

CANADA

SUPERIOR COURT

(Class Action)

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No: 500-06-000076-980

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

Plaintiff

and

JEAN-YVES BLAIS

Designated member

vs.

JTI-MACDONALD CORP.

and

IMPERIAL TOBACCO CANADA LIMITED

and

ROTHMANS, BENSON & HEDGES INC.

Defendants

and

JTI-MACDONALD CORP. a corporation duly incorporated, having a place of business at 2455 Ontario Street East, City and District of Montreal, Province of Quebec, H2K 1W3

Plaintiff in Warranty

vs.

ATTORNEY GENERAL OF CANADA, Complexe Guy Favreau, East Tower, 200 René-Lévesque West, 9th floor, City and District of Montreal, Province of Quebec, H2Z 1X4

Defendant in Warranty

MOTION TO INSTITUTE PROCEEDINGS IN WARRANTY

IN SUPPORT OF ITS MOTION, THE PLAINTIFF IN WARRANTY JTI-MACDONALD CORP. (“JTIM”) STATES AS FOLLOWS:

I INTRODUCTION

THE PRINCIPAL ACTION

1. The Conseil québécois sur le tabac et la santé (the “Plaintiff/Representative”) and Jean-Yves Blais (the “Designated Member”) have instituted proceedings in a class action in damages against JTIM and other Defendant cigarette manufacturers (collectively the “cigarette manufacturers”), as appears from the Amended Motion to Institute Proceedings in a Class Action filed by the Plaintiff/Representative (the “principal action”), a copy of which is communicated herewith as Exhibit PW-1.
2. The Plaintiff/Representative and the Designated Member allege that the cigarette manufacturers manufactured and sold a product akin to a drug which they knew to be dangerous, which caused a powerful addiction and caused certain diseases amongst members of the Class, including *inter alia* lung, larynx and throat cancer and emphysema, or exacerbated such diseases.
3. The Plaintiff/Representative and the Designated Member make certain other specific allegations with regard to the cigarette manufacturers’ conduct extending over a period of almost 50 years. They allege that the cigarette manufacturers have, at different times:
 - (a) manipulated their tobacco products, to ensure that they contain a high nicotine level to ensure that consumers are addicted;
 - (b) initiated and maintained a scientific controversy on the effects of the tobacco products they manufacture and sell, while claiming the supposed benefits from their consumption;
 - (c) developed a common policy of systematic non-disclosure of the risks related to the consumption of these tobacco products;

- (d) developed a systematic joint policy of trivialization and negation of the risks and dangers related to the consumption of the tobacco products manufactured and sold by them; and
 - (e) developed a public relations “counter-discourse” campaign and have specifically targeted youth in their marketing of tobacco products;
4. JTIM denies all such allegations as are made against it in the principal action. In particular, JTIM states that it has manufactured and sold a legal product that at all relevant times complied in all material respects with all applicable regulation. Its products have at all such times provided the level of safety which a person would normally be entitled to expect. JTIM denies that its products have contained or otherwise suffered from any safety defect as supplied to consumers or that it has committed any fault with regard to the design, manufacture, promotion or sale of its products. JTIM further denies that it has caused any individual members of the Class, let alone the Class itself, to smoke, or to continue smoking. It denies that any safety defect or fault as alleged, all of which are denied, has caused any damage allegedly suffered by the Designated Member or any other member of the Class.
 5. JTIM repeats and relies on its Defence in the principal action, a copy of which is communicated herewith as Exhibit PW-2.
 6. As pleaded in the Defence, liability cannot be established and non-pecuniary and punitive damages cannot be awarded on a class-wide basis. JTIM specifically denies the allegation in paragraph 163 of the principal action that the Plaintiff/Representative and the Designated Member can prove with sufficient accuracy or particularity the aggregate amount of the claims of the Class members so as to entitle them to obtain collective recovery of damages, whether on the basis claimed at paragraphs 163 to 172 of the principal action or at all. For the reasons pleaded in JTIM’s Defence, the liability, if any and which is denied, of JTIM and the other cigarette manufacturers can only be determined upon individual proof in respect of each Class member of the

various facts and matters relevant to each such member as also pleaded therein.

7. JTIM further states that none of the statements of fact or allegations contained herein are intended to be, nor should they be construed as, admissions of any of the allegations or claims advanced by the Plaintiff/Representative and the Designated Member in their principal action.

THE CLAIM AGAINST THE FEDERAL GOVERNMENT

8. If, however, as alleged in the principal action, JTIM committed a fault or manufactured a product suffering from a safety defect so as to have caused any compensable damage allegedly suffered by the Class or any of its members, all of which is denied, then the Federal Government, as a result of the conduct of its officials working in its departments and agencies (the “Officials”) particularised herein, is liable to JTIM to the extent of any liability of JTIM to the Class or any of its members and is solidarily liable to the Class or any of its members for the reasons more fully explained hereunder.
9. The principal action puts in issue a wide range of activities and conduct relating to tobacco in Québec and in Canada over many years. The Federal Government, which at all material times was responsible for protecting the health and well being of Canadians, was an important player, fully participating in these activities, directing the actions of the industry and shaping the views and behaviour of the public and consumers.
10. In particular, the Federal Government engaged closely with the industry, gave advice and directions and made various representations and requests to cigarette manufacturers on smoking and health issues and with regard to the design, manufacture, promotion and sale of their products. These actions of the Federal Government played an important part in forming the rules of conduct for cigarette manufacturers, including JTIM, which they, acting reasonably, met at all material times.
11. There were two main groups of actors involved in the same for the Federal Government. The first group was the Officials of Health Canada, the successor

to the Department of National Health and Welfare, the Department of Pensions and National Health and the Products Safety Branch of the former Department of Consumer and Corporate Affairs (collectively referred to as “Health Canada”), established pursuant to the *Department of Health Act*, S.C. 1996, c.8 and predecessor statutes. At material times, Health Canada has had a statutory duty and responsibility under Section 4 of the *Department of Health Act* and predecessor sections to promote and preserve the health and well being of the people of Canada.

12. Health Canada made operational decisions and engaged in operational and commercial conduct through its Ministers, Deputy Ministers, its Health Services and Promotion Branch and its officials, its Health Protection Branch (including at material times the Tobacco Product Section, the Tobacco Bureau and the Non-Medical Use of Drugs Directorate) and its committees and inter-departmental committees and administrative heads, its Assistant Deputy Ministers and Executive Directors General and through other Officials known and unknown to JTIM. Ministers of Health who acted in ways material to this action include Mr Monteith, Ms LaMarsh, Mr MacEachen, Mr Munro, Mr Lalonde, Ms Begin and Mr Epp. Deputy Ministers of Health include Drs Cameron, Crawford, Morrison and LeClair. Assistant Deputy Ministers of Health include Dr A. J. Liston. Committee members include Drs Colburn and Watkinson. Other Officials include Dr Best, M. Palko, Dr Pett, Dr Chapman, Dr Draper, Dr Layton, J. Nightscales and G.B. Schreiber.
13. The second main group of actors for the Federal Government were the Officials of Agriculture Canada, established pursuant to the *Department of Agriculture and Agri-Food Act*, R.S.C., 1985, c.A-9, s.4, and predecessor statutes which have conferred broad powers, duties and functions with respect to agriculture, agriculture products, and research related to agriculture and products derived from agriculture including the operation of experimental farms.
14. Agriculture Canada made operational decisions and engaged in operational and commercial conduct through its Ministers, Deputy Ministers and Assistant

Deputy Ministers, and through its research divisions, committees and inter-departmental committees, as well as Officials of Agriculture Canada, known and unknown to JTIM, including those employed as research scientists at the Delhi Research Station. Ministers of Agriculture who acted in ways material to this action include Mr Whelan. Committee members include Dr Hamilton. Other Officials include B.B Migicovsky, B.F. Zilkey, L.S Vickery, R. Sims, P.W Johnson, Drs Pandey and Court at the Delhi Research Station, and W.H Cherry and Dr W.F Forbes at the University of Waterloo.

