

CANADA

PROVINCE OF QUÉBEC  
DISTRICT OF MONTREAL

No: 500-06-000076-980

(Class Action)

SUPERIOR COURT

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**CONSEIL QUÉBÉCOIS SUR  
LE TABAC ET LA SANTÉ**

Plaintiff

and

**JEAN-YVES BLAIS**

Designated member

vs.

**JTI-MACDONALD CORP.**

and

**IMPERIAL TOBACCO  
CANADA LIMITED**

and

**ROTHMANS, BENSON &  
HEDGES INC.**

Defendants

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**AMENDED DEFENCE OF JTI-  
MACDONALD CORP.**

**JTI-MACDONALD CORP. ("JTIM") PLEADS THE FOLLOWING IN RESPONSE TO PLAINTIFF'S AMENDED MOTION TO INSTITUTE PROCEEDINGS (THE "MOTION"):**

1. With regard to paragraphs 1 to 4 of the Motion, JTIM refers to the February 21, 2005 judgment of Mr. Justice Jasmin of the Superior Court (the "Authorization Judgment") and denies anything contrary to same, adding [...] that (i) members of the Class who purchased and consumed JTIM's product(s) or, under reserve of what is pleaded below at paragraph 14, Macdonald Tobacco Inc. ("MTI")'s product(s) outside the Province of Québec should be excluded from the Class as their claims would be based on foreign law and not the laws of the Province of Québec, and (ii) Québec residents who have developed cancer of the lung, larynx or throat or emphysema since the expiration date to opt out of the Class, cannot be included in the Class as they have been deprived of their right to opt out of the Class;
  
2. JTIM denies paragraphs 5 and 6 of the Motion, adding that:
  - a) JTIM admits that there are health risks associated with smoking, but notes that at all material times such health risks have been known to the general public of Québec (including Class Members), the Federal Government and the scientific and public health community. JTIM and, under reserve of what is pleaded below at paragraph 14, MTI had no greater knowledge of such health risks;
  
  - b) "throat cancer" is not a recognised medical term thereby making determination of the disease being claimed for and the identity of the Class Members impossible;
  
  - c) in order to determine the existence and cause(s) of, or the contribution of a risk factor to, any disease suffered by putative members of the

Class, a full assessment as to each individual member's risk profile - including familial and occupational history, medical history, lifestyle factors, smoking history and a verification of the disease diagnosis itself - would be required;

- d) while cigarette smoking is addictive, as the term is commonly used today, nicotine is only one factor that motivates people to continue smoking. Whether smoking is classified as addictive or not, nicotine does not impair cognitive function or prevent smokers from making the decision to quit and to successfully implement that decision. Moreover, that smoking may be difficult to quit has at all material times been known to the general public of Québec (including Class Members), the Federal Government and the scientific and public health communities;
- e) JTIM admits that it [...] and, under reserve of what is pleaded below at paragraph 14, MTI were members of the CTMC and that JTIM is still a member, but denies that it or MTI “acted behind the shield” of this organisation as alleged. It adds that the CTMC was first established at the request of the Federal Health Minister, as an ad hoc committee formed to interface with government authorities at Canada's first conference on the question of the relationship between smoking and health. JTIM moreover denies that it or, under reserve of what is pleaded below at paragraph 14, MTI formed part of any conspiracy or concerted action that could give rise to a finding of solidarity under the law of the Province of Québec.

- 3. JTIM admits paragraph 7 of the Motion;
- 4. JTIM denies paragraph 8 of the Motion, adding that collective recovery cannot be ordered in this case;
- 5. With regard to paragraphs 9, 10 and 11 of the Motion, JTIM refers to the Authorization Judgment and denies anything contrary to same;

6. JTIM admits paragraphs 12, 13, 14, 15 and 16 of the Motion, save that in regard to paragraph 15, Export “A” cigarettes were at the time marketed by MTI and not JTIM which did not exist then and adding that the Export “A” cigarettes that Mr. Blais smoked were cigarettes with a filter;
7. JTIM denies paragraph 17 of the Motion;
8. JTIM admits paragraphs 18 and 19 of the Motion;
9. JTIM denies paragraphs 20 and 21 of the Motion;
10. With regard to paragraphs 22 to 30 of the Motion, JTIM refers to Exhibits CQTS-1 to CQTS-10 and denies anything contrary to same;
11. With regard to paragraphs 31 to 39 of the Motion, JTIM refers to Exhibits CQTS-11 to CQTS-13 and denies anything contrary to same;
12. With regard to paragraphs 40, 41 and 42 of the Motion, JTIM refers to Exhibits CQTS-14 to CQTS-17 and denies anything contrary to same;
13. With regard to paragraph 43 of the Motion, JTIM refers to Exhibit CQTS-18 and denies anything contrary to same, adding that the allegations contained in paragraph 43 of the Motion are in any event immaterial as Japan Tobacco Inc. is not a party to the Motion;
14. JTIM denies as drafted paragraph 44 of the Motion, adding that: [...]
  - a) Prior to the acquisition on February 15, 1974, of all of the outstanding shares of MTI by R.J. Reynolds Tobacco Company, MTI was a Canadian family owned business;
  - b) RJR-Macdonald Inc. was incorporated on September 12, 1978, under the laws of the Province of Ontario;
  - c) RJR-Macdonald Inc. acquired on September 19, 1978, all of the shares of MTI from R.J. Reynolds Tobacco Company, the whole as appears

from a copy of the “Sale and Purchase Agreement” communicated herewith as Exhibit D-JTIM-1;

d) RJR-Macdonald Inc. acquired on October 27, 1978, all of the assets of MTI and agreed with MTI to assume and discharge all of its liabilities and obligations then owing, the whole as appears from a copy of the “General Conveyancing Agreement” communicated herewith as Exhibit D-JTIM-2;

e) On July 16, 1979, MTI applied to surrender its charter and be dissolved, and it was dissolved effective February 15, 1983, the whole as appears from a copy of a Motion to dissolve MTI and supporting Affidavit dated July 16, 1979, a letter dated January 25, 1983 from Gouvernement du Québec, Ministère des Institutions Financières et Coopératives and pages 764 and 767 of the Gazette Officielle du Québec of February 19, 1983 communicated herewith *en liasse* as Exhibit D-JTIM-3;

f) In April 1999, RJR-Macdonald Inc. created a wholly-owned unlimited company under laws of the Province of Nova Scotia and then amalgamated with this wholly-owned subsidiary to create RJR-Macdonald Corp., an unlimited company under the laws of the Province of Nova Scotia;

g) In November, 1999, RJR-Macdonald Corp. amalgamated with another unlimited company under the laws of the Province of Nova Scotia to become JTIM.

Consequently and under reserve of JTIM’s defences as pleaded herein in regard to its conduct and products and MTI’s conduct and products, JTIM is not liable for any alleged prejudice caused by any alleged faults of MTI or any alleged safety defects in MTI’s products, or alternatively, is not liable for any alleged faults of MTI or any alleged safety defects in MTI’s products relating to liabilities and obligations which were not owing by MTI to class members on October 27, 1978.

15. JTIM admits paragraph 45 of the Motion;
16. JTIM denies as drafted paragraph 46 of the Motion, adding that Kohlberg Kravis Roberts & Co. acquired RJR Nabisco in 1989;
17. JTIM admits paragraph 47 of the Motion;
18. JTIM denies as drafted paragraph 48 of the Motion;
19. JTIM cannot admit or deny paragraphs 49 to 51 of the Motion as it was not part of the R.J. Reynolds group at the time that the corporate transactions alleged therein are said to have occurred, adding that the allegations contained in these paragraphs of the Motion are in any event immaterial as the corporate entities referred to in these paragraphs are not parties to the Motion;
20. JTIM denies as drafted paragraph 52 of the Motion, adding that:
  - a) JTIM admits that there are health risks associated with smoking, including the risk of developing certain types of cancers of the lung, larynx or possibly of the “throat”, (depending on how the term is defined), and emphysema. However, such risks have been established on the basis of epidemiological studies that show associations between smoking and these diseases at a population level. The results of such statistical studies cannot be used to determine the cause(s) of, or the contribution of a risk factor to, these diseases in the Class as a whole but must be determined, if at all, on an individual basis;
  - b) other important risk factors exist for these conditions and each individual will present their own individual profile of risk factors. Not all smokers develop these diseases and not all cases of these diseases occur in smokers;
  - c) in order to assess the cause(s) of, or the contribution of a risk factor to, these diseases in the members of the Class, a full assessment as to each

- d) JTIM admits that there are smokers who report difficulty quitting;
  - e) nicotine is not carcinogenic and is not regarded by the scientific and public health communities as harmful to health at the levels at which it is inhaled by smokers;
21. JTIM denies as drafted paragraphs 53, 55 and 56 of the Motion, adding that:
- a) burning any organic material will give rise to smoke made up of a very complex mixture of chemical constituents. The smoke generated by a burning cigarette is no exception;
  - b) cigarette smoke in fact contains around 5,000 known chemical constituents. Knowledge of this fact is in large part attributable to pioneering research conducted by JTIM's former affiliate, R.J. Reynolds Tobacco Company, which, the public record shows, was the first to identify and publish on about half of these constituents;
22. JTIM admits paragraph 54 of the Motion;
23. With regard to paragraph 57 of the Motion, JTIM admits that nicotine is an alkaloid that naturally occurs in tobacco and denies the remainder of the paragraph, adding that the pharmacological impact of nicotine in cigarettes is in fact weak and its role in smoking behaviour is likely to vary from individual to individual;
24. JTIM denies paragraph 58 of the Motion, adding that nicotine affects the central nervous system and peripheral nervous system, although medical science's understanding of these actions remains incomplete. The central nervous system effects of nicotine include relaxation and a mild stimulation, which are experienced as pleasurable by the smokers;

25. JTIM denies paragraphs 59 and 60 of the Motion, adding that nicotine itself does not impair cognitive function or prevent smokers from making the decision to quit and to successfully implement that decision;
26. JTIM denies paragraph 61 of the Motion;
27. JTIM denies paragraph 62 of the Motion, repeating its response at paragraph 2(d), above. Smoking, regardless of whether it is classified as addictive or not, does not remove smokers' ability to make and implement a decision to quit smoking. Any claim otherwise must be examined individually. Furthermore, not all smokers experience withdrawal symptoms when they stop smoking, and for those that do, the withdrawal is mild, principally psychological, limited in time and is of kind that is experienced whenever a pleasurable reinforcer is stopped. The existence, severity and duration of these symptoms do not correlate to the duration or intensity of the individual's smoking habit;
28. JTIM denies as drafted paragraph 63 of the Motion, adding that, to the extent that smokers recommence smoking after having quit, this is the result of a considered decision to do so and is not evidence of an inability not to smoke;
29. JTIM denies paragraphs 64, 65 and 66 of the Motion, adding that while compensation may occur in some smokers who switch from brands that yield higher levels of tar and nicotine to lower yielding brands, as measured by machine testing, compensation does not occur in all smokers. For those who do, compensation is likely to be temporary, to vary from one smoker to another and to be incomplete, such that, on average, on a population basis, and despite the phenomenon of compensation, smokers of lowered tar and nicotine products will inhale less tar and nicotine than smokers of brands that yield higher levels of tar and nicotine. Moreover, to the extent that compensation does occur, this fact and its extent can only be determined on an individual basis. Further, JTIM had no greater knowledge of this phenomenon than the Federal Government, which supported, encouraged and advised the tobacco manufacturers to produce lower tar yielding cigarettes;

