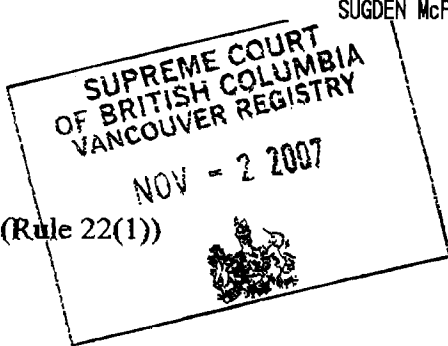


Form 17 (Rule 22(1))

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 RYSEKKS p.l.c.

DEFENDANTS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

THIRD PARTY

**THIRD PARTY NOTICE OF B.A.T INDUSTRIES p.l.c. and BRITISH AMERICAN  
TOBACCO (INVESTMENTS) LIMITED**

TO: THE ATTORNEY GENERAL OF CANADA

AND TO: His Solicitor

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THIS ACTION has been brought by the plaintiff, Her Majesty the Queen in Right of British Columbia, against the defendants, including B.A.T Industries p.l.c. ("Industries") and British American Tobacco (Investments) Limited ("Investments"). The plaintiff's claim against Industries and Investments 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. Industries and Investments repeat and rely on their statements of defence.

TAKE NOTICE that the defendants, Industries and Investments, claim against Her Majesty the Queen in right of Canada ("Federal Government") for:

- (a) A declaration that neither Industries nor Investments, for the reasons particularized herein, committed a tobacco related wrong;
- (b) A declaration that, pursuant to s. 3(4) of the *Tobacco Damages and Health Care Costs Recovery Act*, Industries' and Investments' 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) Contribution and indemnity pursuant to the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333;
- (d) Alternatively, damages measured by the extent of any liability of Industries or Investments to the plaintiff for the conduct of the defendant, Imperial Tobacco Canada Limited ("ITCAN"), or any other defendant;
- (e) Alternatively, an order that the Federal Government indemnify Industries and Investments, in whole or in part, to the extent of any liability of either to the plaintiff for the conduct of ITCAN or any other defendant;

- (f) costs; and
- (g) such other relief as to this Honourable Court seems just.

The material facts on which the defendants Industries and Investments rely are:

**I. Introduction**

1. Operational conduct of officials of the Federal Government has caused or contributed to the plaintiff's incurring the cost of health care benefits which the plaintiff seeks to recover in this action from, among others, Industries and Investments.
2. In particular, operational conduct of officials of the Federal Government, for which the Federal Government is vicariously liable, has caused or contributed to exposure, or to disease or the risk of disease, in the following ways:
  - (a) Officials of the Federal Government developed and sold under licence the variety of tobacco used in most cigarettes sold and consumed in British Columbia for at least the past two decades;
  - (b) What consumers knew about the properties of cigarettes and the health risks of smoking, including the health risks of light and mild products which officials of the Federal Government directed cigarette companies to produce and market, resulted from the dissemination of information or advice to consumers by or at the behest of officials of the Federal Government; and
  - (c) The absence, when absent, and the contents, when present, of warning labels on cigarette packages sold to consumers resulted from decisions taken by officials of the Federal Government in the implementation of a programme to provide relevant and accurate information to consumers in order to guide them in making choices about their smoking behaviour.

3. Further, officials of the Federal Government, through their conduct, publications, representations, advice, requests of and directions to manufacturers of cigarettes in Canada (including ITCAN), set standards of care in relation to duties owed by manufacturers to consumers. Officials were involved intimately in the development, design, marketing and sale of tobacco products to consumers and in the supervision, direction and guidance of manufacturers in matters relating to smoking and health and requested manufacturers to act in certain ways now alleged by the plaintiff to involve the commission of a tobacco related wrong. By complying at all material times with requests or directions given by officials and the standards of care set by officials or established through their conduct, manufacturers of cigarettes in Canada (including ITCAN) discharged any duties owed to consumers and did not commit any tobacco related wrong as alleged or at all.
4. Accordingly, and as set out herein:
  - (a) Each of Industries and Investments is entitled to a declaration that it committed no tobacco related wrong;
  - (b) Each of Industries and Investments is entitled, under s. 3(4) of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 ("Act"), to have its liability to the plaintiff (if any) reduced to the extent that the breaches of duties of officials of the Federal Government alleged herein caused or contributed to exposure or to disease or the risk of disease;
  - (c) Each of Industries and Investments is entitled, under s. 4 of the *Negligence Act*, R.S.B.C. 1996, c. 333, to contribution from the Federal Government, which is vicariously liable for the conduct of its officials, as a person whose fault has caused the damage or loss which the plaintiff seeks to recover in this action; and
  - (d) Alternatively, each of Industries and Investments is entitled to damages or, in the alternative, indemnity, in whole or in part, from the Federal Government to the

extent of any liability to the plaintiff for the conduct of ITCAN or any other defendant.

