

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

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 JTI-MACDONALD CORP.**

Introduction

1. In this Statement of Defence, the Amended Fresh As Amended Statement of Claim is referred to as the “Statement of Claim” for ease of reference.
2. The Defendant JTI-Macdonald Corp. (“JTIM”) was first incorporated on or about September 12, 1978 as RJR-Macdonald Inc. (“RJRMI”), a subsidiary of R.J. Reynolds Tobacco Company of New Jersey (“RJRT NJ”). JTIM denies the allegations contained in paragraphs 30-32 of the Statement of Claim as pleaded. JTIM relies upon the statements of its corporate history as further contained herein. JTIM specifically denies that Macdonald Tobacco Inc. (“MTI”) was a wholly owned subsidiary of the Defendant R.J. Reynolds Tobacco Company (“RJRT”), a

company formed in 2004 pursuant to the laws of North Carolina. JTIM further specifically denies that MTI is a predecessor in interest of JTIM and denies that JTIM is responsible at law for the actions and conduct of MTI. JTIM further denies that it has promoted or sold in Ontario cigarettes manufactured by RJRT.

3. JTIM has no knowledge of the allegations contained in paragraphs 7-12, 16-19, 23-29, 34-39, 44-45, 47, 72.2, 72.3, 72.5, 73.1, 73.2, 73.4, 117-127 and 135-140 of the Statement of Claim and puts the Plaintiff to the strict proof thereof.

4. Except as otherwise expressly admitted herein, JTIM denies the balance of the allegations in the Statement of Claim and puts the Plaintiff to the strict proof thereof. Without limiting the generality of the foregoing, JTIM specifically denies that it has breached any common law, equitable or statutory duty or obligation owed to persons in Ontario as alleged in the Statement of Claim. JTIM denies that any such alleged breach of duty or obligation caused any population of insured persons to smoke cigarettes or to continue to smoke cigarettes. At all material times, JTIM manufactured, distributed and promoted a legal product in material compliance with applicable legal requirements in Ontario.

5. JTIM specifically denies the allegations of negligent design and manufacture, misrepresentation, failure to warn of risks, unlawful promotion of cigarettes to children and adolescents and any and all other alleged breaches of common law, equitable or statutory duties and obligations alleged in the Statement of Claim.

6. JTIM specifically denies that it or MTI acted in a manner that wrongfully caused any person in Ontario to smoke and/or to continue to smoke cigarettes.

7. With respect to paragraphs 56, 63, 71, 78, 142 and 143 of the Statement of Claim it is for the Court to determine whether the duty or duties of care alleged therein existed at the time of the alleged breach of the same and, if so, the appropriate standards(s) of care.

JTIM's Corporate History

8. W.C. Macdonald Inc. was incorporated in 1930. W.C. Macdonald Inc. changed its name to MTI in 1957. In 1974, RJRT NJ acquired all of the shares of MTI.

9. JTIM was incorporated on or about September 12, 1978 as RJRMI, a subsidiary of RJRT NJ. On or about September 19, 1978, RJRMI acquired all of the shares of MTI. On or about October 26, 1978, RJRMI acquired all of the assets of MTI and agreed pursuant to a General Conveyancing Agreement (the "Agreement") to assume and discharge the liabilities and obligations of MTI then owing. Such obligations and liabilities do not include any obligations or liabilities allegedly owing under the *Tobacco Damages and Health Care Costs Recovery Act, 2009*, S.O. 2009, c.13-(the "Act"). The Agreement stated that nothing in it, express or implied, was intended to confer upon any other person any rights or remedies under or by reason of its operation. Following the Agreement, RJRMI then elected to be continued as a Canadian business corporation. In July 1979, MTI applied to the Minister of Consumer Affairs, Cooperatives and Financial Institutions to surrender its charter and be dissolved pursuant to Quebec law. MTI was dissolved and ceased to exist on or about February 15, 1983.

10. In 1999, RJRMI ceased to have any corporate relationship with RJRT NJ or R.J. Reynolds Tobacco International, Inc. (the “RJR Companies”). As a result of a series of transactions in or around May 1999, RJRMI continued as JTIM.

11. JTIM denies that MTI is a predecessor of JTIM. JTIM denies that it is or can be liable to the Plaintiff under the Act as a result of any act or omission that is alleged to have occurred before October 26, 1978, or as a result of any alleged act or omission by MTI. JTIM was not a “manufacturer” within the meaning of the Act before October 26, 1978.

12. On April 5, 2012, JTIM was converted from an unlimited liability company governed by the laws of Nova Scotia to a “company limited by shares” under the laws of Nova Scotia and was continued as a corporation under the *Canada Business Corporations Act*.

13. In the alternative, and entirely without limiting the meaning and effect of paragraph 11 hereof, JTIM has, to the extent possible and out of an abundance of caution, responded to the allegations contained in the Statement of Claim in so far as they relate to MTI.

14. JTIM admits that during the period from its incorporation on September 12, 1978 to 1999, JTIM was a company related to the RJR Companies. However, at all material times, JTIM was a separate legal entity responsible for manufacturing, distributing and promoting its products in Canada. JTIM acknowledges that information and communications passed between JTIM and the RJR Companies from time to time, and previously between MTI and the RJR Companies, and that it, and previously MTI, participated in various meetings and conferences with the RJR

Companies from time to time, in the normal course of intra group business, including matters concerning smoking and health issues.

15. JTIM denies that any information, communication, meeting or conference with the RJR Companies was for any unlawful purpose and denies that any unlawful acts were committed as a result of any such information or communications. Such meetings and exchanges of information did not render its actions or inactions those of the RJR Companies nor does it mean that the actions or inactions of JTIM, RJRMI, or MTI were controlled or directed by the RJR Companies.

