CANADA

PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

N°: 500-06-000076-980

SUPERIOR COURT

(Class Action)

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ & AL.

Plaintiffs

vs.

JTI-MACDONALD CORP.

IMPERIAL TOBACCO CANADA LTD.

ROTHMANS, BENSON & HEDGES INC.

Defendants

AND

IMPERIAL TOBACCO CANADA LTD.

Plaintiff in Warranty

vs.

ATTORNEY GENERAL OF CANADA

Defendant in Warranty

DEFENCE OF THE ATTORNEY GENERAL OF CANADA TO THE ACTION IN WARRANTY

TABLE DES MATIÈRES

IN DEFENCE TO PLAINTIFF IN WARRANTY IMPERIAL TOBACCO CANADA LTD'S ACTION IN WARRANTY, THE DEFENDANT IN WARRANTY, THE ATTORNEY GENERAL OF CANADA, STATES:

1. The Attorney General of Canada reserves its right to amend this statement of defense in warranty after receiving Plaintiff in Warranty's complete answers to the undertakings given during the discovery of its representative.

I- THE PARTIES

2. For the purposes of this pleading, the Attorney General of Canada will be referred to as the "AGC".

3. The Government of Canada or the Federal Crown will be referred to as "Canada".

4. Health Canada and the Department of National Health and Welfare will be referred to as "Health Canada" and the Minister as the "Minister of Health".

5. The Department of Agriculture and the Department of Agriculture and Agri-Food Canada will be referred to as "Agriculture Canada" and the Minister as the "Minister of Agriculture".

6. The Plaintiff in Warranty, Imperial Tobacco Canada Ltd. will be referred to as "ITCAN" and such term includes any predecessor and/or successor corporations of Imperial Tobacco Canada Ltd. that may have existed during the class period.

7. The Plaintiff in Warranty, JTI-Macdonald Corp. will be individually referred to as "JTIM" and such term includes any and all predecessor and/or successor corporations of JTI-Macdonald Corp. that may have existed during the class period.

8. The Plaintiff in Warranty, Rothmans, Benson & Hedges Inc. will be referred to as "RBH" and such term includes any predecessor and/or successor corporations of that corporation that existed prior to or after the merger of Rothmans of Pall Mall Ltd and Benson & Hedges Canada in 1987. For the purposes of clarity only, for allegations related to the period prior to the merger, Rothmans Canada may be referred to as "Rothmans" and Benson & Hedges Canada may be referred to as "Benson & Hedges".

9. ITCAN, RBH and JTIM, Plaintiffs in Warranty, will be collectively referred to as "Plaintiff Manufacturers".

10. Additionally, at all relevant times during the class period, with the exception of RBH for a short period of time, Plaintiff Manufacturers were members of the Ad Hoc Committee of the Canadian Tobacco Industry (the "Ad Hoc

Committee") and, later, the Canadian Tobacco Manufacturers' Council (the "CTMC"). At all relevant times during the class period, each of the Plaintiff Manufacturers expressly authorized the Ad Hoc Committee and subsequently the CTMC to act on their behalf and as such the Ad Hoc Committee and the CTMC were agents for Plaintiff Manufacturers. Each of the Plaintiff Manufacturers is liable and/or responsible for all relevant actions on the part of the Ad Hoc Committee and the CTMC during the class period.

11. The CTMC is a private corporation which is not a party to this litigation.

II- INTRODUCTION

12. The AGC is being sued by the Plaintiff Manufacturers in the Action in Warranty on the basis of the *Crown Liability and Proceedings Act*, R.C.S. 1985 c. C-50, as amended.

13. Pursuant to sections 3 and 10 of the *Crown Liability and Proceedings Act*, no proceedings lie against the Crown in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of the Act, have given rise to a cause of action for liability against that servant.

14. The Plaintiffs in the Principal Actions do not allege that any servant of the Crown committed a fault, nor do they seek to recover any damages whatsoever from the AGC.

15. The Plaintiff Manufacturers allege no fault that a servant of the Crown might have committed and for which the Crown could be liable pursuant to the *Crown Liability and Proceedings Act*.

16. Plaintiff Manufacturers' allegations refer to Canada's policy decisions taken from time to time to address the health risks of a commercial product.

17. The Action in warranty essentially names the Ministers of Health and the Department whose legislative mandate encompasses the protection of public health and the Ministers of Agriculture Canada and the Department whose legislative mandate includes the economic development of agriculture in Canada through, *inter alia*, research in agronomy.

18. At all material times and with respect to all matters pleaded, Canada acted solely in a legislative, regulatory, and/or policy-making capacity and therefore it cannot be liable.

19. At all relevant times, the servants of the Crown have acted in accordance with Canada's policy decisions and mandate.

20. At all relevant times, Plaintiff Manufacturers were solely responsible for the design, manufacturing, marketing and sale of their products, for warning the public about the health risks of smoking, and for the damages arising from the use of their products.

21. At all relevant times, Plaintiff Manufacturers were the experts in the field of tobacco and all related matters.

22. Canada owes no duty of care to the Plaintiff Manufacturers, the Plaintiffs in the Principal Action or the Class Members.

23. Any duty that was assumed by Canada was in the nature of a public duty towards the Canadian public for the protection and/or promotion of public health.

24. Accordingly, Plaintiff in Warranty's Action in Warranty discloses no cause of action that is sustainable in fact and in law and should be dismissed.

IN ANSWER TO PLAINTIFF IN WARRANTY'S ALLEGATIONS, THE AGC STATES THE FOLLOWING:

25. The AGC denies paragraphs:

> 12 to 15, 21, 30 to 32, 34 to 36, 38, 41 and 42, 44, 48, 58, 60 to 62, 64 and 65, 67 and 68, 71 to 75, 77 to 79, 81, 83, 85 and 86, 101, 103 to 108, 113 and 114, 116 to 118, 120, 122 to 127, 129 to 132, 134 and 135, 137, 139 to 145, 149, 151 to 153.

26. With regard to paragraph 1, the AGC states that the Principal Action produced as Exhibit PW-1 speaks for itself.

27. With regard to paragraph 2, the AGC states that the proceedings taken against the Principal Defendants speak for themselves.

28. With regard to paragraphs 3 to 5, the AGC states that the Principal Action speaks for itself and adds that the *Quebec Human Rights Charter* and the *Consumer Protection Act* do not apply to Canada and further, Canada being immune from provincial legislation as a matter of constitutional law.

29. With regard to paragraph 6, the AGC states that the Plea in Defence in the Principal Action speaks for itself.

30. With regard to paragraph 7, the AGC states that the judgment authorizing the Principal Action speaks for itself and the common questions do not implicate Canada.

31. With regard to paragraph 8, the AGC denies for the reasons set forth herein that ITCAN has a recourse in warranty against Canada.

32. The AGC ignores paragraph 9.

33. With regard to paragraph 10, the AGC refers to the *Crown Liability and Proceedings Act*.

34. The AGC denies paragraph 11 and adds that the Action in Warranty is ill-founded in fact and in law.

35. The AGC denies paragraph 16 including its subparagraphs (a) to (i) and further adds that the allegations at 16(i) are irrelevant to the determination of any of the common questions as set out in the judgment authorizing the class action. Canada cannot be held liable for having imposed direct or indirect taxation on any tobacco products as described in said paragraph.

36. The AGC denies paragraph 17 including its subparagraphs (a) to (j) and adds that any actions by Canada underlying the allegations were based on public health policy decisions for which Canada cannot be held liable. The AGC further adds that:

    i) Canada initiated and participated in conferences on smoking and health pursuant to its mandate to protect the health of Canadians.

    ii) Plaintiff Manufacturers created the marketing concepts of "light" and "mild" which Canada did not endorse;

    iii) In response to Canada's policy requests and in an attempt to avoid legislation, Plaintiff Manufacturers adopted voluntary advertising codes which included warnings for which they are solely responsible.

    iv) The CTMC is not a servant of the Crown and Canada is not liable for its conduct.

37. The AGC denies paragraph 18 and states that paragraphs 5, 105 and 109 of the Principal Action speak for themselves.

38. The AGC denies paragraph 19 and states that the Principal Action speaks for itself.

39. The AGC denies paragraph 20 and adds that the Action in Warranty is ill founded in fact and in law.

40. The AGC denies paragraphs 22 to 27, and adds that:

    i) Pursuant to the *Department of Agriculture and Agri-food Act* and other relevant legislation, and pursuant to policy decisions taken from time to time, Canada carried out agricultural research on its experimental farm stations including researching new varieties of tobacco, some of which were registered;

ii) From the early 1980s, most of the tobacco grown in Canada originated from tobacco varieties developed by Agriculture Canada; and

iii) From time to time, Agriculture Canada sold for a nominal fee breeder seeds of tobacco varieties it developed.

41. The AGC has no knowledge of the facts alleged in paragraph 28.

42. The AGC denies paragraph 29 and adds that at all relevant times, Agriculture Canada did not grow or sell tobacco for commercial purposes.

43. The AGC denies paragraph 33 and its subparagraphs (a) to (c), and adds that pursuant to the *Department of Health Act* and other relevant legislation, Health Canada developed public policies in relation to tobacco and health.

44. AGC denies paragraph 37, and adds that in 1957, the Vice-President of research at ITCAN, Mr. Leo Laporte, met with the Deputy Minister of Health to learn the views of the Minister of Health about smoking.

45. The AGC denies paragraph 39, and adds that the Minister of Health issued press releases about smoking and health which speak for themselves.

46. The AGC denies paragraph 40, and adds that pursuant to the *Department of Agriculture and Agri-food Act* and other relevant legislation, and pursuant to policy decisions taken from time to time, Canada carried out agricultural research on its experimental farm stations, including researching new varieties of tobacco, some of which were registered. From time to time, Plaintiff Manufacturers funded some aspects of this research.

47. The AGC denies paragraph 43 and refers to the press releases issued by the Minister of Health which speak for themselves.

48. The AGC denies paragraph 45 and refers to the press releases issued by the Minister of Health which speak for themselves.

49. With regard to paragraph 46, the AGC refers to the parameters prescribed in the *Tobacco Products Control Regulations* and denies the remainder of the paragraph.

50. With regard to paragraph 47, the AGC states that such remarks, if made, were not intended to, and did not result in the creation of any duty towards Plaintiff Manufacturers on the part of Canada.

