recognized by the Court as an expert on "*l'histoire populaire du Québec*"	May 13, 14, 15 and 16, 2013
2. Raymond M. Duch	Recognized by the Court as an expert in the design of surveys, the implementation of surveys, the collection of secondary survey data and the analysis of data generated from survey research	May 27 and 28, 2013
3. W. Kip Viscusi	Recognized by the Court as an expert on how people make decisions in risky and uncertain situations and as to the role and sufficiency of information , including warning to consumers, when making the decision to smoke	January 20 and 21, 2014
4. Kenneth Mundt	Recognized by the Court as an expert in epidemiology, epidemiological methods and principles, cancer epidemiology, etiology and environmental and lifestyle risk factors and disease causation in populations	March 17 and 18, 2014

SCHEDULE G - WITNESSES FROM THE GOVERNMENT OF CANADA

NAME	PRINCIPAL TITLE	CALLED BY AND DATES
1. Denis Choinière	Health Canada - Director of the Office of Tobacco Products Regulations in the Department of Controlled Substances (*Directeur du Bureau de la réglementation des produits du tabac dans la Direction des substances contrôlées et de la lutte au tabagisme*)	JTM – June 10, 11 and 13, 2013
2. Marc Lalonde	Minister of Health for Canada: November 1972–September 1977	Defendants – June 17 and 18, 2013
3. Frank Marks	Director of Delhi Research Station: 1976–1981 and 1995-2000	ITL – December 2 and 3, 2013
4. Peter W. Johnson	Director of Delhi Research Station: 1981-1991	RBH – December 4, 2013
5. Bryan Zilkey	Employee of Agriculture Canada: 1969-1994	ITL – December 9 and 10, 2013
6. Albert Liston	Employee of Health Canada: 1964-92 1984-92 - ADM of Health Protection Branch	ITL - December 11 and 12, 2013

SCHEDULE H - RELEVANT LEGISLATION

I. CIVIL CODE OF QUEBEC

1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

1468. The manufacturer of a movable property is liable to reparation for injury caused to a third person by reason of a safety defect in the thing, even if it is incorporated with or placed in an immovable for the service or operation of the immovable.

[...] (The Court's emphasis)

1469. A thing has a safety defect where, having regard to all the circumstances, it does not afford the safety which a person is normally entitled to expect, particularly by reason of a defect in the design or manufacture of the thing, poor preservation or presentation of the thing, or the lack of sufficient indications as to the risks and dangers it involves or as to means to avoid them.

(The Court's emphasis)

1473. The manufacturer, distributor or supplier of a movable property is not liable to reparation for injury caused by a safety defect in the property if he proves that the

1457. Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.

Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.

Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d'une autre personne ou par le fait des biens qu'elle a sous sa garde.

1468. Le fabricant d'un bien meuble, même si ce bien est incorporé à un immeuble ou y est placé pour le service ou l'exploitation de celui-ci, est tenu de réparer le préjudice causé à un tiers par le défaut de sécurité du bien.

[...] (Le Tribunal souligne)

1469. Il y a défaut de sécurité du bien lorsque, compte tenu de toutes les circonstances, le bien n'offre pas la sécurité à laquelle on est normalement en droit de s'attendre, notamment en raison d'un vice de conception ou de fabrication du bien, d'une mauvaise conservation ou présentation du bien ou, encore, de l'absence d'indications suffisantes quant aux risques et dangers qu'il comporte ou quant aux moyens de s'en prémunir.

(Le Tribunal souligne)

1473. Le fabricant, distributeur ou fournisseur d'un bien meuble n'est pas tenu de réparer le préjudice causé par le défaut de sécurité de ce bien s'il prouve que la victime

victim knew or could have known of the defect, or could have foreseen the injury.

Nor is he liable to reparation if he proves that, according to the state of knowledge at the time that he manufactured, distributed or supplied the property, the existence of the defect could not have been known, and that he was not neglectful of his duty to provide information when he became aware of the defect.

(The Court's emphasis)

1477. The assumption of risk by the victim, although it may be considered imprudent having regard to the circumstances, does not entail renunciation of his remedy against the person who caused the injury.

1478. Where an injury has been caused by several persons, liability is shared by them in proportion to the seriousness of the fault of each.

The victim is included in the apportionment when the injury is partly the effect of his own fault.

1480. Where several persons have jointly participated in a wrongful act which has resulted in injury or have committed separate faults, each of which may have caused the injury, and where it is impossible to determine, in either case, which of them actually caused the injury, they are solidarily bound to make reparation thereof.

1526. The obligation to make reparation for injury caused to another through the fault of two or more persons is solidary where the obligation is extra-contractual.

1537. Contribution to the payment of a solidary obligation is made by equal shares among the solidary debtors, unless their interests in the debt, including their shares of the obligation to make reparation for injury

connaissait ou était en mesure de connaître le défaut du bien, ou qu'elle pouvait prévoir le préjudice.

Il n'est pas tenu, non plus, de réparer le préjudice s'il prouve que le défaut ne pouvait être connu, compte tenu de l'état des connaissances, au moment où il a fabriqué, distribué ou fourni le bien et qu'il n'a pas été négligent dans son devoir d'information lorsqu'il a eu connaissance de l'existence de ce défaut.

(Le Tribunal souligne)

1477. L'acceptation de risques par la victime, même si elle peut, eu égard aux circonstances, être considérée comme une imprudence, n'emporte pas renonciation à son recours contre l'auteur du préjudice.

1478. Lorsque le préjudice est causé par plusieurs personnes, la responsabilité se partage entre elles en proportion de la gravité de leur faute respective.

La faute de la victime, commune dans ses effets avec celle de l'auteur, entraîne également un tel partage.

1480. Lorsque plusieurs personnes ont participé à un fait collectif fautif qui entraîne un préjudice ou qu'elles ont commis des fautes distinctes dont chacune est susceptible d'avoir causé le préjudice, sans qu'il soit possible, dans l'un ou l'autre cas, de déterminer laquelle l'a effectivement causé, elles sont tenues solidairement à la réparation du préjudice.

1526. L’obligation de réparer le préjudice causé à autrui par la faute de deux personnes ou plus est solidaire, lorsque cette obligation est extracontractuelle

1537. La contribution dans le paiement d'une obligation solidaire se fait en parts égales entre les débiteurs solidaires, à moins que leur intérêt dans la dette, y compris leur part dans l'obligation de réparer le préjudice

caused to another, are unequal, in which case their contributions are proportional to the interest of each in the debt.

However, if the obligation was contracted in the exclusive interest of one of the debtors or if it is due to the fault of one co-debtor alone, he is liable for the whole debt to the other co-debtors, who are then considered, in his regard, as his sureties.

1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.

Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

2804. Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof.

2811. A fact or juridical act may be proved by a writing, by testimony, by presumption, by admission or by the production of real evidence, according to the rules set forth in this Book and in the manner provided in the Code of Civil Procedure (chapter C-25) or in any other Act.

2846. A presumption is an inference established by law or the court from a known fact to an unknown fact.

2849. Presumptions which are not established by law are left to the discretion of

causé à autrui, ne soit inégal, auquel cas la contribution se fait proportionnellement à l'intérêt de chacun dans la dette.

Cependant, si l'obligation a été contractée dans l'intérêt exclusif de l'un des débiteurs ou résulte de la faute d'un seul des codébiteurs, celui-ci est tenu seul de toute la dette envers ses codébiteurs, lesquels sont alors considérés, par rapport à lui, comme ses cautions.

1621. Lorsque la loi prévoit l'attribution de dommages-intérêts punitifs, ceux-ci ne peuvent excéder, en valeur, ce qui est suffisant pour assurer leur fonction préventive.

Ils s'apprécient en tenant compte de toutes les circonstances appropriées, notamment de la gravité de la faute du débiteur, de sa situation patrimoniale ou de l'étendue de la réparation à laquelle il est déjà tenu envers le créancier, ainsi que, le cas échéant, du fait que la prise en charge du paiement réparateur est, en tout ou en partie, assumée par un tiers.

2804. La preuve qui rend l'existence d'un fait plus probable que son inexistence est suffisante, à moins que la loi n'exige une preuve plus convaincante.

2811. La preuve d'un acte juridique ou d'un fait peut être établie par écrit, par témoignage, par présomption, par aveu ou par la présentation d'un élément matériel, conformément aux règles énoncées dans le présent livre et de la manière indiquée par le Code de procédure civile (chapitre C-25) ou par quelque autre loi.

2846. La présomption est une conséquence que la loi ou le tribunal tire d'un fait connu à un fait inconnu.

2849. Les présomptions qui ne sont pas établies par la loi sont laissées à l'appréciation

the court which shall take only serious, precise and concordant presumptions into consideration.

du tribunal qui ne doit prendre en considération que celles qui sont graves, précises et concordantes.

2900. Interruption with regard to one of the creditors or debtors of a solidary or indivisible obligation has effect with regard to the others.

2900. L'interruption à l'égard de l'un des créanciers ou des débiteurs d'une obligation solidaire ou indivisible produit ses effets à l'égard des autres.

2908. A motion for leave to bring a class action suspends prescription in favour of all the members of the group for whose benefit it is made or, as the case may be, in favour of the group described in the judgment granting the motion.

2908. La requête pour obtenir l'autorisation d'exercer un recours collectif suspend la prescription en faveur de tous les membres du groupe auquel elle profite ou, le cas échéant, en faveur du groupe que décrit le jugement qui fait droit à la requête.

The suspension lasts until the motion is dismissed or annulled or until the judgment granting the motion is set aside; however, a member requesting to be excluded from the action or who is excluded therefrom by the description of the group made by the judgment on the motion, an interlocutory judgment or the judgment on the action ceases to benefit from the suspension of prescription.

Cette suspension dure tant que la requête n'est pas rejetée, annulée ou que le jugement qui y fait droit n'est pas annulé; par contre, le membre qui demande à être exclu du recours, ou qui en est exclu par la description que fait du groupe le jugement qui autorise le recours, un jugement interlocutoire ou le jugement qui dispose du recours, cesse de profiter de la suspension de la prescription.

In the case of a judgment, however, prescription runs again only when the judgment is no longer susceptible of appeal.

Toutefois, s'il s'agit d'un jugement, la prescription ne recommence à courir qu'au moment où le jugement n'est plus susceptible d'appel.

2925. An action to enforce a personal right or movable real right is prescribed by three years, if the prescriptive period is not otherwise established.

2925. L'action qui tend à faire valoir un droit personnel ou un droit réel mobilier et dont le délai de prescription n'est pas autrement fixé se prescrit par trois ans.

II. CODE OF CIVIL PROCEDURE OF QUEBEC

54.1. A court may, at any time, on request or even on its own initiative after having heard the parties on the point, declare an action or other pleading improper and impose a sanction on the party concerned.

54.1. Les tribunaux peuvent à tout moment, sur demande et même d'office après avoir entendu les parties sur le point, déclarer qu'une demande en justice ou un autre acte de procédure est abusif et prononcer une sanction contre la partie qui agit de manière abusive.

The procedural impropriety may consist in a claim or pleading that is clearly unfounded,

L'abus peut résulter d'une demande en justice ou d'un acte de procédure manifestement mal

frivolous or dilatory or in conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, or in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate.

fondé, frivole ou dilatoire, ou d'un comportement vexatoire ou quérulent. Il peut aussi résulter de la mauvaise foi, de l'utilisation de la procédure de manière excessive ou déraisonnable ou de manière à nuire à autrui ou encore du détournement des fins de la justice, notamment si cela a pour effet de limiter la liberté d'expression d'autrui dans le contexte de débats publics.

54.2. If a party summarily establishes that an action or pleading may be an improper use of procedure, the onus is on the initiator of the action or pleading to show that it is not excessive or unreasonable and is justified in law.

54.2. Si une partie établit sommairement que la demande en justice ou l'acte de procédure peut constituer un abus, il revient à la partie qui l'introduit de démontrer que son geste n'est pas exercé de manière excessive ou déraisonnable et se justifie en droit.

A motion to have an action in the first instance dismissed on the grounds of its improper nature is presented as a preliminary exception.

La requête visant à faire rejeter la demande en justice en raison de son caractère abusif est, en première instance, présentée à titre de moyen préliminaire.

54.3. If the court notes an improper use of procedure, it may dismiss the action or other pleading, strike out a submission or require that it be amended, terminate or refuse to allow an examination, or annul a writ of summons served on a witness.

54.3. Le tribunal peut, dans un cas d'abus, rejeter la demande en justice ou l'acte de procédure, supprimer une conclusion ou en exiger la modification, refuser un interrogatoire ou y mettre fin ou annuler le bref d'assignation d'un témoin.

In such a case or where there appears to have been an improper use of procedure, the court may, if it considers it appropriate,

Dans un tel cas ou lorsqu'il paraît y avoir un abus, le tribunal peut, s'il l'estime approprié:

(1) subject the furtherance of the action or the pleading to certain conditions;

(1) assujettir la poursuite de la demande en justice ou l'acte de procédure à certaines conditions;

(2) require undertakings from the party concerned with regard to the orderly conduct of the proceeding;

(2) requérir des engagements de la partie concernée quant à la bonne marche de l'instance;

(3) suspend the proceeding for the period it determines;

(3) suspendre l'instance pour la période qu'il fixe;

(4) recommend to the chief judge or chief justice that special case management be ordered; or

(4) recommander au juge en chef d'ordonner une gestion particulière de l'instance;

(5) order the initiator of the action or pleading to pay to the other party, under pain of dismissal of the action or pleading, a provision for the costs of the proceeding, if justified by the circumstances and if the court notes that without such assistance the party's financial situation would prevent it from effectively arguing its case.

(5) ordonner à la partie qui a introduit la demande en justice ou l'acte de procédure de verser à l'autre partie, sous peine de rejet de la demande ou de l'acte, une provision pour les frais de l'instance, si les circonstances le justifient et s'il constate que sans cette aide cette partie risque de se retrouver dans une situation économique telle qu'elle ne pourrait faire valoir son point de vue valablement.

54.4. On ruling on whether an action or pleading is improper, the court may order a provision for costs to be reimbursed, condemn a party to pay, in addition to costs, damages in reparation for the prejudice suffered by another party, including the fees and extrajudicial costs incurred by that party, and, if justified by the circumstances, award punitive damages.

54.4. Le tribunal peut, en se prononçant sur le caractère abusif d'une demande en justice ou d'un acte de procédure, ordonner, le cas échéant, le remboursement de la provision versée pour les frais de l'instance, condamner une partie à payer, outre les dépens, des dommages-intérêts en réparation du préjudice subi par une autre partie, notamment pour compenser les honoraires et débours extrajudiciaires que celle-ci a engagés ou, si les circonstances le justifient, attribuer des dommages-intérêts punitifs.

If the amount of the damages is not admitted or may not be established easily at the time the action or pleading is declared improper, the court may summarily rule on the amount within the time and under the conditions determined by the court.

Si le montant des dommages-intérêts n'est pas admis ou ne peut être établi aisément au moment de la déclaration d'abus, il peut en décider sommairement dans le délai et sous les conditions qu'il détermine.

547. Notwithstanding appeal, provisional execution applies in respect of all the following matters unless, by a decision giving reasons, execution is suspended by the court:

547. Il y a lieu à exécution provisoire malgré l'appel dans tous les cas suivants, à moins que, par décision motivée, le tribunal ne suspende cette exécution:

(a) possessory actions;

(a) du possessoire;

(b) liquidation of a succession, or making an inventory;

(b) de mesures pour assurer la liquidation d'une succession ou de confections d'inventaires;

(c) urgent repairs;

(c) de réparations urgentes;

(d) ejectment, when there is no lease or the lease has expired or has been cancelled or annulled;

(d) d'expulsion des lieux, lorsqu'il n'y a pas de bail ou que le bail est expiré, résilié ou annulé;

(e) appointment, removal or replacement of tutors, curators or other administrators of the

(e) de nomination, de destitution ou de remplacement de tuteurs, curateurs ou autres

property of others, or revocation of the mandate given to a mandatary in anticipation of the mandator's incapacity;

administrateurs du bien d'autrui, ou encore de révocation du mandataire chargé d'exécuter un mandat donné en prévision de l'inaptitude du mandant;

(f) accounting;

(f) de reddition de comptes;

(g) alimentary pension or allowance or custody of children;

(g) de pension ou provision alimentaire, ou de garde d'enfants;

(h) judgments of sequestration;

(h) de sentences de séquestre;

(i) (subparagraph repealed);

(i) *(paragraphe abrogé);*

(j) judgments with regard to an improper use of procedure.

(j) de jugements rendus en matière d'abus de procédure.

In addition, the court may, upon application, order provisional execution in case of exceptional urgency or for any other reason deemed sufficient in particular where the fact of bringing the case to appeal is likely to cause serious or irreparable injury, for the whole or for part only of a judgment.

De plus, le tribunal peut, sur demande, ordonner l'exécution provisoire dans les cas d'urgence exceptionnelle ou pour quelqu'autre raison jugée suffisante notamment lorsque le fait de porter l'affaire en appel risque de causer un préjudice sérieux ou irréparable, pour la totalité ou pour une partie seulement du jugement.

985. The judgment has the authority of *res judicata* only as to the parties to the action and the amount claimed.

985. Le jugement n'a l'autorité de la chose jugée qu'à l'égard des parties au litige et que pour le montant réclamé.

The judgment cannot be invoked in an action based on the same cause and instituted before another court; the court, on its own initiative or at the request of a party, must dismiss any action or proof based on the judgment.

Le jugement ne peut être invoqué dans une action fondée sur la même cause et introduite devant un autre tribunal; le tribunal doit alors, à la demande d'une partie ou d'office, rejeter toute demande ou toute preuve basée sur ce jugement.

1031. The court orders collective recovery if the evidence produced enables the establishment with sufficient accuracy of the total amount of the claims of the members; it then determines the amount owed by the debtor even if the identity of each of the members or the exact amount of their claims is not established.

1031. Le tribunal ordonne le recouvrement collectif si la preuve permet d'établir d'une façon suffisamment exacte le montant total des réclamations des membres; il détermine alors le montant dû par le débiteur même si l'identité de chacun des membres ou le montant exact de leur réclamation n'est pas établi.

1032. The judgment ordering the collective recovery of the claims orders the debtor either to deposit the established amount in

1032. Le jugement qui ordonne le recouvrement collectif des réclamations enjoint au débiteur soit de déposer au greffe

the office of the court or with a financial institution operating in Québec, or to carry out a reparatory measure that it determines or to deposit a part of the established amount and to carry out a reparatory measure that it deems appropriate.

ou auprès d'un établissement financier exerçant son activité au Québec le montant établi ou d'exécuter une mesure réparatrice qu'il détermine, soit de déposer une partie du montant établi et d'exécuter une mesure réparatrice qu'il juge appropriée.

Where the court orders that an amount be deposited with a financial institution, the interest on the amount accrues to the members.

Lorsque le tribunal ordonne le dépôt auprès d'un établissement financier, les membres bénéficient alors des intérêts sur les montants déposés.

The judgment may also, for the reasons indicated therein, fix terms and conditions of payment.

Le jugement peut aussi fixer, pour les motifs qu'il indique, des modalités de paiement.

The clerk acts as seizing officer on behalf of the members.

Le greffier agit en qualité de saisissant pour le bénéfice des membres.

1034. The court may, if of opinion that the liquidation of individual claims or the distribution of an amount to each of the members is impossible or too expensive, refuse to proceed with it and provide for the distribution of the balance of the amounts recovered collectively after collocating the law costs and the fees of the representative's attorney.

1034. Le tribunal peut, s'il est d'avis que la liquidation des réclamations individuelles ou la distribution d'un montant à chacun des membres est impraticable ou trop onéreuse, refuser d'y procéder et pourvoir à la distribution du reliquat des montants recouvrés collectivement après collocation des frais de justice et des honoraires du procureur du représentant.

III. CONSUMER PROTECTION ACT

216. For the purposes of this title, representation includes an affirmation, a behaviour or an omission.

216. Aux fins du présent titre, une représentation comprend une affirmation, un comportement ou une omission.

218. To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.

218. Pour déterminer si une représentation constitue une pratique interdite, il faut tenir compte de l'impression générale qu'elle donne et, s'il y a lieu, du sens littéral des termes qui y sont employés.

219. No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.

219. Aucun commerçant, fabricant ou publicitaire ne peut, par quelque moyen que ce soit, faire une représentation fausse ou trompeuse à un consommateur.

220. No merchant, manufacturer or

220. Aucun commerçant, fabricant ou

advertiser may, falsely, by any means whatever,

(a) ascribe certain special advantages to goods or services;

(b) hold out that the acquisition or use of goods or services will result in pecuniary benefit;

(c) hold out that the acquisition or use of goods or services confers or insures rights, recourses or obligations.

publicitaire ne peut faussement, par quelque moyen que ce soit:

(a) attribuer à un bien ou à un service un avantage particulier;

(b) prétendre qu'un avantage pécuniaire résultera de l'acquisition ou de l'utilisation d'un bien ou d'un service;

(c) prétendre que l'acquisition ou l'utilisation d'un bien ou d'un service confère ou assure un droit, un recours ou une obligation.

228. No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.

228. Aucun commerçant, fabricant ou publicitaire ne peut, dans une représentation qu'il fait à un consommateur, passer sous silence un fait important.

253. Where a merchant, manufacturer or advertiser makes use of a prohibited practice in case of the sale, lease or construction of an immovable or, in any other case, of a prohibited practice referred to in paragraph a or b of section 220, a, b, c, d, e or g of section 221, d, e or f of section 222, c of section 224 or a or b of section 225, or in section 227, 228, 229, 237 or 239, it is presumed that had the consumer been aware of such practice, he would not have agreed to the contract or would not have paid such a high price.

253. Lorsqu'un commerçant, un fabricant ou un publicitaire se livre en cas de vente, de location ou de construction d'un immeuble à une pratique interdite ou, dans les autres cas, à une pratique interdite visée aux paragraphes *a* et *b* de l'article 220, *a*, *b*, *c*, *d*, *e* et *g* de l'article 221, *d*, *e* et *f* de l'article 222, *c* de l'article 224, *a* et *b* de l'article 225 et aux articles 227, 228, 229, 237 et 239, il y a présomption que, si le consommateur avait eu connaissance de cette pratique, il n'aurait pas contracté ou n'aurait pas donné un prix si élevé.

272. If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act,

(a) the specific performance of the obligation;

(b) the authorization to execute it at the merchant's or manufacturer's expense;

272. Si le commerçant ou le fabricant manque à une obligation que lui impose la présente loi, un règlement ou un engagement volontaire souscrit en vertu de l'article 314 ou dont l'application a été étendue par un décret pris en vertu de l'article 315.1, le consommateur, sous réserve des autres recours prévus par la présente loi, peut demander, selon le cas:

(a) l'exécution de l'obligation;

(b) l'autorisation de la faire exécuter aux frais du commerçant ou du fabricant;

(c) that his obligations be reduced;

(d) that the contract be rescinded;

(e) that the contract be set aside; or

(f) that the contract be annulled.

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

(c) la réduction de son obligation;

(d) la résiliation du contrat;

(e) la résolution du contrat; ou

(f) la nullité du contrat,

sans préjudice de sa demande en dommages-intérêts dans tous les cas. Il peut également demander des dommages-intérêts punitifs.

IV. QUEBEC CHARTER OF HUMAN RIGHTS AND FREEDOMS

1. Every human being has a right to life, and to personal security, inviolability and freedom.

He also possesses juridical personality.

1. Tout être humain a droit à la vie, ainsi qu'à la sûreté, à l'intégrité et à la liberté de sa personne.

Il possède également la personnalité juridique.

4. Every person has a right to the safeguard of his dignity, honour and reputation.

4. Toute personne a droit à la sauvegarde de sa dignité, de son honneur et de sa réputation.

9. Every person has a right to non-disclosure of confidential information.

No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

The tribunal must, *ex officio*, ensure that professional secrecy is respected.

9. Chacun a droit au respect du secret professionnel.

Toute personne tenue par la loi au secret professionnel et tout prêtre ou autre ministre du culte ne peuvent, même en justice, divulguer les renseignements confidentiels qui leur ont été révélés en raison de leur état ou profession, à moins qu'ils n'y soient autorisés par celui qui leur a fait ces confidences ou par une disposition expresse de la loi.

Le tribunal doit, d'office, assurer le respect du secret professionnel.

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition,

49. Une atteinte illicite à un droit ou à une liberté reconnu par la présente Charte confère à la victime le droit d'obtenir la cessation de cette atteinte et la réparation du préjudice moral ou matériel qui en résulte.

En cas d'atteinte illicite et intentionnelle, le tribunal peut en outre condamner son auteur

condemn the person guilty of it to punitive damages.

à des dommages-intérêts punitifs.

V. TOBACCO PRODUCTS CONTROL ACT

9(1). No distributor shall sell or offer for sale a tobacco product unless

9(1). Il est interdit aux négociants de vendre ou mettre en vente un produit du tabac qui ne comporte pas, sur ou dans l'emballage respectivement, les éléments suivants:

(a) the package containing the product displays, in accordance with the regulations, messages pertaining to the health effect of the product and a list of toxic constituents of the product and, where applicable, of the smoke produced from its combustion indicating the quantities of those constituents present therein;

(a) les messages soulignant, conformément aux règlements, les effets du produit sur la santé, ainsi que la liste et la quantité des substances toxiques, que celui-ci contient et, le cas échéant, qui sont dégagées par sa combustion;

(b) if and as required by the regulations, a leaflet furnishing information relative to the health effects of the product has been placed inside the package containing the product.

(b) s'il y a lieu, le prospectus réglementaire contenant l'information sur les effets du produit sur la santé

9(2). No distributor shall sell or offer for sale a tobacco product if the package in which it is contained displays any writing other than the name, brand name and any trade marks of the tobacco product, the messages and list referred to in subsection (1), the label required by the Consumer Packaging and Labelling Act and the stamp and information required by sections 203 and 204 of the Excise Act.

9(2). Les seules autres mentions que peut comporter l'emballage d'un produit de tabac sont la désignation, le nom et toute marque de celui-ci, ainsi que les indications exigées par la *Loi sur l'emballage et l'étiquetage des produits de consommation* et le timbre et les renseignements prévus aux articles 203 et 204 de la Loi sur l'accise.

9(3). This section does not affect any obligation of a distributor, at common law or under any Act of Parliament or of a provincial legislature to warn purchasers of tobacco products of the health effects of those products.

9(3). Le présent article n'a pas pour effet de libérer le négociant de toute obligation qu'il aurait, aux termes d'une loi fédérale ou provinciale ou en *common law*, d'avertir les acheteurs de produits de tabac des effets de ceux-ci sur la santé.

VI. TOBACCO ACT

16. This section does not affect any

16. La présente partie n'a pas pour effet

obligation of a distributor, at common law or under any Act of Parliament or of a provincial legislature to warn purchasers of tobacco products of the health effects of those products.

de libérer le fabricant ou le détaillant de toute obligation — qu'il peut avoir, au titre de toute règle de droit, notamment aux termes d'une loi fédérale ou provinciale — d'avertir les consommateurs des dangers pour la santé et des effets sur celle-ci liés à l'usage du produit et à ses émissions.

22(2). Subject to the regulations, a person may advertise a tobacco product by means of information advertising or brand-preference advertising that is in:

22(2). Il est possible, sous réserve des règlements, de faire la publicité – publicité informative ou préférentielle – d'un produit du tabac:

(a) a publication that is provided by mail and addressed to an adult who is identified by name;

(a) dans les publications qui sont expédiées par le courrier et qui sont adressées à un adulte désigné par son nom;

(b) a publication that has an adult readership of not less than eighty-five percent; or

(b) dans les publications dont au moins quatre-vingt-cinq pour cent des lecteurs sont des adultes;

(c) signs in a place where young persons are not permitted by law.

(c) sur des affiches placées dans des endroits dont l'accès est interdit aux jeunes par la loi.

22(3). Subsection (2) does not apply to lifestyle advertising or advertising that could be construed on reasonable grounds to be appealing to young persons.

22(3). Le paragraphe (2) ne s'applique pas à la publicité de style de vie ou à la publicité dont il existe des motifs raisonnables de croire qu'elle pourrait être attrayante pour les jeunes.

VII. TOBACCO-RELATED DAMAGES AND HEALTH-CARE COSTS RECOVERY ACT

1. The purpose of this Act is to establish specific rules for the recovery of tobacco-related health care costs attributable to a wrong committed by one or more tobacco product manufacturers, in particular to allow the recovery of those costs regardless of when the wrong was committed.

1. La présente loi vise à établir des règles particulières adaptées au recouvrement du coût des soins de santé liés au tabac attribuable à la faute d'un ou de plusieurs fabricants de produits du tabac, notamment pour permettre le recouvrement de ce coût quel que soit le moment où cette faute a été commise.

It also seeks to make certain of those rules applicable to the recovery of damages for an injury attributable to a wrong committed by one or more of those manufacturers.

Elle vise également à rendre certaines de ces règles applicables au recouvrement de dommages-intérêts pour la réparation d'un préjudice attribuable à la faute d'un ou de plusieurs de ces fabricants.

15. In an action brought on a collective basis, proof of causation between alleged

15. Dans une action prise sur une base collective, la preuve du lien de causalité

facts, in particular between the defendant's wrong or failure and the health care costs whose recovery is being sought, or between exposure to a tobacco product and the disease suffered by, or the general deterioration of health of, the recipients of that health care, may be established on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies, including information derived from a sampling.

existant entre des faits qui y sont allégués, notamment entre la faute ou le manquement d'un défendeur et le coût des soins de santé dont le recouvrement est demandé, ou entre l'exposition à un produit du tabac et la maladie ou la détérioration générale de l'état de santé des bénéficiaires de ces soins, peut être établie sur le seul fondement de renseignements statistiques ou tirés d'études épidémiologiques, d'études sociologiques ou de toutes autres études pertinentes, y compris les renseignements obtenus par un échantillonnage.

The same applies to proof of the health care costs whose recovery is being sought in such an action.

Il en est de même de la preuve du coût des soins de santé dont le recouvrement est demandé dans une telle action.

22. If it is not possible to determine which defendant in an action brought on an individual basis caused or contributed to the exposure to a type of tobacco product of particular health care recipients who suffered from a disease or a general deterioration of health resulting from the exposure, but because of a failure in a duty imposed on them, one or more of the defendants also caused or contributed to the risk for people of contracting a disease or experiencing a general deterioration of health by exposing them to the type of tobacco product involved, the court may find each of those defendants liable for health care costs incurred, in proportion to its share of liability for the risk.

22. Lorsque, dans une action prise sur une base individuelle, il n'est pas possible de déterminer lequel des défendeurs a causé ou contribué à causer l'exposition, à une catégorie de produits du tabac, de bénéficiaires déterminés de soins de santé qui ont souffert d'une maladie ou d'une détérioration générale de leur état de santé par suite de cette exposition, mais qu'en raison d'un manquement à un devoir qui leur est imposé, l'un ou plusieurs de ces défendeurs a par ailleurs causé ou contribué à causer le risque d'une maladie ou d'une détérioration générale de l'état de santé de personnes en les exposant à la catégorie de produits du tabac visée, le tribunal peut tenir chacun de ces derniers défendeurs responsable du coût des soins de santé engagé, en proportion de sa part de responsabilité relativement à ce risque.

23. In apportioning liability under section 22, the court may consider any factor it considers relevant, including

23. Dans le partage de responsabilité qu'il effectue en application de l'article 22, le tribunal peut tenir compte de tout facteur qu'il juge pertinent, notamment des suivants:

(1) the length of time a defendant engaged in the conduct that caused or contributed to the risk;

(1) la période pendant laquelle un défendeur s'est livré aux actes qui ont causé ou contribué à causer le risque;

(2) a defendant's market share in the type of tobacco product that caused or contributed to the risk;

(2) la part de marché du défendeur à l'égard de la catégorie de produits du tabac ayant causé ou contribué à causer le risque;

(3) the degree of toxicity of the substances in the type of tobacco product manufactured by a defendant;

(3) le degré de toxicité des substances contenues dans la catégorie de produits du tabac fabriqués par un défendeur;

(4) the sums spent by a defendant on research, marketing or promotion with respect to the type of tobacco product that caused or contributed to the risk;

(4) les sommes consacrées par un défendeur à la recherche, à la mise en marché ou à la promotion relativement à la catégorie de produits du tabac qui a causé ou contribué à causer le risque;

(5) the degree to which a defendant collaborated or participated with other manufacturers in any conduct that caused, contributed to or aggravated the risk;

(5) la mesure dans laquelle un défendeur a collaboré ou participé avec d'autres fabricants aux actes qui ont causé, contribué à causer ou aggravé le risque;

(6) the extent to which a defendant conducted tests and studies to determine the health risk resulting from exposure to the type of tobacco product involved;

(6) la mesure dans laquelle un défendeur a procédé à des analyses et à des études visant à déterminer les risques pour la santé résultant de l'exposition à la catégorie de produits du tabac visée;

(7) the extent to which a defendant assumed a leadership role in the manufacture of the type of tobacco product involved;

(7) le degré de leadership qu'un défendeur a exercé dans la fabrication de la catégorie de produits du tabac visée;

(8) the efforts a defendant made to warn the public about the health risks resulting from exposure to the type of tobacco product involved, and the concrete measures the defendant took to reduce those risks; and

(8) les efforts déployés par un défendeur pour informer le public des risques pour la santé résultant de l'exposition à la catégorie de produits du tabac visée, de même que les mesures concrètes qu'il a prises pour réduire ces risques;

(9) the extent to which a defendant continued manufacturing, marketing or promoting the type of tobacco product involved after it knew or ought to have known of the health risks resulting from exposure to that type of tobacco product.

(9) la mesure dans laquelle un défendeur a continué la fabrication, la mise en marché ou la promotion de la catégorie de produits du tabac visée après avoir connu ou dû connaître les risques pour la santé résultant de l'exposition à cette catégorie de produits.

24. The provisions of section 15 that relate to the establishment of causation between alleged facts and to proof of health care costs are applicable to actions brought on an individual basis.

24. Les dispositions de l'article 15, relatives à la preuve du lien de causalité existant entre des faits allégués et à la preuve du coût des soins de santé, sont applicables à l'action prise sur une base individuelle.

25. Despite any incompatible provision, the rules of Chapter II relating to actions brought on an individual basis apply, with the necessary modifications, to an action brought by a person or the person's heirs or other successors for recovery of damages for any tobacco-related injury, including any health care costs, caused or contributed to by a tobacco-related wrong committed in Québec by one or more tobacco product manufacturers.

25. Nonobstant toute disposition contraire, les règles du chapitre II relatives à l'action prise sur une base individuelle s'appliquent, compte tenu des adaptations nécessaires, à toute action prise par une personne, ses héritiers ou autres ayants cause pour le recouvrement de dommages-intérêts en réparation de tout préjudice lié au tabac, y compris le coût de soins de santé s'il en est, causé ou occasionné par la faute, commise au Québec, d'un ou de plusieurs fabricants de produits du tabac.

Those rules also apply to any class action based on the recovery of damages for the injury.

Ces règles s'appliquent, de même, à tout recours collectif pour le recouvrement de dommages-intérêts en réparation d'un tel préjudice.

27. An action, including a class action, to recover tobacco-related health care costs or damages for tobacco-related injury may not be dismissed on the ground that the right of recovery is prescribed, if it is in progress on 19 June 2009 or brought within three years following that date.

27. Aucune action, y compris un recours collectif, prise pour le recouvrement du coût de soins de santé liés au tabac ou de dommages-intérêts pour la réparation d'un préjudice lié au tabac ne peut, si elle est en cours le 19 juin 2009 ou intentée dans les trois ans qui suivent cette date, être rejetée pour le motif que le droit de recouvrement est prescrit.

Actions dismissed on that ground before 19 June 2009 may be revived within three years following that date.

Les actions qui, antérieurement au 19 juin 2009, ont été rejetées pour ce motif peuvent être reprises, pourvu seulement qu'elles le soient dans les trois ans qui suivent cette date.

VIII. TOBACCO SALES TO YOUNG PERSONS ACT

4(1). Everyone who, in the course of a business, sells, gives or in any way furnishes, including a vending machine, any tobacco product to a person under the age of eighteen, whether for the person's own use or not, is guilty of an offence and liable

4(1). Quiconque, dans le cadre d'une activité commerciale, fournit – à titre onéreux ou gratuit –, notamment au moyen d'un appareil distributeur, à une personne âgée de moins de dix-huit ans des produits du tabac, pour l'usage de celle-ci ou non, commet une infraction et encourt :

(a) in the case of a first offence, to a fine not exceeding one thousand dollars;

(a) pour une première infraction, une amende maximale de mille dollars;

(b) in the case of a second offence, to a fine not exceeding two thousand dollars;

(b) pour la première récidive, une amende maximale de deux mille dollars;

(c) in the case of a third offence, to a fine not exceeding ten thousand dollars;

(d) in the case of a fourth or subsequent offence, to a fine not exceeding fifty thousand dollars.

4(3). Where an accused is charged with an offence under subsection (1), it is not a defence that the accused believed that the person to whom the tobacco product was sold, given or otherwise furnished was eighteen years of age or more at the time the offence is alleged to have been committed, unless the accused took all reasonable steps to ascertain the age of the person to whom the tobacco product was sold, given or otherwise furnished.

(c) pour la deuxième récidive, une amende maximale de deux mille dollars;

(d) pour toute autre récidive, une amende maximale de cinquante mille dollars.

4(3). Le fait que l'accusé croyait que la personne à qui le produit du tabac a été fourni était âgée de dix-huit and ou plus au moment de la perpétration de l'infraction reprochée ne constitue un moyen de défense que s'il a pris toutes les mesures voulues pour s'assurer de l'âge de la personne.

SCHEDULE I – EXTRACTS OF THE VOLUNTARY CODES

1972

Rule 1: There will be no cigarette advertising after December 31, 1971, on radio and television.

Rule 2: All cigarette packages produced after April 1, 1972 shall bear, clearly and prominently displayed on one side thereof, the following words:

WARNING: THE DEPARTMENT OF NATIONAL HEALTH AND WELFARE ADVISES THAT DANGER TO HEALTH INCREASES WITH AMOUNT SMOKED. (French version omitted)

Rule 9: All advertising, the purpose of which is solely to increase individual brand shares as such, shall be in conformity with the Canadian Code of Advertising Standards ...

Rule 10: Cigarette advertising shall be addressed to adults 18 years of age and over.

Rule 11: No advertising shall state or imply that smoking the brand advertised promotes physical health or that smoking a particular brand is better for health than smoking any other brand of cigarettes, or is essential to romance, prominence, success or personal advancement.

1975

Rule 1: There will be no cigarette or cigarette tobacco advertising on radio or television, nor will such media be used for the promotion of sponsorships of sports or other popular events whether through the use of brand or corporate name or logo.

Rule 6: All advertising will be in conformity with the Canadian Code of Advertising Standards …

Rule 7: Cigarette or cigarette tobacco advertising will be addressed to adults 18 years of age or over and will be directed solely to the increase of cigarette brand shares.

Rule 8: Same as Rule 11 in 1972

Rule 12: All cigarette packages, cigarette tobacco packages and containers will bear, clearly and prominently displayed on one side thereof, the following words:

WARNING: HEALTH AND WELFARE CANADA ADVISES THAT DANGER TO HEALTH INCREASES WITH AMOUNT SMOKED – AVOID INHALING. (French version omitted)

Rule 13: The foregoing words will also be used in cigarette and cigarette tobacco print advertising … Furthermore, it will be prominently displayed on all transit advertising (interior and exterior), airport signs, subway advertising and market place advertising (interior and exterior) and point of sale material over 144 square inches in size but only in the language of the advertising message.

Rule 15: The average tar and nicotine content of smoke per cigarette will be shown on all packages and in print media advertising.

1984 (1)

Rule 1: Same as Rule 1 in 1975

Rule 6: Same as Rule 6 in 1975

Rule 7: Same as Rule 7 in 1975

Rule 8: Same as Rule 8 in 1975

Rule 12: All cigarette packages, cigarette tobacco packages and containers imported of manufactured for use in Canada will bear, clearly and prominently displayed on one side thereof, the following words:

WARNING: HEALTH AND WELFARE CANADA ADVISES THAT DANGER TO HEALTH INCREASES WITH AMOUNT SMOKED – AVOID INHALING. (French version omitted)

Rule 13: The foregoing words will also be used in cigarette and cigarette tobacco print advertising. Furthermore, they will be prominently displayed on all transit advertising (interior and exterior), airport signs, subway advertising and market place advertising (interior and exterior) and point of sale material over 930 square centimetres (144 square inches) in size but only in the language of the advertising message

Rule 15: Same as Rule 15 in 1975

SCHEDULE J – PARAGRAPHS 2138-2145 OF THE PLAINTIFFS' NOTES

2138. The Financial Statements of JTI-M do not tell (or purport to tell) the whole story and do not reflect the "patrimonial situation" of the company.

2139. The evidence before the Court revealed that JTI was able to manipulate its patrimonial situation in order to suits its interests. JTI has the capacity to pay a substantial amount even though such capacity is not reflected per se in their financial statements. The patrimonial situation of JTI-M is not affected nor diminished by the strategic movement of funds, trademarks, etc. within its family of companies.

2140. The amount of punitive damages sought is certainly justifiable "in light of all the appropriate circumstances including the patrimonial situation of JTI-M".[522]

2141. Here are some of the facts established at trial which support this point of view:

(a) Both class actions were filed in September/November 1998 against JTI-M's predecessor RJR-M;

(b) In March 1999, RJR-M was independently and professionally valued at $2.2 billion, of which its trademarks were independently valued at $1.2 billion; [523]

(c) The Company (RJR-M) which became JTI-M was and still is a manufacturer and distributor of cigarettes; its manufacturing facility was and still is located on Ontario Street East in Montreal;[524] its market share was and still is approximately 19.59%;[525] its annual earnings from operations were and still are in the $100 million range and it did not and still does not have any (significant) long-term debt owed to any party at arm's length;[526]

(d) JTI-TM is a wholly-owned subsidiary of JTI-M;[527] it was created for the sole purpose of holding the trademarks for creditor-proofing purposes;[528] its business address is the same as that of JTI-M;[529] all of its officers are employees of JTI-M and it does not carry on any business activities;[530]

(e) For tax and/or creditor-proofing purposes it has "parked" the trademarks in its wholly-owned subsidiary (JTI-TM), it has "loaded" JTI-M with debt

---

522 Article 1621 C.C.Q.
523 *Ibidem*, pp. 53-54, Qs. 23-25; pp. 64-64, Qs. 55-56.
524 *Ibidem*, p 82, Q. 109; Exhibit 1749-r-CONF.
525 Exhibit 1437A.
526 Testimony of Michel Poirier, May 23, 2014, p. 71, Q. 62; pp. 166, Q. 388.
527 *Ibidem*, p. 81, Qs. 103-105.
528 *Ibidem*, pp. 85-87, Qs. 121-127; p. 95, Q. 145; pp. 166-167, Qs. 389-394; Exhibit 1750-r-CONF.
529 *Ibidem*, p. 82, Qs. 108-109; Exhibit 1749-r-conf; Exhibit 1749.1-r-conf.
530 *Ibidem*, p. 165, Qs. 382-384.

through a circular exchange of cheques and complex inter-corporate transactions, etc.;[531]

(f) However the "patrimonial situation" of JTI-M remains the same – it was and still is a highly profitable $2 billion company with annual earnings from operations (well) in excess of $100 million.[532]

(g) The evidence has shown that notwithstanding the constantly changing inter-corporate structure, the transactions and the $200 Million (plus) deficit on JTI-M's 2003 – 2013 Financial Statements, JTI-M has been fully able of paying or not paying huge sums of money to its subsidiary JTI-TM, whenever it suits JTI-M:[533]

2004	JTI-M sought protection under CCAA and it requested the presiding judge in Ontario (Justice James Farley) to issue a Stay Order to prevent JTI-M from paying principal, interest, royalties and dividends (in excess of $100 Million per year) to its subsidiary (JTI-TM) and related companies;[534]
2005	No interest or royalty payments were made to JTI-TM;[535]
2006	JTI-M paid JTI-TM $186 Million in interest and royalties after furnishing the CCAA Monitor with Letters of Credit issued on the strength of a related company;[536]
2007 - 2008	No interest or royalty payments were made to JTI-TM;[537]
2009, 2010, 2011 & 2012	JTI-M "amended" the Debenture Agreement with JTI-TM to reduce the rate of interest on the "loan" of $1.2 billion from 7% to 0% (approximately) thereby reducing the interest payment from $100 Million (approximately) to zero (approximately);[538]
2009	JTI-M "amended" its Royalty Agreement with JTI-TM to reduce the rate of royalty payments by 50%;[539]
2010	JTI-M paid $150 million to the Quebec and Federal Governments as its contribution toward the settlement of the

[531] *Ibidem*, pp. 107-109, Qs. 168-176; pp. 114-115, Qs. 188-189; Exhibit 1751.2-r-conf (according to Plaintiffs) or 1751.1.8-r-CONF (according to Defendants).
[532] *Ibidem*, p. 166, Q.388; Exhibit 1731-1998-r-conf to Exhibit 1731-2013-r-conf.
[533] *Ibidem*, pp. 160-167, Qs. 362-394.
[534] *Ibidem*, pp. 128-129, Qs. 249-254; p. 131, Q.265.
[535] *Ibidem*, pp. 141-142, Q. 289.
[536] *Ibidem*, pp. 152-153, Qs. 318-321.
[537] *Ibidem*, pp. 153-154, Qs. 323-324.
[538] *Ibidem*, pp. 156-158, Qs. 340-352.
[539] *Ibidem*, pp. 155-156, Qs. 333-337.

	smuggling claims;[540]
Dec. 2012	JTI-M once again "amended" its Debenture Agreements with JTI-TM so as to increase the interest rate from 0% - 7% per annum, thereby resulting in an obligation to pay approximately $100 Million in "interest" to JTI-TM starting in 2013;[541]
2012	JTI-M "wiped out" a $410 million debt owed by JTI-TM.[542]

2142. In the case of JTI, the term "capacity" to pay punitive damages may be misleading; it would be more appropriate to talk of its "ability" to do so. While JTI may not have the "capacity" to pay punitive damages based on its financial statements and its obligations to its subsidiary, the evidence shows that it has the "ability" to pay notwithstanding its theoretical "incapacity" to do so. By way of example, in 2010, JTI did not have the "capacity" to pay $150 million to settle the smuggling claim based on its financial statements which showed a deficit and based on its "obligation" to pay JTI-M $100 million in "interest".[543] Nevertheless, the evidence showed that it had the "ability" to pay and did pay $150 million to settle the smuggling claim despite its theoretical "incapacity" to do so.

2143. Here, the Court is not being asked to "ignore" the inter-corporate transactions nor to pronounce on their legality, nor to annul them. On the contrary, the Court is invited to take those transactions and their stated purpose into account when assessing the award for punitive damages "in light of all the appropriate circumstances and, in particular, the patrimonial situation" of the company.

2144. For example, the following answers from Michel Poirier during his examination in chief need to be taken into account to conclude that an exemplary high amount of punitive damages is warranted against JTI here[544]:

> [172]Q." […]The modifications suggested will enhance our ability to protect our most valuable assets." Most valuable assets in this context are the trademarks valued at one point two (1.2) billion dollars?
>
> A- Yes. Yes.
>
> [173]Q-And it's to protect your most valuable assets from creditors, creditors like perhaps the plaintiffs in this lawsuit?
>
> A- Perhaps the plaintiffs. It's a tobacco company.
>
> [173]Q-It's a what?

---

540 *Ibidem*, pp. 159-160, Qs. 358-360.

541 *Ibidem*, pp. 162-163, Q. 374; pp. 165-166, Q.386; Exhibit 1752-r-conf (according to Plaintiffs) or Exhibit 1748.1-r-conf (according to Defendants).

542 *Ibidem*, p. 250, Qs. 602-603; Exhibit 1748.2-R-CONF, pdf 14.

543 *Ibidem*, p. 159, Q. 358.

544 Mr. Poirier was asked to comment on the stated purpose of those transactions as mentioned in Exhibit 1751.2-R-CONF (according to Plaintiffs) or Exhibit 1751.1.8-R-CONF (according to Defendants).

A- It's a tobacco company.[545]

2145. JTI-M will satisfy the judgment awarding punitive damages or it will file for bankruptcy (or, once again, seek CCAA protection). A Trustee (or Monitor) will be appointed and, if necessary, appropriate measures taken.

(Emphasis in the original)

[545] *Ibidem*, at pages 108-109.

TAB K

THIS IS **EXHIBIT "K"** TO THE AFFIDAVIT
OF ERIC THAUVETTE, SWORN BEFORE ME
ON MARCH 12, 2019

Waleed Malik

Commissioner for Taking Affidavits

WALEED MALIK
LSO# 678960

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-025385-154, 500-09-025386-152, 500-09-025387-150
(500-06-000070-983, 500-06-000076-980)

DATE: July 23, 2015

CORAM: THE HONOURABLE MARIE-FRANCE BICH, J.A.
PAUL VÉZINA, J.A.
MARK SCHRAGER, J.A.

No: 500-09-025385-154

IMPERIAL TOBACCO CANADA LTD.
APPELLANT/INCIDENTAL RESPONDENT – Defendant

v.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS
CÉCILIA LÉTOURNEAU
RESPONDENTS/INCIDENTAL APPELLANTS – Plaintiffs

and

JTI-MACDONALD CORP.
ROTHMANS, BENSON & HEDGES INC.
IMPLEADED PARTIES – Defendants

No: 500-09-025386-152

JTI-MACDONALD CORP.
APPELLANT/INCIDENTAL RESPONDENT – Defendant

v.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS
CÉCILIA LÉTOURNEAU
RESPONDENTS/INCIDENTAL APPELLANTS – Plaintiffs

and

IMPERIAL TOBACCO CANADA LTD.
ROTHMANS, BENSON & HEDGES INC.
IMPLEADED PARTIES – Defendants

No: 500-09-025387-150

ROTHMANS, BENSON & HEDGES INC.
APPELLANT/INCIDENTAL RESPONDENT – Defendant

v.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS
CÉCILIA LÉTOURNEAU
RESPONDENTS/INCIDENTAL APPELLANTS – Plaintiffs

and

JTI-MACDONALD CORP.
IMPERIAL TOBACCO CANADA LTD.
IMPLEADED PARTIES – Defendants

JUDGMENT

---

[1] Each of the Appellants in the three appeals before us seeks the cancellation of orders of provisional execution contained in the judgment of May 27, 2015 (corrected on

June 8) of the Superior Court, District of Montreal (the Honourable Justice Brian Riordan).[1]

[2] Appellants, Imperial Tobacco Canada Ltd. ("ITL") and Rothmans, Benson & Hedges Inc. ("RBH") also seek confidentiality and sealing orders regarding certain information and documentation filed in support of their motions to cancel provisional execution. At the beginning of the hearing, this Court issued a safeguard order to such effect to stay in force until signature of this judgment.

[3] The 237 page judgment in first instance culminates two class actions commenced in 1998 against the Appellants who are cigarette manufacturers. The class actions were authorized in 2005; the joint trial commenced on March 12, 2012 and terminated on December 11, 2014. More than 70 witnesses, including 27 experts were heard over a total of 251 hearing days. In excess of 20,000 exhibits were filed in evidence.

[4] The judgment is prefaced by the following summary of its contents:

> The two class actions[2] against the Canadian cigarette companies[3] are maintained in part.
>
> In both actions, the claim for common or collective damages was limited to moral damages and punitive damages, with both classes of plaintiffs renouncing their potential right to make individual claims for compensatory damages, such as loss of income.
>
> In the Blais File, taken in the name of a class of persons with lung cancer, throat cancer or emphysema, the Court finds the defendants liable for both moral and punitive damages. It holds that they committed four separate faults, including under the general duty not to cause injury to another person, under the duty of a manufacturer to inform its customers of the risks and dangers of its products, under the Quebec Charter of Human Rights and Freedoms[4] and under the Quebec Consumer Protection Act.[5]
>
> In Blais, the Court awards moral damages in the amount of $6,858,864,000 solidarily among the defendants. Since this action was instituted in 1998, this sum translates to approximately $15,500,000,000 once interest and the

1 *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382 ["the judgment"].
2 The "Blais" file and the "Létourneau" file, both named for the Plaintiffs / class representatives.
3 Imperial Tobacco Canada Ltd. ("ITL"), Rothmans, Benson & Hedges Inc. ("RBH") and JTI-Macdonald Corp. ("JTM"), the Appellants.
4 CQLR, c. C-12.
5 CQLR, c. P-40.1.

additional indemnity are added. The respective liability of the defendants among themselves is as follows:

ITL - 67%, RBH - 20% and JTM - 13%.

Recognizing that it is unlikely that the defendants could pay that amount all at once, the Court exercises its discretion with respect to the execution of the judgment. It thus orders an initial aggregate deposit of $1,000,000,000, divided among the defendants in accordance with their share of liability and reserves the plaintiffs' right to request further deposits, if necessary.

In the Létourneau File, taken in the name of persons who were dependent on nicotine, the Court finds the defendants liable for both heads of damage with respect to the same four faults. In spite of such liability, the Court refuses to order the payment of moral damages because the evidence does not establish with sufficient accuracy the total amount of the claims of the members.

The faults under the *Quebec Charter* and the *Consumer Protection Act* allow for the awarding of punitive damages. The Court sets the base for their calculation at one year's before-tax profits of each defendant, this covering both files. Taking into account the particularly unacceptable behaviour of ITL over the Class Period and, to a lesser extent, JTM, the Court increases the sums attributed to them above the base amount to arrive at an aggregate of $1,310,000,000, divided as follows:

ITL - $725,000,000, RBH - $460,000,000 and JTM - $125,000,000.

It is necessary to divide this amount between the two files. For that, the Court takes account of the significantly higher impact of the defendants' faults on the Blais Class compared to Létourneau. It thus attributes 90% of the total to Blais and 10% to the Létourneau Class.

Nevertheless, in light of the size of the award for moral damages in Blais, the Court feels obliged to limit punitive damages there to the symbolic amount of $30,000 for each defendant. This represents one dollar for each Canadian death the tobacco industry causes in Canada every year, as stated in a 1995 Supreme Court judgment.

In Létourneau, therefore, the aggregate award for punitive damages, at 10% of the total, is $131,000,000. That will be divided among the defendants as follows:

ITL - $72,500,000, RBH - $46,000,000 and JTM - $12,500,000

Since there are nearly one million people in the Létourneau Class, this represents only about $130 for each member. In light of that, and of the fact that there is no condemnation for moral damages in this file, the Court refuses distribution of an amount to each of the members on the ground that it is not possible or would be too expensive to do so.

> Finally, the Court orders the provisional execution of the judgment notwithstanding appeal with respect to the initial deposit of one billion dollars of moral damages, plus all punitive damages awarded. The Defendants must deposit these sums in trust with their respective attorneys within sixty days of the date of the judgment. The Court will decide how those amounts are to be disbursed at a later hearing.
>
> [Footnotes added]

[5] Though Respondents originally indicated that they would seek an order of provisional execution based on the assertion that Appellants were guilty of improper use of procedure, in the end, they argued for the application of the penultimate paragraph of article 547 *C.C.P.* as the grounds for an order of provisional execution:

> **547.** (…)
>
> In addition, the court may, upon application, order provisional execution in case of exceptional urgency or for any other reason deemed sufficient in particular where the fact of bringing the case to appeal is likely to cause serious or irreparable injury, for the whole or for part only of a judgment.
>
> (…)

> **547.** […]
>
> De plus, le tribunal peut, sur demande, ordonner l'exécution provisoire dans les cas d'urgence exceptionnelle ou pour quelqu'autre raison jugée suffisante notamment lorsque le fait de porter l'affaire en appel risque de causer un préjudice sérieux ou irréparable, pour la totalité ou pour une partie seulement du jugement.
>
> […]

[6] In the conclusions of the judgment, the judge ordered an initial deposit towards partial satisfaction of the two awards within 60 days of $1,131,090,000 broken down as follows:

	BLAIS		**LÉTOURNEAU**	
ITL	$670,000,000	(compensatory)	$72,500,000	(punitive)
	$30,000	(punitive)		
RBH	$200,000,000	(compensatory)	$46,000,000	(punitive)
	$30,000	(punitive)		
JTM	$130,000,000	(compensatory)	$12,500,000	(punitive)

	$30,000	(punitive)		
TOTAL	**$1,000,090,000**		**$131,000,000**	

[7] The judge ordered provisional execution "with respect to the initial deposit of one billion dollars of moral damages, plus all punitive damages".

[8] The condemnation for moral damages in the Blais file (excluding interest and special indemnity) is $6,858,864,000 plus additional amounts per members of sub-classes. In the Létourneau file, there is no condemnation for compensatory damages.

[9] The judge's reasons for ordering provisional execution were that the actions had been pending for over 17 years and he found that Respondents' estimate of 6 years for the appeal process was optimistic. He viewed as serious and irreparable injury that class members would die during those 6 years, in many instances as a result of Appellants' faults.

[10] He also deemed it "critical in the interest of justice" that Plaintiffs, including the Fond d'aide aux recours collectifs be given some relief from the cost of litigation accumulated over the years.

[11] The judge ordered provisional execution for moral and punitive damages with "full knowledge of the Court of Appeal's statement to the effect that provisional execution of moral and punitive damages is very exceptional".[6]

[12] He ordered that the monies be deposited in the trust accounts of the respective attorneys of Appellants and indicated his openness to the "possibility of distributing certain amounts immediately".[7]

[13] As a general rule, execution is suspended by the bringing of an appeal[8] but article 547 *C.C.P.* provides, by way of exception that provisional execution may apply because of the nature of the case or in exceptional circumstances, by order of the trial judge. Article 550 *C.C.P.* permits a judge of the Court of Appeal to "cancel or suspend"

---

6 Para. 1202 of the judgment, referring to *Hollinger v. Hollinger*, 2007 QCCA 1051, para. 3 per Dalphond, J.A.; see also *Immeubles H.T.H. Inc. v. Plaza Chevrolet Buick GMC Cadillac Inc.*, 2012 QCCA 2302, para. 4 (Morissette, J.A.).

7 Para. 1203 of the judgment.

8 Article 497 *C.C.P.*

orders of provisional execution issued in first instance. The matter may be referred to the Court as is presently the case.

[14] To obtain the suspension or cancellation of an order of provisional execution, Appellants must demonstrate:

i) an apparent weakness in the judgment of first instance;

ii) a risk of serious prejudice if provisional execution is maintained; and

iii) that the balance of inconvenience favours the cancellation.[9]

[15] In support of their motions, each Appellant has filed an affidavit (and in the case of ITL, documentation as well) to indicate the prejudice they suffer as a result of the orders of provisional execution. Each affiant was deposed by Respondents' attorneys who requested the production of certain documents.

[16] ITL seeks a sealing order to protect the confidentiality of some of this information found at paragraphs 6, 7, 16 (iii), 20-27, 29-30 and 33 of the affidavit of its officer as well as the documents comprising its exhibit A.

[17] Summarily, this information includes wage and pension obligations and financial data including earnings and availability of cash and credit facilities to pay the awards. Also ITL has filed its consolidated financial statements for the year ending December 31, 2014.

[18] During the deposition of the affiant, Respondents requested RBH's 2014 financial statement and cash flow projections. RBH then also filed a motion to seal documents and the portion of the testimony referring to them.

[19] ITL and RBH invoke the judgment of the Supreme Court of Canada in the matter of *Sierra Club*[10] where the test for a court to issue a confidentiality order was set down as follows:

---

9 André Rochon (with the collab. of Frédérique Le Colletter), *Guide des requêtes devant le juge unique de la Cour d'appel*, Cowansville, Éditions Yvon Blais, 2013, p. 145.

10 *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41 [*Sierra Club*].

53 (…)	53 […]
(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and	a) elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque;
(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.	b) ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires.

[20] The Court added:

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the	55 De plus, l'expression « intérêt commercial important » exige une clarification. Pour être qualifié d'« intérêt commercial important », l'intérêt en question ne doit pas se rapporter uniquement et spécifiquement à la partie qui demande l'ordonnance de confidentialité; il doit s'agir d'un intérêt qui peut se définir en termes d'intérêt public à la confidentialité. Par exemple, une entreprise privée ne pourrait simplement prétendre que l'existence d'un contrat donné ne devrait pas être divulguée parce que cela lui ferait perdre des occasions d'affaires, et que cela nuirait à ses intérêts commerciaux. Si toutefois, comme en l'espèce, la divulgation de renseignements doit entraîner un manquement à une entente de non divulgation, on peut alors parler plus largement de l'intérêt commercial général dans la protection des renseignements confidentiels.

purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness".	Simplement, si aucun principe général n'entre en jeu, il ne peut y avoir d'« intérêt commercial important » pour les besoins de l'analyse. Ou, pour citer le juge Binnie dans *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35, par. 10, la règle de la publicité des débats judiciaires ne cède le pas que « dans les cas où le droit du public à la confidentialité l'emporte sur le droit du public à l'accessibilité ».
(Emphasis added)	

[21] On application of this test, the motions to seal and keep confidential the information proposed by ITL and RBH must fail. The information does not appear significant nor confidential even if the parties may consider it sensitive.

[22] Assuming that the issue of confidentiality raised by ITL and RBH merits application of the criteria in *Sierra Club*, an appreciation of the context of the requests is necessary. It should be remembered that in *Sierra Club*, Atomic Energy of Canada Ltd., the party seeking confidentiality, was contractually bound to a third party (i.e. a branch of the Chinese government with which it had contracted to build nuclear reactors) not to disclose the information in question. However, for purposes of its litigation with Sierra Club, the Atomic Energy Commission required the documents as part of its defence. In the case before us, ITL and RBH are in no such conflict between maintaining a confidence imposed by contract and having at their disposal the appropriate evidence in order that they may benefit from a full defence and fair trial of the issue. In this case, the issue is the applicability of provisional execution and more specifically the prejudice allegedly suffered by ITL and RBH due to the trial judge's order. The information which ITL and RBH seek to have sealed is information belonging to them which they filed in evidence with a view to establishing the prejudice they suffer from the order of provisional execution.

[23] Regarding the first branch of the test in *Sierra Club*, there is no general principle at play in this case in maintaining the confidentiality of the information filed by ITL and RBH. Therefore, there is no "important commercial interest" in issue. The present case is that of private parties not wishing to reveal financial information that they submit as evidence in support of their position before this Court. The reason invoked is the competitive nature of the industry and particularly that the other co-defendants are competitors. However, in ITL's motion, no explanation is attempted as to how the information affects ITL's ability to compete in the market place. Will the consumer's decision to buy its cigarettes over that of its competitors be affected by its balance sheet or availability of cash and credit? The prejudice invoked by ITL is vague. It makes reference to trade secrets and competitive disadvantages without specifically setting out how those interests are negatively affected by the disclosure. ITL has not satisfied its

burden to demonstrate that this Court should issue the requested sealing order. ITL certainly does not define any general principle in the public interest to maintaining the confidentiality of the information in question.

[24] RBH has set out in greater detail its case for commercial sensitivity. It maintains that even though the data in its financial statements is ultimately reflected in the consolidated financial statements of its parent company which is public, the information in its financial statements and projections regarding costing and profit margins could be used by competitors to their advantage (and RBH's detriment) in the market place. It adds that the manner it treats its financial statements internally demonstrates the confidential nature of those documents. Lastly, it refers to the fact that by consent in first instance the judge permitted the Appellants to file limited financial data.

[25] However more detailed may be RBH's description of the potential consequences for it of the disclosure of its financial statements, it does not define any general principle compelling a confidentiality order. Judges of our Court, in applying the principles in *Sierra Club* to commercial situations have underlined the necessity of demonstrating an interest which is not purely private in nature.[11] Indeed, as the Ontario Court of Appeal has stated:

> Where the interest in confidentiality engages no public component, the inquiry is at an end.[12]

The right of a litigant to privacy does not give rise to court ordered confidentiality each time information of a financial nature is put in evidence where the party prefers not to reveal that information.

[26] Neither of ITL or RBH's submissions on confidentiality raise a public component; nor do their positions pertain to their ability to enjoy a fair hearing.

[27] While the analysis could end here as indicated by the Ontario Court of Appeal, we would add the following regarding the second branch of the test in *Sierra Club*. The "open court and public access" principles are related to the fundamental right of free

---

[11] *7999267 Canada inc. v. 9109-8657 Québec inc.*, 2012 QCCA 1649, paras. 14-15 (Gascon, J.A.); *3834310 Canada inc. v. R.C.*, REJB 2004-68462, 2004 CanLII 4122 (C.A.), para. 24.

[12] See also *Out-Of-Home Marketing Association of Canada v. Toronto (City of)*, 2012 ONCA 212, para. 55 (see also para. 45ff.) where a sealing order to protect a commercial party's information from competitors and suppliers was refused absent the demonstration of a public interest in such confidentiality.

speech outlined by the Supreme Court in *Sierra Club*.[13] These principles are reflected in article 13 *C.C.P.* and article 23 of the *Charter of Human Rights and Freedoms*.[14] In the present case, regarding the issue of the prejudice caused by the order of provisional execution, these principles of openness weigh heavier in the balance than any private interest pleaded by ITL and RBH to seal the information in question. Accordingly, the motions of ITL and RBH for sealing orders will be dismissed.

[28] However and despite the deference due to the trial judge,[15] we are of the view that the Appellants have satisfied the criteria so that the order of provisional execution should be cancelled.

[29] We believe that the part of the judgment addressing the order of provisional execution contains an apparent weakness which justifies our intervention.[16] We make no comment whatsoever on the strengths or weaknesses of any of the other parts of the judgment. The presumption of validity of the judgment on the merits[17] forms no part of our reasoning which is restricted to that part of the judgment addressing provisional execution.

[30] Delay as a justification for ordering provisional execution does not stand up to scrutiny. If the 17 years experienced in bringing the case to trial and judgment is due to an abuse of procedure by Appellants then this could potentially justify provisional execution pursuant to article 547 (1) (j) *C.C.P.*, but we note from the judgment[18] that this issue was "put over" until after judgment and that Respondents, in argument, relied on the penultimate paragraph of article 547 *C.C.P.* to seek provisional execution.

[31] As for the 6 years in appeal referred to by the judge, there is no evidentiary basis for this assumption. We take judicial cognizance of the statistics published by this Court on its website and specifically that the delays in civil cases such as those at bar for a hearing date is 12 months from the filing of factums. The legal delays for the filings of the factums' aggregate 7 months reckoned from the inscription.[19] We will not speak to potential delays before the Supreme Court of Canada where an appeal does not

---

13 *Sierra Club*, *supra*, note 10, para. 52.

14 CQRL, c. C-12.

15 A. Rochon, *supra,* note 9*;* citing Pelletier, J.A., *Québec (Ministre de l'agriculture, des pêcheries et de l'alimentation au Québec) v. Produits de l'érable Bolduc & Fils ltée*, J.E. 2002-1239.

16 *Gestion Denis Chesnel Inc. v. Syndicat des copropriétaires du domaine de l'Éden Phase I*, 2015 QCCA 292 (Schrager, J.A.).

17 *Québec (Ministre de l'agriculture, des pêcheries et de l'alimentation au Québec) v. Produits de l'érable Bolduc & Fils ltée*, *supra*, note 15; *Soft Informatique Inc. v. Gestion Gérald Bluteau Inc.*, 2012 QCCA 2018 (Dalphond, J.A.).

18 Paras. 1196 and 1197.

19 Articles 503 and 504.1 *C.C.P.*

automatically suspend execution.[20] Suffice it to say that the 6 years referred to by the judge seems somewhat exaggerated particularly if we consider the possibility of an expedited process.[21] In any event, if delays in appeal were in themselves sufficient to satisfy the criteria of article 547 *C.C.P.* then provisional execution would become the rule instead of the exception as Chief Justice Duval Hesler in her then capacity as a trial judge remarked.[22]

[32] The judge found that this case is exceptional, which there is no denying with regard to its magnitude by measure of quantum of condemnation and potential number of class members. However, there must be some link between the exceptional circumstances and the provisional execution. We do not agree that the exceptional circumstances of this case warrant provisional execution. The award subject to provisional execution is for moral and punitive damages only. The quantum of damages and even scale of impact on the class members (let alone Quebec society at large) speak equally to allowing the appeal to be decided before any execution. Moreover, the bringing of an appeal in itself will not cause serious or irreparable injury to Respondents. Injury that has been suffered is not due to nor does it appear that it will be aggravated at this point by the judicial process, particularly if that process is adequately managed.

[33] We are certainly not without empathy for potential class members who may die of a tobacco related illness prior to receiving any compensation. The judge may have a point that this state of affairs represents serious prejudice measured against the time to bring the case to an end. Unfortunately, the law relating to class actions makes it such that the order of provisional execution is of questionable benefit to potential class members.

[34] On a strict legal basis one may wonder whether provisional execution is simply incompatible with class actions so that articles 547 to 551 *C.C.P.* would be inapplicable altogether in virtue of article 1051 *C.C.P.* Article 1030 *C.C.P.* provides that it is only upon the judgment acquiring "the authority of *res judicata*" ("l'autorité de la chose jugée") that the process to have class members file claims is commenced. Whether the legislator meant to require that the judgment becomes final[23] ("passé en force de chose jugée") in the sense that the appeal process is exhausted, or merely binding upon the parties ("autorité de la chose jugée") need not be decided in this case because the appeal suspends the effect of the "autorité de la chose jugée" and prevents the

---

20 *Supreme Court Act*, R.S.C., 1985, c. S-26, s. 65(1)(d).

21 Appellants have indicated that they have no objection to an accelerated date for the hearing of the appeal.

22 *Société nationale d'assurance inc. – Les Clairvoyants Compagnie d'assurance générale et al. v. Gaz Métropolitain inc. et al.,* [2001] R.R.R. 757, 764, AZ-01021615, p. 11 (Duval Hesler, J.S.C.).

23 See article 591, para. 2 *Code of Civil Procedure*, S.Q. 2014, c. 1 to come into force January 1, 2016, and see also Quebec, National Assembly, *Journal des débats de la Commission permanente de la justice*, 31st legislature, 3rd session, vol. 20, no 102 (June 1, 1978), p. B-3906.

judgment from acquiring the "force" of the "chose jugée".[24] Furthermore, it is certainly a challenge to execute a judgment when its beneficiaries have yet to be appropriately identified although article 1031 *C.C.P.* provides that the court may determine the amount due by the judgment debtor "even if the identity of each of the class members" is not established. Deposit of the appropriate amount appears in law to be the first step of or at least towards the execution of a class action judgment as provided in article 1032 *C.C.P.*

[35] With one possible exception no judgment awarding provisional execution in a class action has been shown to us. The possible exception is the case of *Comartin v. Bordet*[25] relied upon by the trial judge. However, in that case the provisional execution was an order to deposit a portion of the damage award ($50,000) with the prothonotary pending appeal without any discussion of the availability in law of provisional execution. Since there was no appeal, this Court did not examine the question. Again, the order in the circumstances of that case resembles security more than provisional execution. In the present case, the impact of articles 1030 and 1051 *C.C.P.* raise a serious question which does not appear to have been considered by the trial judge but need not be decided by us in order to dispose of the issue given the other reasons expressed in this judgment.

[36] In view of the foregoing, there are legal and practical difficulties with distribution to class members on a provisional basis. Moreover, article 1035 *C.C.P.* provides that law costs are paid first in a class action but provisional execution cannot be ordered for costs (article 548 *C.C.P.*).

[37] Fees of Respondents' attorneys would be collocated second after law costs and before class member entitlements. However, provisional payment of legal fees is not justified by the judge's desire to direct some compensation to class members during their lifetime. Provisional execution as relief from litigation costs and to provide the ability to see the file through the appeal process has no evidentiary basis on the record before us. The judge refers to support made available by Fonds d'aide aux recours collectifs. Has other financing been made available in the past? Is financing available for the appeal process? What are the fee arrangements with the professionals? There is no indication of any element of response to these queries in the judgment nor in the file as constituted before us. We therefore view as a weakness in the judgment an award of provisional execution of over 1 billion dollars, in consideration of the ability to support

---

[24] Léo Ducharme, *Précis de la preuve*, 6th ed., 2005, Montreal, Wilson & Lafleur, para. 602; Jean-Claude Le Royer et Sophie Lavallée, *La preuve civile*, 4th ed., 2008, Cowansville, Éditions Yvon Blais, para. 816.

[25] *Comartin v. Bordet,* [1984] C.S. 584.

the litigation going forward, without any evidentiary basis for such consideration. Specific evidence is required as a foundation for an order of provisional execution.[26]

[38] Another significant weakness in the judge's order of provisional execution is the unaddressed question of "what happens if Appellants are successful in appeal?". We are hardly in a position to say that the inscriptions in appeal raise questions that have no chance of success. Accordingly, it is essential to examine the hypothesis of a successful appeal against an order of provisional execution of over 1 billion dollars.

[39] The judge ordered the initial deposit to be paid over to counsel of Appellants in trust, stating that he is "open to the possibility of distributing certain amounts immediately". Certainly, if nothing is distributed there will be no benefit derived by class members. In such event, the deposits will serve, in effect, as security for such execution but security is not in issue before us. Unless accompanied by some guarantee from or for Respondents, the possibility of reimbursement makes it such that the order of provisional execution suffers from an apparent weakness. Given the amount of the provisional execution in this case it would take specific proof of the capacity to provide such security for us to entertain such an order. While judges of our Court have issued orders of provisional execution of awards of (material) damages in exceptional circumstances, such orders have been made where a need for funds was demonstrated and when the provisional execution was accompanied by the giving of security for reimbursement.[27] All of these instances involve the examination of individual particular cases; none were class actions.

[40] Regarding any potential distribution that the judge may have envisaged, we note that the entire amount of the judgment in the Létourneau case is for punitive damages. The judge stated that none of this will ever be distributed to class members because of the disproportion between the amount due per class member and the costs of distribution.[28] Where no distribution will ever take place, there is no basis to consider provisional distribution or execution. Though not mentioned by the judge, this logic could apply to the $30,000 punitive award against each Appellant in Blais. In such circumstance, the only justification for the order of provisional execution, as the judge himself stated, is that "it is high time that the Companies started to pay for their sins".[29] However, there is no benefit directly to the opposing party litigants (i.e. class members)

---

[26] *Banque Nationale du Canada v. Bédard*, 2007 QCCA 1796, para. 6 (Giroux, J.A.) citing *Lebeuf v. Groupe SNC Lavalin inc.*, [1995] R.D.J. 366, p. 370 (Gendreau, J.A.); *Tonetti v. Entreprises Gaétan Brunette & Fils*, 2015 QCCA 87, para. 3 (Savard, J.A.); *Gaudet v. Judand ltée*, 2012 QCCA 1124, para. 5 (Léger, J.A.).

[27] *St-Cyr v. Fisch,* J.E. 2003-1244, AZ-50179198 (Morin, J.A.); *Financière Banque Nationale v. Cannone*, 2007 QCCA 1453 (Morin, J.A.); *Manoir Montpellier Ltd v. Simitian*, [1985] R.D.J. 435, AZ-85011124 (Bisson, J.A.).

[28] Judgment summary and paras. 951 and 954 of the judgment.

[29] Para. 1200 of the judgment.

and the existence of those "sins" is *sub judice* before the Court of Appeal. We find that this weakness in the order behooves our intervention.

[41] Similarly, the provisional deposit of the condemnation in the Blais case, though comprised of moral in addition to punitive damages is nevertheless not destined to compensate material loss. The tangible benefit to class members is negligible. There remains the nagging issue of reimbursement if Appellants succeed on appeal. We see in this a serious prejudice *per se* for the Appellants.[30] The potential necessity of seeking reimbursement of $10,000 from each of 100,000 class members is by any objective standard a prejudice that cannot be ignored.

[42] The affidavits filed by ITL and RBH in support of their motions to cancel provisional execution indicate that payment within 60 days of judgment causes serious financial prejudice to them. The evidence filed discloses a significant impact for Appellants despite that they are profitable and sizeable. In the case of JTM, its portion of $142,530,000 exceeds its annual earnings before interest, taxes and other expenses and well exceeds cash on hand of approximately $5.1 million. RBH's $246,030,000 exceeds its projected cash on hand at the end of July by approximately $125 million. ITL's provisional execution amount of $742,530,000 is approximately double its annual profit (before extraordinary items) and greatly exceeds current cash and credit availability to pay such sum.

[43] Serious prejudice has been held sufficient to cancel provisional execution where the effect is to negate the right of appeal.[31] At least, in the case of JTM and ITL, based on the affidavits, this appears to be the case. The judge based his calculations of Appellants' ability to pay on historical earnings and balance sheet worth. He obviously did not analyze current cash and credit availability as set forth in the affidavits submitted to us. Respondents have pointed to numerous facts put in evidence in the lower court where Appellants have transferred profits and assets to related companies. Respondents assert that if Appellants are today unable to pay, this is their own doing and that of corporations related to them. However, these arguments are not helpful to Respondents given the other considerations germane to provisional execution and elicited above. This is not to say however that such facts and arguments could not give rise to other recourses or orders.

---

30 *HSBC Bank Canada v. Aliments Infiniti inc.*, 2010 QCCA 717, para. 22 (Bich, J.A.).

31 *Roussel v. Gosselin*, 2015 QCCA 710, para. 11 (Giroux, J.A.); *Kornarski v. Gornitsky*, 2010 QCCA 1291, para. 10 (Rochon, J.A.); *Lutfy ltd v. Lutfy*, [1996] R.D.J. 317, p. 318, AZ-96011470, p. 4 (Chamberland, J.A.); see also *Berthiaume v. Carignan*, 2013 QCCA 1436, [2013] R.J.Q. 1369 (Dalphond, J.A.).

[44] Given the absence of or negligible benefit for class members from the order of provisional execution and the prejudice for the Appellants in paying those amounts, the balance of convenience on the issue of provisional execution favours the Appellants.

[45] In summary, assuming that provisional execution is possible in law for a class action judgment, we consider the justification for the provisional execution weak, the prejudice for Appellants serious and that the balance of convenience weighs in their favour. Accordingly, the order of provisional execution will be cancelled.

[46] **FOR ALL THE FOREGOING REASONS, THE COURT:**

[47] **DISMISSES** the motion by Appellant Imperial Tobacco Canada Ltd. for a sealing order, with costs;

[48] **DISMISSES** the motion by Appellant Rothmans, Benson & Hedges Inc. for a sealing order, with costs;

[49] **GRANTS** the motion of Appellant Imperial Tobacco Canada Ltd. to cancel the order of provisional execution in the judgment of the Superior Court affecting it, and **CANCELS** the order of provisional execution contained therein, costs to follow.

[50] **GRANTS** the motion of Appellant Rothmans, Benson & Hedges Inc. to cancel the order of provisional execution in the judgment of the Superior Court affecting it, and **CANCELS** the order of provisional execution contained therein, costs to follow.

[51] **GRANTS** the motion of Appellant JTI-MacDonald Corp. to cancel the order of provisional execution in the judgment of the Superior Court affecting it, and **CANCELS** the order of provisional execution contained therein, costs to follow.

MARIE-FRANCE BICH, J.A.

PAUL VÉZINA, J.A.

MARK SCHRAGER, J.A.

Mtre Éric Préfontaine
Mtre Deborah Glendinning
Mtre Mahmud Jamal
OSLER, HOSKIN & HARCOURT
For Imperial Tobacco Canada Ltd.

Mtre Guy Pratte
Mtre François Grondin
BORDEN LADNER GERVAIS
For JTI-MacDonald Corp.

Mtre Simon V. Potter
Mtre Pierre-Jérôme Bouchard
McCARTHY TÉTRAULT
For Rothmans, Benson & Hedges Inc.

Mtre Gordon Kugler
KUGLER, KANDESTIN
Mtre André Lespérance
Mtre Bruce Johnston
TRUDEL, JOHNSTON & LESPÉRANCE
Mtre Marc Beauchemin (absent)
DE GRANDPRÉ CHAIT
For Conseil québécois sur le tabac et la santé, Jean-Yves Blais et Cécilia Létourneau

Date of hearing: July 9, 2015

TAB L

THIS IS **EXHIBIT "L"** TO THE AFFIDAVIT
OF ERIC THAUVETTE, SWORN BEFORE ME
ON MARCH 12, 2019

Waleed Malik

Commissioner for Taking Affidavits

WASEEM MALIK
LSO # 678460

FISHMAN FLANZ MELAND PAQUIN

S.E.N.C.R.L./LLP
AVOCATS ET PROCUREURS
BARRISTERS AND SOLICITORS

30 ANS | YEARS de succès juridique of legal excellence

LEONARD W. FLANZ
AVRAM FISHMAN
GILLES PAQUIN
MARK E. MELAND
NICOLAS BEAUDIN
SUZANNE VILLENEUVE
MARGO R. SIMINOVITCH
JASON DOLMAN
NICOLAS BROCHU
TINA SILVERSTEIN
BETLEHEM L. ENDALE
NOAH ZUCKER
GABRIEL FAURE

July 6, 2015

BY EMAIL: martin.castonguay@judex.qc.ca

Mr. Justice Martin Castonguay, J.C.S.
Court House of Montreal
1 Notre-Dame Street East
Montreal QC H2Y 1B6

BY EMAIL: frank.newbould@scj-csj.ca

Mr. Justice Frank Newbould
Superior Court of Justice
Osgoode Hall, 130 Queen Street West
Toronto, Ontario
M5H 2N5

Re: Cécilia Létourneau v. JTI-Macdonald Corp. *et al*
S.C.M.: 500-06-000070-983

Conseil québécois sur le tabac et la santé *et al*
v. JTI-Macdonald Corp. *et al*
S.C.M.: 500-06-000076-980

Dear Justices Castonguay and Newbould,

We write to you in your respective capacities as Justices responsible for the Commercial divisions of your Courts in Montreal and Toronto.

Following seventeen years of litigation, including a trial which lasted more than two years, Justice Brian Riordan of Quebec Superior Court rendered a 276 page decision on May 27, 2015, condemning Imperial Tobacco Canada Limited ("**ITL**"), Rothmans, Benson & Hedges Inc.

("**RBH**") and JTI-Macdonald Corp. ("**JTI**") solidarily to pay billions of dollars in damages to the class members in the above-captioned two class actions (the "**Judgment**").

The Judgment also ordered provisional execution of part of the award and ordered the Defendants to deposit $1,133,000,000 in the trust accounts of their attorneys, within 60 days of the Judgment, notwithstanding appeal ("**Order of Provisional Execution**"). All three Defendants have filed Motions to Suspend the Order of Provisional Execution. The Motions will be heard by a panel of three judges of the Quebec Court of Appeal on July 9, 2015.

The ITL Motion states, in part, that unless the Court of Appeal suspends the Provisional Execution Order, it "may" have to file under the CCAA. Since ITL has its head office in Quebec, it is reasonable to believe that it will file under CCAA in Quebec.

JTI, however, has its head office in Ontario and if it chooses to file under CCAA, it is likely to do so in Ontario, as it did in 2004.

Whether there is an Application for an Initial Order under a CCAA filing in Quebec or in Ontario, we would like not less than seven (7) days prior notice, in order to make representations on behalf of the 100,000 (approximately) class members, suffering from lung cancer, throat cancer and emphysema who will be affected by the Initial Order.

Unless counsel for the Defendants provide written confirmation that they will give us at least seven (7) days prior notice of any Application for an Initial Order under CCAA, whether in Quebec or in Ontario, we hereby request a 9:30 a.m. meeting at your convenience for directives as to notice.

Respectfully yours,

FISHMAN FLANZ MELAND PAQUIN, LLP

Avram Fishman
AF:eb

cc: Deborah Glendinning (dglendinning@osler.com)
cc: Me Guy Pratte, Ad.E. (GPratte@blg.com)
cc: Me Simon Potter, Ad.E (spotter@mccarthy.ca)
cc: Me Gordon Kugler (gkugler@kklex.com)

TAB M

THIS IS **EXHIBIT "M"** TO THE AFFIDAVIT
OF ERIC THAUVETTE, SWORN BEFORE ME
ON MARCH 12, 2019

Waleed Malik

Commissioner for Taking Affidavits

WALEED MALIK
LSO # 678960

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-025385-154, 500-09-025387-150
(500-06-000070-983, 500-06-000076-980)

DATE: October 27, 2015

PRESIDING: THE HONOURABLE MARK SCHRAGER, J.A.

IMPERIAL TOBACCO CANADA LTD.
ROTHMANS, BENSON & HEDGES INC.
APPELLANTS – Defendants

v.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS
CÉCILIA LÉTOURNEAU
RESPONDENTS – Plaintiffs

JUDGMENT

---

[1] Respondents have filed identical motions in each of the three appeals seeking orders against Appellants, jointly, to furnish security.

[2] At the commencement of the hearing, the motion against JTI-Macdonald Corp ("JTM").[1] was withdrawn because attorneys were unavailable due to health issues. Hence, reference in this judgment to the "Appellants" should be read as referring to Imperial Tobacco Canada Ltd ("ITL") and Rothmans, Benson & Hedges Inc. ("RBH"), unless the context indicates otherwise.

---

[1] Record no: 500-09-025386-152.

[3] On May 27, 2015, the Superior Court, District of Montreal (the Honourable Brian Riordan) condemned the three Appellants to pay moral and punitive damages aggregating in excess of $8 billion, which today would exceed $15 billion with interest and additional indemnity.

[4] The 237 page judgment in first instance culminated two class actions commenced in 1998 against the three Appellant cigarette companies. The class actions were authorized in 2005; the joint trial commenced on March 12, 2012 and terminated on December 11, 2014. More than 70 witnesses, including 27 experts, were heard over a total of 251 hearing days. In excess of 20,000 exhibits were filed in evidence. The judgment found that Appellants were liable under the *Charter of Human Rights and Freedoms*,[2] the *Consumer Protection Act*[3] and under the *Civil Code of Quebec*[4] (*C.C.Q.*) for faults causing injury to others and for failure to properly inform consumers of the risks and dangers associated with the products manufactured by Appellants.

[5] In the conclusions of the judgment, the judge ordered an initial deposit of $1,131,090,000 in partial satisfaction of the two awards within 60 days broken down as follows:

	BLAIS		**LÉTOURNEAU**	
ITL	$670,000,000	(compensatory)	$72,500,000	(punitive)
	$30,000	(punitive)		
RBH	$200,000,000	(compensatory)	$46,000,000	(punitive)
	$30,000	(punitive)		
JTM	$130,000,000	(compensatory)	$12,500,000	(punitive)
	$30,000	(punitive)		
TOTAL	**$1,000,090,000**		**$131,000,000**	

[6] The judge also ordered provisional execution “with respect to the initial deposit of one billion dollars of moral damages, plus all punitive damages”.

[7] Applying the proportions of liability found by the trial judge (JTM 13%, ITL 67% and RBH 20%), provisional execution payments amounted to:

---

2 *Charter of Human Rights and Freedoms*, CQLR, c. C-12.
3 *Consumer Protection Act*, CQLR, c. P-40.1.
4 *Civil Code of Quebec*, CQLR c C-25.

i) JTM $130 million

ii) ITL $670 million

iii) RBH $200 million

[8] All Appellants petitioned this Court to cancel the order for provisional execution. In support of their motions, Appellants filed affidavits and financial information to support their claims that, on a cash basis, they could not pay their respective amounts of the provisional execution orders within the sixty day period imposed by the judgment. RBH stated explicitly that the obligation to pay rendered it insolvent on a cash basis and ITL alluded to the possibility of filing proceedings under the *Companies' Creditors Arrangement Act* ("*C.C.A.A.*").[5]

[9] By judgment of July 23, 2015,[6] this Court granted Appellants' motions and cancelled the provisional execution after identifying a weakness in that part of the judgment ordering provisional execution and the existence of a prejudice for the Appellants arising from the order of provisional execution.

[10] The Court pointed out that provisional execution may be incompatible with class actions because it is only upon final judgment that class members are definitively determined. Moreover, the Court observed that unless funds were provisionally distributed to class members, there would be no benefit to them but added that distribution on a provisional basis raised the problem of obtaining reimbursement should Appellants ultimately succeed in their appeals.

[11] On the issue of prejudice the Court said the following:

> [42] The affidavits filed by ITL and RBH in support of their motions to cancel provisional execution indicate that payment within 60 days of judgment causes serious financial prejudice to them. The evidence filed discloses a significant impact for Appellants despite that they are profitable and sizeable. In the case of JTM, its portion of $142,530,000 exceeds its annual earnings before interest, taxes and other expenses and well exceeds cash on hand of approximately $5.1 million. RBH's $246,030,000 exceeds its projected cash on hand at the end of July by approximately $125 million. ITL's provisional execution amount of $742,530,000 is approximately double its annual profit (before extraordinary items) and greatly exceeds current cash and credit availability to pay such sum.
>
> [43] Serious prejudice has been held sufficient to cancel provisional execution where the effect is to negate the right of appeal. At least, in the case of JTM and ITL, based on the affidavits, this appears to be the case. The judge based his

[5] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

[6] *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1224.

> calculations of Appellants' ability to pay on historical earnings and balance sheet worth. He obviously did not analyze current cash and credit availability as set forth in the affidavits submitted to us. Respondents have pointed to numerous facts put in evidence in the lower court where Appellants have transferred profits and assets to related companies. Respondents assert that if Appellants are today unable to pay, this is their own doing and that of corporations related to them. However, these arguments are not helpful to Respondents given the other considerations germane to provisional execution and elicited above. This is not to say however that such facts and arguments could not give rise to other recourses or orders.

[12] In virtue of the instant motions, Respondents seek security from Appellants in the aforementioned proportions, aggregating $5 billion, within 30 days of judgment or, subsidiarily that such security be provided by way of quarterly instalments of $250 million each commencing as at June 26, 2015. The proposed form of the security requested is irrevocable letters of credit issued by a Canadian bank listed in Schedule I of the *Bank Act*.[7]

[13] Other than facts found by the judge, the Respondents rely on the affidavits filed by Appellants in support of their motions to cancel provisional execution as well as the depositions of the affiants. Respondents submit that Appellants have arranged their affairs so as to be, in effect, judgment proof for any substantial condemnation and that there is every indication that, pending appeal, Appellants will continue to direct their earnings to related entities located out of jurisdiction so that they will be unable to pay any significant condemnation that may be maintained in appeal.

[14] Appellants have argued for the dismissal of the motions. Following are summaries of their submissions.

POSITION OF ITL

[15] ITL pleads that there are no grounds upon which to order it furnish security. The facts which Respondents invoke in support of their motion are not current. The transfer of trademarks to a subsidiary, which hypothecated them in favour of a related out-of-jurisdiction company occurred in the year 2000. The payment out of earnings as dividends to the out-of-jurisdiction parent, stopped in 2014, but in any event these payments merely reflect "business as usual". Thus, because there are no relevant facts occurring after judgment which might jeopardize the satisfaction of that judgment, there is no "special reason" to justify the ordering of security pursuant to article 497 of the *Code of Civil Procedure* ("*C.C.P*").[8]

---

7 *Bank Act*, S.C. 1991, c. 46.

8 *Code of Civil Procedure,* CQLR c. C-25.

[16] ITL adds that should I rule that there are grounds justifying security, the amounts requested are such as to drain all pre-tax earnings and put the going concern viability of ITL in peril. Moreover, ITL is unable to grant security in order to obtain borrowed funds because of its covenant to a related corporation. The latter currently provides credit facilities to ITL. Furthermore, an order of security payable in quarterly instalments would not alleviate this inability to pay.

POSITION OF RBH

[17] RBH submits that because of the magnitude of the judgment, Respondents are in effect seeking an appeal bond. However, the quantum of the judgment is an insufficient ground under article 497 *C.C.P.* The courts have stated that security will only be ordered where indicated by clear and precise facts; hypotheses based on subjective fear of Respondents that a judgment will not be satisfied does not suffice.

[18] RBH has been paying dividends in amounts less than net earnings throughout the litigation, so that Respondents' position once and if they obtain judgment from the Court of Appeal will be the same as it was at the outset of proceedings. Security should not be ordered for a situation existing prior to judgment; Respondents must demonstrate that their position has worsened and that their ability to obtain satisfaction of an eventual judgment will be in jeopardy. Respondents will simply have to obtain satisfaction out of the companies' revenues.[9] Counsel conceded that RBH's tangible or hard assets were of no value upon which to execute a judgment since plant and machinery were only appropriate to the manufacture and sale of cigarettes and inventory required government licensing to sell.

[19] Although RBH maintained in July 2015 before this Court that it could not pay its share of the provisional execution order, this only meant that it could not pay during the 60 day period provided in the judgment and should not be taken as a general admission of insolvency. The cancellation by RBH's parent of its credit facility within 2 days following the Superior Court judgment made it clear that it could not pay the provisional execution order, but is not a justification to order RBH to furnish security. In other words, the inability to satisfy the order of provisional execution should not be projected or be understood as an inability to satisfy a final judgment.

[20] RBH joined ITL by declaring that any security (particularly a letter of credit) cannot be ordered payable following the institution of proceedings (as Respondents seek) under either the *Bankruptcy and Insolvency Act* ("*B.I.A.*")[10] or *C.C.A.A.* That would be a "fraud on the bankruptcy". Moreover, as to the furnishing of security, RBH objects

---

[9] This appeared to contradict counsel's assertion that there was no proof that RBH would continue to pay dividends notwithstanding the judgment since its representative was not directly asked the question during the examination on the affidavit supporting the motion to cancel provisional execution.

[10] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 2.

to a letter of credit arguing that this would potentially give Respondents priority over other creditors should RBH become subject to any of the insolvency legislation. Should security be ordered, RBH would prefer that it be in the form of cash deposited in a lawyer's trust account.

[21] RBH points out that security for court costs was not requested in the motion originally filed and of which the undersigned is seized and, in any event, in a class action, costs are paid out of first proceeds of recovery.

[22] Lastly, RBH pleaded that the security requested requires the equivalent of an order not to declare any further dividends which, in essence, is a seizure before judgment under article 733 *C.C.P.* or a safeguard order, both of which are within the jurisdiction of the Court but not of a judge sitting alone.

DISCUSSION

[23] Article 497 *C.C.P.* provides that:

497. Sauf les cas où l'exécution provisoire est ordonnée et ceux où la loi y pourvoit, l'appel régulièrement formé suspend l'exécution du jugement.	**497.** Saving the cases where provisional execution is ordered and where so provided by law, an appeal regularly brought suspends the execution of judgment.
Toutefois, un juge de la Cour d'appel peut, sur requête, pour une raison spéciale […], ordonner à l'appelant de fournir, dans le délai fixé dans cette ordonnance, un cautionnement pour une somme déterminée, destiné à garantir, en totalité ou en partie, le paiement des frais d'appel et du montant de la condamnation, au cas où le jugement serait confirmé.	However, a judge of the Court of Appeal may, on a motion, for a special reason (…), order the appellant to furnish, within the time fixed in the order, security in a specified amount to guarantee in whole or in part the payment of the costs of appeal and the amount of the condemnation, if the judgment is upheld.
Si l'appelant ne fournit pas le cautionnement dans le délai fixé, un juge de la Cour d'appel peut, sur requête, rejeter l'appel.	If the appellant does not furnish security within the fixed time, a judge of the Court of Appeal may, upon motion, dismiss the appeal.

[24] The granting of security is a matter of discretion. It is an exceptional remedy and as such, Respondents must indicate facts upon which I may draw the conclusion that

there is a danger that the judgment, if maintained in appeal, may not be susceptible of execution.[11] Clear and precise facts are required; mere hypotheses will not suffice.[12]

[25] The judgment of Baudouin, J.A., in *Blue Bonnets* is the oft quoted starting point in considering a motion for security. The condemnation in that case of wrongful dismissal amounted to $412,956 plus interest and additional indemnity. This sum corresponded to 36 months of salary. Just prior to the presentation of the motion for security, the appellant deposited the equivalent of 12 months of salary which it recognized owing. Baudouin, J.A., summarized the then existing decisions of judges of this Court applying article 497 *C.C.P.* to state that given the change in the law (in 1966) to make security on appeal the exception instead of the rule, it is insufficient to merely allege fear to be unable to execute the eventual judgment or that appellant will become insolvent. He continued that to justify the granting of security a moving party must:

> […] présenter une preuve claire, précise et articulée basée sur des faits et non sur de simples hypothèses ou conjectures de circonstances particulières à l'espèce qui montrent que, sans l'octroi de ce cautionnement, ses droits reconnus par le jugement de première instance seront effectivement mis en péril.

[26] Baudouin, J.A., in applying these criteria to the facts before him dismissed the motion for security because even though the appellant distributed its earnings as dividends, it did so net of expenses, so that it was not in a "permanent state of insolvency" and that the "heavy" hypothecation of its assets in the absence of fraud was not sufficient as a "special reason" to order security under article 497 *C.C.P.* The report does not disclose the quantum of the appellant's earnings so that there is no means of comparison with the liability in virtue of the judgment appealed.

[27] Several years later, in *Europaper S.A. v. Avenor inc.*[13] Baudouin, J.A., again sitting on a motion[14] seeking security for a costs award of $92,694 found that recovery was in jeopardy because of the appellant's "insolvabilité complète" reflected by the fact that it had ceased activity, and had no place of business, no employees or assets of value. He concluded:

> Il y a donc là une importante différence factuelle avec l'arrêt *Blue Bonnets* […], où le moyen invoqué était la simple crainte éventuelle de difficultés financières d'une des principales parties du litige.

[28] The decided cases on point have considered a variety of factual circumstances as potentially constituting special reasons and, as such, have refined our understanding

---

11 *Brouillette v. Grégoire*, 2011 QCCA 376 (Kasirer, J.A.); *Sodexin Financement mercantile inc. v. Aly*, 2009 QCCA 1860 (Pelletier, J.A.) [*Sodexin*]; *Nadeau v. Nadeau*, 2008 QCCA 300; *Hippodrome Blue Bonnets inc. v. Jolicoeur*, [1990] R.D.J. 458 (Baudouin, J.A.) [*Blue Bonnets*].

12 *Blue Bonnets*, *supra*, note 11.

13 *Europaper S.A. v. Avenor inc.*, AZ-97011392, 1997 CanLII 10448 (Baudouin, J.A.).

14 *Ibid.*, p. 2.

of the test. An accounting firm subject to a multi-million dollar judgment amalgamated with another firm, which asserted that it was not liable for the delictual acts of the partners of the judgment debtor firm. It was ordered to furnish security of $16.9 million.[15] The sale of a company's principal assets has been held sufficient grounds to order security,[16] just as the funnelling of all revenues to a related company has been deemed a special reason.[17] While the apparent insolvency of the judgment debtor continues to be a justification for the furnishing of security, at the end of the day, the correct criterion for the exercise of the discretion, is whether in the absence of security, the execution of the judgment would be in jeopardy.[18] The interpretation of "special reason" in article 497 *C.C.P.* has gone beyond restricting it to cases akin to those where a seizure before judgment could be issued.[19] Naturally, insolvency may constitute a special reason as may fraudulent behaviour, but neither is the criterion *per se*. Moreover, the insolvency discussed by Appellants and seemingly in many of the judgments, is insolvency on a cash basis. The *B.I.A.* defines an insolvent person in a threefold manner including a definition based on the value of assets on a forced sale being less than liabilities (or, a balance sheet test).[20]

[29] I do not subscribe to Appellants' theory that the clear and precise facts underlying an order of security, in appeal, must have occurred since judgment was rendered in first instance. While the existence prior to judgment of the facts invoked may have been noted in certain decisions of my colleagues,[21] no judgment has asserted the existence of such a hard and fast rule. Indeed, in *Widdrington* (which is the highest award of security in appeal of which I am aware), the most salient fact alluded to is the amalgamation of the two accounting firms, which occurred in July, 1998 i.e. after the institution of proceedings in first instance but years before the appeal.

[30] Appellants have submitted a judgment of Mongeon, J.S.C., of 2013,[22] dismissing an application for a safeguard order against JTM because it had transferred its trademarks valued at $1.2 billion to an "offshore" subsidiary in 1999, the year following the institution of proceedings in the Superior Court. The transferee then pledged the trademark to secure an indebtedness. JTM pays substantial royalties to the transferee in consideration of the use by it of the trademark. Its president agreed that the purpose

---

15 *Wightman v. Widdrington (Succession de)*, 2011 QCCA 1393 [*Widdrington*].

16 *Gagné v. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2003 CanLII 55068, J.E. 2003-497 (Dalphond, J.A.).

17 *Entreprise Enapex inc. v. Recouvrements métalliques Bussières ltée*, 2008 QCCA 261 (Rochette, J.A.).

18 *Pothitos v. Demers*, 2013 QCCA 603, para. 15 (St-Pierre, J.A.); *Shama Textiles inc. v. Certain Underwriters at Lloyd's*, 2012 QCCA 473, paras. 13-14 (Dalphond, J.A.).

19 André Rochon, *Guide des requêtes devant le juge unique de la Cour d'appel*, Cowansville, Éditions Yvon Blais, 2013, pp. 158-159.

20 *B.I.A.*, *supra*, note 10, s. 2, "insolvent person".

21 *Sodexin*, *supra*, note 11.

22 *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2013 QCCS 6085; leave to appeal denied in *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2014 QCCA 520 (Savard, J.A.).

of the transaction was “creditor proofing” and Riordan, J.S.C., also characterized “the tangled web of interconnecting contracts” as a creditor proofing exercise.[23] The judgment of Mongeon, J.S.C., however is of no assistance to Appellants as it did not address any point before me for adjudication. It did not support the contention that facts pre-appeal cannot be relied upon. Mongeon, J.S.C., faced with a demand to enjoin JTM from continuing the royalty payments, concluded that he could not do so because the other party to the royalty contract was not a party to the litigation. Mongeon, J.S.C., held that all parties to the contract should be parties to the litigation, in order that he alter their contractual rights.

[31] As a final argument, counsel for RBH likened the motions before me to applications for a seizure before judgment under article 733 *C.C.P.* or a safeguard order and in any event beyond the jurisdiction of a judge in chambers and within the jurisdiction of the Court. The argument is clearly wrong as it flies in the face of the clear wording of article 497 *C.C.P*. according jurisdiction over the motions before me to a “judge of the Court of Appeal”.

[32] From 2008 to 2013, RBH’s average annual earnings from operations was approximately $450 million. It paid $300 million annually on average to its parent, Phillip Morris International (“PMI”). RBH had benefited from a credit facility with PMI but as indicated, that was cancelled the day following the judgment in first instance. Historically, RBH’s short term credit comes from the PMI cash pool, so given the cancellation, it appears to have little short term availability of cash. In June, RBH’s representative confirmed its inability to pay its share of the provisional execution ($200 million) within sixty days, but projected that it could pay the amount by March 2016. At the time of the judgment, its available cash was $70 million.

[33] Despite RBH’s assertion that it does not pay out all of its earnings, its financial statements clearly show negative shareholder equity for 2013 and 2014. Counsel’s attempts to qualify its insolvency on a cash basis by stating that it only said it could not pay the provisional execution within 60 days does not change the conclusion that it was insolvent if it was obliged to pay. The *B.I.A.* measures insolvency by the ability to pay debts when due.[24] In answer to my questioning how Respondents would obtain satisfaction upon receipt of a favourable judgment on the merits, counsel stated that they would have to wait to be paid out of cash flow. By way of illustration, if RBH owed $1 billion (including interest and additional indemnity) upon judgment of the Court on the merits, it would require more than two years, at least, to satisfy that judgment. This is not payment when due.

[34] RBH confirms that its real estate and equipment being appropriate for tobacco production only are not readily marketable. Counsel informed me that the sale of tobacco products requires special government permits so that inventory could be

---

[23] *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382, para. 1101.

[24] *B.I.A.*, *supra*, note 10, s. 2, “insolvent person”.

difficult if not impossible to seize and sell in execution of a judgment. Also, the trademarks are not owned by RBH. Thus, it appears that the only real “assets” on the balance sheet against which a creditor might execute judgment are the accounts receivable which is the cash flow and which is substantially and regularly paid out in dividends to PMI.

[35] Irrespective of whether RBH is technically insolvent, it is certainly unable to satisfy the judgment of the Superior Court even if the quantum was reduced. That fact and the on-going practice of distributing earnings leads the undersigned to conclude that Respondents are in jeopardy of not being able to execute any substantial award that this Court may uphold.

[36] ITL earned $535 million from operations in 2014 and paid $334 million in dividends to its out of jurisdiction parent, British American Tobacco Corp. (“BAT”).

[37] Not only has ITL never set aside funds for a condemnation in this matter, it has still not done so even after the judgment of first instance herein because it does not consider the outcome unfavourable according to its representative during the deposition. I understand that he meant that the outcome would not be unfavourable until all appeals have been exhausted.

[38] Similar statements could be made concerning ITL’s tangible assets as those of RBH. The trademarks are also encumbered.