16. JTIM denies that it is liable for any of the alleged tobacco related wrongs, including for any alleged wrongs of the RJR Companies, on the alleged basis of joint or vicarious liability, agency, conspiracy, or acting in concert.

The Act

17. JTIM admits that this action is brought pursuant to the provisions of the Act.

18. JTIM further admits that the Province of Ontario (the "Province") does not bring this action on the basis of a subrogated claim but brings this action in its own right on an aggregate basis pursuant to subsections 2(1), 2(2) and 2(4)(b) of the Act.

19. JTIM adopts the definitions contained in the Act and in paragraph 5 of the Statement of Claim for the purposes of this Statement of Defence.

20. The Act creates a civil cause of action for the Province. However, except to the extent expressly provided for in the Act, the Act does not alter the substantive, evidentiary, or procedural laws of Ontario or Canada.

The Regulatory Framework

21. The manufacturing and promotion of cigarettes in Canada are, and have been at all material times, highly regulated activities. Both the Federal Government and the Province have regulated the tobacco industry in Ontario at all material times. Further, both the Federal Government and the Province have at all material times played a significant operational role in the tobacco industry in Ontario, as described in paragraphs 86 to 93 below.

22. At all material times, it has been legal to manufacture, distribute, promote, sell and consume cigarettes in Canada, including in Ontario, subject to legislative and regulatory restrictions, which have changed over time.

23. JTIM is a Canadian manufacturer which has manufactured, distributed and promoted cigarettes in Canada, including in Ontario, since October, 1978. At all material times, JTIM and (so far as JTIM is aware) MTI and their cigarettes have complied in all material respects with the applicable laws, regulations and directions of the Federal Government and the Province.

24. The regulatory framework, requirements and standards prevailing from time to time and the acts and omissions of both the Province and the Federal Government, including their acts and omissions regarding the provision of relevant information to the public, were and are important

in assessing the standard(s) of care owed by the manufacturers, including MTI and JTIM, to persons in Ontario and the reasonableness and lawfulness of the conduct of manufacturers, including MTI and JTIM, at all material times.

25. In particular, at all material times, JTIM and (so far as JTIM is aware) MTI acted in reliance on the advice, recommendations and directions (or lack thereof) given by the Federal Government and the Province from time to time.

Smoking and Disease

26. JTIM admits that there are serious potential health risks associated with smoking cigarettes and that epidemiological studies have shown statistical associations between smoking and certain diseases. The strength of the epidemiological or statistical associations between smoking and various diseases vary widely.

27. All of the diseases associated with smoking are multi-factorial. Each such disease has various risk factors associated with it, which may include genetic, environmental, occupational, dietary and lifestyle factors. All such diseases occur in non-smokers as well as in smokers. While, for example, cardiovascular disease has been associated with smoking, it is also the leading cause of death and disability among non-smokers. Similarly, not all smokers develop diseases which have been associated with smoking.

28. The association between smoking and a particular disease may be related to the intensity, duration and history of smoking. In addition, the time period between smoking (or exposure to

any other risk factor) and the development of diseases associated with smoking cigarettes may vary between individuals, populations and for different specific diseases.

29. The disease descriptions contained at paragraph 51 of the Statement of Claim are general or broad categories of disease, within which are many types or subdivisions of specific disease with differing associations to their own various risk factors. JTIM puts the Plaintiff to the strict proof of the fact that smoking can cause or contribute to each specific disease in respect of which the Plaintiff seeks to recover the cost of health care benefits. To the extent that allegations concerning exposure to second hand smoke or environmental tobacco smoke (“ETS”) form part of the Statement of Claim, JTIM puts the Plaintiff to the strict proof of the fact that ETS can cause or contribute to each specific disease in respect of which the Plaintiff seeks to recover the cost of health care benefits.

Awareness of the Risks of Smoking

30. In response to the allegations in paragraphs 48-55 of the Statement of Claim, JTIM says that at all material times, persons in Ontario have been aware of the serious potential health risks associated with smoking, and of the fact that it may be difficult to stop smoking.

31. At all material times, the Federal Government and the Province have been aware of the serious potential health risks associated with smoking, and of the fact that it may be difficult to stop smoking. The actions of, and information provided by, the Federal Government, the Province and the public health community from time to time (in the context of education programs and otherwise) have reinforced the awareness of persons in Ontario with respect to

smoking cigarettes, and the potential risks thereof, and have established the reasonable expectations of persons in Ontario with respect to the same.

32. At all material times, JTIM and (so far as JTIM is aware) MTI 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 Province and/or the public health community. MTI and JTIM's conduct in manufacturing, distributing and promoting a legal product must be assessed in the context of the awareness existing at the time of persons in Ontario, the Federal Government, the Province and/or the public health community.

33. On the basis of the above, among other reasons, JTIM denies that cigarettes manufactured and promoted by JTIM or (so far as JTIM is aware) MTI have at any material time posed an unreasonable risk of harm to consumers, including persons in Ontario.

Why People Smoke

34. Despite their awareness of the serious potential health risks associated with smoking, and of the fact that it may be difficult to stop smoking, persons in Ontario have voluntarily elected to smoke and to continue to smoke. Smoking initiation and continuation are not the result of a lack of information or awareness or a lack of understanding of the potential risks.

35. It is a common and normal aspect of human behaviour that people consciously and voluntarily elect to engage in specific behaviours which carry an element of risk. People

frequently choose to engage in an activity with a short term utility, despite their knowledge that doing so may potentially lead to a detrimental result in the longer term.

36. People smoke for many reasons. These reasons for smoking differ from individual to individual, and from time to time. While the presence of nicotine in tobacco smoke may be an important factor in why some people smoke, it is not sufficient to account for smoking behaviour. Neither nicotine nor any other feature of smoking impairs smokers' decision-making or judgment.

