

(CLASS ACTION)
SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO : 500-06-000070-983

CÉCILIA LÉTOURNEAU
Plaintiff

v.

IMPERIAL TOBACCO CANADA LIMITÉE

- and -

ROTHMANS, BENSON & HEDGES INC.

- and -

JTI-MACDONALD CORP.

Defendants

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

Plaintiff-in-Warranty

v.

ATTORNEY GENERAL OF CANADA, 200 René-Levesque West, Complexe Guy Favreau,
in the City and District of Montreal, Province of Quebec, H2Z 1X4

Defendant-in-Warranty

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 LIMITÉE

- and -

ROTHMANS, BENSON & HEDGES INC.

Defendants

AND

ROTHMANS, BENSON & HEDGES INC., a body corporate having a place of business at 185
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in the City and District of Montreal, Province of Quebec, H2Z 1X4
Defendant-in-Warranty

**MOTION TO INSTITUTE PROCEEDINGS IN WARRANTY OF PLAINTIFF-IN-
WARRANTY ROTHMANS, BENSON & HEDGES INC.**

**IN SUPPORT OF ITS ACTION IN WARRANTY, PLAINTIFF-IN-WARRANTY
ROTHMANS, BENSON & HEDGES INC. SUBMITS THE FOLLOWING:**

The Principal Actions

1. A copy of the *Motion to Institute Proceedings* of Plaintiff Cécilia Létourneau and of the *Amended Motion to Institute Proceedings* of Plaintiff Conseil québécois sur le tabac et la santé (the "Principal Actions") is produced herewith as **Exhibit PW-1 en liasse**;
2. In the Létourneau Principal Action, the Plaintiff-in-warranty Rothmans, Benson & Hedges Inc. ("**RBH**") is being sued solidarily with other Defendants (the "**Principal Defendants**"), by members of a class represented by the Plaintiff Cécilia Létourneau ("**Létourneau**"), for moral, non-pecuniary, exemplary and other damages for an alleged risk of contracting diseases, and for alleged loss of self-esteem and humiliation or social reprobation due to their failure to quit smoking allegedly caused by the use of tobacco products manufactured, marketed and sold by RBH and the other Principal Defendants (the "**Products**") and by an alleged failure to inform the members of the class of the risk of addiction. Létourneau alleges that the addiction to nicotine deprived the member of the class of their ability to exercise their free choice to continue or to stop smoking;
3. In essence, the Létourneau Principal Action alleges faults arising from alleged product liability, failure to inform, misrepresentation and a conspiracy to mislead smokers;
4. In the Létourneau Principal Action, Létourneau claims that RBH is solidarily liable for allegedly knowingly manufacturing, marketing and distributing dangerous, hazardous and addictive Products, manipulating the Products to contain nicotine levels that are sufficient to develop and maintain addiction, a conspiracy to adopt a concerted strategy or common front to prevent consumers from learning about the alleged inherent dangers of smoking, to mislead consumers, to deny the addictive nature of nicotine, to deny a causal link to certain diseases, failing an alleged duty to inform the public of the risks and dangers related to the Products, disseminating false information about the Products, creating a so-called scientific controversy about the effects of the Products and acting in bad faith, which actions and omissions are alleged to constitute faults and lead to damages;

5. In the Principal Action of Plaintiff Conseil québécois sur le tabac et la santé (“**CQTS**”), the Plaintiff-in-warranty RBH is being sued, solidarily with the Principal Defendants by members of a class represented by the Plaintiff CQTS and the Designated Member Blais (“**Blais**”), for damages for certain illnesses (the “**Diseases**”) which allegedly were caused by the use of tobacco Products, as well as punitive damages, indemnity and an order for the creation of a fund;
6. In essence, the Principal Action of the CQTS alleges faults arising from alleged product liability, failure to inform, misrepresentation and a conspiracy to refuse to disclose the risks of smoking;
7. In the Principal Action of the CQTS, the CQTS and Blais claim in the Principal Action that RBH 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;
8. In both Principal Actions, Létourneau, the CQTS and Blais (the “**Plaintiffs**”) also claim punitive damages for an alleged illicit and intentional infringement of a right guaranteed by the *Charter of Human Rights and Freedoms* (R.S.Q. c. C-12) and for misleading advertising contrary to the *Consumer Protection Act* (R.S.Q. c. P-40.1);
9. In RBH’s Plea in Defence in the Principal Actions, a copy of which is produced herewith as **Exhibit PW-2 en liasse**, RBH has denied all liability to the Plaintiffs;
10. The judgment authorizing the Principal Actions as a class proceeding identified eight common questions. The conduct and omissions of the Defendant-in-warranty are relevant to these common questions:
 - (a) Did the Defendants manufacture, market or sell a dangerous product that is harmful to health of consumers?
 - (b) Were the Defendants aware or could they be presumed to be aware of the risks and dangers associated with use of their products?
 - (c) Did the Defendants implement a policy of systematic non-disclosure of such risks and dangers?
 - (d) Did the Defendants trivialize or deny such risks and dangers?
 - (e) Did the Defendants develop marketing strategies conveying false information about the characteristics of the product sold?

