

C A N A D A

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

NO: 500-06-000076-980

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

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

Representative – Plaintiff

And

**JEAN-YVES BLAIS**

Designated Member

v.

**JTI-MACDONALD CORP.**

and

**IMPERIAL TOBACCO CANADA LIMITED**

and

**ROTHMANS, BENSON & HEDGES INC.**

Defendants

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**PLEA OF DEFENDANT  
IMPERIAL TOBACCO CANADA LIMITED**

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**IN PLEA TO THE MOTION TO INSTITUTE PROCEEDINGS, DEFENDANT IMPERIAL TOBACCO  
CANADA LIMITED RESPECTFULLY SUBMITS AS FOLLOWS:**

1. The defendant Imperial Tobacco Canada Limited (“**ITCAN**”), formerly Imperial Tobacco Limited, states that none of its statements herein are to be construed as an admission or a consent to the admissibility or the filing of the exhibits cited in support of the Motion to Institute Proceedings (the “**Motion**”) and puts the Representative Plaintiff, Conseil Québécois Sur Le Tabac Et La Santé (“**CQTS**”) and Mr. Blais, the designated member (the “**Designated Member**”) to the strict proof thereof.
2. ITCAN states that the allegations contained in paragraphs 1 to 4 of the Motion refer to the Court record and to the judgment authorizing the class action rendered on February 21, 2005 (the “**Authorizing Judgment**”). ITCAN denies anything that is inconsistent therewith, and in particular, ITCAN denies that the Authorizing Judgment determined that the relief set out in paragraph 4 of the Motion flows from:
  - (a) the wrongs allegedly committed by the Defendants against the class members (which wrongs are denied); or

- (b) the Defendants' liability for the harm allegedly caused by the Defendants (which liability and harm is denied).
3. ITCAN denies the allegations contained in paragraph 5 of the Motion.
  4. ITCAN denies the allegations contained in paragraph 6 of the Motion. ITCAN states that it was and remains a member of the Canadian Tobacco Manufacturers' Counsel (the "CTMC") but denies that ITCAN acted behind "the shield" of the CTMC. Instead, a predecessor to the CTMC was formed in 1963, when at the request of the federal government, an ad hoc committee of the Defendants was established to interface with government authorities at the federal government's 1963 Conference on Smoking and Health. This ad hoc committee became the CTMC in or about 1971, and ITCAN did not, whether directly or through its participation in the CTMC, engage in any concerted strategies to mislead consumers.
  5. ITCAN admits the allegations contained in paragraph 7 of the Motion.
  6. ITCAN denies the allegations contained in paragraph 8 of the Motion, and denies that it has any liability toward the members of the class. In the alternative, it submits that collective recovery of non-pecuniary and punitive damages is not possible for the reasons more fully set forth herein.
  7. ITCAN states that the allegations contained in paragraphs 9 to 11 of the Motion refer to the Authorizing Judgment and denies anything that is inconsistent therewith.
  8. ITCAN admits the allegations contained in paragraphs 12 to 16 of the Motion, except the allegation contained in paragraph 15 of the Motion, wherein it is stated that the Designated Member smoked Export "A" cigarettes without a filter. Instead, the evidence of the Designated Member is that the Export "A" cigarettes he smoked were filtered cigarettes.
  9. ITCAN denies the allegations contained in paragraph 17 of the motion and further states that the Designated Member was aware of the risks of smoking long before 1987.
  10. ITCAN admits the allegations contained in paragraphs 18 and 19 of the Motion.
  11. ITCAN denies the allegations contained in paragraphs 20 and 21 of the Motion.
  12. ITCAN admits the allegations contained in paragraphs 22 to 23 of the Motion.
  13. ITCAN denies the allegations contained in paragraph 24 of the Motion. In particular, ITCAN states that although British American Tobacco plc held 42.5% of the shares of Imasco Limited ("**Imasco**") prior to the merger referred to in paragraph 24 of the Motion, neither British American Tobacco plc nor its predecessor entities (collectively, "**BAT**") exercised effective control over Imasco and at no relevant time did BAT interfere with the operations and management of ITCAN.
  14. ITCAN admits the allegations contained in paragraph 25 of the Motion.

15. ITCAN denies the allegations contained in paragraph 26 of the Motion. In particular, ITCAN states that it was not a wholly owned subsidiary of British American Tobacco Holdings (Canada) BV as at February 1, 2000, although that is currently the case. British American Tobacco Holdings (Canada) BV is a wholly owned indirect subsidiary of British American Tobacco plc.
16. With respect to paragraph 27 of the Motion, ITCAN denies that Brown & Williamson Tobacco Corporation (“**B&W**”) is appropriately referred to as ITCAN’s “sister” corporation, as alleged, and otherwise has no knowledge of the allegations contained therein.
17. ITCAN states that the allegations contained in paragraph 28 of the Motion refer to Exhibits CQTS-8 and CQTS-9 and denies anything inconsistent therewith.
18. ITCAN states that the allegations contained in paragraph 29 of the Motion refer to Exhibit CQTS-9 and denies anything inconsistent therewith.
19. ITCAN denies the allegations contained in paragraph 30 of the Motion. In particular, ITCAN denies that it currently has a market share of more than 60% of the tailor-made cigarette market in Canada at present or at the time of the filing of the Motion and denies anything inconsistent with Exhibit CQTS-10, as referenced therein.
20. ITCAN has no knowledge of the allegations contained in paragraphs 31 to 35 of the Motion.
21. ITCAN denies the allegations contained in paragraph 36 of the Motion.
22. ITCAN has no knowledge of the allegations contained in paragraphs 37 to 51 of the Motion.
23. ITCAN denies the allegations contained in paragraph 52 of the Motion.
24. ITCAN admits the allegations contained in paragraphs 53 and 54 of the Motion.
25. ITCAN denies the allegations contained in paragraphs 55 and 56 of the Motion. Among other things, ITCAN denies that nicotine contains carcinogenic properties and that NNk and NNN are derived from nicotine.
26. ITCAN denies the allegations contained in paragraphs 57 and 58 of the Motion. Among other things, ITCAN denies that nicotine produces a “strong” physiological response in smokers. ITCAN states that the effect nicotine produces in the brain is similar to any pleasurable substance or activity engaged in by the user and is not unique in that regard.
27. ITCAN denies the allegations contained in paragraphs 59 to 66 of the Motion.
28. ITCAN states that the allegations contained in paragraph 67 of the Motion refers to the Supreme Court of Canada’s decision in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, and 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.

29. ITCAN states that the allegations contained in paragraph 68 of the Motion refers to the Quebec Court of Appeal's decision in *JTI-Macdonald Corp. v. Canada*, [2005] R.J.Q. 2018 (C.A.) and 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.
30. ITCAN denies the allegations contained in paragraph 69 of the Motion.
31. ITCAN denies the allegations contained in paragraphs 70 to 71 of the Motion and states that no member of the class has been identified who is even alleged to have cancer of the "throat" or larynx.
32. ITCAN denies the allegations contained in paragraph 72 of the Motion and states that the actual process by which tobacco smoke may cause lung cancer has yet to be established.
33. ITCAN denies the allegations contained in paragraph 73 to 77 of the Motion.
34. With respect to paragraph 78 of the Motion, ITCAN admits that smoking can cause emphysema in some smokers. However, ITCAN denies the causative mechanisms set out therein.
35. With respect to paragraph 79 of the Motion, ITCAN denies that most individuals with emphysema (whether smokers or not) will develop the effects of emphysema described therein.
36. The allegations contained in paragraph 80 of the Motion refer to the decision in *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. ITCAN 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.
37. 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.). ITCAN 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.
38. ITCAN denies the allegations contained in paragraphs 82 and 83 of the Motion.
39. ITCAN denies that the questions posed in paragraph 84 of the Motion are the pertinent questions to be asked in this matter. Instead, the threshold questions are: what did each

of the class members know regarding the health effects of the consumption of cigarettes, when did they know it and what did they decide to do with the information?

40. ITCAN denies that it can be presumed to have knowledge of the allegations contained in paragraph 85 of the Motion. Further, ITCAN denies that any or all members of the class have suffered from lung, larynx or “throat” cancer or emphysema as a result of smoking its products, as suggested in paragraph 85 of the Motion, and puts the class members to the strict proof thereof.
41. With respect to paragraph 86 of the Motion, ITCAN admits that it has had a relationship with British American Tobacco Company (also hereinafter referred to as BAT) that permitted ITCAN and BAT to mutually benefit from certain research and knowledge that each performed and obtained.
42. ITCAN denies the allegations contained in paragraph 87 of the Motion and further states that the testimony contained in Exhibit CQTS-22 is subject to parliamentary immunity and does not constitute evidence herein.
43. With respect to paragraph 88 of the Motion, ITCAN denies that it can be presumed to have knowledge of the allegations contained therein. ITCAN admits that smoking is addictive as that term is generally understood today, but states that the concept of addiction has varied over the time period at issue.
44. ITCAN admits that:
  - (a) with respect to paragraph 89 of the Motion, Exhibit CQTS-23 contains the statements excerpted therein, but denies that Exhibit CQTS-23 was drafted in the early 1960s. Instead, Exhibit CQTS-23 was drafted in or about 1984;
  - (b) with respect to paragraph 90 of the Motion, Exhibit CQTS-24 contains the statements excerpted therein, but otherwise ITCAN has no knowledge of the allegations contained in the paragraph;
  - (c) with respect to paragraph 91 of the Motion, Exhibit CQTS-25 contains the statements excerpted therein, but otherwise ITCAN has no knowledge of the allegations contained in the paragraph;
  - (d) with respect to paragraph 92 of the Motion, Exhibit CQTS-26 contains the statements excerpted therein. ITCAN denies that this document was a report of a meeting, however. Instead, it was a presentation by a particular individual; and
  - (e) with respect to paragraph 93 of the Motion, Exhibit CQTS-27 contains the statements excerpted therein, but otherwise ITCAN has no knowledge of the allegations contained in the paragraph;
45. ITCAN has no knowledge of the allegations contained in paragraph 94 of the Motion.
46. ITCAN denies the allegations contained in paragraph 95 of the Motion.