15. Separate and apart from their responsibilities under their respective governing statutes, Health Canada and Agriculture Canada have assumed or otherwise been subject to certain other duties, obligations and rules of conduct including those arising from the conduct of Officials as particularized herein, in relation to consumers in Québec, including members of the Class, and in relation to cigarette manufacturers, including JTIM, in particular in respect of smoking and health issues.
16. In furtherance of its role in the tobacco industry, and more particularly with respect to smoking and health issues, the Federal Government, through its Officials, implemented a number of operational programmes and engaged in numerous other operational activities, including:
 - (a) research into the potential risks of smoking, including the risks of habituation, dependence or addiction;
 - (b) monitoring and assessing the level of awareness of consumers in Canada, including those in Québec, of the potential risks of smoking;
 - (c) considering the need to educate and advise consumers as to the properties of cigarettes and to inform and/or remind those consumers of the potential risks of smoking;
 - (d) providing such education, advice and information and/or reminders at certain material times as was considered necessary;

- (e) imposing taxes for the purpose of obtaining the majority of the revenue from the sale of cigarettes to consumers in Canada, including members of the Class, and at levels intended to influence the market for cigarettes in Canada;
- (f) giving advice, recommendations and directions to cigarette manufacturers as to whether printed warnings on packages of cigarettes and other advertising media were necessary or desirable;
- (g) giving advice, recommendations and directions as to the form of such warnings;
- (h) giving advice, recommendations and directions to cigarette manufacturers on the form of packaging to be used by manufacturers;
- (i) giving advice, recommendations and directions to cigarette manufacturers in respect of advertising and promotion of cigarettes;
- (j) research into the chemistry of tobacco smoke and fundamental research into smoking and health effects;
- (k) research into and analysis of the chemical and physical composition of tobacco for the purpose of determining which varieties produced the quality required by manufacturers and consumers in Québec, including members of the Class;
- (l) advising and/or directing cigarette manufacturers regarding the content of nicotine in tobacco to be used in tobacco products sold in Québec;
- (m) since 1971, implementing the “Less Hazardous Cigarette Programme” including the Delhi Tobacco and Health Bio-Assay Programme; and
- (n) advising and directing the cigarette manufacturers to design and develop potentially less hazardous cigarettes and, indeed, taking a position of leadership in relation to the same;

- (o) research regarding nicotine and tobacco varieties for the purpose of providing tobacco manufacturers with a level of nicotine in the leaf believed by Officials to be suitable for use by manufacturers in tobacco products;
 - (p) the development, promotion and commercial licensing to cigarette manufacturers of varieties of tobacco leaf, including genetically modified tobacco leaf, for use in the manufacture of cigarettes sold in Québec, with a view, *inter alia*, to reducing the potential health risks of smoking;
 - (q) giving advice, recommendations and directions to cigarette manufacturers on the need for them to promote cigarettes to consumers in Québec, including members of the Class, with a lower yield of tar, and
 - (r) publishing the results of its research in various journals and publications including Tobacco Science, the Canadian Journal of Plant Science, the Canadian Journal of Genetics and Cytology and The Lighter, its own publication;
17. Without limiting the foregoing, Officials of the Federal Government, based on their knowledge of smoking and health matters, their engagement in the activities mentioned above and their relationship with Québec consumers and with cigarette manufacturers, including JTIM:
- (a) made certain representations and provided certain information and advice about the properties of cigarettes, including their habituating, dependency creating or addictive properties, and the potential health risks of smoking to consumers in Québec, including members of the Class, intending that they would rely, and they did rely, on such representations, information and advice, and
 - (b) made certain representations and requests, provided certain information and advice and gave direction to cigarette manufacturers,

including JTIM, in relation to the same intending that they would comply with such requests and directions and would rely on such representations, information and advice. JTIM did rely on these representations, information and advice and did comply with these requests and directions.

18. The representations made and information provided by cigarette manufacturers, including JTIM, to consumers in Québec, including the members of the Class, concerning the potential risks of smoking, which were similar to the representations made and information provided by the Federal Government on the same and/or in respect of which the cigarette manufacturers, including JTIM, were advised or directed by the Federal Government, are now alleged to have caused the prejudice suffered by the members of the Class.
19. Furthermore, again without limiting the generality of the foregoing, the Federal Government, through its Officials, acting clearly within the operational realm in the context, *inter alia*, of the activities particularised at paragraph 16 above, engaged closely with the industry, gave advice and directions and made representations and requests to cigarette manufacturers in respect of the design, manufacture, marketing and promotion of tobacco products to consumers in Québec, including members of the Class, which are now alleged by the Plaintiff to have suffered from a safety defect causing the damage claimed to be suffered by the members of the Class.
20. Therefore, based on the facts set forth herein, if JTIM is liable to the Class or any of its members, which is denied, then the Federal Government is liable to JTIM and is solidarily liable to the Class or any of its members for the damage caused by the fault of its agents or servants or Officials or resulting from a thing manufactured or supplied by it under the *Crown Liability and Proceedings Act*, R.S.C. 1985, c-50, and JTIM has a recourse in warranty against the Federal Government for any condemnation (in capital, interest, and costs) rendered against JTIM in the principal action and/or for a proportionate share of any such liability.

II EARLY OPERATIONAL CONDUCT OF OFFICIALS PRIOR TO THE SMOKING AND HEALTH CONFERENCE IN 1963

21. As early as the 1950s, it was widely known by consumers in Québec, including members of the Class, and the Federal Government that smoking was potentially harmful to health.
22. In 1908, Parliament enacted the Tobacco Restraint Act 7-8 Edw VII c. 73, which prohibited the sale of tobacco products to persons under the age of 16 years.
23. In the 1940s, Officials published a booklet, in a series of publications on health, entitled “Smoking” which outlined potential health risks associated with smoking and the “habituating” or “addictive” properties of cigarettes.
24. In 1945, a study of the role of nicotine in the smoking “habit” sponsored by a cigarette manufacturer was published in a scientific journal and then summarized by Officials in Agriculture Canada’s publication, “The Lighter”.
25. The study suggested that, for many individuals, nicotine was a major factor in their smoking habit, although the study also concluded that it was “equally certain” that “with many individuals nicotine is not a factor in their cigarette habit” and that, even among those for whom nicotine was a “major factor...a cigarette containing no nicotine would be grudgingly accepted as better than no cigarette at all.”
26. The understanding of consumers in Québec, including members of the Class, and the understanding of Officials of the nature of the potential risks associated with smoking was enhanced during the 1950s when the ongoing debate, as to whether causation could be scientifically established, gained prominence. Epidemiological studies began to appear in the public and scientific literature reporting a statistical association between smoking cigarettes and a rising incidence of lung cancer. These studies were later supplemented by clinical and experimental studies that were regarded by some members of the scientific and public health communities as providing

additional evidence that implicated smoking as a potential cause of lung cancer and other diseases. Officials knew or ought to have known of these studies at the time of their publication.

27. In 1954, the Minister of National Health and Welfare informed Parliament that the Federal Government had allocated funds to the National Cancer Institute of Canada, as the agency through which clinical and statistical research into smoking and health was to be directed. Officials in various Federal departments, such as the Dominion Bureau of Statistics, Indian Health Services and Veterans Affairs, also co-operated with and assisted the National Cancer Institute in respect of smoking and health issues. At the request of Officials, JTIM provided substantial grants, beginning in the early 1950s, to support independent research to be conducted under the auspices of the National Cancer Institute of Canada into the relationship between tobacco smoke and cancer and the potential identification of disease-causing constituents in tobacco smoke. These grants were renewed on an annual basis and ceased only at the insistence of the National Cancer Institute of Canada.
28. Between 1954 and 1962, a number of professional medical bodies and foreign governments made statements regarding the association between lung cancer and smoking which were known or ought to have been known to Officials. On occasion, Officials disseminated these statements to other parties, including the public in Québec.
29. In 1954, the British Government announced a “strong presumption” that smoking is a cause of cancer.
30. In 1955, Officials commissioned and undertook a major epidemiological study known as the “Veterans Study” to examine the relationship between smoking and disease.
31. In 1957, the U.S. Surgeon General published a statement in which he identified an “increasing and consistent body of evidence that excessive cigarette smoking is one of the causative factors in lung cancer”.

32. In 1957, Health Minister Monteith also advised Parliament that it was premature to expect conclusions from the Veterans Study as to the cause of lung cancer.
33. In July 1957, the Deputy Minister of Health, advised or requested cigarette manufacturers to embark on a programme of “selective reduction”; namely, to support independent research directed to identifying the presence in cigarette smoke of compounds or groups of compounds that might be responsible, in whole or in part, for the potential risks of smoking and to developing means of removing or greatly reducing yields of the same.
34. In 1958, the National Cancer Institute of Canada stated that “while it has not been established that cigarette smoking is a cause of lung cancer studies show that smokers have a greater risk”. In 1960, however, Dr Layton, the Principal Medical Officer, Research Development Health Canada, still expressed the view that “most experts” had reservations about the causal link between smoking and lung cancer.
35. In March, 1962, the Royal College of Physicians, in London in March, 1962 concluded that:

Cigarette smoking is a cause of lung cancer and bronchitis, and probably contributed to the development of coronary heart disease and various other less common diseases.
36. In April 1962, the Dominion Council of Health, a body in which the Federal Government and all the Provinces were represented, stated that “overwhelming evidence” showed a direct relationship between cigarette smoking and lung cancer.
37. At a November, 1962 meeting of the Dominion Council of Health, Officials recommended the implementation of a national smoking and health programme to include:
 - (a) cooperation among Federal, Provincial and local authorities to inform and/or remind the public generally, in particular, medical professionals,

parents, young people and school children, of the potential risks of smoking;

- (b) restriction of cigarette advertising;
- (c) a mandatory warning of potential risks of smoking;
- (d) restriction of the production of tobacco and of its sale or use, particularly with respect to young people; and
- (e) collaboration with the tobacco industry to eliminate or reduce the deleterious effects of smoking.