5. Industries and Investments specifically deny that:
  - (a) They have committed any tobacco related wrongs;
  - (b) They conspired with, or acted in concert with, any other defendants; and
  - (c) Any alleged tobacco related wrongs have caused or contributed to exposure, tobacco related disease or the risk of disease, or to the plaintiff's incurring the cost of health care benefits, as alleged or at all.
6. For the purpose of this third party notice, Industries and Investments adopt the definitions of "manufacturer", "tobacco related wrong", "exposure", "tobacco related disease", "consumer" and "cost of health care benefits" used in the statement of claim and the *Act*.

## **II. Breaches of Operational Duties by Officials of Federal Government**

7. 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 herein "Health Canada"), is established pursuant to the *Department of Health Act*, S.C. 1996, c. 8, and predecessor statutes. At all 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.
8. At material times, Health Canada assumed duties separate and apart from its governing statute including, without limiting the foregoing, research into and design of tobacco and tobacco products and promotion of tobacco and tobacco products.

9. At all material times and in relation to matters material to this action, including matters in respect of which the Federal Government assumed duties to consumers, Health Canada has acted in making operational decisions to implement programmes and policy through its Ministers, its 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 and through other officials known and unknown to Industries and Investments, all of whom are referred to herein 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 Wilkinson. 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 confer 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 all material times, Officials of Agriculture Canada at the Delhi Research Station and elsewhere carried out a programme of cooperation with and support for tobacco growers and cigarette manufacturers, 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 tobacco products including total alkaloid (nicotine) and sugar levels;

- (b) research into the chemical constituents of tobacco smoke;
- (c) research regarding nicotine and tobacco varieties with a level of nicotine in the leaf believed by Officials to be suitable for use in the manufacture of tobacco products;
- (d) participation in the Tobacco Variety Evaluation Committee, the Evaluation Committee on Agricultural Chemicals for Tobacco, the Canadian Tobacco Quality Evaluation Committee, the Manufacturers' Smoke Evaluation Committee; the Canadian Tobacco Research Group and the Delhi Engineering Research Group;
- (e) the initiation of smoke preference studies of tobacco treated with experimental pesticides;
- (f) control 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, and frequent consultation and cooperation with cigarette manufacturers on the influence of genetic variation in nicotine, "tar" and surface waxes/lipids on flavour and aroma in relation to mutagenicity/biological activity or tobacco smoke;
- (h) participation in the creation of Centre de Coopération pour les Recherches Scientifiques Relatives au Tabac (hereinafter "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 Agriculture Canada's 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*, Agriculture Canada's own publication;
  - (j) attendance at meetings of the Tobacco Chemists Research Conference and hosting several such meetings including the presentation of reports on tobacco growing and tobacco product manufacturing;
  - (k) advising cigarette manufacturers of the desirable content of nicotine in tobacco to be used in the manufacture of tobacco products;
  - (l) research into the agricultural practices and chemical fertilizers ("cultural practices") that cause variations in the chemical content of tobacco leaf including nicotine;
  - (m) from about 1970 participation with Officials of Health Canada in the "Less Hazardous Cigarette Programme" including the Delhi Tobacco and Health Bio-Assay Programme; and
  - (n) from about 1970 the manufacture of cigarettes for testing on Agriculture Canada's smoking machines and for testing by cigarette manufacturers to determine smoker satisfaction.
12. Agriculture Canada has also undertaken or sponsored research programmes relating to tobacco, smoking and health in support of the national programme developed by Health Canada as further particularized herein.
13. At material times and in relation to matters material to this action, Agriculture Canada has acted in making operational decisions to implement programmes and policy through its Ministers, Deputy Ministers and Assistant Deputy Ministers, and through its research divisions, committees and inter-departmental committees, as well as

through officials of Agriculture Canada known and unknown to Investments and Industries including those employed as research scientists at 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, Dr. N.A. Macrae, B.F. Zilkey, L.S. Vickery, R. Sims, P.W. Johnson, F. Marks, Drs. Pandey and Court at the Delhi Research Station, and W.H. Cherry and Dr. W.F. Forbes at the University of Waterloo.

14. At various times material to the plaintiff's claim, Officials of the Federal Government acted operationally, in the implementation of policy decisions, in ways that were intended to and which did trigger reliance by consumers and influence the smoking behaviour of consumers and in circumstances where Officials knew or ought to have known that consumers would be affected directly by carelessness on their part.
15. In so doing, Officials assumed and came under duties of care to consumers as follows:
  - (a) An operational duty of care to consumers to take reasonable care in the development of tobacco products to which those consumers might be exposed and to warn of health risks associated with the use of those tobacco products;
  - (b) An operational duty of care to consumers to make available in the marketplace a less hazardous cigarette;
  - (c) An operational duty of care to take all reasonable measures to ensure that consumers are informed adequately of the health risks of smoking and the properties of cigarettes; and
  - (d) An operational duty of care to take all reasonable measures to prevent consumers who are youths from starting or continuing to smoke.
16. The operational programmes implemented by Officials included programmes with the purpose and effect of imposing taxes in order to obtain the majority of the revenue

from the sale of cigarettes to consumers and at levels intended to influence the market for cigarettes in Canada and, in particular, among consumers who are youths. As early as 1963, the then Deputy Minister of National Revenue noted the "substantial interest" of the Federal Government in the matter of smoking "from a revenue point of view."

