

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Plaintiff

- and -

**ROTHMANS INC., ROTHMANS, BENSON & HEDGES INC., CARRERAS
ROTHMANS LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS U.S.A. INC.,
PHILIP MORRIS INTERNATIONAL, INC., JTI-MACDONALD CORP., R.J.
REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS TOBACCO
INTERNATIONAL INC., IMPERIAL TOBACCO CANADA LIMITED, BRITISH
AMERICAN TOBACCO P.L.C., B.A.T INDUSTRIES P.L.C., BRITISH AMERICAN
TOBACCO (INVESTMENTS) LIMITED, and CANADIAN TOBACCO
MANUFACTURERS' COUNCIL**

Defendants

**STATEMENT OF DEFENCE OF
BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED**

1. The defendant British American Tobacco (Investments) Limited (hereinafter "Investments") denies, or where applicable does not admit, all allegations contained in the Amended Fresh as Amended Statement of Claim (the "Statement of Claim"), unless and except where expressly admitted herein, and puts the plaintiff to the strict proof thereof.
2. Without limiting the generality of the foregoing, Investments specifically denies:
 - (a) that it took part in any conspiracy, concert of action or common design as alleged or at all; or
 - (b) that it has owed or breached any common law, equitable or statutory duty or obligation to persons in Ontario as alleged in the Statement of Claim or at all; or

- (c) that any such alleged breach of duty or obligation caused any population of insured persons to smoke cigarettes, to continue to smoke cigarettes, or to be exposed to cigarette smoke; or
 - (d) that it acted in a manner that wrongfully caused any person in Ontario to smoke or continue smoking cigarettes or the plaintiff to incur the cost of health care benefits resulting from tobacco related disease or the risk thereof.
3. Investments adopts headings used in the Statement of Claim but it does not thereby admit any facts or allegations contained within such headings. Except where indicated to the contrary, Investments adopts on the same basis the definitions used in the Statement of Claim.
 4. Except where expressly admitted below, Investments denies the allegations contained in paragraphs 19, 20, 40 to 43, 47, 50 to 55, 68, 73.1, 73.2(a)(g), 73.3(a)(f), 73.4(d)(g), 77, 79, 86 to 107, 115, 135 to 141 and 148 to 150 of the Statement of Claim.
 5. Investments has no knowledge of the facts alleged in paragraphs 7 to 18, 21 to 39, 44 to 46, 48, 49, 56 to 67, 69 to 73, 73.2(b)-(f), 73.3(b)-(e), 73.4 (a)-(c)(e), 74 to 76, 78, 80 to 85, 108 to 114, 116 to 134 and 142 to 147 of the Statement of Claim, and puts the plaintiff to the strict proof thereof.

I. INTRODUCTION

A. The Plaintiff and the Nature of the Claim

6. Investments denies that the plaintiff is entitled to the relief sought in paragraphs 1 to 4 and 149 of the Statement of Claim.
7. With respect to paragraphs 5 and 6 of the Statement of Claim, Investments repeats paragraph 3 above.

B. The Defendants

8. With respect to paragraph 19 of the Statement of Claim, Investments admits that it was formerly known as British-American Tobacco Company Limited, and states that in this Statement of Defence the defined term "Investments" incorporates reference to the

company's former name. Investments admits that it has a registered office at Globe House, 1 Water Street, London, England but states that it is incorporated pursuant to the laws of England and Wales.

9. With respect to paragraph 20 of the Statement of Claim, Investments denies that it has any predecessors in interest for whom it is in law responsible, and denies that it is a "manufacturer".
10. With respect to paragraphs 86 and 150 of the Statement of Claim, Investments denies that it jointly breached any of the alleged duties or that it is jointly and severally liable for any of the alleged cost of health care benefits.
11. Investments denies the existence of any conspiracy or that it was a member of any such alleged conspiracy and denies that it has conspired or acted in concert or with common design with any other defendant, or has been involved either as principal or as agent for any other defendant.
12. Investments states that it does not carry on business in Ontario and has never manufactured, advertised, marketed, distributed, promoted or sold cigarettes in Ontario.
13. Any design, manufacture or promotion of cigarettes in Ontario by another defendant cannot and does not constitute such activity by Investments. Any plea otherwise is deficient by reason of the absence of the pleading of material facts in support.