[39] ITL is indebted to BAT under various financing agreements. The credit facilities are fully drawn upon. BAT was not willing to fund the provisional execution award and I am given to understand that BAT makes no commitment to fund a final judgment.

[40] Though counsel asserted that payments of dividends stopped at the end of 2014, this results from payments made to BAT for the repayment of the loan made to finance the settlement of other litigation (*i.e.* the Flinkote matter). In other words, the funds were not available to pay a dividend. Though there is equity for the shareholders on the balance sheet of 2014, there is no liquidity to pay a judgment.

[41] I am also of the opinion that Respondents are in jeopardy of not being able to satisfy any substantial judgment against ITL.

[42] The depositions conducted by Respondents’ attorneys of the affiants upon the motions to cancel the provisional execution make it clear that the Appellants intend to continue payments (dividends and otherwise) to their out-of-jurisdiction related entities while the appeal is pending. That practice caused them to protest their inability to satisfy the order of provisional execution. It is reasonable to deduce that should their appeals fail completely or merely reduce the condemnation marginally, leaving a substantial condemnation, the Appellants will be unable to pay just as they were unable to pay the provisional execution in a timely fashion. This state of affairs is not due to any cause

extraneous to the will of Appellants such as an unsuccessful business. Rather, their businesses are profitable. The situation is the result of the ongoing business practice continued consistently during the litigation of paying out surplus earnings. This was not illegal. However, there is now and has been since May 27, 2015, a judgment, which includes a condemnation with interest and additional indemnity aggregating approximately $15.5 billion at today's value. Interest and additional indemnity run at approximately $1 million per day. This changes the equation radically. Even if the grounds of appeal are not frivolous, in the circumstances Appellants cannot be allowed to continue on a course of conduct where they will not be able to satisfy the judgment.

[43] A judgment pending appeal benefits from a presumption of validity.[25] Findings of fact of the trial judge are compelling as only a palpable error of fact justifies a reversal by an appellate court. It is not an answer for the Appellants to state that they are not behaving differently now than they were prior to the judgment of the Superior Court. That judgment, in the circumstances, and despite the appeal requires that they do behave differently given the circumstances presented to me. It is in my opinion far too cynical to adopt the position that we were so foresightful and efficient in ordering our affairs so as not to have the liquidity to satisfy the judgment, that there is no special reason existing to re-balance the situation. Counsel for Respondents characterized the situation as "heads I win, tails you lose". Sometimes, the vernacular is pointedly apt.

[44] Both Appellants have structured their affairs in a manner that drastically, if not completely, reduces their exposure to satisfy any substantial condemnation that might be made against them in this litigation. Of course, the companies are not empty shells because it is in their obvious interest and that of their parent companies that they continue to operate so as to continue to generate profits. The structure and *modus operandi* was put in place years ago because no doubt Appellants could observe the seriousness of the case and resolve of the Respondents to conclude that a substantial award was possible, even perhaps likely. In these circumstances, now that there is a judgment condemning them to pay $8 billion ($15.5 billion at today's value) and nothing to suggest that the practice (of distributing virtually all earnings) will not continue and notwithstanding that the transfer and encumbrance of trademarks may have occurred long ago, I am faced with a situation where on balance I conclude that the Respondents are in jeopardy of not obtaining satisfaction of any substantial amount confirmed in appeal. I am mindful that Appellants stated clearly that they could not pay the provisional execution award as ordered. Positive action is necessary to convince me that the reaction to a final judgment would not be the same. These circumstances taken together are a "special reason". I will order that security be furnished.

---

[25] *Épiciers unis Métro-Richelieu inc. v. Syndicat des travailleuses et des travailleurs des épiciers unis Métro-Richelieu (C.S.N.)*, 1997 CanLII 10141 (Baudouin, J.A.); *Québec (Ministre de l'Agriculture, des Pêcheries et de l'Alimentation du Québec) v. Produits de l'érable Bolduc & Fils ltée*, AZ-50134137, J.E. 2002-1239, para. 6 (Pelletier, J.A.); *Droit de la famille — 102409*, 2010 QCCA 1725, para. 2 (Rochon, J.A.); *Soft Informatique Inc. v. Gestion Gérald Bluteau Inc.*, 2012 QCCA 2018, para. 12 (Dalphond, J.A.); *Droit de la famille — 151906*, 2015 QCCA 1309, para. 6 (Kasirer, J.A.).

[45] What amount of security is appropriate? The initial deposit required in the class action as awarded by Justice Riordan was $1.131 billion on the rationale that 80% of the estimated compensatory damages might be enough to satisfy claims:

> [927] In nearly every class action, especially ones with a large number of class members, only a small portion of the eligible members actually make claims. Thus, the remaining balance, or "reliquat", could often be greater than the amount actually paid out. Hence, it is not unreasonable to proceed on the basis that the full amount of the initial deposits might not be claimed.
>
> [928] We thus feel comfortable in ordering the Companies initially to deposit only 80% of the estimated total compensatory damages, i.e., before any reduction based on the smoking dates. If that proves insufficient to cover all claims eventually made, it will be possible to order additional deposits later, unless something unforeseen occurs and all three Companies disappear. The Court is willing to assume that this will not happen. We shall thus reserve the Plaintiffs' rights with respect to such additional deposits.

[46] Counsel for Respondents noted that Justice Riordan's reasoning here may be strained because lower "take up rates" in class actions are prevalent where the amount distributed to each member is minimal which will not be the case here. However, I have no evidence of these assertions. I prefer to rely on the judgment.

[47] Also, as the Court noted in cancelling the provisional execution, it cannot be said that the grounds of appeal are frivolous, so that the $5 billion of security requested being nearly the capital amount of the judgment and given Justice Riordan's reasoning above, is not an appropriate amount of security. An amount of security approaching the entire amount of the judgment in first instance is to be avoided as too closely equivalent to provisional execution.[26]

[48] No amount of security for legal costs was requested in the motions as filed so that consideration does not enter into the calculation. Moreover, article 1035 *C.C.P.* provides that first proceeds of collection of class action judgments are directed towards the payment of costs.

[49] Considering the foregoing, the security will be calculated on the basis of the initial deposit of $1.131 billion or, based on the proportions of liability determined by the judge (ITL 67% and RBH 20%), the order against ITL will be $758 million and against RBH $226 million. Both figures are rounded.

---

[26] *Bell v. Molson*, 2013 QCCA 377 [*Bell*]; *Agaisse v. Duranceau*, 2015 QCCA 1320, para. 7; *Laforest v. Côté*, 2015 QCCA 119 (G. Gagnon, J.A.), para. 17.

[50] I am mindful of judgments holding that the amount of security ordered should not, in effect, negate an Appellant's right to appeal.[27]

[51] This Court considered a similar principle in cancelling the provisional execution where Appellants pleaded their inability (or at least inability within 60 days following judgment) to pay the amount of the provisional execution as set forth in the extract quoted above.

[52] I see the current situation as somewhat different. The Appellants chose not to reserve funds to satisfy an eventual condemnation as was their right. However, now that there is a judgment, which I have stated, benefits from a presumption of validity, the situation is changed. Given my conclusions based on the facts in the record, it is not acceptable that Appellants merely say that they have no funds to satisfy the judgment or an order to furnish security and continue to distribute earnings because that is "business as usual". A strategic decision is required by Appellants in caucus with their parent companies and related entities who have received the benefit of the profitable operations over the years and who continue to do so. Are they willing to do the necessary to help fund security to allow Appellants to continue their appeal? I do not question Appellants' right to appeal but neither can I stand idly by while Appellants pursue an appeal which will benefit them if they win but which will not operate to their detriment if they lose. Continuing the practice of distributing earnings out-of-jurisdiction at this point is at best disingenuous and at worst, bad faith.

[53] That being said, in fixing the mode of payment, I am willing to make some compromise to the cash requirements of Appellants. As Justice Riordan said, the object of the exercise is not to bankrupt the Appellants,[28] nor should Appellants appeal rights be defeated by the amount of security.[29]

[54] Accordingly, I will order that the security be provided in quarterly instalments as Respondents concluded, subsidiarily, in their motions. I am unaware of any legal impediment to so ordering. In this manner, each instalment of security will not exceed quarterly earnings.

[55] The trial judge found that the average annual net earnings before tax of Appellants was as follows:

ITL – $483 million

RBH – $460 million

---

27 *Bell*, *supra*, note 26, para. 10; *Camirand v. Gagnon*, 2013 QCCA 375; *Inversiones Bellrim, s.a. v. Guzzler Manufacturing inc.*, 2009 QCCA 1685 (Dalphond, J.A.); *Inversiones Bellrim, s.a. v. Guzzler Manufacturing Inc.*, 2009 QCCA 550 (Dufresne, J.A.); *Sharma Textiles inc. v. Certain Underwriters at Lloyd's*, 2007 QCCA 771 (Bich, J.A.).

28 *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382, para. 1068.

29 *Labene v. Paquette*, 2015 QCCA 962 (Mainville, J.A.), para. 6, and *supra*, note 27.

On a quarterly basis, this computes to:

ITL – $121 million (rounded up)

RBH – $115 million

[56] I have financial statements for 2014 of ITL and RBH, which were filed in the record of this Court with the affidavits in support of the motions to cancel provisional execution. For 2014, RBH's net pre-tax earnings were $495 million. ITL shows a loss due to the pay out of the settlement of the Flinkote litigation. For consistency, I will use the averages determined by the judge for the period 2008 to 2013 as quoted above.

[57] Respondents concluded in the alternative for security to be deposited by way of quarterly instalments of $250 million each in the aggregate. As indicated, I have decided to award security equal to the initial deposit of $1.131 billion or $758 million for ITL and $226 million for RBH. The RBH security will be payable by way of six quarterly instalments and that of ITL in seven quarterly instalments so that the amount of each instalment does not exceed average quarterly earnings. In both cases, payments will commence at the end of December, 2015. In addition to the six months since the judgment, this allows 60 days before the first instalment as requested at the hearing by counsel of RBH.

[58] Accordingly, the Appellants will be ordered to furnish security as follows:

Payable on or before last juridical day of	ITL ($758 million)	RBH ($226 million)
December, 2015	$108,285,000	$37,666,000
March, 2016	$108,285,000	$37,666,000
June, 2016	$108,285,000	$37,666,000
September, 2016	$108,285,000	$37,666,000
December, 2016	$108,285,000	$37,666,000
March, 2017	$108,285,000	$37,666,000
June, 2017	$108,285,000	

The instalments bring us to March 2017 and June 2017. A hearing for the appeal has been tentatively scheduled before this Court during the autumn of 2016. I think it safe to assume that given the projected volume of the joint record, a lengthy advisement can be anticipated. If judgment is rendered before June or even March 2017, the remaining instalments of security will not be payable.

[59] The above amounts are less than average quarterly revenue. They are far easier to manage financially than a single lump sum. Again, according to the figures that we have, I am fully cognizant that Appellants may require some infusion or assistance of their related entities on a short or medium term basis in order to furnish the security. However, the amounts compared to earnings are such that it cannot be said, in my view, that the security ordered has negated the right to appeal.

[60] The security will be in the form of cash or irrevocable letters of credit issued by a Schedule I Canadian bank to remain in force until final judgment of this Court, or further order of this Court.

[61] As to the form of security, an argument was attempted by counsel for Appellants concerning the legality or appropriateness of letters of credit as security.

[62] This Court has held that an irrevocable letter of credit of a Canadian bank could constitute valid security in lieu of the deposit of cash.[30]

[63] A letter of credit of a bank is an undertaking by that bank. The latter is not a party to the litigation. The Appellants voiced concerns that this undertaking would remain despite any insolvency proceedings initiated by the Appellants. However, the deposit of cash at the office of the Court (in effect with the Ministre des Finances)[31] is also security in the sense that a litigant has, conditionally, a right exercisable in respect of the deposit.[32] This is not as Appellants seem to suppose a “fraud on the bankruptcy” or the granting of a “super priority”. Valid security, consensual or court ordered, is supposed to offer priority to its beneficiaries in an insolvency and is so recognized in the *B.I.A*.[33] The effect of such security in the event of an insolvency may be the subject of a decision by a judge or court having jurisdiction but at present the question is hypothetical. In any event, Appellants will have the option of depositing the cash or furnishing letters of credit.

[64] Counsel for RBH suggested that any security take the form of a deposit in one of the lawyer’s trust accounts. This is a matter for consent if any, by the parties but should not, in my view, form part of a court order.

[65] Accordingly, I will order security and allow letters of credit to be provided to Respondents’ counsel instead of cash deposits in court at each Appellants’ option.

[66] The security becomes payable upon a final judgment of this Court maintaining in whole or in part the judgment of first instance. It cannot be payable, as suggested by Respondents on a *B.I.A.* or *C.C.A.A.* filing. Any applicable stay of proceedings arising from such a filing would have to be respected; any exception should be court ordered at

---

30 *Droit de la famille – 2054*, AZ-97011711, 1997 CanLII 10660 (C.A.); see also article 1574 *C.C.Q.*
31 *Deposit Act*, CQLR, c. D-5, s. 8.
32 *Basille v. 9159-1503 Québec inc.*, 2014 QCCA 1653 (Kasirer, J.A.).
33 Ss. 69(2), 69.1(2), 69.3 (2), 71 and 136 *B.I.A.*, *supra*, note 10.

the appropriate time by the court having jurisdiction. The undersigned cannot order now that a letter of credit be payable following an insolvency filing which may impose a suspension of such recourse.

[67] The letter of credit will be payable upon receipt by the issuing bank of a sworn statement by one of Respondents' attorneys certifying that the Court of Appeal has rendered judgment in this matter and specifying the amounts due by Appellants. A copy of the judgment will be annexed to the sworn statement. Since an appeal to the Supreme Court does not automatically operate a stay, I need not include that possibility in the conditions of payment of the letters of credit. In the alternative, the letters of credit will be payable subject to further order of the Court. Any letter of credit must of course be issued by a Canadian bank listed in Schedule I of the *Bank Act* and be irrevocable, payable in whole or in part and remain in force until final judgment either by renewal or replacement prior to expiry.

CONCLUSIONS:

[68] **IN RECORD FILE NO: 500-09-025385-154**

FOR ALL THE FOREGOING REASONS, THE UNDERSIGNED:

[69] **GRANTS** in part Respondents' motion to order Appellants to furnish security;

[70] **ORDERS** Appellant, Imperial Tobacco Canada Ltd, to furnish security in accordance with article 497 *C.C.P.* in an amount of $758 million, which security may at Appellant's option, be in the form of cash or letter of credit and shall be furnished in equal consecutive quarterly instalments of $108,285,000 each, on or before the last juridical day of the following months: December, 2015, March, 2016, June, 2016, September, 2016, December, 2016, March, 2017 and June, 2017.

[71] **DECLARES** that security in the form of cash shall be deposited at the Registry of the Court of Appeal, Montreal, and that security by way of letter of credit be delivered to one of the attorneys of Respondents and comply with the following:

i) be issued by a Canadian bank listed in Schedule I of the *Bank Act*;

ii) make reference to the record number of the Court of Appeal;

iii) be irrevocable;

iv) remain in force until: a) judgment on the merits in this Court record either by renewal or replacement prior to expiry or b) further order of the Court of Appeal;

v) be payable: a) upon receipt by the issuing bank of a sworn statement of one of Respondents' attorneys declaring that judgment has been rendered

and stating the amount owing by the Appellant pursuant to the judgment on the merits, a copy of such judgment to be annexed to such sworn statement or b) upon further order of the Court of Appeal.

[72] **DECLARES** that any and all costs or expenses incurred to furnish the said security will be for the account of Appellant, Imperial Tobacco Canada Ltd.

[73] **THE WHOLE** with costs to follow suit.

[74] **IN RECORD FILE NO: 500-09-025387-150**

FOR ALL THE FOREGOING REASONS, THE UNDERSIGNED:

[75] **GRANTS** in part Respondents' motion to order Appellants to furnish security;

[76] **ORDERS** Appellant, Rothmans, Benson & Hedges Inc., to furnish security in accordance with article 497 *C.C.P.* in an amount of $226 million, which security may at Appellant's option, be in the form of cash or letter of credit and shall be furnished in equal consecutive quarterly instalments of $37,666,000.00 each on or before the last juridical day of the following months: December, 2015, March, 2016, June, 2016, September, 2016, December, 2016 and March, 2017.

[77] **DECLARES** that security in the form of cash shall be deposited at the Registry of the Court of Appeal, Montreal, and that security by way of letter of credit be delivered to one of the attorneys of Respondents and comply with the following:

i) be issued by a Canadian bank listed in Schedule I of the *Bank Act*;

ii) make reference to the record number of the Court of Appeal;

iii) be irrevocable;

iv) remain in force until: a) judgment on the merits in this Court record either by renewal or replacement prior to expiry or b) further order of the Court of Appeal;

v) be payable: a) upon receipt by the issuing bank of a sworn statement of one of Respondents' attorneys declaring that judgment has been rendered and stating the amount owing by the Appellant pursuant to the judgment on the merits, a copy of such judgment to be annexed to such sworn statement or b) upon further order of the Court of Appeal.

[78] **DECLARES** that any and all costs or expenses incurred to furnish the said security will be for the account of Appellant, Rothmans, Benson & Hedges Inc.

[79] **THE WHOLE** with costs to follow suit.

MARK SCHRAGER, J.A.

Mtre Deborah Glendinning
Mtre Éric Préfontaine
OSLER, HOSKIN & HARCOURT
For Imperial Tobacco Canada Ltd.

Mtre Simon V. Potter
Mtre Pierre-Jérôme Bouchard
McCARTHY TÉTRAULT
For Rothmans, Benson & Hedges Inc.

Mtre Gordon Kugler
KUGLER, KANDESTIN
Mtre Philippe Trudel
TRUDEL, JOHNSTON & LESPÉRANCE
For Conseil québécois sur le tabac et la santé, Jean-Yves Blais et Cécilia Létourneau

Date of hearing: October 6, 2015

TAB N

THIS IS **EXHIBIT "N"** TO THE AFFIDAVIT
OF ERIC THAUVETTE, SWORN BEFORE ME
ON MARCH 12, 2019

Waleed Malik

Commissioner for Taking Affidavits

WALEED MALIK
LSO # 678460

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-025385-154
(500-06-000070-983, 500-06-000076-980)

MINUTES OF THE HEARING

DATE: December 9, 2015

THE HONOURABLE MARK SCHRAGER, J.A.

APPELLANT	COUNSEL
IMPERIAL TOBACCO CANADA LTD.	Mtre DEBORAH GLENDINNING Mtre ÉRIC PRÉFONTAINE *(Osler, Hoskin & Harcourt, S.E.N.C.R.L./s.r.l.)*
RESPONDENTS	COUNSEL
CONSEIL QUÉBECOIS SUR LE TABAC ET LA SANTÉ **JEAN-YVES BLAIS** **CÉCILIA LETOURNEAU**	Mtre GORDON KUGLER Mtre PIERRE BOIVIN *(Kugler, Kandestin s.e.n.c.r.l., L.L.P.)*

DESCRIPTION: **Motion of Appellant Imperial Tobacco Canada Ltd. for directions on the Schedule to Furnish Security (Articles 2, 20, 46, 497, 520 & 522.1 *C.C.P.*)**

Clerk: Mihary Andrianaivo	Courtroom: RC-18

HEARING

14: 00 Commencement of the hearing. Continuation of the December 7, 2015 hearing. The presence of the Parties, at the Court, is not required today.

By the Judge: Judgment – See page 3.

End of the hearing.

Mihary Andrianaivo

Clerk

JUDGMENT

[1] On October 27, 2015, the undersigned rendered judgment in this file ordering the Petitioner now before me, Imperial Tobacco Canada Ltd. ("ITL") to furnish security. Petitioner now seeks the rectification of that judgment and more specifically a change to the schedule of payments of security ordered by the undersigned.

[2] Some background information is required. Petitioner, together with two other tobacco companies,[1] have appealed the judgment of May 27, 2015 of the Superior Court, District of Montreal (the Honourable Justice Brian Riordan),[2] condemning them to pay, in a class action, moral and punitive damages aggregating in excess of $8 billion, plus interest, additional indemnity and costs. The judgment of the Superior Court also ordered provisional execution in respect of a portion of the condemnation but that order was cancelled by judgment of the Court following motions presented by Petitioner (and its two Co-Appellants).[3] The appeal is scheduled to be heard in the autumn of 2016.

[3] After the judgment of the Court cancelling provisional execution, Respondents moved for the posting of security. Their motion, filed against the three Appellants, proceeded against two of them and the undersigned granted the motion on October 27, 2015.[4]

[4] I found that the Respondents had demonstrated a "special reason" within the meaning of article 497 *C.C.P.* that justified an order to furnish security to guarantee payment of part of the condemnation. Petitioner had been distributing earnings to its out of jurisdiction parent company which, if the practice were to continue, would lead to the inability to pay any substantial condemnation that this Court might uphold. This lack of availability of funds or "inability to pay" was indeed one of the arguments advanced by Petitioner in support of the cancellation of the order of provisional execution.

[5] The security ordered by the undersigned corresponded to the amount of the initial deposit towards satisfaction of the class claims ordered by the trial judge ($1.131 billion). The pro rata share of Petitioner as determined by the trial judge (67%) resulted in my order of security of $758 million.

[6] Once I had determined to order the furnishing of security, I said this in the judgment:

> [53] That being said, in fixing the mode of payment, I am willing to make some compromise to the cash requirements of Appellants. As Justice Riordan said, the object of the exercise is not to bankrupt the Appellants, nor should Appellants appeal rights be defeated by the amount of security.

---

1 Rothmans, Benson & Hedges inc. and JTI-Macdonald Corp.
2 *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382.
3 *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1224.
4 *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1737 (Schrager, J.A.) [Judgment].

Consequently, I ordered that the security be provided in quarterly instalments.

[7] The amount of the quarterly instalments was calculated as a function of average annual net earnings before tax as determined by the trial judge based on the period 2008 – 2013. Petitioner's annual pre-tax earnings figure is $483 million or, if divided by four, $120,750,000. This would serve as a notional ceiling for the quarterly instalments of security.

[8] Petitioner's 2014 financial statements were filed in the record of this Court in support of the motions to cancel provisional execution. These statements demonstrate that Petitioner showed a loss (contrary to 2008 - 2013) due to repayments of a loan contracted to fund the settlement of the "Flintkote litigation". Since it was an exception to an otherwise consistently profitable enterprise, the 2014 financial year was not considered by me in the determination of average pre-tax earnings. Moreover, I had no financial statements for any portion of 2015.

[9] Petitioner was allowed 60 days before the first quarterly instalment of security was due, as requested by counsel for Co-Appellant Rothmans, Benson & Hedges inc.

[10] Pursuant to my judgment of October 27, 2015, Petitioner is bound to furnish $108,285,000 of security on or before the last juridical day of 2015. This figure is one seventh of the total security of $758 million and less than the notional quarterly average pre-tax earnings of $120,750,000.

[11] Petitioner has now lodged a motion entitled "Motion of Appellant Imperial Tobacco Canada Ltd. for directions on the schedule to furnished security (Articles 2, 20, 46, 497, 520 & 522.1 *C.C.P.*)".

[12] Petitioner states that the final instalment of $100,000,000 of reimbursement of the Flintkote loan is payable on December 23, 2015, as indicated in its 2014 financial statement. Consequently, Petitioner submits that it should only be required to pay $8,285,000 on account of the security in December 2015. Petitioner's motion is artfully drafted to suggest that sufficient funds are not available to pay both the Flintkote loan instalment and the security. However, there is no assertion of inability to pay *per se*. No current financial statements or an affidavit of a financial officer are produced.[5] Moreover, there is no mention of the position of Petitioner's parent and related companies on the subject of helping to fund the security. Petitioner relies on the factual record as constituted upon presentation of its motion to cancel provisional execution.

[13] Petitioner argues that the reasoning of the undersigned in allowing quarterly payments was premised on three principles:

> 17. (…):
>
> (i) ITL not be bankrupted by the Security;
>
> (ii) ITL's appeal rights not be defeated by the Security; and
>
> (iii) The amount of each instalment of the Security not exceed ITL's average quarterly earnings.

[5] The motion is supported by the affidavit of one of Petitioner's attorneys drafted in general terms.

[14] Thus, Petitioner submits that it was by inadvertence that the undersigned, in determining the schedule of payments of security, did not allow for the December 23, Flintkote payment.

[15] Petitioner concludes that I should now change the schedule of instalment payments of security to reflect the following:

> (…)
>
> (a) a first instalment of $8,285,000 due on the last juridical day of December 2015;
>
> (b) a second instalment of $100,000,000 due on the last juridical day of March, 2016;
>
> (c) six consecutive and equal quarterly instalments of $108,285,000, beginning on the last juridical day of June, 2016 and ending on the last juridical day of September, 2017;

[16] Petitioner cannot succeed. It is wrong on two counts.

[17] In principle, once an adjudicator (here a judge of this Court sitting in chambers) has rendered judgment, he or she cannot afterward alter it. This is an application of the doctrine of *functus officio*.[6] Historically, this rule, that only an appellate body can rehear and correct a matter, was subject to two exceptions. Firstly, the Court or one of its judges may correct clerical errors which power is now expressed in article 520 *C.C.P.* to include the power to correct errors "in writing or calculation, or any other clerical error". A clerical error is not the basis of Petitioner's submission in this case. Article 520 *C.C.P.* also permits the correction of "a judgment which, by obvious inadvertence, has granted more than was demanded, or has omitted to adjudicate upon part of the demand". Again, this is not the present situation.

[18] Petitioner has submitted that it merely seeks an additional delay. However, the additional delay requires a modification of the conclusions of my judgment setting out the schedule of payments. This is not a situation where the party in default to furnish security is defending a motion to dismiss its appeal. In such a case, the presiding judge of the Court benefits from a discretion whether or not to dismiss the appeal. The last paragraph of article 497 *C.C.P.* states:

497. (…)	**497.** […]
If the appellant does not furnish security within the fixed time, a judge of the Court of Appeal **may**, upon motion, dismiss the appeal.	Si l'appelant ne fournit pas le cautionnement dans le délai fixé, un juge de la Cour d'appel **peut**, sur requête, rejeter l'appel.
	[My underlining]

[6] *Doucet-Boudreau v. Nova-Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62, paras. 77-79 and paras. 113-117 [*Doucet-Boudreau*]; *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, p. 860-862 [*Chandler*]; *Paper Machinery Ltd. et al. v. J.O. Ross Engineering Corp. et al.*, [1934] S.C.R. 186, 188, 1934 CanLII 1; see also *Boudreault v. Syndicat des salariées et salariés de l'entrepôt Bertrand, distributeur en alimentation inc. Chicoutimi (CSN)*, 2011 QCCA 1495, paras. 75-76, where the Court adopts *Chandler* adding that a third source of exception to the doctrine of *functus officio* would be a statutory provision empowering an adjudicator to decide anew or reconsider a judgment once rendered. Revocation pursuant to art. 482 *C.C.P.* is an example of such a statutory provision (see in this regard *Droit de la famille* – 091431, 2009 QCCA 1169).

The discretion to dismiss may include an ancillary jurisdiction to extend a delay, particularly based on facts arising after the judgment, such as a technical difficulty or formal defect impeding the party from furnishing security within the delay imposed.[7] The situation presented to me is that a relevant fact (i.e. the $100 million payment on the Flintkote loan) was not given proper consideration in the judgment. That is a wholly different situation because Petitioner contends that the judgment contains an error of omission.

[19] In essence, Petitioner submits that the manifest intention of the undersigned in the judgment was to link payments on account of security to available cash. This gives rise to consideration of the second exception to the doctrine of *functus officio* – i.e. that a judge may correct an error in expressing his manifest intention.[8] Thus, where by slip or inadvertence, the conclusions of a judgment do not reflect the reasons, or the judge's manifest intent, a correction is permitted.[9]

[20] Respondents argue that article 520 *C.C.P.* occupies the entire field of possibility to correct a judgment short of an appeal or some other statutory recourse (such as revocation). Whether the aforementioned exception to the doctrine of *functus officio* forms part of the law in Quebec by the vehicle of article 46 *C.C.P.* and whether such inherent jurisdiction can be exercised by a judge as opposed to the Court, need not be decided by me presently, for the reasons which will become self-evident below.

[21] If the conclusions of my judgment ordering security failed to take into account and give effect to an element which was on record and which operated to produce a conclusion other than that contained in the judgment, that would be an error, which could only be corrected on appeal. Thus, if the conclusion to order payment of one of the instalments of security, at the end of December, of $108,285,000 instead of $8,285,000 is an error, not of arithmetic but rather of omission to consider a relevant factual element (i.e. the scheduled Flintkote loan payment) then I am without power to correct it because of the doctrine of *functus officio*. If the element was considered but not given effect in the conclusions of the judgment, such situation would not lend itself to rectification.[10] For this reason, Respondents correctly characterized the motion before me as a disguised appeal.

[22] While it was true that the payment schedule was crafted to make the furnishing of security feasible, the calculations in the judgment are estimates only. These estimates were made on the basis of the trial judge's findings of average pre-tax earnings for the period of 2008-2013. I did not consider any data for quarterly cash flow, current or projected in making these calculations. The estimates were clearly based on history to heed in some way Petitioner's "inability to pay" argument initially raised in seeking cancellation of the order of provisional execution.

---

7 *Fakhri v. Faucher*, 2008 QCCA 1004 (Rochon, J.A.); *Carrier v. 9071-2852 Québec inc.*, 2010 QCCA 451.

8 *Doucet-Boudreau* and *Chandler*, *supra*, note 6. See for example *Deng v. Wang*, 2010 QCCS 4057, where the judge, seeking to put an end to the co-ownership of an immovable inadvertently omitted to order the judicial sale of the immovable as an alternative conclusion, where the defendant failed to purchase the Plaintiff's undivided interest; suspension of provisional execution refused *Wang v. Deng*, 2010 QCCA 1861 (Kasirer, J.A.).

9 *Doucet-Boudreau* and *Chandler*, *supra*, note 6.

10 *Garantie, compagnie d'assurance de l'Amérique du Nord (La) v. Construction Québec Labrador inc.*, 1998 CanLII 12924, J.E. 98-1351 (C.A. Qué).

[23] Most significantly, there is no inadvertence or slip in the judgment regarding the Flintkote loan. The payments were raised in argument by Petitioner to illustrate that it had stopped paying dividends at the end of 2014. Previously, it had paid out earnings for all the years in evidence. It was, as a consequence of these submissions, brought to light that the lender to whom payments were made was Petitioner's parent company, British American Tobacco (or a closely related corporation). In point of fact, as disclosed by the 2014 financial statements and as confirmed by Petitioner's representative in his deposition, Petitioner paid in excess of $300 million in dividends during 2014 to its parent but at year end owed $400 million to a related company for borrowings to finance the settlement of the Flintkote litigation. Respondents' position to the effect that virtually all available cash was being funnelled to related corporations situated out of jurisdiction was reinforced rather than rebutted. Petitioner submits that its obligation to pay $100 million to a related entity on December 23, 2015 should not be treated differently than would be the case if the loan was due to an institutional lender dealing with Petitioner at arm's length. In all of the circumstances of this matter, it is impossible to conveniently ignore the benefit of earnings received over the years and the position asserted by Petitioner's parent that it would not commit to fund a final judgment.[11]

[24] In ordering that security be furnished, I found it unacceptable that Petitioner would continue to distribute its earnings to related entities located out of this jurisdiction notwithstanding the judgment in first instance, which albeit subject to an appeal, benefits from a presumption of validity as I stated in the judgment with the supporting authority.[12] For this reason, as well as the various demands known and for that matter, unknown, on Petitioner's cash flow going forward, I stated that:

> [52] (…) A strategic decision is required by Appellants in caucus with their parent companies and related entities who have received the benefit of the profitable operations over the years and who continue to do so. Are they willing to do the necessary to help fund security to allow Appellants to continue their appeal? (…) Continuing the practice of distributing earnings out-of-jurisdiction at this point is at best disingenuous and at worst, bad faith.

[25] Later in the judgment, I added that:

> [59] (…) Again, according to the figures that we have, I am fully cognizant that Appellants may require some infusion or assistance of their related entities on a short or medium term basis in order to furnish the security. (…).

[26] As can be seen, it was foreseeable that available cash generated from operations might be, in the "short or medium term", inadequate to meet one or more of the instalment payments of security. Indeed, the affidavit of Petitioner's officer filed in support of the motion to cancel provisional execution claims that the amounts outstanding under Petitioner's line of credit fluctuated between $72 million and $317 million during the period of January to June 2015. It is also conceivable but unknown to the undersigned now, as it was when the judgment was rendered, that 2015 may have been a stellar year for Petitioner and there is ample cash to pay both the security and the Flintkote loan in December 2015. The contrary is not asserted in Petitioner's motion. In any event, there was no inadvertent omission by the undersigned to take into account

[11] Judgment, para. 39.
[12] Judgment, para. 43.

the payment of the Flintkote loan to Petitioner's parent or related entity. Petitioner is wrong on that account.

[27] Accordingly, the factual premise of Petitioner's motion is unfounded as there is no error in my previous judgment requiring correction. However, even if there was such an error, its nature is such that the doctrine of *functus officio* applies and I would be without power to correct it.

FOR THE FOREGOING REASONS, THE UNDERSIGNED:

[28] **DISMISSES** Petitioner's motion, with costs.

MARK SCHRAGER, J.A.

TAB O

THIS IS **EXHIBIT "O"** TO THE AFFIDAVIT
OF ERIC THAUVETTE, SWORN BEFORE ME
ON MARCH 12, 2019

Waleed Malik

Commissioner for Taking Affidavits

WALEED MALIK
LSO #67896O

Bennett Jones

Bennett Jones LLP
3400 One First Canadian Place, P.O. Box 130
Toronto, Ontario, M5X 1A4 Canada
T: 416.863.1200
F: 416.863.1716

Jeffrey S. Leon
Partner
Direct Line: 416.777.7472
e-mail: leonj@bennettjones.com

March 6, 2019

By Email: dglendinning@osler.com

Deborah Glendinning
OSLER HOSKIN HARCOURT LLP
6200-100 King Street West
1 First Canadian Place
Toronto, ON M5X 1B8

Dear Ms. Glendinning:

Re: Health Care Cost Recovery Litigation

We write to you in your capacity as counsel to Imperial Tobacco Canada Limited (the "Company"). As you know, we are counsel to the Provinces of British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan in connection with their statutory claims for the recovery of health care costs against, among others, the Company. As such, our clients have very significant claims against the Company.

In light of the March 1, 2019 decision of the Quebec Court of Appeal with respect to the Quebec class action, we assume that the Company is considering various options. We would be pleased to engage with you in that regard. But to the extent the Company intends to seek relief under any insolvency statute, including making an application for an Order under the *Companies' Creditors Arrangement Act*, we request that we receive advance notice of such an application. We recognize that any such application may be required to be made on an urgent basis. Nevertheless, we still request that we receive as much notice as is practicable in the circumstances. There is no need for an application to proceed on an *ex parte* basis.

Yours truly,

Jeffrey S. Leon

JSL:mdlr

TAB P

THIS IS **EXHIBIT "P"** TO THE AFFIDAVIT
OF ERIC THAUVETTE, SWORN BEFORE ME
ON MARCH 12, 2019

Waleed Malik

Commissioner for Taking Affidavits
LSO # 678960

Ministry of the
Attorney General

Crown Law Office
Civil Law

720 Bay Street
8th Floor
Toronto ON M7A 2S9

Jacqueline L. Wall
Tel: (416) 325-8435
Fax: (416) 326-4181

Ministère du
Procureure générale

Bureau des avocats
de la Couronne Droit civil

720 rue Bay
8e étage
Toronto ON M7A 2S9

Please refer to File
S.V.P. Se Référer au dossier
No. 30653

Ontario

March 7, 2019

BY EMAIL

Deborah Glendinning
Osler, Hoskin & Harcourt LLP
1 First Canadian Place
100 King Street West,
Suite 6200, Box 50
Toronto, ON M5X 1B8

Dear Ms. Glendinning:

Re: ***Her Majesty the Queen in right of Ontario* v. *Rothmans Inc. et al.***
Court File No.: CV-09-387984

As you are aware, we are counsel to the plaintiff, Her Majesty the Queen in right of Ontario ("**Ontario**"), in the above captioned action. Pursuant to the *Tobacco Damages and Health Care Costs Recovery Act, 2009*, Ontario is advancing a claim against your client, Imperial Tobacco Canada Limited ("**ITCL**"), and other defendants to recover costs of approximately $330 billion incurred to provide health care required by persons in Ontario as a result of tobacco related disease or the risk of tobacco related disease.

In a press release posted on March 1, 2019, British American Tobacco stated that ITCL intends to seek leave to appeal to the Supreme Court of Canada from the decision of the Court of Appeal of Quebec in *Imperial Tobacco Canada et al.* v. *Conseil Québécois sur le tabac et la santé et al.* If, at some point in the future, ITCL decides to bring an application seeking protection under the *Companies' Creditors Arrangement Act* or any other applicable statute, we request that ITCL provide Ontario with reasonable notice of the hearing date and serve its application materials on Ontario in advance of the initial hearing. We thank you for this consideration.

Yours very truly,

Jacqueline Wall

Jacqueline L. Wall
Counsel

TAB Q

THIS IS **EXHIBIT "Q"** TO THE AFFIDAVIT
OF ERIC THAUVETTE, SWORN BEFORE ME
ON MARCH 12, 2019

Waleed Malik

Commissioner for Taking Affidavits

WALEED MALIK
LSO # 678960

FFMP
AVOCATS
LAWYERS
Depuis/Since 1923

Fishman Flanz Meland Paquin
s.e.n.c.r.l./LLP
1250, boul. René-Lévesque Ouest
Suite 4100
Montréal (Québec) H3B 4W8
Tel: 514-932-4100
Fax: 514-932-4170

Avram Fishman
afishman@ffmp.ca

Mark E. Meland
mmeland@ffmp.ca

Montreal, March 8, 2019

BY MESSENGER

MR. JORGE ARAYA
3711 Saint-Antoine Street West
Montreal, Quebec H4C 3P6

MR. ÉRIC THAUVETTE
3711 Saint-Antoine Street West
Montreal, Quebec H4C 3P6

MS. TAMARA GITTO
3711 Saint-Antoine Street West
Montreal, Quebec H4C 3P6

BOARD OF DIRECTORS OF
IMPERIAL TOBACCO CANADA LIMITED
3711 Saint-Antoine Street West
Montreal, Quebec H4C 3P6

RE: Cécilia Létourneau vs. JTI-Macdonald Corp., Imperial Tobacco Canada Limited and Rothmans, Benson & Hedges Inc. / S.C.M. 500-06-000070-983
Conseil québécois sur le tabac et la santé et Jean-Yves Blais vs. JTI-Macdonald Corp. Imperial Tobacco Canada Limited and Rothmans, Benson & Hedges Inc. / S.C.M. 500-06-000076-980
C.A.M. 500-09-025385-154, 500-09-025386-152 and 500-09-025387-150

Dear Sirs, Madam,

We represent the plaintiffs Conseil québécois sur le tabac et la santé, Jean-Yves Blais (deceased), and Cécilia Létourneau (the "**Quebec Class Action Plaintiffs**") in the above-captioned class action lawsuits instituted, *inter alia*, against Imperial Tobacco Canada Limited ("**Imperial**") in the fall of 1998 (the "**Quebec Tobacco Proceedings**").

You appear under the Industry Canada and *Registre des entreprises du Québec* websites as directors of Imperial. This letter is accordingly being addressed to you in your capacity as directors of Imperial.

On May 27, 2015 (with correction on June 7, 2015), a judgment was rendered by the Superior Court of Quebec (the "**Trial Judgment**") in favour of the Quebec Class Action Plaintiffs condemning Imperial, Rothmans, Benson & Hedges Inc. ("**Rothmans**") and JTI-Macdonald Corp. ("**JTI-Macdonald**") solidarily to pay moral damages to the Quebec Class Action Plaintiffs in the amount of $6,858,864,000 which, as at the time of the Trial Judgment, together with interest and additional indemnity, amounted to in excess of $15.5 billion.

The Trial Judge further ordered that Imperial, Rothmans and JTI-Macdonald pay punitive damages to the Quebec Class Action Plaintiffs in the amounts of $72,530,000, $46,000,000 and $12,500,000 respectively, with interest and additional indemnity from the date of the Trial Judgment.

On March 1, 2019, the Court of Appeal of Quebec rendered a judgment (the "**Appeal Judgment**") substantially maintaining the Trial Judgment and condemning Imperial, Rothmans and JTI-Macdonald solidarily to pay to the Quebec Class Action Plaintiffs moral damages in the amount of $6,857,854,080, with interest and additional indemnity from the dates specified in the Appeal Judgment, and condemning Imperial, Rothmans and JTI-Macdonald to pay punitive damages in the amounts of $72,530,000, $46,000,000 and $12,500,000 respectively, with interest and additional indemnity from the date of the Trial Judgment. An English version of the conclusions of the Appeal Judgment is attached hereto for your convenience.

Section 42 of the *Canada Business Corporations Act* ("CBCA") provides that:

> 42. **[Dividends]** A corporation shall not declare or pay a dividend if there are reasonable grounds for believing that
>
> (a) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or
>
> (b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities and stated capital of all classes.

Section 118(2)(c) CBCA provides for the personal liability of directors in respect of any dividends declared in contravention of the provisions of section 42 CBCA:

> 118. (2) **[Further directors' liabilities]** Directors of a corporation who vote for or consent to a resolution authorizing any of the following are jointly and severally, or solidarily, liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation:
>
> [...]
>
> (c) a payment of a dividend contrary to section 42;
>
> [...]

Section 122 CBCA stipulates the following regarding the duty of care of directors:

> 122. (1) **[Duty of care of directors and officers]** Every director and officer of a corporation in exercising their powers and discharging their duties shall
>
> (a) act honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
>
> (2) **[Duty to comply]** Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.
>
> (3) **[No exculpation]** Subject to subsection 146(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves them from liability for a breach thereof.

As stated by the Honorable Mark Schrager, J.A., of the Court of Appeal of Quebec, in his decision ordering Imperial and Rothmans to post security[1]:

> [37] Not only has ITL never set aside funds for a condemnation in this matter, it has still not done so even after the judgment of first instance herein because it does not consider the outcome unfavourable according to its representative during the deposition. I understand that he meant that the outcome would not be unfavourable until all appeals have been exhausted.
>
> [40] Though counsel asserted that payments of dividends stopped at the end of 2014, this results from payments made to BAT for the repayment of the loan made to finance the settlement of other litigation (*i.e.* the Flinkote matter). In other words, the funds were not available to pay a dividend. Though there is equity for the shareholders on the balance sheet of 2014, there is no liquidity to pay a judgment.
>
> [41] I am also of the opinion that Respondents are in jeopardy of not being able to satisfy any substantial judgment against ITL.
>
> [42] (...) It is reasonable to deduce that should their appeals fail completely or merely reduce the condemnation marginally, leaving a substantial condemnation, the Appellants will be unable to pay just as they were unable to pay the provisional execution in a timely fashion. This state of affairs is not due to any cause extraneous to the will of Appellants such as an unsuccessful business. Rather, their businesses are profitable. (...) However, there is now and has been since May 27, 2015, a judgment, which includes a condemnation with interest and additional indemnity aggregating approximately $15.5 billion at today's value. Interest and additional indemnity run at approximately $1 million per day. This changes the equation

[1] Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc. vs. Conseil québécois sur le tabac et la santé, Jean-Yves Blais et Cécilia Létourneau 2015 QCA 1737 (« **Schrager Judgment** »), paragraphs 37, 40, 41, 42, 43 and 44.

> radically. Even if the grounds of appeal are not frivolous, in the circumstances Appellants cannot be allowed to continue on a course of conduct where they will not be able to satisfy the judgment.
>
> [43] A judgment pending appeal benefits from a presumption of validity. Findings of fact of the trial judge are compelling as only a palpable error of fact justifies a reversal by an appellate court. It is not an answer for the Appellants to state that they are not behaving differently now than they were prior to the judgment of the Superior Court. **That judgment, in the circumstances, and despite the appeal requires that they do behave differently given the circumstances presented to me**. (…).
>
> (emphasis added)

Consequently, we are formally putting you on notice that the directors are personally liable to the Quebec Class Action Plaintiffs for the recovery of any dividends, loan repayments or other distributions made to the shareholder(s) or other related parties of Imperial since May 27, 2015, *i.e.*, a period during which Imperial submitted to the Court of Appeal that even the payment of the security would put the going concern viability of Imperial in peril.[2]

Furthermore, you are hereby notified, in your capacity as directors of Imperial, that until the Appeal Judgment has been satisfied in full (in principal, interest, additional indemnity and costs), any further dividends, loan repayments or other distributions hereafter made by Imperial to its shareholder(s) or other related parties will give rise to additional directors' personal liability.

You are hereby called upon to provide to the undersigned, within 14 days of this letter, copies of all liability insurance policies insuring the directors and officers of Imperial for the policy periods from 2015 until 2019 inclusively, including, for greater certainty, all liability insurance policies issued to British American Tobacco p.l.c. or any related person which covers the directors and officers of Imperial.

DO GOVERN YOURSELVES ACCORDINGLY.

Yours truly,

FISHMAN FLANZ MELAND PAQUIN LLP

Avram Fishman / Mark E. Meland
MEM/hb
Encl.
Cc: Me Deborah Glendinning (dglendinning@osler.com)
Me Thomas Craig Lockwood (clockwood@osler.com)
Me Gordon Kugler (gkugler@kklex.com)
Me Philippe Trudel (philippe@tjl.quebec)
Me Bruce Johnston (bruce@tjl.quebec)
Me André Lespérance (andre@tjl.quebec)
Me Marc Beauchemin (mbeauchemin@dgclex.com)

[2] Schrager Judgment, paragraph 16

COUR D'APPEL

CANADA
PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

N° : 500-09-025385-154, 500-09-025386-152 et 500-09-025387-150
(500-06-000070-983 et 500-06-000076-980)

DATE : 1er mars 2019

CORAM : LES HONORABLES **YVES-MARIE MORISSETTE, J.C.A.**
ALLAN R. HILTON, J.C.A.
MARIE-FRANCE BICH, J.C.A.
NICHOLAS KASIRER, J.C.A.
ÉTIENNE PARENT, J.C.A.

N° : 500-09-025385-154

IMPERIAL TOBACCO CANADA LTÉE
APPELANTE / INTIMÉE INCIDENTE – défenderesse
c.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS
CÉCILIA LÉTOURNEAU
INTIMÉS / APPELANTS INCIDENTS – demandeurs
Et
JTI-MACDONALD CORP.
ROTHMANS, BENSON & HEDGES INC.
MISES EN CAUSE – défenderesses

N° : 500-09-025386-152

JTI-MACDONALD CORP.
APPELANTE / INTIMÉE INCIDENTE – défenderesse
c.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS
CÉCILIA LÉTOURNEAU
INTIMÉS / APPELANTS INCIDENTS – demandeurs
Et
IMPERIAL TOBACCO CANADA LTÉE
ROTHMANS, BENSON & HEDGES INC.
MISES EN CAUSE – défenderesses

N° : 500-09-025387-150

ROTHMANS, BENSON & HEDGES INC.
APPELANTE / INTIMÉE INCIDENTE – défenderesse
c.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS
CÉCILIA LÉTOURNEAU
INTIMÉS / APPELANTS INCIDENTS – demandeurs
Et
JTI-MACDONALD CORP.
IMPERIAL TOBACCO CANADA LTÉE
MISES EN CAUSE – défenderesses

English translation of the orders – Translated from the original French

FOR THE AFOREMENTIONED REASONS, THE COURT, UNANIMOUSLY:

[1280] **ALLOWS** the appeals in part in files n^{os} 500-09-025385-154, 500-09-025386-152 and 500-09-025387-150;

[1281] **REVERSES** the judgment of the Superior Court in part;

[1282] **STRIKES** paragraphs 1208 to 1213 of the judgment and **REPLACES** them with the following paragraphs :

[1208] **AMENDS** the class description as follows:

All persons residing in Quebec who satisfy the following criteria:	Toutes les personnes résidant au Québec qui satisfont aux critéres suivants :
1) To have smoked, **between January 1, 1950 and** November 20, 1998, a minimum of 12 pack/years of cigarettes manufactured by the defendants (that is, the equivalent of a minimum of 87,600 cigarettes, namely any combination of the number of cigarettes smoked in a day multiplied by the number of days of consumption insofar as the total is equal to or greater than 87,600 cigarettes).	1) Avoir fumé, **entre le 1er janvier 1950** et le 20 novembre 1998, au minimum 12 paquets-année de cigarettes fabriquées par les défenderesses (soit l'équivalent d'un minimum de 87 600 cigarettes, c'est-à-dire toute combinaison du nombre de cigarettes fumées dans une journée multiplié par le nombre de jours de consommation dans la mesure où le total est égal ou supérieur à 87 600 cigarettes).
For example, 12 pack/years equals :	Par exemple, 12 paquets/année égale :
20 cigarettes a day for 12 years (20 X 365 X 12 = 87,600) or	20 cigarettes par jour pendant 12 ans (20 X 365 X 12 = 87 600) ou
30 cigarettes a day for 8 years (30 X 365 X 8 = 87,600) or	30 cigarettes par jour pendant 8 ans (30 X 365 X 8 = 87 600) ou
10 cigarettes a day for 24 years (10 X 365 X 24 = 87,600);	10 cigarettes par jour pendant 24 ans (10 X 365 X 24 = 36 500);
2) To have been diagnosed before March 12, 2012 with :	2) Avoir **reçu un diagnostic d'une de ces maladies** avant le 12 mars 2012 :
a) Lung cancer or b) Cancer (squamous cell carcinoma) of the throat, that is to say of the larynx, the oropharynx or the hypopharynx or c) Emphysema.	a) ~~un~~ cancer du poumon ou b) ~~un~~ cancer (carcinome épidermoïde) de la gorge, à savoir du larynx, de l'oropharynx ou de l'hypopharynx ou c) ~~de~~ l'emphysème.
The group also includes the heirs of the persons deceased after November 20, 1998 who satisfied the criteria mentioned herein.	Le groupe comprend également les héritiers des personnes décédées après le 20 novembre 1998 qui satisfont aux critères décrits ci-haut.

[1209] **CONDEMNS** the Defendants solidarily to pay as moral damages an amount of **$6,857,854,080** plus interest and the additional indemnity **from the dates specified in the following table for each increment of the condemnation:**

Year of diagnosis	Amount in capital	Date from which interests and the additional indemnity are to be calculated
1995	$353,485,440	November 20, 1998
1996	$356,231,040	November 20, 1998
1997	$360,103,040	November 20, 1998
1998	$373,338,240	December 31, 1998
1999	$381,575,040	December 31, 1999
2000	$382,279,040	December 31, 2000
2001	$398,541,440	December 31, 2001
2002	$402,554,240	December 31, 2002
2003	$405,863,040	December 31, 2003
2004	$414,240,640	December 31, 2004
2005	$416,634,240	December 31, 2005
2006	$420,154,240	December 31, 2006
2007	$431,629,440	December 31, 2007
2008	$447,821,440	December 31, 2008
2009	$443,597,440	December 31, 2009
2010	$431,207,040	December 31, 2010
2011	$438,599,040	December 31, 2011
Total :	$6,857,854,080	

[1210] **CONDEMNS** the Defendants solidarily to pay the amount of $100,000 as moral damages to each class member diagnosed with **lung cancer, cancer of the larynx, cancer of the oropharynx or cancer of the hypopharynx** who started to smoke before January 1, 1976, plus interest and the additional indemnity **calculated from the date of service of the Motion for Authorization to Institute the Class Action if the member's disease was diagnosed before January 1, 1998, or from December 31 of the year of the member's diagnosis if the member's disease was diagnosed on or after January 1, 1998;**

[1211] **CONDEMNS** the Defendants solidarily to pay the amount of $80,000 as moral damages to each class member diagnosed with **lung cancer, cancer of the larynx, cancer of the oropharynx or cancer of the hypopharynx** who started to smoke as of January 1, 1976, plus interest and the additional indemnity **calculated from the date of service of the Motion for Authorization to Institute the Class Action if the member's disease was diagnosed before January 1, 1998, or from**

December 31 of the year of the member's diagnosis if the member's disease was diagnosed on or after January 1, 1998;

[1212] **CONDEMNS** the Defendants solidarily to pay the amount of $30,000 as moral damages to each member diagnosed with emphysema who started to smoke before January 1, 1976, plus interest and the additional indemnity **calculated from the date of service of the Motion for Authorization to Institute the Class Action if the member's disease was diagnosed before January 1, 1998, or from December 31 of the year of the member's diagnosis if the member's disease was diagnosed on or after January 1, 1998;**

[1213] **CONDEMNS** the Defendants solidarily to pay the amount of $24,000 as moral damages to each member diagnosed with emphysema who started to smoke as of January 1, 1976, plus interest and the additional indemnity **calculated from the date of service of the Motion for Authorization to Institute the Class Action if the member's disease was diagnosed before January 1, 1998, or from December 31 of the year of the member's diagnosis if the member's disease was diagnosed on or after January 1, 1998;**

[1283] **CONFIRMS** the judgment of the Superior Court in every other respect;

[1284] **THE WHOLE** with legal costs in favour of the respondents; and

[1285] **DISMISSES** the cross-appeal, without legal costs.

TAB R

THIS IS **EXHIBIT "R"** TO THE AFFIDAVIT
OF ERIC THAUVETTE, SWORN BEFORE ME
ON MARCH 12, 2019

Waleed Malik

Commissioner for Taking Affidavits

WALEED MALIK
LSO # 678460

SCHEDULE "A"

Court File No.: CV-09-387984

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Plaintiff

- and -

ROTHMANS INC., ROTHMANS, BENSON & HEDGES INC., CARRERAS ROTHMANS LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS U.S.A. INC., PHILIP MORRIS INTERNATIONAL, INC., JTI-MACDONALD CORP., R.J. REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS TOBACCO INTERNATIONAL INC., IMPERIAL TOBACCO CANADA LIMITED, BRITISH AMERICAN TOBACCO P.L.C., B.A.T INDUSTRIES P.L.C., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, and CANADIAN TOBACCO MANUFACTURERS' COUNCIL

Defendants

SECOND AMENDED FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THAT PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM AND $1,500 FOR COSTS WITHIN THE TIME FOR SERVING AND FILING YOUR STATEMENT OF DEFENCE, YOU MAY MOVE TO HAVE THIS PROCEEDING DISMISSED BY THE COURT. IF YOU BELIEVE THE AMOUNT CLAIMED FOR COSTS IS EXCESSIVE, YOU MAY PAY THE PLAINTIFF'S CLAIM AND HAVE THE COSTS ASSESSED BY THE COURT.

Date: .....

Issued by: .....

Local Registrar

Address: 393 University Avenue, 10th Floor
Toronto, Ontario
M5G 1E6

TO: Rothmans Inc.
1500 Don Mills Road
Toronto, Ontario

AND TO: Rothmans Benson & Hedges Inc.
1500 Don Mills Road,
Toronto, Ontario.

AND TO: Carreras Rothmans Limited
Globe House
1 Water Street, London.

AND TO: Altria Group, Inc.
6601 Broad Street, Richmond
Virginia, USA

AND TO: Philip Morris USA Inc
6601 Broad Street, Richmond
Virginia, USA

AND TO: Philip Morris International Inc
120 Park Ave.,
New York, New York.

AND TO: JTI-Macdonald Corp.
5151 George Street, Box 247
Halifax, Nova Scotia

AND TO: R.J. Reynolds Tobacco Company
401 North Main Street
Winston-Salem
North Carolina, USA

AND TO: R.J. Reynolds Tobacco International, Inc.
401 North Main Street
Winston-Salem
North Carolina, USA

AND TO: Imperial Tobacco Canada Limited
3711 St. Antoine Street
Montreal, Quebec

AND TO: British American Tobacco p.l.c.,
Globe House, 4 Temple Place,
London, England.

AND TO: B.A.T Industries p.l.c.
Globe House
4 Temple Place
London, England

AND TO: British American Tobacco (Investments) Limited
Globe House
1 Water Street,
London, England.

AND TO: Canadian Tobacco Manufacturers' Council
1808 Sherbrooke St. West
Montreal, Quebec

TABLE OF CONTENTS

I. RELIEF CLAIMED

1. The Plaintiff, Her Majesty the Queen in right of Ontario (the "Crown"), claims against the Defendants, jointly and severally:

   (a) recovery in the amount of $~~50~~330,000,000,000.00 (~~fifty~~ three hundred and thirty billion dollars) for the cost of health care benefits, resulting from tobacco related disease or the risk of tobacco related disease, which have been paid or will be paid by the Crown for insured persons;

   (b) its costs of this action on a substantial indemnity basis;

   (c) pre-judgment and post-judgment interest in accordance with the provisions of s. 128 of the *Courts of Justice Act,* 1990, R.S.O. and amendments thereto; and

   (d) such further and other relief as this Honourable Court deems just.

II. INTRODUCTION

A. The Plaintiff and the Nature of the Claim

2. The Crown provides health care benefits for the population of insured persons who suffer tobacco related disease or the risk of tobacco related disease as a result of the tobacco related wrongs committed by the Defendants. Pursuant to section 2 of the *Tobacco Damages and Health Care Costs Recovery Act, 2009,* S.O. 2009 C.13 (the "*Act*"), the Crown claims against the Defendants for recovery of the cost of health care benefits,

namely:

(a) the present value of the total expenditure by the Crown for health care benefits provided for insured persons resulting from tobacco related disease or the risk of tobacco related disease, and

(b) the present value of the estimated total expenditure by the Crown for health care benefits that could reasonably be expected will be provided for those insured persons resulting from tobacco related disease or the risk of tobacco related disease,

caused or contributed to by the tobacco related wrongs hereinafter described. Further particulars of the costs incurred by the Crown will be provided prior to trial.

3. Pursuant to subsection 2(1) and section 2(4)(b) of the Act, the Crown brings this action to recover the costs of health care benefits, on an aggregate basis, for a population of insured persons as a result of exposure to cigarettes.

4. Pursuant to subsections 2(1) and 2(2) of the Act, the Crown brings this action as a direct and distinct action for the recovery of health care benefits caused or contributed to by a tobacco related wrong as defined in the Act. The Crown does so in its own right and not on the basis of a subrogated claim.

5. The words and terms used in this Statement of Claim including, "cost of health care benefits", "disease", "exposure", "health care benefits", "insured person", "manufacture", "manufacturer", "promote", "promotion", "tobacco product", "tobacco related disease", and "tobacco related wrong", have the meanings ascribed to them in the Act.

6. Also in this Statement of Claim:

(a) "cigarette" includes loose tobacco intended for incorporation into a cigarette, and

(b) "to smoke" or "smoking" means the ingestion, inhalation or assimilation of a cigarette, including any smoke or other by-product of the use, consumption or combustion of a cigarette.

B. The Defendants

7. The Defendant, Rothmans Inc., is a company incorporated pursuant to the laws of Canada and has a registered office at 1500 Don Mills Road, Toronto, Ontario.

8. The Defendant, Rothmans, Benson & Hedges Inc. (created through the amalgamation of Benson & Hedges (Canada) Inc. and Rothmans of Pall Mall Limited), is a company incorporated pursuant to the laws of Canada with a registered office at 1500 Don Mills Road, North York, Ontario.

9. The Defendant, Carreras Rothmans Limited (formerly known as John Sinclair, Limited), is a company incorporated pursuant to the laws of the United Kingdom and has a registered office at Globe House, 1 Water Street, London.

10. The Defendant, Altria Group, Inc. (formerly known as Philip Morris Companies Inc.), is a company incorporated pursuant to the laws of Virginia and has a registered office at 6601 Broad Street, Richmond, Virginia, in the United States of America.

11. The Defendant, Philip Morris USA Inc. (formerly known as Philip Morris Incorporated), is a company incorporated pursuant to the laws of Virginia and has a registered office at 6601 Broad Street, Richmond, Virginia in the United States of America and it engaged, directly or indirectly in the manufacture and promotion of cigarettes sold in Ontario.

12. The Defendant, Philip Morris International Inc., is a company incorporated pursuant to the laws of Virginia and has a registered office at 120 Park Ave., New York, New York.

13. The Defendant, JTI-Macdonald Corp. (formerly RJR-Macdonald Corp., RJR-Macdonald Inc., and Macdonald Tobacco Inc.), is a company incorporated pursuant to the laws of Nova Scotia with a registered office at 5151 George Street, Box 247, Halifax, Nova Scotia.

14. The Defendant, R.J. Reynolds Tobacco Company, is a company incorporated pursuant to the laws of North Carolina and has its principal office at 401 North Main Street, Winston-Salem, North Carolina, in the United States of America and it engaged, directly or indirectly in the manufacture and promotion of cigarettes sold in Ontario.

15. The Defendant, R.J. Reynolds Tobacco International, Inc., is a company incorporated pursuant to the laws of Delaware and has its principal office at 401 North Main Street, Winston-Salem, North Carolina, in the United States of America.

16. The Defendant, Imperial Tobacco Canada Limited (created through the amalgamation of, *inter alia*, Imperial Tobacco Limited and Imasco Ltd.), is a company incorporated pursuant to the laws of Canada and has a registered office at 3711 St. Antoine Street, Montreal, Quebec.

17. The Defendant, British American Tobacco p.l.c., is a company incorporated pursuant to the laws of the United Kingdom and has a registered office at Globe House, 4 Temple Place, London, England and is a successor in interest to the Defendants, B.A.T Industries p.l.c. and British American Tobacco (Investments) Limited.

18. The Defendant, B.A.T Industries p.l.c. (formerly B.A.T. Industries Limited and Tobacco

Securities Trust Company Limited), is a company incorporated pursuant to the laws of the United Kingdom and has a registered office at Globe House, 4 Temple Place, London, England and is a successor in interest to the Defendant, British American Tobacco (Investments) Limited.

19. The Defendant, British American Tobacco (Investments) Limited (formerly British-American Tobacco Company Limited), is a company incorporated pursuant to the laws of the United Kingdom and has a registered office at Globe House, 1 Water Street, London, England.

20. All of the Defendants described above or their predecessors in interest for whom they are in law responsible are "manufacturers" pursuant to the Act by reason of one or more of the following:

(a) they manufacture, or have manufactured, tobacco products, including cigarettes;

(b) they cause, or have caused, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of tobacco products, including cigarettes;

(c) they engage in, or have engaged in, or cause, or have caused, directly or indirectly, other persons to engage in, the promotion of tobacco products, including cigarettes; or

(d) for one or more of the material fiscal years, each has derived at least 10% of its revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products, including cigarettes, by itself or by other persons.

21. The Defendant, Canadian Tobacco Manufacturers' Council ("CTMC"), is a company incorporated pursuant to the laws of Canada and has a registered office at 1808 Sherbrooke St. West, Montreal, Quebec. It is the trade association of the Canadian tobacco industry, particulars of which are set out in paragraphs 110-116.

22. CTMC is a manufacturer pursuant to the Act by reason of its having been primarily engaged in one or more of the following activities:

(a) the advancement of the interests of manufacturers,

(b) the promotion of cigarettes, and

(c) causing, directly or indirectly, other persons to engage in the promotion of cigarettes,

particulars of which are set out in paragraphs 110-116.

III. THE MANUFACTURE AND PROMOTION OF CIGARETTES SOLD IN ONTARIO

A. Canadian Tobacco Companies

The Defendant Rothmans Inc.

23. Rothmans Inc., and its predecessor corporations, have been part of the Canadian tobacco industry for the past 100 years. Its predecessor companies include Rothmans of Pall Mall Canada Limited, which was incorporated in 1956 and changed its name in 1985 to ROTHMANS INC. Rothmans Inc. was incorporated in 2000 as an amalgamation of ROTHMANS INC., ROTHMANS OF CANADA LTD., and ROTHMANS PARTNERSHIP IN INDUSTRY CANADA LIMITED.

24. Rothmans Inc. has engaged, directly or indirectly, in the manufacture and promotion of cigarettes sold in Ontario.

The Defendant Rothmans, Benson & Hedges Inc.

25. Rothmans of Pall Mall Limited, incorporated pursuant to the laws of Canada in 1980, acquired part of the tobacco related business of ROTHMANS INC. in 1985 and engaged, until it amalgamated with Benson & Hedges (Canada) Inc. in 1986 to form Rothmans, Benson & Hedges Inc., directly or indirectly, in the manufacture and promotion of cigarettes sold in Ontario.

26. Benson & Hedges (Canada) Inc., incorporated in 1934, engaged, until it amalgamated with Rothmans of Pall Mall Limited in 1986 to form Rothmans, Benson & Hedges Inc., directly or indirectly, in the manufacture and promotion of cigarettes sold in Ontario.

27. Rothmans, Benson & Hedges Inc., formed in 1986 by the amalgamation of Rothmans of Pall Mall Limited and Benson & Hedges (Canada) Inc., has engaged, directly or indirectly, in the manufacture and promotion of cigarettes sold in Ontario, including cigarettes manufactured by the Defendant Philip Morris USA Inc.

28. Rothmans, Benson & Hedges Inc. manufactures and promotes cigarettes sold in Ontario and the rest of Canada under several brand names, including Rothmans and Benson & Hedges.

29. Rothmans, Benson & Hedges Inc. is 60% owned by Rothmans Inc. and 40% owned by FTR Holding S.A., a Swiss company. FTR Holding S.A. is a subsidiary of the Defendant, Philip Morris International Inc. and, at one time, was a subsidiary of the Defendant Altria Group, Inc. It is also affiliated with the Defendant, Philip Morris U.S.A. Inc.

The Defendant JTI-Macdonald Corp.

30. MacDonald Brothers and Company Tobacco Merchants carried on business commencing in 1858 and was renamed W.C. MacDonald Incorporated, Tobacco Merchant and Manufacturer, and then renamed W.C. MacDonald Incorporated in 1930, and again changed its name to Macdonald Tobacco Inc. in 1957, and became a wholly owned subsidiary of the Defendant, R.J. Reynolds Tobacco Company, in 1974.

31. RJR-Macdonald Inc. was incorporated as a wholly owned subsidiary of R.J. Reynolds Tobacco Company in 1978. In 1978, R.J. Reynolds Tobacco Company sold Macdonald Tobacco Inc. to RJR-Macdonald Inc. RJR-Macdonald Inc. succeeded Macdonald Tobacco Inc. and acquired all of Macdonald Tobacco Inc.'s assets and liabilities and continued the business of manufacturing, promoting and selling cigarettes previously conducted by Macdonald Tobacco Inc. RJR-Macdonald Inc. was a wholly owned subsidiary of RJR Nabisco Holdings Corp., which was the ultimate parent of R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International. In March 1999, RJR Nabisco sold RJR-Macdonald Corp., which was the amalgamation of RJR-Macdonald Inc. and a subsidiary of RJR-Macdonald Inc., to Japan Tobacco Inc. As a result of that transaction, the name of the RJR-Macdonald Corp. was changed to JTI-Macdonald Corp.

32. JTI-Macdonald Corp. (and its predecessor corporations, Macdonald Tobacco Inc., RJR-Macdonald Inc. and RJR-Macdonald Corp., for whom it is responsible at law) has engaged, directly or indirectly, in the manufacture and promotion of cigarettes sold in Ontario, including cigarettes manufactured by the Defendant R.J. Reynolds Tobacco Company.

33. JTI-Macdonald Corp. manufactures and promotes cigarettes sold in Ontario and the rest of Canada under several brand names including Export "A" and Vantage.

The Defendant Imperial Tobacco Canada Limited

34. Imperial Tobacco Company of Canada Limited, incorporated in 1912, changed its name, effective December 1, 1970, to Imasco Limited ("Imasco").

35. In or about 1970, part of the tobacco related business of Imasco was acquired by Imperial Tobacco Limited, (a wholly owned subsidiary).

36. In or about February, 2000, a 58% shareholding interest in Imasco was acquired by a wholly owned subsidiary of British American Tobacco p.l.c., British American Tobacco (Canada) Limited. At that time, British American Tobacco p.l.c. was the owner of 42% of the issued and outstanding shares in Imasco. Imasco and British American Tobacco (Canada) Limited were then amalgamated and the name of the amalgamated entity was changed to Imperial Tobacco Canada Limited ("Imperial"). In the result, British American Tobacco p.l.c. became the owner of 100% of the issued and outstanding shares in Imperial.

37. Imperial is a wholly owned subsidiary of the Defendant, British American Tobacco p.l.c.

38. Imperial (and its predecessor corporations) has engaged, directly or indirectly, in the manufacture and promotion of cigarettes sold in Ontario.

39. Imperial manufactures and promotes cigarettes sold in Ontario and the rest of Canada under several brand names, including Player's and duMaurier.

B. Multinational Tobacco Enterprises

40. There are four multinational tobacco enterprises ("Groups") whose member companies engage directly or indirectly in the manufacture and promotion of cigarettes sold in Ontario and throughout the world. The four Groups are:

(a) the Rothmans Group;

(b) the Philip Morris Group;

(c) the RJR Group; and

(d) the BAT Group.

41. At all material times, cigarettes sold in Ontario have been manufactured and promoted by manufacturers who are, or were, members of one of the four Groups, as set out above in paragraphs 23-39.

42. The manufacturers of cigarettes sold in Ontario within each Group have had common policies relating to smoking and health. The common policies have been directed or co-ordinated by the Defendants within each group ("Lead Companies") or their predecessors in interest for whom they are in law responsible. Particulars of the common policies and the manner in which they were implemented are set out in paragraphs 86 to 141.

43. At all material times since 1950, the Lead Companies of the four Groups were as follows:

Group	**Lead Companies**
Rothmans Group	Carreras Rothmans Limited [1950 to present]
Philip Morris Group	Altria Group, Inc. (formerly Philip Morris Companies Inc.) [1985 to present] Philip Morris USA Inc. [1950 to present] Philip Morris International, Inc. [1987 to present]

Group	Lead Companies
RJR Group	R.J. Reynolds Tobacco Company [1875 to present] R.J. Reynolds Tobacco International, Inc. [1976 to present]
BAT Group	British American Tobacco p.l.c. [1998 to present] B.A.T Industries p.l.c. (formerly B.A.T. Industries Limited and before that Tobacco Securities Trust Limited) [1976 to present] British American Tobacco (Investments) Limited (formerly British-American Tobacco Company Limited) [1902 to present]

44. The members of the Rothmans Group have included the following companies:

(a) Rothmans, Benson & Hedges Inc. (federally incorporated in Canada) [1986 to 2009];

(b) Rothmans Inc. (federally incorporated in Canada) [2000 to 2009];

(c) Rothmans of Pall Mall Limited (incorporated in the United Kingdom) [1960 to present];

(d) John Sinclair, Limited (incorporated in the United Kingdom) [1905 to 1972], later renamed Carreras Rothmans Limited [1972 to present];

(e) Carreras, Limited (incorporated in the United Kingdom) [1903 to 1972], later renamed Rothmans International Limited [1972 to 1981], Rothmans International p.l.c. [1981 to 1993], and Ryesekks p.l.c. [1993];

(f) Rothmans of Pall Mall Canada Limited (federally incorporated in Canada) [1956 to 1985], later renamed ROTHMANS INC. [1985 to 2000];

(g) Rothmans of Canada Kings Limited (federally incorporated in Canada) [1980 to 1985], later renamed Rothmans of Pall Mall Limited [1985 to 1986]; and

(h) Lintpenny Limited (incorporated in the United Kingdom) [1986], later renamed Rothmans International Services Limited [1986 to 1991], Rothmans International Tobacco Limited [1991 to 1993], and then Rothmans International Services Limited [1993 to present].

45. The members of the Philip Morris Group have included the following companies:

(a) Philip Morris Companies Inc. (incorporated in Virginia) [1985 to 2003], later renamed Altria Group, Inc. [2003 to present];

(b) Philip Morris & Co. Limited (incorporated in Virginia), later renamed Philip Morris USA Inc. [1919 to present];

(c) Philip Morris International, Inc. (incorporated in Virginia) [1987 to present];

(d) Rothmans, Benson & Hedges Inc. (federally incorporated in Canada) [1986 to present]; and

(e) Benson & Hedges (Canada) Inc. (federally incorporated in Canada) [1934 to 1986].

46. The members of the RJR Group have included the following companies:

(a) R.J. Reynolds Tobacco Company [1875 to present];

(b) R.J. Reynolds Tobacco International, Inc. [1976 to 1999];

(c) Macdonald Tobacco Inc. [1974 to 1979];

(d) RJR-Macdonald Inc. [1978 to 1999]; and

(e) RJR-Macdonald Corp. [1999], later renamed JTI-Macdonald Corp. [1999 to present].

47. The members of the BAT Group have included the following companies:

(a) Imperial Tobacco Company of Canada, Limited (federally incorporated in Canada) [1912 to 1966], later renamed Imperial Tobacco Company of Canada Limited [1966 to 1970], and then Imasco Limited [1970 to 2000];

(b) B.A.T Industries p.l.c. [1976 to present];

(c) British American Tobacco (Investments) Limited [1902 to present];

(d) British American Tobacco p.l.c. [1998 to present];

(e) Imperial Tobacco Canada Limited (incorporated in Canada) [2000 to present];

(f) Imperial Tobacco Sales Company of Canada Limited (incorporated in Canada) [1931 to 1966], later renamed Imperial Tobacco Sales Limited [1966 to 1969], Imperial Tobacco Products Limited [1969 to 1974], and Imperial Tobacco Limited [1970 to 2000];

(g) Brown & Williamson Tobacco Corporation [1927 to 2004]; and

(h) American Tobacco Company [1994 to present].

IV. TOBACCO RELATED WRONGS COMMITTED BY THE DEFENDANTS

48. The Crown states that the Defendants, R.J. Reynolds Tobacco Company, Rothmans Inc. (and its predecessor corporations), Rothmans, Benson & Hedges Inc. (and its predecessor corporations), Philip Morris USA Inc. (formerly known as Philip Morris Incorporated), JTI-Macdonald Corp. (and its predecessor corporations) and Imperial (and its predecessor corporations), all of which engaged directly or indirectly in the manufacture and promotion of cigarettes sold in Ontario, have committed tobacco related wrongs as that term is defined in the *Act*. In particular, these Defendants, hereinafter referred to as Direct Breach Defendants, have committed the following breaches of common law, equitable or statutory duties or obligations owed by these Defendants to persons in Ontario who have been exposed or might become exposed to a tobacco product manufactured by them and offered for sale in Ontario. As a result of these tobacco related wrongs, insured persons in Ontario have suffered tobacco related disease or the risk of tobacco related disease and the Crown has incurred expenditures for health care benefits provided to these insured persons.

A. Breaches of Common Law, Equitable or Statutory Duties or Obligations

The Defendants' Knowledge

49. The Direct Breach Defendants designed and manufactured cigarettes sold in Ontario to deliver nicotine to smokers.

50. Nicotine is an addictive drug that affects the brain and central nervous system, the cardiovascular system, the lungs, other organs and body systems and endocrine function.

Addicted smokers physically and psychologically crave nicotine.

51. Smoking and exposure to second hand smoke cause or contribute to disease including, but not limited to:

(a) chronic obstructive pulmonary disease and related conditions, including:

(i) emphysema;

(ii) chronic bronchitis;

(iii) chronic airways obstruction; and

(iv) asthma;

(b) cancer, including:

(i) cancer of the lung;

(ii) cancer of the lip, oral cavity and pharynx;

(iii) cancer of the larynx;

(iv) cancer of the esophagus;

(v) cancer of the bladder;

(vi) cancer of the kidney;

(vii) cancer of the pancreas; and

(viii) cancer of the stomach;

(c) circulatory system diseases, including:

(i) coronary heart disease;

(ii) pulmonary circulatory disease;

(iii) vascular disease; and

(iv) peripheral vascular disease;

(d) increased morbidity and general deterioration of health; and

(e) fetal harm.

52. The Defendants have been aware since 1950, or from the date of their incorporation if subsequent to that date, that, when smoked as intended, cigarettes:

(a) contain substances which can cause or contribute to disease;

(b) produce by-products which can cause or contribute to disease; and

(c) cause or contribute to addiction to nicotine.

53. By 1950, or from the date of the Defendants' incorporation if subsequent to that date, and at all material times thereafter, the Defendants knew or ought to have known based on research which was known to them on smoking and health that smoking cigarettes could cause or contribute to the diseases set out in paragraph 51 herein.

54. By 1950, or from the date of the Defendants' incorporation if subsequent to that date, and at all material times thereafter, the Defendants knew or ought to have known based on research which was known to them on smoking and health that the nicotine present in cigarettes is addictive. In the alternative, at all material times, the Defendants knew or ought to have known that:

(a) nicotine is an active ingredient in cigarettes;

(b) smokers crave nicotine; and

(c) the physiological and psychological effects of nicotine on smokers compel them to continue to smoke.

55. By 1970 or thereabouts, or from the date of the Defendants' incorporation if subsequent to that date, and at all material times thereafter, the Defendants knew or ought to have known based on research which was known to them on smoking and health that exposure to second hand smoke could cause or contribute to disease.

Breach of the Duty - Design and Manufacture

56. At all material times since 1950, the Direct Breach Defendants owed a duty of care to persons exposed to cigarettes manufactured by them to design and manufacture a reasonably safe product which would not cause addiction and disease, and to take all reasonable measures to eliminate, minimize, or reduce the risks of addiction and disease from smoking the cigarettes they manufactured and promoted.

57. The Direct Breach Defendants have breached, and continue to breach, these duties since 1950 by failing to design a reasonably safe product which would not cause addiction and disease, and by failing to take all reasonable measures to eliminate, minimize, or reduce the risks of addiction and disease from smoking cigarettes manufactured by them.

58. The Direct Breach Defendants, in the design, manufacture and promotion of their cigarettes, created, and continue to create, an unreasonable risk of harm to the public from addiction and disease as a result of smoking or exposure to second hand smoke from which they have failed to protect the public, particulars of which are set out below.

59. The Direct Breach Defendants increased the risks of addiction and disease from smoking by manipulating the level and bio-availability of nicotine i.e. the biological availability of nicotine in the body from smoking their cigarettes, for purposes of maintaining and increasing sales of their cigarettes, particulars of which include:

(a) special blending of tobacco;

(b) adding nicotine or substances containing nicotine;

(c) introducing substances, including ammonia, to enhance the bio-availability of nicotine to smokers; and

(d) such further and other particulars known to the Direct Breach Defendants.

60. The Direct Breach Defendants increased the risks of addiction and disease from smoking by adding to their cigarettes ineffective filters which did not reduce the risks of addiction and disease from smoking, since, as was known or should have been known by these Defendants, based on the research known to them into smoking practices, smokers would fully compensate for the presence of the filters by taking deeper inhalations of smoke and/or blocking the air holes in the filter; and by nevertheless misleading the public and government agencies by misrepresenting, particulars of which are set out in paragraph 72, that these filters made smoking safer contrary to their knowledge.

61. The Direct Breach Defendants further misled the public from 1950 on through marketing and advertising campaigns, by misrepresenting, particulars of which are set out in paragraph 72, in written and visual material, that "mild", "low tar" and "light" filter cigarettes were healthier than regular cigarettes contrary to their knowledge.

62. As a result of these tobacco related wrongs, persons in Ontario started to smoke or continued to smoke cigarettes manufactured and promoted by the Direct Breach Defendants, or were exposed to cigarette smoke, and thereby suffered tobacco related disease and an increased risk of tobacco related disease.

Breach of the Duty to Warn

63. At all material times since 1950, the Direct Breach Defendants knew or ought to have

known that their cigarettes, when smoked as intended, were addictive and could cause or contribute to disease, and as manufacturers of cigarettes sold to persons in Ontario they owed a duty of care to warn the public who smoked cigarettes or might become exposed to cigarette smoke of the risks of addiction and disease from smoking or exposure to cigarette smoke, as was known, or should have been known to them based on research known to them on smoking and health.

64. The Direct Breach Defendants breached their duty to persons in Ontario by failing to provide any warning prior to 1972, or any adequate warning thereafter, of:

(a) the risk of tobacco related disease; or

(b) the risk of addiction to the nicotine contained in their cigarettes,

which was known to them, or should have been known to them based on research known to them on smoking and health from 1950 on.

65. Any warnings that were provided by the Direct Breach Defendants were inadequate and ineffective in that they did not accurately reveal the true extent of what they knew or should have known of addiction and disease from smoking or exposure to cigarette smoke based on research known to them on smoking and health and:

(a) failed to warn of the actual and known risks of addiction and disease from smoking;

(b) were insufficient to give users, prospective users, and the public a true indication of the risks of addiction and disease from smoking or exposure to cigarette smoke;

(c) were introduced for the purpose of delaying more accurate government-mandated warnings of the risks of addiction and disease from smoking or exposure to cigarette smoke;

(d) failed to make clear, credible, complete and current disclosure of the risks of addiction and disease inherent in the ordinary use of their cigarettes and therefore failed to permit free and informed decisions concerning smoking; and

(e) and failed to inform persons who might become exposed to cigarette smoke of the risks of disease from such exposure so that they could take measures to limit or eliminate such exposure.

66. The Direct Breach Defendants knew or ought to have known based on research known to them since 1950 that children under the age of 13 and adolescents under the age of 19 in Ontario were smoking or might smoke their cigarettes, but failed to provide warnings sufficient to inform children and adolescents of the risks of addiction and disease, which would have accurately conveyed their knowledge of these risks to children and adolescents.

67. The Direct Breach Defendants engaged in collateral marketing and promotional and public relations activities to neutralize or negate the effectiveness of the stated warnings on cigarette packaging in advertising and in warnings given by governments and other agencies concerned with public health, by mischaracterizing any health concerns relating to smoking, either with respect to addiction or disease, or attempts at regulation by health authorities or governments, as unproven, controversial, extremist, authoritarian, and an infringement of liberty.

68. The Direct Breach Defendants suppressed the information which was known to them or should have been known to them based on research conducted by them or by their Lead Companies or on their behalf, regarding the risks of addiction and disease from smoking and the risks of disease from exposure to second hand smoke, as directed by their Lead Companies as set out in paragraphs 88 to 107 herein.

69. The Direct Breach Defendants misinformed and misled the public, particulars of which

are set out in paragraph 72, about the risks of addiction and disease from smoking and the risks of disease from exposure to second hand smoke.

70. As a result of these tobacco related wrongs, persons in Ontario started or continued to smoke cigarettes manufactured and promoted by the Direct Breach Defendants, or were exposed to cigarette smoke, and thereby suffered tobacco related disease and an increased risk of tobacco related disease.

Breach of the Duty - Misrepresentation

71. As manufacturers of tobacco products, the Direct Breach Defendants owed a duty of care to persons in Ontario who consumed, or were exposed to, cigarette smoke from cigarettes manufactured by them and sold in Ontario and ought reasonably to have foreseen that persons in Ontario who smoked would rely on any representations made by them with respect to the risks of addiction and disease from smoking and the risk of disease from exposure to second hand smoke. Such reliance by persons in Ontario was reasonable in all of the circumstances since as set out below the Direct Breach Defendants took steps to assure persons in Ontario of the truth of their misrepresentations and to conceal from them the true extent of the risks of smoking and exposure to second hand smoke. As a result, since 1950 the Direct Breach Defendants owed a duty to persons in Ontario not to misrepresent the risks of addiction and disease from smoking and the risk of disease from exposure to second hand smoke as was known, or should have been known to them based on research known to them on smoking and health.

72. The Direct Breach Defendants, with full knowledge of the risks of addiction and disease,

misrepresented the risks of smoking and exposure to second hand smoke since 1950 by denying any link between smoking and addiction and disease and denying any link between exposure to second hand smoke and disease contrary to what was known or should have been known to them, based on research known to them on smoking and health. In particular, since 1950 and continuing to the present the Direct Breach Defendants misrepresented to persons in Ontario that:

(a) smoking and exposure to second hand smoke have not been shown to cause any known diseases;

(b) they were aware of no research, or no credible research, establishing a link between smoking or exposure to second hand smoke and disease;

(c) many diseases shown to have been caused by smoking tobacco or exposure to second hand smoke were in fact caused by other environmental or genetic factors;

(d) cigarettes were not addictive;

(e) they were aware of no research, or no credible research, establishing that smoking is addictive;

(f) smoking is merely a habit or custom;

(g) they did not manipulate nicotine levels in their cigarettes;

(h) they did not include substances in their cigarettes designed to increase the bio-availability of nicotine;

(i) the intake of tar and nicotine associated with smoking their cigarettes was less than they knew or ought to have known it to be;

(j) certain of their cigarettes, such as "filter", "mild", "low tar" and "light" brands, were safer than other cigarettes;

(k) smoking is consistent with a healthy lifestyle; and

(l) the risks of smoking and exposure to second hand smoke were less serious than they knew them to be.

72.1. The above misrepresentations were conveyed to persons in Ontario by the Direct Breach Defendants:

(a) in cigarette brand advertising and related marketing and promotional materials in all media, including radio, television, billboards, bus shelters, posters, displays, signs, print media and various electronic media including the internet. Advertising includes commercials, posters, print ads, news releases, press kits, contest materials, coupons, brand merchandising materials, sampling items and activities, discounting and other marketing activities;

(b) on cigarette packaging, including carton wrappings;

(c) at cigarette brand-promoting activities, including cultural, sporting and other events and activity sponsorships, and in promotional materials prepared in relation to such activities, including news releases, press kits, contests, coupons, brand merchandising materials, sampling items and activity materials, discounting and other marketing activities;

(d) in paid advocacy carried out in media including newspapers, magazines, radio, television, and the internet paid for in whole or in part by the Direct Breach Defendants;

(e) in research results presented to the public, governments, news and information media and other organizations as objective and independent when in fact these results were not and the research itself had been funded by the Direct Breach Defendants;

(f) in media interviews, correspondence and other materials prepared on behalf of, and discussions, speeches and presentations given by, company officials, tobacco industry spokespersons acting on behalf of Direct Breach Defendants directly or indirectly (such as CTMC lobbyists, and public relations experts), to persons in Ontario, elected officials, government bureaucrats, medical, health and scientific organizations and bodies, conferences, columnists and journalists, writers, media editors, publishers and scientists; and

(g) via company or tobacco industry spokespersons who did not represent themselves as such at the time or who held themselves out as 'independent' of the Direct Breach Defendants' interests, but who were in fact acting as agents for the Direct Breach Defendants, having received money or money's worth from the Direct Breach Defendants, directly or indirectly. These individuals communicated to, and corresponded with, and provided information to the public, members of the news and information media, elected officials, government officials, members of scientific and health promotion and research entities as well as members of the general public.

72.2. Since 1950, Rothmans Inc. and Rothmans, Benson & Hedges Inc. and their predecessors, as members of the Rothmans Group in Canada, have made all of the misrepresentations set out in paragraph 72 above. These misrepresentations have been repeated continually

by Rothmans Inc. and Rothmans, Benson & Hedges Inc. and their predecessors through a variety of means, including the following:

(a) presentations to the Canadian Medical Association (May 1963), the Conference on Smoking and Health of the federal Department of National Health and Welfare (November 25 and 26, 1963), ~~the House of Commons Standing Committee on Health, Welfare and Social Affairs (May 1969)~~ and the National Association of Tobacco and Confectionery Distributors Convention (October 1969);

(b) meetings with federal Minister of Health Marc Lalonde (April 1973), with Health and Protection Branch (March 1978), federal Minister of Health and Welfare Monique Bégin (April 1978), with officials of the federal Department of Health and Welfare (February 1979), and with the federal Assistant Deputy Minister of Health and Welfare Dr. A.B. Morrison (March 1981);

(c) full-page advertising in Canadian newspapers promoting smoking as safe and pledging to impart "vital information" as soon as available; and

(d) public and media statements to Canadian newspapers and on national television (including in the Toronto Daily Star (September 1962, June 1969) and in the Globe and Mail (June 1967).

72.3. Since 1950, Rothmans, Benson & Hedges Inc. and its predecessors, as members of the Philip Morris Group in Canada, have made all of the misrepresentations set out in paragraph 72 above. These misrepresentations have been repeated continually by Rothmans, Benson & Hedges Inc. and its predecessors through a variety of means, including the following:

(a) presentations to the Canadian Medical Association (May 1963), the Conference on Smoking and Health of the federal Department of National Health and Welfare (November 1963), and the National Association of Tobacco and Confectionery Distributors Convention (October 1969 and in 1995), ~~the House of Commons Standing Committee on Health, Welfare and Social Affairs (May 1969) and federal Legislative Committees (including in November 1987 and January 1988)~~;

(b) meetings with federal Minister of Health Marc Lalonde (April 1973), with Health and Protection Branch (March 1978), federal Minister of Health and Welfare Monique Bégin (April 1978), with officials of the federal Department of Health and Welfare (February 1979), with the federal Assistant Deputy Minister of Health and Welfare Dr. A.B. Morrison (March 1981) and with federal Minister of Health and Welfare Jake Epp (September 1986);

(c) public and media statements to Canadian newspapers and on North American television (including a statement in the Toronto Daily Star (September 1967) and a speech in Halifax (June 1978));

(d) Annual Reports (including in the 1977 and 1981 Annual Reports for Benson & Hedges (Canada) Inc.);

(e) publications (including in the 1978 Booklet "The Facts" published by Benson & Hedges (Canada) Inc.); and

(f) advertising, marketing and promotional campaigns.

72.4. Since 1950, R.J. Reynolds Tobacco Company and JTI-Macdonald Corp. and their predecessors, as members of the RJR Group in Canada, have made all of the misrepresentations set out in paragraph 72 above. These misrepresentations have been repeated continually by R.J. Reynolds Tobacco Company and JTI-Macdonald Corp. and their predecessors through a variety of means, including the following:

(a) presentations to the Canadian Medical Association (May 1963), the Conference on Smoking and Health of the federal Department of National Health and Welfare (November 1963), and the National Association of Tobacco and Confectionery Distributors Convention (October 1969 and 1995), ~~the House of Commons Standing Committee on Health, Welfare and Social Affairs (May 1969) and federal Legislative Committees (including in November 1987 and January 1988)~~;

(b) meetings with federal Minister of Health Marc Lalonde (April 1973), with Health and Protection Branch (March 1978), federal Minister of Health and Welfare Monique Bégin (April 1978), with officials of the federal Department of Health and Welfare (February 1979), with the federal Assistant Deputy Minister of Health and Welfare Dr. A.B. Morrison (March 1981) and with federal Minister of Health and Welfare Jake Epp (September 1986);

(c) publications (including "R.J. Reynolds Industries: A Hundred Years of Progress in North Carolina" in The Tobacco Industry in Transition);

(d) speeches and presentations (including 1969 speech to the Tobacco Growers Information Committee and 1980 presentation to a National Meeting of Security Analysts);

(e) public statements (including the 1983 Revised Mission Statement on Smoking and Health); and

(f) advertising, marketing and promotional campaigns.

72.5. Since 1950, Imperial Tobacco Canada Limited and its predecessors, as members of the BAT Group in Canada, have made all of the misrepresentations set out in paragraph 72 above. These misrepresentations have been repeated continually by Imperial Tobacco Canada Limited and its predecessors through a variety of means, including the following:

(a) presentations to the Canadian Medical Association (May 1963), the Conference on Smoking and Health of the federal Department of National Health and Welfare (November 25 and 26, 1963), ~~the House of Commons Standing Committee on Health, Welfare and Social Affairs (May 1969),~~ and the National Association of Tobacco and Confectionery Distributors Convention (October 1969), ~~federal Legislative Committees (including in November 1987 and January 1988) and the House of Commons Standing Committee on Health (December 1996)~~;

(b) meetings with federal Minister of Health Marc Lalonde (April 1973), with Health and Protection Branch (March 1978), federal Minister of Health and Welfare Monique Bégin (April 1978), with officials of the federal Department of Health and Welfare (February 1979), with the federal Assistant Deputy Minister of Health and Welfare Dr. A.B. Morrison (March 1981) and with federal Minister of Health and Welfare Jake Epp (September 1986);

(c) Annual Reports (including the 1959, 1961, 1967 and 1968 Annual Reports for Imperial Tobacco Canada Limited);

(d) public and media statements to Canadian newspapers and on national television, (including CBC television (December 1969) and in the Toronto Daily Star (June 1971));

(e) publications (including on the topics of smoking and health, "habit or addiction" and environmental tobacco smoke); and

(f) advertising, marketing and promotional campaigns.

73. The Direct Breach Defendants suppressed from persons in Ontario scientific and medical data, which was known or should have been known to them based on research on smoking and health which was known to them, which revealed the serious health risks of smoking and second hand smoke, for the purpose of continuing to misrepresent and conceal the risks of addiction and disease from smoking and exposure to second hand smoke.

73.1. Particulars of this suppression of scientific and medical data by Rothmans Inc. and Rothmans, Benson & Hedges Inc. and their predecessors, as members of the Rothmans Group:

(a) agreeing with British American Tobacco (Investments) Limited to suppress research relating to carbon monoxide and smoke intake; and

(b) participating in ICOSI's total embargo of all research relating to the pharmacology of nicotine in concert with the other Groups.

73.2. Particulars of this suppression of scientific and medical data and research by Rothmans, Benson & Hedges Inc. and its predecessors, as members of the Philip Morris Group:

(a) agreeing with British American Tobacco (Investments) Limited and the RJR Group to suppress scientific and medical findings relating to work that was funded at Harrogate, U.K. (1965 and 1966);

(b) destroying unfavourable smoking and health data generated by external research funded by the Philip Morris Group;

(c) closing research laboratories and destroying related scientific information;

(d) withdrawing internal research relating to nicotine from peer review;

(e) destroying internal research relating to nicotine;

(f) prohibiting research designed to develop new tests for carcinogenicity, to relate human disease and smoking and to show the addictive effect of smoking; and

(g) participating in ICOSI's total embargo of all research relating to the pharmacology of nicotine in concert with the other Groups.

73.3. Particulars of this suppression of scientific and medical data by R.J. Reynolds Tobacco Company and JTI-Macdonald Corp. and their predecessors, as members of the RJR Group:

(a) agreeing with British American Tobacco (Investments) Limited and the Philip Morris Group to suppress scientific and medical findings relating to work that was funded at Harrogate, U.K. (1965 and 1966);

(b) ceasing research on the effects of smoke because of its potential bearing on product liability;

(c) imposing restrictions on the use of terms, including "drug," "marketing" and "dependency," in scientific studies;

(d) invalidating and destroying research reports;

(e) terminating and destroying research associated with R.J. Reynolds Tobacco Company's "The Mouse House" experiments; and

(f) participating in ICOSI's total embargo of all research relating to the pharmacology of nicotine in concert with the other Groups.

73.4. Particulars of this suppression of scientific and medical data by Imperial Tobacco Canada Limited and its predecessors, as members of the BAT Group:

(a) agreeing with the Philip Morris and RJR Groups to suppress scientific and medical findings relating to work that was funded at Harrogate, U.K. (1965 and 1966);

(b) agreeing with Rothmans Group to suppress research relating to carbon monoxide and smoke intake;

(c) implementing a policy to avoid written documentation on issues relating to smoking and health;

(d) agreeing within the BAT Group not to publish or circulate research in the areas of smoke inhalation and smoker compensation and to keep all research on sidestream activity and other product design features within the BAT Group;

(e) destroying research reports indicating the adverse health effects of smoking and exposure to second hand smoke (1992);

(f) suppressing information and developments relating to potentially safer products; and

(g) participating in ICOSI's total embargo of all research relating to the pharmacology of nicotine in concert with the other Groups.

74. The Direct Breach Defendants misinformed the public in Ontario, particulars of which are set out in paragraph 72, as to the harm of both smoking and of exposure to cigarette smoke, which was known or should have been known to them based on research on

smoking and health which was known to them.

75. The Direct Breach Defendants participated in a misleading campaign, particulars of which are set out in paragraph 72, to enhance their own credibility and diminish the credibility of health authorities and anti-smoking groups, for the purpose of reassuring smokers, contrary to what they knew or should have known based on research on smoking and health which was known to them, that cigarettes were not as dangerous as authorities were saying.

76. The Direct Breach Defendants intended that these misrepresentations be relied upon by individuals in Ontario for the purpose of inducing them to start smoking or to continue to smoke their cigarettes. It was reasonably foreseeable that persons in Ontario would and they did, in fact, rely upon these misrepresentations made by the Direct Breach Defendants for the purpose of persuading persons in Ontario to purchase cigarettes manufactured by them.

77. As a result of these misrepresentations, which were either made fraudulently, (contrary to their actual knowledge of the risks of addiction and disease from smoking or exposure to second hand smoke or recklessly without any reasonable basis or belief in their truth) or, in the alternative, negligently (in disregard of research into smoking and health which was available to them and which was known or should have been known to them) persons in Ontario started to, or continued to, purchase and smoke cigarettes manufactured and promoted by the Defendants, or were exposed to cigarette smoke from such cigarettes, and thereby suffered tobacco related disease and an increased risk of tobacco related disease.

Breach of the Duty - Manufacturing or Promoting Products for Children and Adolescents

78. Further to the duty of care alleged in paragraph 71, at all material times since 1950, the Direct Breach Defendants as manufacturers of cigarettes sold in Ontario owed a duty of care to children and adolescents in Ontario to take all reasonable measures to prevent them from starting or continuing to smoke.

79. The Defendants' own research revealed that the vast majority of smokers start to smoke and become addicted before they are 19 years of age.

80. The Direct Breach Defendants knew or ought to have known that children and adolescents in Ontario were smoking or might start to smoke and that it was contrary to law as further particularized in paragraphs 142 to 147 herein, or public policy to sell cigarettes to children and adolescents or to promote smoking by such persons.

81. The Direct Breach Defendants knew or ought to have known based on research known to them on smoking and health of the risk that children and adolescents in Ontario who smoked their cigarettes would become addicted to cigarettes and would suffer tobacco related disease.

82. The Direct Breach Defendants failed to take reasonable and appropriate measures to prevent children and adolescents from starting or continuing to smoke cigarettes manufactured by them and sold in Ontario.

83. The Direct Breach Defendants targeted children and adolescents in their advertising, promotional and marketing activities for the purpose of inducing children and adolescents

in Ontario to start or continue to smoke.

84. The Direct Breach Defendants, in further breach of their duty of care failed to take all reasonable measures to prevent children and adolescents from starting or continuing to smoke and undermined government initiatives and legislation which were intended to prevent children and adolescents in Ontario from starting or continuing to smoke.

85. As a result of these tobacco related wrongs, children and adolescents in Ontario started to or continued to smoke cigarettes manufactured and promoted by the Direct Breach Defendants, or were exposed to cigarette smoke, and thereby suffered tobacco related disease and an increased risk of tobacco related disease.

Conspiracy, Concert of Action and Common Design

86. At all material times, the Defendants conspired, and acted in concert in committing the tobacco related wrongs alleged in paragraphs 48 to 85 and paragraphs 142 to 147, particulars of which are set out below. The Defendants are accordingly all deemed to have jointly breached the duties alleged in paragraphs 48 to 85 and paragraphs 142 to 147 under section 4 of the Act.

(i) Conspiracy within the International Tobacco Industry

87. Commencing in or about 1953, in response to mounting publicity and public concern about the link between smoking and disease, the Lead Companies of the four Groups or their predecessors in interest for whom the Lead Companies are in law responsible,

conspired and acted in concert to prevent the Crown and persons in Ontario and other jurisdictions from acquiring knowledge of the harmful and addictive properties of cigarettes in circumstances where they knew or ought to have known that their actions would cause increased health care costs.

88. This conspiracy, concert of action and common design secretly originated in 1953 and early 1954 in a series of meetings and communications among Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation (in its own capacity and as agent for British American Tobacco Company Limited through meetings it attended on behalf of and as directed by its parent corporation British American Tobacco Company Limited), and American Tobacco Company. These companies, on their own behalf and on behalf of their respective Groups, contrary to their knowledge, agreed to:

(a) jointly disseminate false and misleading information regarding the risks of addiction and disease from smoking cigarettes;

(b) make no statement or admission that smoking caused disease;

(c) suppress or conceal research that was known or should have been known to them regarding the risks of addiction and disease from smoking cigarettes; and

(d) orchestrate a public relations program on smoking and health issues with the object of:

(i) promoting cigarettes;

(ii) protecting cigarettes from attack based upon health risks that were known or should have been known to them; and

(iii) reassuring the public that smoking was not hazardous.

89. This conspiracy, concert of action and common design was continued at secret committees, conferences and meetings involving senior personnel of the Lead Companies

and through written and oral directives issued by the Lead Companies to members of their Groups who manufactured cigarettes sold in Ontario.

90. Between late 1953 and the early 1960s, the Lead Companies formed or joined several research organizations including the Tobacco Industry Research Council (the "TIRC", renamed the Council for Tobacco Research in 1964 (the "CTR")), the Centre for Co-operation in Scientific Research Relative to Tobacco ("CORESTA"), the Tobacco Institute ("TI"), and the Tobacco Manufacturers' Standing Committee, (renamed the Tobacco Research Council ("TRC") and then the Tobacco Advisory Council), collectively referred to as TRC, and Verband der Cigarettenindustrie ("Verband") which was the German equivalent of the Tobacco Institute to which the Lead Companies were affiliated.

91. The Lead Companies publicly misrepresented that they, or members of their respective Groups, along with the TIRC, the CTR, CORESTA, the TRC, CTMC, TI, Verband and similar organizations, would objectively conduct research and gather data concerning the link between smoking and disease and would publicize the results of this research throughout the world. Particulars of these misrepresentations are within the knowledge of the Defendants but include:

(a) The issuance of the TIRC's 1954 "Frank Statement to Cigarette Smokers" which received coverage in the Canadian press;

(b) Statements made to the Canadian Medical Association in May 1963;

(c) November 25-26, 1963 presentation to the Conference on Smoking and Health of the federal Department of National Health and Welfare;

~~(d) May 1969 presentation to the House of Commons Standing Committee on Health, Welfare and Social Affairs;~~

(e) Statements to the national press and news organizations in Canada; and

(f) Communications through the CTMC in Canada, including to the federal Department of Health and Welfare.

92. In reality, the Lead Companies conspired with the TIRC, the CTR, CORESTA, the TRC, CTMC, TI, Verband and similar organizations, to distort the research and to publicize misleading information to undermine the truth about the link between smoking and disease. The Lead Companies intended to mislead persons in Ontario and the Crown, into believing that there was a real medical or scientific controversy about whether smoking caused addiction and disease contrary to their knowledge.

93. In 1963 and 1964, the Lead Companies agreed to co-ordinate their research with research conducted by the TIRC in the United States, for the purpose of suppressing any findings which might indicate that cigarettes were a harmful and dangerous product.

94. In April and September 1963, the Lead Companies agreed to develop a public relations campaign to counter the Royal College of Physicians report in England, the forthcoming Surgeon General's Report in the United States and a report of the Canadian Medical Association in Canada, for the purpose of misleading smokers that their health would not be endangered by smoking cigarettes, contrary to their knowledge.

95. In September 1963 in New York, the Lead Companies agreed that they would not issue warnings about the link between smoking and disease, as was known to them or should have been known to them based on research on smoking and health which was known to them, unless and until they were forced to do so by government action.

96. The Lead Companies further agreed that they would suppress and conceal information concerning the harmful effects of cigarettes, which was known to them or should have been known to them based on research on smoking and health which was known to them.

97. By the mid-1970s, the Lead Companies decided that an increased international misinformation campaign was required to mislead smokers and potential smokers and to protect the interests of the tobacco industry, for fear that any admissions relating to the link between smoking and disease as was known to them or should have been known to them based on research on smoking and health which was known to them, could lead to a "domino effect" to the detriment of the industry world-wide.

97.1. In 1974, the Lead Companies as members of TI formed a Research Review Committee, which became known as the Research Liaison Committee to achieve a coordinated approach to all industry research into smoking and health. In 1978, the Research Liaison Committee was replaced with the Industry Research Committee.

98. As a result, in June, 1977, the Lead Companies met in England to establish the International Committee on Smoking Issues ("ICOSI").

99. Through ICOSI, the Lead Companies resisted attempts by governments including in Canada to provide adequate warnings about smoking and disease including the effects of second hand smoke, and pledged to:

(a) jointly disseminate false and misleading information regarding the risks of addiction and disease from smoking;

(b) make no statement or admission that smoking caused disease;

(c) suppress research that was known or should have been known to them regarding the risks of addiction and disease from smoking;

(d) not compete with each other by making health claims with respect to their cigarettes, and thereby avoid direct or indirect admissions about the risks of addiction and disease from smoking; and

(e) participate in a public relations program on smoking and health issues with the object of promoting cigarettes, protecting cigarettes from attack based upon health

risks, and reassuring smokers, the public and authorities in Ontario and other jurisdictions that smoking was not hazardous;

hereinafter referred to as the ICOSI policies and position on smoking.

