

**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 P.L.C.**

1. The defendant British American Tobacco p.l.c. (hereinafter "BAT plc") 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, BAT plc 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 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 to continue smoking or the plaintiff to incur the cost of health care benefits resulting from tobacco related disease or the risk thereof.
3. BAT plc adopts headings used in the Statement of Claim but does not thereby admit any facts or allegations contained within such headings. Except where indicated otherwise, BAT plc adopts on the same basis the definitions used in the Statement of Claim
 4. Except as expressly admitted below, BAT plc denies the allegations contained in paragraphs 17, 20, 36, 37, 40 to 43, 47, 50 to 55, 68, 77, 79, 86 to 107, 115, 135 to 141 and 148 to 150 of the Statement of Claim. With respect to paragraph 20 and allegations throughout the Statement of Claim and in the plaintiff's Further Particulars provided on March 3, 2016 pursuant to the Order of Master Short (the "Further Particulars"), BAT plc denies that it has any predecessors in interest for whom it is in law responsible.
 5. The following paragraphs of the Statement of Claim do not appear to contain allegations relating to BAT plc or any of the entities for whom BAT plc is alleged to be in law responsible: 7 to 15, 23 to 33, 44(a)-(d)(f)(g), 45, 46 and 121 to 134 of the Statement of Claim. Accordingly, BAT plc does not plead to these paragraphs in the Statement of Claim, but reserves its position in the event that the plaintiff subsequently asserts that these paragraphs of the Statement of Claim do purport to contain allegations against BAT plc.
 6. BAT plc has no knowledge of the facts alleged in paragraphs 16, 18, 19, 21, 22, 34, 35, 38, 39, 44(e)(h), 48, 49, 56 to 67, 69 to 76, 78, 80 to 85, 108 to 114, 116 to 120 and 142 to 147 of the Statement of Claim, and specifically denies that the Canadian Tobacco Manufacturers' Council or any other defendant has ever acted as agent for BAT plc. BAT plc also denies that it has ever engaged in any co-ordinated efforts with the Canadian Tobacco Manufacturers' Council or any other defendant as alleged in the Statement of Claim.

I. INTRODUCTION

A. The Plaintiff and the Nature of the Claim

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

B. The Defendants

9. With respect to paragraph 17 of the Statement of Claim, BAT plc:
 - (a) admits that it has a registered office at Globe House, 4 Temple Place, London, England, but states that it is a public limited company incorporated pursuant to the laws of England and Wales; and
 - (b) denies that it is a successor in interest to either the defendant B.A.T Industries p.l.c. ("Industries") or the defendant British American Tobacco (Investments) Limited ("Investments").
10. BAT plc was incorporated on July 23, 1997, and did not exist prior to that date. During the period from its incorporation until September 7, 1998, BAT plc was a dormant company. Consequently, BAT plc states that it was impossible for it to be a participant in any conduct which took place prior to September 7, 1998 and accordingly denies that it was a participant in any conduct alleged to have taken place prior to that date and which forms the basis of allegations made in the Statement of Claim. BAT plc states that as a matter of law, it cannot be held liable for conduct which took place prior to its existence.
11. BAT plc was formed in connection with a corporate restructuring of Industries. As part of the restructuring, and pursuant to a "Scheme of Arrangement", BAT plc was to become the ultimate owner of all of the ordinary shares of Industries.
12. The Scheme of Arrangement was presented to the High Court of Justice in England and Wales under Section 425 of the *Companies Act* of 1985. The Scheme of Arrangement was

approved by the High Court on September 3, 1998. Following the High Court's approval, the Scheme of Arrangement was effective as of September 7, 1998. On that date, BAT plc became the ultimate parent company of the collection of companies sometimes referred to (although without legal significance) as the BAT group of companies, including Industries and its tobacco subsidiaries such as Investments (the "1998 Restructuring").