47. With respect to the allegations contained in paragraph 96 of the Motion, ITCAN admits that Exhibit CQTS-29 contains the statements excerpted therein. ITCAN notes that Exhibit CQTS-29 also states:

...Without better knowledge of mechanisms it is a reasonable hypothesis that the risk of lung cancer will be reduced in smokers who inhale less tar, and despite the argument that some smokers adjust their inhaling habits to get a fixed dose of nicotine, since tar and nicotine deliveries tend to move in the same direction, there is likely to be an overall benefit from across the board reductions in tar delivery. [at p. 4]

48. With respect to the allegations contained in paragraph 97 of the Motion, ITCAN denies that it can be presumed to have knowledge of the allegations contained therein. ITCAN admits that for some smokers, smoking can cause the cancers referenced in paragraph 97 of the Motion (with the qualification that “throat” cancer is not a specific cancer in and of itself, but rather a general reference to cancers that appear in various parts of the throat, and that some such cancers lack an association with smoking). However, this knowledge varied over the time period at issue and what was known and accepted by the scientific community at large, including public health authorities, at such points in time.
49. ITCAN further states that a determination of whether any of the diseases alleged to have been developed by the members of the class (being lung, larynx or throat cancer or emphysema, and collectively, the “**Diseases**”, the causation of which are all multi-factorial) were caused by smoking ITCAN’s products can only be determined following individual assessments of each class member.
50. Paragraphs 98 and 99 of the Motion refer to Exhibit CQTS-30. ITCAN admits that Exhibit CQTS-30 contains the statements referenced in paragraph 98 of the Motion, but otherwise has no knowledge of the allegations contained in these paragraphs.
51. With respect to the allegations contained in paragraph 100 of the Motion, ITCAN admits that Exhibit CQTS-31 contains the statements referenced therein, but otherwise has no knowledge of the allegations contained in the paragraph.
52. ITCAN denies the allegations contained in paragraph 101 of the Motion, noting that Exhibit CQTS-32 on its face, is not a research report, but rather, a research proposal.
53. With respect to the allegations contained in paragraph 102 of the Motion, ITCAN admits that Exhibit CQTS-28 contains the statements referenced therein, but otherwise has no knowledge of the allegations contained in the paragraph.
54. ITCAN denies the allegations contained in paragraph 103 of the Motion, noting that Exhibit CQTS-33 on its face is a document authored by a Philip Morris representative, and not a B&W representative.
55. ITCAN denies the allegations contained in paragraphs 104 to 105 of the Motion.
56. With respect to the allegations contained in paragraph 106 of the Motion, ITCAN admits that Exhibit CQTS-34 contains the statements referenced therein, but otherwise has no knowledge of the allegations contained in the paragraph.

57. ITCAN denies the allegations contained in paragraphs 107 to 112 of the Motion.
58. With respect to the allegations contained in paragraph 113 of the Motion, ITCAN denies that it was the “sister corporation” of B&W and states that at the material time IMASCO was the 100% shareholder of ITCAN. ITCAN admits that Exhibit CQTS-36 contains the statements referenced therein, but otherwise has no knowledge of this document.
59. ITCAN denies the allegations contained in paragraph 114 of the Motion.
60. ITCAN denies the allegations contained in paragraphs 115 of the Motion, adding that the testimony referenced in Exhibit CQTS-37 is subject to parliamentary immunity and does not constitute evidence herein.
61. ITCAN denies the allegations contained in paragraph 116 to 117 of the Motion.
62. With respect to paragraph 118 of the Motion, ITCAN admits that Exhibit CQTS-38 contains the statements referenced therein. It denies the suggestion contained in the paragraph, however, that its actions and policies were directed by BAT, and states that, in any event, there is nothing in the policy contained in Exhibit CQTS-38 that is improper. Further, ITCAN notes the failure of the Plaintiffs to include the first sentence to the first paragraph quoted, which reads:

For this reason it is essential that statements about cigarette smoking or the smoking and health issue generally must be factually and scientifically correct.
63. With respect to paragraph 119 of the Motion, ITCAN admits that Exhibit CQTS-39 contains the statements excerpted therein. ITCAN has no knowledge of the policies applied by JTI-Macdonald Corp. (“**JTI**”).
64. ITCAN denies the allegations contained in paragraphs 120 of the Motion and states that it did not contest the sections of the *Tobacco Products Control Act* (the “**TPCA**”) mandating unattributed warnings. Rather, JTI, then RJR-Macdonald, alone challenged that aspect of the warning (while continuing to carry the warning mandated by the legislation), and its challenge was affirmed by the Supreme Court of Canada in 1995.
65. ITCAN denies the allegations contained in paragraphs 121 to 124 of the Motion.
66. With respect to paragraphs 125 and 126 of the Motion, the allegations contained therein refer to Exhibits CQTS-37 and CQTS-22 respectively and ITCAN denies anything that is inconsistent therewith, adding that the testimony referenced in these exhibits are subject to parliamentary immunity and do not constitute evidence herein.
67. ITCAN states that the allegations contained in paragraphs 127 and 128 of the Motion have no bearing on these proceedings, and in any event denies the allegations contained in paragraph 128.
68. ITCAN denies the allegations contained in paragraphs 129 to 136 of the Motion.

69. With respect to paragraph 137 of the Motion, ITCAN admits that Exhibit CQTS-44 contains the statements referenced therein (subject to various words having been omitted), but otherwise has no knowledge of the allegations in the paragraph.
70. ITCAN denies the allegations contained in paragraphs 138 to 142 of the Motion.
71. ITCAN admits the allegations contained in paragraphs 143 and 144 of the Motion.
72. ITCAN denies the allegations contained in paragraphs 145 to 147 of the Motion.
73. ITCAN admits the allegations contained in paragraph 148 of the Motion.
74. With respect to paragraph 149 of the Motion, ITCAN admits that Exhibit CQTS-52 contains the statements referenced therein, but otherwise has no knowledge of the allegations in the paragraph.
75. ITCAN denies the allegations contained in paragraphs 150 to 152 of the Motion.
76. With respect to paragraphs 153 and 154 of the Motion, ITCAN admits that Exhibit CQTS-53 contains the statements referenced therein, but otherwise has no knowledge of the allegations in the paragraphs.
77. ITCAN denies the allegations contained in paragraphs 155 to 158 of the Motion.
78. ITCAN denies the allegations contained in paragraph 159 of the Motion, stating that Exhibit CQTS-55 was drafted in or about 1978 and is merely the expression of a hypothesis, after having observed certain limited market trends and potential future trends.
79. With respect to paragraph 160 of the Motion, ITCAN admits that Exhibit CQTS-56 contains the statements referenced therein. However, ITCAN denies that BAT gave directions to ITCAN regarding this matter. Instead, as noted below, ITCAN's efforts to reduce the tar and nicotine levels in its cigarettes were conducted in accordance both with the directions and with the assistance of the federal government and the prevailing scientific views at the time.
80. ITCAN denies the allegations contained in paragraphs 161 and 162 of the Motion.
81. ITCAN denies the allegations contained in paragraphs 163 to 172 of the Motion, and in particular states that the members are not entitled to collective recovery of non-pecuniary or punitive damages, and that an award of damages of any kind, whether on a collective base or otherwise, is unwarranted.
82. With respect to the allegations contained in paragraphs 173 to 180 of the Motion, ITCAN states that should its liability toward a given member be established following proof made on an individual basis, that member may file a claim for pecuniary damages in accordance with the procedure for individual recovery, but denies that all members toward whom its liability may be established can systematically claim compensation for loss of income up to age 65, or that such loss of income may be established on the basis



of the average of the best three consecutive years of income earned by such member prior to the date as of which he or she was found to have a partial or total disability.

**AND IN ORDER TO RE-ESTABLISH THE FACTS, ITCAN STATES AS FOLLOWS:**

**A. INTRODUCTION**

83. The use of tobacco in our society represents a complex societal phenomenon, which must be viewed and analyzed in the proper context.
84. The Representative Plaintiff and the Designated Member (collectively, the “**Plaintiffs**”) invite the Court to view the issues that arise in this case through the lens of hindsight, without regard to historical or social context and without regard to the role played by governments, the scientific community, the health care community and other non-governmental organizations and groups in addressing the issue of tobacco use and without regard to the state of accepted scientific knowledge at the relevant time.
85. The Plaintiffs also invite the Court to ignore the fact that individuals have the right and autonomy to make, and do constantly make, choices and engage in behaviours that expose them to risks that may entail negative consequences and that they assume those risks and consequences.
86. Indeed, a significant number of people continue to take up smoking each year in full knowledge of the risks of smoking and in the absence of any advertising for tobacco products.

**B. GOVERNMENT INVOLVEMENT**

87. The federal government played an integral and central role at all material times in the development, manufacture, marketing and sale of tobacco products in Canada. In addition, the federal government assumed responsibility for the dissemination of information regarding the risks associated with tobacco products.
88. Among other things, the federal government researched, developed and licensed to tobacco growers (and collected licensing fees in respect of) tobacco strains with marginally higher nicotine levels, but which tobacco leaf, when burned, produced lower tar. These strains became virtually the only tobacco varieties available for purchase by Canadian cigarette manufacturers (including ITCAN) for the purpose of manufacturing tobacco products in Canada.
89. ITCAN states that at all material times, the federal government:
  - (a) requested, mandated, directed or otherwise required ITCAN to place particular warnings, including the content of such warnings, on its products and any permissible advertisements; and
  - (b) requested, mandated, directed or otherwise required ITCAN as to when to it should place such warnings on its products and permissible advertisements,

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

90. ITCAN states that the federal government's conduct was reasonable in the circumstances. In the alternative, if the federal government's conduct was not reasonable, ITCAN states that its conduct and reliance on the federal government was reasonable in all such respects and as a result, ITCAN bears no liability to class members.
91. The federal government assumed a duty to both the consumers and ITCAN in respect of the relevant public health issues, advertising and warnings.
92. To the extent that any such manufacture and promotion of ITCAN's products resulted in the Diseases suffered by the class members, ITCAN states that the liability, if any, resides with, or is shared with, the federal government.