100. In and after 1977, the members of ICOSI, including each of the Lead Companies, agreed orally and in writing, to ensure that:

(a) the members of their respective Groups, including the Direct Breach Defendants, would act in accordance with the ICOSI position on smoking and health set out above, including the decision to mislead the public about the link between smoking and disease;

(b) initiatives pursuant to the ICOSI positions would be carried out, whenever possible, by national manufacturers' associations ("NMAs") including, in Canada, CTMC, to ensure compliance in the various tobacco markets world wide;

(c) when it was not possible for NMAs to carry out ICOSI's initiatives they would be carried out by the members of the Lead Companies' Groups or by the Lead Companies themselves; and

(d) their subsidiary companies would, when required, suspend or subvert their local or national interests in order to assist in the preservation and growth of the tobacco industry as a whole.

101. In the late 1970s, the Lead Companies launched Operation Berkshire, which was aimed at Canada and other major markets, to further advance their campaign of misinformation and to promote smoking. Operation Berkshire was led by Lead Companies of the Philip Morris Group in concert with the Rothmans Group and the BAT Group.

102. In 1980, ICOSI was renamed the International Tobacco Information Centre / Centre International d'Information du Tabac - INFOTAB ("INFOTAB"). In or before 1992, INFOTAB changed its name to the Tobacco Documentation Centre ("TDC") (ICOSI, INFOTAB and TDC are hereinafter referred to collectively as "ICOSI").

103. At all material times, the policies of ICOSI were identical to the policies of the NMAs

including CTMC, and were presented as the policies and positions of the NMAs and their member companies so as to conceal from the public and from governments including in Canada the existence of the conspiracy, concert of action and common design.

104. The Lead Companies at all times acted to ensure that the manufacturers of cigarettes sold in Ontario within their Group complied, and did not deviate, from the official ICOSI position on the adverse health effects of smoking, particulars of which are set out below in paragraphs 117 to 140.

105. In addition to the foregoing, the Lead Companies engaged in a conspiracy, concert of action and common design specifically with respect to the issue of second hand smoke, as set out below.

106. In the early 1970s, the Lead Companies began to combine their resources and coordinate their activities specifically with respect to second hand smoke. In 1975, the Lead Companies formed the first of several committees to specifically address second hand smoke, which they also called Environmental Tobacco Smoke (ETS) and passive smoking. The first committee, sometimes referred to as the Public Smoking Committee or Advisory Group, met under the direction of the Research Liaison Committee. Although the Lead Companies claimed that the Committees were formed to conduct "sound science" regarding the emerging issue of second hand smoke, their actual purpose was to fund projects that would counter the public's growing concern regarding the harmful effects of second hand smoke, despite the knowledge amongst the Lead Companies of these harmful effects. The Committee formed in 1975 and its various successors, including the Tobacco Institute ETS Advisory Committee ("TI-ETSAG") founded in 1984 and the Committee for Indoor Air Research ("CIAR") founded in 1988,

carried out the mandate of the Lead Companies of challenging the growing consensus regarding second hand smoke by:

(a) coordinating and funding efforts to generate evidence to support the notion that there remained an "open controversy" as to the health implications of second hand smoke;

(b) leading the attack on government efforts to act on evidence linking second hand smoke to disease;

(c) acting as a "front" organization for flowing tobacco industry funds to research projects so that the various committees appeared to be independent organizations and the role of the tobacco industry was hidden;

(d) in the case of TI-ETSAG, meeting monthly to propose, review, and manage scientific projects approved for funding;

(e) in 1988 when it was formed, the Chairman of the CIAR Board told the TI that the purpose of CIAR was providing ammunition for the tobacco industry on the ETS battlefield;

(f) from 1988 until its dissolution in 1999, funding of 150 projects by CIAR at 75 institutions resulting in 250 peer reviewed publications, in addition to special studies on the effects of second hand smoke, 18 of which were released;

(g) creating a consultancy program in June 1987 at a conference called "Operation Down Under" to train and deploy scientists worldwide;

(h) in 1988 forming and funding of the Association for Research on Indoor Air (ARIA) by the Defendants' consultants on second hand smoke; and

(i) in 1989, forming of the Indoor Air International (IAI), a group to address scientific issues related to indoor air quality that the Defendants promoted publicly as learned societies dedicated to promote indoor air quality but failed to disclose that they were funded by the tobacco industry.

The policies and positions referenced above are hereinafter referred to as the CIAR policies and position on second hand smoke.

107. Further particulars of the manner in which the conspiracy, concert of action and common design was entered into or continued, and of the breaches of duty committed in furtherance of the conspiracy, concert of action and common design are within the

knowledge of the Defendants.

(ii) Conspiracy within the Canadian Tobacco Industry

108. At all material times since in or about 1950, the Direct Breach Defendants, in furtherance of the conspiracy and concerted action within the International Tobacco Industry and within their particular Corporate Groups, conspired and acted in concert to prevent the Crown and persons in Ontario from acquiring knowledge of the harmful and addictive properties of cigarettes, and committed tobacco related wrongs, as set out above in paragraphs 48 to 85 and below in paragraphs 142 to 147, in circumstances where they knew or ought to have known that harm and health care costs would result from acts done in furtherance of the conspiracy, concert of action and common design.

109. This conspiracy, concert of action and common design was entered into or continued at or through committees, conferences and meetings established, organized and convened by the Defendants Rothmans Inc., Rothmans, Benson & Hedges Inc., JTI-Macdonald Corp. and Imperial Tobacco Canada Limited and their predecessors in interest for whom they are liable, hereinafter referred to as the Canadian Tobacco Company Defendants, and attended by their senior personnel and through written and oral directives and communications amongst them.

110. The conspiracy, concert of action and common design was continued when, contrary to their knowledge:

(a) in or about 1962, the Canadian Tobacco Company Defendants agreed not to compete with each other by making health claims with respect to their cigarettes

so as to avoid any admission, directly or indirectly, concerning the risks of addiction and disease from smoking;

(b) in 1963, the Canadian Tobacco Company Defendants misrepresented to the Canadian Medical Association that there was no causal connection between smoking and disease;

(c) in or about 1963, the Canadian Tobacco Company Defendants formed the Ad Hoc Committee on Smoking and Health (renamed the Canadian Tobacco Manufacturers' Council in 1969, and incorporated as CTMC in 1982) in order to maintain a united front on smoking and health issues (the Ad Hoc Committee on Smoking and Health, the pre-incorporation Canadian Tobacco Manufacturers' Council and CTMC are hereinafter collectively referred to as CTMC"); and

~~(d) in or about 1969, the Canadian Tobacco Company Defendants misrepresented to the House of Commons, Standing Committee on Health, Welfare and Social Affairs, that there was no causal connection between smoking and disease.~~

111. Upon its formation, and at all material times thereafter, CTMC provided a means and method to continue the conspiracy, concert of action and common design and, upon its incorporation, agreed, adopted and participated in the conspiracy, concert of action and common design.

112. In furtherance of the conspiracy, concert of action and common design, CTMC has lobbied governments and regulatory agencies throughout Canada on behalf of and as agent for their members which included all of the Canadian Tobacco Company Defendants' since about 1963, with respect to tobacco industry matters, including delaying and minimizing government initiatives in respect of warnings to be placed on cigarette packages and imposing limitations on smoking in public places, as well as misrepresenting the risks of addiction and disease from smoking to the Canadian public, in accordance with the tobacco industry's position, which is the same as the ICOSI policies and position on smoking particularized in paragraph 99 herein and the CIAR policies and position on second hand smoke particularized in paragraph 106 herein.

113. CTMC has co-ordinated, with the Canadian Tobacco Company Defendants and the international tobacco industry associations ICOSI and INFOTAB, through its membership in these organizations, the Canadian cigarette industry's positions on smoking and health issues.

114. In furtherance of the conspiracy, concert of action and common design, CTMC on behalf of and as agent for their members which included all of the Canadian Tobacco Company Defendants:

(a) disseminated false and misleading information regarding the risks of addiction and disease from smoking including making false and misleading submissions to governments denying any connection contrary to its knowledge;

(b) refused to admit that smoking caused disease contrary to its knowledge;

(c) suppressed research regarding the risks of addiction and disease from smoking which was known or should have been known to them;

(d) participated in a public relations program on smoking and health issues with the object of promoting cigarettes, protecting cigarette sales and protecting cigarettes and smoking from attack by misrepresenting the link, which was known or should have been known to them, between smoking and disease;

(e) lobbied governments in order to delay and minimize government initiatives with respect to smoking and health, including initiatives to place warnings on cigarettes packaging and limiting smoking in public places contrary to its knowledge;

(f) in a 1963 presentation to the Conference on Smoking and Health of the Department of National Health and Welfare, the Ad Hoc Committee of the Canadian Tobacco Industry (the predecessor to the CTMC) claimed that the evidence that tobacco causes disease was inconclusive and used this to undermine the scientific case against tobacco;

(g) stated in a 1968 paper that there is no established proof that tobacco causes harm;

~~(h) in June 1969 made a statement to the House of Commons Standing Committee on Health and Welfare denying that smoking is a major cause of illness or death;~~

(i) at a 1971 meeting of technical representatives of the members of CTMC called by the head of the CTMC, representatives of the CTMC and the Canadian tobacco companies noted the need for minimum nicotine levels in cigarettes;

(j) denied at a 1971 press conference that tobacco causes disease;

(k) in a 1977 Position Paper, stated that there is no persuasive scientific evidence to support the contention that the non-smoker is harmed by the tobacco smoke of others;

(l) in a 1987 Position Statement, stated that:

(i) smoking had not been proven to cause disease;

(ii) smoking is not addictive; and

(iii) there was no conclusive evidence that second hand smoke causes adverse health effects and stated that the scientific community holds the view that there are no proven health consequences to exposure to second hand smoke;

(m) in a 1987 press release denied that second hand smoke is harmful to health; and

~~(n) in 1987 advised a House of Commons Legislative Committee that there was uncertainty regarding the role of smoking in causing disease; and~~

(o) in a 1990 letter wrote to the Canadian government to voice the Industry's opposition to the federal government's proposed amendments to the Tobacco Products Regulations which would require, inter alia, the placing of addiction warnings on cigarette packages. In its letter, the CTMC questioned whether smoking was addictive and whether second hand smoke was dangerous.

115. At all material times, CTMC acted as the agent of the Canadian Tobacco Company Defendants, as members of the CTMC, and as agent of the Lead Companies through its membership with them in the International Associations, ICOSI and INFOTAB. In 1982 CTMC became an associate member of INFOTAB and was a full participant from 1982 to 1989.

116. Further particulars of the manner in which the conspiracy, concert of action and common design was entered into or continued, and of the tobacco related wrongs committed by the Defendants in Canada in furtherance of the conspiracy, concert of action and common design are within the knowledge of these Defendants and the CTMC.

(iii) Conspiracy within Corporate Groups

The Rothmans Group

117. In or about 1953 the Rothmans Group members entered into the conspiracy, concert of action and common design referred to above, and continued the conspiracy, concert of action and common design within the International Tobacco Industry and the Canadian Tobacco Industry at or through committees, conferences and meetings established, organized, convened and attended by senior personnel of the Rothmans Group members, including those of Rothmans International Limited, Rothmans Inc., Rothmans, Benson & Hedges Inc., its amalgamating company Rothmans of Pall Mall Limited, and Carreras Rothmans Limited, as well as those of the Philip Morris Group, and through written and oral directives and communications amongst the Rothmans Group members.

118. Carreras Rothmans Limited and affiliated companies were involved in directing or co-ordinating the Rothmans Group's common policies on smoking and health by preparing and distributing statements which set out the Rothmans Group's position on smoking and health issues. Rothmans International Limited functioned as a central body to coordinate and establish policies for all Rothmans Group members worldwide, creating an International Advisory Board for this particular purpose. These positions were then adopted by member companies.

118.1. From 1950 onwards, Rothmans Group policies included denying the existence of any relationship between smoking and adverse health effects, and strenuously opposing the introduction of warning labels on tobacco products. From 1960 onwards, these policies included denying or minimizing the relationship between exposure to cigarette smoke,

including second hand smoke, and adverse health effects.

118.2. Rothmans International Limited and Carreras Rothmans Limited directed Rothmans Inc. (and its predecessor corporations) to maintain the Rothmans Group's position that more research was required to determine whether cigarettes cause disease, and instructed Rothmans Inc. to resist cautionary warnings in advertising. Carreras Rothmans Limited also directed Rothmans Inc. (and its predecessor corporations) on how to vote at CTMC meetings on issues relating to smoking and health, including the approval and funding of research. Rothmans Inc. (and its predecessor corporations) acted as an agent for and as directed by Carreras Rothmans Limited.

118.3. Within the Rothmans Group, scientists worked collaboratively, exchanged research results, and advised senior management of the companies that were part of the Rothmans Group from time to time, through specific committees. From 1978 to 1986, Carreras Rothmans Limited and its research division were designated responsibility for providing direction on tobacco-related health issues and for coordinating the Rothmans Group's research strategy. Rothmans Inc. (and its predecessor corporations) in particular relied on Carreras Rothmans Limited's expertise and direction on smoking-related health issues. Rothmans Group companies also held meetings on issues related to second-hand smoke. Through its conferences, meetings, directives and policies, Carreras Rothmans Limited directed the Rothmans Group to take the same positions on smoking and health as the ICOSI policies and position on smoking particularized in paragraph 99 herein and the CIAR policies and position on second hand smoke particularized in paragraph 106 herein.

119. Carreras Rothmans Limited and affiliated companies also were involved in directing or

co-ordinating the smoking and health policies of Rothmans, Benson & Hedges Inc., its amalgamating company Rothmans of Pall Mall Limited, and Rothmans Inc. (and its predecessor corporations), by influencing or advising how they should vote in committees of the Canadian manufacturers of cigarettes sold in Ontario and at meetings of CTMC on issues relating to smoking and health, including the approval and funding of research by the Canadian manufacturers and by CTMC.

120. Further particulars of the manner in which the conspiracy, concert of action and common design was entered into or continued and of the tobacco related wrongs committed by Rothmans, Benson & Hedges Inc., its amalgamating company Rothmans of Pall Mall Limited, and Rothmans Inc. (and its predecessor corporations), in furtherance of the conspiracy, concert of action and common design are within the knowledge of the Rothmans Group members.

The Philip Morris Group

121. In or about 1953 the Philip Morris Group members entered into the conspiracy, concert of action and common design referred to above, and continued the conspiracy, concert of action and common design within the International Tobacco Industry and the Canadian Tobacco Industry at or through committees, conferences and meetings established, organized and convened by Altria Group, Inc., Philip Morris USA Inc., Philip Morris International, Inc., and attended by senior personnel of the Philip Morris Group companies, including those of Rothmans, Benson & Hedges Inc. and its amalgamating company Benson & Hedges (Canada) Ltd., and through written and oral directives and communications amongst the Philip Morris Group members.

122. The committees used by Altria Group, Inc., Philip Morris USA Inc., and Philip Morris International, Inc. to direct or co-ordinate the Philip Morris Group's common policies on smoking and health include the Committee on Smoking Issues and Management and the Corporate Products Committee.

123. The conferences used by Altria Group, Inc., Philip Morris USA Inc., and Philip Morris International, Inc. to direct or co-ordinate the Philip Morris Group's common policies on smoking and health include the Conference on Smoking and Health and the Corporate Affairs World Conference.

124. Altria Group, Inc., Philip Morris USA Inc., and Philip Morris International Inc. further directed or co-ordinated the Philip Morris Group's common policies on smoking and health by means of their respective Corporate Affairs and Public Affairs Departments which directed or advised various departments of the other members of the Philip Morris Group, including Rothmans, Benson & Hedges Inc. and its amalgamating company Benson & Hedges (Canada) Ltd., concerning the Philip Morris Group position on smoking and health issues.

125. Altria Group, Inc., Philip Morris U.S.A. Inc., and Philip Morris International, Inc. further directed or co-ordinated the common policies of the Philip Morris Group on smoking and health by preparing and distributing to the members of the Philip Morris Group including Rothmans, Benson & Hedges Inc. and its amalgamating company Benson & Hedges (Canada) Ltd., written directives and communications including "Smoking and Health Quick Reference Guides" and "Issues Alerts". These directives and communications set out the Philip Morris Group's position on smoking and health issues to ensure that the personnel of the Philip Morris Group companies, including Rothmans, Benson & Hedges

Inc., and its amalgamating company Benson & Hedges (Canada) Ltd., understood and disseminated the Philip Morris Group's position, which was the same position as the ICOSI policies and position on smoking particularized in paragraph 99 herein and the CIAR policies and position on second hand smoke particularized in paragraph 106 herein.

126. Altria Group, Inc., Philip Morris U.S.A. Inc., and Philip Morris International, Inc. further directed or co-ordinated the smoking and health policies of Rothmans, Benson & Hedges Inc. and its amalgamating company Benson & Hedges (Canada) Ltd., by directing or advising how they should vote in committees of the Canadian manufacturers and at meetings of CTMC on issues relating to smoking and health, including the approval and funding of research by the Canadian manufacturers of cigarettes sold in Ontario and by CTMC.

126.1 In furtherance of the conspiracy, concert of action and common design, Altria Group, Inc., Philip Morris USA Inc., Philip Morris International, Inc., and Rothmans Benson & Hedges Inc. and their predecessors participated in the establishment and operation of INBIFO, a research facility in Europe. At INBIFO, research was carried out into the health effects of both smoking and second hand smoke. When the research indicated that smoking and second hand smoke was harmful to health, the research was suppressed and/or destroyed.

127. Further particulars of the manner in which the conspiracy, concert of action and common design was entered into or continued and of the tobacco related wrongs committed by Rothmans, Benson & Hedges Inc., its amalgamating company Benson & Hedges (Canada) Inc., and by Altria Group, Inc., Philip Morris U.S.A. Inc., and Philip Morris

International, Inc. in furtherance of the conspiracy, concert of action and common design are within the knowledge of the Philip Morris Group members.

The RJR Group

128. In or about 1953 the RJR Group members entered into the conspiracy, concert of action and common design referred to above, and continued the conspiracy, concert of action and common design within the International Tobacco Industry and the Canadian Tobacco Industry at or through committees, conferences and meetings established, organized and convened by R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc. and attended by senior personnel of the RJR Group members, including those of JTI-Macdonald Corp. (and its predecessor corporations), and through written and oral directives and communications amongst the RJR Group members.

129. The meetings used by R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc. to direct or co-ordinate the RJR Group's common policies on smoking and health included the Winston-Salem Smoking Issues Coordinator Meetings.

130. The conferences used by R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc. to direct or co-ordinate the RJR Group's common policies on smoking and health include the "Hound Ears" and Sawgrass conferences.

131. R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc., further directed or co-ordinated the RJR Group's position on smoking and health by means of a system of reporting whereby each global "Area" had a "smoking issue designee" who was supervised by R.J. Reynolds Tobacco International, Inc. and who reported to the Manager

of Science Information in the R.J. Reynolds Tobacco Company. In the case of Area II (Canada), this "designee" was, from 1974, a senior executive of Macdonald Tobacco Inc., and later of JTI-Macdonald Corp. (and its predecessor corporations).

132. R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc. further directed or co-ordinated the RJR Group's common policies on smoking and health by preparing and distributing to the members of the RJR Group, including JTI-Macdonald Corp. (and its predecessor corporations), written directives and communications including an "Issues Guide" and a "Media Guide".

133. R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc. further directed or co-ordinated the smoking and health policies of JTI-Macdonald Corp. (and its predecessor corporations) by directing or advising how they should vote in committees of the Canadian manufacturers and at meetings of CTMC on issues relating to smoking and health, including the approval and funding of research by the Canadian manufacturers and by CTMC and maintaining the right to veto any particular research proposal.

133.1 The direction and co-ordination of the RJR Lead Companies over the RJR Group was also carried out by:

(a) Developing an action plan which set out the RJR Group's position on smoking and health issues to ensure that the personnel in the RJR Group companies, including its Canadian subsidiaries, understood and disseminated the RJR Group's position;

(b) Taking a leadership role in the International Committee on Smoking Issues (ICOSI), particularly in relation to Canada and coordinating CTMC's positions to align with those of ICOSI as particularized in paragraph 99 herein, as well as the CIAR policies on second hand smoke particularized in paragraph 106 herein;

(c) Placing senior executives of the Lead Companies as senior executives of the Canadian subsidiaries;

(d) Advising the RJR Group's sales representatives that cigarettes did not pose a health hazard to the non-smoker;

(e) Making public statements on behalf of the entire Group denying or marginalizing the link between health and second hand smoke;

(f) Distributing materials and related information and providing knowledge obtained from the Lead Companies' "Information Science" research department;

(g) Providing technical expertise, including information and knowledge on the manufacture of cigarettes, the use of substitutes and additives, the use of pH controls, the appropriate levels of tar and nicotine and the type and mixture of tobacco used in the manufacture of cigarettes; and

(h) Holding RJR Group and tobacco industry meetings relating to environmental tobacco smoke.

133.2 These directives and communications set out the RJR Group's position on smoking and health issues, which was the same position as the ICOSI policies and position on smoking particularized in paragraph 99 herein and the CIAR policies and position on second hand smoke particularized in paragraph 106 herein. These directives and communications were meant to ensure that the personnel of the RJR Group companies, including those of JTI-Macdonald Corp. (and its predecessor corporations) understood and disseminated the RJR Group's position.

133.3 In furtherance of the conspiracy, concert of action and common design, R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., and JTI-Macdonald Corp. (and its predecessor corporations) participated in the removal and destruction of smoking and health materials from the R.J. Reynolds Tobacco Company libraries in Winston-Salem, North Carolina and destroyed research relating to the biological activity of cigarettes manufactured and promoted by members of the RJR Group for sale in Ontario.

134. Further particulars of the manner in which the conspiracy, concert of action and common design was entered into or continued and of the tobacco related wrongs committed by

JTI-Macdonald Corp., (and its predecessor corporations), and the Defendants, R.J. Reynolds Tobacco International and R.J. Reynolds Tobacco Company, in furtherance of the conspiracy, concert of action and common design are within the knowledge of the RJR Group members.

The BAT Group

135. In or about 1953 the BAT Group members entered into the conspiracy, concert of action and common design referred to above, and continued the conspiracy, concert of action and common design within the International Tobacco Industry and the Canadian Tobacco Industry at or through committees, conferences and meetings established, organized and convened by British American Tobacco (Investments) Limited, B.A.T Industries p.l.c. and British American Tobacco p.l.c. and attended by senior personnel of the BAT Group members, including those of Imperial Tobacco Limited and Imasco Limited, and through written and oral directives and communications amongst the BAT Group members.

135.1 The Lead Companies of the BAT Group have consistently held the BAT Group out to the public as a single corporate entity and tobacco enterprise, continuously in operation since 1902, and, as a result, each of the Lead Companies, by its words and conduct, continued and thereby adopted and assumed the benefits of and the liabilities of its predecessors for the conspiracy and acting in concert within the International Tobacco Industry and the Canadian Tobacco Industry and its own Group. British American Tobacco p.l.c. stands where its predecessors stood, at the head of the BAT Group, representing a continuity of control, purpose and policies throughout the past 100 years or more. British American

Tobacco p.l.c., like B.A.T Industries p.l.c. before it, has represented to the public in its annual financial statements and otherwise, that it has been in existence since 1902, employing tens of thousands of people and is one of the largest tobacco companies in the world. British American Tobacco p.l.c. has continued the BAT Group's practice of misleading the public and governments about the dangers of smoking and the risks of second-hand smoke.

136. The committees used by British American Tobacco (Investments) Limited, British American Tobacco p.l.c. and B.A.T Industries p.l.c. to direct or co-ordinate the BAT Group's common policies on smoking and health include the Chairman's Policy Committee, the Research Policy Group, the Scientific Research Group, the Tobacco Division Board, the Tobacco Executive Committee, and the Tobacco Strategy Review Team (which later became known as the Tobacco Strategy Group).

137. The conferences used by the Defendants, British American Tobacco (Investments) Limited, British American Tobacco p.l.c. and B.A.T Industries p.l.c., to direct or co-ordinate the BAT Group's common policies on smoking and health include the Chairman's Advisory Conferences, BAT Group Research Conferences, and BAT Group Marketing Conferences. Some of these conferences took place in Canada.

138. British American Tobacco (Investments) Limited, British American Tobacco p.l.c. and B.A.T Industries p.l.c. further directed or co-ordinated the BAT Group's common policies on smoking and health, which was the same position as the ICOSI policies and position on smoking particularized in paragraph 99 herein and the the CIAR policies and position on second hand smoke particularized in paragraph 106 herein, by creating a Tobacco Strategy Review Team (TSRT) and preparing and distributing to the members of the

BAT Group, including Imperial Tobacco Limited and Imasco Limited, written directives and communications including "Smoking Issues: Claims and Responses", "Consumer Helplines: How To Handle Questions on Smoking and Health and Product Issues" (that addressed inter alia second hand smoke), "Smoking and Health: The Unresolved Debate", "Smoking: The Scientific Controversy", "Smoking: Habit or Addiction?", and "Legal Considerations on Smoking and Health Policy", "Smoking and Health – Assumptions – Policy – Guidelines", "Environmental Tobacco Smoke – Improving the Quality of Public Debate, Smoking and Health – The End Result Debate", and "Answering the Critics". These directives and communications set out the BAT Group's position on smoking and health issues, which was the same position as the ICOSI policies and position on smoking particularized in paragraph 99 herein and the CIAR policies and position on second hand smoke particularized in paragraph 106 herein and were meant to ensure that the personnel of the BAT Group companies, including the personnel of Imperial Tobacco Limited and Imasco Limited, understood and disseminated the BAT Group's position.

138.1 Direction, to this end, was further provided at meetings of the Tobacco Strategy Review Team and recorded in notes of meetings of the Tobacco Strategy Review Team. This strategy for the BAT Group was further set out in corporate documents such as the Listing Particulars of British American Tobacco p.l.c. in 1998, the statement of Policy of the Group on Regulatory and Taxation Issues and through various websites operated by the Lead Companies from and after 1998, including statements made by British American Tobacco p.l.c. on its website in 2003 and thereafter questioning research that exposure to second hand smoke causes disease.

139. British American Tobacco (Investments) Limited, British American Tobacco p.l.c. and

B.A.T Industries p.l.c., further directed or co-ordinated the smoking and health policies of Imperial Tobacco Limited and Imasco Limited, by directing or advising how they should vote in committees of the Canadian manufacturers of cigarettes sold in Ontario and at meetings of CTMC on issues relating to smoking and health, including the approval and funding of research by the Canadian manufacturers and by CTMC.

140. Further particulars of the manner in which the conspiracy, concert of action and common design was entered into or continued and of the tobacco related wrongs committed in furtherance of the conspiracy, concert of action and common design are within the knowledge of the BAT Group members.

141. As a result of the aforementioned conspiracy, concert of action and common design, set out in paragraphs 86 to 140, persons in Ontario started to, or continued to, smoke cigarettes manufactured and promoted by the Defendants, or were exposed to cigarette smoke, and thereby suffered tobacco related disease and an increased risk of tobacco related disease.

Breach of *Consumer Protection Act, 2002*, the *Competition Act* and their Predecessor Statutes

142. The Direct Breach Defendants, in breach of their statutory duties or obligations pursuant to the *Business Practices Act* S.O. 1974, c.131, s.2 and successor legislation including the *Consumer Protection Act*, 2002 S.O. 2002, s.14 and 17, engaged in unfair practices by making false, misleading or deceptive representations in respect of cigarettes sold to persons in Ontario, by word or by conduct. These Defendants further breached these statutes by making unconscionable representations in respect of cigarettes sold by them to

persons in Ontario, contrary to the *Consumer Protection Act*, 2002 S.O. 2002, s.15. Particulars of the false, misleading or deceptive and unconscionable representations are set out in paragraphs 56 to 85 and 145 herein.

143. In addition, these Defendants, for the purpose of promoting, directly or indirectly, the supply to or use of cigarettes by persons in Ontario, breached their statutory duties or obligations to consumers in Ontario under the *Combines Investigation Act* R.S.C. 1952 (supp.), chapter 314 as amended by the *Criminal Law Amendment Act* S.C. 1968-69, chapter 38, section 116 and amendments thereto and subsequently the *Competition Act* R.C.S. 1985, chapter C-34, sections 52(1), 52(4), 74.1 and 74.03 and amendments thereto. Specifically, the Defendants made representations to the public in Ontario that were false or misleading in a material respect and made representations to the public in Ontario in the form of statements regarding the performance and efficacy of cigarettes that were not based on adequate and proper testing, particulars of which are set out in paragraphs 56 to 85 and 145.

144. Knowing that cigarettes were addictive and would cause and contribute to disease, these Defendants intentionally inflicted harm on persons in Ontario by manufacturing, promoting and selling cigarettes, for profit and in disregard of public health, with knowledge of the risks of addiction and disease and failing to disclose and suppressing this information as particularized herein.

145. These Defendants engaged in unconscionable acts or practices and exploited the vulnerabilities of children and adolescents, and persons addicted to nicotine from smoking cigarettes, particulars of which include:

(a) manipulating the level and bio-availability of nicotine in their cigarettes, particulars of which include the following:

(i) sponsoring or engaging in selective breeding or genetic engineering of tobacco plants to produce a tobacco plant containing increased levels of nicotine,

(ii) increasing the level of nicotine through the blending of tobaccos contained in their cigarettes,

(iii) increasing the level of nicotine in their cigarettes by the addition of nicotine or substances containing nicotine,

(iv) introducing substances, including ammonia, into their cigarettes to enhance the bio-availability of nicotine to smokers;

(b) incorporating into the design of their cigarettes ostensible safety features such as filters which they knew or ought to have known were ineffective in reducing the risks of addiction and disease from smoking, yet which would lead a reasonable consumer to believe that the product was safer to use than it was in fact;

(c) failing to disclose to such consumers the risks inherent in the ordinary use of their cigarette products including the risks of disease and addiction which was known or should have been known to them based on research on smoking and health which was known to them;

(d) engaging in collateral marketing, promotional and public relations activities to neutralize or negate the effectiveness of warnings regarding the risks of addiction and disease from smoking provided to such consumers;

(e) suppressing or concealing from such consumers scientific and medical information regarding the risks of addiction and disease from smoking;

(f) engaging in marketing and promotional activities having the tendency to lead such consumers to believe that cigarettes have performance characteristics, ingredients, uses and benefits and approval that they did not have;

(g) misinforming and misleading such consumers about the risks of addiction and disease from smoking and the risks of disease from exposure to second hand smoke by using innuendo, exaggeration and ambiguity having the tendency to mislead them about the material facts regarding smoking and health;

(h) misrepresenting the actual intake of tar and nicotine associated with smoking their cigarettes;

(i) providing misleading information to the public in Ontario about the risks of addiction and disease from smoking and the risks of disease from exposure to second hand smoke based upon a failure to provide any or any adequate research or testing of their cigarettes;

(j) publicly discrediting the testing and research undertaken, and information provided by others, regarding the link between smoking and disease and smoking and addiction;

(k) failing to take any, or any reasonable, measures to prevent children and adolescents from starting or continuing to smoke;

(l) targeting children and adolescents in their advertising, promotional and marketing activities with the object of inducing children and adolescents to start or continue to smoke;

(m) manufacturing, marketing, distributing and selling cigarettes which they knew or ought to have known are unjustifiably hazardous in that, when smoked as intended, they are addictive and inevitably cause or contribute to disease and death in large numbers of consumers of cigarettes and persons exposed to cigarette smoke and provide no benefit to either class of persons;

(n) making the following representations to such consumers which they knew or ought to have known were false or misleading:

(i) representing that smoking and exposure to second hand smoke has not been shown to cause any known diseases,

(ii) representing that they were aware of no research, or no credible research, establishing a link between smoking or exposure to second hand smoke and disease,

(iii) representing that many diseases shown to have been caused by smoking tobacco or exposure to second hand smoke were in fact caused by other environmental or genetic factors,

(iv) representing that cigarettes were not addictive,

(v) representing that they were aware of no research, or no credible research, establishing that smoking is addictive,

(vi) representing that smoking is merely a habit or custom,

(vii) representing that they did not manipulate nicotine levels in their cigarettes,

(viii) representing that they did not include substances in their cigarettes designed to increase the bio-availability of nicotine,

(ix) representing that the actual intake of tar and nicotine associated with smoking their cigarettes was less than they knew it to be,

(x) representing that certain of their cigarettes, such as "filter", "mild", "low tar" and "light" brands, were safer than other cigarettes,

(xi) representing that smoking is consistent with a healthy lifestyle,

(xii) representing that the risks of smoking were less serious than they knew them to be; and

(o) making representations about the characteristics of their cigarettes that were not based upon any or any adequate and proper testing of and investigation and research into:

(i) the risk of disease caused or contributed to by smoking their cigarettes and exposure to second hand smoke,

(ii) the risk of addiction to nicotine contained in their cigarettes, and

(iii) the feasibility of eliminating or minimizing the risks referred to in subparagraphs (i) and (ii);

(p) failing to correct statements made by others on their behalf to such consumers regarding the risks of smoking and exposure to second hand smoke, which they knew were incomplete or inaccurate, and thereby misrepresenting the risks of smoking by omission or silence.

146. In making the representations referred to in paragraph 145, these Defendants knew or ought to have known:

(a) that the consumers are not reasonably able to protect their interests because of disability, ignorance, illiteracy, or similar factors; and

(b) that the consumers are unable to receive a substantial benefit from the subject-matter of the representations (ie. cigarettes).

147. As a result of the aforementioned breaches of statutory duties and obligations by the Direct Breach Defendants, persons in Ontario started to smoke or continued to smoke cigarettes manufactured and promoted by these Defendants, or were exposed to cigarette smoke, and thereby suffered tobacco related disease and an increased risk of such disease. The Crown has provided and will continue to provide health care benefits for the population of insured persons who have suffered tobacco related disease or have an increased risk of such disease.

V. CONCLUSION

148. Exposure to cigarettes can cause or contribute to disease. During the period in which the Defendants committed the tobacco related wrongs referred to in Part IV above, cigarettes manufactured or promoted by the Direct Breach Defendants were offered for sale in Ontario.

149. But for the above described tobacco related wrongs, insured persons in Ontario exposed to tobacco products manufactured or promoted by the Direct Breach Defendants would not have been exposed to these products, and as a result, insured persons in Ontario have suffered tobacco related disease or the risk of tobacco related disease. The Crown has incurred expenditures for health care benefits provided to these insured persons. In accordance with the Act, the Crown is entitled to recover these health care costs from the Direct Breach Defendants. The Crown pleads and relies on section 3 of the Act.

150. Furthermore, in accordance with section 4 of the *Act* and as a result of the facts set out in paragraphs 86 through 141, the Crown pleads that all Defendants conspired and acted in concert in committing the tobacco related wrongs committed by the Direct Breach Defendants and as a result, all Defendants are jointly and severally liable for the cost of health care benefits provided to insured persons in Ontario resulting from tobacco related disease or the risk of tobacco related disease caused or contributed to by the breaches of duty of the Direct Breach Defendants.

151. The Crown relies on Rules 17.02(g), (h), (o) and (p) in serving the Statement of Claim on Defendants outside Ontario without leave.

The Crown proposes that this action be tried at Toronto.

Date: ~~March 28, 2014~~ May 29, 2018

ATTORNEY GENERAL FOR ONTARIO
Crown Law Office - Civil
8th Floor, 720 Bay Street
Toronto, ON M7A 2S9
Fax: (416) 326-4181

~~William Manuel~~
~~LSUC # 16446I~~
~~Tel: (416) 326-9855~~

~~Ronald E. Carr~~
~~LSUC # 13341F~~
~~Tel: (416) 326-2704~~

~~Lise G. Favreau~~
~~LSUC # 37800S~~
~~Tel: (416) 325-7078~~

~~Lynne McArdle~~
~~LSUC # 40561H~~
~~Tel: (416) 325-8435~~

Jacqueline Wall, LSO No. 38511D
Tel.: (416) 325-8435

Shabana Kar, LSO No. 33311Q
Tel: (416) 314-2080

Edmund Huang, LSO No. 42673F
Tel: (416) 326-4161

Sunil Mathai, LSO No. 49616Q
Tel: (416) 326-0486

Counsel for the Plaintiff, Her Majesty the Queen in Right of Ontario

Court File No.: CV-09-387984

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO - and - **ROTHMANS INC., *et al***

Plaintiff

Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

SECOND AMENDED FRESH AS AMENDED STATEMENT OF CLAIM

MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office - Civil
8th Floor, 720 Bay Street
Toronto, Ontario M7A 2S9
Fax: (416) 326-4181

Jacqueline Wall, LSO No. 38511D
Tel.: (416) 325-8435

Shahana Kar, LSO No. 33311O
Tel: (416) 314-2080

Edmund Huang, LSO No. 42673F
Tel: (416) 326-4161

Sunil Mathai, LSO No. 49616O
Tel: (416) 326-0486

Counsel for the Plaintiff, Her Majesty the Queen in Right of Ontario

TAB S

THIS IS **EXHIBIT "S"** TO THE AFFIDAVIT
OF ERIC THAUVETTE, SWORN BEFORE ME
ON MARCH 12, 2019

Waleed Malik

Commissioner for Taking Affidavits

WALEED MALIK
LSO # 678960

TAB I

TRANSLATION

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO.: 500-06-000076-980

SUPERIOR COURT
(Class Actions)

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ, a corporation legally incorporated under Part III of the Quebec *Companies Act*, having its registered office and principal place of business at 4126 Saint Denis Street, Suite 302, in the City and District of Montreal, Province of Quebec, H2W 2M5;

Plaintiff/Representative

and

JEAN-YVES BLAIS, residing and domiciled at 3950 Sir-Wilfrid-Laurier Boulevard, Unit No. 638, in the City of Saint-Hubert, District of Longueuil, Province of Quebec, J3Y 5Y9;

Designated Member

v.

JTI-MACDONALD CORP., a body corporate having a place of business at 2455 Ontario Street East, in the City and District of Montreal, Province of Quebec, H2K 1W3;

and

IMPERIAL TOBACCO CANADA LIMITED, a body corporate having a place of business at 3711 St. Antoine Street, in the City and District of Montreal, Province of Quebec, H4C 3P6;

and

ROTHMANS, BENSON & HEDGES INC., a body corporate having a place of business at 185 Laurentian Autoroute, in the City and District of Quebec, Province of Quebec, G1K 7L2;

TABLE OF CONTENTS

MOTION TO INSTITUTE PROCEEDINGS
IN A CLASS ACTION
Arts. 1011 *et seq.* C.C.P.

IN SUPPORT OF THEIR MOTION TO INSTITUTE PROCEEDINGS IN A CLASS ACTION, THE QUEBEC COUNCIL ON TOBACCO AND HEALTH AND JEAN-YVES BLAIS RESPECTFULLY SUBMIT AS FOLLOWS:

(A) Introduction

1. On a motion served and filed in November 1998, the Conseil québécois sur le tabac et la santé (hereinafter referred to as the "**CQTS**") and Mr Jean-Yves Blais (hereinafter referred to either as such or as the "**Designated Member**") petitioned this Honourable Court to authorize the commencement of a class action in damages against the Defendants;

2. By judgement rendered on 21 February 2005, the Superior Court allowed the motion filed by the CQTS and Mr Jean-Yves Blais, and authorized the commencement of a class action in damages against the Defendants on behalf of the persons forming part of the following group:

> "All persons residing in Quebec who, at the time of service of the motion, were suffering from lung, larynx or throat cancer or from emphysema, or who, since the motion was served, have developed lung, larynx or throat cancer or have suffered from emphysema, after having directly inhaled cigarette smoke, and having smoked a minimum of fifteen cigarettes per twenty-four (24) hour period over an extended and uninterrupted period of not less than five (5) years, including the assigns of any person who met the aforementioned criteria and has died since service of the motion."

3. In its judgement the Superior Court identified the following main questions as questions of fact and law to be dealt with collectively:

- ❑ Did the Respondents manufacture, market and sell a dangerous product which is harmful to the health of the consumers;
- ❑ Were the Respondents aware and were they presumed to be aware of the risks and dangers associated with the consumption of their products;
- ❑ Did the Respondents implement a policy of systematic non-disclosure of such risks and dangers;
- ❑ Did the Respondents trivialize or deny such risks and dangers;
- ❑ Did the Respondents develop marketing strategies conveying false information

on the characteristics of the product being sold;

- ❑ Did the Respondents knowingly market an addictive product and did they refrain from using such parts of the tobacco plant as have such a low nicotine content as to effectively end addiction in a large number of smokers;

- ❑ Did the Respondents conspire to form a common front designed to prevent the users of their products from becoming aware of the inherent dangers of smoking;

- ❑ Did the Respondents wilfully impair the right to life, security, and inviolability of the members of the group;

4. In its judgement, the Superior Court also identified as follows the relief sought, which relief flows from the wrongs committed by the Defendants against the members of the group and from the Defendants' liability for the harm caused by them:

- ❑ **ALLOW** the Petitioner's action in damages and that of each member of the group;

- ❑ **DECLARE** the Respondents jointly and severally liable for the harm incurred by Mr Blais and each member of the group;

- ❑ **ORDER** the Respondents to indemnify the members of the group and remedy the harm incurred;

- ❑ **ORDER** the Respondents to pay punitive damages to each member of the group for impairment of the right to life and security of the person;

- ❑ **RESERVE** each member's right to claim future damages in connection with tobacco consumption;

- ❑ **ORDER** the Respondents to pay, as a restorative measure, from the indemnities awarded to the members, up to a proportion deemed appropriate by the Court, the amounts necessary for the creation of a fund for the implementation of countermeasures designed to limit cigarette consumption (including through information, education and the treatment of persons inclined to smoke or addicted to tobacco products) and for medical research into tobacco-related diseases;

- ❑ **ORDER** the Respondents to pay interest to the Petitioners and to each member of the group at the legal rate, as at the date of this motion, including the additional indemnity set forth in article 1619 C.C.Q.;

5. With this Motion, the CQTS and the Designated Member seek a finding of joint and several liability in damages on the part of the Defendants for wrongs committed against the members of the group, as follows:

- ❑ The Defendants manufactured and sold a product akin to a drug to the members of the group, a product which the Defendants knew to be dangerous, which caused a powerful addiction in the members of the group, and caused the appearance or development of diseases, including *inter alia* lung, larynx and

throat cancer and emphysema, or exacerbated such diseases;

- ❑ The Defendants manipulated their tobacco products, thus making them more dangerous for the members of the group;

- ❑ The Defendants have initiated and maintained a scientific controversy on the effects of the tobacco products they manufacture and sell, while invoking the supposed benefits related to the consumption thereof;

- ❑ The Defendants have developed a common policy of systematic non-disclosure of the risks and dangers related to the consumption of the tobacco products manufactured and sold by them;

- ❑ The Defendants have developed a common policy of systematic trivialization and negation of the risks and dangers related to the consumption of the tobacco products manufactured and sold by them;

- ❑ The Defendants have developed a public relations counter-discourse and have specifically targeted youth as part of the marketing of tobacco products manufactured by them.

6. By committing such wrongs, the Defendants sometimes acted behind the shield of the Canadian Tobacco Manufacturer's Council (hereinafter referred to as the "**CTMC**") created by the Defendants in 1963;

7. The current directors of the CTMC are Benjamin Kemball, who is the President and CEO of ITL; John Barnett, who is the President and CEO of RBH; and Michel Poirier, who is the President and CEO of JTI;

8. By this Motion, the CQTS seeks to obtain the following on behalf of the Designated Member and members of the group:

- ❑ the collective recovery of non-pecuniary damages for loss of enjoyment of life, physical and mental pain and anguish, reduction of life expectancy, and the trouble and inconvenience that they suffer or have suffered after having been diagnosed with one or more of the diseases referred to herein, resulting from the wrongs committed by the Defendants, including punitive damages for unlawful and intentional interference with a right guaranteed by the Quebec *Charter of Human Rights and Freedoms* (R.S.Q., c. C-12) and for false and misleading representations contrary to the *Consumer Protection Act* (R.S.Q., c. P-40.1);

- ❑ the individual recovery of any other pecuniary damages incurred by them after having been diagnosed with one or more of the diseases referred to herein, if applicable, resulting from the wrongs committed by the Defendants;

(B) <u>The Parties Involved</u>

(B.1) The Representative: Quebec Council for Tobacco and Health

9. In its judgement authorizing the class action, the Superior Court designated the CQTS as

the Representative of the group;

10. In this regard, the Court declared that :

> [99] The Court is of the opinion that the COUNCIL's goals are in perfect harmony with, and complement, the demands of MR BLAIS and the members that he wishes to represent. Indeed, the "collective" members of the COUNCIL are all contributing to the promotion of health, to the prevention of cancer, to research designed to eliminate or treat cancer, or to the battle against smoking. And the trial judge may very well come to the conclusion, if proved, that the Respondents failed in their duty adequately to inform smokers or those about to become smokers, of all the health dangers related to tobacco use.
>
> [100] It can therefore reasonably be presumed that such a judgement could have an impact on prevention and eventually lead to a decrease in the number of smokers. In that case, health promotion would emerge victorious. [Translation]

(B.2) The Designated Member: Mr Jean-Yves Blais

11. In its judgement authorizing the class action, the Superior Court conferred upon Mr Jean-Yves Blais the status of Designated Member;

12. Mr Blais was born in Abitibi in 1944;

13. He started smoking (rolling tobacco) in 1954 at the age of ten;

14. He started smoking because "smoking made you feel like a man (...) we were ten (10) years old and we thought we were sixteen (16)";

15. At the age of fifteen (15) (1959), when he left the school system, Mr Blais went from smoking rolling tobacco to smoking tailor-made cigarettes, ie, Export "A" (without filter), marketed and sold by the Respondent JTI MacDonald Corp.;

16. The number of cigarettes smoked increased gradually. By 1964, Mr Blais, who was then twenty (20) years old, smoked two (2) packs of cigarettes per day;

17. In 1987, ie, thirty-three (33) years after he had started smoking, his physician told him for the first time that he had better quit smoking;

18. In August 1997, Mr Blais discovered that he had lung cancer;

19. On 1 October 1997, Mr Blais was operated on at Hôtel-Dieu Hospital in Montreal, where he underwent the removal of a lobe of the right lung;

20. On 19 October 1997, still addicted and incapable of depriving himself of cigarettes, Mr Blais started smoking again, albeit more moderately;

21. The consumption of tobacco products caused or contributed to Mr Blais' lung cancer;

(B.3) Defendant Imperial Tobacco Canada Limited and its Affiliates

22. Respondent Imperial Tobacco Canada Limited (hereinafter "ITL"), formerly known as Imperial Tobacco Limited, is a body corporate having its registered office in Montreal, as appears from an extract from the business registry (CIDREQ) produced herewith as Exhibit CQTS-1;

23. ITL is the result of the merger, on 1 February 2000, of British American Tobacco (Canada) Limited, an indirect, wholly-owned subsidiary of British American Tobacco p.l.c. (hereinafter referred to as "**BAT**"), and Imasco Limited (hereinafter referred to as "**Imasco**"), which held 100% of the shares of Imperial Tobacco Limited, as appears from ITL's Annual Information Form dated 20 April 2000, produced herewith as Exhibit CQTS-2, and from pages taken from ITL's website, produced *en liasse* as Exhibit CQTS-3;

24. Before the merger, effective control of Imasco was exercised by its principal shareholder BAT who, in August 1999, held 42.5% of the common shares thereof, as appears from the Annual Information Form (CQTS-2);

25. Imasco was created in 1912 under the name Imperial Tobacco Company of Canada, Limited and the name was changed to Imasco Limited in 1970. BAT has been the principal shareholder of Imasco since its creation, the whole as appears from Imasco's Annual Information Form dated 29 April 1999, produced herewith as Exhibit CQTS-4, and from ITL's Annual Information Form dated 20 April 2000 (CQTS-2);

26. Since 1 February 2000, ITL has been a wholly-owned subsidiary of British American Tobacco Holdings (Canada) B.V., a corporation having its registered office in Amsterdam, Netherlands, as appears from an extract from the business registry (CIDREQ) produced herewith as Exhibit CQTS-5. British American Tobacco Holdings (Canada) B.V. is itself a wholly-owned subsidiary of BAT, as appears from ITL's Annual Information Form dated 30 March 2005, produced herewith as Exhibit CQTS-6;

27. Between 1927 and 2004, BAT was the sole shareholder of Brown and Williamson Tobacco Corporation ("**B&W**"), an American cigarette manufacturer and sister corporation to ITL;

28. On 30 July 2004, the American assets of B&W were combined with those of R.J. Reynolds Tobacco Company. At the time, R.J. Reynolds Tobacco Company was held by Reynolds American Inc., a holding company in which BAT held 42% of the shares through Brown & Williamson, the remaining shares being held by the shareholders of R.J. Reynolds, as appears from BAT's 2004 Annual Report, produced herewith as Exhibit CQTS-7, at page 23 and from an extract from R.J. Reynolds Tobacco Company's website, produced herewith as Exhibit CQTS-8;

29. BAT is the second largest cigarette manufacturer in the world. In its fiscal year ended 31 December 2004, BAT earned an operating profit of £2,830M, ($6,509,849,000) on sales of £34,255M ($78,796,776,500), as appears from a copy of its financial statements for fiscal 2004, produced herewith as Exhibit CQTS-9;

30. ITL is the leading cigarette manufacturer in Canada, with a market share of more than 60% of tailor-made cigarettes. In its fiscal year ended 31 December 2004, ITL earned an operating profit of $775M on sales of $1.54 billion, as appears from a copy of the financial information published by ITL, produced herewith as Exhibit CQTS-10;

(B.4) Defendants Rothmans, Benson & Hedges and its Affiliates

31. Rothmans, Benson & Hedges Inc. (hereinafter referred to as "**RBH**") was formed on 19 December 1986 by virtue of the merger of Rothmans of Pall Mall Limited, a wholly-owned subsidiary of Rothmans Inc., and Benson & Hedges (Canada) Inc.;

32. Rothmans Inc. was incorporated on 8 May 1956 under the name Rothmans of Pall Mall Canada Limited. This name was changed to Rothmans Inc. on 30 September 1985, as appears from the Renewal Annual Information Form dated 17 June 2005, produced herewith as Exhibit CQTS-11;

33. On 11 February 2000, Rothmans merged with Rothmans Partnership in Industry Canada Limited and with Rothmans of Canada Limited, two indirect, wholly-owned subsidiaries of BAT. The resulting corporation continued carrying on business under the name Rothmans Inc., a holding company which holds a 60% interest in the Respondent RBH, as appears from the Renewal Annual Information Form (CQTS-11);

34. Benson & Hedges Inc. was an indirect, wholly-owned subsidiary of Philip Morris Companies Inc. (hereinafter referred to as "**Philip Morris**"), whose name has since been changed to Altria Group, Inc. (hereinafter referred to as "**Altria**"), as appears from the Renewal Annual Information Form (CQTS-11);

35. As at the commencement of these proceedings, Rothmans Inc. holds a 60% interest in RBH, and the remaining interest is held by FTR Holding S.A., a Swiss corporation controlled by Philips Morris International, the largest manufacturer of tobacco products in the world;

36. BAT, therefore, controls two of the three Defendants;

37. Philip Morris International is itself a member of the Altria Group, which also controls Philip Morris USA and Kraft Foods;

38. In its fiscal year ended 31 March 2004, RBH recorded sales of $620.1M and earnings before interest, taxes and amortization of $268.08M, as appears from the financial statements of Rothmans Inc., produced herewith as Exhibit CQTS-12;

39. In the fiscal year ended 31 December 2004, Philip Morris International recorded sales of US$39.53 billion and generated an operating income of US$6.6 billion for its parent company, while Philip Morris USA contributed US$4.4 billion on sales of US$17.51 billion, as appears from the consolidated financial statements of Altria, produced herewith as Exhibit CQTS-13;

(B.5) Defendants JTI-MacDonald Corp. and its Affiliates

40. Respondent JTI-MacDonald Corp (hereinafter referred to as "**JTI**") was created in

November 1999 as a result of the merger of RJR-MacDonald Inc. and JT Nova Scotia Corporation. JTI has its registered office in Halifax, Nova Scotia, as appears from an extract from the business registry (CIDREQ) produced herewith as Exhibit CQTS-14;

41. The controlling shareholder of JTI-MacDonald is JT Canada LLC II Inc., which is itself controlled by JT Canada LLC Inc., as appears from an extract from the business registry (CIDREQ) produced herewith as Exhibit CQTS-15;

42. The controlling shareholder of JT Canada LLC Inc. is JT International Holding B.V., a corporation which has its registered office in the Netherlands and is a wholly-owned subsidiary of Japan Tobacco Inc., the third largest cigarette manufacturer in the world, the whole as appears from an extract from the business registry (CIDREQ) produced herewith as Exhibit CQTS-16, and from note 1 of the financial statements included in the Annual Report of Japan Tobacco Inc. for the fiscal year ended 31 March 2005, produced herewith as Exhibit CQTS-17;

43. Sales of tobacco products for Japan Tobacco Inc. totalled ¥4,284 billion and net earnings totalled ¥259 billion, as appears from a copy of its financial statements, produced herewith as Exhibit CQTS-18;

44. Before being integrated into the Japan Tobacco Inc. group in 1999, RJR-Macdonald Inc. had, since 1974, been a wholly-owned subsidiary of R.J. Reynolds International, itself a subsidiary of R.J. Reynolds Industries, the parent company of R.J. Reynolds Tobacco Company;

45. In 1985, R.J. Reynolds Industries bought Nabisco Brands and became RJR Nabisco;

46. In April 1989, RJR Nabisco merged with Kohlberg Kravis Roberts & Co. and became RJR Nabisco Holdings Corp.;

47. RJ Reynolds Tobacco Company thus became a wholly-owned subsidiary of RJR Nabisco Holdings Corp., which also held 80.5% of the shares of Nabisco Holdings Corp., a maker of food products;

48. In May 1999, RJ Reynolds International, whose business activities included RJR Nabisco Holdings Corp.'s tobacco product manufacturing operations outside the USA, was sold to JT International Holding B.V., a wholly-owned subsidiary of Japan Tobacco Inc.;

49. Furthermore, also in May 1999, the Board of Directors of RJR Nabisco Holdings Corp. effected a spin off to isolate the tobacco-related business from the rest of the group by assigning the shares of RJ Reynolds Tobacco Company to a new entity named RJ Reynolds Tobacco Holdings Inc.;

50. On 15 June 1999, the spin off was completed with a distribution of the shares of RJ Reynolds Tobacco Holdings Inc. to the shareholders of RJR Nabisco Holdings Corp., whose name was then changed to Nabisco Group Holdings Corp.;

51. On 27 October 2003, RJ Reynolds Tobacco Holdings Inc. and BAT merged their respective subsidiaries, RJ Reynolds Tobacco Company and Brown & Williamson, to form Reynolds American Inc., a publicly-held corporation 42% of whose shares are held

by BAT and 58% by the former shareholders of RJ Reynolds Tobacco Holdings, Inc.;

(C) Description of Product Manufactured and Sold by Defendants

52. The Defendants have designed and, fully aware of the consequences, manufacture, market and sell a dangerous product containing nicotine, a highly-addictive drug which causes the appearance or development of diseases, including *inter alia* lung, larynx and throat cancer and emphysema, and which exacerbates such diseases;

53. Cigarettes contain more than two thousand five hundred and forty-nine (2,549) chemical substances;

54. The consumption of any Canadian cigarette requires the combustion of the tobacco, which is effected by lighting the cigarette. There is no other way this product can be used;

55. As it burns, a cigarette produces smoke containing more than three thousand eight hundred (3,800) chemical substances, including heavy metals, over sixty-nine (69) of which are known carcinogens. Such carcinogens induce permanent and devastating changes in the genetic material of human, animal and bacterial cells;

56. Such toxic substances with carcinogenic properties include nicotine, NNk and NNN, two of the most important nitrosamines derived from and exclusive to nicotine, aromatic polynuclear hydrocarbons, such as benzo(a)pyrene, benzene, 4-aminobiphenyl, formaldehyde, nickel, chrome, lead and cadmium;

(D) Psychological Effects of the Consumption of Cigarettes Manufactured and Sold by the Defendants

(D.l) Addiction

57. Nicotine is a tobacco alkaloid found in the tobacco plant which produces a strong physiological response in smokers;

58. Stimulation is the predominant pharmacological effect of nicotine. It produces an electrocortical activity and acts at the heart of the endocrinal system. The nicotine which penetrates into the body through cigarette smoke affects almost all the cerebral neurotransmitters and the neuroendocrine system;

59. Cigarettes are the most effective way of administering a dose of nicotine that is most likely to create and maintain an addiction as the effect of nicotine inhaled in cigarette smoke acts on the brain of the smoker within a few seconds;

60. Indeed, the Defendants consider nicotine as the "product" which ensures the existence of a market for cigarettes, the cigarette itself being no more than a vehicle to administer a series of doses;

61. Addiction is one of the most serious chronic consequences of the consumption of nicotine contained in tobacco;

62. Addiction to nicotine is particularly characterized by the regular and compulsive need for

the smoker to procure nicotine, and is accompanied by withdrawal symptoms when the addict is deprived thereof. Nicotine deprives its victims of the ability to freely exercise the choice to continue or not to continue smoking, even when confronted with his or her own addiction and with lung, larynx and throat cancer and emphysema resulting from such addiction;

63. The victims of addiction to nicotine are likely to relapse even many years after having quit smoking;

64. Furthermore, addiction to nicotine causes the smoker to adjust his or her smoking habits to maintain the dose of nicotine required, a phenomenon known as "compensation";

65. To satisfy their need for nicotine, smokers will increase or decrease the number of cigarettes smoked or will inhale cigarette smoke more deeply;

66. Deeper inhalation causes the peripheral part of the lung to be exposed to greater quantities of substances contained in the smoke, thus increasing the risk of developing lung cancer;

67. In its 1995 judgement on the constitutionality of the *Tobacco Products Control Act* (R.S. C., 1985 (4th supp) c. 14), the Supreme Court of Canada held that addiction to tobacco is such that prohibition would be inconceivable and would most likely result in an increase in illegal activity and smuggling greater than anything we have seen to date;

68. On 22 August 2005, the Quebec Court of Appeal, having held that the provisions of the *Tobacco Act* (1997, ch. 13) were essentially *intra vires*, found it difficult to deny that most people who start smoking become addicted, and only through considerable effort do they manage to rid themselves of this habit;

(D.2) Lung, Larynx and Throat Cancer

69. Direct inhalation of tobacco smoke, coupled with addiction, are the reason the consumption of tobacco products manufactured and sold by the Defendants is the principal cause of disease and death in Canada;

70. The consumption of tobacco products manufactured and sold by the Defendants is the cause of eighty-five percent (85%) of lung cancers and thirty percent (30%) of throat and larynx cancers in the Canadian population;

71. The consumption of tobacco products manufactured and sold by the Defendants is the cause of the lung, larynx and throat cancers from which the members of the group are suffering;

72. The inhalation of cigarette smoke causes the absorption of carcinogenic chemical substances which, once in the system, are transformed by the enzymes of the cells, thereby resulting in damage to the deoxyribonucleic acid (DNA), which is the first step in the process of carcinogenesis, leading to lung, throat and larynx cancer;

73. In its reports entitled "*Smoking and Health*" published in 1964 and "*The Health Consequences of Smoking*" published in 1982, the U.S. Surgeon General found the

existence of a cause-and-effect relationship between the consumption of tobacco products and lung, throat and larynx cancer, as appears from a copy of such reports produced herewith as Exhibits CQTS-19 and CQTS-20 respectively;

74. In its report entitled "*The Health Consequences of Smoking – Cancer and Chronic Lung Disease in the Workplace*" published in 1985, the U.S. Surgeon General found that this causal link existed despite the fact that smokers were exposed to other environmental factors, as appears from a copy of such report, produced herewith as Exhibit CQTS-21;

75. Despite early-response medical procedures, chemotherapy and X-ray treatments, the life expectancy of a smoker diagnosed with one of these cancers rarely exceeds a few years;

(D.3) Emphysema

76. The consumption of tobacco products manufactured and sold by the Defendants is the cause of eighty-five percent (85%) of the cases of emphysema in the Canadian population;

77. The consumption of tobacco products manufactured and sold by the Defendants is the cause of emphysema in the members of the group;

78. The inhalation of smoke causes the absorption of chemical substances which irritate the bronchi, obstruct the bronchioles and cause the pulmonary alveoli to lose their elasticity, thus causing emphysema;

79. Emphysema cannot be cured and implies permanent respiratory problems during light effort and even rest, causing an alteration of blood circulation and often heart failure leading to death;

80. In its 1995 judgment which addressed the issue of the constitutionality of the *Tobacco Products Control Act* (R.S.C. 1985 (4th supp) chapter 14), the Supreme Court of Canada found *overwhelming evidence* that the use of tobacco manufactured and sold by the defendants was a hazardous product and a principal cause of cancer.

81. On August 22, 2005, the Quebec Court of Appeal, in its judgment finding that virtually the entirety of the provisions of the *Tobacco Act* (1997, chapter 13) were *intra vires*, also ruled that:

tobacco smoke is a poison;

the use of tobacco has extremely serious consequences for health and constitutes one of the principal factors underlying several fatal diseases, while constituting a probable and direct cause of cancer, cardiovascular and pulmonary disease leading to death;

the harmful effects of tobacco on health are undisputed, and a very serious problem for society.

82. It therefore would appear that the tobacco products which are manufactured and sold by the defendants are extremely hazardous, contain no safe level of exposure, and that their consumption has important consequences for health which have no justification due to the complete absence of benefits which can be derived from its solely intended use.

83. The sale and manufacture of tobacco products by the defendants thus constitutes a fault which triggers their liability and entitles the plaintiff to claim damages arising from the consumption of tobacco by members of the group.

E) The knowledge by the defendants of the physiological effects related to the consumption of cigarettes which they manufacture and sell

84. Three questions arise with respect to the defendants and the effects related to the consumption of their products: what did they know, when did they know it and what did they do with such information?

85. The defendants have actual knowledge and, by law, are deemed to have knowledge of the devastating physiological effects arising out of consumption by members of the group of tobacco products which they manufacture and sell.

86. For a period in excess of forty years, the defendants have shared the fruits of their research and knowledge with other members of their corporate groups with respect to physiological effects arising out of consumption by members of the group of tobacco products which they manufacture and sell.

87. The presidents of the defendants have furthermore claimed in their capacity as representatives of the CTMC before the Parliamentary Committee of the Canadian House of Commons studying Bill C-204 *regulating the use of tobacco in federal workplaces and transportation carriers, and amending the Hazardous Products Act with respect to cigarette advertising*, that their corporations conducted no research in Canada and that in this regard they relied on their mother or sister companies elsewhere in the world and particularly in the United States, as more fully appears in an excerpt of their testimony filed herewith as exhibit **CQTS-22**.

E.1) Knowledge by the defendants of the effect of nicotine addiction

88. The defendants possess actual knowledge or are deemed to have knowledge of nicotine's addictive properties.

89. In a research report which probably dates from the early 1960s, C.C. Greig, who was with the BAT research and development department, wrote as follows:

> "A cigarette as a "drug" administration system for public use has very significant advantages:
>
> I) Speed
>
> Within 10 seconds of starting to smoke, nicotine is available in the brain. Before this, impact is available giving an instantaneous catch or hit, signifying to the user that the cigarette is "active". Flavour, also, is immediately perceivable to add to

> the sensation.
>
> Other "drugs" such as marijuana, amphetamines, and alcohol are slower and may be mood dependant."

as more fully appears from a copy of such report, filed herewith as exhibit **CQTS-23**.

90. On April 14, 1972, a confidential report of RJR titled *"Research Planning Memorandum On The Nature of the Tobacco Business And The Crucial Role of Nicotine Therein"*, stated as follows:

> "In a sense, the tobacco industry may be thought of as a specialized, highly ritualized and stylized segment of the pharmaceutical industry. Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects.
>
> [...]
>
> Happily for the tobacco industry, nicotine is both habituating and unique in its variety of physiological actions, hence no other active material or combination of materials provides equivalent "satisfaction"."

as more fully appears in a copy of such memorandum, filed herewith as exhibit **CQTS-24**.

91. On October 21, 1976, P.B. Smith wrote as follows:

> "The syndicates have been assured that nicotine is the major physiological 'hook' of the smoking habit. It is quite possible that future health publicity will discredit the public image of nicotine and there in hence a need to investigate whether there are other constituents which could perform a similar function as a substitute for nicotine."

as more fully appears in a copy of such document, filed herewith as exhibit **CQTS-25**.

92. In 1984, the report of a meeting of the *"Structured creativity group"* of BAT stated as follows:

> "High on the list of consumers needs is nicotine, which I believe to be the main motivator and sustainer of smoking behaviour. Without nicotine in sufficient quantity to satisfy the needs of the smoker, the smoker can (a) give up altogether, (b) cut back to a low purchase level, (c) keep switching brands."

as more fully appears in a copy of such report, filed herewith as exhibit **CQTS-26**.

93. Philip Morris described nicotine and its effects on the consumer in a confidential report authored by Barbara Reuter:

> "Different people smoke cigarettes for different reasons. But the primary reason is to deliver nicotine into their bodies. Nicotine is an alkaloid derived from the tobacco plant. It is a physiologically active nitrogen containing substances. Similar organic chemicals include nicotine, quinine, cocaine, atropine and morphine. While each of these substances can be used to affect human physiology, nicotine has a particularly broad range of influence.
>
> During the smoking act, nicotine is inhaled into the lungs in smoke, enters the bloodstream and travels to the brain in about eight to ten seconds. The nicotine alters the state of the smoker by becoming a neurotransmitter and a stimulant. Nicotine mimics alters the body's most important neurotransmitter, acetycholine (ACH), which controls heart rate and message sending within the brain."

as more fully appears in a copy of such report, filed herewith as exhibit **CQTS-27**.

94. With full knowledge of the drug dependency which is created by the absorption of nicotine through cigarette use, William L. Dunn of Philip Morris stated on March 21, 1980:

> "Our attorneys, however, will likely continue to insist upon clandestine effort in order to keep nicotine the drug in low profile."

as more fully appears in a copy of such letter, filed herewith as exhibit **CQTS-28**.

E.2) Knowledge of the compensation phenomenon present in smokers

95. The defendants have knowledge and are deemed to have knowledge of the phenomenon of compensation present in smokers and its effects on smokers' health, particulars of which are more fully set forth at paragraphs 64 to 66 of this originating motion.

96. In 1978, a BAT consultant, Dr F.J.C. Roe wrote as follows:

> "Perhaps the most important determinant of the risk to health or to a particular aspect of health is the extent to which smoke is inhaled by smokers. If so, then deeply inhaled smoke from low-tar delivery cigarettes might be more harmful than uninhaled smoked from high-tar cigarettes."

as more fully appears in a copy of such letter, filed herewith as exhibit **CQTS-29**.

E.3) Knowledge of the causal link between various types of cancer and the consumption of tobacco products

97. The defendants have knowledge and are deemed to have knowledge of the causal link between lung, larynx and throat cancers and cigarette consumption.

98. On November 15, 1961, a research report of Philip Morris thus identified evidence

linking tobacco with cancer:

> ***"Evidence linking cancer and tobacco***
>
> Based on two main points
>
> Statistical evidence that certain diseases are more prevalent among smokers than non-smokers.
>
> Lung Cancer
>
> Bladder cancer
>
> Cardiovascular diseases
>
> These associations suggest that smoking may be a causative factor.
>
> Physiological tests in which animals treated with smoke condensates, extracts, or compounds therefrom, suffer from increased tumor frequency. (...)"

as more fully appears in a copy of such research report, filed herewith as exhibit **CQTS-30**.

99. This research report also identified carcinogenic substances contained in tobacco smoke and classified them under the titles "Relative Potency of Carcinogens to the skin of Mice", "Partial List of Compounds in Cigarettes Smoke also Identified as Carcinogens" and "Cancer Promoting Agents in Cigarette Smoke".

100. In 1962, the RJR research report set forth the following with respect to the causal relationship between the consumption of tobacco products and lung cancer:

> "The statistical data from the lung cancer-smoking studies are almost universally accepted. The majority of scientists accept these data as indicative of a either a high degree of association or a cause-and-effect relationship between lung cancer and smoking."

as more fully appears in a copy of such report, filed herewith as exhibit **CQTS-31**.

101. A BAT research report published in 1969, titled "The Effects of Smoking" recognised that the physiological effects resulting from the consumption of tobacco products were not only bad for humans but were of a nature to cause humans significant harm:

> "Smoking has psychological and physiological effects; the psychological effects are mainly acceptable and desirable, but the physiological effects are more varied. Some are definitely bad and harmful.(...)"

as more fully appears in a copy of such report, filed herewith as exhibit **CQTS-32**.

102. On March 21, 1980, a Philip Morris research report thus qualified the physiological effects of tobacco smoke:

> "The acute, transient, short-lived effects of nicotine upon a physiological system (among which are those effects or that effect sought by the smoker) are wholly independent of those alleged, cumulative, long-term contributions of smoke compounds to disease processes"

as more fully appears in a copy of such report, already disclosed as exhibit **CQTS-28**.

103. In 1982, following the deposit by the Surgeon General of the United States of his report titled "Smoking and Health", the vice-president of research at B&W made the following comments to his director:

> "Let's face the facts:
> 1. Cigarette smoke is biologically active.
> A. Nicotine is a potent pharmacological agent. Every toxicologist, physiologist, medical doctor and most chemists know that. It's not a secret.
> B. Cigarette smoke condensate applied to the backs of mice cause tumors.
> C. Hydrogen cyanide is a potent inhibitor of cytochrome oxidase – a crucial enzyme in the energy metabolism of all cells.
> D. Oxides of nitrogen are important in nitrosamine formation. Nitrosamines as a class are potent carcinogens.
> E. Tobacco-specific nonvolatile nitrosamines are present in significant amounts in cigarette smoke.
> F. Acrolein is a potent eye irritant and is very toxic to cells. Acrolein is in cigarette smoke.
> G. Polonium-210 is present in cigarette smoke.
> H. We know very little about the biological activity of sidestream smoke."

as more fully appears in a copy of the internal memorandum, filed herewith as exhibit **CQTS-33**.

104. The defendants intentionally acted in concert to block disclosure of these facts, while denying, contradicting and trivialising research results produced by the scientific community, thereby committing numerous faults which trigger their liability and entitle the plaintiff to claim compensatory, consequential and punitive damages arising out of the consumption by members of the group of tobacco products which they manufacture and sell.

F) <u>The manipulation by the defendants of cigarettes which they manufacture and sell</u>

105. Notwithstanding this knowledge and with wanton disregard for the physiological consequences that consumption of their tobacco products entail for members of the group, the defendants manipulated and continue to manipulate cigarettes which they

manufacture and sell in order to:

- Ensure that tobacco entering into their production comes from leaves of the tobacco plant which have the highest concentration of nicotine;
- Ensure that a high level of nicotine is maintained by the use of "reconstituted tobacco";
- Maintain a high level of nicotine, notwithstanding the decrease in the quantity of tobacco which may enter into manufacture (so-called "elastic" cigarette);

thus ensuring that the addiction of consumers continues while affecting their physiological condition.

106. However, in an internal memorandum of BAT dated 1976, Dr Sydney Green stated as follows:

> "(4) In view of the known toxicity and the strong association of smoking and disease I believe any attempt to increase the smoking habit is irresponsible."

copy of such letter being filed herewith as exhibit **CQTS-34**.

107. Furthermore, and without in any way exonerating liability which arises out of other acts of negligence and breaches of duty set forth hereunder, the defendants have failed to attempt to develop and market safer cigarettes which are designed to decrease the risks and hazards associated with the consumption of tobacco products by members of the group.

108. This fact is inter alia demonstrated by a letter dated December 18, 1986, addressed by the chairman of the board of BAT to the chairman and chief operating officer of Imasco, further to which he stated the following:

> "You will remember that when we last met in Montreal we spoke about the approach you believe should be taken in fundamental research to produce improve cigarette.
>
> I have reviewed the position with my colleagues. Since there is such a wide discrepancy between your approach and that of the rest of the group, I thought that I should write to explain why it is that I cannot support your contention that we should give a higher priority to projects aimed at developing a "safe" cigarette (as perceived by those who claim our current product is "unsafe") by either eliminating, or at least reducing to acceptable level, all components claimed by our critics to be carcinogenic. (...)
>
> The BAT view is thus wider than that encompassed in the Imasco approach. Furthermore, I believe there are other important objections inherent in your approach.

> Firstly, your objective is probably unattainable – no matter what can be done in chemical terms (and I believe this to be very limited) there will continue to be strong vocal factions that seek to denigrate the product and they are likely to continue to move the goal posts away from whatever initial target we were able to achieve.
>
> A second practical objection is that in attempting to develop a "safe" cigarette you are, by implication in danger of being interpreted as accepting that the current product is "unsafe" and this is not a position that I think we should take.
>
> As you can see, there is no disagreement on the importance that we all place on the need for fundamental research leading to results which will have a practical impact on the acceptability of our product.
>
> Where we part company from the Imasco approach is that we do not believe that there is a sufficiently high chance of a successful outcome to justify committing the very large scale of resources that would be necessary to pursue the direct but arguably over-simplistic approach which your people are proposing. This is why I cannot support this line of research."

copy of which letter being filed herewith as exhibit **CQTS-35**.

109. As a result of their acts and omissions, the defendants are liable for faults which entitle the plaintiff to claim compensatory, consequential and punitive damages arising out of the use by members of the group of tobacco products manufactured and sold by the defendants.

G) <u>The defendants initiated and nurtured a scientific controversy while claiming alleged benefits related to the consumption of cigarettes which they manufacture and sell</u>

110. The defendants, in concert with other related or affiliated corporations which form part of their corporate groups, have created and maintain on an ongoing basis what they qualify as "scientific controversy" with respect to the impact on the health of members of the group related to the consumption of cigarettes which they manufacture and sell.

111. They developed this strategy by pooling their scientific resources with those of their marketing consultants and their legal advisers.

112. Within the framework of the development and implementation of this strategy:

- they *inter alia* prioritised research into the origin of diseases rather than on the components of tobacco and tobacco smoke and their consequences on health of members of the group, as more fully appears in the exhibit filed herewith as exhibit **CQTS-36**;

- they initiated research into alleged "benefits" which may arise out of the

> use of their products and even publicly discussed and raised them, whereas they remained silent about the devastating effects of tobacco use, which were already well-known to them, as more fully appears in the evidence already disclosed as exhibit CQTS-35.

113. Furthermore, as of 1968, the vice-president (and future president) of Brown & Williamson Tobacco Corporation, the sister corporation of the respondent Imperial Tobacco Limited, discussed research orientation in the following terms:

> "(...) The question of orientation provoked from Janet Brown a well reasoned argument in defense of the long established policy of CTR, carried out through SAB, to "research the disease" as opposed to researching questions more directly related to tobacco. With apologies to Janet if I misstate her position, the argument seems to be that by operating primarily in the field of research of the disease we do at least two useful things:
>
> First, we maintain the position that the existing evidence of a relationship between the use of tobacco and health is inadequate to justify research more closely related to tobacco. And
>
> Secondly, that the study of the disease keeps constantly alive the argument that, until basic knowledge of the disease itself is further advanced, it is scientifically inappropriate to devote the major effort to tobacco (...)"

as more fully appears in the letter already filed as exhibit CQTS-36.

114. In 1984, the chairman of the board of BAT wrote to the chairman and chief operating officer of Imasco with a view to publicly broaching the idea that smoking constitutes an acceptable practice based on what he nevertheless personally acknowledged as only "the so-called benefits of smoking":

> "The BAT objective is and should be to make the whole subject of smoking <u>acceptable</u> to the authorities and to the public at large since this is the real challenge facing the industry. (...) (their underlining)
>
> As a part of an integrated approach to the acceptability of smoking, we are also studying the so-called "benefits of smoking". We are supporting research on the pharmacological effects of nicotine (the key element of our product which, fortunately, has few adversaries). The beneficial associations of smoking not only with specific diseases such as Parkinson's disease, but with the widespread disorders of senile dementia or Alzheimer's disease are being monitored."

as more fully appears in the letter already filed as exhibit CQTS-35.

115. The collective pooling of resources to implement this strategy is amply demonstrated by the testimony of the president of each of the defendants, also acting as representatives of

the CTMC, before the Isabelle Commission, which was charged with investigating tobacco advertising and the scope of Bills C-34, C-69 and C-70, filed herewith as exhibit CQTS-37.

116. As a result of their acts and omissions, the defendants are liable for faults which entitle the plaintiff to claim compensatory, consequential and punitive damages arising out of the use by members of the group of tobacco products manufactured and sold by the defendants.

H) <u>The joint creation of a systematic policy of non-disclosure of risks and dangers</u>

117. The defendants agreed in concert to block disclosure of information which they possessed concerning the dangers and risks related to the consumption of their tobacco products by members of the group.

118. In a March 1984 memorandum intended for its member companies (including the defendant Imperial Tobacco Limited), the BAT group furthermore published the policy which was to be followed by these companies with respect to public statements in relation to the risks of illness caused by tobacco:

> "The issue is controversial and there is no case for either condemning or encouraging smoking. It may be responsible for the alleged smoking related diseases or it may not. No conclusive scientific evidence has been advanced and the statistical association does not amount to proof of cause and effect. Thus a genuine scientific controversy exists.
>
> The Group's position is that causation has not been proved and that we do not ourselves make health claims for tobacco products. Consequently the Group cannot participate in any campaigns stressing the benefits of a moderate level of cigarette consumption, of cigarettes with low tar and/or nicotine deliveries or any other positive aspects of smoking except those concerned with the dissemination of objective information and the right of individuals to choose whether or not they smoke.
>
> Non-tobacco companies in the Group must particularly beware of any commercial activities or conduct which could be construed as discrimination against tobacco or tobacco manufacturers (whether or not involving companies within the group), since this could adversely affect the position of Brown & Williamson in current US product liability litigation in the US (...)"

copy of such memorandum being filed herewith as exhibit **CQTS-38**.

119. An identical policy was applied by JTI. In a document brief for representatives responsible for communicating the corporate position on the issue of health risks and addiction, one reads as follows:

> "WHY DON'T YOU WARN CONSUMERS THAT TOBACCO

IS ADDICTIVE?

• There is no scientific agreement on a definition as to what degree of use constitutes addiction, nor on what addiction is.

• Many consumers in Canada, as elsewhere, each year give up smoking. This is not consistent with any theory of addiction. (See ADDICTION)"

copy of such document being filed herewith as exhibit **CQTS-39**.

120. The joint implementation of this systematic policy of non-disclosure by the defendants furthermore led them to refuse to display the warning imposed by Bill C-51, known as the Tobacco Products Control Act R.S.C. 1985 (4th supplement), chapter 14, as the defendants then raised the right "to only express what we wish to express and not to say what we do not want to say" [Translation] with respect to the risks and dangers of their products for the health of those men and women consuming them.

121. Thus, for the last fifty (50) years, the defendants have refused to disclose the existence of these risks and dangers. At the same time, during the authorisation motion, they imputed to members of the group the same knowledge of risks and dangers in order to attempt to limit their liability in this regard.

122. This position of the defendants is all the more astonishing when one considers that during the same period, they trivialised and denied the existence of any such risks and dangers, therefore imputing to members of the group knowledge which they claimed not to possess themselves.

123. As a result of their acts and omissions, the defendants are liable for faults which entitle the plaintiff to claim compensatory, consequential and punitive damages arising out of the use by members of the group of tobacco products manufactured and sold by the defendants.

I) <u>The creation of a systematic joint policy of trivialisation and negation of risks and dangers</u>

124. Notwithstanding the knowledge which they have possessed for a period in excess of fifty (50) years relating to the harmful effects of tobacco consumption, the manipulation of their products in order to ensure that consumers remain addicted, the creation of scientific controversy and a systematic policy of non-disclosure, the defendants have publicly denied and occasionally ridiculed the devastating effects of consumption by members of the group of products which they manufacture and sell.

125. In 1969, before the Isabelle Commission, the president of the respondent Imperial Tobacco Limited, also speaking on behalf of the CTMC, testified as follows with respect to the effects related to consumption by members of the group of products manufactured and sold by the defendants:

"**M. Paré**: You have seen how people have attempted to blame cigarettes for the ills which statistics appear to link to them (...)

"**M. Paré**: It certainly doesn't render service to thousands of smokers to continually assault them with some of the extreme and gratuitous assertions concerning the so-called harmful effects of tobacco.

"**M. Paré**: I am of the view that the use of any consumer product affects certain people who can not and should not use the product in question. It doesn't matter whether we are speaking here of spinach or turnips or anything. I think that that should also apply to tobacco.

"**M. Robinson**: Do you then acknowledge that the use of tobacco may be harmful to health?

"**M. Paré**: I believe that is quite different from what I said. If we take people who should not eat carrots and who eat them, we could then describe carrots as being harmful to health. In this context, I am in agreement with what you say.

"**M. Robinson**: I believe that you have taken this statement out of context? We are not speaking of carrots today, we are speaking of tobacco.

"**M. Paré**: In that case, the answer is no, if you like..."

as more fully appears in a copy of transcripts already filed as exhibit CQTS-37.

126. Eighteen years (18) later, in 1987, corporate officers of the defendants who also appeared as representatives of the CTMC before the Legislative Committee of the Canada House of Commons studying Bill C-204 governing the use of tobacco in federal workplaces and public transport vehicles and amending the Hazardous Products Act with respect to cigarette advertising, at that time denied inter alia:

- that cigarettes are hazardous for the health of consumers:

  "Ms McDonald: Mr Fennell, is there a cigarette which is not hazardous with low tar and nicotine levels? Once again, is there a cigarette which is not hazardous?

  Mr P.J. Fennell **[president Rothman, Bensen & Hedges]**: Ms McDonald, I never said there was a hazardous cigarette, so I am not about to say that there is a cigarette which is not hazardous.

Ms McDonald: So, no difference.

Mr P.J. Fennell: Excuse me, what are you talking about?

Ms McDonald: It makes no difference whether people smoke cigarettes with high or low tar levels. None of them are hazardous, right?

Mr P.J. Fennell: People smoke cigarettes because they like them. Some prefer cigarettes with high tar content and others prefer a lower tar level. It's a personal choice.

Ms McDonald: And there are no consequences for health. They're all equally hazardous or not hazardous.

Mr P.J. Fennell: I think I have already responded to your questions on that point."

- that smoking can be harmful for children:

"Ms McDonald: The product which you sell is the cause of a number of conditions and malformations.

Mr Hoult **[president of RJR McDonald Inc.]**: That's your assertion.

Ms McDonald: We have the evidence and it is well known. Children whose parents smoke have twice as many respiratory ailments as others. Mr Hoult, do you not think that when you smoke at home that you're running a risk for children?

Mr Hoult: My answer is the same as what I gave with respect to other associations. Epidemiological research which has been carried out, and Dr Witorsch himself has observed this, demonstrates that very often verifications have not been made properly and that the results are doubtful.

Ms McDonald: In your view then, not a single epidemiological study confirms this result.

Mr Hoult: In fact there is no epidemiological study which proves a direct cause and effect relationship.

Ms McDonald: Let's come back to that point. According to you, the cause and effect relationship has to be proved absolutely when we know very well that it would be perfectly immoral to force young children to breathe tobacco smoke over long periods of time.

Mr Hoult: I think there is a better way to approach this. Outside of epidemiological studies or these extreme positions, I think that

science gives us better tools in order to respond to your question. If we had been able to prove that certain elements contained in tobacco smoke were directly responsible for certain illnesses, that certainly would have been confirmed by clinical studies which were carried out on animals. This has never been the case.

(...)

Mr Hoult: No. We also consider this question as a personal choice. As long as a young person has not attained the age of majority, he is not sufficiently mature to take these decisions.

Ms McDonald: But it doesn't appear unhealthy to you that children smoke?

Mr Hoult: We don't have sufficient evidence to say whether it's healthy or unhealthy. We have set forth our position on that point at length.

Ms McDonald: Mr Fennell, when children smoke, is it good for their health?

Mr P.J. Fennell: It is illegal for children who are less than 18 years old to smoke.

Ms McDonald: Is it healthy or unhealthy for children to smoke?

Mr P.J. Fennell: I don't have any opinion on that; it's illegal, as the Government said."

- that smoking can be harmful for pregnant women:

"Ms McDonald: (...)

Do you think that pregnant women should smoke? Doctors have proved to us that in addition to the risks to the health of the mother, the foetus also suffers harmful effects. Mr Mercier, do you think that pregnant women should smoke?

Mr Mercer **[president CTMC and president of Imperial Tobacco Ltd]**: Generally, if a smoker has doubts, she should seek advice and if her physician advises her not to smoke, I would recommend that she immediately stop. That has always been our position.

Ms McDonald: You are therefore not going to respond to my question. Should pregnant women smoke?

Mr Mercier: I have already responded.

Ms McDonald: Is it bad for pregnant women to smoke, either for

themselves or for the foetus?

Mr Mercier: I'm not a doctor. It's up to doctors to rule on that and I would recommend to pregnant women that they seek the opinion of their physician.

Ms McDonald: Mr Fennell.

Mr P.J. Fennell: Doctors consulted are in fact in the best position to advise pregnant women. As I've already said, the Canadian opinion is generally up to date on the problems which are attributed to tobacco consumption. And women smokers themselves believe there is a causal relationship.

Ms McDonald: Are you convinced of it, Mr Fennell?

Mr P.J. Fennell: No, that's not what I think.

Ms McDonald: You therefore do not think that there is any risk for a pregnant woman or her foetus?

Mr P.J. Fennell: No, I don't think so.

Ms McDonald: Mr Hoult.

Mr Hoult: Given the criteria that we use ourselves, I have never had any formal evidence in my hands. I therefore would respond in the same manner. Besides, it's a medical question which I cannot respond to and it is up to the doctor to advise his patient."

- that tobacco is the cause of a range of diseases which annually cause the death of thousands of Canadians:

"Ms McDonald: Your factum challenges numerous studies, but you have not disclosed to us your deep beliefs. I would like you to publicly state whether you agree with this. The Canadian Medical Association and the Ministry of Health and Welfare are of the view that 35,000 Canadian smokers die each year from tobacco-related diseases. Would you agree with that, Mr Hoult?

Mr Hoult: No.

Ms McDonald: In that case, how many?

Mr Hoult: Nobody can say on the basis of currently available data.

Ms McDonald: Are there smokers who die of diseases related to tobacco? Is there at least one?

Mr Hoult: Nobody can say. The testimony which has been

> presented today and on earlier occasions demonstrates that studies which are relied upon are only statistics. No clinical research allows for the conclusion that tobacco smoke causes disease. So that's for the clinical result.
>
> Ms McDonald: Mr Fennell, how many smokers die each year in Canada?
>
> Mr P.J. Fennell: I already responded to this question when Ms Copps put it to me. I gave her a much lengthier response than this. Science has not proved that there is a causal relationship between tobacco and disease. We do however recognise that scientific reports disclose a statistical relationship between tobacco and disease. It would be a good thing that scientific studies continue in order to determine the truth."

as more fully appears from the transcript of statements already filed as exhibit CQTS-22.

127. During the debate with respect to the constitutionality of the *Tobacco Act* (1997, chapter 13) that the defendants initiated notwithstanding their position in 1988 during the constitutional challenge to the *Tobacco Products Control Act* (R.S.C. 1985 (4th supplement) chapter 14), the defendants refused to admit the following:

> "6. Tobacco consumption is widespread in Canadian society and it poses serious risks to the health of a great number of Canadians;
>
> 7. Overwhelming evidence shows that tobacco use is a principal cause of deadly cancers, heart disease and lung disease;
>
> 8. Smoking causes the death of approximately 40,000 Canadians annually. It is responsible for one out of every five deaths in Canada;
>
> 9. Passive smoking (exposure to environmental tobacco smoke) increases the risk of lung cancer in non-smokers. It also increases the risk of heart disease in non-smokers;
>
> 10. Medical studies show that tobacco product consumption and exposure to tobacco smoke by pregnant women are injurious to foetuses;
>
> 11. Until a few years ago, it was generally believed that certain tobacco products, designed to deliver to the smoker lower levels of nicotine and tar, were less harmful to the health of their users. In fact, all tobacco products, including smokeless tobacco and so-called "light" tobacco products, are very harmful to health;
>
> 12. The pharmacological and behavioral processes that

underlie tobacco addiction are similar to those of other drugs, such as heroin and cocaine. Many scientists agree that nicotine found in tobacco is a powerful addictive drug;

13. Addictive properties of nicotine mean that once people have started to smoke regularly, it is very difficult for the large majority of them to stop;

14. Most of the Canadian population that consumes tobacco products is addicted to them;

15. Approximately 6.9 million Canadians, that is, 31% of the population aged 15 years and over, consume tobacco products on a regular basis;

16. The majority of Canadian tobacco smokers start smoking regularly in their teens;"

as more fully appears in the document titled *"List of Admissions prepared by Defendant and submitted to Plaintiffs for their acceptation, 29 May 1997"* filed herewith as exhibit **CQTS-40**.

128. During the same constitutional challenge, the defendants, while maintaining the scientific controversy that they had initiated and maintained, finally admitted the causal relationship between cancers, cardiovascular disease,

pulmonary disease and tobacco in the following terms:

"(i) that at present approximately 30% of the population of Canada are smokers;

(ii) that epidemiological studies report a statistical correlation between smoking and other factors and a number of diseases and conditions including those mentioned generally in paragraph 7 of Defendant's List of Admissions;

(iii) that the epidemiological studies referred to above, notwithstanding that they do not explain the causation of any disease, provide a sufficient basis4 in law

a) for treating the incidence of smoking as a public health issue;

b) for legislation imposing reasonable limits on the freedom of commercial expression for the purpose of reducing the incidence of smoking provided that the means adopted in such legislation are justifiable pursuant to section 1 of the Charter."

as more fully appears in the document titled *"Admissions by Plaintiffs"* filed herewith as exhibit **CQTS-41**.

129. During pleadings on the motion for authorisation held in November 2004, the defendants, solely for the purpose of denying the existence of joint questions, and with a view to having the motion for authorisation dismissed, made the following judicial admissions:

> "In fact, nobody, including the respondents, disputes that, for some people, smoking cigarettes may lead to addiction and may cause some, or to be clear, the diseases referred to in the proceedings of the Counsel."
>
> ---
>
> "And in particular paragraph 31 of the judgment of the Supreme Court of Canada, which is towards the middle of this page, where the Honourable Mr Justice La Forest, dissenting, stated as follows:
>
> > "[31] Overwhelming evidence was introduced at trial that tobacco use is a...and I emphasize "a"... principal cause of deadly cancers, heart disease and lung disease. In our day and age this conclusion has become almost a truism.
> >
> > My Lord, it is unnecessary to mobilise judicial resources to rule on a truism. Nor is it necessary to use the court's time to rule on an issue which is neither controversial nor disputed. This applies both to the diseases referred to in Counsel's pleadings and the issue of addiction."
>
> ---

as more fully appears in the excerpts of pleadings filed herewith as exhibit **CQTS-42**.

130. These opportunistic judicial admissions, however, are based on the very research which they have trivialised, ignored, denied and blocked from disclosure over the last fifty (50) years.

131. As a result of the foregoing acts and omissions, the defendants are liable for faults which entitle the plaintiff to claim compensatory, consequential and punitive damages arising out of the use by members of the group of tobacco products manufactured and sold by the defendants.

J) <u>The defendants have created marketing strategies and developed an advertising counter-speech campaign which, on occasion, has specifically targeted young people</u>

132. In addition to the knowledge, the systematic non-disclosure, the trivialisation and denials of physiological effects related to the consumption of tobacco products which they manufacture and sell, the defendants, through the use of marketing strategies, have disseminated false and misleading information with respect to their products and targeted

young people, thus committing faults which entitle the plaintiff to claim damages suffered by members of the group in the same manner as in the case of other faults already mentioned herein.

133. The internal documents of the defendants demonstrate that they have orchestrated and continue to orchestrate advertising campaigns or have deployed marketing strategies designed to identify their products with prestige, wealth, youth, vitality, freedom and independence of spirit, and thereby to convince new generations to join the ranks of smokers, as will be demonstrated during the hearing and as more fully appears from samples of advertising of the defendants filed in a bundle herewith as exhibit CQTS-43.

134. These advertising and marketing campaigns amount to false representation and misrepresentation which gives rise to the liability of the defendants in favour of members of the group.

135. The defendants used a marketing approach which identifies certain target groups ("segments"), including for example women, youths (the "starters") or smokers concerned about the effects of cigarettes on their health (the "quitters").

136. These strategies had and continue to have the purpose of convincing consumers to start smoking and to dissuade smokers from quitting smoking and not only to convince smokers to change brands.

137. For example, an internal document of RBH titled Project 21, dated June 1995, mentions the following with respect to desirable characteristics for a cigarette pack:

> "DESIRED IMAGE CHANGES The overriding desire is for a proposition which generates more social acceptability"
>
> -"More upscale This image would provide more social "status" to the smoker *"less blue collar, more elegant, more white collar, sophisticated, worldly, distinctive, discerning"*
>
> -More sociable more friendly, less pretentious, more fun.
>
> -More considerate... "nicer, more caring, cleaner, healthier"
>
> -Less harmful a general sense of healthfulness and/or a healthy lifestyle
>
> -More contemporary.. modern, cool, youthful and younger..
>
> -Cleaner less dirty ..both in physical (less)"

as more fully appears from a copy of this marketing plan, filed herewith as exhibit **CQTS-44**.

138. However, any attempt whatsoever to convince anyone to fall into a drug dependency trap such as cigarettes is negligent because it promotes a product which is useless, toxic and often mortal and thereby per se a civil wrong.

139. Furthermore, any advertising or marketing strategy which has the purpose or effect of leading consumers to believe that certain cigarette brands are less harmful for health, is misleading and a civil wrong, because the defendants were well aware that no cigarette brand is safer than another.

140. In this regard, the use of terms such as "light", "mild", "ultra light", "ultra mild", "smooth" or other similar expressions is misleading, as is more fully alleged hereinafter as section J.2) of this motion.

141. Any advertising or marketing strategy which associates cigarettes with freedom and independence of spirit is misleading and a civil wrong because cigarettes do not represent freedom but on the contrary are a dangerous form of enslavement for its victims.

J.1) The youth market

142. In a marketing plan dated 1985 and prepared by ITL, youths are described as "fish" who have to be targeted:

> "2-PRECISION/PRODUCTIVITY
>
> We have to continue to "fish where the fish are". That means refining our store segmentation approach (via store profiles, etc.). For the time being, we will agree that there are, at least two stores types
>
> -Type A where young people, particularly young males tend to buy packages of predominantly regular length versions of products at 9 mgs, and
>
> -Others where the above group does not "dominate".
>
> 6-NEW, NON-TRADITIONAL MEDIA
>
> What we are talking about is having our imagery reach those difficult to reach, non-reading young people that frequent malls in an impactful, involving first-class way that makes them, us, mall managers, etc. happy.
>
> Wilmat has called together a group of us to meet regularly on this whole area of non-traditional media and has agreed, in principle, that one person and a budget should be assigned to it."

as more fully appears from a copy of this marketing plan, filed herewith as exhibit **CQTS-45**.

143. In a document dated 1971, issued by ITL, titled Matinee Marketing Plan, the following statement was made:

> "Young smokers represent the major opportunity group for the cigarette industry. We should therefore determine their attitudes to smoking and health and how this might change over time."

as more fully appears in a copy of this marketed plan, filed herewith as exhibit **CQTS-46**.

144. A document dated March 25, 1977 prepared by Spitzer, Mills & Bates for ITL titled The Player's Family, A Working Paper, stated inter alia:

> "POSITIONAL STATEMENT (Dec. 1976)
>
> "To position Player's Filter as the brand with the greatest relevant appeal to younger, modern smokers, by being part of a desirable natural lifestyle".
>
> The basis of appeal is:
>
> Natural social acceptability of the brand in the peer group environment.
>
> Strength of taste, provided that the fullness of taste is perceived as slightly milder than Export A; thus building on historical perceptions of Player's Filter being milder than Export A, particularly among non-users.
>
> Rationale
>
> By younger modern smokers, we mean those people ranging from starters of the smoking habit up to and through the seeking and setting of their independent adult lifestyle. (...)
>
> 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 (...)"

as more fully appears from a copy of this market plan, filed herewith as exhibit **CQTS-47**.

145. In 1977, ITL received a report titled "Project sixteen" from its marketing consultants, which principally aimed to identify marketing techniques which would prove most effective to convince young people to smoke:

> "(...) Around the age of 11 to 13, there is peer pressure exerted by smokers on non smokers that amounts to taunting and goading of the latter to get them to smoke.(...)
>
> More important reasons for this attraction are the "forbidden fruits" aspects of cigarettes. The adolescent seeks to display his new urge for independence with a symbol, and cigarettes are

> such a symbol since they are associated with adulthood and at the same time adults seek to deny them to the young. By deliberately flaunting out this denial, the adolescent proclaims his break with childhood, at least to his peers.(...)
>
> Serious efforts to learn to smoke occur between ages 12 and 13 in most case. Playful experimentations, especially by children from smoking homes, can take place as early as 5 years of age, but most often around 7 or 8.
>
> (...) If successfully hidden, the young smoker will announce his smoking around the age of 15 or 16.(...)
>
> 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.(...)
>
> Many claim they wish to quit, but it is doubtful if many will take action on their desire.
>
> Those who had tried quitting were not successful, though any that had been would not have been part of this study.(...)
>
> The health warning clause is perceived as an intrusion by government on individual rights, and a sham since governments make vast sums on tobacco tax, and alcohol, also perceived as dangerous, bears no warnings clause.
>
> The "avoid inhaling" words are singled out for the strongest derision since smoking a cigarette in this way is seen as a waste and, in their word, "goofy"."

as more fully appears from a copy of this marketing plan, filed herewith as exhibit **CQTS-48**.

146. Furthermore, an ITL "media plan" titled Fiscal '81 National Media Plan, states that certain brands should target young people who are younger than 24 years old. This target group is more specifically described in the following manner:

"TARGET GROUP	Weight
Males 12-24 years	1.0
Females 12-17	0.5
Females 18-24	0.4
Male smokers 25-34	0.8
Female smokers 25-34	0.3

as more fully appears in a copy of this document, filed herewith as exhibit **CQTS-49**.

147. In a marketing report prepared by ITL consultants, titled "Project Minus/Plus" once again the marketing strategy is focused on young people:

> "(...) Serious smoking mainly starts in the 14 - 16 age range. It is entirely social in nature, and is heavily dependant on actual or perceived peer group pressure and the desire to conform.(...)
>
> Starters no longer disbelieved the danger of smoking, but they almost universally assume these risks will not apply to themselves because they will not become addicted.
>
> Once addiction does take place, it becomes necessary for the smoker to make peace with the accepted hazards. This is done by a wide range of rationalizations."

as more fully appears in a copy of this marketing plan, filed herewith as exhibit **CQTS-50**.

148. Furthermore, an internal ITL study, dated August 1991 and titled Switching Analysis, concludes that:

> "[...]
>
> Although switchers of all ages represent opportunity for new business, targeting young consumers continues to be of strategic importance in terms of future growth because of their switching behaviour, twice the rate of total smokers."

as more fully appears in a copy of this study, filed herewith as exhibit **CQTS-51**.

149. In a document dated 1997 produced by RBH and titled Strategic Plan 1997/1998, the following is indicated:

> "Demographie Shifts/Young Adult Market
>
> •RBH must be ever mindful of the changing demographic profile of the Canadian marketplace including the increasing percent of immigrants and the impact that these changes have on the demand for product and brands. We must plan/prepare not only for today but for the market of the future.
>
> •Identify products and activities which will strengthen RBH's position among the key 19-24 age group to gain a much larger share of starters
>
> [...]
>
> -although the key 15-19 age group is a must for RBH there are other bigger volume groups that we cannot ignore for example:

(...)"

as more fully appears in a copy of this study, filed herewith as exhibit **CQTS-52**.

150. The marketing strategies of the defendants have never changed with respect to courting minors, but the vocabulary used has been refined since these strategies have been made public.

151. Target groups which include minors are no longer directly named. The 12-17 year age group or the 15-24 age group are now referred to as the "under 24 age group" and new smokers or "starters" now officially form part of the 19-24 year age group.

152. The marketing plan of the defendant RBH for the years 1996-1997 is an example which illustrates this policy change, but nevertheless reveals the ongoing objective of courting minors, in conjunction with the aim of associating their poison to prestige, wealth, youth, vitality, freedom and independence, as more fully appears in a copy of this plan, filed herewith as exhibit CQTS-53.

153. In this document, the strengths of ITL are also described in the following manner:

> "•Owns the 18-24 age segment with 81 % of consumers in this segment smoking an Imperial brand.
> •Owns the 14-17 age segment with over 90% of consumers smoking duMaurier or Player's.
> •Representation across all age groups: all segments."

154. This same document described the new design of the duMaurier packs:

> "BIGGEST NEWS":
>
> •Pack appears designed to offset the current health warning."

J.2) The misleading nature of cigarettes referred to as "light" and "mild"

155. The defendants have prepared advertising campaigns and launched products aiming to reassure smokers and encourage them to continue smoking.

156. Some of these campaigns market cigarettes labelled as "light" or "mild", which have the purpose of attracting consumers who wish to stop smoking, and are marketed with a specific view to preventing these smokers from quitting their consumption.

157. By switching to a product which claims to contain lower nicotine and less tar, the consumer is led to believe that these products are safer.

158. The defendants are well aware of the advantage they derive from light and mild cigarettes. This appears for example in a report authored by Eli Seggev Ph.D., president of the firm Marketing Systems Inc. of New York dated August 26, 1982 and addressed to ITL:

> "PERCEPTIONS OF LOW-TAR BRANDS

> -LTN's allow consumers to continue to smoke under social duress. As a category, low-tar brands are seen as a means to yield to health considerations, social pressures and personal guilt feelings.
>
> -LTN's smokers can be grouped into two categories: those who want to continue to enjoy smoking and those who are trying to give it up.
>
> -The most important feature of this market is that smokers perceive the low-tar smoking experience as involving giving up part of the enjoyment of smoking while, in fact, they wished that low-tar, i.e., reduction of health hazard, be an added benefit.
>
> [...]
>
> 1. Benefits sought
>
> The reasons mentioned for smoking LTN cigarettes, all of which involve the low tar feature, may be classified as follows:
>
> 1. Health considerations, i.e, coughing, etc;
>
> 2. concern about safety of cigarette smoking due to publicity and articles;
>
> 3. pressure to smoke safer cigarettes exercised by relatives and friends;
>
> 4. attempts to give up smoking altogether."

as more fully appears in a copy of the report, filed herewith as exhibit **CQTS-54**.

159. In the same manner, an undated document drafted after 1985 which is titled Response of the market and of Imperial Tobacco to the smoking and health environment, reads as follows:

> "Marketing Opportunities
>
> Charts A and B show that the four brands containing less than 6 mgs. of tar now hold a combined 4.5% market share. We have evidence of virtually no quitting among smokers of those 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.
>
> [Our underlining]"

as more fully appears in a copy of the study, filed herewith as exhibit **CQTS-55**.

160. The motivation to reduce nicotine and tar levels is summarised in the instructions which BAT gave to its subsidiaries in 1979:

> "In view of mounting concern and action on health issues by Governments and international organizations such as WHO, UNCTAD, etc. and, indeed, likely competitive response, it is essential that our export and locally manufactured products should yield acceptable deliveries both in the eyes of public organisations, and in the interest of reassuring smokers themselves."

as more fully appears in a copy of the study, filed herewith as exhibit **CQTS-56**.

161. However, as mentioned at paragraphs 64, 65, 66, 95 and 96, the defendants know and are presumed to know that the conduct of most smokers will be such that they will succeed in extracting their personal dose of nicotine from these cigarettes referred to as "light" or "mild" by way of the phenomenon known as compensation, thereby triggering physiological damage which is just as harmful as in the case of cigarettes which are not labelled in this manner.

162. Thus, the defendants are well aware that cigarettes referred to as "light" or "mild" are in no way safer than those which contain strong levels of tar, but nevertheless allow people to believe the contrary and deliberately use this perception to mislead consumers, thereby affecting their condition to the same degree.

K) Damages

K.1) Collective recovery of non-pecuniary damages and punitive damages (Articles 1031 to 1036 C.p.c.)

163. On the basis of evidence which proves with sufficient particulars the aggregate amount of claims of members, the CQTS and the designated member are entitled to seek collective recovery of non-pecuniary damages for loss of life enjoyment, suffering and physical and moral pain, shortened life expectancy, suffering, inconvenience and hardship, which they have incurred or will occur after having been diagnosed with any of the illnesses referred to hereunder, in connection with the faults committed by the defendants, including punitive damages for illicit and intentional infringement of rights guaranteed under the Quebec Human Rights Charter (R.S.Q. chapter C-12) and for misleading advertising contrary to the *Consumer Protection Act* (R.S.Q. chapter P-40.1).