51. With regard to paragraph 49, the AGC refers to the agreements referred to in said paragraph and denies anything contrary to same.

52. With regard to paragraph 50, the AGC refers to the Minister of Health's and to the Minister of Agriculture's policy announcement referred to in said paragraph and denies anything contrary to same.

53. With regard to paragraph 51, the AGC refers to the Minister of Health's policy announcement referred to in said paragraph and denies anything contrary to same.

54. With regard to paragraph 52, the AGC refers to the Minister of Health's policy announcement and denies anything contrary to same.

55. With regard to paragraph 53, the AGC refers to the document dated February 20, 1974 and denies anything contrary to same.

56. With regard to paragraph 54, the AGC refers to the Minister of Health's policy announcement and denies anything contrary to same.

57. The AGC denies paragraph 55 and adds that despite Canada's requests in previous years, it was only in 1975 that Plaintiff Manufacturers began providing tar and nicotine figures in some of their print advertising.

58. The AGC denies paragraph 56 and adds that despite Canada's requests in previous years, it was only in 1976 that Plaintiff Manufacturers began providing tar and nicotine figures on some of their cigarette packages.

59. With regard to paragraph 57, the AGC states that Plaintiff Manufacturers chose the standard testing parameters.

60. The AGC denies paragraph 59 and adds that Agriculture Canada and Health Canada were involved in research towards the development of less hazardous tobacco, which failed to produce any concrete results.

61. With regard to paragraph 63, the AGC refers to the letter dated February 15, 1978 and denies anything contrary to same.

62. With regard to paragraph 66, the AGC refers to the Minister of Health's policy announcement of January 1983 and denies anything contrary to same.

63. With regard to paragraph 69, the AGC refers to the alleged research proposal and request for funding and denies anything contrary to same.

64. The AGC denies paragraph 70 and adds that varieties of tobacco, including Delgold and Candel, were registered pursuant to the relevant legislation.

65. With regard to paragraph 76, the AGC states that it is irrelevant to the issues at stake whether or not Canada received direct taxation revenues

from the sale of cigarettes in Canada and adds that taxation decisions are policy.

66. With regard to paragraph 80, the AGC states that the Principal Action speaks for itself.

67. With regard to paragraph 82, the AGC states that no liability can flow from the policy statement made by the Minister of Health in the House of Commons on June 17, 1963.

68. The AGC denies paragraph 84 and adds that, pursuant to policy decisions taken from time to time and in accordance with its legislative mandate, Health Canada informed Canadians about the health risks of smoking.

69. The AGC acknowledges that ITCAN was a member of the Ad Hoc Committee and of the CTMC but denies the remainder of paragraph 87.

70. The AGC denies paragraphs 88 and 89 and adds that Plaintiff Manufacturers are affiliates of multinational corporations and are experts in tobacco products and marketing, to whom Canada owes no obligation whatsoever.

71. The AGC denies paragraphs 90 to 100 and states that Plaintiff Manufacturers consistently over time opposed the policy decisions of Health Canada.

72. With regard to paragraph 102, the AGC refers to the announcement of the Minister of Health in June 1963 referred to in paragraph 102(a) and to the memorandum to Cabinet referred to in paragraph 102(d) and denies anything contrary to same, and denies the remainder of the paragraph.

73. With regard to paragraph 109, the AGC refers to the regulations passed under the *Tobacco Products Control Act* and adds that Plaintiff Manufacturers contested the constitutionality of the Act and the Regulations in relation to, *inter alia*, warnings.

74. The AGC takes notice of the admission contained in paragraph 110.

75. With regard to paragraphs 111 and 112, the AGC refers to the *Tobacco Act* and adds that Plaintiff Manufacturers contested the constitutionality of the Act and the Regulations in relation to, *inter alia*, warnings.

76. The AGC denies paragraph 115 and refers to the *Tobacco Products Control Regulations*.

77. With regard to paragraph 119, the AGC refers to the *Tobacco Products Control Act* and its Regulations and states that Plaintiff Manufacturers

contested the constitutionality of the Act and the Regulations in relation to, *inter alia*, warnings.

78. The AGC denies paragraph 121 and refers to the policy announcement in the news release of November 20, 1968 and denies anything contrary to same.

79. With regard to paragraph 128, the AGC refers to the policy announcements in the press releases referred to in subparagraphs (a), (b), (g), (h) and denies anything contrary to same, and denies the remainder of paragraph 128.

80. With regard to paragraph 133, the AGC states that the Principal Action speaks for itself.

81. With regard to paragraph 136, the AGC refers to the policy announcement in the news release dated December 12, 1969, and denies anything contrary to same, and denies the remainder of the paragraph.

82. With regard to paragraph 138, the AGC refers to the *Tobacco Products Control Act* and its Regulations, and states that:

    (i) Section 9(3) of the *Tobacco Products Control Act* reiterated Plaintiff Manufacturers' obligation to warn consumers of the health hazards and health effects arising from the use of tobacco products or from their emissions.

    (ii) Plaintiff Manufacturers contested the constitutionality of the Act and the Regulations in relation to, *inter alia*, warnings.

83. With regard to paragraph 146, the AGC states that the allegation is irrelevant and that Canada cannot be held liable for having imposed direct or indirect taxation on any tobacco products pursuant to legislation.

84. The AGC denies paragraph 147 and states that at all relevant times, pursuant to relevant legislation, Canada developed public policies in relation to tobacco and health.

85. The AGC has no knowledge of the allegations in paragraph 148 as to the profits of ITCAN, denies the remainder of the paragraph and subparagraphs, and further adds that the allegations are irrelevant. Any taxes were imposed by legislation enacted by the Parliament of Canada.

86. With regard to paragraph 150, the AGC refers to the Principal Action and denies anything contrary to same.

AND THE AGC FURTHER PLEADS:

III- THE ROLE OF PLAINTIFF MANUFACTURERS

87. Plaintiff Manufacturers were solely responsible for the design, marketing and sale of their products, for warning the public about the health risks of smoking, and for the damages arising from the use of their products.

88. Plaintiff Manufacturers are experts in the design, manufacture, marketing and sale of their products, and thus they relied on:

    a) their own knowledge and expertise as highly experienced manufacturers of tobacco products;

    b) the knowledge, expertise, advice, and instructions of their parent companies and affiliates and associated companies with whom they worked closely;

    c) the knowledge, expertise, and advice of other tobacco product manufacturers with whom Plaintiff Manufacturers shared information and strategy, both through the auspices of the CTMC and otherwise; and

    d) the knowledge, expertise, advice, and instructions of their own officers, employees, and experts, including without limitation scientists and others with technical expertise and legal advisors both within and outside Plaintiff Manufacturers.

89. Plaintiff Manufacturers have or should have had full knowledge and expertise with respect to the following:

    a) the risks of smoking to the health of smokers and non-smokers;

    b) tobacco-related diseases and the medical science concerning such diseases;

    c) the research, design and manufacture of cigarettes; *e.g.*: filter, paper, additives, reconstituted sheets of tobacco, etc.;

    d) the properties and constituents of tobacco, cigarettes, smoke, and their measurement;

    e) the marketing and sale of cigarettes;

    f) the techniques and behavioral aspects of smoking, including, without limitation, the phenomenon of compensation;

    g) the development, characteristics, and risks of all forms of tobacco;

h) the addictive characteristics of smoking;

90. The AGC denies that Canada was the industry leader, as is alleged by Plaintiff Manufacturers, and pleads that at all times, Canada acted in its capacity as public health and agriculture regulator pursuant to a broad statutory mandate. Further and in any event, the AGC pleads that Plaintiff Manufacturers were in fact critical of Canada and were of the view that Canada lacked the expertise that existed in the industry.

91. The AGC denies that Canada gave Plaintiff Manufacturers advice, directives and instructions, as is alleged by Plaintiff Manufacturers, on how to design and manufacture cigarettes, including lower tar and nicotine yield cigarettes.

92. Plaintiff Manufacturers designed and manufactured cigarettes that were marketed and sold under the descriptors of "light" or "mild" or variations thereof in Canada regardless of any conduct by Canada; and Plaintiff Manufacturers and their affiliates did so in other countries prior to and independent of any alleged representations by Canada.

93. Regardless of the nicotine level of the tobacco that Plaintiff Manufacturers purchased for use in their cigarettes, they had control over the tar and nicotine yields of their cigarettes.

94. There are numerous cigarette design features that affect tar and nicotine yields, features over which Canada had no control. Such features include the specific blends of tobacco used in manufacturing the cigarette, the part of the plant from which the tobacco is chosen, the type and porosity of the paper, type of filter, the addition, size and placement of ventilation holes and the use of additives.

95. Plaintiff Manufacturers have repeatedly, over the entire class period, admitted that they have a responsibility towards the consumers of their products, in relation to smoking and health.

96. Canada never assumed, in any way, either expressly or implicitly, any part of Plaintiff Manufacturers' responsibility towards the consumers of their products.

97. Canada never assumed Plaintiff Manufacturers' responsibilities to inform consumers of the health risks of smoking nor did it discharge Plaintiff Manufacturers' responsibility to do so.

98. From time to time, the Minister of Health reiterated to Plaintiff Manufacturers their responsibility towards the consumers.

99. Since 1963 and throughout the remainder of the class period, Health Canada publicly stated that smoking caused disease. Plaintiff Manufacturers, throughout the entire class period, did not agree with that statement.

100. Far from relying on Canada in the area of smoking and health, Plaintiff Manufacturers, throughout the class period, deliberately did not disclose the full extent of their knowledge with respect to smoking and health.

IV- THE ROLE OF HEALTH CANADA

101. At all times relevant and material to these proceedings, Health Canada acted in conformity with the applicable statutes and its role as a policymaker.

102. The constant and overriding policy goal of Health Canada is to protect the health of Canadians.

103. With respect to tobacco, Health Canada's goal was to prevent cigarette smoking and to advise the public to stop smoking.

104. The results of research on smoking and health among Canadian Veterans in the early 1960s, the publication of the 1962 report of the Royal College of Physicians in the United Kingdom, the 1963 Canadian Conference on Smoking and Health and the release in 1964 of the U.S. Surgeon General's Report linking tobacco use to health problems prompted Health Canada to adopt policy measures in relation to smoking designed to protect the health of Canadians.

105. In 1971, Canada prepared and tabled legislation that would have prohibited advertising of tobacco products and prescribed warnings on cigarette packaging.