### **C. THE COMMON QUESTIONS**

93. In considering whether this Court can answer any of the common questions in the affirmative (which is denied), consideration must be given to the fact that the Plaintiffs allege that the class in question is comprised of over 49,000 members, each of whom had individual experiences in respect of any of the allegations made by the Plaintiffs in support of the common questions.
94. In light of the long-standing and widespread knowledge of the health effects of smoking, ITCAN denies that it had the duties alleged to disclose to any members of the class the risks associated with its products. Nor did it have any duty not to discuss the facts and risks in the manner pleaded. Nor did it fail to comply with any other duty, as pleaded, that may have been owed to the members of the class.
95. Moreover, the common questions cannot be answered solely by reference to the actions of the Defendants. Instead, an answer to the common questions and any liability of ITCAN (which is denied) necessarily requires an understanding of the extent of the public knowledge of the health effects of smoking at various points in time, in order to understand what duties ITCAN may have owed to members of the class at those times and whether such duties were breached.
96. The existence of any duty and compliance with that duty must necessarily be assessed by reference to the individual class member's smoking history.
97. Further, whether any such breach of a duty was causative of the class member's smoking behaviour and his or her Disease is necessarily an individual issue.
98. ITCAN's position with respect to the common questions is as follows:
  - (a) Les intimées ont-elles fabriqué, mis en marché, commercialisé un produit dangereux, nocif pour la santé des consommateurs?

The cigarettes manufactured by ITCAN entail certain health risks for users, which at the material times were well known. However, not all users develop all or any

of the Diseases, and the manufacturing, marketing and sale of cigarettes, a legal product, is not a civil fault.

Moreover, although not pleaded by the Plaintiffs, ITCAN states that its cigarettes do not contain a “safety defect” as that term is defined in the *Civil Code of Quebec*.

ITCAN further states that the federal government requested, mandated, directed or otherwise required ITCAN to manufacture, market and sell certain products that the Plaintiffs allege were wrongfully manufactured, marketed and sold by ITCAN. ITCAN states that it acted reasonably in all respects when complying with the requirements of the federal government.

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

What ITCAN knew about the risks and dangers associated with its products varies over the time period at issue. ITCAN complied with its obligation to inform itself of the prevailing science and what such science concluded in respect of the pertinent risks and dangers at the material times, all of which risks and dangers were known by the federal government and the public at such times. ITCAN cannot be presumed to have knowledge of all risks and dangers pleaded at all periods of time.

Further, members of the class were aware of the risks and dangers associated with ITCAN’s products at the material times and therefore ITCAN’s knowledge of same is irrelevant.

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

There was no policy, systematic or otherwise, by ITCAN to avoid the disclosure of any of the risks or dangers, which purported policy would have been futile in any event, given that the risks and dangers were known to the public.

Further, at all material times, the federal government disclosed and later directed, mandated or otherwise required the disclosure by ITCAN of the risks and dangers associated with smoking, including the content of warnings disseminated to the public. ITCAN reasonably complied with such directives, and ITCAN states that it bears no liability for complying with the requirements of the federal government.

In any event, any such purported policy would have to be assessed in the context of each class member’s knowledge of such risks and dangers and in the context of all other information available in the public domain.

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

ITCAN did not trivialize or inappropriately deny any risks or dangers associated with smoking. In any event, any such alleged trivializations or inappropriate denials would have to be considered in the context of each class member's knowledge of such risks and dangers and in the context of all other information available in the public domain.

ITCAN states that the purported denials or trivializations had no impact on any class member's behaviour and that in any event, the effect of any such denials and trivializations can only be assessed by reference to the particular trivializations and denials heard by individual class members and the impact that such trivializations and denials had on the behaviour of each such class member.

ITCAN further states that if any inappropriate trivializations or denials were made with respect to lower delivery cigarettes (including the "light" and "mild" products), such inappropriate trivializations and denials were made by the federal government who promoted such products as "safer" or "less hazardous".

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

ITCAN's marketing did not contain false information about the characteristics of its products. ITCAN states that consumers were not misled about those characteristics as a result of ITCAN's marketing strategies.

ITCAN further states that the federal government:

- (i) directed ITCAN to manufacture certain products, including, lower standard delivery products (such as cigarettes labeled as "light" and "mild");
- (ii) requested and later required ITCAN to place average "tar" and nicotine deliveries for their cigarettes, which numbers were derived from government approved testing methodologies, on all advertisements for such products and on all such products themselves, as part of and in furtherance of the government's attempts to convince smokers to switch to lower standard delivery products;
- (iii) required ITCAN to promote and sell certain tobacco products (and in particular lower standard delivery products) in preference to higher yield products, as part of and in furtherance of the federal government's attempts to encourage smokers to switch to lower standard delivery products.

ITCAN states that it acted reasonably in all respects when complying with the requests and directives of the federal government and bears no liability for

complying with same. Further, ITCAN states at no time in the marketing of its products did it advise consumers that one product was safer than another, despite the federal government's express promotion of lower deliver products as being a safer alternative for smokers.

ITCAN further states that the purported false information had no impact on any class member's behaviour (the dissemination of false information being denied). In any event, ITCAN states that the impact of any purported false information disseminated by ITCAN in its marketing activities (which dissemination of false information is denied) can only be assessed by reference to the particular advertisements and other marketing activities observed by individual class members, and the impact that such specific marketing activities had on the behaviour of each such class member.

- (f) Les intimées ont-elles sciemment mis sur le marché un produit qui crée une dépendance et ont-elles fait en sorte de ne pas utiliser les parties du tabac comportant un taux de nicotine tellement bas qu'il aurait pour effet de mettre fin à la dépendance d'une bonne partie des fumeurs?

Nicotine is a naturally occurring substance in the tobacco leaf. What ITCAN knew about the issue of nicotine and addiction (the nomenclature of which has changed over time) varies over the time period at issue.

At the request and direction of the federal government, ITCAN was successful in substantially reducing the nicotine levels in the products it manufactured over the period relevant to the present proceedings. ITCAN states, however, that it had no duty to manufacture products that would have been unacceptable to consumers and therefore doomed to failure in the market place. Instead, in accordance with the federal government's requests, mandates, directives and other requirements, ITCAN reduced the average nicotine deliveries in its products by developing lower yield products. Indeed, the federal government's role in this regard was integral, the federal government having researched and developed strains of tobacco with a lower tar to nicotine ratio, following which such strains were licensed by the federal government to tobacco growers. Such strains ultimately became virtually the only tobacco available for purchase by ITCAN in the manufacture of its products. Notwithstanding that these tobacco strains had marginally higher nicotine levels, other modifications made by ITCAN in the manufacture of its cigarettes resulted in some cigarettes that delivered lower nicotine levels in the smoke.

Certain consumers chose to smoke such low standard delivery brands, either at the outset of their smoking history or by switching to such brands for reasons that have nothing to do with ITCAN.

- (g) Les intimées ont-elles conspiré entre elles pour maintenir un front commun visant à empêcher que les utilisateurs de leurs produits ne soient informés des dangers inhérents à leur consommation?

ITCAN did not conspire to maintain a common front to prevent users of their products from being informed about the dangers of using its products.

ITCAN states that at all material times the federal government directed and mandated the information to be disseminated to smokers regarding the risks and dangers associated with smoking. Prior to the 1970's, the federal government directed that warnings regarding the dangers of ITCAN's products were unnecessary, as the dangers associated with smoking were well known. Following that time, and in particular, beginning in 1972, the federal government altered its directives in that regard, and at all material times following, directed the content of warnings disseminated to the public by ITCAN.

In any event, even if ITCAN and the other Defendants did conspire to maintain the "common front" as alleged (which conspiracy is denied), none of the Defendants actions had any impact on the dissemination of information about the risks of smoking to members of the class nor on the class member's understanding of that information.

Moreover, the effect of any such common front (the existence of which is denied) can only be assessed in the context of each class member's knowledge of such dangers and in the context of all other information available in the public domain.

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

ITCAN did not willfully impair the right to life, personal security, inviolability and freedom of the members of the class, as is more fully detailed in the paragraphs below.

99. Further, even if all of the common questions certified were answered in the affirmative, there can be no finding of liability against ITCAN.

