

**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 THE DEFENDANT
PHILIP MORRIS USA INC.**

1. The defendant Philip Morris USA Inc. (hereafter “PM USA”) denies, or where applicable does not admit, the allegations made in the Amended Fresh as Amended Statement of Claim amended on April 26, 2016 (the “Statement of Claim”) by the plaintiff (“Ontario” or the “Province”), unless expressly admitted, and puts the Province to the strict proof thereof.
2. PM USA admits the allegations contained in paragraphs 10-12 and 26-27 of the Statement of Claim.

3. PM USA denies the allegations contained in paragraphs 1-6, 20, 29, 40-45, 48-72.1, 73, 74-127, and 141-150 of the Statement of Claim.

4. PM USA has no knowledge in respect of the allegations contained in paragraphs 7-9, 13-19, 21-25, 28, 30-39, 46-47, 72.2-72.5, 73.1-73.4, 128-140, and 151 of the Statement of Claim.

I. RELIEF CLAIMED

5. PM USA denies that the Province is entitled to the relief claimed in paragraph 1 of the Statement of Claim and that the Statement of Claim should be dismissed with costs.

II. INTRODUCTION

A. The Plaintiff and the Nature of the Case

6. PM USA denies the allegations in paragraphs 2-4 in the Statement of Claim and denies the Province's ability to seek relief or recover the cost of health care benefits described in paragraph 1 of the Statement of Claim (the "Claimed Cost") from PM USA, except that PM USA admits that this action is brought pursuant to the provisions of the *Tobacco Damages and Health Care Costs Recovery Act*, 2009, S.O. 2009 C.13 (the "Act").

7. PM USA admits only that the Statement of Claim states the definitions referred to in paragraphs 5-6 of the Statement of Claim for the purposes of the Statement of Claim but not otherwise.

B. The Defendants

8. PM USA has no knowledge of the allegations in paragraphs 7-9 of the Statement of Claim and therefore denies the same.

9. PM USA admits that Altria Group, Inc. was formerly known as Philip Morris Companies Inc. and is a Virginia corporation with offices at 6601 West Broad Street, Richmond, Virginia in the United States of America.

10. PM USA admits that it was formerly known as Philip Morris Inc. and is a Virginia corporation with offices at 6601 West Broad Street, Richmond, Virginia in the United States of America. PM USA further states that U.S.-sourced tobacco products manufactured by PM USA accounted for less than 0.1% of all duty-paid cigarettes sold in Canada from the early 1960s until 1989, after which time U.S.-sourced products were no longer offered for sale in the Canadian duty-paid market. Further, tobacco products manufactured in the U.S. by PM USA for the Canadian duty-free market were provided for sale only to individuals leaving Canada and had to be taken out of the country immediately after purchase. To the very limited extent that cigarettes manufactured by PM USA were ever offered for sale in Canada, PM USA states that such cigarettes were at all material times a legal product sold in compliance with all applicable laws.

11. PM USA admits that Philip Morris International Inc. ("PMI") is a Virginia company with offices located at 120 Park Avenue in New York, New York in the United States of America.

12. PM USA has no knowledge of the allegations in paragraphs 13-19 of the Statement of Claim and therefore denies the same.

13. PM USA denies the allegations in paragraph 20 of the Statement of Claim. PM USA states that it does not manufacture, advertise, market, distribute, or sell cigarettes in Ontario. PM USA admits that U.S.-sourced tobacco products manufactured by PM USA (or its corporate predecessors) accounted for less than 0.1% of all duty-paid cigarettes sold in Canada from the

early 1960s until 1989, after which time U.S.-sourced products were no longer offered for sale in the Canadian duty-paid market. Further, tobacco products manufactured in the U.S. by PM USA for the Canadian duty-free market were provided for sale only to individuals leaving Canada and had to be taken out of the country immediately after purchase. To the very limited extent that cigarettes manufactured by PM USA were ever offered for sale in Canada, PM USA states that such cigarettes were at all material times a legal product sold in compliance with all applicable laws. PM USA further states that it has no knowledge as to the truth of the allegations made with respect to other defendants and therefore denies the same.

14. PM USA has no knowledge of the allegations in paragraphs 21-22 of the Statement of Claim and therefore denies the same.

III. THE MANUFACTURE AND PROMOTION OF CIGARETTES SOLD IN ONTARIO

A. Canadian Tobacco Companies

The Defendant Rothmans Inc.

15. PM USA has no knowledge of the allegations in paragraphs 23-24 of the Statement of Claim and therefore denies the same.

The Defendant Rothmans, Benson & Hedges Inc.

16. PM USA has no knowledge of the allegations in paragraph 25 of the Statement of Claim and therefore denies the same.

17. PM USA admits that Benson & Hedges (Canada) Limited was incorporated in 1934 and that RBH was formed in 1986 by the amalgamation of Benson & Hedges (Canada) Inc. and

Rothmans of Pall Mall Limited. PM USA also admits that Benson & Hedges (Canada) Ltd. (renamed Benson & Hedges (Canada) Inc. in 1979), at various times since 1950, manufactured and promoted cigarettes offered for sale in Ontario.