II. THE MANUFACTURE AND PROMOTION OF CIGARETTES SOLD IN ONTARIO

Multinational Tobacco Enterprises

14. Investments denies, if it is alleged, that it is a Multinational Tobacco Enterprise, and specifically denies that it was ever, together with its subsidiaries and associates, operated as a single corporate entity or enterprise.
15. Investments denies that the "BAT Group" is a designation with any legal significance whatsoever and makes no admissions as to the membership of the "BAT Group".

16. Investments is unable to determine what, if any, legal or other significance the plaintiff seeks to ascribe to the term "Lead Companies" as defined in paragraphs 42 and 43 of the Statement of Claim. Without prejudice to this, Investments denies that it was in such relation to any of the companies identified in paragraph 47 of the Statement of Claim, and specifically denies the allegation that it has directed or co-ordinated within those companies common policies relating to smoking and health.
17. Between 1902 and July 23, 1976, Investments was the ultimate parent company of the collection of companies sometimes referred to (although without legal significance) as the BAT group of companies. During that time certain of the corporate predecessors of the defendant Imperial Tobacco Canada Limited were associated companies of Investments (those predecessors and Imperial Tobacco Canada Limited are collectively referred to hereinafter as "ITCAN"). At all material times Investments observed all formalities of corporate separateness with ITCAN and neither functionally nor legally exerted control or undue influence over or dominated ITCAN. In the normal course of business Investments and ITCAN legitimately and appropriately exchanged information relevant to ITCAN's operations in Canada. However, Investments had no involvement in the day-to-day management of ITCAN's operations or programmes, and Investments did not dominate or exert functional or legal control or undue influence over ITCAN, with respect to smoking and health issues or at all.
18. Investments specifically denies the allegations contained in paragraphs 42, 68, 89 and 135 to 140 of the Statement of Claim. The committees, conferences, meetings and communications referred to were not used as vehicles to direct or co-ordinate ITCAN's activities or its policies on smoking and health. Investments did not direct ITCAN to adopt policies or positions on smoking and health in Canada through the meetings and structures identified in the Statement of Claim. Ultimately, it was up to ITCAN to assess its own legal and commercial needs, to form its own scientific and business judgments, and to develop policies and day-to-day execution of those policies that best promoted the company-specific needs and judgments.
19. ITCAN acted independently in adopting its own policies and undertaking its own actions relating to smoking and health and research and development issues. ITCAN always retained the ultimate operational decision-making authority with respect to,

among other subjects, the public statements it made and the positions it took relating to smoking and health issues. In particular, ITCAN:

- (a) directed and controlled the operation of its R&D facilities;
 - (b) determined its own research agenda and did not seek or require Investments' agreement or approval for any aspect of its R&D program;
 - (c) designed and developed the specific products that it sold or intended to sell in the Canadian market, including in the Ontario market, based on its own specific knowledge and assessment of these markets' legal and consumer requirements and other local considerations; and
 - (d) adopted its own policies and made its own public statements with respect to smoking and health related issues.
20. Further, Investments denies that any alleged tobacco related wrongs in Canada (which are denied) are a proximate or direct result of the communications or structures identified in the Statement of Claim.

III. TOBACCO RELATED WRONGS COMMITTED BY THE DEFENDANTS

A. Breaches of Common Law, Equitable or Statutory Duties or Obligations

21. Investments repeats paragraphs 12 and 13 above and denies that it owes or ever owed a duty to persons in Ontario.
22. Further, and in the alternative, to the extent that Investments owes or ever owed a duty to persons in Ontario (which is not admitted but denied), Investments complied with any such duty, whether based in common law, equity or statute.
23. Further, and in the alternative, if Investments breached any duty to persons in Ontario (which is not admitted but denied), Investments says no such breach resulted in persons in Ontario starting or continuing to smoke cigarettes manufactured or promoted by the defendants, or being exposed to cigarette smoke, or suffering tobacco related disease or an increased risk of tobacco related disease.