30. With regard to paragraphs 67 and 68 of the Motion, JTIM refers to the decisions referred to in these paragraphs and denies anything contrary to same, adding that these decisions do not constitute evidence herein;
31. JTIM denies as drafted paragraph 69 of the Motion;
32. JTIM denies paragraphs 70 and 71 of the Motion, adding that:
  - a) JTIM admits that there are health risks associated with smoking, including the risk of developing certain types of cancers of the lung, larynx and possibly of the “throat” depending on how the term is defined. However, these risks have been established on the basis of epidemiological studies. Moreover, JTIM denies the statistics cited in paragraph 70 of the Motion;
  - b) the statistics cited in respect of “throat and larynx cancer” are moreover of uncertain value, since “throat cancer” is not a recognised medical condition;
  - c) more generally, figures for the attributable risk of a given disease in a population are reached on the basis of statistical studies. Those figures cannot be reliably applied from one population to another, as different factors, including different environmental, lifestyle and genetic exposures, will inevitably be present in different population groups;
  - d) studies which show statistical associations between smoking and a particular disease at a population level cannot in turn be used to determine the cause(s) of or the contribution to any disease suffered by any individual members of the Class;
  - e) other risk factors exist for these diseases and each individual will have their own unique circumstances. Not all smokers develop these diseases and not all cases of these diseases occur in smokers;
  - f) in order to assess the cause(s) of, or the contribution of a risk factor to, these diseases in the members of the Class, a full assessment as to each

individual's circumstances, medical history and smoking history, and a verification of the disease diagnosis itself would be required;

- g) the Plaintiff has not shown that smoking as a result of a fault by JTIM or due to a defect in its products was the cause of the Class Representative's disease;
- 33. JTIM denies paragraph 72 of the Motion, adding that the specific underlying biological mechanisms whereby smoking causes the diseases with which it has been statistically associated have not been conclusively established. There are still major gaps in scientific knowledge in this regard. Further, while JTIM admits that there are health risks associated with smoking, including the risk of developing certain types of cancers of the lung, larynx and possibly of the "throat" (depending on how the term is defined), other important risk factors can cause these diseases and/or play a role in their pathogenesis;
- 34. With regard to paragraphs 73 and 74 of the Motion, JTIM refers to Exhibits CQTS-19 to CQTS-21 and denies anything contrary to same;
- 35. JTIM denies paragraph 75 of the Motion, adding that the life expectancy of an individual will depend on each individual, the nature of their disease and the stage of the disease;
- 36. JTIM denies paragraphs 76 and 77 of the Motion, adding that:
  - a) JTIM accepts that there are health risks associated with smoking, including the risk of developing emphysema. However, these risks have been established on the basis of epidemiological studies. Moreover, JTIM denies the statistics cited in paragraph 76 of the Motion are accurate, at all, but particularly as they relate to the Members of the Class;
  - b) more generally, figures for the attributable risk of a given disease in a population are reached on the basis of statistical studies and cannot be applied from one population to another, as different factors, including

different environmental and genetic exposures, will inevitably be present in different population groups;

- c) studies which show statistical associations between smoking and a particular disease at a population level cannot in turn be used to determine the cause(s) of or the contribution to any disease suffered by any member of the Class;
  - d) other risk factors exist for emphysema and each individual will present their own individual profile of risk factors. Not all smokers develop emphysema and not all cases of emphysema occur in smokers;
  - e) in order to determine the cause(s) of, or the contribution of a risk factor to, emphysema in the members of the Class, a full assessment as to each individual's circumstances, medical history and smoking history, and a verification of the disease diagnosis itself would be required;
37. JTIM neither admits nor denies paragraph 78, adding that while JTIM admits that there are health risks associated with smoking, including the risk of developing emphysema, other risk factors can cause this disease and play a role in its pathogenesis. Further, the causal mechanism set out in paragraph 78 is denied;
38. JTIM denies paragraph 79 of the Motion, adding that:
- a) while it is accepted that emphysema is an irreversible process, it involves different disease stages which differ substantially in terms of severity and impact;
  - b) the determination of the degree of impairment from emphysema (if any) will require an in-depth medical assessment of each individual member of the Class and the degree of impairment will vary with each individual depending on the type of emphysema and the stage of emphysema;

39. The allegations contained in paragraph 80 of the Motion refer to the decision *RJR Macdonald v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, a case that dealt with a prohibition of tobacco advertising as opposed to a case pertaining to allegations of injuries purportedly caused by tobacco smoke. JTIM denies anything inconsistent therewith, adding that the statements contained in this paragraph were made in the dissenting judgment in the context of a case involving the constitutionality of a statute banning advertising, in which the cause, object and parties were different than those involved in the present instance.
40. The allegations contained in paragraph 81 of the Motion refer to the decision of the Court of Appeal in *JTI-Macdonald Corp. v. Canada*, [2005] R.J.Q 2018 (C.A.). JTIM denies anything inconsistent therewith, adding that the statements contained in this paragraph were made in the context of a case involving the constitutionality of a statute banning advertising, in which the cause, object and parties were different than those involved in the present instance.
41. JTIM denies paragraphs 82 and 83 of the Motion, adding that there is no such thing as a safe cigarette and JTIM has never maintained the contrary, and noting that the health risks associated with smoking, including the risk of developing certain types of cancers of the lung larynx or possibly of the “throat” (depending on how it is defined) and emphysema, have at all material times been known to the general public of Québec including by Mr. Blais, the scientific and public health communities and the Federal Government. It is denied JTIM had any greater knowledge on such issues;
42. With regard to paragraph 84 of the Motion, JTIM denies that the questions asked are the correct questions in this matter, adding that the same questions must be asked with regard to Québec consumers collectively and if need be, the members of the Class individually;
43. JTIM denies as drafted paragraph 85 of the Motion, adding that it is aware that there are health risks associated with smoking, including the risk of

developing certain types of cancers of the lung, larynx or possibly of the “throat” (depending on how the term is defined) and emphysema, and that at all material times it had no greater awareness of those risks than that which was in the public domain;

44. JTIM denies as drafted paragraph 86 of the Motion;
45. With regard to paragraph 87 of the Motion, JTIM refers to Exhibit CQTS 22 and denies anything contrary to the same, adding that this testimony is subject to parliamentary immunity and in any event does not constitute evidence herein;
46. JTIM denies as drafted paragraph 88 of the Motion, adding that while cigarette smoking is addictive, as the term is commonly used today, nicotine is only one factor that motivates people to continue to smoke. However smoking is classified, nicotine does not impair cognitive function nor does it prevent smokers from making the decision to quit and successfully implementing that decision. Furthermore, JTIM is aware that there are smokers who report difficulty quitting but at all material times it and MTI had no greater awareness of this beyond the information that was available in the public domain;
47. With regard to paragraph 89 of the Motion, JTIM cannot admit or deny the Report, Exhibit CQTS-23, as it does not emanate from nor was it addressed to JTIM or MTI. Furthermore a BAT Report is not relevant to JTIM’s or MTI’s conduct;
48. With regard to paragraph 90 of the Motion, JTIM cannot admit or deny the Report, Exhibit CQTS-24, as it does not emanate from nor was it addressed to JTIM or MTI, adding that prior to the acquisition on February 15, 1974 of all of the outstanding shares of [...] MTI by R.J. Reynolds Tobacco Company, [...] MTI was a Canadian family owned business. Furthermore, this RJR Report is not relevant to JTIM’s or MTI’s conduct;

49. With regard to paragraphs 91 to 94 of the Motion, JTIM cannot admit or deny the documents, Exhibits CQTS-25 to CQTS-28, as they do not emanate from nor were they addressed to JTIM or MTI. Furthermore, BAT and Philip Morris documents are not relevant to JTIM's or MTI's conduct;
50. JTIM denies as drafted paragraph 95 of the Motion and reiterates in this regard its response at paragraph 29, above;
51. With regard to paragraph 96 of the Motion, JTIM cannot admit or deny the letter, Exhibit CQTS-29, as it does not emanate from, nor was it addressed to JTIM or MTI. Furthermore, a BAT letter is not relevant to JTIM's or MTI's conduct;
52. With regard to paragraph 97 of the Motion, JTIM admits that there are health risks associated with smoking, including the risk of developing certain types of cancers of the lung, larynx or possibly of the "throat" (depending on how that term is defined), adding that at all material times it and MTI had no greater awareness of those risks than that which was in the public domain;
53. With regard to paragraph 98 and 99 of the Motion, JTIM cannot admit or deny the Report, Exhibit CQTS-30 as it does not emanate from, nor was it addressed to JTIM or MTI. Furthermore, a Philip Morris Report is not relevant to JTIM's or MTI's conduct;
54. With regard to paragraph 100 of the Motion, JTIM cannot admit or deny the Report, Exhibit CQTS-31, as it does not emanate from nor was it addressed to JTIM or MTI, adding that prior to the acquisition on February 15, 1974 of all of the outstanding shares of [...] MTI by R.J. Reynolds Tobacco Company, [...] MTI was a Canadian family owned business. Furthermore, this RJR Report is not relevant to JTIM's or MTI's conduct;
55. With regard to paragraphs 101, 102 and 103 of the Motion, JTIM cannot admit or deny these documents, Exhibits CQTS-28, CQTS-32 and CQTS-33, as they do not emanate from, nor were they addressed to JTIM or MTI. Furthermore,

reports from BAT and Philip Morris and a document from PM are not relevant to JTIM's or MTI's conduct;