18. PM USA admits that RBH has, at various times since 1986, manufactured and promoted cigarettes offered for sale in Ontario. PM USA also admits that, between 1986 and 1989, RBH distributed in Canada a small amount of U.S.-sourced tobacco products manufactured by Philip Morris Incorporated (now PM USA), but these products accounted for less than 0.1% of all duty-paid cigarettes sold in Canada during this time period.

19. PM USA has no knowledge of the allegations in paragraph 28 and therefore denies the same.

20. PM USA denies the allegations in paragraph 29 of the Statement of Claim. PM USA further states that between 1986 and March 2008, corporate entities related to Altria Group, Inc. held a 40% shareholder interest in RBH. PM USA further states that it and Altria Group, Inc. have had no corporate affiliation with PMI since a March 28, 2008 spinoff. PM USA has no knowledge of the remaining allegations in paragraph 29 of the Statement of Claim and therefore denies the same.

The Defendant JTI-Macdonald Corp.

21. PM USA has no knowledge of the allegations in paragraphs 30-33 of the Statement of Claim and therefore denies the same.

The Defendant Imperial Tobacco Canada Limited

22. PM USA has no knowledge of the allegations in paragraphs 30-39 of the Statement of Claim and therefore denies the same.

B. Multinational Tobacco Enterprises

23. PM USA denies the allegations in paragraphs 40-45 of the Statement of Claim. PM USA states additionally that paragraphs 40-45 of the Statement of Claim purport to collectively categorize separate entities as certain “Groups” or “Lead Companies”, and PM USA denies that such characterization is accurate, proper or has any legal significance whatsoever relevant to the Province’s claims or the Province’s ability to seek relief or recover the Claimed Cost from PM USA. PM USA further states that, to the extent that companies have had policies in common with PM USA in relation to smoking and health, such common policies were developed for appropriate business purposes and were lawful. In further answer, PM USA states that:

- (a) While it has had a corporate relationship over the years with RBH, at all material times, operating decisions were made in Canada by RBH, and RBH arrived at its own positions on smoking-related issues;
- (b) It never entered into a conspiracy or common design with the Defendants PMI, Altria Group, Inc., or RBH, or any other defendant in this action;
- (c) It never acted in concert with the Defendants PMI, Altria Group, Inc., or RBH, or any other defendant in this action;
- (d) RBH was never the agent of PM USA; and

- (e) PM USA never directed the activities of RBH or any other defendant in this action.

24. PM USA has no knowledge of the allegations in paragraphs 46-47 of the Statement of Claim and therefore denies the same.

IV. TOBACCO RELATED WRONGS COMMITTED BY THE DEFENDANTS

A. General

25. PM USA states that PM USA has never manufactured tobacco products in Canada at any material time. Furthermore, U.S.-sourced tobacco products manufactured by PM USA, accounted for less than 0.1% of all duty-paid cigarettes sold in Canada from the early 1960s until 1989, after which time U.S.-sourced products were no longer offered for sale in the Canadian duty-paid market. Further, tobacco products manufactured in the U.S. by PM USA for the Canadian duty-free market were provided for sale only to individuals leaving Canada and had to be taken out of the country immediately after purchase. To the very limited extent that cigarettes manufactured by PM USA were ever offered for sale in Canada, PM USA states that such cigarettes were at all material times a legal product sold in compliance with all applicable laws. PM USA states that it has no knowledge as to the truth of the allegations made with respect to other Defendants and therefore denies the same. PM USA denies the remaining allegations in paragraph 48 of the Statement of Claim. Specifically, PM USA denies that:

- (a) it has committed any tobacco related wrong, or breached any common law, equitable or statutory duty as alleged in the Statement of Claim or at all;
- (b) it manufactures or has manufactured a defective product;

- (c) it fails or has failed to warn, unlawfully sells or markets to children and adolescents or has ever done so;
- (d) it makes or has made any deceitful or negligent misrepresentations;
- (e) it contravenes or has contravened any consumer protection or competition legislation; or
- (f) it takes or has taken part in any conspiracy, concerted action or common design as alleged.