The Defendants' Knowledge

24. Investments admits that nicotine occurs naturally in the tobacco plant and is a constituent of tobacco smoke. Nicotine has pharmacological properties; it has both a mild stimulant effect and a mild relaxant effect. While the pharmacological effects of nicotine are an important aspect of smoking behaviour, consumers enjoy many sensorial aspects of cigarette smoking, including smoke taste, aroma and the sensation resulting from stimulation of nerve endings in the mouth, nose and upper airway (throat "impact"). Many of those sensorial aspects of smoking are caused by non-nicotine components in cigarette smoke. Smoking is, for many people, difficult to quit and it can be termed an "addiction" or dependency. However, millions of smokers have quit without any medical help, and millions have modified where and when they smoke in the light of differing social norms, and nothing about smoking precludes smokers from either quitting or understanding the serious health risks of smoking. It has been known during all material times that smoking is difficult to quit and that smoking poses serious health risks.
25. The number of discrete compounds identified in cigarette smoke has increased rapidly over time and now totals over 4,000, most in minute quantities. Those constituents include the constituents of tar, gases and the emissions listed on packages, such as nicotine. Water vapour is also produced by the combustion, because the burning of any organic material breaks down the chemical components and produces water.
26. Smoking is a cause, in some smokers, of serious diseases. The health risks of smoking are derived from epidemiology, the study of the incidence and distribution of diseases in human populations, and the factors which affect such distribution. Science to date has not been able to identify biological mechanisms which can explain with certainty the statistical findings linking smoking or exposure to smoke with certain diseases, nor has science been able to clarify the role of particular smoke constituents in those disease processes.
27. Investments states that at all material times, persons in Ontario have been aware of the potential health risks associated with smoking and of the fact that it may be difficult to stop smoking. Further, at all material times, the federal government of Canada and the

plaintiff have been aware of the potential health risks of smoking and of the fact that it may be difficult to stop smoking. The actions of, and information provided by, the federal government, the plaintiff and the public health community have reinforced the awareness of persons in Ontario with respect to cigarette smoking and its potential risks. At all material times, Investments had no materially greater awareness of the potential health risks associated with smoking and of the fact that it may be difficult to stop smoking, than did persons in Ontario, the federal government, the plaintiff and/or the public health community.

28. With respect to paragraphs 73.1, 73.2(a)(g), 73.3(a)(f) and 73.4(d)(g) of the Statement of Claim, Investments denies that it suppressed or concealed scientific and medical data. Investments had no policy to avoid public disclosure or to conceal its knowledge of such data. Without prejudice to the generality of the foregoing, Investments specifically denies:
- (a) that it agreed with Canadian members of the "Rothmans Group" to suppress research relating to carbon monoxide and smoke intake; or
 - (b) that it agreed in 1965 and 1966 with the "RJR Group" and Canadian members of the "Philip Morris Group" to suppress scientific and medical findings relating to work that was funded at Harrogate, U.K.; or
 - (c) that it agreed not to publish or circulate research in the areas of smoke inhalation and smoker compensation and to keep all research on sidestream activity and other product design features within the "BAT Group". Investments further denies that it participated in "ICOSI's total embargo of all research relating to the pharmacology of nicotine" or that any such embargo existed. While Investments may have maintained the commercial confidentiality of certain product design issues for competitive reasons, Investments published, circulated and supported research with respect to smoking and health issues, including with respect to the pharmacology of nicotine.

