

**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 R.J. REYNOLDS TOBACCO COMPANY**

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, R.J. Reynolds Tobacco Company of North Carolina, is a company incorporated pursuant to the laws of North Carolina (“RJRT”).
3. RJRT admits that this action is brought pursuant to the *Tobacco Damages and Health Care Costs Recovery Act, 2009*, S.O. 2009, c. 13 (“the Act”).

4. RJRT 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) and 2(2) of the Act.

5. RJRT adopts the definitions contained in the Act and in paragraph 6 of the Statement of Claim for the purposes of this Statement of Defence.

6. 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.

7. RJRT 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.

8. Except as otherwise expressly admitted herein, RJRT 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, RJRT 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. RJRT 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 or to be exposed to tobacco smoke.

9. 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.

RJRT's Corporate History

10. RJRT was formed in 2004, pursuant to the laws of the State of North Carolina.

11. In 2004, R.J. Reynolds Tobacco Company of New Jersey, a company that was previously incorporated pursuant to the laws of the State of New Jersey ("RJRT NJ"), merged with another corporate entity and thereafter ceased to exist. RJRT says that, as a result of the merger, it did not become subject to any liability under the Act, which statute had not been enacted in 2004.

12. RJRT NJ is not a predecessor in interest of RJRT. RJRT denies that it is responsible in law for the actions or conduct of RJRT NJ. Accordingly, RJRT cannot be liable for any tobacco related wrongs allegedly committed in Ontario prior to 2004, its date of incorporation. However, without prejudice to the generality of the foregoing, RJRT, to the extent possible and out of an abundance of caution, defends in respect of its own conduct and that of RJRT NJ.

13. Prior to 1970, RJRT NJ had no interest in the cigarette market in Ontario, nor did it own any shares of any corporation so interested. Accordingly, RJRT NJ cannot be held liable for any tobacco related wrong allegedly committed in Ontario prior to 1970.

14. In 1970, RJRT NJ entered into a business relationship with Macdonald Tobacco Inc. ("MTI") for the distribution of small volumes of RJRT NJ's cigarette brands in Canada.

15. On February 15, 1974, RJRT NJ purchased all of the shares of MTI. MTI became a subsidiary of RJRT NJ. Prior to that date, RJRT NJ did not hold shares in MTI or any other Canadian tobacco company. RJRT denies that MTI was, or has ever been, a subsidiary of RJRT.

16. RJR-Macdonald Inc. ("RJRMI") was incorporated on or about September 12, 1978 as a subsidiary of RJRT NJ. RJRT denies that RJRMI was, or has ever been, a subsidiary of RJRT. On or about September 19, 1978, RJRMI acquired all of the shares of MTI.

17. On or about October 26, 1978, RJRMI acquired all of the assets of MTI and agreed pursuant to a General Conveyancing Agreement ("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 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.

18. On May 11, 1999, RJRT NJ sold and transferred its shares in RJRMI to JT Nova Scotia Corporation and therefore RJRMI ceased to have any corporate relationship with RJRT NJ or R.J. Reynolds Tobacco International, Inc. (the "RJR Companies"). Since that time:

- a) neither RJRT NJ nor RJRT has owned shares of any corporation involved in the Canadian cigarette market;

- b) no significant quantities of cigarettes manufactured by RJRT NJ and/or RJRT have been distributed for sale in Ontario.

Accordingly, RJRT says that neither it nor RJRT NJ can be liable for any tobacco related wrong allegedly committed in Ontario after May 11, 1999.

19. In the normal course of business, RJRT NJ and MTI, and later RJRMI, legitimately exchanged information relevant to MTI and/or RJRMI's operations in Canada. However, such exchange of information does not render the acts of MTI or RJRMI the acts of RJRT NJ, nor does such exchange of information mean that the actions or inactions of MTI or RJRMI were controlled or directed by RJRT NJ.

20. RJRT denies that it or RJRT NJ would be liable for any of the alleged tobacco related wrongs of JTIM, RJRMI, or MTI on the basis of joint or vicarious liability, agency, conspiracy, or acting in concert.

General

21. RJRT denies, on its own behalf and that of RJRT NJ, 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.

22. RJRT specifically denies that any act or omission on the part of RJRT or RJRT NJ in the design, manufacture, advertising, promotion or marketing of their products wrongfully caused persons in Ontario to start smoking and/or to continue smoking cigarettes.

23. RJRT says that its conduct and that of RJRT NJ must be judged with reference to the time and the circumstances in which they took place. Those circumstances would include, but are not limited to, the awareness – from time to time – of the public, the public health authorities, the Federal Government, and the Plaintiff of the potential risks of smoking cigarettes.

24. 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 at paragraphs 70 to 78 below.

25. The regulatory framework, requirements and standards prevailing from time to time and the acts and omissions of both the Province and the Federal Government were and are important in assessing the standard(s) of care owed by cigarette manufacturers to persons in Ontario and the reasonableness and lawfulness of cigarette manufacturers' conduct at all material times.