PM USA further states the following:

- (g) At all times, PM USA conducted itself in accordance with appropriate business practices and in compliance with the applicable common law, equitable and statutory duties governing its conduct;
- (h) In addition, a significant and growing proportion of the Canadian cigarette market is supplied by manufacturers other than those identified in the Claim. Specifically, manufacturers located on aboriginal reserves (the “Aboriginal Manufacturers”) produce, promote and provide cigarettes to numerous consumers across Canada. Vendors selling cigarettes produced by the Aboriginal Manufacturers routinely fail to collect the federal and provincial taxes applicable to sales to non-aboriginal purchasers, creating a substantial incentive for non-aboriginal to purchase cigarettes from these manufacturers instead of the manufacturers identified in the Claim. Additionally, cigarettes produced by the Aboriginal Manufacturers dominate the market for contraband cigarettes in Canada. As a result, a significant fraction of the cigarettes consumed in Canada are not supplied by

manufacturers identified in the Claim, but rather by the Aboriginal Manufacturers; and

- (i) In particular, PM USA denies that any breach of duty by PM USA caused persons in Ontario to start or continue to smoke cigarettes or be exposed to cigarette smoke from cigarettes manufactured or promoted by it; and
- (j) Without limiting the generality of the foregoing, PM USA 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. PM USA specifically 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.

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

The Defendants' Knowledge

26. PM USA denies the allegations in paragraphs 49-50 of the Statement of Claim. PM USA does admit that:

- (a) cigarettes contain tobacco and nicotine occurs naturally in tobacco;
- (b) nicotine, as found in cigarette smoke, has pharmacological effects; and
- (c) nicotine in cigarette smoke is addictive and cigarette smoking is addictive.

PM USA further states that it has never manufactured cigarettes in Canada at any material time. In admitting (a) to (c) above, PM USA states that it can be difficult for smokers to quit smoking, but this should not deter smokers who want to quit from trying to do so. PM USA denies the

allegations in paragraph 50 of the Statement of Claim to the extent that the term “addictive” is intended to assert that cigarette smokers are unable to quit smoking if they decide to do so.

27. PM USA admits that cigarette smoking causes or contributes to cancers of the lung, bronchus, trachea, larynx, pharynx, lip, esophagus, bladder, kidneys, and pancreas; leukemia; emphysema; chronic bronchitis; chronic airways obstruction; chronic obstructive pulmonary disease; coronary heart disease; peripheral vascular disease; and vascular disease. PM USA states that “cancer of the stomach,” “cancer of the nose,” and “cancer of the oral cavity” are relatively vague terms which might encompass a number of different and varied anatomical structures, but admits that smoking causes cancer in certain of the anatomical structures associated with the stomach, nose, and mouth. PM USA denies that smoking causes or contributes to cancers of the liver, colon, rectum, or uterus, or to pulmonary circulatory disease or miscarriage. PM USA states that “fetal harm” is a relatively vague term which might encompass a number of different and varied anatomical structures, but admits that smoking is associated with an increased risk of placental abruption, premature birth, stillbirth, neonatal mortality, and intrauterine growth restriction; and that cigarette smoking causes lower infant birth weight in infants whose mothers were smokers during pregnancy. PM USA further states that many other factors, whether environmental, physiological, genetic, or based upon lifestyle choices, can also have harmful effects on pregnancy. PM USA acknowledges that the Surgeon General’s 2014 Report (entitled “The Health Consequences of Smoking – 50 Years of Progress”) concluded that there is sufficient evidence to infer a causal relationship between smoking and asthma and increased morbidity and general deterioration of health, but PM USA’s position is that at this time, these conclusions are based on inadequate scientific support. PM USA further states that diseases caused or contributed to by cigarette smoking are complex and may be

caused or contributed to by many different factors, whether environmental, physiological, genetic or based upon lifestyle choices. With respect to environmental tobacco smoke (“ETS”) (referred to in the Statement of Claim as “second hand smoke”), PM USA acknowledges that the Surgeon General’s 2006 Report (entitled “The Health Consequences of Involuntary Exposure to Tobacco Smoke”) concluded that there is sufficient evidence to infer a causal relationship between ETS and lung cancer, coronary heart disease, and cough in children, but PM USA’s position is that at this time, these conclusions are based on inadequate scientific support. PM USA denies the remaining allegations in paragraph 51 of the Statement of Claim.

28. PM USA denies the allegations in paragraphs 52-53 of the Statement of Claim. PM USA states that cigarette smoke contains numerous constituents, some of which are acknowledged by public health organizations, such as the U.S. Food and Drug Administration, Health Canada, and the International Agency for Research on Cancer, to be hazardous to health. PM USA further 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, the Province and the public health community 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 Province 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, PM USA 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 the public health community.

