



No. S010421
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH
COLUMBIA

PLAINTIFF

AND:

IMPERIAL TOBACCO CANADA LIMITED, ROTHMANS,
BENSON & HEDGES INC., ROTHMANS INC., JTI-
MACDONALD CORP., CANADIAN MANUFACTURERS'
COUNCIL, B.A.T. INDUSTRIES p.l.c., BRITISH AMERICAN
TOBACCO (INVESTMENTS) LIMITED, CARRERAS
ROTHMANS LIMITED, PHILIP MORRIS INCORPORATED,
PHILIP MORRIS INTERNATIONAL, INC., R.J.REYNOLDS
TOBACCO COMPANY, R.J. REYNOLDS TOBACCO
INTERNATIONAL, INC., ROTHMANS INTERNATIONAL
RESEARCH DIVISION and RYESEKKS p.l.c.

DEFENDANTS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

THIRD PARTY

THIRD PARTY NOTICE OF JTI-MACDONALD CORP.

TO: THE ATTORNEY GENERAL OF CANADA

AND TO: His Solicitor

TABLE OF CONTENTS

<i>I. INTRODUCTION.....</i>	<i>4</i>
<i>II. THE INVOLVEMENT OF FEDERAL GOVERNMENT DEPARTMENTS AND OFFICIALS WITH THE TOBACCO INDUSTRY</i>	<i>6</i>
<i>III. EARLY OPERATIONAL CONDUCT OF OFFICIALS PRIOR TO THE SMOKING AND HEALTH CONFERENCE IN 1963.....</i>	<i>10</i>
<i>IV. THE 1963 NATIONAL CONFERENCE ON SMOKING AND HEALTH AND THE IMPLEMENTATION OF THE NATIONAL SMOKING AND HEALTH PROGRAMME... </i>	<i>15</i>
A. Overview of the National Smoking and Health Programme.....	15
B. Implementing the National Programme: Informing Smokers and Non-Smokers of the Properties of Cigarettes.....	19
C. Implementing The National Programme; Printed Warnings	21
D. Implementing the National Programme: Monitoring Advertising and Promotion	24
<i>V. FURTHER EVOLUTION OF THE NATIONAL SMOKING AND HEALTH PROGRAMME</i>	<i>25</i>
A. Implementing the National Programme: Introduction of the Less Hazardous Cigarette and Smoking Programme.....	25
B. The Design and Development of a “Less Hazardous Cigarette” by Officials.....	36
C. Continued Monitoring, Encouraging and Endorsing by the Federal Government of the Advertising and Promotion of Light and Mild Cigarettes	40
<i>VI. WARNINGS IN THE POST 1988 ERA</i>	<i>43</i>
<i>VII. THE RELIEF SOUGHT WITH RESPECT TO THE FEDERAL GOVERNMENT ..</i>	<i>44</i>
A. A Declaration JTI Committed No Tobacco Related Wrong	44
B. In the Alternative, A Declaration Pursuant to s. 3(4) of the Act, that JTI’s Liability Be Reduced.....	45
C. In the Alternative, Contribution and Indemnity Under the Negligence Act	45
D. In the Alternative, Damages to the Extent of Any Liability to the Plaintiff	46
E. In the Alternative, Indemnity in Whole or In Part to the Extent of Any Liability of JTI to the Plaintiff	47

THIS ACTION has been brought by the Plaintiff, Her Majesty the Queen in Right of British Columbia, against the Defendants, including JTI-Macdonald Corp. ("JTI"). The Plaintiff's claim against JTI is set out in the Writ of Summons and Statement of Claim. None of the statements of fact or allegations contained herein are intended to be, nor should they be construed as, admissions of the allegations or claims advanced by the Plaintiff. JTI repeats and relies on its Statement of Defence.