- (f) Did the Defendants 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?
 - (g) Did the Defendants conspire to maintain a common front designed to prevent the users of their products from being aware of the inherent dangers of smoking?
 - (h) Did the Defendants wilfully impair the right to life, personal security, well being, inviolability and freedom of the members of the class?
11. RBH 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 Actions, nor any admission that liability can be established or that damages can be awarded on a class-wide basis, or otherwise. RBH maintains that neither it nor the Defendant-in-warranty, Attorney General of Canada (the “**federal government**”) committed any fault or breach of duty or are responsible for the damages allegedly suffered by the Plaintiffs;
12. Based on the facts set forth herein, RBH submits that the presence of the federal government is necessary to enable the Court to assess the Plaintiffs’ claims against RBH. Moreover, RBH has a recourse in warranty against federal government for any condemnation (in capital, interest, and costs) rendered against RBH in the Principal Actions, or subsidiarily for a proportionate share of any such liability;

The Defendant-in-warranty

13. 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 RBH against the federal government naming the Attorney General of Canada as the nominal Defendant-in-warranty;
14. This action in warranty is being brought to establish the liability of the federal government to RBH and to members of the classes:
- 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 RBH’s Products resulted in any injury or damages suffered by the Plaintiffs or members of the classes, RBH 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 RBH’s production, sale and marketing of the Products, including risk disclosure or any failure to warn members of the classes;
- 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 RBH 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 RBH, solidarily, 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 RBH;
 - (ii) the representations, information and advice given by the federal government to smokers and potential smokers and to RBH;
 - (iii) the requests, mandates, directions and requirements made to or imposed on RBH by the federal government in respect of the relevant matters pleaded in the Principal Actions; 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 RBH from Canadian tobacco marketing boards and used in RBH’s Products,

as more fully set out below;

The Basis of Liability of the Federal Government

- 15. At all relevant times in respect of matters pleaded in the Principal Actions, a direct relationship existed between Officials of the federal government and members of the classes, and between Officials of the federal government and RBH;
- 16. During World War II, the federal government distributed, endorsed, encouraged and facilitated the distribution of tobacco products. Thereafter, 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;

17. If, as alleged by the Plaintiffs, RBH committed any fault in respect of any of the matters identified alleged in the Principal Actions, which RBH 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 RBH and who provided information and advice or refrained from providing information and advice to members of the classes, 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 classes or to RBH, both directly and in warranty to RBH;
18. 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 RBH denies), then the federal government caused or contributed to such faults and is liable to make reparation for any damages or losses caused to RBH or to members of the classes, such obligation to make reparation being owed both directly to members of the classes and in warranty to RBH;
19. At all relevant times in respect of matters pleaded in the Principal Actions, the federal government and its Officials owed obligations not to cause injury and duties of care to RBH, and to the members of the classes, 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 classes 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 and marketing 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 RBH;
 - (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 Actions to lead to faults;

20. At all relevant times in respect of matters pleaded in the Principal Actions, the federal government and its Officials owed obligations not to cause injury and duties of care to RBH, and to the members of the classes, when the federal government was providing information or advice, or imposing requirements on RBH. In particular:
- (a) Officials undertook a duty to smokers, potential smokers and RBH 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 RBH;
 - (c) Officials made representations and provided information and advice about the potential risks of smoking, including habituating, dependency creating or addictive properties of tobacco, to consumers, including to members of the classes;
 - (d) 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;

