C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

S U P E R I O R C O U R T
(Class Actions)

NO: 500-06-000076-980

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ

Representative – Plaintiff

And

JEAN-YVES BLAIS

Designated Member

v.

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

Defendants

And

IMPERIAL TOBACCO CANADA LIMITED

Plaintiff in Warranty

v.

ATTORNEY GENERAL OF CANADA, having a place of business at Complexe Guy-Favreau, 200 René-Lévesque West, East Tower, 9th Floor, Montreal, Quebec H2Z 1X4

Defendant in Warranty

MOTION TO INSTITUTE PROCEEDINGS (ACTION IN WARRANTY)

(Article 216 *et seq Code of Civil Procedure*)

THE PLAINTIFF-IN-WARRANTY, IMPERIAL TOBACCO CANADA LIMITED, STATES AS FOLLOWS:

The Principal Action

1. A copy of the Plaintiffs' Motion to Institute Proceedings (the "**Principal Action**"), is produced herewith as **Exhibit PW-1**. ITCAN states that neither the required filing of the Motion to Institute Proceedings with Exhibits (the "**Motion**") nor any of the statements in

that Exhibit or this Plea are to be construed as an admission or a consent to the admissibility of the Exhibits cited in support of the Motion.

2. In the Principal Action, the Plaintiff-in-warranty Imperial Tobacco Canada Limited ("**ITCAN**"), formerly Imperial Tobacco Limited, is being sued, solidarily with other Defendants (the "**Principal Defendants**"), by members of a class represented by the Representative Plaintiff and the Designated Member (collectively the "**Plaintiffs**"), for damages for certain illnesses (the "**Diseases**") which allegedly were caused by the use of tobacco products manufactured, marketed and sold by ITCAN and the other Principal Defendants (the "**Products**"), as well as punitive damages, indemnity and an order for the creation of a fund.

3. In essence, the Principal Action alleges faults arising from alleged product liability, failure to inform, misrepresentation and a conspiracy to refuse to disclose the risks of smoking.

4. The Plaintiffs claim in the Principal Action that ITCAN is solidarily liable for allegedly manufacturing dangerous, hazardous and addictive Products, manipulating the Products to make them more dangerous, a conspiracy to adopt a common policy of systematic non-disclosure, trivialization and negation of the risks and dangers related to the Products, failing to inform, disseminating false information about the Products and initiating and maintaining a scientific controversy and public relations counter-discourse on the effects of the Products, which actions and omissions are alleged to constitute faults. [See Motion, paragraphs 5, 83, 104, 109, 116, 123, 131, 132, 134, 138, 141]

5. The Plaintiffs also claim punitive damages for an alleged illicit and intentional infringement of a right guaranteed by the *Quebec Human Rights Charter* (R.S.Q. c. C-12) and for misleading advertising contrary to the *Consumer Protection Act* (R.S.Q. c. P-40.1). [See Motion, paragraphs 163, 166]

6. In ITCAN's Plea in Defence in the Principal Action, a copy of which is produced herewith as **Exhibit PW-2**, ITCAN has denied all liability to the Plaintiffs. ITCAN repeats and incorporates herein the facts pleaded in its Plea in Defence.

7. The judgment authorizing the Principal Action as a class proceeding identified eight common questions which are set out in paragraph 3 of the Plea in the Principal Action. The conduct and omissions of the Defendant-in-warranty are relevant to these common questions:

(a) Les intimées ont-elles fabriqué, mis en marché, commercialisé un produit dangereux, nocif pour la santé des consommateurs?

(b) Les intimées avaient-elles connaissance et étaient-elles présumées avoir connaissance des risques et des dangers associés à la consommation de leurs produits?

(c) Les intimées ont-elles mis en œuvre une politique systématique de non-divulgation de ces risques et de ces dangers?

(d) Les intimées ont-elles banalisé ou nié ces risques et ces dangers?

(e) Les intimées ont-elles mis sur pied des stratégies de marketing véhiculant de fausses informations sur les caractéristiques du bien vendu?

(f) Les intimées 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?

(g) Les intimées 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) Les intimées ont-elles intentionnellement porté atteinte au droit à la vie, à la sécurité, à l'intégrité des membres du groupe?

8. Based on the facts set forth herein, ITCAN has a recourse in warranty against the Defendant-in-warranty, Attorney General of Canada (the **"federal government**") for any condemnation (in capital, interest, and costs) rendered against ITCAN in the Principal Action, or subsidiarily for a proportionate share of any such liability.

9. ITCAN states that none of the facts or allegations herein are intended to be, nor should they be construed as, admissions of any of the allegations or claims advanced by the Plaintiffs in the Principal Action, nor any admission that liability can be established or that damages can be awarded on a class-wide basis, or otherwise.

The Defendant-in-warranty

10. Pursuant to section 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, this action in warranty is being brought by ITCAN against the federal government naming the Attorney General of Canada as the nominal Defendant-in-warranty.

11. This action in warranty is being brought to establish the liability of the federal government to ITCAN and to members of the class:

(a) for the acts, omissions, breach of duties and obligations and faults of:

(i) officials of Health Canada, successor to the Department of National Health and Welfare and of the Products Safety Branch of the former Department of Consumer and Corporate Affairs (hereinafter "**Health Canada**");

(ii) officials in the Department of Agriculture and Agri-Food Canada (hereinafter "**Agriculture Canada**");

(iii) the Ministers, Deputy Ministers, Assistant Deputy Ministers, Executive Directors, members of committees, administrative heads, scientists and other public servants of Health Canada and Agriculture Canada,

(collectively referred to herein as the "**Officials**"), because to the extent that any manufacture, promotion or sale of ITCAN's Products resulted in the Diseases

suffered by the Plaintiffs or members of the class, ITCAN states that the liability, if any, for damages and reparation resides with the federal government;

(b) as a result of its civil liability, resulting from the conduct and omissions of Officials of Health Canada and Agriculture Canada in connection with ITCAN's production, sale and marketing of the Products, including risk disclosure or any failure to inform members of the class;

(c) as a result of its civil liability, resulting from the conduct and omissions of Officials of Agriculture Canada and Health Canada in the design, licensing and manufacturing of new strains of tobacco purchased by ITCAN and used in the Products, and their promotion of the lower delivery Products to consumers;

(d) subsidiarily, for its proportionate liability and share of any award of damages made against ITCAN such share to be determined, *inter alia*, with regard to:

(i) the degree of participation and fault of Officials of the federal government in each of the matters alleged by the Plaintiffs against ITCAN;

(ii) the representations, information and advice given by the federal government to smokers and potential smokers and to ITCAN;

(iii) the requests, mandates, directions and requirements made to or imposed on ITCAN by the federal government in respect of the relevant matters pleaded in the Principal Action; and

(iv) the extent of the federal government's financial interest, through the Minister of National Revenue and otherwise, in taxes on the proceeds of sale of the Products and in the royalties derived from the federal government's licensing of intellectual property rights in the strains of tobacco to farmers whose tobacco was purchased by ITCAN from Canadian tobacco marketing boards and used in ITCAN's Products,

as more fully set out below.