56. JTIM denies paragraph 104 of the Motion;
57. JTIM denies as drafted paragraph 105 of the Motion, adding that it does not alter and [...] it and MTI have never altered the design or manufacture of their products in order to make quitting smoking difficult or more difficult to quit. JTIM further adds that, although it uses and it and MTI have used reconstituted and other processed tobaccos in their products, the effect of doing so is to decrease, rather than increase machine measured, tar and nicotine yields;
58. With regard to paragraph 106 of the Motion, JTIM cannot admit or deny the Internal Note, Exhibit CQTS-34, as it does not emanate from nor was it addressed to JTIM or MTI. Furthermore, a BAT Internal Note is not relevant to JTIM's or MTI's conduct;
59. JTIM denies paragraph 107 of the Motion;
60. With regard to paragraph 108 of the Motion, JTIM cannot admit or deny the letter, Exhibit CQTS-35, as it does not emanate from, nor was it addressed to JTIM or MTI. Furthermore, a letter from BAT is not relevant to JTIM's or MTI's conduct;
61. JTIM denies paragraph 109 of the Motion;
62. JTIM denies paragraphs 110 and 111 of the Motion, adding that any beliefs expressed by JTIM or MTI regarding proof of disease causation have at all times been genuinely held;
63. With regard to paragraphs 112, 113 and 114 of the Motion, JTIM cannot admit or deny the letters, Exhibits CQTS-35 and CQTS-36, as they do not emanate from nor were they addressed to JTIM or MTI. Furthermore, BAT and B&W documents are not relevant to JTIM's or MTI's conduct. Moreover, the

substantive allegations set out in paragraph 112 of the Motion are specifically denied;

64. With regard to paragraph 115 of the Motion, JTIM refers to Exhibit CQTS-37 and denies anything contrary to same, adding that the said testimonies, including the testimony of the President of MTL, are subject to parliamentary immunity and in any event do not constitute evidence herein. Moreover, the substantive allegations set out in Paragraph 115 of the Motion are specifically denied;
65. JTIM denies paragraphs 116 and 117 of the Motion;
66. With regard to paragraph 118 of the Motion, JTIM cannot admit or deny the Note, Exhibit CQTS-38, as it does not emanate from, nor was it addressed to JTIM or MTL. Furthermore, a BAT memorandum is not relevant to JTIM's or MTL's conduct;
67. With regard to paragraph 119, JTIM refers to Exhibit CQTS-39 and denies anything contrary to same, adding that the document is not a JTIM document but a CTMC document. It is specifically denied that JTIM applied an "identical policy" to that alleged in paragraph 118 of the Motion to have been followed by the BAT group;
68. JTIM denies paragraph 120 of the Motion, adding that positions taken by JTIM in respect of proposals relating to the draft legislation Bill C-51, later known as the Tobacco Products Control Act (the TPCA), were put forward legitimately and did not constitute a refusal to comply with legal requirements. All such warning requirements have been observed by JTIM in all material respects following the proclamation into force of the TPCA in 1989, notwithstanding its subsequent, successful legal challenge to the constitutionality of elements of that Act;
69. JTIM denies paragraphs 121 of the Motion, adding that there is no fault in not providing information to consumers, whether in general or in connection with the supply of a product, concerning risks of which they are already aware. At

all material times the general public of Québec (including Class Members) and the scientific and public health communities have known that there are health risks associated with smoking, as well as the risk that smoking may be difficult to stop. Moreover, JTIM and MTI had no greater awareness of those risks than that which was in the public domain;

70. JTIM denies paragraphs 122 of the Motion and repeats its response at paragraph 62, above;
71. JTIM denies paragraphs 123 and 124 of the Motion;
72. With regard to paragraphs 125 and 126 of the Motion, JTIM refers to Exhibits CQTS-37 and CQTS-22 and denies anything contrary to same, adding that the said testimonies, including the testimony of the President of MTI, are subject to parliamentary immunity and in any event do not constitute evidence herein;
73. With regard to paragraphs 127, 128 and 129 of the Motion, JTIM refers to Exhibits CQTS-40 to CQTS-42 and denies anything contrary to same;
74. JTIM denies paragraphs 130 and 131 of the Motion;
75. JTIM denies paragraph 132 of the Motion, adding that, as set out below, JTIM's and MTI's marketing have at all times been targeted at smokers over the legal age;
76. With regard to paragraph 133 of the Motion, JTIM refers to its and MTI's advertisements in Exhibit CQTS-43 and denies the remainder of the said paragraph, adding that JTIM's and MTI's marketing have at all times been targeted at smokers over the legal age;
77. JTIM denies paragraph 134 of the Motion;
78. JTIM denies as drafted paragraph 135 of the Motion, adding that while it or MTI have on occasion developed marketing campaigns by reference to specific target groups, as is common practice when selling consumer products,

it or MTI have never developed marketing campaigns targeting anyone other than smokers over the legal age;

79. JTIM denies paragraph 136 of the Motion;
80. With regard to paragraph 137 of the Motion, JTIM cannot admit or deny the document Exhibit CQTS-44, as it does not emanate from, nor was it addressed to JTIM or MTI. Furthermore, an RBH document is not relevant to JTIM's or MTI's conduct;
81. JTIM denies paragraphs 138 to 141 of the Motion, adding that:
  - a) there is no such thing as a safe cigarette and JTIM or MTI have never maintained the contrary;
  - b) the public in Québec (including Class Members) was aware, at all material times, that there is no such thing as a safe cigarette;
  - c) JTIM and MTI have marketed cigarettes in Québec which have used descriptors like "light" and "ultra light", and they have produced and marketed cigarettes with lower machine-measured tar and nicotine yields, over time. It is denied that such conduct constitutes fault on the part of JTIM or MTI. JTIM and MTI were strongly encouraged and advised by the Federal Government to manufacture and preferentially promote such products, due to the Federal Government's belief, at the time, that such cigarettes would present less risk to smokers. The marketing of such products generally, and by reference to the use of descriptors, was not intended to, nor did it in fact, mislead the public in Québec as to the safety or relative safety of such products;
  - d) further, members of the Class were not misled as to the safety or relative safety of such products by JTIM's or MTI's marketing of them;
82. With regard to paragraphs 142 to 149 of the Motion, JTIM cannot admit or deny the documents, Exhibits CQTS-45 to CQTS-52, as they do not emanate

from, nor were they addressed to JTIM or MTI. Furthermore, ITL and RBH documents are not relevant to JTIM's or MTI's conduct;

83. JTIM denies paragraphs 150 and 151 of the Motion;
84. With regard to paragraphs 152, 153 and 154 of the Motion, JTIM cannot admit or deny the document, Exhibit CQTS-53, as it does not emanate from, nor was it addressed to JTIM or MTI. Furthermore, an RBH document is not relevant to JTIM's or MTI's conduct. Moreover, the substantive allegations set out in Paragraph 152 of the Motion are specifically denied.
85. JTIM denies paragraphs 155, 156 and 157 of the Motion, and repeats its response at paragraph 81, above, adding that:
  - a) at the time that JTIM and MTI introduced products with the descriptors “light” or “mild” in Québec, and for well into the 1990s, the Federal Government, and the majority consensus of the scientific and public health community, considered that cigarettes with lower machine-measured tar yields, would present reduced health risks associated with smoking. From the time of introduction of products bearing such descriptors, JTIM and MTI had no other information to cause them to doubt such a view. The Federal Government raised no objections to the use of such descriptors by JTIM and MTI in Québec until 1999 at the earliest;
  - b) further, it has not been demonstrated that any JTIM or MTI product with a lower machine-measured tar yield, or any JTIM or MTI product bearing a descriptor such as “light” or “mild”, does not, on a population basis, present a reduced health risk associated with smoking when compared with JTIM or MTI products of a higher tar yields;
  - c) if, in fact, any consumers in Québec do or did believe that reduced tar and nicotine yield products are indeed relatively less hazardous than those with higher tar yields, this is not because of any statement or representation made by JTIM or MTI;

86. With regard to paragraphs 158, 159 and 160 of the Motion, JTIM cannot admit or deny the documents, Exhibits CQTS-54 to CQTS-56, as they do not emanate from, nor were they addressed to JTIM or MTI. Furthermore, ITL and BAT documents are not relevant to JTIM's or MTI's conduct. Moreover, the substantive allegations set out in Paragraph 158 of the Motion are specifically denied;
87. JTIM denies paragraphs 161 and 162 of the Motion, and repeats its response at paragraphs 29 and 50, above;
88. JTIM denies paragraphs 163 to 180 of the Motion, adding that liability cannot be established and non pecuniary and punitive damages cannot be awarded herein on a Class-wide basis. With regard to paragraph 169, the information mentioned therein is insufficient to confirm the diagnosis and to determine the cause(s) of, or the contribution of a risk factor to, disease in any individual members of the Class or the causal relationship between any individual member's smoking and any fault or safety defect in any product supplied by JTIM or MTI to smokers in Québec, all of which is denied. Furthermore, no liability can be founded on the Consumer Protection Act, if this Act applies which is not admitted, for alleged breaches or prohibited practices that would have occurred before this Act or one of its sections came into force;

**AND FOR FURTHER PLEA, JTIM ADDS THE FOLLOWING**

**A. THE AUTHORISATION OF A CLASS ACTION DOES NOT REMOVE OR AMEND THE ESSENTIAL ELEMENTS OF LIABILITY**

89. The authorisation of a Class Action and the institution of a Class Action proceeding in no way alters the substantive law of Québec or its evidentiary standards: “le recours collectif n’est qu’un véhicule procédural”;
- 89.1 As is pleaded in paragraph 14 above, JTIM is not liable for any alleged prejudice caused by any alleged faults of MTI or any alleged safety defects in MTI’s products, or alternatively, is not liable for any alleged faults of MTI or any alleged safety defects in MTI’s products relating to liabilities and

obligations which were not owing by MTI to class members on October 27, 1978. Therefore, JTIM's defences as pleaded herein in regard to its conduct and products and MTI's conduct and products are pleaded under reserve of the foregoing;

90. The substantive law of Québec provides that JTIM cannot be held liable for the bodily injury of each individual Class Member unless the Plaintiff proves that such bodily injury was caused by a safety defect in JTIM's or MTI's products or by JTIM's or MTI's fault;
91. The eight common questions identified in the Authorization Judgment address only issues related to the existence of a safety defect or a fault. They do not address issues related to the causal link between any such safety defect in a JTIM or MTI product, or fault on JTIM's or MTI's part, and any damages suffered by the individual Class Members;
92. Such issues relating to causation and damages can only be determined on an individual basis, as can defences like prescription, assumption of risks or apportionment of liability;
93. Moreover, the determination of the existence of a safety defect or a fault in respect of JTIM's or MTI's products or conduct cannot be made without reference to the level of public awareness of the risks associated with smoking from time to time, as the level of safety legitimately expected from the public in Québec or the conduct expected of JTIM or MTI (and whether they complied) will vary pursuant to the level of public awareness of the risks associated with smoking, from time to time;
94. In summary, JTIM and MTI have manufactured and sold a legal product in a legally compliant way throughout the material time, and JTIM denies, for the avoidance of doubt, that its or MTI's products suffered from any safety defect or that it or MTI acted in any way wrongfully either at all or in any way that caused any individual Members of the Class to smoke, and/or further to continue smoking. JTIM denies further that any such alleged acts or any

safety defect, which are denied, caused or contributed to any of the four alleged smoking related diseases in the case of any of the Class Members;