17. If, as is alleged in the statement of claim, but which is denied by Industries and Investments:

- consumers were not universally or adequately informed about the properties of cigarettes and the health risks of smoking, or
- warnings on cigarette packages and other materials were required to inform consumers of the health risks of smoking or the properties of cigarettes, or
- consumers were misinformed or deceived about the attributes or properties of light and mild products,

then the foregoing was caused or contributed to by breaches of the aforesaid duties by Officials of the Federal Government. The conduct of Officials, whether wrongful or otherwise, for the purposes of recovery pursuant to the *Act*, caused or contributed to exposure, tobacco related disease or the risk of disease, and to the plaintiff's incurring the cost of health care benefits.

18. If Industries or Investments is liable to the plaintiff, which is denied, then the Federal Government is liable as alleged herein, based, *inter alia*, on vicarious liability for the actions of its servants or Officials and on the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50.

### **III. Operational Duty of Care in Relation to the Development of Tobacco Products**

19. By 1983, nearly all tobacco products consumed in British Columbia were manufactured from tobacco varieties developed by Officials at Agriculture Canada.

20. The Federal Government has earned licensing fees and royalties from those tobacco varieties sold to consumers.
21. The Federal Government is a manufacturer as defined in the *Act*. The Federal Government 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.
22. Officials developed and sold those tobacco varieties with the knowledge and intention, actual or constructive, that those tobacco varieties would be placed into the stream of commerce and thereby made available to and consumed by consumers. As such, the Federal Government is a manufacturer not only under the *Act*, but also in fact, in that consumers are exposed every day to tobacco varieties developed and sold by Officials. Officials knew or ought to have known, when developing tobacco varieties with the knowledge and intention that consumers would be exposed to them, that consumers would be affected directly by carelessness on the part of Officials in the development and sale of those tobacco varieties.
23. The development of those tobacco varieties began at least as early as the 1960's. For many years, Officials of Agriculture Canada, and particularly those of the Delhi Research Station, undertook a comprehensive research and development programme in support of the Canadian tobacco industry. The purpose of this research and of the programme included improvements to the quality (including nicotine and sugar levels) and marketability of Canadian tobacco varieties and leaf processing, having regard to

the desires and preferences of consumers, and later in order to further Health Canada's less hazardous cigarette program.

24. In or about 1969, officials of Agriculture Canada at the Delhi Research Station embarked upon a programme to develop a less hazardous cigarette. The programme continued until the late 1980's and, without limiting the generality of the foregoing, included:
  - (a) identification and reduction of compounds deleterious to health in existing varieties of tobacco plants;
  - (b) development of new varieties of tobacco which when smoked yielded a lower "tar" to nicotine ratio; and
  - (c) development of new tests to assess the relative safety of the new varieties of tobacco plants (bioassay).
25. On January 22, 1973, the then Minister of Health announced a three-way programme of cooperative research between Health Canada, Agriculture Canada and the University of Waterloo to contribute to international efforts, *inter alia*, to produce less hazardous light and mild products and to develop types of tobacco products that would be required in the future.
26. The result of those efforts was that between about 1979 and 1983 Agriculture Canada Officials at the Delhi Research Station created varieties of tobacco, including Nordel, Delgold, Newdel and Candel, which contained significantly higher levels of nicotine than previously available varieties, and which when smoked produced a lower "tar" to nicotine ratio and were therefore believed to be "safer". Those varieties were tested at the Delhi Research Station for their relative safety and to determine whether they were consistent with levels of biological activity or mutagenicity acceptable to Officials, and whether they were acceptable to consumers (when manufactured into cigarettes) for the

purpose of improving marketability. Officials licensed those varieties and promoted them for use by all growers of tobacco in Canada, and for use by cigarette manufacturers in their products for sale to consumers.

27. The Delhi Research Station also manufactured cigarettes from the tobacco varieties that it had designed or developed for evaluation by various cigarette manufacturers.
28. By reason of the foregoing, the Federal Government is a manufacturer in fact, and within the terms of the *Act*, of a tobacco product. As such, by embarking on an operational programme to develop a variety of tobacco and thereafter sell seed therefor under licence, Officials assumed a duty of care to consumers to take reasonable care in the development of tobacco products to which those consumers might be exposed and to warn of health risks associated with the use of those tobacco products.