100. The legal consequences attaching to any such conduct, if answered in the manner suggested by the Plaintiffs, can only be assessed after a multitude of other questions are answered, all of which are dependant on the knowledge, behaviour and circumstances of each individual class member in the context of the pertinent time period at issue. Among other things, before liability can flow, the following questions must be answered and assessed by individual examinations and cross-examinations of each class member:

- (a) which of the class members, if any, smoked ITCAN's products, and of those class members, which ITCAN products did they consume;

- (b) was the Disease suffered by any class member caused in fact by the consumption of ITCAN's products;
- (c) when did each class member begin to smoke;
- (d) what did each class member know of the pertinent risks and dangers associated with ITCAN's products;
- (e) when did each class member become aware of the pertinent risks and dangers associated with ITCAN's products;
- (f) did awareness of these risks and dangers affect each of the class member's behaviour, including quitting behaviour;
- (g) which, if any, of the class members, heard or were aware of the purported trivializations or denials by ITCAN of the risks and dangers associated with its products;
- (h) did such purported trivializations or denials affect the behaviour of each such class member;
- (i) was such altered behaviour, if any, reasonable in the circumstances;
- (j) did such altered behaviour cause the Disease suffered by each class member;
- (k) which, if any, of the class members heard or were aware of the purported marketing strategies containing alleged false information regarding ITCAN's products;
- (l) did any of the class members consume ITCAN's products associated with alleged false marketing strategies;
- (m) which, if any, of the class members who heard the alleged false marketing strategies and who consumed the pertinent ITCAN products, altered their behaviour in reliance upon the allegedly false information;
- (n) was such altered behaviour reasonable in the circumstances of each class member;
- (o) did such altered behaviour result in the Disease suffered by each class member;
- (p) were any of the class members younger than the legal age for smoking at the time they began smoking;
- (q) did any such under-aged smoker smoke ITCAN's products at the relevant time, and if so, did they smoke such products as a result of any statements made by ITCAN which were directed at under-aged smokers;
- (r) did any of the class members switch from a higher yield product to a lower yield product manufactured by ITCAN;

- (s) if so, what product did they switch from and what product did they switch to;
- (t) with respect to lower yield products – which of the class members smoked any of ITCAN’s “light” or “mild” products;
- (u) did any class members switch to ITCAN’s lower yield products as a result of representations made by ITCAN, or instead, did they switch for reasons that have nothing to do with the actions of ITCAN but rather, *inter alia*, were connected to the actions of the federal government;
- (v) did any such class members “compensate” (as further explained below) when switching to such lower yield products manufactured by ITCAN;
- (w) if compensation did occur upon switching to ITCANs lower yield products, was such compensation of a limited duration;
- (x) was any compensation such that the class member achieved no reduction in the consumption of any potentially harmful constituents of tobacco smoke;
- (y) was any change in the smoking behaviour of the class member as a result of switching to lower yield products causative of the Disease suffered by the class member; and
- (z) did any class member purchase lower nicotine products than those manufactured by ITCAN?

101. These issues, by their very nature, must be assessed individually, such that a finding in respect of the entire class is impossible.

**D. THE DESIGNATED MEMBER’S INDIVIDUAL CLAIM**

102. Many of the difficulties inherent in this action are illustrated by the Designated Member, who has no claim against ITCAN for the following reasons.

103. The Designated Member never smoked ITCAN’s products at any material time. Instead, at all material times he smoked tobacco and cigarettes manufactured by JTI.

104. The Designated Member has long been aware of the risks associated with smoking.

105. The Designated Member saw the first health warnings in 1972 when they appeared on cigarette packages and the subsequent warnings as they appeared. He saw those warnings long after he was aware of the risks and dangers associated with smoking.

106. The Designated Member was advised at twenty-one years old to quit smoking.

107. The Designated Member was advised ten years before he contracted lung cancer that if he did not stop smoking he would have lung cancer in ten years. Despite this warning, the Designated Member continued to smoke.



108. The Designated Member has been aware that smoking can be a difficult behaviour to quit since he was seventeen years old.
109. As the Plaintiffs themselves admit at paragraph 14 of their Motion, the Designated Member began smoking because it made him feel like a man.
110. Accordingly, the Designated Member did not begin or continue smoking because of any actions, statements or omissions on the part of ITCAN or any of the Defendants. Instead, the Designated Member began to smoke and continues to smoke for his own personal reasons, including the fact that he loves the taste of his cigarettes.
111. The Designated Member does not recall any comments by ITCAN or the other Defendants about the health effects of tobacco.
112. The Designated Member never heard ITCAN or the other Defendants deny or trivialize the risks of smoking.
113. The Designated Member never heard ITCAN or the other Defendants engage in a “scientific controversy”.
114. The Designated Member did not smoke light or mild cigarettes at any material time and never heard ITCAN or the other Defendants claim that these types of cigarettes were less harmful.
115. The Designated Member has never heard any statements from ITCAN or the other Defendants with respect to light and mild cigarettes.
116. The Designated Member did not think light or mild cigarettes were less harmful. In fact, he heard that light and mild cigarettes were just as harmful as regular cigarettes.
117. While the Designated Member remembers having seen advertising for light and mild cigarettes, he was not convinced to change his brand because he knew he wouldn’t like them.
118. The Designated Member never paid attention to the smoke constituent delivery numbers on the packages.
119. It is clear from the above that the Designated Member’s decision to smoke and to continue smoking was not caused by the actions of ITCAN or the other Defendants and that none of the alleged faults had any influence on the Designated Member, even if those faults are proved. Accordingly, the Designated Member’s personal claim must fail. This in and of itself establishes that there cannot be collective fault or liability.

**E. THE BASIS OF THE CLAIM AS AGAINST ITCAN IS AN ALLEGED CONSPIRACY, WHICH CONSPIRACY DOES NOT EXIST**

120. As noted above, the Designated Member did not smoke ITCAN’s products at any material time. Therefore, as recognized by this Court in its judgment of February 9, 2007, the only viable claim of the Designated Member as against ITCAN, and those of

the class he represents, is based on an alleged conspiracy between the Defendants to refuse to disclose the risks of smoking or to confuse the public's mind as to those risks.

121. Accordingly, if the Plaintiffs fail to establish this conspiracy, no liability can attach to ITCAN, regardless of any other findings in this case.
122. There was no conspiracy between ITCAN and the other Defendants to refuse to disclose the risks of smoking or to confuse the public as to the risks.
123. The Designated Member individually and the Plaintiffs collectively have admitted that they have no evidence to support their bald allegations of conspiracy.
124. The Designated Member's decision to smoke or to continue to smoke was not caused by the actions of ITCAN or any conspiracy between it and the remaining Defendants, even if the faults alleged are proved. Accordingly, the personal claim of the Designated Member must fail.
125. Furthermore, even if ITCAN and the other Defendants did have an agreement to act in concert or to establish a common front as alleged, which is denied, neither the agreement to act in concert nor any of the Defendants' alleged conduct or omissions had any impact on the dissemination of information about the risks of smoking to the members of the class, nor on any of the class members' understanding of that information.

#### **F. ITCAN AND ITS PRODUCTS**

126. For over one hundred years, ITCAN manufactured tobacco products, including cigarettes, which are sold in the Province of Quebec and elsewhere in Canada.
127. At all material times, the manufacture and sale of cigarettes have been legal activities in Canada.
128. Cigarettes contain tobacco leaves. Nicotine is a naturally occurring substance in the tobacco leaf and "tar" is the name given to a combination of substances produced by the combustion, which occurs when a cigarette is lit.
129. ITCAN does not itself grow the tobacco used in its product; rather, at all material times, it purchased virtually all of the tobacco used in its product, grown by tobacco growers, from Canadian tobacco marketing boards.
130. The tobacco used by ITCAN in its cigarettes does not contain any flavours or additives, apart from the menthol used for menthol cigarettes.
131. The tobacco industry is and has been for many years one of the most extensively regulated industries in Canada, whether through legislation or through the requests, directions and mandates of the federal government.
132. Indeed, Canada is at the forefront of tobacco regulation *vis-à-vis* advertising restrictions, warnings, constituent reporting, testing and disclosure requirements, all of which have been mandated by the federal government.

133. By law, certain of the average smoke constituents of all cigarettes distributed by ITCAN, including the average nicotine and tar yields, measured and reported as specifically prescribed by the regulations pursuant to the *Tobacco Act*, S.C. 1997, c. 13 or by predecessor statutes (collectively, the “**Tobacco Statutes**”), or at the direction of the federal government, are clearly marked on every package. Indeed, the average tar and nicotine yields of cigarettes, in accordance with government approved measurements, and at the directive of the federal government, have appeared on all cigarette packages since 1976.
134. At all material times, the cigarettes manufactured by ITCAN were fit for the purpose for which they are intended and ITCAN has complied with its duties and obligations to class members, whether imposed through legislation or otherwise.

**G. ITCAN BEARS NO LIABILITY IN RESPECT OF THE DISEASES SUFFERED BY THE CLASS**

135. ITCAN admits that lung and larynx cancer and emphysema can be causally connected to smoking. ITCAN states, however, that the term “throat” cancer is an imprecise term (as admitted by the Plaintiffs’ expert), that oftentimes is associated with cancers that have very little association with smoking.
136. However, ITCAN states that causation in respect of each of the Diseases is multi-factorial (as admitted by the Plaintiffs’ expert). That is, numerous factors other than smoking may cause these Diseases, such as genetics, occupational and environmental factors, family history and consumption of alcohol and diet. Accordingly, ITCAN puts the Plaintiffs to the strict proof that ITCAN’s product caused any Disease in any class member, which in any event requires an individual diagnosis to determine the cause of a Disease in any individual.
137. Further, ITCAN denies that any of the Diseases suffered by the members of the class were caused by any negligent or wrongful acts by ITCAN.

**(i) DISEASE CAUSATION OF THE CLASS CANNOT BE ESTABLISHED ON THE BASIS OF THE PLAINTIFFS’ FLAWED EPIDEMIOLOGICAL MODEL**

138. At paragraphs 69 and following of the Motion, the Plaintiffs allege that 85% of all cancers of the lung, 30% of all cancers of the throat and larynx, and 85% of all cases of emphysema are caused by smoking.
139. However, ITCAN states that none of the Diseases can be causally connected to the actions of ITCAN on the basis of the epidemiological model put forward by the Plaintiffs.
140. ITCAN denies that the Plaintiffs’ exposure model posited by their expert can be considered to be an exposure level such that smoking is always the likely cause of one or another of the Diseases. Among other things, it is not possible to draw conclusions about the causative role of smoking in the development of any of the Diseases simply on the basis of the number of the pack years they have smoked, as asserted by the Plaintiffs’ expert.

141. The Diseases do not materialize in all smokers and vary, among other things, with the quantity and duration of cigarette use. For example, close to 85% of cigarette smokers will never develop lung cancer.
142. Among the smokers who do develop the Diseases, there are some whose Disease was not caused by cigarette smoking. In addition, quitting smoking for a particular period of time will significantly reduce the risk of Disease (thereby again affecting any causal connection between smoking and the Diseases).
143. Accordingly, before there can be recovery for any individual's claim, there must first be an evaluation of the probable cause of a Disease by taking into account the relative exposure, by duration, intensity and quantity to each of the factors (including tobacco smoke) that might play a causal role in connection with the Diseases, which in turn can only be based on an individual assessment, including a detailed review of that individual's medical records.