164. The average annual number of new cases of persons who are victims of cancer of the lung, of the throat (including the oropharynx, the nasopharynx, the hypopharynx and the pharynx), of the larynx and emphysema linked with the tobacco consumption in Quebec is in the order of:

DISEASE	ANNUAL AVERAGE OF CANCER CASES
Lung cancer	5,082
Throat cancer	82
Larynx cancer	129
Emphysema	1,842

165. Thus, by taking an annual average of 5,000 new cases of persons who suffer from lung cancer, 80 new cases of persons who are victims of throat cancer, 125 new cases of persons who are victims of cancer of the larynx and 1,800 new cases of persons who are victims of emphysema, for the period covered by this claim, as defined by the Honourable Justice Jasmin in the authorisation judgment, i.e. for a period of seven (7) years since November 23, 1998, up until the date of filing of the claim, the aggregate number of members of the group by illness is as follows:

DISEASE	ANNUAL AVERAGE OF CANCER CASES
Lung cancer	35,000
Throat cancer	560
Larynx cancer	875
Emphysema	12,600
Total	**49,035**

166. For loss of enjoyment of life, physical and moral pain and suffering, shortened life expectancy, suffering, hardship and inconvenience which they have incurred or will occur after having been diagnosed with any of the illnesses referred to hereunder, each member of the group is entitled to claim a lump sum award of $100,000, plus $5,000 as punitive damages for illicit and intentional infringement of a right guaranteed by the Quebec Human Rights Charter (R.S.Q. chapter C-12) and for misleading advertising contrary to the Consumer Protection Act (R.S.Q. chapter P-40.1).

167. Due to the estimated number of members for each disease, the plaintiff is entitled to seek an order against the defendants jointly and severally, to pay the collective amount of $5,148,675,000.00.

168. Such sum shall be payable in an initial instalment equivalent to half of the sum to which each member is entitled. The other half shall be paid in five annual, equal and consecutive instalments, carrying interest at the legal rate commencing on the date of final judgment up until the date of each payment, based on the following payment schedule:

Date of payment	Amount to pay
On the judgment date	$2,574,337,500.00
On the 1st anniversary of the judgment	$514,867,500.00
On the 2nd anniversary of the judgment	$514,867,500.00
On the 3rd anniversary of the judgment	$514,867,500.00
On the 4th anniversary of the judgment	$514,867,500.00
On the 5th anniversary of the judgment	$514,867,500.00

169. For the purpose of claiming compensation for non-pecuniary damages and punitive damages, each member of the group shall file a claim form with the Administrator, which discloses the following information:

- A statement by the attendant physician of the member of the group certifying that the claimant is or has been affected by cancer of the lung, throat, larynx or suffers from emphysema, in addition to the date of such diagnostic;

- A sworn statement of the claimant certifying that he or she consumed tobacco products;

and any other information that the Court deems useful to include in compliance with Article 1030 C.p.c.

K.2) The balance (Article 1036 C.p.c.)

170. Where any balance remains, the court shall dispose thereof in the manner they deem appropriate, taking into account inter alia the interests of members of the group.

171. On this issue, the CQTS and the designated member submit that it would be in the interest of members of the group that the balance be used notably to implement measures of intervention designed to limit cigarette consumption (including but not limited to information, education and the treatment of persons inclined to smoke or addicted to tobacco products) and medical research into tobacco-related illnesses.

K.3) The administration and liquidation of claims (Article 1033.1 C.p.c.)

172. In order to carry out the liquidation of individual claims or the distribution of amounts granted by judgment to each of the members of the group, the Court shall appoint an administrator upon recommendation of the plaintiff, who shall inter alia have the following duties:

- Develop, install and implement systems and procedures for the reception, processing and assessment of claims and the taking of decisions in this regard, including but not limited to carrying out any necessary verifications (including consulting medical personnel) in order to establish the validity of claims;

- File reports with the court with respect to claims received and administered;
- Provide personnel in a reasonable number for the requirements of performance of his or her duties, in addition to training of such personnel and the communication of guidelines to such personnel;
- Hold under his direct or indirect authority specific reports and accounts of his activities and administration of the Fund, preparation of financial statements, reports and registers required by the court;
- Receive any requests and correspondence with respect to claims and send out responses to any such requests and any such correspondence, supply claim forms, review and assess any claims, take decisions with respect to claims, serve notices of decisions, receive payments of compensation on behalf of members of class actions and send out compensation in compliance with the provisions of any plans in a timely manner and enter into communication with claimants, either in French or in English, based on the choice of the claimant;
- Provide assistance with respect to filling out claim forms and the deployment of efforts to resolve any disputes with claimants;
- Keep a database containing any information necessary to allow the court to assess the proper disbursement of funds paid out of the Fund in trust;
- Any other duties and responsibilities which the court deems appropriate and necessary.

K.4) Recovery of individual claims for pecuniary damages (Articles 1037 to 1040 C.p.c.)

173. The CQTS and the designated member are entitled to seek compensation for pecuniary damages to compensate, inter alia, any loss of income incurred due to cancer of the lung, larynx, throat or emphysema, based on agreed upon modes of proof and procedure designed to facilitate the procedure of individual claims in compliance with Article 1039 C.p.c.

174. The CQTS and the designated member are also seeking individual recovery of any loss of income suffered by any member in proportion to his incapacity to carry out duties in relation to his employment which is caused by his disease, as determined by his attendant physician.

175. In order to facilitate proof of individual claims for loss of income, the relevant member of the group shall be entitled to claim and to receive, based on the proportion of the aforementioned disability, compensation for past, present and future loss of income, equal to the annual loss of income for each calendar year where any loss has occurred up until the date when the member becomes 65 years of age.

176. The "annual loss of income" for any given year refers to the amount by which net income prior to the diagnostic of any of the targeted diseases for the same year exceeds actual net

income after the claim for such year.

177. For the purposes of the calculation, income prior to the claim shall be an amount equal to the average of the three highest consecutive years of income earned which preceded the moment when the attendant physician recognised a partial or total disability of the claimant to perform his employment duties due to his condition.

178. Income earned shall refer to taxable income as defined by the Income Tax Act (Canada) arising out of a position or employment or the operation of a business.

179. In order to claim loss of income, the relevant member of the group shall file with the Administrator a claim which discloses the following information:

- A statement of the attendant physician of the claimant certifying the percentage disability of the latter to exercise his duties in relation to his employment due to his condition, in addition to the date when such disability commenced;
- Any of the following forms of evidence of income, i.e.:
- A complete income tax return form (T1) and notice of contribution;
- Financial statements of the business
- Corporate income tax form (T2) and notice of contribution;
- T4 and T4A notice slips;
- Income tax summary (T1).

180. The CQTS and the designated member shall ask the court to reserve their rights in order to propose any other procedure or special method of evidence in order to simplify the processing of individual claims.

UPON THE AFOREMENTIONED GROUNDS, MAY IT PLEASE THE COURT TO:

GRANT the originating motion of the plaintiff and the designated member;

DECLARE the defendants jointly and severally liable to pay damages claimed in the originating motion;

ORDER the defendants jointly and severally liable to pay to the designated member the sum of one hundred thousand dollars ($100,000.00) as non-pecuniary damages and the sum of five thousand dollars ($5,000.00) as punitive damages, in addition to interest and the additional indemnity, as set forth below;

ORDER the defendants jointly and severally to pay to each and every member of the group the sum of one hundred thousand dollars ($100,000.00) as compensation for non-pecuniary damages, plus interest as set forth below;

ORDER the defendants jointly and severally to pay to members of the group the sum of

five thousand dollars ($5,000.00) as punitive damages, plus interest as set forth below;

ORDER the collective recovery of sums due to the designated member and to members of the group as non-pecuniary damages and punitive damages;

ORDER the defendants jointly and severally to file with the registry of the Superior Court or with any financial institution appointed by the court upon recommendation of the plaintiff and the designated member, the total sum of $5,148,675,000.00 payable on the following dates:

Date of payment	Amount to pay
Final judgment date	$2,574,337,500.00
On the 1st anniversary of the judgment	$514,867,500.00
On the 2nd anniversary of the judgment	$514,867,500.00
On the 3rd anniversary of the judgment	$514,867,500.00
On the 4th anniversary of the judgment	$514,867,500.00
On the 5th anniversary of the judgment	$514,867,500.00

Such amounts shall carry interest at the legal rate in addition to the additional indemnity, commencing on the final judgment date and up until the date of each payment.

APPOINT an administrator responsible for liquidation of sums due to each of the members of the group and payable out of the Fund created further to the class action;

DETERMINE the methods of proof and procedure for the liquidation by the appointed administrator of sums payable to each of the members of the group pursuant to the class action;

ORDER the defendants jointly and severally to pay to members of the group legal interest and the additional indemnity provided for at Article 1619 C.c.Q. upon any sum due pursuant to the class action;

RESERVE for members of the group the right to present any individual claim for pecuniary damages including loss of income;

ORDER any member of the group who so desires to present his claim individually within a one-year time period commencing from the date of publication of notice to members following final judgment on the present originating motion;

ORDER publication of a notice to members following final judgment to intervene on this originating motion, in compliance with the terms and conditions set forth at Article 1030 C.p.c. and after having heard the solicitors of the parties with respect to the content and method of publication of such notice;

THE WHOLE with costs, including experts' costs and fees and costs of notices.

MONTREAL, September 29, 2005

(S) DE GRANDPRÉ CHAIT

DE GRANDPRE CHAIT *S.E.N.C.R.L.*
Solicitors for the Plaintiff –
Representative of the designated Member

MONTREAL, September 29, 2005

(S) LAUZON BÉLANGER

LAUZON BÉLANGER *S.E.N.C.R.L.*
Solicitors for the Plaintiff –
Representative of the designated Member

TRUE COPY

[Signature]
LAUZON BELANGER, S.E.N.C.R.L.

NOTICE TO THE DEFENDANT
(Article 119 C.p.c.)

TAKE NOTICE that the plaintiff has filed this claim with the registry of the Superior Court of the judicial district of Montreal.

If you wish to answer this claim, you must file a written appearance personally or through your lawyer, at the Montreal Courthouse, 1 rue Notre-Dame Est within 10 days of service of this motion.

If you fail to appear within this time limit, a default judgment may be rendered against you without further notice upon expiration of this 10-day period.

Should you elect to appear, take further notice that the claim will be presented before the court on **October 20, 2005 at 9.00am** in a **courtroom to be determined by the Honourable Madam Justice Carole Julien** of the courthouse and the court may, upon such date, exercise such powers as are necessary to ensure the orderly progress of the proceeding or proceed with the hearing of the case, unless you have entered into a written agreement with the plaintiff or her solicitor with respect to a timetable to ensure the orderly progress of the proceeding, which shall be filed with the court registry.

In support of this originating motion, the plaintiff has filed the following exhibits:

CQTS-1	Excerpt of the Quebec Enterprise Register (CIDREQ) in relation to Imperial Tobacco Canada Limited
CQTS-2	Annual notice of ITL dated April 20, 2000
CQTS-3	Pages published on the ITL Internet site
CQTS-4	Imasco annual notice dated April 29, 1999
CQTS-5	Excerpt of the Quebec Enterprise Register (CIDREQ) in relation to ITL
CQTS-6	ITL annual notice dated March 30, 2005
CQTS-7	BAT 2004 annual report
CQTS-8	Excerpt from the R.J. Reynolds Tobacco Company website
CQTS-9	BAT financial statements for 2004 financial year
CQTS-10	Financial information published by ITL
CQTS-11	Rothmans Inc. annual renewal notice dated June 17, 2005
CQTS-12	Rothmans Inc. consolidated financial statements
CQTS-13	Altria consolidated financial statements
CQTS-14	Statement of Enterprise Registry (CIDREQ) for JTI MacDonald Corp.

CQTS-15 Statement of Enterprise Registry (CIDREQ) for JT Canada LLC Inc.

CQTS-16 Statement of Enterprise Registry (CIDREQ) for JT International Holding B.V.

CQTS-17 Note 1 to the financial statements of Japan Tobacco Inc. for the financial year ending March 31, 2005

CQTS-18 Japan Tobacco Inc. financial statements

CQTS-19 United States Surgeon General's report titled *"Smoking and Health"* published in 1964

CQTS-20 United States Surgeon General's report titled *"The Health Consequences of Smoking"* published in 1982

CQTS-21 Report titled *"The Health Consequences of Smoking – Cancer and Chronic Lung Disease in the Workplace"* published in 1985

CQTS-22 Excerpt of testimony before the Parliamentary Committee of the House of Commons of Canada studying Bill C-204 *respecting the use of tobacco in the federal workplace and transport carriers and amending the Hazardous Products Act with respect to cigarette advertising*

CQTS-23 Research report dating from the 1960s by C.C. Greig of the BAT research and development department

CQTS-24 RJR confidential report titled *"Research Planning Memorandum On The Nature of The Tobacco Business And The Crucial Role of Nicotine Therein"* dated April 14, 1972

CQTS-25 Note by P.B. Smith dated October 21, 1976

CQTS-26 Summary of a meeting of the *"Structured creativity group"* of BAT dated 1984

CQTS-27 Confidential report by Barbara Reuter of Philip Morris

CQTS-28 Letter by William L. Dunn of Philip Morris dated March 21, 1980

CQTS-29 1978 letter by Dr F.J.C. Roe, BAT consultant

CQTS-30 Philip Morris research report dated November 15, 1961

CQTS-31 RJR 1962 research report

CQTS-32 1969 BAT report titled *"The Effects of Smoking"*

CQTS-33 1982 B&W vice-president research internal memorandum

CQTS-34 BAT internal memorandum of Dr Sydney Green dated 1976

CQTS-35 Letter addressed by the chairman of the board of BAT to the president and chief operating officer of Imasco dated December 18, 1986

CQTS-36 Letter of the vice-president (and future president) of Brown & Williamson Tobacco

Corporation of 1968

CQTS-37 Testimony of the president of each of the defendants before the Isabelle Commission, having the mandate to investigate tobacco advertising and the scope of Bills C-34, C69 and C-70

CQTS-38 Memorandum issued to the attention of member companies of the BAT group (including defendant Imperial Tobacco Limited), dated March 1984

CQTS-39 JTI policy

CQTS-40 *List of Admissions prepared by the Defendant and submitted to Plaintiffs for their acceptation, 29 May 1997* filed by the defendants within the framework of the debate related to the constitutionality of the *Tobacco Act* (1997, chapter 13)

CQTS-41 Document titled *"Admissions by Plaintiffs"* filed by the defendants within the framework of argument on the constitutionality of the *Tobacco Act* (1997, chapter 13)

CQTS-42 Excerpt of pleadings on the motion for authorisation heard in November 2004

CQTS-43 Samples of advertising of the defendants

CQTS-44 RBH marketing plan titled Project 21, dated June 1995

CQTS-45 1995 Marketing plan issued by ITL

CQTS-46 Document issued by ITL titled *Matinee Marketing Plan* dated 1971

CQTS-47 Document prepared by Spitzer, Mills & Bates for ITL titled *The Player's Family, A working Paper* dated March 25, 1977

CQTS-48 Report titled *"Project sixteen"*

CQTS-49 "Media plan" of ITL titled *Fiscal '81 National Media Plan*

CQTS-50 Marketing plan issued by ITL consultants titled *"Project Minus/Plus"*

CQTS-51 ITL internal study titled *Switching Analysis* dated August 1991

CQTS-52 Document issued by RBH titled *Strategic Plan 1997/1998*

CQTS-53 Marketing plan of the defendant RBH for the year 1996-1997

CQTS-54 Report authored by Eli Seggev Ph.D. president of the firm Marketing Systems Inc. of New York, dated August 26, 1982

CQTS-55 Document drafted after 1985 titled *Response of the market and of Imperial Tobacco to the smoking and health environment*

CQTS-56 BAT instructions to its subsidiaries dated 1979

These exhibits are available upon demand.

Request for transfer to small claims

If the amount claimed against you is equal to or does not exceed $7,000, excluding interest, and where as plaintiff you were entitled to present this demand to the small claims division, you may ask the registrar to have the claim dealt with according to the rules set forth in Book VIII of the Code of Civil Procedure (R.S.Q. chapter C-25). In the event you fail to present this request, you could be liable for costs higher than those set forth in Book VIII of this Code.

No: 500-06-000076-980

SUPERIOR COURT
(Class action)

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ

Representative – Plaintiff

-and-

JEAN-YVES BLAIS

Designated Member

v.

JTI MACDONALD CORP
IMPERIAL TOBACCO CANADA LTD
ROTHMANS, BENSON & HEDGES INC

Defendants

ORIGINATING MOTION FOR A CLASS ACTION
(Article 1011 *et seq.* C.p.c.)

COPY FOR:
JTI MACDONALD CORP.
455, rue Ontario Est
Montreal (Quebec) H2K 1W3

Our file: 130

Me Michel Bélanger

LAUZON BÉLANGER, S.E.N.C.R.L.
286, rue Saint-Paul Ouest
Suite 100
Montreal (Quebec) H2Y 2A3
Telephone: (514) 844-4646
Fax: (514) 844-7009

Code: BL-4724

SERVED ON 29/09/05 AT 15:29 HRS

.....[Signature].....BAILIFF
OF THE FIRM
PAQUETTE & ASSOCIÉS

TAB II

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

(Class action)
SUPERIOR COURT

No.: 500-06-00070-983

CÉCILIA LÉTOURNEAU, residing at 734 Des Sources, in the city and district of Rimouski, Province of Quebec G5L 8M2

Plaintiff

c.

IMPERIAL TOBACCO CANADA LTD., a legal person having its place of business at 3711, St-Antoine Street, in the city and district of Montreal, Province of Quebec, H4C 3P6

-and-

ROTHMANS' BENSON & HEDGES INC., a legal person having its place of business at 185, Laurentian Autoroute, in the city and district of Quebec, Province of Quebec, G1K 7L2

-and-

JTI MACDONALD CORP., a legal person with its place of business at 2455, Ontario Street East, in the city and district of Montreal, Province of Quebec, H2K 1W3

Defendants

MOTION TO INSTITUTE CLASS ACTION PROCEEDINGS

TO THE HONOURABLE CAROLE JULIEN OF THE QUEBEC SUPERIOR COURT, THE PLAINTIFF STATES AS FOLLOWS:

1. On February 21, 2005, the Honourable Pierre Jasmin of this Court authorized the institution of class action proceedings against the defendants for the group described below:

> All persons residing in Quebec who, at the time of the filing of the motion, were addicted to nicotine contained in cigarettes manufactured by the defendants and who remained so addicted, as well as the legal heirs of persons who were included in the group at the time the motion was filed but who died prior to quitting smoking.

2. Justice Jasmin named the plaintiffs as representatives of the group and identified the following common issues:

2.1 Did the defendants manufacture, market, and distribute a dangerous product, one that is hazardous to the health of consumers?

2.2 Did the defendants know, or could they be presumed to know, the risks and dangers associated with the use of their products?

2.3 Did the defendants implement a policy of systematic non-disclosure with respect to theses risks and dangers?

2.4 Did the defendants trivialize or deny these risks and dangers?

2.5 Did the defendants orchestrate marketing strategies which disseminated false information about the products being sold?

2.6 Did the defendants knowingly market a product which resulted in addiction, and did they deliberately refrain from using tobacco products which contained so little nicotine that it would have ended the addiction of many smokers?

2.7 Did the defendants conspire to present a common front in order to prevent their consumers from learning about the inherent dangers associated with tobacco smoking?

2.8 Did the defendants deliberately infringe the group members' rights to life, security of the person, and integrity?

3. Justice Jasmin went on to describe as follows the conclusions sought by plaintiffs:

3.1 **GRANT** the motion of the petitioner, CÉCILIA LÉTOURNEAU;

3.2 **ORDER** the defendants, solidarily, to pay exemplary damages to the petitioner;

3.3 **ORDER** the defendants, solidarily, to pay the petitioner damages with interest calculated beginning as of the service date of the motion, as well as the additional indemnity provided by article 1619 C.C.Q.;

3.4 **GRANT** petitioner's class action in respect of the group members;

3.5 **ORDER** collective recovery of the claims for exemplary damages and liquidation of the members' individual claims pursuant to the provisions contained in articles 1037 to 1040 C.C.P.;

3.6 **ORDER** the defendants, solidarily, to pay exemplary damages to each group member;

3.7 **ORDER** the defendants, solidarily, to pay each group member the value of his claim, with interest calculated beginning on the service date of the motion, with interest as of the submission of this motion and the additional indemnity provided by article 1619 C.C.Q.;

3.8 **THE WHOLE** with costs, including expert and opinion fees;

I. INTRODUCTION

4. Like any other for-profit undertaking, the main purpose of the defendants is to maximize the value of their business for the sake of their shareholders. In a document entitled "Statement of Principles In the Conduct of Corporate Affairs", the defendant ITL expressed itself in this way:

> As a company, our primary purpose is to create long-term financial value for the shareholder.

A copy of this document, taken from the defendant's, website, has been filed as Exhibit **CL-1**;

5. Unlike all other legal business undertakings in the past, however, the defendants created "long-term financial value" for their shareholders by marketing a deadly product which serves no purpose other than satisfying the addiction to which it gives rise;

6. In effect, tobacco consumption constitutes the main cause of premature deaths in Quebec and kills approximately 12,000 people per year, namely three times the number of deaths caused by roadside accidents, homicides, suicides, AIDS, and illicit drogue use put together;

7. Cigarettes are the only products which kill its consumers if used in the manner prescribed by the manufacturer;

8. Cigarettes are a pharmacological trap. The defendants set this trap in order to catch society's most vulnerable members, hoping to entrap the largest number possible in order to maximize "long-term financial value" for their shareholders;

9. The plaintiffs estimate that in September of 1998, when the Motion to institute class action proceedings was filed, the number of individuals included in the group was approximately 1,780,200 persons, namely 30% of Quebeckers of 15 years of age or more who smoked daily over a period of 30 consecutive days;

10. For over fifty years, the defendants and their affiliated companies knew that cigarettes caused fatal illnesses and that the nicotine which they contained was an addictive drug;

11. The defendants knew that once caught in the trap, the vast majority of smokers would have great difficulty quitting their smoking habit. The defendants nevertheless stated that smokers "choose" to smoke and could therefore "choose" to stop;

12. Demonstrating a disturbing level of nonchalance and bad faith, the defendants on the one hand systematically refrained from informing consumers about the dangers of cigarette smoking and, on the other hand, concerted their efforts in order to ensure that this information was kept away from the public, going so far as to lie with impunity in order to sow confusion;

II. THE DEFENDANTS, THE GROUP OF COMPANIES WITH WHICH THEY ARE ASSOCIATED AND THEIR RELATIONSHIP

1. IMPERIAL TOBACCO CANADA LIMITED AND ITS GROUP

13. ITL, formerly known as Imperial Tobacco Limited, is a legal person headquartered in Montreal, as indicated in a statement filed with the Registry of Companies, Exhibit **CL-2**;

14. It resulted from the merger effected on February 1, 2000, of British American Tobacco Limited (Canada), a wholly-owned subsidiary held indirectly by British American Tobacco p.l.c. ("BAT"), and Imasco Limited ("Imasco"), which held 100% of the shares of Imperial Tobacco Limited, as indicated in ITL's Annual Notice dated April 20, 2002, Exhibit CL-3, and in information contained on ITL's website, Exhibit **CL-4**;

15. Before the merger, Imasco exercised its authority via its primary shareholder, BAT, which in August of 1999 held 42.5% of its ordinary shares, as indicated in the Annual Notice **CL-3**;

16. Imasco was created in 1912 under the corporate name Imperial Tobacco Company of Canada Limited, which name was changed to Imasco Limited in 1970. BAT was Imasco's primary shareholder since the date of its inception, as indicated in Imasco's Annual Notice dated April 29, 1999, Exhibit **CL-5**, and ITL's Annual Notice dated April 20, 2000, Exhibit CL-3;

17. Since February 1, 2000, ITL has been a wholly-owned subsidiary of British American Tobacco Holdings (Canada) B.V., a company headquartered in Amsterdam, as indicated in Exhibit CL-2;

18. British American Tobacco Holdings (Canada) B.V. is itself a wholly-owned subsidiary of BAT, as indicated in ITL's Annual Notice dated March 30, 2005, Exhibit **CL-6**;

19. Between 1927 and 2004, BAT was the only shareholder of Brown and Williamson Tobacco Corporation ("B&W"), an American cigarette manufacturer and sister company of ITL;

20. On July 30, 2004, the U.S. assets of B&W were combined with those of R.J. Reynolds Company. R.J. Reynolds Tobacco Company was at that time held by Reynolds American Inc., a holding company of which BAT owned 42% of the shares through B&W, the rest of the shares being in the hands of R.J. Reynolds' shareholders, as indicated in BAT's 2004 Annual Notice, Exhibit **CL-7**, and information taken from the website of R.J. Reynolds Tobacco Company, Exhibit **CL-8**;

21. BAT is the second largest producer of cigarettes in Canada. In the fiscal year ending December 31, 2004, ITL earned an operating profit of £ 2.83 billion on sales totaling £ 34.255 billion, as indicated in Exhibit CL-7;

22. ITL is the most important producer of cigarettes in Canada, with over 60% of the manufactured cigarette market. In the fiscal year ending December 31, 2004, ITL earned an operating profit of $775 million on sales totaling $1.54 billion, as indicated in a copy of financial information published by ITL, Exhibit **CL-9**;

2. ROTHMANS, BENSON & HEDGES INC. AND ITS GROUP

23. Rothmans, Benson & Hedges Inc. ("RBH") was created on Decemeber 19, 1986, following the merger of The Rothmans of Pall Mall Company Limited, a wholly-owned subsidiary of Rothmans Inc., and Benson & Hedges (Canada) Inc.;

24. Rothmans Inc. was created on May 8, 1956, under the name The Rothmans of Pall Mall Company of Canada Limited. This name was changed to Rothmans Inc. on September 30, 1985, as indicated in an Annual Notice dated June 17, 2005, Exhibit **CL-10**;

25. On February 11, 2000, Rothmans Inc. merged with Rothmans Partnership in Industry Canada Limited and Rothmans of Canada Limited, two wholly-owned subsidiaries held indirectly by BAT. The new corporate entity conducted its business activities under the name Rothmans Inc., a holding company holding 60% of the shares issued by defendant RBH, as indicated in Exhibit CL-10;

26. Benson & Hedges Inc. was a wholly-owned subsidiary held indirectly by Phillip Morris Companies Inc., whose name was changed to Altria Group Inc. ("Altria"), as indicated in the Annual Notice renewal form, Exhibit CL-10;

27. As of the date on which these class action proceedings were initiated, Rothmans Inc. controlled 60% of RBH, the rest of the shares being held by FTR Holding S.A., a Swiss company controlled by Phillip Morris International, the world's largest producer of tobacco products;

28. Philip Morris International is itself a member of the Altria group, which is controlled by Philip Morris USA and Kraft Foods;

29. For the fiscal year ending March 31, 2004, RBH recorded sales of $620.1 million and earned a profit, before interest, taxes, and debt payments, of $268.08 million, as indicated in the consolidated financial statements of Rothmans inc., Exhibit **CL-11**;

30. For the fiscal year ending Decemeber 31, 2004, Phillip Morris International recorded sales of $39.53 billion US and generated $6.6 billion US of operating income for its parent company, while Phillip Morris USA contributed $4.4. billion US from recorded sales of $17.51 billion US, as indicated in Atria's consolidated financial statements, Exhibit **CL-12**;

3. JTI MACDONALD AND ITS GROUP

31. Defendant RJR MacDonald Corp. ("JTI") was created in November of 1999 following the merger of RJR-MacDonald Inc. and JT Nova Scotia Corporation. It is headquartered in Halifax, Nova Scotia, as indicated in a statement filed with the Registry of Companies, Exhibit **CL-13**;

32. The majority shareholder of JTI is JT Canada LLC II Inc., which is itself controlled by JT Canada LLC Inc., as indicated in a statement filed with the Registry of Companies, Exhibit **CL-14**;

33. The majority shareholder of JT Canada LLC Inc is JT International Holding B.V., a company headquartered in the Netherlands and a fully-owned subsidiary of Japan Tobacco Inc., the third largest producer of cigarettes in the world, as indicated in a statement filed with the Registry of Companies, Exhibit **CL-15**, and note 1 of the financial statements included in the Annual Report of Japan Tobacco for the fiscal year ending March 31, 2005, Exhibit **CL-16**;

34. Japan Tobacco Inc.'s recorded sales of tobacco products were calculated at ¥ 4,284 billion et its annual net profit from tobacco sales at ¥ 259 billion, as indicated in Exhibit CL-16;

35. Before being integrated into the Japan Tobacco Inc. group in 1999, RJR-MacDonald Inc. was, since 1974, a wholly-owned subsidiary of R. J. Reynolds International, which itself was a subsidiary of R.J. Reynolds Industries, the parent of R.J. Reynolds Tobacco Company;

36. In 1985, R.J. Reynolds Industries acquired Nabisco Brands to become RJR Nabisco;

37. In April of 1989, RJR Nabisco merged with Kohlberg Kravis Roberts & Co. to become RJR Nabisco Holdings Corp.;

38. RJR Reynolds Tobacco Company was thus a wholly-owned subsidiary of RJR Nabisco Holdings Corp., which also held 80.5% of the shares of Nabisco Holdings Corp., a food products company;

39. In May of 1999, RJ Reynolds International, whose activities included the tobacco operations of RJR Nabisco Holdings Corp. outside the United States, was sold to JT International Holding B.V., a wholly-owned subsidiary of Japan Tobacco Inc.;

40. Moreover, also in May of 1999, the board of directors of RJR Nabisco Holdings Corp. initiated a spin-off in order to isolate its group from tobacco producing activities. The arrangement involved the transfer of RJ Reynolds Tobacco Company shares to a new entity, RJ Reynolds Tobacco Holdings Inc.;

41. On June 15, 1999, the spin-off was effected by distributing the shares of RJ Reynolds Tobacco Holdings Inc. to the shareholders of RJR Nabisco Holdings Corp., whose name was then changes to Nabisco Group Holdings Corp.;

42. On October 27, 2003, RJ Reynolds Tobacco Holdings Inc. and BAT merged the activities of their respective subsidiaries, RJ Reynolds Tobacco Company and B&W. The resulting firm was Reynolds American Inc., a public company of which BAT held 42% of the shares and the former shareholders of RJ Reynolds Tobacco Holdings held 58%;

43. For at least 40 years, the defendants have shared, along with other companies belonging to the same corporate groups, their research and knowledge, particularly insofar as this information relates to the effect of their tobacco products on the health of consumers;

4. THE CANADIAN TOBACCO MANUFACTURERS' COUNCIL

44. In 1963, the defendants created the Canadian Tobacco Manufacturers' Council("CTMC");

45. Since its inception, the CTMC has coordinated the defendants' public relations efforts in order to oppose and contradict any negative perceptions and prevent governmental regulation of the tobacco industry. The CTMC has been, and remains to this day, an instrument used by the defendants to implement several concerted strategies designed to mislead consumers;

46. In their capacity as representatives of the CTMC, the presidents of the defendant firms claimed, in statements made to the Legislative Committee of the House of Commons convened to study Bill C-204, that their corporations were conducting no research in Canada, and that they referred simply to the research conducted by parent or sister companies elsewhere in the world, notably in the United States, as indicated in a transcript of that testimony, Exhibit CL-17;

47. The current board members of the CTMC are Benjamin Kemball, President and Chairman of ITL, John Barnett, President and Chairman of RBH, and Michel Poirier, President and Chairman of JTI;

III. NICOTINE

1. ADDICTION

48. Nicotine is an organic substance found almost exclusively in tobacco plants and which has a powerful psychological effect on smokers;

49. In a document dated March 31, 1995, and filed as Exhibit I-15 by ITL during the debate over authorization, Dr. Bill Rickert described nicotine and its effects in the following manner:

> 2.1 Physiological Properties of Nicotine
>
> Nicotine is one of the most powerful of all drugs [...] The actions of nicotine in the body are so complex and multitudinous that there are few other psychoactive drugs about which so much is known, though so little understood. Nicotine can have an effect on every organ in the body.
>
> Nicotine has both peripheral and central effects. It can stimulate, it can sedate. It induces tolerance. Physical as well as psychological effects occur on withdrawal. More importantly, unlike some addictive drugs, it does not impair the capacity to work or socialize appropriately. Social disapproval is the only contiguous negative consequence and this does not operate all the time.

As indicated in a copy of the document, Exhibit **CL-18**;

50. Stimulation is the primary pharmacological effect of nicotine. It produces electrocortical activity and impacts the heart and the endrocin system. Nicotine which enters the body by the inhalation of cigarette smoke affects almost all cerebral neurotransmitters and the neuroendocrinal system;

51. One of the more serious chronic consequences of nicotine use is addiction;

52. Cigarettes are the most effective means of administering a dose of nicotine sufficient to create and maintain an addiction since nicotine which is inhaled in cigarette smoke affects the brain of the smoker within a few seconds;

53. Dr. Rickert put it this way in Exhibit CL-18:

> 2.2 Addictive Properties of Nicotine
>
> Why is cigarette smoking so addictive? The short answer is because the modern cigarette is such a highly effective device for delivering nicotine to the brain. By inhaling tobacco smoke, the smoker can get nicotine to his brain more rapidly than the heroin addict can get a "buzz" when he shoots heroin into a vein. It takes only 7 seconds for inhaled nicotine to reach the brain. Furthermore, the smoker gets a "shot" of nicotine after each inhaled puff. The number of rapid pharmacological reinforcements is quite staggering. The pack-a-day smoker gets through 7,300 cigarettes a year. At 10 puffs per cigarette, this means more than 70,000 shots of nicotine to the brain in a year.
>
> Added to this are other factors such as taste, aroma, the social and other non-pharmacological rewards, and the fact that smoking combines a pharmacological effect with a sensorimotor ritual which provides an elaborate network of sensory and motor stimuli to act as substrate for secondary conditioning. <u>It is hardly surprising that smoking is so addictive.</u>
>
> (Our emphasis)

54. The defendants have known that nicotine causes addiction for decades. For instance, on July 17, 1963, Addison Yeaman, general counsel of B&W, wrote as follows:

> We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms.

as indicated in a copy of a quotation of his internal memorandum, Exhibit **CL-19**;

55. In effect, the defendants have long considered nicotine as the "product" that allows the cigarette market to exist, the cigarette itself being the mere vehicle used to administer nicotine in a series of doses;

56. For example, C.C. Greig, of BAT's research and development department, wrote as follows probably towards the beginning of the 1960s:

> A cigarette as a "drug" administration system for public use have very significant advantages:
>
> I) Speed
>
> Within ten seconds of starting to smoke, nicotine is available in the brain. Before this, impact is available giving an instantaneous catch or hit, signifying to the user that the cigarette is "active". Flavour, also, is immediately perceivable to add to the sensation.
>
> Other "drugs" such as marijuanha, amphetamines, and alcohol are slower and may be mood dependant.

as indicated in a copy of the document, Exhibit **CL-20**;

57. Similarly, a confidential report of RJR's entitled *Research Planning Memorandum on the Nature of the Tobacco Business and the Crucial Role of Nicotine Therein*, dated April 14, 1972, stated the following:

> In a sense, the tobacco industry may be thought of as a specialized, highly ritualized and stylized segment of the pharmaceutical industry. Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects.
>
> [...]
>
> Happily for the tobacco industry, nicotine is both habituating and unique in its variety of physiological actions, hence no other active material or combination of materials provides equivalent "satisfaction".

as indicated in a copy of the memorandum, Exhibit **CL-21**;

58. Addiction to nicotine is notably characterized by a regular and compulsive need on the part of the smoker to procure the substance and is accompanied by a feeling of withdrawal when the addicted person is unable to gain access to it;

59. Dr. Rickert expressed himself as follows in CL-18:

> 2.3 Tobacco Withdrawal Syndrome
>
> There is evidence of a clear-cut tobacco withdrawal syndrome. Apart from intense craving, tension, irritability, restlessness, depression and difficulty with concentration, objective physical withdrawal effects have been demonstrated. these include a drop in pulse and blood pressure, gastrointestinal changes such as constipation, sleep disturbance, impaired performance at simulated driving and

> other vigilance and reaction time tasks, changes in the EEG and visual evoked potential and an increase in aggressiveness.

60. Addiction deprives its victim of the ability to exercise a free choice to continue or stop smoking, even when the person realizes that cigarette smoking is dangerous;

61. Those suffering from addiction to nicotine are likely to relapse even if it has been several years since they stopped smoking;

62. The defendants themselves and/or other companies to which they are related, such as BAT, Phillip Morris, and R.J. Reynolds Tobacco Company, have conducted research which proves that nicotine results in addiction;

63. Similarly, in 1984, the explanation provided by BAT following its conference entitled "Structured Creativity Group" mentioned that:

> High on the list of consumers' needs is nicotine, which I believe to be the main motivator and sustainer of smoking behaviour. Without nicotine in sufficient quantity to satisfy the needs of the smoker, the smoker can (a) give up altogether, (b) cut back to a low purchase level, (c) keep switching brands.

as indicated in a copy of the briefing, Exhibit **CL-22**;

64. Deliberately exhibiting a disturbing level of bad faith, the defendants continued denying until just recently the addictive properties of nicotine, this despite the results of their own research and the near-unanimity of scientific opinion;

65. For example, at paragraphs 77 and 78 of its defence regarding the constitutionality of *An Act Respecting Tobacco Products*, dated May 23, 1997, the Attorney General of Canada stated:

> 77. Addictive properties of nicotine mean that once people have started to smoke regularly, it is very difficult for the large majority of them to stop;
>
> 78. Plaintiff denies that its tobacco products are addictive;

as indicated in a copy of the defence, Exhibit **CL-23**;

66. In its reply to this defence, JTI denied these statements in the following manner:

> Paragraphs 76 to 78 inclusive are denied as drafted. It is admitted that many smokers experience difficulty in quitting. The degree of difficulty varies from individual to individual. Some smokers have little or no difficulty in quitting, others have considerable difficulty. Even those smokers who experience the greatest difficulty can and do quit if they genuinely wish to do so. Almost seven

> million Canadians have successfully quit and approximately 95% of them did so without outside help;

as indicated in a copy of the reply, Exhibit **CL-24**. ITL and RBH provided similar replies;

67. In the context of a debate before the Court of Quebec involving ITL and the plaintiff, counsel for ITL made the following statements to Judge Guy Ringuet, J.C.Q., on September 30, 1998:

> Ms Sylvie Rodrigue [Attorney for ITL]
>
> Clearly, the position of my clients, in both files, is that the products which they manufacture and the nicotine which these products contain do not lead to addiction.

as indicated in a copy of some excerpts taken from the transcripts of the pleadings made by ITL counse before the Court of Quebec, Exhibit **CL-25**;

68. For the last number of years, the defendants have admitted in their public statements that nicotine does lead to addiction, but have qualified and circumscribed these admissions in order to limit their impact. For example, on June 8, 2000, when a committee of the Senate of Canada was holding hearings on Bill S-20, the defendants' board members, *inter alia*, compared nicotine to chocolate and implicitly blamed victims for their lack of will power:

> [Senator Cochrane]
>
> Recent statements by your industry suggest that you now acknowledge that your product causes addiction. However, the addiction that you are talking about is just a common knowledge, like an addiction to soda pop or to certain candy or chocolate. That is not the same kind of addiction that we are talking about when we speak about tobacco.
>
> Bill S-20 is about raising a fund to explain what real tobacco addiction is about. Could you help me to understand where you are coming from? Would you agree that cigarettes are physically addictive in the same sense that heroin and cocaine are physically addictive.
>
> [John Barnett, CEO of RBH]
>
> As I said earlier, I am neither a doctor nor a scientists.
>
> [...]
>
> To some people, I am sure that they would consider smoking cigarettes to be physically addictive and they would have great difficulty giving them up.

I started smoking 40 years ago. From time to time I have given up, sometimes with more success than others, but I sit here today as a smoker. Statictics Canada data show that significantly more Canadians claim to have smoked and given up than claim to smoke currently. A large number of people also believe they should exercise more frequently. A large number of people believe they should lose weight. If people put their minds to do something, I believe most people, with or without external aids, can achieve their goals.

[Senator Cochrane]

That is your opinion and I accept that, but I must tell you it is not always so. I have lived with this. My brother and now my daughter cannot give it up. They have tried in all earnestness but they cannot. That says something about the strength of the addiction.

[Michel Poirier, CEO JTI MacDonald]

I am very sorry that your brother and your daughter are facing those problems. We know that there are as many ex-smokers today as there are smokers, so it depends on how we define addiction. The definition changes over time.

We can play with semantics. The crunch is that some people find it difficult but do succeed in quitting, and, yes, many people relapse into it. Many people decide to try quitting but then decide to keep on smoking, but some others are very successful in stopping.

I must object to the definition to which you are referring in the same pharmacological way that heroin and cocaine are addictive. From everything we have seen, tobacco is not as addictive as heroin or cocaine. It is my understanding -- not as a scientists -- that poeple require a rehabilitation program to quit those drugs, usually requiring hospitalization and much help and they go through a number of physiological stages. That is very different. I do not know of any smokers who required being hospitalized to get out their addiction or whatever you call it. I see a difference. I have to disagree with that particular definition.

[Senator Cochrane]

You hear smokers using the same terminology used by cocaine and heroin users: "I have to get my fix".

[Michel Poirier]

I hear that from people who eat chocolate, too.

[Our emphasis]

as indicated in the transcripts of the hearings held on June 8, 2000, Exhibit CL-26;

69. In November of 2001, we could read the following on ITL's website, under the heading "Our Position":

> Does Nicotine Lead to Addiction?
>
> The manner in which "addiction" is used has gained in expansiveness over the course of the last quarter century and we accept that, in the broader sense of the term, smoking can be described as an addiction. We know that many smokers have difficulty quitting. Be that as it may, millions of smokers have stopped smoking and most without assistance, be it medical or of any other nature. we now count more non-smokers than smokers in Canada.

as indicated in a copy of this excerpt, Exhibit **CL-27**;

70. If the public statements made by the defendants recently are more nuanced, though still misleading, the internal documents of the defendants or their affiliates leave no room for fine nuances or doubts of any kind. On the contrary, addiction to nicotine is clearly depicted as a pharmacological trap. For example, in a recent study dated May 7, 1982, entitled "*Project Plus/Minus*" and prepared for ITL by Kwechansky Marketing Research Inc., of which a copy has been filed as Exhibit CL-28, the following is mentioned:

> STUDY HIGHLIGHTS
>
> 5) Starters [defined in the report as adolescents between the ages of 14 and 16] no longer disbelieve the dangers of smoking, but they almost universally assume these risks will not apply to themselves because they will not become addicted.
>
> 6) Once addiction does take place, it becomes necessary for the smokers to make peace with the accepted hazards. This is done by a wide range of rationalizations;
>
> [...]
>
> 9) 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.
>
> [Our emphasis]

71. In a document prepared by JTI in order to define its official position with respect to health risks and addiction, we read the following:

> WHY DON'T YOU WARN CONSUMERS THAT TOBACCO IS ADDICTIVE?
>
> - There is no scientific agreement on a definition as to what degree of use constitutes addiction, nor on what addiction is

> - Many consumers in Canada, as elsewhere, each year give up smoking. This is not consistent with any theory of addiction.

as indicated in a copy of the document, Exhibit **CL-29**;

72. As indicated in Exhibits CL-27 and CL-29, at the heart of defendants' position on addiction is the argument that because a large number of smokers manage to quit smoking, cigarettes are not addictive.

73. Now, the fact that a person suffering from addiction manages to overcome it does not prove that they were not addicted in the first place

74. Moreover, the fact that a person suffering from an addiction can manage to quit smoking completely is evidence of the addiction rather than evidence of its non-existence;

75. Indeed, the decision to quit smoking often comes about when the smoker realizes that he cannot lessen or limit his intake, being compelled by his addiction to get the dose of nicotine to which he has grown accustomed;

2. COMPENSATION

76. Nicotine addiction is such that the smoker adjusts his consumption of the product in order to maintain the nicotine dose which he needs, a phenomenon known as compensation;

77. To satisfy his craving for nicotine, the smoker increases or diminishes the number of cigarettes he smokes or inhales the smoke more deeply;

78. A deeper inhalation means that the peripheral portion of the lung is exposed to greater quantities of the substances found in smoke, thereby increasing the risk of developing cancer;

79. The defendants were well aware of the compensation mechanism and the dangers it posed for smokers. In 1978, Dr. F.J.C. Roe, a BAT consultant, wrote as follows:

> Perhaps the most important determinant of the risk to health or to a particular aspect of health is the extent to which smoke is inhaled by smokers. If so, then deeply inhaled smoke from low-tar delivery cigarettes might be more harmful than uninhaled smoke from high-tar cigarettes.

as indicated in a copy of the document, Exhibit **CL-30**;

80. Based on the foregoing, it is obvious that the defendants knowingly marketed a toxic product meant to entrap the most vulnerable consumers by subjecting them to a terrible addiction. Today, the defendants cynically inform those victims whom they have trapped that if they are unable to escape, it is because they are lacking in willpower and have no one to blame but themselves;

IV. RISKS ASSOCIATED WITH TOBACCO USE

81. Direct inhalation of tobacco smoke, combined with the phenomenon of addiction, have made the use of tobacco products the leading cause of illness and death in Canada;

82. Smoking is notably an important factor in causing the following diseases:

82.1 coronary insufficiency;

82.2 cerebral vascular accident;

82.3 vasomotor acrosyndrome

82.4 aortic aneurism;

82.5 atherosclerosis;

82.6 emphysema;

82.7 chronic bronchitis;

82.8 asthmatic brochitis;

82.9 chronic caugh;

82.10 chronic wheezing;

82.11 dyspnea (difficulty breathing);

82.12 upper and lower respiratory infections;

82.13 decreased lung growth in teenagers;

82.14 reduction in pulmonary function in babies whose mothers smoke;

82.15 erectile disfunction;

82.16 lung cancer;

82.17 mouth cancer;

82.18 tongue cancer;

82.19 cancer of the gums;

82.20 cancer of the lips;

82.21 pharynx cancer;

82.22 larynx cancer;

82.23 oesophagus cancer;

82.24 pancreatic cancer;

82.25 renal cancer;

82.26 bladder cancer;

82.27 uterine cancer;

82.28 cancer of the large intestine;

82.29 stomach cancer;

82.30 leukemia;

82.31 gastroduodenal ulcers;

83. Smoking undermines the physical health of smokers who otherwise have no diagnosed medical condition associated with smoking. Smokers have less endurance than non-smokers since they suffer from reduced oxygenation. They also have higher pulse rates and base metabolism, which hamper physical activity, including the endurance level of the cardiopulmonary system;

84. Smoking reduces blood flow in the capillaries of the skin as is thus associated with wrinkles and the appearance of premature ageing;

85. Smoking increases the risk of hip fractures;

86. Cataracts are twice as likely to afflict smokers;

87. Menopause begins as much as two years earlier for female smokers;

88. Smoking diminishes the density of bone mass in menopausal women;

89. Smoking is associated with abnormal menstrual cycles;

90. The fertility of women smokers is diminished when compared to non-smoking females;

91. Women who smoke are more likely to give birth to premature babies or babies with a below normal birth weight;

92. The combination of smoking and the sue of oral contraceptives noticeably increases the risk of heart attacks, strokes, and other vascular complications;

93. It follows that tobacco products are extremely dangerous because they lead to pharmacological addiction and cannot be consumed in a safe manner. The use of such products leads to serious health problems that cannot be justified in light of the complete absence of any type of beneficial use;

94. Under the circumstances, the mere act of manufacturing and selling such a product constitutes a civil fault on the part of the defendants, who should be obliged to pay damages calculated according to the degree of harm that the use of this product has had on members of the group;

V. KNOWLEDGE ON THE PART OF DEFENDANTS AS TO THE DANGER OF THEIR PRODUCTS

95. For over forty years, the defendants have known that cigarettes cause serious health problems;

96. For example, in 1962, a report prepared by RJR addressed the causal link between tobacco use and lung cancer:

> The statistical data from the lung cancer-smoking studies are almost universally accepted. The majority of scientists accept these data as indicative of either a high degree of association or a cause-and-effect relationship between lung cancer and smoking.

as indicated in a copy of the report, Exhibit **CL-31**;

97. A report prepared by BAT in 1969, entitled *The Effects of Smoking*, recognized that the physiological effects associated with tobacco use were likely to cause serious harm to smokers:

> Smoking has psychological effects; the psychological effects are mainly acceptable and desirable, but the physiological effects are more varied. Some are definitively bad and harmful.

as indicated in a copy of the report, Exhibit **CL-32**;

98. In 1982, following a report issued by the Surgeon General of the United States entitled *Smoking and Health*, B&W's vice-president of research made the remarks to his superior:

> Let's face the facts:
>
> 1. Cigarette smoke is biologically active.

A. Nicotine is a potent pharmacological agent. Every toxicologist, physiologist, medical doctor and most chemists know that. It's not a secret.

B. Cigarette smoke condensate applied to the backs of mice causes tumors.

C. Hydrogen cyanide is a potent inhibitor of cytochrome oxidase – a crucial enzyme in the energy metabolism of all cells.

D. Oxides of nitrogen are important in nitrosamine formation. Nitrosamines as a class are potent carcinogens.

E. Tobacco-specific nonvolatile nitrosamines are present in significant amounts in cigarette smoke.

F. Acrolein is a potent eye irritant and is very toxic to cells. Acrolein is in cigarette smoke.

G. Polonium-210 is present in cigarette smoke.

H. We know very little about the biological activity of sidestream smoke.

as indicated in a copy of the document, Exhibit **CL-33**;

VI. MANIPULATION OF CIGARETTES

99. The defendants design and produce cigarettes by ensuring that they contain nicotine levels which are sufficient to develop and maintain addiction;

100. This form of manipulation is achieved, *inter alia*, by selectively using parts of the tobacco plant and/or by using "reconstituted" tobacco.

101. Other techniques have likely been used, as indicated in an annual report prepared by ITL's research department in 1971, in which the following was stated:

> Object: To reduce the Canadian tar levels of du Maurier K.S. to 20 mg whilst maintaining smoke nicotine yields and decreasing irritation.
>
> [...]
>
> Object: to reduce Canadian tar levels of Player's cigarettes to 20 mg or lower and to maintain a nicotine level of 1.3-1.35 without perceptibly altering the subjective smoking characteristics.

as indicated in a copy of the report, Exhibit **CL-34**;

102. Moreover, it appears from the minutes of a research and development conference held in Southampton by the BAT group in 1984, that the group was studying ways of maximizing nicotine absorption:

> Products with nominally equivalent nicotine deliveries are assessed as having greater impact if the ratio of free to bound nicotine is increased relative to each other.
>
> [...]
>
> In terms of products design parameters, the use of increasing filter ventilation tends to increase the ratio of free to bound levels of nicotine. Increasing paper porosity however tends to have the opposite effect to filter ventilation, in addition there are other design parameters that can affect the ratio of free to bound nicotine. In addition, where the smoke velocity is increased by human smoking behaviour, this will have the effect of increasing the free to bound nicotine ratio.
>
> These studies indicate how the level of free to bound nicotine levels can be used to modify products thorugh strength perception.

as indicated in a copy othe minutes, **Exhibit CL-35**;

103. When the defendant ITL wanted to develop a safer cigarette, the President of BAT issued the following cautionary letter:

> I confirm the substance of our position on fundamental research which we discussed with you on our recent visit.
>
> I have reviewed the position with my colleagues. Since there is such a wide discrepancy between your approach and that of the rest of the Group, I thought that I should write to explain why it is that I cannot support your contention that we should give a higher priority to projects aimed at developing a 'safe' cigarette (as perceived by those who claim our current product is 'unsafe') by either eliminating, or at least reducing to acceptable levels, all components claimed by our critics to be carcinogenic.
>
> The BAT objective is and should be to make the whole subject of smoking acceptable (author's emphasis) to the authorities and to the public at large since this is the real challenge facing the Industry. Not only do I believe that this is the right objective but I also believe that it is an achievable one.
>
> The Group already has several approaches in place to respond to this objective. These include experimental science, carried out both internally and at leading universities/medical departments, and also studies of the evidence from epidemiological work.
>
> There are many issues that contribute to the overall acceptability of smoking. Understandably, the causation issue in relation to several diseases is important and we have to take note of all relevant publications that throw light on this issue. We sponsor research work on mechanisms of disease, including psychological or genetic predisposition, as well as probing the simple conclusions of what is probably rather poor epidemiology. Whatever strong guidance is

offered by reputable scientists on product modification, which they believe would be desirable, we will respond. The Group has several research projects, mainly in the combustion area. That should enable us to alter our product if good reason exists. This encompasses components such as nitrosamines and free radicals but extends to the ability to genetically altar tobacco leaf, for instance in its propensity to form tar.

Another important issue affecting acceptability is passive Smoking. Our current initiatives are to challenge the whole area of "low risk epidemiology". There are reputable external experts who believe that this is a highly imprecise science and we are finding means for them to express their concerns. In parallel, we have research programmes measuring the composition of ambient smoke under carefully controlled conditions; other of our research teams are seeking products that reduce the burden of overall smoke or its particular components in the environment.

As part of an integrated approach to the acceptability of smoking, we are also studying the so-called 'benefits of smoking'. We are supporting research on the pharmacological effects of nicotine (the key element of our product which, fortunately, has few adversaries). The beneficial associations of smoking not only with specific diseases such as Parkinson's disease, but with the widespread disorders of senile dementia or Alzheimer's disease are being monitored.

The BAT view is thus wider than that encompassed in the Imasco approach. Furthermore, I believe there are other important objections inherent in your approach.

Firstly, your objective is probably unattainable - no matter what can be done in chemical terms (and I believe this to be very limited) there will continue to be strong vocal factions that seek to denigrate the product and they are likely to continue to move the goal posts away from whatever initial target we were able to achieve.

A second practical objection is that in attempting to develop a 'safe' cigarette you are, by implication in danger of being interpreted as accepting that the current product is 'unsafe' and this is not a position that I think we should take.

As you can see, there is no disagreement on the importance that we all place on the need for fundamental research leading to results which will have a practical impact on the acceptability of our product.

Where we part company from the Imasco approach is that we do not believe that there is a sufficiently high chance of successful outcome to justify committing the very large scale of resources that would be necessary to pursue the direct but arguably over-simplistic approach which your people are proposing. This is why I cannot support this line of research.

[Emphasis added]

as indicated in a copy of that letter, Exhibit **CL-36**;

VII. THE FAILURE TO WARN MEMBERS OF THE DANGERS OF THEIR PRODUCTS

1. FAILURE OF THEIR OBLIGATION TO INFORM

104. The defendants have the obligation to disclose in a complete and continuous manner, all dangers, including risks, linked to the use of their products and must inform users of ways to protect themselves against these dangers;

105. Despite this obligation, the defendants have never voluntarily supplied any information whatsoever on the dangers or risks associated with the use of their products;

106. The knowledge acquired over the years on the dangers of cigarettes has been obtained despite the efforts of the defendants to contradict, deny, and hide the truth already in their possession;

107. The defendants agreed amongst themselves never to communicate information which they held on the dangers and risks linked to the use of tobacco products;

108. In March of 1984, in a note sent to the attention of companies within its group, including the defendant ITL, BAT set forth the policy to be followed concerning public statements on the risks of diseases caused by the use of tobacco:

> The issue is controversial and there is no case for either condemning or encouraging smoking. It may be responsible for the alleged smoking related diseases or it may not. No conclusive scientific evidence has been advanced and the statistical association does not amount to proof of cause and effect. Thus a genuine scientific controversy exists.
>
> The Group's position is that causation has not been proved and that we do not ourselves make health claims for tobacco products. Consequently the Group cannot participate in any campaigns stressing the benefits of a moderate level of cigarette consumption, of cigarettes with low tar and/or nicotine deliveries or any other positive aspects of smoking except those concerned with the dissemination of objective information and the right of individuals to choose whether or not they smoke.
>
> Non-tobacco companies in the Group must particularly beware of any commercial activities or conduct which could be construed as discrimination against tobacco or tobacco manufacturers (whether or not involving companies within the group), since this could adversely affect the position of Brown & Williamson in current US product liability litigation in the US (...)

a copy of this note is filed as Exhibit **CL-37**;

109. The implementation of this systematic policy of non-disclosure would lead the defendants to refuse to be submitted to the warnings imposed by Bill C-51, the defendants calling upon the right to "*express only what we want to express or to not say what we don't want to say*";

110. However, for a long time, the defendants have known that the health warnings attributed to Health Canada have had a greatly reduced impact, as demonstrated in "Project 16" (1977):

> SUMMARY OF FINDINGS
>
> [...]
>
> ** Though they accept health warnings as true, the threat is perceived as so far in the future as to be scarcely related to actions taken now.
>
> ** The health warning clause is perceived as an intrusion by government on individual rights, and a sham since governments make vast sums on tobacco tax, and alcohol, also perceived as dangerous, bears no warning clause.
>
> ** The 'avoid inhaling' words are singled out for the strongest derision since smoking a cigarette in this way is seen as a waste and, in their word, 'goofy'.

as indicated in a copy of that report, exhibit **CL-38**;

111. Now, for over fifty years, the defendants have refused to disclose the existence of these risks and dangers. They have, in the authorization period, attributed to the Group members, that same knowledge of the risks and dangers in order to try to limit their responsibility in that respect;

112. The defendants' position is even more surprising since, during the same time period, they minimized and denied the existence of such risks and dangers, thus attributing to the members of the group a knowledge completely opposite to the one which they themselves claim to hold;

113. Also, at the time of the debate on authorisation, the defendants formulated the following judicial admissions in order to deny the existence of common issues, and in the hope of seeing the motion for authorisation rejected:

> " In fact, nobody, including the respondents, contests that, in certain people, the fact of smoking cigarettes can create an addiction and can provoke, or cause, to be clear, certain diseases mentioned in the proceedings of the Council."

"And in particular, in Paragraph 31 of the Supreme Court judgment, near the middle of the page, Justice La Forest states the following:

> [31] (...) Overwhelming evidence was introduced at trial that tobacco use is a ... and I emphasize the word "a", ... principal cause of deadly cancers, heart disease and lung disease. In our day and age this conclusion has almost become a truism.

Your Lordship, there is no need to mobilize judicial forces to decide upon a truism. No need to mobilize judicial forces to decide upon a question that is not the subject of controversy or debate. And this is as true for the diseases mentioned in the proceedings of the Council as for the question of addiction".

as indicated in excerpts of the pleadings, exhibit **CL-39**

114. However, these opportunistic judicial admissions are based on no other research than those which they minimised, ignored, denied and refused to disclose during the past fifty years;

2. CREATION OF A SO-CALLED CONTROVERSY

115. The defendants, in concert with affiliated companies, have created and maintained a so-called "scientific controversy" as to the consequences of cigarette use on the health of members of the Group.

116. From what has been said, it is obvious that the defendants have not only failed to adequately inform the users of the dangers and the addiction their products create, but have rather done everything to distance themselves from their duty to inform the public. In addition, they have misinformed the public;

117. They have elaborated this strategy by adding to their scientific resources those of their marketing and legal advisors;

118. In the elaboration and implementation of this strategy :

- they have, among other things, prioritized research related to the origin of diseases rather than the composition of tobacco and tobacco smoke and its consequences on the health of the group members, as shown in exhibit **CL-40**;

- they started research on alleged "benefits" that could come about from consumption of their products and even invoked them publicly while they were silent about the certain, devastating effects they already knew about, as shown in exhibit **CL-41**;

119. As a matter of fact, as early as in 1968, the Vice-President (and future President) of B&W, established the orientation of research in the following terms:

(...) The question of orientation provoked from Janet Brown a well reasoned argument in defense of the long established policy of CTR, carried out through SAB, to "research the disease" as opposed to researching questions more directly related to tobacco. With apologies to Janet if I misstate her position, the argument seems to be that by operating primarily in the field of research of the disease we do at least two useful things:

First, we maintain the position that the existing evidence of a relationship between the use of tobacco and health is inadequate to justify research more closely related to tobacco. And

Secondly, that the study of the disease keeps constantly alive the argument that, until basic knowledge of the disease itself is further advanced, it is scientifically inappropriate to devote the major effort to tobacco (...)

a copy of this letter is produced as exhibit **CL-42**

120. This strategy is also depicted in the testimony of the presidents of the defendants heard before the Isabelle Commission, whose mandate was to hold an inquiry on advertising in the field of tobacco. Excerpts of their testimony are produced "en liasse" as exhibits **CL-43**;

3. MISINFORMATION

121. Despite their knowledge of the effects of tobacco consumption (knowledge they have had for over fifty years), the manipulation of their products contributing to consumer addiction, the creation of a scientific controversy and a systematic policy of non-disclosure, the defendants have publicly denied and, at times, ridiculed the terrible effects stemming from the use of tobacco by the group members, to whom they manufacture and sell their products;

122. In 1969, before the Isabelle Commission, the President of ITL, speaking in the name of the *ad hoc* Committee of the tobacco industry regrouping the three defendants, stated the following, concerning the effects of tobacco use:

Mr. Paré: We are certainly not doing any favours to the thousands of smokers when we continuously assail them with certain extreme and unprovoked statements on the so-called harmful effects of tobacco.
[...]

Mr. Paré: I estimate that, for any consumer product, some people cannot or had better not use it. It makes no difference, whether it be spinach or turnips or whatever. I think this should apply to tobacco in the same way.

Mr Robinson: Do you recognize, therefore, that tobacco use can be harmful to your health ?

Mr Paré: I think that is very different to what I said. We could describe carrots as being harmful to your health based on people who eat them but should not. In that context, I agree with what you said.

Mr Robinson: I think you've taken this declaration out of context ? We are not talking about carrots today, we are talking about tobacco.

Mr Paré: In that case, the answer is no, if you like...

as it appears in exhibit **CL-43**

123. In 1987, the defendants' officers, who appeared before the legislative committee of the House of Commons which was studying Bill C-204, denied, among other things:

- that cigarettes were dangerous for the health of consumers;

Mrs. McDonald: Mr Fennell, does a harmless cigarette with low contents of tar and nicotine exist? Again, does a harmless cigarette exist?

Mr. P.J. Fennell **[President Rothman, Benson & Hedges]** : Mrs. McDonald, I have never said that a dangerous cigarette existed, and I will therefore not say that a harmless one exists.

Mrs. McDonald: So, it does not matter.

Mr. P.J. Fennell: Excuse me, what are you talking about?

Mrs. McDonald: It does not matter whether people smoke cigarettes with high or low tar content. They are all harmless, are they not?

Mr. P.J. Fennell: People smoke cigarettes because they like it. Some prefer cigarettes with a high tar content and others prefer lighter ones. It's a personal choice.

Mrs. McDonald: And there are no health consequences. They are all equally dangerous or not.

Mr. P.J. Fennell: I think that I have already previously answered that question.

That it could have a harmful effect on a child to smoke or to be exposed to secondary smoke;

Mrs. McDonald: The product that you sell is the cause of certain conditions and deformities.

Mr. Hoult **[president of RJR–MacDonald Inc.]**: That is what you say.

Mrs. McDonald: We have had evidence, and it is well–known, that children whose parents smoke have twice as many respiratory problems as others. Mr. Hoult, do you not think that when we smoke at home, we are creating a risk for children?

Mr. Hoult: My response will be the same as that which I gave with respect to the other associations. Epidemiological research which has been done, and Dr Witorsch has observed this himself, shows that very often the verifications are not done as they should be and that the results are doubtful.

Mrs. McDonald: According to you, therefore, not one epidemiological study confirms this result.

Mr. Hoult: There is effectively no epidemiological study which establishes a direct connection of cause and effect.

Mrs. McDonald: Let's come back to this a little bit. According to you, a connection of cause and effect needs to be proved absolutely, even though we know very well that it would be completely immoral to force young children to breathe atobacco smoke for a long period of time.

Mr. Hoult: I think that there is a better way to do it. Outside of epidemiological studies or these extreme stances, I think that science gives us better tools to respond to your question. If we had to prove that certain elements contained in tobacco smoke were directly responsible for certain illnesses, this would certainly have been confirmed by clinical studies which were done on animals. In fact, this was not even once the case.

[...]

Mr. Hoult: No. We believe that this question is a personal choice. As long as a youth has not attained the age of adulthood, he is not sufficiently mature to make decisions.

Mrs. McDonald: But it does not seem insane to you that children are smoking?

Mr. Hoult: We don't have sufficient evidence to say whether it is sane or insane. We have clearly articulated our position on this point.

Mrs. McDonald: Mr. Fennell, when children smoke, is it good for their health?

Mr. P.J. Fennell: It is illegal for children under 18 to smoke.

Mrs. McDonald: Is it sane or insane for children to smoke?

Mr. P.J. Fennell: I don't have an opinion on this point. It is illegal, as the government says.

That it can be harmful for a pregnant woman to smoke;

Mrs. McDonald: (...)

Do you think that pregnant woman should smoke? Doctors have proven that outside of the harm that it could have from the point of view of the health of the mother, the foetus would also suffer as a result. Mr. Mercier, do you think that a pregnant woman should smoke?

Mr. Mercier **[president of CTMC and president of Imperial Tobacco Ltd]**: In a general fashion, if a smoker has doubts, he should consult [a physician], and if the doctor counsels him to not smoke, I would recommend that he stops smoking immediately. There, this has always been our position.

Mrs. McDonald: You are therefore not going to answer my question. Pregnant women, should they smoke?

Mr. Mercier: I have already answered.

Mrs. McDonald: Is it bad for pregnant woman to smoke, for themselves and the fetus?

Mr. Mercier: I am not a doctor. It is for a doctor to decide and I recommend that pregnant women adhere to advice of their doctors.

Mrs. McDonald: Mr. P.J. Fennell.

Mr. P.J. Fennell: Consultations provided by doctors are effectively the best way to counsel pregnant women. As I said, Canadian opinion is generally aware of problems which are attributed to the consumption of tobacco. And female smokers also think that there is a cause and effect relationship.

Mrs. McDonald: Are you persuaded of this, Mr. Fennell?

Mr. P.J. Fennell: No. This is not what I think.

Mrs. McDonald: You don't think therefore that there is a risk for a pregnant woman and for her fetus?

Mr. P.J. Fennell: No, I don't think so.

Mrs. McDonald: Mr. Hoult.

Mr. Hoult: Given the criteria that we have used ourselves, I never had formal proof in my hands. I must therefore respond in the same way. This is a question which is medical and to which I can not respond; it is for a doctor to counsel his patient.

That tobacco is the cause of several illnesses annually causing the death of thousands of Canadians;

"Mrs. McDonald: Your factum contests numerous studies but you do not share your profound convictions. I would like you to tell us publicly if you are in agreement with this. The Canadian Medical Association and the Ministry of Health and Social Welfare estimate that 35,000 Canadian smokers die each year of tobacco-related illnesses. Are you in agreement Mr. Hoult?

Mr. Hoult: No.

Mrs. McDonald: In this case, how many?

Mr. Hoult: Nobody can say given the data which we have today.

Mrs. McDonald: Are there smokers that die of illnesses connected to tobacco? Is there at least one?

Mr. Hoult: Nobody can say. Testimonies which have been presented today and during previous occasions show that studies on which we are basing ourselves are nothing but statistics. In no cases did the clinical research allow us to show that tobacco smoke was the cause of illnesses. That is the clinical result.

Mrs. McDonald: Mr. Fennell: How many smokers die each year in Canada?

Mrs. [sic] P.J. Fennell: I already responded to this question when Mrs. Copps asked me. I gave her a much longer answer than this one. Science has not proven that there is a cause and effect relationship between tobacco and illness. We recognize, however, that scientific reports establish a statistical link between tobacco and illness. It is good that scientific studies are being pursued to establish the truth.

As indicated in the transcript of the declarations issued with the present as Tab **CL-44**;

1. In fact, since the creation of the CTMC, the defendants have acted in concert in order to maintain a common front to accomplish the following objectives:

   - maintain the collective denial of the dependency-creating character of nicotine and, more recently, to trivialize and minimize the weight of their admissions relating to dependence;

   - maintain the collective denial that a causal link is established between smoking a cigarette and any given health problem and, more recently, to trivialize and minimize the weight of their admissions relating to the causal link between tobacco addiction and health problems;

   - erase or refrain from divulging internal research results conducted by the defendants or by companies which are related to them which would tend to demonstrate the health impact of cigarettes, as well as the addictive character of nicotine;

   - combat the perception that their products are dangerous for health in creating from scratch a so-called "controversy" tending to discredit independent scientific and/or governmental research establishing the danger of cigarettes, as well as the addictive character of nicotine;

   - trick consumers by launching on the market so-called light or soft cigarettes with the goal of making consumers believe that these cigarettes are less damaging for health when they know that this is not the case;

VIII. FALSE ADVERTISING AND MARKETING STRATEGIES

125. In an internal document of BAT dating from 1976, Dr. Sydney J. Green recognized that it was irresponsible to have encouraged people to smoke:

> (4) In view of the known toxicity and the strong association of smoking and disease I believe any attempt to increase the smoking habit is irresponsible.

as indicated in a copy of this document, Exhibit **CL-45**;

126. However, despite the dangerous nature of their product, the defendants have promoted it by means of misleading advertisement and marketing strategies;

127. On the occasion of the debate on the constitutionality of *An Act Respecting Tobacco Products* (L.C. 1997 c. P-11.5), the defendants claimed that their advertisement did not have the effect of inciting consumers to smoke:

> Defence of the Attorney General of Canada, May 23, 1997
>
> [90] The consumption of tobacco products is at the heart of a national health problem, as described above. Parliament, in an effort to limit tobacco consumption, has chosen, among other things, to restrict the inducement to consume those products;
>
> Response of JTI, June 6, 1997
>
> [20] In response to paragraph 90, the Plaintiff refers to what is said in paragraph 7 above and denies that people are induced by advertising to consume tobacco products;

as indicated in a copy of these procedures, Exhibits CL-23 and CL-24;

128. On its face, this affirmation is ludicrous. First, it is ridiculous to claim that an advertisement could only be geared towards smokers without having an impact on those that are susceptible to begin smoking;

129. Secondly, it is unrealistic to claim, as do the defendants, that their advertisement or marketing strategies are only geared towards the market of smokers who are susceptible of changing brands. In effect, this portion of the market would in no way justify the substantial amounts that the defendants invest in advertisement;

130. In fact, the internal documents of the defendants demonstrate that they orchestrated advertising campaigns and implemented marketing strategies aimed at associating their products with prestige, wealth, youth, vitality, liberty and freedom of spirit and, by these means, to convince new generations to join the ranks of smokers, as indicated notably in the examples of advertisements published by the defendants, Exhibit **CL-46**, bundled;

131. An internal document of RBH, entitled Project 21 and dated June 1995, mentions the following on the desirable characteristics of a package of cigarettes:

> <u>DESIRED IMAGE CHANGES The overriding desire is for a proposition which generates more social acceptability</u>

> -"More upscale This image would provide more social "status" to the smoker "*less blue collar, more elegant, more white collar, sophisticated, worldly, distinctive, discerning*"
>
> - More sociable more friendly, less pretentious, more fun.
>
> - More considerate... "nicer, more caring, cleaner, healthier"
>
> - Less harmful a general sense of healthfulness and/or a healthy lifestyle
>
> - More contemporary.. modern, cool, youthful and younger..
>
> - Cleaner less dirty .. both in physical (less messy) and in image (less downscale) terms

as indicated in a copy of this document, Exhibit **CL-47**;

132. The defendants used a marketing approach identifying certain target groups as "segments", such as, for example, women, youth, "starters", or smokers worried about the effects of cigarettes on their health, the "quitters";

133. For example, ITL had concluded that women were preoccupied with the ugliness of packages having sanitary warnings:

> It was women who felt more strongly about their packages being made ugly; and about the stigma they felt would be associated with carrying around packages with these large explicit warnings

as indicated in a copy of the document entitled *Project Pampers* dated August of 1998, Exhibit **CL-48**;

134. As well, RBH aimed to reassure women that felt guilty about smoking:

> Many women influenced by smoker's guilt prefer a more attractive package than a less visible (i.e. discrete) one. [...]

as indicated in a document entitled *Oona II: A Qualitative Study*, dated November of 1994, Exhibit **CL-49**;

1. "*FISH WHERE THE FISH ARE*": ADVERTISING AIMED AT YOUTH

135. More than 90% of smokers in Québec started to smoke before the age of 18;

136. On June 8, 2000, in his testimony before the senate committee studying Bill S-20, Robert Bexon, president and chairman of the board of ITL, affirmed the following:

> [Senator Banks]

> At some time the tobacco industry, and your company in particular, did research that included and to some degree targeted smokers between 12 years and 17 years of age. Do you know how long it has been since your company stopped doing that?
>
> [Robert Bexon, CEO ITL]
>
> We have never targeted youth. I must put that out again. I will leave the document that will prove it. We have never targeted underage smokers and I want that on the record. The last 15-year-old out of our statistical component of the survey fell off about four or five years ago, but I cannot speak exactly to that.
>
> [our emphasis]

as indicated in a copy of the transcript, Exhibit **CL-50**;

137. This affirmation is not only contradicted by a panoply of internal documents, but it shocks common sense. It is evident that in order to accomplish their mission and to maximize the value of their business, the defendants must trap the largest number of youth possible;

138. This is what they do. A document dated March 25, 1977, prepared by Spitzer, Mills & Bates entitled *The Player's Family, A Working Paper*, produced as exhibit **CL-51**, states, among other things, that:

> POSITIONAL STATEMENT (Dec 1976)
>
> "To position Player's Filter as the brand with the greatest relevant appeal to younger, modern smokers, by being part of a desirable natural lifestyle".
>
> The basic of appeal is:
>
> 1) Natural social acceptability of the brand in the peer group environment.
>
> 2) Strength of taste, provided that the fullness of taste is perceived as slightly milder than Export A; thus building on historical perceptions of Player's Filter being milder than Export A, particularly among non-users.
>
> Rationale
>
> 1) By younger modern smokers, we mean those people ranging from starters of the smoking habit up to and through the seeking and setting of their independent adult lifestyle. (...)
>
> 2) 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 (...)
>
> [Our emphasis]

139. As well, a document entitled *F/85 Marketing Plan*, produced as Exhibit **CL-52**, describes very well the vision of the defendants with respect to their future clients:

> [...]
>
> 2- PRECISION/PRODUCTIVITY
>
> We have to continue to "fish where the fish are". That means refining our store segmentation approach (via store profiles, etc.) For the time being, we will agree that there are, at least two stores types
>
> - Type A where young people, particularly young males tend to buy packages of predominantly regular versions of products at 9 mgs, and
>
> - Others where the above group does not "dominate".
>
> 6- NEW NON-TRADITIONAL MEDIA
>
> What we are talking about is having our imagery reach those difficult to reach, non-reading young people that frequent malls in an impactful, involving first-class way that makes them, us, mall managers, etc. happy.
>
> [Our underline]

140. As well, in a document entitled *Matinee Marketing Plan*, for the year 1971, we find the following affirmation:

> Young smokers represent the major opportunity group for the cigarette industry. We should therefore determine their attitudes to smoking and health and how this might change over time.

as appears from a copy of this marketing plan, Exhibit **CL-53**;

141. As well, a marketing document of ITL entitled *Fiscal '81 National Media Plan*, mentions that the emphasis for certain brands should be placed on the group of "males under 24 years of age", a group which includes those which are aged 12 years or more:

TARGET GROUP :	Weight
Males 12-24 years	1.0

Females 12-17	0,5
Females 18-24	0,4
Male smokers 25-34	0,8
Female smokers 25-34	0,3

as appears indicated in a copy of this document, Exhibit **CL-54** and from a copy of the document *Fiscal '80 National Media Plan*, Exhibit **CL-55** which [is] to the same effect;

142. As well, an internal study of ITL, dated in the month of August 1991 and entitled *Switching Analysis*, concludes that:

> Although switchers of all ages represent opportunity for new business, targeting young consumers continues to be of strategic importance in terms of future growth because of their switching behaviour, twice the rate of total smokers.

as indicated in a copy of this study, exhibit **CL-56**;

143. In the *Strategic Plan 1997/1998* of RBH, the following is indicated:

> Demographic Shifts/Young Adult Market
>
> •RBH must be ever mindful of the changing demographic profile of the Canadian marketplace including the increasing percent of immigrants and the impact that these changes have on the demand for product and brands. We must plan/prepare not only for today but for the market of the future.
>
> •Identify products and activities which wll strengthen RBH's position among the key 19-24 age group to gain a much larger share of starters
>
> [...]
>
> -although the key 15-19 age group is a must for RBH there are other bigger volume groups that we cannot ignore for example: (...)

as appears from a copy of this document, exhibit **CL-57**;

144. The marketing strategies of the defendants have never changed relative to the necessity of seducing minors but the vocabulary used has been polished since these strategies were brought to light;

145. From that point on, there were no longer direct references to targets which included minors. The 12-17 year olds or the 15-24 year olds became the "less than

24 year olds" and the new smokers or "starters" are now part of the group of 19-24 year olds;

146. The marketing plan of the defendant RBH for the year 1996 to 1997 is an example which illustrates this change of direction but reveals, nevertheless, the permanence of the objective to reach minors and to associate their poison with prestige, wealth, youth, vitality, liberty, and independence, as appears from a copy of this plan, Exhibit **CL-58**. The forces of ITL are described in the following manner by RBH in this document:

> • [ITL] Owns the 18-24 age segment with 81% of consumers in this segment smoking an Imperial brand.
>
> • Owns the 14-17 age segment with over 90% of consumers smoking duMaurier or Player's.
>
> • Representation across all age groups; all segments.

And, on the subject of the new design of ITL's duMaurier packages, under the title:

> "BIGGEST NEWS":
>
> • Pack appears designed to offset the current health warning.

147. From the foregoing, it is evident that the defendants have targeted youth while affirming the contrary. Their statements in this regard are fundamentally vitiated because, if it is particularly reprehensible to target youth, no reasonable person would try to convince anybody to smoke without engaging his civil liability;

148. As well, any advertising or marketing strategy having the goal of making consumers believe that certain cigarette brands are less harmful for their health is misleading and faulty because the defendants know very well that no type of cigarette is safe;

149. Equally, any advertising or marketing strategy associating cigarettes to liberty and to independence of spirit is misleading and false because cigarettes do not represent freedom but, to the contrary, a dangerous subservience for their victims;

150. In this respect, the use of the terms "light" ("légères"), "smooth" ("douces") "douces" or "veloutées", "ultra light" ("ultra légères"), "ultra smooth" ("ultra douces"), or other similar expressions are misleading, as more amply alleged hereafter in paragraphs 149 to 162 of the present;

IX. THE SWINDLE OF "LIGHT" AND "SMOOTH" CIGARETTES

151. The defendants know that a large number of smokers wish to stop smoking or, at least, undertake concrete action to decrease the risks of their tobacco addiction;

152. The defendants, in reaction to this wish, have mounted advertisement campaigns and have launched products aimed at reassuring smokers and encouraging them to continue to smoke;

153. In particular, "light" or "smooth" brand-types attract consumers who wish to stop smoking and are marketed with the specific goal of preventing the smokers from stopping to smoke;

154. In changing for a product which claims to contain less nicotine and less tar, several consumers have believed and continue to believe that these products are safer;

155. The defendants understand very well what kind of advantage they can draw from light and smooth cigarettes, as appears, for example, from a report of the firm Marketing Systems Inc. of New York, dated August 26, 1982, addressed to ITL:

> PERCEPTIONS OF LOW-TAR BRANDS
>
> -LTN's [Cigarettes à basse teneur en goudrong et en nicotine (Low Tar and Nicotine)] allow consumers to continue to smoke under social duress. As a category, low-tar brands are seen as a means to yield to health considerations, social pressures and personal guilt feelings.
>
> -LTN's smokers can be grouped into two categories: those who want to continue to enjoy smoking and those who are trying to give it up.
>
> -The most important feature of this market is that smokers perceive the low-tar smoking experience as involving giving up part of the enjoyment of smoking while, in fact, they wished that low-tar, i.e., reduction of health hazard, be an added benefit..
>
> [...]
>
> 1. Benefits sought
>
> The reasons mentioned for smoking LTN cigarettes, all of which involve the low tar feature, may be classified as follows:
>
> 1. Health considerations, i.e. coughing, etc;
>
> 2. Concern about safety of cigarette smoking due to publicity and articles;
>
> 3. Pressure to smoke safer cigarettes exercised by relatives and friends;
>
> 4. Attempts to give up smoking altogether.

as indicated in a copy of this report, Exhibit **CL-59**;

156. As well, in a document which is undated but drafted after 1985 entitled *Response of the market and of Imperial Tobacco to the Smoking and Health Environment*, we can read the following:

> Marketing Opportunities
>
> Charts A and B show that the four brands containing less than 6 mgs of tar now hold a combined 4.5% market share. We have evidence of virtually no quitting among smokers of those 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.
>
> [Our emphasis]

As indicated in a copy of this document, Exhibit **CL-60**;

157. The motivation to reduce the nicotine and tar rates is summarized in the instructions that BAT gave its subsidiaries in 1979:

> In view of mounting concern and action on health issues by Governments and international organizations such as WHO, UNCTAD, etc. and, indeed, likely competitive response, it is essential that our export and locally manufactured products should yield acceptable deliveries both in the eyes of public organisations, and in the interest of reassuring smokers themselves.

as indicated in a copy of these instructions, Exhibit **CL-61**;

158. However, as mentioned at paragraphs 77 to 81, the defendants know very well that the behaviour of most smokers will be such that they will succeed to extract their dose of nicotine from these so-called "light" or "smooth" cigarettes by the phenomenon of compensation;

159. The defendants also know that light or smooth cigarettes can be more harmful than those which contain higher quantities of tar but nevertheless suggest the contrary and deliberately exploit this perception in order to mislead consumers;

160. The defendants have also developed techniques in order to mislead consumers on the nicotine and tar rates which they should have printed on their cigarette packages by playing on elasticity, or the possibility to give smokers more than the rate of nicotine or other additives which are announced;

161. This trickery has spawned the following reflection of a researcher working for BAT, which we find in an internal document:

> Is this an ethical thing to do? People who buy an 8 mg product expect to get 8 mg. [...] If a declaration that this product is elastic is made then it could upset the apple cart.

as indicated in a copy of this document, Exhibit **CL-62**;

162. The ethical debate was resolved in the following manner:

> From a research and product development viewpoint, the proposition of designing a cigarette of high taste to tar ratio, which responds positively to human behaviour has been agreed to be acceptable. This is necessary if we are to explore and understand what consumers are seeking from the cigarettes they buy.
>
> [...]
>
> The marketing policy concerning this type of product is not clear but it is believed it will depend largely on the degree of elasticity in the design and how overtly this elasticity is achieved. The consensus is that small improvements in elasticity which are less obvious, visually or otherwise is likely to be an acceptable route.

as indicated in a copy of an internal document of BAT, Exhibit **CL-63**;

163. In order to mislead the consumer, the defendants have also considered how to falsify the instruments measuring the rates of tar and of nicotine:

> Smokers have disappointed us in that they have not chosen to smoke twice as many 10 mg cigarettes if they changed from 20 mg products. Thus in order to reinforce the primary pleasures of smoking, I have proposed to make it easier for smokers to take what they want from a cigarette which might well have a low delivery when smoked by machine which overcomes current legal constraints and to enhance the sensations from the first few puffs.

as indicated in a copy of this document, Exhibit **CL-64**;

164. From the foregoing, it appears that the defendants have not fulfilled their legal obligations:

- in using terms which allow consumers to believe that "light" or "smooth" are less harmful for their health;
- in omitting to inform consumers of the accrued health risks which could result from the consumption of these products;
- in omitting to inform the consumers that the measurements of tar and nicotine rates printed on cigarette packages could be misleading;

X. THE CASE OF MS. CÉCILIA LÉTOURNEAU

165. The plaintiff, Cécilia Létourneau, began to smoke cigarettes manufactured by ITL in 1964, when she was 19 years of age;

166. In 1964, Ms. Létourneau associated cigarettes with freedom and autonomy; smoking was, for her, a visible manifestation of her newly-acquired autonomy;

167. At the moment at which she started to smoke, Ms. Létourneau did not know that cigarettes could create an addiction but she rapidly became addicted;

168. A few years later, learning little by little from the media that smoking was dangerous for her health, Ms. Létourneau opted for a brand for which the advertised rates of nicotine and tar were less;

169. Subsequently, Ms. Létourneau made her first attempt at quitting following a bout with the flu;

170. This attempt failed. When her flu was healed, the physiological need manifested itself and she was incapable of resisting it;

171. In 1977, her doctor at the time informed her that smoking while taking oral contraceptives represented an increased risk of cardiac illnesses;

172. This revelation pushed her to attempt, once again, to quit smoking, which she did by gradually lowering her consumption, which was of approximately 25 cigarettes a day, by removing one cigarette per day;

173. This strategy worked until she arrived at 13 cigarettes per day;

174. At this level of consumption, Ms. Létourneau had difficulty concentrating on anything else but the moment at which she could have her next cigarette. A relapse followed;

175. In 1978, Ms. Létourneau attempted, once again, to quit smoking following an invitation made by a friend to accompany him during a fishing trip;

176. Ms. Létourneau agreed that she would not bring cigarettes on the two-week trip. Five days later, Ms. Létourneau had to admit, once again, that she was defeated by her nicotine addiction and she felt a profound humiliation as a result;

177. In 1980, Ms. Létourneau tried, once again, to quit following another warning from her doctor relating to the dangers of using oral contraceptives while smoking. Despite substantial symptoms of withdrawal, she succeeded in not smoking for one month but was incapable of holding out longer;

178. After this failure, Ms. Létourneau decided to never again try quitting, resigning herself to the fact that she was hooked for life;

179. Fifteen years later, Ms. Létourneau met a doctor who explained to her the nature of nicotine addiction and informed her of the possibility of following replacement therapy by means of nicotine patches, which could facilitate the withdrawal process;

180. In June of 1996, Ms. Létourneau tried, once again, to stop smoking with the help of a prescription for nicotine patches. This attempt worked up until January 1998, but her addiction got the upper-hand once more;

181. Other than the damages mentioned above, Ms. Létourneau is addicted to nicotine, a toxic product, and she suffers an increased risk, because of this addiction, of contracting one or several illnesses associated with the use of cigarettes, as well as having her life expectancy reduced;

182. Moreover, because of her addiction, Ms. Létourneau has suffered and continues to suffer moral damages related to the loss of self-esteem resulting from her incapacity to break her addiction and the humiliation resulting from the failures she has experienced each time she has tried to quit;

183. Moreover, Ms. Létourneau is the victim of the social disapproval which afflicts every smoker;

184. What is more, given her addiction, Ms. Létourneau needs to purchase a costly and toxic product;

XI. THE RECOVERY AND LIQUIDATION OF THE CLAIMS

185. All of the members of the group, given their addiction, suffered moral damages which are similar or identical to those suffered by the plaintiff and, consequently, are all in right to claim compensation under this head from the defendants;

186. The plaintiff requests therefore, that the defendants be solidarily condemned to pay to each member of the group a lump sum of $5,000 to compensate them for non-pecuniary damages linked to the addiction, and requests that the Court order the collective recovery of this award, namely the amount of $8,901,000,000;

187. Given the intentional faults and the blatant bad faith of the defendants, as here described, all of the members of the group are in right to claim exemplary damages from the defendants;

188. The plaintiff therefore requests that the defendants be solidarily condemned to pay to each member of the group an amount of $5,000 under the head of exemplary damages for an illicit and intentional infringement of their rights as guaranteed by the : *Quebec Charter for Human Rights and Freedoms* (L.R.Q., c. C-12), as well as for the default of failing to conform to the provisions of the *Consumer Protection Act* (L.R.Q., c. P-40.1) and requests that the Court order the collective recovery of this award, namely the amount of $8,901,000,000;

189. The plaintiff requests that the Court determine the process of distribution and of payment to each member given articles 1027 to 1036 C.C.P., the evidence and the suggestions being subsequently presented by the parties at an opportune time;

190. The plaintiff also requests that the Court make it possible for members of the group to bring individual claims for all damages other than those which are the object of collective recovery;

191. The plaintiff requests that the Court determine the process of liquidation of individual claims and the modalities of payment given articles 1027 and 1040 C.C.P., based on the evidence and the suggestions which will be presented by the parties at an opportune time;

FOR THESE REASONS, MAY IT PLEASE THE COURT TO :

GRANT the class action of the plaintiff;

CONDEMN the defendants solidarily to pay to each of the members of the group a sum of $5,000 under the head of non-pecuniary damages, with interests and the additional indemnity since the service of the Motion to authorize the exercise of a class action;

CONDEMN the defendants solidarily to pay to each of these members of the group the sum of $5,000 under the head of exemplary damages;

ORDER the collective recovery of these awards, namely the payment of a sum of $17,802,000,000 with interests and the additional indemnity on the sum of $8,901,000,000 since the service of the Motion for authorization to exercise a class action, with interests and the additional indemnity on the sum of $8,901,000,000 starting from the date of the judgment to be rendered herein;

DETERMINE the appropriate measures of distribution for these sums recovered collectively and the modalities of payment of these sums to the members of the group;

ORDER the liquidation of the individual claims for any other damage suffered by the members of the group;

DETERMINE the process of liquidation of individual claims and of the modalities of payment of these claims given articles 1027 to 1040 C.C.P.;

ORDER the publication of notices to members foreseen at article 1030 C.C.P.;

THE WHOLE WITH COSTS, including expert and opinion fees;

MONTREAL, Septembre 30, 2005 MONTREAL, September, 30, 2005

(s) TRUDEL & JOHNSTON
TRUDEL & JOHNSTON
Attorneys of the plaintiff

(s) KUGLER KANDESTIN
KUGLER KANDESTIN
Attorneys of the defendant

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

No.: 500-06-000070-983

(Class Action)
SUPERIOR COURT

CÉCILIA LÉTOURNEAU

Plaintiff

v.

IMPERIAL TOBACCO CANADA LIMITÉE

-and-

ROTHMANS, BENSON & HEDGES INC.

-and-

JTI MACDONALD CORP.

Defendants

NOTICE OF PRESENTATION

Addressees:

Borden Ladner Gervais
1000 de La Gauchetière West
Suite 900
Montreal, Québec H3B 5H4
Attorneys for JTI-MacDonald Corp.

Ogilvy, Renault
1981 McGill College avenue
Suite 1100
Montreal, Québec H3A 3C1
Attorneys of Imperial Tobacco Ltée

McCarthy Tétrault
1170 Peel Street
5th floor
Montreal, Québec H3B 4S8
Attorneys for Rothmans, Benson & Hedges Inc.

TAKE NOTICE that the present Motion will be presented for decision before the Honorable Carole Julien, judge designated to the present class action, on October 20, 2005, in a room which will be determined by this Honorable Judge, at the Montreal Courthouse.

GOVERN YOURSELVES ACCORDINGLY.

MONTREAL, Septembre 30, 2005

(s) TRUDEL & JOHNSTON
TRUDEL & JOHNSTON
Attorneys of the plaintiff

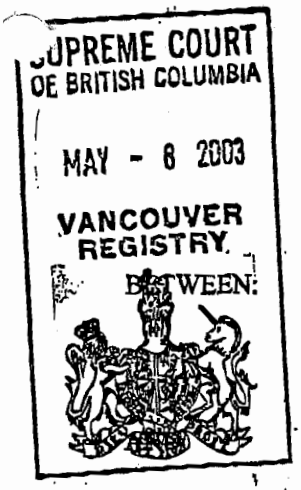
MONTREAL, September, 30, 2005

(s) KUGLER KANDESTIN
KUGLER KANDESTIN
Attorneys of the defendant

TAB III

LAJB

L 031300



No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BC Class Action

KENNETH KNIGHT

PLAINTIFF

IMPERIAL TOBACCO CANADA LIMITED

DEFENDANT

WRIT OF SUMMONS
Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

(Name and address of each Plaintiff)	Kenneth Knight c/o Klein Lyons 1100 - 1333 West Broadway VANCOUVER, B.C. V6H 4C1
(Name and address of each Defendant)	Imperial Tobacco Canada Limited 3711 St.-Antoine Street Montreal, Quebec H4C 3P6

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom, Canada and Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith.

TO the Defendant(s): Imperial Tobacco Canada Limited

TAKE NOTICE that this action has been commenced against you by the Plaintiff(s) for the claim(s) set out in this writ.

IF YOU INTEND TO DEFEND this action, or if you have a set-off or counterclaim which you wish to have taken into account at the trial, **YOU MUST**

(a) **GIVE NOTICE** of your intention by filing a form entitled "Appearance" in the above registry of this Court within the Time of Appearance provided for below and **YOU MUST ALSO DELIVER** a copy of the "Appearance" to the Plaintiff's address for delivery, which is set out in this writ, and

(b) if a Statement of Claim is provided with this writ of summons or is later served on or delivered to you, FILE a Statement of Defence in the above registry of this court within the Time for Defence provided for below and DELIVER a copy of the Statement of Defence to the Plaintiff's address for delivery.

YOU OR YOUR SOLICITOR may file the Appearance and the Statement of Defence. You may obtain a form of Appearance at the Registry.

JUDGMENT MAY BE TAKEN AGAINST YOU IF

(a) **YOU FAIL** to file the Appearance within the Time for Appearance provided for below, or
(b) **YOU FAIL** to file the Statement of Defence within the Time for Defence provided for below.

TIME FOR APPEARANCE

If this Writ is served on a person in British Columbia, the time for appearance by that person is 7 days from the service (not including day of service).

If this Writ is served on a person outside British Columbia, the time for appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

(or, where the time for appearance has been set by order of the court, within that time.)

TIME FOR DEFENCE

A Statement of Defence must be filed and delivered to the plaintiff with 14 days after the later of

(a) the time that the Statement of Claim is served on you (whether with this writ of summons or otherwise) or is delivered to you in accordance with the Rules of Court, and

(b) the end of the Time for Appearance provided for above.

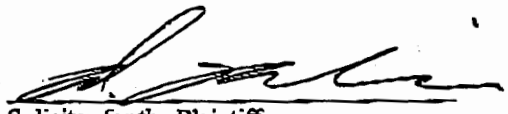
(or, if the time for defence has been set by order of the court, within that time.)

(1) The address of the registry is: 800 SMITHE STREET VANCOUVER BC V6Z 2E1
(2) The plaintiff's address for delivery is: KLEIN, LYONS #1100 – 1333 WEST BROADWAY VANCOUVER BC V6H 4C1 Fax number for delivery: (604) 874-7180
(3) The name and office address of the plaintiff's solicitor is: David A. Klein KLEIN, LYONS #1100 – 1333 WEST BROADWAY VANCOUVER BC V6H 4C1

The plaintiff's claim is detailed in the Statement of Claim.

The plaintiff claims the right to serve the defendant outside British Columbia pursuant to Rules 13(1)(i) and 13(1)(o) on the basis that injunctive relief is requested and on the basis that the claim arises out of goods or merchandise sold or delivered in British Columbia.

Dated: May 8, 2003



Solicitor for the Plaintiff

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

KENNETH KNIGHT

Plaintiff

AND:

IMPERIAL TOBACCO CANADA LIMITED

Defendant

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c.50

STATEMENT OF CLAIM

1. The Plaintiff, Kenneth Knight, is a resident of Roberts Creek, British Columbia.

2. The Defendant, Imperial Tobacco Canada Limited, is Canada's largest tobacco company, manufacturing nearly 70% of the cigarettes sold in this country. The Defendant is a company incorporated pursuant to the laws of Canada and has a registered office at 3711 St. Antoine Street West, Montreal, Quebec.

3. This is a proposed class action brought pursuant to the *Trade Practices Act*, R.S.B.C. 1996, c. 457 (the "TPA") and the *Class Proceedings Act*, R.S.B.C. 1996, c.50 on behalf of persons who made purchases in British Columbia of "light" and "mild" cigarettes manufactured, sold and/or distributed by the Defendant. The class is intended to include persons who are "consumers" within the meaning of section 1 of the TPA. Excluded from the proposed class are directors, officers and employees of the Defendant.

4. The terms "light" and "mild" are descriptors that the Defendant uses 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 Defendant 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 Defendant solicited, offered, advertised and promoted the sale of its Light Cigarettes to consumers in British Columbia. As such, the Defendant is a "supplier" within the meaning of section 1 of the TPA.

5. Each purchase by the Plaintiff and by class members of the Defendant's Light Cigarettes for personal use is a "consumer transaction" within the meaning of section 1 of the TPA. Each solicitation and promotion by the Defendant with respect to the purchase by consumers of the Defendant's Light Cigarettes is a "consumer transaction" within the meaning of section 1 of the TPA.

6. 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 Defendant's continued profitability. The Defendant 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.

7. The Defendant 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 Defendant's 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 Defendant's 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.

8. The Defendant's Lights are not less harmful, nor do they transmit significantly fewer toxic emissions to the smoker. The Defendant 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 Defendant thereby achieved apparent support for its claim that its Lights 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 Defendant's Light Cigarettes as "light" or "mild" had the capability, tendency or effect of being deceptive or misleading. The Defendant published the machine read toxic emission levels, and specifically the levels of tar and nicotine, of its Light Cigarettes in promotional material and on the cigarette packages. The publication of those levels had the capability, tendency or effect of being deceptive or misleading.

9. The so-called lowered toxic emission deliveries of the Defendant's 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 or fingers, inhale more deeply, puff more frequently, hold the smoke in their lungs for longer and smoke more cigarettes.

10. The Defendant 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 Defendant failed to make timely disclosure to consumers of the existence and results of those tests. Additionally, the Defendant failed to disclose that the smoke produced by its Lights is more genotoxic (causing genetic and chromosomal damage) per milligram of tar than regular cigarettes. The failure to make these disclosures had the capability, tendency or effect of being deceptive or misleading.

11. 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. In particular, the Defendant:

(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 had the capability, tendency or effect of deceiving or misleading consumers;

(b) stated numbers for toxic emissions levels, and specifically levels of tar and nicotine, for its Light Cigarettes that had the capability, tendency or effect of deceiving or misleadingly the consumer as to the relative levels of toxic emissions, including tar and nicotine, of the Defendant's Light Cigarettes in comparison with regular cigarettes;

(c) used the descriptors "light" and "mild" in the marketing of its Light cigarettes which had the capability, tendency or effect of 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 Defendant 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 to 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 reductions in toxic emissions;

(h) failed to disclose the material fact that smoking the Defendant's 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 Defendant's 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 Defendant 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 Defendant's manipulation of the nicotine content of its Light Cigarettes.

12. The Plaintiff purchased and consumed approximately one and a half packs a day of the Defendant's Light Cigarettes in British Columbia for a period of approximately 17 years. The Plaintiff did not have knowledge of the conduct by the Defendant alleged in this claim, or of any facts from which it might reasonably be concluded that the Defendant was so acting, or which would have lead to the discovery of such actions, until a few months prior to the commencement of this action. The Defendant willfully concealed 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.

13. The Defendant has unfairly and unjustly profited from its deceptive acts and practices with regard to its solicitation, offer, advertisement and promotion of its Light Cigarettes.

14. The Plaintiff seeks a declaration pursuant to section 18(1)(a) of the TPA that the Defendant's acts or practices as described in paragraph 11 of this Statement of Claim are deceptive acts or practices.

15. The Plaintiff seeks a permanent injunction pursuant to section 18(1)(b) of the TPA restraining the Defendant from engaging or attempting to engage in the deceptive acts or practices described in paragraph 11 of this Statement of Claim.

16. The Plaintiff seeks an order pursuant to section 18(2) of the TPA requiring the Defendant to advertise to the public the particulars of any judgment, declaration, order or injunction against it in this action on terms and conditions the court considers reasonable and just.

17. The Plaintiff seeks statutory compensation for the class pursuant to sections 18(4) and 22(1) of the TPA, including an order that the Defendant refund all sums that class members paid to purchase the Light Cigarettes, or that the Defendant 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.

18. The Plaintiff does not seek to recover damages for personal injuries suffered by any class member.

19. 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 to society in general has been substantial. The Defendant's conduct, as outlined in this Statement of Claim, has been sufficiently high handed, callous and reprehensible that an award of punitive damages is justified.

20. The Plaintiff pleads that it is unnecessary for the Plaintiff or any class member to prove that the Defendant's deceptive acts or practices caused such persons to purchase the Light Cigarettes in order to make out a claim for relief under sections 18(1), 18(4), 22(1)(b) and 22(1)(c) of the TPA.

21. In the alternative, the Plaintiff pleads that the Defendant's deceptive acts or practices did cause the Plaintiff and class members to purchase the Light Cigarettes such that a claim for relief is made out under sections 18 and 22 of the TPA.

22. The Plaintiff pleads that even if causation is a required element of a claim under sections 18 and 22 of the TPA, individual reliance on the deceptive acts or practices is not a required element of a cause of action under those sections.

23. In the alternative, the Plaintiff pleads that he and the class members relied on the Defendant to disclose all material facts regarding the Defendant's Light Cigarettes. The failure of the Defendant 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.

24. In the further alternative, the Plaintiff pleads that the Defendant's deceptive acts or practices were calculated or would naturally tend to induce the Plaintiff and the class members to act upon the deceptive acts or practices when purchasing the Defendant's Light Cigarettes and that reliance on the Defendant's deceptive acts or practices may be inferred.

25. In the still further alternative, the Plaintiff pleads that he and the class members acted in reliance on the Defendant's deceptive acts or practices, to their detriment, when they purchased the Defendant's Light Cigarettes.

26. 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 18(1)(a) of the TPA;

(c) a permanent injunction pursuant to section 18(1)(b) of the TPA;

(d) an order requiring the Defendant to advertise any adverse findings against it pursuant to section 18(2) of the TPA;

(e) disgorgement and/or restitution by the Defendant pursuant to sections 18(4) and 22(1)(b) of the TPA;

(e) damages pursuant to section 22(1)(a) of the TPA;

(f) punitive and exemplary damages pursuant to section 22(1)(a) of the TPA;

(g) the costs of administering and distributing an aggregate damage award;

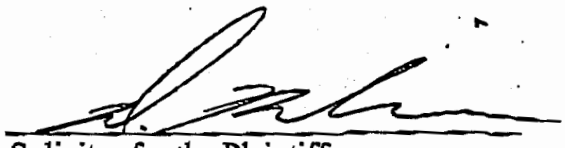
(h) costs pursuant to section 37(2) of the *Class Proceedings Act,* RSBC 1996, c. 50;

(i) interest pursuant to the *Court Order Interest Act,* RSCB 1996, c. 79; and

(j) such further and other relief this Honorable Court may find just.

PLACE OF TRIAL: Vancouver, British Columbia.

Dated at Vancouver, British Columbia, this 8th day of May, 2003.



Solicitor for the Plaintiff

This statement of claim is filed and served by David A. Klein of the firm of Klein, Lyons, Barristers and Solicitors, whose place of business and address for service and delivery is at 1100 – 1333 West Broadway, Vancouver, B.C. V6H 4C1.

Telephone: (604) 874-7171. Fax: (604) 874-7180.

Appendix A

Some of the Defendant's Light Cigarette Brands

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

MISSING AVANTI CAMEO.

TAB IV

Hfx No. 312807 2009

Supreme Court of Nova Scotia

Between:

BEN SEMPLE

Plaintiff

and

CANADIAN TOBACCO MANUFACTURERS' COUNCIL, B.A.T INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, BRITISH AMERICAN TOBACCO, p.l.c., IMPERIAL TOBACCO CANADA LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL, INC., PHILIP MORRIS USA INC., R. J. REYNOLDS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO, INTERNATIONAL, INC., CARRERAS ROTHMANS LIMITED, JTI-MACDONALD CORP , ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., and RYESEKKS p.l.c.

Defendants

Brought under the *Class Proceedings Act.*

Notice of Action and Statement of Claim

Casey R. Churko

Tel: (306) 359-7777
Fax: (306) 522-3299

HPx No. 3128609 2009

Supreme Court of Nova Scotia

Between:

BEN SEMPLE

Plaintiff

and

CANADIAN TOBACCO MANUFACTURERS' COUNCIL, B.A.T INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, BRITISH AMERICAN TOBACCO, p.l.c., IMPERIAL TOBACCO CANADA LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL, INC., PHILIP MORRIS USA INC., R. J. REYNOLDS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO, INTERNATIONAL, INC., CARRERAS ROTHMANS LIMITED, JTI-MACDONALD CORP., ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., and RYESEKKS p.l.c.