**IV. Operational Duty of Care in Relation to Availability of a Less Hazardous Cigarette**

29. Officials at Health Canada developed a national smoking and health programme through which they implemented operationally governmental policy on smoking and health ("National Programme"). The National Programme was designed by Officials and was implemented with the approval of the Dominion Council of Health. The National Programme resulted in Officials' taking steps to protect smokers from the risks of smoking, including tobacco related disease, through a nation-wide programme of education, information exchange with provinces, including British Columbia, and research into the risks of smoking and the possibilities of reducing those risks.
30. In particular, Officials, in implementing the National Programme, embarked on a course of conduct, *inter alia*, to conduct research into manufacturing a less hazardous cigarette. Health Canada financed research into a "safer" cigarette and, in 1973, the then Minister of Health announced publicly that Health Canada's research efforts should be coordinated with that of manufacturers of cigarettes in Canada.

31. In implementing the National Programme and embarking on this operational course of conduct, Officials assumed a duty of care to consumers to make available in the marketplace a less hazardous cigarette, in furtherance of which Officials at various times undertook the following activities:
- (a) In or about 1964, Officials of Agriculture Canada became involved in researching the ingredients in tobacco and tobacco smoke at the Delhi Research Station;
  - (b) In the mid-1960's, Officials of Health Canada and Agriculture Canada explored ways to reduce "tar" and tobacco smoke;
  - (c) In or about late 1966, Officials of Health Canada began to collect information about the deliveries of different brands of Canadian cigarettes in order to analyze the implications of that information in the context of the National Programme;
  - (d) In 1968, Officials of Health Canada initiated studies at the University of Waterloo including a chemical and physical analysis of marketed Canadian cigarettes, an analysis of "tar" and nicotine and carbon monoxide yields, butt length and paper, as well as studies of how smoking behaviour changes with the use of lower yield cigarettes, and statistical studies involving monitoring of "tar" and nicotine and carbon monoxide yields in Canadian cigarettes, all of which were done for the purpose of publishing League Tables and for the purpose of developing a programme to permit the manufacture of a less hazardous cigarette;
  - (e) In 1972, the Canadian Tobacco Manufacturers' Council joined with Agriculture Canada in a research agreement to develop reconstituted sheet tobacco, which can be used to reduce the overall yield of tar and nicotine from the cigarette;
  - (f) In or about 1973 and 1974, Health Canada Officials undertook studies of smoking behaviour and responses of smokers to modified cigarettes, and Officials at the

Delhi Research Station researched the phenomenon of compensation and noted the need of some smokers to maintain sufficient "dose levels"; and

- (g) In the mid-1970's, Health Canada sponsored research into developing biological tests into the relative safety of both commercial and experimental cigarettes and into the mutagenicity of Canadian experimental cigarettes, and published the results of research.
32. In the mid-1960's, Officials of Health Canada concluded that, notwithstanding the knowledge of consumers of the possible health risks of smoking, a portion of current smokers would choose to continue to smoke and a portion of non-smokers would choose to begin to smoke. Officials began implementing a programme to provide relevant and accurate information to smokers, guiding them in making choices about their smoking behaviour, including inducing them to choose brands of cigarettes with lower deliveries of "tar" and nicotine as measured by standard testing methods ("light and mild products").
33. Beginning in late 1968, Officials of Health Canada, including the then Minister of Health, began to implement an operational programme to induce smokers to select light and mild products. In furtherance of the programme, Officials provided information to the public to encourage the avoidance of high "tar" and nicotine brands, and to encourage smokers to switch to light and mild products. Between 1968 and 1986 Officials of Health Canada published tables showing the "tar" and nicotine yields of cigarette brands sold in Canada ("League Tables") in order to enable smokers to compare the "tar" and nicotine yield of cigarette smoke on a brand basis and thereby to encourage smokers to switch to lower "tar" products.
34. In furtherance of the duty of care assumed by Officials to make available in the marketplace a less hazardous cigarette, Officials advised, requested or directed manufacturers of cigarettes in Canada to:



- (a) comply with maximum limits for “tar” and nicotine in cigarettes as measured by the standard testing methods approved by Officials;
- (b) comply with levels set by Officials for the “sales weighted average tar” content of cigarettes; and
- (c) produce light and mild products and lower “tar” and nicotine yields as measured by standard testing methods.