29. PM USA denies the allegations in paragraph 54 of the Statement of Claim and repeats paragraphs 49-50 hereof.

30. PM USA denies the allegations in paragraph 55 of the Statement of Claim.

Breach of Duty – Design and Manufacture

31. PM USA denies the allegations in paragraphs 56-62 of the Statement of Claim. PM USA has never breached any duty with respect to the design or manufacture of cigarettes as alleged or at all, nor has PM USA made any misrepresentations with respect to tobacco products or their characteristics. PM USA states that it does not manufacture, advertise, market, distribute or sell cigarettes in Ontario. In further answer, PM USA states that at all material times, it (and its corporate predecessors) have monitored the world-wide development of tobacco products, implemented all product modifications as appropriate, and ensured that its products were free of latent defects and fit for the purposes intended by the provincial and federal governments. PM USA repeats paragraphs 32-34 and 47 hereof, and states that it complied with all applicable common law, equitable, and statutory duties that govern its conduct. PM USA further states the following:

- (a) Over the years, PM USA has modified its cigarette design and manufacturing processes for all of its cigarettes to generally reduce the levels of smoke constituents, including allegedly harmful constituents, of cigarette smoke. These modifications have included filtration, paper porosity/air dilution, and the use of reconstituted and/or expanded tobacco, among others;
- (b) To date, there are no technologically possible and commercially feasible features that could potentially reduce the harm of cigarette smoking that could have been

incorporated into the design or manufacture of traditional cigarettes that have not been so incorporated. Notwithstanding its efforts and numerous advancements in scientific knowledge on the subject of smoking and health, no entity has yet been able to produce a commercially viable traditional cigarette that is free of health risks.

- (c) At all material times, the federal government has directed and supported the manufacture and sale of cigarettes in Canada, and set the standard of care required for cigarette manufacturers. As part of its direction and supervision of the cigarette industry, the federal government (among other things):
 - (i) Researched and developed strains of tobacco which became effectively the only varieties available for use in Canadian cigarettes;
 - (ii) Advised manufacturers on the necessity and efficacy of printed package warnings, as well as their content; and
 - (iii) Advised and directed manufacturers on the need to develop and promote lower-yield cigarettes.
- (d) Beginning in the 1950s, the government and public health community called for and otherwise encouraged the development and marketing of lower tar cigarettes. During this time, consumer demand also increased for lower tar cigarettes;
- (e) PM USA cooperated with the government and health community and responded to consumer demand by developing lower tar cigarettes;

- (f) PM USA denies that it has ever stated in its advertising that “light” brands are “safer” than full-flavored brands;
- (g) At all material times the Province informed the public within Ontario of the risks associated with tobacco products; and
- (h) At all times the Province alone had the obligation to enforce all relevant statutes and regulations pertaining to the sale of tobacco products to under-aged smokers, as defined from time to time by statutes or regulations, and failed to do so; and
- (i) In further answer, PM USA admits that it has been unlawful to sell cigarettes to persons under a certain age. Notwithstanding those laws, some persons under a certain age have smoked. Further, PM USA has never targeted under-aged smokers or non-smokers.

Breach of Duty to Warn

32. PM USA denies the allegations in paragraphs 63-70 of the Statement of Claim. PM USA repeats paragraphs 31, 33-34 and 47 hereof and states that it complied with all common law, equitable and statutory duties that governed its conduct at all material times. PM USA states additionally that cigarettes sold in Canada by the manufacturers identified in the Statement of Claim were at all times labelled consistently with all applicable federal and provincial legislation and regulations and with the voluntary advertising code. Specifically, by 1972, the voluntary advertising code adopted by certain Canadian cigarette manufacturers required package warnings concerning the health risks of smoking. Prior to 1972, representatives of the federal government had advised against package warnings concerning health risks, on the ground that such risks were already well-understood and written warnings would only confuse the public. Package

labels subsequently disclosed tar and nicotine levels by 1976. Thereafter, health warnings on cigarette packaging became increasingly prominent, in accordance with increasing federal and provincial legislation and regulation. By 2000, federal regulations required rotating graphic health warnings to cover at least 50% of cigarette packaging.

Breach of the Duty – Misrepresentation

33. PM USA denies the allegations in paragraphs 71-72.1, 73, and 74-77 of the Statement of Claim and repeats paragraph 48 hereof. PM USA has never at any time made representations that were false and has never suppressed any such scientific and medical data. No representations were made by PM USA at any time which were false or made with willful blindness or recklessness as to their truth or falsity. Further, PM USA states that it never represented that any tobacco products were less hazardous than any others, and that any tobacco products manufactured by PM USA and sold in Canada were labelled consistently with all applicable federal and provincial legislation and regulations and with the voluntary advertising code, to the extent that its products were ever subject to such legislation or regulation or to the voluntary advertising code. PM USA repeats paragraphs 31-32, 34 and 47 hereof. PM USA has no knowledge of the allegations in paragraphs 72.2, 72.3, 72.4, 72.5, 73.1, 73.2, 73.3, and 73.4 and therefore denies the same.

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

34. PM USA denies the allegations in paragraphs 78-85 of the Statement of Claim. PM USA has never breached any duty to children or adolescents as alleged or at all, and denies that it targeted children or adolescents in its advertising or other activities. PM USA also pleads as follows:

- (a) At all material times the Province had and undertook a program of informing children and adolescents within Ontario of the risks associated with the consumption of tobacco products, and if such persons have not been informed of such risks, which is denied, the Province failed to perform that program adequately; and
- (b) At all material times the Province alone had the obligation to enforce all relevant statutes and regulations pertaining to the sale of tobacco products to under-aged smokers, as defined from time to time by statutes or regulations, and failed to do so.