The Basis of Liability of the Federal Government

12. At all relevant times in respect of matters pleaded in the Principal Action, a direct relationship existed between Officials of the federal government and members of the class, and between Officials of the federal government and ITCAN.

13. In respect of the matters at issue in this proceeding, the federal government has gone far beyond performing a traditional government role of formulating policy. Many of the Officials were bureaucrats who were exercising their professional judgment. Others were performing administrative and operational functions. None of them were making policy decisions at the relevant times or for matters relevant to this claim for recourse in warranty; they were only implementing established policy. The conduct and omissions of the Officials were operational activities or decisions.

14. If, as alleged by the Plaintiffs, ITCAN committed any fault in respect of any of the matters identified in paragraphs 2, 3, 4, 5, and 7 above (which ITCAN denies), then the Officials of Health Canada and Agriculture Canada who manufactured components of the Products, who provided advice and information, made representations, made requests to and imposed requirements on ITCAN and who provided information and advice or refrained from providing information and advice to members of the class, as set out in some detail below, were also at fault, and the federal government, by virtue of its direct liability or its vicarious liability for its servants' conduct and omissions, has an obligation to make reparation for any injuries caused to members of the class or to ITCAN, both directly and in warranty to ITCAN.

15. If the Products were dangerous, hazardous, or had a safety defect, or if there was a lack of sufficient information or warnings as to the risks and dangers of consuming the Products (all of which ITCAN denies), then the federal government caused or contributed to such faults and is liable to make reparation for any damages or losses caused to ITCAN or to members of the class, such obligation to make reparation being owed both directly to members of the class and in warranty to ITCAN.

16. At all relevant times in respect of matters pleaded in the Principal Action, the federal government and its Officials owed obligations not to cause injury and duties of care to ITCAN, and to the members of the class, when the federal government was designing, marketing and manufacturing the tobacco strains used in virtually all of the Principal Defendants' Products, including without limitation the lower tar and marginally-higher nicotine cigarettes (such as the "light" and "mild" cigarettes), that were purchased or used by members of the class in Québec. The federal government is itself a manufacturer whose obligations and liability is governed by general civil law provisions, which are binding on the federal government. In particular:

(a) The federal government chose to enter the commercial chain of production of the Products by designing and licensing the tobacco strains used by the Principal Defendants in manufacturing their Products;

(b) Officials genetically engineered, designed, developed and manufactured the tobacco used in the Products, and especially the marginally higher nicotine, lower tar tobacco found in the commercially produced "light" and "mild" cigarettes, sold in Québec that is at the foundation of some of the common questions and some of the Plaintiffs' claims against ITCAN;

(c) Officials independently determined that lower delivery products were safer and less hazardous, based on its own research;

(d) Officials were directly engaged in and responsible for literally every step of implementing its "Less Hazardous Cigarette" program and in doing so became a significant actor in the tobacco industry;

(e) The federal government charged licensing fees and royalties and earned commercial income from tobacco growers who used seeds of the new tobacco strains that the federal government had developed;

(f) The federal government was the leader in creating and promoting the "light" and "mild" cigarettes;

(g) Agriculture Canada researched, developed, grew, marketed and distributed tobacco, for the benefit of itself and the tobacco farming and processing industry in Canada;

(h) As a result of the foregoing, the tobacco developed and marketed by the federal government became, by the 1980's, virtually the only tobacco available in Canada for the commercial production of cigarettes; and

(i) Through the Minister of National Revenue and fiscal legislation, the federal government has derived a significant portion of its annual revenues from the direct taxation of the Products and the indirect taxation of the agricultural, manufacturing and distribution operations involved in the production and sale of tobacco and tobacco Products,

as set out in some detail below. The alleged dangerous or hazardous nature of the tobacco Products is alleged by the Plaintiffs in the Principal Action to lead to faults.

17. At all relevant times in respect of matters pleaded in the Principal Action, the federal government and its Officials owed obligations not to cause injury and duties of care to ITCAN, and to the members of the class, when the federal government was providing information or advice, or imposing requirements on ITCAN. In particular:

(a) Officials undertook a duty to smokers, potential smokers and ITCAN to ensure they were properly and adequately advised and informed of the risks of smoking;

(b) Officials decided at various times what risks or dangers should be disclosed or need not be disclosed, and so advised ITCAN;

(c) Officials published the "League Tables" listing standard tar and nicotine deliveries as a "useful buyer's guide" for smokers, together with press releases representing, expressly or impliedly, that the lower delivery Products were better for smokers who continued to smoke;

(d) Officials made direct representations to both smokers and ITCAN that using lower delivery, including the "light" and "mild", cigarettes was "safer" or "less hazardous", based on the state of scientific knowledge at the time and specifically the federal government's knowledge at the time;

(e) Officials requested and subsequently dictated to ITCAN both the need to provide warnings on cigarette packages and in print advertising (while permitted) and the content of the warnings;

(f) Officials directed or influenced and later controlled how the Products would or would not be advertised and promoted;

(g) Officials requested, and subsequently mandated, the measurement and disclosure by ITCAN of certain smoke constituents, including tar and nicotine deliveries;

(h) Officials directed and subsequently mandated the manner of measurement by ITCAN for the testing of the tar and nicotine deliveries referenced above;

(i) Officials initiated and participated in discussions on scientific findings or scientific knowledge from time to time, which the Plaintiffs characterize in the Principal Action as a "scientific controversy" or "counter-discourse", and

(j) Officials requested that ITCAN and the Principal Defendants respond on an industry-wide basis to issues concerning health risks, advertising and labelling, as a result of which an ad hoc committee and later the CTMC was created and industry positions were expressed, which conduct the Plaintiffs now seek to characterize as the Principal Defendants acting wrongly in concert,

as set out in some detail below. The nature of the Products, the adequacy of the information and warnings, the alleged withholding of information, the allegation that the Principal Defendants were acting in concert and the nature of the public debate are now claimed by the Plaintiffs to be faults.

18. The Plaintiffs also allege a wrongful manipulation of the tobacco plant by ITCAN [referred to in paragraphs 5, 105 and 109 of the Motion]. To the extent that any such wrongful manipulation occurred (which is denied), that wrongful act was committed by the federal government as a result of its role in developing, promoting and licensing certain tobacco strains, as discussed further below.

19. In the Principal Action, the Plaintiffs seek to hold ITCAN liable for damages on the basis of allegations of fault relating to each of the issues referred to in the preceding paragraphs 14-18.

20. If ITCAN has any liability to the members of the class in respect of the issues identified above (which ITCAN denies), then it is entitled to call upon the Defendant-in-warranty to indemnify it in regard to any award of damages against it, or subsidiarily, to indemnify ITCAN for a proportionate share thereof.

