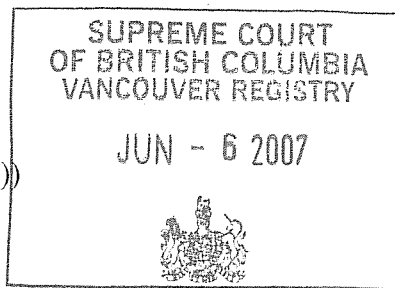


Form 17 (Rule 22(1))



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 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  
RYESEKKS p.l.c.

DEFENDANTS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

THIRD PARTY

**THIRD PARTY NOTICE OF IMPERIAL TOBACCO CANADA 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 Imperial Tobacco Canada Limited ("ITCAN"). The Plaintiff's claim against ITCAN 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 to the allegations or claims advanced by the Plaintiff. ITCAN repeats and relies on its Statement of Defence.

TAKE NOTICE that ITCAN claims against Her Majesty the Queen in Right of Canada (the "Federal Government") for:

- (a) a declaration that ITCAN committed no "tobacco related wrongs";
- (b) alternatively, a declaration that if the Plaintiff incurred the cost of health care benefits as alleged in the Statement of Claim, those costs were caused or contributed to by the conduct, fault, or alternatively, breaches of duty of care of officials of the Federal Government and ITCAN's liability, if any, accordingly be extinguished or reduced;
- (c) alternatively, damages against the Federal Government measured by the extent of any liability of ITCAN to the Plaintiff;
- (d) alternatively, an order that the Federal Government indemnify in whole or in part ITCAN to the extent of any liability of ITCAN to the Plaintiff;
- (e) 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;
- (f) costs; and
- (g) such other relief as to this Honourable Court seems just.

The facts on which the Defendant, ITCAN, relies are:

## **I. INTRODUCTION**

1. The Federal Government, at times material to the allegations in the Statement of Claim, has undertaken an active role in the support and direction of cigarette manufacturers in Canada and has set the standard of care that cigarette manufacturers, acting reasonably, met at

material times. In furtherance of that role, the Federal Government, through officials of its departments and agencies, implemented numerous operational programmes including:

- (a) researching and developing varieties of tobacco leaf including the genetic modification of tobacco leaf to suit the Canadian and export tobacco markets;
- (b) promoting to Canadian cigarette manufacturers varieties of genetically modified tobacco leaf for use in the manufacture of cigarettes consumed in Canada;
- (c) giving advice, recommendations and directions to Canadian cigarette manufacturers on whether printed warnings on packages of cigarettes were necessary or desirable;
- (d) giving advice, recommendations and directions on the form and content of such warnings;
- (e) giving advice, recommendations and directions to Canadian cigarette manufacturers in respect of advertising and promotion of cigarettes;
- (f) giving advice, recommendations and directions to Canadian cigarette manufacturers on the need for them to develop and promote cigarettes to consumers in Canada with a lower yield of “tar”;
- (g) imposing taxes for the purpose of obtaining 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 adolescent smokers; and
- (h) ensuring an increased availability of cigarettes during both the First and Second World Wars and encouraging their use by members of the Armed Forces.

2. The Plaintiff alleges that ITCAN is 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”. The Plaintiff seeks to recover from, *inter alia*, ITCAN the cost of such health care benefits. For the purpose of this Third Party Notice, ITCAN adopts the definitions of “tobacco related wrong”, “exposure”, “manufacturer”, “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* (the “Act”).

3. ITCAN 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 incurring the cost of health care benefits by the Plaintiff as alleged or at all. In particular, but without limiting the generality of the foregoing, ITCAN denies that it has withheld information about the properties of cigarettes or of cigarette smoke and its health hazards, and ITCAN repeats its Statement of Defence herein.

## **II. OVERVIEW OF THE INVOLVEMENT OF FEDERAL GOVERNMENT DEPARTMENTS AND OFFICIALS**

4. The Federal Government was, at all material times, responsible for protecting the health of Canadians, including consumers, and was responsible for providing them with accurate and reliable health information.

5. 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.

6. At materials 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.

7. 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 and to the cigarette manufacturers, Health Canada has acted in making operational decisions to implement programmes and 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 ITCAN, 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 Watkinson. Other Officials include Dr. Best, M. Palko, Dr. Pett, Dr. Chapman, Dr. Draper, Dr. Layton, J. Nightscales and G. B. Schreiber.