- (e) Officials made direct representations to both smokers and RBH that using lower delivery and 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;
- (f) Officials requested and subsequently dictated to RBH both the need to provide warnings on cigarette packages and in print advertising (while permitted) and the content of the warnings;
- (g) Officials directed or influenced and later controlled how the Products would or would not be advertised and promoted;
- (h) Officials requested, and subsequently mandated the measurement and disclosure by RBH of certain smoke constituents, including tar and nicotine deliveries;
- (i) Officials directed and subsequently mandated the manner of measurement by RBH for the testing of the tar and nicotine deliveries referenced above;
- (j) Officials initiated and participated in discussions on scientific findings or scientific knowledge from time to time, which the Plaintiffs characterize in the Principal Actions as a “scientific controversy” or “counter-discourse”; and
- (k) Officials requested that RBH 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;

- 21. The Plaintiffs also allege a wrongful manipulation of the tobacco plant by RBH. 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;
- 22. In the Principal Actions, the Plaintiffs seek to hold RBH liable for damages in part on the basis of allegations of fault relating to each of the issues referred to in the preceding paragraphs;
- 23. If RBH has any liability to the members of the classes in respect of the issues identified above, which RBH 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 RBH for a proportionate share thereof;

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

24. 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

25. 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;

26. 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;

27. 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 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;

28. 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;

29. As a result, among other things, the federal government researched, developed 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 RBH) for the purpose of manufacturing tobacco Products in Canada;

30. Virtually all of the Canadian tobacco growers who sold tobacco to RBH produced that tobacco from plant strains developed by Agriculture Canada, at times in conjunction with Health Canada and university researchers funded by the federal government. The federal government licensed and received fees for the new tobacco strains from tobacco growers, and thereby earned substantial commercial income;

31. Most of the tobacco used by RBH in the manufacture of the Products during the period covered by the Principal Actions was grown in Canada and bought by RBH from Canadian tobacco marketing boards. During the 1980s and 1990s, the proportion of Canadian tobacco used by RBH was in excess of 90%;
32. Thus, by the 1980's virtually all of the tobacco purchased by RBH 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;
33. Accordingly, the federal government was itself the researcher, designer and manufacturer of the new strains of tobacco that were components in RBH's Products. This was an operational activity, not a policy-making function;
34. 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

35. 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;
36. 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;
37. 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 RBH in respect of the relevant public health issues, advertising and warnings;
38. 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;

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

40. 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 developing means of removing or greatly reducing yields of the same;
41. Thereafter, the Officials requested that RBH lower tar and nicotine levels in cigarettes, and RBH 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;
42. 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;
43. RBH and the other Principal Defendants, through CTMC, was 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;
44. Beginning in or about 1968, Officials of Health Canada began to implement a series of steps intended to encourage RBH 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 RBH and the other Principal Defendants in regard to the tar and nicotine deliveries in cigarettes;
45. 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;

46. 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 July 1974, and then following a suspension of publication, until 1968). Health Canada collected this information about tar and nicotine deliveries for the purpose of disseminating that information to promote lower delivery products;
47. In 1969, RBH and the other Principal Defendants began to use standard testing methods, developed and mandated 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 mandated by the federal government were based in large measure on the studies and methods of the U.S. Federal Trade Commission.;
48. As Health Canada's numerous press releases of the time 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;
49. 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;
50. 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";
51. 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;
52. 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;
53. 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;

54. 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;
55. Later in 1973, Health Minister Marc Lalonde publicly called upon the tobacco manufacturers to provide tar and nicotine figures on cigarette packages;
56. 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";
57. 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;
58. In 1975, at the direction and insistence of Officials of Health Canada, RBH and the other Principal Defendants began providing tar and nicotine figures in their print advertising;
59. In 1976, at the direction and insistence of Officials of Health Canada, RBH and the other Principal Defendants began to put tar and nicotine delivery figures on their cigarette packages;
60. The declared average tar and nicotine deliveries were and are machine derived deliveries, established under the standard testing parameters referred to above;
61. 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;
62. 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 "light" and "mild" Products;
63. 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.";
64. 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 smoked, produced lower

levels of tar. Those strains were therefore believed by the federal government to produce a less-hazardous cigarette, based upon then current scientific knowledge;