**V. Operational Duty of Care in Relation to Informing Consumers Adequately**

- 35. At all material times, Officials communicated with consumers to inform them of the health risks of smoking and the properties of cigarettes, with an intention to influence the conduct of consumers with respect to whether they smoked or the type of cigarette that they smoked.
- 36. In embarking on a programme operationally so to communicate with consumers, Officials came under a duty of care to ensure that consumers were informed properly and adequately of the health risks of smoking and the properties of cigarettes. In June 1963, the then Minister of Health and National Welfare, Ms. LaMarsh, accepted that the Federal Government had a duty to inform consumers of the risks to health connected with cigarette smoking. At various times in the same decade, Officials repeated that it was the duty of health agencies, including Health Canada, to provide adequate and proper information to consumers in order to influence their behaviour.
- 37. Officials, in implementing the National Programme, embarked upon a course of conduct to:
  - (a) inform and/or remind consumers about the risk to health of smoking;
  - (b) encourage consumers who smoke to smoke in moderation or to stop smoking; and
  - (c) dissuade consumers who are non-smokers from starting to smoke.

38. At least as far back as the 1950's Officials disseminated to various persons, including the plaintiff, statements publicized by a number of professional medical bodies and foreign governments on the association between lung cancer and smoking. In June 1963, the then Minister of Health and National Welfare, Ms. LaMarsh, made public a conclusion that "there is scientific evidence that cigarette smoking is a contributory cause of lung cancer and that it may also be associated with chronic bronchitis and coronary heart disease." Officials knew of this conclusion.
39. In 1964, ITCAN and other cigarette manufacturers in Canada entered into a voluntary Cigarette Advertising Code, the contents of which were discussed with and accepted by Officials. That participation by Officials came notwithstanding what the Deputy Minister of National Revenue of the day described as "a rather anomalous situation ..., bearing in mind our interest in revenue which is obviously being prejudicially affected by another branch of Government."
40. From time to time, the Canadian cigarette manufacturers amended the voluntary advertising codes at the request or direction of Officials to ensure that cigarette advertising and promotion did not target underage smokers, make implied or explicit health claims about the relative safety of different brands of cigarettes, or depend on "life-style" promotion.
41. At all material times, Officials agreed that the voluntary codes established promotional and advertising practices that were consistent with their public education programme, including the National Programme. From time to time, Officials requested changes to the voluntary codes, which were implemented by ITCAN and other cigarette manufacturers. At all times, the promotional and advertising practices permitted under these codes were reasonable and lawful in the circumstances.
42. At various times Officials made decisions concerning the need for and contents of warning labels on packages of cigarettes sold to consumers.

- (a) In or about 1965, after warning label legislation was enacted in the United States, Canadian cigarette companies refrained from placing warning labels on cigarette packages based on advice from Officials that warning labels were not necessary and that public awareness of the potential health risks of tobacco was ubiquitous.
  - (b) Subsequently the position of Officials changed and beginning in or about January 1972, Canadian cigarette companies voluntarily placed a warning on cigarette packaging with wording that was dictated by Officials.
  - (c) Prior to 1990, Officials took the position that there should be no warning that cigarettes were addictive.
43. On or about August 1, 1985, Officials at Health Canada, again in furtherance of the National Programme, encouraged the production of light and mild products and lowering "tar" and nicotine yields as measured by standard testing methods.
44. In January 1986, Health Canada informed smokers that:
- (a) they actually experience three times the average "tar" yield shown on the packages;
  - (b) notwithstanding (a) above, the published "tar" and nicotine yields are a satisfactory buyer's guide to selecting cigarettes with lower average yield;
  - (c) nevertheless, these printed "tar" and nicotine yields are not good estimates of the hazard to health for individual smokers; and
  - (d) some cigarettes may be less hazardous than others.
45. Until August 2003, Health Canada's website continued to encourage or advise consumers that light and mild products reduced cancer risk. That was so notwithstanding publication in the United States of the U.S. National Cancer Institute's monograph entitled, *Risks Associated with Smoking Cigarettes with Low*

*Machine-Measured Yields of Tar and Nicotine*, about which Officials knew or ought to have known.

46. Officials of Health Canada published and widely disseminated information with an aim to encouraging smokers to switch to lower "tar" and nicotine cigarettes as measured by standard testing methods. Whatever views consumers had about the health risks associated with light and mild products resulted from the dissemination of information or advice to consumers by Officials and others, but not by the defendants.
47. Officials implemented their smoking and health initiatives based on their independent judgment about the relationship between smoking and disease and the alleged habit forming character of cigarettes. In reaching operational decisions on the basis of which they implemented their smoking and health initiatives, Officials knew or ought to have known all of the material facts relating to the properties of cigarettes and the health risks of smoking.
48. Officials, Dr. Colburn in particular, met regularly and actively shared information with officials in the government of the United Kingdom ("U.K."), in particular Dr. Frank Fairweather of the U.K. Department of Health and Social Security ("DHSS") and later chair of a joint DHSS/industry advisory panel. As a result, Officials, and Dr. Colburn in particular, knew or ought to have known of initiatives in the U.K. with respect to a less hazardous cigarette.
49. As early as 1967, the U.K. Royal College of Physicians ("RCP") recognized the possibility that a reduction of "tar" yields might reduce the risk of lung cancer. The RCP made those observations, recognizing that smokers likely smoke for nicotine and compensate for nicotine when switching to reduced yield products. The RCP recognized that there could be utility in lowering the "tar" yield of cigarettes while maintaining the nicotine yield as that could help smokers avoid increasing their cigarette consumption when switching to a product with a lower "tar" yield. This was or ought to have been known by Officials prior to August 1, 1985.