8. 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 confers 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.

9. 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, including ITCAN and its predecessor companies, 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 of 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 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 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.

10. 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.

11. 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 officials of Agriculture



Canada known and unknown to ITCAN including those employed as research scientists at Delhi Research Station, also referred to herein 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.

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

### **III. EARLY OPERATIONAL CONDUCT OF OFFICIALS UNTIL THE SMOKING AND HEALTH CONFERENCE IN 1963**

#### **A. The Early Studies**

13. In the early 1950’s, epidemiological studies began to appear in the public and scientific literature reporting an association between smoking cigarettes and the rising incidence of lung cancer. These studies were supplemented by clinical and experimental studies that were regarded by some members of the scientific and public health communities as providing evidence that cigarette smoke contained substances capable of causing disease. At all material times, Officials knew of these studies and on occasion republished summaries of the studies in official Health Canada publications.

14. In the 1950’s, Officials recognized smoking and health as a priority issue and, in 1955, commissioned and undertook a major epidemiological study, known as the “Veterans Study”, to examine the relationship between smoking and disease.

15. In 1957, Health Minister Monteith advised Parliament that it was premature to expect conclusions from the Veterans Study on the cause of lung cancer. 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. 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.

**B. Federal Government Advice, Direction and Requests to Cigarette Manufacturers**

16. In July 1957, Officials advised, requested or directed ITCAN and other cigarette manufacturers to embark on a programme of “selective reduction”; namely, to support basic independent research directed to determining which, if any, constituents of tobacco smoke potentially caused disease, particularly lung cancer, so that they could be removed from cigarette smoke if technically feasible.

17. Beginning in the 1950’s, upon the advice, request or direction of Officials, ITCAN and other cigarette manufacturers provided substantial grants 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 identification of disease-causing constituents in tobacco smoke.

18. Also beginning in the 1950’s, upon the advice, request or direction of Officials, ITCAN and other cigarette manufacturers developed and incorporated filters into cigarette design as a possible means of reducing potentially toxic constituents in cigarette smoke. 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.

19. The advice, requests or direction of Officials, and ITCAN’s subsequent reliance and actions thereupon, were reasonable in the circumstances. If, as alleged in the Statement of Claim, ITCAN and other cigarette manufacturers committed tobacco related wrongs, which is denied, then 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 and to the Plaintiff incurring the cost of health care benefits.

**C. Further Operational Initiatives of the Federal Government**

20. Even before the published studies in the early 1950's of the possible association between smoking and lung cancer, there was a widespread public understanding that smoking might be harmful to health. Arising out of that understanding, in 1908 the federal 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. By 1954, Officials were monitoring the scientific literature to assess the nature of the health risks associated with smoking.
21. In 1945, a study of the role of nicotine in the smoking "habit" and of smoker "compensation" (a phenomenon by which smokers increased their consumption of tobacco smoke in order to maintain a consistent level of nicotine) 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 indicated that nicotine was important to some smokers and that some smokers compensated.
22. 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 cooperated with and assisted the National Cancer Institute in respect of smoking and health issues.
23. The public understanding and the understanding of Officials of the nature of the risks associated with smoking was enhanced when, in 1954, the British Government announced publicly a "strong presumption" that smoking is a cause of cancer and further when, in 1957, the U.S. Surgeon General published a statement in which he identified an "increasing and consistent body of evidence that excessive smoking is one of the causative factors in lung cancer". At materials times, these statements were known to Officials.
24. Between 1957 and 1962, a number of professional medical bodies and foreign governments made statements on the association between lung cancer and smoking, including, *inter alia*, a statement by the Royal College of Physicians and Surgeons in March 1962. These

statements were known to the Dominion Council of Health, a body on which the Federal Government and all provinces were represented, and to Officials, and on occasion were disseminated by those Officials to other parties, including the Plaintiff.

25. Throughout the 1950's, further studies appeared in the public literature which apparently implicated smoking as a potential cause of lung cancer and other diseases such as heart disease, chronic bronchitis and chronic obstructive pulmonary disease. Although these studies were monitored by Officials, they published no conclusions from them in the 1950's.