95. If there is no safety defect or fault on JTIM's or MTI's part, law and public policy require that each individual is responsible for his or her actions and the consequences of such actions.
96. Further, an individual should only be compensated for damage caused to him or her by the relevant defendant as a proven consequence of that defendant's wrongful acts or of a safety defect in that defendant's product. The use of a Class Action procedure should not remove these key cornerstones of societal and legal responsibility, whatever the subject matter of the action and the identity of the industry involved;

**B. JTIM'S AND MTI'S PRODUCTS ARE NOT DEFECTIVE AND JTIM AND MTI HAVE COMMITTED NO FAULT**

**JTIM's and MTI's compliance with relevant legislation and regulation in respect of manufacture, marketing and sale of JTIM or MTI products**

97. At all material times, it has been legal to manufacture, promote, sell and consume cigarettes in Québec and in the rest of Canada, subject to certain legislative and regulatory restrictions governing, among other things:
- (i) the use of ingredients;
  - (ii) the content, placement and use of any warnings or information to be provided to consumers in Québec;
  - (iii) the measurement of and use of tar and nicotine numbers on the packaging;
  - (iv) the content and placement of advertising and other marketing from time to time; and
  - (v) the adherence to maximum tar levels in products, as machine measured;

98. Moreover, at various times, JTIM and MTI, either alone or through their representation on the CTMC, have cooperated with the Federal Government and have agreed to formulate appropriate regulations for the tobacco market in Canada and in various Government led initiatives whose aim has been to develop a potentially less hazardous product;
99. The Federal Government fully participated in the tobacco market in Québec, supervising the tobacco manufacturers, including JTIM and MTI, and directing the actions of the industry or advising the industry on issues related to the risks associated with smoking, and the design, manufacture, promotion and sale of JTIM's or MTI's products. These actions of the Federal Government were important in forming the rules of the conduct of the industry, including JTIM and MTI, from time to time, and in setting the expectations and informing views of the public;
100. At all times, JTIM's and MTI's products have complied with applicable regulations;
101. JTIM and MTI products sold in Québec – including Export A cigarettes and ZigZag rolling tobacco – will have been purchased by some, but clearly not all, of the Class Members at different times over the period relevant to the claim. The products and their associated advertising, the applicable regulation and the extent of information available to the general public of Québec about the risks associated with smoking would all have differed from time to time, and cannot be assessed with benefit of hindsight;
102. The regulatory framework prevailing from time to time contributed to the Québec public's reasonable level of safety expected from the product. The public's attitude to the product was informed to a good degree by the information required under the regulatory framework, together with the information provided to the public by numerous sources;

**The consumer was aware of the health risks associated with smoking**

103. At all material times, the public in Québec has been aware of the health risks associated with smoking. This awareness has existed since at least the 1950s;

104. The information available to the general public in Québec about the health risks associated with smoking has increased over time;
105. Mr. Blais was aware of the health risks of smoking since the 1960s at the latest. If the Designated Member was aware of the health risks associated with smoking at such time, it must be presumed that at least some other Class Members were also so aware. Such individual awareness would have been provided by public sources or by the numerous education campaigns of the Federal Government or by the on-pack warnings or by the individual Class Member's doctor, teachers, family and friends;
106. If, in the alternative, it is held that there was no such public awareness of the health risks associated with smoking, the awareness of each Class Member must be assessed to determine if and when he/she did become or could have become aware of those risks. This is important because:
  - a) there can be no fault in failing to warn of a risk which is already known to the intended recipient;
  - b) some or all Class Members were aware of the health risks associated with smoking before they started smoking and/or sufficiently early in their smoking history to have avoided or substantially reduced any risk of developing cancer of the lung, larynx or "throat" (as it may be defined) or emphysema. Any member of the public or of the Class who was so aware or who become so aware at any material time is obliged to act to minimise the potential harm, or else be deemed to have assumed the risk of such harm voluntarily and to be legally responsible for the consequences;
107. To the extent that it is alleged that any specific individual Class Member was unaware of the health risks associated with smoking, each individual Class Member has the burden to establish that, had they been aware of the risks, they would not have started and/or continued smoking;

### **The consumer was aware of the potential difficulty of quitting smoking**

108. There was widespread public awareness in Québec from the 1950s onwards that smoking could be difficult to give up;
109. Members of the public in Québec, including individual Class Members who started smoking despite their awareness of the risk that they may find smoking difficult to stop, are deemed to have assumed such risk voluntarily. The same analysis as set out in paragraph 106, above, applies *mutatis mutandis*. In particular, to the extent that the safety defect in JTIM products is claimed to reside in their difficulty to give up, the analysis at paragraph 106.a) applies. Smokers are capable of deciding to quit and of implementing that decision successfully and to the extent they alleged any derogation from that, they must establish it on an individual basis;

### **Consumers consciously and deliberately take decisions involving risk**

110. Despite their knowledge of the risks associated with smoking, consumers in Québec – including members of the Class – decided to start and to continue smoking for their own reasons, regardless of JTIM's or MTI's conduct;
111. Such smoking initiation in such circumstances is not evidence of either a lack of awareness or a lack of understanding of the risks, however caused. It is rather that people consciously elect to take courses of action or engage in specific behaviours which carry risk. This is a common and normal aspect of reasoned human behaviour. People assess the risks involved in pursuing a certain course and consider that against the utility or benefits to be obtained. Different individuals have different attitudes to and tolerance of risk. A decision involving risk is still a rational choice made in response to the risks an individual is prepared to take at that time to obtain the benefit they individually feel they receive. It is not, of itself, evidence of some irrationality or lack of awareness of the risks potentially involved;
112. People's attitude to taking known and understood risks is evident every day in the common decisions that individuals make to speed while driving, to drink alcoholic drinks, or to work too hard or not to exercise regularly. These are

rational decisions made by rational people, in the full knowledge that they all involve risk, albeit of a potentially different magnitude to smoking. The fact of them does not indicate per se either a lack of knowledge or awareness or a lack of capacity to decide competently upon the act or behaviour;

**JTIM and MTI had no greater material knowledge of the risks associated with smoking than was in the public domain**

113. At all material times, JTIM and MTI had no materially greater knowledge than was known either by the public in Québec at that time, or by an individual Member of the Class, if different, of the health risks associated with smoking or of the potential difficulty in stopping smoking;
114. The general public in Québec was aware, from numerous sources including the Federal Government's education programme and, from 1972, on pack warnings, of the risks associated with smoking. JTIM's and MTI's knowledge of such issues must be assessed against such public awareness. JTIM and MTI had no greater material awareness of such risks;
115. Any statements made by JTIM or MTI concerning smoking and proof of disease causation have, over time, represented their genuinely held beliefs, based on the information available. None of any such statements had the intention or effect of trivialising or denying the health risks associated with smoking, or the risk that smoking may be difficult to stop;
116. Further, the existence and impact of any such alleged trivialisation and denial must be assessed against the public awareness at the relevant time as to the risks associated with smoking. Moreover, each individual Class Member would need to be examined to determine if any was aware, or had relied on, such alleged denials or trivialization by JTIM or MTI. None of the Common Questions assist the Court in assessing such issues. Class Members must establish that they were aware of any trivialisations and or denials by JTIM or MTI and, if they were (which is not admitted), that they acted in reliance on such alleged statements. As discussed above, such reliance on any such alleged trivialisations or denials is improbable, given public awareness of the

risks associated with smoking and the perceived weak credibility of information from the industry;

117. Mr. Blais has admitted that he was not aware of any such denials or of any statement by JTIM or MTI or any other defendant trivialising, denying or misrepresenting the risks associated with smoking;
118. If Mr. Blais was unaware of any statement by JTIM or MTI or any other defendant trivialising, denying or misrepresenting the risks associated with smoking, it must be presumed that at least some other members of the Class were also unaware of any such statement;
119. Moreover, JTIM or MTI did not, either alone or in concert with any other party, implement a policy of not disclosing risks associated with smoking. To the extent JTIM or MTI did not provide any material information concerning the risks associated with smoking, which is denied, any such non-disclosure was not the result of any systematic policy or of any conspiracy with others not to disclose such information;
120. In any event, any such policy of systematic non disclosure of the risks, which is denied, would not and did not adversely affect the Québec public's awareness of the risks associated with smoking and did not prevent users of their products from being informed about the risks associated with smoking, given the public awareness of those risks or, alternatively, the individual awareness of those risks by Class Members. Therefore no damages were caused by such non disclosure herein;
121. Given the level of public awareness in Québec of the risks associated with smoking, including amongst Class Members, none of the alleged acts or omissions by JTIM or MTI, as to the risks associated with smoking affected materially the public's expectations as to the level of safety expected from the product nor, given the Class Members' awareness of such risks from time to time, would such alleged acts demonstrate a fault by JTIM or MTI;

122. The level of awareness of the existence of the risks associated with smoking and the defences raised in paragraphs 92 above, apply to lowered tar and nicotine (“LTN”) cigarettes and those labelled “light”, “ultra light”, “ultra mild”, (“Lights”), just as they do to full flavour products. The Québec public was aware that there were risks associated with smoking LTN or Lights cigarettes and indeed the same health warnings were included on the packaging and advertising of such products as on that of full flavour products;
123. Individual Class Members must establish that the existence of LTN and Lights products, and the information provided about their product characteristics by JTIM or MTI, led them to expect that Light cigarettes were somehow safer than full flavour cigarettes, and that this was false. Moreover, individual Class Members must establish that they in fact smoked such cigarettes as a consequence of such higher level of safety expectation, rather than for other reasons (e.g. milder taste) and instead of than giving up smoking, and that it was this smoking of such products pursuant to such false expectation that caused or contributed to the disease that they claim to have suffered, as opposed to any other factors or indeed any other smoking howsoever motivated;

**JTIM and MTI product modifications**

124. It is denied that JTIM or MTI “manipulated” or amended the product in order to increase nicotine levels in the cigarettes to “ensure addiction”, and to make it harder for any individual smoker to stop smoking:
- a) JTIM and MTI have not sold cigarettes which have been designed or otherwise altered so as to increase nicotine content or availability (except for minor modifications to take account of seasonal variations in the natural nicotine yield of its crops, so as to achieve product blend consistency year-on-year);
  - b) by way of exception to the above, JTIM has, however, sold products which have reduced tar disproportionately to nicotine, through the use

of higher nicotine tobaccos developed by Agriculture Canada scientists working at the Delhi research facility with the encouragement and knowledge of the Federal Government, and sold under licence by the Federal Government;

- c) the machine-measured tar and nicotine yields of JTIM's and MTI's products have decreased dramatically over time. This is, in part, due to the use of reconstituted tobacco, which, far from increasing or maintaining nicotine yields, yields less tar and nicotine when burned than an equivalent quantity of unprocessed leaf. It is (and has been recognised by the public health community as being) an important tool for lowering tar and nicotine yields. A Health & Welfare report in 1994 found no evidence that JTIM or MTI had "spiked" its products with nicotine and indeed noted that machine-measured nicotine yields had fallen by 20 per cent since 1968;