**(ii) MEMBERS OF THE CLASS WERE AWARE OF AND ASSUMED THE HEALTH RISKS ASSOCIATED WITH SMOKING**

144. In the alternative, even if the Plaintiffs can establish a link applicable to all class members between the Diseases and smoking on the basis of the Plaintiffs' exposure model, they cannot establish liability (if any) on a collective basis, as any such a conclusion would not establish a causal nexus between the Diseases and ITCAN's actions.
145. As further discussed below, ITCAN states at all material times the members of the class were aware, or could have been aware, of the risks associated with smoking. Notwithstanding this awareness, members of the class who smoked ITCAN's products voluntarily chose to smoke. ITCAN denies that it bears liability in the circumstances.
146. In particular, the rise of lung cancer as a cause of mortality during the first half of the 20<sup>th</sup> century led to several major research studies that attempted to determine the cause of this rise.
147. The results of these studies began to be published in the early 1950s, and reported an association between smoking and lung cancer. The findings of these studies and others, as they emerged, were widely publicized in the Quebec media during the 1950s.
148. As of 1954, a public opinion poll reported that 88% of Canadians had heard or read that smoking can cause lung cancer.
149. While the scientific community did not conclude at this time that smoking caused lung cancer, the public health community and the media in Canada did not await the final conclusions of this debate to publicize the suspected link between lung cancer and smoking.
150. As the 1950s progressed, the list of diseases with which smoking was associated grew to include emphysema, among other diseases. Similarly, the fact that for many smokers, quitting was difficult, was also known by the public.

151. In the 1960s the level of media, governmental and non-governmental dissemination of these risks continued to grow.
152. For example, a 1963 Gallup poll found that 96% of Canadians had heard that smoking may be a cause of lung cancer. Such polls confirmed and added to the number of Canadians who had heard of such risks a decade earlier.
153. Indeed, the association between smoking and detrimental health effects reported by the U.S. Surgeon General in its 1964 Report on Smoking and Health (the “**1964 Report**”) received wide-spread media coverage throughout the world, including Canada and Quebec.
154. While there remained a lack of scientific consensus of the mechanics by which disease was caused, Canadians were nonetheless well aware of the risks associated with smoking, including the risk of developing lung cancer by the 1950s, which awareness was further solidified by the 1960’s.
155. By the end of the 1960’s, smoking incidence had declined from 1965, the first year for which the government collected statistics, a decline that continues to this date.
156. The amount of information available and disseminated to the public regarding the risks associated with smoking increased in the following decades, rendering it impossible for a smoker to be unaware of such risks.
157. Further, a smoker who has smoked 15 cigarettes per day for five consecutive years, but who quits smoking can substantially reduce or eliminate the risk of contracting one of the Diseases. Accordingly, even if any of the class members were not aware of the risks associated with smoking at the time they began to smoke, ITCAN denies that it bears liability for smokers who chose to continue to smoke after being made aware of the risk of Disease. ITCAN states that each and every member of the class was aware of the risk of Disease, or could have been aware of such risk, before being diagnosed with same.
158. In any event, the federal government at all material times mandated, directed or otherwise required the content of warnings to be provided by ITCAN to the public. Prior to 1972, the government’s position was that warnings regarding the risks of smoking were unnecessary, given the public’s overwhelming knowledge of same.
159. The first warning required and directed by the federal government read:

WARNING: The Department of National Health and Welfare advises that danger to health increases with amount smoked.
160. As appears from that warning, it was not designed to alert smokers to the fact that there were risks associated with smoking. Indeed, awareness of those risks was presumed by the warning. Rather, the warning directed smokers to focus on reduction of the known risks (in this instance, by reducing the amount smoked).
161. Similarly, effective January 1, 1976, the following warning required and directed by the federal government read:

WARNING: Health and Welfare Canada advises that danger to health increases with amount smoked - avoid inhaling.

162. This warning had previously been considered by the federal government as a legislated warning in Bill C-248 but was rejected. Again, the focus remained on a potential manner of risk reduction (in this case, by avoiding inhaling).
163. Further warnings provided by ITCAN, in reliance on and at the direction of the federal government, reiterated knowledge that at all material times had been in the public domain.

**(iii) INDIVIDUAL ISSUES**

164. Accordingly, a finding that all of the members of the class suffered from one of the Diseases could not assist in a determination of liability on a collective basis.
165. Instead, in order to arrive at a determination of liability it will be necessary to determine for an individual member, among other things, whether the Disease is causally connected to smoking ITCAN's product.
166. Indeed, as noted by Dr. Guertin, one of the Plaintiffs' experts, in order to establish the medical cause of "throat" cancer, a clinician must perform an individual physical examination and a full individualized medical history.
167. Another of the Plaintiffs' experts, Dr. Desjardins, has stated that in order to diagnose and establish the medical cause of emphysema, an individual diagnosis is necessary.
168. Further, before liability is established (which liability cannot be determined on a collective basis), one must determine, in respect of each class member whether:
  - (a) he or she was aware, or could have been aware, that cigarette smoking entailed risks when that class member began to smoke;
  - (b) whether once he or she became aware of those risks, steps were taken to eliminate those risks, in particular, by quitting smoking; or
  - (c) whether the alleged actions or inactions of ITCAN has any impact on the individual class member's behaviour;

as well as a multitude of other issues.

**H. ADDICTION**

169. At paragraphs 57 and following of their Motion, the Plaintiffs' allege that the nicotine contained in ITCAN's products creates an addiction amongst its users.
170. The Plaintiffs' position is that virtually all daily smokers are addicted. The "virtually all daily smokers" position, however, is further clarified and qualified by the Plaintiffs' expert, Dr. Negrete, who:

- (a) states that 95% of daily smokers are addicted; but
  - (b) does not posit a theory or methodology for segregating non-addicted daily smokers from addicted daily smokers.
171. ITCAN states that even if daily smokers are addicted, such a conclusion does not assist in a determination as to why such smokers smoke or why they continue to smoke. For example, is it because of the pleasure derived from smoking, is it a release from boredom, is it because it may assist in concentration or is it because of a fear of withdrawal symptoms?
172. Indeed, Dr. Negrete testified that whether or not one wishes to quit smoking is not a criterion for determining whether a person is addicted. Further, Dr. Negrete testified that smokers smoke for different reasons, which may include pleasure and/or the fear of withdrawal. However, according to Dr. Negrete, it is impossible to determine the degree to which any of these factors may motivate any particular individual, some of which could only be smoking for the pleasurable effects.
173. Members of the class could and can quit smoking if they choose to do so, regardless of whether smoking is labelled as addictive, dependence producing or habit forming and regardless of the reasons smokers smoke. Indeed, millions of smokers have quit without any assistance whatsoever.
174. ITCAN further states that it had no duty to inform that its products were or could be addictive, in light of the evolution of the term “addiction” as it relates to smoking and the public’s awareness of the fact that it can be difficult to quit smoking. ITCAN further denies that it failed in any duty to inform that its products were or could be addictive (to the extent that such a duty existed at a particular point in time).
- (i) THE SCIENTIFIC CONCEPTS AND DEFINITIONS OF ADDICTION HAVE CHANGED OVER TIME**
175. The definition of “addiction” and in particular, whether or not smoking could be considered to be addictive, has altered over time.
176. The 1964 Report (CQTS-19) was the first public health report in the U.S. to survey the medical and scientific literature in an effort to present a consensus of medical and scientific thinking on the subject of smoking behaviour. The 1964 Report concluded, consistent with previous statements from public health authorities, that smoking was habitative (or habit-forming) and not addictive. Notwithstanding this conclusion, the 1964 Report recognized that smoking can be difficult to quit, a fact that had long been widely known.
177. While the federal government, first through non-legislative measures in 1972 and then through legislated health warnings in 1989, required certain warnings to appear on cigarette packages, no warning regarding addiction was mandated by the federal government until 1994.

178. Consistent with all previous directions, policies and requirements of the federal government, ITCAN complied with the government's standard in this regard.
179. Regardless of the terminology used, ITCAN states that at all material times, members of the class were aware of the fact that it may be difficult for individuals to quit smoking.

**(ii) INDIVIDUAL REASONS FOR SMOKING BEHAVIOUR**

180. Contrary to the allegations and suggestions in paragraph 62 of the Motion, members of the class do not purchase and consume cigarettes simply to avoid "withdrawal" symptoms when deprived of nicotine. Indeed, many smokers do not experience any withdrawal symptoms at all when they quit smoking and in any event, there is no correlation between withdrawal symptoms and success in quitting. Further, many class members have neither tried to quit nor want to quit. As stated by the Plaintiffs' expert, it is not necessary that a smoker has tried or wants to quit in order to conclude that a smoker is addicted.
181. Accordingly, even assuming that daily smokers are addicted, such a conclusion does not address whether or not any smoker wants to quit, has tried to quit or whether the individual continues to smoke for pleasure, as a result of any withdrawal symptoms or for other reasons.
182. Smokers do not continue to smoke because the nicotine in cigarettes deprives a smoker of the ability to freely exercise the choice to continue or not to continue smoking, (as alleged in paragraph 62 of the Motion). This is made abundantly clear by the fact that there are presently more ex-smokers than smokers in Canada and indeed, this has been the case for many years.
183. Instead, many smokers choose to smoke for the pleasurable effects cigarettes produce in them, making the decision that the pleasure or other benefits of smoking outweigh the risks. While such pleasurable effects are connected, in part, to the nicotine in cigarettes, the fact is that a significant number of smokers can and do quit smoking every year, notwithstanding any nicotine addiction.