The Development and Manufacture of Products: The Role of the Federal Government in the Chain of Production

21. The federal government played an integral and central role at all material times in the development, manufacture, marketing and sale of tobacco products in Canada as set out in the Plea in Defence and incorporated herein, and as further set out in this Plea in Warranty.

1. The Role of the Department of Agriculture and Agriculture Canada

22. In contrast with other tobacco producing countries, most of the research and development relating to tobacco strains in Canada has been carried out by the federal government. Since 1893, the federal government has operated experimental farms, staffed by its Officials, where tobacco plant research and breeding has occurred, the benefit of which was shared with and used by private, commercial tobacco growers in Canada.

23. In 1933, Agriculture Canada established a research facility in Delhi, Ontario (the "**Delhi Research Station**"). The mandate of the Delhi Research Station included improving the quality of Canadian tobacco leaf, and the development of domestic and export markets for Canadian tobacco.

24. In 1970 Agriculture Canada embarked on a tobacco and health research program at the federal government's Delhi Research Station, the goal of which was to produce a less hazardous cigarette. Since at least 1970, Agriculture Canada and Health Canada worked together on the "Less Hazardous Cigarette Programme". This included the research and breeding of low tar varieties of tobacco and the manufacture of cigarettes for testing on Agriculture Canada's smoking machines and for testing by consumer panels to determine smoker satisfaction.

25. Research and breeding of low tar varieties of tobacco continued at the Delhi Research Station until at least 1987, and resulted in genetically altered tobacco cultivars such as Nordel, Newdel, Delgold, Delfield and Candel. Research into tobacco crops by the federal government continued until 2000.

26. As a result, among other things, the federal government researched, developed, produced and licensed to tobacco growers (and collected licensing fees in respect of) tobacco strains with marginally higher nicotine levels but that would produce lower tar deliveries when burned. These new strains became virtually the only tobacco varieties available for purchase by Canadian cigarette manufacturers (including ITCAN) for the purpose of manufacturing tobacco Products in Canada.

27. Virtually all of the Canadian tobacco grown and sold to ITCAN was produced from plant strains developed by Agriculture Canada, at times in conjunction with Health Canada and university researchers funded by the federal government, and obtained under licence from the federal government. The federal government received fees for its new tobacco strains from tobacco growers, and thereby earned substantial commercial income.

28. Most of the tobacco used by ITCAN in the manufacture of the Products during the period covered by the Principal Action was grown in Canada and bought by ITCAN from Canadian tobacco marketing boards. During the 1980s and 1990s, the proportion of Canadian tobacco used by ITCAN was in excess of 90%.

29. Thus, by the 1980's virtually all of the tobacco purchased by ITCAN for use in the manufacture of its Products was tobacco that had been genetically engineered, designed and produced by Officials of Agriculture Canada and its sponsored university researchers. The tobacco varieties developed by Agriculture Canada effectively replaced all previous tobacco varieties grown in the country.

30. Accordingly, the federal government was itself the researcher, designer and manufacturer of the new strains of tobacco that were components in ITCAN's Products. This was an operational activity, not a policy-making function.

31. In respect of all matters relevant to this Plea in Warranty, Agriculture Canada Officials were performing administrative and operational acts. To the extent that any decision-

making was involved, the Officials were making operational decisions, not policy decisions.

2. The Role of the Department of Health and Welfare and Health Canada

32. In the 1960's, Health Canada effectively assumed the leadership of research efforts in Canada into all aspects of smoking and risks to health, and Health Canada has continued to assert that leadership since the 1960's.

33. Officials at Health Canada engaged in a course of conduct that included:

(a) research on the health risks of smoking and the possibilities and ways of reducing those risks;

(b) informing consumers about the health risks of smoking through posters, publications, bibliographies, news releases, radio promotions, television commercials, audio visual aids, encouraging newspapers to publish articles presenting the federal government's position on smoking and health and ultimately through warnings on packaging and in manufacturers' print advertising; and

(c) dissuading non-smokers, particularly children and adolescents, from starting to smoke.

34. Health Canada assumed the responsibility for the dissemination of information regarding the risks associated with tobacco products, and it assumed a duty of care and obligation to both smokers and potential smokers and to ITCAN in respect of the relevant health issues, advertising and warnings.

35. For many years the scientific community and Health Canada Officials advocated the development of a low-tar cigarette, based on scientific knowledge at the time. Health Canada joined with Agriculture Canada in joint programs intended to address the health concerns related to tobacco and the benefits of lower delivery cigarettes. These joint programs involved genetic engineering of the tobacco plant specifically to reduce the levels of tar in tobacco smoke, while maintaining a level of nicotine sufficient to make the Products commercially viable.

36. In respect of all matters relevant to this Plea in Warranty, Health Canada Officials were performing administrative and operational acts. To the extent that any decision-making was involved, the Officials were making operational decisions, not policy decisions.

3. Further Specifics of the Conduct of The Federal Government Encouraging, Developing and Publicizing Low-tar Products

37. In July 1957, the Deputy Minister of Health requested that the Principal Defendants embark on a program of selective reduction; namely, to support independent research directed to identifying the presence in cigarette smoke of compounds or groups of compounds that might be responsible, in whole or in part, for the potential risks of smoking, and to develop means of removing or greatly reducing yields of the same.

38. Thereafter, the Officials requested that ITCAN lower tar and nicotine levels in cigarettes, and ITCAN did so. The Officials also advised the Principal Defendants on how they might research and design a cigarette that could reduce the health risks of smoking.

39. Beginning in the late 1960's and continuing for decades thereafter, it was considered by the federal government that smokers who chose not to quit smoking were better served by switching to lower delivery brands and in particular, cigarettes with lower standard tar deliveries. As a result, the Officials took the leadership role in researching, developing and promoting the design, cultivation and sale of new tobacco strains, and in the design and development of potentially less hazardous, lower delivery cigarettes, as set out herein.

40. ITCAN and the other Principal Defendants, through CTMC, were requested by Officials of Agriculture Canada to assist, and they agreed to assist, with the funding of the research and development at the federal government's research stations of reconstituted sheet tobacco and new tobacco strains with reduced tar and lower tar to nicotine ratios that could be used to manufacture lower delivery cigarettes.

41. Beginning in or about 1968, Officials of Health Canada began to implement a series of steps intended to encourage ITCAN to manufacture cigarettes with lower levels of tar and nicotine, and to induce smokers to select such Products. Officials at Health Canada began to provide information, advice and direction to ITCAN and the other Principal Defendants in regard to the tar and nicotine deliveries in cigarettes.

42. On May 24, 1968, the chief executive officers of the Principal Defendants met with Health Minister Allan MacEachen and agreed in principle to his request that they work with Health Canada in establishing a system for periodic testing of tar and nicotine levels and to cooperate with Health Canada on labelling.

43. In a press release dated November 20, 1968, Health Canada published the first in a series of "league tables" of the tar and nicotine deliveries of cigarette brands, accompanied with health warnings (which tables it continued to publish until November 1974, and then following a suspension of publication, until 1986.) Health Canada collected this information about tar and nicotine deliveries for the purpose of disseminating that information to promote lower delivery products.