TAKE NOTICE that the Defendant, JTI-Macdonald Corp. (JTI), claims against you for:

- (a) A declaration that JTI, for the reasons particularized herein, committed no "tobacco related wrong";
- (b) Alternatively, a declaration that, pursuant to s. 3(4) of the *Tobacco Damages and Health Care Costs Recovery Act*, JTI's liability be reduced to the extent that the Federal Government's conduct, wrongful or not, caused or contributed to smoking or to disease or the risk of disease;
- (c) Alternatively, contribution and indemnity pursuant to the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333, based upon the Federal Government's conduct as a manufacturer;
- (d) Alternatively, damages, measured by the extent of any liability of JTI to the Plaintiff;
- (e) Alternatively, an order that the Federal Government indemnify JTI, in whole or in part, to the extent of any liability of JTI to the Plaintiff;
- (f) costs; and
- (g) such other relief as to this Honourable Court seems just.

The material facts on which the Defendant JTI-Macdonald Corp. relies are:

I. INTRODUCTION

1. The Federal Government, at times material to the allegations in the Statement of Claim, undertook an active role in the tobacco industry in Canada and, in particular, gave cigarette manufacturers in Canada support and direction and set the standard of care that cigarette manufacturers, acting reasonably, met at material times. In furtherance of that role, through the conduct of Officials working in its departments and agencies, the Federal Government implemented numerous operational programmes including:
 - (a) Research into the potential health risks of smoking;
 - (b) Monitoring and assessing the level of awareness of consumers in British Columbia of the potential health risks of smoking;
 - (c) Considering the need to educate and advise consumers in British Columbia as to the properties of cigarettes and to inform and/or remind those consumers of the potential health risks of smoking;
 - (d) Providing such education, advice and information and/or reminders at certain material times as was considered necessary;
 - (e) Research into and development of varieties of tobacco leaf including the genetic modification of tobacco leaf to suit the Canadian and export tobacco markets;
 - (f) The promotion to Canadian cigarette manufacturers of varieties of tobacco leaf, including genetically modified tobacco leaf, for use in the manufacture of cigarettes sold in British Columbia, with a view, *inter alia*, to reducing the potential health risks of smoking;
 - (g) Working with the Canadian cigarette manufacturers to develop potentially less hazardous cigarettes and, indeed, taking a position of leadership in relation to the same;

- (h) Giving advice, recommendations and directions to Canadian cigarette manufacturers as to whether printed warnings on packages of cigarettes were necessary or desirable;
 - (i) Giving advice, recommendations and directions as to the form of such warnings;
 - (j) Giving advice, recommendations and directions to Canadian cigarette manufacturers in respect of advertising and promotion of cigarettes;
 - (k) Giving advice, recommendations and directions to Canadian cigarette manufacturers on the need for them to promote cigarettes to consumers in British Columbia with a lower yield of "tar";
 - (l) Giving advice, recommendations and directions to Canadian cigarette manufacturers on the form of packaging to be used by manufacturers; and
 - (m) Imposing taxes for the purpose of obtaining the majority of the revenue from the sale of cigarettes to consumers in British Columbia and at levels intended to influence the market for cigarettes in Canada and, in particular, among adolescent smokers.
2. The Plaintiff alleges that JTI-Macdonald Corp. and its predecessor corporations, (hereinafter "JTI") are a "manufacturer" which committed various "tobacco related wrongs" causing or contributing to "exposure" to tobacco products and "tobacco related disease" among "consumers", thereby causing or contributing to the Plaintiff incurring the "cost of health care benefits", all of which is denied. The Plaintiff seeks to recover from JTI the cost of such health care benefits. For the purpose of this Third Party Notice, JTI adopts the definitions of "manufacturer," "tobacco related wrong", "exposure", "tobacco related disease", "consumers" and "cost of health care benefits" used in the Statement of Claim and the *Tobacco Damages and Health Care Costs Recovery Act* S.B.C. 2000, c. 30 (the "Act").
3. The Federal Government is a manufacturer. It has:
- (a) manufactured tobacco products;

- (b) caused, directly or indirectly, through arrangements with contractors, licensees, franchisees or others, the manufacture of tobacco products; and
 - (c) engaged in or has caused, directly or indirectly, other persons to engage in the promotion of tobacco products, including cigarettes.
4. JTI denies that it has committed any tobacco related wrongs and that any alleged tobacco related wrongs have caused or contributed to exposure, tobacco related disease or the risk of disease and to the Plaintiff incurring the cost of health care, as alleged or at all. In particular, but without limiting the generality of the foregoing, JTI denies that it has withheld information about the properties of cigarettes or of cigarette smoke and their potential health risks, and JTI repeats its Statement of Defence herein.