**(iii) Individual Issues**

184. Accordingly, even if daily smokers are addicted, such a finding could not assist, even as an interim step, in a determination of fault on a collective basis, since such a finding would not explain, among other things:
  - (a) whether the individual was aware or became aware of that fact that smoking is addictive;
  - (b) when he or she became aware of the fact that it can be difficult to quit;
  - (c) whether the individual smokes for pleasure or in order to avoid withdrawal symptoms, or for some other reason and how the reasons are relevant to the Plaintiffs' action;



- (d) whether the smoker wants to quit, or has even tried to quit, and if so, why he or she continues to smoke; and
- (e) whether the individual's smoking behaviour was caused or contributed to by the alleged faults of ITCAN;

in addition to the myriad of other individual issues that must be determined, as set out above and below.

**I. COMPENSATION DOES NOT OCCUR IN ALL SMOKERS AND ITCAN COMMITTED NO WRONG IN RESPECT OF THE MANUFACTURE OF LIGHT AND MILD CIGARETTES**

- 185. ITCAN denies that addiction to nicotine necessarily leads to a phenomenon known as "compensation", as asserted by the Plaintiffs in paragraphs 64 and following of the Motion and denies that most smokers compensate.
- 186. Indeed, no allegation has been made that the Designated Member compensated.
- 187. ITCAN states that compensation refers to smokers who, when switching to brands with different standard deliveries, alter their smoking behavior.
- 188. ITCAN denies that these behavioral changes, however, result in a change in the number of cigarettes smoked per day or an alteration in the inhalation patterns for all or most smokers, as alleged by the Plaintiffs in paragraph 65 of the Motion.
- 189. ITCAN further denies that these behavioral changes, if any, are permanent or are to such an extent that the changes result in a smoker consuming the same levels of tar and nicotine as had been the case with his or her previous brand.
- 190. ITCAN further denies, as asserted in paragraphs 161 and 162 of the Motion, that smokers of lower standard delivery cigarettes, whether labeled as "light" or "mild" or otherwise, obtain no benefit in smoking such cigarettes as opposed to smoking cigarettes with substantially higher standard deliveries.
- 191. Further, ITCAN states that the alleged alterations in smoking behavior are the result of the individual smoker voluntarily changing his or her smoking behavior, for which ITCAN cannot be liable.
- 192. In addition, ITCAN states that at all material times, it advised the federal government of the potential for compensation when smokers switched from higher yield to lower yield products, which potential in any event, the federal government was well aware of. Indeed, the federal government, with full awareness of this potential, advised the public of the possibility of compensation in press releases and otherwise, but nonetheless recommended that those who chose to continue to smoke switch to lower delivery products. The federal government further advised the public that the published tar and nicotine numbers were a comparative buyer's guide to lower yield cigarettes.
- 193. As noted above, and as further detailed below, the federal government was at all material times responsible for directing the tobacco industry, including ITCAN, as to the warnings

it was to disseminate to the public, including the necessity of warnings in respect of compensation, which direction ITCAN reasonably relied upon.

194. ITCAN states that it had no duty to inform of the risk of compensation, and in any event, any failure to inform did not result in the damages alleged in this proceeding.

**(i) GOVERNMENT PROMOTION OF LOWER DELIVERY CIGARETTES**

195. In July 1957, the federal government requested that the Defendants embark on a program of selective reduction; namely, to support independent research directed to identifying the presence in cigarette smoke of compounds or groups of compounds that might be responsible, in whole or in part, for the potential risks of smoking, and to developing means of removing or greatly reducing yields of the same.
196. Thereafter, the federal government requested and advised the Defendants on how they might research and design a cigarette that could reduce the potential health risks from smoking.
197. Beginning in the late 1960's and continuing for decades thereafter, it was considered by the federal government that smokers who choose not to quit smoking were better served by switching to lower standard delivery brands, and in particular, cigarettes with lower standard tar deliveries. Accordingly, standard tar and nicotine deliveries in cigarettes were first published by the federal government beginning in 1968.
198. The government's purpose in publishing these numbers was to provide this information to smokers as a comparative measure and to convince smokers to switch to lower yield cigarettes if they were going to continue to smoke.
199. In response, ITCAN cautioned the federal government about the publication of tar and nicotine numbers. Specifically, ITCAN publicly cautioned the federal government that because of the many different ways people smoke, including the frequency and intensity, it was possible that there might be little relation between published tar figures and the exposure of an individual smoker to any given cigarette.
200. Nonetheless, the federal government continued to release the standard tar and nicotine content of various Canadian cigarette brands, as it had since 1968. The government also persisted in calling upon tobacco companies to both reduce tar deliveries and also, to print the tar and nicotine numbers on packages.
201. At the time and for decades thereafter, it was considered by the federal government that smokers who chose not to quit were better served by switching to lower yield brands, and in particular, as further discussed below, cigarettes with lower standard tar deliveries.

**(A) Government Approved And Mandated Testing Methodologies**

202. The declared average deliveries were and are machine-derived deliveries, established under standard testing parameters. These standard deliveries were never intended to represent the yields that would actually be obtained by any particular smoker, as was acknowledged by the federal government in its statements to the public.

203. In fact, it is impossible to have a standardized testing regime that would produce yields actually obtained by all smokers, as smokers smoke differently and furthermore each individual smoker smokes differently at different times.
204. The testing parameters initially used and mandated by the federal government were based in large measure on the studies and methods of the U.S. Federal Trade Commission.
205. In accordance with the federal government's directives, beginning in 1975 ITCAN began printing the machine derived average tar and nicotine numbers on some advertisements, with all advertisements and products bearing the numbers in 1976, at which point in time the government was well aware of the issues relating to compensation.
206. The testing parameters were only slightly modified with the passage of the TPCA in 1988. At this time, the regime was changed by legislation to that known as the "ISO Method" (a standard machine method for measuring deliveries approved by the International Organization for Standardization) and the federal government legislated the printing of machine derived average tar and nicotine numbers on the Defendants' cigarette packages.

**(B) Continued Government Insistence To Develop Lower Delivery Products**

207. Despite knowledge of the potential for compensation, the federal government, and in particular, the federal department of national health and welfare ("**Health Canada**"), continued to press ITCAN to reduce standards deliveries in its products. Similar positions were advocated by various other public health authorities, including those in the United Kingdom and the United States.
208. Among other things, the federal government insisted that ITCAN and other cigarette manufacturers attempt to reduce the "sales weighted average tar" content of cigarettes (or "**SWAT**" levels) in accordance with government targets. SWAT levels are a measurement of the average tar content of cigarettes as measured by the standard testing methods, taking into account the sales volumes of each of the manufacturer's brands. Such targets included the target of reducing SWAT to 12 milligrams by December 31, 1984, which governmental directive was complied with by ITCAN.
209. To comply with the SWAT levels set by officials, cigarette manufacturers necessarily had to introduce, promote and sell brands with lower tar yields. At no time, however, did ITCAN promote its brands on the basis that lower yield cigarettes (as measured by the standard testing methods) were "safer" or "less hazardous" than cigarettes containing higher deliveries.
210. The federal government also established sales weighted average nicotine targets and ITCAN complied with these targets as well.
211. In complying with the federal government's requests, mandates and directions in this regard, ITCAN acted reasonably in all the circumstances.

212. Moreover, ITCAN states that it cannot be held liable for complying with these requests, mandates and directives.

**(ii) INDIVIDUAL ISSUES**

213. ITCAN further states that whether or not a smoker compensates is necessarily an individual issue and requires assessments, among other things, of:

- (a) each individual's smoking history;
- (b) the manner in which he or she smokes various cigarette brands;
- (c) whether the smoking behaviour was altered upon switching to a lower yield brand;
- (d) whether any such compensation was only of a temporary nature;
- (e) the consequences of any changes in his or her smoking behavior; and
- (f) whether the individual was aware of the change in his or her smoking behaviour.

214. Indeed, the Designated Member does not assert that he compensated and in fact he never smoked "light", "mild" or other lower yield cigarettes at any material time.

215. In addition, there can be no liability in respect of compensation unless each individual member establishes that compensation caused the harm complained of.

216. Further, any liability (which liability is denied) cannot be assessed absent evidence of whether a class member who actually compensated smoked lower yield products, including those labeled as "light" or "mild", as a result of the alleged false or misleading advertisements by ITCAN, or the representations and promotions of same by the federal government, for which ITCAN cannot be held responsible.

**J. ITCAN DID NOT MANIPULATE THE NICOTINE CONTENT OF ITS CIGARETTES**

217. ITCAN denies that it manipulated the levels of nicotine in their cigarettes in order to maintain addiction, as asserted by the Plaintiffs in paragraph 5 and paragraphs 105 and following of the Motion or in order to make it more difficult for smokers to quit.

218. ITCAN further denies that it has ever artificially raised the nicotine level in its cigarettes to a level higher than that naturally occurring in the tobacco plant. In fact, the average nicotine yield of the cigarettes manufactured by ITCAN has been dramatically reduced since the 1960's.

219. Among other things, and contrary to the allegations contained in paragraph 105 of the Motion, the reconstituted tobacco used by ITCAN in the manufacture of its products yields less nicotine than an equivalent quantity of unprocessed leaf. ITCAN further states that research into reconstituted tobacco sheet was undertaken by, and then the use of same was promoted by, the federal government as part of its efforts to develop less hazardous cigarettes.

220. In any event, the level of nicotine in tobacco plants is irrelevant beyond 1976, as beginning that year, the nicotine yields of ITCAN's products were disclosed on all cigarette packages.
221. Further, to the extent that there has been any manipulation in the nicotine content of cigarettes (none of which has been engaged in by ITCAN), such manipulation, if any, was effected by the federal government.