65. 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;
66. 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";
67. 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 RBH to develop and promote lower tar brands so as to produce higher sales volumes than those with higher tar yields;
68. By the spring of 1981, Officials at Health Canada represented to the public and to RBH 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";
69. 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 RBH and other cigarette manufacturers attempt to reduce the SWAT levels in accordance with the federal government target;
70. To comply with the SWAT levels set by Officials, RBH and the other cigarette manufacturers necessarily had to introduce, promote and sell brands with lower tar yields. RBH 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;
71. Health Canada also established Sales Weighted Average Nicotine ("SWAN") targets. RBH complied with these targets as well;
72. 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 resulting lower tar to nicotine ratios in cigarettes manufactured with these tobacco varieties;
73. 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;
74. In their design of the lower tar tobacco varieties later grown by Canadian farmers and sold to RBH, 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;

75. The federal government knew that this tobacco was intended for use in the manufacture of cigarettes by RBH and the Principal Defendants and for sale of the Products to the public, including to members of the classes;
76. At the specific request of Officials of Health Canada, RBH developed, promoted and sold cigarettes with lower tar deliveries;
77. Until advertising and promotion were banned by legislation, Officials at Health Canada requested that RBH devote increased resources to advertising and promoting "light" and "mild" products, and RBH complied with those requests;
78. 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;
79. 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;
80. 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;

81. To the extent that there has been any wrongful manipulation in the nicotine content of cigarettes (none of which has been engaged in by RBH), 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;
82. If RBH 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

RBH 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 classes, all of which is denied, then the federal government is liable to RBH to the extent of any liability of RBH to the classes or any of its members and is solidarily liable to the classes and any of its members;

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

83. The Plaintiffs claim that the risks and dangers of smoking were not disclosed to them by RBH and the Principal Defendants and that false statements were made about the same;

1. The Nature of the Relationship

84. 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;

85. 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;

86. 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;

87. The federal government provided advice, information and warnings to consumers and potential smokers, including to members of the classes, 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;

88. RBH and the other manufacturers of the Products from time to time sought the advice and guidance of Officials of Health Canada and Agriculture Canada;

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

90. 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 was re-established as 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. The predecessors of RBH were members of the Ad Hoc Committee and of CTMC;

91. RBH and the other manufacturers of the Products were a discrete classes 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;
92. In each instance where Officials gave information and advice to RBH or to smokers and potential smokers or made representations to RBH and smokers and potential smokers, those Officials intended that RBH and the consumers and potential consumers of tobacco Products would rely on the information, advice, and representations,
93. RBH states that at all material times, the federal government:
 - (a) requested, mandated, directed or otherwise required RBH 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 RBH should place such warnings on its Products and permissible advertisements,and RBH complied with these requests, mandates, directions and requirements at all material times;
94. The federal government advised RBH and the Principal Defendants that the warnings it required were sufficient for informing the public about the risks of smoking;
95. The representations and advice were made or given by Officials during numerous meetings and on many occasions, including those particularized below. In respect of RBH, the representations, advice, mandates and directions began in and around the mid 1950's and continued until at least the mid 1980's;
96. RBH 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;
 - (b) the discussion of risks and dangers, including the effect of "compensation";
 - (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;
 - (d) the development, manufacture and sale of cigarettes with lower tar and nicotine levels but higher nicotine to tar ratios;
 - (e) the marketing and promotion of cigarettes with various tar and nicotine levels, including those described as "light" or "mild";
 - (f) the use of reconstituted tobacco; 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;
97. RBH 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;
98. RBH conducted its advertising, promotion and development of new brands of Products in reliance upon the advice and information given to RBH 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 RBH regarding its Products, and in particular, the warnings made on cigarette packaging and in print advertising prior to the prohibition on advertising;
99. The Officials knew or ought to have known, that RBH would rely on their representations and advice and would rely on and comply with their requests or directions;
100. If it is found in the Principal Actions that some smokers relied upon the information and advice published by the federal government or the lack of information or warnings, then RBH states that 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;
101. By undertaking to provide the aforesaid advice and information to smokers and potential smokers, RBH 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 RBH and to the members of the classes 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 Actions;
102. As a result of the foregoing, a direct relationship existed between RBH and the federal government, and between smokers and potential smokers and the federal government;
103. 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;
104. 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 RBH 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