II. THE INVOLVEMENT OF FEDERAL GOVERNMENT DEPARTMENTS AND OFFICIALS WITH THE TOBACCO INDUSTRY

5. The Federal Government was, at material times, responsible for protecting the health of Canadians, including consumers, in British Columbia and was, in particular, responsible for providing them with accurate and reliable health information. Consumers in British Columbia relied on the Federal Government with respect to the same.
6. Health Canada, the successor to the Department of National Health and Welfare, the Department of Pensions and National Health and the Products Safety Branch of the former Department of Consumer and Corporate Affairs (collectively referred to herein as "Health Canada"), was established pursuant to the *Department of Health Act*, S.C. 1996, c. 8 and predecessor statutes. At material times, Health Canada has had a statutory duty and responsibility under Section 4 of the *Department of Health Act* and predecessor sections to promote and preserve the health and well being of the people of Canada.
7. At material times, Health Canada has assumed duties and obligations separate and apart from its governing statutes including those arising from the conduct of Officials, as particularized herein, who engaged in or undertook research into the extent and nature of smoking, the properties of cigarettes, the potential health risks of smoking, the level of awareness of consumers of the potential health risks of smoking and who engaged in the

research and design of tobacco and tobacco products and in the promotion of tobacco and tobacco products.

8. Without limiting the foregoing, Officials of Health Canada, based on their knowledge of smoking and health matters, their engagement in the activities pleaded in paragraph 7 above and their relationship with consumers and with cigarette manufacturers, including JTI:

- (a) made certain representations and provided certain information and advice about the properties of cigarettes and the potential health risks of smoking to consumers in British Columbia, intending that consumers in British Columbia would rely, and consumers did rely, on such representations, information and advice, and
- (b) made certain representations and requests, provided certain information and advice and gave direction to cigarette manufacturers, including JTI, in relation to the same intending that the cigarette manufacturers would rely, on such representations, information and advice. The cigarette manufacturers did rely on these representations, information and advice and did comply with these requests and directions.

9. In relation to matters material to the allegations in the Statement of Claim, including matters in respect of which the Federal Government assumed duties and obligations to consumers in British Columbia and to cigarette manufacturers, Health Canada made operational decisions to implement policy through its Ministers, Deputy Ministers, its Health Services and Promotion Branch and its officials, its Health Protection Branch (including at material times the Tobacco Product Section, the Tobacco Bureau and the Non-Medical Use of Drugs Directorate) and its committees and inter-departmental committees and administrative heads, its Assistant Deputy Ministers and Executive Directors General and through other officials known and unknown to JTI, herein referred to as "Officials". Ministers of Health who acted in ways material to this action include Mr. Monteith, Ms. LaMarsh, Mr. MacEachen, Mr. Munro, Mr. Lalonde, Ms. Begin and Mr. Epp. Deputy Ministers of Health include Drs. Cameron, Crawford, Morrison and LeClair. Assistant Deputy Ministers of Health include Dr. A. J. Liston. Committee

members include Drs. Colburn and Watkinson. Other Officials include Dr. Best, M. Palko, Dr. Pett, Dr. Chapman, Dr. Draper, Dr. Layton, J. Nightscales and G. B. Schreiber.

10. Agriculture Canada is established pursuant to the *Department of Agriculture and Agri-Food Act*, R.S.C., 1985, c. A-9, s. 4, and predecessor statutes which have conferred broad powers, duties and functions with respect to agriculture, agricultural products, and research related to agriculture and products derived from agriculture including the operation of experimental farms.
11. From 1906, and at material times thereafter, Officials of Agriculture Canada at the Delhi Research Station and elsewhere carried out a programme in cooperation with and in support of the tobacco industry, including tobacco growers and cigarette manufacturers, including JTI, which programme included:
 - (a) research into and analysis of the chemical and physical composition of tobacco for the purpose of determining which varieties produced the quality required by manufacturers and consumers of cigarettes in British Columbia;
 - (b) research into the chemical constituents of tobacco smoke;
 - (c) research regarding nicotine and tobacco varieties for the purpose of providing tobacco manufacturers with a level of nicotine in the leaf believed by Officials to be suitable for use by manufacturers in tobacco products;
 - (d) participation in the following
 - (i) Tobacco Variety Evaluation Committee,
 - (ii) Evaluation Committee on Agricultural Chemicals for Tobacco,
 - (iii) Canadian Tobacco Quality Evaluation Committee,
 - (iv) Manufacturers' Smoke Evaluation Committee,
 - (v) Canadian Tobacco Research Group, and