37. The decision to begin or to continue smoking is one made by individuals, based on their values, circumstances, experiences and motivations at the time, and is one for which they remain responsible, given their awareness and understanding of the material risks. Smoking does not affect smokers' understanding or appreciation of the potential health risks of smoking or their ability to make judgments and decisions, including the decision to stop smoking and to implement that decision successfully.

38. At various times, different terms have been used to describe the difficulty in stopping smoking, including "habituation", "dependence" and "addiction". JTIM accepts that smoking is addictive, in the sense that the term is commonly used today. Regardless of what term is used, smokers retain the capacity to quit. Millions of people have successfully quit smoking, the vast majority without medical help.

Alleged Breach of Duty – Design and Manufacture

39. JTIM and (so far as JTIM is aware) MTI have complied in all material respects with all common law, equitable and statutory duties and obligations, as they existed from time to time, owed to persons in Ontario. JTIM specifically denies each and every allegation set forth in paragraphs 56-62 of the Statement of Claim. Any alleged breach of duty must be assessed in the context of the circumstances, both general and specific, existing at the time.

40. JTIM denies that it was at any material time possible to design and manufacture cigarettes, acceptable to consumers, which represented a less harmful feasible alternative to the cigarettes manufactured, distributed and promoted by MTI and JTIM, to the extent that the Plaintiff shows that cigarettes manufactured and promoted by either were offered for sale in Ontario. JTIM puts the Plaintiff to the strict proof of what would constitute a “reasonably safe product” and of what feasible measures could have been taken to “eliminate, minimize, or reduce the risks of addiction and disease from smoking cigarettes manufactured by them” as alleged in paragraphs 56 and 57 of the Statement of Claim.

41. JTIM denies that the cigarettes manufactured and promoted by it or (so far as JTIM is aware) MTI were negligently designed or manufactured at any material time. JTIM used reasonable efforts to develop cigarettes that might reduce the potential risks associated with smoking, including by participating in Federal Government initiatives and by working with the RJR Companies in this regard from time to time.

42. The standard of care with respect to the design and manufacture of cigarettes must be assessed in the context of the generally accepted standards and practices for designing and manufacturing cigarettes existing at the time of their manufacture, the legislative and regulatory framework governing cigarettes in effect at that time, and the awareness by the Federal Government, the Province, the public health community and persons in Ontario of the potential risks of smoking. At all material times, cigarettes manufactured, distributed and promoted by JTIM and (so far as JTIM is aware) MTI complied in all material respects with the then generally accepted standards and practices for cigarette design and manufacture and with all applicable legislative and regulatory standards of both the Federal Government and the Province.

43. JTIM notes, in this regard, that, from the late 1960s, the Federal Government (by means of its Less Hazardous Cigarette Programme and otherwise) undertook a leadership role in relation to the design and manufacture of potentially less harmful cigarettes, among other things, by developing varieties of tobacco containing elevated levels of nicotine, for use by the manufacturers in their products, and by directing or requesting the manufacturers to develop, manufacture, distribute and promote cigarettes with lower machine yields of tar and nicotine (lowered tar and nicotine, or “LTN” products). JTIM and (so far as JTIM is aware) MTI cooperated with the Federal Government in respect of such initiatives and participated in the same.

44. With respect to the allegations at paragraph 61 of the Statement of Claim, JTIM denies that it marketed or advertised its brands in a manner designed to mislead the public and reinforce

any alleged perception that “certain filter cigarettes, including but not limited to “mild”, “low tar” and “light” cigarettes were healthier for the public than “regular cigarettes”. In this regard, JTIM refers to and relies on the statements in paragraph 54 of this Statement of Defence, and further says that all marketing was done in material compliance with all legislation, regulations, and directives of the Federal Government and the Province.

Alleged Breach of the Duty to Warn

45. JTIM and (so far as JTIM is aware) MTI have complied in all material respects with all common law, equitable and statutory duties and obligations, as they existed from time to time, owed to persons in Ontario. JTIM specifically denies each and every allegation set forth in paragraphs 63-70 of the Statement of Claim and puts the Plaintiff to the strict proof thereof. In particular, JTIM puts the Plaintiff to the strict proof of when it was known to persons in Ontario, or if different, to MTI or JTIM, that smoking may cause or contribute to each of the diseases in respect of which the Plaintiff seeks to recover the cost of health care benefits. Any alleged act or omission of MTI or JTIM must be assessed in the context of the circumstances, both general and specific, existing at the time.

46. At all material times, the actions of JTIM and (so far as JTIM is aware) MTI with respect to the information provided to consumers concerning the risks of smoking were lawful and reasonable. These actions must be considered in their appropriate scientific and historical context, including: the state of scientific knowledge, from time to time, concerning the potential risks of smoking, and in particular the genuine and protracted debate within the scientific

community as to whether epidemiological associations could be said to amount to proof of disease causation; the public health community's changing characterization of smoking as involving "habituation", "dependence" or "addiction"; and the awareness at all material times of governments, the public health community and persons in Ontario of both the potential health risks of smoking and of the difficulty in quitting.

47. The legislative and regulatory framework, requirements and standards relating to warnings on cigarette packaging and permitted advertising are likewise important considerations in assessing the reasonableness of the actions of the manufacturers, including JTIM and MTI, with respect to such warnings. In this regard, and in relation to the allegation that the Defendants failed to provide any warning prior to 1972, JTIM notes that it was the view of the Federal Government during this period that public awareness of the potential risks of smoking was essentially universal and that no such warning was required. When, in 1972, the Federal Government changed its position, and requested the manufacturers, including MTI, to place a warning on cigarette packaging, MTI did so.