13. As stated, BAT plc denies that it has any predecessors in interest for whom it is in law responsible. Without prejudice to the generality of the foregoing denial, BAT plc states that the 1998 Restructuring did not entail the combination of BAT plc and Industries to form a new company, nor did it render BAT plc a successor to either Industries or Investments. Neither Industries nor Investments is a predecessor to BAT plc. BAT plc, Industries and Investments are all entities incorporated pursuant to the law of England and Wales and any question of whether Industries and Investments are predecessors in interest for whom BAT plc is legally responsible is subject to the law of England and Wales, which does not recognize any doctrine of successor liability as a matter of law. Further, neither by way of the 1998 Restructuring nor at any other point in time did BAT plc either expressly or implicitly assume any liabilities of Industries or Investments. Each company retains its own separate corporate identity and existence.
14. Further, BAT plc denies the allegation contained in section 1 of the Further Particulars that any company named "Rothmans International" is a predecessor in interest to BAT plc for whom BAT plc is in law responsible and specifically denies, if it is alleged, that any company referred to in paragraph 44 of the Statement of Claim whose name includes the words "Rothmans International" is a predecessor in interest to BAT plc for whom BAT plc is in law responsible.
15. BAT plc denies that it acted either as principal or as agent for any other defendant.
16. BAT plc is a holding company which has never had any commercial operations of any kind. Its office has always been located in London, England. BAT plc has never carried on business in Ontario and, as a holding company, BAT plc has never been involved in the research, development, design, manufacture, advertisement, marketing, distribution or promotion of cigarettes or other tobacco products sold in Ontario, Canada or

elsewhere. BAT plc denies any involvement with or attendance at any of the committees, conferences or meetings identified in the Statement of Claim and denies that any alleged tobacco related wrongs in Canada (which are not admitted, but denied) are a proximate or direct result of the committees, conferences, meetings and communications identified in the Statement of Claim.

17. Any activity by another defendant or company, including but not limited to the manufacture or promotion of cigarettes sold in Ontario, cannot and does not constitute such activity by BAT plc. Any plea otherwise is deficient by reason of the absence of the pleading of material facts in support. BAT plc denies that it is a “manufacturer” within the meaning of the *Tobacco Damages and Health Care Costs Recovery Act*, 2009, SO 2009 c 13 (the “Act”) or at all, or that the Act has any permissible application to it.

II. THE MANUFACTURE AND PROMOTION OF CIGARETTES SOLD IN ONTARIO

Multinational Tobacco Enterprises

18. BAT plc 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.
19. BAT plc denies that the so-called “BAT Group” is a designation with any legal significance whatsoever and makes no admissions as to the membership of the “BAT Group”.
20. BAT plc is unable to determine what, if any, legal or other significance the Plaintiff ascribes to the term “Lead Companies” as defined in paragraphs 42 and 43 of the Statement of Claim. Without prejudice to the foregoing, BAT plc 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.
21. By way of the 1998 Restructuring described above, BAT plc acquired, indirectly through another subsidiary, what was then Industries’ indirectly owned minority interest in Imasco Limited (“Imasco”). In August 1999, Imasco and BAT plc agreed on a “going

private” transaction by which BAT plc would tender for the approximately 58% of Imasco’s publicly traded shares that BAT plc did not own. An Independent Committee of Imasco’s board was established to render advice with respect to the proposed transaction and, on January 28, 2000, Imasco’s public shareholders voted to approve the transaction.

22. On February 1, 2000, Imperial Tobacco Canada Limited (“Imperial”) was formed as a result of various corporate transactions (including the amalgamation of Imasco and Imperial Tobacco Limited) and became, and remains, a wholly owned, indirect subsidiary of BAT plc. Subject to the qualification that BAT plc became the indirect owner of the issued and outstanding shares in Imperial as a result of those transactions, the final sentence of paragraph 36 of the Statement of Claim is admitted.
23. Subject to the qualification that Imperial is an indirect wholly owned subsidiary of BAT plc, paragraph 37 of the Statement of Claim is admitted.
24. BAT plc’s acquisition, indirectly through another subsidiary, of the shares in Imperial was not an amalgamation of the two companies. BAT plc and Imperial have always operated as separate and distinct corporate entities. BAT plc denies paragraphs 42, 68, 89 and 135 to 140 of the Statement of Claim and further denies:
 - (a) that it ever directed or co-ordinated Imperial’s activities or policies on smoking and health or positions Imperial took on smoking and health; or
 - (b) that it is jointly and severally liable for the alleged “tobacco related wrongs” of Imperial; or
 - (c) that it conspired or acted in concert or with common design with Imperial in committing “tobacco related wrongs”.