Exposure

29. Investments denies that any of the identified individual tobacco related wrongs (the commission of which is denied) caused or contributed to insured persons starting or continuing to smoke or otherwise being exposed to cigarette smoke and says further in respect of such allegations:
- (a) the decision to commence or to continue smoking by any individual insured person is an individual decision taken by that person for reasons specific to that person;
 - (b) while Investments accepts that smoking is for many people difficult to quit and that it can be termed an “addiction” or dependency, Investments says that the decision by any insured person to continue smoking is a true choice exercised by that person, and denies that an insured person who smokes is deprived, by reason of the effects of nicotine, of the ability to exercise a free choice to stop smoking; and
 - (c) while Investments accepts that the nature and amount of material available to insured persons regarding the risks associated with smoking has changed over time, Investments says that at all material times insured persons have been aware of, or had available to them, information which recognises the existence of health risks associated with smoking and the fact that smoking is difficult to quit. Therefore, and without prejudice to its primary case, Investments denies that insured persons relied, reasonably or otherwise, on positions adopted by Investments as to the health risks associated with smoking.

Disease and the Risk of Disease

30. Investments states that the risks and incidence of diseases that are associated with smoking vary considerably and may depend upon numerous factors including, but not limited to, cigarettes smoked per day, years smoked, periods of smoking cessation, and the presence or absence of other risk factors associated with the disease. Further, if Investments had any duties or obligations in Ontario (which is denied), and if

Investments breached any such duties or obligations (which is denied), no such breach caused or contributed to:

- (a) any tobacco related disease in any insured person; or
- (b) any increased risk of tobacco related disease in any insured person.

No Market Share

- 31. By reason of the facts and matters pleaded above, in particular at paragraphs 12 and 13, Investments has never possessed any share of the market for tobacco products in Ontario whether as defined by the *Tobacco Damages and Health Care Costs Recovery Act, 2009, SO 2009 c 13* (the “*Act*”) or at all. Accordingly, Investments can have no liability quantifiable by reference to its market share and to the extent that liability under the *Act* is determined by reference thereto then Investments can have no liability at all.

Conspiracy, Concert of Action and Common Design

- 32. In the following section, Investments pleads as fully as it currently is able to the allegations contained in paragraphs 86 to 116, 135 to 141 and 150 of the Statement of Claim. Investments reserves the right to supplement this Statement of Defence if further particulars become known in the future.
- 33. If, which is denied, Investments has any liability to the plaintiff by reason of the matters pleaded at paragraphs 56 to 85 and 142 to 147 of the Statement of Claim, then the extent of such liability will fall to be determined by reference to the extent of the liability of each individual defendant, if any, with whom Investments is found to be jointly and severally liable in respect of a tobacco related wrong. Accordingly, without prejudice to the balance of this Statement of Defence, and without advancing a positive case beyond the scope of that otherwise set out in this Statement of Defence, Investments claims the benefit of all and any defences of all and any defendants with whom Investments is alleged to be jointly and severally liable for the purposes of avoiding or reducing the amount, if any, for which each such defendant and, hence, Investments is alleged to be jointly and severally liable.

34. Without prejudice to the foregoing, in the generality in respect of paragraphs 86 to 116, 135 to 141 and 150 of the Statement of Claim, Investments denies that it:
- (a) conspired with any other defendant with respect to the commission of any tobacco related wrong, whether directly or through the industry associations identified in the Statement of Claim; or
 - (b) acted in concert or with a common design with any other defendant with respect to the commission of any tobacco related wrong, whether directly or through the industry associations identified in the Statement of Claim; or
 - (c) was involved either as principal or as agent for any other defendant with respect to the commission of any tobacco related wrong; or
 - (d) acted so as to render it jointly or vicariously liable with any other defendant in respect of any tobacco related wrong, whether pursuant to section 4(2)(b)(iii) of the *Act* or otherwise pursuant to section 4 of the *Act*, or at all.
35. Further, Investments repeats paragraphs 18 to 20 above and denies that it directed or coordinated the activities of, or conspired or acted in concert with the defendant ITCAN, as alleged or at all.
36. Further, the plaintiff has no claim in respect of the alleged conspiracy, concert of action or common design because the plaintiff agreed to and adopted the design of what it alleges is a conspiracy, concert of action or common design and became a party thereto and carried out acts in Ontario in furtherance thereof that the plaintiff alleges are unlawful.
37. Further, the plaintiff has profited from the sale of tobacco products and if any of the defendants has committed a tobacco related wrong (which is denied), then the plaintiff has directly benefitted from the tax revenue raised by each and every purchase of tobacco products which was entered into in consequence of that tobacco related wrong. In the premises, the cost of health care benefits described in paragraph 2 of the Statement of Claim must be adjusted to reflect the financial benefits which the plaintiff has obtained by reason of the foregoing.