Conspiracy, Concert of Action and Common Design

35. PM USA denies the allegations in paragraph 86 of the Statement of Claim. At no time did PM USA enter into or engage in any conspiracy, concert of action or common design with other persons. PM USA further states that:

- (a) It conducts business in a highly regulated industry which leads, in some instances, to uniformity and consistency in the industry's manufacturing, packaging and promotional activities;
- (b) It conducted itself at all times in accordance with appropriate business practices and in compliance with any applicable common law, equitable, and statutory duties that governed its conduct;
- (c) In late 1953 and early 1954, representatives of the cigarette industry and tobacco growers based in the United States met to address scientific developments regarding smoking and health. As a result of those meetings, of which the U.S.

Department of Justice received notice, the Tobacco Industry Research Committee, later known as the Council for Tobacco Research (“TIRC/CTR”), was formed to support and fund research. An independent scientist of national repute was appointed as the Scientific Director as was an Advisory Board of distinguished scientists disinterested in the cigarette industry. Over the years, the U.S. Surgeon General has cited more than 350 studies funded by TIRC/CTR starting with the 1964 Surgeon General Report;

- (d) In answer to the allegation that unlawful acts were committed by PM USA in furtherance of an alleged conspiracy, PM USA repeats paragraphs 1-34 hereof, and in particular, paragraphs 28-34 hereof; and
- (e) PM USA states that it never conspired or acted in concert or with a common design with any of the Lead Companies or defendants. Further, to the extent that other Lead Companies or defendants may have had policies in common with PM USA in relation to smoking and health, those policies were developed for appropriate business purposes and were lawful. PM USA further states that the risks associated with smoking have been widely known in Ontario, as elsewhere, for over 50 years, that information about the risks of smoking was communicated to persons in Ontario through a variety of sources and that PM USA 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 the public health community.

(i) Conspiracy within the International Tobacco Industry

36. PM USA denies the allegations in paragraphs 87-107 of the Statement of Claim and repeats paragraph 35 hereof.

(ii) Conspiracy within the Canadian Tobacco Industry

37. PM USA denies the allegations in paragraphs 108-116 of the Statement of Claim and repeats paragraph 35 hereof.

(iii) Conspiracy within Corporate Groups

The Rothmans Group

38. PM USA denies the allegations in paragraphs 117-120 of the Statement of Claim and repeats paragraph 35 and refers to paragraph 39 hereof.

The Philip Morris Group

39. PM USA denies the allegations in paragraphs 121-127 of the Statement of Claim and repeats paragraph 35 hereof.

The RJR Group

40. PM USA has no knowledge of the allegations in paragraphs 128-134 of the Statement of Claim and therefore denies the same.

The BAT Group

41. PM USA has no knowledge of the allegations in paragraphs 135-140 of the Statement of Claim and therefore denies the same.

42. PM USA denies the allegations in paragraph 141 of the Statement of Claim and repeats paragraph 35 hereof.

Breach of Consumer Protection Act, 2002, the Competition Act and their Predecessor Statutes

43. PM USA denies the allegations at paragraphs 142-147 of the Statement of Claim and repeats paragraphs 25 and 31-35 hereof.

V. CONCLUSION

44. PM USA denies the allegations at paragraphs 148-150 of the Statement of Claim and repeats paragraphs 25 and 31-35 hereof.

45. PM USA has no knowledge of the allegations in paragraph 151 of the Statement of Claim and therefore denies the same.

ANSWERS TO THE STATEMENT OF CLAIM AS A WHOLE

A. GENERAL DEFENCES

(i) No cause of action

46. The Statement of Claim discloses no cause of action because:

- (a) There has been no pecuniary damage suffered by insured persons in respect of the “cost of health care benefits” as defined by the *Act*;
- (b) The statutory liability the Province is attempting to impose on the defendants in this action is an after the fact attempt to make actionable conduct that was not actionable when it occurred;

- (c) If the Claimed Cost was incurred as alleged or at all, which is denied, it was incurred by the federal government by means of transfer payments, conditional grants and shared cost programmes, and not by the Province;
- (d) If the Province has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost was incurred to provide services to insured persons that the Province was and is required to provide pursuant to Ontario's *Health Insurance Act*, R.S.O. 1990, c. H.6, as amended, and any predecessor statutes; and
- (e) If the Province has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost was caused by the conduct and acts or omissions of the federal government and of the Province.