Smoking and Disease

26. RJRT 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. RJRT 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, RJRT 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, RJRT 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. RJRT notes that beginning in 1972 – two years prior to RJRT NJ’s purchase of the shares of MTI – all packages of cigarettes sold in Canada displayed health warnings. Shortly thereafter all cigarette advertising contained similar warnings.

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, neither RJRT nor RJRT NJ had any 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. RJRT and RJRT NJ’s conduct 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.

Why People Smoke

33. 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.

34. 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.

35. 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.

36. 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.

37. At various times, different terms have been used to describe the difficulty in stopping smoking, including “habituation”, “dependence” and “addiction”. RJRT 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 the Duty - Design and Manufacture

38. RJRT and RJRT NJ 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. On its own behalf and on behalf of RJRT NJ, RJRT 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.

39. RJRT 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 or by RJRT NJ and/or RJRT, to the extent that the Plaintiff shows that cigarettes manufactured and promoted by any of them were offered for sale in Ontario. RJRT 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 the cigarettes” as alleged in paragraphs 56 and 57 of the Statement of Claim.

40. At all material times, RJRT and RJRT NJ acted reasonably and lawfully in the design and manufacture of their products.

41. At all material times, persons in Ontario, the Federal Government, and the Plaintiff were aware that smoking could be harmful to smokers’ health and that it could be difficult to stop smoking.

42. RJRT and RJRT NJ dedicated substantial resources with the objective of developing cigarettes that may reduce the health risks associated with smoking. Between the mid-1950’s and 2004, RJRT NJ dedicated over a billion dollars to this research and to efforts to bring such products to market and investigated numerous potential innovations in cigarette design, including:

- a) selective reduction, i.e. attempting to remove or reduce specific constituents of smoke identified as potentially being of particular concern by the scientific and public health community;
- b) general reduction, i.e. attempting to reduce machine-measured levels of tar, nicotine and other smoke constituents through the use of filtration, ventilation, processed tobaccos and other techniques;

- c) the use of tobacco substitutes, i.e. attempting to replace some or all of the tobacco in cigarettes with other substances that generate simpler smoke chemistry;
- d) reducing the ratio of tar to nicotine, i.e. attempting to change the amount of nicotine yielded per unit tar, as has been recommended by some in the public health and wider scientific community since the 1970s and 1980s; and
- e) developing new products with dramatically simplified smoke chemistry, by reason of the fact that they heat, rather than burn, tobacco.

43. At all material times, RJRT NJ worked with RJRMI in this regard and shared the fruits of its research with RJRMI.

Alleged Breach of the Duty to Warn

44. RJRT specifically denies, on its own behalf and on behalf of RJRT NJ, each and every allegation set forth in paragraphs 63-70 of the Statement of Claim and puts the Plaintiff to the strict proof thereof.

45. Any statements, warnings or failure to warn of risks by RJRT or RJRT NJ must be assessed in the 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 of quitting.

46. Neither RJRT nor RJRT NJ made health claims with respect to any products sold in Ontario. RJRT and RJRT NJ complied in all material respects with the legislation, regulations and directives established by the Federal Government and the Province in effect from time to time, as well as the industry Voluntary Codes from time to time.

Alleged Breach of the Duty – Misrepresentation

47. RJRT and RJRT NJ 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. RJRT 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.

48. RJRT expressly denies that it or RJRT NJ 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, RJRT denies that persons in Ontario relied on any such representation or statement to their detriment and says that

any such representation or statement must be assessed in the context of the circumstances, both general and specific, existing at the time of the particular statement.

49. In specific reply to the allegations in paragraphs 73 and 73.3 of the Statement of Claim, RJRT denies that it, or RJRT NJ, 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.

50. In specific reply to the allegations in paragraphs 76-77 of the Statement of Claim, RJRT expressly denies that it or (so far as RJRT is aware) RJRT NJ, 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 commence smoking or to continue to smoke as alleged. In the alternative, RJRT denies that persons in Ontario relied on such representation or statement to their detriment.

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

51. RJRT 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.

52. RJRT and RJRT NJ 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. On its own behalf and on behalf of RJRT NJ, RJRT specifically denies each and every allegation set forth in paragraphs 79-85 of the Statement of Claim. Any alleged act or omission of RJRT or

RJRT NJ must be assessed in the context of the circumstances, both general and specific, existing at the time.

53. Neither RJRT nor RJRT NJ targeted children or adolescents in the promotion, advertising or marketing of cigarettes at all or, in particular, in Ontario, in order to convince such children or adolescents to smoke; nor did either company suggest that MTI or RJRMI should do so. In any event, advertising and promotion for cigarettes do not play any significant role in why minors smoke.

54. RJRT does not admit that either it or RJRT NJ was obliged to take measures to prevent children or adolescents from starting to smoke or continuing to smoke cigarettes. The sale of cigarettes to children or adolescents under the age of 16 in Ontario was, at all material times, illegal. The Federal Government and the Province determined the age at which persons in Ontario may lawfully purchase cigarettes and other tobacco products. The enforcement of the law was not the responsibility of RJRT or RJRT NJ. 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.