125. Attempts to reduce machine-measured yields of tar from cigarettes were initiated, encouraged and supported by the Federal Government, due to its belief that such attempts would reduce the health risks of smoking. Indeed, the Federal Government continues, to this day, to impose maximum ceilings on machine-measured tar yields for JTIM's products sold in Québec. It is for the Plaintiff to prove that the position taken by the Federal Government in respect of products that yield lower machine-measured levels of tar, as conveyed by the Federal Government to the public, was, in fact, false;

126. At all material times, JTIM and MTI have been directed, advised and encouraged by and has participated with, the Federal Government and public health agencies in product development initiatives, including the reduction of machine-measured tar yields and the manufacture of cigarettes using Federal Government licensed tobacco varieties designed to yield higher levels of nicotine, despite such reductions. JTIM and MTI have also cooperated with their US affiliates in relation to other ways of reducing the potential health risks of smoking (including the use of tobacco substitutes, the development of

reduced tar to nicotine ratio cigarettes and the development of cigarettes that primarily heat, rather than burn, tobacco);

127. JTIM and MTI had no greater knowledge than the Federal Government or the public health community as to any specific mechanism or constituents that might create any health risks associated with smoking. Moreover, there was, at all material times, no objective, approved standards or scale for agreeing what constituted a less hazardous cigarette, and how it might be produced. This remains the case today. Nevertheless, JTIM and MTI took reasonable steps to modify their products by reducing machine-measured tar yields, within the parameters of what would be acceptable by consumers in terms of satisfaction with the cigarette;

### **C. THE ALLEGED WRONGFUL CONDUCT**

#### **JTIM's or MTI's alleged wrongful conduct did not cause Class Members to smoke or to continue smoking**

128. The alleged wrongful acts of JTIM or MTI, set out in the Motion, which are denied, did not cause either the general public in Québec or the individual Class Members to start and/or to continue smoking, in circumstances where they would otherwise have stopped; nor did such alleged acts lead or contribute to a safety defect in JTIM's or MTI's products, given the Québec public's (including Class Members) levels of awareness of the risks referred to above;
129. Consumers in Québec, in knowledge of the risks associated with smoking, elect to smoke and to continue to smoke for many reasons, which will differ from individual to individual. These reasons will include, for those deciding to start to smoke, peer pressure, parental influence, the individual's attitudes towards risk-taking, ease of access to cigarettes, social tolerance of smoking, and other personal and social factors and, for those continuing to smoke, pleasure, relaxation, peer influence, to relieve stress or boredom, sensory pleasures or to increase alertness;

130. The Class, collectively, is unable to prove either that its smoking or its damages, if established, were caused by any JTIM or MTI wrongful conduct, being relied on by the Class, or by any safety defect in any of their products;
131. It is denied that JTIM's or MTI's conduct were in fact wrongful at all. However, any assessment of whether such alleged fault had any effect or causal relevance to a Québec consumer's smoking related decisions must be determined at an individual level. Each of the individual Members will have a differing history with regard to:
- (i) why he or she started smoking;
  - (ii) when he or she became aware of the risks of smoking;
  - (iii) whether he or she smoked JTIM or MTI products;
  - (iv) whether he or she smoked any JTIM or MTI LTN or Lights products;
  - (v) whether he or she saw and/or were influenced by any JTIM or MTI marketing;
  - (vi) whether he or she saw or heard and/or was influenced by any statements from JTIM or MTI concerning either the risks of smoking or the alleged benefits of smoking;
132. For instance, Mr. Blais started smoking when he was 10 in 1954. He is unaware, at that time or when he reached maturity, of seeing or being influenced to smoke by any JTIM or MTI marketing or statements generally. He did not smoke any Lights product until around 2006, approximately 50 years after he started smoking. The LTN product Blais smoked in recent years is not a JTIM product. Mr. Blais has been aware of the risks associated with smoking since the 1960s at the latest;
133. It is denied that JTIM's or MTI's alleged conduct had any causal role in Blais' decision to smoke or to continue to smoke, or, if proven, his damages. The

use of a Class action procedure does not make Mr. Blais' claim any stronger than, nor should it be treated any differently from, a claim brought individually, given the lack of causal relationship between JTIM's or MTI's alleged fault, which is denied, and the damage;

134. It is necessary for each individual Class Member to establish such a causal relationship between their damage, if established, and the alleged JTIM or MTI fault, which is denied. The paragraphs that follow examine the Plaintiff's allegations in turn;

**JTIM's and MTI's marketing did not misrepresent the risks associated with smoking nor did it cause smoking initiation**

135. JTIM and MTI have marketed their products in Québec pursuant to the established voluntary codes and other regulations or legislation promulgated from time to time, including as to the placement and content of health warnings. The placement and content of the health warnings were matters in relation to which the Federal Government provided direction and advice to manufacturers. JTIM and MTI complied with all such restrictions on their marketing in Québec in all material respects and without misrepresenting material information;

136. In such circumstances, it is legitimate for a company to market its legal products in a way that is attractive to smokers of and over the legal age. This is the accepted practice for a consumer products company, and JTIM and MTI operated and JTIM still operates in a competitive consumer product market;

137. JTIM and MTI have therefore sought, using the permitted marketing strategies in Québec, to promote a positive image for their brands as compared to their competitor's brands. Their marketing has sought to provide appealing images for the target market of smokers over the legal age, within the overall context of all other information that was known to these smokers and others about smoking generally at the time, from whatever source, in Québec. JTIM's and MTI's marketing did not mislead the public in Québec, including Class Members, as to the level of safety to expect from the JTIM or MTI products,

given what was known in the public domain about the risks associated with smoking;

138. JTIM and MTI did not devise or target their advertising or marketing strategies at “young people”, if that implies people under the legal age to purchase cigarettes in accordance with legislation from time to time in force in Québec. Further, although this in itself is denied as being wrongful, if the consumer is of legal age, JTIM’s and MTI’s marketing strategies did not seek to persuade non-smokers, of whatever age, to start smoking or to dissuade smokers from quitting. JTIM and MTI did not disseminate false and misleading information about their products via their marketing;
139. The primary objective of JTIM’s and MTI’s marketing is to convince over legal age smokers of competitive brands to switch to JTIM or MTI brands. Secondary objectives are to reinforce brand loyalty amongst legal age smokers of JTIM or MTI brands, and to support cigarette pricing. Moreover, such marketing is necessary to protect market share, in light of competitors’ marketing for their own products;
140. Regardless of JTIM’s or MTI’s intentions behind its marketing, the evidence is that cigarette advertising plays no discernible role, or at most a negligible role, in individuals’ decisions to begin smoking. There are many other factors that studies show to be more relevant in smoking initiation. Indeed, tobacco advertising has been severely restricted in Canada since 1989, but Canadians still begin (and continue) to smoke in the knowledge of the risks associated with smoking;
141. The reason why an individual began smoking or continued smoking must be assessed on an individual basis. Each individual Class Member must prove that he or she saw JTIM’s or MTI’s advertising, and relied on it (notwithstanding the lack of credibility of advertising generally and tobacco advertising in particular), causing him or her to smoke, either as a minor or pursuant to misleading messages as to risks (notwithstanding the general awareness of the health risks associated with smoking);

142. Mr. Blais did not start to smoke as a result of any JTIM's or MTI's advertising or other marketing strategies. Mr Blais did not see any advertising for ZigZag tobacco (the rolling tobacco that he smoked when he started to smoke and which continued to smoke for about five years); that when he began to smoke Export 'A' cigarettes in or around 1959/1960, he did not do so because of tobacco advertising; that he does not remember any Export 'A' advertisements from that time; and that he always smoked Export 'A' cigarettes because of their taste, not because of advertising;

**JTIM's and MTI's LTN and Lights cigarettes did not mislead the public as to the risks associated with smoking as alleged**

143. In the 1960s, the international and Canadian scientific consensus was that lowering machine-measured tar yields would likely reduce the health risks associated with smoking;

144. In the late 1960s, as part of the Federal Government's approach to the health risks associated with smoking, the Federal Government informed the public of the machine-measured tar and nicotine yields of brands available in Canada, including Québec, in order to allow members of the public to choose, if they wanted, lower levels of tar.

145. The Federal Government continued to publish "league tables" of relative machine-measured tar yields until the mid-1980s. These yield figures were generated by a testing protocol devised and recommended by the Federal Government, and agreed to by the manufacturers. As such, it represented machine measured yields, and was not intended to be, nor understood as, a measure of the levels that any individual smoker would in fact inhale;

146. The Federal Government's belief that lower tar yielding cigarettes produced less risk prompted a programme of information and promotion to convince those smokers who elected not to quit smoking to smoke lower tar yielding products;

147. The Federal Government also established, in around 1971, a working group comprising Health Canada, Agriculture Canada and the CTMC to try to agree

upon ways to produce a “less hazardous” cigarette. In essence, this centered on reducing the tar yields of cigarettes, potentially without reducing nicotine yields correspondingly. These cooperative initiatives continued throughout the 1970s;

148. Throughout this period of Federal Government attempts to promote lower yielding cigarettes as a less risky option for smokers, JTIM or MTI, both alone and through the CTMC, advised the Federal Government that its attempts to direct JTIM or MTI to produce a lower tar yield cigarette might not in fact reduce the levels of tar inhaled by the individual smoker, due to the phenomenon of compensation. JTIM and MTI informed the Federal Government that smokers who switched to lower tar yielding brands might compensate by changing their smoking behaviour to obtain more nicotine, and thus tar. The Federal Government was well aware of this phenomenon, and informed JTIM, MTI and the CTMC, that the evidence was that only a minority of smokers compensated at all, and that, despite this phenomenon, there were still potentially relative health benefits to the widespread adoption of lower tar yield cigarettes. Indeed, in any event, the Federal Government press releases in the 1970s specifically cautioned consumers to take care not to compensate;
149. 1975, at the request or direction of the Federal Government, [...] MTI agreed, with the industry, to publish tar and nicotine yields on its packages, as measured by the standardised machine testing protocol approved by the Government. Smokers were thus able to make comparative tar evaluations in their brand selection. [...]
150. The Federal Government continued to advise members of the public from 1968, through to 2003 that there was a reduced risk in smoking lower tar yield cigarettes;
151. Moreover, at the same time, the Federal Government required MTI and then JTIM to design its product to reduce the Sales Weighted Average Tar yields,

and to this day, continues to impose a ceiling on the maximum tar yields from JTIM's products.