105. 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";
106. 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 RBH'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 therefore, 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;
107. RBH relied on Health Canada's assumption of responsibility in regard to risk disclosure to smokers and potential smokers, including members of the classes, and relied on Health Canada's position that warnings were not necessary;
108. In 1971, the Officials changed their position on warnings. Following this change in position, discussions were held between Officials, RBH and the other Principal Defendants;

109. 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";
110. 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 requiring a health warning on cigarette packages 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;
111. The Officials monitored RBH'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;
112. RBH 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;
113. 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*;
114. RBH again carried warnings on its packages between 1996 and 2000 when there was no legislation requiring those warnings;
115. Since December 2000, government legislated and regulated warnings, in the form mandated by the federal *Tobacco Act*, have appeared on all cigarette packages;
116. From 1989 to 1995, the *TPCA* expressly prohibited RBH from including any messages or warnings on its Product packaging, other than those specifically prescribed;
117. If members of the classes 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 RBH has any liability to members of the classes as a result, which is denied, then RBH has a recourse in warranty against the federal government for having advised RBH on and having requested and later required the specific warnings, and no other warnings;

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

118. Since before the 1950s, the fact that some smokers report difficulty quitting smoking was known by the federal government. The same was also widely known by consumers, including the members of the classes, at all material times;

119. As set out in the Defence in the Principal Actions, the definition of the term “addiction” and in particular, whether or not smoking could be considered to be addictive, has altered over time;
120. For example:
- (a) On November 26, 1963, following the conclusion of the Canadian Conference on Smoking and Health, Health Minister LaMarsh stated that the federal government was prepared to fund “...motivational research into the smoking habit – why it is picked up and why it persists so strongly”. The extra funds would be available “for research into why a person starts smoking and why he finds it so difficult to stop”;
 - (b) In a January 13, 1964 report to Health Canada entitled ‘The Report of the Meeting of the Technical Advisory Committee on Health Education concerning Smoking and Health’, the Committee stated that “the smoking habit is not an addiction, but rather habituation, since it is psychological rather than pharmacological in nature”;
 - (c) The U.S. Surgeon General’s 1964 report on Smoking and Health (the “**1964 Report**”) was the first public health report in the U.S. to survey the medical and scientific literature in an effort to present a consensus of medical and scientific thinking on the subject of smoking behaviour. The 1964 Report concluded, consistent with previous statements from public health authorities, that smoking was habituating (or habit-forming) and not addictive. Notwithstanding this conclusion, the 1964 Report recognized that smoking can be difficult to quit, a fact that had long been widely known. The 1964 Report received wide-spread media coverage throughout the world, including Canada and Quebec;
 - (d) In a press release dated November 20, 1968 Health Canada stated that “many people find it difficult to stop smoking...” and that “nicotine is assumed to be the basis of the dependency that develops to cigarette smoking”;
 - (e) In 1979, Health Canada indicated that it considered the smoking habit to be one that an individual could decide to break, noting: “[d]ependency on smoking can be ‘psycho-social or psychological.’ Most people decide to quit because of the serious health hazard cigarette smoking poses”;
 - (f) In 1988, the U.S. Surgeon General posited a new definition for addiction, with criteria that focussed primarily on psychological, rather than physiological factors. It was no longer necessary that the particular component in question produced intoxication, tolerance or physical dependence in order to be classified as addictive, as had previously been the case. With that new definition in hand, the U.S. Surgeon General concluded that nicotine was addictive;
 - (g) In June 1989, Health Canada commissioned the Royal Society of Canada to report on “the most appropriate term to characterize the risk of dependence on nicotine... and all other tobacco products”;