Defendants

Brought under the *Class Proceedings Act.*

Notice of Action and Statement of Claim

Casey R. Churko

Tel: (306) 359-7777
Fax: (306) 522-3299

2009 HFx No. 312809

SUPREME COURT OF NOVA SCOTIA

Between:

BEN SEMPLE,

Plaintiff,

and

CANADIAN TOBACCO MANUFACTURERS' COUNCIL, B.A.T INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, BRITISH AMERICAN TOBACCO, p.l.c., IMPERIAL TOBACCO CANADA LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL, INC., PHILIP MORRIS USA INC., R. J. REYNOLDS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO, INTERNATIONAL, INC., CARRERAS ROTHMANS LIMITED, JTI-MACDONALD CORP., ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., and RYESEKKS p.l.c.,

Defendants.

Brought under the *Class Proceedings Act.*

Notice of Action

To:

CANADIAN TOBACCO MANUFACTURERS' COUNCIL
1808 Sherbrooke Street West
Montréal Quebec

B.A.T INDUSTRIES P.L.C.
Globe House
4 Temple Place
London, England

BRITISH AMERICAN TOBACCO P.L.C.
Globe House, 4 Temple Place
London, England

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED
Globe House, 1 Water Street
London, England

IMPERIAL TOBACCO CANADA LIMITED
3711 Rue Saint-Antoine
Montréal, Quebec

ALTRIA GROUP, INC.
120 Park Avenue
New York, New York

PHILIP MORRIS INCORPORATED
6601 West Broad Street
Richmond, Virginia

PHILIP MORRIS INTERNATIONAL, INC.
120 Park Avenue
New York, New York

PHILIP MORRIS USA INC.
6601 West Broad Street
Richmond, Virginia

R.J. REYNOLDS TOBACCO COMPANY
401 North Main Street
Winston Salem, North Carolina

R.J. REYNOLDS TOBACCO INTERNATIONAL, INC.
401 North Main Street.
Winston Salem, North Carolina

CARRERAS ROTHMANS LIMITED
Oxford Road
Aylesbury
Bucks, England

JTI-MACDONALD CORP.
1300 - 1969 Upper Water Street
Purdy's Wharf Tower II
Halifax, Nova Scotia

ROTHMANS, BENSON & HEDGES INC.
1500 Don Mills Road
North York, Ontario

ROTHMANS INC.
1500 Don Mills Road
North York, Ontario

RYESEKKS p.l.c.
Plumtree Court
London, England

Action has been started against you
The plaintiff takes action against you.

The plaintiff started the action by filing this notice with the court on the date certified by the prothonotary.

The plaintiff claims the relief described in the attached statement of claim. The claim is based on the grounds stated in the statement of claim.

Deadline for defending the action
To defend the action, you or your counsel must file a notice of defence with the court no more than following number of days after the day this notice of action is delivered to you:

- 15 days if delivery is made in Nova Scotia
- 30 days if delivery is made elsewhere in Canada
- 45 days if delivery is made anywhere else.

Judgment against you if you do not defend
The court may grant an order for the relief claimed without further notice, unless you file the notice of defence before the deadline.

You may demand notice of steps in the action
If you do not have a defence to the claim or you do not choose to defend it you may, if you wish to have further notice, file a demand for notice.

If you file a demand for notice, the plaintiff must notify you before obtaining an order for the relief claimed and, unless the court orders otherwise, you will be entitled to notice of each other step in the action.

Rule 57 - Action for Damages Under $100,000
Civil Procedure Rule 57 limits pretrial and trial procedures in a defended action so it will be more economical. The Rule applies if the plaintiff states the action is within the Rule. Otherwise, the Rule does not apply, except as a possible basis for costs against the plaintiff.

This action is not within Rule 57.

Filing and delivering documents
Any documents you file with the court must be filed at the office of the prothonotary The Law Courts Building, 1815 Upper Water St. Street, Halifax, Nova Scotia (telephone 902-424-4900).

When you file a document you must immediately deliver a copy of it to each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a judge orders it is not required.

Contact information
The plaintiff designates the following address:

MERCHANT LAW GROUP LLP
Barristers and Solicitors
2401 Saskatchewan Drive
Regina, Saskatchewan
S4P 4H8,

Phone: (306) 359-77777
Fax: (306) 522-3299,

Casey R. Churko.

Documents delivered to this address are considered received by the plaintiff on delivery. Further contact information is available from the prothonotary.

Proposed place of trial
The plaintiff proposes that, if you defend this action, the trial will be held in Nova Scotia.

Signed: June 15th, 2009

Signature of Counsel
Casey R. Churko for Ben Semple

MERCHANT LAW GROUP LLP
Barristers and Solicitors
2401 Saskatchewan Drive
Regina, Saskatchewan
S4P 4H8,

Phone: (306) 359-7777
Fax: (306) 522-3299,

Prothonotary's certificate
I certify that this notice of action, including the attached statement of claim, was filed with the court on June 15th, 2009

~~Prothonotary~~
NANCY MURPHY
Deputy Prothonotary

Statement of Claim

I. PARTIES

(1) plaintiff

1. The Plaintiff, Ben Semple, resides in Halifax, Nova Scotia.

2. The Plaintiff began smoking in 1968, at the age of 14, after being bombarded with tobacco advertisements and brainwashed into believed that smoking was glamorous, attractive, adventurous, cool, hip, macho and sexy - the key to personal and career success. Each advertisement failed to warn of the harmful effects of smoking. The Plaintiff currently smokes 20 cigarettes per day which are designed, manufactured, marketed and distributed by the Defendants.

(2) class

3. The Plaintiff brings this claim on behalf of all individuals, including their estates, their dependants and family members, who purchased or smoked cigarettes designed, manufactured, marketed, or distributed by the Defendants, for the period January 1, 1954[1], to the expiry of the opt out period as set by this Honourable Court.

(3) defendants

(a) BAT Group

4. B.A.T Industries p.l.c. was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Globe House, 4 Temple Place, London, England.

5. British American Tobacco p.l.c., was incorporated pursuant to the laws of the United Kingdom and has a registered office at Globe House, 4 Temple Place, London, England.

---

[1] By the end of 1953 it was known, and should have been known that smoking created unacceptable health risks for consumers and members of the class like the Plaintiff.

6. British American Tobacco (Investments) Limited was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Globe House, 1 Water Street, London, England.

7. Imperial Tobacco Canada Limited was incorporated pursuant to the laws of Canada. It has a registered office at 3711 Rue Saint-Antoine Montréal, Quebec.

(b) Philip Morris Group

8. Altria Group, Inc. (formerly known as Philip Morris Companies Inc.), has a registered office at 120 Park Avenue, in New York, New York.

9. Philip Morris Incorporated (formerly Philip Morris & Co., Ltd., Incorporated) was incorporated pursuant to the laws of Virginia. Its principal place of business is 6601 West Broad Street, Richmond, Virginia.

10. Philip Morris International, Inc. was incorporated pursuant to the laws of Delaware. It has a registered office at 120 Park Avenue, New York, New York.

11. Philip Morris USA Inc. was incorporated pursuant to the laws of Virginia. Its principal office is 120 Park Avenue, New York, New York.

(c) R.J. Reynolds

12. R. J. Reynolds Tobacco Company was incorporated pursuant to the laws of North Carolina. It has a registered office at 401 North Main Street, Winston Salem, North Carolina.

13. R. J. Reynolds Tobacco International Inc. was incorporated pursuant to Deleware laws. Its registered office is at 327 Hillsborough Street, Raleigh, North Carolina.

(d) Rothmans Group

14. Carreras Rothmans Limited was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Oxford Road, Aylesbury, Bucks, England.

15. Ryesekks p.l.c. (formerly Rothmans International p.l.c., before that, Rothmans International Limited, and before that Carreras Limited) was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Plumtree Court, London, England.

16. JTI-Macdonald Corp. was incorporated pursuant to the laws of Nova Scotia. It has a registered office at 1300 - 1969 Upper Water Street, Purdy's Wharf Tower II, Halifax, Nova Scotia. In 2004, under the *Companies Creditor Arrangements Act,* R.S.C. 1985, c. C-36, JTI-Macdonald Corp. sought protection from the Ontario Superior Court of Justice. The Plaintiff will seek any necessary leave to proceed against JTI-Macdonald Corp..

17. Rothmans, Benson & Hedges Inc. was incorporated pursuant to the laws of Canada. It has a registered office at 1500 Don Mills Road, North York, Ontario.

18. Rothmans Inc. (formerly Rothmans of Pall Mall Canada Limited) was incorporated pursuant to the laws of Canada. It has a registered office at 1500 Don Mills Road, Toronto, Ontario.

(e) CTMC

19. Canadian Tobacco Manufacturers' Council (**"CTMC"**) was incorporated pursuant to the laws of Canada. It has a registered office at 1808 Sherbrooke St. West, Montréal, Quebec. Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., and JTI-Macdonald Corp. are members of CTMC.

(4) canadian manufacturers

20. The principal Canadian cigarette manufacturers who manufactured or imported and then marketed cigarettes to the Plaintiff and the class in Nova Scotia and throughout Canada were and are:

(1) **Imperial Tobacco Canada Limited:** In 1912, Imperial Tobacco Company of Canada Limited was incorporated.

(a) In September of 1970:

(i) it changed its name to Imasco Limited (effective Dec. 1st,1970); and

(ii) Imperial Tobacco Limited, a wholly-owned subsidiary, acquired part of the tobacco related business of Imasco Limited, and

(b) In February of 2000:

(i) Imasco Limited amalgamated with its subsidiaries including Imperial Tobacco Limited to form Imasco Limited; and

(ii) In a second amalgamation, also in or about February, 2000, Imasco Limited amalgamated with its parent company, British American Tobacco (Canada) Limited, to form Imperial Tobacco Canada Limited. Imperial Tobacco Canada Limited is a wholly owned subsidiary of the defendant, British American Tobacco p.l.c.

(2) **Rothmans, Benson & Hedges Inc.:** In 1934, Benson & Hedges (Canada) Inc. was incorporated. In 1960, Rothmans of Pall Mall Limited was incorporated in the United Kingdom. In 1985 it acquired tobacco related business of Rothmans Inc.. In 1986, Rothmans, Benson & Hedges Inc. was formed from an amalgamation of Rothmans of Pall Mall Limited and Benson & Hedges (Canada) Inc.

(a) Until 1986, Rothmans of Pall Mall Limited and Benson & Hedges directly or indirectly manufactured and promoted cigarettes in Nova Scotia and Canada.

(b) After 1986, Rothmans, Benson & Hedges Inc. directly or indirectly manufactured or promoted cigarettes sold in Nova Scotia and Canada.

Rothmans Inc. owns 40% of the securities of Rothmans, Benson & Hedges Inc.

FTR Holding S.A., a Swiss company, a subsidiary of Altria Group, Inc., and an affiliate of Philip Morris U.S.A. Inc. and Philip Morris International, Inc., owns 40% of the securities of Rothmans, Benson & Hedges Inc.

(3) **JTI-Macdonald Corp.**: In 1930, W.C. MacDonald Incorporated was incorporated pursuant to the laws of Quebec. From 1858, it carried on business in Montréal as an unincorporated entity. In 1957, it changed its name to Macdonald Tobacco Inc.. In 1973, Macdonald Tobacco Inc. became a wholly-owned subsidiary of R.J. Reynolds Tobacco Company. In 1978:

(a) RJR-Macdonald Inc. was incorporated as a wholly owned subsidiary of R.J. Reynolds Tobacco Company; and

(b) R.J. Reynolds Tobacco Company sold Macdonald Tobacco Inc. to RJR-Macdonald Inc.. RJR-Macdonald Inc. acquired all or substantially all of Macdonald Tobacco Inc.'s assets and continued the business of manufacturing and promoting cigarettes previously carried on by Macdonald Tobacco Inc..

In 1999, RJR-Macdonald Inc. changed its name to RJR-Macdonald Corp., which subsequently, changed its name to JTI-Macdonald Corp. RJR-Macdonald Inc., JTI-Macdonald Corp., and Macdonald Tobacco Inc. directly or indirectly manufactured and promoted cigarettes sold in Nova Scotia and Canada.

21. Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., and JTI-Macdonald Corp. are the three largest Canadian cigarette manufacturers (hereinafter "Manufacturers"). They manufactured and promoted cigarettes sold in Nova Scotia and Canada under brands that included:

"CANADIAN MANUFACTURERS"	BRAND NAMES
Imperial Tobacco Canada Limited	• Player's • Du Maurier • Matinee • Cameo

"CANADIAN MANUFACTURERS"	"BRAND NAMES"
Rothmans, Benson & Hedges Inc.	• Benson & Hedges • Rothmans. • Number 7 • Craven A
JTI-Macdonald Corp.	• Export "A" • Vantage • Macdonald Special • Macdonald Select

22. CTMC is the trade and lobbying association of the Canadian tobacco industry. It advances the interests of manufacturers, promotes cigarettes, and directly or indirectly causes other persons to promote cigarettes. Its membership includes, among others: Defendants Imperial, Rothmans, Benson & Hedges, and JTI-Macdonald.

(5) non-canadian manufacturers

23. Philip Morris Incorporated, R.J. Reynolds Tobacco Company, and Ryesekks p.l.c. directly or indirectly manufactured and promoted cigarettes sold in Nova Scotia and Canada.

II. CAUSE OF ACTION

24. Each Defendant is a "manufacturer" within the meaning of the *Tobacco Damages and Health-care Costs Recovery Act*, S.N.S. 2005, c. 46. By directly or indirectly manufacturing and promoting cigarettes in Nova Scotia and Canada, each carried on business in Nova Scotia.

(1) tobacco products

(a) nicotine

25. Nicotine is a psychoactive drug that affects various body systems including the brain and central nervous system, skeletal muscles, cardiovascular system, endocrine functions, and lungs and other organs.[2]

26. Nicotine is addictive.

(b) tobacco

27. Tobacco contains nicotine.

(c) cigarettes

28. Cigarettes contain tobacco. When smoked, they deliver nicotine to users and thereby cause addiction.[3]

---

[2] Despite decades of public pronouncements to the contrary, the tobacco industry admits in its confidential internal correspondence that nicotine is a drug. The Schedules 1 to 48, are part of this Statement of Claim and are to be fully considered with the within numbered paragraphs. *See* **Sch. 01** ("We are, then, in the business of selling nicotine, an addictive drug... ") (B&W/BAT, 1963); **Sch. 02** ("Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects.") (RJR, 1972); **Sch. 03** ("B.A.T. should learn to look at itself as a drug company rather than a tobacco company.") (BAT, 1980); **Sch. 04** ("[D]o we really want to tout cigarette smoke as a drug? It is, of course, but there are dangerous F.D.A. implications to having such conceptualization go beyond these walls. . . .") (PM, 1969).

[3] *See* **Sch. 05** ("Very few consumers are aware of the effects of nicotine, i.e., its addictive nature and that nicotine is a poison.") (B&W/BAT, 1978); **Sch. 06** ("The cigarette should be conceived not as a product but as a package. The product is nicotine. . . . Think of the cigarettes as a dispenser for a dose unit of nicotine.") (PM, 1972); **Sch. 02** ("Happily for the tobacco industry, nicotine is both habituating and unique in its variety of physiologic actions ....") (RJR, 1972).

29. By smoking cigarettes, smokers become addicted to nicotine. While addicted, they regularly crave tobacco. Attempting to withdraw causes irritability, difficulty in concentrating, anxiety, restlessness, increased hunger, depression, and a pronounced craving for tobacco.[4]

30. When smokers inhale tobacco smoke as intended by manufacturers, they also inhale harmful substances which manufacturers know can cause or contribute to disease. They include aldehydes, ammonia, carbon monoxide, catechol, endotoxins, hydrogen cyanide, metals, micotoxins, nicotine, nitrogen dioxide, nitrogen monoxide, nitrosamines, organics, phenols, polyaromatic hydrocarbons, and tar.[5]

31. As a result, inhaling cigarette smoke causes or materially contributes to various diseases, including, but not limited to: (a) cancers, *inter alia*, of the bladder, esophagus, kidney, larynx, lip, lung oral cavity, pancreas, pharynx, and stomach; (b) chronic obstructive pulmonary disease and allied conditions, including asthma, chronic airways obstruction, chronic bronchitis, and emphysema; (c) circulatory system diseases including atherosclerosis, aortic and other aneurysms, cerebrovascular disease, coronary heart disease, pulmonary circulatory disease, and other peripheral vascular disease; (d)

---

[4] *See* **Sch. 07** ("Once addiction does take place, it becomes necessary for the smoker to make peace with the accepted hazards. This is done by a wide range of rationalizations.... However, the desire to quit, and actually carrying it out, are two quite different things, as the would-be quitter soon learns.") (ITL, 1982). **Sch. 08** ("[S]moking is a habit of addiction that is pleasurable.") (BAT, 1962); **Sch. 09** ("High profits ... are directly related to the fact that the customer is dependent upon the product.") (BAT, 1979).

[5] *See* **Sch. 10** ("[I]f anyone ever identified any ingredient in tobacco smoke as being hazardous to human health or being something that shouldn't be there; we could eliminate it. But no one ever has.") (PM, 1976); **Sch. 11** ("[B]iologically active materials [are] present in cigarette tobacco. These are: a) cancer causing; b) cancer promoting; and c) poisonous.") (L&M, 1961) Liggett & Myers is not a party to these proceedings, but its documents and those of other non-party tobacco manufacturers and trade groups illustrate general industry knowledge. *See also* **Sch. 12** ("Eight of the polycyclic hydrocarbons isolated from the smoke are known to produce cancer in mice.... [T]here is a distinct possibility that these substances would have a carcinogenic effect on the human respiratory system.") (RJR, 1959); **Sch. 13** ("[N]itrosamines are the most potent carcinogens known to man....") (PM, 1958).

morbidity and general deterioration of health; (e) peptic ulcers; (f) pneumonia and influenza; and (g) fetal harm.

(2) tort

(a) duty

32. Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-Macdonald Corp., Philip Morris Incorporated, R.J. Reynolds Tobacco Company, and Ryesekks p.l.c. (**"Manufacturers"**) manufactured and promoted cigarettes that reached consumers without alteration or intermediate inspection after leaving manufacturing and distribution facilities.

33. The Plaintiff has smoked a least one pack of cigarettes designed, manufactured, marketed and distributed by each of the Manufacturers, in the intended way. The Plaintiff currently smokes 20 cigarettes per day in the intended way. The Plaintiff has smoked cigarettes designed, manufactures, marketed, and distributed by each of the Manufacturers at different times.

34. The Manufacturers therefore owed the Plaintiff and the class a duty of care:

(a) to design and manufacture a reasonably safe cigarette by taking all reasonable measures to eliminate, minimize, or reduce the risks of smoking cigarettes;

(b) not to promote knowingly defective cigarettes;

(c) to provide reasonably clear, complete, and current warnings of the risks of smoking cigarettes of which they knew or ought to have known; and

(d) alternatively to market and advertise the risks and health effects of smoking so that the Plaintiff and class would have the opportunity of fully informed choice.

35. The Manufacturers owed a special duty to children and adolescents to take reasonable measures to prevent them from starting or continuing to smoke.

(b) knowledge

36. At all material times, the Manufacturers were in possession of scientific and medical data which established the risks of smoking cigarettes. They knew or ought to have known that:

(a) nicotine is addictive;

(b) nicotine addiction compels smokers to continue to smoke; and

(c) cigarettes and other types of tobacco products they manufactured and promoted:

(i) contained nicotine and were therefore addictive; and

(ii) contained the substances enumerated in paragraph 30 as described in the Schedules, and therefore caused or contributed to tobacco related diseases in those who inhaled or were exposed to cigarette smoke.

(c) breach

(i) duty not to market

37. In past and continuing breach of their duty of care, the Manufacturers:

(a) failed to conduct proper investigation, research, and testing as to the risk of tobacco related illness, nicotine addiction, and the feasibility of eliminating or minimizing these risks.[6]

(b) failed to design a reasonably safe product and to take all reasonable measures to eliminate, minimize, or reduce the risk of tobacco related illness.

(c) failed to eliminate or reduce to a safe level, substances and by-products of combustion, including nicotine and tar, which can cause or contribute to disease.

---

[6] *See* **Sch. 14** ("Members of [the RJR] Research Department have studied in detail cigarette smoke composition. Some of the findings have been published. However, much data remain unpublished because they are concerned with carcinogenic or co-carcinogenic compounds....") (RJR, 1962); **Sch. 15** ("The psychopharmacology of nicotine is a highly vexatious topic. It is where the action is for those doing fundamental research on smoking, and from where most likely will come significant scientific developments profoundly influencing the industry. Yet it is where our attorneys least want us to be, for two reasons... The first reason is the oldest and is implicit in the legal strategy employed over the years in defending corporations ... 'We within the industry are ignorant of any relationship between smoking and disease. Within our laboratories no work is being conducted on biological systems.' That posture has moderated considerably as our attorneys have come to acknowledge that the original carte blanche avoidance of all biological research is not required in order to plead ignorance about any pathological relationship between smoke and smoker.") (PM, 1980).

(d) manufactured and promoted defective cigarettes and other tobacco products:

(i) when smoked as intended, they are addictive, inevitably cause or contribute to tobacco related disease in an unreasonable number of users;[7] and

(ii) have no utility or benefit to consumers, or have a utility or benefit which is vastly outweighed by smoking related risks, diseases, and costs.

(e) wilfully increased the bio-availability of nicotine in their cigarettes by:

(i) special blending of tobacco;

(ii) sponsoring or engaging in selective breeding and genetic engineering of tobacco plants;

(iii) adding nicotine or substances containing nicotine; and

(iv) introducing substances, including ammonia, into their cigarettes to enhance the bio-availability of nicotine to smokers.

(ii) duty to warn

38. The Manufacturers breached their duty to warn consumers. They:

(a) failed to provide any or reasonable warnings before 1972;

(b) after 1972, failed to provide reasonable warnings of the risk of tobacco related diseases caused by smoking, and of the risk of addiction to the nicotine contained in, their cigarettes. In particular, their warnings:

(i) were designed to be as ineffective as possible;

(ii) did not give users, prospective users, and the public, an adequate indication of each of the specific risks of smoking their cigarettes;

(iii) were given only to forestall more effective governmental warnings; and

(iv) failed to make clear, complete, and current disclosure of the risks inherent in smoking their cigarettes;

---

[7] *See* Sch. 09 ("[H]igh profits ... are directly related to the fact that the customer is dependent upon the product.") (BAT, 1979); Sch. 16 ("A cigarette that does not deliver nicotine cannot satisfy the habituated smoker and cannot lead to habituation and would therefore almost certainly fail.") (PM, 1966).

(v) failed to advertise and market the warning effectively;

(c) made representations which they knew or ought to have known were false and deceptive. In particular, they falsely represented:

(i) that smoking has not been shown to cause disease;[8]

(ii) that they were aware of no research, or no credible research, that established a link between smoking and disease;[9]

(iii) that many diseases shown to have been related to tobacco were in fact related to other environmental or genetic factors;[10]

(iv) that cigarettes were not addictive;[11]

(v) that smoking is merely a habit or custom as opposed to an addiction;[12]

---

[8] *Compare* **Sch. 17** ("With one exception the individuals whom we met believe that smoking causes lung cancer.") (BAT, 1958) *with* **Sch. 18** ("We do not believe that cigarettes are hazardous; we do not accept that."); **Sch. 19** ("There is disagreement among medical experts as to whether the reported associations between smoking and various diseases are causal or not. CTMC's position is to the effect that no causal relationship has been established.") (CTMC1978); **Sch. 20** ("Doubt is our product since it is the best means of competing with the body of fact that exists in the mind of the general public. It is also the means of establishing a controversy.") (B&W, 1969).

[9] *See* **Sch. 21** ("Despite all the research going on, the simple and unfortunate fact is that scientists do not know the cause or causes of the chronic diseased reported to be associated with smoking.... We would appreciate you passing this information along to your [fifth grade] students." (RJR, 1990); **Sch. 22** ("It is not known whether cigarettes cause cancer.") (RJR, 1984).

[10] *See* **Sch. 23** ("Distinguished authorities point out that there is no proof that cigarette smoking is one of the causes.... That statistics purporting to link cigarette smoking with disease could apply with equal force to any other aspect of modern life."); **Sch. 24** ("[M]any scientists are becoming concerned that preoccupation with smoking may be both unfounded and dangerous, unfounded because evidence on many critical points is conflicting, dangerous because it diverts attention from other suspected hazards.") (TI, 1979).

[11] *See* **Sch. 25** ("The fact is there is nothing about smoking, or about the nicotine in cigarettes, that would prevent smokers from quitting.") (TI, 1989); **Sch. 26** ("The fact is there is nothing about smoking, or about the nicotine in cigarettes, that would prevent smokers from quitting." (RJR, 1992).

[12] *See* **Sch. 27** ("When we use the term 'addiction,' there are two meanings. There's an everyday meaning when we talk about being news junkies or chocoholics.... Now, under that, all kinds of habits become addictions. And so if it's a habit, then, yes, smoking can be a habit.") (TI, 1994); **Sch. 28** ("If [cigarettes] are behaviorally addictive or habit forming, they are much more like caffeine, or in my case, Gummy Bears.") (PM, 1997).

(vi) that they did not manipulate nicotine levels in their cigarettes;[13]

(vii) that they did not include substances in their cigarettes designed to increase the bio-availability of nicotine;[14]

(viii) actual intake of tar and nicotine associated with actually smoking cigarettes, as opposed to levels measured on machines;[15]

(ix) that certain of their cigarettes, such as "filter", "mild", "low tar" and "light" brands, were safer than other cigarettes;[16] and

(x) that smoking is consistent with a healthy lifestyle;[17]

(d) misled consumers on a class wide objective standard into believing that cigarettes were safer than they were by:

---

[13] *See* **Sch. 29** ("Dr. Kessler's contention that we add or otherwise manipulate nicotine to create, maintain, or satisfy an addiction, is false.") (RJR, 1994); **Sch. 30** ("The claims that RJR increases the nicotine in its cigarettes are false. RJR does not increase nicotine in cigarettes above what is found naturally in tobacco.") (RJR, 1994)

[14] *Compare* **Sch. 31** ("There is no indication that ammonia compounds in our cigarettes alter the amount of nicotine the smoker inhales.") (PM, 1994) *with* **Sch. 32** ("We are pursuing this project with the eventual goal of lowering the total nicotine present in smoke while increasing the physiologic effect of the nicotine which is present, so that no physiological effect is lost on nicotine reduction.") (RJR, 1973); **Sch. 33** ("Marlboro (and other Philip Morris brands) as compared with WINSTON, our other brands and most other brands on the market shows : (1) higher smoke pH (higher alkalinity), hence increased amounts of 'free' nicotine in smoke, and higher immediate nicotine 'kick'.") (RJR, 1973); **Sch. 34** ("Cigarettes made from filler oversprayed with nicotine as the citrate (NC) produce CNS effects which are approximately half the magnitude of those obtained with the FB [freebase] or unextracted cigarettes - at comparable nicotine delivery levels.") (PM, 1989).

[15] *See* **Sch. 35** ("The paper itself expresses what we in Behavioral have 'felt' for quite some time. That is, smokers smoke differently than the FTC machine and may very well smoke to obtain a certain level of nicotine in their bloodstream.") (RJR, 1983).

[16] *See* **Sch. 36** ("[T]here 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.") (ITL, undated); **Sch. 37** ("Unmet needs of smokers that could be satisfied by newer modified products, products which could delay the quitting process, are pursued.") (ITL, 1986).

[17] **Sch. 44** ("Since younger smokers represent the recruitment market, and female smokers are clearly a growth segment, in-depth motivational studies of both groups are strongly indicated.") (BAT, 1985); **Sch. 45** ("Young smokers represent the major opportunity group for the cigarette industry, we should therefore determine their attitude to smoking and health and how this might change over time.") (ITL, 1970).

(i) incorporating into the design of their cigarettes ineffective safety features including filters which they knew or ought to have known were ineffective, yet whose presence implied safety which was not there;[18] and

(ii) designing and manufacturing "mild", "low tar", and "light" cigarettes, which they promoted in a manner which misled consumers on a class wide objective standard that these "mild", "low tar", and "light" cigarettes were safer to use than they were;

(e) misled consumers on a class wide objective standard about the risks of smoking using innuendo, exaggeration and ambiguity;

(f) systemically made statements regarding smoking and health which they knew were incomplete and inaccurate;

(g) failed to correct statements made by others regarding the risks of smoking, which they knew were incomplete or inaccurate. Their failure to correct misinformation was a misrepresentation by omission or silence;

(h) engaged in collateral marketing, promotional, and public relations activities to neutralize or negate the efficacy of warnings provided to consumers by Manufacturers, governments and other agencies concerned with public health;

(i) suppressed information regarding the risks of smoking; and

(j) participated in a misleading campaign to make themselves appear more credible than health authorities and anti-smoking groups, and to reassure smokers that cigarettes were not as dangerous as authorities said they were.

---

[18] The industry has long known that smokers compensate for ventilated filters by taking bigger puffs and blocking vent holes. *See* **Sch. 38** ("[S]ubjects took more puffs of very much larger volume from the ventilated cigarette, but showed no difference in the way they inhaled smoke.") (BAT, 1972); **Sch. 39** ("[S]mokers adjust puff intake in order to maintain constant smoke intake.") (PM, 1967); **Sch. 40** ("[S]ome of these [vent] holes are likely to be occluded under normal smoking conditions, whereas no occlusion is likely to occur when the cigarettes are machine smoked for analysis.") (PM, 1967); **Sch. 16** ("The illusion of filtration is as important as the fact of filtration.") (PM, 1966).

39. At the Defendants' direction, the Defendant CMTC participated in this deception.

40. The Manufacturers and all Defendants intended that these misrepresentations be relied upon by the Plaintiff, the class, and all Canadians for the purpose of inducing them to start or continue smoking.

(iii) special duties

41. The Manufacturers and all Defendants exploited the inability of children, adolescents, and those addicted to nicotine to protect their own interests because of their psychological and physiological dependence on nicotine and their augmented inability to understand smoking risks. In particular, the Manufacturers knew or ought to have known that:

(a) More than 80% of smokers start to smoke and become addicted before they are 19 years of age.

(b) It was illegal to sell cigarettes to children and adolescents in Nova Scotia and Canada and to promote smoking to such persons.

(c) Children and adolescents in Nova Scotia and Canada were smoking or might start to smoke their cigarettes.

(d) Children and adolescents in Nova Scotia and Canada who smoked their cigarettes would become addicted to cigarettes and would suffer tobacco related disease.

42. In breach of their duty to children and adolescents in Nova Scotia and Canada, the Manufacturers:

(a) failed to take any, or any reasonable, measures to prevent them from starting or continuing to smoke;

(b) undermined legislative and regulatory initiatives that intended to prevent children

and adolescents in Nova Scotia and Canada from starting or continuing to smoke;

(c) targeted children and adolescents in their advertising, promotional and marketing activities in Nova Scotia and Canada with the object of inducing them to start or continue to smoke; and

(d) provided cigarettes to persons under circumstances where they knew or ought to have known that they would be illegally brought into Nova Scotia, and sold to children and adolescents.[19]

(3) trade practices

43. The Plaintiff pleads and relies on s. 14 and Part III of *The Consumer Protection Act*, S.S. 1996, c. C-30.1; s. 13 of the *Fair Trading Act*, R.S.A. 2000, c. F-2, as am; *The Business Practices Act*, S.M. 1990-91, c. 6, as am.; s. 8 of the *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, as am.; and s. 14 of the *Trade Practices Act*, R.S.N.L. 1990, c. T-71, as am.., and other similar legislation throughout Canada.

(4) competition act

44. The Manufacturers, for the purpose of directly and indirectly promoting the supply or use of cigarettes, in breach of their statutory duties or obligations to consumers

---

[19] **Sch. 41** ("Realistically, if our company is to survive and prosper, over the long term, we must get our share of the youth market.") (RJR, 1973); **Sch. 42** ("The specific area of interest is young smokers between the ages of 15 and 19.") (BAT, undated); **Sch. 43** ("The under 25-year old smokers continue to show the highest level of potential for ITL activities. The model that sees young customers acquiring their preferences and staying with them as they age is increasingly valid.") (ITL, 1991); **Sch. 44** ("Since younger smokers represent the recruitment market, and female smokers are clearly a growth segment, in-depth motivational studies of both groups are strongly indicated.") (BAT, 1985); **Sch. 45** ("Young smokers represent the major opportunity group for the cigarette industry, we should therefore determine their attitude to smoking and health and how this might change over time.") (ITL, c.1970); **Sch. 46** ("RE-ESTABLISH clear distinct images for ITL brands with particular emphasis on relevance to younger smokers.") (ITL, c.1988); *Id.* ("If the last ten years have taught us anything, it is that the industry is dominated by the companies who respond most effectively to the needs of younger smokers. Our efforts on these brands will remain on maintaining their relevance to smokers in these younger groups in spite of the share performance they may develop among older smokers."); **Sch. 47** ("Contact leading firms in terms of children research ... contact Sesame Street ... contact Gerber, Schwinn, Mattel ... Determine why these young people were not becoming smokers.") (B&W, 1977).

under the *Combines Investigation Act* R.S.C. 1952 (supp.), c. 314 as amended by the *Criminal Law Amendment Act* S.C. 1968-69, c. and amendments thereto and subsequently the *Competition Act* R.C.S. 1985, c. C-34, as am. made false or misleading representations to the public, the Plaintiff, and the class, the particulars of which are set out in the Schedules appended hereto. The Plaintiff pleads and relies on ss. 36 and 52:

> **36** (1) Any person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of Part VI ... may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.
>
> **52** (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that
>
> (a) any person was deceived or misled;
>
> (b) any member of the public to whom the representation was made was within Canada; or
>
> (c) the representation was made in a place to which the public had access.

(5) concerted action

45. Four multinational tobacco enterprises (the BAT, Philip Morris, RJR, and Rothmans Groups manufactured and promoted all or most of the cigarettes sold in Saskatchewan and Canada. As defined terms used herein, their "Head Members" and "Other Members" were as follows:

	"MEMBERS"	
	"Head Members"	**"Other Members"**
BAT	• **B.A.T Industries p.l.c.** - B.A.T. Industries Limited - Tobacco Securities Trust Limited • **British American Tobacco (Investments) Limited** - British-American Tobacco Company Limited • **British American Tobacco p.l.c.**	• **Imperial Tobacco Canada Limited** - Imasco Limited - Imperial Tobacco Limited

	"MEMBERS"	
Philip Morris	• **Altria Group, Inc.,** - Philip Morris Companies Inc. • **Philip Morris Incorporated** • **Philip Morris International, Inc.** • **Philip Morris USA, Inc.**	• **Rothmans, Benson & Hedges Inc.** - Benson & Hedges (Canada) Inc.
RJRC	• **R.J. Reynolds Tobacco Company** • **R.J. Reynolds Tobacco International, Inc.**	• **JTI-Macdonald Corp.** - Macdonald Tobacco Inc.
Rothmans	• **Carreras Rothmans Limited** • **Ryesekks p.l.c.**	• **Rothmans, Benson & Hedges Inc.** • **Rothmans Inc.** - Rothmans of Pall Mall Limited

46. The Head Members directed and coordinated common policies for each group relating to smoking and health and the Head Members and Other Members together are defined as the "Group" or "Group Members".

(a) agreement

47. In 1953 and early 1954, in response to mounting publicity about the link between smoking and disease,

(a) American Tobacco Company,

(b) Brown & Williamson Tobacco Corporation (in its own capacity and as agent for British American Tobacco (Investments) Limited),

(c) Philip Morris Incorporated, and

(d) R. J. Reynolds Tobacco Company,

conspired, or formed a common purpose, to use unlawful means to prevent consumers in Saskatchewan and other jurisdictions including the Plaintiff and the class, from learning about the harmful nature and addictive properties of cigarettes smoking, in circumstances where they knew or ought to have known that injury to consumers, the Plaintiff, and the class, would result from furtherance thereof.

48. The conspirators included members of the BAT Group (after about 1950), Philip Morris Group (after about 1954), RJR Group (after about 1973), and Rothmans Group (after about 1956), separately, and as a collective.

(b) unlawful means

49. Group Members formed and furthered the civil conspiracy or common purpose:

(a) through committees, conferences and meetings established, organized, and convened by Head Members and attended by Group Member senior personnel; and

(b) by written and oral directives and communications amongst Group Members

50. At these meetings and through these communications, Group Members agreed to breach their duties to consumers, the Plaintiff, and the class, as outlined above, and, in particular to:

(a) jointly disseminate objectively false and misleading information about smoking risks;

(b) suppress statements and admissions that smoking causes disease;

(c) suppress or conceal research regarding the risks of smoking;

(d) participate in a public relations program that promoted cigarettes, protected them from attacks based upon health risks, and reassured consumers that smoking was not hazardous; and

(e) ensure that the members of their respective Groups would implement the policies described in (a) through (d), above.

51. In or about 1962, the Manufacturers (entitled in Schedule 48 "By Canadian Tobacco Manufacturers") each signed an agreement not to make adverse health claims about each other's cigarettes, so as to avoid acknowledging the risks of smoking.[20]

---

[20] **Sch. 48**

(i) committees, conferences and meetings

52. The Group Members used committees, conferences, and meetings to direct or co-ordinate their common policies on smoking and health, including:

COMMITTEES, CONFERENCES, AND MEETINGS			
[illegible]	**committees**	**conferences**	**meetings**
BAT	• Chairman's Policy Committee • Research Policy Group • Scientific Research Group • Tobacco Division Board • Tobacco Executive Committee • Tobacco Strategy Review Team	•Chairman's Advisory Conferences • Group Research Conferences • Group Marketing Conferences	• particulars are peculiarly known to the BAT Group
PM	• particulars peculiarly known to the PM Group	• Conference on Smoking and Health • Corporate Affairs World Conference	• Committee on Smoking Issues and Management • Corporate Products Committee
Rothmans	• particulars are peculiarly known to the Rothmans Group	• particulars are peculiarly known to the Rothmans Group	• particulars are peculiarly known to the Rothmans Group
RJR	• particulars are peculiarly known to the RJR Group	• "Hound Ears" and Sawgrass conferences	• Winston-Salem Smoking Issues Coordinator Meetings

(ii) directives and communications

53. The Head Members created and distributed written directives that set out their common policy on smoking and health issues to Group Member personnel for direct and indirect dissemination to consumers. The full particulars of the directives and communications are known only to the Group Members, but included:

DIRECTIVES AND COMMUNICATIONS	
BAT	• "Smoking Issues: Claims and Responses" •"Consumer Helplines: How To Handle Questions on Smoking and Health and Product Issues"

	DIRECTIVES AND COMMUNICATIONS
	• "Smoking and Health: The Unresolved Debate", "Smoking: The Scientific Controversy" • "Smoking: Habit or Addiction?" • "Legal Considerations on Smoking and Health Policy"
PM	• "Smoking and Health Quick Reference Guides" and "Issues Alert[s]"
RJR	• "Issues Guide"
Rothmans	• particulars are peculiarly known to the Rothmans Group

54. Group Members further directed or co-ordinated their common policy and position on smoking and health:

(a) R.J. Reynolds International Inc. appointed and supervised a "smoking issue designee" in various global "Areas". The designees reported to the Manager of Science Information at R.J. Reynolds Tobacco Company. From 1974, a senior executive of Macdonald Tobacco Inc. (later of JTI-Macdonald Corp) was the designee in "Area II" (Canada).

(b) The Corporate Affairs and Public Affairs Departments of Philip Morris Incorporated and Philip Morris International, Inc. directed or advised departments of the other Philip Morris Group Members, including Rothmans, Benson & Hedges Inc. and its amalgamating company Benson & Hedges (Canada) Ltd., concerning the Philip Morris Group position on smoking and health issues.

(c) Ryesekks p.l.c. and Carreras Rothmans Limited, through the Rothmans International Research Division, created and distributed statements which set out their position on smoking and health issues. In 1958, they issued numerous false announcements including in the *Globe and Mail* (June 23rd, 1958) and in the *Toronto Daily Star* (August 13th, 1958) that:

(i) smoking in moderation was safe; and

(ii) Canadian-made Rothmans cigarettes were safer than those of other brands because they contained less tar and had "cooler" smoke.

(iii) ctmc

55. In 1963, in furtherance of their civil conspiracy or common purpose, as directed by the Head Members, to maintain a united front on smoking and health issues, the Group Members formed the Ad Hoc Committee on Smoking and Health which, in 1969, was named the Canadian Tobacco Manufacturers' Council. In 1982, it was incorporated.

56. Upon its formation, the CTMC adopted and participated in the civil conspiracy. Since 1963, in breach of its duties to the Plaintiff and the class, the Defendants directed and caused the CTMC to:

(a) provide forums for Groups to further their civil conspiracy or common purpose;

(b) synchronize the Defendant's false positions on smoking and health issues with those of international tobacco manufacturers and associations;

(c) relay the Defendants' and tobacco industry's common policies and positions respecting the health risks and concerns about smoking;

(d) suppress statements or admissions that smoking causes disease and health risks;

(e) suppress or conceal research regarding the adverse risks of smoking;

(f) counter independent attacks regarding the health risks of cigarettes and smoking;

(g) disseminate false and misleading information about the risks of smoking to governments, health and medical organizations, and consumers including the Plaintiff and the class:

(i) in 1963, the CTMC misrepresented to the Canadian Medical Association that there was no causal connection between smoking and disease; and

(ii) in 1969, CTMC misrepresented to the House of Commons, Standing Committee on Health, Welfare and Social Affairs, that there was no causal connection between smoking and disease;

(h) lobby the Federal and provincial governments to delay and minimize government initiatives with respect to smoking and health; and

(i) participate in a public relations program on smoking and health issues with the intent of promoting cigarettes and maximizing sales.

57. The Group Members and the CTMC conspired or acted in concert in breaching their duties outlined above. They knew or ought to have known that one or more of them might breach duties in furtherance of the common purpose.

(iv) influence voting

58. Head Members further directed or co-ordinated the smoking and health policies of the Other Members within their Group by directing and advising them of how they should vote in committees of the Group Members and at meetings of the CTMC on smoking and health issues, including the approval and funding of research by the Manufacturers, all Group Members, and the CTMC.

(v) research organizations

59. Between late 1953 and the early 1960's:

(a) the Head Members formed or joined numerous research organizations including:

(i) the Centre for Co-operation in Scientific Research Relative to Tobacco (**"CORESTA"**);

(ii) the Tobacco Industry Research Council (**"TIRC"**), which was renamed the Council for Tobacco Research in 1964 (**"CTR"**); and

(iii) the Tobacco Research Council (**"TRC"**).

(b) the Head Members publicly represented that they or Other Members, along with CORESTA, TIRC / CTR, TRC, and similar organizations, would perform objective research and gather data regarding the link between smoking and disease and internationally publicize the results.

(c) the Head Members agreed that they or Other Members, along with CORESTA, TIRC / CTR, TRC, and similar organizations, would conduct research and publicize information to counter, undermine, or obscure information that showed the link between smoking and disease, with a view to creating widespread belief that there was a medical or scientific controversy as to whether smoking is harmful and whether nicotine is addictive, when in fact there was not.

(d) In 1963 and 1964, with a view to ensuring that no research would be approved or conducted by CORESTA, TIRC / CTR, and TRC which would indicate that cigarettes were dangerous, the Head Members and European tobacco companies and state monopolies agreed to coordinate their research on the link between smoking and disease with that conducted by TIRC in the United States.

(e) In April and September 1963, Head Members of the BAT and RJR Groups agreed with members of the 'Council of Action' in Hamburg, Germany and with Head Members of the Philip Morris Group in New York, to develop a public relations campaign to counter reports of the English Royal College of Physicians, United States Surgeon General, and the Canadian Medical Association, and to reassure consumers that their health would not be harmed by smoking cigarettes.

(f) In September 1963, in New York, the Head Members of the Philip Morris, RJR, and BAT Groups, along with other US tobacco companies, agreed that they, and members of their respective Groups, would not issue warnings about the link between smoking and disease unless and until required by governmental action.

(g) The formation of 'research organizations' was a part of deliberately creating an objectively false impression and fraud upon the marketplace of unbiased research.

60. From the outset of the civil conspiracy or common purpose described herein or, alternatively, from the time each Defendant became a Group Member, each Defendant agreed to and adopted the common purpose and breached duties in furtherance thereof.

(vi) icosi

61. By the mid-1970's, motivated by their concern that admissions by any of the Group Members about a link between smoking and disease could lead to a 'domino effect' to the detriment of the worldwide industry, Head Members agreed to take an increased international response to reassure existing and potential smokers and to protect the tobacco industry.

62. So, in furtherance of the civil conspiracy or common purpose:

(a) in June of 1977, Head Members and other international tobacco companies met in England and established the International Committee on Smoking Issues (**"ICOSI"**).

(b) In 1980, ICOSI was renamed the International Tobacco Information Centre / Centre International d'Information du Tabac - INFOTAB (**"INFOTAB"**). In 1992, INFOTAB changed its name to the Tobacco Documentation Centre (**"TDC"**) (ICOSI, INFOTAB, and TDC are collectively referred as **"ICOSI"**).

63. ICOSI's policies were mirrored by Group Members (including the CTMC), and were presented as the policies and positions of Group Member companies to conceal the civil conspiracy or common purpose from the public and governments.

64. If a Member within one of the Groups took a position on smoking and health issues contrary to that of ICOSI, the Head Members took steps to enforce compliance with the position of ICOSI.

65. Through ICOSI, Head Members agreed to resist governmental attempts to provide adequate warnings about the link between smoking and disease, and reiterated their position on smoking and health issues, furthering their agreement to:

(a) jointly disseminate false and misleading information regarding smoking risks;

(b) make no statement or admission that smoking caused disease;

(c) suppress or conceal research regarding the risks of smoking;

(d) make explicit health claims about each other's cigarettes, and thereby avoid highlighting the risks of smoking; and

(e) participate in a public relations program on smoking and health issues with the objective of promoting cigarettes, protecting cigarettes from attack based upon health risks, and reassuring consumers that smoking was not hazardous.

66. In and after 1977, the members of ICOSI, including the Head Members, agreed orally and in writing to ensure that:

(a) the members of their respective groups, including those in Canada, would act in accordance with the ICOSI position on smoking and health, including its position on warnings with respect to the link between smoking and disease;

(b) initiatives pursuant to the ICOSI positions would be carried out, whenever possible, by Head Members, including the CTMC, to ensure compliance in the various tobacco markets worldwide;

(c) when it was not possible for Head Members to carry out ICOSI's initiatives, Other Members individually would carry them out; and

(d) Head Members subsidiary companies would, when required, suspend or subvert their local or national interests in order to assist in preserving and growing the tobacco industry as a whole.

(vii) peculiar knowledge

67. Further particulars of the way in which the civil conspiracy or common purpose was entered into or continued, and Group Member breaches of duty in furtherance thereof, are peculiarly known to Group Members.

(c) joint liability

68. The Head Members civilly conspired with the Other Members with respect to the breaches of duty committed by the Other Members. Alternatively:

(a) Head Members acted in concert with Other Members with respect to Other Members' breaches of duty;

(b) if Group Members did not agree or intend that unlawful means be used in pursuing their civil conspiracy or common purpose, they knew or ought to have known that one or more of them might commit breaches of duty in furtherance of it. As a result, Head Members acted in concert with Other Members, or each of

them, with respect to Other Members' breaches of duty;

(c) in breaching duties, Other Members acted as agents of Head Members; or

(d) Head Members directed the activities of Other Members to such a degree that the Other Members' breaches of duties were also committed by Head Members.

69. The CTMC was agent of the Defendants who directed and co-ordinated the activities of the CTMC to such a degree that the CTMC's breaches were committed by the Defendants.

70. By reason of the foregoing, each of the Defendants conspired or acted in concert with respect to the breaches of duty described herein. They jointly breached the duties described herein.

71. At common law or in equity, Defendants are jointly and severally liable for the cost of health care benefits attributed to each.

(6) waiver of tort

72. The Plaintiff claims an aggregate monetary award for the amount of the Defendants' revenues or profits obtained from manufacturing and promoting cigarettes and other tobacco products in Nova Scotia and Canada.

(a) The Defendants breached legal, statutory, and equitable duties and obligations in the manner outlined above.

(b) The Defendants intended to, and did, profit as a result of their breaches of legal, statutory, and equitable duties.

(c) If the Defendants had complied with their duties the Plaintiff and class members:

(i) would not have started nor continued smoking;

(ii) would not have purchased cigarettes; and

(iii) the Defendants would not have been enriched from tobacco product sales.

(7) harm caused

73. The Plaintiff has developed Chronic Obstructive Pulmonary Disease caused by smoking cigarettes manufactured and promoted by the Defendants. Though he has repeatedly tried, his addiction to nicotine preclude him from quitting.

74. Because of the tobacco related wrongs described above, the Plaintiff and class members, including children and adolescents, started and continue to smoke cigarettes manufactured and promoted by the Defendants. As a result, they suffer from tobacco related diseases and an increased risk of such disease.

(8) relief sought

75. The Plaintiff relies on *The Survival of Actions Act,* S.S. 1990, c. S-66.1, ss. 3, 6(1)-(3); *The Fatal Accidents Act,* R.S.S. 1978, c. F-11, ss. 2, 3(1), and 4(1)-(3); the *Survival of Actions Act,* R.S.A. 2000, c. S-27, ss. 2, 5(1)-(2); the *Fatal Accidents Act,* R.S.A. 2000, c. F-8, ss. 1, 2, and 3(1); the *Trustee Act,* R.S.O. 1990, c. T.23, s. 38(1); the *Family Law Act,* R.S.O. 1990, c. F. 3, ss. 61(1)-(2); the *Survival of Actions Act,* R.S.N.S. 1989, c. 453, ss. 2(1)-(2) and (4); the *Fatal Injuries Act*, R.S.N.S. 1989, c. 163, ss. 2-3 and 5; the *Survival of Actions Act*, R.S.P.E.I. 1988, c. S-11, ss. 2 and 5; the *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5, ss. 1-2, 6; the *Survival of Actions Act* R.S.N.L. 1990, c. S-32, ss. 2 and 4; the *Fatal Accidents Act*, R.S.N.L. 1990, c. F-6, ss. 2-4.

76. The Defendants, with a common plan, scheme or design, conspired together to design, manufacture, market and distribute knowingly defective cigarettes and failed to provide clear, complete and current warnings of the risks of smoking cigarettes of which they knew or ought to have known.

77. Plaintiffs rely on *Sindell v. Abbott Laboratories*, 607 P.2d 924 (1980). "Market Share" herein, means the total volume of cigarettes promoted or sold by all Group

Members in Canada between January 1, 1954 to the date damages are calculated pursuant to direction, judgment, or order of the Court.

78. Each of the Group Members jointly or separately maintained or currently maintains a substantial share of the Market Share such that each of the Group Members is liable for its proportion of the aggregate cost equal to a proportionate share of the Market Share calculated cumulatively over the class period.

79. The Plaintiff and class members purchased or smoked cigarettes designed, manufactured, marketed, or promoted by Group Members. The aggregated damages for the Plaintiff and class members should be apportioned among the Group Members in proportion to their Market Share during the Class Period, and imposed upon the other Defendant as the Court may deem appropriate.

III. RELIEF

80. On behalf of himself and class members, the Plaintiff claims against the Defendants, jointly and severally, an order providing the following remedies:

(a) unliquidated compensatory, aggravated, exemplary, and punitive damages;

(b) restitution, including by way of a constructive trust and aggregate monetary award, of all profits which were or, with reasonable accounting, should have been earned by the Defendants from the manufacture and promotion of all types of tobacco products;

(c) the present value of the total expenditure and estimated total expenditure by the government for health care benefits provided to insured persons resulting from tobacco related disease or the risk of tobacco related disease;

(d) interest;

(e) costs; and

(f) such other relief as to this Honourable Court seems just.

Signed: June 15th, 2009

MERCHANT LAW GROUP LLP
Barristers and Solicitors
2401 Saskatchewan Drive
Regina, Saskatchewan
S4P 4H8,

Phone: (306) 359-7777
Fax: (306) 522-3299,

Casey R. Churko

TAB V

File No. C109-01-61479

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

DEBORAH KUNTA

Plaintiff,

- and -

CANADIAN TOBACCO MANUFACTURERS' COUNCIL, B.A.T INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, BRITISH AMERICAN TOBACCO, p.l.c., IMPERIAL TOBACCO CANADA LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL, INC., PHILIP MORRIS USA INC., R. J. REYNOLDS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO, INTERNATIONAL, INC., CARRERAS ROTHMANS LIMITED, JTI-MACDONALD CORP., ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., and RYESEKKS p.l.c.,

Defendants

STATEMENT OF CLAIM

MERCHANT LAW GROUP LLP
#812 - 363 Broadway Avenue
Winnipeg, Manitoba
R3C-3N9

S. Norman Rosenbaum

Tel: (204) 896-7777
Fax: (204) 982-0771

File No. _____

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

DEBORAH KUNTA

Plaintiff,

- and -

CANADIAN TOBACCO MANUFACTURERS' COUNCIL, B.A.T INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, BRITISH AMERICAN TOBACCO, p.l.c., IMPERIAL TOBACCO CANADA LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL, INC., PHILIP MORRIS USA INC., R. J. REYNOLDS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO, INTERNATIONAL, INC., CARRERAS ROTHMANS LIMITED, JTI-MACDONALD CORP., ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., and RYESEKKS p.l.c.,

Defendants

STATEMENT OF CLAIM

MERCHANT LAW GROUP LLP
#812 - 363 Broadway Avenue
Winnipeg, Manitoba
R3C-3N9

S. Norman Rosenbaum

Tel: (204) 896-7777
Fax: (204) 982-0771

File No. _____

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

DEBORAH KUNKA

Plaintiff,

- and -

CANADIAN TOBACCO MANUFACTURERS' COUNCIL, B.A.T INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, BRITISH AMERICAN TOBACCO, p.l.c., IMPERIAL TOBACCO CANADA LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL, INC., PHILIP MORRIS USA INC., R. J. REYNOLDS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO, INTERNATIONAL, INC., CARRERAS ROTHMANS LIMITED, JTI-MACDONALD CORP., ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., and RYESEKKS p.l.c.,

Defendants.

<court seal>

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a Manitoba lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Queen's Bench Rules*, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it in this court office, WITHIN 20 DAYS after this statement of claim is served on you, if you are served in Manitoba.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is 40 days. If you are served outside Canada and the United States of America, the period is 60 days.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

June 12th, 2009 Issued by _____
Registrar

J. DOUGLAS
DEPUTY REGISTRAR
COURT OF QUEEN'S BENCH
FOR MANITOBA

TO:

CANADIAN TOBACCO MANUFACTURERS' COUNCIL
1808 Sherbrooke Street West
Montréal Quebec

B.A.T INDUSTRIES P.L.C.
Globe House
4 Temple Place
London, England

BRITISH AMERICAN TOBACCO P.L.C.
Globe House
4 Temple Place
London, England

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED
Globe House
1 Water Street
London, England

IMPERIAL TOBACCO CANADA LIMITED
3711 Rue Saint-Antoine
Montréal, Quebec

ALTRIA GROUP, INC.
120 Park Avenue
New York, New York

PHILIP MORRIS INCORPORATED
6601 West Broad Street
Richmond, Virginia

PHILIP MORRIS INTERNATIONAL, INC.
120 Park Avenue
New York, New York

PHILIP MORRIS USA INC.
6601 West Broad Street
Richmond, Virginia

R.J. REYNOLDS TOBACCO COMPANY
401 North Main Street
Winston Salem, North Carolina

R.J. REYNOLDS TOBACCO INTERNATIONAL, INC.
401 North Main Street.
Winston Salem, North Carolina

CARRERAS ROTHMANS LIMITED
Oxford Road
Aylesbury
Bucks, England

JTI-MACDONALD CORP.
1300 - 1969 Upper Water Street
Purdy's Wharf Tower II
Halifax, Nova Scotia

ROTHMANS, BENSON & HEDGES INC.
1500 Don Mills Road
North York, Ontario

ROTHMANS INC.
1500 Don Mills Road
North York, Ontario

RYESEKKS p.l.c.
Plumtree Court
London, England

CLAIM

1. On behalf of herself and class members, the Plaintiff claims against the Defendants, jointly and severally:

(a) compensatory, aggravated, and punitive damages;

(b) restitution, including by way of a constructive trust and aggregate monetary award, of all profits which were or, with reasonable accounting, should have been earned by the Defendants from the manufacture and promotion of all types of tobacco products;

(c) the present value of the total expenditure and estimated total expenditure by the government for health care benefits provided to insured persons resulting from tobacco related disease or the risk of tobacco related disease;

(d) interest;

(e) costs; and

(f) such other relief as to this Honourable Court seems just.

I. PARTIES

(1) plaintiff

2. The Plaintiff, Deborah Kunka, resides at #1-10 Strauss Drive, Winnipeg, Manitoba, R3J 3V1.

3. The Plaintiff began smoking in 1976, at the age of 12, after seeing various tobacco advertisements which portrayed smoking as "glamorous" and "prestigious" and which failed to adequately warn, or warn at all, of the harmful effects of smoking. The Plaintiff currently smokes 25 cigarettes per day which are designed, manufactured, marketed and distributed by the Defendants.

4. As a result, the Plaintiff has become addicted to, and has had this addiction maintained by such products; and has developed chronic obstructive pulmonary disease and severe asthma, as well as mild reversible lung disease, all of which have caused the Plaintiff to be hospitalized.

(2) class

5. The Plaintiff brings this claim on behalf of all individuals, including their estates, and who purchased or smoked cigarettes manufactured by the Defendants, and their dependants and family members.

(3) defendants

(a) BAT Group

6. B.A.T Industries p.l.c. was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Globe House, 4 Temple Place, London, England.

7. British American Tobacco p.l.c., was incorporated pursuant to the laws of the United Kingdom and has a registered office at Globe House, 4 Temple Place, London, England.

8. British American Tobacco (Investments) Limited was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Globe House, 1 Water Street, London, England.

9. Imperial Tobacco Canada Limited was incorporated pursuant to the laws of Canada. It has a registered office at 3711 Rue Saint-Antoine Montréal, Quebec.

(b) Philip Morris Group

10. Altria Group, Inc. (formerly known as Philip Morris Companies Inc.), has a registered office at 120 Park Avenue, in New York, New York.

11. Philip Morris Incorporated (formerly Philip Morris & Co., Ltd., Incorporated) was incorporated pursuant to the laws of Virginia. Its principal place of business is 6601 West Broad Street, Richmond, Virginia.

12. Philip Morris International, Inc. was incorporated pursuant to the laws of Delaware. It has a registered office at 120 Park Avenue, New York, New York.

13. Philip Morris USA Inc. was incorporated pursuant to the laws of Virginia. Its principal office is 120 Park Avenue, New York, New York.

(c) R.J. Reynolds

14. R. J. Reynolds Tobacco Company was incorporated pursuant to the laws of North Carolina. It has a registered office at 401 North Main Street, Winston Salem, North Carolina.

15. R. J. Reynolds Tobacco International, Inc. was incorporated pursuant to the laws of Delaware. It has a registered office at 327 Hillsborough Street, Raleigh North Carolina.

(d) Rothmans Group

16. Carreras Rothmans Limited was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Oxford Road, Aylesbury, Bucks, England.

17. Ryesekks p.l.c. (formerly Rothmans International p.l.c., before that, Rothmans International Limited, and before that Carreras Limited) was

incorporated pursuant to the laws of the United Kingdom. It has a registered office at Plumtree Court, London, England.

18. JTI-Macdonald Corp. was incorporated pursuant to the laws of Nova Scotia. It has a registered office at 1300 - 1969 Upper Water Street, Purdy's Wharf Tower II, Halifax, Nova Scotia. In 2004, under the *Companies Creditor Arrangements Act,* R.S.C. 1985, c. C-36, JTI-Macdonald Corp. sought protection from the Ontario Superior Court of Justice. The Plaintiff will seek any necessary leave to proceed against JTI-Macdonald Corp..

19. Rothmans, Benson & Hedges Inc. was incorporated pursuant to the laws of Canada. It has a registered office at 1500 Don Mills Road, North York, Ontario.

20. Rothmans Inc. (formerly Rothmans of Pall Mall Canada Limited) was incorporated pursuant to the laws of Canada. It has a registered office at 1500 Don Mills Road, Toronto, Ontario.

(e) CTMC

21. Canadian Tobacco Manufacturers' Council ("CTMC") was incorporated pursuant to the laws of Canada. It has a registered office at 1808 Sherbrooke St. West, Montréal, Quebec. Imperial Tobacco Canada Limited, Rothmans, Benson

& Hedges Inc., and JTI-Macdonald Corp. are members of CTMC.

(4) canadian manufacturers

22. The principal Canadian cigarette manufacturers were and are:

(1) **Imperial Tobacco Canada Limited:** In 1912, Imperial Tobacco Company of Canada Limited was incorporated.

(a) In September of 1970:

(i) it changed its name to Imasco Limited (effective Dec. 1st,1970); and

(ii) Imperial Tobacco Limited, a wholly-owned subsidiary, acquired part of the tobacco related business of Imasco Limited, and

(b) In February of 2000:

(i) Imasco Limited amalgamated with its subsidiaries including Imperial Tobacco Limited to form Imasco Limited; and

(ii) In a second amalgamation, also in or about February, 2000, Imasco Limited amalgamated with its parent company, British American Tobacco (Canada) Limited, to form Imperial Tobacco Canada Limited. Imperial Tobacco Canada Limited is a a wholly owned subsidiary of the defendant, British American Tobacco p.l.c.

(2) **Rothmans, Benson & Hedges Inc.:** In 1934, Benson & Hedges (Canada) Inc. was incorporated. In 1960, Rothmans of Pall Mall Limited was incorporated in the United Kingdom. In 1985 it acquired part of the tobacco

related business of Rothmans Inc.. In 1986, Rothmans, Benson & Hedges Inc. was formed from an amalgamation of Rothmans of Pall Mall Limited and Benson & Hedges (Canada) Inc.

(a) Until 1986, Rothmans of Pall Mall Limited and Benson & Hedges directly or indirectly manufactured and promoted cigarettes in Manitoba.

(b) After 1986, Rothmans, Benson & Hedges Inc. directly or indirectly manufactured or promoted cigarettes sold in Manitoba.

Rothmans Inc. owns 40% of the securities of Rothmans, Benson & Hedges Inc. FTR Holding S.A., a Swiss company, a subsidiary of Altria Group, Inc., and an affiliate of Philip Morris U.S.A. Inc. and Philip Morris International, Inc., owns 40% of the securities of Rothmans, Benson & Hedges Inc.

(3) **JTI-Macdonald Corp.**: In 1930, W.C. MacDonald Incorporated was incorporated pursuant to the laws of Quebec. From 1858, it carried on business in Montréal as an unincorporated entity. In 1957, it changed its name to Macdonald Tobacco Inc.. In 1973, Macdonald Tobacco Inc. became a wholly-owned subsidiary of R.J. Reynolds Tobacco Company. In 1978:

(a) RJR-Macdonald Inc. was incorporated as a wholly owned subsidiary of R.J. Reynolds Tobacco Company; and

(b) R.J. Reynolds Tobacco Company sold Macdonald Tobacco Inc. to RJR-Macdonald Inc.. RJR-Macdonald Inc. acquired all or substantially all of Macdonald Tobacco Inc.'s assets and continued the business of

manufacturing and promoting cigarettes previously carried on by Macdonald Tobacco Inc..

In 1999, RJR-Macdonald Inc. changed its name to RJR-Macdonald Corp., which subsequently, changed its name to JTI-Macdonald Corp. RJR-Macdonald Inc., JTI-Macdonald Corp., and Macdonald Tobacco Inc. directly or indirectly manufactured and promoted cigarettes sold in Manitoba.

23. Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., and JTI-Macdonald Corp. are the three largest Canadian cigarette manufacturers. They manufactured and promoted cigarettes sold in Manitoba under brands that included:

"CANADIAN MANUFACTURERS"	**BRAND NAMES**
Imperial Tobacco Canada Limited	• Player's • Du Maurier • Matinee • Cameo
Rothmans, Benson & Hedges Inc.	• Benson & Hedges • Rothmans. • Number 7 • Craven A
JTI-Macdonald Corp.	• Export "A" • Vantage • Macdonald Special • Macdonald Select

24. CTMC is the trade and lobbying association of the Canadian tobacco industry. It advanced the interests of manufacturers, promoted cigarettes, and directly or indirectly caused other persons to promote cigarettes. Its membership included, among others: Imperial, Rothmans, Benson & Hedges, and JTI-Macdonald.

(5) non-canadian manufacturers

25. Philip Morris Incorporated, R.J. Reynolds Tobacco Company, and Ryesekks p.l.c. directly or indirectly manufactured and promoted cigarettes sold in Manitoba.

II. CAUSE OF ACTION

26. Each Defendant is a "manufacturer" within the meaning of *The Tobacco Damages and Health Care Costs Recovery Act*, S.M. 2006, c. 18. By directly or indirectly manufacturing and promoting cigarettes in Manitoba, each carried on business here.

(1) tobacco products

(a) nicotine

27. Nicotine is a psychoactive drug that affects various body systems including the brain and central nervous system, skeletal muscles, cardiovascular system,

endocrine functions, and lungs and other organs.[1]

28. Nicotine is addictive.

(b) tobacco

29. Tobacco contains nicotine.

(c) cigarettes

30. Cigarettes contain tobacco. When smoked, they deliver nicotine to users and thereby cause addiction.[2]

31. By smoking cigarettes, smokers become addicted to nicotine. While addicted, they regularly crave and consume tobacco. Attempting to withdraw causes irritability, difficulty in concentrating, anxiety, restlessness, increased hunger, depression and a pronounced craving for tobacco.[3]

---

[1] Despite decades of public pronouncements to the contrary, the tobacco industry admits in its confidential internal correspondence that nicotine is a drug. *See* **Sch. 01** ("We are, then, in the business of selling nicotine, an addictive drug ....") (B&W/BAT, 1963); **Sch. 02** ("Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects") (RJR, 1972); **Sch. 03** ("B.A.T. should learn to look at itself as a drug company rather than a tobacco company.") (BAT, 1980); **Sch. 04** ("[D]o we really want to tout cigarette smoke as a drug? It is, of course, but there are dangerous F.D.A. implications to having such conceptualization go beyond these walls. . . .") (PM, 1969).

[2] *See* **Sch. 05** ("Very few consumers are aware of the effects of nicotine, i.e., its addictive nature and that nicotine is a poison.") (B&W/BAT, 1978); **Sch. 06** ("The cigarette should be conceived not as a product but as a package. The product is nicotine. . . . Think of the cigarettes as a dispenser for a dose unit of nicotine.") (PM, 1972); **Sch. 02** ("Happily for the tobacco industry, nicotine is both habituating and unique in its variety of physiologic actions ....") (RJR, 1972).

[3] *See* **Sch. 07** ("Once addiction does take place, it becomes necessary for the smoker to make peace with the accepted hazards. This is done by a wide range of rationalizations.... However, the desire to quit, and actually carrying it out, are two quite different things, as the would-be quitter soon

32. When smokers inhale tobacco smoke as intended by manufacturers, they also inhale harmful substances which manufacturers know can cause or contribute to disease. They include aldehydes, ammonia, carbon monoxide, catechol, endotoxins, hydrogen cyanide, metals, micotoxins, nicotine, nitrogen dioxide, nitrogen monoxide, nitrosamines, organics, phenols, polyaromatic hydrocarbons, and tar.[4]

33. As a result, inhaling cigarette smoke causes or materially contributes to various diseases, including, but not limited to: (a) cancers of the bladder, esophagus, kidney, larynx, lip, lung oral cavity, pancreas, pharynx, stomach; (b) chronic obstructive pulmonary disease and allied conditions, including asthma, chronic airways obstruction, chronic bronchitis, and emphysema; (c) circulatory system diseases including atherosclerosis, aortic and other aneurysms, cerebrovascular disease, coronary heart disease, pulmonary circulatory disease,

---

learns.") (ITL, 1982). **Sch. 08** ("[S]moking is a habit of addiction that is pleasurable.") (BAT, 1962); **Sch. 09** ("High profits ... are directly related to the fact that the customer is dependent upon the product.") (BAT, 1979).

[4] *See* **Sch. 10** ("[I]f anyone ever identified any ingredient in tobacco smoke as being hazardous to human health or being something that shouldn't be there; we could eliminate it. But no one ever has.") (PM, 1976); **Sch. 11** ("[B]iologically active materials [are] present in cigarette tobacco. These are: a) cancer causing; b) cancer promoting; and c) poisonous.") (L&M, 1961) Liggett & Myers is not a party to these proceedings, but its documents and those of other non-party tobacco manufacturers and trade groups illustrate state of the art and general industry knowledge. *See also* **Sch. 12** ("Eight of the polycyclic hydrocarbons isolated from the smoke are known to produce cancer in mice.... [T]here is a distinct possibility that these substances would have a carcinogenic effect on the human respiratory system.") (RJR, 1959); **Sch. 13** ("[N]itrosamines are the most potent carcinogens known to man....") (ATC, 1965).

other peripheral vascular disease; (d) morbidity and general deterioration of health; (e) peptic ulcers; (f) pneumonia and influenza; and (g) fetal harm.

(2) tort

(a) duty

34. Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-Macdonald Corp., Philip Morris Incorporated, R.J. Reynolds Tobacco Company, and Ryesekks p.l.c. ("Manufacturers") manufactured and promoted cigarettes that reached consumers without alteration or intermediate inspection after leaving manufacturing and distribution facilities.

35. The Plaintiff has smoked at least one pack of cigarettes designed, manufactured, marketed and distributed by each of the Manufacturers. She has regularly smoked Canadian Classic, Craven Menthol, duMaurier Regular, Export "A", John Player, Matinee Extra Mild, Player's, Player's Light, Player's Extra Light, in the intended way.

36. The Manufacturers therefore owed the Plaintiff and the class a duty of care:

(a) to design and manufacture a reasonably safe cigarette by taking all reasonable measures to eliminate, minimize, or reduce the risks of smoking cigarettes;

(b) not to promote knowingly defective cigarettes; and

(c) to provide reasonably clear, complete, and current warnings of the risks of smoking cigarettes of which they knew or ought to have known.

37. The Manufacturers owed a special duty to children and adolescents to take reasonable measures to prevent them from starting or continuing to smoke.

(b) knowledge

38. At all material times, the Manufacturers were in possession of scientific and medical data which established the risks of smoking cigarettes. They knew or ought to have known that:

(a) nicotine is addictive; and

(b) nicotine addiction compels smokers to continue to smoke;

(c) the cigarettes and other types of tobacco products they manufactured and promoted:

(i) contained nicotine and were therefore addictive; and

(ii) contained the substances enumerated in paragraph 30, and therefore caused or contributed to tobacco related diseases in those who inhaled or were exposed to cigarette smoke.

(c) breach

(i) duty not to market

39. In past and continuing breach of their duty of care, the Manufacturers:

(a) failed to conduct proper investigation, research, and testing as to the risk of tobacco related illness, nicotine addiction, and the feasibility of eliminating or minimizing these risks.[5]

(b) failed to design a reasonably safe product and to take all reasonable measures to eliminate, minimize, or reduce the risk of tobacco related illness.

(c) failed to eliminate or reduce to a safe level, substances and by-products of combustion, including nicotine and tar, which can cause or contribute to disease.

(d) manufactured and promoted defective cigarettes and other tobacco products:

(i) when smoked as intended, they are addictive, inevitably cause or

---

[5] *See* **Sch. 14** ("Members of [the RJR] Research Department have studied in detail cigarette smoke composition. Some of the findings have been published. However, much data remain unpublished because they are concerned with carcinogenic or co-carcinogenic compounds....") (RJR, 1962); **Sch. 15** ("The psychopharmacology of nicotine is a highly vexatious topic. It is where the action is for those doing fundamental research on smoking, and from where most likely will come significant scientific developments profoundly influencing the industry. Yet it is where our attorneys least want us to be, for two reasons... The first reason is the oldest and is implicit in the legal strategy employed over the years in defending corporations ... 'We within the industry are ignorant of any relationship between smoking and disease. Within our laboratories no work is being conducted on biological systems.' That posture has moderated considerably as our attorneys have come to acknowledge that the original carte blanche avoidance of all biological research is not required in order to plead ignorance about any pathological relationship between smoke and smoker.") (PM, 1980).

contribute to tobacco related disease in an unreasonable number of users;[6] and

(ii) have no utility or benefit to consumers, or have a utility or benefit which is vastly outweighed by smoking related risks and costs.

(e) wilfully increased the bio-availability of nicotine in their cigarettes by:

(i) special blending of tobacco;

(ii) sponsoring or engaging in selective breeding and genetic engineering of tobacco plants;

(iii) adding nicotine or substances containing nicotine; and

(iv) introducing substances, including ammonia, into their cigarettes to enhance the bio-availability of nicotine to smokers.

(ii) duty to warn

40. The Manufacturers breached their duty to warn consumers. They:

(a) failed to provide any or reasonable warnings before 1972;

(b) after 1972, failed to provide reasonable warnings of the risk of tobacco related diseases caused by smoking, and of the risk of addiction to the nicotine contained in, their cigarettes. In particular, their warnings:

(i) were designed to be as ineffective as possible;

---

[6] *See* **Sch. 09** ("[H]igh profits ... are directly related to the fact that the customer is dependent upon the product.") (BAT, 1979); **Sch. 16** ("A cigarette that does not deliver nicotine cannot satisfy the habituated smoker and cannot lead to habituation and would therefore almost certainly fail.") (PM, 1966).

(ii) did not give users, prospective users, and the public, an adequate indication of each of the specific risks of smoking their cigarettes;

(iii) were given only to forestall more effective governmental warnings; and

(iv) failed to make clear, complete, and current disclosure of the risks inherent in smoking their cigarettes;

(c) made representations which they knew or ought to have known were false and deceptive. In particular, they falsely represented:

(i) that smoking has not been shown to cause disease;[7]

(ii) that they were aware of no research, or no credible research, that established a link between smoking and disease;[8]

(iii) that many diseases shown to have been related to tobacco were in fact related to other environmental or genetic factors;[9]

---

[7] *Compare* **Sch. 17** ("With one exception the individuals whom we met believe that smoking causes lung cancer.") (BAT, 1958) *with* **Sch. 18** ("We do not believe that cigarettes are hazardous; we do not accept that."); **Sch. 19** ("There is disagreement among medical experts as to whether the reported associations between smoking and various diseases are causal or not. CTMC's position is to the effect that not causal relationship has been established.") (CTMC1978); **Sch. 20** ("Doubt is our product since it is the best means of competing with the body of fact that exists in the mind of the general public. It is also the means of establishing a controversy.") (B&W, 1969).

[8] *See* **Sch. 21** ("Despite all the research going on, the simple an unfortunate fact is that scientists do not know the cause or causes of the chronic diseased reported to be associated with smoking.... We would appreciate you passing this information along to your [fifth grade] students." (RJR, 1990); **Sch. 22** ("It is not known whether cigarettes cause cancer.") (RJR, 1984).

[9] *See* **Sch. 23** ("Distinguished authorities point out that there is no proof that cigarette smoking is one of the causes.... That statistics purporting to link cigarette smoking with disease could apply with equal force to any other aspect of modern life."); **Sch. 24** ("[M]any scientists are becoming concerned that preoccupation with smoking may be both unfounded and dangerous, unfounded

(iv) that cigarettes were not addictive;[10]

(v) that smoking is merely a habit or custom as opposed to an addiction;[11]

(vi) that they did not manipulate nicotine levels in their cigarettes;[12]

(vii) that they did not include substances in their cigarettes designed to increase the bio-availability of nicotine;[13]

(viii) actual intake of tar and nicotine associated with smoking cigarettes,

---

because evidence on many critical points is conflicting, dangerous because it diverts attention from other suspected hazards.") (TI, 1979).

[10] *See* **Sch. 25** ("The fact is there is nothing about smoking, or about the nicotine in cigarettes, that would prevent smokers from quitting.") (TI, 1989); **Sch. 26** ("The fact is there is nothing about smoking, or about the nicotine in cigarettes, that would prevent smokers from quitting." (RJR, 1992).

[11] *See* **Sch. 27** ("When we use the term 'addiction,' there are two meanings. There's an everyday meaning when we talk about being news junkies or chocoholics.... Now, under that, all kinds of habits become addictions. And so if it's a habit, then, yes, smoking can be a habit.") (TI, 1994); **Sch. 28** ("If [cigarettes] are behaviorally addictive or habit forming, they are much more like caffeine, or in my case, Gummy Bears.") (PM, 1997).

[12] *See* **Sch. 29** ("Dr. Kessler's contention that we add or otherwise manipulate nicotine to create, maintain, or satisfy an addiction, is false.") (RJR, 1994); **Sch. 30** ("The claims that RJR increases the nicotine in its cigarettes are false. RJR does not increase nicotine in cigarettes above what is found naturally in tobacco.") (RJR, 1994)

[13] *Compare* **Sch. 31** ("There is no indication that ammonia compounds in our cigarettes alter the amount of nicotine the smoker inhales.") (PM, 1994) *with* **Sch. 32** ("We are pursuing this project with the eventual goal of lowering the total nicotine present in smoke while increasing the physiologic effect of the nicotine which is present, so that no physiological effect is lost on nicotine reduction.") (RJR, 1973); **Sch. 33** ("Marlboro (and other Philip Morris brands) as compared with WINSTON, our other brands and most other brands on the market shows : (1) higher smoke pH (higher alkalinity), hence increased amounts of 'free' nicotine in smoke, and higher immediate nicotine 'kick'.") (RJR, 1973); **Sch. 34** ("Cigarettes made from filler oversprayed with nicotine as the citrate (NC) produce CNS effects which are approximately half the magnitude of those obtained with the FB [freebase] or unextracted cigarettes - at comparable nicotine delivery levels.") (PM, 1989).

as opposed to levels measured on machines;[14]

(ix) that certain of their cigarettes, such as "filter", "mild", "low tar" and "light" brands, were safer than other cigarettes;[15] and

(x) that smoking is consistent with a healthy lifestyle;[16]

(d) misled consumers into believing that cigarettes were safer than they were by:

(i) incorporating into the design of their cigarettes ineffective safety features including filters which they knew or ought to have known were ineffective, yet whose presence implied safety which was not there;[17] and

(ii) designing and manufacturing "mild", "low tar", and "light" cigarettes,

---

[14] *See* **Sch. 35** ("The paper itself expresses what we in Behavioral have 'felt' for quite some time. That is, smokers smoke differently than the FTC machine and may very well smoke to obtain a certain level of nicotine in their bloodstream.") (RJR, 1983).

[15] *See* **Sch. 36** ("[T]here 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.") (ITL, undated); **Sch. 37** ("Unmet needs of smokers that could be satisfied by newer modified products, products which could delay the quitting process, are pursued.") (ITL, 1986).

[16] *See* **Sch. 44** ("Since younger smokers represent the recruitment market, and female smokers are clearly a growth segment, in-depth motivational studies of both groups are strongly indicated.") (BAT, 1985); **Sch. 45** ("Young smokers represent the major opportunity group for the cigarette industry, we should therefore determine their attitude to smoking and health and how this might change over time.") (ITL, 1970).

[17] The industry has long known that smokers compensate for ventilated filters by taking bigger puffs and blocking vent holes. *See* **Sch. 38** ("[S]ubjects took more puffs of very much larger volume from the ventilated cigarette, but showed no difference in the way they inhaled smoke.") (BAT, 1972); **Sch. 39** ("[S]mokers adjust puff intake in order to maintain constant smoke intake.") (PM, 1967); **Sch. 40** ("[S]ome of these [vent] holes are likely to be occluded under normal smoking conditions, whereas no occlusion is likely to occur when the cigarettes are machine smoked for analysis.") (PM, 1967); **Sch. 16** ("The illusion of filtration is as important as the fact of filtration.") (PM, 1966).

which they promoted in a manner which led reasonable consumers to believe that cigarettes were safer to use than they were;

(e) misled the public about the risks of smoking using innuendo, exaggeration and ambiguity;

(f) systemically made statements regarding smoking and health which they knew were incomplete and inaccurate;

(g) failed to correct statements made by others regarding the risks of smoking, which they knew were incomplete or inaccurate. Their failure to correct misinformation was a misrepresentation by omission or silence;

(h) engaged in collateral marketing, promotional, and public relations activities to neutralize or negate the efficacy of warnings provided to consumers by Manufacturers, governments and other agencies concerned with public health;

(i) suppressed information regarding the risks of smoking; and

(j) participated in a misleading campaign to make themselves appear more credible than health authorities and anti-smoking groups, and to reassure smokers that cigarettes were not as dangerous as authorities said they were.

41. At the Manufacturers' direction, the CMTC participated in this deception.

42. The Manufacturers intended that these misrepresentations be relied upon by Canadians for the purpose of inducing them to start or continue smoking.

(iii) special duties

43. The Manufacturers exploited the inability of children, adolescents, and those addicted to nicotine to protect their own interests because of their psychological and physiological dependence on nicotine and their augmented inability to understand smoking risks. In particular, the Manufacturers knew or ought to have known that:

(a) more than 80% of smokers start to smoke and become addicted before they are 19 years of age.

(b) it was illegal to sell cigarettes to children and adolescents in Manitoba and to promote smoking by such persons;

(c) children and adolescents in Manitoba were smoking or might start to smoke their cigarettes;

(d) children and adolescents in Manitoba who smoked their cigarettes would become addicted to cigarettes and would suffer tobacco related disease.

44. In breach of their duty to children and adolescents in Manitoba, the Manufacturers:

(a) failed to take any, or any reasonable, measures to prevent them from starting or continuing to smoke;

(b) targeted children and adolescents in their advertising, promotional and marketing activities in Manitoba with the object of inducing them to start or

continue to smoke;

(c) undermined legislative and regulatory initiatives that intended to prevent children and adolescents in Manitoba from starting or continuing to smoke; and

(d) provided cigarettes to persons under circumstances where they knew or ought to have known that they would be illegally brought into Manitoba, and sold to children and adolescents.[18]

(3) trade practices

45. The Plaintiff relies on *The Business Practices Act*, S.M. 1990-91, c. 6, as am.

---

[18] **Sch. 41** ("Realistically, if our company is to survive and prosper, over the long term, we must get our share of the youth market.") (RJR, 1973); **Sch. 42** ("The specific area of interest is young smokers between the ages of 15 and 19.") (BAT, undated); **Sch. 43** ("The under 25-year old smokers continue to show the highest level of potential for ITL activities. The model that sees young customers acquiring their preferences and staying with them as they age is increasingly valid.") (ITL, 1991); **Sch. 44** ("Since younger smokers represent the recruitment market, and female smokers are clearly a growth segment, in-depth motivational studies of both groups are strongly indicated.") (BAT, 1985); **Sch. 45** ("Young smokers represent the major opportunity group for the cigarette industry, we should therefore determine their attitude to smoking and health and how this might change over time.") (ITL, c.1970); **Sch. 46** ("RE-ESTABLISH clear distinct images for ITL brands with particular emphasis on relevance to younger smokers.") (ITL, c.1988); *Id.* ("If the last ten years have taught us anything, it is that the industry is dominated by the companies who respond most effectively to the needs of younger smokers. Our efforts on these brands will remain on maintaining their relevance to smokers in these younger groups in spite of the share performance they may develop among older smokers."); **Sch. 47** ("Contact leading firms in terms of children research ... contact Sesame Street ... contact Gerber, Schwinn, Mattel ... Determine why these young people were not becoming smokers.") (B&W, 1977).

(4) competition act

46. The Manufacturers, for the purpose of directly and indirectly promoting the supply or use of cigarettes, in breach of their statutory duties or obligations to consumers under the *Combines Investigation Act* R.S.C. 1952 (supp.), c. 314 as amended by the *Criminal Law Amendment Act* S.C. 1968-69, c. and amendments thereto and subsequently the *Competition Act* R.C.S. 1985, c. C-34, as am. made false or misleading representations to the public including as to the performance and efficacy of cigarettes that were not supported by reasonable and proper testing.

(5) concerted action

47. Four multinational tobacco enterprises (the BAT, Philip Morris, RJR, and Rothmans Groups manufactured and promoted all or most of the cigarettes sold in Manitoba. Their Head and Other Members were as follows:

group	**"MEMBERS"**	
	"Head Members"	**"Other Members"**
BAT	• **B.A.T Industries p.l.c.** - B.A.T. Industries Limited - Tobacco Securities Trust Limited • **British American Tobacco (Investments) Limited** - British-American Tobacco Company Limited • **British American Tobacco p.l.c.**	• **Imperial Tobacco Canada Limited** - Imasco Limited - Imperial Tobacco Limited

group	"MEMBERS"	
Philip Morris	• **Altria Group, Inc.,** - Philip Morris Companies Inc. • **Philip Morris Incorporated** • **Philip Morris International, Inc.** • **Philip Morris USA, Inc.**	• **Rothmans, Benson & Hedges Inc.** - Benson & Hedges (Canada) Inc.
RJR	• **R.J. Reynolds Tobacco Company** • **R.J. Reynolds Tobacco International, Inc.**	• **JTI-Macdonald Corp.** - Macdonald Tobacco Inc.
Rothmans	• **Carreras Rothmans Limited** • **Ryesekks p.l.c.**	• **Rothmans, Benson & Hedges Inc.** • **Rothmans Inc.** - Rothmans of Pall Mall Limited

48. The Head Members directed and coordinated common policies for each Group relating to smoking and health.

(a) agreement

49. In 1953 and early 1954, in response to mounting publicity about the link between smoking and disease,

(a) American Tobacco Company,

(b) Brown & Williamson Tobacco Corporation (in its own capacity and as agent for British American Tobacco (Investments) Limited),

(c) Philip Morris Incorporated, and

(d) R. J. Reynolds Tobacco Company,

conspired, or formed a common purpose, to use unlawful means to prevent consumers in Manitoba and other jurisdictions from learning about the harmful nature and addictive properties of cigarettes, in circumstances where they knew or

ought to have known that injury to consumers would result from furtherance thereof.

50. The conspirators included Members of the BAT Group (after about 1950), Philip Morris Group (after about 1954), RJR Group (after about 1973), and Rothmans Group (after about 1956), separately, and as a collective.

(b) unlawful means

51. Group Members formed and furthered the civil conspiracy or common purpose through:

(a) committees, conferences and meetings established, organized, and convened by Head Members and attended by Group Member senior personnel; and

(b) written and oral directives and communications amongst Group Members

52. At these meetings and through these communications, Group Members agreed to breach their duties to consumers, as outlined above, and, in particular to:

(a) jointly disseminate false and misleading information about smoking risks;

(b) suppress statements and admissions that smoking causes disease;

(c) suppress or conceal research regarding the risks of smoking;

(d) participate in a public relations program that promoted cigarettes, protected

them from attacks based upon health risks, and reassured consumers that smoking was not hazardous; and

(e) ensure that the members of their respective Groups would implement the policies described in (a) through (d), above.

53. In or about 1962, the Canadian Manufacturers each signed an agreement not to make adverse health claims about each other's cigarettes, so as to avoid acknowledging the risks of smoking.[19]

(i) committees, conferences and meetings

54. The Group Members used committees, conferences, and meetings to direct or co-ordinate their common policies on smoking and health, including:

COMMITTEES, CONFERENCES, AND MEETINGS			
group	**committees**	**conferences**	**meetings**
BAT	• Chairman's Policy Committee • Research Policy Group • Scientific Research Group • Tobacco Division Board • Tobacco Executive Committee • Tobacco Strategy Review Team	• Chairman's Advisory Conferences • Group Research Conferences • Group Marketing Conferences	• particulars are peculiarly known to the BAT Group
PM	• particulars peculiarly known to the PM Group	• Conference on Smoking and Health	• Committee on Smoking Issues and Management

[19] **Sch. 48**.

COMMITTEES, CONFERENCES, AND MEETINGS			
group	**committees**	**conferences**	**meetings**
		• Corporate Affairs World Conference	• Corporate Products Com- mittee
Rothmans	• particulars are peculiarly known to the Rothmans Group	• particulars are peculiarly known to the Rothmans Group	• particulars are peculiarly known to the Rothmans Group
RJR	• particulars are peculiarly known to the RJR Group	• "Hound Ears" and Sawgrass conferences	• Winston-Salem Smoking Issues Coordinator Meetings

(ii) directives and communications

55. The Head Members created and distributed written directives that set out their common policy on smoking and health issues to Group Member personnel for direct and indirect dissemination to consumers. The full particulars of the directives and communications are known only to the Group Members, but included:

DIRECTIVES AND COMMUNICATIONS	
group	**directives and communications**
BAT	• "Smoking Issues: Claims and Responses" •"Consumer Helplines: How To Handle Questions on Smoking and Health and Product Issues" • "Smoking and Health: The Unresolved Debate", "Smoking: The Scientific Controversy" • "Smoking: Habit or Addiction?" • "Legal Considerations on Smoking and Health Policy"
PM	• "Smoking and Health Quick Reference Guides" and "Issues Alert[s]"
RJR	• "Issues Guide"
Rothmans	• particulars are peculiarly known to the Rothmans Group

56. Group Members further directed or co-ordinated their common policy and position on smoking and health:

(a) R.J. Reynolds International Inc. appointed and supervised a "smoking issue designee" in various global "Areas". The designees reported to the Manager of Science Information at R.J. Reynolds Tobacco Company. From 1974, a senior executive of Macdonald Tobacco Inc. (later of JTI-Macdonald Corp) was the designee in "Area II" (Canada).

(b) The Corporate Affairs and Public Affairs Departments of Philip Morris Incorporated and Philip Morris International, Inc. directed or advised departments of the other Philip Morris Group Members, including Rothmans, Benson & Hedges Inc. and its amalgamating company Benson & Hedges (Canada) Ltd., concerning the Philip Morris Group position on smoking and health issues.

(c) Ryesekks p.l.c. and Carreras Rothmans Limited, through the Rothmans International Research Division, created and distributed statements which set out their position on smoking and health issues. In 1958, they issued numerous false announcements including in the *Globe and Mail* (June 23rd, 1958) and in the *Toronto Daily Star* (August 13th, 1958) that:

(i) smoking in moderation was safe, and

(ii) Canadian-made Rothmans cigarettes were safer than those of other brands because they contained less tar and had "cooler" smoke.

(iii) ctmc

57. In 1963, in furtherance of their civil conspiracy or common purpose, as directed by the Head Members, and to maintain a united front on smoking and health issues, the Canadian Manufacturers formed the Ad Hoc Committee on Smoking and Health which, in 1969, was renamed the Canadian Tobacco Manufacturers' Council, and in 1982, was incorporated (collectively "CTMC").

58. Upon its formation, the CTMC adopted and participated in the civil conspiracy. Since 1963, in breach of its duties to the Plaintiff, the Canadian Manufacturers directed and caused the CTMC to:

(a) provide forums for Groups to further their civil conspiracy or common purpose;

(b) synchronize the Canadian Manufacturer's false positions on smoking and health issues with those of international tobacco manufacturers and associations;

(c) relay the tobacco industry's common policies and positions respecting the health risks and concerns about smoking;

(d) suppress statements or admissions that smoking causes disease;

(e) suppress or conceal research regarding the adverse risks of smoking;

(f) counter independent attacks on the health risks of cigarettes and smoking;

(g) disseminate false and misleading information about the risks of smoking to

governments, health and medical organizations, and consumers:

(i) in 1963, the CTMC misrepresented to the Canadian Medical Association that there was no causal connection between smoking and disease; and

(ii) in 1969, CTMC misrepresented to the House of Commons, Standing Committee on Health, Welfare and Social Affairs, that there was no causal connection between smoking and disease;

(h) lobby the Federal and provincial governments to delay and minimize government initiatives with respect to smoking and health; and

(i) participate in a public relations program on smoking and health issues with the intent of promoting cigarettes and maximizing sales;

59. The Canadian Manufacturers and the CTMC conspired or acted in concert in breaching their duties outlined above. They knew or ought to have known that one or more of them might breach duties in furtherance of the common purpose.

(iv) influence voting

60. Head Members further directed or co-ordinated the smoking and health policies of the Other Members within their Group by directing and advising how they should vote in committees of the Canadian Manufacturers and at meetings of the CTMC on smoking and health issues, including the approval and funding of research by the Canadian Manufacturers and the CTMC.

(v) research organizations

61. Between late 1953 and the early 1960's:

(a) the Head Members formed or joined numerous research organizations including the:

(i) Centre for Co-operation in Scientific Research Relative to Tobacco ("CORESTA");

(ii) Tobacco Industry Research Council ("TIRC"), which was renamed the Council for Tobacco Research in 1964 ("CTR"); and

(iii) Tobacco Research Council ("TRC").

(b) the Head Members publicly represented that they or Other Members, along with CORESTA, TIRC / CTR, TRC, and similar organizations, would perform objective research and gather data regarding the link between smoking and disease and internationally publicize the results.

(c) the Head Members agreed that they or Other Members, along with CORESTA, TIRC / CTR, TRC, and similar organizations, would conduct research and publicize information to counter, undermine, or obscure information that showed the link between smoking and disease, with a view to creating widespread belief that there was a medical or scientific controversy as to whether smoking is harmful and whether nicotine is addictive, when in fact there was not.

(d) In 1963 and 1964, with a view to ensuring that no research would be approved or conducted by CORESTA, TIRC / CTR, and TRC which would indicate that cigarettes were dangerous, the Head Members and European tobacco companies and state monopolies agreed to coordinate their research on the link between smoking and disease with that conducted by TIRC in the United States.

(e) In April and September 1963, Head Members of the BAT and RJR Groups agreed with members of the 'Council of Action' in Hamburg, Germany and with Head Members of the Philip Morris Group in New York, to develop a public relations campaign to counter reports of the English Royal College of Physicians, United States Surgeon General, and the Canadian Medical Association, and to reassure consumers that their health would not be harmed by smoking cigarettes.

(f) In September 1963, in New York, the Head Members of the Philip Morris, RJR, and BAT Groups, along with other US tobacco companies, agreed that they, and members of their respective Groups, would not issue warnings about the link between smoking and disease unless and until required by governmental action.

62. From the outset of the civil conspiracy or common purpose described herein or, alternatively, from the time each Canadian Manufacturer became a

Group Member, each Canadian Manufacturer agreed to and adopted the common purpose and breached their duties in furtherance thereof.

(vi) icosi

63. By the mid-1970's, motivated by their concern that admissions by any of the national manufacturers' associations ("NMA") about a link between smoking and disease could lead to a 'domino effect' to the detriment of the worldwide industry, Head Members agreed to take an increased international response to reassure existing and potential smokers and to protect the tobacco industry:

64. So, in furtherance of the civil conspiracy or common purpose:

(a) in June of 1977, Head Members and other international tobacco companies met in England and established the International Committee on Smoking Issues ("ICOSI").

(b) In 1980, ICOSI was renamed the International Tobacco Information Centre / Centre International d'Information du Tabac - INFOTAB ("INFOTAB"). In 1992, INFOTAB changed its name to the Tobacco Documentation Centre ("TDC") (ICOSI, INFOTAB, and TDC are collectively referred as "ICOSI").

65. ICOSI's policies were mirrored in the NMA's (including the CTMC), and were presented as the policies and positions of NMA's and their member

companies to conceal the civil conspiracy or common purpose from the public and governments.

66. If a manufacturer within one of the Groups took a position on smoking and health issues contrary to that of ICOSI, the Head Members took steps to enforce compliance with the position of ICOSI.

67. Through ICOSI, Head Members agreed to resist governmental attempts to provide adequate warnings about the link between smoking and disease, and reiterated their position on smoking and health issues, furthering their agreement to:

(a) jointly disseminate false and misleading information regarding smoking risks;

(b) make no statement or admission that smoking caused disease;

(c) suppress or conceal research regarding the risks of smoking;

(d) make explicit health claims about each other's cigarettes, and thereby avoid highlighting the risks of smoking; and

(e) participate in a public relations program on smoking and health issues with the objective of promoting cigarettes, protecting cigarettes from attack based upon health risks, and reassuring consumers that smoking was not hazardous.

68. In and after 1977, the members of ICOSI, including the Head Members, agreed orally and in writing to ensure that:

(a) the members of their respective Groups, including those in Canada, would act in accordance with the ICOSI position on smoking and health, including its position on warnings with respect to the link between smoking and disease;

(b) initiatives pursuant to the ICOSI positions would be carried out, whenever possible, by NMA's, including the CTMC, to ensure compliance in the various tobacco markets worldwide;

(c) when it was not possible for NMA's to carry out ICOSI's initiatives, Group Members would carry them out; and

(d) their subsidiary companies would, when required, suspend or subvert their local or national interests in order to assist in preserving and growing the tobacco industry as a whole.

(vii) peculiar knowledge

69. Further particulars of the way in which the civil conspiracy or common purpose was entered into or continued, and Group Member breaches of duty in furtherance thereof, are peculiarly known to Group Members.

(c) joint liability

70. The Head Members civilly conspired with the Other Members with respect to the breaches of duty committed by the Other Members. Alternatively:

(a) Head Members acted in concert with Other Members with respect to Other Members' breaches of duty;

(b) if Group Members did not agree or intend that unlawful means be used in pursuing their civil conspiracy or common purpose, they knew or ought to have known that one or more of them might commit breaches of duty in furtherance of it. As a result, Head Members acted in concert with Other Members, or either of them, with respect to Other Members' breaches of duty;

(c) in breaching duties, Other Members acted as agents of Head Members; or

(d) Head Members directed the activities of Other Members to such a degree that the Other Members' breaches of duties were also committed by Head Members.

71. The CTMC was agent of the Canadian Manufacturers. The Canadian Manufacturers directed and co-ordinated the activities of the CTMC to such a degree that the CTMC's breaches were committed by the Canadian Manufacturers.

72. By reason of the foregoing, each of the Defendants conspired or acted in concert with respect to the breaches of duty described herein. They jointly breached the duties described herein.

73. Under *The Tobacco Damages and Health Care Costs Recovery Act*, S.M. 2006, c. 18, at common law, or in equity, the Defendants are jointly and severally liable for the cost of health care benefits attributed to each.

(6) waiver of tort

74. The Plaintiff claims an aggregate monetary award for the amount of the Defendants' revenues or profits obtained from manufacturing and promoting cigarettes and other tobacco products in Manitoba.

(a) The Defendants breached legal, statutory, and equitable duties and obligations in the manner outlined above.

(b) The Defendants intended to, and did, profit as a result of their breaches of legal, statutory, and equitable duties.

(c) If the Defendants had complied with their duties:

(i) class members would not have started nor continued smoking;

(ii) class members would not have purchased cigarettes; and

(iii) the Defendants would not have been enriched from the sale of tobacco products.

(7) harm caused

75. The Plaintiff has developed chronic obstructive pulmonary disease and severe asthma, as well as mild reversible lung disease, caused by smoking

cigarettes manufactured and promoted by the Defendants. Though she repeatedly tried, her addiction to nicotine precludes her from quitting.

76. Because of the tobacco related wrongs described above, the Plaintiff and class members, including children and adolescents, started and continued to smoke cigarettes manufactured and promoted by the Defendants. As a result, they suffered tobacco related disease and an increased risk of such disease.

77. The Plaintiff pleads and relies on *The Tobacco Damages and Health Care Costs Recovery Act*, S.M. 2006, c. 18 as retroactively applying when in force.

June 11th 2009

MERCHANT LAW GROUP LLP
#812 – 363 Broadway Avenue
Winnipeg, Manitoba
R3C-3N9,

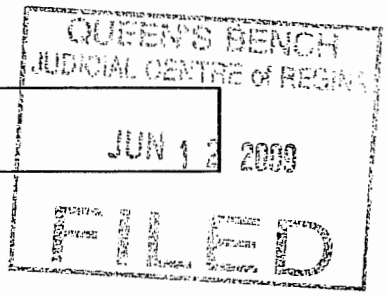
Tel: (204) 896-7777
Fax: (204) 982-0771,

S. Norman Rosenbaum

TAB VI

Q.B. No. 916 of 2009

CANADA)
PROVINCE OF SASKATCHEWAN)



IN THE QUEEN'S BENCH
JUDICIAL CENTRE OF REGINA

BETWEEN:

Thelma Adams

PLAINTIFF

-and-

Canadian Tobacco Manufacturers' Council, B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, British American Tobacco, p.l.c., Imperial Tobacco Canada Limited, Altria Group, Inc., Philip Morris Incorporated, Philip Morris International, Inc., Philip Morris USA Inc., R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco, International, Inc., Carreras Rothmans Limited, JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., Rothmans Inc., and Ryesekks p.l.c.,

DEFENDANTS

Brought under *The Class Actions Act*

Statement of Claim

JUN12'09 #00000058 COFA 100.00

MERCHANT LAW GROUP LLP
#812 - 363 Broadway Avenue
Winnipeg, Manitoba
R3C-3N9

E.F. Anthony Merchant, Q.C.

Tel: (306) 359-7777
Fax: (306) 522-3299

Q.B. No. 916 of 2009

CANADA)
PROVINCE OF SASKATCHEWAN)

IN THE QUEEN'S BENCH
JUDICIAL CENTRE OF REGINA

BETWEEN:

Thelma Adams

PLAINTIFF

-and-

Canadian Tobacco Manufacturers' Council, B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, British American Tobacco, p.l.c., Imperial Tobacco Canada Limited, Altria Group, Inc., Philip Morris Incorporated, Philip Morris International, Inc., Philip Morris USA Inc., R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco, International, Inc., Carreras Rothmans Limited, JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., Rothmans Inc., and Ryesekks p.l.c.,

DEFENDANTS

Brought under *The Class Actions Act*

Statement of Claim

NOTICE TO DEFENDANT

1. The plaintiff may enter judgment in accordance with this Statement of Claim or such judgment as may be granted pursuant to the Rules of Court unless

- within 20 days if you were served in Saskatchewan;
- within 30 days if you were served elsewhere in Canada or in the United States of America;
- within 40 days if you were served outside Canada and the United States of America

(excluding the day of service) you serve a Statement of Defence on the plaintiff and file a copy thereof in the office of the local registrar of the Court for the judicial centre above named.

2. In many cases a defendant may have the trial of the action held at a judicial centre other than the one at which the Statement of Claim is issued. Every defendant should consult his lawyer as to his rights.

3. This Statement of Claim is to be served within six months from the date on which it is issued.

4. This Statement of Claim is issued at the above-named judicial centre the 12th day of June, 2009.

<seal>

Local Registrar

CLAIM

I. PARTIES

(1) plaintiff

1. The Plaintiff, Thelma Adams, resides in Regina, Saskatchewan.

2. The Plaintiff , for most of her adult life, smoked at least 25 cigarettes designed, manufactured, marketed, and distributed by the Defendants since she began smoking in 1971, at the age of 16, after being bombarded with tobacco advertisements which portrayed smoking as "cool", glamorous" and "prestigious" and which failed to warn of the harmful effects of smoking. The Plaintiff currently smokes 8 to 10 cigarettes per day which are designed, manufactured, marketed, and distributed by the Defendants.

(2) class

3. The Plaintiff brings this claim on behalf of all individuals, including their estates, their dependants and family members, who purchased or smoked cigarettes designed, manufactured, marketed, or distributed by the Defendants, for the period January 1, 1954[1], to the expiry of the opt out period as set by this Honourable Court.

(3) defendants

(a) BAT Group

4. B.A.T Industries p.l.c. was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Globe House, 4 Temple Place, London, England.

5. British American Tobacco p.l.c., was incorporated pursuant to the laws of the United Kingdom and has a registered office at Globe House, 4 Temple Place, London, England.

6. British American Tobacco (Investments) Limited was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Globe House, 1 Water Street, London, England.

---

[1] By the end of 1953 it was known, and should have been known that smoking created unacceptable health risks for consumers and members of the class like the Plaintiff.

7. Imperial Tobacco Canada Limited was incorporated pursuant to the laws of Canada. It has a registered office at 3711 Rue Saint-Antoine Montréal, Quebec.

(b) Philip Morris Group

8. Altria Group, Inc. (formerly known as Philip Morris Companies Inc.), has a registered office at 120 Park Avenue, in New York, New York.

9. Philip Morris Incorporated (formerly Philip Morris & Co., Ltd., Incorporated) was incorporated pursuant to the laws of Virginia. Its principal place of business is 6601 West Broad Street, Richmond, Virginia.

10. Philip Morris International, Inc. was incorporated pursuant to the laws of Delaware. It has a registered office at 120 Park Avenue, New York, New York.

11. Philip Morris USA Inc. was incorporated pursuant to the laws of Virginia. Its principal office is 120 Park Avenue, New York, New York.

(c) R.J. Reynolds

12. R. J. Reynolds Tobacco Company was incorporated pursuant to the laws of North Carolina. It has a registered office at 401 North Main Street, Winston Salem, North Carolina.

13. R. J. Reynolds Tobacco International, Inc. was incorporated pursuant to the laws of Delaware. It has a registered office at 327 Hillsborough Street, Raleigh North Carolina.