44. In 1969, ITCAN and the other Principal Defendants began to use standard testing methods, developed and required by Officials of Health Canada, to measure and disclose to Health Canada the tar and nicotine deliveries of their various cigarette brands. The testing parameters initially used and required by the federal government were based in large measure on the studies and methods of the U.S. Federal Trade Commission.

45. As Health Canada's numerous press releases of the time stated and subsequent studies have shown, these measurements were not intended to produce absolute numbers but rather relative ones that would allow (and in fact do allow) the consumer to determine the standard tar and nicotine deliveries of a brand and compare them to the standard deliveries of other brands.

46. The testing parameters for nicotine and tar deliveries were only slightly modified with the passage of the *Tobacco Products Control Act* in 1988. At this time, the regime was changed to that known as the "ISO Method". The ISO Method is an accepted international standard adopted as a result of consultation with interested parties, including Officials in Health Canada.

47. In a speech to tobacco growers at Delhi on July 14, 1971, Dr. D. G. Hamilton, Assistant Director General, Research Branch, Agriculture Canada, stated that "Our research will guide you in how to manipulate the tar and nicotine levels in the tobacco you grow and get ready for market".

48. Included in the new production techniques undertaken by Officials of Health Canada and Agriculture Canada at the Delhi Research Station was the concept of reconstituted tobacco sheet, which is one of the techniques specifically targeted by the Plaintiffs [see paragraph 105 of the Motion].

49. In September 1972, at the request of Agriculture Canada , the Principal Defendants entered into a research agreement with Agriculture Canada and the Growers' Marketing Board for the research and development of reconstituted sheet tobacco. On July 27, 1973, a further agreement was signed in order to continue research with various specific objectives, including the use of reconstituted tobacco sheet as a means of reducing the biological activity of cigarette smoke.

50. On January 22, 1973, Health Minister Marc Lalonde and Agriculture Minister Eugene Whelan announced that new laboratories were to be constructed early that year at Delhi, with the long term aim of developing, through tobacco breeding, tobacco varieties and cultural, curing and other processing techniques that could contribute towards the production of "less hazardous" cigarettes.

51. In January 1973, the Health Minister also announced a three way program of cooperative research, to be undertaken by Health Canada, Agriculture Canada, and the University of Waterloo, with the objective of contributing to international efforts to produce new forms of light and mild products, among other things. The federal government presented Canada as taking a major role, internationally, in the development of potentially less harmful cigarettes.

52. Later in 1973, Health Minister Marc Lalonde publicly called upon the tobacco manufacturers to provide tar and nicotine figures on cigarette packages.

53. In a paper dated February 20, 1974 and entitled "Review of Tobacco and Health Program at Delhi", Officials of Agriculture Canada described their research goals as including the production of cultivars with "desirable nicotine contents to meet current demands".

54. In 1974, the Minister of Health stated that tar reduced products were beneficial to persons who smoked in moderation and did not inhale deeply and stated that the Principal Defendants were manufacturing tar reduced products in response to requests by Health Canada.

55. In 1975, at the direction and insistence of Officials of Health Canada, ITCAN and the other Principal Defendants began providing tar and nicotine figures in its print advertising.

56. In 1976, at the direction and insistence of Officials of Health Canada, ITCAN and the other Principal Defendants began to put tar and nicotine delivery figures on their cigarette packages.

57. The declared average tar and nicotine deliveries were and are machine derived deliveries, established under the standard testing parameters referred to above.

58. In March 1977, Health Canada identified the potential need for cigarettes with lower tar and carbon monoxide yields but with a sufficient nicotine yield to satisfy certain smokers.

59. In 1977, Officials at the Delhi Research Station and Health Canada conducted a project entitled "Delhi Tobacco and Health Bio-Assay Programme" as part of its "less hazardous" cigarette programme. The federal government was directly engaged in developing strains of tobacco which, when combined with filtering and other technology, would be suitable for use in the lower delivery Products, including the "light" and "mild" Products.

60. Agriculture Canada represented, and the fact is, that it was working to develop new varieties of tobacco "…tailor-made for…light cigarette brands, [by] combining low tar and high nicotine."

61. The result of the Delhi research and development programmes was that Agriculture Canada created varieties of tobacco with lower tar to nicotine ratios. Eventually as the research and development progressed, the tobacco strains contained marginally higher levels of nicotine than previously available varieties, but when burned produced lower levels of tar. These strains were therefore believed by the federal government to produce a less-hazardous cigarette, based upon then current scientific knowledge.

62. In 1978, the Minister of Health, Monique Bégin, took credit on behalf of the federal government for the availability of "light" and "mild" Products on the market.

63. In a letter dated February 15, 1978, the Director of the Delhi Research Station, Dr. Frank Marks, wrote the Principal Defendants to solicit funding for research work on reconstituted tobacco sheet research work, stating that such work was "the cornerstone for the development of less hazardous cigarettes".

64. In 1978, Officials of Health Canada introduced a programme of mandatory tar reduction in cigarettes which was based on a sales weighted average tar ("**SWAT**") target set by Health Canada Officials. This programme required ITCAN to develop and promote lower tar brands so as to produce higher sales volumes than those with higher tar yields.

65. By the spring of 1981, Officials at Health Canada represented to the public and to ITCAN that: "The relatively low tar/nicotine ratio of Canadian tobacco offers manufacturers greater flexibility in producing lighter cigarettes and still maintains sufficient nicotine and flavour to satisfy consumer demands."

66. In January 1983, Health Minister Bégin announced that she had requested all cigarette companies to reduce the average tar yield to 12 mg. The federal government insisted that ITCAN and other cigarette manufacturers attempt to reduce the SWAT levels in accordance with the federal government target.

67. To comply with the SWAT levels set by Officials, ITCAN and the other cigarette manufacturers necessarily had to introduce, promote and sell brands with lower tar yields. ITCAN successfully reduced the SWAT levels of its brands from about 15 milligrams in 1978 to 12 milligrams in 1984, in accordance with the federal government's directive to do so.

68. Health Canada also established Sales Weighted Average Nicotine ("**SWAN**") targets. ITCAN complied with these targets as well.

69. In February, 1986, Officials of Agriculture Canada prepared a research proposal and request for funding from the Principal Defendants to develop tobacco varieties with higher leaf nicotine and lower tar to nicotine ratios.

70. By October 1987, work at the Delhi Research Station had advanced to the point that researchers at the Delhi Research Station recommended that two new strains of tobacco with enhanced nicotine content, Delgold and Candel, be introduced into agricultural production.

71. In their design of the lower tar tobacco varieties later grown by Canadian farmers and sold to ITCAN, Officials of Health Canada and Agriculture Canada specifically sought to maintain a certain level of nicotine based upon then current scientific knowledge. The Officials of Health Canada and Agriculture Canada resolved to maintain the nicotine content of the tobacco varieties they were developing at levels sufficient to avoid having smokers spurn those products in favour of "regular strength" products.