48. Since 1972, the Federal Government has directed or approved the language, format and content of warnings. Every package of cigarettes manufactured and distributed in Canada, including Ontario, by JTIM since its incorporation in 1978 (and, so far as JTIM is aware, by MTI between 1972 and 1978) has displayed warnings directed and/or approved by the Federal Government. From 1976, all advertising in Ontario for cigarettes manufactured, distributed and promoted by JTIM (at times when such advertising was permitted by law) has carried warnings.

The warnings directed and/or approved by the Federal Government from time to time since 1972 were sufficient to reinforce the awareness of consumers, including consumers in Ontario, of the potential risks of smoking. JTIM acted reasonably in the circumstances.

49. More generally, JTIM and (so far as JTIM is aware) MTI have distributed and promoted their products in Ontario in material compliance with the legislation, regulations and directives established by the Federal Government and the Province in effect from time to time, as well as the Voluntary Codes from time to time.

Alleged Breach of Duty – Misrepresentation

50. JTIM and (so far as JTIM is aware) MTI have complied in all material respects with all common law, equitable and statutory duties and obligations, as they existed from time to time, owed to persons in Ontario. JTIM specifically denies each and every allegation set forth in paragraphs 71-72, 72.1, 72.4, 73, 73.3 and 74-77 of the Statement of Claim and puts the Plaintiff to the strict proof thereof.

51. JTIM expressly denies that it or (so far as JTIM is aware) MTI made any materially false, inaccurate or misleading representation or statement, which they knew or should have known to be false, inaccurate or misleading as assessed at the time such statement was made, or made any such statement with the intent to misrepresent to, or conceal from, persons in Ontario, the risks of smoking or exposure to second hand smoke as alleged. In the alternative, JTIM denies that persons in Ontario relied on any such representation or statement to their detriment.

52. JTIM further denies that it is responsible or liable for any statements or representations alleged to have been made by the RJR Companies.

53. Any statements made by JTIM or MTI must be assessed in the context of the circumstances, both general and specific, existing at the time of the particular statement. The acts and omissions of the Federal Government form an important part of this context. In this regard, in relation to the allegations contained in paragraph 72 of the Statement of Claim:

- a) By the mid-1960's the international and Canadian scientific and public health consensus was that lowering the tar yield of tobacco smoke was likely to reduce the incidence of tobacco related disease among smokers. In this context, the Federal Government researched methods of reducing machine-measured tar yields, through its Less Hazardous Cigarette Programme, and gave directions, advice and/or made requests to the manufacturers to develop, manufacture, distribute and promote LTN products.
- b) Commercially available cigarettes in Canada have for decades been manufactured using varieties of tobacco leaf developed by or for the Federal Government in the context of its "Less Hazardous Cigarette Programme". These varieties contain elevated levels of nicotine.

- c) The protocol for standardized measurements of tar, nicotine and other smoke constituents used in Canada was selected and recommended by the Federal Government.
- d) The same or a comparable testing protocol was then used by the Federal Government as the basis for its publication at various times of “League Tables”, showing the machine measured standardized tar and nicotine yields of cigarette brands sold in Canada, and by the manufacturers, who in 1975, at the direction or request of the Federal Government, agreed to publish tar and nicotine yields on all cigarette packages and on advertising. This was consistent with the position of the Federal Government that LTN products were likely to be less harmful to health than cigarettes with higher yields.
- e) In the late 1970s, the Federal Government agreed with the manufacturers to express targets for the reduction of the “Sales Weighted Average Tar” yield of cigarettes.
- f) Beginning in the late 1960s, the Federal Government also began to encourage smokers who did not want to quit smoking to select LTN products, by the publication of League Tables and otherwise. As late as August 2003, Health Canada’s website continued to advise smokers that LTN cigarettes had been shown to present a lower risk of certain diseases than other cigarettes.

- g) At all material times, the Federal Government knew that such standardized results were not predictive of actual deliveries of tar and nicotine to any individual smoker, which might vary depending on individual smoking behaviour. The Federal Government advised smokers in Canada of this.

- h) The Federal Government did all these things despite knowing that some smokers who switch from cigarettes with higher machine-measured yields of tar and nicotine to LTN products may alter their smoking behaviour so as to compensate for reductions in taste and nicotine, and may thereby not achieve a proportionate reduction in their actual intake of tar and nicotine.

54. JTIM further notes that in 1964 the manufacturers, including MTI, entered into a Cigarette Advertising Code (the “Voluntary Code”), by which they agreed, among other things, to avoid any claims in advertising that smoking a particular brand of cigarettes might promote physical health or was better for health than any other brand. The contents of the Voluntary Code were developed in consultation with and endorsed by the Federal Government and were subsequently amended from time to time, with the knowledge and approval of the Federal Government. JTIM and (so far as JTIM is aware) MTI complied with the Voluntary Code at all material times and in all material respects.

55. In specific reply to the allegations in paragraphs 73 and 73.3 of the Statement of Claim, JTIM denies that it, or (so far as JTIM is aware) MTI, have unlawfully suppressed scientific and

medical data or unlawfully acted on policies to withhold, alter or destroy research as alleged in the Statement of Claim.

56. JTIM denies that it is responsible or liable for any acts or omissions alleged in paragraph 73.3 of the Statement of Claim or the particulars related thereto concerning the RJR Companies.

57. In specific reply to the allegations in paragraphs 76-77 of the Statement of Claim, JTIM expressly denies that it or (so far as JTIM is aware) MTI, made any fraudulent, reckless or negligent representation or statement, as assessed at the time such statement was made, or made any such statement with the intent to induce persons in Ontario to use cigarettes or to commence smoking or to continue to smoke as alleged. In the alternative, JTIM denies that persons in Ontario relied on such representation or statement to their detriment.

58. JTIM and (so far as JTIM is aware) MTI conducted its advertising, marketing or promotional campaigns in Ontario in the normal course of marketing and in material compliance with all legislation, regulations and directives of the Federal Government and the Province concerning such advertising, marketing and promotional campaigns that may have been in existence from time to time (at times when such advertising was permitted by law).