(ii) No breach of duty

47. PM USA repeats paragraph 13 hereof and states:

- (a) PM USA never owed nor breached a duty to persons in Ontario;
- (b) PM USA conducted itself at all times in accordance with appropriate business practices and in compliance with the common law, equitable and statutory duties that governed its conduct; and
- (c) At all materials times, the manufacture, sale, advertising and promotion of tobacco products in Ontario and throughout Canada has been supervised, regulated and controlled by the Province and the federal government. The Province encouraged or participated in such supervision, regulation and control in Ontario either directly or indirectly through agreements, express or implied with

the federal government. Together the said governments have defined and delineated the duties of tobacco manufacturers in Canada including Ontario and have given advice, recommendations, directions and suggestions in relation to, *inter alia*:

- (i) The nature and scope of research into the properties of cigarettes to be undertaken by Canadian tobacco manufacturers;
- (ii) Whether warnings of the health risks and addictive character of cigarettes should be provided to consumers;
- (iii) The content and placement of any such warnings to be provided;
- (iv) Product modifications, including the development, manufacture, promotion, distribution and sale of cigarettes containing lower amounts of tar and nicotine as measured by standard smoking machines;
- (v) Communications by Canadian manufacturers with consumers about the health risks and addictive character of cigarettes and their tar and nicotine content when measured by standard smoking machines; and
- (vi) The acceptability of the types of advertising and other forms of promotion that have been used in the past by Canadian manufacturers to promote the sale of their products.

(iii) No damage

48. PM USA states that the Province has (i) suffered no damage, and (ii) incurred none of the Claimed Cost, as a result of anything that the Province alleges in this action that PM USA did or failed to do. PM USA further states that:

- (a) If PM USA breached any duty, as alleged or at all, which is denied, no such breach caused or contributed to the Claimed Cost as alleged or at all;
- (b) If the Province has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost was caused by, without limitation, one or more of the following:
 - (i) The requirement that the Province provide services to insured persons pursuant to the Ontario's *Health Insurance Act*, R.S.O. 1990, c. H.6, as amended, and any predecessor statutes;
 - (ii) The conduct and acts or omissions of the federal government and of the Province;
 - (iii) The conduct and acts or omissions of individual insured persons as further particularized herein; and
 - (iv) Disease or risk of disease in individual insured persons unrelated to smoking cigarettes;
- (c) If the Province has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost is exceeded by the tax revenue received by the Province from the sale of cigarettes in Ontario so that no cost is ultimately incurred by the Province;

- (d) If the Province has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost is exceeded by monies received by the Province from the federal government by means of transfer payments, conditional grants and shared-cost programmes for the purpose of funding the Claimed Cost so that no cost is ultimately incurred by the Province; and
- (e) If the Province has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost was inflated by overbilling, waste, abuse, neglect and other misconduct by various of the Province, persons involved in the administration and delivery of health care benefits and insured persons.

(iv) Causation

49. PM USA admits that smoking causes or contributes to disease. These diseases are complex and may be caused or contributed to by many different factors, including genetics, stress, excess weight, alcohol, environmental factors and other consumer products. If PM USA breached any duties, as alleged or at all, 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.

(v) Limitations

50. PM USA pleads and relies upon the provisions of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, as amended, and any predecessor statutes, both in respect of the Province's claim and in respect of the health care costs of those persons on which the Province's claim is alleged to be based and calculated.

B. DEFENCES ARISING OUT OF THE PROVINCE'S CONDUCT AND KNOWLEDGE

(i) General

51. The Province's claim to recover the Claimed Cost is subject to complete defences, by reason of information the Province knew or should have known, and the Province's own conduct, including:

- (a) The Province's knowledge of health risks associated with cigarette smoking;
- (b) The Province's licensing and regulation of the production, manufacture and sale of cigarettes, including its failure to enforce or implement such regulation to the extent constitutionally permissible;
- (c) The Province's voluntarily undertaking obligations to pay the cost of health care benefits allegedly caused or contributed to by cigarette smoking;
- (d) The Province's failure to establish or delay in developing, or both, policies and practices, including health care expenditures and taxation policies and practices, legislation and regulations, when the Province knew or should have known of the alleged risks and costs it alleges are caused or contributed to by cigarette smoking and ETS;
- (e) The Province's failure to fund, develop and implement health promotion and smoking cessation practices and policies, when the Province knew or should have known of the alleged risks and costs it alleges are caused or contributed to by cigarette smoking and ETS;

- (f) The Province's failure to take any steps prior to commencement of this action to attempt to recover the alleged cost of health care benefits by subrogation;
- (g) The Province's delay in implementing and failure 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;
- (h) The Province's own decision to regulate many aspects of the tobacco business and to keep the largest portion of the proceeds from the sale of tobacco products;
- (i) The Province's taxation of cigarettes in excess of the cost (if any) of health care benefits allegedly resulting from tobacco related disease or the risk thereof; and
- (j) The Province's own breaches of its duty or duties to insured persons as particularized herein.