- (vi) Delhi Engineering Research Group;
- (e) the initiation of smoke preference studies of tobacco treated with experimental pesticides;
- (f) control and approval of the varieties of tobacco seed available for use in Canada;
- (g) breeding and/or genetic engineering of improved smoking quality tobacco varieties for use by cigarette manufacturers; including frequent consultation and cooperation with cigarette manufacturers on the influence of genetic variation in nicotine, tar and surface waxes/lipids on flavours and aroma in relation to mutagenicity/biological activity of tobacco smoke;
- (h) participation in the creation of Centre de Coopération pour les Recherches Scientifiques Relatives au Tabac (hereafter "C.O.R.E.S.T.A.") as a world tobacco organization and attendance at the International Tobacco Scientific Congresses sponsored by C.O.R.E.S.T.A. to present scientific reports;
- (i) publishing the results of its research in Tobacco Science, the Canadian Journal of Plant Science, the Canadian Journal of Genetics and Cytology and other scientific journals and in The Lighter, its own publication;
- (j) attendance at the Tobacco Chemists Research Conference meetings; hosting several such meetings which included the presentation of reports on tobacco growing and tobacco product manufacturing;
- (k) advising and/or directing cigarette manufacturers regarding the content of nicotine in tobacco to be used in tobacco products sold in British Columbia;
- (l) research into the agricultural practices and chemical fertilizers ("cultural practices") that cause variations in the chemical content of tobacco leaf, including nicotine;

- (m) since 1970, participation with Officials of Health Canada in the "Less Hazardous Cigarette Programme" including the Delhi Tobacco and Health Bio-Assay Programme; and
 - (n) since about 1970, the manufacture of cigarettes for testing on Agriculture Canada's smoking machines and for testing by consumer panels to determine smoker satisfaction.
12. Agriculture Canada also undertook or sponsored research programmes relating to tobacco, smoking and health in support of the smoking and health programme developed by Health Canada as further particularized herein.
13. In relation to matters material to this action, including the matters particularized in paragraphs 9-12 above, the Federal Government assumed duties and obligations to consumers in British Columbia and to cigarette manufacturers. In these regards Agriculture Canada made operational decisions through its Ministers, Deputy Ministers and Assistant Deputy Ministers, and through its research divisions, committees and inter-departmental committees, as well as officials of Agriculture Canada, known and unknown to JTI, including those employed as research scientists at the Delhi Research Station, herein also referred to as "Officials". Ministers of Agriculture who acted in ways material to this action include Mr. Whelan. Committee members include Dr. Hamilton. Other Officials include B. B. Migicovsky, B. F. Zilkey, L. S. Vickery, R. Sims, P. W. Johnson, Drs. Pandey and Court at the Delhi Research Station, and W.H. Cherry and Dr. W.F. Forbes at the University of Waterloo.
14. If JTI is liable to the Plaintiff, which is denied, then the Federal Government is liable to JTI as alleged herein, based on vicarious liability for the actions of its servants or Officials and the *Crown Liability and Proceedings Act*, R.S.C. 1985, c-50.
- III. EARLY OPERATIONAL CONDUCT OF OFFICIALS PRIOR TO THE SMOKING AND HEALTH CONFERENCE IN 1963**
15. Prior to the 1950's, it was widely known by consumers in British Columbia and the Federal Government that smoking was potentially harmful to health.