59. JTIM denies that it is responsible or liable for any alleged advertising, marketing or promotional campaigns of the RJR Companies.

Alleged Breach of the Duty – Manufacturing or Promoting Products for Children and Adolescents

60. JTIM does not admit the existence of the duty to children and adolescents in Ontario in the terms alleged in paragraph 78 of the Statement of Claim.

61. JTIM and (so far as JTIM is aware) MTI have complied in all material respects with all common law, equitable and statutory duties and obligations, as they existed from time to time, owed to persons in Ontario. JTIM specifically denies each and every allegation set forth in paragraphs 79-85 of the Statement of Claim. Any alleged act or omission of MTI or JTIM must be assessed in the context of the circumstances, both general and specific, existing at the time.

62. With respect to the allegations contained in paragraphs 79-85, JTIM notes that:

- a) JTIM believes that children and adolescents should not smoke. It is committed to youth smoking prevention. JTIM supports and has long supported programs by the Federal Government and the Province to educate children and adolescents about the potential risks of smoking and to dissuade them from starting to smoke. Neither JTIM nor (so far as JTIM is aware) MTI has promoted cigarettes to children and adolescents; nor has JTIM or (so far as JTIM is aware) MTI sought to undermine the Federal Government's initiatives in the area of youth smoking prevention.
- b) At all material times, JTIM and (so far as JTIM is aware) MTI have distributed and promoted their products in Ontario in material compliance with all applicable

laws, regulations and directives of both the Federal Government and the Province with respect to the age of persons to whom cigarettes may be lawfully sold or furnished in Ontario. The federal and provincial legal age for the purchase and sale of tobacco products has varied over time. From 1908 to 1994, the federal legal age for the purchase and sale of cigarettes was 16 years of age. The federal legal age was raised to 18 years of age in 1994 and remains 18 years of age today. The provincial legal age in Ontario is 19 years of age. Prior to 1994, the provincial legal age was 18 years of age.

- c) Advertising and promotion for tobacco products do not, in any event, play any significant role in why minors smoke. Youth smoking needs to be seen in the broader context of adolescent behaviour.
- d) Nevertheless, in recognition of societal concerns over tobacco advertising and promotion, the Voluntary Code entered into by the manufacturers, including MTI, in 1964 prohibited the advertising and promotion of cigarettes to minors, provided that models appearing in tobacco advertisements be at least 25 years old, forbade the use of athletes and celebrities in such advertising and required that posters and billboards advertising tobacco products should not appear in the vicinity of schools. These rules were maintained and/or tightened in subsequent iterations of the Voluntary Code, with the knowledge and approval of the Federal

Government. JTIM and (so far as JTIM is aware) MTI complied with the Voluntary Code at all material times and in all material respects.

- e) To the extent allegations are made regarding the improper sale of cigarettes to minors in Ontario, neither JTIM nor MTI was or is a retailer, and neither JTIM nor (so far as JTIM is aware) MTI has sold cigarettes directly to persons in Ontario.

Alleged Breaches of Statutory Duties and Obligations

63. JTIM and (so far as JTIM is aware) MTI have complied in all material respects with all applicable statutory duties and obligations, as they existed from time to time, owed to persons in Ontario. JTIM specifically denies each and every allegation set forth in paragraphs 142-147 of the Statement of Claim.

64. JTIM denies that it has materially breached the provisions of any of the statutes generally referenced in paragraphs 142-147 of the Statement of Claim, and puts the Plaintiff to the strict proof of the circumstances, timing and facts alleged to constitute breaches of same. The allegations as pleaded in paragraphs 142-147 of the Statement of Claim do not set forth any legal, equitable or statutory duties or obligations known to law in Ontario and therefore do not disclose or support a cause of action under the Act.

65. Any alleged breach of statutory duty or obligation must be assessed in the context of the circumstances, both general and specific, existing at the time. JTIM pleads and relies upon the context as previously described in its Statement of Defence.

Alleged Conspiracy, Concert of Action and Common Design

66. JTIM denies the existence of any conspiracy, concert of action or common design as alleged in the Statement of Claim. JTIM specifically denies each and every allegation set forth in paragraphs 86-116 and 128-134 of the Statement of Claim and puts the Plaintiff to the strict proof thereof.

67. JTIM further denies that JTIM or (so far as JTIM is aware) MTI participated in, or was a member of, or a party to any conspiracy, concert of action or common design as alleged in the Statement of Claim and puts the Plaintiff to the strict proof thereof.

68. JTIM further denies that JTIM or (so far as JTIM is aware) MTI engaged in any unlawful act or conduct as alleged in the Statement of Claim in furtherance of any alleged conspiracy, concert of action or common design and puts the Plaintiff to the strict proof thereof.

69. JTIM has only been in existence since on or about September 12, 1978. JTIM could not have engaged, either in fact or in law, in any conspiracy, concert of action, common design or unlawful act or conduct alleged to have occurred prior to September 12, 1978.

70. At all material times, JTIM and (so far as JTIM is aware) MTI acted lawfully in the advancement of their own legitimate commercial interests in material compliance with the legislation, regulations and directives of the Federal Government and the Province in effect from time to time. JTIM denies that, at any material time, it or (so far as JTIM is aware) MTI engaged in any lawful or unlawful acts or conduct directed at, or for the purpose of causing injury to the Province or to persons in Ontario in circumstances where MTI or JTIM knew or ought to have known that injury to the Province or persons in Ontario was likely to occur. JTIM further denies that any such injury was so caused.