38. In April 1963, at the request of Officials, the Dominion Council of Health recommended that the Minister of National Health and Welfare undertake a national health education programme consistent with the recommendations described in paragraph 33 herein and emphasized that it was essential for Provincial and Federal health departments to work together to inform and/or remind consumers, including those in Québec and including members of the Class, of the potential risks of smoking.
39. Officials undertook or refrained from undertaking smoking and health initiatives based upon their independent judgment about the relationship between smoking and disease. In doing so, Officials knew, or ought to have known, of and to have taken into account, the research carried out at that time relating to the properties of cigarettes and the potential risks of smoking.
40. During this period and for decades thereafter, Officials, with full knowledge of the material facts necessary to support a proper judgment, and on the basis of definitions of “addiction” and “habit” accepted in the scientific and public health community, endorsed the view that smoking was properly to be considered a habit and not an addiction.
41. During this period of time, the cigarette manufacturers met regularly with Officials. The Officials made certain requests and gave advice and directions to cigarette manufacturers on how they might initiate and further medical

research and design a cigarette that could reduce the potential health risks from smoking. JTIM and other cigarette manufacturers relied on the views and advice of these officials and complied with their requests and directions.

42. The advice, requests or directions of Officials, and JTIM's subsequent reliance and actions thereon, were reasonable and lawful in the circumstances. If, however, insofar as it is alleged in the principal action that, before 1963, JTIM committed faults by failing to inform consumers in Québec, including members of Class and/or inadequately informing them about the properties of cigarettes or the potential risks of smoking, or with respect to its research or cigarette design or if it designed or manufactured a product suffering from a safety defect, so as to have caused any damage allegedly suffered by the Class or any of its members, all of which is denied, then the Federal Government, as a result of the conduct of its Officials particularised in paragraphs 21 to 41 above, is liable to JTIM to the extent of any liability of JTIM to the Class or any of its members and is solidarily liable to the Class or any of its members.

III THE 1963 NATIONAL CONFERENCE ON SMOKING AND HEALTH AND THE FEDERAL GOVERNMENT'S CONDUCT

A. Overview of the National Smoking and Health Programme

43. In June 1963, Ms LaMarsh, then Minister of National Health and Welfare, made a public statement that "there is sufficient evidence that cigarette smoke is a contributory cause of lung cancer and it may be associated with chronic bronchitis and coronary heart disease". She also stated that the Federal Government had "a duty to inform the public of the risk to health of cigarette smoking" and that special efforts should be made to dissuade children and adolescents from acquiring the smoking habit. Ms LaMarsh announced that a conference with representatives of the Provinces, health agencies and professionals as well as cigarette manufacturers would be held to address initiatives directed to the potential risks of smoking.
44. At or following this Conference, Officials expressly acknowledged that it was the duty of Health Canada to ensure that smokers were properly and

adequately informed of the potential risks of smoking and the properties of cigarettes.

45. Subsequently, Officials at Health Canada developed a national smoking and health programme (hereafter the “National Programme”) which was intended to:
 - (a) inform and/or remind smokers and potential smokers about the potential risks of smoking;
 - (b) encourage smokers to smoke in moderation or stop smoking;
 - (c) dissuade non-smokers, particularly children and adolescents, from starting to smoke;
 - (d) conduct research into manufacturing a potentially less hazardous cigarette; and
 - (e) conduct research into the extent and nature of smoking.
46. Two committees were established under the chairmanship of Health Canada Officials to develop the National Programme, which was implemented through or under the direction of Health Canada Officials, namely, the Technical Advisory Committee on Health Education Concerning Smoking Hazards and Technical Committee on Research Concerning Smoking Hazards.
47. The Technical Advisory Committee on Health Education Concerning Smoking Hazards, under the chairmanship of Health Canada Officials and comprised of other Officials, as well as representatives of the Provincial Governments and representatives of cigarette manufacturers, began meeting in January 1964. The Committee reviewed current approaches to education about smoking. It recommended the components of an effective programme to inform and/or remind smokers and non-smokers of the potential risks of cigarette smoking to dissuade young people from smoking. The Committee addressed matters such as cigarette advertising and promotion practices, warnings, labelling of cigarette packages and smoking on television.

48. The Technical Committee on Research Concerning Smoking Hazards also began meeting in January 1964. It conducted research to develop, improve and evaluate the components of the National Programme. Under the chairmanship of Health Canada Officials, it was composed of experts in various disciplines including sociology, psychology and epidemiology and included Officials of Health Canada expert in those disciplines.
49. Health Canada, through its Officials, asserted and maintained, throughout the material time, leadership in developing and executing smoking and health initiatives, including the National Programme, in which it requested and directed the tobacco companies to play an active but subordinate part. This included acquiring knowledge of all material aspects of smoking and health issues including through epidemiological studies, clinical and experimental studies, studies in to the chemical composition of tobacco and tobacco smoke, techniques of measuring smoke constituents, as well as techniques for developing and manufacturing cigarettes and studies intended to consider smoking behaviour, including in relation to habituation and compensation.
50. At the 1963 National Conference on Smoking and Health, the Federal Government also announced a 5-year, anti-smoking budget starting in 1964. At the same time, the Federal Government was receiving large amounts of money from tobacco taxes. In 1962, the Federal Government received approximately \$420million from tobacco taxes, which was 7% of the Federal Government's income in that year.
51. In 1963, at the request of Ms LaMarsh, a committee of cigarette manufacturers was established informally to represent the position of the Canadian tobacco industry at the 1963 National Conference on Smoking and Health. This committee later developed into the Canadian Tobacco Manufacturers Council ("CTMC"). JTIM was, at all material times, a member of the CTMC.
52. It is noteworthy that, despite the conclusions of the 1963 National Conference on Smoking and Health, in 1965, Officials of Health Canada concluded that Canadian consumers, including members of the Class, had been adequately

informed and were aware of the potential risks of smoking. Officials advised certain cigarette manufacturers that it was unnecessary or inadvisable for the them to issue definitive statements to consumers, at that time, concerning the relationship between smoking and health.

53. If and to the extent that JTIM and other cigarette manufacturers had obligations to provide information to consumers, including members of the Class, about the properties of cigarettes and the potential risks of smoking the Federal Government had the same or similar obligations. It was the Federal Government's further obligation, where it provided such information, to ensure that such information was adequate and correct.
54. In undertaking all its initiatives as pleaded herein, the Federal Government was subject to the obligations pleaded at paragraph 53 above and to the obligation to take fully into account the knowledge and research into the properties of cigarettes from time to time available in providing information to the public on smoking and its risks and in conducting or sponsoring of research into the development and manufacture of potentially less hazardous cigarettes and in giving advice or making requests and directions to the tobacco companies in respect of the same.

B. Informing Smokers and Non-Smokers of the Properties of Cigarettes

55. In 1964, 1967 and 1968, Officials repeated that it was the duty of health agencies, including Health Canada, to inform the public of the potential risks of smoking.
56. During the same period, the National Programme was implemented through a variety of means.
 - (a) Officials routinely participated in nationwide health education programmes relating to cigarette smoking;
 - (b) school programmes and other information and educational means were adopted to inform and educate children.

- (c) consumers in Québec, including members of the Class, were informed and/or reminded of the potential risks of smoking and the properties of cigarettes through media or intermediaries such as public interest groups and medical professionals.
 - (d) the level of awareness of consumers in Québec, including members of the Class, of the potential risks of smoking was monitored and assessed.
 - (e) Officials also established cooperative working relationships with Provincial Governments and national or local organisations committed to the objectives of the National Programme.
 - (f) these efforts were co-ordinated through the Technical Advisory Committee on Health Education Concerning Smoking Hazards and through an internal committee on Health Canada on Smoking and Health.
57. In or about April 1964, on the recommendation of the Technical Advisory Committee on Health Education Concerning Smoking Hazards, Officials published a Smoking and Health Reference Book (Canada) which was widely circulated to health professionals and others for the purpose of informing and/or reminding consumers in Québec, including members of the Class, about the properties of cigarettes and the potential risks of smoking.
58. In 1964, a Teachers' Information Kit was prepared as part of the National Programme. The Teachers' Information Kit was prepared in conjunction with Provincial authorities, and was made available to schools in Canada. It adequately informed and/or reminded children and adolescents of the potential risks of smoking and the properties of cigarettes.
59. Officials further informed and/or reminded children and adolescents of the potential risks of smoking and the properties of cigarettes through monthly advertisements to secondary school students.