(d) Rothmans Group

14. Carreras Rothmans Limited was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Oxford Road, Aylesbury, Bucks, England.

15. Ryesekks p.l.c. (formerly Rothmans International p.l.c., before that. Rothmans International Limited, and before that Carreras Limited) was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Plumtree Court, London, England.

16. JTI-Macdonald Corp. was incorporated pursuant to the laws of Nova Scotia. It has a registered office at 1300 - 1969 Upper Water Street, Purdy's Wharf Tower II, Halifax, Nova Scotia. In 2004, under the *Companies Creditor Arrangements Act*. R.S.C. 1985, c. C-36, JTI-Macdonald Corp. sought protection from the Ontario Superior Court of Justice. The Plaintiff will seek any necessary leave to proceed against JTI-Macdonald Corp..

17. Rothmans, Benson & Hedges Inc. was incorporated pursuant to the laws of Canada. It has a registered office at 1500 Don Mills Road, North York, Ontario.

18. Rothmans Inc. (formerly Rothmans of Pall Mall Canada Limited) was incorporated pursuant to the laws of Canada. It has a registered office at 1500 Don Mills Road, Toronto, Ontario.

(e) CTMC

19. Canadian Tobacco Manufacturers' Council ("CTMC") was incorporated pursuant to the laws of Canada. It has a registered office at 1808 Sherbrooke St. West, Montr éal, Quebec. Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., and JTI-Macdonald Corp. are members of CTMC.

(4) canadian manufacturers

20. The principal Canadian cigarette manufacturers who manufactured or imported and then marketed cigarettes to the Plaintiff and the class in Saskatchewan and throughout Canada were and are:

(1) **Imperial Tobacco Canada Limited:** In 1912, Imperial Tobacco Company of Canada Limited was incorporated.

(a) In September of 1970:

(i) it changed its name to Imasco Limited (effective Dec. 1st, 1970); and

(ii) Imperial Tobacco Limited, a wholly-owned subsidiary, acquired part of the tobacco related business of Imasco Limited, and

(b) In February of 2000:

(i) Imasco Limited amalgamated with its subsidiaries including Imperial Tobacco Limited to form Imasco Limited; and

(ii) In a second amalgamation, also in or about February, 2000, Imasco Limited amalgamated with its parent company, British American Tobacco (Canada) Limited, to form Imperial Tobacco Canada Limited. Imperial Tobacco Canada Limited is a wholly owned subsidiary of the defendant, British American Tobacco p.l.c.

(2) **Rothmans, Benson & Hedges Inc.:** In 1934, Benson & Hedges (Canada) Inc. was incorporated. In 1960, Rothmans of Pall Mall Limited was incorporated in the United Kingdom. In 1985 it acquired part of the tobacco related business of Rothmans Inc.. In 1986, Rothmans, Benson & Hedges Inc. was formed from an amalgamation of Rothmans of Pall Mall Limited and Benson & Hedges (Canada) Inc.

(a) Until 1986, Rothmans of Pall Mall Limited and Benson & Hedges directly or indirectly designed, manufactured, marketed, and distributed cigarettes in Saskatchewan and Canada.

(b) After 1986, Rothmans, Benson & Hedges Inc. directly or indirectly designed, manufactured, marketed, and distributedigarettes sold in Saskatchewan and Canada.

Rothmans Inc. owns 40% of the securities of Rothmans, Benson & Hedges Inc. FTR Holding S.A., a Swiss company, a subsidiary of Altria Group, Inc., and an affiliate of Philip Morris U.S.A. Inc. and Philip Morris International, Inc., owns 40% of the securities of Rothmans, Benson & Hedges Inc.

(3) **JTI-Macdonald Corp.**: In 1930, W.C. MacDonald Incorporated was incorporated pursuant to the laws of Quebec. From 1858, it carried on business in Montréal as an

unincorporated entity. In 1957, it changed its name to Macdonald Tobacco Inc.. In 1973, Macdonald Tobacco Inc. became a wholly-owned subsidiary of R.J. Reynolds Tobacco Company. In 1978:

(a) RJR-Macdonald Inc. was incorporated as a wholly owned subsidiary of R.J. Reynolds Tobacco Company; and

(b) R.J. Reynolds Tobacco Company sold Macdonald Tobacco Inc. to RJR-Macdonald Inc.. RJR-Macdonald Inc. acquired all or substantially all of Macdonald Tobacco Inc.'s assets and continued the business of manufacturing and promoting cigarettes previously carried on by Macdonald Tobacco Inc..

In 1999, RJR-Macdonald Inc. changed its name to RJR-Macdonald Corp., which subsequently, changed its name to JTI-Macdonald Corp. RJR-Macdonald Inc., JTI-Macdonald Corp., and Macdonald Tobacco Inc. directly or indirectly designed, manufactured, marketed, and distributed cigarettes sold in Saskatchewan and Canada.

21. Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., and JTI-Macdonald Corp. are the three largest Canadian cigarette manufacturers (hereinafter "Manufacturers"). They designed, manufactured, marketed, and distributed cigarettes sold in Saskatchewan under brands that included:

"CANADIAN MANUFACTURERS"	**BRAND NAMES**
Imperial Tobacco Canada Limited	• Player's • Du Maurier • Matinee • Cameo
Rothmans, Benson & Hedges Inc.	• Benson & Hedges • Rothmans. • Number 7 • Craven A
JTI-Macdonald Corp.	• Export "A" • Vantage • Macdonald Special • Macdonald Select

22. CTMC is the trade and lobbying association of the Canadian tobacco industry. It advances the interests of manufacturers, promotes cigarettes, and directly or indirectly causes other persons to promote cigarettes. Its membership includes, among others: Defenants Imperial, Rothmans, Benson & Hedges, and JTI-Macdonald.

(5) non-canadian manufacturers

23. Philip Morris Incorporated, R.J. Reynolds Tobacco Company, and Ryesekks p.l.c. directly or indirectly designed, manufactured, marketed, and distributed cigarettes sold in Saskatchewan and Canada.

II. CAUSE OF ACTION

24. Each Defendant is a "manufacturer" within the meaning of *The Tobacco Damages and Health Care Costs Recovery Act,* S.S. 2007, c. T-14.2; *The Tobacco Damages and Health Care Costs Recovery Act*, S.M. 2006, c. 18; *Tobacco Damages and Health-care Costs Recovery Act*, S.N.S. 2005, c. 46; *Tobacco Health Care Costs Recovery Act*, S.N.L. 2001, c. T-4.2, and other similar legislation. By directly or indirectly designing, manufacturing, marketing, and distributing cigarettes in Saskatchewan, and across Canada, each carried on business in Saskatchewan.

(1) tobacco products

(a) nicotine

25. Nicotine is a psychoactive drug that affects various body systems including the brain and central nervous system, skeletal muscles, cardiovascular system, endocrine functions, and lungs and other organs.[2]

---

[2] Despite decades of public pronouncements to the contrary, the tobacco industry admits in its confidential internal correspondence that nicotine is a drug. The Schedules 1 to 48, are part of this Statement of Claim and are to be fully considered with the within numbered paragraphs. *See* **Sch. 01** ("We are, then, in the business of selling nicotine, an addictive drug... .") (B&W/BAT, 1963); **Sch. 02** ("Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects.") (RJR, 1972); **Sch. 03** ("B.A.T. should learn to look at itself as a drug company rather than a tobacco company.") (BAT, 1980); **Sch. 04** ("[D]o we really want to tout cigarette smoke as a drug? It is, of course, but there are dangerous F.D.A. implications to having such conceptualization go beyond these walls. . . .") (PM, 1969).

26. Nicotine is addictive.

(b) tobacco

27. Tobacco contains nicotine.

(c) cigarettes

28. Cigarettes contain tobacco. When smoked, they deliver nicotine to users and thereby cause addiction.[3]

29. By smoking cigarettes, smokers become addicted to nicotine. While addicted, they regularly crave and consume nicotine by smoking tobacco. Attempting to withdraw causes irritability, difficulty in concentrating, anxiety, restlessness, increased hunger, depression, and a pronounced craving for tobacco.[4]

30. When smokers inhale tobacco smoke as intended by manufacturers, they also inhale harmful substances which manufacturers know can cause or contribute to disease. They include aldehydes, ammonia, carbon monoxide, catechol, endotoxins, hydrogen cyanide, metals, micotoxins, nicotine, nitrogen dioxide, nitrogen monoxide, nitrosamines, organics, phenols, polyaromatic hydrocarbons, and tar.[5]

---

[3] *See* **Sch. 05** ("Very few consumers are aware of the effects of nicotine, i.e., its addictive nature and that nicotine is a poison.") (B&W/BAT, 1978); **Sch. 06** ("The cigarette should be conceived not as a product but as a package. The product is nicotine. . . . Think of the cigarettes as a dispenser for a dose unit of nicotine.") (PM, 1972); **Sch. 02** ("Happily for the tobacco industry, nicotine is both habituating and unique in its variety of physiologic actions ....") (RJR, 1972).

[4] *See* **Sch. 07** ("Once addiction does take place, it becomes necessary for the smoker to make peace with the accepted hazards. This is done by a wide range of rationalizations.... However, the desire to quit, and actually carrying it out, are two quite different things, as the would-be quitter soon learns.") (ITL, 1982). **Sch. 08** ("[S]moking is a habit of addiction that is pleasurable.") (BAT, 1962); **Sch. 09** ("High profits ... are directly related to the fact that the customer is dependent upon the product.") (BAT, 1979).

[5] *See* **Sch. 10** ("[I]f anyone ever identified any ingredient in tobacco smoke as being hazardous to human health or being something that shouldn't be there; we could eliminate it. But no one ever has.") (PM, 1976); **Sch. 11** ("[B]iologically active materials [are] present in cigarette tobacco. These are: a) cancer causing; b) cancer promoting; and c) poisonous.") (L&M, 1961) Liggett & Myers is not a party to these proceedings, but its documents and those of other non-party tobacco manufacturers and trade groups illustrate state of the art and general industry knowledge. *See also* **Sch. 12** ("Eight of the polycyclic hydrocarbons isolated from the smoke

31. As a result, inhaling cigarette smoke causes or materially contributes to various diseases, including, but not limited to: (a) cancers, *inter alia*, of the bladder, esophagus, kidney, larynx, lip, lung oral cavity, pancreas, pharynx, and stomach; (b) chronic obstructive pulmonary disease and allied conditions, including asthma, chronic airways obstruction, chronic bronchitis, and emphysema; (c) circulatory system diseases including atherosclerosis, aortic and other aneurysms, cerebrovascular disease, coronary heart disease, pulmonary circulatory disease, and other peripheral vascular disease; (d) morbidity and general deterioration of health; (e) peptic ulcers; (f) pneumonia and influenza; and (g) fetal harm.

(2) tort

(a) duty

32. Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-Macdonald Corp., Philip Morris Incorporated, R.J. Reynolds Tobacco Company, and Ryesekks p.l.c. ("Manufacturers") designed, manufactured, marketed, and distributed cigarettes that reached consumers without alteration or intermediate inspection after leaving manufacturing and distribution facilities.

33. During most of her adult life, the Plaintiff has smoked 25 to 35 cigarettes designed, manufactured, marketed, and distributed by the Manufacturers, in the intended way. She currently smokes approximately 8 cigarettes per day, in the intended way. The Plaintiff smoked cigarettes designed, manufactures, marketed, and distributed by each of the Manufacturers at different times.

34. The Manufacturers therefore owed the Plaintiff and the class a duty of care:

(a) to design and manufacture a reasonably safe cigarette by taking all reasonable measures to eliminate, minimize, or reduce the risks of smoking cigarettes;

(b) not to promote knowingly defective cigarettes;

---

are known to produce cancer in mice.... [T]here is a distinct possibility that these substances would have a carcinogenic effect on the human respiratory system.") (RJR, 1959); **Sch. 13** ("[N]itrosamines are the most potent carcinogens known to man....") (PM, 1958).

(c) to provide reasonably clear, complete, and current warnings of the risks of smoking cigarettes of which they knew or ought to have known; and

(d) alternatively to market and advertise the risks and health effects of smoking so that the Plaintiff and class would have the opportunity of fully informed choice.

35. The Manufacturers owed a special duty to children and adolescents to take reasonable measures to prevent them from starting or continuing to smoke.

(b) knowledge

36. At all material times, the Manufacturers were in possession of scientific and medical data which established the risks of smoking cigarettes. They knew or ought to have known that:

(a) nicotine is addictive; and

(b) nicotine addiction compels smokers to continue to smoke;

(d) the cigarettes and other types of tobacco products they designed, manufactured, marketed, and distributed:

(i) contained nicotine and were therefore addictive; and

(ii) contained the substances enumerated in paragraph 30 as described in the Schedules, and therefore caused or contributed to tobacco related diseases in those who inhaled or were exposed to cigarette smoke.

(c) breach

(i) duty not to market

37. In past and continuing breach of their duty of care, the Manufacturers:

(a) failed to conduct proper investigation, research, and testing as to the risk of tobacco smoking related illness, nicotine addiction, and the feasibility of eliminating or minimizing these risks.[6]

---

[6] *See* **Sch. 14** ("Members of [the RJR] Research Department have studied in detail cigarette smoke composition. Some of the findings have been published. However, much data remain unpublished because they are concerned with carcinogenic or co-carcinogenic compounds....") (RJR, 1962); **Sch. 15** ("The psychopharmacology of nicotine is a highly vexatious topic. It is where the action is for those doing

(b) failed to design a reasonably safe product and to take all reasonable measures to eliminate, minimize, or reduce the risk of tobacco related illness.

(c) failed to eliminate or reduce to a safe level, substances and by-products of combustion, including nicotine and tar, which can cause or contribute to disease.

(d) designed, manufactured, marketed, and distributed defective cigarettes and other tobacco products:

(i) when smoked as intended, they are addictive, inevitably cause or contribute to tobacco related disease in an unreasonable number of users;[7] and

(ii) have no utility or benefit to consumers, or have a utility or benefit which is vastly outweighed by smoking related risks, deceases, and costs.

(e) wilfully increased the bio-availability of nicotine in their cigarettes by:

(i) special blending of tobacco;

(ii) sponsoring or engaging in selective breeding and genetic engineering of tobacco plants;

(iii) adding nicotine or substances containing nicotine; and

(iv) introducing substances, including ammonia, into their cigarettes to enhance the bio-availability of nicotine to smokers.

(ii) duty to warn

38. The Manufacturers breached their duty to warn consumers. They:

(a) failed to provide any or reasonable warnings before 1972;

---

fundamental research on smoking, and from where most likely will come significant scientific developments profoundly influencing the industry. Yet it is where our attorneys least want us to be, for two reasons... The first reason is the oldest and is implicit in the legal strategy employed over the years in defending corporations ... 'We within the industry are ignorant of any relationship between smoking and disease. Within our laboratories no work is being conducted on biological systems.' That posture has moderated considerably as our attorneys have come to acknowledge that the original carte blanche avoidance of all biological research is not required in order to plead ignorance about any pathological relationship between smoke and smoker.") (PM, 1980).

[7] *See* **Sch. 09** ("[H]igh profits ... are directly related to the fact that the customer is dependent upon the product.") (BAT, 1979); **Sch. 16** ("A cigarette that does not deliver nicotine cannot satisfy the habituated smoker and cannot lead to habituation and would therefore almost certainly fail.") (PM, 1966).

(b) after 1972, failed to provide reasonable warnings of the risk of tobacco related diseases caused by smoking, and of the risk of addiction to the nicotine contained in, their cigarettes. In particular, their warnings:

(i) were designed to be as ineffective as possible;

(ii) did not give users, prospective users, and the public, an adequate indication of each of the specific risks of smoking their cigarettes;

(iii) were given only to forestall more effective governmental warnings; and

(iv) failed to make clear, complete, and current disclosure of the risks inherent in smoking their cigarettes;

(v) failed to advertise and market the warnings effectively;

(c) made representations which they knew or ought to have known were false and deceptive. In particular, they falsely represented:

(i) that smoking has not been shown to cause disease;[8]

(ii) that they were aware of no research, or no credible research, that established a link between smoking and disease;[9]

(iii) that many diseases shown to have been related to tobacco were in fact related to other environmental or genetic factors;[10]

---

[8] *Compare* **Sch. 17** ("With one exception the individuals whom we met believe that smoking causes lung cancer.") (BAT, 1958) *with* **Sch. 18** ("We do not believe that cigarettes are hazardous; we do not accept that."); **Sch. 19** ("There is disagreement among medical experts as to whether the reported associations between smoking and various diseases are causal or not. CTMC's position is to the effect that no causal relationship has been established.") (CTMC1978); **Sch. 20** ("Doubt is our product since it is the best means of competing with the body of fact that exists in the mind of the general public. It is also the means of establishing a controversy.") (B&W, 1969).

[9] *See* **Sch. 21** ("Despite all the research going on, the simple and unfortunate fact is that scientists do not know the cause or causes of the chronic diseased reported to be associated with smoking.... We would appreciate you passing this information along to your [fifth grade] students." (RJR, 1990); **Sch. 22** ("It is not known whether cigarettes cause cancer.") (RJR, 1984).

[10] *See* **Sch. 23** ("Distinguished authorities point out that there is no proof that cigarette smoking is one of the causes.... That statistics purporting to link cigarette smoking with disease could apply with equal force to any other aspect of modern life."); **Sch. 24** ("[M]any scientists are becoming concerned that preoccupation with smoking may be both unfounded and dangerous, unfounded because evidence on many critical points is conflicting, dangerous because it diverts attention from other suspected hazards.") (TI, 1979).

(iv) that cigarettes were not addictive;[11]

(v) that smoking is merely a habit or custom as opposed to an addiction;[12]

(vi) that they did not manipulate nicotine levels in their cigarettes;[13]

(vii) that they did not include substances in their cigarettes designed to increase the bio-availability of nicotine;[14]

(viii) actual intake of tar and nicotine associated with actually smoking cigarettes, as opposed to levels measured on machines;[15]

(ix) that certain of their cigarettes, such as "filter", "mild", "low tar" and "light" brands, were safer than other cigarettes;[16] and

---

[11] *See* **Sch. 25** ("The fact is there is nothing about smoking, or about the nicotine in cigarettes, that would prevent smokers from quitting.") (TI, 1989); **Sch. 26** ("The fact is there is nothing about smoking, or about the nicotine in cigarettes, that would prevent smokers from quitting." (RJR, 1992).

[12] *See* **Sch. 27** ("When we use the term 'addiction,' there are two meanings. There's an everyday meaning when we talk about being news junkies or chocoholics.... Now, under that, all kinds of habits become addictions. And so if it's a habit, then, yes, smoking can be a habit.") (TI, 1994); **Sch. 28** ("If [cigarettes] are behaviorally addictive or habit forming, they are much more like caffeine, or in my case, Gummy Bears.") (PM, 1997).

[13] *See* **Sch. 29** ("Dr. Kessler's contention that we add or otherwise manipulate nicotine to create, maintain, or satisfy an addiction, is false.") (RJR, 1994); **Sch. 30** ("The claims that RJR increases the nicotine in its cigarettes are false. RJR does not increase nicotine in cigarettes above what is found naturally in tobacco.") (RJR, 1994)

[14] *Compare* **Sch. 31** ("There is no indication that ammonia compounds in our cigarettes alter the amount of nicotine the smoker inhales.") (PM, 1994) *with* **Sch. 32** ("We are pursuing this project with the eventual goal of lowering the total nicotine present in smoke while increasing the physiologic effect of the nicotine which is present, so that no physiological effect is lost on nicotine reduction.") (RJR, 1973); **Sch. 33** ("Marlboro (and other Philip Morris brands) as compared with WINSTON, our other brands and most other brands on the market shows : (1) higher smoke pH (higher alkalinity), hence increased amounts of 'free' nicotine in smoke, and higher immediate nicotine 'kick'.") (RJR, 1973); **Sch. 34** ("Cigarettes made from filler oversprayed with nicotine as the citrate (NC) produce CNS effects which are approximately half the magnitude of those obtained with the FB [freebase] or unextracted cigarettes - at comparable nicotine delivery levels.") (PM, 1989).

[15] *See* **Sch. 35** ("The paper itself expresses what we in Behavioral have 'felt' for quite some time. That is, smokers smoke differently than the FTC machine and may very well smoke to obtain a certain level of nicotine in their bloodstream.") (RJR, 1983).

[16] *See* **Sch. 36** ("[T]here 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.") (ITL, undated); **Sch. 37** ("Unmet needs of smokers that could be satisfied by newer modified products, products which could delay the quitting process, are pursued.") (ITL, 1986).

(x) that smoking is consistent with a healthy lifestyle;[17]

(d) misled consumers on a class wide objective standard that cigarettes were safer than they were by:

(i) incorporating into the design of their cigarettes ineffective safety features including filters which they knew or ought to have known were ineffective, yet whose presence implied safety which was not there;[18] and

(ii) designing and manufacturing "mild", "low tar", and "light" cigarettes, which they promoted in a manner which misled consumers on a class wide objective standard that these "mild", "low tar", and "light" cigarettes were safer to use than they were;

(e) misled consumers on a class wide objective standard about the risks of smoking using innuendo, exaggeration and ambiguity;

(f) systemically made statements regarding smoking and health which they knew were incomplete and inaccurate;

(g) failed to correct statements made by others regarding the risks of smoking, which they knew were incomplete or inaccurate. Their failure to correct misinformation was a misrepresentation by omission or silence;

(h) engaged in collateral marketing, promotional, and public relations activities to neutralize or negate the efficacy of warnings provided to consumers by Manufacturers, governments and other agencies concerned with public health;

(i) suppressed information regarding the risks of smoking; and

(j) participated in a misleading campaign to make themselves appear more credible than

---

[17] *See* **Sch. 44** ("Since younger smokers represent the recruitment market, and female smokers are clearly a growth segment, in-depth motivational studies of both groups are strongly indicated.") (BAT, 1985); **Sch. 45** ("Young smokers represent the major opportunity group for the cigarette industry, we should therefore determine their attitude to smoking and health and how this might change over time.") (ITL, 1970).

[18] The industry has long known that smokers compensate for ventilated filters by taking bigger puffs and blocking vent holes. *See* **Sch. 38** ("[S]ubjects took more puffs of very much larger volume from the ventilated cigarette, but showed no difference in the way they inhaled smoke.") (BAT, 1972); **Sch. 39** ("[S]mokers adjust puff intake in order to maintain constant smoke intake.") (PM, 1967); **Sch. 40** ("[S]ome of these [vent] holes are likely to be occluded under normal smoking conditions, whereas no occlusion is likely to occur when the cigarettes are machine smoked for analysis.") (PM, 1967); **Sch. 16** ("The illusion of filtration is as important as the fact of filtration.") (PM, 1966).

health authorities and anti-smoking groups, and to reassure smokers that cigarettes smoking not as dangerous as it was or as authorities said it was.

39. At the Defendants' direction, the Defendant CMTC participated in this deception.

40. The Manufacturers and all Defendants intended that these misrepresentations be relied upon by the Plaintiff, the class, and all Canadians for the purpose of inducing them to start or continue smoking.

(iii) special duties

41. The Manufacturers and all Defendants exploited the inability of children, adolescents, and those addicted to nicotine to protect their own interests because of their psychological and physiological dependence on nicotine and their augmented inability to understand smoking risks. In particular, the Manufacturers knew or ought to have known that:

(a) more than 80% of smokers start to smoke and become addicted before they are 19 years of age.

(b) it was illegal to sell cigarettes to children and adolescents in Saskatchewan and Canada and to promote smoking by such persons;

(c) children and adolescents in Saskatchewan and Canada were smoking or might start to smoke their cigarettes;

(d) children and adolescents in Saskatchewan and Canada who smoked their cigarettes would become addicted to cigarettes and would suffer tobacco related disease.

42. In breach of their duty to children and adolescents in Saskatchewan and Canada, the Manufacturers:

(a) failed to take any, or any reasonable, measures to prevent them from starting or continuing to smoke;

(b) targeted children and adolescents in their advertising, promotional and marketing activities in Saskatchewan and Canada with the object of inducing them to start or continue to smoke;

(c) undermined legislative and regulatory initiatives that intended to prevent children and adolescents in Saskatchewan and Canada from starting or continuing to smoke; and

(d) provided cigarettes to persons under circumstances where they knew or ought to have known that they would be illegally brought into Saskatchewan, and sold to children and adolescents.[19]

(3) trade practices

43. The Plaintiff pleads and relies on s. 14 and Part III of *The Consumer Protection Act*, S.S. 1996, c. C-30.1; s. 13 of the *Fair Trading Act*, R.S.A. 2000, c. F-2, as am; *The Business Practices Act*, S.M. 1990-91, c. 6, as am.; s. 8 of the *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, as am.; and s. 14 of the *Trade Practices Act*, R.S.N.L. 1990, c. T-71, as am.., and other similar legislation throughout Canada.

(4) competition act

44. The Manufacturers, for the purpose of directly and indirectly promoting the supply or use of cigarettes, in breach of their statutory duties or obligations to consumers under the *Combines Investigation Act* R.S.C. 1952 (supp.), c. 314 as amended by the *Criminal Law Amendment Act* S.C. 1968-69, c. and amendments thereto and subsequently the *Competition Act* R.C.S. 1985, c. C-34, as am. made false or misleading representations to the public, the Plaintiff, and the class, including as to the performance and efficacy of cigarettes that were

---

[19] **Sch. 41** ("Realistically, if our company is to survive and prosper, over the long term, we must get our share of the youth market.") (RJR, 1973); **Sch. 42** ("The specific area of interest is young smokers between the ages of 15 and 19.") (BAT, undated); **Sch. 43** ("The under 25-year old smokers continue to show the highest level of potential for ITL activities. The model that sees young customers acquiring their preferences and staying with them as they age is increasingly valid.") (ITL, 1991); **Sch. 44** ("Since younger smokers represent the recruitment market, and female smokers are clearly a growth segment, in-depth motivational studies of both groups are strongly indicated.") (BAT, 1985); **Sch. 45** ("Young smokers represent the major opportunity group for the cigarette industry, we should therefore determine their attitude to smoking and health and how this might change over time.") (ITL, c.1970); **Sch. 46** ("RE-ESTABLISH clear distinct images for ITL brands with particular emphasis on relevance to younger smokers.") (ITL, c.1988); *Id.* ("If the last ten years have taught us anything, it is that the industry is dominated by the companies who respond most effectively to the needs of younger smokers. Our efforts on these brands will remain on maintaining their relevance to smokers in these younger groups in spite of the share performance they may develop among older smokers."); **Sch. 47** ("Contact leading firms in terms of children research ... contact Sesame Street ... contact Gerber, Schwinn, Mattel ... Determine why these young people were not becoming smokers.") (B&W, 1977).

not supported by reasonable and proper testing. In particular, without any requirement that consumers, the Plaintiff or members of the Class be misled (although objectively they were misled) the acts by the Defendants of making "false" and "misleading" representations are contrary to specific sections of the said *Act*; s. 36 and s. 52:

> s. 36
> (1) Any person who has suffered loss or damage as a result of
> (a) conduct that is contrary to any provision of Part VI
> ...
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.
>
> s. 52
>
> (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
> (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that
> (a) any person was deceived or misled;
> (b) any member of the public to whom the representation was made was within Canada; or
> (c) the representation was made in a place to which the public had access.

(5) concerted action

45. Four multinational tobacco enterprises (the BAT, Philip Morris, RJR, and Rothmans Groups manufactured and promoted all or most of the cigarettes sold in Saskatchewan and Canada. As defined terms used herein, their "Head Members" and "Other Members" were as follows:

group	"MEMBERS"	
	"Head Members"	"Other Members"
BAT	• **B.A.T Industries p.l.c.** - B.A.T. Industries Limited - Tobacco Securities Trust Limited • **British American Tobacco (Investments) Limited** - British-American Tobacco Company Limited • **British American Tobacco p.l.c.**	• **Imperial Tobacco Canada Limited** - Imasco Limited - Imperial Tobacco Limited
Philip Morris	• **Altria Group, Inc.,** - Philip Morris Companies Inc. • **Philip Morris Incorporated** • **Philip Morris International, Inc.** • **Philip Morris USA, Inc.**	• **Rothmans, Benson & Hedges Inc.** - Benson & Hedges (Canada) Inc.
RJR	• **R.J. Reynolds Tobacco Company** • **R.J. Reynolds Tobacco International, Inc.**	• **JTI-Macdonald Corp.** - Macdonald Tobacco Inc.
Rothmans	• **Carreras Rothmans Limited** • **Ryesekks p.l.c.**	• **Rothmans, Benson & Hedges Inc.** • **Rothmans Inc.** - Rothmans of Pall Mall Limited

46. The Head Members directed and coordinated common policies for each group relating to smoking and health and the Head Members and Other Members together are defined as the "Group" or "Group Members".

(a) agreement

47. In 1953 and early 1954, in response to mounting publicity about the link between smoking and disease,

(a) American Tobacco Company,

(b) Brown & Williamson Tobacco Corporation (in its own capacity and as agent for British American Tobacco (Investments) Limited),

(c) Philip Morris Incorporated, and

(d) R. J. Reynolds Tobacco Company,

conspired, or formed a common purpose, to use unlawful means to prevent consumers in Saskatchewan and other jurisdictions including the Plaintiff and the class, from learning about the harmful nature and addictive properties of cigarettes smoking, in circumstances where they knew or ought to have known that injury to consumers, the Plaintiff, and the class, would result from furtherance thereof.

48. The conspirators included members of the BAT Group (after about 1950), Philip Morris Group (after about 1954), RJR Group (after about 1973), and Rothmans Group (after about 1956), separately, and as a collective.

(b) unlawful means

49. Group Members formed and furthered the civil conspiracy or common purpose through:

(a) committees, conferences and meetings established, organized, and convened by Head Members and attended by Group Member senior personnel; and

(b) written and oral directives and communications amongst Group Members

50. At these meetings and through these communications, Group Members agreed to breach their duties to consumers, the Plaintiff, and the class, as outlined above, and, in particular to:

(a) jointly disseminate objectively false and misleading information about smoking risks;

(b) suppress statements and admissions that smoking causes disease;

(c) suppress or conceal research regarding the risks of smoking;

(d) participate in a public relations program that promoted cigarettes, protected them from attacks based upon health risks, and reassured consumers that smoking was not hazardous; and

(e) ensure that the members of their respective Groups would implement the policies described in (a) through (d), above.

51. In or about 1962, the Manufacturers (entitled in Schedule 48 "By Canadian Tobacco Manufacturers") each signed an agreement not to make adverse health claims about each other's cigarettes, so as to avoid acknowledging the risks of smoking.[20]

(i) committees, conferences and meetings

52. The Group Members used committees, conferences, and meetings to direct or co-ordinate their common policies on smoking and health, including:

COMMITTEES, CONFERENCES, AND MEETINGS			
group	**committees**	**conferences**	**meetings**
BAT	• Chairman's Policy Committee • Research Policy Group • Scientific Research Group • Tobacco Division Board • Tobacco Executive Committee • Tobacco Strategy Review Team	•Chairman's Advisory Conferences • Group Research Conferences • Group Marketing Conferences	• particulars are peculiarly known to the BAT Group
PM	• particulars peculiarly known to the PM Group	• Conference on Smoking and Health • Corporate Affairs World Conference	• Committee on Smoking Issues and Management • Corporate Products Committee
Rothmans	• particulars are peculiarly known to the Rothmans Group	• particulars are peculiarly known to the Rothmans Group	• particulars are peculiarly known to the Rothmans Group
RJR	• particulars are peculiarly known to the RJR Group	• "Hound Ears" and Sawgrass conferences	• Winston-Salem Smoking Issues Coordinator Meetings

[20] **Sch. 48**

(ii) directives and communications

53. The Head Members created and distributed written directives that set out their common policy on smoking and health issues to Group Member personnel for direct and indirect dissemination to consumers. The full particulars of the directives and communications are known only to the Group Members, but included:

DIRECTIVES AND COMMUNICATIONS	
group	**directives and communications**
BAT	• "Smoking Issues: Claims and Responses" •"Consumer Helplines: How To Handle Questions on Smoking and Health and Product Issues" • "Smoking and Health: The Unresolved Debate", "Smoking: The Scientific Controversy" • "Smoking: Habit or Addiction?" • "Legal Considerations on Smoking and Health Policy"
PM	• "Smoking and Health Quick Reference Guides" and "Issues Alert[s]"
RJR	• "Issues Guide"
Rothmans	• particulars are peculiarly known to the Rothmans Group

54. Group Members further directed or co-ordinated their common policy and position on smoking and health:

(a) R.J. Reynolds International Inc. appointed and supervised a "smoking issue designee" in various global "Areas". The designees reported to the Manager of Science Information at R.J. Reynolds Tobacco Company. From 1974, a senior executive of Macdonald Tobacco Inc. (later of JTI-Macdonald Corp) was the designee in "Area II" (Canada).

(b) The Corporate Affairs and Public Affairs Departments of Philip Morris Incorporated and Philip Morris International, Inc. directed or advised departments of the other Philip Morris Group Members, including Rothmans, Benson & Hedges Inc. and its amalgamating company Benson & Hedges (Canada) Ltd., concerning the Philip Morris Group position on smoking and health issues.

(c) Ryesekks p.l.c. and Carreras Rothmans Limited, through the Rothmans International Research Division, created and distributed statements which set out their position on

smoking and health issues. In 1958, they issued numerous false announcements including in the *Globe and Mail* (June 23rd, 1958) and in the *Toronto Daily Star* (August 13th, 1958) that:

(i) smoking in moderation was safe, and

(ii) Canadian-made Rothmans cigarettes were safer than those of other brands because they contained less tar and had "cooler" smoke.

(iii) ctmc

55. In 1963, in furtherance of their civil conspiracy or common purpose, as directed by the Head Members, and to maintain a united front on smoking and health issues, the Group Members formed the Ad Hoc Committee on Smoking and Health which, in 1969, was renamed the Canadian Tobacco Manufacturers' Council, and in 1982, it was incorporated.

56. Upon its formation, the CTMC adopted and participated in the civil conspiracy. Since 1963, in breach of its duties to the Plaintiff and the class, the Defendants directed and caused the CTMC to:

(a) provide forums for Groups to further their civil conspiracy or common purpose;

(b) synchronize the Defendant's false positions on smoking and health issues with those of international tobacco manufacturers and associations;

(c) relay the Defendants' and tobacco industry's common policies and positions respecting the health risks and concerns about smoking;

(d) suppress statements or admissions that smoking causes disease and health risks;

(e) suppress or conceal research regarding the adverse risks of smoking;

(f) counter independent attacks regarding the health risks of cigarettes and smoking;

(g) disseminate false and misleading information about the risks of smoking to governments, health and medical organizations, and consumers including the Plaintiff and the class:

(i) in 1963, the CTMC misrepresented to the Canadian Medical Association that there was no causal connection between smoking and disease; and

(ii) in 1969, CTMC misrepresented to the House of Commons, Standing Committee on Health, Welfare and Social Affairs, that there was no causal connection between smoking and disease;

(h) lobby the Federal and provincial governments to delay and minimize government initiatives with respect to smoking and health; and

(i) participate in a public relations program on smoking and health issues with the intent of promoting cigarettes and maximizing sales.

57. The Group Members and the CTMC conspired or acted in concert in breaching their duties outlined above. They knew or ought to have known that one or more of them might breach duties in furtherance of the common purpose.

(iv) influence voting

58. Head Members further directed or co-ordinated the smoking and health policies of the Other Members within their Group by directing and advising them of how they should vote in committees of the Group Members and at meetings of the CTMC on smoking and health issues, including the approval and funding of research by the Manufacturers, all Group Members, and the CTMC.

(v) research organizations

59. Between late 1953 and the early 1960's:

(a) the Head Members formed or joined numerous research organizations including the:

(i) Centre for Co-operation in Scientific Research Relative to Tobacco ("CORESTA");

(ii) Tobacco Industry Research Council ("TIRC"), which was renamed the Council for Tobacco Research in 1964 ("CTR"); and

(iii) Tobacco Research Council ("TRC").

(b) the Head Members publicly represented that they or Other Members, along with CORESTA, TIRC / CTR, TRC, and similar organizations, would perform objective research and gather data regarding the link between smoking and disease and

internationally publicize the results.

(c) the Head Members agreed that they or Other Members, along with CORESTA, TIRC / CTR, TRC, and similar organizations, would conduct research and publicize information to counter, undermine, or obscure information that showed the link between smoking and disease, with a view to creating widespread belief that there was a medical or scientific controversy as to whether smoking is harmful and whether nicotine is addictive, when in fact there was not.

(d) In 1963 and 1964, with a view to ensuring that no research would be approved or conducted by CORESTA, TIRC / CTR, and TRC which would indicate that cigarettes were dangerous, the Head Members and European tobacco companies and state monopolies agreed to coordinate their research on the link between smoking and disease with that conducted by TIRC in the United States.

(e) In April and September 1963, Head Members of the BAT and RJR Groups agreed with members of the 'Council of Action' in Hamburg, Germany and with Head Members of the Philip Morris Group in New York, to develop a public relations campaign to counter reports of the English Royal College of Physicians, United States Surgeon General, and the Canadian Medical Association, and to reassure consumers that their health would not be harmed by smoking cigarettes.

(f) In September 1963, in New York, the Head Members of the Philip Morris, RJR, and BAT Groups, along with other US tobacco companies, agreed that they, and members of their respective Groups, would not issue warnings about the link between smoking and disease unless and until required by governmental action.

(g) The very formation of 'research organizations' was a part of deliberately creating an objectively false impression and fraud upon the marketplace of unbiased research being underway.

60. From the outset of the civil conspiracy or common purpose described herein or, alternatively, from the time each Defendant became a Group Member, each Defendant agreed to and adopted the common purpose and breached their duties in furtherance thereof.

(vi) icosi

61. By the mid-1970's, motivated by their concern that admissions by any of the Group Members about a link between smoking and disease could lead to a 'domino effect' to the detriment of the worldwide industry, Head Members agreed to take an increased international response to reassure existing and potential smokers and to protect the tobacco industry.

62. So, in furtherance of the civil conspiracy or common purpose:

(a) in June of 1977, Head Members and other international tobacco companies met in England and established the International Committee on Smoking Issues ("ICOSI").

(b) In 1980, ICOSI was renamed the International Tobacco Information Centre / Centre International d'Information du Tabac - INFOTAB ("INFOTAB"). In 1992, INFOTAB changed its name to the Tobacco Documentation Centre ("TDC") (ICOSI, INFOTAB, and TDC are collectively referred as "ICOSI").

63. ICOSI's policies were mirrored by Group Members (including the CTMC), and were presented as the policies and positions of Group Member companies to conceal the civil conspiracy or common purpose from the public and governments.

64. If a Member within one of the Groups took a position on smoking and health issues contrary to that of ICOSI, the Head Members took steps to enforce compliance with the position of ICOSI.

65. Through ICOSI, Head Members agreed to resist governmental attempts to provide adequate warnings about the link between smoking and disease, and reiterated their position on smoking and health issues, furthering their agreement to:

(a) jointly disseminate false and misleading information regarding smoking risks;

(b) make no statement or admission that smoking caused disease;

(c) suppress or conceal research regarding the risks of smoking;

(d) make explicit health claims about each other's cigarettes, and thereby avoid highlighting the risks of smoking; and

(e) participate in a public relations program on smoking and health issues with the objective of promoting cigarettes, protecting cigarettes from attack based upon health risks, and reassuring consumers that smoking was not hazardous.

66. In and after 1977, the members of ICOSI, including the Head Members, agreed orally and in writing to ensure that:

(a) the members of their respective groups, including those in Canada, would act in accordance with the ICOSI position on smoking and health, including its position on warnings with respect to the link between smoking and disease;

(b) initiatives pursuant to the ICOSI positions would be carried out, whenever possible, by Head Members, including the CTMC, to ensure compliance in the various tobacco markets worldwide;

(c) when it was not possible for Head Members to carry out ICOSI's initiatives, Other Members individually would carry them out; and

(d) Head Members subsidiary companies would, when required, suspend or subvert their local or national interests in order to assist in preserving and growing the tobacco industry as a whole.

(vii) peculiar knowledge

67. Further particulars of the way in which the civil conspiracy or common purpose was entered into or continued, and Group Member breaches of duty in furtherance thereof, are peculiarly known to Group Members.

(c) joint liability

68. The Head Members civilly conspired with the Other Members with respect to the breaches of duty committed by the Other Members. Alternatively:

(a) Head Members acted in concert with Other Members with respect to Other Members' breaches of duty;

(b) if Group Members did not agree or intend that unlawful means be used in pursuing their civil conspiracy or common purpose, they knew or ought to have known that one

or more of them might commit breaches of duty in furtherance of it. As a result, Head Members acted in concert with Other Members, or each of them, with respect to Other Members' breaches of duty;

(c) in breaching duties, Other Members acted as agents of Head Members; or

(d) Head Members directed the activities of Other Members to such a degree that the Other Members' breaches of duties were also committed by Head Members.

69. The CTMC was agent of the Defendants who directed and co-ordinated the activities of the CTMC to such a degree that the CTMC's breaches were committed by the Defendants.

70. By reason of the foregoing, each of the Defendants conspired or acted in concert with respect to the breaches of duty described herein. They jointly breached the duties described herein.

71. Under *The Tobacco Damages and Health Care Costs Recovery Act* (SK); *The Tobacco Damages and Health Care Costs Recovery Act* (MB); *Tobacco Damages and Health-care Costs Recovery Act* (NS); and other similar legislation, at common law, or in equity, the Defendants are jointly and severally liable for the cost of health care benefits attributed to each.

(6) waiver of tort

72. The Plaintiff claims an aggregate monetary award for the amount of the Defendants' revenues or profits obtained from manufacturing and promoting cigarettes and other tobacco products in Saskatchewan.

(a) The Defendants breached legal, statutory, and equitable duties and obligations in the manner outlined above.

(b) The Defendants intended to, and did, profit as a result of their breaches of legal, statutory, and equitable duties.

(c) If the Defendants had complied with their duties the Plaintiff and:

(i) class members would not have started nor continued smoking;

(ii) class members would not have purchased cigarettes; and

(iii) the Defendants would not have been enriched from the sale of tobacco products.

(7) harm caused

73. The Plaintiff has developed Chronic Obstructive Pulmonary Disease caused by smoking cigarettes designed, manufactured, marketed, and distributed by the Defendants. Though she has repeatedly tried, her addiction to nicotine precludes her from quitting.

74. Because of the tobacco related wrongs described above, the Plaintiff and class members, including children and adolescents, started and continue to smoke cigarettes designed, manufactured, marketed, and distributed by the Defendants. As a result, they suffered tobacco related disease and an increased risk of such disease.

(8) relief sought

75. The Plaintiff pleads and relies on *The Survival of Actions Act,* S.S. 1990, c. S-66.1, ss. 3, 6(1)-(3); *The Fatal Accidents Act,* R.S.S. 1978, c. F-11, ss. 2, 3(1), and 4(1)-(3); the *Survival of Actions Act,* R.S.A. 2000, c. S-27, ss. 2, 5(1)-(2); the *Fatal Accidents Act,* R.S.A. 2000, c. F-8, ss. 1, 2, and 3(1); the *Trustee Act,* R.S.O. 1990, c. T.23, s. 38(1); the *Family Law Act,* R.S.O. 1990, c. F. 3, ss. 61(1)-(2); the *Survival of Actions Act,* R.S.N.S. 1989, c. 453, ss. 2(1)-(2) and (4); the *Fatal Injuries Act*, R.S.N.S. 1989, c. 163, ss. 2-3 and 5; the *Survival of Actions Act*, R.S.P.E.I. 1988, c. S-11, ss. 2 and 5; the *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5, ss. 1-2, 6; the *Survival of Actions Act* R.S.N.L. 1990, c. S-32, ss. 2 and 4; the *Fatal Accidents Act*, R.S.N.L. 1990, c. F-6, ss. 2-4, and other similar legislation.

76. The Defendants, with a common plan, scheme or design, conspired together to design, manufacture, market and distribute knowingly defective cigarettes and failed to provide clear, complete and current warnings of the risks of smoking cigarettes of which they knew or ought to have known.

77. Plaintiffs rely on *Sindell v. Abbott Laboratories*, 607 P.2d 924 (1980). "Market Share" herein, means the total volume of cigarettes promoted or sold by all Group Members in Canada between January 1, 1954 to the date damages are calculated pursuant to direction, judgment, or order of the Court.

78. Each of the Group Members jointly or separately maintained or currently maintains a substantial share of the Market Share such that each of the Group Members is liable for its proportion of the aggregate cost equal to a proportionate share of the Market Share calculated cumulatively over the class period.

79. The Plaintiff and class members purchased or smoked cigarettes designed, manufactured, marketed, or promoted by Group Members. The aggregated damages for the Plaintiff and class members should be apportioned among the Group Members in proportion to their Market Share during the Class Period, and imposed upon the other Defendant as the Court may deem appropriate.

III. RELIEF

80. On behalf of herself and class members, the Plaintiff claims against the Defendants, jointly and severally:

(a) compensatory, aggravated, exemplary, and punitive damages;

(b) the cost of health services on behalf of the Minister of Health;

(c) restitution, including by way of a constructive trust and aggregate monetary award, of all profits which were or, with reasonable accounting, should have been earned by the Defendants from the manufacture and promotion of all types of tobacco products;

(d) the present value of the total expenditure and estimated total expenditure by the government for health care benefits provided to insured persons resulting from tobacco related disease or the risk of tobacco related disease;

(e) interest; and

(f) costs; and

(g) such other relief as to this Honourable Court seems just.

DATED at the City of Regina, in the Province of Saskatchewan, on the 12th day of June, 2009.

MERCHANT LAW GROUP LLP
Barristers and Solicitors
2401 Saskatchewan Drive
Regina, Saskatchewan
S4P 4H8,

Phone: (306) 359-7777
Fax: (306) 522-3299,

E.F. Anthony Merchant, Q.C.

Address for Service:	100-2401 Saskatchewan Drive Regina, Saskatchewan S4P 4H8
Lawyer in Charge:	E. F. Anthony Merchant, Q.C.
Telephone:	(306) 359-7777
Fax:	(306) 522-3299

This Statement of Claim was delivered by: Merchant Law Group LLP

H:\Wpdata\Class Actions\Tobacco\Sask\StC.wpd

TAB VII

Action No. 0901-08964

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

Between:

LINDA DORION

Plaintiff,

and

CANADIAN TOBACCO MANUFACTURERS' COUNCIL, B.A.T INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, BRITISH AMERICAN TOBACCO, p.l.c., IMPERIAL TOBACCO CANADA LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL, INC., PHILIP MORRIS USA INC., R. J. REYNOLDS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO, INTERNATIONAL, INC., CARRERAS ROTHMANS LIMITED, JTI-MACDONALD CORP., ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., and RYESEKKS p.l.c.,

Defendants.

Brought under the *Class Proceedings Act.*

STATEMENT OF CLAIM

MERCHANT LAW GROUP LLP
2401 Saskatchewan Drive
Regina, Saskatchewan
S4P-4H8,

E.F. Anthony Merchant, Q.C.
Phone: (306) 359-7777
Fax: (306) 522-3299.

Action No. 0501 [illegible]

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

Between:

LINDA DORION

Plaintiff,

and

CANADIAN TOBACCO MANUFACTURERS' COUNCIL, B.A.T INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, BRITISH AMERICAN TOBACCO, p.l.c., IMPERIAL TOBACCO CANADA LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL, INC., PHILIP MORRIS USA INC., R. J. REYNOLDS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO, INTERNATIONAL, INC., CARRERAS ROTHMANS LIMITED, JTI-MACDONALD CORP., ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., and RYESEKKS p.l.c.,

Defendants.

Brought under the *Class Proceedings Act*.

STATEMENT OF CLAIM

I. PARTIES

(1) plaintiff

1. The Plaintiff, Linda Dorion was born on September 25th, 1952 and resides at 103 - 6319 172nd Street, Edmonton, Alberta.

2. The Plaintiff has smoked at least one pack of cigarettes designed, manufactured, marketed and distributed by each of the Defendants since she began smoking in 1963 after seeing various tobacco advertisements which portrayed smoking as "glamorous" and "prestigious" and which neglected to mention the harmful effects of smoking. The Plaintiff currently smokes 30 to 50 cigarettes per day which are designed, manufactured, marketed and distributed by the Defendants.

3. As a result, the Plaintiff has become addicted to, and has had this addiction maintained by such products; and has developed chronic bronchitis and severe sinus infections. The Plaintiff has tried repeatedly to quit smoking to no avail.

(2) class

4. The Plaintiff brings this claim on behalf of all individuals, including their estates, and who purchased or smoked cigarettes designed, manufactured, marketed or distributed by the Defendants, and their dependants and family members.

(3) defendants

(a) BAT Group

5. B.A.T Industries p.l.c. was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Globe House, 4 Temple Place, London, England.

6. British American Tobacco p.l.c., was incorporated pursuant to the laws of the United Kingdom and has a registered office at Globe House, 4 Temple Place, London, England.

7. British American Tobacco (Investments) Limited was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Globe House, 1 Water Street, London, England.

8. Imperial Tobacco Canada Limited was incorporated pursuant to the laws of Canada. It has a registered office at 3711 Rue Saint-Antoine Montréal, Quebec.

(b) Philip Morris Group

9. Altria Group, Inc. (formerly known as Philip Morris Companies Inc.), has a registered office at 120 Park Avenue, in New York, New York.

10. Philip Morris Incorporated (formerly Philip Morris & Co., Ltd., Incorporated) was incorporated pursuant to the laws of Virginia. Its principal place of business is 6601 West Broad Street, Richmond, Virginia.

11. Philip Morris International, Inc. was incorporated pursuant to the laws of Delaware. It has a registered office at 120 Park Avenue, New York, New York.

12. Philip Morris USA Inc. was incorporated pursuant to the laws of Virginia. Its principal office is 120 Park Avenue, New York, New York.

(c) R.J. Reynolds

13. R. J. Reynolds Tobacco Company was incorporated pursuant to the laws of North Carolina. It has a registered office at 401 North Main Street, Winston Salem, North Carolina.

14. R. J. Reynolds Tobacco International, Inc. was incorporated pursuant to the laws of Delaware. It has a registered office at 327 Hillsborough Street, Raleigh North Carolina.

(d) Rothmans Group

15. Carreras Rothmans Limited was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Oxford Road, Aylesbury, Bucks, England.

16. Ryesekks p.l.c. (formerly Rothmans International p.l.c., before that, Rothmans International Limited, and before that Carreras Limited) was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Plumtree Court, London, England.

17. JTI-Macdonald Corp. was incorporated pursuant to the laws of Nova Scotia. It has a registered office at 1300 - 1969 Upper Water Street, Purdy's Wharf Tower II, Halifax, Nova Scotia. In 2004, under the *Companies Creditor Arrangements Act*, R.S.C. 1985, c. C-36, JTI-Macdonald Corp. sought protection from the Ontario Superior Court of Justice. The Plaintiff will seek any necessary leave to proceed against JTI-Macdonald Corp..

18. Rothmans, Benson & Hedges Inc. was incorporated pursuant to the laws of Canada. It has a registered office at 1500 Don Mills Road, North York, Ontario.

19. Rothmans Inc. (formerly Rothmans of Pall Mall Canada Limited) was incorporated pursuant to the laws of Canada. It has a registered office at 1500 Don Mills Road, Toronto, Ontario.

(e) CTMC

20. Canadian Tobacco Manufacturers' Council ("CTMC") was incorporated pursuant to the laws of Canada. It has a registered office at 1808 Sherbrooke St. West, Montréal, Quebec. Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., and JTI-Macdonald Corp. are members of CTMC.

(4) canadian manufacturers

21. The principal Canadian cigarette manufacturers were and are:

(1) **Imperial Tobacco Canada Limited:** In 1912, Imperial Tobacco Company of Canada Limited was incorporated.

(a) In September of 1970:

(i) it changed its name to Imasco Limited (effective Dec. 1st,1970); and

(ii) Imperial Tobacco Limited, a wholly-owned subsidiary, acquired part of the tobacco related business of Imasco Limited, and

(b) In February of 2000:

(i) Imasco Limited amalgamated with its subsidiaries including Imperial Tobacco Limited to form Imasco Limited; and

(ii) In a second amalgamation, also in or about February, 2000, Imasco Limited amalgamated with its parent company, British American Tobacco (Canada) Limited, to form Imperial Tobacco Canada Limited. Imperial Tobacco Canada Limited is a a wholly owned subsidiary of the defendant, British American Tobacco p.l.c.

(2) **Rothmans, Benson & Hedges Inc.:** In 1934, Benson & Hedges (Canada) Inc. was incorporated. In 1960, Rothmans of Pall Mall Limited was incorporated in the United Kingdom. In 1985 it acquired part of the tobacco related business of Rothmans Inc.. In 1986, Rothmans, Benson & Hedges Inc. was formed from an amalgamation of Rothmans of Pall Mall Limited and Benson & Hedges (Canada) Inc.

(a) Until 1986, Rothmans of Pall Mall Limited and Benson & Hedges directly or indirectly manufactured and promoted cigarettes in Alberta.

(b) After 1986, Rothmans, Benson & Hedges Inc. directly or indirectly manufactured or promoted cigarettes sold in Alberta.

Rothmans Inc. owns 40% of the securities of Rothmans, Benson & Hedges Inc. FTR Holding S.A., a Swiss company, a subsidiary of Altria Group, Inc., and an affiliate of Philip Morris U.S.A. Inc. and Philip Morris International, Inc., owns 40% of the securities of Rothmans, Benson & Hedges Inc.

(3) **JTI-Macdonald Corp.**: In 1930, W.C. MacDonald Incorporated was incorporated pursuant to the laws of Quebec. From 1858, it carried on business in Montréal as an unincorporated entity. In 1957, it changed its name to Macdonald Tobacco Inc.. In 1973, Macdonald Tobacco Inc. became a wholly-owned subsidiary of R.J. Reynolds Tobacco Company. In 1978:

(a) RJR-Macdonald Inc. was incorporated as a wholly owned subsidiary of R.J. Reynolds Tobacco Company; and

(b) R.J. Reynolds Tobacco Company sold Macdonald Tobacco Inc. to RJR-Macdonald Inc.. RJR-Macdonald Inc. acquired all or substantially all of Macdonald Tobacco Inc.'s assets and continued the business of manufacturing and promoting cigarettes previously carried on by Macdonald Tobacco Inc..

In 1999, RJR-Macdonald Inc. changed its name to RJR-Macdonald Corp., which subsequently, changed its name to JTI-Macdonald Corp. RJR-Macdonald Inc., JTI-Macdonald Corp., and Macdonald Tobacco Inc. directly or indirectly manufactured and promoted cigarettes sold in Alberta.

22. Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., and JTI-Macdonald Corp. are the three largest Canadian cigarette manufacturers. They manufactured and promoted cigarettes sold in Alberta under brands that included:

"CANADIAN MANUFACTURERS"	**BRAND NAMES**
Imperial Tobacco Canada Limited	• Player's • Du Maurier • Matinee • Cameo
Rothmans, Benson & Hedges Inc.	• Benson & Hedges • Rothmans. • Number 7 • Craven A
JTI-Macdonald Corp.	• Export "A" • Vantage • Macdonald Special • Macdonald Select

23. CTMC is the trade and lobbying association of the Canadian tobacco industry. It advanced the interests of manufacturers, promoted cigarettes, and directly or indirectly caused other persons to promote cigarettes. Its membership included, among others: Imperial, Rothmans, Benson & Hedges, and JTI-Macdonald.

(5) non-canadian manufacturers

24. Philip Morris Incorporated, R.J. Reynolds Tobacco Company, and Ryesekks p.l.c. directly or indirectly manufactured and promoted cigarettes sold in Alberta.

II. CAUSE OF ACTION

(1) tobacco products

(a) nicotine

25. Nicotine is a psychoactive drug that affects various body systems including the brain and central nervous system, skeletal muscles, cardiovascular system, endocrine functions, and lungs and other organs.[1]

26. Nicotine is addictive.

(b) tobacco

27. Tobacco contains nicotine.

---

[1] Despite decades of public pronouncements to the contrary, the tobacco industry admits in its confidential internal correspondence that nicotine is a drug. *See* **Sch. 01** ("We are, then, in the business of selling nicotine, an addictive drug ....") (B&W/BAT, 1963); **Sch. 02** ("Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects") (RJR, 1972); **Sch. 03** ("B.A.T. should learn to look at itself as a drug company rather than a tobacco company.") (BAT, 1980); **Sch. 04** ("[D]o we really want to tout cigarette smoke as a drug? It is, of course, but there are dangerous F.D.A. implications to having such conceptualization go beyond these walls. . . .") (PM, 1969).

(c) cigarettes

28. Cigarettes contain tobacco. When smoked, they deliver nicotine to users and thereby cause addiction.[2]

29. By smoking cigarettes, smokers become addicted to nicotine. While addicted, they regularly crave and consume tobacco. Attempting to withdraw causes irritability, difficulty in concentrating, anxiety, restlessness, increased hunger, depression and a pronounced craving for tobacco.[3]

30. When smokers inhale tobacco smoke as intended by manufacturers, they also inhale harmful substances which manufacturers know can cause or contribute to disease. They include aldehydes, ammonia, carbon monoxide, catechol, endotoxins, hydrogen cyanide, metals, micotoxins, nicotine, nitrogen dioxide, nitrogen monoxide, nitrosamines, organics, phenols, polyaromatic hydrocarbons, and tar.[4]

---

[2] *See* **Sch. 05** ("Very few consumers are aware of the effects of nicotine, i.e., its addictive nature and that nicotine is a poison.") (B&W/BAT, 1978); **Sch. 06** ("The cigarette should be conceived not as a product but as a package. The product is nicotine. . . . Think of the cigarettes as a dispenser for a dose unit of nicotine.") (PM, 1972); **Sch. 02** ("Happily for the tobacco industry, nicotine is both habituating and unique in its variety of physiologic actions ....") (RJR, 1972).

[3] *See* **Sch. 07** ("Once addiction does take place, it becomes necessary for the smoker to make peace with the accepted hazards. This is done by a wide range of rationalizations.... However, the desire to quit, and actually carrying it out, are two quite different things, as the would-be quitter soon learns.") (ITL, 1982). **Sch. 08** ("[S]moking is a habit of addiction that is pleasurable.") (B&W/BAT, 1994); **Sch. 09** ("High profits ... are directly related to the fact that the customer is dependent upon the product.") (BAT, 1979).

[4] *See* **Sch. 10** ("[I]f anyone ever identified any ingredient in tobacco smoke as being hazardous to human health or being something that shouldn't be there; we could eliminate it. But no one ever has.") (PM, 1976); **Sch. 11** ("[B]iologically active materials [are] present in cigarette tobacco. These are: a) cancer causing; b) cancer promoting; and c) poisonous.") (L&M, 1961) Liggett & Myers is not a party to these proceedings, but its documents and those of other non-party tobacco manufacturers and trade groups illustrate state of the art and general industry knowledge. *See also* **Sch. 12** ("Eight of the polycyclic hydrocarbons isolated from the smoke are known to produce cancer in mice.... [T]here is a distinct possibility that these substances would have a carcinogenic effect on the human respiratory system.") (RJR, 1959); **Sch. 13** ("[N]itrosamines are the most potent carcinogens known to man....") (ATC, 1965).

31. As a result, inhaling cigarette smoke causes or materially contributes to various diseases, including, but not limited to: (a) cancers of the bladder, esophagus, kidney, larynx, lip, lung oral cavity, pancreas, pharynx, stomach; (b) chronic obstructive pulmonary disease and allied conditions, including asthma, chronic airways obstruction, chronic bronchitis, and emphysema; (c) circulatory system diseases including atherosclerosis, aortic and other aneurysms, cerebrovascular disease, coronary heart disease, pulmonary circulatory disease, other peripheral vascular disease; (d) morbidity and general deterioration of health; (e) peptic ulcers; (f) pneumonia and influenza; and (g) fetal harm.

(2) tort

(a) duty

32. Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-Macdonald Corp., Philip Morris Incorporated, R.J. Reynolds Tobacco Company, and Ryesekks p.l.c. ("Manufacturers") manufactured and promoted cigarettes that reached consumers without alteration or intermediate inspection after leaving manufacturing and distribution facilities.

33. The Plaintiff has smoked at least one pack of cigarettes designed, manufactured, marketed and distributed by each of the Defendants. She has regularly smoked: duMaurier Regular, duMaurier Light, duMaurier Special Mild, Export A, Export Light, Rothman's, Rothman's Light, and John Player Standard, in the intended way.

34. The Manufacturers therefore owed the Plaintiff and the class a duty of care:

(a) to design and manufacture a reasonably safe cigarette by taking all reasonable measures to eliminate, minimize, or reduce the risks of smoking cigarettes;

(b) not to promote knowingly defective cigarettes; and

(c) to provide reasonably clear, complete, and current warnings of the risks of smoking cigarettes of which they knew or ought to have known.

35. The Manufacturers owed a special duty to children and adolescents to take reasonable measures to prevent them from starting or continuing to smoke.

(b) knowledge

36. At all material times, the Manufacturers were in possession of scientific and medical data which established the risks of smoking cigarettes. They knew or ought to have known that:

(a) nicotine is addictive;

(b) nicotine addiction compels smokers to continue to smoke; and

(c) the cigarettes and other types of tobacco products they manufactured and promoted:

(i) contained nicotine and were therefore addictive; and

(ii) contained the substances enumerated in paragraph 29, and therefore caused or contributed to tobacco related diseases in those who inhaled or were exposed to cigarette smoke.

(c) breach

(i) duty not to market

37. In past and continuing breach of their duty of care, the Manufacturers:

(a) failed to conduct proper investigation, research, and testing as to the risk of tobacco related illness, nicotine addiction, and the feasibility of eliminating or minimizing these risks.[5]

---

[5] *See* **Sch. 14** ("Members of [the RJR] Research Department have studied in detail cigarette smoke composition. Some of the findings have been published. However, much data remain unpublished because they are concerned with carcinogenic or co-carcinogenic compounds....") (RJR, 1962); **Sch. 15** ("The psychopharmacology of nicotine is a highly vexatious topic. It is where the action is for those doing fundamental research on smoking, and from where most likely will come significant scientific developments profoundly influencing the industry. Yet it is where our attorneys least want

(b) failed to design a reasonably safe product and to take all reasonable measures to eliminate, minimize, or reduce the risk of tobacco related illness.

(c) failed to eliminate or reduce to a safe level, substances and by-products of combustion, including nicotine and tar, which can cause or contribute to disease.

(d) manufactured and promoted defective cigarettes and other tobacco products:

(i) when smoked as intended, they are addictive, inevitably cause or contribute to tobacco related disease in an unreasonable number of users;[6] and

(ii) have no utility or benefit to consumers, or have a utility or benefit which is vastly outweighed by smoking related risks and costs.

(e) wilfully increased the bio-availability of nicotine in their cigarettes by:

(i) special blending of tobacco;

(ii) sponsoring or engaging in selective breeding and genetic engineering of tobacco plants;

(iii) adding nicotine or substances containing nicotine; and

(iv) introducing substances, including ammonia, into their cigarettes to enhance the bio-availability of nicotine to smokers.

(ii) duty to warn

38. The Manufacturers breached their duty to warn consumers. They:

---

us to be, for two reasons... The first reason is the oldest and is implicit in the legal strategy employed over the years in defending corporations ... 'We within the industry are ignorant of any relationship between smoking and disease. Within our laboratories no work is being conducted on biological systems.' That posture has moderated considerably as our attorneys have come to acknowledge that the original carte blanche avoidance of all biological research is not required in order to plead ignorance about any pathological relationship between smoke and smoker.") (PM, 1980).

[6] *See* **Sch. 09** (""[H]igh profits ... are directly related to the fact that the customer is dependent upon the product.") (BAT, 1979); **Sch. 16** ("A cigarette that does not deliver nicotine cannot satisfy the habituated smoker and cannot lead to habituation and would therefore almost certainly fail.") (PM, 1966).

(a) failed to provide any or reasonable warnings before 1972;

(b) after 1972, failed to provide reasonable warnings of the risk of tobacco related diseases caused by smoking, and of the risk of addiction to the nicotine contained in, their cigarettes. In particular, their warnings:

(i) were designed to be as ineffective as possible;

(ii) did not give users, prospective users, and the public, an adequate indication of each of the specific risks of smoking their cigarettes;

(iii) were given only to forestall more effective governmental warnings; and

(iv) failed to make clear, complete, and current disclosure of the risks inherent in smoking their cigarettes;

(c) made representations which they knew or ought to have known were false and deceptive. In particular, they falsely represented:

(i) that smoking has not been shown to cause disease;[7]

(ii) that they were aware of no research, or no credible research, that established a link between smoking and disease;[8]

(iii) that many diseases shown to have been related to tobacco were in fact related to other environmental or genetic factors;[9]

---

[7] *Compare* **Sch. 17** ("With one exception the individuals whom we met believe that smoking causes lung cancer...") (BAT, 1958) *with* **Sch. 18** ("We do not believe that cigarettes are hazardous; we do not accept that.") (CBS News, 1971); **Sch. 19** ("There is disagreement among medical experts as to whether the reported associations between smoking and various diseases are causal or not. CTMC's position is to the effect that not causal relationship has been established.") (CTMC1978); **Sch. 20** ("Doubt is our product since it is the best means of competing with the body of fact that exists in the mind of the general public. It is also the means of establishing a controversy.") (B&W, 1969).

[8] *See* **Sch. 21** ("Despite all the research going on, the simple an unfortunate fact is that scientists do not know the cause or causes of the chronic diseased reported to be associated with smoking.... We would appreciate you passing this information along to your [fifth grade] students." (RJR, 1990); **Sch. 22** ("It is not known whether cigarettes cause cancer.") (RJR, 1984).

[9] *See* **Sch. 23** ("Distinguished authorities point out that there is no proof that cigarette smoking is one of the causes.... That statistics purporting to link cigarette smoking with disease could apply with equal force to any other aspect of modern life."); **Sch. 24** ("[M]any scientists are becoming concerned that preoccupation with smoking may be both unfounded and dangerous, unfounded because evidence

(iv) that cigarettes were not addictive;[10]

(v) that smoking is merely a habit or custom as opposed to an addiction;[11]

(vi) that they did not manipulate nicotine levels in their cigarettes;[12]

(vii) that they did not include substances in their cigarettes designed to increase the bio-availability of nicotine;[13]

(viii) actual intake of tar and nicotine associated with smoking cigarettes, as opposed to levels measured on machines;[14]

(ix) that certain of their cigarettes, such as "filter", "mild", "low tar" and

---

on many critical points is conflicting, dangerous because it diverts attention from other suspected hazards.") (TI, 1979).

[10] *See* **Sch. 25** ("The fact is there is nothing about smoking, or about the nicotine in cigarettes, that would prevent smokers from quitting.") (TI, 1989); **Sch. 26** ("The fact is there is nothing about smoking, or about the nicotine in cigarettes, that would prevent smokers from quitting." (RJR, 1992).

[11] *See* **Sch. 27** ("When we use the term 'addiction,' there are two meanings. There's an everyday meaning when we talk about being news junkies or chocoholics.... Now, under that, all kinds of habits become addictions. And so if it's a habit, then, yes, smoking can be a habit.") (TI, 1994); **Sch. 28** ("If [cigarettes] are behaviorally addictive or habit forming, they are much more like caffeine, or in my case, Gummy Bears.") (PM, 1997).

[12] *See* **Sch. 29** ("Dr. Kessler's contention that we add or otherwise manipulate nicotine to create, maintain, or satisfy an addiction, is false.") (RJR, 1994); **Sch. 30** ("The claims that RJR increases the nicotine in its cigarettes are false. RJR does not increase nicotine in cigarettes above what is found naturally in tobacco.") (RJR, 1994)

[13] *Compare* **Sch. 31** ("There is no indication that ammonia compounds in our cigarettes alter the amount of nicotine the smoker inhales.") (PM, 1994) *with* **Sch. 32** ("We are pursuing this project with the eventual goal of lowering the total nicotine present in smoke while increasing the physiologic effect of the nicotine which is present, so that no physiological effect is lost on nicotine reduction.") (RJR, 1971); **Sch. 33** ("Marlboro (and other Philip Morris brands) as compared with WINSTON, our other brands and most other brands on the market shows : (1) higher smoke pH (higher alkalinity), hence increased amounts of 'free' nicotine in smoke, and higher immediate nicotine 'kick'.") (RJR, 1973); **Sch. 34** ("Cigarettes made from filler oversprayed with nicotine as the citrate (NC) produce CNS effects which are approximately half the magnitude of those obtained with the FB [freebase] or unextracted cigarettes - at comparable nicotine delivery levels.") (PM, 1989).

[14] *See* **Sch. 35** ("The paper itself expresses what we in Behavioral have 'felt' for quite some time. That is, smokers smoke differently than the FTC machine and may very well smoke to obtain a certain level of nicotine in their bloodstream.") (RJR, 1983).

"light" brands, were safer than other cigarettes;[15] and

(x) that smoking is consistent with a healthy lifestyle;[16]

(d) misled consumers into believing that cigarettes were safer than they were by:

(i) incorporating into the design of their cigarettes ineffective safety features including filters which they knew or ought to have known were ineffective, yet whose presence implied safety which was not there;[17] and

(ii) designing and manufacturing "mild", "low tar", and "light" cigarettes, which they promoted in a manner which led reasonable consumers to believe that cigarettes were safer to use than they were;

(e) misled the public about the risks of smoking using innuendo, exaggeration and ambiguity;

(f) systemically made statements regarding smoking and health which they knew were incomplete and inaccurate;

(g) failed to correct statements made by others regarding the risks of smoking, which they knew were incomplete or inaccurate. Their failure to correct misinformation was a misrepresentation by omission or silence;

---

[15] *See* **Sch. 36** ("[T]here 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.") (ITL, undated); **Sch. 37** ("Unmet needs of smokers that could be satisfied by newer modified products, products which could delay the quitting process, are pursued.") (ITL, 1986).

[16] *See* **Sch. 44** ("Since younger smokers represent the recruitment market, and female smokers are clearly a growth segment, in-depth motivational studies of both groups are strongly indicated.") (BAT, 1985); **Sch. 45** ("Young smokers represent the major opportunity group for the cigarette industry, we should therefore determine their attitude to smoking and health and how this might change over time.") (ITL, 1970).

[17] The industry has long known that smokers compensate for ventilated filters by taking bigger puffs and blocking vent holes. *See* **Sch. 38** ("[S]ubjects took more puffs of very much larger volume from the ventilated cigarette, but showed no difference in the way they inhaled smoke.") (BAT, 1972); **Sch. 39** ("[S]mokers adjust puff intake in order to maintain constant smoke intake.") (PM, 1967); **Sch. 40** ("[S]ome of these [vent] holes are likely to be occluded under normal smoking conditions, whereas no occlusion is likely to occur when the cigarettes are machine smoked for analysis.") (PM, 1967); **Sch. 16** ("The illusion of filtration is as important as the fact of filtration.") (PM, 1966).

(h) engaged in collateral marketing, promotional, and public relations activities to neutralize or negate the efficacy of warnings provided to consumers by Manufacturers, governments and other agencies concerned with public health;

(i) suppressed information regarding the risks of smoking; and

(j) participated in a misleading campaign to make themselves appear more credible than health authorities and anti-smoking groups, and to reassure smokers that cigarettes were not as dangerous as authorities said they were.

39. At the Manufacturers' direction, the CMTC participated in this deception.

40. The Manufacturers intended that these misrepresentations be relied upon by Canadians for the purpose of inducing them to start or continue smoking.

(iii) special duties

41. The Manufacturers exploited the inability of children, adolescents, and those addicted to nicotine to protect their own interests because of their psychological and physiological dependence on nicotine and their augmented inability to understand smoking risks. In particular, the Manufacturers knew or ought to have known that:

(a) more than 80% of smokers start to smoke and become addicted before they are 19 years of age;

(b) it was illegal to sell cigarettes to children and adolescents in Alberta and to promote smoking by such persons;

(c) children and adolescents in Alberta were smoking or might start to smoke their cigarettes; and

(d) children and adolescents in Alberta who smoked their cigarettes would become addicted to cigarettes and would suffer tobacco related disease.

42. In breach of their duty to children and adolescents in Alberta, the Manufacturers:

(a) failed to take any, or any reasonable, measures to prevent them from starting or continuing to smoke;

(b) targeted children and adolescents in their advertising, promotional and marketing activities in Alberta with the object of inducing them to start or continue to smoke;

(c) undermined legislative and regulatory initiatives that intended to prevent children and adolescents in Alberta from starting or continuing to smoke; and

(d) provided cigarettes to persons under circumstances where they knew or ought to have known that they would be illegally brought into Alberta, and sold to children and adolescents.[18]

(3) trade practices

43. The Plaintiff relies on s. 13 of the *Fair Trading Act*, R.S.A. 2000, c. F-2, as am.

---

[18] **Sch. 41** ("Realistically, if our company is to survive and prosper, over the long term, we must get our share of the youth market.") (RJR, 1973); **Sch. 42** ("The specific area of interest is young smokers between the ages of 15 and 19.") (BAT, undated); **Sch. 43** ("The under 25-year old smokers continue to show the highest level of potential for ITL activities. The model that sees young customers acquiring their preferences and staying with them as they age is increasingly valid.") (ITL, 1991); **Sch. 44** ("Since younger smokers represent the recruitment market, and female smokers are clearly a growth segment, in-depth motivational studies of both groups are strongly indicated.") (BAT, 1985); **Sch. 45** ("Young smokers represent the major opportunity group for the cigarette industry, we should therefore determine their attitude to smoking and health and how this might change over time.") (ITL, c.1970); **Sch. 46** ("RE-ESTABLISH clear distinct images for ITL brands with particular emphasis on relevance to younger smokers.") (ITL, c.1988); *Id.* ("If the last ten years have taught us anything, it is that the industry is dominated by the companies who respond most effectively to the needs of younger smokers. Our efforts on these brands will remain on maintaining their relevance to smokers in these younger groups in spite of the share performance they may develop among older smokers."); **Sch. 47** ("Contact leading firms in terms of children research ... contact Sesame Street ... contact Gerber, Schwinn, Mattel ... Determine why these young people were not becoming smokers.") (B&W, 1977).

(4) competition act

44. The Manufacturers, for the purpose of directly and indirectly promoting the supply or use of cigarettes, in breach of their statutory duties or obligations to consumers under the *Combines Investigation Act* R.S.C. 1952 (supp.), c. 314 as amended by the *Criminal Law Amendment Act* S.C. 1968-69, c. and amendments thereto and subsequently the *Competition Act* R.C.S. 1985, c. C-34, as am. made false or misleading representations to the public including as to the performance and efficacy of cigarettes that were not supported by reasonable and proper testing.

(5) concerted action

45. Four multinational tobacco enterprises (the BAT, Philip Morris, RJR, and Rothmans Groups manufactured and promoted all or most of the cigarettes sold in Alberta. Their Head and Other Members were as follows:

"GROUP"	**'MEMBERS"**	
	"Head Members"	**"Other Members"**
BAT	• **B.A.T Industries p.l.c.** - B.A.T. Industries Limited - Tobacco Securities Trust Limited • **British American Tobacco (Investments) Limited** - British-American Tobacco Company Limited • **British American Tobacco p.l.c.**	• **Imperial Tobacco Canada Limited** - Imasco Limited - Imperial Tobacco Limited
Philip Morris	• **Altria Group, Inc.,** - Philip Morris Companies Inc. • **Philip Morris Incorporated** • **Philip Morris International, Inc.** • **Philip Morris USA, Inc.**	• **Rothmans, Benson & Hedges Inc.** - Benson & Hedges (Canada) Inc.
RJR	• **R.J. Reynolds Tobacco Company** • **R.J. Reynolds Tobacco International, Inc.**	• **JTI-Macdonald Corp.** - Macdonald Tobacco Inc.
Rothmans	• **Carreras Rothmans Limited** • **Ryesekks p.l.c.**	• **Rothmans, Benson & Hedges Inc.** • **Rothmans Inc.** - Rothmans of Pall Mall Limited

46. The Head Members directed and coordinated common policies for each Group relating to smoking and health.

(a) agreement

47. In 1953 and early 1954, in response to mounting publicity about the link between smoking and disease,

(a) American Tobacco Company,

(b) Brown & Williamson Tobacco Corporation (in its own capacity and as agent for British American Tobacco (Investments) Limited),

(c) Philip Morris Incorporated, and

(d) R. J. Reynolds Tobacco Company,

conspired, or formed a common purpose, to use unlawful means to prevent consumers in Alberta and other jurisdictions from learning about the harmful nature and addictive properties of cigarettes, in circumstances where they knew or ought to have known that injury to consumers would result from furtherance thereof.

48. The conspirators included Members of the BAT Group (after about 1950), Philip Morris Group (after about 1954), RJR Group (after about 1973), and Rothmans Group (after about 1956), separately, and as a collective.

(b) unlawful means

49. Group Members formed and furthered the civil conspiracy or common purpose through:

(a) committees, conferences and meetings established, organized, and convened by Head Members and attended by Group Member senior personnel; and

(b) written and oral directives and communications amongst Group Members

50. At these meetings and through these communications, Group Members agreed to breach their duties to consumers, as outlined above, and, in particular to:

(a) jointly disseminate false and misleading information about smoking risks;

(b) suppress statements and admissions that smoking causes disease;

(c) suppress or conceal research regarding the risks of smoking;

(d) participate in a public relations program that promoted cigarettes, protected them from attacks based upon health risks, and reassured consumers that smoking was not hazardous; and

(e) ensure that the members of their respective Groups would implement the policies described in (a) through (d), above.

51. In or about 1962, the Canadian Manufacturers each signed an agreement not to make adverse health claims about each other's cigarettes, so as to avoid acknowledging the risks of smoking.[19]

(i) committees, conferences and meetings

52. The Group Members used committees, conferences, and meetings to direct or co-ordinate their common policies on smoking and health, including:

COMMITTEES, CONFERENCES, AND MEETINGS			
group	**committees**	**conferences**	**meetings**
BAT	• Chairman's Policy Committee • Research Policy Group • Scientific Research Group • Tobacco Division Board • Tobacco Executive Committee • Tobacco Strategy Review Team	•Chairman's Advisory Conferences • Group Research Conferences • Group Marketing Conferences	• particulars are peculiarly known to the BAT Group

[19] **Sch. 48**.

COMMITTEES, CONFERENCES, AND MEETINGS			
group	**committees**	**conferences**	**meetings**
PM	• particulars peculiarly known to the PM Group	• Conference on Smoking and Health • Corporate Affairs World Conference	• Committee on Smoking Issues and Management • Corporate Products Committee
Rothmans	• particulars are peculiarly known to the Rothmans Group	• particulars are peculiarly known to the Rothmans Group	• particulars are peculiarly known to the Rothmans Group
RJR	• particulars are peculiarly known to the RJR Group	• "Hound Ears" and Sawgrass conferences	• Winston-Salem Smoking Issues Coordinator Meetings

(ii) directives and communications

53. The Head Members created and distributed written directives that set out their common policy on smoking and health issues to Group Member personnel for direct and indirect dissemination to consumers. The full particulars of the directives and communications are known only to the Group Members, but included:

DIRECTIVES AND COMMUNICATIONS	
group	**directives and communications**
BAT	• "Smoking Issues: Claims and Responses" •"Consumer Helplines: How To Handle Questions on Smoking and Health and Product Issues" • "Smoking and Health: The Unresolved Debate", "Smoking: The Scientific Controversy" • "Smoking: Habit or Addiction?" • "Legal Considerations on Smoking and Health Policy"
PM	• "Smoking and Health Quick Reference Guides" and "Issues Alert[s]"
RJR	• "Issues Guide"
Rothmans	• particulars are peculiarly known to the Rothmans Group

54. Group Members further directed or co-ordinated their common policy and position on smoking and health:

(a) R.J. Reynolds International Inc. appointed and supervised a "smoking issue

designee" in various global "Areas". The designees reported to the Manager of Science Information at R.J. Reynolds Tobacco Company. From 1974, a senior executive of Macdonald Tobacco Inc. (later of JTI-Macdonald Corp) was the designee in "Area II" (Canada).

(b) The Corporate Affairs and Public Affairs Departments of Philip Morris Incorporated and Philip Morris International, Inc. directed or advised departments of the other Philip Morris Group Members, including Rothmans, Benson & Hedges Inc. and its amalgamating company Benson & Hedges (Canada) Ltd., concerning the Philip Morris Group position on smoking and health issues.

(c) Ryesekks p.l.c. and Carreras Rothmans Limited, through the Rothmans International Research Division, created and distributed statements which set out their position on smoking and health issues. In 1958, they issued numerous false announcements including in the *Globe and Mail* (June 23rd, 1958) and in the *Toronto Daily Star* (August 13th, 1958) that:

(i) smoking in moderation was safe, and

(ii) Canadian-made Rothmans cigarettes were safer than those of other brands because they contained less tar and had "cooler" smoke.

(iii) ctmc

55. In 1963, in furtherance of their civil conspiracy or common purpose, as directed by the Head Members, and to maintain a united front on smoking and health issues, the Canadian Manufacturers formed the Ad Hoc Committee on Smoking and Health which, in 1969, was renamed the Canadian Tobacco Manufacturers' Council, and in 1982, was incorporated (collectively "CTMC").

56. Upon its formation, the CTMC adopted and participated in the civil conspiracy. Since 1963, in breach of its duties to the Plaintiff, the Canadian Manufacturers directed and caused the CTMC to:

(a) provide forums for Groups to further their civil conspiracy or common purpose;

(b) synchronize the Canadian Manufacturer's false positions on smoking and health issues with those of international tobacco manufacturers and associations;

(c) relay the tobacco industry's common policies and positions respecting the health risks and concerns about smoking;

(d) suppress statements or admissions that smoking causes disease;

(e) suppress or conceal research regarding the adverse risks of smoking;

(f) counter independent attacks on the health risks of cigarettes and smoking;

(g) disseminate false and misleading information about the risks of smoking to governments, health and medical organizations, and consumers:

(i) in 1963, the CTMC misrepresented to the Canadian Medical Association that there was no causal connection between smoking and disease; and

(ii) in 1969, CTMC misrepresented to the House of Commons, Standing Committee on Health, Welfare and Social Affairs, that there was no causal connection between smoking and disease;

(h) lobby the Federal and provincial governments to delay and minimize government initiatives with respect to smoking and health; and

(i) participate in a public relations program on smoking and health issues with the intent of promoting cigarettes and maximizing sales;

57. The Canadian Manufacturers and the CTMC conspired or acted in concert in breaching their duties outlined above. They knew or ought to have known that one or more of them might breach duties in furtherance of the common purpose.

(iv) influence voting

58. Head Members further directed or co-ordinated the smoking and health policies of the Other Members within their Group by directing and advising how they should vote in committees of the Canadian Manufacturers and at meetings of the CTMC on smoking and health issues, including the approval and funding of research by the Canadian Manufacturers and the CTMC.

(v) research organizations

59. Between late 1953 and the early 1960's:

(a) the Head Members formed or joined numerous research organizations including the:

(i) Centre for Co-operation in Scientific Research Relative to Tobacco ("CORESTA");

(ii) Tobacco Industry Research Council ("TIRC"), which was renamed the Council for Tobacco Research in 1964 ("CTR"); and

(iii) Tobacco Research Council ("TRC").

(b) the Head Members publicly represented that they or Other Members, along with CORESTA, TIRC / CTR, TRC, and similar organizations, would perform objective research and gather data regarding the link between smoking and disease and internationally publicize the results.

(c) the Head Members agreed that they or Other Members, along with CORESTA, TIRC / CTR, TRC, and similar organizations, would conduct research and publicize information to counter, undermine, or obscure information that showed the link between smoking and disease, with a view to creating widespread belief that there was a medical or scientific controversy as to whether smoking is harmful and whether nicotine is addictive, when in fact there was not.

(d) In 1963 and 1964, with a view to ensuring that no research would be approved or conducted by CORESTA, TIRC / CTR, and TRC which would

indicate that cigarettes were dangerous, the Head Members and European tobacco companies and state monopolies agreed to coordinate their research on the link between smoking and disease with that conducted by TIRC in the United States.

(e) In April and September 1963, Head Members of the BAT and RJR Groups agreed with members of the 'Council of Action' in Hamburg, Germany and with Head Members of the Philip Morris Group in New York, to develop a public relations campaign to counter reports of the English Royal College of Physicians, United States Surgeon General, and the Canadian Medical Association, and to reassure consumers that their health would not be harmed by smoking cigarettes.

(f) In September 1963, in New York, the Head Members of the Philip Morris, RJR, and BAT Groups, along with other US tobacco companies, agreed that they, and members of their respective Groups, would not issue warnings about the link between smoking and disease unless and until required by governmental action.

60. From the outset of the civil conspiracy or common purpose described herein or, alternatively, from the time each Canadian Manufacturer became a Group Member, each Canadian Manufacturer agreed to and adopted the common purpose and breached their duties in furtherance thereof.

(vi) icosi

61. By the mid-1970's, motivated by their concern that admissions by any of the national manufacturers' associations ("NMA") about a link between smoking and disease could lead to a 'domino effect' to the detriment of the worldwide industry, Head Members agreed to take an increased international response to reassure existing and potential smokers and to protect the tobacco industry:

62. So, in furtherance of the civil conspiracy or common purpose:

(a) in June of 1977, Head Members and other international tobacco companies met in England and established the International Committee on Smoking Issues ("ICOSI").

(b) In 1980, ICOSI was renamed the International Tobacco Information Centre / Centre International d'Information du Tabac - INFOTAB ("INFOTAB"). In 1992, INFOTAB changed its name to the Tobacco Documentation Centre ("TDC") (ICOSI, INFOTAB, and TDC are collectively referred as "ICOSI").

63. ICOSI's policies were mirrored in the NMA's (including the CTMC), and were presented as the policies and positions of NMA's and their member companies to conceal the civil conspiracy or common purpose from the public and governments.

64. If a manufacturer within one of the Groups took a position on smoking and health issues contrary to that of ICOSI, the Head Members took steps to enforce compliance with the position of ICOSI.

65. Through ICOSI, Head Members agreed to resist governmental attempts to provide adequate warnings about the link between smoking and disease, and reiterated their position on smoking and health issues, furthering their agreement to:

(a) jointly disseminate false and misleading information regarding smoking risks;

(b) make no statement or admission that smoking caused disease;

(c) suppress or conceal research regarding the risks of smoking;

(d) make explicit health claims about each other's cigarettes, and thereby avoid highlighting the risks of smoking; and

(e) participate in a public relations program on smoking and health issues with the objective of promoting cigarettes, protecting cigarettes from attack based upon health risks, and reassuring consumers that smoking was not hazardous.

66. In and after 1977, the members of ICOSI, including the Head Members, agreed orally and in writing to ensure that:

(a) the members of their respective Groups, including those in Canada, would act in accordance with the ICOSI position on smoking and health, including its position on warnings with respect to the link between smoking and disease;

(b) initiatives pursuant to the ICOSI positions would be carried out, whenever possible, by NMA's, including the CTMC, to ensure compliance in the various tobacco markets worldwide;

(c) when it was not possible for NMA's to carry out ICOSI's initiatives, Group Members would carry them out; and

(d) their subsidiary companies would, when required, suspend or subvert their local or national interests in order to assist in preserving and growing the tobacco industry as a whole.

(vii) peculiar knowledge

67. Further particulars of the way in which the civil conspiracy or common purpose was entered into or continued, and Group Member breaches of duty in furtherance thereof, are peculiarly known to Group Members.

(c) joint liability

68. The Head Members civilly conspired with the Other Members with respect to the breaches of duty committed by the Other Members. Alternatively:

(a) Head Members acted in concert with Other Members with respect to Other Members' breaches of duty;

(b) if Group Members did not agree or intend that unlawful means be used in pursuing their civil conspiracy or common purpose, they knew or ought to have known that one or more of them might commit breaches of duty in furtherance of it. As a result, Head Members acted in concert with Other Members, or either

of them, with respect to Other Members' breaches of duty;

(c) in breaching duties, Other Members acted as agents of Head Members; or

(d) Head Members directed the activities of Other Members to such a degree that the Other Members' breaches of duties were also committed by Head Members.

69. The CTMC was agent of the Canadian Manufacturers. The Canadian Manufacturers directed and co-ordinated the activities of the CTMC to such a degree that the CTMC's breaches were committed by the Canadian Manufacturers.

70. By reason of the foregoing, each of the Defendants conspired or acted in concert with respect to the breaches of duty described herein. They jointly breached the duties described herein.

71. At common law, or in equity, the Defendants are jointly and severally liable for the cost of health care benefits attributed to each.

(6) waiver of tort

72. The Plaintiff claims an aggregate monetary award for the amount of the Defendants' revenues or profits obtained from manufacturing and promoting cigarettes and other tobacco products in Alberta.

(a) The Defendants breached legal, statutory, and equitable duties and obligations in the manner outlined above.

(b) The Defendants intended to, and did, profit as a result of their breaches of legal, statutory, and equitable duties.

(c) If the Defendants had complied with their duties:

(i) class members would not have started nor continued smoking;

(ii) class members would not have purchased cigarettes; and

(iii) the Defendants would not have been enriched from the sale of tobacco products.

(7) harm caused

73. The Plaintiff has developed chronic bronchitis and sinus infections caused by smoking cigarettes manufactured and promoted by the Defendants. Though she repeatedly tried, her addiction to nicotine precludes her from quitting.

74. Because of the tobacco related wrongs described above, the Plaintiff and class members, including children and adolescents, started and continued to smoke cigarettes manufactured and promoted by the Defendants. As a result, they suffered tobacco related disease and an increased risk of such disease.

(8) relief sought

75. The Plaintiff pleads and relies on the *Survival of Actions Act*, R.S.A. 2000, c. S-27, ss. 2, 5(1), 5(2) and ss. 1, 2, and 3(1) of the *Fatal Accidents Act*, R.S.A. 2000, c. F-8.

76. On behalf of the Minister of Health, pursuant to Part 5, Division 1, of the *Hospital Act*, R.S.A. 2000, c. H-12, as am., the Plaintiff claims the cost of health services received by class members as a result of tobacco related illness caused by the Defendants' tobacco related wrongs described above, including, but not limited to, in-patient and out-patient services, transportation services, public health services, and drug services.

III. RELIEF

77. On behalf of herself and class members, the Plaintiff claims against the Defendants, jointly and severally:

(a) compensatory, aggravated, and punitive damages;

(b) the cost of health services on behalf of the Minister of Health;

(c) restitution, including by way of a constructive trust and aggregate monetary award, of all profits which were or, with reasonable accounting, should have been earned by the Defendants from the manufacture and promotion of all types of tobacco products;

(d) the present value of the total expenditure and estimated total expenditure by the government for health care benefits provided to insured persons resulting from tobacco related disease or the risk of tobacco related disease;

(e) interest;

(f) costs; and

(g) such other relief as to this Honourable Court seems just.

78. The Plaintiff proposes that the trial of this action be held at the Court House in the City of Calgary. In the opinion of the Plaintiff, this action will likely take more than 25 days to try.

DATED at the City of Calgary, Alberta, this 15 day of June, 2009 **AND DELIVERED BY Merchant Law Group LLP,** 2401 Saskatchewan Drive, Regina, Saskatchewan, S4P 4H8, Phone: (306) 359-7777, Fax: (306) 522-3299.
E.F. Anthony Merchant, Q.C.

ISSUED out of the office of the Clerk of the Court of Queen's Bench of Alberta, Judicial District of Calgary, this 17 day of June, 2009.

V.A. BRANDT COURT SEAL

CLERK OF THE COURT

This Statement of Claim is filed by the solicitor for the Plaintiff, whose name and address for service is:

MERCHANT LAW GROUP LLP
Barristers and Solicitors
2401 Saskatchewan Drive
Regina, Saskatchewan
S4P 4H8.

Phone: (306) 359-7777
Fax: (306) 522-3299.

E.F. Anthony Merchant, Q.C.

TO THE DEFENDANTS

You have been sued. You are the Defendants. You have only 15 days to file and serve a Statement of Defence or Demand of Notice. You or your lawyer must file your Statement of Defence or Demand of Notice in the office of the Clerk of the Court of Queen's Bench in Edmonton, Alberta. You or your lawyer must also leave a copy of your Statement of Defence or Demand of Notice at the address for service for the Plaintiff named in this Statement of Claim.

WARNING: If you do not do both things within 15 days, you may automatically lose the law suit. The Plaintiff may get a Court judgment against you if you do not file, or do not give a copy to the Plaintiff, or do either late.

TAB VIII

No. 10-2780 Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Barbara Bourassa on behalf of the Estate of Mitchell David Bourassa,

PLAINTIFF

AND:

Imperial Tobacco Canada Limited, B.A.T. Industries p.l.c.,
British American Tobacco (Investments) Limited, British American Tobacco, p.l.c.,
Altria Group, Inc., Philip Morris International, Inc., Philip Morris USA Inc.,
R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco Company,
R. J. Reynolds Tobacco International, Inc., Carreras Rothmans Limited,
JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., Rothmans Inc.,
Ryesekks p.l.c., and Canadian Tobacco Manufacturers' Council,

DEFENDANTS

Brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

WRIT OF SUMMONS & STATEMENT OF CLAIM

MERCHANT LAW GROUP LLP
531 Quadra Street
Victoria, B.C.
V8V 3S4

E. F. Anthony Merchant, Q.C.
Phone: (250) 478-9928
Fax: (250) 478-9943

Court Box: 138

SUPREME COURT
OF
BRITISH COLUMBIA
SEAL
VICTORIA
REGISTRY

JUN 25 2010

No. 10-2780
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Barbara Bourassa on behalf of the Estate of Mitchell David Bourassa,

PLAINTIFF

Imperial Tobacco Canada Limited, B.A.T. Industries p.l.c.,
British American Tobacco (Investments) Limited, British American Tobacco, p.l.c.,
Altria Group, Inc., Philip Morris International, Inc., Philip Morris USA Inc.,
R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco Company,
R. J. Reynolds Tobacco International, Inc., Carreras Rothmans Limited,
JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., Rothmans Inc.,
Ryesekks p.l.c., and Canadian Tobacco Manufacturers' Council,

DEFENDANTS

Brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

WRIT OF SUMMONS

Name and Address of each Plaintiff:

Barbara Bourassa on behalf of the Estate of Mitchell David Bourassa
c/o Merchant Law Group LLP
531 Quadra Street
Victoria B.C. V8V 3S4

Name and Address of each Defendant:

Imperial Tobacco Canada Limited
3711 Rue Saint-Antoine
Montreal, Quebec

B.A.T. Industries p.l.c.
Globe House
4 Temple Place
London, England

British American Tobacco (Investments) Limited
Globe House
1 Water Street
London, England

British American Tobacco, p.l.c.
Globe House
4 Temple Place
London, England

Altria Group, Inc.
6601 West Broad Street
Richmond, Virginia

Philip Morris International, Inc.
6601 West Broad Street
Richmond, Virginia

Philip Morris USA Inc.
6601 West Broad Street
Richmond, Virginia

R. J. Reynolds Tobacco Company
401 North Main Street
Winston Salem, North Carolina

R. J. Reynolds Tobacco Company
401 North Main Street
Winston Salem, North Carolina

R. J. Reynolds Tobacco International Inc.
401 North Main Street
Winston Salem, North Carolina

Carreras Rothmans Limited
Globe House, 1 Water Street
London, England

JTI-Macdonald Corp.
1300-1969 Upper Water Street
Purdy's Wharf Tower II
Halifax, Nova Scotia

Rothmans, Benson & Hedges Inc.
1500 Don Mills Road
New York, Ontario

Rothmans Inc.
1500 Don Mills Road
New York, Ontario

Ryesekks p.l.c.
Plumtree Court
London, England

Canadian Tobacco Manufacturers' Council
6 D'Angers Street
Gatineau, Quebec

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom, Canada and Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith.

To the Defendants: **Imperial Tobacco Canada Limited**
B.A.T. Industries p.l.c.
British American Tobacco (Investments) Limited
British American Tobacco, p.l.c.
Altria Group, Inc.
Philip Morris International, Inc.
Philip Morris USA Inc.
R. J. Reynolds Tobacco Company
R. J. Reynolds Tobacco Company
R. J. Reynolds Tobacco International, Inc.
Carreras Rothmans Limited
JTI-Macdonald Corp.
Rothmans, Benson & Hedges Inc.
Rothmans Inc.
Ryesekks p.l.c.
Canadian Tobacco Manufacturers' Council

TAKE NOTICE that this action has been commenced against you by the plaintiffs for the claim set out in this writ.

IF YOU INTEND TO DEFEND this action, or if you have a set off or counterclaim that you wish to have taken into account at the trial, **YOU MUST**

(a) **GIVE NOTICE** of your intention by filing a form entitled "Appearance" in the above registry of this court, at the address shown below, within the Time

for Appearance provided for below and **YOU MUST ALSO DELIVER** a copy of the Appearance to the plaintiffs' address for delivery, which is set out in this writ, and

(b) if a statement of claim is provided with this writ of summons or is later served on or delivered to you, FILE a Statement of Defence in the above registry of this court within the Time for Defence provided for below and DELIVER a copy of the Statement of Defence to the plaintiffs' address for delivery.

YOU OR YOUR SOLICITOR may file the Appearance and the Statement of Defence. You may obtain a form of Appearance at the registry.

JUDGMENT MAY BE TAKEN AGAINST YOU IF

(a) **YOU FAIL** to file the Appearance within the Time for Appearance provided for below; or

(b) **YOU FAIL** to file the Statement of Defence within the Time for Defence provided for below.

TIME FOR APPEARANCE

If this writ is served on a person in British Columbia, the time for appearance by that person is 7 days from the service (not including the day of service).

If this writ is served on a person outside British Columbia, the time for appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

TIME FOR DEFENCE

A Statement of Defence must be filed and delivered to the plaintiffs within 14 days after the later of

(a) the time that the Statement of Claim is served on you (whether with this writ of summons or otherwise) or is delivered to you in accordance with the Rules of Court, and

(b) the end of the Time for Appearance provided for above.

[or, if the time for defence has been set by order of the court, within that time.]

(1) The address for the registry is:
Ministry of Attorney General
Court Registry
PO Box 9248 Stn Prov Govt
2nd Floor, 850 Burdett Avenue
Victoria, British Columbia
V8W 9J2

(2) The plaintiffs' ADDRESS FOR DELIVERY is:

Merchant Law Group LLP
531 Quadra Street
Victoria B.C. V8V 3S4
Fax number for delivery (if any): 250-478-9943

(3) The name and office address of the plaintiffs' solicitor is:

Merchant Law Group LLP
531 Quadra Street
Victoria B.C. V8V 3S4

The Plaintiff's claim is set out in the Statement of Claim attached hereto.

ENDORSEMENT ON ORIGINATING PROCESS FOR SERVICE OUTSIDE OF BRITISH COLUMBIA

The Plaintiff claims the right to serve this Writ and Statement of claim on the Defendants, Imperial Tobacco Canada Limited, B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, British American Tobacco, p.l.c., Altria Group, Inc., Philip Morris International, Inc., Philip Morris USA Inc., R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco International, Inc., Carreras Rothmans Limited, JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., Rothmans Inc., Ryesekks p.l.c., and Canadian Tobacco Manufacturers' Council outside of British Columbia on the ground that the claims involves a tort and statutory breach committed in British Columbia.

Dated: June 25, 2010

Merchant Law Group LLP
Solicitors for the Plaintiff

No. _____
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Barbara Bourassa on behalf of the Estate of Mitchell David Bourassa,

PLAINTIFF

AND:

Imperial Tobacco Canada Limited, B.A.T. Industries p.l.c.,
British American Tobacco (Investments) Limited, British American Tobacco, p.l.c.,
Altria Group, Inc., Philip Morris International, Inc., Philip Morris USA Inc.,
R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco Company,
R. J. Reynolds Tobacco International, Inc., Carreras Rothmans Limited,
JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., Rothmans Inc.,
Ryesekks p.l.c., and Canadian Tobacco Manufacturers' Council,

DEFENDANTS

Brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

STATEMENT OF CLAIM

I. OVERVIEW

1. Cigarettes are a dangerous and defective product. Even when used as directed, cigarettes inevitably cause death and disease to a large percentage of users.

2. The Defendants, who manufacture and sell almost all of the cigarettes sold in this country, and their co-conspirators, have for many years sought to deceive Canadians about the health effects of smoking. For decades, the Defendants repeatedly and consistently denied that smoking cigarettes causes disease, even though they have known since 1953, at the latest, that smoking increases the risk of disease and death. The Defendants have repeatedly and consistently denied that cigarettes are addictive even though they have long understood and intentionally exploited the addictive properties of nicotine.

3. Smoking has adverse health effects on the entire lung, and is the leading cause of chronic respiratory diseases.

II. CLASS

4. The Plaintiff brings this claim on behalf of all individuals, including their estates, who were alive on June 12th, 2007, and who have suffered, or who currently suffer, from chronic respiratory diseases, after having smoked a minimum of 25,000 cigarettes designed, manufactured, imported, marketed, or distributed by the Defendants.[1]

III. PARTIES

(1) plaintiff

5. The Plaintiff, Barbara Bourassa brings this claim as Executrix of the Estate of Mitchell David Bourassa. She is Mitchell Bourassa's wife and resides in Nanaimo, British Columbia. At the time of his death, Barbara Bourassa and her husband resided in Nanaimo, British Columbia.

6. Mr. Bourassa began smoking cigarettes in 1964, when he was twelve years of age. Mr. Bourassa began smoking one pack a day at the age of 18. Eventually, Mr. Bourassa started smoking one to two packs a day. Mr. Bourassa continued to smoke because of his addiction even after being diagnosed with emphysema caused by his smoking. In his last two years, Mr. Bourassa was a quarter pack to half pack a day smoker. Mr. Bourassa passed away on September 28th, 2007. Over a lifetime of being addicted to cigarette smoking and nicotine, he smoked in excess of 300,000 cigarettes.

(2) defendants

(a) BAT Group

7. B.A.T Industries p.l.c. was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Globe House, 4 Temple Place, London, England.

---

[1] By the end of 1953, the Defendants knew or should have been known, that cigarettes posed an unacceptable health risk. The period from January 1st, 1954 to the present is the "Knowledge Period".

8. British American Tobacco p.l.c., was incorporated pursuant to the laws of the United Kingdom and has a registered office at Globe House, 4 Temple Place, London, England.

9. British American Tobacco (Investments) Limited was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Globe House, 1 Water Street, London, England.

10. Imperial Tobacco Canada Limited was incorporated pursuant to the laws of Canada. It has a registered office at 3711 Rue Saint-Antoine Montréal, Quebec.

(b) Philip Morris Group

11. Altria Group, Inc. (formerly known as Philip Morris Companies Inc.), was incorporated pursuant to the laws of Virginia. Its principal place of business is 6601 West Broad Street, Richmond, Virginia.

12. Philip Morris International, Inc. was incorporated pursuant to the laws of Delaware. It has a registered office at 120 Park Avenue, New York, New York.

13. Philip Morris USA Inc. (formerly Philip Morris Incorporated, and Philip Morris & Co., Ltd.) was incorporated pursuant to the laws of Virginia. Its principal place of business is at 6601 West Broad Street, Richmond, Virginia.

14. Rothmans, Benson & Hedges Inc. was incorporated pursuant to the laws of Canada. It has a registered office at 1500 Don Mills Road, North York, Ontario.

(c) R.J. Reynolds Group

15. JTI-Macdonald Corp. was incorporated pursuant to the laws of Nova Scotia. It has a registered office at 1300 - 1969 Upper Water Street, Purdy's Wharf Tower II, Halifax, Nova Scotia.

16. R.J. Reynolds Tobacco Company was incorporated pursuant to the laws of New Jersey. Its principal place of business was at 401 North Main Street, Winston Salem, NC. In this claim, references to R.J. Reynolds Tobacco Company before July 30, 2004, relate to the R.J. Reynolds Tobacco Company which was incorporated in New Jersey.

17. R. J. Reynolds Tobacco Company was incorporated pursuant to the laws of North Carolina. Its principal place of business is at 401 North Main Street, Winston Salem, NC. In this claim, references to R.J. Reynolds Tobacco Company on or after July 30, 2004, relate to the R.J. Reynolds Tobacco Company which was incorporated in North Carolina.

18. R. J. Reynolds Tobacco International, Inc. was incorporated pursuant to the laws of Delaware. Its principal place of business is at 401 North Main Street, Winston Salem, North Carolina.

(d) Rothmans Group

19. Carreras Rothmans Limited was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Globe House, 1 Water Street, London, England.

20. Ryesekks p.l.c. (formerly Rothmans International p.l.c., before that, Rothmans International Limited, and before that Carreras Limited) was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Plumtree Court, London, England.