(i) Conspiracy within the International Tobacco Industry

38. Investments states that it never conspired or acted in concert with any other defendant including any of the Lead Companies. Further, to the extent that other Lead Companies may have had policies in common with Investments in relation to smoking and health, such were developed for appropriate business purposes and were lawful. Investments further states that the risks associated with smoking have been widely known in Ontario, as elsewhere, for over 50 years, that information about the risks of smoking was communicated to persons in Ontario through a variety of sources and that Investments had no materially greater awareness of the potential health risks associated with smoking and of the fact that it may be difficult to stop smoking, than did persons in Ontario, the federal government, the plaintiff and/or the public health community.
39. With respect to allegations contained in paragraphs 68, 73 to 73.4 and 88 to 107 of the Statement of Claim, Investments denies that it agreed with any other defendant to suppress or conceal, or suppressed or concealed, or directed any Direct Breach Defendant to suppress or conceal, or had any policy to suppress or conceal information about the risks associated with smoking and exposure to smoke.
40. To the extent that paragraph 88 of the Statement of Claim is directed at Investments under its former name of British-American Tobacco Company Limited, Investments denies the allegations that, through an agent, it participated in the meetings or communications alleged.
41. Investments was never a member of the Tobacco Industry Research Council or the Council for Tobacco Research. These were American organizations formed by and composed of members of the U.S. tobacco industry and have not existed as of 1998.
42. The Centre for Cooperation and Scientific Research Relative to Tobacco is an international organization founded in 1956 for the study of science and technology related to tobacco products, and in particular the development of analytical and testing methodologies, including with the World Health Organization and the International Organization for Standardization. Its reports in this regard have been and are publicly

available. Membership is open to organizations with research and development activities related to tobacco. Investments did not become a member until 1972.

43. Investments was never a member of or affiliated to the Tobacco Institute or any Tobacco Institute committee. The Tobacco Institute was an American organization formed by and composed of members of the U.S. tobacco industry.
44. The Tobacco Research Council, originally known as the Tobacco Manufacturers' Standing Committee, was a U.K. organization, of which Investments was a founding member, which sponsored and conducted extensive published research relating to smoking and health. In 1978, the Tobacco Research Council merged with the Tobacco Advisory Committee to form the Tobacco Advisory Council. Investments was a member of the Tobacco Advisory Council.
45. Investments was never a member of the Verband der Cigarettenindustrie. This was a German trade association whose members include German cigarette manufacturers.
46. The International Committee on Smoking Issues was established in 1977 as a forum for the exchange of views and information on international tobacco issues (including smoking and health) among various unaffiliated tobacco companies. In December 1980, it became known as The International Tobacco Information Centre/Centre International d'Information du Tabac - INFOTAB ("INFOTAB"). Investments announced its withdrawal from INFOTAB in 1987.
47. The Tobacco Documentation Centre was a separate body established in 1992 as a repository for published literature relevant to the tobacco industry.
48. Investments was never a member of the Committee for Indoor Air Research, the Association for Research on Indoor Air or Indoor Air International.
49. None of those organizations, referred to in paragraphs 90 to 106 of the Statement of Claim, was under the direction or control of Investments and neither was any of those organizations ever used by Investments to direct or co-ordinate the activities, policies or positions of ITCAN. None ever determined the direction of Investments' research into issues relating to smoking and health.