52. Further, for decades Ontario has exercised its legislative and regulatory authority with respect to the sale, use and taxation of tobacco, and has either prohibited or regulated all activities and conduct with respect to tobacco and its sale that it considered to be necessary, appropriate or desirable. In this regard, PM USA pleads and relies on the *Minors' Protection Act*, R.S.O. 1990, c M.38 (superseded); *Smoking in the Workplace Act*, R.S.O. 1990, c S.13 (superseded); the *Public Vehicles Act*, R.S.O. 1990, c P.54, s. 20; and the *Smoke-Free Ontario Act*, S.O. 1994, c. 10 and O. Reg. 48/06; the *Tobacco Tax Act*, R.S.O. 1990, c. T.10, as amended, and any predecessor statutes and regulations.

53. At all material times, the sale, advertising, promotion and consumption of tobacco products have been legal in Ontario subject to certain exceptions and restrictions all of which have been fully complied with by PM USA.

54. At all material times, the Province, through its ministers, ministries, departments, servants and agents, has known as much regarding the material risks associated with smoking cigarettes and ETS as PM USA.

55. Despite its knowledge of risks associated with smoking cigarettes and ETS, the Province continued to license and regulate the production, manufacturing, advertising, promotion and sale of cigarettes in Ontario and to impose heavy taxation upon, *inter alia*, manufacturers, distributors and consumers of cigarettes.

56. The Province benefits from the taxes imposed on and in relation to the sale of cigarettes in Ontario, which results in complete mitigation of the claim. PM USA pleads and relies on the *Tobacco Tax Act*, R.S.O. 1990, c. T.10, as amended, and any predecessor statutes.

57. Despite its knowledge of risks associated with cigarette smoking and ETS, the Province took no steps to restrict or limit the sale of cigarettes save for restrictions on sale to persons below a prescribed age and in that case, delayed in implementing such restrictions, and subsequently took no reasonable steps to enforce them. PM USA pleads and relies on the *Smoke-Free Ontario Act*, S.O. 1994, c. 10 and O. Reg. 48/06, as amended, and any predecessor statutes.

58. Despite its knowledge of risks associated with cigarette smoking, the Province voluntarily undertakes the obligation of paying for the costs of health care benefits including

such costs it alleges are caused or contributed to by cigarette smoking and ETS and sets its taxation and health care policies accordingly.

59. Despite its knowledge of risks associated with cigarette smoking, the Province, at all material times, permitted the sale and consumption of cigarettes in Ontario and derived substantial revenue therefrom.

60. The Province is wrongfully attempting, by statute, to make conduct actionable which was not actionable at the time it occurred. As a result and because the Province waited for decades to commence a claim, PM USA pleads that the Province's action should be dismissed on the basis of voluntary assumption of risk, laches, estoppel and the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, as amended, and any predecessor statutes.

(ii) Voluntary assumption of risk

61. PM USA repeats paragraphs 51-60 hereof and states that at all material times the Province has been aware of health risks associated with cigarette smoking and ETS. Accordingly, the Province voluntarily assumes such risks, whatever their extent, in incurring the costs it alleges are caused or contributed to by cigarette smoking and ETS, and the Province is barred from recovering any of the Claimed Cost from PM USA in this action by reason of its own actions and its voluntary assumption of risk. PM USA further states that:

- (a) the Province has had knowledge of the health risks for over 50 years. Despite that knowledge, the Province and the federal government have continued to permit the sale of tobacco products in Ontario;

- (b) PM USA's activities over the last 50 years took place with the knowledge and consent of the governments, including the Province; and
- (c) relying on the Province's course of conduct, PM USA continued to make its tobacco products available for sale in Ontario in compliance with all applicable government direction until 1989.

(iii) Contributory negligence

62. PM USA repeats paragraphs 51-60 hereof and states that if the Province has incurred the Claimed Cost as alleged or at all, which is denied, then the Claimed Cost was caused or contributed to, in whole or in part, by the acts or omissions of the federal government acting alone or as agent for or in concert with the Province, or due to the acts or omissions of the Province as pleaded herein, and not any act or omission of PM USA. PM USA pleads and relies upon the *Negligence Act*, R.S.O. 1990, c. N.1, as amended, and any predecessor statutes.

63. PM USA repeats and relies on paragraphs 51-60 hereof and states that it was governments that decided many aspects of the tobacco business and who kept the largest portion of the proceeds from the sale of tobacco products. To the extent insured persons, including under-aged persons, were not informed of the risks associated with smoking cigarettes or purchased low tar cigarettes as a result of a misrepresentation (all of which is denied), it is because the Province or the federal government, or both, failed to perform their obligations adequately.

(iv) The Province cannot profit from its wrongful conduct

64. PM USA repeats paragraphs 25-43 and 51-60 hereof and states that the Province is barred from recovering any damages or costs it has suffered, the existence of which is denied, as any

damages or costs flowed from its participation as set out herein in conduct which the Province itself alleges in the Statement of Claim constituted breaches of duty.