152. During this period, from 1968 onwards, MTI and then JTIM began to either introduce lower tar yielding products or to reduce the tar yields of its products in response to the Federal Government's directions, and in response to the growing consumer demand for lower tar yield products. This was as a result of the international consensus and the Federal Government's view of the link between tar yields and the health risks associated with smoking. In 1976, this led to the introduction of [...] MTI's first "Lights" descriptor product. In 1978, the Minister of Health, Minister Monique Begin, claimed credit for the availability of such products on the Canadian market, asserting that their availability had been achieved in response to the efforts of Health Canada, triggered initially by publication in 1968 of the first comprehensive report on tar and nicotine yields from Canadian cigarettes;
153. By 1976, the public in Québec was well aware of the health risks associated with smoking, including the smoking of LTN and Lights cigarettes. Identical health warnings for full flavour and Lights cigarettes have been included on every pack of LTN and Lights cigarettes ever sold in Québec. The public in Québec does not consider LTN and Lights products to be safe, and was aware of the risks associated with smoking them;
154. The Federal Government was aware and permitted MTI and then JTIM to describe and sell LTN and Lights brands from their introduction in 1976. Only very recently has the Competition Bureau of Canada requested that JTIM discontinue the use of descriptors such as "light", "ultra light", "ultra mild". JTIM has acceded to this request;
155. Until August 2003, Health Canada's website continued to advise continuing smokers that light and mild products reduced the risk of cancer;
156. Each Class Member individually must prove that he or she smoked a JTIM or MTI LTN or Lights brand. Mr. Blais, did not smoke such a brand. Further, each Class Member must establish that if they did smoke such a brand, that he

or she did so due to a false belief that they were safe or safer, caused and relied on by a representation from JTIM or MTI and that such smoking, caused by a JTIM or MTI fault, in turn, caused or contributed to the individual damage in circumstances where without such fault from JTIM or MTI (which is denied) he or she would not have suffered the damage. Each Class Member must establish that at an individual level. None of the Common Questions assist the Court in this regard;

157. To the extent that some consumers in Québec may have considered JTIM's or MTI's LTN or Lights brands safer, this was caused by reference to the lower tar numbers, as machine measured, for a LTN or Lights cigarette when compared to a full flavour cigarette. Any such belief that lower tar yielding cigarettes were safer was created by the Federal Government and the public health community, and not by JTIM or MTI. The demand for lower tar cigarettes was created and stimulated by the Federal Government and the public health community and JTIM and MTI responded, by producing LTN or Lights cigarettes;
158. In any event, consumers smoke LTN or Lights brands for many reasons, which will differ from individual to individual. The consumer may not have relied on any representation as to health given the state of public knowledge of risks associated with smoking, let alone one from JTIM or MTI. Each Class Member will have to prove such reliance;
159. It has not been established that LTN or Lights cigarettes, are not safer than full flavour cigarettes yielding higher tar yields, as measured across a population. This is particularly so, as compensation is not total or permanent, and does not affect all smokers. Moreover, this range of effect of the phenomenon of compensation on smokers was better known to the Federal Government and the public health community before JTIM or MTI were so aware. It is for the Plaintiff to establish that smokers of lower tar yielding products will not obtain any benefit such as a lower health risks associated with smoking;

160. If it is established now that LTN or Lights brands are not safer than full flavour cigarettes, for an individual, JTIM and MTI had no greater material knowledge than the Federal Government or public health community about the relative safety of Lights or LTN cigarettes and the alleged role and effect of compensation, at all material times;

**JTIM and MTI did not manipulate their products to make it hard to quit nor did they trivialise the risks associated with smoking**

161. The alleged issues of modifying the product to make it harder to give up and allegedly denying or “trivialising” the health risks of the product are considered at paragraphs 113 – 121 and 124 - 127, above, respectively. It is for the Plaintiff to demonstrate that such conduct occurred, which is denied, and that:

- a) the alleged manipulation of the product led each Class Member to continue smoking, in circumstances where he or she would otherwise have quit, and that this smoking caused the damage;
- b) the alleged trivialisation of the risks involved in smoking and/or the alleged denial of the same led each Class Member to smoke in circumstances where he or she would not otherwise have smoked, or to continue smoking in circumstances where he or she would otherwise have quit (i.e. each Class Member relied on the statement in question, despite his or her knowledge of the risks associated with smoking), and that this smoking in turn caused the damage;

**D. WHY DO PEOPLE CONTINUE TO SMOKE IF OR ONCE THEY ARE AWARE OF THE RISKS ASSOCIATED WITH SMOKING?**

162. Even accepting the existence of any fault of JTIM or MTI, which was relied on by Class Members, or the existence of a safety defect (both of which are denied), once such fault or defect has been corrected or avoided, including by the individual’s becoming aware of the risks associated with smoking, the individual is subsequently then able to stop smoking if he so chooses. Any smoking thereafter is a personal choice for an individual, and one for which he

or she should bear the consequences. This is because as soon as an individual Class Member is aware, or could be aware of, the risks associated with smoking, if (s)he elects to start or to continue to smoke (s)he is deemed to have assumed the risks associated with smoking voluntarily, and all consequences of those risks;

163. It is JTIM's position that, unless individual Class Members can prove otherwise, all of the Class Members are capable of deciding to stop smoking and implementing that decision. It is denied that smoking has prevented any Class Member from choosing to stop smoking and implementing that decision.
164. Smoking may be difficult to quit but many millions have successfully given up, most without medical help. In fact, there are now more ex-smokers than current smokers in Canada. According to figures published by the Canadian Tobacco Use Monitoring Survey (CTUMS) for Health Canada, there were approximately 2.8 million more former smokers than current smokers in Canada in June 2007, with the number of former smokers increasing by about 600,000 between December 2006 and June 2007 to approximately 7.8 million in total. The CTUMS figures indicate that there were just over 2 million former smokers in Québec in December 2006. A separate survey published on behalf of the Québec Health and Finance Departments in June 2007 indicates that the number of smokers in Québec fell from about 1.5 million to about 1.1 million between Spring 2006 and Spring 2007. This demonstrates that individuals with varying smoking histories, and even those said to be addicted, can decide to quit and to implement that decision successfully;
165. In this regard, at all material times it has been known by the public in Québec, the public health community and by Government bodies that nicotine is present in tobacco, and smoking is a behaviour that may be difficult to quit;
166. JTIM and MTI have had no material information about the addictive properties of smoking or nicotine, in the sense of the difficulty in quitting smoking, that was not known to the public in Québec and the public health

community. JTIM and MTI made no representations to Québec consumers about the risks of the difficulty of giving up that were different to what was publicly known, or which they knew to be false or deceitful;

167. Smoking does not remove or avoid the capacity of each smoker to decide to quit smoking and to implement that decision, whether it is considered an addiction or not (the definition of the term having changed often over the years, with the Federal Government and scientific and public health communities taking different views from time to time). All smokers, unless suffering from an inherent lack of capacity unrelated to nicotine, are capable of quitting irrespective of the intensity or duration of their smoking, as the number of cigarettes smoked is not determinative of the ease with which smokers can quit;
168. It is accepted that nicotine in cigarettes has a weak pharmacological effect upon the brain, but it does not impair the frontal lobe, which is thought to control cognitive function. Therefore smoking does not prevent smokers' from making rational judgments including the decision to stop smoking and to implement that decision successfully;
169. Neither nicotine nor smoking interferes with a smoker's ability to understand and appreciate the risks of smoking, and does not prevent a smoker from making and acting upon decisions;
170. In summary, the capability of smokers to decide to stop smoking and to implement that decision is presumed in Québec. It is each individual Class Member's burden to prove otherwise;
171. It is accepted that smoking may be difficult to stop. Just as with changing any well-liked repetitive behaviour, motivation and self-efficacy are key for most smokers in deciding to quit and to implementing that decision successfully. A person sufficiently motivated to quit, for whatever reason, is able to stop successfully;

172. It is denied that such difficulty exists, or is known to exist, for all smokers (e.g. those who have not tried to quit or have no desire to quit), or is experienced to the same degree by all, or that it can be objectively or comparatively measured. Such difficulty, to the extent it exists, may vary over time. Difficulty is self-reported, incapable of proper calibration, and temporary (or at least variable). Any alleged difficulty must be assessed on an individual basis. Moreover, any such reported difficulty does not equate to a loss of an individual's capacity to stop;
173. The reasons for the reported difficulty in stopping need to be assessed individually, may vary over time for individuals and may be related to behavioural issues or circumstances of the individual at the time;
174. Indeed, people smoke for pleasure, as they obtain benefits from smoking, and they are thus motivated to make the decision to continue smoking because they prefer receiving the benefits over and above their perception of the associated risks at the time. The decision to smoke is a matter for individual assessment, and should not be disputed or dismissed because others would make a different decision;
175. Mr Blais' admitted the role of pleasure in relation to his reported difficulty in quitting:

“Q. Mais je vous ai posé la question quant à savoir si vous vous êtes penché sur la question quant à savoir pourquoi dans votre cas à vous, vous semblez avoir des difficultés à arrêter. C'est quoi la source ou l'origine de ces difficultés?

R. Parce que fumer, moi, je n'aime pas ça, j'adore ça. Ça fait que c'est ça”

176. As already discussed, it is human nature to take risks, even when well informed, and it is the rule rather than the exception that humans do not always do what may be in their long-term best interests. It is a part of fundamental human nature that rational, unimpaired individuals elect

deliberately to continue a behaviour they know to be risky. This is a common decision-making path, involving individual assessments of risk perception, risk tolerance and desire. Humans have different attitudes to risks. A person is not impaired or incapable of processing risks correctly simply because they choose what others perceive to be a “bad” or “irrational” course. For many, the pleasure they derive from smoking outweighs the risks that they know they are taking in choosing to continue experiencing such pleasure. This paradigm of decision making, applies to all such decisions and is not particular to smoking;

**E. THE ALLEGED MEDICAL CAUSATION**

177. It is denied that the Plaintiff is able, either through the Common Questions, or at all, to prove that JTIM’s or MTI’s alleged wrongful conduct or the presence of any safety defect in their products, both of which are denied, has caused or contributed to any individual member of the Class or the Class as a whole to smoke or to smoke a product which was defective so as to, in turn, have caused or contributed to any individual Class Member or the Class as a whole suffering from any one of the four diseases referred to in the Motion;
178. It is necessary, in particular, for each individual Class Member to prove that they have been properly diagnosed with one of the four diseases. Neither the Motion nor the Common Questions enable an identification of which individual member of the Class has been properly diagnosed with one of the four diseases and, if so, whether the disease was caused or was contributed to as a result of any wrongful act by JTIM or MTI or any safety defect in any of their products;
179. JTIM admits that there are health risks associated with smoking, including certain types of cancer of the lung, the larynx or possibly the “throat” (depending on how it is defined) and emphysema. Not all smokers, however, develop these diseases and not all cases of such diseases occur in smokers.
180. Other important risk factors exist for these multifactorial conditions. These other factors must be taken into account when assessing possible disease causation. Risk factors in respect of the four diseases referred to in the Motion

have been established on the basis of epidemiological studies, which show statistical associations between these factors and the incidence of these diseases at a population level. The results of such studies cannot, however, be used to determine the causation of, or contribution to, disease in the individual Members of the Class. This is because each individual Class Member has a unique set of circumstances including exposure to the relevant risk factors.