106. To forestall such legislation, Plaintiff Manufacturers agreed among themselves to adopt voluntarily measures such as health warning messages, toxic constituent information, and the removal of advertising from television and radio through industry voluntary advertising codes for the promotion and sale of cigarettes.

107. By the mid 1980s, Canada formed the view that stringent legislative control was required.

108. In 1988, Parliament enacted the *Tobacco Products Control Act* ("TPCA") which banned tobacco advertising, restricted the promotion of tobacco products and required prominent and legible health messages and toxic constituent information on tobacco products.

109. In September 1994, Regulations under the TPCA came into force requiring more prominent health messages on tobacco packaging.

110. Plaintiff Manufacturers challenged the TPCA and in September 1995, the Supreme Court of Canada ruled that key provisions of the TPCA violated the *Canadian Charter of Rights and Freedoms,* as a result of which its provisions were struck down.

111. In 1997, Parliament enacted the *Tobacco Act* which, *inter alia*, restricted tobacco marketing.

112. Plaintiff Manufacturers challenged the *Tobacco Act* and its Regulations but the Supreme Court of Canada upheld the validity of the *Tobacco Act* and Regulations in their entirety.

113. Through the class period, Canada's policy measures to protect the health of Canadians from the health hazards of tobacco smoking have involved, *inter alia*, the following:

    a) public education and awareness programs on smoking and health;

    b) encouraging the public to discontinue smoking;

    c) dissuading the public from commencing smoking;

    d) requesting Plaintiff Manufacturers to lower the tar and nicotine yields of cigarettes;

    e) requesting Plaintiff Manufacturers to disclose the yields of tar, nicotine and other constituents in cigarette smoke as well as the nature and levels of additives used in the manufacture of cigarettes;

    f) requesting Plaintiff Manufacturers to print health warnings on cigarette packaging and in advertising;

    g) requesting Plaintiff Manufacturers to restrict the marketing of their products;

    h) in collaboration with Agriculture Canada, research towards the development of a less hazardous tobacco;

    i) research activities designed to increase understanding of smoking behaviours and factors that influence smoking;

    j) tabling legislation to limit the accessibility of tobacco products to young persons; and

k) tabling legislation to control and restrict the marketing of tobacco products.

A) Legislative framework

i- The Department of Health Act

114. The *Department of Health Act*, S.C. 1996, c. 8, as did the predecessor legislation, sets out the broad mandate of the Minister of Health. Section 4 of the Act reads as follows:

> *(1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction relating to the promotion and preservation of the health of the people of Canada not by law assigned to any other department, board or agency of the Government of Canada.*
>
> *(2) Without restricting the generality of subsection (1), the Minister's powers, duties and functions relating to health include the following matters:*
>
> *(a) the administration of such Acts of Parliament and of orders or regulations of the Government of Canada as are not by law assigned to any other department of the Government of Canada or any minister of that Government relating in any way to the health of the people of Canada;*
>
> *(a.1) the promotion and preservation of the physical, mental and social well-being of the people of Canada;*
>
> *(b) the protection of the people of Canada against risks to health and the spreading of diseases;*
>
> *(c) investigation and research into public health, including the monitoring of diseases;*
>
> *(d) the establishment and control of safety standards and safety information requirements for consumer products and of safety information requirements for products intended for use in the workplace;*
>
> *(e) the protection of public health on railways, ships, aircraft and all other methods of transportation, and their ancillary services;*
>
> *(f) the promotion and preservation of the health of the public servants and other employees of the Government of Canada;*

(g) the enforcement of any rules or regulations made by the International Joint Commission, promulgated pursuant to the treaty between the United States of America and His Majesty, King Edward VII, relating to boundary waters and questions arising between the United States and Canada, in so far as they relate to public health;

(h) subject to the Statistics Act, the collection, analysis, interpretation, publication and distribution of information relating to public health; and

(i) cooperation with provincial authorities with a view to the coordination of efforts made or proposed for preserving and improving public health.

ii- The Tobacco Products Control Act (1988) and Regulations

115. In the mid 1980s, Canada considered that Plaintiff Manufacturers' self-regulation was insufficient and that legislative control was required to further its public health objectives.

116. To this end, on April 30, 1987, Canada introduced Bill C-51, the "*Tobacco Products Control Act*" ("TPCA").

117. The TPCA, which came into effect on January 1, 1989 and banned advertising of tobacco products, was part of a comprehensive strategy designed to protect public health by diminishing tobacco consumption over time.

118. Section 3 of the TPCA sets out the purpose of the Act:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

(a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

(c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

119. The TPCA and its Regulations ("TPCR") contained provisions on advertising, promotion, labeling, reporting and enforcement. It prohibited tobacco advertising, free distribution of tobacco products and placement of tobacco trademarks on non-tobacco goods and in advertising. The TPCA also required non-attributed health warnings to be on packages.

120. Sub-Section 9(3) of the TPCA specifically provided that the inclusion of health warnings on packaging "does not affect any obligation of a distributor at common law or under any Act of Parliament or a provincial legislature, to warn purchasers of tobacco products of the health effects of their products". Pursuant to the TPCA, Plaintiff Manufacturers are a distributor.

121. The TPCR were amended in 1993 to increase the total message area of health warnings. It also provided for eight new health warnings to be displayed on packages and to be printed in black on white, or white on black.

122. Before the Act came into force, JTIM and ITCAN challenged the constitutionality of the TPCA in 1988 and subsequently, the TPCR before the Quebec Superior Court, while RBH challenged the TPCA in the Federal Court.

123. In 1995, the Supreme Court of Canada held that key provisions of the TPCA violated the *Canadian Charter of Rights and Freedoms* and struck them down. It confirmed Canada's jurisdiction over the advertising and promotion of tobacco products, and health messages.

124. The Supreme Court of Canada stated, *inter alia*, that it was difficult to believe that the tobacco industry would spend as much money on advertising as it did, if it did not expect that it would result in an increase in consumption of its products; and that the industry was aware of the necessity of attracting young smokers to maintain and increase their share of the tobacco market and attract new smokers.

iii- The Tobacco Sales to Young Persons Act (1994)

125. Effective in 1994, the *Tobacco Restraint Act* was repealed and replaced with the *Tobacco Sales to Young Persons Act* which raised the national minimum age for selling tobacco to persons at least 18 years old and banned vending machines from most public places.

126. The *Tobacco Sales to Young Persons Act* was subsequently repealed in 1997, its provisions being mostly included in the *Tobacco Act* and regulations.

iv- The Tobacco Act (1997)

127. The *Tobacco Act* ("TA"), which replaced the TPCA, came into effect in 1997 and it remains in effect.

128. Section 4 sets out the purpose of the TA :

> *4. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,*
>
> *(a) to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;*
>
> *(b) to protect young persons and others from inducements to use tobacco products and the consequent dependence on them;*
>
> *(c) to protect the health of young persons by restricting access to tobacco products; and*
>
> *(d) to enhance public awareness of the health hazards of using tobacco products.*

129. The TA:

a. Provides for the regulation of substances contained in tobacco products and their emissions;

b. Restricts access to tobacco by young persons under 18 years of age;

c. Sets requirements regarding labelling of tobacco products and allows for the attribution of health warnings;

d. Provides for a partial prohibition on promotional activities: it prohibits lifestyle product advertising and advertising that appeals to youth. Informational and brand preference product advertising are permitted in material mailed to adults identified by name or in places where young persons are not permitted by law. It permits tobacco brands on some non-tobacco products;

e. Provides for enforcement powers, offences and punishment.

130. The TA, as did the TPCA, specifically stipulates that it does not exempt manufacturers of their obligation to warn consumers of the hazards of their product:

> *16. This Part does not affect any obligation of a manufacturer or retailer at law or under an Act of Parliament or of a provincial legislature to warn consumers of the health hazards and health effects arising from the use of tobacco products or from their emissions.*

131. In 1998, the TA was amended to ban sponsorship promotion, with the goal of putting an end to Plaintiff Manufacturers' practice of associating attractive activities with tobacco consumption.

132. In 2000, the *Tobacco Reporting Regulations* and the *Tobacco Products Information Regulations* were made.

133. The *Tobacco Reporting Regulations* set out requirements for reporting of sales data, manufacturing information, tobacco product ingredients, toxic constituents, toxic emissions, research and promotional activities.

134. The *Tobacco Products Information Regulations* serve to give effect to the TA's provisions dealing with labelling and health warnings and set out requirements for information that must be displayed on most tobacco products that are for retail sale in Canada to inform consumers about the products and the health hazards arising from their use and their emissions.

135. Plaintiff Manufacturers challenged the TA before it came into force.

136. Plaintiff Manufacturers also challenged the *Tobacco Products Information Regulations* and the *Tobacco Reporting Regulations*.

137. The Supreme Court of Canada unanimously upheld the validity of the TA and the challenged Regulations in their entirety.

138. The Supreme Court of Canada stated, *inter alia*:

> *61 [...] The creative ability of the manufacturers to send positive messages about a product widely known to be noxious is impressive. In recent years, for example, manufacturers have used labels such as "additive free" and "100% Canadian tobacco" to convey the impression that their product is wholesome and healthful. Technically, the labels may be true. But their intent and effect is to falsely lull consumers into believing, as they ask for the package behind the counter, that the product they will consume will not harm them, or at any rate will harm them less than would other tobacco products, despite evidence demonstrating that products bearing these labels are in fact no safer than other tobacco products. [...]*
>
> *[...]*

> *64 The industry practice of promoting tobacco consumption by inducing consumers to draw false inferences about the safety of the products is widespread. This suggests that it is viewed by the industry as effective. [...]*

v- The involvement of other levels of government

139. The tobacco industry and its products have been regulated over time by all levels of government, including provincial, territorial and municipal.

140. Provincial governments have concentrated on enacting legislation dealing primarily with retail sales and youth access, to reduce tobacco consumption.

141. All levels of government have passed laws or by-laws restricting smoking in public.

142. From the late 1970s, municipal authorities in Quebec have passed smoking by-laws. For example, in 1991 more than 59 municipalities in Quebec had passed by-laws.

143. There also has been a substantial amount of cooperation between the provincial/territorial and federal governments throughout the class period with regard to tobacco control efforts, namely through Federal/Provincial/Territorial Committees and joint strategies, such as the Dominion Council of Health and its successor, the FPT advisory committees and other national programs.