(v) Legal and equitable bars

65. PM USA repeats paragraphs 51-60 hereof and states that by reason of the facts set out therein and the knowledge, conduct and delay of the Province and the prejudice thereby caused to PM USA, the Province is barred in law and in equity from advancing the claims made in the Statement of Claim against PM USA. PM USA pleads and relies on the *Health Insurance Act*, R.S.O. 1990, c. H.6, as amended, and any predecessor statutes.

(vi) Mitigation

66. PM USA repeats paragraphs 51-60 hereof and states that if the Province has incurred the Claimed Cost, as alleged or at all, which is denied, the Province has failed to mitigate the Claimed Cost.

C. DEFENCES ARISING OUT OF INDIVIDUAL CONDUCT

(i) General

67. If the Province has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost was caused by, and the Province's claim to recover the Claimed Cost is subject to complete defences by reason of the conduct of individual insured persons, including their voluntary decisions to commence or continue smoking with awareness of the associated risks.

68. All of the insured persons who smoke or have smoked cigarettes were aware or had been warned of risks associated with smoking.

69. Each insured person became aware or received warnings of risks associated with smoking by various means, including, without limitation, one or more of the following:

- (a) Warnings, including on the packaging of cigarettes, as required from time to time pursuant to federal and provincial legislation and regulations and voluntary codes of compliance by Canadian tobacco manufacturers;
- (b) Mandatory displays, signs and other warnings required by provincial legislation in premises where sales of cigarettes take place;
- (c) Discussions and writing, including advertising, in all forms of media including newspapers, magazines, journals, television, movies and radio;
- (d) Education programmes including courses, seminars and lectures and educational literature and other media;
- (e) Oral and written warnings from physicians and other health practitioners;
- (f) Oral and written warnings from family members, friends and other acquaintances;
and
- (g) The common general understandings and historical beliefs about adverse health consequences attributed to cigarette smoking dating back hundreds of years.

70. By reason of the foregoing, PM USA states that all of the insured persons who smoke or have smoked cigarettes were aware or had been warned of associated risks.

71. Each of those insured persons who commenced or continued to smoke cigarettes did so with awareness of the risks associated with smoking, and each such insured person voluntarily consented to accept such risks.

72. The cause in fact and in law of the commencement and continuation of the use of cigarettes by insured persons was a voluntary choice to smoke cigarettes with awareness of the associated risks. PM USA had and has no legal duty to such persons, or alternatively, no legal duty to such persons that has not been fulfilled.

73. PM USA denies that any insured persons began, continued, or were unable to cease smoking by reason of any of the alleged breaches of duty of PM USA, or that any alleged breach of duty caused or contributed to any alleged tobacco related disease or increased costs of tobacco related disease in any insured person.

74. If the federal government did not act as an agent for or in concert with the Province, then to the extent insured persons were not adequately informed about the risks of smoking cigarettes or purchased low tar cigarettes as the result of a misrepresentation (all of which is denied), they did so as a result of the breach of duty owed to them by the federal government.

75. Finally, to the extent the Province incurred health care costs due to smoking by insured persons, which is denied, the cost was caused by Aboriginal Manufacturers who breached duties owed to insured persons by the way they packaged and sold their products.

(ii) Voluntary assumption of risk

76. PM USA repeats paragraphs 67-75 hereof and states that at all material times individual insured persons were aware of health risks associated with cigarette smoking. Accordingly, such persons voluntarily assumed such risks, whatever their extent, when they decided to commence and continue smoking.

(iii) Contributory negligence

77. PM USA repeats paragraphs 67-75 hereof and states that if the Province has incurred the Claimed Cost as alleged or at all, which is denied, then the Claimed 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 PM USA. PM USA pleads and relies upon the provisions of the *Negligence Act*, R.S.O. 1990, c. N.1, as amended, and any predecessor statutes.

(iv) Legal and equitable bars

78. PM USA repeats paragraphs 67-75 hereof and states that by reason of the facts set out therein and the knowledge and conduct of insured persons and the prejudice thereby caused to PM USA, the Province is barred at law and in equity from advancing the claims made in the Statement of Claim against PM USA.

(v) Limitations

79. PM USA pleads and relies upon the provisions of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, as amended, and any predecessor statutes, in respect of the claims of any individual insured person upon which the Province's cause of action is alleged to rest.

80. PM USA pleads and relies upon the limitation provisions in the *Competition Act*, RSC 1985, c. C-34, as amended, and any predecessor statutes.

(vi) Mitigation

81. PM USA repeats paragraphs 67-75 hereof and states that if the Province has incurred the Claimed Cost as alleged or at all, which is denied, individual insured persons have failed to mitigate the Claimed Cost.

RELIEF SOUGHT BY PM USA

82. In the circumstances, PM USA submits that the Province's claim should be dismissed, with costs.

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Her Majesty The Queen in Right of Ontario

- and -

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Court File No. CV-09-387984

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at TORONTO

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