60. Officials also sponsored National Film Board films including, “Let’s Discuss Smoking” and a 1965 Canadian Youth Conference on Smoking and Health, and provided poster publications, film strips and film clips circulated to children and adolescents in Canada.
61. In 1967, Health Canada stated that it had been and continued to be the duty of “public health officials” to implement a “preventative programme” in respect of smoking.
62. Officials informed and/or reminded consumers in Québec, including members of the Class, of the potential risks of smoking and the properties of cigarettes through posters, publications, bibliographies, news releases, radio promotions, television commercials, audio visual aids and by encouraging newspapers to publish articles presenting the Federal Government’s position on smoking and health.
63. During this period, the cigarette manufacturers also met regularly with Officials. The cigarette manufacturers complied with the requests and directions of Officials at that time including complying with a request to form an ad hoc committee to represent the industry at the 1963 National Conference on Smoking and Health.
64. The potential risks of smoking and the properties of cigarettes were already known to consumers in Québec, including members of the Class, before the National Programme. The information provided under the National Programme further ensured that consumers in Québec knew of the properties of cigarettes and the potential risks of smoking.
65. If, however, as alleged in the principal action, JTIM committed a fault by inadequately informing consumers in Québec, including members of the Class, about the properties of cigarettes or the potential risks of smoking, or manufactured or supplied a product suffering from a safety defect, so as to have caused any damage allegedly suffered by the Class or any of its members, all of which is denied, then the Federal Government, as a result of the conduct of its Officials particularised in paragraphs 43 to 63 above, is

liable to JTIM to the extent of any liability of JTIM to the Class or any of its members and is solidarily liable to the Class or any of its members.

C. Printed Warnings

66. In 1965, warning label legislation was enacted in the United States.
67. At that time, Officials, in implementing smoking and health policies, concluded that warnings were not necessary, would be ineffective, were undesirable and could be counterproductive. In particular, in May 1965, the Deputy Minister of Health asserted to certain cigarette manufacturers that the labelling of cigarette packages with warnings was unrealistic and “silly”.
68. In 1965, the position of Officials was that public awareness of the potential risks of smoking was ubiquitous, and this view of officials was communicated to the tobacco companies.
69. In 1968, the Parliamentary Committee on Health and Welfare (the “Isabelle Committee”) was charged with the responsibility to review several Bills relating to smoking and health and report to Parliament. The Isabelle Committee reported late 1969. It recommended that several possible forms of printed warnings, despite widespread awareness of the properties of cigarettes and the potential risks of smoking, including warnings of dependency, be placed on all cigarette packaging and advertising and promotional materials on cigarette vending machines.
70. The Isabelle Committee concluded that the precise wording of the warnings should only be determined after further study and consultation, including possible testing across Canada.
71. Officials considered and rejected the warnings initially favoured by the Minister of Health and also rejected those recommended by the Isabelle Committee. Instead, in June, 1971, the Federal Government introduced Bill C-248 which, if enacted, would have required a warning on cigarette packaging in the following form:

Warning: Danger to health increases with the amount smoked, avoid inhaling.

72. This proposed warning reflected the judgment of Officials as to the terms of a warning they considered to be effective to inform and/or remind smokers of the potential risks of smoking and the properties of cigarettes. Bill C-248 was not enacted into law.

73. In September 1971, the CTMC, after negotiations and in response to a request by Officials, announced that, effective about April 1972, its then members would place a warning on cigarette packaging. The warning that was placed on cigarette packages, starting in about May 1972, was as follows:

Warning... the Department of National Health and Welfare advises that danger to health increases with amounts smoked.

74. The wording of this warning was insisted upon by the Minister of Health and was derived from the language of Bill C-248, save for the deletion of the reference to “avoid inhaling” and with the inclusion of an attribution of the warning to the Department of Health and Welfare.

75. In December 1972, Officials requested the inclusion of the phrase, “avoid inhaling” on packaging and requested the same wording be used in advertising, which request gave rise to a series of discussions between Officials and the CTMC until changes were introduced in 1975.

76. Numerous surveys, including those conducted by Officials, confirmed that public awareness of the potential risks of smoking made it unnecessary to place warnings on cigarette packages and advertising.

77. The Federal Government reasonably and lawfully determined that warnings on cigarette packages were unnecessary at all material times that such determinations were made. Between 1968 and 1972, the Federal Government reasonably and lawfully conducted consultation and study on the precise wording of a warning. If, however, as alleged in the principal claim, JTIM committed a fault by not providing warnings on its cigarette packages before 1972, or manufactured and supplied a product suffering from a safety defect,

so as to have caused any damage allegedly suffered by the Class or any of its members, all of which is denied, then the Federal Government, as a result of the conduct of its Officials particularised in paragraphs 66 to 76 above, is liable to JTIM to the extent of any liability of JTIM to the Class or any of its members and is solidarily liable to the Class or any of its members.

78. If a warning on cigarette packages and other materials was ever necessary to inform consumers, including members of the Class, as to potential risks of smoking, which is denied, the warning agreed to and mandated by Officials and given to consumers, including members of the Class, in December 1972 was sufficient to inform them adequately and was reasonable and lawful in the circumstances. If, however, as alleged in the principal action, JTIM committed a fault by providing only an inadequate or ineffective warning or supplied a product suffering from a safety defect so as to have caused any damage allegedly suffered by the Class or any of its members, all of which is denied, then the Federal Government, as a result of the conduct of its Officials particularised in paragraphs 66 to 76 above, is liable to JTIM to the extent of any liability of JTIM to the Class or any of its members and is solidarily liable to the Class or any of its members.

D. Monitoring Advertising and Promotion

79. At material times, Officials monitored the advertising and promotional practices of the cigarette manufacturers to ensure that they were consistent with the National Programme. In 1964, Officials commissioned their own analysis of Canadian tobacco products advertising and promotion and at material times thereafter, requested changes to those practices to be consistent with the National Programme.
80. As early as 1962, at the request or direction of Officials, JTIM agreed not to advertise or promote its cigarettes on the basis of express or implied health claims about the safety or relative safety of its cigarettes, and, in particular, not to participate in a US-style “tar derby” in which different brands of cigarettes

were promoted on the basis of reducing machine-measured tar and nicotine yields.

81. In 1964, JTIM and other cigarette manufacturers entered into the Cigarette Advertising Code. The contents of this document were developed in consultation with and were endorsed by Officials. The purpose of the Cigarette Advertising Code was to regulate the advertising and promotion of cigarettes in Canada and to explicitly prohibit *inter alia*:
 - (a) any claims by cigarette manufacturers that smoking a particular brand promotes physical health or that smoking a particular brand was better for health than smoking any other brand;
 - (b) youth advertising; and
 - (c) certain forms of “life-style” advertising.
82. From time to time, the cigarette manufacturers amended the voluntary advertising codes, with the knowledge and assent of Officials, to reinforce the principles that cigarette advertising and promotion should not target underage smokers, make implied or explicit health claims about the relative safety of different brands of cigarettes or depend on “life-style” promotion.
83. At material times, Officials agreed that the advertising codes established promotional and advertising practices that were consistent with their approval to public education or smoking risks.
84. The advertising and promotion permitted under the advertising codes as directed, agreed to and endorsed by Officials were reasonable and lawful in the circumstances. JTIM complied with the various advertising codes in effect from time to time in all material respects and at all material times, and therefore, did not commit any fault as alleged, or at all. If, however JTIM’s advertising or promotion constituted a fault or if JTIM manufactured or supplied a product suffering from a safety defect so as to have caused any damage allegedly suffered by the Class or any of its members, all of which is denied, then the Federal Government, as a result of the conduct of its Officials

particularised in paragraphs 79 to 83 above, is liable to JTIM to the extent of any liability of JTIM to the Class or any of its members and is solidarily liable to the Class or any of its members.