71. JTIM and (so far as JTIM is aware) MTI participated in various meetings, conferences and communications from time to time with other manufacturers and with the Canadian Tobacco Manufacturers' Council ("CTMC"). Such meetings, conferences and communications were legitimate and appropriate, and did not constitute a conspiracy, concert of action, common design or result in the commission of any unlawful acts or conduct.

72. JTIM specifically denies that JTIM or (so far as JTIM is aware) MTI participated in, was a member of, or a party to any conspiracy, concert of action or common design to prevent the Province or persons in Ontario or other jurisdictions from acquiring knowledge of the potential risks of smoking cigarettes and/or to commit tobacco related wrongs, and puts the Plaintiff to the strict proof thereof.

(i) Conspiracy Within The International Tobacco Industry

73. JTIM admits that representatives of JTIM (and as far as it is aware MTI) met and otherwise communicated with representatives of other cigarette manufacturers from time to time, including in the context of meetings of trade associations. Such meetings and communications (as the case may be) have been commonplace across many manufacturing sectors for many years, were legitimate and appropriate, and did not constitute a conspiracy, concert of action or common design or result in the commission of any unlawful acts of conduct.

74. JTIM denies that it (and as far as it aware MTI) communicated with any other cigarette manufacturer or trade association for any unlawful purpose, or employing any unlawful means, or with the intent of injuring any person in Ontario. JTIM further denies that any unlawful acts were committed as a result of any communication between JTIM (or MTI) and any other person.

(ii) Conspiracy Within The Canadian Tobacco Industry

75. With respect to the allegations at paragraphs 108-116 of the Statement of Claim concerning alleged conspiracy and concerted action in Canada:

- a) JTIM notes that the CTMC is a legitimate, non-profit trade organization of the sort that is commonplace in many industries. The CTMC was founded in 1963 in response to a request by the Federal Government that the Canadian tobacco manufacturers create an *ad hoc* committee to represent the industry at that year's National Conference on Smoking and Health. Thereafter, the CTMC functioned

as a forum in which its members could exchange views and share information on the key issues facing the industry. It also represented the Canadian manufacturers in discussions with the Federal Government from time to time.

- b) JTIM denies that it or (so far as JTIM is aware) MTI, through the CTMC, has participated in, was a member of, or a party to any conspiracy or concert of action as alleged in the Statement of Claim. JTIM denies that it or (so far as JTIM is aware) MTI, through the CTMC, has engaged in any unlawful act or conduct in furtherance of any such alleged conspiracy or concert of action. JTIM denies that, so far as JTIM is aware, the CTMC has participated in, or was a member of, any such conspiracy or concert of action.

76. In the alternative, if there was any conspiracy, concert of action or common design as alleged in the Statement of Claim, which is specifically denied, such conspiracy, concert of action or common design was ineffective in preventing or delaying any of the Federal Government, the Province, or persons in Ontario from acquiring knowledge of the potential risks of smoking cigarettes.

(iii) Alleged Conspiracy Within Corporate Groups

77. JTIM denies the existence of any conspiracy, concert of action or common design as alleged in the Statement of Claim among those Defendants alleged to constitute the “RJR Group”. JTIM specifically denies each and every allegation contained in paragraphs 128-134 of the Statement of Claim and puts the Plaintiff to the strict proof thereof.

78. JTIM denies that it or (so far as JTIM is aware) MTI participated in, or was a member of, or a party to any conspiracy, concert of action or common design as alleged in the Statement of Claim with any or all of the Defendants alleged to constitute the “RJR Group”, and puts the Plaintiff to the strict proof thereof.

79. JTIM further denies that it or (so far as JTIM is aware) MTI engaged in any unlawful act or conduct in furtherance of any alleged conspiracy, concert of action or common design with any or all of the Defendants alleged to constitute the “RJR Group” and puts the Plaintiff to the strict proof thereof.

80. As previously outlined in this Statement of Defence, JTIM admits that during the period from its incorporation on September 12, 1978 to 1999, JTIM was a company related to the RJR Companies. However, at all material times, JTIM was a separate legal entity responsible for manufacturing, distributing and promoting its products in Canada. JTIM acknowledges that information and communications passed between JTIM and the RJR Companies from time to time in the normal course of intra group business, including information and communications with respect to smoking and health issues. JTIM made use of such information and communications with the RJR Companies as it deemed appropriate in operating its own business and affairs in Canada.

81. JTIM denies that any information or communications with the RJR Companies was for any unlawful purpose and denies that any unlawful acts were committed as a result of any such information or communications.

82. JTIM and (so far as JTIM is aware) MTI participated in various meetings, conferences and communications from time to time with the RJR Companies. Such meetings, conferences and communications were legitimate and appropriate among related companies, and did not constitute a conspiracy, concert of action or common design or result in the commission of any unlawful acts or conduct.

83. With respect to the allegations at paragraphs 128-134 of the Statement of Claim, JTIM specifically denies that its smoking and health policies are or have been directed and coordinated by the RJR Companies through the means and methods alleged in those paragraphs of the Statement of Claim. JTIM further specifically denies that it unlawfully participated in the removal and destruction of smoking and health materials or unlawfully destroyed research relating to the biological activity of cigarettes as alleged in paragraph 133.3 of the Statement of Claim.

84. The awareness of the risks of smoking cigarettes by persons in Ontario was not reduced or adversely affected as a result of any meetings, conferences, or other communication between MTI or JTIM and either of the RJR Companies.

85. Accordingly, JTIM denies that it is jointly and severally liable with any or all of the other Defendants, or any of the Defendants alleged to constitute the RJR Group, for the cost of health care benefits provided to insured persons in Ontario pursuant to section 4 of the Act as alleged in paragraph 148 of the Statement of Claim.

The Role of the Federal Government

86. The Federal Government, which at all material times had a responsibility to promote and preserve the health and well-being of the people of Canada, was an active and prominent presence in the tobacco industry in Canada, directing, and otherwise influencing, the actions of the industry and shaping the views and behaviour of persons in Ontario.