181. In order to define the cause of or contribution to disease in the Members of the Class, a full assessment as to each individual's circumstances (including medical and smoking history, and a review of all potential alternate risk factors) is required;
182. This individual assessment would, in particular, need to consider the smoking history of the individual as the smoking related risk of contracting the diseases varies in respect of pack years. This smoking history should include:
  - a) the fact of and volume of smoking of JTIM or MTI products for each Class Member;
  - b) any periods (and length) of cessation, because the risk associated with smoking will vary greatly, and may return to that of a non-smoker, for certain diseases if a smoker has stopped smoking for a sufficiently long period;
  - c) whether such smoking history of the individual was caused by any of the alleged wrongful conduct by JTIM or MTI and/or a safety defect in JTIM's or MTI's products; and
  - d) other alternate risk factors experienced by each individual.
183. Further, individual assessment is required of the temporal and other factual relationships between the faults alleged to have been committed by JTIM or MTI and/or consumption of any of their products alleged to have suffered from a safety defect and the individual circumstances and smoking history of each Class Member to determine whether, if at all, there is a casual connection between the said fault or consumption of the defective product and the

initiation or continuation of the individual's smoking and also whether such smoking has played a role in the causation of any relevant disease suffered by the Class Member.

184. Further, it is for these reasons, amongst others pleaded at paragraphs 213 - 219 below, that JTI denies that the Plaintiff can prove with sufficient accuracy or particularity the aggregate amount of the claims of the Class Members so as to entitle her to seek collective recovery of damages in this case.
185. In respect of Mr. Blais, it is denied that smoking was the cause of his lung cancer. He has many alternate risk factors for lung cancer. Moreover, if smoking is the cause, which is denied, it is denied that his smoking would have caused his lung cancer if he had stopped smoking when he became aware of the health risks associated with smoking. Each individual Class Member must demonstrate that, had they stopped smoking when they were or could have been aware of the risks they would still have suffered the damage;
186. It is denied that Mr. Blais suffers from emphysema. Mr Blais does not allege that he has "throat" or laryngeal cancer;

**F. THE CASE OF DESIGNATED MEMBER JEAN-YVES BLAIS**

187. Mr. Blais has admitted that he started to smoke when he was 10 years old due to peer pressure and because it was "manly to smoke";
188. Mr. Blais did not start to smoke because of tobacco advertising;
189. Mr. Blais has admitted that he never saw any advertising for ZigZag tobacco, which is the rolling tobacco that he smoked when he started to smoke and which he continued to smoke for about five years;
190. Mr. Blais has admitted that in around 1959/1960 he began to smoke Export "A" filtered cigarettes and he continued to smoke them until the end of 2005;
191. Mr. Blais has admitted that he did not start to smoke Export "A" cigarettes because of tobacco advertising;

192. Mr. Blais has admitted that he does not remember seeing any Export “A” ads when he started to smoke them;
193. Mr. Blais has admitted that he has always smoked Export “A” cigarettes because of the taste, not because of any tobacco advertising;
194. Mr. Blais has not been influenced in his decision to start and to continue to smoke by any tobacco advertising;
195. Inasmuch as there was public awareness of the health risks associated with smoking as well as the risk that smoking may be difficult to stop in 1954, when Mr. Blais started to smoke, cigarettes afforded the safety which a person is normally entitled to expect and do not, therefore, present a safety defect;
196. If there was no such public awareness and if Mr. Blais was not aware of those risks in 1954 when he started to smoke (which is denied), he was aware or could have been aware of those risks shortly thereafter, in the late 1950s or 1960s;
197. Such an awareness of the risks associated with smoking had no impact whatsoever on Mr. Blais as he continued to smoke despite his knowledge of the risks and, any earlier awareness of those risks would not have altered his behaviour; Mr. Blais liked the taste of his cigarettes, enjoyed smoking and accepted the risks associated with smoking;
198. If Mr. Blais had stopped smoking permanently in the late 1950s or 1960s as he could have, any smoking specific risk of disease claimed for here would have substantially decreased, possibly, to that of a non-smoker. Mr. Blais had an obligation to minimise his damages and he failed to do so;
199. Mr. Blais has admitted that over the years, his doctors have advised him to stop smoking but, even though he finds his doctors most credible, and understand and believes their advice, he elected to ignore it;

200. Mr. Blais has admitted that he has never been influenced in his decision to start or to continue to smoke by any acts, statements or declarations of JTIM, MTI or the other Canadian tobacco manufacturers;
201. Mr. Blais has admitted that he has never read any statements or heard any declarations from JTIM, MTI or the other Canadian tobacco manufacturers, denying or trivialising the risks associated with smoking;
202. Mr. Blais has never been influenced in his decision to start or to continue to smoke by alleged marketing strategies of JTIM, MTI or the other Canadian tobacco manufacturers providing false or misleading information about tobacco products;
203. Mr. Blais has admitted that he has never seen any marketing from JTIM, MTI or the other Canadian tobacco manufacturers that said there were no risk associated with smoking cigarettes;
204. Mr. Blais has admitted that he has never heard a declaration from JTIM, MTI or the other Canadian tobacco manufacturers as to the safety of Lights cigarettes, nor has he ever seen any ads to that effect from JTIM, MTI or the other Canadian tobacco manufacturers;
205. Mr. Blais has not smoked a JTIM or MTI LTN or Lights brand in the period 1954 to 2006;
206. Mr Blais is unaware of any JTIM or MTI act or statement, whether wrongful or not, which caused him to start and/or to continue smoking, and/or which caused or contributed to his alleged conditions and damages;
207. Furthermore, Mr. Blais has not established that he suffers from emphysema and, if he does, that it was caused by smoking. Furthermore and under reserve, his claim in this regard would in any event be prescribed;
208. Mr Blais has not established that his lung cancer was caused by smoking as opposed to the various significant risk factors other than smoking to which he was exposed, namely important occupational risk factors and asthma;

209. Mr. Blais has not established that he is in fact incapable of stopping to smoke;
210. Furthermore, any claim of Mr. Blais under the Consumer Protection Act is prescribed;
211. Under reserve of the foregoing, the damages claimed by Mr. Blais are grossly exaggerated, indirect and illegal;

**G. COLLECTIVE RECOVERY / DAMAGES**

212. As aforesaid at paragraphs 89 - 96, class action proceedings in no way alters the substantive law of Québec or its evidentiary standards;
213. For any damages to be awarded, a Plaintiff has the burden of proving on a balance of probabilities the existence of a fault or safety defect, the nature and extent of his damages and a direct link (causation) between the two. The Court must assess which individual Class Members (if any) smoked due to any wrongful conduct on the part of JTIM or MTI or any safety defect associated with their products, to a sufficient degree to cause or contribute to a disease for which the claim has been brought. In order to provide sufficient accuracy of such issues, an individual assessment is required. The Court must moreover dismiss any defence raised such as *inter alia*, that the Plaintiff knew or could have known of the safety defect, or could have foreseen the injury, that the damages are illegal or not an immediate and direct consequence of the fault/safety defect, that he or she did not minimize their damages, prescription, assumption of risk or apportionment of liability. JTIM adds that the claim of any Class Member whose disease was diagnosed prior to November 1995 is prescribed;
214. The Plaintiff has not demonstrated, and will be unable to demonstrate, with sufficient accuracy or particularity that the Members of the Class in fact suffered the damage complained of, or indeed that they suffered from one of the four diseases referred to in the Motion, or, finally, that the alleged diseases and damage of the Members of the Class were caused by any wrongful act by JTIM or MTI or any safety defect associated with their products;

215. Given the unique risk circumstances of each individual Members of the Class, and the inability to determine without individual analysis the cause or contribution to a disease, if properly diagnosed, by a single factor, it is not legitimate or legally valid to seek to use statistical population studies of different populations to infer the “average” of the responsibility of a single factor in multifactorial diseases for a Class of individuals, who have different smoking and other histories and different exposures to alternate risk factors. The epidemiologic or population data does not supply information about the probability of causation at the individual level necessary, and this is more so where the group providing the statistical association has differing backgrounds or differing risk factors to the Class in question;
216. It is denied that the figures in paragraphs 164 and 165 of the Motion are accurate, or could be accurate for the Class, given their derivation from other population studies of other groups;
217. Answering the common questions cannot lead to a finding of liability against JTIM or MTI, as the questions do not address causality, damages or defences, these being individual issues, separate and distinct for each individual Class Member;
218. In such individual assessments, there are many specific important facts that need to be determined on an individual basis for each class member, upon which JTIM has the opportunity to cross examine, where relevant, before the liability of JTIM or MTI can be determined in regard to any Class Member and an award for damages granted in respect of that individual. The non-exhaustive questions are, *inter alia*:
- (i) Was, and if so, when was the Class Member aware (or could he have been aware) of the health risks associated with smoking as well as the risk that smoking may be difficult to stop?
  - (ii) If the Class Member was not so aware of the risks associated with smoking at certain points, would he or she have smoked even if he would have been aware of these risks?

- (iii) If the Class Member was not aware of these risks on starting smoking, which must be assessed, when did he or she become aware of these risks and did he stop smoking when he or she became so aware of these risks? If no, why not?
- (iv) If the Class Member stopped smoking when he or she became aware of these risks (or it is decided that he should have stopped smoking at that point), what was the risk of this smoking causing the disease at that point?
- (v) For how long has a Class Member stopped smoking?
- (vi) Did the Class Member smoke JTIM's or MTI's products? If not, he or she has no legal interest in regard to JTIM;
- (vii) If the Class Member smoked other products than JTIM's or MTI's products, what, if any, is the risk attributable to the period he smoked JTIM's or MTI's products? Did he also smoke the products of other Canadian tobacco manufacturers?
- (viii) Which product(s) did he smoke, regular, LTN or descriptor cigarettes and what were the reason(s) for doing so? In what amounts and intensity did he smoke such cigarettes? When and where did he smoke such cigarettes? For what periods and with or without interruption?
- (ix) Did the Class Member believe that LTN or Lights cigarettes were safer and, if so, why? Would the Class Member have stopped or not started smoking without this belief?
- (x) When did he or she start smoking and at what age? Why did the Class Member start to smoke?
- (xi) Was the Class Member aware of the alleged denials or trivializations, or statements made or views expressed by JTIM or MTI with regard to the health risks associated with smoking? If so, when did he or she

become so aware and did he rely on any such alleged denials, trivialisation, statements or views in his smoking related decisions;