16. In 1908, Parliament enacted the *Tobacco Restraint Act* 7-8 Edw VII c. 73, which prohibited the sale of tobacco products to persons under the age of 16 years.
17. In the 1940's, Officials published a booklet, in a series of publications on health, entitled "Smoking" which outlined potential health risks associated with smoking and the "habituating" or "addicting" properties of cigarettes.
18. In 1945, a study of the role of nicotine in the smoking "habit" sponsored by a cigarette manufacturer was published in a scientific journal and then summarized by Officials in Agriculture Canada's publication, "The Lighter". The study suggested that, for many individuals, nicotine was a major factor in their smoking habit, although the study also concluded that it was "equally certain" that "with many individuals nicotine is not a factor in their cigarette habit" and that, even among those for whom nicotine was a "major factor...a cigarette containing no nicotine would be grudgingly accepted as better than no cigarette at all."
19. The understanding of consumers in British Columbia and the understanding of Officials of the nature of the potential risks associated with smoking was enhanced during the 1950's when the ongoing debate, as to whether causation could be scientifically established, gained prominence. Epidemiological studies began to appear in the public and scientific literature reporting a statistical association between smoking cigarettes and a rising incidence of lung cancer. These studies were later supplemented by clinical and experimental studies that were regarded by some members of the scientific and public health communities as providing additional evidence that implicated smoking as a potential cause of lung cancer and other diseases such as heart disease, chronic bronchitis and chronic obstructive pulmonary disease. At material times, Officials knew or ought to have known of these studies and on occasion republished summaries of the studies in official Health Canada publications. Officials published no conclusions from them in the 1950's however, in the 1950's, Officials described smoking and health as a priority issue.
20. Also beginning in the 1950's, advised by Officials that filters were a possible means of reducing potentially harmful constituents in cigarette smoke, JTI and other cigarette manufacturers developed and incorporated filters into their cigarette designs.

21. In 1954, the Minister of National Health and Welfare informed Parliament that the Federal Government had allocated funds to the National Cancer Institute of Canada, as the agency through which clinical and statistical research into smoking and health was to be directed. Officials in various Federal departments, such as the Dominion Bureau of Statistics, Indian Health Services and Veterans Affairs, also co-operated with and assisted the National Cancer Institute in respect of smoking and health issues. At the request of Officials, JTI provided substantial grants, beginning in the early 1950's, to support independent research to be conducted under the auspices of the National Cancer Institute of Canada into the relationship between tobacco smoke and cancer and the potential identification of disease-causing constituents in tobacco smoke. These grants were renewed on an annual basis and ceased only at the insistence of the National Cancer Institute of Canada.
22. Between 1954 and 1962, a number of professional medical bodies and foreign governments made statements regarding the association between lung cancer and smoking which were known or ought to have been known to Officials. On occasion, Officials disseminated these statements to other parties, including the Plaintiff. In 1954, the British Government announced a "strong presumption" that smoking is a cause of cancer.
23. In 1955, Officials commissioned and undertook a major epidemiological study known as the "Veterans Study" to examine the relationship between smoking and disease.
24. In 1957, the U.S. Surgeon General published a statement in which he identified an "increasing and consistent body of evidence that excessive cigarette smoking is one of the causative factors in lung cancer."
25. In 1957, Health Minister Monteith also advised Parliament that it was premature to expect conclusions from the Veterans Study as to the cause of lung cancer.
26. In July 1957, the Deputy Minister of Health, advised or requested cigarette manufacturers to embark on a programme of "selective reduction"; namely, to support independent research directed to identifying the presence in cigarette smoke of compounds or groups

of compounds that might be responsible, in whole or in part, for the potential risks of smoking and to developing means of removing or greatly reducing yields of the same.

27. In July 1957, a cigarette manufacturer advised the Deputy Minister of Health that no health related claim was being made for filters on cigarettes, and the Deputy Minister agreed or advised this was appropriate.
28. In 1958, the National Cancer Institute of Canada stated that “[w]hile it has not been established that cigarette smoking is a cause of lung cancer” studies show that smokers have a greater risk.
29. In 1960, Dr. Layton, the Principal Medical Officer, Research Development Health Canada, expressed the view that “most experts” had reservations about the causal link between smoking and lung cancer.
30. In March, 1962, the Royal College of Physicians, in London in March, 1962, concluded that:

Cigarette smoking is a cause of lung cancer and bronchitis, and probably contributed to the development of coronary heart disease and various other less common diseases.