87. The Federal Government and its officials working in its departments and agencies worked closely with the cigarette manufacturers, including MTI and JTIM, gave advice and directions and made various representations and requests to the cigarette manufacturers on smoking and health issues and with regard to the design, manufacture and promotion of their products. The actions and conduct of the Federal Government occurred principally through Health Canada and Agriculture Canada and their respective predecessor departments and agencies. The Federal Government was particularly active in relation to the information provided to the Canadian public, including the public in Ontario, about the potential risks of smoking. Further, the Federal Government directed and advised the cigarette manufacturers in respect of their communications with persons in Ontario concerning the properties of cigarettes and the potential risks of smoking, including the form of printed warnings on packaging and other materials.

88. In furtherance of its role in the tobacco industry, and more particularly with respect to issues which are alleged in the Statement of Claim to have a relevance to consumers' health, the

Federal Government implemented a number of operational programmes and engaged in numerous other operational activities from time to time, including:

- a) Analysis of the potential risks of smoking, including the risks of “habituation”, “dependence” and “addiction”.
- b) Monitoring and assessing the level of awareness of consumers in Canada, including those in Ontario, 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.
- f) Giving advice, recommendations and directions to manufacturers of cigarettes 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 manufacturers of cigarettes on the form of packaging to be used by manufacturers.
- i) Giving advice and recommendations to manufacturers of cigarettes in respect of the relevant codes or practices governing the advertising and promotion of cigarettes.
- j) Research into the chemistry of tobacco smoke and fundamental research into potential smoking and health effects.
- k) Research into and analysis of the chemical and physical composition of tobacco.
- l) Since 1971, implementing the “Less Hazardous Cigarette Programme”, including the Delhi Tobacco and Health Bio-Assay Programme.
- m) Developing and cultivating varieties of tobacco plant with elevated levels of nicotine and giving advice, recommendations and directions to cigarette manufacturers to use such varieties in cigarettes sold in Canada.
- n) Advising the cigarette manufacturers to design, manufacture, distribute and promote LTN products and, indeed, taking a position of leadership in relation to the same in Canada.

- o) Giving advice, recommendations and directions to cigarette manufacturers regarding targets for the reduction of the “Sales Weighted Average Tar” yield of cigarettes.
- p) At least until 2003, encouraging those smokers who did not want to quit to switch to LTN products, on the basis that these might be less harmful to health, and informing such smokers to avoid compensating if they did switch to such cigarettes.

89. The acts and omissions of the Federal Government influenced the views and behaviour of persons in Canada, including Ontario, and had a significant effect on, among other things, the manner in which the manufacturers conducted their business and the contents and properties of the cigarettes that they manufactured, distributed and promoted in Canada, including Ontario. The standard(s) of care allegedly owed by the manufacturers to persons in Ontario and the reasonableness of the manufacturers’ conduct must be considered in light of these acts and omissions.

The Role of the Provincial Government

90. The Province was also involved in the activities of the tobacco industry in Ontario, including supervising, advising and directing the actions of the tobacco manufacturers in relation to the market for tobacco and tobacco products in Ontario.

91. At all material times, the Province was aware of the potential serious health risks of smoking and the difficulty of giving up smoking. At all material times, the Province was at least as aware of the potential risks of smoking as the manufacturers, including MTI and JTIM.

92. At all material times, the Province:

- a) Permitted persons in Ontario to purchase and consume cigarettes.
- b) Permitted the distribution, promotion and sale of cigarettes in Ontario by the manufacturers, including MTI and JTIM.
- c) Licensed sellers of cigarettes in Ontario as part of the marketing system for cigarettes in Ontario.
- d) Imposed taxes for the purpose of obtaining the revenue from the sale of cigarettes to persons in Ontario.
- e) Cooperated with, and participated in, Federal Government tobacco initiatives and programs.
- f) Directly and indirectly supported and promoted the agricultural cultivation and marketing of Ontario tobacco for use in the manufacture of Canadian cigarettes.
- g) Had a duty to promote and preserve the health and well-being of the public in Ontario.

- h) Played an important role in educating persons in Ontario, and in particular children and adolescents, about the potential risks of smoking and in dissuading them from smoking or starting to smoke.

93. The acts and omissions of the Province influenced the views and behaviour of persons in Ontario and had a significant effect on, among other things, the manner in which the manufacturers conducted their business, and the contents and properties of the cigarettes that they manufactured, distributed and promoted in Ontario. The standard(s) of care allegedly owed by the manufacturers to persons in Ontario and the reasonableness of the manufacturers' conduct must be considered in light of these acts and omissions.

The Cost of Health Care Benefits

94. Under the Act, the Province can only recover the cost of health care benefits caused or contributed to by a tobacco related wrong, which breach resulted in smoking of cigarettes or other tobacco products by, or exposure to, a specific and relevant population of insured persons in Ontario and which smoking or exposure actually caused or contributed to disease in such persons. JTIM puts the Province to the strict proof of its claim for the cost of health care benefits.

95. JTIM denies that any population of insured persons who smoked cigarettes or were exposed to tobacco smoke started or continued to smoke or were exposed to tobacco smoke because of any breach of any common law, equitable or statutory duty or obligation owed by MTI or JTIM to persons in Ontario, which breach is expressly denied. JTIM denies that the

Province is entitled to recover the cost of health care benefits resulting from smoking or exposure for any population of insured persons.

96. The Province is not entitled to claim for or recover the total cost of health care benefits for a disease which can be caused by smoking cigarettes or exposure to tobacco smoke. All of the diseases associated with smoking occur in non-smokers as well as smokers. Not every case of such a disease that occurs in smokers results from smoking cigarettes or exposure to tobacco smoke. The Province must prove, in relation to each disease, the cost of health care benefits that was actually caused or contributed to by smoking cigarettes or exposure to tobacco smoke.