B) Health Canada's policies and measures on smoking and health

144. For nearly one hundred years the mandate of Health Canada has been to protect the health of Canadians and to carry out public health education.

145. By the early 1950s, there was growing medical and scientific interest in Canada and the international community concerning the reported rapid rise in lung cancer rates and the possible link between lung cancer and smoking.

i- The Veterans' Study

146. In response to the growing concern with respect to the rise in lung cancer rates in Canada and the potential link with cigarette smoking, Health Canada, through its Epidemiology Division, in cooperation with the Department of Veterans Affairs and the Canadian Pension Commission, conducted, from 1955 to 1962, a study on "smoking and health" among 200 000 Canadian veterans (the "Veterans Study").

147. The Veterans Study concluded that cigarette smokers, compared to non-smokers, had excessive mortality rates, particularly from heart and circulatory diseases, lung cancer, bronchitis and emphysema.

148. The tobacco industry criticized the Veterans Study.

ii- The 1962 Report of the Royal College of Physicians of London

149. In 1962, the Royal College of Physicians of London released a report which concluded, *inter alia*, that:

> *"... cigarette smoking is the most likely cause of the recent world-wide increase in deaths from lung cancer ...; that it is an important predisposing cause of the development of chronic bronchitis...; ... may be a contributory factor in cancer of the mouth, pharynx, oesophagus and bladder."*

150. The Royal College of Physicians of London's Report recommended the following preventive measures with respect to smoking:

> *"The harmful effects of cigarette smoking might be reduced by efficient filters, by using modified tobaccos, by leaving longer cigarette stubs or by changing from cigarette to pipe or cigar smoking."*

151. The Report also recommended as possible action by the Government:

> *"Decisive steps should be taken by the Government to curb the present rising consumption of tobacco, and especially of cigarettes. This action could be taken along the following lines ... :*
>
> *(i) more education of the public and especially school-children concerning the hazards of smoking:*
>
> *(ii) more effective restrictions on the sale of tobacco to children:*
>
> *(iii) restriction of tobacco advertising:*

(iv) wider restriction of smoking in public places:

(v) an increase of tax on cigarettes, perhaps with adjustment of the tax on pipe and cigar tobaccos:

(vi) informing purchasers of the tar and nicotine content of the smoke of cigarettes:

(vii) investigating the value of anti-smoking clinics to help those who find difficulty in giving up smoking."

iii- The 1963 Canadian Conference on Smoking and Health

152. In June 1963, the Minister of Health stated before the House of Commons:

> *"There is a scientific evidence that cigarette smoking is a contributory cause of lung cancer, and that it may also be associated with chronic bronchitis and coronary heart disease. Health agencies, including my department, have a duty to inform the public about the risk to health connected with cigarette smoking."*

153. Health Canada embarked on a long-term program aimed at stemming the increase of tobacco diseases by reducing or eliminating the health hazards of smoking.

154. In 1963, the Minister of Health, Judy LaMarsh, convened and chaired, the first Canadian Conference on Smoking and Health (the "1963 Conference") as a measure to heighten public awareness and as an initial step in policy planning. The 1963 Conference was attended by representatives from both federal and provincial governments as well as national medical associations, Plaintiff Manufacturers and tobacco growers.

155. Prior to the 1963 Conference, Minister LaMarsh wrote to the President of ITCAN, Mr. Keith, and proposed that, for the purpose of the 1963 Conference, the tobacco industry should consider presenting a single voice at the Conference, as they had previously done before the Canadian Medical Association. The President of ITCAN agreed and proceeded to communicate with JTIM, Rothmans and Benson & Hedges in that regard.

156. Notwithstanding that the Minister of Health's request to act in unison was for the purpose of the 1963 Conference, Plaintiff Manufacturers proceeded to form an ad hoc Committee which ultimately became the CTMC. Thereafter, Plaintiff Manufacturers chose to continue to respond to Canada's concerns on an industry wide basis.

157. The principal purpose for the creation of the Ad Hoc Committee was to discuss smoking and health issues with Canada and to "*...dissuade the*

government from making any moves prejudicially affecting the tobacco industry." It was also a goal of the Ad Hoc Committee, and later the CTMC, to avoid legislation.

158. At the 1963 Conference, the Canadian Medical Association recommended action in regard to professional and public education, research, lower tar cigarettes and regulations requiring packaging to state tar and nicotine content.

159. The National Cancer Institute of Canada and the Canadian Cancer Society formally endorsed the Canadian Medical Association's recommendations.

160. The Ad Hoc Committee submitted a Conference Brief on behalf of Plaintiff Manufacturers, which detailed scientific evidence that contradicted or failed to support the anti-smoking charges and that maintained that research was inadequate to demonstrate a causal link between lung cancer and cigarette smoking and called for additional study. Nonetheless, the Conference Brief also explicitly recognized that the industry had a responsibility to its consumers in the area of smoking and health.

161. Tobacco growers' representatives from Ontario and Quebec stressed their regions' dependence on the tobacco crop and the economic contributions of the industry.

162. At the conclusion of the 1963 Conference, it was recommended that a program of research and one on health education be instituted to tackle the issues and that Health Canada assume the coordinating and supporting role in that regard.

iv- The U.S. Surgeon General Report (1964)

163. In or around January 1964, the Advisory Committee to the Surgeon General of the U.S. Public Health Service released its report entitled "Smoking and Health". The report found, *inter alia*, that:

> *"Cigarette smoking is causally related to lung cancer in men; the magnitude of the effect of cigarette smoking far outweighs all other factors; the data for women, though less extensive, point in the same direction."*
>
> *"Cigarette smoking is the most important of the causes of chronic bronchitis in the United States, and increases the risk of dying from chronic bronchitis and emphysema."*
>
> *"It is established that male cigarette smokers have a higher death rate from coronary artery disease than non-smoking males".*

"The habitual use of tobacco is related primarily to psychological and social drives, reinforced and perpetuated by the pharmacological actions of nicotine."

v- The House of Commons Standing Committee on Health, Welfare and Social Affairs (1969)

164. In or around 1968, the House of Commons Standing Committee on Health, Welfare and Social Affairs chaired by Dr. Gaston Isabelle (the "Isabelle Committee") was asked to consider the question of smoking and health and to provide the tobacco industry and all other interested parties the opportunity to present evidence.

165. The Isabelle Committee held at least 28 formal meetings before presenting its final report in 1969.

166. The Minister of Health's position before the Isabelle Committee was, *inter alia*, that:

- smoking was the leading cause of lung cancer;
- there should be health warnings on packages;
- tar and nicotine maximums should be developed and enforced for all cigarettes;
- that while filter cigarettes were considered by some smokers automatically to reduce the hazards, that many filter brands were very high in tar and nicotine levels, some higher even than some plain-end cigarettes, which tended to deceive the public.

167. Plaintiff Manufacturers agreed that the Ad Hoc Committee would represent the individual companies before the Isabelle Committee and present a single consolidated brief.

168. The Ad Hoc Committee retained the services of a public relations firm, Public and Industrial Relations for the purposes of advising on its oral and written presentations to the Isabelle Committee.

169. The Ad Hoc Committee also consulted with David R. Hardy, Legal Counsel for the Tobacco Institute, U.S.A. and obtained "all pertinent scientific information..." from the Tobacco Institute that it had available, in preparing its material for use at the Isabelle Committee. The Tobacco Institute was a non-profit membership corporation founded in 1958 by U.S. Cigarette Manufacturers. Over the years, the Tobacco Institute functioned as an industry association for the U.S. tobacco industry.

170. The Ad Hoc Committee also retained experts to speak to the smoking and health issue at the Isabelle Committee. The financial responsibility for their appearance was undertaken by Plaintiff Manufacturers.

171. In or around December 1968, ITCAN recommended that the brief that was to be submitted to the Isabelle Committee on behalf of the Ad Hoc Committee (the "Industry Brief") ought to be updated from the brief that had been submitted to the 1963 Conference and to put on the record that the scientific causality was still "in question" as it was in 1963.

172. In or around March 1969, the Ad Hoc Committee instructed Public and Industrial Relations to compile press summaries, position papers and "feature pieces" with respect to the Industry Brief for release to the media.

173. Plaintiff Manufacturers maintained the position that a causal link between smoking and disease had not been proven and that Health Canada's position on smoking and health did not justify any kind of regulatory proposals.

174. The Ad Hoc Committee's position was published in an ITCAN publication called "The Leaflet" (June 1969) as well as in the newspaper "The Telegram" (July 1969) and was reiterated publicly outside of Parliament in October 1969, when the Chairman, Paul Paré, delivered a speech, before the National Association of Tobacco and Confectionery Distributors Convention.

175. In December 1969, the Isabelle Committee released its report on Tobacco and Cigarette Smoking (the "Isabelle Report"). It concluded, *inter alia*, that "*Cigarette smoking is now considered by experts to be one of the most important causes of preventable illness and death in Canada... (and) there is no substantial body of informed health opinion or consistent scientific evidence that disputes this conclusion.*"

176. The Isabelle Committee recommended that Canada continue and expand its program of action on smoking and health as a matter of public policy, including the following:

    a) Prohibiting cigarette advertising on television and radio;

    b) Prohibiting promotional marketing of cigarettes;

    c) Requiring the inclusion of health warnings on all packaging and advertising;

    d) Continuing and expanding the smoking and health educational and public awareness campaigns;

    e) Setting maximum levels of tar and nicotine in cigarettes;

f) Publishing tar and nicotine levels by brand on a regular basis and printing of the figures on packaging;

g) Promoting measures designed to reduce the intake of cigarette smoked constituents by continuing cigarette smokers;

h) Increase research into less hazardous products;

i) Coordination of efforts between Agriculture Canada and Health Canada to assist growers and workers in the tobacco industry with "*special emphasis to the production of tobacco required for the production of less hazardous cigarettes*" together with interested universities.

177. The Ad Hoc Committee issued a public statement on behalf of Plaintiff Manufacturers criticizing the recommendations of the Isabelle Committee.