50. Investments specifically denies the allegations contained in paragraph 91 of the Statement of Claim:
- (a) with respect to paragraph 91(a), Investments did not make the Tobacco Industry Research Council's 1954 "Frank Statement to Cigarette Smokers". Investments did not draft, sign or publish or direct anyone else to draft, sign or publish the "Frank Statement to Cigarette Smokers";
 - (b) with respect to paragraph 91(b), Investments did not make representations in May 1963 to the Canadian Medical Association;
 - (c) with respect to paragraph 91(c), Investments did not make a presentation to the Conference on Smoking and Health of the Federal Department of National Health Welfare on November 25-26, 1963;
 - (d) with respect to paragraph 91(e), Investments did not make statements to the National Press or news organisations in Canada; and
 - (e) with respect to paragraph 91(f), Investments did not make communications through the Canadian Tobacco Manufacturers' Council ("CTMC") in Canada including, without limitation, to the Federal Department of Health Welfare.

(ii) Conspiracy within the Canadian Tobacco Industry

51. Investments was not involved in the formation of the CTMC. The CTMC was a Canadian organization whose members were from the Canadian tobacco industry. Investments has never been a member of the CTMC and has never engaged in any coordinated efforts with the CTMC.
52. With respect to paragraph 115 of the Statement of Claim, Investments denies that the CTMC ever acted as agent for Investments, as alleged or at all.
53. Investments specifically denies the allegations contained in paragraph 139 of the Statement of Claim. Investments has never directed or advised how ITCAN should vote in committees of Canadian manufacturers or at meetings of the CTMC. Member companies of the CTMC, which did not include Investments, exclusively decided issues

relating to smoking and health including, in particular, the approval and funding of CTMC research.

IV. RELIEF

54. In answer to the entire Statement of Claim, Investments says that the costs that have been incurred or will be incurred by the plaintiff in respect of health care benefits for insured persons resulting from tobacco related disease or the risk thereof have not been and will not be caused or contributed to by exposure of insured persons to tobacco products attributable to the tobacco related wrongs alleged. Further, and in particular:
- (a) if Investments breached any duty, as alleged or at all, which is denied, no such breach caused or contributed to, or will cause or contribute to, the cost of health care benefits as alleged or at all;
 - (b) if the plaintiff has incurred the cost of health care benefits as alleged or at all, which is denied, the cost of health care benefits was caused by one or more of the following:
 - (i) requirements of the statutes and regulations that were voluntarily enacted by the plaintiff and which provide for health care in Ontario, namely the statutes, programmes, services, benefits or similar matters associated with disease, as set out in the definition of "health care benefits" in subparagraph 1(1) of the *Act*;
 - (ii) the conduct and acts or omissions of the plaintiff as further particularized herein;
 - (iii) the conduct and acts or omissions of individual insured persons as further particularized herein;
 - (iv) disease or risk of disease in individual insured persons unrelated to smoking tobacco or exposure to tobacco smoke; and
 - (v) the manufacture, promotion and sale of tobacco products by persons other than the defendants, including manufacturers located on First

Nations reserves, whose tobacco products are packaged and sold to persons in Ontario in breach of duties owed to them;

- (c) if the plaintiff has incurred or will incur the cost of health care benefits as alleged, which is denied, then the plaintiff has made no expenditure and suffered no loss for which it is legally entitled to be compensated by reason of any or all of the following:
 - (i) that cost constitutes the utilization of a pre-determined budget for the provision of health care generally and is the product of decisions by the plaintiff based upon, *inter alia*, political expediency, policy considerations and the availability of finance;
 - (ii) that cost reflects monies received from the government of Canada by means of transfer payments, conditional grants and shared-cost programmes;
 - (iii) that cost is or will be exceeded by tax revenues received by the plaintiff from the sale of tobacco products in Ontario alleged to have been caused by the tobacco related wrongs alleged; and
 - (iv) that cost is not influenced by the tobacco related wrongs alleged.