21. Rothmans Inc. (formerly Rothmans of Pall Mall Canada Limited) was incorporated pursuant to the laws of Canada. It has a registered office at 1500 Don Mills Road, North York, Ontario.

(e) CTMC

22. The Canadian Tobacco Manufacturers' Council ("CTMC") was incorporated pursuant to the laws of Canada. It has a registered office at 6 D'Angers St., Gatineau, Quebec.

(3) canadian manufacturers

23. The principal Canadian cigarette manufacturers who designed, manufactured, imported, marketed, or distributed cigarettes to the Plaintiff and the class in Canada, including British Columbia, were and are:

(1) **Imperial Tobacco Canada Limited:** In 1912, Imperial Tobacco Company of Canada Limited was incorporated.

(a) In September of 1970:

(i) it changed its name to Imasco Limited (effective Dec. 1st,1970); and

(ii) Imperial Tobacco Limited, a wholly-owned subsidiary, acquired part of the tobacco related business of Imasco Limited, and

(b) In February of 2000:

(i) Imasco Limited amalgamated with its subsidiaries including Imperial Tobacco Limited to form Imasco Limited; and

(ii) In a second amalgamation, also in or about February, 2000, Imasco Limited amalgamated with its parent company, British American Tobacco (Canada) Limited, to form Imperial Tobacco Canada Limited. Imperial Tobacco Canada Limited is a wholly-owned subsidiary of the defendant, British American Tobacco p.l.c.

(c) Imperial Tobacco Canada Limited and the various Imperial Tobacco related corporations named in sub-paragraphs (a) and (b) above, directly or indirectly designed, manufactured, imported, marketed, or distributed cigarettes sold in Canada, including British Columbia, during the Knowledge Period, causing members of the class to suffer or die from chronic respiratory diseases.

(2) **Rothmans, Benson & Hedges Inc.:** In 1934, Benson & Hedges (Canada) Inc. was incorporated. In 1960, Rothmans of Pall Mall Limited was incorporated in the United Kingdom. In 1985 it acquired part of the tobacco related business of Rothmans Inc.. In 1986, Rothmans, Benson & Hedges Inc. was formed from an amalgamation of Rothmans of Pall Mall Limited and Benson & Hedges (Canada) Inc.

(a) Until 1986, Rothmans of Pall Mall Limited and Benson & Hedges directly or

indirectly designed, manufactured, imported, marketed, or distributed cigarettes in Canada, including British Columbia.

(b) After 1986, Rothmans, Benson & Hedges Inc. directly or indirectly designed, manufactured, imported, marketed, or distributed cigarettes in Canada, including British Columbia.

(c) Rothmans Inc. owns 40% of the securities of Rothmans, Benson & Hedges Inc. FTR Holding S.A., a Swiss company, a subsidiary of Altria Group, Inc., and an affiliate of Philip Morris U.S.A. Inc. and Philip Morris International, Inc., owns 40% of the securities of Rothmans, Benson & Hedges Inc.

(d) Rothmans Inc. and the various Rothmans related corporations named in sub-paragraphs (a), (b), and (c) above, directly or indirectly designed, manufactured, imported, marketed, or distributed cigarettes in Canada, including British Columbia, during the Knowledge Period, causing members of the class to suffer or die from chronic respiratory diseases.

(3) **JTI-Macdonald Corp.**: In 1930, W.C. MacDonald Incorporated was incorporated pursuant to the laws of Quebec. From 1858, it carried on business in Montreal as an unincorporated entity. In 1957, it changed its name to Macdonald Tobacco Inc.. In 1973, Macdonald Tobacco Inc. became a wholly-owned subsidiary of R.J. Reynolds Tobacco Company. In 1978:

(a) RJR-Macdonald Inc. was incorporated as a wholly-owned subsidiary of R.J. Reynolds Tobacco Company; and

(b) R.J. Reynolds Tobacco Company sold Macdonald Tobacco Inc. to RJR-Macdonald Inc.. RJR-Macdonald Inc. acquired all or substantially all of Macdonald Tobacco Inc.'s assets and continued the business of manufacturing and promoting cigarettes previously carried on by Macdonald Tobacco Inc..

(c) In 1999, RJR-Macdonald Inc. changed its name to RJR-Macdonald Corp., which subsequently, changed its name to JTI-Macdonald Corp.

(d) RJR-Macdonald Inc. and the various RJR related corporations named in (a), (b), and (c) above, directly or indirectly designed, manufactured, imported, marketed, or distributed cigarettes in Canada, including British Columbia, during the

Knowledge Period, causing members of the class to suffer or die from chronic respiratory diseases.

24. Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., and JTI-Macdonald Corp. are the three largest Canadian cigarette manufacturers. They, and each of the Defendants, directly or indirectly, designed, manufactured, imported, marketed, or distributed cigarettes sold in Canada, including British Columbia, under brands that included:

"CANADIAN MANUFACTURERS"	BRAND NAMES	
Imperial Tobacco Canada Limited	• Avanti • Cameo • Du Maurier • JPS • Kool • Marlboro • Matinée	• Pall Mall • Peter Jackson • Player's • Sterling • Sweet Caporal • Viceroy • Vogue
Rothmans, Benson & Hedges Inc.	• Benson & Hedges • Craven A • Davidoff	• Number 7 • Rothmans
JTI-Macdonald Corp.	• Camel • Export "A" • Macdonald Special	• Macdonald Select • Vantage • Winston

25. The CTMC is the trade and lobbying association of the Canadian tobacco industry. It advances the interests of manufacturers and promotes cigarette smoking. Its membership has included, among others, Imperial Tobacco Canada Limited, JTI-Macdonald Corp., R.J. Reynolds Tobacco Company, and Rothmans, Benson & Hedges Inc.

(4) non-canadian manufacturers

26. The BAT Group, the Philip Morris Group, the R.J. Reynolds Group, and the Rothmans Group, have each directly or indirectly designed, manufactured, imported, marketed, or distributed cigarettes sold in Canada, including British Columbia.

IV. CAUSES OF ACTION

27. By directly or indirectly designing, manufacturing, importing, marketing, or distributing cigarettes in Canada, including British Columbia, each Defendant carried on business in British Columbia.

(1) tobacco products

(a) nicotine

28. Nicotine is a psychoactive drug that affects various body systems including the brain and central nervous system, skeletal muscles, cardiovascular system, endocrine functions, lungs, and other organs.[2]

29. Nicotine is addictive.

(b) tobacco

30. Tobacco contains nicotine.

(c) cigarettes

31. Cigarettes contain tobacco. When smoked, they deliver nicotine to users thereby causing addiction.[3]

---

[2] Despite decades of public pronouncements to the contrary, the tobacco industry admits in its confidential internal correspondence that nicotine is a drug. *See* **Sch. 01** ("We are, then, in the business of selling nicotine, an addictive drug... .") (B&W/BAT, 1963); **Sch. 02** ("Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects.") (RJR, 1972); **Sch. 03** ("B.A.T. should learn to look at itself as a drug company rather than a tobacco company.") (BAT, 1980); **Sch. 04** ("[D]o we really want to tout cigarette smoke as a drug? It is, of course, but there are dangerous F.D.A. implications to having such conceptualization go beyond these walls. . . .") (PM, 1969).

[3] *See* **Sch. 05** ("Very few consumers are aware of the effects of nicotine, i.e., its addictive nature and that nicotine is a poison.") (B&W/BAT, 1978); **Sch. 06** ("The cigarette should be conceived not as a product but as a package. The product is nicotine. . . . Think of the cigarettes as a dispenser for a dose unit of nicotine.") (PM, 1972); **Sch. 02** ("Happily for the tobacco industry, nicotine is both habituating and unique in its variety of physiologic actions ....") (RJR, 1972).

32. By smoking cigarettes, smokers become addicted to nicotine. While addicted, they regularly crave nicotine. They satisfy their craving by smoking cigarettes. Attempting to stop smoking causes irritability, difficulty concentrating, anxiety, restlessness, increased hunger, depression, and a pronounced craving for tobacco.[4]

33. When Mr. Bourassa and class members inhaled tobacco smoke as intended by the Defendants, they also inhaled harmful substances which the Defendants knew could cause chronic respiratory diseases. These substances include aldehydes, ammonia, carbon monoxide, catechol, endotoxins, hydrogen cyanide, metals, micotoxins, nicotine, nitrogen dioxide, nitrogen monoxide, nitrosamines, organics, phenols, polyaromatic hydrocarbons, and tar.[5]

34. As a result, inhaling cigarette smoke causes or materially contributes to chronic respiratory diseases.

(2) tort

(a) duty

35. The BAT Group, the Philip Morris Group, the R.J. Reynolds Group, and the Rothmans Group (the "Tobacco Industry"), directly or indirectly, designed, manufactured,

---

[4] *See* **Sch. 07** ("Once addiction does take place, it becomes necessary for the smoker to make peace with the accepted hazards. This is done by a wide range of rationalizations.... However, the desire to quit, and actually carrying it out, are two quite different things, as the would-be quitter soon learns.") (ITL, 1982). **Sch. 08** ("[S]moking is a habit of addiction that is pleasurable.") (BAT, 1962); **Sch. 09** ("High profits ... are directly related to the fact that the customer is dependent upon the product.") (BAT, 1979).

[5] *See* **Sch. 10** ("[I]f anyone ever identified any ingredient in tobacco smoke as being hazardous to human health or being something that shouldn't be there; we could eliminate it. But no one ever has.") (PM, 1976); **Sch. 11** ("[B]iologically active materials [are] present in cigarette tobacco. These are: a) cancer causing; b) cancer promoting; and c) poisonous.") (L&M, 1961) Liggett & Myers is not a party to these proceedings, but its documents and those of other non-party tobacco manufacturers and trade groups illustrate state of the art and general industry knowledge. *See also* **Sch. 12** ("Eight of the polycyclic hydrocarbons isolated from the smoke are known to produce cancer in mice.... [T]here is a distinct possibility that these substances would have a carcinogenic effect on the human respiratory system.") (RJR, 1959); **Sch. 13** ("[N]itrosamines are the most potent carcinogens known to man....") (PM, 1958).

imported, marketed, and distributed cigarettes that were not altered by class members after leaving their manufacturing and distribution facilities.

36. The Tobacco Industry therefore owed Mr. Bourassa and the class a duty of care:

(a) to take all reasonable measures to eliminate, minimize, or reduce the risks of smoking cigarettes;

(b) not to manufacture defective cigarettes; and

(c) to provide reasonably clear, complete, and current warnings of the risks of smoking cigarettes of which they knew or ought to have known.

37. The Tobacco Industry owed a special duty to children and adolescents to take reasonable measures to prevent them from starting or continuing to smoke.

(b) knowledge

38. At all material times, the Tobacco Industry was in possession of scientific and medical data which established the risks of smoking cigarettes. They knew or ought to have known that:

(a) nicotine is addictive;

(b) nicotine addiction compels smokers to continue to smoke; and

(c) the cigarettes they designed, manufactured, imported, marketed, and distributed:

(i) contained nicotine and were therefore addictive; and

(ii) contained the substances enumerated in paragraph 33, which are described in the Schedules, and therefore caused class members to suffer from chronic respiratory diseases.

(c) breach

(i) duty not to market

39. In past and continuing breach of their duty of care, the Tobacco Industry:

(a) failed to conduct proper investigation, research, and testing as to the risk of cigarette smoking related illness, nicotine addiction, and the feasibility of eliminating or

minimizing these risks;[6]

(b) failed to design a reasonably safe product and to take all reasonable measures to eliminate, minimize the risk of chronic respiratory diseases;

(c) failed to eliminate or reduce to a safe level, substances and by-products of combustion, including nicotine and tar, which can cause chronic respiratory diseases;

(d) designed, manufactured, marketed, imported, and distributed defective cigarettes which:

(i) when smoked as intended, are addictive and cause chronic respiratory diseases in an unreasonable number of users;[7] and

(ii) have no utility or benefit to consumers, or have a utility or benefit which is vastly outweighed by the risk of contracting chronic respiratory diseases;

(e) wilfully increased the bio-availability of nicotine in their cigarettes by:

(i) special blending the tobacco;

(ii) sponsoring or engaging in selective breeding and genetic engineering of tobacco plants;

(iii) adding nicotine or substances containing nicotine; and

(iv) introducing substances, including ammonia, into their cigarettes.

---

[6] *See* **Sch. 14** ("Members of [the RJR] Research Department have studied in detail cigarette smoke composition. Some of the findings have been published. However, much data remain unpublished because they are concerned with carcinogenic or co-carcinogenic compounds....") (RJR, 1962); **Sch. 15** ("The psychopharmacology of nicotine is a highly vexatious topic. It is where the action is for those doing fundamental research on smoking, and from where most likely will come significant scientific developments profoundly influencing the industry. Yet it is where our attorneys least want us to be, for two reasons... The first reason is the oldest and is implicit in the legal strategy employed over the years in defending corporations ... 'We within the industry are ignorant of any relationship between smoking and disease. Within our laboratories no work is being conducted on biological systems.' That posture has moderated considerably as our attorneys have come to acknowledge that the original carte blanche avoidance of all biological research is not required in order to plead ignorance about any pathological relationship between smoke and smoker.") (PM, 1980).

[7] *See* **Sch. 09** ("[H]igh profits ... are directly related to the fact that the customer is dependent upon the product.") (BAT, 1979); **Sch. 16** ("A cigarette that does not deliver nicotine cannot satisfy the habituated smoker and cannot lead to habituation and would therefore almost certainly fail.") (PM, 1966).

(ii) duty to warn

40. The Tobacco Industry breached its duty to warn consumers. They:

(a) failed to provide any reasonable warnings before 1972;

(b) failed to provide reasonable warnings of the risk of chronic respiratory diseases, caused by smoking, and of the risk of nicotine addiction after 1972. In particular, their warnings:

(i) were designed to be ineffective;

(ii) did not give users, prospective users, and the public, an adequate indication of each of the specific risks of smoking their cigarettes;

(iii) were given only to forestall more effective governmental warnings;

(iv) failed to make clear, complete, and current disclosure of the risks inherent in smoking their cigarettes; and

(v) failed to advertise and market the warnings effectively;

(c) made representations which they knew or ought to have known were false and deceptive. In particular, they falsely represented:

(i) that smoking has not been shown to cause disease;[8]

(ii) that they were not aware of any credible research which established a link between smoking and disease;[9]

(iii) that many diseases shown to have been related to tobacco were in fact related to environmental or genetic factors;[10]

---

[8] *Compare* **Sch. 17** ("With one exception the individuals whom we met believe that smoking causes lung cancer.") (BAT, 1958) *with* **Sch. 18** ("We do not believe that cigarettes are hazardous; we do not accept that."); **Sch. 19** ("There is disagreement among medical experts as to whether the reported associations between smoking and various diseases are causal or not. CTMC's position is to the effect that no causal relationship has been established.") (CTMC1978); **Sch. 20** ("Doubt is our product since it is the best means of competing with the body of fact that exists in the mind of the general public. It is also the means of establishing a controversy.") (B&W, 1969).

[9] *See* **Sch. 21** ("Despite all the research going on, the simple and unfortunate fact is that scientists do not know the cause or causes of the chronic diseased reported to be associated with smoking.... We would appreciate you passing this information along to your [fifth grade] students." (RJR, 1990); **Sch. 22** ("It is not known whether cigarettes cause cancer.") (RJR, 1984).

[10] *See* **Sch. 23** ("Distinguished authorities point out that there is no proof that cigarette smoking is one of the causes.... That statistics purporting to link cigarette smoking with disease could apply with equal force to any

(iv) that cigarettes were not addictive;[11]

(v) that smoking was merely a habit or custom as opposed to an addiction;[12]

(vi) that they did not manipulate nicotine levels in their cigarettes;[13]

(vii) that they did not include substances in their cigarettes designed to increase the bio-availability of nicotine;[14]

(viii) the actual intake of tar and nicotine associated with smoking cigarettes, as opposed to levels measured on machines;[15]

(ix) that certain of their cigarettes, such as "filter", "mild", "low tar", "light", and "extra light" brands, were safer than other cigarettes;[16] and

---

other aspect of modern life."); **Sch. 24** ("[M]any scientists are becoming concerned that preoccupation with smoking may be both unfounded and dangerous, unfounded because evidence on many critical points is conflicting, dangerous because it diverts attention from other suspected hazards.") (TI, 1979).

[11] *See* **Sch. 25** ("The fact is there is nothing about smoking, or about the nicotine in cigarettes, that would prevent smokers from quitting.") (TI, 1989); **Sch. 26** ("The fact is there is nothing about smoking, or about the nicotine in cigarettes, that would prevent smokers from quitting." (RJR, 1992).

[12] *See* **Sch. 27** ("When we use the term 'addiction,' there are two meanings. There's an everyday meaning when we talk about being news junkies or chocoholics.... Now, under that, all kinds of habits become addictions. And so if it's a habit, then, yes, smoking can be a habit.") (TI, 1994); **Sch. 28** ("If [cigarettes] are behaviorally addictive or habit forming, they are much more like caffeine, or in my case, Gummy Bears.") (PM, 1997).

[13] *See* **Sch. 29** ("Dr. Kessler's contention that we add or otherwise manipulate nicotine to create, maintain, or satisfy an addiction, is false.") (RJR, 1994); **Sch. 30** ("The claims that RJR increases the nicotine in its cigarettes are false. RJR does not increase nicotine in cigarettes above what is found naturally in tobacco.") (RJR, 1994)

[14] *Compare* **Sch. 31** ("There is no indication that ammonia compounds in our cigarettes alter the amount of nicotine the smoker inhales.") (PM, 1994) *with* **Sch. 32** ("We are pursuing this project with the eventual goal of lowering the total nicotine present in smoke while increasing the physiologic effect of the nicotine which is present, so that no physiological effect is lost on nicotine reduction.") (RJR, 1973); **Sch. 33** ("Marlboro (and other Philip Morris brands) as compared with WINSTON, our other brands and most other brands on the market shows : (1) higher smoke pH (higher alkalinity), hence increased amounts of 'free' nicotine in smoke, and higher immediate nicotine 'kick'.") (RJR, 1973); **Sch. 34** ("Cigarettes made from filler oversprayed with nicotine as the citrate (NC) produce CNS effects which are approximately half the magnitude of those obtained with the FB [freebase] or unextracted cigarettes - at comparable nicotine delivery levels.") (PM, 1989).

[15] *See* **Sch. 35** ("The paper itself expresses what we in Behavioral have 'felt' for quite some time. That is, smokers smoke differently than the FTC machine and may very well smoke to obtain a certain level of nicotine in their bloodstream.") (RJR, 1983).

[16] *See* **Sch. 36** ("[T]here 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.") (ITL, undated); **Sch. 37**

(x) that smoking was consistent with a healthy lifestyle;[17]

(d) misled consumers on a class wide objective standard that cigarettes were safer than they actually were by:

(i) incorporating into the design of their cigarettes ineffective safety features including filters which they knew or ought to have known were ineffective, yet whose presence falsely implied safety;[18] and

(ii) designing, manufacturing, importing, marketing, and distributing "mild", "low tar", "light", and "extra light" cigarettes, which they marketed in a manner which misled consumers into thinking that they were safer to use than they actually were;

(e) misled consumers on a class wide objective standard about the risks of smoking using innuendo, exaggeration, and ambiguity;

(f) systemically made statements regarding smoking and health which they knew were incomplete or inaccurate;

(g) failed to correct statements made by others regarding the risks of smoking, which they knew were incomplete or inaccurate, thereby constituting misrepresentation by omission or silence;

(h) engaged in collateral marketing, promotional, and public relations activities to neutralize or negate the efficacy of warnings provided to consumers by governments, and other agencies concerned with public health;

(i) suppressed information regarding the risks of smoking; and

---

("Unmet needs of smokers that could be satisfied by newer modified products, products which could delay the quitting process, are pursued.") (ITL, 1986).

[17] *See* **Sch. 44** ("Since younger smokers represent the recruitment market, and female smokers are clearly a growth segment, in-depth motivational studies of both groups are strongly indicated.") (BAT, 1985); **Sch. 45** ("Young smokers represent the major opportunity group for the cigarette industry, we should therefore determine their attitude to smoking and health and how this might change over time.") (ITL, 1970).

[18] The industry has long known that smokers compensate for ventilated filters by taking bigger puffs and blocking vent holes. *See* **Sch. 38** ("[S]ubjects took more puffs of very much larger volume from the ventilated cigarette, but showed no difference in the way they inhaled smoke.") (BAT, 1972); **Sch. 39** ("[S]mokers adjust puff intake in order to maintain constant smoke intake.") (PM, 1967); **Sch. 40** ("[S]ome of these [vent] holes are likely to be occluded under normal smoking conditions, whereas no occlusion is likely to occur when the cigarettes are machine smoked for analysis.") (PM, 1967); **Sch. 16** ("The illusion of filtration is as important as the fact of filtration.") (PM, 1966).

(j) participated in a misleading campaign to make themselves appear more credible than health authorities and anti-smoking groups, and to reassure smokers that cigarette smoking was not as dangerous as it actually was or as authorities said it was.

41. At the Tobacco Industry's direction, the CMTC participated in this deception and was instrumental in thwarting or delaying government regulation.

42. The Tobacco Industry and the CMTC intended that these misrepresentations be relied upon by the Plaintiff, and the class for the purpose of inducing them to start or continue smoking.

(iii) special duties

43. The Tobacco Industry and the CMTC exploited the inability of children, adolescents, and those addicted to nicotine to protect their own interests because of their psychological and physiological dependence on nicotine and their augmented inability to understand smoking risks. In particular, the Tobacco Industry knew or ought to have known that:

(a) more than 80% of smokers start to smoke and become addicted before they are 19 years of age;

(b) it was illegal to sell cigarettes to children and adolescents in Canada, including British Columbia, and to promote smoking by such persons;

(c) children and adolescents might start or continue to smoke their cigarettes; and

(d) children and adolescents who smoked their cigarettes would become addicted to cigarettes and were likely to contract chronic respiratory diseases.

44. In breach of their duty to children and adolescents in Canada, including British Columbia, the Tobacco Industry:

(a) failed to take any reasonable measures to prevent them from starting or continuing to smoke;

(b) targeted children and adolescents in their promotional and marketing activities with the objective of inducing them to start or continue to smoke;

(c) undermined legislative and regulatory initiatives intended to prevent children and adolescents from starting or continuing to smoke; and

(d) provided cigarettes to persons under circumstances where they knew or ought to have known that they would be illegally brought into Canada, including British Columbia, and sold to children and adolescents.[19]

(iv) harm caused

45. Because of the acts and omissions of the Defendants described above, Mr. Bourassa and class members started and continued to smoke cigarettes designed, manufactured, imported, marketed, or distributed by the Defendants. As a result, the Plaintiff suffered from chronic respiratory diseases caused by smoking cigarettes designed, manufactured, imported, marketed, and distributed by the Defendants.

46. The Plaintiff relies on *Sindell v. Abbott Laboratories*, 607 P.2d 924 (1980). "Market Share" herein, means the total volume of cigarettes promoted or sold by individual Group Members cumulatively during the Knowledge Period divided by the total volume of cigarettes promoted or sold cumulatively by all Group Members during the Knowledge Period producing a percentage for each Group Member.

---

[19] **Sch. 41** ("Realistically, if our company is to survive and prosper, over the long term, we must get our share of the youth market.") (RJR, 1973); **Sch. 42** ("The specific area of interest is young smokers between the ages of 15 and 19.") (BAT, undated); **Sch. 43** ("The under 25-year old smokers continue to show the highest level of potential for ITL activities. The model that sees young customers acquiring their preferences and staying with them as they age is increasingly valid.") (ITL, 1991); **Sch. 44** ("Since younger smokers represent the recruitment market, and female smokers are clearly a growth segment, in-depth motivational studies of both groups are strongly indicated.") (BAT, 1985); **Sch. 45** ("Young smokers represent the major opportunity group for the cigarette industry, we should therefore determine their attitude to smoking and health and how this might change over time.") (ITL, c.1970); **Sch. 46** ("RE-ESTABLISH clear distinct images for ITL brands with particular emphasis on relevance to younger smokers.") (ITL, c.1988); *Id.* ("If the last ten years have taught us anything, it is that the industry is dominated by the companies who respond most effectively to the needs of younger smokers. Our efforts on these brands will remain on maintaining their relevance to smokers in these younger groups in spite of the share performance they may develop among older smokers."); **Sch. 47** ("Contact leading firms in terms of children research ... contact Sesame Street ... contact Gerber, Schwinn, Mattel ... Determine why these young people were not becoming smokers.") (B&W, 1977).

47. Each of the Defendants, except the CTMC, jointly or separately maintained or currently maintains a Market Share such that each of them is liable for its proportion of the aggregate cost equal to a proportionate Market Share calculated cumulatively over the Knowledge Period.

48. Mr. Bourassa and class members purchased or smoked cigarettes manufactured, imported, marketed, or distributed by the Defendants, except the CTMC. The aggregated damages for the Plaintiff and class members should be apportioned among the Group Members in proportion to their Market Share during the Knowledge Period, and imposed upon the other Defendants as the Court may deem appropriate.

(3) trade practices

49. The Plaintiff pleads and relies on the *Business Practices and Consumer Protection Act,* S.B.C. 2004, c.2, as am., including s. 171; the *Fair Trading Act*, R.S.A. 2000, c. F-2, as am. including s. 13; *The Consumer Protection Act*, S.S. 1996, c. C-30.1, as am., including s. 14, and Part III; *The Business Practices Act*, S.M. 1990-91, c. 6; the *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, as am., including s. 8, and Part III; the *Trade Practices Act*, R.S.N.L. 1990, c. T-71, as am., including s. 14; and other similar legislation throughout Canada.

(4) competition act

50. The Tobacco Industry, for the purposes of directly or indirectly promoting the supply or use of cigarettes, in breach of their statutory duties or obligations to consumers under the *Competition Act,* R.C.S. 1985, c. C-34, as am., including s. 36 and 52, made false or misleading representations to Mr. Bourassa, and the class, with respect to the safety of cigarettes.

(5) concerted action

51. The BAT Group, the Philip Morris Group, the R.J. Reynolds Group, and the Rothmans Group (the "Tobacco Industry"), directly or indirectly, designed, manufactured,

imported, marketed, and distributed all or most of the cigarettes sold in Canada, including British Columbia. As defined terms used herein, their "Head Members" and "Other Members" were as follows:

group	"MEMBERS"	
	"Head Members"	"Other Members"
BAT	• **B.A.T Industries p.l.c.** - B.A.T. Industries Limited - Tobacco Securities Trust Limited • **British American Tobacco (Investments) Limited** - British-American Tobacco Company Limited • **British American Tobacco p.l.c.**	• **Imperial Tobacco Canada Limited** - Imasco Limited - Imperial Tobacco Limited
Philip Morris	• **Altria Group, Inc.,** - Philip Morris Companies Inc. • **Philip Morris Incorporated** • **Philip Morris International, Inc.** • **Philip Morris USA, Inc.**	• **Rothmans, Benson & Hedges Inc.** - Benson & Hedges (Canada) Inc.
RJR	• **R.J. Reynolds Tobacco Company** • **R.J. Reynolds Tobacco International, Inc.**	• **JTI-Macdonald Corp.** - Macdonald Tobacco Inc.
Rothmans	• **Carreras Rothmans Limited** • **Ryesekks p.l.c.**	• **Rothmans, Benson & Hedges Inc.** • **Rothmans Inc.** - Rothmans of Pall Mall Limited

52. The Head Members directed and coordinated common policies for each group relating to smoking and health and the Head Members and Other Members together are defined as the "Group" or "Group Members".

(a) agreement

53. In 1953 and early 1954, in response to mounting publicity about the link between smoking and disease,

(a) American Tobacco Company;

(b) Brown & Williamson Tobacco Corporation (in its own capacity and as agent for British American Tobacco (Investments) Limited);

(c) Philip Morris Incorporated; and

(d) R. J. Reynolds Tobacco Company,

conspired, or formed a common purpose, to use unlawful means to prevent the Plaintiff and class members, from learning about the harmful nature and addictive properties of cigarettes smoking, in circumstances where they knew or ought to have known would result in injury to the Plaintiff and class members.

54. The conspirators included members of the BAT Group (after about 1950), Philip Morris Group (after about 1954), RJR Group (after about 1973), and Rothmans Group (after about 1956), separately, and as a collective.

(b) unlawful means

55. Group Members formed and furthered the civil conspiracy or common purpose through:

(a) committees, conferences and meetings established, organized, and convened by Head Members and attended by Group Member senior personnel; and

(b) written and oral directives and communications among Group Members.

56. At these meetings and through these communications, Group Members agreed to breach their duties to consumers, the Plaintiff, and class members, as outlined above, and, in particular to:

(a) jointly disseminate objectively false and misleading information about smoking risks;

(b) suppress statements and admissions that smoking causes disease;

(c)suppress or conceal research regarding the risks of smoking;

(d) participate in a public relations program that promoted cigarettes, protected them from attacks based upon health risks, and reassured consumers that smoking was not hazardous; and

(e) ensure that the members of their respective Groups would implement the policies described in (a) through (d), above.

57. In or about 1962, the Tobacco Industry (referred to in Schedule 48 as "Canadian Tobacco Manufacturers") each signed an agreement not to make adverse health claims about each other's cigarettes, in order to prevent the risks of smoking from becoming known.[20]

(i) committees, conferences and meetings

58. The Group Members used committees, conferences, and meetings to direct or co-ordinate their common policies on smoking and health, including:

COMMITTEES, CONFERENCES, AND MEETINGS			
group	**committees**	**conferences**	**meetings**
BAT	•Chairman's Policy Committee • Research Policy Group •Scientific Research Group •Tobacco Division Board •Tobacco Executive Committee •Tobacco Strategy Review Team	•Chairman's Advisory Conferences • Group Research Conferences •Group Marketing Conferences	• particulars are peculiarly known to the BAT Group
PM	•particulars are peculiarly known to the PM Group	•Conference on Smoking and Health • Corporate Affairs World Conference	•Committee on Smoking Issues and Management • Corporate Products Committee
Rothmans	•particulars are peculiarly known to the Rothmans Group	•particulars are peculiarly known to the Rothmans Group	•particulars are peculiarly known to the Rothmans Group
RJR	•particulars are peculiarly known to the RJR Group	• "Hound Ears" and Sawgrass conferences	•Winston-Salem Smoking Issues Coordinator Meetings

(ii) directives and communications

59. The Head Members created and distributed written directives that set out their common policy on smoking and health issues to Group Member personnel for direct and

---

[20] **Sch. 48**

indirect dissemination to consumers. The full particulars of the directives and communications are known only to the Group Members, but included:

DIRECTIVES AND COMMUNICATIONS	
group	**directives and communications**
BAT	• "Smoking Issues: Claims and Responses" •"Consumer Helplines: How To Handle Questions on Smoking and Health and Product Issues" • "Smoking and Health: The Unresolved Debate", "Smoking: The Scientific Controversy" • "Smoking: Habit or Addiction?" • "Legal Considerations on Smoking and Health Policy"
PM	• "Smoking and Health Quick Reference Guides" and "Issues Alert[s]"
RJR	• "Issues Guide"
Rothmans	• particulars are peculiarly known to the Rothmans Group

60. Group Members further directed or co-ordinated their common policy and position on smoking and health:

(a) R.J. Reynolds International Inc. appointed and supervised a "smoking issue designee" in various global "Areas". The designees reported to the Manager of Science Information at R.J. Reynolds Tobacco Company. From 1974, a senior executive of Macdonald Tobacco Inc. (later of JTI-Macdonald Corp) was the designee in "Area II" (Canada).

(b) The Corporate Affairs and Public Affairs Departments of Philip Morris Incorporated and Philip Morris International, Inc. directed or advised departments of the other Philip Morris Group Members, including Rothmans, Benson & Hedges Inc. and its amalgamating company Benson & Hedges (Canada) Ltd., concerning the Philip Morris Group position on smoking and health issues.

(c) Ryesekks p.l.c. and Carreras Rothmans Limited, through the Rothmans International Research Division, created and disseminated statements which set out their position on smoking and health issues. In 1958, they issued numerous false announcements including

in the *Globe and Mail* (June 23rd, 1958) and in the *Toronto Daily Star* (August 13th, 1958) that:

(i) smoking in moderation was safe, and

(ii) Canadian-made Rothmans cigarettes were safer than those of other brands because they contained less tar and had "cooler" smoke.

(iii) canadian tobacco manufacturers' council

61. In 1963, in furtherance of their civil conspiracy or common purpose, as directed by the Head Members, and to maintain a united front on smoking and health issues, the Group Members formed the Ad Hoc Committee on Smoking and Health which, in 1969, was renamed the Canadian Tobacco Manufacturers' Council, and in 1982, it was incorporated.

62. Upon its formation, the CTMC adopted and participated in the civil conspiracy. Since 1963, the Tobacco Industry directed and caused the CTMC to:

(a) provide forums for the Tobacco Industry to further their civil conspiracy or common purpose;

(b) synchronize the Tobacco Industry's false positions on smoking and health issues with those of other international tobacco manufacturers and associations;

(c) relay the Tobacco Industry's common policies and positions respecting the health risks and concerns about smoking;

(d) suppress statements or admissions that smoking causes disease and health risks;

(e) suppress or conceal research regarding the adverse risks of smoking;

(f) counter independent attacks regarding the health risks of cigarettes and smoking;

(g) disseminate false and misleading information about the risks of smoking to governments, health and medical organizations, and consumers including the Plaintiff and the class:

(i) in 1963, the CTMC misrepresented to the Canadian Medical Association that there was no causal connection between smoking and disease; and

(ii) in 1969, CTMC misrepresented to the House of Commons, Standing Committee on Health, Welfare and Social Affairs, that there was no causal connection between smoking and disease;

(h) lobby the Federal and provincial governments to delay and minimize government initiatives pertaining to smoking and health; and

(i) participate in a public relations program on smoking and health issues with the intent of promoting cigarettes and maximizing sales.

63. The Group Members and the CTMC conspired or acted in concert in breaching their duties outlined above. They knew or ought to have known that one or more of them were likely to breach these duties in furtherance of the common purpose.

(iv) influence voting

64. Head Members further directed or co-ordinated the smoking and health policies of the Other Members within their Group by directing and advising them of how they should vote in committees of the Group Members and at meetings of the CTMC on smoking and health issues, including the approval and funding of research by the Tobacco Industry, all Group Members, and the CTMC.

(v) research organizations

65. Between late 1953 and the early 1960's:

(a) the Head Members formed or joined numerous research organizations including the:

(i) Centre for Co-operation in Scientific Research Relative to Tobacco ("CORESTA");

(ii) Tobacco Industry Research Council ("TIRC"), which was renamed the Council for Tobacco Research in 1964 ("CTR"); and

(iii) Tobacco Research Council ("TRC").

(b) the Head Members publicly represented that they or Other Members, along with CORESTA, TIRC/CTR, TRC, and similar organizations, would perform objective

research and gather data regarding the link between smoking and disease and internationally publicize the results.

(c) the Head Members agreed that they or Other Members, along with CORESTA, TIRC/CTR, TRC, and similar organizations, would conduct research and publicize information to counter, undermine, or obscure information that showed the link between smoking and disease, with a view to creating the widespread belief that there was a medical or scientific controversy as to whether smoking was harmful and whether nicotine was addictive, when in fact there was not.

(d) In 1963 and 1964, with a view to ensuring that no research would be approved or conducted by CORESTA, TIRC / CTR, and TRC which would indicate that cigarettes were dangerous, the Head Members and European tobacco companies and state monopolies agreed to coordinate their research on the link between smoking and disease with that conducted by the TIRC in the United States.

(e) In April and September 1963, Head Members of the BAT and RJR Groups agreed with members of the 'Council of Action' in Hamburg, Germany and with Head Members of the Philip Morris Group in New York, to develop a public relations campaign to counter reports of the English Royal College of Physicians, United States Surgeon General, and the Canadian Medical Association, and to falsely reassure consumers that their health would not be harmed by smoking cigarettes.

(f) In September 1963, in New York, the Head Members of the Philip Morris, RJR, and BAT Groups, along with other US tobacco companies, agreed that they, and members of their respective Groups, would not issue warnings about the link between smoking and disease unless and until required by governmental action.

(g) The very formation of 'research organizations' was a part of deliberately creating an objectively false impression and fraud upon the marketplace that unbiased research was being conducted.

66. From the outset of the civil conspiracy or common purpose described herein or, alternatively, from the time each defendant listed in paragraph 51, became a Group Member,

each Defendant agreed to and adopted the common purpose and breached their duties in furtherance thereof.

(vi) international committee on smoking issues

67. By the mid-1970's, motivated by their concern that admissions by any of the Group Members about a link between smoking and disease could lead to a 'domino effect' to the detriment of the worldwide industry, Head Members agreed to take an increased international response to reassure existing and potential smokers, and to protect the tobacco industry.

68. So, in furtherance of the civil conspiracy or common purpose:

(a) in June of 1977, Head Members and other international tobacco companies met in England and established the International Committee on Smoking Issues ("ICOSI").

(b) In 1980, ICOSI was renamed the International Tobacco Information Centre / Centre International d'Information du Tabac - INFOTAB ("INFOTAB"). In 1992, the INFOTAB changed its name to the Tobacco Documentation Centre ("TDC") (ICOSI, INFOTAB, and TDC are collectively referred as "ICOSI").

69. ICOSI's policies were mirrored by Group Members (including the CTMC), and were presented as the policies and positions of Group Member companies to conceal the civil conspiracy or common purpose from the public and governments.

70. If a Member within one of the Groups took a position on smoking and health issues contrary to that of ICOSI, the Head Members took steps to enforce compliance with the position of ICOSI.

71. Through ICOSI, Head Members agreed to resist governmental attempts to provide adequate warnings about the link between smoking and disease, and reiterated their position on smoking and health issues, furthering their agreement to:

(a) jointly disseminate false and misleading information regarding smoking risks;

(b) make no statement or admission that smoking causes disease;

(c) suppress or conceal research regarding the risks of smoking;

(d) make explicit health claims about each other's cigarettes, and thereby avoid highlighting the risks of smoking; and

(e) participate in a public relations program on smoking and health issues with the objective of promoting cigarettes, protecting cigarettes from attack based upon health risks, and reassuring consumers that smoking was not hazardous.

72. In and after 1977, the members of ICOSI, including the Head Members, agreed orally and in writing to ensure that:

(a) the members of their respective groups, including those in Canada, would act in accordance with the ICOSI position on smoking and health, including its position on warnings with respect to the link between smoking and disease;

(b) initiatives pursuant to the ICOSI positions would be carried out, whenever possible, by Head Members, including the CTMC, to ensure compliance in the various tobacco markets worldwide;

(c) when it was not possible for Head Members to carry out ICOSI's initiatives, Other Members individually would carry them out; and

(d) Head Members subsidiary companies would, when required, suspend or subvert their local or national interests in order to assist in preserving and growing the tobacco industry as a whole.

(vii) peculiar knowledge

73. Further particulars of the way in which the civil conspiracy or common purpose was entered into or continued, and Group Member breaches of duty in furtherance thereof, are peculiarly known to Group Members.

(c) joint liability

74. The Head Members civilly conspired with each other and with the Other Members with respect to the breaches of duty committed by the Other Members. Alternatively:

(a) Head Members acted in concert with the Other Members with respect to the Other Members' breaches of duty;

(b) if Group Members did not agree or intend that unlawful means be used in pursuing their civil conspiracy or common purpose, they knew or ought to have known that one or more of them would likely commit breaches of duty in furtherance of it. As a result, Head Members acted in concert with Other Members, or each of them, with respect to Other Members' breaches of duty;

(c) in breaching duties, Other Members acted as agents of Head Members; or

(d) Head Members directed the activities of Other Members to such a degree that the Other Members' breaches of duties were also committed by Head Members.

75. The CTMC was an agent of the Tobacco Industry which directed and co-ordinated the activities of the CTMC to such a degree that the CTMC's breaches were committed by the Defendants.

(6) waiver of tort

76. The Plaintiff and class members claim the right to waive the torts described above, and claim an aggregate monetary award for the amount of revenues the Defendants received from the sale of cigarettes to class members in Canada, including British Columbia, based on the following:

(a) The Defendants breached legal, statutory, and equitable duties and obligations in the manner outlined above;

(b) The Defendants intended to, and did, profit as a result of their breaches of legal, statutory, and equitable duties; and

(c) If the Defendants had complied with their duties the Plaintiff and class members:

(i) would not have started, nor gotten addicted to cigarettes;

(ii) would not have purchased cigarettes; and

(iii) would not have been enriched from the sale of cigarettes.

(7) family compensation act

77. The Plaintiff pleads and relies on the *Family Compensation Act*, R.S.B.C. 1996, c. 126, as am., including ss. 2 and 3(8)-(9).

V. RELIEF

78. On behalf of himself and class members, the Plaintiff claims against the Defendants, jointly and severally:

(a) compensatory and aggravated damages;

(b) punitive or exemplary damages;

(c) the right to waive the torts described above and claim the amount of revenues the Defendants received from the sale of cigarettes to class members during the Knowledge Period, and an order requiring the Defendants to disgorge the revenues determined by the accounting to the benefit of class members;

(d) interest pursuant to the *Court Order Interest Act*; and

(e) such other relief as this Honourable Court deems just.

DATED at the City of Victoria, in the Province of British Columbia, on the 25th day of June, 2010.

MERCHANT LAW GROUP LLP
Barristers and Solicitors
2401 Saskatchewan Drive
Regina, Saskatchewan
S4P 4H8

Address for Service: 531 Quadra Street
Victoria, BC
V8V 3S4

Lawyer in Charge: E. F. Anthony Merchant, Q.C.
Telephone: (250) 385-7777
Fax: (250) 478-9943

This Statement of Claim was delivered by: Merchant Law Group LLP

TAB IX

No. 10-2769 Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Roderick Dennis McDermid,

PLAINTIFF

AND:

Imperial Tobacco Canada Limited, B.A.T. Industries p.l.c.,
British American Tobacco (Investments) Limited, British American Tobacco, p.l.c.,
Altria Group, Inc., Philip Morris International, Inc., Philip Morris USA Inc.,
R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco Company,
R. J. Reynolds Tobacco International, Inc., Carreras Rothmans Limited,
JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., Rothmans Inc.,
Ryesekks p.l.c., and Canadian Tobacco Manufacturers' Council,

DEFENDANTS

Brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

WRIT OF SUMMONS & STATEMENT OF CLAIM

MERCHANT LAW GROUP LLP
531 Quadra Street
Victoria, B.C.
V8V 3S4

E. F. Anthony Merchant, Q.C.
Phone: (250) 478-9928
Fax: (250) 478-9943

Court Box: 138

SUPREME COURT
OF
BRITISH COLUMBIA
SEAL
VICTORIA
REGISTRY

JUN 25 2010

No. 10-27-69
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Roderick Dennis McDermid,

PLAINTIFF

Imperial Tobacco Canada Limited, B.A.T. Industries p.l.c.,
British American Tobacco (Investments) Limited, British American Tobacco, p.l.c.,
Altria Group, Inc., Philip Morris International, Inc., Philip Morris USA Inc.,
R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco Company,
R. J. Reynolds Tobacco International, Inc., Carreras Rothmans Limited,
JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., Rothmans Inc.,
Ryesekks p.l.c., and Canadian Tobacco Manufacturers' Council,

DEFENDANTS

Brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

WRIT OF SUMMONS

Name and Address of each Plaintiff:

Roderick Dennis McDermid
c/o Merchant Law Group LLP
531 Quadra Street
Victoria B.C. V8V 3S4

Name and Address of each Defendant:

Imperial Tobacco Canada Limited
3711 Rue Saint-Antoine
Montreal, Quebec

B.A.T. Industries p.l.c.
Globe House
4 Temple Place
London, England

British American Tobacco (Investments) Limited
Globe House
1 Water Street
London, England

British American Tobacco, p.l.c.
Globe House
4 Temple Place
London, England

Altria Group, Inc.
6601 West Broad Street
Richmond, Virginia

Philip Morris International, Inc.
6601 West Broad Street
Richmond, Virginia

Philip Morris USA Inc.
6601 West Broad Street
Richmond, Virginia

R. J. Reynolds Tobacco Company
401 North Main Street
Winston Salem, North Carolina

R. J. Reynolds Tobacco Company
401 North Main Street
Winston Salem, North Carolina

R. J. Reynolds Tobacco International Inc.
401 North Main Street
Winston Salem, North Carolina

Carreras Rothmans Limited
Globe House, 1 Water Street
London, England

JTI-Macdonald Corp.
1300-1969 Upper Water Street
Purdy's Wharf Tower II
Halifax, Nova Scotia

Rothmans, Benson & Hedges Inc.
1500 Don Mills Road
New York, Ontario

Rothmans Inc.
1500 Don Mills Road
New York, Ontario

Ryesekks p.l.c.
Plumtree Court
London, England

Canadian Tobacco Manufacturers' Council
6 D'Angers Street
Gatineau, Quebec

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom, Canada and Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith.

To the Defendants: **Imperial Tobacco Canada Limited**
B.A.T. Industries p.l.c.
British American Tobacco (Investments) Limited
British American Tobacco, p.l.c.
Altria Group, Inc.
Philip Morris International, Inc.
Philip Morris USA Inc.
R. J. Reynolds Tobacco Company
R. J. Reynolds Tobacco Company
R. J. Reynolds Tobacco International, Inc.
Carreras Rothmans Limited
JTI-Macdonald Corp.
Rothmans, Benson & Hedges Inc.
Rothmans Inc.
Ryesekks p.l.c.
Canadian Tobacco Manufacturers' Council

TAKE NOTICE that this action has been commenced against you by the plaintiffs for the claim set out in this writ.

IF YOU INTEND TO DEFEND this action, or if you have a set off or counterclaim that you wish to have taken into account at the trial, **YOU MUST**

(a) **GIVE NOTICE** of your intention by filing a form entitled "Appearance" in the above registry of this court, at the address shown below, within the Time

for Appearance provided for below and **YOU MUST ALSO DELIVER** a copy of the Appearance to the plaintiffs' address for delivery, which is set out in this writ, and

(b) if a statement of claim is provided with this writ of summons or is later served on or delivered to you, FILE a Statement of Defence in the above registry of this court within the Time for Defence provided for below and DELIVER a copy of the Statement of Defence to the plaintiffs' address for delivery.

YOU OR YOUR SOLICITOR may file the Appearance and the Statement of Defence. You may obtain a form of Appearance at the registry.

JUDGMENT MAY BE TAKEN AGAINST YOU IF

(a) **YOU FAIL** to file the Appearance within the Time for Appearance provided for below; or

(b) **YOU FAIL** to file the Statement of Defence within the Time for Defence provided for below.

TIME FOR APPEARANCE

If this writ is served on a person in British Columbia, the time for appearance by that person is 7 days from the service (not including the day of service).

If this writ is served on a person outside British Columbia, the time for appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

TIME FOR DEFENCE

A Statement of Defence must be filed and delivered to the plaintiffs within 14 days after the later of

(a) the time that the Statement of Claim is served on you (whether with this writ of summons or otherwise) or is delivered to you in accordance with the Rules of Court, and

(b) the end of the Time for Appearance provided for above.

[or, if the time for defence has been set by order of the court, within that time.]

(1) The address for the registry is:
Ministry of Attorney General
Court Registry
PO Box 9248 Stn Prov Govt
2nd Floor, 850 Burdett Avenue
Victoria, British Columbia
V8W 9J2

(2) The plaintiffs' ADDRESS FOR DELIVERY is:

Merchant Law Group LLP
531 Quadra Street
Victoria B.C. V8V 3S4
Fax number for delivery (if any): 250-478-9943

(3) The name and office address of the plaintiffs' solicitor is:

Merchant Law Group LLP
531 Quadra Street
Victoria B.C. V8V 3S4

The Plaintiff's claim is set out in the Statement of Claim attached hereto.

ENDORSEMENT ON ORIGINATING PROCESS FOR SERVICE OUTSIDE OF BRITISH COLUMBIA

The Plaintiff claims the right to serve this Writ and Statement of claim on the Defendants, Imperial Tobacco Canada Limited, B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, British American Tobacco, p.l.c., Altria Group, Inc., Philip Morris International, Inc., Philip Morris USA Inc., R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco International, Inc., Carreras Rothmans Limited, JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., Rothmans Inc., Ryesekks p.l.c., and Canadian Tobacco Manufacturers' Council outside of British Columbia on the ground that the claims involves a tort and statutory breach committed in British Columbia.

Dated: June 25, 2010

Merchant Law Group LLP
Solicitors for the Plaintiff

No. _____
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Roderick Dennis McDermid,

PLAINTIFF

AND:

Imperial Tobacco Canada Limited, B.A.T. Industries p.l.c.,
British American Tobacco (Investments) Limited, British American Tobacco, p.l.c.,
Altria Group, Inc., Philip Morris International, Inc., Philip Morris USA Inc.,
R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco Company,
R. J. Reynolds Tobacco International, Inc., Carreras Rothmans Limited,
JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., Rothmans Inc.,
Ryesekks p.l.c., and Canadian Tobacco Manufacturers' Council,

DEFENDANTS

Brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

STATEMENT OF CLAIM

I. OVERVIEW

1. Cigarettes are a dangerous and defective product. Even when used as directed, cigarettes inevitably cause death and disease to a large percentage of users.

2. The Defendants, who manufacture and sell almost all of the cigarettes sold in this country, and their co-conspirators, have for many years sought to deceive Canadians about the health effects of smoking. For decades, the Defendants repeatedly and consistently denied that smoking cigarettes causes disease, even though they have known since 1953, at the latest, that smoking increases the risk of disease and death. The Defendants have repeatedly and consistently denied that cigarettes are addictive even though they have long understood and intentionally exploited the addictive properties of nicotine.

3. Smoking has adverse health effects on the heart, and is the leading cause of heart disease.

II. CLASS

4. The Plaintiff brings this claim on behalf of all individuals, including their estates, who were alive on June 12th, 2007, and who have suffered, or who currently suffer, from heart disease, after having smoked a minimum of 25,000 cigarettes designed, manufactured, imported, marketed, or distributed by the Defendants.[1]

III. PARTIES

(1) plaintiff

5. The Plaintiff, Roderick Dennis McDermid, resides in Port Alberni, British Columbia.

6. Mr. McDermid began smoking cigarettes in 1957, when he was thirteen years of age. Mr. McDermid has been a one to two pack a day smoker over many years. Over a lifetime of being addicted to cigarette smoking and nicotine, he has smoked in excess of 500,000 cigarettes.

7. Mr. McDermid continues to smoke because of his addiction even after he was diagnosed with heart disease caused by his smoking. His doctors have warned him that if he continues to smoke his health will further deteriorate. Unfortunately, Mr. McDermid's determination, and strength of character are no match for his all consuming addiction to cigarettes.

(2) defendants

(a) BAT Group

8. B.A.T Industries p.l.c. was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Globe House, 4 Temple Place, London, England.

---

[1] By the end of 1953, the Defendants knew or should have been known, that cigarettes posed an unacceptable health risk. The period from January 1st, 1954 to the present is the "Knowledge Period".

9. British American Tobacco p.l.c., was incorporated pursuant to the laws of the United Kingdom and has a registered office at Globe House, 4 Temple Place, London, England.

10. British American Tobacco (Investments) Limited was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Globe House, 1 Water Street, London, England.

11. Imperial Tobacco Canada Limited was incorporated pursuant to the laws of Canada. It has a registered office at 3711 Rue Saint-Antoine Montréal, Quebec.

(b) Philip Morris Group

12. Altria Group, Inc. (formerly known as Philip Morris Companies Inc.), was incorporated pursuant to the laws of Virginia. Its principal place of business is 6601 West Broad Street, Richmond, Virginia.

13. Philip Morris International, Inc. was incorporated pursuant to the laws of Delaware. It has a registered office at 120 Park Avenue, New York, New York.

14. Philip Morris USA Inc. (formerly Philip Morris Incorporated, and Philip Morris & Co., Ltd.) was incorporated pursuant to the laws of Virginia. Its principal place of business is at 6601 West Broad Street, Richmond, Virginia.

15. Rothmans, Benson & Hedges Inc. was incorporated pursuant to the laws of Canada. It has a registered office at 1500 Don Mills Road, North York, Ontario.

(c) R.J. Reynolds Group

16. JTI-Macdonald Corp. was incorporated pursuant to the laws of Nova Scotia. It has a registered office at 1300 - 1969 Upper Water Street, Purdy's Wharf Tower II, Halifax, Nova Scotia.

17. R.J. Reynolds Tobacco Company was incorporated pursuant to the laws of New Jersey. Its principal place of business was at 401 North Main Street, Winston Salem, NC. In this claim, references to R.J. Reynolds Tobacco Company before July 30, 2004, relate to the R.J. Reynolds Tobacco Company which was incorporated in New Jersey.

18. R. J. Reynolds Tobacco Company was incorporated pursuant to the laws of North Carolina. Its principal place of business is at 401 North Main Street, Winston Salem, NC. In this claim, references to R.J. Reynolds Tobacco Company on or after July 30, 2004, relate to the R.J. Reynolds Tobacco Company which was incorporated in North Carolina.

19. R. J. Reynolds Tobacco International, Inc. was incorporated pursuant to the laws of Delaware. Its principal place of business is at 401 North Main Street, Winston Salem, North Carolina.

(d) Rothmans Group

20. Carreras Rothmans Limited was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Globe House, 1 Water Street, London, England.

21. Ryesekks p.l.c. (formerly Rothmans International p.l.c., before that, Rothmans International Limited, and before that Carreras Limited) was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Plumtree Court, London, England.

22. Rothmans Inc. (formerly Rothmans of Pall Mall Canada Limited) was incorporated pursuant to the laws of Canada. It has a registered office at 1500 Don Mills Road, North York, Ontario.

(e) CTMC

23. The Canadian Tobacco Manufacturers' Council ("CTMC") was incorporated pursuant to the laws of Canada. It has a registered office at 6 D'Angers St., Gatineau, Quebec.

(3) canadian manufacturers

24. The principal Canadian cigarette manufacturers who designed, manufactured, imported, marketed, or distributed cigarettes to the Plaintiff and the class in Canada, including British Columbia, were and are:

(1) **Imperial Tobacco Canada Limited:** In 1912, Imperial Tobacco Company of Canada Limited was incorporated.

(a) In September of 1970:

(i) it changed its name to Imasco Limited (effective Dec. 1st,1970); and

(ii) Imperial Tobacco Limited, a wholly-owned subsidiary, acquired part of the tobacco related business of Imasco Limited, and

(b) In February of 2000:

(i) Imasco Limited amalgamated with its subsidiaries including Imperial Tobacco Limited to form Imasco Limited; and

(ii) In a second amalgamation, also in or about February, 2000, Imasco Limited amalgamated with its parent company, British American Tobacco (Canada) Limited, to form Imperial Tobacco Canada Limited. Imperial Tobacco Canada Limited is a wholly-owned subsidiary of the defendant, British American Tobacco p.l.c.

(c) Imperial Tobacco Canada Limited and the various Imperial Tobacco related corporations named in sub-paragraphs (a) and (b) above, directly or indirectly designed, manufactured, imported, marketed, or distributed cigarettes sold in Canada, including British Columbia, during the Knowledge Period, causing members of the class to suffer or die from heart disease.

(2) **Rothmans, Benson & Hedges Inc.:** In 1934, Benson & Hedges (Canada) Inc. was incorporated. In 1960, Rothmans of Pall Mall Limited was incorporated in the United Kingdom. In 1985 it acquired part of the tobacco related business of Rothmans Inc.. In 1986, Rothmans, Benson & Hedges Inc. was formed from an amalgamation of Rothmans of Pall Mall Limited and Benson & Hedges (Canada) Inc.

(a) Until 1986, Rothmans of Pall Mall Limited and Benson & Hedges directly or

indirectly designed, manufactured, imported, marketed, or distributed cigarettes in Canada, including British Columbia.

(b) After 1986, Rothmans, Benson & Hedges Inc. directly or indirectly designed, manufactured, imported, marketed, or distributed cigarettes in Canada, including British Columbia.

(c) Rothmans Inc. owns 40% of the securities of Rothmans, Benson & Hedges Inc. FTR Holding S.A., a Swiss company, a subsidiary of Altria Group, Inc., and an affiliate of Philip Morris U.S.A. Inc. and Philip Morris International, Inc., owns 40% of the securities of Rothmans, Benson & Hedges Inc.

(d) Rothmans Inc. and the various Rothmans related corporations named in sub-paragraphs (a), (b), and (c) above, directly or indirectly designed, manufactured, imported, marketed, or distributed cigarettes in Canada, including British Columbia, during the Knowledge Period, causing members of the class to suffer or die from heart disease.

(3) **JTI-Macdonald Corp.**: In 1930, W.C. MacDonald Incorporated was incorporated pursuant to the laws of Quebec. From 1858, it carried on business in Montreal as an unincorporated entity. In 1957, it changed its name to Macdonald Tobacco Inc.. In 1973, Macdonald Tobacco Inc. became a wholly-owned subsidiary of R.J. Reynolds Tobacco Company. In 1978:

(a) RJR-Macdonald Inc. was incorporated as a wholly-owned subsidiary of R.J. Reynolds Tobacco Company; and

(b) R.J. Reynolds Tobacco Company sold Macdonald Tobacco Inc. to RJR-Macdonald Inc.. RJR-Macdonald Inc. acquired all or substantially all of Macdonald Tobacco Inc.'s assets and continued the business of manufacturing and promoting cigarettes previously carried on by Macdonald Tobacco Inc..

(c) In 1999, RJR-Macdonald Inc. changed its name to RJR-Macdonald Corp., which subsequently, changed its name to JTI-Macdonald Corp.

(d) RJR-Macdonald Inc. and the various RJR related corporations named in (a), (b), and (c) above, directly or indirectly designed, manufactured, imported, marketed, or distributed cigarettes in Canada, including British Columbia, during the

Knowledge Period, causing members of the class to suffer or die from heart disease.

25. Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., and JTI-Macdonald Corp. are the three largest Canadian cigarette manufacturers. They, and each of the Defendants, directly or indirectly, designed, manufactured, imported, marketed, or distributed cigarettes sold in Canada, including British Columbia, under brands that included:

"CANADIAN MANUFACTURERS"	BRAND NAMES	
Imperial Tobacco Canada Limited	• Avanti • Cameo • Du Maurier • JPS • Kool • Marlboro • Matinée	• Pall Mall • Peter Jackson • Player's • Sterling • Sweet Caporal • Viceroy • Vogue
Rothmans, Benson & Hedges Inc.	• Benson & Hedges • Craven A • Davidoff	• Number 7 • Rothmans
JTI-Macdonald Corp.	• Camel • Export "A" • Macdonald Special	• Macdonald Select • Vantage • Winston

26. The CTMC is the trade and lobbying association of the Canadian tobacco industry. It advances the interests of manufacturers and promotes cigarette smoking. Its membership has included, among others, Imperial Tobacco Canada Limited, JTI-Macdonald Corp., R.J. Reynolds Tobacco Company, and Rothmans, Benson & Hedges Inc.

(4) non-canadian manufacturers

27. The BAT Group, the Philip Morris Group, the R.J. Reynolds Group, and the Rothmans Group, have each directly or indirectly designed, manufactured, imported, marketed, or distributed cigarettes sold in Canada, including British Columbia.

IV. CAUSES OF ACTION

28. By directly or indirectly designing, manufacturing, importing, marketing, or distributing cigarettes in Canada, including British Columbia, each Defendant carried on business in British Columbia.

(1) tobacco products

(a) nicotine

29. Nicotine is a psychoactive drug that affects various body systems including the brain and central nervous system, skeletal muscles, cardiovascular system, endocrine functions, lungs, and other organs.[2]

30. Nicotine is addictive.

(b) tobacco

31. Tobacco contains nicotine.

(c) cigarettes

32. Cigarettes contain tobacco. When smoked, they deliver nicotine to users thereby causing addiction.[3]

---

[2] Despite decades of public pronouncements to the contrary, the tobacco industry admits in its confidential internal correspondence that nicotine is a drug. *See* **Sch. 01** ("We are, then, in the business of selling nicotine, an addictive drug... .") (B&W/BAT, 1963); **Sch. 02** ("Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects.") (RJR, 1972); **Sch. 03** ("B.A.T. should learn to look at itself as a drug company rather than a tobacco company.") (BAT, 1980); **Sch. 04** ("[D]o we really want to tout cigarette smoke as a drug? It is, of course, but there are dangerous F.D.A. implications to having such conceptualization go beyond these walls. . . .") (PM, 1969).

[3] *See* **Sch. 05** ("Very few consumers are aware of the effects of nicotine, i.e., its addictive nature and that nicotine is a poison.") (B&W/BAT, 1978); **Sch. 06** ("The cigarette should be conceived not as a product but as a package. The product is nicotine. . . . Think of the cigarettes as a dispenser for a dose unit of nicotine.") (PM, 1972); **Sch. 02** ("Happily for the tobacco industry, nicotine is both habituating and unique in its variety of physiologic actions ....") (RJR, 1972).

33. By smoking cigarettes, smokers become addicted to nicotine. While addicted, they regularly crave nicotine. They satisfy their craving by smoking cigarettes. Attempting to stop smoking causes irritability, difficulty concentrating, anxiety, restlessness, increased hunger, depression, and a pronounced craving for tobacco.[4]

34. When Mr. McDermid and class members inhale tobacco smoke as intended by the Defendants, they also inhale harmful substances which the Defendants knew could cause heart disease. These substances include aldehydes, ammonia, carbon monoxide, catechol, endotoxins, hydrogen cyanide, metals, micotoxins, nicotine, nitrogen dioxide, nitrogen monoxide, nitrosamines, organics, phenols, polyaromatic hydrocarbons, and tar.[5]

35. As a result, inhaling cigarette smoke causes or materially contributes to heart disease.

(2) tort

(a) duty

36. The BAT Group, the Philip Morris Group, the R.J. Reynolds Group, and the Rothmans Group (the "Tobacco Industry"), directly or indirectly, designed, manufactured, imported, marketed, and distributed cigarettes that were not altered by class members after leaving their manufacturing and distribution facilities.

---

[4] *See* **Sch. 07** ("Once addiction does take place, it becomes necessary for the smoker to make peace with the accepted hazards. This is done by a wide range of rationalizations.... However, the desire to quit, and actually carrying it out, are two quite different things, as the would-be quitter soon learns.") (ITL, 1982). **Sch. 08** ("[S]moking is a habit of addiction that is pleasurable.") (BAT, 1962); **Sch. 09** ("High profits ... are directly related to the fact that the customer is dependent upon the product.") (BAT, 1979).

[5] *See* **Sch. 10** ("[I]f anyone ever identified any ingredient in tobacco smoke as being hazardous to human health or being something that shouldn't be there; we could eliminate it. But no one ever has.") (PM, 1976); **Sch. 11** ("[B]iologically active materials [are] present in cigarette tobacco. These are: a) cancer causing; b) cancer promoting; and c) poisonous.") (L&M, 1961) Liggett & Myers is not a party to these proceedings, but its documents and those of other non-party tobacco manufacturers and trade groups illustrate state of the art and general industry knowledge. *See also* **Sch. 12** ("Eight of the polycyclic hydrocarbons isolated from the smoke are known to produce cancer in mice.... [T]here is a distinct possibility that these substances would have a carcinogenic effect on the human respiratory system.") (RJR, 1959); **Sch. 13** ("[N]itrosamines are the most potent carcinogens known to man....") (PM, 1958).

37. The Tobacco Industry therefore owed Mr. McDermid and the class a duty of care:

(a) to take all reasonable measures to eliminate, minimize, or reduce the risks of smoking cigarettes;

(b) not to manufacture defective cigarettes; and

(c) to provide reasonably clear, complete, and current warnings of the risks of smoking cigarettes of which they knew or ought to have known.

38. The Tobacco Industry owed a special duty to children and adolescents to take reasonable measures to prevent them from starting or continuing to smoke.

(b) knowledge

39. At all material times, the Tobacco Industry was in possession of scientific and medical data which established the risks of smoking cigarettes. They knew or ought to have known that:

(a) nicotine is addictive;

(b) nicotine addiction compels smokers to continue to smoke; and

(c) the cigarettes they designed, manufactured, imported, marketed, and distributed:

(i) contained nicotine and were therefore addictive; and

(ii) contained the substances enumerated in paragraph 34, which are described in the Schedules, and therefore caused class members to suffer from heart disease.

(c) breach

(i) duty not to market

40. In past and continuing breach of their duty of care, the Tobacco Industry:

(a) failed to conduct proper investigation, research, and testing as to the risk of cigarette smoking related illness, nicotine addiction, and the feasibility of eliminating or

minimizing these risks;[6]

(b) failed to design a reasonably safe product and to take all reasonable measures to eliminate, minimize the risk of heart disease;

(c) failed to eliminate or reduce to a safe level, substances and by-products of combustion, including nicotine and tar, which can cause heart disease;

(d) designed, manufactured, marketed, imported, and distributed defective cigarettes which:

(i) when smoked as intended, are addictive and cause heart disease in an unreasonable number of users;[7] and

(ii) have no utility or benefit to consumers, or have a utility or benefit which is vastly outweighed by the risk of contracting heart disease;

(e) wilfully increased the bio-availability of nicotine in their cigarettes by:

(i) special blending the tobacco;

(ii) sponsoring or engaging in selective breeding and genetic engineering of tobacco plants;

(iii) adding nicotine or substances containing nicotine; and

(iv) introducing substances, including ammonia, into their cigarettes.

---

[6] *See* **Sch. 14** ("Members of [the RJR] Research Department have studied in detail cigarette smoke composition. Some of the findings have been published. However, much data remain unpublished because they are concerned with carcinogenic or co-carcinogenic compounds....") (RJR, 1962); **Sch. 15** ("The psychopharmacology of nicotine is a highly vexatious topic. It is where the action is for those doing fundamental research on smoking, and from where most likely will come significant scientific developments profoundly influencing the industry. Yet it is where our attorneys least want us to be, for two reasons... The first reason is the oldest and is implicit in the legal strategy employed over the years in defending corporations ... 'We within the industry are ignorant of any relationship between smoking and disease. Within our laboratories no work is being conducted on biological systems.' That posture has moderated considerably as our attorneys have come to acknowledge that the original carte blanche avoidance of all biological research is not required in order to plead ignorance about any pathological relationship between smoke and smoker.") (PM, 1980).

[7] *See* **Sch. 09** ("[H]igh profits ... are directly related to the fact that the customer is dependent upon the product.") (BAT, 1979); **Sch. 16** ("A cigarette that does not deliver nicotine cannot satisfy the habituated smoker and cannot lead to habituation and would therefore almost certainly fail.") (PM, 1966).

(ii) duty to warn

41. The Tobacco Industry breached its duty to warn consumers. They:

(a) failed to provide any reasonable warnings before 1972;

(b) failed to provide reasonable warnings of the risk of heart disease, caused by smoking, and of the risk of nicotine addiction after 1972. In particular, their warnings:

(i) were designed to be ineffective;

(ii) did not give users, prospective users, and the public, an adequate indication of each of the specific risks of smoking their cigarettes;

(iii) were given only to forestall more effective governmental warnings;

(iv) failed to make clear, complete, and current disclosure of the risks inherent in smoking their cigarettes; and

(v) failed to advertise and market the warnings effectively;

(c) made representations which they knew or ought to have known were false and deceptive. In particular, they falsely represented:

(i) that smoking has not been shown to cause disease;[8]

(ii) that they were not aware of any credible research which established a link between smoking and disease;[9]

(iii) that many diseases shown to have been related to tobacco were in fact related to environmental or genetic factors;[10]

---

[8] *Compare* **Sch. 17** ("With one exception the individuals whom we met believe that smoking causes lung cancer.") (BAT, 1958) *with* **Sch. 18** ("We do not believe that cigarettes are hazardous; we do not accept that."); **Sch. 19** ("There is disagreement among medical experts as to whether the reported associations between smoking and various diseases are causal or not. CTMC's position is to the effect that no causal relationship has been established.") (CTMC1978); **Sch. 20** ("Doubt is our product since it is the best means of competing with the body of fact that exists in the mind of the general public. It is also the means of establishing a controversy.") (B&W, 1969).

[9] *See* **Sch. 21** ("Despite all the research going on, the simple and unfortunate fact is that scientists do not know the cause or causes of the chronic diseased reported to be associated with smoking.... We would appreciate you passing this information along to your [fifth grade] students." (RJR, 1990); **Sch. 22** ("It is not known whether cigarettes cause cancer.") (RJR, 1984).

[10] *See* **Sch. 23** ("Distinguished authorities point out that there is no proof that cigarette smoking is one of the causes.... That statistics purporting to link cigarette smoking with disease could apply with equal force to any other aspect of modern life."); **Sch. 24** ("[M]any scientists are becoming concerned that preoccupation with smoking may be both unfounded and dangerous, unfounded because evidence on many critical points is

(iv) that cigarettes were not addictive;[11]

(v) that smoking was merely a habit or custom as opposed to an addiction;[12]

(vi) that they did not manipulate nicotine levels in their cigarettes;[13]

(vii) that they did not include substances in their cigarettes designed to increase the bio-availability of nicotine;[14]

(viii) the actual intake of tar and nicotine associated with smoking cigarettes, as opposed to levels measured on machines;[15]

(ix) that certain of their cigarettes, such as "filter", "mild", "low tar", "light", and "extra light" brands, were safer than other cigarettes;[16] and

---

conflicting, dangerous because it diverts attention from other suspected hazards.") (TI, 1979).

[11] *See* **Sch. 25** ("The fact is there is nothing about smoking, or about the nicotine in cigarettes, that would prevent smokers from quitting.") (TI, 1989); **Sch. 26** ("The fact is there is nothing about smoking, or about the nicotine in cigarettes, that would prevent smokers from quitting." (RJR, 1992).

[12] *See* **Sch. 27** ("When we use the term 'addiction,' there are two meanings. There's an everyday meaning when we talk about being news junkies or chocoholics.... Now, under that, all kinds of habits become addictions. And so if it's a habit, then, yes, smoking can be a habit.") (TI, 1994); **Sch. 28** ("If [cigarettes] are behaviorally addictive or habit forming, they are much more like caffeine, or in my case, Gummy Bears.") (PM, 1997).

[13] *See* **Sch. 29** ("Dr. Kessler's contention that we add or otherwise manipulate nicotine to create, maintain, or satisfy an addiction, is false.") (RJR, 1994); **Sch. 30** ("The claims that RJR increases the nicotine in its cigarettes are false. RJR does not increase nicotine in cigarettes above what is found naturally in tobacco.") (RJR, 1994)

[14] *Compare* **Sch. 31** ("There is no indication that ammonia compounds in our cigarettes alter the amount of nicotine the smoker inhales.") (PM, 1994) *with* **Sch. 32** ("We are pursuing this project with the eventual goal of lowering the total nicotine present in smoke while increasing the physiologic effect of the nicotine which is present, so that no physiological effect is lost on nicotine reduction.") (RJR, 1973); **Sch. 33** ("Marlboro (and other Philip Morris brands) as compared with WINSTON, our other brands and most other brands on the market shows : (1) higher smoke pH (higher alkalinity), hence increased amounts of 'free' nicotine in smoke, and higher immediate nicotine 'kick'.") (RJR, 1973); **Sch. 34** ("Cigarettes made from filler oversprayed with nicotine as the citrate (NC) produce CNS effects whicb are approximately half the magnitude of those obtained with the FB [freebase] or unextracted cigarettes - at comparable nicotine delivery levels.") (PM, 1989).

[15] *See* **Sch. 35** ("The paper itself expresses what we in Behavioral have 'felt' for quite some time. That is, smokers smoke differently than the FTC machine and may very well smoke to obtain a certain level of nicotine in their bloodstream.") (RJR, 1983).

[16] *See* **Sch. 36** ("[T]here 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.") (ITL, undated); **Sch. 37** ("Unmet needs of smokers that could be satisfied by newer modified products, products which could delay the quitting process, are pursued.") (ITL, 1986).

(x) that smoking was consistent with a healthy lifestyle;[17]

(d) misled consumers on a class wide objective standard that cigarettes were safer than they actually were by:

(i) incorporating into the design of their cigarettes ineffective safety features including filters which they knew or ought to have known were ineffective, yet whose presence falsely implied safety;[18] and

(ii) designing, manufacturing, importing, marketing, and distributing "mild", "low tar", "light", and "extra light" cigarettes, which they marketed in a manner which misled consumers into thinking that they were safer to use than they actually were;

(e) misled consumers on a class wide objective standard about the risks of smoking using innuendo, exaggeration, and ambiguity;

(f) systemically made statements regarding smoking and health which they knew were incomplete or inaccurate;

(g) failed to correct statements made by others regarding the risks of smoking, which they knew were incomplete or inaccurate, thereby constituting misrepresentation by omission or silence;

(h) engaged in collateral marketing, promotional, and public relations activities to neutralize or negate the efficacy of warnings provided to consumers by governments, and other agencies concerned with public health;

(i) suppressed information regarding the risks of smoking; and

---

[17] *See* **Sch. 44** ("Since younger smokers represent the recruitment market, and female smokers are clearly a growth segment, in-depth motivational studies of both groups are strongly indicated.") (BAT, 1985); **Sch. 45** ("Young smokers represent the major opportunity group for the cigarette industry, we should therefore determine their attitude to smoking and health and how this might change over time.") (ITL, 1970).

[18] The industry has long known that smokers compensate for ventilated filters by taking bigger puffs and blocking vent holes. *See* **Sch. 38** ("[S]ubjects took more puffs of very much larger volume from the ventilated cigarette, but showed no difference in the way they inhaled smoke.") (BAT, 1972); **Sch. 39** ("[S]mokers adjust puff intake in order to maintain constant smoke intake.") (PM, 1967); **Sch. 40** ("[S]ome of these [vent] holes are likely to be occluded under normal smoking conditions, whereas no occlusion is likely to occur when the cigarettes are machine smoked for analysis.") (PM, 1967); **Sch. 16** ("The illusion of filtration is as important as the fact of filtration.") (PM, 1966).

(j) participated in a misleading campaign to make themselves appear more credible than health authorities and anti-smoking groups, and to reassure smokers that cigarette smoking was not as dangerous as it actually was or as authorities said it was.

42. At the Tobacco Industry's direction, the CMTC participated in this deception and was instrumental in thwarting or delaying government regulation.

43. The Tobacco Industry and the CMTC intended that these misrepresentations be relied upon by the Plaintiff, and the class for the purpose of inducing them to start or continue smoking.

(iii) special duties

44. The Tobacco Industry and the CMTC exploited the inability of children, adolescents, and those addicted to nicotine to protect their own interests because of their psychological and physiological dependence on nicotine and their augmented inability to understand smoking risks. In particular, the Tobacco Industry knew or ought to have known that:

(a) more than 80% of smokers start to smoke and become addicted before they are 19 years of age;

(b) it was illegal to sell cigarettes to children and adolescents in Canada, including British Columbia, and to promote smoking by such persons;

(c) children and adolescents might start or continue to smoke their cigarettes; and

(d) children and adolescents who smoked their cigarettes would become addicted to cigarettes and were likely to contract heart disease.

45. In breach of their duty to children and adolescents in Canada, including British Columbia, the Tobacco Industry:

(a) failed to take any reasonable measures to prevent them from starting or continuing to smoke;

(b) targeted children and adolescents in their promotional and marketing activities with the objective of inducing them to start or continue to smoke;

(c) undermined legislative and regulatory initiatives intended to prevent children and adolescents from starting or continuing to smoke; and

(d) provided cigarettes to persons under circumstances where they knew or ought to have known that they would be illegally brought into Canada, including British Columbia, and sold to children and adolescents.[19]

(iv) harm caused

46. Because of the acts and omissions of the Defendants described above, Mr. McDermid and class members started and continued to smoke cigarettes designed, manufactured, imported, marketed, or distributed by the Defendants. As a result, the Plaintiff suffered from heart disease caused by smoking cigarettes designed, manufactured, imported, marketed, and distributed by the Defendants.

47. The Plaintiff relies on *Sindell v. Abbott Laboratories*, 607 P.2d 924 (1980). "Market Share" herein, means the total volume of cigarettes promoted or sold by individual Group Members cumulatively during the Knowledge Period divided by the total volume of cigarettes promoted or sold cumulatively by all Group Members during the Knowledge Period producing a percentage for each Group Member.

---

[19] **Sch. 41** ("Realistically, if our company is to survive and prosper, over the long term, we must get our share of the youth market.") (RJR, 1973); **Sch. 42** ("The specific area of interest is young smokers between the ages of 15 and 19.") (BAT, undated); **Sch. 43** ("The under 25-year old smokers continue to show the highest level of potential for ITL activities. The model that sees young customers acquiring their preferences and staying with them as they age is increasingly valid.") (ITL, 1991); **Sch. 44** ("Since younger smokers represent the recruitment market, and female smokers are clearly a growth segment, in-depth motivational studies of both groups are strongly indicated.") (BAT, 1985); **Sch. 45** ("Young smokers represent the major opportunity group for the cigarette industry, we should therefore determine their attitude to smoking and health and how this might change over time.") (ITL, c.1970); **Sch. 46** ("RE-ESTABLISH clear distinct images for ITL brands with particular emphasis on relevance to younger smokers.") (ITL, c.1988); *Id.* ("If the last ten years have taught us anything, it is that the industry is dominated by the companies who respond most effectively to the needs of younger smokers. Our efforts on these brands will remain on maintaining their relevance to smokers in these younger groups in spite of the share performance they may develop among older smokers."); **Sch. 47** ("Contact leading firms in terms of children research ... contact Sesame Street ... contact Gerber, Schwinn, Mattel ... Determine why these young people were not becoming smokers.") (B&W, 1977).

48. Each of the Defendants, except the CTMC, jointly or separately maintained or currently maintains a Market Share such that each of them is liable for its proportion of the aggregate cost equal to a proportionate Market Share calculated cumulatively over the Knowledge Period.

49. Mr. McDermid and class members purchased or smoked cigarettes manufactured, imported, marketed, or distributed by the Defendants, except the CTMC. The aggregated damages for the Plaintiff and class members should be apportioned among the Group Members in proportion to their Market Share during the Knowledge Period, and imposed upon the other Defendants as the Court may deem appropriate.

(3) trade practices

50. The Plaintiff pleads and relies on the *Business Practices and Consumer Protection Act,* S.B.C. 2004, c.2, as am., including s. 171; the *Fair Trading Act*, R.S.A. 2000, c. F-2, as am. including s. 13; *The Consumer Protection Act*, S.S. 1996, c. C-30.1, as am., including s. 14, and Part III; *The Business Practices Act*, S.M. 1990-91, c. 6; the *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, as am., including s. 8, and Part III; the *Trade Practices Act*, R.S.N.L. 1990, c. T-71, as am., including s. 14; and other similar legislation throughout Canada.

(4) competition act

51. The Tobacco Industry, for the purposes of directly or indirectly promoting the supply or use of cigarettes, in breach of their statutory duties or obligations to consumers under the *Competition Act,* R.C.S. 1985, c. C-34, as am., including s. 36 and 52, made false or misleading representations to Mr. McDermid, and the class, with respect to the safety of cigarettes.

(5) concerted action

52. The BAT Group, the Philip Morris Group, the R.J. Reynolds Group, and the Rothmans Group (the "Tobacco Industry"), directly or indirectly, designed, manufactured,

imported, marketed, and distributed all or most of the cigarettes sold in Canada, including British Columbia. As defined terms used herein, their "Head Members" and "Other Members" were as follows:

group	"MEMBERS"	
	"Head Members"	**"Other Members"**
BAT	• **B.A.T Industries p.l.c.** - B.A.T. Industries Limited - Tobacco Securities Trust Limited • **British American Tobacco (Investments) Limited** - British-American Tobacco Company Limited • **British American Tobacco p.l.c.**	• **Imperial Tobacco Canada Limited** - Imasco Limited - Imperial Tobacco Limited
Philip Morris	• **Altria Group, Inc.,** - Philip Morris Companies Inc. • **Philip Morris Incorporated** • **Philip Morris International, Inc.** • **Philip Morris USA, Inc.**	• **Rothmans, Benson & Hedges Inc.** - Benson & Hedges (Canada) Inc.
RJR	• **R.J. Reynolds Tobacco Company** • **R.J. Reynolds Tobacco International, Inc.**	• **JTI-Macdonald Corp.** - Macdonald Tobacco Inc.
Rothmans	• **Carreras Rothmans Limited** • **Ryesekks p.l.c.**	• **Rothmans, Benson & Hedges Inc.** • **Rothmans Inc.** - Rothmans of Pall Mall Limited

53. The Head Members directed and coordinated common policies for each group relating to smoking and health and the Head Members and Other Members together are defined as the "Group" or "Group Members".

(a) agreement

54. In 1953 and early 1954, in response to mounting publicity about the link between smoking and disease,

(a) American Tobacco Company;

(b) Brown & Williamson Tobacco Corporation (in its own capacity and as agent for British American Tobacco (Investments) Limited);

(c) Philip Morris Incorporated; and

(d) R. J. Reynolds Tobacco Company,

conspired, or formed a common purpose, to use unlawful means to prevent the Plaintiff and class members, from learning about the harmful nature and addictive properties of cigarettes smoking, in circumstances where they knew or ought to have known would result in injury to the Plaintiff and class members.

55. The conspirators included members of the BAT Group (after about 1950), Philip Morris Group (after about 1954), RJR Group (after about 1973), and Rothmans Group (after about 1956), separately, and as a collective.

(b) unlawful means

56. Group Members formed and furthered the civil conspiracy or common purpose through:

(a) committees, conferences and meetings established, organized, and convened by Head Members and attended by Group Member senior personnel; and

(b) written and oral directives and communications among Group Members.

57. At these meetings and through these communications, Group Members agreed to breach their duties to consumers, the Plaintiff, and class members, as outlined above, and, in particular to:

(a) jointly disseminate objectively false and misleading information about smoking risks;

(b) suppress statements and admissions that smoking causes disease;

(c) suppress or conceal research regarding the risks of smoking;

(d) participate in a public relations program that promoted cigarettes, protected them from attacks based upon health risks, and reassured consumers that smoking was not hazardous; and

(e) ensure that the members of their respective Groups would implement the policies described in (a) through (d), above.

58. In or about 1962, the Tobacco Industry (referred to in Schedule 48 as "Canadian Tobacco Manufacturers") each signed an agreement not to make adverse health claims about each other's cigarettes, in order to prevent the risks of smoking from becoming known.[20]

(i) committees, conferences and meetings

59. The Group Members used committees, conferences, and meetings to direct or co-ordinate their common policies on smoking and health, including:

COMMITTEES, CONFERENCES, AND MEETINGS			
group	**committees**	**conferences**	**meetings**
BAT	•Chairman's Policy Committee • Research Policy Group •Scientific Research Group •Tobacco Division Board •Tobacco Executive Committee •Tobacco Strategy Review Team	•Chairman's Advisory Conferences • Group Research Conferences •Group Marketing Conferences	• particulars are peculiarly known to the BAT Group
PM	•particulars are peculiarly known to the PM Group	•Conference on Smoking and Health • Corporate Affairs World Conference	•Committee on Smoking Issues and Management • Corporate Products Committee
Rothmans	•particulars are peculiarly known to the Rothmans Group	•particulars are peculiarly known to the Rothmans Group	•particulars are peculiarly known to the Rothmans Group
RJR	•particulars are peculiarly known to the RJR Group	• "Hound Ears" and Sawgrass conferences	•Winston-Salem Smoking Issues Coordinator Meetings

(ii) directives and communications

60. The Head Members created and distributed written directives that set out their common policy on smoking and health issues to Group Member personnel for direct and

---

[20] **Sch. 48**

indirect dissemination to consumers. The full particulars of the directives and communications are known only to the Group Members, but included:

DIRECTIVES AND COMMUNICATIONS	
group	**directives and communications**
BAT	• "Smoking Issues: Claims and Responses" •"Consumer Helplines: How To Handle Questions on Smoking and Health and Product Issues" • "Smoking and Health: The Unresolved Debate", "Smoking: The Scientific Controversy" • "Smoking: Habit or Addiction?" • "Legal Considerations on Smoking and Health Policy"
PM	• "Smoking and Health Quick Reference Guides" and "Issues Alert[s]"
RJR	• "Issues Guide"
Rothmans	• particulars are peculiarly known to the Rothmans Group

61. Group Members further directed or co-ordinated their common policy and position on smoking and health:

(a) R.J. Reynolds International Inc. appointed and supervised a "smoking issue designee" in various global "Areas". The designees reported to the Manager of Science Information at R.J. Reynolds Tobacco Company. From 1974, a senior executive of Macdonald Tobacco Inc. (later of JTI-Macdonald Corp) was the designee in "Area II" (Canada).

(b) The Corporate Affairs and Public Affairs Departments of Philip Morris Incorporated and Philip Morris International, Inc. directed or advised departments of the other Philip Morris Group Members, including Rothmans, Benson & Hedges Inc. and its amalgamating company Benson & Hedges (Canada) Ltd., concerning the Philip Morris Group position on smoking and health issues.

(c) Ryesekks p.l.c. and Carreras Rothmans Limited, through the Rothmans International Research Division, created and disseminated statements which set out their position on smoking and health issues. In 1958, they issued numerous false announcements including

in the *Globe and Mail* (June 23rd, 1958) and in the *Toronto Daily Star* (August 13th, 1958) that:

(i) smoking in moderation was safe, and

(ii) Canadian-made Rothmans cigarettes were safer than those of other brands because they contained less tar and had "cooler" smoke.

(iii) canadian tobacco manufacturers' council

62. In 1963, in furtherance of their civil conspiracy or common purpose, as directed by the Head Members, and to maintain a united front on smoking and health issues, the Group Members formed the Ad Hoc Committee on Smoking and Health which, in 1969, was renamed the Canadian Tobacco Manufacturers' Council, and in 1982, it was incorporated.

63. Upon its formation, the CTMC adopted and participated in the civil conspiracy. Since 1963, the Tobacco Industry directed and caused the CTMC to:

(a) provide forums for the Tobacco Industry to further their civil conspiracy or common purpose;

(b) synchronize the Tobacco Industry's false positions on smoking and health issues with those of other international tobacco manufacturers and associations;

(c) relay the Tobacco Industry's common policies and positions respecting the health risks and concerns about smoking;

(d) suppress statements or admissions that smoking causes disease and health risks;

(e) suppress or conceal research regarding the adverse risks of smoking;

(f) counter independent attacks regarding the health risks of cigarettes and smoking;

(g) disseminate false and misleading information about the risks of smoking to governments, health and medical organizations, and consumers including the Plaintiff and the class:

(i) in 1963, the CTMC misrepresented to the Canadian Medical Association that there was no causal connection between smoking and disease; and

(ii) in 1969, CTMC misrepresented to the House of Commons, Standing Committee on Health, Welfare and Social Affairs, that there was no causal connection between smoking and disease;

(h) lobby the Federal and provincial governments to delay and minimize government initiatives pertaining to smoking and health; and

(i) participate in a public relations program on smoking and health issues with the intent of promoting cigarettes and maximizing sales.

64. The Group Members and the CTMC conspired or acted in concert in breaching their duties outlined above. They knew or ought to have known that one or more of them were likely to breach these duties in furtherance of the common purpose.

(iv) influence voting

65. Head Members further directed or co-ordinated the smoking and health policies of the Other Members within their Group by directing and advising them of how they should vote in committees of the Group Members and at meetings of the CTMC on smoking and health issues, including the approval and funding of research by the Tobacco Industry, all Group Members, and the CTMC.

(v) research organizations

66. Between late 1953 and the early 1960's:

(a) the Head Members formed or joined numerous research organizations including the:

(i) Centre for Co-operation in Scientific Research Relative to Tobacco ("CORESTA");

(ii) Tobacco Industry Research Council ("TIRC"), which was renamed the Council for Tobacco Research in 1964 ("CTR"); and

(iii) Tobacco Research Council ("TRC").

(b) the Head Members publicly represented that they or Other Members, along with CORESTA, TIRC/CTR, TRC, and similar organizations, would perform objective

research and gather data regarding the link between smoking and disease and internationally publicize the results.

(c) the Head Members agreed that they or Other Members, along with CORESTA, TIRC/CTR, TRC, and similar organizations, would conduct research and publicize information to counter, undermine, or obscure information that showed the link between smoking and disease, with a view to creating the widespread belief that there was a medical or scientific controversy as to whether smoking was harmful and whether nicotine was addictive, when in fact there was not.

(d) In 1963 and 1964, with a view to ensuring that no research would be approved or conducted by CORESTA, TIRC / CTR, and TRC which would indicate that cigarettes were dangerous, the Head Members and European tobacco companies and state monopolies agreed to coordinate their research on the link between smoking and disease with that conducted by the TIRC in the United States.

(e) In April and September 1963, Head Members of the BAT and RJR Groups agreed with members of the 'Council of Action' in Hamburg, Germany and with Head Members of the Philip Morris Group in New York, to develop a public relations campaign to counter reports of the English Royal College of Physicians, United States Surgeon General, and the Canadian Medical Association, and to falsely reassure consumers that their health would not be harmed by smoking cigarettes.

(f) In September 1963, in New York, the Head Members of the Philip Morris, RJR, and BAT Groups, along with other US tobacco companies, agreed that they, and members of their respective Groups, would not issue warnings about the link between smoking and disease unless and until required by governmental action.

(g) The very formation of 'research organizations' was a part of deliberately creating an objectively false impression and fraud upon the marketplace that unbiased research was being conducted.

67. From the outset of the civil conspiracy or common purpose described herein or, alternatively, from the time each defendant listed in paragraph 51, became a Group Member,

each Defendant agreed to and adopted the common purpose and breached their duties in furtherance thereof.

(vi) international committee on smoking issues

68. By the mid-1970's, motivated by their concern that admissions by any of the Group Members about a link between smoking and disease could lead to a 'domino effect' to the detriment of the worldwide industry, Head Members agreed to take an increased international response to reassure existing and potential smokers, and to protect the tobacco industry.

69. So, in furtherance of the civil conspiracy or common purpose:

(a) in June of 1977, Head Members and other international tobacco companies met in England and established the International Committee on Smoking Issues ("ICOSI").

(b) In 1980, ICOSI was renamed the International Tobacco Information Centre / Centre International d'Information du Tabac - INFOTAB ("INFOTAB"). In 1992, the INFOTAB changed its name to the Tobacco Documentation Centre ("TDC") (ICOSI, INFOTAB, and TDC are collectively referred as "ICOSI").

70. ICOSI's policies were mirrored by Group Members (including the CTMC), and were presented as the policies and positions of Group Member companies to conceal the civil conspiracy or common purpose from the public and governments.

71. If a Member within one of the Groups took a position on smoking and health issues contrary to that of ICOSI, the Head Members took steps to enforce compliance with the position of ICOSI.

72. Through ICOSI, Head Members agreed to resist governmental attempts to provide adequate warnings about the link between smoking and disease, and reiterated their position on smoking and health issues, furthering their agreement to:

(a) jointly disseminate false and misleading information regarding smoking risks;

(b) make no statement or admission that smoking causes disease;

(c) suppress or conceal research regarding the risks of smoking;

(d) make explicit health claims about each other's cigarettes, and thereby avoid highlighting the risks of smoking; and

(e) participate in a public relations program on smoking and health issues with the objective of promoting cigarettes, protecting cigarettes from attack based upon health risks, and reassuring consumers that smoking was not hazardous.

73. In and after 1977, the members of ICOSI, including the Head Members, agreed orally and in writing to ensure that:

(a) the members of their respective groups, including those in Canada, would act in accordance with the ICOSI position on smoking and health, including its position on warnings with respect to the link between smoking and disease;

(b) initiatives pursuant to the ICOSI positions would be carried out, whenever possible, by Head Members, including the CTMC, to ensure compliance in the various tobacco markets worldwide;

(c) when it was not possible for Head Members to carry out ICOSI's initiatives, Other Members individually would carry them out; and

(d) Head Members subsidiary companies would, when required, suspend or subvert their local or national interests in order to assist in preserving and growing the tobacco industry as a whole.

(vii) peculiar knowledge

74. Further particulars of the way in which the civil conspiracy or common purpose was entered into or continued, and Group Member breaches of duty in furtherance thereof, are peculiarly known to Group Members.

(c) joint liability

75. The Head Members civilly conspired with each other and with the Other Members with respect to the breaches of duty committed by the Other Members. Alternatively:

(a) Head Members acted in concert with the Other Members with respect to the Other Members' breaches of duty;

(b) if Group Members did not agree or intend that unlawful means be used in pursuing their civil conspiracy or common purpose, they knew or ought to have known that one or more of them would likely commit breaches of duty in furtherance of it. As a result, Head Members acted in concert with Other Members, or each of them, with respect to Other Members' breaches of duty;

(c) in breaching duties, Other Members acted as agents of Head Members; or

(d) Head Members directed the activities of Other Members to such a degree that the Other Members' breaches of duties were also committed by Head Members.

76. The CTMC was an agent of the Tobacco Industry which directed and co-ordinated the activities of the CTMC to such a degree that the CTMC's breaches were committed by the Defendants.

(6) waiver of tort

77. The Plaintiff and class members claim the right to waive the torts described above, and claim an aggregate monetary award for the amount of revenues the Defendants received from the sale of cigarettes to class members in Canada, including British Columbia, based on the following:

(a) The Defendants breached legal, statutory, and equitable duties and obligations in the manner outlined above;

(b) The Defendants intended to, and did, profit as a result of their breaches of legal, statutory, and equitable duties; and

(c) If the Defendants had complied with their duties the Plaintiff and class members:

(i) would not have started, nor gotten addicted to cigarettes;

(ii) would not have purchased cigarettes; and

(iii) would not have been enriched from the sale of cigarettes.

(7) family compensation act

78. The Plaintiff pleads and relies on the *Family Compensation Act*, R.S.B.C. 1996, c. 126, as am., including ss. 2 and 3(8)-(9).

V. RELIEF

79. On behalf of himself and class members, the Plaintiff claims against the Defendants, jointly and severally:

(a) compensatory and aggravated damages;

(b) punitive or exemplary damages;

(c) the right to waive the torts described above and claim the amount of revenues the Defendants received from the sale of cigarettes to class members during the Knowledge Period, and an order requiring the Defendants to disgorge the revenues determined by the accounting to the benefit of class members;

(d) interest pursuant to the *Court Order Interest Act*; and

(e) such other relief as this Honourable Court deems just.

DATED at the City of Victoria, in the Province of British Columbia, on the 25th day of June, 2010.

MERCHANT LAW GROUP LLP
Barristers and Solicitors
2401 Saskatchewan Drive
Regina, Saskatchewan
S4P 4H8

Address for Service: 531 Quadra Street
Victoria, BC
V8V 3S4

Lawyer in Charge: E. F. Anthony Merchant, Q.C.
Telephone: (250) 385-7777
Fax: (250) 478-9943

This Statement of Claim was delivered by: Merchant Law Group LLP

TAB X

Court File No. 53794/12

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SUZANNE JACKLIN

Plaintiff

and

CANADIAN TOBACCO MANUFACTURERS' COUNCIL, B.A.T. INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, BRITISH AMERICAN TOBACCO, p.l.c., IMPERIAL TOBACCO CANADA LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL, INC., PHILIP MORRIS USA INC., R. J. REYNOLDS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO, INTERNATIONAL, INC., CARRERAS ROTHMANS LIMITED, JTI-MACDONALD CORP., ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., and RYESEKKS p.l.c.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is

forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Original signed by "Karen Clark"

Date: June 27, 2012 Issued by: _____

Local registrar

Address of Court Office:

59 Church Street
St. Catharines, ON L2R 7N8

TO:

CANADIAN TOBACCO MANUFACTURERS' COUNCIL

1808 Sherbrooke Street West

Montréal Quebec

B.A.T INDUSTRIES P.L.C.

Globe House

4 Temple Place

London, England

BRITISH AMERICAN TOBACCO P.L.C.

Globe House

1 Water Street

London, England

IMPERIAL TOBACCO CANADA LIMITED

3711 Rue Saint-Antoine

Montréal, Quebec

ALTRIA GROUP, INC.

120 Park Avenue

New York, New York

PHILIP MORRIS INCORPORATED

6601 West Broad Street

Richmond, Virginia

PHILIP MORRIS INTERNATIONAL, INC.

120 Park Avenue

New York, New York

PHILIP MORRIS USA INC.

6601 West Broad Street

Richmond, Virginia

R.J. REYNOLDS TOBACCO COMPANY

401 North Main Street

Winston Salem, North Carolina

R.J. REYNOLDS TOBACCO INTERNATIONAL, INC.

401 North Main Street.

Winston Salem, North Carolina

CARRERAS ROTHMANS LIMITED

Oxford Road

Aylesbury

Bucks, England

JTI-MACDONALD CORP.

1300 - 1969 Upper Water Street

Purdy's Wharf Tower II

Halifax, Nova Scotia

ROTHMANS, BENSON & HEDGES INC.

1500 Don Mills Road

North York, Ontario

ROTHMANS INC.

1500 Don Mills Road

North York, Ontario

RYESEKKS p.l.c.

Plumtree Court

London, England

CLAIM

1. On behalf of herself and class members, the Plaintiff claims against the Defendants, jointly and severally:

(a) compensatory, aggravated, and punitive damages;

(b) restitution, including by way of a constructive trust and aggregate monetary award, of all profits which were or, with reasonable accounting, should have been earned by the Defendants from the manufacture and promotion of all types of tobacco products;

(c) the present value of the total expenditure and estimated total expenditure by the government for health care benefits provided to insured persons resulting from tobacco related disease or the risk of tobacco related disease;

(d) interest;

(e) costs; and

(f) such other relief as to this Honourable Court seems just.

I. PARTIES

(1) Plaintiff

2. The Plaintiff, Suzanne Jacklin, resides in Ottawa, Ontario.

(2) Defendants

(a) BAT Group

3. B.A.T Industries p.l.c. was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Globe House, 4 Temple Place, London, England.

4. British American Tobacco p.l.c., was incorporated pursuant to the laws of the United Kingdom and has a registered office at Globe House, 4 Temple Place, London, England.

5. British American Tobacco (Investments) Limited was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Globe House, 1 Water Street, London, England.

6. Imperial Tobacco Canada Limited was incorporated pursuant to the laws of Canada. It has a registered office at 3711 Rue Saint-Antoine Montréal, Quebec.

(b) Philip Morris Group

7. Altria Group, Inc. (formerly known as Philip Morris Companies Inc.), has a registered office at 120 Park Avenue, in New York, New York.

8. Philip Morris Incorporated (formerly Philip Morris & Co., Ltd., Incorporated) was incorporated pursuant to the laws of Virginia. Its principal place of business is 6601 West Broad Street, Richmond, Virginia.

9. Philip Morris International, Inc. was incorporated pursuant to the laws of Delaware. It has a registered office at 120 Park Avenue, New York, New York.

10. Philip Morris USA Inc. was incorporated pursuant to the laws of Virginia. Its principal office is 120 Park Avenue, New York, New York.

(c) R.J. Reynolds

11. R. J. Reynolds Tobacco Company was incorporated pursuant to the laws of North Carolina. It has a registered office at 401 North Main Street, Winston Salem, North Carolina.

12. R. J. Reynolds Tobacco International, Inc. was incorporated pursuant to the laws of Delaware. It has a registered office at 327 Hillsborough Street, Raleigh North Carolina.

(d) Rothmans Group

13. Carreras Rothmans Limited was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Oxford Road, Aylesbury, Bucks, England.

14. Ryesekks p.l.c. (formerly Rothmans International p.l.c., before that, Rothmans International Limited, and before that Carreras Limited) was incorporated pursuant to the laws of the United Kingdom. It has a registered office at Plumtree Court, London, England.

15. JTI-Macdonald Corp. was incorporated pursuant to the laws of Nova Scotia. It has a registered office at 1300 - 1969 Upper Water Street, Purdy's Wharf Tower II, Halifax, Nova Scotia. In 2004, under the *Companies Creditor Arrangements Act,* R.S.C. 1985, c. C-36, JTI-Macdonald Corp. sought protection from the Ontario Superior Court of Justice. The Plaintiff will seek any necessary leave to proceed against JTI-Macdonald Corp..

16. Rothmans, Benson & Hedges Inc. was incorporated pursuant to the laws of Canada. It has a registered office at 1500 Don Mills Road, North York, Ontario.

17. Rothmans Inc. (formerly Rothmans of Pall Mall Canada Limited) was incorporated pursuant to the laws of Canada. It has a registered office at 1500 Don Mills Road, Toronto, Ontario.

(e) CTMC

18. Canadian Tobacco Manufacturers' Council ("CTMC") was incorporated pursuant to the laws of Canada. It has a registered office at 1808 Sherbrooke St. West, Montréal, Quebec. Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., and JTI-Macdonald Corp. are members of CTMC.

(4) Canadian Manufacturers

19. The principal Canadian cigarette manufacturers were and are:

(1) **Imperial Tobacco Canada Limited:** In 1912, Imperial Tobacco Company of Canada Limited was incorporated.

(a) In September of 1970:

(i) it changed its name to Imasco Limited (effective Dec. 1st,1970); and

(ii) Imperial Tobacco Limited, a wholly-owned subsidiary, acquired part of the tobacco related business of Imasco Limited, and

(b) In February of 2000:

(i) Imasco Limited amalgamated with its subsidiaries including Imperial Tobacco Limited to form Imasco Limited; and

(ii) In a second amalgamation, also in or about February, 2000, Imasco Limited amalgamated with its parent company, British American Tobacco (Canada) Limited, to form Imperial Tobacco Canada Limited. Imperial Tobacco Canada Limited is a a wholly owned subsidiary of the defendant, British American Tobacco p.l.c.

(2) **Rothmans, Benson & Hedges Inc.:** In 1934, Benson & Hedges (Canada) Inc. was incorporated. In 1960, Rothmans of Pall Mall Limited was incorporated in the United Kingdom. In 1985 it acquired part of the tobacco related business of Rothmans Inc.. In 1986, Rothmans, Benson & Hedges Inc. was formed from an amalgamation of Rothmans of Pall Mall Limited and Benson & Hedges (Canada) Inc.

(a) Until 1986, Rothmans of Pall Mall Limited and Benson & Hedges directly or indirectly manufactured and promoted cigarettes in Ontario.

(b) After 1986, Rothmans, Benson & Hedges Inc. directly or indirectly manufactured or promoted cigarettes sold in Ontario.

Rothmans Inc. owns 40% of the securities of Rothmans, Benson & Hedges Inc. FTR Holding S.A., a Swiss company, a subsidiary of Altria Group, Inc., and

an affiliate of Philip Morris U.S.A. Inc. and Philip Morris International, Inc., owns 40% of the securities of Rothmans, Benson & Hedges Inc.

(3) **JTI-Macdonald Corp.:** In 1930, W.C. MacDonald Incorporated was incorporated pursuant to the laws of Quebec. From 1858, it carried on business in Montréal as an unincorporated entity. In 1957, it changed its name to Macdonald Tobacco Inc.. In 1973, Macdonald Tobacco Inc. became a wholly-owned subsidiary of R.J. Reynolds Tobacco Company. In 1978:

(a) RJR-Macdonald Inc. was incorporated as a wholly owned subsidiary of R.J. Reynolds Tobacco Company; and

(b) R.J. Reynolds Tobacco Company sold Macdonald Tobacco Inc. to RJR-Macdonald Inc.. RJR-Macdonald Inc. acquired all or substantially all of Macdonald Tobacco Inc.'s assets and continued the business of manufacturing and promoting cigarettes previously carried on by Macdonald Tobacco Inc..

In 1999, RJR-Macdonald Inc. changed its name to RJR-Macdonald Corp., which subsequently, changed its name to JTI-Macdonald Corp. RJR-Macdonald Inc., JTI-Macdonald Corp., and Macdonald Tobacco Inc. directly or indirectly manufactured and promoted cigarettes sold in Ontario.

20. Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., and JTI-Macdonald Corp. are the three largest Canadian cigarette manufacturers. They manufactured and promoted cigarettes sold in Ontario under brands that included:

"CANADIAN MANUFACTURERS"	**BRAND NAMES**
Imperial Tobacco Canada Limited	• Player's • Du Maurier • Matinee • Cameo
Rothmans, Benson & Hedges Inc.	• Benson & Hedges • Rothmans. • Number 7 • Craven A
JTI-Macdonald Corp.	• Export "A" • Vantage • Macdonald Special • Macdonald Select

21. CTMC is the trade and lobbying association of the Canadian tobacco industry. It advanced the interests of manufacturers, promoted cigarettes, and directly or indirectly caused other persons to promote cigarettes. Its membership included, among others: Imperial, Rothmans, Benson & Hedges, and JTI-Macdonald.