178. In June 1969, Plaintiff Manufacturers were displeased with public comments made by the Minister of Health John Munro and reported in the media with respect to his desire to take "*...every practical step that can be taken to limit smoking....*" The Chairman of the Ad Hoc Committee, Paul Paré, wrote directly to the Prime Minister of Canada to manifest his discontent with the public statements made by the Minister.

vi- Health Canada's policy measures regarding the disclosure to the public of the level of tar, nicotine and other constituents and additives in cigarettes

179. Pursuant to the *Department of Health Act*, the Health Minister published news releases listing the levels of tar and nicotine in cigarette smoke by brand (also called "League Tables") and requested Plaintiff Manufacturers to inform smokers and the public of the levels of tar, nicotine and other constituents and additives in cigarettes.

180. International medical and other public health communities around the world also advocated the same policy measures.

181. From the beginning of the class period, knowledge and expertise with respect to cigarette constituents and constituent testing methods lay within the cigarette manufacturing industry itself.

182. Generally, from the 1950s on, Plaintiff Manufacturers had conducted routine testing with regard to tar and nicotine yields in their cigarettes.

183. In or about the month of September 1966, Mr. G.J. McDonald and Mr. Devlin, from Rothmans, expressed concern to the other Plaintiff Manufacturers that the Canadian government would soon wish to begin

assessing tar and nicotine levels of Canadian cigarettes, as was then being done in the U.S.

184. In or around September 1966, Plaintiff Manufacturers began having discussions about developing standardized tar and nicotine testing methods and ultimately such agreement was reached among them.

185. The original suggestion to publish tar and nicotine tables in Canada came from Plaintiff Manufacturers who wanted to avoid printing tar and nicotine levels on packages.

186. In a memorandum to Cabinet dated April 13, 1967, the Minister of Health had recommended that legislation be prepared to prohibit the sale of cigarettes and advertisements unless the package and the advertisement clearly declare the nicotine and tar content of the smoke from the product and to provide for the establishment of official methods for determining the tar and nicotine content of the smoke.

187. In July 1967, to avoid legislation and the printing of tar and nicotine content of cigarettes on packages, Plaintiff Manufacturers decided to "*cooperate with the government and attempt to guide the government in any action it might take*".

188. Plaintiff Manufacturers also decided to maintain their opposition to voluntary general hazard labeling as well as to voluntary tar and nicotine labeling on packages. However, Plaintiff Manufacturers agreed to the idea of government organized tar and nicotine analyses and publication.

189. In November 1967, in preparation for a meeting with the Minister of Health, Plaintiff Manufacturers decided to suggest to the Minister that in lieu of labeling "*the industry could suggest the idea of a government-issued quarterly bulletin listing Canadian brands and their tar and nicotine ratings for distribution to public health organizations and individual medical practitioners who subscribe to the theory that lower tar and nicotine constitute a "safer" cigarette*".

190. In November 1968, the Minister of Health released the first League Tables setting out the tar and nicotine levels of various brands of Canadian cigarettes. The Leagues Tables were last published by Canada on January 13, 1987.

191. It was never the intention of Health Canada, in releasing the League Tables, to unreservedly endorse low yield cigarettes. This position was expressed in a press release about the first League Tables in which the Minister of Health stated the following :

> *"My Department's position with respect to the cigarette smoking problem remains unchanged. We know of no safe cigarette or safe way to smoke, and we strongly recommend that Canadians stop smoking entirely. Nevertheless, many people find it difficult to stop smoking and we feel it is important to help them reduce the inhalation of cigarette smoke constituents into their lungs."*

192. Far from following any advice, requests or directions by Health Canada, Plaintiff Manufacturers negotiated among themselves an agreement on a standardized method of assessing cigarette tar and nicotine. The testing parameters which they chose to measure tar and nicotine yields of cigarettes were based in large measure on the method of the U.S. Federal Trade Commission.

193. In February 1969, representatives of ITCAN met with officials of Health Canada and representatives of the University of Waterloo "*to present to the people in attendance, the method for the determination of particulate matter, nicotine and water in cigarette smoke which had been agreed to as a standard method by the four members of the cigarette industry*".

194. Plaintiff Manufacturers repeatedly opposed Canada's requests with respect to the printing of tar and nicotine levels on their cigarette packages and in advertising.

195. Under the threat of regulatory or legislative action, Plaintiff Manufacturers at length agreed among themselves to print tar and nicotine levels on their packages and in advertising.

196. In the 1970s and throughout the 1980s, the Minister of Health expressed to the CTMC concerns regarding carbon monoxide in cigarette smoke and requested the printing of carbon monoxide levels on cigarette packaging and in advertisements.

197. In the period up to and including 1979, the CTMC opposed such requests from the Minister of Health with respect to printing carbon monoxide levels on packaging and in advertising.

198. The CTMC took the position that it did not make sense to report the levels of carbon monoxide in cigarette smoke and did not defer to the Minister of Health in this regard.

199. In 1981, the Minister of Health raised the issue of cigarette additives and asked for an explanation of the criteria used by Plaintiff Manufacturers to satisfy themselves that additives were safe for use.

200. Plaintiff Manufacturers opposed the release of any cigarette additive information publicly.

201. There was no agreement on the part of the CTMC with respect to the public disclosure of additives at any point prior to the passage of legislation in 1989.

vii- Health Canada's policy measures regarding the reduction of tar, nicotine and CO yields of cigarettes

202. Health Canada's requests to Plaintiff Manufacturers to reduce the levels of tar, nicotine and carbon monoxide ("CO") in the smoke of their cigarettes embodied a policy decision for which Canada cannot be held liable.

203. Early research on the issue of cigarette smoke and human disease had led to the view that the degree of exposure to cigarette smoke tar was an important factor in determining the health risks of smoking.

204. Throughout the 1950s, and up to the 1990s, international and national health organizations, as well as scientists engaged in research in the area, advocated a tar and nicotine reduction policy as a means of reducing the health risks attributed to smoking, such as the following:

    a) In its 1971 report, the Royal College of Physicians advocated tar yield reduction as a means of reducing the health risks associated with cigarette smoking.

    b) Similarly, the UK Government continued to advise smokers who could not quit, to switch to lower tar brands but to also smoke fewer cigarettes, take smaller puffs over longer intervals, leave a longer stub and cease inhaling.

    c) Until the late 1990s, the UK Government's product-modification program required progressive reductions in the tar yields of cigarettes on the UK market.

    d) The U.S. Surgeon General stated in its 1981 report that it was recommended that people who continue to smoke should "switch to cigarettes yielding less "tar" and nicotine, provided they do not increase their smoking or change their smoking in other ways".

    e) The World Health Organization suggested "those who are unable to stop smoking should try and reduce their exposure to such harmful substances in smoke as tar, nicotine and carbon monoxide".

205. The Canadian Medical Association's brief presented at the 1963 Canadian Conference on Smoking and Health recommended that "as an interim step in the production of an entirely safe cigarette, cigarettes of lower tar and nicotine content be produced, and that the content of these substances be described on each cigarette package".

206. The 1969 Report of the Isabelle Committee recommended, under the section "*Less Hazardous Smoking*", "*the wide promotion of the following measures to reduce the intake of cigarette smoke constituents, gases as well as tar and nicotine, by continuing smokers:*

    - *Using low tar, low nicotine cigarettes*
    - *Lengthening the period between cigarettes*
    - *Lengthening the period between puffs*
    - *Not inhaling"*

207. The Minister of Health repeatedly asked Plaintiff Manufacturers to lower tar and nicotine yields of their cigarettes and to agree to a determined tar and nicotine yield ceilings.

208. In general, Plaintiff Manufacturers opposed the Minister of Health's requests with respect to reducing toxic constituent levels.

209. Plaintiff Manufacturers did not start reducing tar and nicotine levels of cigarettes as a result of the advice, requests or direction of the Minister of Health, as is alleged by Plaintiffs Manufacturers.

210. In fact, as early as the 1950s, cigarette manufacturers, including Plaintiff Manufacturers, had begun introducing filters and other means to produce cigarettes with lower tar and nicotine yield.

211. Plaintiff Manufacturers had undertaken the development and promotion of lower yield cigarettes before Health Canada's public health policy regarding the reduction of tar and nicotine yields.

212. Plaintiff Manufacturers publicly denied a causal relationship between cancer and smoking, did scientific research with respect, *inter alia*, to smoke constituents and promoted the sale of cigarettes with filters or other features alleged to lower the tar levels of their products.

213. Plaintiff Manufacturers marketed some of their products as being "light" or "mild" and variations thereof.

214. Any and all actions taken by Plaintiff Manufacturers during the class period to develop or market "light" or "mild" products and variations thereof, were taken unilaterally by Plaintiff Manufacturers and not as a result of any advice, requests or directions on the part of Health Canada, as is alleged by Plaintiff Manufacturers.

215. Plaintiff Manufacturers disagreed with the Minister of Health's concerns regarding the use of the terms "light" or "mild".

216. Throughout the class period, Health Canada consistently took the public position that there was no such thing as a "safe cigarette" and that the only safe option was to quit entirely.

viii- Health Canada's policy regarding health warnings on cigarette packaging and in advertising

217. Throughout the class period, Plaintiff Manufacturers repeatedly opposed the requests of the Minister of Health with regards to health warnings on cigarette packaging and in advertising.

218. Plaintiff Manufacturers, throughout the class period, also opposed the Minister of Health's requests for stricter and more prominent warnings on packages and in advertising with respect to the toxic constituents in their products.

219. Aside from the health warnings on packages and in print advertising required by regulation during the periods 1989 to 1995 and since 2000, any other warnings that appeared on packages and in print advertising were the choice of Plaintiff Manufacturers.

220. Throughout the 1960s, the Ad Hoc Committee and Plaintiff Manufacturers refused to agree to Health Canada's proposals for the labelling of cigarette packages.

221. In the period from 1963 through to at least 1970, the Ad Hoc Committee took the position that warnings on cigarette packages would be "*...misleading, meaningless and actually a disservice to the public*". It was also its position that warnings on packages suggested a state of scientific knowledge that did not exist.

222. In this time period, it was also the expressed position of the Ad Hoc Committee that labelling was also unnecessary because consumers already understood the risks of smoking.

223. In early 1971, there was ongoing discussion between the CTMC and Health Canada with respect to the inclusion of a warning on cigarette packages and in cigarette advertising.