55. To the extent allegations are made regarding the improper sale of cigarettes to minors in Ontario, neither RJRT nor RJRT NJ was or is a retailer, and neither has sold cigarettes directly to persons in Ontario.

Alleged Breaches of Statutory Duties and Obligations

56. RJRT and RJRT NJ complied in all material respects with all applicable statutory duties and obligations, as they existed from time to time, owed to persons in Ontario. On its own behalf, and on behalf of RJRT NJ, RJRT specifically denies each and every allegation set forth in paragraphs 142-147 of the Statement of Claim.

57. On its own behalf, and on behalf of RJRT NJ, RJRT 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.

58. 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. No act or omission on the part of RJRT or RJRT NJ in the design, manufacture, advertising, promotion or marketing of their products wrongfully caused persons in Ontario to start smoking or to continue smoking cigarettes. RJRT, on its own behalf and on behalf of RJRT NJ, pleads and relies upon the context as previously described in its Statement of Defence.

Alleged Conspiracy, Concert of Action and Common Design

59. On its own behalf and on behalf of RJRT NJ, RJRT denies the existence of any conspiracy, concert of action or common design as alleged in the Statement of Claim. RJRT, on

its own behalf and on behalf of RJRT NJ, 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.

60. RJRT further denies that it or RJRT NJ 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.

61. RJRT further denies that it or RJRT NJ 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.

62. In response to the allegations at paragraphs 128-134 of the Statement of Claim, RJRT specifically denies that it or RJRT NJ directed and coordinated the smoking and health policies of JTIM, MTI or RJRMI through the means and methods alleged in those paragraphs of the Statement of Claim. RJRT further specifically denies that it, or RJRT NJ, 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.

63. RJRT admits that representatives of RJRT NJ 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.

64. RJRT denies that it or RJRT NJ communicated with any other cigarette manufacturer or trade association, or with MTI or RJRMI, for any unlawful purpose, or employing any unlawful means, or with the intent of injuring any person in Ontario. RJRT further denies that any unlawful acts were committed in Ontario as a result of any communication between RJRT or RJRT NJ and any other person.

65. In the normal course of business, RJRT NJ and MTI, and later RJRMI, legitimately exchanged information relevant to MTI and/or RJRMI's operations in Canada. However, such exchange of information does not render the acts of MTI or RJRMI the acts of RJRT NJ, nor does such exchange of information mean that the actions or inactions of MTI or RJRMI were controlled or directed by RJRT NJ.

66. From time to time, employees of RJRT NJ participated in meetings at which issues relating to smoking and health were discussed. These meetings and the exchange of information more generally were means by which to discuss issues common to companies with some connection to RJRT NJ, including smoking and health issues. The communications did not constitute directives or orders, and, in any event, did not encourage the commission of unlawful acts.

67. No communication between RJRT or RJRT NJ and any other person, or any other act or omission of RJRT or RJRT NJ, reduced or adversely affected the awareness of persons in Ontario regarding the risks associated with smoking.

68. RJRT 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”.

69. Accordingly, RJRT 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

70. 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.

71. The Federal Government and its officials working in its departments and agencies worked closely with the cigarette manufacturers, 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.

72. 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; and
- 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.

73. 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

74. 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.

75. 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 RJRT NJ or RJRT.

76. 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; and
- 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.

77. 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.

78. 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 the Province when the Plaintiff permitted (and benefited from) the sale of cigarettes with knowledge of the potential health risks.

79. RJRT pleads and relies on the provisions of the *Negligence Act*, R.S.O. 1990, c. N. 1 and the *Limitations Act, 2002*, S.O. 2002, c. 24.

The Cost of Health Care Benefits

80. RJRT repeats its denial that neither it nor RJRT NJ committed any tort or breached any common law, equitable or statutory duty or obligation owed by them to persons in the Province of Ontario, which led such persons to start smoking or to continue to smoke.

81. 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. RJRT puts the Province to the strict proof of its claim for the cost of health care benefits.

82. RJRT 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 RJRT or RJRT NJ to persons in Ontario, which breach is expressly denied. RJRT 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.

83. 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.

84. 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; and
- e) must not include the cost of health care benefits for a disease resulting from exposure to tobacco products other than cigarettes.

85. 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. RJRT 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.

86. 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.

87. 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; and
- 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.

88. The Province has agreed to and accepted the manufacture, distribution, promotion and sale of cigarettes in Ontario. 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 or exposure to tobacco smoke, since such costs have been fully paid from taxes on the sale of cigarettes in Ontario.

89. 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 the Province of 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.

90. 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, distributed and promoted in Ontario. The Plaintiff is not entitled to recover from RJRT or RJRT NJ the cost of health care benefits resulting from such actions and conduct by the Federal Government and/or the Province or from compliance with their advice, recommendations or directions.

Mitigation

91. RJRT 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

92. RJRT 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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HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

- and -

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