72. The federal government knew that this tobacco was intended for use in the manufacture of cigarettes by ITCAN and the Principal Defendants and for sale of the Products to the public, including to members of the class.

73. At the specific request of Officials of Health Canada, ITCAN developed, promoted and sold cigarettes with lower standard tar deliveries.

74. Until advertising and promotion were banned by legislation, Officials at Health Canada requested that ITCAN devote increased resources to advertising and promoting "light" and "mild" products, and ITCAN complied with those requests.

75. The federal government licensed the use of their tobacco strains by farmers and received substantial commercial income, in the form of license fees and royalties, for those tobacco strains. The federal government received seed royalties for its intellectual property rights in those new varieties of tobacco.

76. The federal government also received direct taxation revenues derived from the sale for consumption of tobacco Products manufactured from the varieties of tobacco which it had developed.

77. The allegations of the Plaintiffs in regard to:

(a) the manufacture and promotion of dangerous, hazardous or unsafe Products;

(b) the marketing and promotion of cigarettes with lower levels of tar and nicotine, and

(c) the development and use of reconstituted tobacco,

all relate to actions taken by Officials of the federal government, as researchers, designers, promoters and/or manufacturers of the tobacco used by the Principal Defendants in the Products, and as the promoters of lower delivery Products, including the "light" and "mild" Products.

78. To the extent that there has been any manipulation in the nicotine content of cigarettes (none of which has been engaged in by ITCAN), such manipulation, if any, was effected by the federal government. Any manipulation of Products in regard to factors influencing addiction or dependency which is relevant to these proceedings is the result of work carried out by Officials of Health Canada and Agriculture Canada in genetically engineering strains of tobacco with specific targets for sustained levels of nicotine.

79. If ITCAN has any liability as manufacturer or distributor of the Products, it has a recourse in warranty against the Defendant-in-warranty, flowing from the federal government's role in the design and promotion of the essential ingredient of cigarettes: tobacco. If ITCAN committed any faults with respect to its research or cigarette design, or if it designed or manufactured a product suffering from a safety defect, so as to have caused any damage allegedly suffered by the Plaintiffs or any members of the class (all of which is denied), then the federal government is liable to ITCAN to the extent of any liability of ITCAN to the class or any of its members and is solidarily liable to the class and any of its members.

Specifics of The Federal Government's Direction of the Timing, Standards and Content of Information Disclosure and Required Warnings

80. The Plaintiffs claim that the risks and dangers of smoking were not disclosed to them by ITCAN and the Principal Defendants and that false statements were made about the same. [see Motion, paragraphs 5, 121,123, 131, 132, 134, 140, and 157]

1. The Nature of the Relationships

81. Health Canada has repeatedly expressly acknowledged its duty to ensure that smokers and potential smokers were properly and adequately informed of the risks of smoking to health.

82. On June 17, 1963, the Health Minister stated that the Department of Health and Welfare had the responsibility to inform the public about the risks of smoking.

83. Throughout the period of implementation of the National Smoking and Health Programme, the Ministers of Health have stated that it was the responsibility of Health Canada to ensure that smokers were properly and adequately informed of the risks of

smoking to health and the properties of cigarettes, and Health Canada assumed that responsibility.

84. The federal government provided advice, information and warnings to smokers and potential smokers, including to members of the class, about the health risks of smoking. Its numerous public statements directed to smokers show that the federal government was acting with their interests in mind, rather than some broad and amorphous public interest.

85. ITCAN and the other manufacturers of the Products from time to time sought the advice and guidance of Officials of Health Canada and Agriculture Canada.

86. Officials of Health Canada and Agriculture Canada gave information, advice and directives to ITCAN and the other manufacturers of the Products about new tobacco strains and about the risks of smoking to health.

87. In 1963, at the request of Health Minister LaMarsh, a committee of cigarette manufacturers was established informally to present the position of the Canadian tobacco industry at the 1963 National Conference on Smoking and Health (the "**Ad Hoc Committee**"). This Ad Hoc Committee became the Canadian Tobacco Manufacturers' Council ("**CTMC**") in or about 1971, the members of which met frequently with Officials, sometimes at their request and sometimes at the request of the CTMC. ITCAN was a member of the Ad Hoc Committee and of the CTMC.

88. ITCAN and the other manufacturers of the Products were a discrete class of persons to whom the federal government owed obligations and duties of care when advice and information was being provided to them and requests were being made of them by the Officials.

89. In each instance where Officials gave information and advice to ITCAN or to smokers and potential smokers or made representations to ITCAN and smokers and potential smokers, those Officials intended that ITCAN and the consumers and potential consumers of tobacco Products would rely on the information, advice, and representations.

90. ITCAN states that at all material times, the federal government:

    (a) requested, mandated, directed or otherwise required ITCAN to place particular warnings, including the content of such warnings, on its Products and in any permissible advertisements; and

    (b) requested, mandated, directed or otherwise determined the times when ITCAN should place such warnings on its Products and permissible advertisements,

    and ITCAN complied with these requests, mandates, directions and requirements at all material times.

91. The federal government advised ITCAN and the Principal Defendants that the warnings it required were sufficient for informing the public about the risks of smoking.

92. The representations and advice were made or given by Officials during numerous meetings and on many occasions, including those particularized below. In respect of ITCAN, the representations, advice, mandates and directions began in and around the mid 1950's and continued until at least the mid 1980's. ITCAN was entitled to rely upon and in fact reasonably followed and relied upon the information, advice, requests or directives made by the Officials in respect of:

(a) the need or lack of need for specific warnings on cigarette packaging, as referred to in paragraphs 5, 117, 120, 123 and 132 of the Motion;

(b) the discussion of risks and dangers, including the effect of "compensation", as referred to in paragraphs 5, 64-66, 95, 105,116 and 161 of the Motion;

(c) responding to the health, labelling and advertising issues raised by the federal government from time to time on a coordinated and industry-wide basis, referred to as a common policy or acting in concert in paragraphs 5, 104, 110, 117, 120, 124 of the Motion;

(d) the development, manufacture and sale of cigarettes with lower tar and nicotine levels but higher nicotine to tar ratios, as referred to in paragraphs 105, 107, 109, 139, 140 and 201-202 of the Motion;

(e) the marketing and promotion of cigarettes with various tar and nicotine levels, including those described as "light" or "mild", as referred to in paragraphs 5, 52, 83, 109, 138-140, 155-157, 161 and 162 of the Motion;

(f) the use of reconstituted tobacco, as referred to in paragraphs 105 and 109 of the Motion; and

(g) the funding for or the conduct of research by third parties, and the discussions of the results of that research, including the alleged scientific controversy regarding the causal connection between smoking and disease, as referred to in paragraphs 5, 110-112, 115 and 116 of the Motion.