V. THE PLAINTIFF'S OWN CONDUCT

- 55. At all material times, the sale, advertising, promotion and consumption of tobacco products have been legal in Ontario and have been supervised, regulated and controlled by the plaintiff and the Government of Canada. Within that legal and regulatory framework, if the plaintiff has incurred or will incur the cost of health care benefits that have been or will be provided to insured persons who have suffered tobacco related disease, as alleged (which is denied), Investments states that such costs were caused, and the plaintiff's claim to recover such costs is subject to complete defences, by reason of the plaintiff's own conduct and knowledge.
- 56. At all material times and at least since 1950, the plaintiff, through its ministers, ministries, departments, servants and agents, has been apprised of the information that

was available, according to the state of the art of the day, regarding the health risks associated with smoking tobacco and exposure to tobacco smoke. Despite its knowledge of those risks, the plaintiff:

- (a) continued to license and regulate the production, manufacture, advertising, promotion, distribution and sale of tobacco products in Ontario and insured persons have relied upon the plaintiff's activities in such areas in relation to their decisions to take up and continue smoking;
- (b) has sought to benefit financially from the sale of tobacco products in Ontario, and has so benefited, by taking advantage of its ability to impose and to collect heavy taxation and licensing fees from, *inter alia*, manufacturers, distributors (both wholesalers and retailers) and consumers of tobacco products and, in particular but not exclusively, has justified the fact and scale of the taxation and licensing fees by reference to the health risks associated with smoking tobacco and exposure to tobacco smoke;
- (c) delayed implementing, and failed to enforce, laws prohibiting the sale to and use of tobacco products by people under the legal age for purchasing them as defined by law from time to time; and
- (d) has voluntarily undertaken the obligations of paying for the cost of health care benefits, including such costs as it alleges are caused or contributed to by smoking or exposure to tobacco smoke, and has set its taxation and health care policies accordingly.

57. Further, Investments says that manufacturers of tobacco products in Canada complied at all times with government requests, mandates, and directions (including from the plaintiff) in respect of, *inter alia*,

- (a) the type of tobacco that would be purchased (which tobacco was developed by the government of Canada);
- (b) the type of tobacco products that would be sold;
- (c) product modifications;

- (d) whether tobacco products require health warnings, and the content, size and placement of those warnings;
- (e) the type of promotion that would be permitted; and
- (f) where tobacco products could be sold and used,

and in doing so, acted reasonably in all the circumstances and committed no “tobacco related wrong” in these respects or otherwise.

58. Further, Investments states that if the plaintiff has incurred the cost of health care benefits as alleged or at all (which is denied) then that cost was caused or contributed to, in whole or in part, by the plaintiff’s own acts or omissions as pleaded herein, and not any act or omission of Investments. Investments pleads and relies upon the provisions of the *Negligence Act*, RSO 1990, c N.1.
59. Further, Investments states that by reason of the facts set out herein and the knowledge, conduct and delay of the plaintiff and the prejudice thereby caused to Investments, the plaintiff is barred in law and in equity from advancing the claims made in the Statement of Claim against Investments. Investments also pleads and relies upon the provisions of the limitation of actions statute (or statutes) applicable on proper choice of law analysis to the tobacco related wrongs alleged, including the *Limitations Act, 2002*, SO 2002, c 24 (if applicable).
60. Further, Investments states that, if the plaintiff has incurred the cost of health care benefits resulting from tobacco related disease or the risk of tobacco related disease as alleged (which is denied), the plaintiff has mitigated its loss and such costs must be adjusted to reflect the financial benefits the plaintiff thereby obtained.
61. Without prejudice to the foregoing, Investments repeats paragraph 55 above and says that the acts, errors and omissions pleaded therein represent failures by the plaintiff to act reasonably to mitigate the “cost of health care benefits” as alleged, and any such costs must be adjusted to reflect this failure.