50. Thus, by the early 1970's, officials in the U.K. government were encouraging the development of lower "tar" cigarettes. That was so with, and notwithstanding, their knowledge of the phenomenon of compensation, whereby smokers may adjust their smoking behaviours to compensate for nicotine when switching to a lower yield cigarette.
51. In January 1971, the RCP concluded that it was the consensus view of the U.K. medical and scientific community that the only cancer-causing substances known then in tobacco smoke were contained in the "tar" fraction, so reducing "tar" yields could reduce the risk of cancer to smokers. Recognizing this consensus view, the RCP issued a report in 1971 entitled "Smoking and Health Now" and recommended that smokers should "smok[e] brands with a low content of tar and nicotine." The RCP further recommended that those who continue to smoke should be encouraged to smoke fewer cigarettes, inhale less, smoke less of each cigarette, take fewer puffs from each cigarette and take the cigarette out of their mouth between puffs. This publication was widely disseminated throughout the world, including Canada, and was or ought to have been known by Officials prior to August 1, 1985.
52. In response to the RCP's 1971 Report, the Standing Scientific Liaison Committee ("SSLC") was formed in 1971 by the U.K. government and it issued a report entitled *Report of the Standing Scientific Liaison Committee (on the scientific aspects of Smoking and Health) to the Secretary of State for Social Services on the publication of Tar and Nicotine yields of Packaged Cigarettes*, which concluded that there was enough evidence of the advantages of lower "tar" yield cigarettes that smokers of high "tar" brands should be encouraged to trade down, and that smokers should be presented with the information which would enable them to make that kind of decision.
53. The SSLC made those pronouncements fully aware that: "Because the smoker can vary his own intake of tar and nicotine by the way he smokes whichever brand he

chooses, he could, without realizing it, nullify any beneficial effects from a change to lower tar yield cigarettes." By reason of the publication of the SSLC Report, this information was or ought to have been known by Officials prior to August 1, 1985.

54. Following upon the publication in 1977 of a paper by Dr. Fairweather entitled "The Design and Development of Low Risk Cigarettes," the U.K. DHSS stated its express desire to implement practical and rapid measures to produce a "safer" cigarette by spring 1980.
55. The U.K. Independent Scientific Committee on Smoking and Health ("ISCSH"), a committee established in 1973 and chaired by Dr. Hunter which reported directly to the U.K. Department of Health, favoured developing what it called "lower risk cigarettes." In its Second Report issued in 1979, the ISCSH recommended that "tar" yields on the U.K. market be brought down in general. The ISCSH focused on what they called "sales-weighted average tar", or "SWAT", which was essentially an average of "tar" yields on the market. The ISCSH was quite explicit that the goal of reducing "tar" yields was being set by the U.K. Government for health reasons. By reason of the publication of this ISCSH Report, this information was or ought to have been known by Officials prior to August 1, 1985.
56. A 1979 memorandum to the ISCSH from the Tobacco Advisory Council specifically drew attention to the effect of compensation. It stated that reduction of "tar" yield had to be achieved in a way that would minimize the risk of any compensatory change in cigarette consumption or smoking habit which could have the effect of acting against the reduction in "tar" yield of the product itself.
57. The ISCSH recognized the possible effect of smoker compensation. Its Third Report, issued in 1983, stated that "[t]he industry has told us, however, that the level of nicotine in some cigarettes has already reached the point where consumers are trying to maintain their nicotine intake by methods of 'compensation'." The ISCSH further noted that "there is no clear evidence of marked compensation over long periods; so

even accepting that some may occur, the lowering of tar and nicotine yields would still result in reduced average intakes of these substances." By reason of the active collaboration between Officials and their counterparts in the U.K., and the publication of this ISCSH Report, this information was or ought to have been known by Officials prior to August 1, 1985.

58. Officials also knew, or ought to have known, that officials in the U.K. government, through recommendation of the ISCSH, encouraged the U.K. industry to research and manufacture cigarettes that were designed deliberately to alter the "tar" to nicotine ratio so that the "dose" of nicotine was maintained in lower "tar" cigarettes.
59. In 1988, the ISCSH issued its Fourth Report, concluding that "smoking lower tar cigarettes confers a reduced risk of lung cancer than does the smoking of cigarettes with the relatively high yields that were customary 25 or more years ago." Officials knew or ought to have known of this conclusion and were guided by it in the information disseminated to consumers.
60. A 1996 report of the Tobacco Products Research Trust in the U.K., based on research conducted from 1982 through 1995, concluded that compensation occurs but is incomplete and therefore there was benefit in continuing the low "tar" programme in the U.K. Officials knew or ought to have known of this conclusion and were guided by it in the information disseminated to consumers.
61. The said implementation by Officials of operational initiatives, activities or decisions of Officials was reasonable in the circumstances. If, as alleged in the statement of claim, consumers were inadequately informed of the properties of cigarettes and the risks of smoking, which is denied, then this was the result of the implementation of inadequate smoking and health programmes by Officials. This conduct of Officials, whether wrongful or otherwise, for the purposes of recovery pursuant to the *Act*, caused or contributed to exposure, to tobacco related disease, and to the plaintiff's incurring the cost of health care benefits.