224. In a letter dated March 25, 1971, the Chairman of the CTMC, Mr. Paul Paré advised the President of the Treasury Board, Mr. C.M. Drury, that Plaintiff Manufacturers would be prepared to accept a bilingual general hazard warning on packages with the initials of the Department of National Health and Welfare in brackets, as follows:

> *"Warning: Danger to health increases with amount smoked. Avoid inhaling."*

225. The CTMC was, however, of the view that the Minister of Health's proposal to include the warning in advertising was "*...punitive and unnecessary*" because the public was already aware of the "*...alleged hazards of smoking.*"

226. In March 1971, Plaintiff Manufacturers knew that the Minister of Health was considering legislation on cigarette advertising.

227. In June 1971, the Minister of Health introduced before the House of Commons Bill C-248, "*An Act respecting the promotion and sale of cigarettes*", which included a prohibition on cigarette advertising, regulatory powers to limit the amount of nicotine, tar or other constituents, and the clear and prominent display of the following warning on packages:

> *"Warning: Danger to health increases with amount smoked, avoid inhaling"*

228. On September 21, 1971, the CTMC, on behalf of Plaintiff Manufacturers, advised Canada that they had revised their cigarette advertising code, *inter alia*, to provide for the printing of a cautionary notice on all cigarette packages in an attempt to answer to the intent of Bill C-248:

> *"Warning: Excessive smoking may be hazardous to your health"*

229. Discussions continued between the CTMC and the Minister of Health concerning the wording of the warning.

230. In May 1972, the CTMC amended its Cigarette Advertising Code to modify the wording of the warning as follows:

> *"Warning: the Department of National Health and Welfare advises that danger to health increases with amount smoked"*

231. In 1976, the CTMC amended its Cigarette Tobacco Advertising and Promotion Code to add the words "*Avoid inhaling*" at the end of the warning.

232. Throughout the 1970s, there were ongoing discussions with regard to the Minister of Health requesting that Plaintiff Manufacturers revise their existing warnings on packaging and in advertising.

233. During this period, Plaintiff Manufacturers followed a pattern of reaching agreements among themselves with respect to matters of advertising and health warnings and then presenting the concluded agreements to the Minister of Health, following their public release.

234. On or about March 16, 1976, the Minister of Health sent correspondence to the CTMC advising as follows:

> *" I am afraid that, in my earlier correspondence, I may not have clearly conveyed our sense of urgency and my purpose in requesting a continuing consultative process between the Council and my Department. There are several matters that, in our view, require early action and I propose regular meetings as a means to consider and plan needed changes..."*

235. In his correspondence, the Minister of Health delineated twelve (12) areas of urgent concern in the areas of advertising and promotion for action by the CTMC as follows (the "1976 Requests"):

    (1) Improving the size and clarity of health warnings on packages and in advertisements;

    (2) Printing of tar and nicotine levels for all cigarette lengths;

    (3) Including warnings in all advertisements including billboards;

    (4) Placing posters in tobacco outlets;

    (5) Developing a procedure for reporting the presence of levels of carbon monoxide in smoke;

    (6) Increasing the unsmokeable portion of cigarettes (butt length);

    (7) Reducing the maximum levels of tar and nicotine;

    (8) Eliminating the promotion of high tar brands;

    (9) Eliminating promotional activities that depict "lifestyle";

    (10) Elimination of radio and television promotion of sponsored events;

    (11) Preparing a report on the effects of package size on consumption;

    (12) Preparing a report on differential pricing effectiveness.

236. The CTMC opposed all of the 1976 Requests.

237. In 1977, the Assistant Deputy Minister of Health, Dr. A.B. Morrison addressed to the CTMC nine (9) proposals (the "1977 Requests") with respect to providing improved warnings and tar and nicotine levels on packaging and in various forms of advertising to consider adopting educational messages, eliminate high tar brands and establish a maximum tar level of 16 mg, to begin reporting carbon monoxide level, provide an industry plan for reducing smoke chemicals and improve the cigarette testing method.

238. The CTMC's position was that some of the 1977 Requests were "not acceptable" and others "warranted strong resistance".

239. In or around March 1978, Health Canada again made requests to the CTMC with respect to improving warnings on packages and in advertisements that included improving the size, lettering and location and expanding the presence of the warnings on other promotional materials. Health Canada also reiterated its requests for the listing of tar and nicotine levels in advertisements.

240. In response, Plaintiff Manufacturers took the position that improved cautionary information was not required because the public was already aware of the cautionary notices.

241. In a letter dated November 9, 1982, the Minister of Health asked the CTMC that Plaintiff Manufacturers undertake "*the following actions to ensure strict adherence*" with their Cigarette Tobacco Advertising and Promotion Code:

> *"1. Ensure that the health warning and tar and nicotine information appear on all print advertisements, including billboards.*
>
> *2. Ensure that no cigarette or cigarette tobacco advertisement appear on posters, bulletin boards, billboards or other public display location within 500 metres of any primary or secondary school property.*
>
> *3. Ensure that the health warning and tar and nicotine information appear on all tobacco packaging, including cigarette carton wrappers."*

242. In a press release dated January 24, 1983, the Minister of Health announced that she had asked the CTMC to interpret their voluntary advertising and promotion code more strictly.

243. In a letter dated May 11, 1983, the Minister of Health requested the CTMC that it "*take the necessary action to ensure that no cigarette advertisement appear on any form of television in the future.*"

244. On January 1st, 1984, the CTMC amended its Cigarette & Cigarette Tobacco Advertising and Promotion Code.

245. In a letter dated April 19, 1984, the Minister of Health said that there has been no satisfactory reply to her May 11, 1983 nor November 9, 1982 requests and that she was "distressed" by the widespread violations of Rule 11 of the CTMC's code which stated that "*no cigarette or cigarette tobacco*

product will be advertised on posters or bulletin boards located in the immediate vicinity of primary or secondary schools."

ix- Health Canada's policy measures regarding the marketing of tobacco products

246. Throughout the class period, Plaintiff Manufacturers repeatedly ignored or opposed the requests of the Minister of Health with respect to their advertising, promotional and marketing activities.

247. Plaintiff Manufacturers repeatedly over the class period, unilaterally entered into voluntary advertising codes and agreements amongst themselves which purported to "govern" their marketing conduct.

248. Such agreements were entered into without the authority, approval or direction of Health Canada.

249. Health Canada had no involvement in the adoption of any of Plaintiff Manufacturers' voluntary advertising codes and agreements or their regulations and interpretation guidelines, if any, all of which were unilaterally implemented by the CTMC. In fact, Plaintiff Manufacturers would interpret and apply the agreements in any manner that they saw fit.

250. Health Canada did not endorse the use of the words "light" or "mild" or variations thereof. In 1977, the Assistant Deputy Minister, Dr. A.B. Morrison, on behalf of the Minister of Health, wrote to the CTMC and expressed concern about how Plaintiff Manufacturers were marketing their "light" or "mild" brands of cigarettes in relation to their tar and nicotine yield.

251. The CTMC refused to endorse the views of the Minister of Health and advised that it would continue to make use of the descriptors of "light" or "mild" in the manner that it had been using them to that date.

x- Health Canada's policy regarding warnings on addiction

252. Plaintiff Manufacturers had the duty to inform consumers that smoking is addictive. Health Canada had no such duty.

253. In late 1988, the U.S. Surgeon General issued a report on the health consequences of tobacco, which stated, *inter alia*, the following:

> *"Careful examination of the data makes it clear that cigarettes and other forms of tobacco are addicting. An extensive body of research has shown that nicotine is the drug in tobacco that causes addiction...."*

254. On or around 1989, Health Canada commissioned a study from the Royal Society of Canada (the "Royal Society Addiction Study"), in order to answer the following question:

> *"Which is the most appropriate term ("addiction", "dependence" or "habit formation") to characterize the risk of dependence on nicotine, and, by extension, the use of tobacco products?"*

255. At the time of the Royal Society Addiction Study, it was the position of the CTMC, on behalf of Plaintiff Manufacturers that tobacco was not addictive.

256. The Royal Society Addiction Study concluded the following:

> *"The proposed definition is: Drug addiction is a strongly established pattern of behaviour characterized by (1) the repeated self administration of a drug in amounts which reliably produce reinforcing psychoactive effects, and (2) great difficulty in achieving long-term cessation of such use, even when the user is strongly motivated to stop.*
>
> ...
>
> *Cigarette smoking can, and frequently does, meet all the criteria for the proposed definition of addiction."*

257. In December 1989, the President of the CTMC, Mr. Neville, advised the Minister of Health that Plaintiff Manufacturers did not agree with the Royal Society Addiction Study.

258. The Minister of Health rejected the CTMC's objections and stated:

> *"There is no doubt that the issue of defining addiction has long proven to be a difficult one and that expert opinion about the addiction question over the years, including the views expressed in reports of international agencies and by Departmental officials, have not always been unanimous. Nonetheless, I believe the Royal Society has done an excellent job of reaching a scientifically supportable conclusion on this matter, insofar as it relates to the use of tobacco."*

259. Following the release of the Royal Society Addiction Study, Health Canada began the process to pass regulations providing for a health message on packaging to the effect that tobacco smoking was addictive.

260. In 1990, Health Canada issued an Information Letter regarding proposed amendments to the TPCR to provide for, among other amendments, a warning advising consumers of the addictive nature of tobacco.

261. In an April 6, 1990 letter to Health Canada, the CTMC expressed Plaintiff Manufacturers' "*complete opposition*" to the proposed amendments and took "*particular exception to the proposal to add new messages stating "Smoking is addictive"...*".

262. In a March 1993 press release, the Minister of Health, Benoit Bouchard, announced that he would be proceeding with the amendment process to obtain stronger regulations requiring tobacco companies to put new and more visible warnings on cigarette packages, including the warning "*Cigarettes are addictive*".

263. In 1993, the TPCR were amended to prescribe the following warning on addiction on Canadian cigarette packages effective in 1994:

> *"Cigarettes are addictive"*

264. The CTMC continued to dispute that the term "addiction" as defined by the Royal Society Addiction Study was valid, both up to the amendment of the TPCR and afterwards.

xi- Health Canada's public statements regarding smoking behaviour

265. Plaintiff Manufacturers had the duty to inform consumers of their products about smoking behaviour or compensation.

266. Notwithstanding that Canada had no duty to inform the public about smoking behaviour, the Minister of Health made, amongst others, the following statements when publishing the League Tables.