31. In April 1962, the Dominion Council of Health, a body in which the Federal Government and all the Provinces were represented, stated that “overwhelming evidence” showed a direct relationship between cigarette smoking and lung cancer.
32. At a November, 1962 meeting of the Dominion Council of Health, Officials recommended the implementation of a national smoking and health programme to include:
 - (a) Cooperation among Federal, Provincial and local authorities to inform and/or remind the public generally, and, in particular, medical professionals, parents, young people and school children, of the potential health risks of smoking;
 - (b) Restriction of cigarette advertising;

- (c) A mandatory warning of potential health risks of smoking;
 - (d) Restriction of the production of tobacco and of its sale or use, particularly with respect to young people; and
 - (e) Collaboration with the tobacco industry to eliminate or reduce the deleterious effects of smoking.
33. In April, 1963, at the request of Officials, the Dominion Council of Health recommended that the Minister of National Health and Welfare undertake a national health education programme consistent with the recommendations described in paragraph 32 herein and emphasized that it was essential for Provincial and Federal health departments to work together to inform and/or remind consumers in British Columbia of the potential health risks associated with cigarette smoking.
34. Officials based and implemented their smoking and health initiatives on their independent judgment about the relationship between smoking and disease. In implementing their smoking and health initiatives, Officials knew or ought to have known of the research carried out at that time relating to the properties of cigarettes and the potential health risks of smoking.
35. During this period and for decades thereafter, Officials, with full knowledge of the material facts necessary to support a proper judgment, and on the basis of definitions of "addiction" and "habit" accepted in the scientific and public health community, endorsed the view that smoking was properly to be considered a habit and not an addiction.
36. During this period of time, the cigarette manufacturers met regularly with Officials and sought advice and directions on how the cigarette manufacturers could cooperate in initiating and furthering medical research and designing a cigarette that could reduce the potential health risks from smoking. The cigarette manufacturers complied with the advice, requests and directions of Officials.
37. The advice, requests or direction of Officials, and cigarette manufacturers' subsequent reliance and actions thereon, were reasonable and lawful in the circumstances. If,

however, as alleged in the Statement of Claim, JTI breached duties or obligations owed to consumers in British Columbia with respect to its research or cigarette design, so as to have caused or contributed to exposure, tobacco related disease or to the risk of disease and to the Plaintiff incurring the cost of health care benefits, all of which is denied, the Federal Government is liable to JTI by reason of Officials' conduct as particularized in paragraphs 15 to 36 or, alternatively, this conduct, wrongful or not, caused or contributed to exposure, tobacco related disease or the risk of disease.

38. The said implementation of operational initiatives, activities and decisions of Officials was reasonable and lawful in the circumstances. If, however, insofar as it is alleged in the Statement of Claim that, before 1963, JTI breached duties or obligations to consumers in British Columbia by failing to inform and/or inadequately informing them about the properties of cigarettes or the potential health risks of smoking, so as to have caused or contributed to exposure, tobacco related disease, or to the risk of disease and to the Plaintiff incurring the cost of health care benefits, all of which is denied, the Federal Government is liable to JTI by reason of Officials' conduct as particularized in paragraphs 15 to 36 or, alternatively, this conduct, wrongful or not, caused or contributed to smoking or to exposure, tobacco related disease or the risk of disease.

IV. THE 1963 NATIONAL CONFERENCE ON SMOKING AND HEALTH AND THE IMPLEMENTATION OF THE NATIONAL SMOKING AND HEALTH PROGRAMME

A. Overview of the National Smoking and Health Programme

39. In June 1963, Ms. LaMarsh, then Minister of National Health and Welfare, made public a conclusion that "there is sufficient evidence that cigarette smoke is a contributory cause of lung cancer and that it may be associated with chronic bronchitis and coronary heart disease." Ms. LaMarsh publicly stated that the Federal Government had "a duty to inform the public of the risk to health of cigarette smoking." Ms. LaMarsh stated that special efforts should be made to dissuade children and adolescents from acquiring the smoking habit. The Minister announced that a conference with representatives of the Provinces, health agencies and professionals as well as cigarette manufacturers would be held to address initiatives directed to the potential health risks of smoking.