**VI. Operational Duty to Prevent Youths from Smoking**

62. Flowing out of the operational implementation of the National Programme, and the consequential operational initiatives described herein, Officials assumed a further duty of care to take all reasonable measures to prevent consumers who are youths from starting or continuing to smoke. In June 1963, the then Minister of Health and National Welfare, Ms. LaMarsh, acknowledged a duty to take special efforts to dissuade children and adolescents from acquiring the smoking habit.
63. In 1964, a teacher's information kit was prepared as part of the National Programme. The kit was prepared in conjunction with provincial authorities, including the plaintiff, and was made available to and incorporated in the curriculum of the schools in British Columbia. Its purpose was to ensure that children or adolescents were adequately informed and/or reminded of the health risks of smoking and the properties of cigarettes. Other literature and materials about the risks of smoking on health and the properties of cigarettes similarly were prepared by Officials as part of the National Programme and made available to provincial authorities, including the plaintiff, for incorporation in the BC schools' curriculum.
64. As part of the National Programme, Officials further informed and/or reminded children and adolescents of the health risks of smoking and the properties of cigarettes through monthly advertisements aimed at secondary school students. Officials sponsored National Film Board films, including "Let's Discuss Smoking", sponsored a 1965 Canadian Youth Conference on Smoking and Health, and distributed poster publications, film strips and film clips aimed at children and adolescents in Canada.
65. If, as alleged in the statement of claim, consumers who are youths were not universally or adequately informed about the properties of cigarettes and the health risks of smoking, which is denied, Officials knew or ought to have known that the implementation of these initiatives under the National Programme lacked clear, credible, complete and current disclosure to permit such consumers to make free and



informed decisions concerning smoking and was thereby inadequate to inform all consumers properly of:

- (a) the risk of tobacco related disease;
- (b) the risks of smoking cigarettes;
- (c) the risks of addiction, habituation or dependence on the nicotine contained in tobacco; and
- (d) the risks inherent in the use of cigarettes.

66. This conduct of Officials, whether wrongful or otherwise, for the purposes of recovery pursuant to the *Act*, caused or contributed to exposure, tobacco related disease or the risk of disease, and to the plaintiff's incurring the cost of health care benefits.

**VII. Officials Set Standards of Care for Cigarette Manufacturers**

67. Officials have undertaken an active role in the support and direction of cigarette manufacturers in Canada and have set the standards of care that cigarette manufacturers, acting reasonably, met at material times. In particular, Officials set standards of care in relation to, *inter alia*:

- (a) the nature and scope of research to be undertaken into the properties of tobacco;
- (b) the nature of advertising, marketing and promotion of tobacco;
- (c) whether warnings of the alleged potential health risks and properties of cigarettes, including their alleged addictive character, should be provided to consumers;
- (d) the content and placement of any such warnings to be provided;
- (e) product modifications, including the design and development of new forms of tobacco leaf including high nicotine tobacco;

- (f) the design, development, manufacture, promotion, marketing, distribution and sale of cigarettes containing lower yields of “tar” and nicotine as measured by standard testing devices; and
  - (g) communications by manufactures to consumers about the properties of cigarettes including their alleged health effects, alleged addictive character, and their “tar” and nicotine yields when measured by standard testing devices.
68. The conduct of Officials was reasonable and lawful. By complying, at all material times, with requests or directions given by Officials and the standards of care set by Officials or established through their conduct, cigarette manufacturers in Canada discharged any duties owed to consumers and did not commit any tobacco related wrongs as alleged or at all.
69. If, however, reliance by ITCAN or any other defendant on the standards of care set by Officials as aforesaid resulted in a breach by ITCAN or any other defendant of duties or obligations to consumers so as to have caused or contributed to exposure, tobacco related disease or the risk of disease, and to the plaintiff's incurring the cost of health care benefits, for which Industries or Investments is jointly and severally liable with ITCAN or any other defendant, all of which is denied, then the Federal Government is liable to Industries and Investments by reason of the conduct of Officials as particularized herein.