III. TOBACCO RELATED WRONGS COMMITTED BY THE DEFENDANTS

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

25. BAT plc repeats paragraphs 16 and 17 above and denies that it owes or ever owed a duty to persons in Ontario.

26. Further, and in the alternative, to the extent that BAT plc owes or ever owed a duty to persons in Ontario (which is not admitted but specifically denied), BAT plc complied with any such duty, whether based in common law, equity or statute.
27. Further, and in the alternative, if BAT plc breached any duty to persons in Ontario (which is not admitted but specifically denied), BAT plc states that 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.
28. With respect to any and all allegations that BAT plc had any involvement in the commission of tobacco related wrongs, such allegations are denied. Further, BAT plc states that actions taken or not taken by any other defendant in Canada are not the actions or omissions of BAT plc and are not a proximate result of any direction or co-ordination by BAT plc. Without prejudice to the generality of the foregoing, BAT plc states specifically that actions taken or not taken by Imperial in Canada were undertaken by Imperial pursuant to the business, legal and scientific judgments of Imperial's executives and not as a proximate result of any direction or co-ordination by BAT plc.

The Defendants' Knowledge

29. BAT plc 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 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, including by persons in Ontario, that smoking is difficult to quit and that smoking poses serious health risks.

30. The number of discrete compounds identified in cigarette smoke has increased rapidly over time and now totals over 4,000, most occurring 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.
31. 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.
32. BAT plc 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, BAT plc 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.

Exposure

33. BAT plc 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 BAT plc accepts that smoking is for many people difficult to quit and it can be termed an "addiction" or dependency, BAT plc says 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 BAT plc accepts that the nature and amount of material available to insured persons regarding the risks associated with smoking has changed over time, BAT plc 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, BAT plc denies that insured persons relied, reasonably or otherwise, on any positions of BAT plc as to the health risks associated with smoking.

Disease and the Risk of Disease

34. BAT plc 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 BAT plc had any duties or obligations in Ontario (which is denied), and if BAT plc 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

35. By reason of the facts and matters pleaded above, in particular at paragraphs 16 and 17, BAT plc has never possessed any share of the market for tobacco products in Ontario whether as defined by the *Act* or at all. Accordingly, BAT plc 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 BAT plc can have no liability at all.

Conspiracy, Concert of Action and Common Design

36. In the following section, BAT plc 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. BAT plc reserves the right to amend this Statement of Defence if further particulars become known in the future.
37. If BAT plc has any liability to the plaintiff by reason of the matters pleaded in paragraphs 56 to 85 and 142 to 147 of the Statement of Claim, which is not admitted but denied, 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 BAT plc 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, BAT plc claims the benefit of all and any defences of all and any defendants with whom BAT plc 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, BAT plc, is alleged to be jointly and severally liable.
38. Without prejudice to the foregoing, to the extent that the conduct alleged in paragraphs 86 to 116, 135 to 141 and 150 of the Statement of Claim occurred prior to September 7, 1998, BAT plc repeats paragraph 10 above including that, as a matter of law, it cannot be held liable for conduct which took place prior to its existence.
39. By reason of the failure of the plaintiff to plead any conduct undertaken by BAT plc since September 7, 1998 within the scope of the allegations pleaded at paragraphs 86 to

116, 135, 136 to 138, 139 to 141 and 150 of the Statement of Claim, such allegations are irrelevant to any claim against BAT plc and BAT plc denies these allegations.

40. With respect to allegations contained in paragraph 135.1 of the Statement of Claim, BAT plc:
 - (a) repeats paragraphs 4 and 13 above and denies that either Industries or Investments is a predecessor in interest to BAT plc for whom BAT plc is in law responsible; and
 - (b) denies that it has made statements about the dangers of smoking and the risks of second-hand smoke in furtherance of any conspiracy, and further denies that any statements it made were misleading or inaccurate. Any statements made by BAT plc with respect to the dangers of smoking and the risks of second-hand smoke were based on BAT plc's reasonably and genuinely held beliefs given the scientific state of the art.
41. With respect to allegations contained in paragraph 138.1 of the Statement of Claim, BAT plc denies that it directed the strategy for the "BAT Group" through statements made on its website questioning research that exposure to second hand smoke causes disease. As stated, any statements made by BAT plc with respect to the risks of second hand smoke were based on BAT plc's reasonably and genuinely held beliefs given the scientific state of the art.
42. With respect to the allegations that the alleged conspiracy, concert of action and common design was continued as set out in paragraphs 89, 135 and 135.1 of the Statement of Claim and to the extent that any conduct is alleged to have taken place since September 7, 1998 then, in respect of paragraphs 86 to 116, 135 to 141 and 150 of the Statement of Claim, BAT plc denies that it:
 - (a) conspired, or joined any ongoing conspiracy, 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 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 or any other person or entity 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.
43. BAT plc states that it never conspired or acted in concert with any of the Lead Companies.
44. BAT plc denies that it formed, joined or was ever a member of any of the industry organisations identified in the Statement of Claim or any of the committees allegedly formed by any of those organisations. In addition, none of the industry organisations identified in the Statement of Claim has ever been under the direction or control of BAT plc and neither was any of those organisations ever used by BAT plc to direct or co-ordinate the activities or policies of or positions taken by any other defendant or any other company at all.
45. BAT plc was not involved in the formation of, and has never been a member of, the Canadian Tobacco Manufacturers' Council. BAT plc has never directed or advised how Imperial should vote in committees of Canadian manufacturers, at meetings of the Canadian Tobacco Manufacturers' Council or at meetings of the Tobacco Institute. And, as stated, BAT plc denies that the Canadian Tobacco Manufacturers' Council (or any other defendant) ever acted as agent for BAT plc.
46. BAT plc denies that it directed or co-ordinated the activities or policies of, or conspired or acted in concert with the defendant Imperial, as alleged or at all. At all material times, to the extent that BAT plc indirectly held shares in Imperial, BAT plc and Imperial observed all corporate separateness formalities. BAT plc did not dominate or exert functional or legal control or undue influence over Imperial.