IV. FURTHER EVOLUTION OF THE FEDERAL GOVERNMENT'S ROLE IN THE TOBACCO INDUSTRY

A. Introduction of the Less Hazardous Cigarette and Smoking Programme

85. By the mid-1960s, the international and Canadian scientific consensus was that lowering the tar yield of tobacco smoke would likely reduce the incidence of tobacco related disease in the population of smokers. This view was later reinforced by, and Officials accepted, the scientific consensus based upon their independent assessment of epidemiological evidence. This assessment correlated the potential risk of contracting smoking related disease to tar yields as measured by standard machine testing methods. It also contained an independent analysis of studies of smoking behaviour and the effect on deliveries of tar to the smoker.
86. In the mid-1960s, Officials at Health Canada and Agriculture Canada explored ways to reduce tar in tobacco smoke. This approach reflected the conclusion of Officials that the identification and removal from tobacco smoke of specific toxic constituents (“selective reduction”) was unlikely to yield satisfactory results and that a programme of general reduction of tar exposure might better achieve a reduction in the incidence of disease.
87. In or about late 1966, Officials of Health Canada began to collect information about the yields of different brands of Canadian cigarettes in order to analyse the implications of that information.
88. Further, during 1966, Officials at Health Canada, including Dr Pett, Dr Colburn, Deputy Minister Crawford and Minister of Health MacEachen, examined whether the National Programme should be changed in a variety of ways. These included providing information about tar and nicotine yields to smokers, an approach that had previously been rejected, and setting maximum

tar and nicotine yields for Canadian cigarettes by means of differential taxation to influence smokers in their choice of brands.

89. At that time, Officials of Health Canada concluded that, notwithstanding the knowledge of the public as to the potential risks of smoking, a portion of current smokers would choose to continue to smoke and that a portion of non-smokers would choose to begin to smoke.
90. Officials took steps to provide information to smokers to guide them in making choices about their smoking behaviour. This information encouraged smokers to choose brands of cigarettes with lower yields of tar and nicotine as measured by standard testing methods. Officials also provided information to smokers about tar, nicotine and carbon monoxide yields as measured by standard testing methods, smoking behaviour and as to the unreliability of standard testing methods using machines to determine the exposure of individual smokers.
91. Officials also gave advice, made requests or gave directions to cigarette manufacturers involving the development and promotion of light and mild products and the use of standard testing machines. At the same time, and in conjunction with Health Canada, Officials of Agriculture Canada were developing tobacco varieties particularly suitable for use in lower tar products that were sold in Canada, including in Québec.
92. Beginning in the late 1968, Officials of Health Canada, including the Minister of Health, began, as further particularized herein, to induce smokers to select, lower tar products. This practice was endorsed by the Isabelle Committee in 1969.
93. Officials also provided information to consumers, including members of the Class, to discourage the consumption of higher tar brands and to encourage smokers to switch to lower tar products.
94. On November 20, 1968, Officials of Health Canada published tables showing the tar and nicotine yields of cigarette brands sold in Canada (the “League

Tables”). This information was published so that smokers could compare the tar and nicotine yield of cigarette smoke on a brand-basis and thereby to encourage smokers to switch to lower tar products. Officials of Health Canada continued to publish League Tables, from time to time, until 1986.

95. In 1968, Dr Chapman of Health Canada confirmed to representatives of the tobacco growers and to cigarette manufacturers that Officials of Health Canada intended to protect the health of smokers. This included the implementation of a programme to reduce the tar yield in cigarette smoke and to take other measures to promote the consumption of light and mild products. One of these measures was the publication of the League Tables.
96. The information contained in the League Tables was generated by a testing protocol selected in 1968 by Officials that measured the tar and nicotine yields in the smoke of particular brands of cigarettes consistently and reproducibly over time. This protocol was recommended by Officials and was ultimately agreed to by the cigarette manufacturers.
97. Officials had the principal role in the collection of tar and nicotine information and in the publication of such information and in advising or requesting or directing manufacturers to print that information on cigarette packaging and advertising.
98. Given the variations in individual smoking behaviour, it was never the purpose of the testing protocol to measure tar and nicotine deliveries to particular individual smokers. Rather, the testing protocol created a single, standardized test to ensure consistency and reproducibility and to provide smokers, with comparative brand information. This testing protocol became a basis for the tar nicotine information provided to smokers, including members of the Class, by or at the direction of Officials, throughout the material period. Officials knew or ought to have known at material times that the machine-measured yield did not and could not measure the tar and nicotine yields to particular consumers including individual Class members. The third League Table published in 1969 expressly stated that machine measurement may not be an

accurate measure of individual exposure to tar as individual smoking behaviour will vary.

99. Notwithstanding the known shortcomings of the League Tables to indicate tar and nicotine deliveries for any particular consumer, Officials continued to publish League Tables from time to time until 1986. In publishing the League Tables, Officials disclosed the parameters of the standard testing protocol that was used. That information was widely publicized in the media and elsewhere and was used by health professionals and others in advising consumers in Québec about the potential risks of smoking, the properties of cigarettes and in encouraging smokers to switch to lower yield products.
100. Officials, with the assistance initially of the University of Waterloo, played the principal role in the collection of tar and nicotine information, the publication of such information and requests that it be printed on cigarette packaging and advertising.
101. When the League Tables were published by Officials, they were accompanied by representations or advice to smokers. In particular, continuing smokers were advised, typically by the Minister, not to be concerned about small differences in tar and nicotine yields, that brands could be compared within test periods by ranking brands in relation to others, that the tables were to be used by smokers to help reduce exposure to smoke constituents, but that smokers should not rely on the brand of cigarette as the only way to reduce exposure, and that smokers could reduce exposure by changing the manner in which they smoked a cigarette.
102. Smokers were advised in the League Tables that the amount of tar and nicotine inhaled by a smoker depended upon how the smoker smoked the cigarette as well as the tar and nicotine yield of the cigarette, and that the reduction in tar and nicotine intake to be obtained by choosing lower tar and nicotine brands might not be achieved if more cigarettes were smoked, more puffs taken, or cigarette smoke was inhaled more deeply or smoked to a shorter butt length;

smokers were thereby advised of the means by which any possible “compensation” could be avoided.

103. Publication of the League Tables by Officials was temporarily suspended in 1975 when, at the request or direction of Officials, the cigarette manufacturers agreed to publish tar and nicotine yields on all cigarette packages and on advertising, as measured by the same or comparable testing protocol which had been selected by Officials for use in the League Tables. Officials monitored the accuracy of the information on the packages and advertising.
104. On the advice, request or direction and with the active guidance and assistance of Officials, the cigarette manufacturers designed and developed cigarettes that complied with the maximum limits established by Officials and as a result delivered lower average tar yield as measured by the standard testing methods. The maximum sales weighted average tar and nicotine in cigarette smoke was lowered in stages until 1984. The design features which lowered the tar and nicotine yield of cigarette smoke as measured by standard testing methods were known to Officials. The design features were applied to all cigarettes so that the tar and nicotine yields decreased materially from the early 1970s to the mid 1980s.
105. At material times, Officials knew of advances in medical and scientific knowledge on matters pertaining to the smoking of tobacco and its potential risks, including matters relating to cigarette design. Without limiting the generality of the foregoing, those Officials knew of research relating to the so-called phenomenon of smoker “compensation”. The Federal Government sponsored research at the University of Waterloo and elsewhere from approximately 1968 into the mid-1980s. In the 1970s, Officials and researchers from the University of Waterloo attended international smoking and health conferences at which they published statements that the phenomenon of compensation did not affect most smokers.
106. Officials also knew and kept abreast of advances in chemical, biological, medical and technical knowledge and techniques concerning the growing, harvesting, curing and manufacture of tobacco and tobacco products.

107. The advice, requests or directions to JTIM and other cigarette manufacturers to lower the tar and nicotine yield of cigarettes continued during a series of meetings between representatives of the cigarette manufacturers and Officials, starting in January 1970. Relevant meetings were attended by Mr. Munro, the Minister of Health, Dr. LeClair, then Deputy Minister of Health, Dr. Watkinson, Director General of Health, and Dr. Colburn, Director of Use of Tobacco Programme, at which scientific research into bioassays, smoking behaviour and compensation were also discussed.
108. Representatives of the CTMC attended a meeting of the Inter-departmental Committee on Less Hazardous Smoking on May 20, 1971. This Inter-departmental Committee included Officials from Health Canada including Drs. Colburn and Watkinson, and Officials of Agriculture Canada including Dr. Hamilton and B. F. Zilkey. Officials of Health Canada again requested agreement to a tar reduction programme. Representatives of CTMC raised the issue of smoker compensation.
109. At this meeting, the CTMC representatives advised that for some smokers there was a tendency to change smoking patterns to obtain a minimum daily level of nicotine when using lower yield cigarettes and that this could increase the intake of tar and combustion gases. Officials advised or represented to the representatives of the CTMC that the evidence was that only a minority of smokers compensated fully or permanently when smoking light and mild products and that health benefits existed from choosing to smoke them.
110. It was decided at the meeting that in response to the apparent tendency of some smokers to change their smoking patterns and on the basis of the belief that smokers smoked in order to obtain nicotine, rather than tar, an attempt should be made to reduce the ratio of tar to nicotine in tobacco by breeding tobacco varieties with higher levels of nicotine which could be filtered down to obtain a potentially less hazardous lower tar and medium nicotine cigarette. The stated position of Officials of Health Canada, until about 1999, was that these lower yield cigarettes were safer than higher tar cigarettes. This position was

repeated by Officials to representatives of the CTMC, including JTIM, on subsequent occasions as the basis for the lower tar programme.