267. In 1972, the Minister of Health issued a press release which contained the following statement:

> *"The amount of tar and nicotine inhaled by a smoker depends upon how the smoker smokes his cigarette and the amount smoked as well as the tar and nicotine level of the cigarette. Reduction in tar and nicotine intake by choosing low tar and nicotine brands may be nullified if more cigarettes are smoked, more puffs are taken, they are smoked more vigorously or to a shorter butt."*

268. In December 1973, the Minister of Health made the following statement in a press release:

> *"The Minister stated that the potential benefit of switching to low tar and low nicotine cigarettes may be nullified if more cigarettes are smoked, or more of each cigarette is smoked, or if the depth of inhalation is increased. He suggested that those who switch*

should observe their smoking patterns and butts to ensure this doesn't happen, but added that the ultimate goal of every smoker should be to give up smoking."

269. In January 1986, the Minister of Health stated in a press release that:

> *"While the tar and nicotine values printed on cigarette packages in milligrams per cigarette are a satisfactory buyer's guide to selecting cigarettes with lower average yields, they do not reflect the fact that exposure varies with the volume of smoke inhaled. Hence, they are not good estimates of the hazard to individual smokers. There is a wide range of smoking behavior and a smoker may get more or less tar and nicotine than shown on the package, depending on how the cigarette is smoked."*

270. Such statements did not result in the creation of any duty on behalf of Canada towards Plaintiff Manufacturers, the Plaintiffs in the Principal Action or the Class Members.

V- THE ROLE OF AGRICULTURE CANADA

A) Legislative framework

271. Pursuant to section 95 of the *Constitution Act, 1867,* both the provincial legislatures and the Parliament of Canada may enact laws in relation to agriculture.

272. At all relevant times, Agriculture Canada, through its experimental farm stations, including the Delhi Research Station, has acted pursuant to its legislative mandate and in accordance with policy decisions taken from time to time.

273. The fundamental role of Agriculture Canada is to maintain and promote the growth, stability and competitiveness of the Canadian agriculture and agri-food sector thereby assisting growers in the domestic and international market.

274. Agriculture Canada's mandate does not, and never has extended to the manufacturing or selling of commercial products derived from agriculture products.

275. Agriculture Canada's legislative mandate extends to agricultural products and crops grown in Canada, including tobacco.

i- The Department of Agriculture and Agri-Food Act, R.S.C. 1985, c. A-9

276. The Department of Agriculture was established in 1868 pursuant to the *Department of Agriculture Act.*

277. The *Department of Agriculture and Agri-food Act* provides broad legislative authority to the Minister of Agriculture and Agri-food. Section 4 of the Act sets out the powers, duties and functions of the Minister which specifically include research related to agriculture:

> *"The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to*
>
> *(a) agriculture;*
>
> *(b) products derived from agriculture; and*
>
> *(c) research related to agriculture and products derived from agriculture including the operation of experimental farm stations."*

278. The relevant provisions of the Act remained essentially the same throughout the class period.

ii- The Experimental Farm Stations Act, R.S.C. 1985, c. E-16

279. The *Experimental Farm Stations Act ("EFSA")* was enacted in 1886 (S.C. 1886, c. 57). The relevant provisions of the EFSA remained essentially the same throughout the class period.

280. Section 8 of the EFSA provides that:

> *"Duties of officers*
>
> *8. Such officers of each farm station as are charged with the duty by the Minister shall:*
>
> *(c) test the merits, hardiness and adaptability of new or untried varieties of wheat or other cereals, and of field crops, grasses and forage-plants, fruits, vegetables, plants and trees, and distribute among persons engaged in farming, gardening or fruit growing, on such conditions as are prescribed by the Minister, samples of the surplus of such products as are considered to be specially worthy of introduction;*
>
> *[...]*
>
> *d) analyze fertilizers, whether natural or artificial and conduct experiments with those fertilizers, in order to test their comparative value as applied to crops of different kinds;*
>
> *[...]*

g) study the diseases to which cultivated plants and trees are subject and the ravages of destructive insects and ascertain and test the most useful preventives and remedies to be used in each case;

[...]

i) ascertain the vitality and purity of agricultural seeds."

281. Sections 9 and 10 of the EFSA provide that:

"Quarterly reports

9. The officer in charge of each farm station, or such other officer at each farm station as the Minister designates, shall, for the purpose of making the results of the work done thereat immediately useful, prepare and transmit through the director of that farm station to the Minister, for publication, at least once in every three months, a bulletin or progress report.

Annual report

10. The officer in charge of each farm station shall prepare and transmit through the director of that farm station to the Minister, on or before December 31 in each year, a full and detailed report of the work accomplished and of the revenue and expenditure at that farm station, which report shall be laid before both Houses of Parliament within the first twenty-one days of the next session."

282. The *Experimental Farm Stations Act* permits the establishment of experimental farm stations. Throughout the class period, there was a network of over 40 experimental farms and research stations located across Canada.

283. A large number of crops are grown commercially in Canada and new varieties of crops are continually being developed at experimental farm stations to, among other objectives, improve yield, quality, time to maturity and resistance to disease or insects.

iii- The Seeds Act, R.S.C. 1985, c. S-7 and the Seeds Regulations, C.R.C. c. 1400

284. The original *Seeds Act* was enacted in 1905 as the *Seeds Control Act*.

285. The *Seeds Act* and *Regulations* govern the testing, inspection, quality and sale of seeds in Canada, and provide the legislative authority for variety registration process in Canada.

286. In accordance with the *Seeds Act* and its predecessor legislation, the seed of a variety must be registered prior to being advertised or sold in Canada, except as provided by the *Seeds Regulations*.

287. The marketing of tobacco seeds in Canada is carried on by private seed companies and seed growers.

iv- The Agricultural Products Marketing Act, R.S.C. 1985, c. A-6

288. Canada has no control over the farming practices of tobacco. The sale and purchase of tobacco within the provinces is regulated by the provinces through their respective tobacco marketing boards.

289. The *Agricultural Products Marketing Act*, originally adopted in 1949, allows Canada to delegate, by way of Order in council, to provincial boards the authority to regulate marketing conditions for agricultural commodities in interprovincial and export trade. For flue-cured tobacco, Orders in council have been granted to provincial marketing boards in Quebec, Ontario, and Prince Edward Island, in 1961, 1967, 1975 respectively.

290. Throughout the class period, Ontario produced most of the flue-cured tobacco grown in Canada, the marketing of which was subject to Ontario legislation.

v- The Farm Products Marketing Act, R.S.O. (1990), c. F-9

291. The Ontario *Farm Products Marketing Act ("FPM Act")* sets forth the legal foundation of the regulated marketing system for farm products in Ontario.

292. In accordance with the FPM Act, the Ontario government provides Ontario farmers with the opportunity to market their commodities as a group through a compulsory marketing board system.

293. The Ontario Flue-Cured Tobacco Growers' Marketing Board was established pursuant to the *FPM Act* of Ontario in 1957.

294. The Office des producteurs de tabac jaune du Québec was established in 1958.

295. Pursuant to the federal *Ontario Flue-cured Tobacco Marketing (Interprovincial and Export) Regulations*, C.R.C. c. 186, no person shall buy tobacco from any person other than the Ontario Flue-cured Tobacco Grower's Marketing Board or a person to whom it has fixed and allotted a marketing quota. Furthermore, no person shall offer to sell or sell tobacco to any other person than the Ontario Flue-cured Tobacco Grower's Marketing Board or a person to whom it has fixed and allotted a marketing quota.

vi- Flue-Cured Tobacco Regulation R.R.O. 1990, REGULATION 374

296. Pursuant to the *Flue-Cured Tobacco Regulation*, Canadian tobacco purchased in Ontario by Plaintiff Manufacturers was graded based on different characteristics of the tobacco leaf such as intensity, leaf structure, maturity, green tolerance, uniformity, waste and crude.

297. At all relevant times, Plaintiff Manufacturers were free to purchase any grade of tobacco they wished, whether for the domestic or export market.

B) Agriculture Canada and Tobacco Research

298. Agriculture Canada did not grow tobacco or manufacture cigarettes for commercial purposes.

299. Beginning in the early 1900s, Agriculture Canada undertook research to improve tobacco crops to assist growers, pursuant to relevant legislation and policy decisions taken from time to time.

300. In 1909, pursuant to the *Experimental Farm Stations Act*, a first research station was established in Harrow, Ontario, to conduct studies on burley and flue-cured tobacco.

301. In 1933, the Delhi Research Station was established as a substation of Harrow to conduct research on tobacco, including the testing and development of tobacco varieties, soil management, insect, disease and weed control, to enable growers to increase quality, yield and efficiency of crop production as is the case with other crops in other research and experimental farm stations.

302. At all relevant times, the Delhi Research Station carried out research on the improvement of yield, quality and efficiency of tobacco crop production.

303. In addition to the foregoing, following the policy recommendations made by the Isabelle Committee in 1969, research towards the development of a less hazardous tobacco became part of the mandate of the Delhi Research Station but failed to produce any concrete results and ended in or about 1979.

304. Agriculture Canada researched varieties to maintain and promote the growth, stability and competitiveness of the Canadian tobacco agriculture thereby assisting tobacco growers in the domestic and international market.

305. Throughout the class period, approximately 15 of the tobacco varieties developed at the Delhi Research Station were registered pursuant to the *Seeds Act*; Plaintiff Manufacturers agreed to the registration thereof through their involvement in various committees established under the auspices of

the Ontario Agricultural Services Coordinating Committee of the Ontario Ministry of Agriculture, Food and Rural Affairs.

306. Plaintiff Manufacturers tested a number of characteristics of the varieties that were being developed.

307. Pursuant to the Tobacco Variety Licensing Guidelines, to be registered, a new variety had to be in some way superior to the existing check varieties which were selected to serve as benchmarks.

308. The varieties developed by Agriculture Canada demonstrated overall potential for improved quality and agronomic characteristics relative to previous varieties, including: yield; resistance to diseases such as black root rot, blue mold and weather fleck; suckering tendency; pesticides; leaf dimensions; levels of alkaloids; leaf drop-off; overturned and brittle leaves; maturing; and generally ease of handling and curing.

309. From time to time, Agriculture Canada sold, for a negligible fee, tobacco breeder seeds of the varieties it had developed and registered to seed producers; these monies were collected by the Receiver General of Canada.

310. From the early 1980s, most of the tobacco grown in Canada originated from tobacco varieties developed by Agriculture Canada, whereas prior to this date, the tobacco grown in Canada was grown mostly from American varieties.