- (h) In January 1990, the Minister of Health announced in a press conference that he intended to introduce four new warning messages, including one stating that "Cigarette smoking is addictive." The Minister also stated that the addiction warning was "a direct result of the Royal Society report on addiction...". By this date, RBH was prohibited from advertising and prohibited from placing any statements on its cigarette packaging other than those mandated by the federal government; and
 - (i) In 1993 (effective in September 1994), the federal government amended the Regulations to provide for a new health warning which read: "*Cigarettes are addictive. La cigarette crée une dépendance*";
121. No warning regarding addiction was mandated by the federal government until September, 1994, even though 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);
 122. 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 RBH;
 123. Until September 1994, the federal government did not consider it necessary to inform smokers and potential smokers of the risk or danger of addiction;
 124. Consistent with all previous directions and requirements of the federal government and with the state of scientific knowledge at the time, RBH acted in accordance with the government's standard in regard to the use of the terms "addictive" or "addiction";
 125. Once a warning about "addiction" was mandated by the federal government, RBH immediately complied with the federal government's requirements by adding the warning to its packaging;
 126. If and to the extent that RBH had any obligation to provide information to smokers or potential smokers, including members of the classes, about the habituating or dependency creating or addictive properties of cigarettes, which is denied, the federal government had the same or similar obligations. When it provided such information, the federal Government had the obligation to ensure that such information was adequate and correct;
 127. If members of the classes successfully claim that they were misinformed or misled by any information or advice about the habituating or dependency creating or addictive properties of cigarettes or the risk of addiction, or that they were insufficiently informed of the risks and if RBH has any liability to members of the classes as a result, which is denied, then RBH has a recourse in warranty against the federal government for having advised RBH on and having required the specific warning on addiction only in September 1994 and later years, and no other warnings;

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

(a) **Generally**

128. 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, as part of the government's smoking and health program, 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.";

129. RBH cautioned the federal government about the publication of tar and nicotine numbers. Specifically, RBH 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;

130. 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;

131. The federal government insisted that RBH 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;

132. In accordance with the federal government's recommendations, beginning in 1975 RBH began printing the machine derived average tar and nicotine numbers on some advertisements, with all advertisements and Products bearing the numbers in 1976;

133. 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;

134. Officials of Health Canada 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;

135. At material times in the Principal Actions, 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 a preferable 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;
136. The foregoing opinions, advice and representations of the Officials of Health Canada were relied upon by RBH and RBH complied with their directions;
137. At no time did RBH 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;
138. In fact, it was Officials of Health Canada, and not RBH 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;
139. Whatever opinions or beliefs members of the classes had formed about the health risks associated with lower delivery or "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 RBH. To the extent that any member of the classes was led to believe that lower delivery products were "less hazardous" or "safer" than higher ones, that belief was due to the conduct and omissions of the federal government, as set out above;

(b) The "Compensation" Issue

140. 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";
141. RBH 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;
142. 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;
143. 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;

144. 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;
145. 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;
146. None of the warnings requested by the federal government and voluntarily used by RBH 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;
147. 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 RBH in this regard;
148. If RBH is in any way liable to members of the classes 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

149. If and to the extent that RBH and the other Principal Defendants had obligations to provide information to consumers, including to members of the classes, about the properties of cigarettes and the risks of smoking, the federal government had the same or similar obligations;
150. If RBH is liable to the Plaintiffs or members of the classes, 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. RBH reasonably relied on those false representations to its detriment;
151. If RBH is liable to the Plaintiffs or members of the classes, 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. RBH reasonably relied on that inaccurate advice to its detriment;
152. If members of the classes 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 RBH has any liability to members of the classes 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 Actions, RBH committed any faults by misinforming or failing to adequately inform members of the classes 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 classes, all of which is denied, then the federal government is liable to RBH to the extent of any liability of RBH to the classes or any of its members, and is solidarily liable to the classes and its members;

The Financial Interests of Canada

153. Ever since Confederation, the federal government has had a significant direct interest in tobacco as a source of taxes and duties;
154. 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 RBH providing, information and warnings to smokers and potential smokers on its packaging and in advertisements (at times when advertising was permitted);
155. At all times material to the Principal Actions, the direct revenues of the Government of Canada from the manufacture and sale of RBH's tobacco products were many times the profits derived by RBH 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;
156. 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 classes;

The Defendant-in-warranty's liability

157. The Plaintiffs seek awards of damages solidarily against the three Principal Defendants;
158. RBH seeks 100% recourse in warranty for any condemnation rendered against RBH in the Principal Actions, by reason of the federal government's conduct and omissions as set out herein;

159. Subsidiarily, RBH 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;
160. RBH's motion to exercise a recourse in warranty is well-founded in fact and in law.