111. On January 22, 1973, Mr. Lalonde directed Health Canada to finance research into a “safer” cigarette and announced publicly that Health Canada’s research efforts were being co-ordinated with that of the cigarette manufacturers.
112. In February, 1973, and again in March, 1974, the Minister of Health in publishing the League Tables, and in reiterating the representations and advice that were typical on the occasion of such publication, commended the manufacturers for their efforts to bring down yields of tar and nicotine.
113. By the fiscal year end of March 31, 1973, responsibility for the National Programme was assumed by the Use of Tobacco Bureau of the Non-Medical Use of Drugs Directorate.
114. In April 1973, Mr. Lalonde stated at a meeting with the CTMC that Health Canada supported research into a “safer” cigarette and that Officials at Health Canada were doing research with Agriculture Canada and cigarette manufacturers towards developing tobacco varieties that would lead to lower tar and nicotine yields in cigarettes.
115. On or about May 16, 1973, Officials of Health Canada confirmed to the cigarette manufacturers that they were continuing to request Agriculture Canada and the cigarette manufacturers to direct research and production efforts into lowering the tar content in cigarette smoke.
116. In or about February 1974, the smoking and health research financed by Health Canada at Delhi to further the production of light and mild products was outlined to JTIM.
117. In March 1975, Mr. Lalonde reiterated the requests of the CTMC to develop and promote light and mild products.
118. In March, 1976, Mr. Lalonde wrote to the CTMC making a number of requests including the listing of tar and nicotine on advertisements for all cigarette lengths

in which a brand was available, the use of posters in tobacco sales outlets to draw attention to the tar and nicotine levels printed on packages, the lowering of tar and nicotine maximums in Canadian cigarettes, the elimination of the promotion of higher tar brands, and the preparation of a report on the potential effectiveness of using differential pricing of cigarettes according to tar and nicotine levels.

119. The cigarette manufacturers began publishing tar and nicotine yields on its cigarette packages, as measured by the standard testing protocol approved by Officials, and in compliance with Mr. Lalonde's request.
120. A comprehensive report was published by Officials of Health Canada in March, 1977, entitled "Smoking and Health in Canada" which noted, *inter alia*, that
 - (a) in response to the initiative of Officials, cigarettes were being marketed with much lower yields of tar and nicotine than previously;
 - (b) lower yield cigarettes may be "safer";
 - (c) smokers of lower yield cigarettes may be susceptible to compensation, making a high nicotine but low tar cigarette desirable; and
 - (d) filters were an important improvement to cigarettes, making them increasingly safe and more effective in removing carcinogens in cigarette smoke.
121. In June 1977, Mr. Lalonde publicly stated that Health Canada continued to have the objective of reducing tar and nicotine yields in cigarettes.
122. In published reports, following a meeting of the Federal and Provincial Health Ministers in June, 1977, the participants (including Health Canada Officials) requested or directed that cigarette manufacturers lower the tar and nicotine yields in cigarettes. Officials also wished to examine ways to modify the Federal excise tax on cigarettes so that those with higher tar levels would be taxed at a higher rate. Officials represented that the introduction of "light cigarettes" by cigarette manufacturers was an appropriate reaction to Health Canada's campaign

to warn Canadians of the potential risks of smoking. Officials noted the increase in sales of “light” products with approval.

123. In 1978 and thereafter, CTMC representatives met repeatedly with Officials at the Health Protection Branch of Health Canada. Dr. Morrison informed the CTMC that the goal of Officials of Health Canada continued to be to ensure further reductions in tar and nicotine yields of cigarettes. Officials requested the cigarette manufacturers to accept targets for the reduction of tar and nicotine in cigarettes sold in Canada. The cigarette manufacturers agreed with Officials to attempt to reduce the “Sales Weighted Average Tar” content of cigarettes (or “SWAT” level) in accordance with government targets, namely, to reduce SWAT to 12 milligrams by December 31, 1984.
124. SWAT levels are a measurement of the average tar yield of cigarettes as measured by the standard testing methods, taking into account the sales volumes of the brands. The SWAT levels were successfully reduced from about 15 milligrams in 1978 to approximately 12 milligrams in 1984.
125. In League Tables published from 1973 to 1986, Officials at Health Canada publicly acknowledged that Health Canada, at material times, actively requested the production and marketing of lower tar products.
126. In 1978, the Minister of Health, Ms. Begin, claimed credit for the availability of light and mild products on the Canadian market, asserting the fact that their availability had been achieved in response to the efforts of Health Canada, triggered initially by publication in 1968 of the first comprehensive report on tar and nicotine levels in Canadian cigarette.
127. From 1968, until at least 1983, Health Canada, including the Minister of Health, Ms. Begin, in 1981, repeatedly informed smokers that they could reduce their intake of harmful substances by switching to a brand with lower tar and nicotine yields provided they did not compensate by smoking more cigarettes per day or smoking more intensively.

128. On January 24, 1983, Ms. Begin informed those smokers who switched from high yield to low yield cigarettes that, after switching, and depending on how they smoked, they could experience an even higher yield than experienced before switching. Notwithstanding this information, Ms. Begin continued to recommend smokers switch to lower yield cigarettes.
129. In January 1983 and again in January 1984, Ms. Begin published a Press Release to advise smokers of the carbon monoxide yield in brands of Canadian cigarettes. She advised Canadian consumers, including members of the Class, of her request of cigarette manufacturers to reduce SWAT to 12 milligrams by the end of 1984, expressed optimism concerning the continuing efforts by cigarette manufacturers to reduce tar and nicotine yields.
130. Ms Begin repeated the advice, based on tests conducted for Health Canada, that actual yields are affected by the way in which cigarettes are smoked. Her advice or representation to consumers, including members of the Class, was that tar and nicotine values printed on packages were a satisfactory buyer's guide to cigarettes with lower average yields, but that Health Canada's studies showed that actual intake depended at least as much on how the cigarette was smoked as the published yield levels.
131. On August 1, 1985, Officials of Health Canada, again, encouraged the production of light and mild products and lowering tar and nicotine yields as measured by standard testing methods.
132. In January 1986, Health Canada informed smokers that:
 - (a) they might actually experience three times the average tar yield shown on the packages;
 - (b) notwithstanding (a) above, the published tar and nicotine yields were a satisfactory buyer's guide to selecting cigarettes with lower average yields; and

- (c) although these printed tar and nicotine yields were not accurate estimates of the potential risks for individual smokers, some cigarettes might still be potentially less hazardous than others,
- 133. Health Canada stopped publishing the League Tables in 1986 but continued thereafter to encourage smokers to switch to lower tar and “Light” and “Mild” product.
- 134. Officials of Health Canada published and widely disseminated other information, beyond the League Tables, all with an aim of encouraging smokers to switch to lower tar cigarettes as measured by standard testing methods.
- 135. Until August 2003, Health Canada's website continued to advise continuing smokers that “Light” and “Mild” products presented a reduced risk of cancer. Any views held by consumers in Québec, including members of the Class, about the potential risks of lower tar products and “Light” and “Mild” cigarettes resulted largely from the dissemination of information or advice to consumers, by Officials or by others relying on such information or advice.

B. The Design and Development of a “Less Hazardous Cigarette” by Officials

- 136. Since 1906, Officials of Agriculture Canada have conducted research to improve the quality of tobacco grown commercially in Canada. Beginning in or about 1964, Officials of Agriculture Canada become involved in researching the constituents in tobacco and tobacco smoke at the Delhi Research Station, including for the purposes of supporting the National Programme.
- 137. Agriculture Canada had established the Delhi Research Station in 1933 as part of a tobacco development program undertaken by Officials, although it did not receive its name until 1967. The mandate of the Delhi Research Station included improving the quality of Canadian tobacco leaf, and the development of domestic and export markets, including the sale of cigarettes and tobacco to consumers in Canada.