- (xii) Was the Class Member aware of the alleged misleading marketing strategies and other marketing strategies that allegedly conveyed false information about the characteristics of the products sold? If so, when did he or she become so aware and did he or she rely on any such marketing and other marketing strategies in his smoking related decisions including the decision to start?
  - (xiii) Has the Class Member been told to quit smoking by his/her doctor, teachers and/or family or friends? Did he or she follow that advice?
  - (xiv) Did the Class Member attempt to quit smoking?
  - (xv) Was the Class Member exposed to factors other than smoking which may during his or her lifetime have caused or contributed to his or her disease?
  - (xvi) How has the Class Member established that he or she was diagnosed with the disease?
  - (xvii) Has the Class Member established that his or her smoking was responsible in the whole or in part for his or her disease, given the individual's circumstances and alternate factors?
  - (xviii) Is the Class Member's claim prescribed pursuant to the Civil Code of Québec and the Consumer Protection Act, assuming the latter applies to the class member, which is not admitted?
  - (xix) The nature and extent of the alleged pecuniary, non pecuniary and punitive damages, if any;
219. Consequently, without such individual analysis, the individual amount of the claims of the Class Members (let alone the total) cannot be established herein with any accuracy whatsoever. This cannot be overcome by the use of

statistical analysis or other collective approaches based on associations in different population groups with different risk profiles, which ignore the factors or questions set out above, and collective recovery cannot be ordered;

## H. THE COMMON QUESTIONS

### **First Common Question: Did the Respondents manufacture, market and sell a dangerous product that is harmful to the health of consumers?**

220. JTIM admits that there are health risks associated with smoking its products, including certain types of lung cancer, cancer of the larynx, cancer of the “throat” depending on how the term is defined and emphysema;
221. Each of these diseases is multifactorial, as several important and independent risk factors may play a role in their development. Smoking is only one such risk factor. Not all smokers develop these diseases and not all cases of these diseases occur in smokers;
222. Whether JTIM’s or MTI’s products have harmed Class Members’ health can only be established on an individual basis by assessing the individuals unique circumstances, including their smoking and medical history other relevant factors;
223. Notwithstanding the foregoing, there was at all material times no safety defect in the cigarettes manufactured, marketed and sold by JTIM and MTI, as having regard to all circumstances. Cigarettes manufactured by JTIM and MTI were not affected by a design or manufacturing defect and they afforded the safety which a person was normally entitled to expect, in light of both the JTIM and MTI marketing of the products and the public awareness of the health risks associated with smoking, as well as the risk that smoking may be difficult to stop. Such public awareness was reinforced by the express warnings as to health risks on packaging and marketing of JTIM and MTI products since 1972;

**Second Common Question: Did the defendants know and were they presumed to have known about the risks and dangers associated with the use of their products?**

224. JTIM is aware that there are health risks associated with smoking, including certain types of cancer of the lung, the larynx or possibly the “throat” (depending on how it is defined), or emphysema, adding that at all material times there has been public awareness of these risks in Québec, including amongst Class Members, and JTIM and MTI did not have greater awareness of those risks than that which was in the public domain;

225. JTIM is aware that smoking may be difficult to quit, but at all material times there has been public awareness that smoking may be difficult to stop. JTIM and MTI did not have greater awareness of this than that which was in the public domain;

**Third Common Question: Did the defendants implement a systematic policy of not disclosing such risks and dangers?**

226. JTIM denies that it or MTI implemented, alone or with the co-defendants, a systematic policy, the definition of which is unclear, of not disclosing the health risks associated with smoking as well as the risk that smoking may be difficult to stop for some. Such risks were known to the public in any event at all material times with such knowledge being strengthened by the introduction, at the Federal Government’s request, of express health warnings on packaging in 1972;

227. Therefore, to the extent that JTIM or MTI did not provide information about those risks that they should have provided, which is not admitted but expressly denied, such non-disclosure was not the result of a policy of systematic non-disclosure of those risks aimed at misleading consumers in any way and did not have any effect in misleading any members of the Class;

**Fourth Common Question: Did the defendants trivialise or deny such risks and dangers?**

228. JTIM or MTI did not, at any material time, trivialise or deny the health risks associated with smoking as well as the risk that smoking may be difficult to

stop, with such alleged conduct having to be assessed in respect of the public's knowledge of those risks;

229. Under reserve of the foregoing, if there were any such trivialisation or denial of risks by JTIM or MTI, which is not admitted but expressly denied, Mr. Blais was not aware of any such trivialisation, denial, statements or views and did not rely on any of these in his smoking related decisions;
230. Furthermore, and under reserve of the foregoing, to determine whether any trivialisation or denial is relevant to the question of liability would require one to examine each class member individually to determine if he or she was aware of and relied on any such alleged trivialisation, denial, statements or views in his or her smoking related decisions;

**Fifth Common Question: Did the defendants establish marketing strategies conveying false information about the characteristics of the product sold?**

231. At no time did JTIM or MTI devise and implement advertising or other marketing strategies conveying false information about the characteristics of its products;
232. At all material times, JTIM's and MTI's advertising or other marketing strategies about the characteristics of their products respected applicable legislation, regulation and the CTMC's Voluntary Advertising Codes in all material respects;
233. The public in Québec was not misled as to the risks associated with smoking or JTIM's or MTI's products' characteristics by JTIM's or MTI's marketing strategies;
234. At no time did JTIM or MTI devise and implement marketing strategies, including advertisements, that conveyed information about the characteristics of LTN cigarettes or Lights cigarettes, which they knew at the time to be false or misleading;
235. It was the independently arrived at position of the Federal Government that low tar cigarettes were less hazardous than higher yielding tar cigarettes and

the Federal Government directed JTIM, MTI and the other Canadian tobacco manufacturers to manufacture lower tar yielding cigarettes (which, in part were marketed as Lights) and encouraged JTIM, MTI and the other Canadian manufacturers to market and promote such products in pursuance of government health objectives of the time to encourage smokers to switch to LTN or Lights cigarettes including marketing such products and providing the tar yields, as machine measured, on all packages from 1975, and subsequently on marketing;

236. Therefore, any claims made by JTIM or MTI in relation to LTN or Lights cigarettes were both consistent with the independently held view of the Federal Government and complied with the Federal Government's approach to the sale of cigarettes, JTIM or MTI did not commit a fault in so doing;
237. Under reserve of the foregoing, if JTIM's or MTI's advertising or other marketing strategies did convey false information about the characteristics of LTN or Lights cigarettes, which is not admitted but expressly denied, the public, including Class Members, and Mr. Blais in particular, were not materially influenced by and did not rely on any such advertising or other marketing strategies in their smoking related decisions, such assessment having to be made by reference to marketing strategies seen by individuals and their specific knowledge of the health risks associated with smoking from time to time;
238. It is not established that any individual Class Members considered LTN or Lights cigarettes are safe or "safer", or that they acted in reliance of such a belief, or that such a belief was caused by any act or statement by JTIM or MTI;

**Sixth Common Question: did the defendants knowingly sell a product that is addictive and did they deliberately not use parts of the tobacco plant that have such low rates of nicotine that they would have put an end to the addiction of a large percentage of smokers?**

239. At all material times cigarettes were made from tobacco, which naturally contains nicotine;

240. Machine-measured nicotine yields from JTIM's and MTI's products have fallen dramatically since 1968, in accordance with the Federal Government's requirements and consumer demand. However, nicotine plays a role in the consumer acceptability of the product. It was the Federal Government's independently arrived at position that altering the tar/nicotine ratio in cigarettes to lower the tar, while keeping the nicotine at a level acceptable to consumers, would have beneficial public health effects, so it initiated a programme which led to the development of a tobacco plant having those characteristics on which the Federal Government holds the patent. On the Federal Government's view therefore of an acceptable level of the nicotine for the consumer, assuming a smoker continues to smoke, the supply of cigarettes which provided too low nicotine yields would not provide a health benefit as smokers would not have bought them or, in some cases, smokers may have varied their smoking behaviour. There was thus a common belief in the Federal Government and among the wider scientific and public health community that a cigarette manufactured from such a tobacco plant would present less risk. JTIM and MTI did not have any knowledge over and above that which was known by the Federal Government and the scientific and public health community in respect of such matters;
241. JTI is aware that smoking may be difficult to quit, but at all material times there has been public awareness that smoking may be difficult to stop. JTI and MTI did not have greater awareness of this than that which was in the public domain;
242. The pharmacological impact of nicotine in cigarettes is in fact weak, its role in smoking behaviour is likely to vary from individual to individual and it has no detrimental effect on the smoker's cognitive function including his ability to make and implement a decision to quit smoking;
243. As the term is commonly used today, cigarette smoking is addictive but this does not mean that all smokers will find it difficult to give up. It is not accepted that all members of the Class will find it difficult to quit, particularly if they are substantially motivated;

244. JTIM and MTI did not manipulate the nicotine levels in cigarettes as alleged herein in order to ensure “addiction” or to increase the difficulty for an individual to stop;

**Seventh Common Question: did the defendants conspire to maintain a common front to prevent users of their products being informed about the inherent dangers of using their products?**

245. JTIM denies the existence of a conspiracy or of concerted action as alleged or at all to prevent users of cigarettes or the public generally being informed about the health risks associated with smoking;

246. As aforesaid, more particularly at paragraphs 97 - 102, JTIM and MTI complied in all material respects with the Federal Government’s standards, regulations and directives in force from time to time with regard to warnings and communications with consumers about the health risks associated with smoking;

247. At all material times, there was public awareness of the health risks associated with smoking, as well as the risk that smoking may be difficult to stop, regardless of the brand smoked;

248. Consequently, if there was such a conspiracy or concerted action between JTIM or MTI and the other Canadian tobacco manufacturers to prevent users of their products being informed about the risks associated with smoking (which is denied), such conspiracy or concerted action failed to prevent such risks being known at all or at the earliest time possible in light of the public awareness of those risks from other sources or, alternatively, the individual awareness of those risks by Class Members from other sources and therefore caused no damages herein;

**Eighth Common Question: did the defendants intentionally jeopardize the right to life, security and inviolability of the Members of the Class?**

249. JTIM reiterates that at all material times JTIM and MTI acted in good faith and did not unlawfully and intentionally jeopardize the right to life, security and inviolability of the Class Members;

250. Furthermore, the determination of whether or not, and to what extent, if any, a class member's right to life, security and inviolability has been jeopardized by JTI's or MTI's alleged unlawful and intentional acts, cannot be done on a class-wide basis but only on an individual basis;

## **CONCLUSIONS**

### **WHEREFORE, JTIM ASKS THIS HONOURABLE COURT TO:**

1. MAINTAIN JTIM'S AMENDED DEFENCE;
2. DISMISS Plaintiff's Amended Motion to Institute Proceedings with costs including the costs of experts; and
3. DISMISS Mr. Jean-Yves Blais' individual action with costs including the costs of experts.

Montreal, November 17, 2008

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**Borden Ladner Gervais LLP**  
Attorneys for defendant  
JTI-Macdonald Corp.

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