93. ITCAN reasonably relied upon all of the representations, advice and directions in relation to product research, the placing or not placing of warnings on cigarette packages and advertisements, the content of warnings, developing, marketing and promoting lower delivery Products (including the "light" and "mild" Products), publishing "tar" and nicotine deliveries as measured by standard testing methods, and using tobacco strains sold or licensed by Officials of Agriculture Canada.

94. ITCAN conducted its advertising, promotion and development of new brands of Products in reliance upon the advice and information given to ITCAN by the Officials of Health Canada and Agriculture Canada, and at times in accordance with its directions and regulations on the statements to be made or not to be made by ITCAN regarding its Products, and in particular, the warnings made on cigarette packaging and in print advertising prior to the prohibition on advertising.

95. The Officials knew or ought to have known, that ITCAN would rely on their representations and advice and would rely on and comply with their requests or directions.

96. If it is found in the Principal Action that some smokers relied upon the information and advice published by the federal government or the lack of information and did not know the risks of smoking (which is denied), then ITCAN states the Officials knew or ought to have known, that smokers and potential smokers would rely on their representations and advice. Indeed, the Officials intended and knew or should have known that smokers and potential smokers would rely more on the information and advice from Health Canada than on anything said by the Principal Defendants.

97. By undertaking to provide the aforesaid advice and information to smokers, potential smokers, ITCAN and the Principal Defendants, and by actually providing the advice and information, the federal government and its Officials assumed and owed obligations and duties of care to ITCAN and to the members of the class when providing the information and advice to each of them in respect of the relevant public health issues, advertising and warnings on various matters raised in the Principal Action.

98. As a result of the foregoing, a direct relationship existed between ITCAN and the federal government, and between smokers and potential smokers and the federal government.

99. In particular, the federal government's Officials had a duty to act reasonably and diligently, to exercise due care and skill to provide accurate and competent advice and accurate and not misleading information that was consistent with the state of scientific knowledge at the relevant times.

100. Many of these Officials were bureaucrats who were exercising their professional judgment when providing the information and advice. Others were performing administrative and operational functions. None of them were making policy decisions when they were advising or informing ITCAN and smokers and potential smokers at the relevant times. They were operators, sometimes making operational decisions.

2. The Federal Government's Representations and Advice on Health Risks Generally

101. Prior to 1972, tar and nicotine delivery disclosure was chosen by Health Canada in lieu of other proposals for informing consumers of tobacco Products about health risks, including "general cautions or warnings on cigarette packages".

102. For example:

(a) in June 1963, the Minister of Health stated that the federal government had "a duty to inform the public of the risk to health of cigarette smoking", and, further, that special efforts should be made to dissuade children and adolescents from acquiring a smoking habit;

(b) in discussions with ITCAN's representatives on May 11, 1965, Deputy Minister of Health G. D. W. Cameron stated that it was not possible to be categorical in stating a

causal relationship between cigarette smoking and disease and that he considered labelling on Products to be "silly";

(c) in 1965, Officials concluded that the public in general and smokers in particular had been adequately informed and were aware of the potential association between smoking and disease. Officials advised cigarette manufacturers that it was unnecessary or inadvisable to issue definitive public statements at that time on the relationship between smoking and health;

(d) in a memorandum to the Cabinet dated April 13, 1967, the Minister of Health advised that: "After careful considerations of all the proposals [to overcome the risk to injury to health from cigarette smoking] it is believed that the one most likely to be effective is a declaration on all cigarettes and cigarette tobacco packages and advertisements therefor, of the nicotine and tar content of the smoke produced from the cigarette or tobacco in question"; and

(e) Until 1971, Officials of Health Canada concluded and expressed the opinion that warnings of the health risks of smoking were unnecessary or inadvisable on cigarette packages or in print advertising, given the public's overwhelming knowledge of the same.

103. ITCAN relied on Health Canada's assumption of responsibility in regard to risk disclosure to smokers and potential smokers, including members of the class, and relied on Health Canada's position that warnings were not necessary.

104. In 1971, the Officials changed their position on warnings. Following this change in position, discussions were held between Officials, ITCAN and the other Principal Defendants.

105. In particular, the Officials requested a warning be placed on all packages and in advertisements that implicitly recognized the health risks were already well known: "Warning …danger to health increases with amounts smoked".

106. On September 15, 1971, the Principal Defendants, at the request and direction of the federal government, agreed to include a requirement for a health warning on cigarette packages in their self-imposed cigarette advertising code that became effective in 1972. Over time, the advertising code adopted by the Principal Defendants was expanded and updated in accordance with the on-going advice, requests and directions from the Officials of Health Canada.

107. The Officials monitored ITCAN's compliance with the advertising codes. Consequently, the advertising and promotion permitted under the advertising codes, which was endorsed by Officials, was reasonable and lawful and did not constitute any fault as alleged, or at all.

108. ITCAN carried the government directed health warnings on their products and in its advertising beginning in 1972 and until 1989. The warnings that were placed on cigarette packages in Quebec prior to 1989, and which are impugned by the Plaintiffs, were

worded in accordance with the specific advice from and requests of the Officials of Health Canada.

109. In 1988, Regulations were passed under the TPCA that became effective in January 1989. This was the very first federal legislation regulating warnings. From 1989 to 1995, the warnings contained on cigarette packages were mandated by the *TPCA.*

110. ITCAN again carried warnings on its packages between 1996 and 2000 when there was no legislation requiring those warnings.

111. Since December 2000, government legislated and regulated warnings, in the form mandated by the federal *Tobacco Act*, have appeared on all cigarette packages.

112. From 1989 to 1995, the TPCA expressly prohibited ITCAN from including any messages or warnings on its Product packaging, other than those specifically prescribed.

113. If members of the class successfully claim that they were misinformed or misled by any information or advice relating to the health risks associated with smoking or that they were insufficiently informed of the risks and if ITCAN has any liability to members of the class as a result (which is denied), then ITCAN has a recourse in warranty against the federal government for having advised ITCAN on and having requested and later required the specific warnings, and no other warnings.

3. The Federal Government's Advice and Representations on "Addiction"

114. As set out in the Defence in the Principal Action, the definition of the term "addiction" and in particular, whether or not smoking could be considered to be addictive, has altered over time.

115. While the federal government, first through non-legislative measures in 1972 and then through legislated health warnings in 1989, has required certain health warnings to appear on cigarette packages and in print advertising (at times when advertising was permitted), no warning regarding addiction was mandated by the federal government until September, 1994.

116. In 1969, 1986 and again in 1988, Officials of Health Canada considered and rejected a warning on addiction. At that time, the Officials endorsed the view that smoking was properly to be considered a habit and not an addiction, and they so advised ITCAN.

117. Until September 1994, the federal government did not consider it necessary to inform smokers and potential smokers of the risk or danger of addiction.

118. Consistent with all previous directions and requirements of the federal government and with the state of scientific knowledge at the time, ITCAN acted in accordance with the government's standard in regard to the use of the terms "addictive" or "addiction".

119. Once a warning about "addiction" was mandated by the federal government, ITCAN immediately complied with the federal government's requirements by adding the warning to its packaging.