138. For many years, Officials of Agriculture Canada, particularly those at the Delhi Research Station, undertook research and product development activities as part of actively supporting the cigarette manufacturers in the design and marketing of tobacco products. The purposes of the Officials' actions included achieving improvements to the quality (including nicotine and sugar levels) and marketability of Canadian tobacco varieties with reference to the desires and preferences of consumers, and, later, to further Health Canada's Less Hazardous Cigarette programme, as particularized herein.
139. In 1968, Officials of Health Canada initiated studies at the University of Waterloo including a chemical and physical analysis of currently marketed Canadian cigarettes and an analysis of tar, nicotine and carbon monoxide yields, butt length and paper, as well as studies of how smoking behaviour changes with the use of lower yield cigarettes. Officials of Health Canada also initiated studies involving the monitoring of tar, nicotine and carbon monoxide yields in currently marketed Canadian cigarettes. All of these studies were for the purpose of publishing League Tables and for the purpose of developing a potentially less hazardous cigarette.
140. In or about 1969, Officials of Agriculture Canada at the Delhi Research Station embarked upon a programme to further the development and marketing of a potentially less hazardous cigarette (hereafter the "Less Hazardous Cigarette Programme"). The programme continued until the late 1980s and included:
- (a) identifying and reducing compounds believed to be deleterious to health in existing varieties of tobacco plants;
 - (b) development of new varieties of tobacco which, when smoked, yielded a lower tar to nicotine ratio; and
 - (c) development of new tests to assess the relative safety of the new varieties of tobacco plants (bioassay).
141. In or about 1971, Officials of Agriculture Canada and Health Canada, as one component of the Less Hazardous Cigarette Programme, established the Inter-

departmental Committee on Less Hazardous Smoking with a mandate to develop a cigarette capable of being marketed as potentially “less hazardous” than alternative or pre-existing cigarettes.

142. On July 14, 1971, Dr. Hamilton, Assistant Director, General Eastern Division of the Research Branch of Agriculture Canada, announced that Agriculture Canada would assume an important role in developing programmes related to smoking and health, by undertaking research into factors that affect the physiology and chemistry of tobacco plants, and that control the tar and nicotine levels in tobacco smoke. This research became an integral component of the Less Hazardous Cigarette Programme.
143. On or about November 18, 1971, Dr. Chapman of Health Canada confirmed to representatives of the tobacco growers and cigarette manufacturers that Officials of Health Canada were interested in protecting the health of smokers by, amongst other things, reducing the tar and nicotine content of cigarette smoke and by producing lower yield products.
144. In 1972, the CTMC joined with Agriculture Canada in a research agreement to develop reconstituted sheet tobacco for use in the manufacture of cigarettes, with the objective of reducing the overall yield of tar and nicotine from a cigarette, a manufacturing process which is specifically alleged in the principal action to constitute a fault on the part of the cigarette manufacturers, including JTIM, or a safety defect in their product.
145. By late 1972, Officials of Agriculture Canada, particularly those at the Delhi Research Station, were responsible for leading the research and development of a potentially less hazardous cigarette under the Less Hazardous Cigarette Programme.
146. On January 22, 1973, the Ministers of Agriculture, Mr. Whelan, and Health, Mr. Lalonde, announced the use of new laboratories, which were then constructed, at the Delhi Research Station to develop tobacco varieties and cultural, curing, and other processing techniques that could contribute to the production of potentially less hazardous cigarettes. It was contemplated the new tobacco

varieties would contain a lower percentage of tar-producing constituents than the existing varieties. The objective was that new types of tobacco, when combined with changes in manufacturing processes, such as the use of reconstituted tobacco sheet and advancements in filter design, would enable further steps to be taken in the production of lower yield products that would expose smokers to fewer harmful substances.

147. The Federal Government at this time presented Canada as taking a major role, internationally, in the development of potentially less harmful cigarettes. In January 1973, the Minister of Health announced a three-way programme of co-operative research, to be undertaken by Health Canada, Agriculture Canada, and the University of Waterloo. Its objective was to contribute to international efforts to produce new forms of light and mild products, to develop the types of tobacco products that would be required in the future and to facilitate Health Canada's guidance of the tobacco industry in matters affecting health.
148. In his announcement the Minister of Health also confirmed that regular communications on the above matters between the two government departments and cigarette manufacturers were continuing. The Minister stated that Health Canada was involved in a programme (the Less Hazardous Cigarette Programme) which was one component of a broad programme to reduce the hazards of cigarette smoking and which included public education and studies to help Canadians avoid or discontinue smoking.
149. As part of the Less Hazardous Cigarette Programme, in 1973, Health Canada through, *inter alia*, Dr. Colburn and Dr. Forbes at the University of Waterloo, undertook studies of smoking behaviour and responses of smokers to modified cigarettes. Also in 1973 and 1974, Officials at the Delhi Research Station were researching the phenomenon of compensation and noted their belief that smokers need to maintain sufficient "dose levels" of nicotine.
150. In 1974, the Non-Medical Use of Drugs Directorate of Health Canada began sponsored research at the University of Guelph into developing biological tests into the relative safety of both commercial and experimental cigarettes and in the

following year sponsored research into the mutagenicity of Canadian experimental cigarettes.

151. In 1977, Officials at the Delhi Research Station and Health Canada Officials conducted a project entitled “Delhi Tobacco and Health Bio-Assay Programme” as part of the Less Hazardous Cigarette Programme.
152. In 1977, Officials at Health Canada published a report identifying the potential need for cigarettes with lower tar and carbon monoxide yields but with a sufficient nicotine yield to satisfy certain smokers.
153. In June, 1977, representatives of the cigarette manufacturers were advised by Officials that the Federal Government was sponsoring research into developing strains of tobacco consistent with this objective, which when combined with filtering technology would be suitable for use in “Light” and “Mild” products. Officials further advised these representatives of progress in product developed at the Delhi Research Station; of studies into the mutagenicity of tobacco leaf; the effects of nicotine concentration on smoking behaviour; of options to obtain reductions of maximum constituent levels; reductions in biological activity, and of long-range research and development.
154. At material times, the Federal Government publicized the results of the research, particularised above.
155. A key outcome of the Less Hazardous Cigarette Programme was that Officials of Agriculture Canada at the Delhi Research Station created for the commercial market varieties of tobacco leaf, including Nordel, Delgold, Newdel and Candel, which contained higher levels of nicotine than previously available varieties.
156. These varieties, when smoked, produced a lower tar to nicotine ratio. They were, therefore, believed, including by Officials, to produce a safer cigarette. These varieties were tested at the Delhi Research Station. The tests were intended to determine whether cigarettes manufactured from these varieties were consistent with acceptable levels of biological activity or mutagenicity and whether they would be acceptable to consumers in Canada, including members of the Class.

Officials promoted these varieties and licensed them on a commercial basis for use by all growers of tobacco in Canada and for use by JTIM and other cigarette manufacturers in their products for sale to consumers including to consumers in Québec.

157. By the summer of 1980, Officials at Agriculture Canada were actively advising the public and cigarette manufacturers that the new varieties of tobacco “that Agriculture Canada had developed, could be tailor-made for today's light cigarette brands, combining low-tar and high nicotine”.
158. In the spring of 1981, Officials at Health Canada further advised and represented to the public and to the cigarette manufacturers in published material that, “The relatively low-tar/nicotine ratio of Canadian tobacco offers manufacturers greater flexibility in producing lighter cigarettes and still maintains sufficient nicotine and flavour to satisfy consumer demands.” Similar statements were published on multiple occasions including those in Volumes 53, 54 and 55 of “The Lighter”, a publication of Agriculture Canada.
159. By the 1980s, the tobacco varieties developed and licensed by Officials of Agriculture Canada and promoted by Agriculture Canada and Health Canada for use in lower yield cigarettes comprised about 95% of the tobacco available to cigarette manufacturers and therefore nearly all tobacco products consumed in Québec were manufactured from these varieties.
160. Commercial income in the form of licensing fees and royalties earned on those tobacco strains has been earned by the Federal Government.

C. Continued Monitoring, Encouraging and Endorsing by the Federal Government of the Advertising and Promotion of Light and Mild Cigarettes

161. Throughout the period between 1972 and 1988, Officials continued to monitor, encourage and endorse the advertising and promotional practices set out in the advertising codes.

162. During the same period Officials of Health Canada requested or directed the cigarette manufacturers to market lower yield cigarettes to meet its SWAT and Sales Weighted Average Nicotine (“SWAN”) targets and, thereafter, monitored the cigarette manufacturers' promotional activities. Particulars include requests by Minister of Health, Mr. Lalonde, in February 1973, to decrease the promotion of higher tar brands, to reduce tar levels in widely available higher tar products and to develop and promote lower yield products in preference to higher tar products. They also include requests or directions by Drs. Colburn and Draper of Health Canada in February 1974 to cigarette manufacturers to advertise and promote lower yield products.
163. Such requests and directions were repeated at meetings that took place between Officials of Health Canada and cigarette manufacturers on a regular basis throughout most of the 1970s and 1980s.
164. Officials at Health Canada in practice oversaw the introduction of “Light” and “Mild” versions of popular brands by tobacco manufacturers and their increasing share of the market in Canada. Indeed in 1977 these Officials announced that the introduction of these new product lines by cigarette manufacturers had been made in response not just to public demand but also to their own requests and directions.
165. Beginning in or about 1976, Officials of Health Canada explicitly endorsed the use of the descriptors “Light” and “Mild” in JTIM's marketing practices.
166. Officials of Health Canada also influenced the content of, and monitored compliance with, the cigarette advertising and promotion codes agreed to from time to time by the CTMC. These codes prohibited advertising or promotion on the basis of relative health claims for different brands of cigarettes. Officials at Health Canada brought any infractions to the attention of the cigarette manufacturers. Until 1999, Officials at Health Canada, raised no objections to the use of the descriptors “Light” and “Mild” on the cigarette manufacturers' products.
167. Officials of Health Canada also monitored the advertising budgets of cigarette manufacturers on a regular basis until advertising and promotion were banned by

legislation. Prior to that ban, these Officials requested that cigarette companies increase the resources they devoted to advertising and promoting the light and mild products.