**(i) GOVERNMENT DEVELOPMENT AND PROMOTION OF HIGHER NICOTINE TOBACCO STRAINS**

222. With respect to the use of tobacco containing higher levels of nicotine, ITCAN states that for many years the scientific community and Health Canada officials advocated the development of a low-tar, medium-nicotine cigarette. The prevailing view among the scientific community, including public health authorities, was that for smokers who continued to smoke, the development of such cigarettes might increase consumer acceptability of low tar cigarettes.
223. In 1977, federal officials at the Delhi Research Station and Health Canada conducted a project entitled "Delhi Tobacco and Health Bio-Assay Programme" as part of its less hazardous cigarette programme.
224. That same year, Health Canada, in a published report, identified the potential need for cigarettes with lower tar and carbon monoxide yields but with a sufficient nicotine yield to satisfy certain smokers.
225. As of this time, the federal government was directly engaged in developing strains of tobacco, which when combined with filtering technology, would be suitable for use in light and mild products.
226. The result of this programme was that the Department of Agriculture and Agri-Food Canada ("**Agriculture Canada**"), during the 1970's and continuing for many years thereafter, created varieties of tobacco with a lower tar to nicotine ratio. These tobacco strains produced lower tar when burned and contained marginally higher levels of nicotine than previously available varieties, which when smoked produced a lower tar to nicotine ratio. They were therefore believed by the federal government to produce a less-hazardous cigarette.
227. The federal government licensed and received fees for those tobacco strains and promoted them for use by all growers of tobacco in Canada. These new strains became virtually the only strains of tobacco available for producing commercially available cigarettes.
228. By the spring of 1981, the federal government represented to smokers and cigarette manufacturers in published material that the relatively low-tar/nicotine ratio of Canadian tobacco offered manufacturers greater flexibility in producing light brand cigarettes, while still maintaining adequate nicotine and flavour to satisfy consumer demands.

229. ITCAN denies that its purchase of such tobacco varieties, with the encouragement of the federal government, from tobacco growers (through Canadian tobacco marketing boards) who obtained licences from the federal government to produce these varieties, constitutes a fault for which it is liable.

**K. ITCAN HAS MADE SIGNIFICANT EFFORTS TO DEVELOP A SAFER CIGARETTE**

230. Contrary to the allegations contained in paragraphs 107 and following of the Motion, at all material times, ITCAN has consistently attempted to develop a cigarette with less risks, both by way of long-term research and the implementation of changes to cigarette designs.

231. As noted above, some of these efforts, in conjunction with and at the prompting of the federal government, and in particular Health Canada and Agriculture Canada, were aimed at reducing the standard tar deliveries in cigarettes, based on reports that it was the tar in tobacco smoke that most likely caused disease.

232. Among other means, reducing the tar levels in cigarette smoke was achieved through the addition of filter tips.

233. Filters reduce the amount of tar in the smoke inhaled from a cigarette.

234. In 1982, the United States Surgeon General concluded that this reduction lowers the risk of cancer of the lung and other diseases and for decades the reduction of tar yields was the cornerstone of the federal government's less hazardous cigarette programme.

235. Changes to the designs of cigarettes (including the porosity of cigarette paper) have also allowed for the reduction of carbon monoxide yields.

236. In addition, significant and consistent attempts to reduce the risks associated with smoking included (among many others):

- (a) research regarding the use of tobacco substitutes;
- (b) the use of dried ice expanded tobacco in an effort to reduce standard tar and nicotine deliveries;
- (c) detailed investigations regarding the biological and chemical composition of tobacco smoke;
- (d) research involving numerous long-term bioassays and short-term toxicity tests in order to measure the biological activity of existing and modified products;
- (e) long-term efforts to develop generally lower biologically active cigarettes; and
- (f) long-term efforts to identify and eliminate or reduce the amount of specific undesirable elements in tobacco smoke.

237. At no time did ITCAN know of, or ought it to have been aware of, a reasonable, safer design alternative that could have been adopted in the manufacture of its products.

238. Indeed, the Plaintiffs' own expert, Dr. Castonguay, testified that the Defendants have produced a less toxic cigarette in terms of emissions, but he further stated that he did not know what a safer cigarette was and that there is no known way of producing a less harmful cigarette in the "global" sense.
239. ITCAN states that it had no obligation to manufacture and market products, as seems to be alleged by the Plaintiffs, which were destined to be rejected by consumers.
240. Accordingly, ITCAN states that at all material times, it has demonstrated a steadfast commitment to reduce the risks and dangers associated with its products.

**L. ITCAN DID NOT MISREPRESENT ITS KNOWLEDGE, OR BLOCK DISCLOSURE OF THE RISKS AND DANGERS ASSOCIATED WITH SMOKING, WHICH IN ANY EVENT, WERE WELL KNOWN BY THE MEMBERS OF THE CLASS**

241. As noted above, ITCAN admits that smoking can cause disease in some smokers and, as the term is commonly understood today, is addictive. However, scientific knowledge about the risks of smoking and definitions of addiction have evolved over time.
242. ITCAN states that at no time did it misrepresent its knowledge of the risks and dangers associated with smoking to the public, implement a policy of systematic non-disclosure of risks and dangers, trivialize such risks and dangers or develop marketing strategies conveying false information, all as asserted by the Plaintiffs at paragraph 5 and paragraphs 84 and following of the Motion.
243. ITCAN denies that any wrongful denials or trivializations were made by it. In the alternative, ITCAN states that if it is determined that such wrongful denials or trivializations were made by it, ITCAN denies that such statements were heard or read by, or were relied upon or influenced the behaviour of all or any members of the class, who, in each case, made their decision to start or stop smoking, or to switch brands, for their own personal reasons.
244. ITCAN states that beyond making cigarettes available for purchase, its actions played no role in determining why consumers begin to smoke or continue to smoke.
245. In fact, as noted above, information regarding the risks associated with smoking and the difficulties some smokers face in quitting have been known since the early 1950s.

**M. ITCAN DID NOT INITIATE AND NURTURE A SCIENTIFIC CONTROVERSY, WHETHER THROUGH ITS RESEARCH OR OTHERWISE**

246. ITCAN denies that it inappropriately initiated and maintained a scientific controversy concerning the risks and dangers of tobacco products, as asserted by the Plaintiffs in paragraph 5 and paragraphs 110 and following of the Motion.
247. Instead, ITCAN participated in a legitimate scientific debate that was neither created nor maintained by ITCAN.
248. Contrary to what is alleged in paragraph 114 of the Motion, the letter from the Chairman of BAT to the Chairman of Imasco was not designed to convince ITCAN to engage in

inappropriate scientific controversies. Rather, the discussion related to whether or not BAT would contribute at that time to particular ITCAN research projects aimed at developing a less hazardous cigarette through the selective reduction of certain components in tobacco smoke. While BAT chose not to contribute to this project at this particular time, ITCAN nonetheless embarked on the project, spending many millions and man-hours in furtherance of same, which projects continue to this day.

249. In any event, ITCAN further denies that its involvement in any scientific debates affected the smoking behaviour of any of the class members, which in any event, can only be determined on an individual basis.
250. Indeed, the evidence of the Designated Member is that he never heard of any statement made by ITCAN in respect of such debates.

**N. ITCAN DID NOT ENGAGE IN A JOINT POLICY OF NON-DISCLOSURE OF RISKS AND DANGERS OR THE TRIVIALIZATION AND NEGATION OF RISKS AND DANGERS**

251. Contrary to the assertions in paragraph 5 and paragraphs 117 of the Motion and following, at no time did ITCAN agree with the remaining Defendants to act in concert so as to block the disclosure of the risks and dangers associated with smoking, or to trivialize or to negate such risks and dangers.
252. Indeed, ITCAN directly, and by way of funding projects conducted by third parties, participated in the publication of a multitude of research studies on various topics, including:
  - (a) the components and chemistry of tobacco smoke;
  - (b) the structure and physical properties of tobacco;
  - (c) the determination of components in tobacco smoke;
  - (d) the effects of the addition of constituents to tobacco smoke;
  - (e) smoking behaviour and compensation, including the effects of nicotine enhanced cigarettes on human smoking parameters;
  - (f) the pharmacological effects of nicotine; and
  - (g) animal studies and the effects of exposing animals to smoke.
253. Rather than acting in concert with Rothmans, Benson and Hedges Inc. (“**RBH**”) and JTI in the manner alleged by the Plaintiffs, ITCAN, together with RBH and JTI, began in the 1950’s to provide funds to the National Cancer Institute. Soon thereafter, the federal government sought out the cooperation of the industry on the smoking and health issue by specifically requesting the industry’s collaboration on ways to eliminate or reduce the deleterious effects of smoking.
254. Such collaborations resulted in, among other things, the long-standing industry policy whereby the companies agreed to refrain from making health claims about their products.



255. In addition, ITCAN carried government directed health warnings on their products and in its advertising beginning in 1972 and until 1989. From 1989 to 1995, the warnings contained on cigarette packages were mandated by the TPCA. ITCAN also carried warnings on its packages between 1996 and 2000 when there was no legislation requiring those warnings, during which period the warnings previously legislated (together with attributions to the federal government) continued to be complied with. Legislated warnings have appeared on all cigarette packages since that time.
256. These warnings were seen by all members of the class, who nonetheless chose to begin or continue to smoke for their own personal reasons.
257. Further, whether or not any smoker heard or was affected by the purported trivializations, or was even affected by the purported non-disclosure (all of which is denied) can only be assessed on an individual basis.
258. The need for such individual assessments is again confirmed by the evidence of the Designated Member, who testified that he never heard ITCAN (or the other Defendants) trivialize or deny the risks and dangers of smoking, and that the Defendants actions did not prevent him from being informed of the risks and dangers of smoking.