(5) Non-Canadian Manufacturers

22. Philip Morris Incorporated, R.J. Reynolds Tobacco Company, and Ryesekks p.l.c. directly or indirectly manufactured and promoted cigarettes sold in Ontario.

II. CLASS

23. The Plaintiff brings this claim on behalf of all individuals including their estates, who were alive on June 12th, 2007, and who have suffered, or who currently suffer, from chronic obstructive pulmonary disease, heart disease, or cancer, after having smoked a minimum of 25,000 cigarettes designed, manufactured, imported, marketed, or distributed by the Defendants.[1]

III. CAUSE OF ACTION

(1) Tobacco Products

(a) Nicotine

24. Nicotine is a psychoactive drug that affects various body systems including the brain and central nervous system, skeletal muscles, cardiovascular system, endocrine functions, and lungs and other organs.[2]

---

[1] By the end of 1953, the Defendants knew or should have been known, that cigarettes posed an unacceptable health risk. The period from January 1st, 1954 to the present is the "Knowledge Period".

[2] Despite decades of public pronouncements to the contrary, the tobacco industry admits in its confidential internal correspondence that nicotine is a drug. *See* Sch. 01 ("We are, then, in the business of selling nicotine, an addictive drug ....") (B&W/BAT, 1963); Sch. 02 ("Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects") (RJR, 1972); Sch. 03 ("B.A.T. should learn to look at itself as a drug company rather than a tobacco company.") (BAT, 1980); Sch. 04 ("[D]o we really want to tout cigarette smoke as a drug? It is, of course, but there are dangerous F.D.A. implications to having such conceptualization go beyond these walls. . . .") (PM, 1969).

25. Nicotine is addictive.

(b) Tobacco

26. Tobacco contains nicotine.

(c) Cigarettes

27. Cigarettes contain tobacco. When smoked, they deliver nicotine to users and thereby cause addiction.[3]

28. By smoking cigarettes, smokers become addicted to nicotine. While addicted, they regularly crave and consume tobacco. Attempting to withdraw causes irritability, difficulty in concentrating, anxiety, restlessness, increased hunger, depression and a pronounced craving for tobacco.[4]

---

[3] *See* Sch. 05 ("Very few consumers are aware of the effects of nicotine, i.e., its addictive nature and that nicotine is a poison.") (B&W/BAT, 1978); Sch. 06 ("The cigarette should be conceived not as a product but as a package. The product is nicotine. . . . Think of the cigarettes as a dispenser for a dose unit of nicotine.") (PM, 1972); Sch. 02 ("Happily for the tobacco industry, nicotine is both habituating and unique in its variety of physiologic actions ....") (RJR, 1972).

[4] *See* Sch. 07 ("Once addiction does take place, it becomes necessary for the smoker to make peace with the accepted hazards. This is done by a wide range of rationalizations.... However, the desire to quit, and actually carrying it out, are two quite different things, as the would-be quitter soon learns.") (ITL, 1982). Sch. 08 ("[S]moking is a habit of addiction that is pleasurable.") (BAT, 1962); Sch. 09 ("High profits ... are directly related to the fact that the customer is dependent upon the product.") (BAT, 1979).

29. When smokers inhale tobacco smoke as intended by manufacturers, they also inhale harmful substances which manufacturers know can cause or contribute to disease. They include aldehydes, ammonia, carbon monoxide, catechol, endotoxins, hydrogen cyanide, metals, micotoxins, nicotine, nitrogen dioxide, nitrogen monoxide, nitrosamines, organics, phenols, polyaromatic hydrocarbons, and tar.[5]

30. As a result, inhaling cigarette smoke causes or materially contributes to various diseases, including, but not limited to:

(a) cancers of the bladder, esophagus, kidney, larynx, lip, lung oral cavity, pancreas, pharynx, stomach;

(b) chronic obstructive pulmonary disease and allied conditions, including asthma, chronic airways obstruction, chronic bronchitis, and emphysema;

---

[5] *See* **Sch. 10** ("[I]f anyone ever identified any ingredient in tobacco smoke as being hazardous to human health or being something that shouldn't be there; we could eliminate it. But no one ever has.") (PM, 1976); **Sch. 11** ("[B]iologically active materials [are] present in cigarette tobacco. These are: a) cancer causing; b) cancer promoting; and c) poisonous.") (L&M, 1961) Liggett & Myers is not a party to these proceedings, but its documents and those of other non-party tobacco manufacturers and trade groups illustrate state of the art and general industry knowledge. *See also* **Sch. 12** ("Eight of the polycyclic hydrocarbons isolated from the smoke are known to produce cancer in mice.... [T]here is a distinct possibility that these substances would have a carcinogenic effect on the human respiratory system.") (RJR, 1959); **Sch. 13** ("[N]itrosamines are the most potent carcinogens known to man....") (PM, 1958).

(c) circulatory system diseases including atherosclerosis, aortic and other aneurysms, cerebrovascular disease, coronary heart disease, pulmonary circulatory disease, other peripheral vascular disease;

(d) morbidity and general deterioration of health;

(e) peptic ulcers;

(f) pneumonia and influenza; and

(g) fetal harm.

(2) Tort

(a) Duty

31. Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-Macdonald Corp., Philip Morris Incorporated, R.J. Reynolds Tobacco Company, and Ryesekks p.l.c. ("Manufacturers") manufactured and promoted cigarettes that reached consumers without alteration or intermediate inspection after leaving manufacturing and distribution facilities.

32. The Plaintiff smoked cigarettes manufactured and promoted by the Manufacturers in the intended way.

33. The Manufacturers therefore owed the Plaintiff and the class a duty of care:

(a) to design and manufacture a reasonably safe cigarette by taking all reasonable measures to eliminate, minimize, or reduce the risks of smoking cigarettes;

(b) not to promote knowingly defective cigarettes; and

(c) to provide reasonably clear, complete, and current warnings of the risks of smoking cigarettes of which they knew or ought to have known.

34. The Manufacturers owed a special duty to children and adolescents to take reasonable measures to prevent them from starting or continuing to smoke.

(b) Knowledge

35. At all material times, the Manufacturers were in possession of scientific and medical data which established the risks of smoking cigarettes. They knew or ought to have known that:

(a) nicotine is addictive; and

(b) nicotine addiction compels smokers to continue to smoke;

(d) the cigarettes and other types of tobacco products they manufactured and promoted:

(i) contained nicotine and were therefore addictive; and

(ii) contained the substances enumerated in paragraph 29, and therefore caused or contributed to tobacco related diseases in those who inhaled or were exposed to cigarette smoke.

(c) Breach

(i) Duty not to Market

36. In past and continuing breach of their duty of care, the Manufacturers:

(a) failed to conduct proper investigation, research, and testing as to the risk of tobacco related illness, nicotine addiction, and the feasibility of eliminating or minimizing these risks.[6]

(b) failed to design a reasonably safe product and to take all reasonable measures to eliminate, minimize, or reduce the risk of tobacco related illness.

---

[6] *See* Sch. 14 ("Members of [the RJR] Research Department have studied in detail cigarette smoke composition. Some of the findings have been published. However, much data remain unpublished because they are concerned with carcinogenic or co-carcinogenic compounds....") (RJR, 1962); Sch. 15 ("The psychopharmacology of nicotine is a highly vexatious topic. It is where the action is for those doing fundamental research on smoking, and from where most likely will come significant scientific developments profoundly influencing the industry. Yet it is where our attorneys least want us to be, for two reasons... The first reason is the oldest and is implicit in the legal strategy employed over the years in defending corporations ... 'We within the industry are ignorant of any relationship between smoking and disease. Within our laboratories no work is being conducted on biological systems.' That posture has moderated considerably as our attorneys have come to acknowledge that the original carte blanche avoidance of all biological research is not required in order to plead ignorance about any pathological relationship between smoke and smoker.") (PM, 1980).

(c) failed to eliminate or reduce to a safe level, substances and by-products of combustion, including nicotine and tar, which can cause or contribute to disease.

(d) manufactured and promoted defective cigarettes and other tobacco products:

(i) when smoked as intended, they are addictive, inevitably cause or contribute to tobacco related disease in an unreasonable number of users;[7] and

(ii) have no utility or benefit to consumers, or have a utility or benefit which is vastly outweighed by smoking related risks and costs.

(e) wilfully increased the bio-availability of nicotine in their cigarettes by:

(i) special blending of tobacco;

(ii) sponsoring or engaging in selective breeding and genetic engineering of tobacco plants;

(iii) adding nicotine or substances containing nicotine; and

---

[7] *See* **Sch. 09** (""[H]igh profits ... are directly related to the fact that the customer is dependent upon the product.") (BAT, 1979); **Sch. 16** ("A cigarette that does not deliver nicotine cannot satisfy the habituated smoker and cannot lead to habituation and would therefore almost certainly fail.") (PM, 1966).

(iv) introducing substances, including ammonia, into their cigarettes to enhance the bio-availability of nicotine to smokers.

(ii) Duty to Warn

37. The Manufacturers breached their duty to warn consumers. They:

(a) failed to provide any or reasonable warnings before 1972;

(b) after 1972, failed to provide reasonable warnings of the risk of tobacco related diseases caused by smoking, and of the risk of addiction to the nicotine contained in, their cigarettes. In particular, their warnings:

(i) were designed to be as ineffective as possible;

(ii) did not give users, prospective users, and the public, an adequate indication of each of the specific risks of smoking their cigarettes;

(iii) were given only to forestall more effective governmental warnings; and

(iv) failed to make clear, complete, and current disclosure of the risks inherent in smoking their cigarettes;

(c) made representations which they knew or ought to have known were false and deceptive. In particular, they falsely represented:

(i) that smoking has not been shown to cause disease;[8]

(ii) that they were aware of no research, or no credible research, that established a link between smoking and disease;[9]

(iii) that many diseases shown to have been related to tobacco were in fact related to other environmental or genetic factors;[10]

(iv) that cigarettes were not addictive;[11]

---

[8] *Compare* Sch. 17 ("With one exception the individuals whom we met believe that smoking causes lung cancer.") (BAT, 1958) *with* Sch. 18 ("We do not believe that cigarettes are hazardous; we do not accept that."); Sch. 19 ("There is disagreement among medical experts as to whether the reported associations between smoking and various diseases are causal or not. CTMC's position is to the effect that not causal relationship has been established.") (CTMC1978); Sch. 20 ("Doubt is our product since it is the best means of competing with the body of fact that exists in the mind of the general public. It is also the means of establishing a controversy.") (B&W, 1969).

[9] *See* Sch. 21 ("Despite all the research going on, the simple an unfortunate fact is that scientists do not know the cause or causes of the chronic diseased reported to be associated with smoking.... We would appreciate you passing this information along to your [fifth grade] students." (RJR, 1990); Sch. 22 ("It is not known whether cigarettes cause cancer.") (RJR, 1984).

[10] *See* Sch. 23 ("Distinguished authorities point out that there is no proof that cigarette smoking is one of the causes.... That statistics purporting to link cigarette smoking with disease could apply with equal force to any other aspect of modern life."); Sch. 24 ("[M]any scientists are becoming concerned that preoccupation with smoking may be both unfounded and dangerous, unfounded because evidence on many critical points is conflicting, dangerous because it diverts attention from other suspected hazards.") (TI, 1979).

[11] *See* Sch. 25 ("The fact is there is nothing about smoking, or about the nicotine in cigarettes, that would prevent smokers from quitting.") (TI, 1989); Sch. 26 ("The fact is there is nothing about smoking, or about the nicotine in cigarettes, that would prevent smokers from quitting." (RJR, 1992).

(v) that smoking is merely a habit or custom as opposed to an addiction;[12]

(vi) that they did not manipulate nicotine levels in their cigarettes;[13]

(vii) that they did not include substances in their cigarettes designed to increase the bio-availability of nicotine;[14]

(viii) actual intake of tar and nicotine associated with smoking cigarettes, as opposed to levels measured on machines;[15]

---

[12] *See* **Sch. 27** ("When we use the term 'addiction,' there are two meanings. There's an everyday meaning when we talk about being news junkies or chocoholics.... Now, under that, all kinds of habits become addictions. And so if it's a habit, then, yes, smoking can be a habit.") (TI, 1994); **Sch. 28** ("If [cigarettes] are behaviorally addictive or habit forming, they are much more like caffeine, or in my case, Gummy Bears.") (PM, 1997).

[13] *See* **Sch. 29** ("Dr. Kessler's contention that we add or otherwise manipulate nicotine to create, maintain, or satisfy an addiction, is false.") (RJR, 1994); **Sch. 30** ("The claims that RJR increases the nicotine in its cigarettes are false. RJR does not increase nicotine in cigarettes above what is found naturally in tobacco.") (RJR, 1994)

[14] *Compare* **Sch. 31** ("There is no indication that ammonia compounds in our cigarettes alter the amount of nicotine the smoker inhales.") (PM, 1994) *with* **Sch. 32** ("We are pursuing this project with the eventual goal of lowering the total nicotine present in smoke while increasing the physiologic effect of the nicotine which is present, so that no physiological effect is lost on nicotine reduction.") (RJR, 1973); **Sch. 33** ("Marlboro (and other Philip Morris brands) as compared with WINSTON, our other brands and most other brands on the market shows : (1) higher smoke pH (higher alkalinity), hence increased amounts of 'free' nicotine in smoke, and higher immediate nicotine 'kick'.") (RJR, 1973); **Sch. 34** ("Cigarettes made from filler oversprayed with nicotine as the citrate (NC) produce CNS effects which are approximately half the magnitude of those obtained with the FB [freebase] or unextracted cigarettes - at comparable nicotine delivery levels.") (PM, 1989).

[15] *See* **Sch. 35** ("The paper itself expresses what we in Behavioral have 'felt' for quite some time. That is, smokers smoke differently than the FTC machine and may very well smoke to obtain a certain level of nicotine in their bloodstream.") (RJR, 1983).

(ix) that certain of their cigarettes, such as "filter", "mild", "low tar" and "light" brands, were safer than other cigarettes;[16] and

(x) that smoking is consistent with a healthy lifestyle;[17]

(d) misled consumers into believing that cigarettes were safer than they were by:

(i) incorporating into the design of their cigarettes ineffective safety features including filters which they knew or ought to have known were ineffective, yet whose presence implied safety which was not there;[18] and

---

[16] *See* **Sch. 36** ("[T]here 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.") (ITL, undated); **Sch. 37** ("Unmet needs of smokers that could be satisfied by newer modified products, products which could delay the quitting process, are pursued.") (ITL, 1986).

[17] *See* **Sch. 38** ("The scenes will depict an outdoor leisure activity.... The activity shown should be one which is practiced by young people aged 16 to 20 years old or one that these people can reasonably aspire to in the near future.") (ITL, 1981); **Sch. 45** ("Since younger smokers represent the recruitment market, and female smokers are clearly a growth segment, in-depth motivational studies of both groups are strongly indicated.") (BAT, 1985); **Sch. 46** ("Young smokers represent the major opportunity group for the cigarette industry, we should therefore determine their attitude to smoking and health and how this might change over time.") (ITL, 1970).

[18] The industry has long known that smokers compensate for ventilated filters by taking bigger puffs and blocking vent holes. *See* **Sch. 39** ("[S]ubjects took more puffs of very much larger volume from the ventilated cigarette, but showed no difference in the way they inhaled smoke.") (BAT, 1972); **Sch. 40** ("[S]mokers adjust puff intake in order to maintain constant smoke intake.") (PM, 1967); **Sch. 41** ("[S]ome of these [vent] holes are likely to be occluded under normal smoking conditions, whereas no occlusion is likely to occur when the cigarettes are machine smoked for analysis.") (PM, 1967); **Sch. 16** ("The illusion of filtration is as important as the fact of filtration.") (PM, 1966).

(ii) designing and manufacturing "mild", "low tar", and "light" cigarettes, which they promoted in a manner which led reasonable consumers to believe that cigarettes were safer to use than they were;

(e) misled the public about the risks of smoking using innuendo, exaggeration and ambiguity;

(f) systemically made statements regarding smoking and health which they knew were incomplete and inaccurate;

(g) failed to correct statements made by others regarding the risks of smoking, which they knew were incomplete or inaccurate. Their failure to correct misinformation was a misrepresentation by omission or silence;

(h) engaged in collateral marketing, promotional, and public relations activities to neutralize or negate the efficacy of warnings provided to consumers by Manufacturers, governments and other agencies concerned with public health;

(i) suppressed information regarding the risks of smoking; and

(j) participated in a misleading campaign to make themselves appear more credible than health authorities and anti-smoking groups, and to reassure smokers that cigarettes were not as dangerous as authorities said they were.

38. At the Manufacturers' direction, the CMTC participated in this deception.

39. The Manufacturers intended that these misrepresentations be relied upon by Canadians for the purpose of inducing them to start or continue smoking.

(iii) Special Duties

40. The Manufacturers exploited the inability of children, adolescents, and those addicted to nicotine to protect their own interests because of their psychological and physiological dependence on nicotine and their augmented inability to understand smoking risks. In particular, the Manufacturers knew or ought to have known that:

(a) more than 80% of smokers start to smoke and become addicted before they are 19 years of age.

(b) it was illegal to sell cigarettes to children and adolescents in Ontario and to promote smoking by such persons;

(c) children and adolescents in Ontario were smoking or might start to smoke their cigarettes;

(d) children and adolescents in Ontario who smoked their cigarettes would become addicted to cigarettes and would suffer tobacco related disease.

41. In breach of their duty to children and adolescents in Ontario, the Manufacturers:

(a) failed to take any, or any reasonable, measures to prevent them from starting or continuing to smoke;

(b) targeted children and adolescents in their advertising, promotional and marketing activities in Ontario with the object of inducing them to start or continue to smoke;

(c) undermined legislative and regulatory initiatives that intended to prevent children and adolescents in Ontario from starting or continuing to smoke; and

(d) provided cigarettes to persons under circumstances where they knew or ought to have known that they would be illegally brought into Ontario, and sold to children and adolescents.[19]

---

[19] Sch. 42 ("Realistically, if our company is to survive and prosper, over the long term, we must get our share of the youth market.") (RJR, 1973); Sch. 43 ("The specific area of interest is young smokers between the ages of 15 and 19.") (BAT, undated); Sch. 44 ("The under 25-year old smokers continue to show the highest level of potential for ITL activities. The model that sees young customers acquiring their preferences and staying with them as they age is increasingly valid.") (ITL, 1991); Sch. 45 ("Since younger smokers represent the recruitment market, and female smokers are clearly a growth segment, in-depth motivational studies of both groups are strongly indicated.") (BAT, 1985); Sch. 46 ("Young smokers represent the major opportunity group for the cigarette industry, we should therefore determine their attitude to smoking and health and how this might change over time.") (ITL, c.1970); Sch. 47 ("In order to move Player's Light up on the masculinity dimension, we will continue throughout F'89 to feature creative which reflects freedom, independence and self-reliance in a relevant fashion for young males.") (ITL, c.1988); Sch. 48 ("RE-ESTABLISH clear distinct images for ITL brands with particular emphasis on relevance to younger smokers.") (ITL, c.1988); *Id.* ("If the last ten years have taught us anything, it is that the industry is dominated by the companies who respond most effectively to the needs of younger smokers. Our efforts on these brands will remain on maintaining their relevance to

(3) Trade Practices

42. The Plaintiff relies on s. 8 of the *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, as am.

(4) Competition Act

43. The Manufacturers, for the purpose of directly and indirectly promoting the supply or use of cigarettes, in breach of their statutory duties or obligations to consumers under the *Combines Investigation Act* R.S.C. 1952 (supp.), c. 314 as amended by the *Criminal Law Amendment Act* S.C. 1968-69, c. and amendments thereto and subsequently the *Competition Act* R.C.S. 1985, c. C-34, as am. made false or misleading representations to the public including as to the performance and efficacy of cigarettes that were not supported by reasonable and proper testing.

(5) Concerted Action

44. Four multinational tobacco enterprises (the BAT, Philip Morris, RJR, and Rothmans Groups manufactured and promoted all or most of the cigarettes sold in Ontario. Their Head and Other Members were as follows:

---

smokers in these younger groups in spite of the share performance they may develop among older smokers."); **Sch. 38** ("Models in Player's advertising must be 25 years or older, but should appear to be between 18 and 25 years of age") (ITL, 1981); **Sch. 49** ("Contact leading firms in terms of children research ... contact Sesame Street ... contact Gerber, Schwinn, Mattel ... Determine why these young people were not becoming smokers.") (B&W, 1977).

"GROUP"	'MEMBERS"	
	"Head Members"	"Other Members"
BAT	• **B.A.T Industries p.l.c.** - B.A.T. Industries Limited - Tobacco Securities Trust Limited • **British American Tobacco (Investments) Limited** - British-American Tobacco Company Limited • **British American Tobacco p.l.c.**	• **Imperial Tobacco Canada Limited** - Imasco Limited - Imperial Tobacco Limited
Philip Morris	• **Altria Group, Inc.,** - Philip Morris Companies Inc. • **Philip Morris Incorporated** • **Philip Morris International, Inc.** • **Philip Morris USA, Inc.**	• **Rothmans, Benson & Hedges Inc.** - Benson & Hedges (Canada) Inc.
RJR	• **R.J. Reynolds Tobacco Company** • **R.J. Reynolds Tobacco International, Inc.**	• **JTI-Macdonald Corp.** - Macdonald Tobacco Inc.
Rothmans	• **Carreras Rothmans Limited** • **Ryesekks p.l.c.**	• **Rothmans, Benson & Hedges Inc.** • **Rothmans Inc.** - Rothmans of Pall Mall Limited

45. The Head Members directed and coordinated common policies for each Group relating to smoking and health.

(a) Agreement

46. In 1953 and early 1954, in response to mounting publicity about the link between smoking and disease,

(a) American Tobacco Company,

(b) Brown & Williamson Tobacco Corporation (in its own capacity and as agent for British American Tobacco (Investments) Limited),

(c) Philip Morris Incorporated, and

(d) R. J. Reynolds Tobacco Company,

conspired, or formed a common purpose, to use unlawful means to prevent consumers in Ontario and other jurisdictions from learning about the harmful nature and addictive properties of cigarettes, in circumstances where they knew or ought to have known that injury to consumers would result from furtherance thereof.

47. The conspirators included Members of the BAT Group (after about 1950), Philip Morris Group (after about 1954), RJR Group (after about 1973), and Rothmans Group (after about 1956), separately, and as a collective.

(b) Unlawful Means

48. Group Members formed and furthered the civil conspiracy or common purpose through:

(a) committees, conferences and meetings established, organized, and convened by Head Members and attended by Group Member senior personnel; and

(b) written and oral directives and communications amongst Group Members

49. At these meetings and through these communications, Group Members agreed to breach their duties to consumers, as outlined above, and, in particular to:

(a) jointly disseminate false and misleading information about smoking risks;

(b) suppress statements and admissions that smoking causes disease;

(c) suppress or conceal research regarding the risks of smoking;

(d) participate in a public relations program that promoted cigarettes, protected them from attacks based upon health risks, and reassured consumers that smoking was not hazardous; and

(e) ensure that the members of their respective Groups would implement the policies described in (a) through (d), above.

50. In or about 1962, the Canadian Manufacturers each signed an agreement not to make adverse health claims about each other's cigarettes, so as to avoid acknowledging the risks of smoking.[20]

[20] Sch. 50.

(i) Committees, Conferences and Meetings

51. The Group Members used committees, conferences, and meetings to direct or co-ordinate their common policies on smoking and health, including:

COMMITTEES, CONFERENCES, AND MEETINGS			
group	**committees**	**conferences**	**meetings**
BAT	• Chairman's Policy Committee • Research Policy Group • Scientific Research Group • Tobacco Division Board • Tobacco Executive Committee • Tobacco Strategy Review Team	• Chairman's Advisory Conferences • Group Research Conferences • Group Marketing Conferences	• particulars are peculiarly known to the BAT Group
PM	• particulars peculiarly known to the PM Group	• Conference on Smoking and Health • Corporate Affairs World Conference	• Committee on Smoking Issues and Management • Corporate Products Com- mittee
Rothmans	• particulars are peculiarly known to the Rothmans Group	• particulars are peculiarly known to the Rothmans Group	• particulars are peculiarly known to the Rothmans Group
RJR	• particulars are peculiarly known to the RJR Group	• "Hound Ears" and Sawgrass conferences	• Winston-Salem Smoking Issues Coordinator Meetings

(ii) Directives and Communications

52. The Head Members created and distributed written directives that set out their common policy on smoking and health issues to Group Member personnel for direct and indirect dissemination to consumers. The full particulars of the

directives and communications are known only to the Group Members, but included:

DIRECTIVES AND COMMUNICATIONS	
group	**directives and communications**
BAT	• "Smoking Issues: Claims and Responses" •"Consumer Helplines: How To Handle Questions on Smoking and Health and Product Issues" • "Smoking and Health: The Unresolved Debate", "Smoking: The Scientific Controversy" • "Smoking: Habit or Addiction?" • "Legal Considerations on Smoking and Health Policy"
PM	• "Smoking and Health Quick Reference Guides" and "Issues Alert[s]"
RJR	• "Issues Guide"
Rothmans	• particulars are peculiarly known to the Rothmans Group

53. Group Members further directed or co-ordinated their common policy and position on smoking and health:

(a) R.J. Reynolds International Inc. appointed and supervised a "smoking issue designee" in various global "Areas". The designees reported to the Manager of Science Information at R.J. Reynolds Tobacco Company. From 1974, a senior executive of Macdonald Tobacco Inc. (later of JTI-Macdonald Corp) was the designee in "Area II" (Canada).

(b) The Corporate Affairs and Public Affairs Departments of Philip Morris Incorporated and Philip Morris International, Inc. directed or advised departments of the other Philip Morris Group Members, including Rothmans, Benson & Hedges Inc. and its amalgamating company Benson & Hedges (Canada) Ltd., concerning the Philip Morris Group position on smoking and health issues.

(c) Ryesekks p.l.c. and Carreras Rothmans Limited, through the Rothmans International Research Division, created and distributed statements which set out their position on smoking and health issues. In 1958, they issued numerous false announcements including in the *Globe and Mail* (June 23rd, 1958) and in the *Toronto Daily Star* (August 13th, 1958) that:

(i) smoking in moderation was safe, and

(ii) Canadian-made Rothmans cigarettes were safer than those of other brands because they contained less tar and had "cooler" smoke.

(iii) CTMC

54. In 1963, in furtherance of their civil conspiracy or common purpose, as directed by the Head Members, and to maintain a united front on smoking and

health issues, the Canadian Manufacturers formed the Ad Hoc Committee on Smoking and Health which, in 1969, was renamed the Canadian Tobacco Manufacturers' Council, and in 1982, was incorporated (collectively "CTMC").

55. Upon its formation, the CTMC adopted and participated in the civil conspiracy. Since 1963, in breach of its duties to the Plaintiff, the Canadian Manufacturers directed and caused the CTMC to:

(a) provide forums for Groups to further their civil conspiracy or common purpose;

(b) synchronize the Canadian Manufacturer's false positions on smoking and health issues with those of international tobacco manufacturers and associations; (c) relay the tobacco industry's common policies and positions respecting the health risks and concerns about smoking;

(d) suppress statements or admissions that smoking causes disease;

(e) suppress or conceal research regarding the adverse risks of smoking;

(f) counter independent attacks on the health risks of cigarettes and smoking;

(g) disseminate false and misleading information about the risks of smoking to governments, health and medical organizations, and consumers:

(i) in 1963, the CTMC misrepresented to the Canadian Medical Association that there was no causal connection between smoking and disease; and

(ii) in 1969, CTMC misrepresented to the House of Commons, Standing Committee on Health, Welfare and Social Affairs, that there was no causal connection between smoking and disease;

(h) lobby the Federal and provincial governments to delay and minimize government initiatives with respect to smoking and health; and

(i) participate in a public relations program on smoking and health issues with the intent of promoting cigarettes and maximizing sales;

56. The Canadian Manufacturers and the CTMC conspired or acted in concert in breaching their duties outlined above. They knew or ought to have known that one or more of them might breach duties in furtherance of the common purpose.

(iv) Influence Voting

57. Head Members further directed or co-ordinated the smoking and health policies of the Other Members within their Group by directing and advising how they should vote in committees of the Canadian Manufacturers and at meetings of the CTMC on smoking and health issues, including the approval and funding of research by the Canadian Manufacturers and the CTMC.

(v) Research Organizations

58. Between late 1953 and the early 1960's:

(a) the Head Members formed or joined numerous research organizations including the:

(i) Centre for Co-operation in Scientific Research Relative to Tobacco ("CORESTA");

(ii) Tobacco Industry Research Council ("TIRC"), which was renamed the Council for Tobacco Research in 1964 ("CTR"); and

(iii) Tobacco Research Council ("TRC").

(b) the Head Members publicly represented that they or Other Members, along with CORESTA, TIRC / CTR, TRC, and similar organizations, would perform objective research and gather data regarding the link between smoking and disease and internationally publicize the results.

(c) the Head Members agreed that they or Other Members, along with CORESTA, TIRC / CTR, TRC, and similar organizations, would conduct research and publicize information to counter, undermine, or obscure information that showed the link between smoking and disease, with a view to creating widespread belief that there was a medical or scientific controversy as to whether smoking is harmful and whether nicotine is addictive, when in fact there was not.

(d) In 1963 and 1964, with a view to ensuring that no research would be approved or conducted by CORESTA, TIRC / CTR, and TRC which would indicate that cigarettes were dangerous, the Head Members and European tobacco companies and state monopolies agreed to coordinate their research on the link between smoking and disease with that conducted by TIRC in the United States.

(e) In April and September 1963, Head Members of the BAT and RJR Groups agreed with members of the 'Council of Action' in Hamburg, Germany and with Head Members of the Philip Morris Group in New York, to develop a public relations campaign to counter reports of the English Royal College of Physicians, United States Surgeon General, and the Canadian Medical Association, and to reassure consumers that their health would not be harmed by smoking cigarettes.

(f) In September 1963, in New York, the Head Members of the Philip Morris, RJR, and BAT Groups, along with other US tobacco companies, agreed that they, and members of their respective Groups, would not issue warnings about the link between smoking and disease unless and until required by governmental action.

59. From the outset of the civil conspiracy or common purpose described herein or, alternatively, from the time each Canadian Manufacturer became a Group Member, each Canadian Manufacturer agreed to and adopted the common purpose and breached their duties in furtherance thereof.

(vi) Icosi

60. By the mid-1970's, motivated by their concern that admissions by any of the national manufacturers' associations ("NMA") about a link between smoking and disease could lead to a 'domino effect' to the detriment of the worldwide industry, Head Members agreed to take an increased international response to reassure existing and potential smokers and to protect the tobacco industry:

61. So, in furtherance of the civil conspiracy or common purpose:

(a) in June of 1977, Head Members and other international tobacco companies met in England and established the International Committee on Smoking Issues ("ICOSI").

(b) In 1980, ICOSI was renamed the International Tobacco Information Centre / Centre International d'Information du Tabac - INFOTAB ("INFOTAB"). In 1992, INFOTAB changed its name to the Tobacco

Documentation Centre ("TDC") (ICOSI, INFOTAB, and TDC are collectively referred as "ICOSI").

62. ICOSI's policies were mirrored in the NMA's (including the CTMC), and were presented as the policies and positions of NMA's and their member companies to conceal the civil conspiracy or common purpose from the public and governments.

63. If a manufacturer within one of the Groups took a position on smoking and health issues contrary to that of ICOSI, the Head Members took steps to enforce compliance with the position of ICOSI.

64. Through ICOSI, Head Members agreed to resist governmental attempts to provide adequate warnings about the link between smoking and disease, and reiterated their position on smoking and health issues, furthering their agreement to:

(a) jointly disseminate false and misleading information regarding smoking risks;

(b) make no statement or admission that smoking caused disease;

(c) suppress or conceal research regarding the risks of smoking;

(d) make explicit health claims about each other's cigarettes, and thereby avoid highlighting the risks of smoking; and

(e) participate in a public relations program on smoking and health issues with the objective of promoting cigarettes, protecting cigarettes from attack based upon health risks, and reassuring consumers that smoking was not hazardous.

65. In and after 1977, the members of ICOSI, including the Head Members, agreed orally and in writing to ensure that:

(a) the members of their respective Groups, including those in Canada, would act in accordance with the ICOSI position on smoking and health, including its position on warnings with respect to the link between smoking and disease;

(b) initiatives pursuant to the ICOSI positions would be carried out, whenever possible, by NMA's, including the CTMC, to ensure compliance in the various tobacco markets worldwide;

(c) when it was not possible for NMA's to carry out ICOSI's initiatives, Group Members would carry them out; and

(d) their subsidiary companies would, when required, suspend or subvert their local or national interests in order to assist in preserving and growing the tobacco industry as a whole.

(vii) peculiar knowledge

66. Further particulars of the way in which the civil conspiracy or common purpose was entered into or continued, and Group Member breaches of duty in furtherance thereof, are peculiarly known to Group Members.

(c) Joint Liability

67. The Head Members civilly conspired with the Other Members with respect to the breaches of duty committed by the Other Members. Alternatively:

(a) Head Members acted in concert with Other Members with respect to Other Members' breaches of duty;

(b) if Group Members did not agree or intend that unlawful means be used in pursuing their civil conspiracy or common purpose, they knew or ought to have known that one or more of them might commit breaches of duty in furtherance of it. As a result, Head Members acted in concert with Other Members, or either of them, with respect to Other Members' breaches of duty;

(c) in breaching duties, Other Members acted as agents of Head Members; or

(d) Head Members directed the activities of Other Members to such a degree that the Other Members' breaches of duties were also committed by Head Members.

68. The CTMC was agent of the Canadian Manufacturers. The Canadian Manufacturers directed and co-ordinated the activities of the CTMC to such a degree that the CTMC's breaches were committed by the Canadian Manufacturers.

69. By reason of the foregoing, each of the Defendants conspired or acted in concert with respect to the breaches of duty described herein. They jointly breached the duties described herein.

70. At common law, or in equity, the Defendants are jointly and severally liable for the cost of health care benefits attributed to each.

(6) Waiver of Tort

(a) The Defendants carry on business in Ontario;

(b) The Defendants marketed, distributed and sold its products in Ontario; and

(c) The Plaintiff and Class Members resident in Ontario suffered damages in Ontario.

(11) The Place of Trial

77. The Plaintiff proposes that Trial in this action take place in the City of St. Catharines, in the Province of Ontario.

Date of Issue: June 27th, 2012

MERCHANT LAW GROUP LLP
Barristers and Solicitors
154 James Street
St. Catharines, ON L2R 5C5
Tel: 289-398-7777
Fax: 289-398-0777

Stephen Osborne
LSUC #:59426M

JACKLIN and CANADIAN TOBACCO MANUFACTURERS' COUNCIL ET AL.
Plaintiff Defendants

Court File No. 53794/12

I CERTIFY THIS TO BE A TRUE COPY OF
ORIGINATING PROCESS ISSUED HEREIN, ON
POUR COPIE CONFORME DE L'ACTE INTRODUCTIF
D'INSTANCE EN L'ESPÈCE LE June 27, 2012

Solicitor for the Plaintiff
Procureur du demandeur

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDINGS COMMENCED
AT ST. CATHARINES

STATEMENT OF CLAIM

MERCHANT LAW GROUP LLP
Barristers & Solicitors
154 James Street
St. Catharines, ON L2R 5C5

Stephen Osborne
LSUC No. 59426M
Tel.: (289) 398-7777
Fax: (289) 398-0777

Lawyers for the Plaintiffs

TAB XI

Court File No.: 64757

ONTARIO
SUPERIOR COURT OF JUSTICE

MARIO BOYER CHJQ 826 HUISSIER DE JUSTICE

SIGNIFIÉ LE 11 09 1323 hrs

B E T W E E N :

THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD, ANDY J. JACKO, BRIAN BASWICK, RON KICHLER and ARPAD DOBRENTEY

Plaintiffs

and

IMPERIAL TOBACCO CANADA LIMITED

Defendant

Proceeding Under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

December 7, 2009

Issued by: _____
Local Registrar

Address of Court Office:
80 Dundas Street
London, ON N6A 6A5

TO:
IMPERIAL TOBACCO CANADA LIMITED
3711 Saint-Antoine Street
Montréal, Québec
H4C 3P6

CLAIM

DEFINITIONS

1. The following terms used throughout this pleading have the meanings indicated:

(a) "***Act***" means the *Farm Products Marketing Act*, R.S.O. 1990, c. F.9;

(b) "**Agreements**" means the agreements made during the Class Period among the Board, Imperial and other Canadian manufacturers of tobacco products under the Ontario Flue-Cured Tobacco Growers' Marketing Plan, declared in force by the Farm Products Marketing Commission and set out in the chart at paragraph 17;

(c) "**Baswick**" means Brian Baswick;

(d) "**Board**" means the Ontario Flue-Cured Tobacco Growers' Marketing Board;

(e) "**Class Period**" means the period January 1, 1986 to December 31, 1996;

(f) "**Class Members**" or "**Class**" means growers and producers in Ontario who sold tobacco through the Board pursuant to the terms of the Agreements during the Class Period;

(g) "***CJA***" means the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(h) "**Dobrentey**" means Arpad Dobrentey;

(i) "**Imperial**" means Imperial Tobacco Canada Limited;

(j) "**Jacko**" means Andy J. Jacko;

(k) "**Kichler**" means Ron Kichler; and

(l) "**Makeup Payment**" means the difference between the domestic price per pound of tobacco and the floor price per pound of tobacco.

RELIEF CLAIMED

2. The Board, Jacko, Baswick, Kichler and Dobrentey claim on their own behalf and on behalf of the Class:

(a) an order pursuant to the *Act* certifying this action as a class proceeding and appointing them as the representatives of the Class;

(b) $50,000,000.00 for damages for breach of the Agreements;

(c) an order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;

(d) prejudgment and postjudgment interest pursuant to the *CJA* or at the internal rate of return earned on capital by Imperial or its parent Imperial Inc. or its affiliated corporations during the Class Period;

(e) costs of this action on a full or substantial indemnity basis plus applicable taxes; and

(f) such further and other relief as to this court deems just.

NATURE OF THIS ACTION

3. Pursuant to the *Act*, the Board made the Agreements with Imperial and other Canadian manufacturers of tobacco products. The Agreements governed the purchase and sale of tobacco by the Class Members to Imperial during the Class Period. The Board administered and processed the sale of tobacco by the Class Members to Imperial pursuant to the Agreements, invoiced Imperial, collected the proceeds of sale from Imperial and, after deducting certain fees and charges, distributed the net proceeds of the sale to the Class Members.

4. Each of the Agreements provided that Imperial would pay a guaranteed, minimum average price per pound for tobacco it intended to sell domestically and a lower floor price for tobacco it intended to sell for duty free and export purposes. In the result, Imperial paid Class Members more for tobacco to be used for domestic purposes than for tobacco to be used for duty free and export purposes. Imperial paid the Makeup Payments to the Board. The Board distributed the Makeup Payments to each Class Member, pro rata.

5. Imperial was required to use the quantity of tobacco purchased and designated as being for duty free and export purposes only for such purposes.

6. The Agreements required Imperial to accurately disclose to the Board's auditors the quantity of tobacco Imperial delivered to the U.S. to be sold for duty free and export purposes. Imperial breached the Agreements by failing to report to the Board's auditors the tobacco, designated as being for export and duty free purposes, which it knew or ought to have known would be smuggled into Canada.

7. In breach if the Agreements, Imperial failed to pay to the Board the domestic price for the product ultimately smuggled into Canada. Imperial failed to pay to the Board the Makeup Payments on these sales, which would have been distributed to the Class Members. As such, Imperial caused the Class Members to suffer damages and loss.

THE PARTIES

8. The Board is a corporation without share capital established under the *Act* to control and regulate all aspects of the production and marketing of tobacco grown in Ontario. The Board's head office is located in Tillsonburg, Ontario.

9. Jacko is a farmer residing in Tillsonburg, Ontario. During the Class Period, Jacko grew tobacco in Ontario and sold it to Imperial through the Board.

10. Baswick is a farmer residing in Delhi, Ontario. During the Class Period Baswick grew tobacco in Ontario and sold it to Imperial through the Board.

11. Kichler is a retired farmer residing in Delhi, Ontario. During the Class Period, Kichler grew tobacco in Ontario and sold it to Imperial through the Board.

12. Dobrentey is a farmer residing in Mount Brydges, Ontario. During the Class Period, Dobrentey grew tobacco in Ontario and sold it to Imperial through the Board.

13. Each of the plaintiffs and each of the Class Members sold tobacco to Imperial for both domestic and export purposes.

14. Imperial is a Canadian corporation. It is a wholly-owned indirect subsidiary of British American Tobacco PLC. Imperial's registered head office is at

3711 Saint-Antoine Street, Montréal, Québec. At all material times, Imperial carried on business in Canada and elsewhere as a manufacturer and distributor of tobacco products. During the Class Period, Imperial purchased tobacco from the Class Members through the Board for domestic and export purposes.

THE AGREEMENTS

15. Pursuant to Ontario Regulation 435, the Farm Products Marketing Commission delegated supply management powers to the Board, including the power to establish a quota system, to license producers and buyers and to require all tobacco to be sold through the Board's auction exchanges.

16. The Agreements were the result of negotiations between the Board, Imperial and other domestic cigarette manufacturers. The Agreements set the terms and conditions of the annual sale of tobacco, the pricing for tobacco and the quantities of tobacco to be produced and marketed.

17. The dates of the Agreements for each crop year are as follows:

Crop Year	Date of Agreement
1986	June 4, 1986
1987	April 22, 1987
1988	May 27, 1988
1989	May 31, 1989
1990	October 22, 1990
1991	September 3, 1991
1992	September 8, 1992
1993	April 29, 1993
1994	July 12, 1994
1995	April 12, 1995
1996	July 3, 1996

18. Each of the Agreements required Imperial to pay to the Board a guaranteed average price per pound for tobacco for domestic use and floor prices for each pound of tobacco to be used for duty free or export purposes. Imperial paid the Board for each purchase contract. The Board then deducted its applicable fees and paid the net amounts to the Class Members who sold the tobacco.

19. Each of the Agreements required Imperial to deliver "proof of export" to the Board's auditors, MacGillivray Partners LLP, accurately disclosing the quantity of tobacco Imperial delivered to U.S. to be sold for duty free and export purposes.

20. The Agreements established a two-tier pricing system with the per pound price for duty-free and export tobacco being less than the per pound price of tobacco used for domestic purposes.

21. By way of example, for the 1986 crop, Imperial agreed to pay a guaranteed average price of $1.84 per pound for tobacco purchased for domestic purposes compared to the lower average floor price, which was calculated at the end of market for that year, at $1.26 per pound for tobacco for duty free and export purposes.

22. In 1986, duty-free and export tobacco represented between 1% and 3% of all domestic tobacco sold through the Board.

23. Starting in 1987, taxes on tobacco products at the Canadian federal and provincial levels increased regularly and significantly until early 1994. During that same period, and largely as a result of the increased taxes, purchases in Canada of legal tobacco products for domestic use declined significantly.

24. In 1991, the Canadian government increased taxes and duties by 3 cents per cigarette ($6 per carton). Applicable taxes and duties on other tobacco products were also increased. The provincial governments matched the federal tax increases with another $6 per carton increase. The result was that applicable taxes and duties on cigarettes and tobacco increased by approximately 100%. In two years, the average price of a carton of cigarettes increased from $26 to $48 or higher. These tax increases were not applicable to export and duty free products.

25. During the Class Period, the amount of tobacco purchased by domestic manufacturers at the lower export or duty free price in comparison to the tobacco purchased for domestic account was as set out in the following chart:

CropYear	Ontario Duty Free and Export Poundage Purchased	Ontario Domestic Poundage Purchased	DFX/Domestic
1986	2,500,000	70,210,806	3.1%
1987	3,000,000	61,419,471	4.1%
1988	4,000,000	93,272,683	6.2%
1989	4,300,000	96,348,074	4.4%
1990	1,120,000	73,769,214	1.1%
1991	6,340,000	76,379,877	8.5%
1992	9,150,000	71,484,328	11.1%
1993	11,480,000	90,296,831	14.2%
1994	11,800,000	88,133,376	11.6%
1995	2,940,000	92,091,230	2.9%
1996	2,860,000	88,769,706	3.0%

26. During the Class Period, Imperial designated tobacco as being for export and duty free purposes intending that it be smuggled into and sold in Canada. Imperial did not package or stamp the cigarette packages and cartons to conform to the *Excise Act* so as to facilitate the smuggling of the cigarettes into Canada.

27. In the result, massive quantities of cigarettes and other tobacco products were smuggled back into Canada after Imperial executed sham exports, leading to the distribution of these products throughout Canada on the black market.

28. On July 31, 2008, Imperial pleaded guilty to violating section 241(1)(a) of the federal *Excise Act* by "aiding persons to sell or be in possession of tobacco products manufactured in Canada that were not packaged and were not stamped in conformity with the *Excise Act* and its amendments and the ministerial regulations", thereby admitting publicly for the first time its involvement in smuggling operations.

29. In breach of the Agreements, Imperial failed to report to the Board's auditors the tobacco, designated as being for export and duty fee purposes, which it knew or ought to have known would be smuggled into Canada. It failed to pay the Makeup Payments on these sales to the Board, which would have been distributed to the Class Members, and thereby caused the Class Members to suffer damages and loss.

30. Imperial did not pay the domestic price to the Board for the product ultimately smuggled to the domestic market as it was required to do under the Agreements.

31. Imperial had the benefit of the Makeup Payments which it should have paid to the Board and used them for the purposes of its business and earned an average internal rate of return thereon which exceeded 10%.

SERVICE OUTSIDE OF ONTARIO

32. This originating process may be served without court order outside Ontario because the claim is:

(a) in respect of a contract made in Ontario (rule 17.02(f)(i));

(b) in respect of a breach of contract that was committed in Ontario (rule 17.02(f)(iv);

(c) in respect of damages sustained in Ontario arising from a breach of contract wherever committed (rule 17.02(h)); and

(d) against a person carrying on business in Ontario (rule 17.02(p)).

PLACE OF TRIAL

33. The plaintiffs propose that this action be tried in the City of London.

December 2, 2009

SUTTS, STROSBERG LLP
Lawyers
600 - 251 Goyeau Street
Windsor, ON N9A 6V4

HARVEY T. STROSBERG, Q.C.
LSUC# 12640O
WILLIAM V. SASSO
LSUC# 12134I
Tel: (519) 561-6228
Fax: (519) 561-6203

Lawyers for the plaintiffs

755688

64757

THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD et al.

vs. IMPERIAL TOBACCO CANADA LIMITED

Plaintiffs

Defendant

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDINGS COMMENCED AT LONDON

STATEMENT OF CLAIM

SUTTS, STROSBERG LLP
Lawyers
600 - 251 Goyeau Street
Windsor, ON N9A 6V4

HARVEY T. STROSBERG, Q.C.
LSUC# 12640O
Tel: (519) 561-6228
Fax: (519) 561-6203

Lawyers for the plaintiffs

Court File No.: 64757

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD, ANDY J. JACKO, BRIAN BASWICK, RON KICHLER and ARPAD DOBRENTEY

Plaintiffs

and

IMPERIAL TOBACCO CANADA LIMITED

Defendant

Proceeding Under the *Class Proceedings Act, 1992*

INFORMATION FOR COURT USE

This proceeding is an:	☒	action	☐	application
Has it been commenced under the *Class Proceedings Act, 1992*?	☒	yes	☐	no

(*If the proceeding is an action, answer all of the following:*)				
Rule 76 (Simplified Procedure) applies: Note: *Subject to the exceptions found in subrule 76.01(1), it is MANDATORY to proceed under Rule 76 for all cases in which the money amount claimed or the value of real or personal property claimed is $50,000 or less.*	☐	yes	☒	no
Rule 77 (Civil Case Management) applies:	☐	yes	☒	no
If Rule 77 applies, choice of track is:	☐	Fast	☐	Standard
Rule 78 (Toronto Civil Case Management Pilot Project) applies:	☐	yes	☒	no

The claim in this proceeding (action or application) is in respect of: Breach of contract

(*Select the **one** item that **best** describes the nature of the main claim in the proceeding.*)

Bankruptcy or insolvency law	☐	Motor vehicle accident	☐
Collection of liquidated debt	☐	Municipal law	☐
Constitutional law	☐	Partnership law	☐
Construction law (other than construction lien)	☐	Personal property security	☐
Construction lien	☐	Produce liability	☐
Contract law	☒	Professional malpractice (other than medical)	☐
Corporate law	☐	Real property (including leases; excluding mortgage or charge)	☐
Defamation	☐	Tort: economic injury (other than from medical or professional malpractice)	☐
Employment or labour law	☐		
Intellectual property law	☐	Tort: personal injury (other than from motor vehicle accident)	☐
Judicial review	☐	Trusts, fiduciary duty	☐
Medical malpractice	☐	Wills, estates	☐
Mortgage or charge	☐		

CERTIFICATION

I certify that the above information is correct, to the best of my knowledge.

Date: December 1, 2009

Signature of lawyer
(*if no lawyer, party must sign*)

THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD et al.

Plaintiffs

vs. IMPERIAL TOBACCO CANADA LIMITED

Defendant

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDINGS COMMENCED AT LONDON

INFORMATION FOR COURT USE

SUTTS, STROSBERG LLP
Lawyers
600 - 251 Goyeau Street
Windsor, ON N9A 6V4

HARVEY T. STROSBERG, Q.C.
LSUC# 12640O
WILLIAM V. SASSO
LSUC# 12134I
Tel: (519) 561-6228
Fax: (519) 561-6203

Lawyers for the plaintiffs

FILE: 72.216.000
REF: HTS/df

TAB T

THIS IS **EXHIBIT "T"** TO THE AFFIDAVIT
OF ERIC THAUVETTE, SWORN BEFORE ME
ON MARCH 12, 2019

Waleed Malik

Commissioner for Taking Affidavits

WALEED MALIK
LSO #678960

Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

APPLICANTS

CONSENT TO ACT AS MONITOR

We, FTI Consulting Canada Inc., hereby consent to act as the Court-appointed Monitor in respect of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended.

DATED this 10th day of March, 2019.

FTI CONSULTING CANADA INC.

Per: _____
Name: JEFFREY ROSENBERG
Title: SENIOR MANAGING DIRECTOR

TAB U

\THIS IS **EXHIBIT "U"** TO THE AFFIDAVIT
OF ERIC THAUVETTE, SWORN BEFORE ME
ON MARCH 12, 2019

Waleed Malik

Commissioner for Taking Affidavits

WALEED MALIK
LSO # 678960

Imperial Tobacco Canada Limited

CCAA Cash Flow Forecast

(CAD$ in thousands)

Week Beginning (Monday)		11-Mar-19	18-Mar-19	25-Mar-19	1-Apr-19	8-Apr-19	15-Apr-19	22-Apr-19	29-Apr-19	6-May-19	13-May-19	20-May-19	27-May-19	3-Jun-19	13-Week Total
Forecast Week		**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**	
RECEIPTS															
Trade Receipts	[2]	84,976	85,295	88,530	89,298	96,601	100,220	97,694	101,552	104,809	109,311	105,032	109,621	112,352	**1,285,291**
DISBURSEMENTS															
Operating Disbursements															
Taxes and Levies	[3]	(59,212)	(27,197)	(25,460)	(118,618)	(41,495)	(36,110)	(39,772)	(181,309)	(45,190)	(46,786)	(46,397)	(193,257)	-	**(860,802)**
Operations	[4]	(20,285)	(21,329)	(51,287)	(16,816)	(14,151)	(4,692)	(36,897)	(11,094)	(9,259)	(11,955)	(7,797)	(39,943)	(11,613)	**(257,118)**
Total Operating Disbursements		(79,497)	(48,525)	(76,747)	(135,434)	(55,646)	(40,802)	(76,668)	(192,403)	(54,449)	(58,741)	(54,194)	(233,200)	(11,613)	**(1,117,920)**
OPERATING CASH FLOWS		5,480	36,769	11,782	(46,136)	40,956	59,418	21,026	(90,851)	50,359	50,569	50,839	(123,579)	100,739	**167,371**
Financing Disbursements															
Interest and Related Fees on Existing Facilities	[5]	-	-	-	(56)	-	-	-	-	-	-	-	(21)	-	**(77)**
Restructuring Disbursements															
Restructuring Fees	[6]	(1,596)	(1,596)	(1,596)	(1,187)	(1,187)	(1,187)	(1,187)	(1,187)	(1,030)	(1,030)	(1,030)	(1,030)	(583)	**(15,423)**
NET CASH FLOWS		3,884	35,173	10,187	(47,379)	39,769	58,231	19,839	(92,038)	49,330	49,540	49,809	(124,629)	100,156	**151,871**
CASH															
Beginning Balance		304,700	308,584	343,757	353,943	306,565	346,334	404,564	424,403	332,366	381,695	431,235	481,044	356,415	**304,700**
Net Cash Inflows / (Outflows)		3,884	35,173	10,187	(47,379)	39,769	58,231	19,839	(92,038)	49,330	49,540	49,809	(124,629)	100,156	**151,871**
Other (FX)		-	-	-	-	-	-	-	-	-	-	-	-	-	**-**
ENDING CASH		308,584	343,757	353,943	306,565	346,334	404,564	424,403	332,366	381,695	431,235	481,044	356,415	456,571	**456,571**

Notes to the CCAA Forecast:

[1] The purpose of this cash flow forecast is to estimate the liquidity requirements of the Company during the forecast period.

[2] Forecast Trade Receipts include collections from the sale of tobacco-related products, net of returns, and inclusive of sales taxes. The sales forecast is based on historical sales patterns, seasonality, and current management's expectations.

[3] Forecast Taxes and Levies disbursements reflect the remittance of the federal excise tax, provincial tobacco taxes, sales taxes, and the Company's corporate income taxes.

[4] Forecast Operations disbursements include employee-related costs, purchase of tobacco-related products, royalties, IT-related costs, selling, general, and administrative costs.

[5] Forecast Interest and Related Fees on Existing Facilities reflect all payments relating to the existing facilities.

[6] Forecast Professional Fees include legal and financial advisor fees associated with the CCAA proceedings and are based on on estimates provided by the advisors.

TAB V

THIS IS **EXHIBIT "V"** TO THE AFFIDAVIT
OF ERIC THAUVETTE, SWORN BEFORE ME
ON MARCH 12, 2019

Waleed Malik

Commissioner for Taking Affidavits

WALEED MALIK
LSO # 678460

Clerk's stamp

CLERK OF THE COURT
FILED
JUN 0 8 2012
JUDICIAL CENTRE
OF CALGARY

FORM 10
[RULE 3.25]

COURT FILE NUMBER	1201- 07314
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	CALGARY
PLAINTIFF(S)	**HER MAJESTY IN RIGHT OF ALBERTA**
DEFENDANT(S)	**ALTRIA GROUP, INC.; B.A.T. INDUSTRIES P.L.C.; BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED; BRITISH AMERICAN TOBACCO P.L.C.; CANADIAN TOBACCO MANUFACTURERS COUNCIL; CARRERAS ROTHMANS LIMITED; IMPERIAL TOBACCO CANADA LIMITED; JTI-MACDONALD CORP.; PHILIP MORRIS INTERNATIONAL, INC.; PHILIP MORRIS USA, INC.; R.J. REYNOLDS TOBACCO COMPANY; R.J. REYNOLDS TOBACCO INTERNATIONAL, INC.; ROTHMANS BENSON & HEDGES INC.; and ROTHMANS INC.**
DOCUMENT	**STATEMENT OF CLAIM**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**JENSEN SHAWA SOLOMON DUGUID HAWKES LLP** Barristers 800, 304 - 8 Avenue SW Calgary, Alberta T2P 1C2 Sabri M. Shawa QC Carsten Jensen QC Phone: 403 571 1520 Fax: 403 571 1528 File: 12049-1
NOTICE TO DEFENDANT(S)	You are being sued. You are a defendant. Go to the end of this document to see what you can do and when you must do it.

S010421

NO.
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA

PLAINTIFF

AND:

IMPERIAL TOBACCO CANADA LIMITED, ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., JTI-MACDONALD CORP., CANADIAN TOBACCO MANUFACTURERS' COUNCIL, B.A.T INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, CARRERAS ROTHMANS LIMITED, PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL, INC., R. J. REYNOLDS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO INTERNATIONAL, INC., ROTHMANS INTERNATIONAL RESEARCH DIVISION and RYESEKKS p.l.c.

DEFENDANTS

WRIT OF SUMMONS

Name and address of each Plaintiff:

Her Majesty the Queen in right of British Columbia
c/o Bull, Housser & Tupper
3000 - 1055 West Georgia Street
Vancouver, British Columbia
V6E 3R3

NO.
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA

PLAINTIFF

AND:

IMPERIAL TOBACCO CANADA LIMITED, ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., JTI-MACDONALD CORP., CANADIAN TOBACCO MANUFACTURERS' COUNCIL, B.A.T INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, CARRERAS ROTHMANS LIMITED, PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL, INC., R. J. REYNOLDS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO INTERNATIONAL, INC., ROTHMANS INTERNATIONAL RESEARCH DIVISION and RYESEKKS p.l.c.

DEFENDANTS

STATEMENT OF CLAIM

File No. CI 12-01-78127

THE QUEEN'S BENCH
WINNIPEG JUDICIAL CENTRE

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA

PLAINTIFF

- and -

ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., ALTRIA GROUP, INC., PHILIP MORRIS U.S.A. INC., PHILIP MORRIS INTERNATIONAL, INC., JTI-MACDONALD CORP., R.J. REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS TOBACCO INTERNATIONAL INC., IMPERIAL TOBACCO CANADA LIMITED, BRITISH AMERICAN TOBACCO P.L.C., B.A.T INDUSTRIES P.L.C., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, CARRERAS ROTHMANS LIMITED, and CANADIAN TOBACCO MANUFACTURERS' COUNCIL

DEFENDANTS

STATEMENT OF CLAIM

Counsel for the Plaintiff:
Thompson Dorfman Sweatman LLP
2000-201 Portage Avenue
Winnipeg, Manitoba R3B 3L3
E. W. OLSON, Q.C.
Telephone: (204) 934-2534
Facsimile: (204) 934-0534

Local Agent for Delivery:
Thompson Dorfman Sweatman LLP
2000-201 Portage Avenue
Winnipeg, Manitoba R3B 3L3
E. W. OLSON, Q.C.
Telephone: (204) 934-2534
Facsimile: (204) 934-0534

Court File No.

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEW BRUNSWICK,

Plaintiff,

- and -

ROTHMANS INC., ROTHMANS, BENSON & HEDGES INC., CARRERAS ROTHMANS LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS U.S.A. INC., PHILIP MORRIS INTERNATIONAL, INC., JTI-MACDONALD CORP., R.J. REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS TOBACCO INTERNATIONAL INC., IMPERIAL TOBACCO CANADA LIMITED, BRITISH AMERICAN TOBACCO P.L.C., B.A.T INDUSTRIES P.L.C., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, and CANADIAN TOBACCO MANUFACTURERS' COUNCIL,

Defendants.

NOTICE OF ACTION
WITH STATEMENT OF CLAIM
ATTACHED
(Form 16A)

TO:

ROTHMANS INC.
1500 Don Mills Road
North York, Ontario

Numéro du dossier: FIC 33/08

DANS LA COUR DU BANC DE LA REINE DU NOUVEAU-BRUNSWICK
DIVISION DE PREMIÈRE INSTANCE
CIRCONSCRIPTION JUDICIARE DE FREDERICTON

ENTRE:

COURT OF QUEEN'S BENCH
FREDERICTON, NB
RECEIVED AND FILED
MAR 13 2008
COUR DU BANC DE LA REINE
FREDERICTON, N-B
REÇU ET DÉPOSÉ

Demanderesse,

- et -

13th
March —2008

Défendeurs.

AVIS DE POURSUITE
ACCOMPAGNE D'UN EXPOSE
DE LA DEMAND
(Formule 16A)

DESTINATAIRES:

2011 01G. No. 0826
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

BETWEEN:

ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR

PLAINTIFF

AND:

ROTHMANS INC., ROTHMANS, BENSON & HEDGES INC., CARRERAS ROTHMANS LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS U.S.A. INC., PHILIP MORRIS INTERNATIONAL, INC., JTI-MACDONALD CORP., R.J. REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS TOBACCO INTERNATIONAL INC., IMPERIAL TOBACCO CANADA LIMITED, BRITISH AMERICAN TOBACCO P.L.C., B.A.T. INDUSTRIES P.L.C., BRITISH AMERICA TOBACCO (INVESTMENTS) LIMITED, and CANADIAN TOBACCO MANUFACTURERS' COUNCIL

DEFENDANTS

STATEMENT OF CLAIM

I. INTRODUCTION

A. The Plaintiff and the Nature of the Claim

1. The Plaintiff, the Attorney General of Newfoundland and Labrador (the "Province"), provides health care services to a population of insured persons who suffer from tobacco related disease or who are at risk of suffering from tobacco related disease as a result of the wrongs committed by the Defendants.

2. Pursuant to Section 4 of the ***Tobacco Health Care Costs Recovery Act,*** S.N.L. 2001, c. T-4.2 (the ***"Act"***) the Province in its own right and not on the basis of a subrogated claim, claims against the Defendants for recovery of the cost of health care services that it has provided and will continue to

2015 HFX No. 434868

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA

Plaintiff

- and -

ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., ALTRIA GROUP, INC., PHILIP MORRIS U.S.A. INC., PHILIP MORRIS INTERNATIONAL, INC., JTI-MACDONALD CORP., R.J. REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS TOBACCO INTERNATIONAL INC., IMPERIAL TOBACCO CANADA LIMITED, BRITISH AMERICAN TOBACCO P.L.C., B.A.T INDUSTRIES P.L.C., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, CARRERAS ROTHMANS LIMITED, and CANADIAN TOBACCO MANUFACTURERS' COUNCIL

Defendants

NOTICE OF ACTION

TO: ROTHMANS, BENSON & HEDGES INC.
1500 Don Mills Road
North York, Ontario M3B 3L1

AND TO: ROTHMANS INC.
1500 Don Mills Road
North York, Ontario M3B 3L1

AND TO: ALTRIA GROUP, INC.
6601 West Broad Street
Richmond, Virginia 23230

AND TO: PHILIP MORRIS U.S.A. INC.
6601 West Broad Street
Richmond, Virginia 23230

AND TO: PHILIP MORRIS INTERNATIONAL, INC.
120 Park Avenue, No. 6
New York, New York 10017

SCHEDULE "A"

Court File No.: CV-09-387984

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Plaintiff

- and -

ROTHMANS INC., ROTHMANS, BENSON & HEDGES INC., CARRERAS ROTHMANS LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS U.S.A. INC., PHILIP MORRIS INTERNATIONAL, INC., JTI-MACDONALD CORP., R.J. REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS TOBACCO INTERNATIONAL INC., IMPERIAL TOBACCO CANADA LIMITED, BRITISH AMERICAN TOBACCO P.L.C., B.A.T INDUSTRIES P.L.C., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, and CANADIAN TOBACCO MANUFACTURERS' COUNCIL

Defendants

SECOND AMENDED FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THAT PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

SUPREME COURT OF PRINCE EDWARD ISLAND
(GENERAL SECTION) S1-GS-25019

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF PRINCE EDWARD ISLAND

PLAINTIFF

- and -

ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., ALTRIA GROUP, INC., PHILIP MORRIS U.S.A. INC., PHILIP MORRIS INTERNATIONAL, INC., JTI-MACDONALD CORP., R.J. REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS TOBACCO INTERNATIONAL INC., IMPERIAL TOBACCO CANADA LIMITED, BRITISH AMERICAN TOBACCO P.L.C., B.A.T INDUSTRIES P.L.C., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, CARRERAS ROTHMANS LIMITED, and CANADIAN TOBACCO MANUFACTURERS' COUNCIL

DEFENDANTS

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a Prince Edward Island lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Queen's Bench Rules*, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it in this court office, WITHIN 20 DAYS after this statement of claim is served on you, if you are served in Prince Edward Island.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is 40 days. If you are served outside Canada and the United States of America, the period is 60 days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

[UNOFFICIAL TRANSLATION PROVIDED BY PLAINTIFF]

C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

S U P E R I O R C O U R T

NO. 500-17-072363-123

THE ATTORNEY GENERAL OF QUÉBEC, having an office at 1 rue Notre-Dame Est, Suite 8.00, Montréal, Québec H2Y 1B6, District of Montréal

Plaintiff

v.

IMPERIAL TOBACCO CANADA LIMITED, a legal person having its head office at 3711 rue Saint-Antoine Ouest, Montréal, Québec H4C 3P6, District of Montréal

and
B.A.T INDUSTRIES P.L.C., a legal person having its head office at Globe House, 4 Temple Place, London WC2R 2PG, United Kingdom

and
BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, a legal person having its head office at Globe House, 1 Water Street, London WC2R 3LA, United Kingdom

and
CARRERAS ROTHMANS LIMITED, a legal person having its head office at Globe House, 1 Water Street, London WC2R 3LA, United Kingdom

871
2012

No. 2 (R. 30)
STATEMENT OF CLAIM

CANADA

PROVINCE OF SASKATCHEWAN

IN THE QUEEN'S BENCH
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

THE GOVERNMENT OF SASKATCHEWAN

PLAINTIFF

- and -

ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., ALTRIA GROUP, INC., PHILIP MORRIS U.S.A. INC., PHILIP MORRIS INTERNATIONAL, INC., JTI-MACDONALD CORP., R.J. REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS TOBACCO INTERNATIONAL INC., IMPERIAL TOBACCO CANADA LIMITED, BRITISH AMERICAN TOBACCO P.L.C., B.A.T INDUSTRIES P.L.C., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, CARRERAS ROTHMANS LIMITED, and CANADIAN TOBACCO MANUFACTURERS' COUNCIL

DEFENDANTS

01 06/08/2012 10:00 017361 PLU
STMT OF CLAIM 200.00
CLERK 1

NOTICE TO DEFENDANTS

1 The plaintiff may enter judgment in accordance with this Statement of Claim or such judgment as may be granted pursuant to the Rules of Court

within 20 days if you were served in Saskatchewan;

within 30 days if you were served elsewhere in Canada or in the United States of America;

within 40 days if you were served outside Canada and the United States of America.

(excluding the day of service) you serve a Statement of Defence on the plaintiff and file a copy thereof in the office of the local registrar of the Court for the judicial centre above-named.

2 In many cases a defendant may have the trial of the action held at a judicial centre other than the one at which the Statement of Claim is issued. Every defendant should consult his lawyer as to his rights.

3 This Statement of Claim is to be served within six months from the date on which it is issued.

4 This Statement of Claim is issued at the above-named judicial centre the 8 day of June, 2012.

D

Local Registrar

TRANSLATION

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO.: 500-06-000076-980

SUPERIOR COURT
(Class Actions)

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ, a corporation legally incorporated under Part III of the Quebec *Companies Act*, having its registered office and principal place of business at 4126 Saint Denis Street, Suite 302, in the City and District of Montreal, Province of Quebec, H2W 2M5;

Plaintiff/Representative

and

JEAN-YVES BLAIS, residing and domiciled at 3950 Sir-Wilfrid-Laurier Boulevard, Unit No. 638, in the City of Saint-Hubert, District of Longueuil, Province of Quebec, J3Y 5Y9;

Designated Member

v.

JTI-MACDONALD CORP., a body corporate having a place of business at 2455 Ontario Street East, in the City and District of Montreal, Province of Quebec, H2K 1W3;

and

IMPERIAL TOBACCO CANADA LIMITED, a body corporate having a place of business at 3711 St. Antoine Street, in the City and District of Montreal, Province of Quebec, H4C 3P6;

and

ROTHMANS, BENSON & HEDGES INC., a body corporate having a place of business at 185 Laurentian Autoroute, in the City and District of Quebec, Province of Quebec, G1K 7L2;

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

(Class action)
SUPERIOR COURT

No.: 500-06-00070-983

CÉCILIA LÉTOURNEAU, residing at 734 Des Sources, in the city and district of Rimouski, Province of Quebec G5L 8M2

Plaintiff

c.

IMPERIAL TOBACCO CANADA LTD., a legal person having its place of business at 3711, St-Antoine Street, in the city and district of Montreal, Province of Quebec, H4C 3P6

-and-

ROTHMANS' BENSON & HEDGES INC., a legal person having its place of business at 185, Laurentian Autoroute, in the city and district of Quebec, Province of Quebec, G1K 7L2

-and-

JTI MACDONALD CORP., a legal person with its place of business at 2455, Ontario Street East, in the city and district of Montreal, Province of Quebec, H2K 1W3

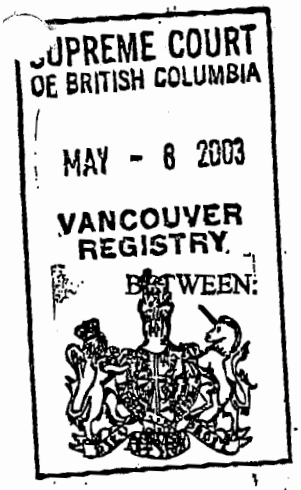
Defendants

MOTION TO INSTITUTE CLASS ACTION PROCEEDINGS

TO THE HONOURABLE CAROLE JULIEN OF THE QUEBEC SUPERIOR COURT, THE PLAINTIFF STATES AS FOLLOWS:

LAJB

L 031300



No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BC Class Action

KENNETH KNIGHT

PLAINTIFF

IMPERIAL TOBACCO CANADA LIMITED

DEFENDANT

WRIT OF SUMMONS
Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

(Name and address of each Plaintiff)	Kenneth Knight c/o Klein Lyons 1100 - 1333 West Broadway VANCOUVER, B.C. V6H 4C1
(Name and address of each Defendant)	Imperial Tobacco Canada Limited 3711 St.-Antoine Street Montreal, Quebec H4C 3P6

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom, Canada and Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith.

TO the Defendant(s): Imperial Tobacco Canada Limited

TAKE NOTICE that this action has been commenced against you by the Plaintiff(s) for the claim(s) set out in this writ.

IF YOU INTEND TO DEFEND this action, or if you have a set-off or counterclaim which you wish to have taken into account at the trial, **YOU MUST**

(a) **GIVE NOTICE** of your intention by filing a form entitled "Appearance" in the above registry of this Court within the Time of Appearance provided for below and **YOU MUST ALSO DELIVER** a copy of the "Appearance" to the Plaintiff's address for delivery, which is set out in this writ, and

(b) if a Statement of Claim is provided with this writ of summons or is later served on or delivered to you, FILE a Statement of Defence in the above registry of this court within the Time for Defence provided for below and DELIVER a copy of the Statement of Defence to the Plaintiff's address for delivery.

YOU OR YOUR SOLICITOR may file the Appearance and the Statement of Defence. You may obtain a form of Appearance at the Registry.

JUDGMENT MAY BE TAKEN AGAINST YOU IF

(a) **YOU FAIL** to file the Appearance within the Time for Appearance provided for below, or
(b) **YOU FAIL** to file the Statement of Defence within the Time for Defence provided for below.

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

KENNETH KNIGHT

Plaintiff

AND:

IMPERIAL TOBACCO CANADA LIMITED

Defendant

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c.50

STATEMENT OF CLAIM

1. The Plaintiff, Kenneth Knight, is a resident of Roberts Creek, British Columbia.

2. The Defendant, Imperial Tobacco Canada Limited, is Canada's largest tobacco company, manufacturing nearly 70% of the cigarettes sold in this country. The Defendant is a company incorporated pursuant to the laws of Canada and has a registered office at 3711 St. Antoine Street West, Montreal, Quebec.

3. This is a proposed class action brought pursuant to the *Trade Practices Act*, R.S.B.C. 1996, c. 457 (the "TPA") and the *Class Proceedings Act*, R.S.B.C. 1996, c.50 on behalf of persons who made purchases in British Columbia of "light" and "mild" cigarettes manufactured, sold and/or distributed by the Defendant. The class is intended to include persons who are "consumers" within the meaning of section 1 of the TPA. Excluded from the proposed class are directors, officers and employees of the Defendant.

HPx No. 3128609 2009

Supreme Court of Nova Scotia

Between:

BEN SEMPLE

Plaintiff

and

CANADIAN TOBACCO MANUFACTURERS' COUNCIL, B.A.T INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, BRITISH AMERICAN TOBACCO, p.l.c., IMPERIAL TOBACCO CANADA LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL, INC., PHILIP MORRIS USA INC., R. J. REYNOLDS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO, INTERNATIONAL, INC., CARRERAS ROTHMANS LIMITED, JTI-MACDONALD CORP., ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., and RYESEKKS p.l.c.

Defendants

Brought under the *Class Proceedings Act.*

Notice of Action and Statement of Claim

Casey R. Churko

Tel: (306) 359-7777
Fax: (306) 522-3299

File No. CI09-01-61479

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

DEBORAH KUNTA

Plaintiff,

- and -

CANADIAN TOBACCO MANUFACTURERS' COUNCIL, B.A.T INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, BRITISH AMERICAN TOBACCO, p.l.c., IMPERIAL TOBACCO CANADA LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL, INC., PHILIP MORRIS USA INC., R. J. REYNOLDS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO, INTERNATIONAL, INC., CARRERAS ROTHMANS LIMITED, JTI-MACDONALD CORP., ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., and RYESEKKS p.l.c.,

Defendants

STATEMENT OF CLAIM

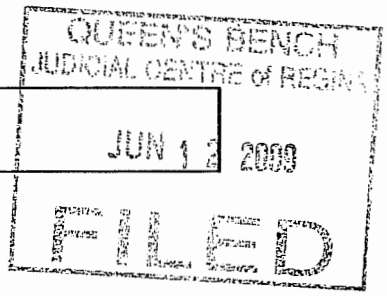
MERCHANT LAW GROUP LLP
#812 - 363 Broadway Avenue
Winnipeg, Manitoba
R3C-3N9

S. Norman Rosenbaum

Tel: (204) 896-7777
Fax: (204) 982-0771

Q.B. No. 916 of 2009

CANADA)
PROVINCE OF SASKATCHEWAN)



IN THE QUEEN'S BENCH
JUDICIAL CENTRE OF REGINA

BETWEEN:

Thelma Adams

PLAINTIFF

-and-

Canadian Tobacco Manufacturers' Council, B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, British American Tobacco, p.l.c., Imperial Tobacco Canada Limited, Altria Group, Inc., Philip Morris Incorporated, Philip Morris International, Inc., Philip Morris USA Inc., R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco, International, Inc., Carreras Rothmans Limited, JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., Rothmans Inc., and Ryesekks p.l.c.,

DEFENDANTS

Brought under *The Class Actions Act*

Statement of Claim

JUN12'09 #00000058 COFA 100.00

MERCHANT LAW GROUP LLP
#812 - 363 Broadway Avenue
Winnipeg, Manitoba
R3C-3N9

E.F. Anthony Merchant, Q.C.

Tel: (306) 359-7777
Fax: (306) 522-3299

Action No. 0901-08964

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

Between:

LINDA DORION

Plaintiff,

and

CANADIAN TOBACCO MANUFACTURERS' COUNCIL, B.A.T INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, BRITISH AMERICAN TOBACCO, p.l.c., IMPERIAL TOBACCO CANADA LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL, INC., PHILIP MORRIS USA INC., R. J. REYNOLDS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO, INTERNATIONAL, INC., CARRERAS ROTHMANS LIMITED, JTI-MACDONALD CORP., ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., and RYESEKKS p.l.c.,

Defendants.

Brought under the *Class Proceedings Act.*

STATEMENT OF CLAIM

MERCHANT LAW GROUP LLP
2401 Saskatchewan Drive
Regina, Saskatchewan
S4P-4H8,

E.F. Anthony Merchant, Q.C.
Phone: (306) 359-7777
Fax: (306) 522-3299.

SUPREME COURT
OF
BRITISH COLUMBIA
SEAL
VICTORIA
REGISTRY

JUN 25 2010

No. 10-2780
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Barbara Bourassa on behalf of the Estate of Mitchell David Bourassa,

PLAINTIFF

Imperial Tobacco Canada Limited, B.A.T. Industries p.l.c.,
British American Tobacco (Investments) Limited, British American Tobacco, p.l.c.,
Altria Group, Inc., Philip Morris International, Inc., Philip Morris USA Inc.,
R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco Company,
R. J. Reynolds Tobacco International, Inc., Carreras Rothmans Limited,
JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., Rothmans Inc.,
Ryesekks p.l.c., and Canadian Tobacco Manufacturers' Council,

DEFENDANTS

Brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

WRIT OF SUMMONS

Name and Address of each Plaintiff:

Barbara Bourassa on behalf of the Estate of Mitchell David Bourassa
c/o Merchant Law Group LLP
531 Quadra Street
Victoria B.C. V8V 3S4

Name and Address of each Defendant:

Imperial Tobacco Canada Limited
3711 Rue Saint-Antoine
Montreal, Quebec

B.A.T. Industries p.l.c.
Globe House
4 Temple Place
London, England

No. _____
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Barbara Bourassa on behalf of the Estate of Mitchell David Bourassa,

PLAINTIFF

AND:

Imperial Tobacco Canada Limited, B.A.T. Industries p.l.c.,
British American Tobacco (Investments) Limited, British American Tobacco, p.l.c.,
Altria Group, Inc., Philip Morris International, Inc., Philip Morris USA Inc.,
R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco Company,
R. J. Reynolds Tobacco International, Inc., Carreras Rothmans Limited,
JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., Rothmans Inc.,
Ryesekks p.l.c., and Canadian Tobacco Manufacturers' Council,

DEFENDANTS

Brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

STATEMENT OF CLAIM

I. OVERVIEW

1. Cigarettes are a dangerous and defective product. Even when used as directed, cigarettes inevitably cause death and disease to a large percentage of users.

2. The Defendants, who manufacture and sell almost all of the cigarettes sold in this country, and their co-conspirators, have for many years sought to deceive Canadians about the health effects of smoking. For decades, the Defendants repeatedly and consistently denied that smoking cigarettes causes disease, even though they have known since 1953, at the latest, that smoking increases the risk of disease and death. The Defendants have repeatedly and consistently denied that cigarettes are addictive even though they have long understood and intentionally exploited the addictive properties of nicotine.

3. Smoking has adverse health effects on the entire lung, and is the leading cause of chronic respiratory diseases.

SUPREME COURT
OF
BRITISH COLUMBIA
SEAL
VICTORIA
REGISTRY

JUN 25 2010

No. 10-27-69
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Roderick Dennis McDermid,

PLAINTIFF

Imperial Tobacco Canada Limited, B.A.T. Industries p.l.c.,
British American Tobacco (Investments) Limited, British American Tobacco, p.l.c.,
Altria Group, Inc., Philip Morris International, Inc., Philip Morris USA Inc.,
R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco Company,
R. J. Reynolds Tobacco International, Inc., Carreras Rothmans Limited,
JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., Rothmans Inc.,
Ryesekks p.l.c., and Canadian Tobacco Manufacturers' Council,

DEFENDANTS

Brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

WRIT OF SUMMONS

Name and Address of each Plaintiff:

Roderick Dennis McDermid
c/o Merchant Law Group LLP
531 Quadra Street
Victoria B.C. V8V 3S4

Name and Address of each Defendant:

Imperial Tobacco Canada Limited
3711 Rue Saint-Antoine
Montreal, Quebec

B.A.T. Industries p.l.c.
Globe House
4 Temple Place
London, England

No. _____
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Roderick Dennis McDermid,

PLAINTIFF

AND:

Imperial Tobacco Canada Limited, B.A.T. Industries p.l.c.,
British American Tobacco (Investments) Limited, British American Tobacco, p.l.c.,
Altria Group, Inc., Philip Morris International, Inc., Philip Morris USA Inc.,
R. J. Reynolds Tobacco Company, R. J. Reynolds Tobacco Company,
R. J. Reynolds Tobacco International, Inc., Carreras Rothmans Limited,
JTI-Macdonald Corp., Rothmans, Benson & Hedges Inc., Rothmans Inc.,
Ryesekks p.l.c., and Canadian Tobacco Manufacturers' Council,

DEFENDANTS

Brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

STATEMENT OF CLAIM

I. OVERVIEW

1. Cigarettes are a dangerous and defective product. Even when used as directed, cigarettes inevitably cause death and disease to a large percentage of users.

2. The Defendants, who manufacture and sell almost all of the cigarettes sold in this country, and their co-conspirators, have for many years sought to deceive Canadians about the health effects of smoking. For decades, the Defendants repeatedly and consistently denied that smoking cigarettes causes disease, even though they have known since 1953, at the latest, that smoking increases the risk of disease and death. The Defendants have repeatedly and consistently denied that cigarettes are addictive even though they have long understood and intentionally exploited the addictive properties of nicotine.

3. Smoking has adverse health effects on the heart, and is the leading cause of heart disease.

Court File No. 53794/12

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SUZANNE JACKLIN

Plaintiff

and

CANADIAN TOBACCO MANUFACTURERS' COUNCIL, B.A.T. INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, BRITISH AMERICAN TOBACCO, p.l.c., IMPERIAL TOBACCO CANADA LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL, INC., PHILIP MORRIS USA INC., R. J. REYNOLDS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO, INTERNATIONAL, INC., CARRERAS ROTHMANS LIMITED, JTI-MACDONALD CORP., ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., and RYESEKKS p.l.c.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is

Court File No.: 64757

ONTARIO
SUPERIOR COURT OF JUSTICE

MARIO BOYER CHJQ 826 HUISSIER DE JUSTICE

SIGNIFIÉ LE 11 09 1323 hrs

B E T W E E N :

THE ONTARIO FLUE-CURED TOBACCO GROWERS' MARKETING BOARD, ANDY J. JACKO, BRIAN BASWICK, RON KICHLER and ARPAD DOBRENTEY

Plaintiffs

and

IMPERIAL TOBACCO CANADA LIMITED

Defendant

Proceeding Under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

AMENDED THIS Sept 8/14 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
☐ RULE/LA RÈGLE 26.02 (_____)
☐ THE ORDER OF Justice Horkins
L'ORDONNANCE DU
DATED / FAIT LE October 8, 2014
REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

Court File No. 00-CV-183165 - CP00

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JASMINE RAGOONANAN and PHILLIP RAGOONANAN,
by their estate representative, DAVINA RAGOONANAN,
RANUKA BABOOLAL, by her estate representative, BASDAYE VASHTI
BABOOLAL, DAVINA RAGOONANAN, RONALD BALKARRAN, BASDAYE
VASHTI BABOOLAL, JASMINE CHERIE RAGOONANAN, DAVID
RAGOONANAN, FRANKLIN RAGOONANAN, DIANA RAGOONANAN,
ANGELIQUE RAGOONANAN, JADEN RAGOONANAN, and RAJESH BABOOLAL

Plaintiffs

- and -

IMPERIAL TOBACCO CANADA LIMITED

Defendant

STATEMENT OF CLAIM
(Pursuant to order of Justice Horkins, dated October 18, 2011)

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff(s). The claim made against you is set out in the following pages:

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff(s) lawyer(s) or, where the plaintiff(s) do(es) not have a lawyer, serve it on the plaintiff(s), and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

Superior Court of Justice
Cour supérieure de justice

Plaintiff's Claim
Demande du demandeur

Form/*Formule* 7A Ont. Reg. No./*N° du règl. de l'Ont.* : 258/98

Claim no. / *N° de la demande*: 1442/03

London Small Claims Court
Small Claims Court / *Cour des petites créances de*
80 Dundas Street Floor Unit "A"
Address / *Adresse*
London, Ontario
N6A - 6A3

Plaintiff No. 1 / *Demandeur N° 1*

Full name / *Nom et prénoms*	
Scott Donald Landry	
Address for service (street & number, city, postal code) / *Domicile élu (numéro et rue, ville, code postal)*: 222 Vancouver st. London. Ont., N5W 4R8	
Phone no. / *Numéro de téléphone*: (519)-936-9054 cell-(519)-318-7695	Fax no. (if any) / *Numéro de télécopieur (le cas échéant)*
Plaintiff's Lawyer/Agent (Full name) / *Avocat/mandataire du demandeur (nom et prénoms)*: No Counsel	
Lawyer/Agent's address for service (street & number, city, postal code) / *Domicile élu de l'avocat/du mandataire (numéro et rue, ville, code postal)*: n/a	
Lawyer/Agent's phone no. / *Numéro de téléphone de l'avocat/du mandataire*: n/a	Lawyer/Agent's fax no. (if any) / *Numéro de télécopieur (le cas échéant)*

Plaintiff No. 2 (if applicable) / *Demandeur N° 2 (le cas échéant)*

Full name / *Nom et prénoms*	
Address for service (street & number, city, postal code) / *Domicile élu (numéro et rue, ville, code postal)*	
Phone no. / *Numéro de téléphone*	Fax no. (if any) / *Numéro de télécopieur (le cas échéant)*
Plaintiff's Lawyer/Agent (Full name) / *Avocat/mandataire du demandeur (nom et prénoms)*	
Lawyer/Agent's address for service (street & number, city, postal code) / *Domicile élu de l'avocat/du mandataire (numéro et rue, ville, code postal)*	
Lawyer/Agent's phone no. / *Numéro de téléphone de l'avocat/du mandataire*	Lawyer/Agent's fax no. (if any) / *Numéro de télécopieur (le cas échéant)*

Defendant No. 1 / *Défendeur N° 1*

Full name / *Nom et prénoms*	
Imperial Brands Ltd	
Address for service (street & number, city, postal code) / *Domicile élu (numéro et rue, ville, code postal)*: 3711 St. Antoine., Montreal, Quebec, H4C3P6	
Phone no./ *Numéro de téléphone*: 1-800-311 2000	Fax no. (if any) / *Numéro de télécopieur (le cas échéant)*
Defendant's Lawyer/Agent (Full name) / *Avocat/mandataire du défendeur (nom et prénoms)*: n/a Legal dept	
Lawyer/Agent's address for service (street & number, city, postal code) / *Domicile élu de l'avocat/du mandataire (numéro et rue, ville, code postal)*: n/a	
Lawyer/Agent's phone no. / *Numéro de téléphone de l'avocat/du mandataire*: n/a	Lawyer/Agent's fax no. (if any) / *Numéro de télécopieur (le cas échéant)*

Defendant No. 2 (if applicable) / *Défendeur N° 2 (le cas échéant)*

Full name / *Nom et prénoms*	
Address for service (street & number, city, postal code) / *Domicile élu (numéro et rue, ville, code postal)*	
Phone no./ *Numéro de téléphone*	Fax no. (if any) / *Numéro de télécopieur (le cas échéant)*
Defendant's Lawyer/Agent (Full name) / *Avocat/mandataire du défendeur (nom et prénoms)*	
Lawyer/Agent's address for service (street & number, city, postal code) / *Domicile élu de l'avocat/du mandataire (numéro et rue, ville, code postal)*	
Lawyer/Agent's phone no. / *Numéro de téléphone de l'avocat/du mandataire*	Lawyer/Agent's fax no. (if any) / *Numéro de télécopieur (le cas échéant)*

Note: For additional defendants, please list on attached sheet with all the necessary information as requested above.
Rem. : S'il y a d'autres défendeurs, veuillez indiquer leurs noms et tous les renseignements demandés ci-dessus sur une feuille séparée.

Ontario Court (General Division)
Cour de l'Ontario (Division générale)

NORTH YORK ..... Small Claims Court
Cour des petites créances de

Claim
Créance
Courts of Justice Act, R.R.O. 1990, Reg. 201
Loi sur les tribunaux judiciaires, L.R.O. 1990, Règl. 201
Form/*Formule* 7A

Refer to *Réf:*	NO 21513 19 97
Amount of Claim *Montant de la demande*	$ 6,000.00
Entry Fee *Droits d'inscription*	$ 50.00
	$

When referring to this document, please use number in upper right corner
Veuillez utiliser le numéro en haut à droite comme référence de ce document

PLAINTIFF/*DEMANDEUR*

Name/*Nom*: JOSEPH T. BATTAGLIA

DEFENDANT(S)/*DÉFENDEUR(S)*

Name/*Nom*: IMPERIAL TOBACCO LIMITED

Street No./*N° et rue*: 1857 Leslie Street | Address/*Adresse* | Apt. No./*N° d'app.*

Borough/City/*Ville/Municipalité*: DON MILLS, Ontario | Postal Code/*Code postal*: M3B 2M2 | Phone No./*N° de tél.*: (416) 447-2471

DEFENDANT/*DÉFENDEUR*

Name/*Nom*:

Street No./*N° et rue* | Address/*Adresse* | Apt. No./*N° d'app.*

Borough/City/*Ville/Municipalité* | Postal Code/*Code Postal* | Phone No./*N° de tél.*

To the Defendant/*Au défendeur:*

The Plaintiff claims from you $ 6,000.00, and costs for the reason(s) set out below.
Le(la) demandeur(s) vous demand(ent) la somme de ..... $ plus les frais pour la(les) raison(s) indiquée(s) ci-après.

IF YOU DO NOT FILE A DEFENCE WITH THE COURT WITHIN TWENTY DAYS AFTER YOU HAVE RECEIVED THIS CLAIM, JUDGMENT MAY BE ENTERED AGAINST YOU. PLEASE REFER TO INSTRUCTIONS ON REVERSE.
SI VOUS NE DÉPOSEZ PAS DE DÉFENSE AUPRÈS DU TRIBUNAL DANS LES VINGT JOURS SUIVANT LA RÉCEPTION DE CETTE DEMANDE, UN JUGEMENT PEUT ÊTRE RENDU CONTRE VOUS. VOIR RENSEIGNEMENTS AU VERSO.

TYPE OF CLAIM/*GENRE DE DEMANDE:*

- ☐ Overpaid account/Loan — *Compte impayé/prêt*
- ☐ Contract — *Contrat*
- ☐ Motor vehicle accident — *Accident qui implique un véhicule automobile*
- ☐ Promissory note — *Billet à ordre*
- ☐ Lease — *Bail*
- ☐ Services rendered — *Services rendus*
- ☐ N.S.F. cheque — *Chèque sans provision*
- ☐ Damage to property — *Dommages aux biens*
- ☒ Other — *Autres* TORT (describe/*préciser*)

Reasons for Claim and Details/*Raisons de la créance et détails:*
(Explain what happened, where and when and the amounts of money involved)
(Indiquer les faits qui donnent lieu à la demande, de même que la date et l'endroit où ils se sont produits ainsi que les sommes d'argent en cause):

SEE ATTACHED.

(If claim is based on a document, attach a copy for each copy of the claim, or if it is lost or unavailable, explain why it is not attached.)
(Si la demande est fondée sur un écrit, annexer une copie de cet écrit pour chaque copie de la demande, sauf celui qui a été perdu ou ne peut être produit, et les motifs pour lesquels il n'est pas annexé.)

Signature/*Solicitor or Agent's Name*
Signature du demandeur/Nom de l'avocat ou du mandataire

Address/*Adresse*: 271 Ridley Blvd., Suite 108

Borough/City/*Ville/Municipalité*: NORTH YORK, Ontario | Postal Code/*Code Postal*: M5M 4N1

Tel. No./*N° de tél.*: (416) 484-6174 | Fax No./*N° de télécopieur*:

Office use only/*À l'usage du bureau*

NORTH YORK SMALL CLAIMS COURT
COUR DES PETITES CRÉANCES NORTH YORK
47, SHEPPARD AVENUE EAST, 2ND FLOOR
47, AVENUE SHEPPARD, EST, 2ÈME ETAGE
WILLOWDALE, ONTARIO M2N 5X5
416-326-3554

0330 (rev. 04/96)

FOR INFORMATION ON ACCESS TO ONTARIO COURTS FOR PERSONS WITH DISABILITIES, CALL 1-800-387-4456 TORONTO AREA 326-0111
POUR PLUS DE RENSEIGNEMENTS SUR L'ACCÈS AUX TRIBUNAUX DE L'ONTARIO POUR LES PERSONNES HANDICAPÉES COMPOSEZ LE 1-800-387-4456 RÉGION DE TORONTO 326-0111

2002 S.H. No.

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

PETER STRIGHT

PLAINTIFF

- and -

IMPERIAL TOBACCO COMPANY LIMITED

DEFENDANT

STATEMENT OF CLAIM

1. The Plaintiff, Peter Stright, is a resident of Lower Sackville, Halifax Regional Municipality, Province of Nova Scotia.

2. The Defendant, Imperial Tobacco Limited, is a federally incorporated company with its registered office in Montreal, Province of Quebec.

3. At all times material hereto, the Defendant was responsible for the design, manufacture and distribution of tobacco products.

4. The Plaintiff smoked tobacco products, designed, manufactured and distributed by the Defendant since approximately 1975 when the Plaintiff was 11 years of age, including Player's Filter and Player's Light.

5. As a result of consuming the Defendant's tobacco products, the Plaintiff became addicted to nicotine and developed Buerger's Disease.

Negligent and/or Intentional Acts

6. The Plaintiff alleges that his nicotine addiction and Buerger's Disease were caused by the negligent and/or intentional acts of the Defendant, its employees, servants, and agents, for which the Defendant is, in law, liable. Such acts consist of the following:

    a. The Defendant knew or ought to have known that their tobacco products are nicotine delivering devices and are pharmacologically addictive;

CANADA
PROVINCE DE QUÉBEC
District de SAINT-HYACINTHE
Localité : Saint-Hyacinthe
No Dossier : 750-32-700014-163

COUR DU QUÉBEC
Chambre civile
Division des petites créances

Roland Bergeron
5108.du Tertre
Saint-Hyacinthe QC J2T 0B4

Partie demanderesse

c.

Impérial Tobacco Canada
3711 St-Antoine Ouest
Montréal QC H4C 3P6

Partie défenderesse

Demande

Dédommagement

La partie demanderesse déclare ce qui suit :

1. Le ou vers le 25 mai 2015, la partie défenderesse a causé les dommages suivants à la partie demanderesse : Le demandeur a reçu un diagnostique d'emphysème pulmonaire et le demandeur a 3 micronodules au lobe supérieur gauche.
2. La partie défenderesse est responsable des dommages pour les raisons suivantes : Le demandeur a fumé pendant plus de 40 ans les produits Players : qui sont produits par le défendeur.
3. La faute a été commise le ou vers le 25 mai 2015, à St-Hyacinthe (Québec).
4. Les dommages se sont produits à St-Hyacinthe (Québec).
5. La partie demanderesse réclame la somme de 15 000,00 $, pour les raisons suivantes : Dommages à sa santé.
6. Bien que le paiement soit dûment requis par mise en demeure, la partie défenderesse refuse ou néglige de payer.

Pour ces raisons, la partie demanderesse demande à la cour de :

Condamner la partie défenderesse à payer à la partie demanderesse la somme de 15 000,00 $, avec intérêts au taux légal, et l'indemnité additionnelle prévue à l'article 1619 du Code civil du Québec.

Condamner la partie défenderesse à payer à la partie demanderesse les frais de 200,00 $ de la présente demande.

TAB 3

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

APPLICANTS

AFFIDAVIT OF NANCY ROBERTS

(Sworn March 12, 2019)

I, Nancy Roberts, of the City of Toronto, in the municipality of Metropolitan Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a partner at Osler, Hoskin and Harcourt LLP, counsel to the Applicants, Imperial Tobacco Canada Limited ("ITCAN") and Imperial Tobacco Company Limited, and therefore I have personal knowledge of the matters deposed to herein. Where I have relied on other sources for information, I have stated the sources of my belief and believe them to be true.

2. I understand that the Applicants have filed an affidavit of Eric Thauvette sworn March 12, 2019 (the "Thauvette Affidavit"), in support of their application for an Initial Order and related relief under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "CCAA"). I am swearing this affidavit to supplement the Thauvette Affidavit and provide evidence in support of the Applicants' request for the appointment of the Honourable Warren K. Winkler as the "Tobacco Claimant Representative" on an interim basis.

3. Any capitalized terms not defined in this affidavit have the meaning given to them in the Thauvette Affidavit.

4. In the Initial Order, the Applicants are requesting that the Tobacco Claimant Representative be appointed on an interim basis until April 30, 2019 or as may be agreed to by the Applicants and the Monitor (the "Interim Period") as an officer of the Court to represent the interests of all persons (other than any defendant or respondent, any of their respective affiliates, and the federal, provincial and territorial governments of Canada) in these proceedings (the "Tobacco Claimants") in connection with any Tobacco Claim. During the Interim Period, the Tobacco Claimant Representative will, among other things, be authorized to take the following steps (the "Interim Duties"):

(a) retain independent legal counsel and such other advisors and persons as the Tobacco Claimant Representative considers necessary or desirable to assist him in relation to the Interim Duties;

(b) consult with Tobacco Claimants, the Monitor, the Applicants and other creditors and stakeholders of the Applicants, including in connection with any recommendations that the Tobacco Claimant Representative has in respect of (i) establishing a committee of Tobacco Claimants to consult with and provide input to the Tobacco Claimant Representative and the procedures to govern the formation and operation of such an "Interim Tobacco Claimant Committee"; and (ii) procedural mechanisms to be implemented to facilitate the resolution of the Tobacco Claims;

(c) accept a court appointment of similar nature to represent claimants with interests similar to the Tobacco Claimants in any proceedings under the CCAA commenced by a company that is a co-defendant with any of the Applicants in any action brought by one or more Tobacco Claimants; and

(d) apply to this Court for advice and directions at such times as the Tobacco Claimant Representative may so require.

5. The Applicants will, before the end of the Interim Period, bring a motion seeking the permanent appointment of the Tobacco Claimant Representative to represent the interests of all Tobacco Claimants in negotiating a settlement with the Applicants and others.

6. In order to appreciate the fundamental role of the proposed Tobacco Claimant Representative in managing the claims of the various litigation stakeholders, it is essential to consider the nature and extent of the existing Canadian claims held by Tobacco Claimants other than Government Claimants (*i.e.*, the claims / claimants captured by the ongoing proceedings, as well as the nature and scope of the potential claims / claimants that are outside the scope of the existing litigation).

7. The tobacco industry has been the subject of significant product liability and consumer litigation in recent decades. ITCAN is currently facing more than 20 large tobacco litigation claims that have been filed across Canada (four of which are in Ontario), with claims for damages totalling well over $600 billion. A chart outlining these proceedings and certain other litigation across Canada is appended at Schedule A of the Thauvette Affidavit. These proceedings include the Government Medicaid Actions, the Class Actions, Other Proceedings, and the Ontario Tobacco Grower Class Action.

8. The ongoing proceedings do not represent all of the potential Tobacco Claims that may be commenced against the Applicants. For example, the two Quebec class proceedings encompass a fixed class and do not include the following claims or claimants:

(a) claims for individual pecuniary damages (the Quebec class counsel renounced these claims and the Quebec Class Action Judgment is limited to moral and punitive damages only);

(b) all claims by non-residents of Quebec;

(c) addiction or health claims by Quebec residents who started smoking after 1998;

(d) claims for lung cancer, throat cancer or emphysema by Quebec residents who were diagnosed after March 2012;

(e) all claims for diseases other than lung cancer, throat cancer or emphysema (*i.e.*, claims for heart disease, other types of cancer, etc.);

(f) all claims with respect to diseases related to second-hand smoke; and

(g) Restitutionary Claims.

9. In another example, class proceedings have been commenced in Alberta, Manitoba, Nova Scotia, and Saskatchewan seeking damages for "tobacco-related" disease and a disgorgement of revenues or profits, among other things. Each of these proceedings seek recovery on behalf of national classes of smokers (which arguably includes residents of Quebec who fall outside the ambit of the Blais or Letourneau proceedings).

10. The claims in Ontario are more circumscribed as the proposed class (also a purported national class) is limited to smokers who have been diagnosed with chronic obstructive pulmonary disease, heart disease or cancer. No other Personal Injury Claims are currently asserted in Ontario. Similarly, two class actions have been commenced in British Columbia seeking damages in respect of heart disease and chronic respiratory disease, respectively. Both of these

again purport to be national in scope. No other Personal Injury Claims have been asserted in British Columbia, nor have any Addiction Claims been advanced.

11. A further class action has been commenced in British Columbia asserting only a Restitutionary Claim with respect to the improper marketing of "light" and "mild" products by the Applicants. This Restitutionary Claim is limited to residents of British Columbia and others who opt into the B.C. proceeding. Notably, no similar Restitutionary Claims have been commenced as yet in any of the other Canadian provinces (other than in Newfoundland, where certification was denied).

12. No class proceedings or individual proceedings have been commenced as yet in New Brunswick, Newfoundland, Prince Edward Island, or any of the Territories with respect to any of the above-noted categories of potential claims.

13. Similarly, no Addiction Claims have been commenced as yet in any of the common law provinces (other than an Ontario Small Claims Court action that has been in abeyance since 2003), and no Personal Injury Claims with respect to second-hand smoke exist in any Canadian province (including Quebec).

14. As is evident from the foregoing, the litigation landscape against the Applicants consists of a patchwork of overlapping claims which have been advanced on behalf of various subgroups of Canadian consumers over the years. In addition, the Applicants are potentially exposed to as-yet-unasserted claims on behalf of other Canadian consumers. The Applicants need to identify and resolve all potential, yet unasserted claims, even if many or most of them may well be time-barred.

15. It will be critical for the success of the Applicants' restructuring initiatives that the claims of all Tobacco Claimants be considered under one umbrella to ensure uniformity of treatment, to avoid economic tensions as between Tobacco Claimants, to deal with competing claims of class counsel, and to streamline the process for the resolution of such claims. Therefore, the Applicants anticipate that on the motion to confirm the Tobacco Claimant Representative's appointment, they will request that he have the mandate to:

(a) represent the interests of Tobacco Claimants in the CCAA proceedings, including in relation to any negotiations to settle with the Applicants, the BAT Affiliates and others, and the development of a plan of compromise or arrangement;

(b) negotiate on behalf of Tobacco Claimants with class counsel in the various class actions to ensure fair and reasonable class counsel fees;

(c) negotiate and consult with the Government Claimants;

(d) commence the process of constituting a committee (the "Tobacco Claimant Committee") to consult with him in connection with his mandate, at such times and intervals as the Tobacco Claimant Representative may deem appropriate;

(e) be at liberty to consult with the Monitor in connection with the negotiations of the settlement of any Tobacco Claims and the development of a plan of compromise or arrangement; and

(f) report to this Court and to Tobacco Claimants at such times and intervals as the Tobacco Claimant Representative may deem appropriate with respect to his mandate.

16. Subject to this Court's approval, the proposed Tobacco Claimant Representative has engaged Lax O'Sullivan Lisus Gottlieb LLP to act as his independent legal counsel in these proceedings and he may seek to engage financial and other advisors as necessary.

17. In connection with his appointment, it is proposed that the Tobacco Claimant Representative, along with his counsel and financial and other advisors, be granted a Court-ordered charge as security for their respective fees and disbursements relating to services rendered in accordance with its Court appointment up to a maximum amount of $1 million (the "Tobacco Claimant Representative Charge"). The Tobacco Claimant Representative Charge is proposed to rank *pari passu* with the Administration Charge and to have first priority over all other charges.

18. The proposed Initial Order also states that, in connection with his appointment or the fulfilment of his duties in carrying out the provisions of the Order, the Tobacco Claimant Representative shall have the same immunity from liability as a judge of the Ontario Superior Court of Justice and shall be afforded protection pursuant to Section 142 of the *Courts of Justice Act*, RSO 1990, c C-43.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, this 12th day of March, 2019.

Commissioner for Taking Affidavits

Evan M. Thomas (LSUC# 54447K)
Osler, Hoskin & Harcourt LLP
1 First Canadian Place, Suite 6100
Toronto, Ontario, Canada M5X 1B8

Nancy Roberts

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

APPLICANTS

Court File No:

Ontario
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

AFFIDAVIT OF NANCY ROBERTS

(Sworn March 12, 2019)

OSLER, HOSKIN & HARCOURT LLP
1 First Canadian Place, P.O. Box 50
Toronto, ON M5X 1B8

Deborah Glendinning (LSO# 31070N)
Marc Wasserman (LSO# 44066M)
John A. MacDonald (LSO# 25884R)
Michael De Lellis (LSO# 48038U)

Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers to the Applicants,
Imperial Tobacco Canada Limited
and Imperial Tobacco Company Limited

Matter No: 1144377

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

APPLICANTS

Court File No:

Ontario
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

APPLICATION RECORD OF THE APPLICANTS (VOLUME 2 OF 2)

OSLER, HOSKIN & HARCOURT LLP
1 First Canadian Place, P.O. Box 50
Toronto, ON M5X 1B8

Deborah Glendinning (LSO# 31070N)
Marc Wasserman (LSO# 44066M)
John A. MacDonald (LSO# 25884R)
Michael De Lellis (LSO# 48038U)

Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers to the Applicants,
Imperial Tobacco Canada Limited
and Imperial Tobacco Company Limited

Matter No: 1144377