168. Cigarette manufacturers on the advice, request and directions of Officials developed, manufactured and promoted lower yield cigarettes, described to consumers as “Mild”, or “Light” cigarettes with descriptors such as, “Special Mild”, “Extra Mild” and “Ultra Mild”. They also encouraged cigarette manufacturers to promote light and mild products preferentially. JTIM, in particular, complied with the requests received from time to time from Officials in relation to the design, manufacture, advertising and promotion of its light and mild products and in respect of other product design features intended to reduce the potential risks of smoking. By so acting, JTIM did not commit any fault as alleged or at all.
169. As pleaded at paragraph 135 above, Health Canada, through its website, continued to advise continuing smokers that “Light” and “Mild” products presented a reduced risk of cancer.
170. Officials encouraged and directed the cigarette manufacturers in the design and manufacture of products that Officials believed would reduce the potential risks of smoking. They created new strains and varieties of tobacco which they believed would contribute directly and substantially to this aim. All these actions were reasonable and lawful in the circumstances.
171. If, however, as alleged in the principal action, JTIM committed a fault by designing, manufacturing cigarettes as it did, including by manufacturing a product which suffered from a safety defect, so as to have caused any damage allegedly suffered by the Class or any of its members, all of which is denied, then the Federal Government, as a result of the conduct of its Officials particularised in paragraphs 85 to 170 above, is liable to JTIM to the extent of any liability of JTIM to the Class or any of its members and is solidarily liable to the Class or any of its members.

172. Further, if as alleged in the principal action, JTIM committed a fault by misinforming or deceiving consumers Québec, including members of the Class, about the attributes or properties of its products, including light and mild products, or by preferentially promoting light and mild products, or if JTIM manufactured or supplied light and mild products which suffered from a safety defect, so as to have caused any damage allegedly suffered by the Class or any of its members, all of which is denied, then the Federal Government, as a result of the conduct of its Officials particularised in paragraphs 85 to 170 above, is liable to JTIM to the extent of any liability of JTIM to the Class or any of its members and is solidarily liable to the Class or any of its members.

V. WARNINGS IN THE POST 1988 ERA

173. After 1988, the Federal Government legislated or regulated the tobacco industry in relation to the form and content of warnings on cigarette packages, advertising, promotional and sponsorship practices and the form and content of disclosure of smoke constituents.

174. Warnings had been endorsed and requested by the Officials in 1972. They remained on cigarette packages thereafter until the content of the warnings was changed by legislation, effective in 1989. Since that time, the warnings on cigarette packages have been in the terms set out in the Regulations. Between 1989 and 1996, the warnings required by legislation had the authority of law. In 1995, the Supreme Court of Canada declared the legislation authorizing the Regulation requiring specific warnings to be *ultra vires* the Parliament of Canada but suspended the effect of the declaration for one year. Until the passage of the Tobacco Act, S.C. 1997, c.13, warnings stipulated by the *ultra vires* Regulation remained on cigarette packages voluntarily and since that time they have been legislated.

175. Since 1994 Regulation has required a specific warning that cigarettes are addictive.

176. Notwithstanding the regulation of the cigarette manufacturers, Officials themselves continued, after 1988, to communicate with the public and consumers

including those in Québec and members of the Class, to inform and/or remind them of the potential risks of smoking and the properties of cigarettes.

177. If a warning on cigarette packages and other materials was ever necessary to inform the public, including Members of the Class, as to potential risks of smoking, which is denied, the warnings required by the Federal Government from time to time after 1988 were sufficient to inform and/or remind consumers in Québec, including members of the Class, of the properties of cigarettes and the potential risks of smoking and were reasonable in the circumstances. JTIM complied with the relevant regulations in force in all material respects and at all material times and committed no fault as alleged or at all.
178. If, as alleged in the principal action, JTIM committed a fault after 1988 by misinforming or by inadequately or ineffectively informing and/or reminding consumers in Québec, including members of the Class, of the potential risks of smoking or the properties of cigarettes, or if JTIM manufactured or supplied a product suffering from a safety defect, so as to have caused any damage allegedly suffered by the Class or any of its members, all of which is denied, then the Federal Government, as a result of the conduct of its Officials particularised in paragraphs 173 to 176 above, is liable to JTIM to the extent of any liability of JTIM to the Class or any of its members and is solidarily liable to the Class or any of its members.

VI. CONCLUSIONS

179. In short, the Federal Government and its Officials played a formative and leading role in the Canadian tobacco industry over many years as particularised herein. They were particularly active in relation to the information provided to the Canadian public, and the public in Québec, about the potential risks of smoking. They supervised and advised, made representations and requests and gave directions to cigarette manufacturers in respect of the design, manufacture, marketing and promotion of tobacco products to consumers in Québec, including members of the Class. Further, the Federal Government and its Officials acted likewise in relation to the

cigarette manufacturer's communications to consumers in Québec, including members of the Class, concerning the properties of cigarettes and the potential risks of smoking, including in the form of printed warnings on packs and other materials.

180. In acting in these ways, the Federal Government and its Officials specified and promoted rules and standards of conduct by which it was lawful and reasonable for the cigarette manufacturers to abide. By complying with these rules of conduct and with all other relevant requirements and obligations imposed by Federal legislation in all material respects and at all material times, JTIM has committed no fault as alleged or at all and did not manufacture or supply products which suffered from any safety defect.
181. If, however, as a result of abiding by rules and standards of conduct specified and promoted by the Federal Government and its Officials, JTIM committed a fault or manufactured or supplied a product suffering from a safety defect so as to have caused any damage allegedly suffered by the Class or any of its members, all of which is denied, then the specification of these rules and standards by the Federal Government and its Officials must of necessity have also constituted a fault. To the extent that this fault resulted in JTIM's liability to the Class or any of its Members, the Federal Government and its Officials are liable to JTIM. For these reasons, JTIM claims damages from the Federal Government to the extent of any liability of JTIM to the Class or any of its members.
182. Further, if, as alleged in the principal action, JTIM committed a fault by making certain representations about the properties of cigarettes and the potential risks of smoking or manufactured or supplied a product suffering from a safety defect, then the Federal Government and its Officials, also committed a fault, including through their similar representations, information and advice to consumers, and also participated in the manufacturing or supplying of a product suffering from a safety defect, and, if, and to the extent, that all or any of the above caused the damage allegedly suffered by the Class or any of its members, which is denied, the Federal Government and its

Officials are solidarily liable to members of the Class. For these reasons, JTIM claims contribution from the Federal Government to the extent of its share of the obligation to make reparation for injury caused to the Class or any of its members.

183. As stated at paragraph 6 above, JTIM denies that, in the principal action, any liability of itself or the other cigarette manufacturers, can be established and any non-pecuniary or punitive damages can be awarded on a class-wide basis. In particular, JTIM denies that the Plaintiff/Representative and the Designated Member can prove with sufficient accuracy or particularity the aggregate amount of the claims of the Class Members so as to entitle them to seek collective recovery of any such damages. If, however, any liability of JTIM is so determined and such damages it are awarded against in the principal action on the basis of collective recovery, then JTIM is entitled to recover from the Federal Government the damages sought herein, both by way of indemnity and contribution, on the same basis.

184. JTIM's motion to institute proceedings in warranty is well-founded in fact and in law.

WHEREFORE THE PLAINTIFF IN WARRANTY PRAYS FOR JUDGEMENT:

GRANTING its motion to institute proceedings in warranty;

CONDEMNING the Defendant in Warranty to indemnify the Plaintiff in Warranty from any condemnation that it could be subject to in capital, interest and costs in relation to the principal action;

CONDEMNING the Defendant in Warranty to reimburse the Plaintiff in Warranty to the extent of its share in any condemnation that it could be subject to in capital, interest and costs in relation to the principal action;

RESERVING all of Plaintiff in Warranty's rights and recourses herein;

THE WHOLE, with costs against the Defendant in Warranty, including the costs of experts.

Montréal, February 29, 2008

BORDEN LADNER GERVAIS LLP
Attorneys for the Plaintiff in Warranty
JTI-Macdonald Corp.

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