**O. ITCAN DID NOT DEVELOP MARKETING STRATEGIES CONVEYING FALSE INFORMATION**

259. As of 1972, all tobacco manufacturers in Canada voluntarily ceased all brand advertising for tobacco products on radio and television, with the acknowledgment and approval of the federal government. Further, as of 1989 to present, ITCAN has not engaged in advertising for its products, with the exception of the period between January 1996 and April 1997, during which period it complied with a voluntary code relating to branded advertising self-imposed by the Defendants.
260. Contrary to the allegations contained at paragraphs 132 and following of the Motion, ITCAN's advertising did not convey false and misleading information about its products.
261. Dr. Pollay, the Plaintiffs' expert, testified that the Defendants did not engage in false advertising.
262. In essence, Plaintiffs allege, among other things, that all cigarette advertising throughout the relevant period was inherently misleading because it was attractive. Indeed, at paragraph 138 of the Motion, the Plaintiffs go so far as to say that any advertising for a tobacco product would constitute a fault, a concept that is wrong at law.
263. Consumers see, and are accustomed to interpreting, thousands of advertisements for consumer products. They understand the purpose of advertising - namely, to sell a product and present it in a favourable light.
264. The fact that advertising depicts a product in a favourable light, whether through the use of attractive settings or people, does not make the advertising false. Nor does it override a person's ability to evaluate the product advertised, including its risks. Nor does it displace a person's knowledge of those risks.

265. Accordingly, advertising legal products, including those with risks associated with their use, is not itself a wrongful act.
266. ITCAN denies the assertion that it directed its advertisements to under-aged smokers (as asserted in paragraph 5 and paragraphs 142 and following of the Motion), and it further denies that it ever suggested through its advertising or marketing strategies that certain cigarette brands are less harmful for health.
267. In contrast to the allegations made by the Plaintiffs, the use of “light” and “mild” descriptors provided information to smokers, which allowed them to readily navigate the strength and taste spectrums of cigarettes. From the outset, light and mild descriptors merely referred to the relative standard tar deliveries of cigarettes within a brand family and were understood by consumers as such.
268. ITCAN denies that its advertisements, including advertisements for light or mild cigarettes induced members of the class to begin or continue to smoke.
269. At no time did ITCAN assert through its marketing strategies that light or mild cigarettes constituted “safer” cigarettes. Instead, as noted above, at all material times such assertions were made by the federal government, who represented to consumers that brands containing standard deliveries with lower levels of tar and nicotine were “safer” or “less hazardous” and that these lower yield products were preferable to higher yield cigarettes.
270. Further, and in any event, ITCAN states that, based on the science known to date, lower standard delivery cigarettes may in fact reduce the health risks associated with smoking.
271. Accordingly, for the reasons stated above, ITCAN has no liability to class members in respect of its marketing strategies.

**(i) INDIVIDUAL ISSUES**

272. The Plaintiffs’ assertion that ITCAN’s advertising was false or misleading is mere speculation, unsupported by any evidence that any of the class members were, in fact, misled.
273. In any event, any assessment of whether ITCAN’s advertisements conveyed false or misleading information to a class member for which liability might flow would be dependant not simply on an objective review on the particular advertisement viewed by the member (which requires evidence from each member as to what was seen), but also is dependant on:
  - (a) when any advertisement was viewed by the member;
  - (b) what information was transmitted to the member by the advertisement;
  - (c) what information, if any, was false or misleading;

- (d) an assessment of the reasonableness of any reliance on the information received in light of both the other information specifically known to the class member and that in the public domain;
- (e) whether each member knew or believed the pertinent information to be true or false; and
- (f) if and to what extent any such false or misleading advertisements impacted upon the class member's behaviour.

274. Similarly, whether or not liability might flow for ITCAN's advertisements or marketing strategies which caused class members younger than the legal age for smoking to begin or continue smoking (which causation is denied) can again only be assessed on the basis of individual assessments.

275. Again, highlighting the individual nature of the allegations made, the Designated Member could not provide an example of any false or misleading information in the Defendants' advertisements. Nor did the Designated Member start to smoke or continue to smoke because of any of the Defendants advertisements and marketing strategies.

**P. ITCAN DID NOT FAIL IN ANY OF ITS DUTIES AND THERE IS NO CAUSAL CONNECTION BETWEEN THE PURPORTED FAULTS AND THE INJURY ALLEGED**

276. As stated above, ITCAN denies that it failed in any duties owed to its consumers.

277. Further, ITCAN denies that it had any duty to inform of the risks as alleged by the Plaintiffs, all of which risks were already known by class members.

278. Among other things, an examination of the duty to inform must take into account the state of the accepted scientific knowledge as well as public awareness of the risks.

279. At all material times, ITCAN complied with the requests, mandates and directions of the federal government regarding the necessity for and the content of warnings. Between 1972 and 1995 and then from 2000 forward, the federal government required ITCAN to place warnings on its products, whether through legislation or otherwise. Between January 1996 and December 2000, ITCAN continued to comply with the previously legislated warnings (together with attributions to the federal government).

280. Further, from 1989 to 1995, the Tobacco Statutes expressly prohibited ITCAN from including any messages on its products other than those specifically prescribed.

281. ITCAN acted reasonably when complying with the requests, mandates, directions or legislation of the federal government.

282. Further, well prior to 1972, there was an abundance of published studies, media stories and information disseminated to the general public which informed of the potential consequences associated with smoking, including the fact that quitting smoking could be difficult for smokers.

283. Given the common knowledge of the risks associated with smoking, there can be no duty to inform nor can there be any causal link between ITCAN's acts or omissions in respect of a duty to inform and the alleged damages suffered by the members of the class. The risks in question were in fact known or could have been known by the class members, regardless of the alleged actions or inactions of ITCAN. Nonetheless, the class members chose to begin to smoke or continue to smoke in the face of those known risks.
284. Plaintiffs have neither alleged nor evoked any evidence of such a causal link and the decision of the members of the class to use a product which they knew entailed certain risks was not caused by ITCAN. Rather, the class members chose to begin or continue to smoke with awareness of the pertinent risks that accompanied smoking.
285. Despite the foregoing, the Plaintiffs inappropriately seek, through this action, to shift responsibility to ITCAN for decisions made by the members and the consequences thereof.

**(i) INDIVIDUAL ISSUES**

286. In the alternative, if there are certain members of the class who were misled about the existence of risks associated with their smoking cigarettes, which is denied, only an analysis of each individual case would allow such a finding to be established.
287. Further, as noted above, the Court would need to examine each individual case to determine whether the member's Disease was caused by his or her use of ITCAN's product before rendering a conclusion as to ITCAN's fault or liability.

**Q. PRESCRIPTION**

288. ITCAN submits that even if the Court should find it committed a fault causing injury, the action must be dismissed in respect of all persons whose Disease was diagnosed prior to November 1995.
289. Anyone whose Disease had been diagnosed before that date could have taken proceedings against ITCAN and failure to do so means that any right of action was lost through extinctive prescription in respect of such person.
290. Furthermore, no liability can be founded on the *Consumer Protection Act* (the "CPA"), if the CPA applies, (which is denied), for alleged breaches or prohibited practices that occurred before this Act or one of its sections came into force. Further, any claim of the Designated Member under the CPA, to the extent this Act applies, is prescribed.

**R. THE DAMAGES CLAIMED**

**(i) COLLECTIVE RECOVERY**

291. At paragraphs 163 and following, the Plaintiffs claim damages on a collective basis.
292. As indicated above, it is impossible to determine on a collective basis the number of individuals who are suffering from one or other of the Diseases as a result of smoking ITCAN's products.

293. It is also not possible to determine on a collective basis the number of members who were allegedly misled about the existence of the risks associated with smoking as a result of fault on the part of ITCAN (which fault is denied).
294. Only proof made on an individual basis can establish whether a given member's Disease was caused by his or her smoking and whether that member was misled about the existence of the risks related to smoking.
295. It is therefore not possible to establish ITCAN's liability (which liability is denied) toward the members of the class on a collective basis.
296. Collective recovery of damages is therefore not possible in this case, and accordingly, it is also inappropriate to award damages to a fund, as proposed in paragraphs 170 to 171 of the Motion.

**(II) MODE OF RECOVERY**

297. At paragraph 169 of their Motion, the Plaintiffs are proposing that the claims of the class members can be proved by simply providing a medical certificate attesting that they have one of the Diseases and a declaration that they smoked for the requisite number of years. Such a declaration will not inform of the pertinent information necessary to establish liability and damages, some of which information is detailed in paragraph 100 above.
298. Simply put, whether or not a class member has a Disease or has smoked for the requisite number of years is simply insufficient to determine liability or damages even on an individual basis because they are not sufficient to establish whether a claimant's Disease was in fact caused by smoking or whether ITCAN is liable for the harm suffered by the claimant.
299. The Plaintiffs' experts all agree that an individual medical diagnosis is required in order to determine whether a particular individual's disease was in fact caused by smoking.
300. Furthermore, even that medical diagnosis cannot inform the court as to whether the individual began or continued smoking with knowledge of the risks or whether that person could have stopped smoking and thereby avoided the injury claimed for.

**(III) RECOVERY OF INDIVIDUAL CLAIMS FOR PECUNIARY DAMAGES**

301. The method proposed by Plaintiffs, at paragraphs 173 to 180 of their Motion, to calculate the alleged loss of income suffered by the members of the class is completely inappropriate.
302. Each and every member of the class should be required to prove, through the ordinary rules of evidence, that he (or she) indeed suffered a loss of income and establish the quantum of such loss.
303. Plaintiffs seek once again to shift the burden of proof upon the Defendants, which this Honourable Court cannot allow.

**(IV) RECOVERY OF PUNITIVE DAMAGES**

304. ITCAN states that liability in this action cannot be determined on a collective basis and accordingly punitive damages cannot be so assessed. Furthermore, and in any event, for the reasons set out above, punitive damages are not recoverable.

**FOR THESE REASONS, ITCAN REQUESTS THIS HONOURABLE COURT TO :**

**MAINTAIN** the present Plea;

**DISMISS** the Plaintiffs' Motion to Institute Proceedings;

The whole with costs including expert costs.

Montreal, February 29, 2008

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