WHEREFORE, MAY IT PLEASE THIS HONOURABLE COURT TO:

In both class actions:

GRANT the present Action in Warranty of Plaintiff-in-warranty Rothmans, Benson & Hedges Inc.;

ORDER the Defendant-in-warranty to pay to it, with interest, the amount of any award of damages, interest or costs which Plaintiff-in-warranty Rothmans, Benson & Hedges Inc. is required to pay pursuant to any judgment rendered in the Principal Actions, or pursuant to any subsequent judgment rendered by this Court or a tribunal created by it following a finding of fault in the Principal Actions;

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

THE WHOLE with costs, including all expert fees and the costs of all notices.

MONTREAL, FEBRUARY 29, 2008

(s) / (sgd.) McCarthy Tétrault S.E.N.C.R.L., s.r.l., LLP

MCCARTHY TÉTRAULT LLP
Attorneys for Plaintiff-in-Warranty ROTHMANS, BENSON & HEDGES INC.

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McCarthy Tétrault S.E.N.C.R.L., s.r.l., LLP

(CLASS ACTION)
SUPERIOR COURT

**CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL**

NO : 500-06-000070-983

CÉCILIA LÉTOURNEAU
Plaintiff

v.

IMPERIAL TOBACCO CANADA LIMITÉE

- and -

ROTHMANS, BENSON & HEDGES INC.

- and -

JTI-MACDONALD CORP.

Defendants

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

Plaintiff-in-Warranty

v.

ATTORNEY GENERAL OF CANADA, 200 René-Levesque West, Complexe Guy Favreau,
in the City and District of Montreal, Province of Quebec, H2Z 1X4

Defendant-in-Warranty

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 LIMITÉE

- and -

ROTHMANS, BENSON & HEDGES INC.

Defendants

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
Plaintiff-in-Warranty

v.

ATTORNEY GENERAL OF CANADA, 200 René-Levesque West, Complexe Guy Favreau,
in the City and District of Montreal, Province of Quebec, H2Z 1X4
Defendant-in-Warranty

**LIST OF EXHIBITS OF PLAINTIFF-IN-WARRANTY ROTHMANS, BENSON &
HEDGES INC.**

- Exhibit PW-1:** En liasse, copy of the *Motion to Institute Proceedings* of Plaintiff Cécilia
Létourneau and of the *Amended Motion to Institute Proceedings* of
Plaintiff Conseil québécois sur le tabac et la santé;
- Exhibit PW-2:** En liasse, copy of pleas of Plaintiff-in-warranty Rothmans, Benson &
Hedges Inc. in the Principal Actions.

MONTREAL, FEBRUARY 29, 2008

(s) / (sgd.) McCarthy Tétrault S.E.N.C.R.L., s.r.l., LLP

MCCARTHY TÉTRAULT LLP
**Attorneys for Plaintiff-in-Warranty ROTHMANS, BENSON &
HEDGES INC.**

Copie conforme / True Copy


McCarthy Tétrault S.E.N.C.R.L., s.r.l., LLP

NOTICE TO DEFENDANTS
(Article 119 C.C.P.)

Take notice that the Plaintiff-in-Warranty has filed this Motion to Institute Proceedings in Warranty in the office of the Superior Court of the judicial district of Montreal.

To file an answer to this Motion, you must first file an Appearance, personally or through an attorney, at the Courthouse of Montreal, located at 1 Notre-Dame Street West, within 10 days of service of this Motion.

If you fail to file an Appearance within the time limit indicated, a judgment by default may be rendered against you without further notice upon the expiry of the 10-day period.

If you file an Appearance, the Motion will be presented before the Honourable Justice Brian Riordan of the Superior Court of Quebec, on March 27, 2008, at 9:30 a.m., in a room to be designated, of the Montreal Courthouse.

Request for transfer of a small claim

If the amount claimed by the plaintiff does not exceed \$7,000, exclusive of interest, and if you could have filed such an action as a plaintiff in Small Claims Court, you may make a request to the Clerk for the action to be disposed of pursuant to the rules of Book VIII of the Code of Civil Procedure (R.S.Q., c. C-25). If you do not make such a request, you could be liable for costs higher than those provided for in Book VIII of the Code.

Montréal, February 29, 2008

(s) / (sgd.) McCarthy Tétrault S.E.N.C.R.L. s.r.l., LLP

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