120. If members of the class successfully claim that they were misinformed or misled by any information or advice relating to the risk of addiction or that they were insufficiently informed of the risks and if ITCAN has any liability to members of the class as a result (which is denied), then ITCAN has a recourse in warranty against the federal government for having advised ITCAN on and having required the specific warning on addiction only in 1994 and later years, and no other warnings.

4. The Federal Government's Advice and Representations on "Safer" and "Less Hazardous" Products

(a) Generally

121. Standard tar and nicotine deliveries in cigarettes were first published by the federal government in 1968. The government's purpose in publishing these numbers was to provide this information to smokers as a comparative measure and to convince smokers to switch to lower delivery cigarettes if they were going to continue to smoke. As stated in the federal government's news release of November 20, 1968:

> "The main purpose in releasing this information," said Mr. Munro, "is to allow people to know tar and nicotine levels of the cigarettes they smoke so they may, if they wish, avoid those with high and choose those with low levels."

122. ITCAN cautioned the federal government about the publication of tar and nicotine numbers. Specifically, ITCAN cautioned the federal government that because of the many different ways people smoke, including the frequency and intensity, it was possible that there might be little relation between published tar figures and the exposure of an individual smoker to any given cigarette. Nonetheless, the federal government continued to release the standard tar and nicotine deliveries of various Canadian cigarette brands, and to pressure the Principal Defendants to disclose the tar and nicotine deliveries of their brands on their packaging.

123. As intended by the Officials, the information in the league tables was widely publicized in the media and was used by health professionals and others when advising smokers or potential smokers about the potential health risks of smoking, and the properties of cigarettes, and when encouraging smokers to switch to low yield products.

124. The federal government insisted that ITCAN and the Principal Defendants print the machine derived average tar and nicotine numbers on their products and in advertisements, and that they reduce the standard deliveries of tar and nicotine.

125. In accordance with the federal government's directives, beginning in 1975 ITCAN began printing the machine derived average tar and nicotine numbers on some advertisements, with all advertisements and Products including the tar and nicotine numbers in 1976.

126. From the outset, "light" and "mild" descriptors merely referred to the relative standard tar deliveries of cigarettes within a brand family. The use of "light" and "mild" descriptors provided information to smokers which allowed them to readily navigate the strength and taste spectrums of cigarettes.

127. Officials of Health Canada explicitly endorsed the use of the descriptors "light" and "mild" by the Principal Defendants. Until 1999 (after the commencement of the Plaintiffs' Motion), Officials at Health Canada raised no objection to the use of the descriptors "light "and "mild" on the Principal Defendants' Products.

128. At material times in the Principal Action, Health Canada's Officials took steps to encourage smokers to switch to brands containing lower standard deliveries (and in particular, lower deliveries of tar) by representing and advising that they were "safer" or "less hazardous". Among other things:

(a) In various press releases issued between 1968 and 1986 together with the "league tables" of standard tar and nicotine deliveries, the federal government represented, expressly or impliedly, that lower delivery cigarettes were safer or less harmful, as a smoker could reduce their exposure to smoke chemicals.

(b) In a press release dated February 2, 1971, Health Canada stated that one of the research objectives of the Department of Agriculture was to develop tobaccos required for the production of "less hazardous" cigarettes.

(c) In a television interview on October 15, 1973, Health Minister Marc Lalonde stated that Health Canada was spending money to develop a "safer" cigarette.

(d) In their report of March 1977 entitled "Smoking and Health in Canada", Officials of Health Canada stated that cigarettes with very low tar and nicotine levels may be safer to the consumer.

(e) On July 23, 1982, Dr. E. J. LeRoux, Assistant Deputy Minister of Research for Agriculture Canada, stated that "Our job is to make your product the cleanest and healthiest".

(f) By actively involving themselves in the development of "less hazardous" cigarettes and publicizing the fact that they were safer or less hazardous, the Officials of the Government of Canada represented to smokers that the use of such cigarettes was an acceptable alternative in the event that the consumer decided not to quit smoking, and they created the impression for potential smokers that such lower delivery products were safer.

(g) In a press release in January 1984, Health Minister Monique Bégin stated that recent studies "reinforce our knowledge that the tar and nicotine values printed on packages are a satisfactory buyer's guide to cigarettes with lower average yields of toxic substances".

(h) In a January 1986 press release, Health Canada informed smokers that they might actually experience three times the average "tar" yield shown on cigarette packages but, nonetheless, the published "tar" and nicotine yields were a satisfactory buyer's guide to selecting cigarettes with lower average yields, and some cigarettes may be less hazardous than others.

(i) In May, 2001, Dr. Murray Kaiserman of Health Canada stated that the "federal government encouraged these products [light and mild cigarettes] because of the general belief among the tobacco control community was that these products were less harmful."

(j) Until August 2003, Health Canada on its website continued to encourage or advise smokers to switch to light and mild products in the event that they would not quit smoking.

129. The foregoing opinions, advice and representations of the Officials of Health Canada were relied upon by ITCAN and ITCAN complied with their directions.

130. At no time did ITCAN promote its brands on the basis that cigarettes containing lower levels of tar and nicotine (as measured by the standard testing methods) were "safer" or "less hazardous" than cigarettes containing higher levels.

131. In fact, it was Officials of Health Canada, and not ITCAN or any of the Principal Defendants, that represented that brands containing lower levels of tar and nicotine were "safer" or "less hazardous" on the basis of the contemporary scientific knowledge.

132. Whatever opinions or beliefs members of the class had formed about the health risks associated with lower delivery Products, including "light" and "mild" cigarettes, resulted from the dissemination of information and advice to smokers and potential smokers by Officials of Health Canada, and not by ITCAN. To the extent that any member of the class was led to believe that lower delivery Products were "less hazardous" or "safer" than higher tar ones, that belief was due to the conduct and omissions of the federal government, as set out above.

(b) The "Compensation" Issue

133. The term "compensation" refers to smokers who, when switching to brands with different standard deliveries, alter their smoking behavior. The Plaintiffs allege that the damage from smoking "light" and "mild" cigarettes is as harmful as smoking other cigarettes due to the phenomenon known as "compensation". [see paragraphs 64-66, 95-96 and 161 of the Motion]

134. ITCAN advised the federal government of the potential for compensation, as potentially negating at least some of the potential benefit of lower delivery cigarettes for some smokers.

135. The position of Health Canada's Officials regarding possible warnings relating to compensation was that (a) such warnings were unnecessary because compensation was only temporary, if it occurred at all, and (b) such warnings might detract from Health Canada's efforts to promote low tar cigarettes.

136. Notwithstanding this position, by the time the third league table was published in 1969 and thereafter, the federal government has advised smokers and potential smokers of the possibility of compensation in press releases and otherwise, while continuing to recommend that those smokers who choose to continue to smoke should switch to lower delivery Products. The federal government further continued to advise smokers and

potential smokers that the published tar and nicotine deliveries were a satisfactory buyer's guide to lower yield cigarettes, even though the machine measurements may not be an accurate measure of an individual's exposure to tar.