97. The cost of health care benefits to be determined on an aggregate basis under section 3(3)(a) of the Act includes only the cost of health care benefits provided after the date of the breach, which breach is expressly denied, resulting from smoking cigarettes or exposure to tobacco smoke. Without limiting the generality of the foregoing, the cost of health care benefits to be determined on an aggregate basis:

- a) Must not include the cost of any health care benefits incurred before the date of the breach, which breach is expressly denied.
- b) Must be determined in relation to the specific and relevant population of insured persons in Ontario, determined at the time of the breach, to whom the duty or obligation was owed and in relation to whom the duty or obligation was breached.

- c) Must be limited to the specific and relevant population of insured persons in Ontario during the period of the breach.
- d) Must not include the cost of health care benefits for any non-tobacco related disease.
- e) Must not include the cost of health care benefits for a disease resulting from exposure to tobacco products other than cigarettes.

98. The Province is not entitled to recover, on an aggregate basis for any population of insured persons, the cost of health care benefits that it would have incurred in any event. JTIM denies that the Province has incurred any cost of health care benefits as a result of persons smoking cigarettes or being exposed to tobacco smoke in excess of any cost that the Province would have incurred in any event.

99. Further, the Province is not entitled to recover, on an aggregate basis for any population of insured persons, the cost of health care benefits that were not incurred by the Province, but were incurred, in whole or in part, by the Federal Government by means of transfer payments, funding arrangements, grants and shared cost programs. The Province is not entitled to recover the cost of health care benefits which the Province has not actually incurred itself.

100. Further, taking into account sections 3(2) and 3(4) of the Act, the cost of health care benefits assessed against any Defendant under section 3(3) of the Act based upon that Defendant's market share in cigarettes must be eliminated or reduced to the extent, *inter alia*,

that persons, events, factors or circumstances, other than the Defendant's breach, caused or contributed to the smoking or exposure or to the disease or risk of disease in the population of insured persons. Without limiting the generality of the foregoing, the cost of health care benefits must be eliminated or reduced based upon:

- a) The awareness of persons in the population during and after the period of the breach of the potential health risks of smoking.
- b) The conscious and voluntary decisions by persons in Ontario to start smoking and/or to continue smoking notwithstanding the awareness of the potential health risks associated with smoking.
- c) The actions and conduct of other persons and entities, including without limitation, the Federal Government and the Province, which may have influenced persons in Ontario to start smoking and/or to continue smoking during and after the period of the breach.
- d) All other events, factors or circumstances which influenced persons in the population to start smoking and/or to continue smoking during and after the period of the breach.

101. The Province has agreed to and accepted the manufacture, distribution, promotion and sale of cigarettes in Ontario. As described above in paragraph 92, the Province's acts and conduct in imposing taxes on the sale of cigarettes influenced the views and behaviour of

persons in Ontario. The tax revenue received by the Province from the sale of cigarettes in Ontario has exceeded the cost of health care benefits resulting from smoking cigarettes or exposure to tobacco smoke. The Province has not incurred the cost of any health care benefits resulting from smoking cigarettes and/or exposure to tobacco smoke, since such costs have been fully paid from taxes on the sale of cigarettes in Ontario.

102. If the Plaintiff has incurred the cost of health care benefits as alleged or at all, which is denied, then the cause of the Plaintiff incurring such costs is a requirement of the statutes which have provided or are providing for health care in Ontario, including, without limitation, the *Health Insurance Act*, R.S.O. 1990, c. H.6, *Charitable Institutions Act*, R.S.O. 1990, c. C.9, *Homemakers and Nurses Services Act*, R.S.O. 1990, c. H. 10, *Homes for the Aged and Rest Homes Act*, R.S.O. 1990, c. H. 13, *Independent Health Facilities Act*, R.S.O. 1990, c. I. 3, *Local Health System Integration Act, 2006*, S.O. 2006, c. 4, *Long-Term Care, 1994*, S.O. 1994, c. 26, *Long-Term Care Homes Act, 2007*, S.O. 2007, c. 8, *Nursing Homes Act*, R.S.O. 1990, c. N.7, *Ontario Drug Benefit Act*, R.S.O. 1990, c. O. 10 and *Public Hospitals Act* R.S.O. 1990, c. P. 40 and predecessor statutes and regulations.

103. Further, and as already described, the acts and omissions of the Federal Government and the Province influenced the views and behaviour of persons in Ontario and had a significant effect on, among other things, the manner in which the manufacturers conducted their business, and the contents and properties of the cigarettes that they manufactured, distributed and promoted in Ontario. The Plaintiff is not entitled to recover from JTIM the cost of health care

benefits resulting from such actions and conduct by the Federal Government and/or the Province or from compliance by the manufacturers with their advice, recommendations or directions.

104. JTIM says that the Plaintiff is precluded, by common law and equitable principles, from recovering the cost of health care benefits arising out of the consumption of cigarettes in Ontario when the Plaintiff permitted (and benefited from) the sale of cigarettes with knowledge of the potential health risks.

105. JTIM pleads and relies upon the provisions of the *Negligence Act*, R.S.O. 1990, c. N. 1, and the *Limitations Act, 2002*, S.O. 2002, c. 24.

Mitigation

106. JTIM says, in further answer to the whole of the Statement of Claim, the Plaintiff has mitigated the cost of health care benefits as aforesaid, and the cost of health care benefits has therefore been eliminated or reduced. In the alternative, the Plaintiff has failed to mitigate such costs.

Relief Claimed

107. JTIM denies that the Plaintiff is entitled to the relief claimed, or any relief, and says that the action should be dismissed as against it with costs.

Date: April 29, 2016

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- and -

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