VI. THE CONDUCT OF INDIVIDUAL INSURED PERSONS

62. If the plaintiff has incurred the cost of health care benefits as alleged (which is denied), the cost was caused by, and the plaintiff's claim to recover that cost is subject to complete defences by reason of, the conduct of individual insured persons, including their voluntary decisions to commence or to continue smoking with awareness of the associated risks.
63. At all material times insured persons who smoke or have smoked cigarettes were aware of the risks associated with smoking during all material times.
64. Insured persons became, or should have become, aware of the risks associated with smoking at all material times by various means, including, without limitation, one or more of the following:
 - (a) discussions and writing, including advertising, in all forms of media including newspapers, magazines, journals, television, movies and radio;
 - (b) education programmes including courses, seminars and lectures and educational literature and other media;
 - (c) oral and written warnings from physicians and other health practitioners and public health authorities;
 - (d) oral and written warnings from family members, friends and other acquaintances;
 - (e) common general understandings and historical beliefs;
 - (f) warnings on the packaging of tobacco products, as required for decades pursuant to federal and provincial legislation and regulations and/or voluntary codes of compliance by Canadian tobacco manufacturers; and
 - (g) mandatory displays, signs and other warnings required by provincial legislation in premises where sales of tobacco products take place.

65. By reason of the foregoing, Investments states that insured persons who smoke or have smoked cigarettes were aware of, or should have been aware of, the associated risks at all material times.
66. Insured persons who commenced or continued to smoke cigarettes did so with awareness of the risks associated with smoking and voluntarily consented to accept such risks.
67. The cause in fact and in law of the commencement and continuation of the use of cigarettes by insured persons was a voluntary choice to smoke cigarettes with awareness of the associated risks. Investments had and has no legal duty to such persons, or, alternatively, no legal duty that has not been fulfilled.
68. Further, the cause of (i) an individual's choice to smoke or to continue to smoke or (ii) disease consists not of alleged breaches of duty but, rather, of some or all of the following:
 - (a) individual choices and decisions of the smoker;
 - (b) requests, mandates and directions from the plaintiff and the government of Canada, and Investments repeats and relies on paragraphs 55 to 57 herein;
 - (c) the many and varied causes of certain diseases including genetics, stress, excess weight, alcohol, environmental factors and other consumer products; and
 - (d) the manufacture, promotion and sale of tobacco products by persons other than defendants, including manufacturers located on First Nations reserves, whose tobacco products are packaged and sold to persons in Ontario in breach of duties owed to them.
69. Investments denies that insured persons began, continued or were unable to stop smoking by reason of any of the alleged breaches of duty of Investments (which are denied) or that any such breach of duty caused or contributed to any alleged tobacco related disease or increased risk of tobacco related disease in any insured person or the cost of health care benefits.

70. Investments states that, at all material times, insured persons have been, or should have been, aware of health risks associated with smoking tobacco products. Accordingly, such persons voluntarily assume such risks when they decide to commence or continue smoking.
71. Further, Investments states that if the plaintiff has incurred the cost of health care benefits as alleged (which is denied) then that cost was caused or contributed to, in whole or in part, by the acts or omissions of individual insured persons as pleaded herein, and not any act or omission of Investments. Investments pleads and relies upon the provisions of the *Negligence Act*, RSO 1990, c N.1.
72. Further, Investments states that by reason of the facts set out herein and the knowledge and conduct of insured persons and the prejudice thereby caused to Investments, the plaintiff is barred at law and in equity from advancing the claims made in the Statement of Claim against Investments.
73. Investments pleads and relies upon the limitation of actions statute (or statutes) applicable on a proper choice of law analysis to the tobacco related wrongs alleged in respect of the claims of any individual insured person upon which the plaintiff's cause of action is alleged to rest, including the *Limitations Act, 2002*, SO 2002, c 24 (if applicable).
74. Further and in the alternative, Investments states that, if the plaintiff has incurred the costs of health care benefits as alleged (which is denied), individual insured persons have failed to act reasonably to assist the plaintiff to mitigate that cost.
75. Investments requests that the claim against it be dismissed with costs.

Date: 2016 April 29

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Plaintiff

and

ROTHMANS INC., et al
Defendants

Court File No. CV-09-387984

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

**Statement of Defence of
British American Tobacco (Investments)
Limited**

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