137. By no later than 1973, Officials at the Delhi Research Station were researching the phenomenon of compensation as part of the research and development of new strains of tobacco that would be used for cigarettes with lower tar yields.

138. In 1988, the federal government legislated the printing of machine derived average tar and nicotine numbers on the Products and notwithstanding its knowledge of the potential for compensation, it did not require a warning about the compensation and, indeed, it prohibited any other statements from being made on cigarette packaging.

139. None of the warnings requested by the federal government and voluntarily used by ITCAN before 1989 and none of the legislated warnings which have been drafted and imposed by the federal government since 1989 have required the disclosure of the possibility of compensation.

140. Either the Officials actually had a genuine belief or opinion that Products with reduced deliveries, and especially the "light" and "mild" Products, produced from the tobacco strains that the federal government had genetically designed and promoted represented a preferable choice for those who would continue to smoke, that they were safer and that the risk of compensation was not sufficiently material to warrant warnings on packaging, or they misled both smokers and ITCAN in this regard.

141. If ITCAN is in any way liable to members of the class in regard to disclosure of the levels of tar and nicotine or the marketing and promotion of cigarettes with lower deliveries, including without limitation the "light" and "mild" Products, or in regard to disclosure of the risks of addiction or compensation or the lack thereof (all of which is denied), then it has a recourse in warranty against the Defendant-in-warranty.

5. Conclusions on Representations, Advice, Requests and Directions

142. If and to the extent that ITCAN and the other Principal Defendants had obligations to provide information to consumers, including to members of the class, about the properties of cigarettes and the risks of smoking, the federal government had the same or similar obligations.

143. If ITCAN is liable to the Plaintiffs or members of the class, as alleged or at all (which is denied), then some or all of the aforesaid representations of the Officials were false, and ought to have been known to Officials to be false. ITCAN reasonably relied on those false representations to its detriment.

144. If ITCAN is liable to the Plaintiffs or members of the class, as alleged or at all (which is denied), then some or all of the aforesaid advice of the Officials was inaccurate and negligently provided, and was known or ought to have been known by Officials to be inaccurate. ITCAN reasonably relied on that inaccurate advice to its detriment.

145. If members of the class successfully claim that they were not properly informed or that they were misled by any information, advice or warnings relating to the health risks associated with smoking, or because of the lack thereof, and if ITCAN has any liability to members of the class in that regard (which is denied), then it has a recourse in warranty against the Defendant-in-warranty for the matters described herein. If, as alleged in the Principal Action, ITCAN committed any faults by misinforming or failing to adequately inform members of the class of the potential risks of smoking or the properties of cigarettes, so as to have caused any of the damage allegedly suffered by members of the class (all of which is denied), then the federal government is liable to ITCAN to the extent of any liability of ITCAN to the class or any of its members, and is solidarily liable to the class and its members.

The Financial Interests of Canada

146. Ever since Confederation, the federal government has had a significant direct interest in tobacco as a source of taxes and duties.

147. The federal government has assiduously protected its financial interests derived from tobacco products and tobacco farming, even after Health Canada began providing, and then insisting upon ITCAN providing, information and warnings to smokers and potential smokers on its packaging and in advertisements (at times when advertising was permitted).

148. At all times material to the Principal Action, the direct revenues of the Government of Canada from the manufacture and sale of ITCAN'S tobacco products were many times the profits derived by ITCAN from that same manufacture and sale. In particular:

(a) The federal government earned licensing fees on the sale of the genetically redesigned tobacco strains;

(b) The total revenue of the Government of Canada derived from tobacco products between 1950 and 1962 was in excess of $3,341,000,000;

(c) The federal government has repeatedly increased the rates of tax on tobacco products; and

(d) In 2004, the federal and provincial governments collected approximately $8,679,300,000 in taxes and duties from tobacco products.

149. Because the federal government shares in the proceeds of all the sales for consumption in Canada of all tobacco Products sold by all the Principal Defendants, the federal government should share the liability, if any, to the Plaintiffs or to members of the class.

The Defendant-in-warranty's liability

150. The Plaintiffs seek awards of damages solidarily against the three Principal Defendants.

151. ITCAN seeks 100% recourse in warranty for any condemnation rendered against ITCAN in the Principal Action, by reason of the federal government's conduct and omissions as set out herein.

152. Subsidiarily, ITCAN states that the apportionment of any liability as among the Principal Defendants cannot equitably be made without accounting for the share of solidary liability of the federal government, by reason of its conduct and omissions as set out herein.

153. ITCAN's motion to exercise a recourse in warranty is well-founded in fact and in law.

FOR ALL OF THE FOREGOING REASONS, PLAINTIFF-IN-WARRANTY IMPERIAL TOBACCO CANADA LIMITED ASKS THAT THIS HONORABLE COURT:

MAINTAIN the present action in warranty;

ORDER the Defendant-in-warranty to pay to it, with interest, the amount of any award of damages, interest or costs which ITCAN is required to pay pursuant to any judgment rendered in the Principal Action, or pursuant to any subsequent judgment rendered by this Court or a tribunal created by it following a finding of fault in the Principal Action;

Alternatively, **DETERMINE** the share of the Defendant-in-warranty in any award of damages in the Principal Action or pursuant to any subsequent judgment rendered by this Court or a tribunal created by it following a finding of fault in the Principal Action, and **ORDER** the Defendant-in-warranty to reimburse ITCAN any amount of such share, with interest, which ITCAN may be required to pay pursuant to such an award;

THE WHOLE WITH COSTS, including the costs of experts.

Montreal, February 29, 2008

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NOTICE TO DEFENDANTS
Article 119 *C.C.P.*

TAKE NOTICE that the Plaintiff in Warranty has filed this claim with the clerk of the Superior Court, of the judicial district of Montreal.

To file an answer to this claim, you must file an appearance in writing, personally or by advocate, at the **Montreal Courthouse** located at 1 Notre-Dame St. E., Montreal, within ten (10) day of service.

If you fail to file an appearance within the time limit indicated, a judgement by default may be rendered against you without further notice upon the expiry of the ten (10) day period.

If you file an appearance, the application will be presented before **the Honourable Justice Brian Riordan** at a date and on the terms the court may order.

In support of its motion to institute proceedings (action in warranty), the Plaintiff in Warranty discloses the following exhibits:

NOTICE OF DISCLOSURE OF PLAINTIFF IN WARRANTY'S EXHIBITS

TAKE NOTICE that the Plaintiff in Warranty, Imperial Tobacco Canada Limited, intends to file the following Exhibits in support of the Motion to Institute Proceedings (Action in Warranty) into the Court record:

Exhibit PW-1:	Copy of Plaintiff's Motion to Institute Proceedings.
Exhibit PW-2:	Copy of ITCAN's Plea in Defence in the Principal Action.

Montreal, February 29, 2008

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