#### **VIII. Relief Sought Against Federal Government**

70. If, as alleged in the statement of claim, Industries and Investments jointly breached, with another defendant, any duties or obligations owed to consumers in British Columbia so as to have caused or contributed to exposure, tobacco related disease or the risk of disease and to the plaintiff's incurring the cost of health care benefits, all of which is denied, Officials also breached duties or obligations owed to consumers in British Columbia in respect of the matters particularized herein so as to have caused or

contributed to exposure, tobacco related disease or the risk of disease and to the plaintiff's incurring the cost of health care benefits and the Federal Government thus is liable to the plaintiff under the *Act* for the cost of health care benefits. Industries and Investments claim contribution and indemnity pursuant to the *Negligence Act*, R.S.B.C. 1996, c. 333.

71. Without limiting the foregoing, if as alleged in certain paragraphs of Parts III, IV or V of the statement of claim, certain representations made by cigarette manufacturers about the properties of cigarettes and the potential health risks of smoking were false when made or were ineffective or inadequate to inform consumers as to the same when made, which is denied, Officials knew or ought to have known that their same or similar representations, information and advice about the properties of cigarettes and the potential risks of smoking were false, ineffective or inadequate.
72. Based upon the Federal Government's conduct as a manufacturer, the Federal Government is liable to the plaintiff under the *Act* for the cost of health care benefits. Industries and Investments claim contribution and indemnity pursuant to the *Negligence Act*, R.S.B.C. 1996, c. 333.
73. If, as alleged in the statement of claim, Industries and Investments jointly breached duties or obligations owed to consumers in British Columbia, so as to have caused or contributed to exposure, tobacco related disease or the risk of disease, and to the plaintiff's incurring the cost of health care benefits, all of which is denied, Industries and Investments are entitled to a declaration under section 3(4) of the *Act* that the amount of any liability of Industries and Investments for the cost of health care benefits assessed under section 3(3)(b) of the *Act* be reduced to the extent that the conduct of Officials at material times and as pleaded herein, wrongful or not, caused or contributed to exposure, tobacco related disease or to the risk of disease.

74. If, as alleged in the statement of claim, other defendants breached duties or obligations owed to consumers, so as to have caused or contributed to exposure, to disease or the risk of disease, and to the plaintiff's incurring the cost of health care benefits, and if, which is denied, Industries or Investments is jointly or severally liable with one or more of those defendants, and if one or more of those defendants with whom Industries or Investments is jointly or severally liable is entitled to damages or indemnity from the Federal Government, then Industries and Investments is each entitled likewise to damages or indemnity from the Federal Government, to the extent of its liability for the conduct of another defendant.

**IF YOU INTEND TO DEFEND** this claim against you, or if you have a set off or counterclaim that you wish to have taken into account at the trial, **YOU MUST**

**GIVE NOTICE** of your intention by filing a form entitled "Appearance" in the above registry of this court, at the address shown below, within the Time for Appearance provided for below and **YOU MUST ALSO DELIVER** a copy of the Appearance to the Defendants' address for delivery, which is set out in this Third Party Notice, and

**FILE** a Statement of Defence in the above registry of this court within the Time for Defence provided for below and **DELIVER** a copy of the Statement of Defence to the Defendants' address for delivery.

**YOU OR YOUR SOLICITOR** may file the Appearance and the Statement of Defence. You may obtain a form of Appearance at the registry.

#### **JUDGMENT MAY BE TAKEN AGAINST YOU IF**

**YOU FAIL** to file the Appearance within the Time for Appearance provided for below, or

**YOU FAIL** to file the Statement of Defence within the Time for Defence provided for below.

#### **TIME FOR APPEARANCE**

If this notice is served on a person in British Columbia, the time for appearance by that person is 7 days from the service (not including the day of service).

If this notice is served on a person outside British Columbia, the time for appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days

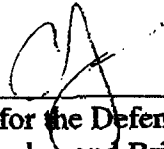
in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

### TIME FOR DEFENCE

A Statement of Defence must be filed and delivered to Industries and Investments' solicitors within 14 days after the end of the Time for Appearance provided for above.

	ADDRESS OF THE REGISTRY is:  800 Smithe Street, Vancouver, B.C. V3M 1C9
	Defendants' ADDRESS FOR DELIVERY is:  700 – 375 Water Street Vancouver, B.C. V6B 5N3  Fax number for delivery: (604) 687-5596
	NAME and OFFICE ADDRESS of the Defendants' SOLICITORS are:  Sugden, McFee & Roos LLP 700 – 375 Water Street Vancouver, B.C. V6B 5N3

Dated: November 2, 2007

  
Solicitors for the Defendants, B.A.T  
Industries p.l.c. and British American  
Tobacco (Investments) Limited

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 TOBACCO  
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 RYSEKKS p.l.c.

DEFENDANTS

**THIRD PARTY NOTICE**

Sugden, McFee & Roos  
Barristers and Solicitors  
700 - 375 Water St.  
Vancouver BC V6B 5N3  
CPD/gm