47. BAT plc states that the plaintiff has no claim in respect of the alleged conspiracy or 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.
48. Further, the plaintiff has profited from the sale of cigarettes and if any of the defendants has committed a tobacco related wrong (which is not admitted but 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 the tobacco related wrong. Accordingly, 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.

IV. RELIEF

49. In answer to the entire Statement of Claim, BAT plc states 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 BAT plc 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 products 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

50. 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), BAT plc 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.
51. At 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 cigarettes and exposure to cigarette smoke. Despite its knowledge of those risks, the plaintiff:
- (a) continued to license and regulate the production, manufacture, advertising, promotion, distribution and sale of cigarettes 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 cigarettes 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 cigarettes 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 cigarettes and exposure to cigarette smoke;
 - (c) delayed implementing, and failed to enforce, laws prohibiting the sale to and use of cigarettes 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 costs of health care benefits, including such costs as it alleges are caused or contributed to by cigarette smoking or exposure to cigarette smoke, and has set its taxation and health care policies accordingly.

52. Further, without prejudice to its pleading that it is not a manufacturer of tobacco products under the *Act* or at all (as set out in paragraphs 16 and 17 above and throughout this Statement of Defence), BAT plc 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.

53. Further, BAT plc 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 BAT plc. BAT plc pleads and relies upon the provisions of the *Negligence Act*, RSO 1990, c N.1.

54. Further, BAT plc 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 BAT plc, the

plaintiff is barred in law and in equity from advancing the claims made in the Statement of Claim against BAT plc. BAT plc 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 (if applicable) the *Limitations Act, 2002*, SO 2002, c 24.

55. Further, BAT plc 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.
56. Without prejudice to the foregoing, BAT plc repeats paragraph 50 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

57. 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.
58. At all material times insured persons who smoke or have smoked cigarettes were aware of the risks associated with smoking during all material times.
59. 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 cigarettes, 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 cigarettes take place.
60. By reason of the foregoing, BAT plc 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.
61. 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.
62. 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 with awareness of the associated risks. BAT plc had and has no legal duty to such persons, or, alternatively, no legal duty that has not been fulfilled.
63. 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 BAT plc repeats and relies on paragraphs 50 to 52 above;

- (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 cigarettes by persons other than defendants, including manufacturers located on First Nations reserves, whose cigarettes are packaged and sold to persons in Ontario in breach of duties owed to them.
64. BAT plc denies that insured persons began, continued or were unable to stop smoking by reason of any of the alleged breaches of duty of BAT plc (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.
65. BAT plc states that at all material times insured persons have been, or should have been, aware of health risks associated with smoking cigarettes. Accordingly, such persons voluntarily assume such risks when they decide to commence or to continue smoking.
66. Further, BAT plc 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 BAT plc. BAT plc pleads and relies upon the provisions of the *Negligence Act*, RSO 1990, c N.1.
67. Further, BAT plc states that by reason of the facts set out herein and the knowledge and conduct of insured persons and the prejudice thereby caused to BAT plc, the plaintiff is barred at law and in equity from advancing the claims made in the Statement of Claim against BAT plc.
68. BAT plc 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 in respect of the claims of any individual insured person upon which the plaintiff's cause of action is alleged to rest, including (if applicable) the *Limitations Act*, 2002, SO 2002, c 24.

69. Further and in the alternative, BAT plc 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.
70. BAT plc 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 p.l.c.**

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