

**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 INTERNATIONAL INC.**

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 International, Inc. (“RJRTI”), admits that it is a company incorporated pursuant to the laws of the State of Delaware but says that its registered office address is 327 Hillsborough Street, Raleigh, North Carolina 27603, in the United States of America.

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

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

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

12. 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.

RJRTI's Corporate History

13. RJRTI was incorporated in the State of Delaware in the United States of America in 1976. RJRTI is, and since its incorporation has been, a subsidiary of R.J. Reynolds Tobacco Holdings, Inc. (formerly named R.J. Reynolds Industries, Inc. and RJR Nabisco, Inc.).

14. Since 1999, RJRTI has been an inactive shell corporation that is wholly-owned by R.J. Reynolds Tobacco Holdings Inc., without assets or employees.

15. Macdonald Tobacco Inc. ("MTI") and RJR-Macdonald Inc. ("RJRMI") were legal entities separate and apart from RJRTI. JTI-Macdonald Corp. ("JTIM") is a legal entity separate and apart from RJRTI. At no time has RJRTI held shares in MTI, RJRMI or JTIM.

Alleged Tobacco Related Wrongs

16. RJRTI has not:

- a) designed, manufactured, distributed or sold cigarettes in Ontario;
- b) advertised, marketed or promoted cigarettes or smoking in Ontario;
- c) made statements or representations to persons in Ontario concerning smoking and health, addiction and/or any other risk or benefit allegedly associated with smoking or tobacco smoke;
- d) conducted research into the design of cigarettes sold in Ontario;
- e) interacted with the Government of Canada or the Government of Ontario;
- f) held shares in any corporation engaged in the activities listed in subparagraphs (a) through (e).

17. RJRTI therefore denies that it can be held liable for the tobacco related wrongs alleged in paragraphs 48-85 of the Statement of Claim.

Alleged Conspiracy, Concert of Action and Common Design

18. RJRTI denies the existence of any conspiracy, concert of action or common design as alleged in the Statement of Claim. RJRTI 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.

19. RJRTI further denies that it 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. RJRTI specifically denies that it has ever been a member of the Canadian Tobacco Manufacturers' Council.

20. RJRTI further denies that it 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.

21. In response to the allegations at paragraphs 128-134 of the Statement of Claim, RJRTI specifically denies that it 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. RJRTI further specifically denies that it unlawfully participated in the removal and destruction of

smoking and health materials or unlawfully destroyed research relating to the biological activity of cigarettes as alleged in paragraph 133.3 of the Statement of Claim.

22. RJRTI admits that its representatives met and otherwise communicated with representatives of 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 or conduct. RJRTI denies that it communicated with any 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. RJRTI further denies that any unlawful acts were committed in Ontario as a result of any communication between RJRTI and any other person.

23. In the normal course of business, RJRTI and MTI, and later RJRTI, 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 RJRTI, nor does such exchange of information mean that the actions or inactions of MTI or RJRMI were controlled or directed by RJRTI.

24. RJRTI participated in meetings, including the Winston-Salem Smoking Issues Coordinator Meetings and the "Hounds Ears" and "Sawgrass" conferences. RJRTI nominated smoking issue designees. The designee for Canada was an executive of MTI and later RJRMI.

These meetings, the nomination of a smoking issue designee, and the exchange of information more generally, were means by which to discuss issues common to companies with some connection to RJRTI, 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.

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

26. RJRTI specifically denies that RJRTI participated in, was a member of, or a party to any conspiracy, concert of action or common design to prevent the Province or persons in Ontario or other jurisdictions from acquiring knowledge of the potential risks of smoking cigarettes and/or to commit tobacco related wrongs and/or to engage in the acts alleged in paragraphs 87 to 107 of the Statement of Claim.

27. Accordingly, RJRTI 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.

28. RJRTI denies there is any basis to find joint or vicarious liability, agency, conspiracy, acting in concert or common design as between it and any other person for any alleged tobacco related wrongs.

The Cost of Health Care Benefits

29. RJRTI repeats its denial that it breached any common law, equitable or statutory duty or obligation owed by it to persons in Ontario, which led such persons to start smoking or to continue to smoke.

30. 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. RJRTI puts the Province to the strict proof of its claim for the cost of health care benefits.

31. RJRTI 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 RJRTI to persons in Ontario, which breach is expressly denied. RJRTI 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.

32. 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.

33. 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.

34. 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. RJRTI 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.

35. 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 agreements, 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.

36. 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.

37. 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.

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

39. Further, the acts and omissions of the Federal Government and the Province influenced the views and behaviour of persons in Ontario and had a significant effect on, among other things, the manner in which the manufacturers conducted their business, and the contents and properties of the cigarettes that they manufactured, distributed and promoted, in Ontario. The Plaintiff is not entitled to recover from RJRTI the cost of health care benefits resulting from such actions and conduct by the Federal Government and/or the Province or from compliance by the manufacturers with their advice, recommendations or directions.

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

41. RJRTI pleads and relies upon the *Negligence Act*, R.S.O. 1990, c. N. 1 and the *Limitations Act, 2002*, S.O. 2002, c. 24.

Mitigation

42. RJRTI 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

43. RJRTI 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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