311. Numerous factors over which Canada has no control affect the level of nicotine in the tobacco plant, such as climatic and soil conditions and farming practices, including, irrigation, fertilization, spacing of plants, time of harvesting, topping height, suckering and curing. In addition, different parts and leaves of the tobacco plants contain different levels of nicotine.

312. The tobacco used in commercial cigarettes manufactured by Plaintiff Manufacturers undergoes various manufacturing processes and therefore the characteristics of the tobacco found in commercial cigarettes are different from the tobacco grown in the field.

313. Some of the varieties developed at the Delhi Research Station had potentially marginally higher levels of nicotine than other varieties when measured under set conditions.

314. The level of nicotine in the tobacco plant is not directly related to the level of nicotine in the smoke of a commercial cigarette. Through the design features of their cigarettes, Plaintiff Manufacturers are able to fix and control the amount of nicotine they wish the cigarette to deliver. Plaintiff manufacturers are able to fix tar and nicotine yields of particular brands at

different levels notwithstanding that such brands utilize the same blend of tobacco.

315. Plaintiff Manufacturers were able to and did manufacture cigarettes with low tar and nicotine yields before the development and registration of new varieties by Agriculture Canada.

316. Plaintiff Manufacturers had control over the design and the yields of the cigarettes they sold in Canada, including the nicotine content of the tobacco blend, the quantity of tobacco in their cigarettes and the final yields of tar and nicotine to the smoker.

317. Moreover, in some cases, Plaintiff Manufacturers used the same blend of tobacco to manufacture cigarettes labeled as "light", "mild", "regular" and variations thereof, and giving different yields. This was done through "filtering and other technology" which was entirely within Plaintiff Manufacturers' control.

318. In addition, the tar to nicotine ratio of the smoke of commercial cigarettes is not related to the one that may have been measured from time to time by the Delhi Research Station in the smoke of the experimental cigarettes that were designed for testing purposes under set laboratory conditions.

319. A portion of tobacco grown in Canada was purchased by Plaintiff Manufacturers and leaf exporters for purposes of exports (*e.g.*: an average of 34% between 1977 and 1982 was exported). Canada was not involved in Plaintiff Manufacturers' choice of grades of tobacco that were exported.

320. Plaintiff Manufacturers sold cigarettes under the descriptors "light" or "mild" and variations thereof long before the introduction in the 1980's of tobacco varieties developed by Agriculture Canada.

321. The concept of reconstituted tobacco sheet was known to Plaintiff Manufacturers prior to the research done by Agriculture Canada on tobacco agricultural practices that would produce tobacco plants suitable for reconstituted sheet tobacco, which research was unsuccessful.

322. As of the mid 1980s, tobacco research at the Delhi Research Station steadily decreased; as of the 1990s, only one third of the research at the Delhi research Station was in regard to tobacco. The emphasis was increasingly on the development of alternate crops for tobacco replacement. In or around 2000, Agriculture Canada withdrew its support for tobacco research.

VI- CONCLUSION

323. The AGC is being sued by the Plaintiff Manufacturers in the Action in Warranty on the basis of the *Crown Liability and Proceedings Act*, R.C.S. 1985 c. C-50, as amended.

324. The AGC denies that the allegations in the Action in Warranty have in any manner caused or contributed to any losses or damages to the Class Members, as claimed by the Plaintiff Manufacturers.

325. At all material times and with respect to all matters pleaded, Canada was acting in a legislative, regulatory, and/or policy-making capacity, and therefore it cannot be liable.

326. Throughout the class period, the international public health community advocated policy measures similar to those taken by Canada to address the health problems caused by tobacco.

327. The legislative framework governing the Minister of Health and his department is directed towards protection of the health interests of the general public and provides no indication of a duty to Plaintiff Manufacturers or the Class Members.

328. The authority of the Minister of Health is focused on "the promotion and preservation of the health of the people of Canada", "the promotion and preservation of the physical, mental and social well-being of the people of Canada", "the protection of the people of Canada against risks to health and the spreading of diseases", and "investigation and research into public health, including monitoring of diseases". This focus on the health of the general public has been present since the first legislation of 1919.

329. The *TPCA and TA* place obligations, restrictions and prohibitions on tobacco manufacturers directed towards protecting the health of the general public, or broad constituencies within the public, such as young persons. The legislation specifically indicates that it is not intended to affect other legal obligations of tobacco manufacturers to warn consumers of the health hazards and effects of tobacco products. No intention to protect or promote the economic or commercial interests of tobacco manufacturers, or be mindful of their interests, can be gleaned from this legislation. To the contrary, the clear intention is to protect the general public from the deleterious health effects of the tobacco products marketed and sold by such companies, through the creation of various regulatory powers and authorities, which by their very nature may be inconsistent with tobacco companies' commercial interests.

330. The *Department of Agriculture and Agri-Food Act* similarly does not contain any indication of duties directed at the protection of the economic interests

of tobacco manufacturers or the interests of the Class Members. The legislation creates general authority of the Minister over matters relating to agriculture and research and provides no indication of a duty to Plaintiff Manufacturers or the Class Members.

331. Any duty that was assumed by Canada was in the nature of a public duty towards the Canadian public for the protection and promotion of public health.

332. The creation of a duty of care between Canada and Plaintiff Manufacturers and the Class Members would undermine Canada's ability to create and implement policies to protect public health.

333. Imposing a duty of care on Canada towards Plaintiff Manufacturers and the Class Members would be highly inconsistent with the duty to protect the interests of the public at large.

334. During the class period, Plaintiff Manufacturers' commercial interests conflicted with the policy and regulatory measures taken by Canada to protect public health.

335. The alleged development of tobacco varieties was within the mandate of Agriculture Canada and a part and parcel of Canada's response to the public health risk posed by tobacco, and the policy decision to reduce tar and nicotine in cigarettes.

336. In conducting research on tobacco varieties and interacting with the tobacco industry for that purpose, officials were acting pursuant to their general statutory authority and to policy decisions. Any finding of liability against Canada towards Plaintiff Manufacturers or Class Members would undermine legislative and policy initiatives directed towards protecting public health.

337. The protection of the public health against emerging health risks would be compromised if statutory discretion had to be exercised in a fashion which required government to be mindful of the economic interests of Plaintiff Manufacturers.

338. Public authorities must be free to further the public interest through research, regulatory and policy measures which may affect or constrain the actions of industry, without fear of liability to such companies.

339. Canada never took responsibility for Plaintiff Manufacturers' interests. In fact, from their perspective, Canada was an adversary.

340. All actions taken by Canada's officials were part of a series of policy responses and decisions intended to alter the behavior of both consumers and manufacturers and to protect public health.

341. Canada did not act in an advisory capacity to tobacco manufacturers.

342. Prior to 1988, Canada chose to utilize a voluntary compliance approach to tobacco control rather than direct regulation. Plaintiff manufacturers resisted most of the proposed changes to their conduct, as a result of which Canada moved to a direct regulation regime beginning in 1989.

343. Canada's research efforts were articulations of Canada's broader tobacco policies directed at educating the public as to the risks of smoking, discouraging both adults and youths from smoking, and informing the public, for health reasons, of the tar and nicotine yields of cigarettes.

344. The public health risk associated with tobacco products is not one that was created by Canada or that arises from the use of a public facility provided by Canada.

345. Plaintiff Manufacturers who control the design, the manufacturing and the marketing of their cigarettes and who profit from their commercial transactions are responsible for warning the consumer in respect of the associated health risks or for indemnifying smokers for damages resulting from their use of cigarettes.

346. Imposing a duty of care on Canada would create an insurance scheme funded by tax payers which was not the intention of Parliament.

347. Canada does not manufacture or market cigarettes and did not create the public health risks posed by these products. Its role was directed towards mitigating the effects of the public health problems arising from tobacco products.

348. Plaintiff Manufacturers controlled product design, manufacturing and marketing. They are responsible for warning the consumer in respect of the risks posed by cigarettes and for the sale thereof.

349. There is no "lien de droit" between the AGC and the Plaintiff in Warranty.

350. Pursuant to section 8 of the *Crown Liability and Proceedings Act*, the Crown is not liable in respect of anything done or omitted in the exercise of any power or authority exercisable by virtue of the prerogative of the Crown or conferred on the Crown by any statute.

351. The AGC pleads and relies on the *Crown Liability and Proceedings Act,* including sections 3, 8, 9, 10, 23 and 24.

352. The *Tobacco-Related Damages and Health Care Costs Recovery Act*, R.S.Q., c. R-2.2.0.0.1, the *Quebec Human Rights Charter*, R.S.Q., c. C-12, and the *Consumer Protection Act*, R.S.Q., c. P-40.1, are not applicable to the Crown for Canada.

353. Moreover, Canada is not a manufacturer under the *Tobacco-Related Damages and Health Care Costs Recovery Act*, the *Consumer Protection Act* or the *Civil Code of Quebec*.

354. There is no causal link between the damages claimed by Plaintiffs in the Principal Action and the involvement of Canada with regard to smoking and health, tobacco research and agronomy.

355. No servant of the Crown committed any fault for which Canada could be liable.

356. Further, or in the alternative, if Canada made any representation to Plaintiff Manufacturers, which is denied, Canada did not act negligently in making any such representation.

357. The AGC reserves all of its rights to amend its defence, in connection with the allegations of the Principal Action.

WHEREOF, THE DEFENDANT IN WARRANTY, THE ATTORNEY GENERAL OF CANADA, PRAYS THIS HONOURABLE COURT TO:

DISMISS the Action in Warranty, the whole with costs, including all costs incurred for the production, scanning, coding and communication of documents and all expert costs.

Montreal, April 6, 2011

(s) Gilbert Simard Tremblay

GILBERT SIMARD TREMBLAY

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COPIE CONFORME À L'ORIGINAL

GILBERT SIMARD TREMBLAY

NO : 500-06-000076-980

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

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ & AL.

Plaintiffs;

Vs.
JTI-MACDONALD CORP.
IMPERIAL TOBACCO CANADA LTD
ROTHMANS, BENSON & HEDGES INC.

Defendants;

AND
IMPERIAL TOBACCO CANADA LTD

Plaintiff in Warranty;

Vs.
ATTORNEY GENERAL OF CANADA

Defendant in Warranty.

DEFENCE OF THE ATTORNEY GENERAL OF CANADA TO THE ACTION IN WARRANTY

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