26. At all material times during the 1950's until in or about 1962, Officials, on the basis of 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 communities, endorsed the view that smoking was properly to be considered a habit and not an addiction.

27. In April 1962, the Dominion Council of Health, at a meeting attended by the Minister of National Health and Welfare, Mr. Monteith, agreed that overwhelming evidence showed a direct relationship between cigarette smoking and lung cancer. Officials knew of this conclusion. In June 1963, Ms. LaMarsh, the then Minister of National Health and Welfare, made public a conclusion that "[t]here 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".

28. At a November 1962 meeting of the Dominion Council of Health, Officials considered the implementation of a national smoking and health programme to include:

- (a) cooperation among federal, provincial and local authorities to inform the public generally, and in particular medical professionals, parents, young people and school children, of the hazards of smoking;
- (b) restriction of cigarette advertising;
- (c) a mandatory warning of health hazards 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 in steps to eliminate or reduce the deleterious effects of smoking.

29. 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 objectives described in paragraph 28 herein and emphasized that it was essential for provincial and federal health departments to work together to inform the public generally, and consumers in particular, of the health risks associated with cigarette smoking.

30. In June 1963, the Minister of Health, Ms LaMarsh, accepted that the Federal Government had a duty to inform the public of the risk to health connected with 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 health risks of smoking.

31. Officials based and implemented their smoking and health initiatives on their independent judgment about the relationship between smoking and disease and the alleged habit forming character of cigarettes. In reaching decisions on which they implemented their smoking and health initiatives, Officials knew all of the material facts relating to the properties of cigarettes and the health risks of smoking.

32. 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 prior to 1963. 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 and to the Plaintiff incurring the cost of health care benefits.

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

**A. Overview of the Health Canada National Smoking and Health Programme**

33. Officials at Health Canada developed a national smoking and health programme (hereinafter the “National Programme” or the “National Smoking and Health Programme”) through which they operationally implemented governmental policy on smoking and health. The National Programme was designed by Officials and was implemented with the approval of the Dominion Council of Health and the first National Conference on Smoking and Health held in 1963. 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 the provinces, and research into the risks of smoking and the possibilities of reducing those risks. At or following this Conference, Officials expressly acknowledged that it was the duty of Health Canada to ensure that smokers were properly and adequately informed of the risks of smoking to health and the properties of cigarettes.

34. At the 1963 National Conference on Smoking and Health, the Federal Government announced a five-year, anti-smoking budget starting in 1964.

35. In 1963, at the request of the Minister of National Health and Welfare, Ms. LaMarsh, an ad hoc committee of cigarette manufacturers was established informally to represent the position of cigarette manufacturers at the 1963 National Conference on Smoking and Health.

36. Health Canada, through its Officials, asserted leadership in developing and executing smoking and health programmes, including the National Programme. This included acquiring knowledge in all material aspects of smoking and health issues including, without limiting the generality of the foregoing, epidemiological studies, studies of medical science and the aetiology of disease, clinical and experimental studies, studies in the chemical composition of tobacco and tobacco smoke, techniques of measuring smoke constituents, as well as techniques for developing and manufacturing cigarettes and studies into the smoking behaviour known as compensation. Health Canada, through its Officials, retained both its leadership role in

developing and executing smoking and health programmes and its knowledge of issues relating to smoking and health throughout the material period.

37. Provincial Governments, including the Plaintiff, as well as consumers and cigarette manufacturers, at material times deferred to the leadership of the Officials and relied upon the knowledge of those Officials to devise and implement a programme that would accurately assess the risks of smoking, educate and inform consumers of those risks and guide product development in light of research into the properties of cigarettes.

38. Officials, in implementing the National Programme, embarked upon a course of conduct to:

- (a) inform and/or remind smokers and potential smokers about the risk to health of smoking;
- (b) encourage smokers to smoke in moderation or to stop smoking;
- (c) dissuade non-smokers, particularly children and adolescents, from starting to smoke; and
- (d) conduct research into manufacturing a less hazardous cigarette; and
- (e) conduct research into the extent and nature of smoking.

39. Arising out of the 1963 National Conference on Smoking and Health, two committees were established under the chairmanship of Health Canada Officials to develop the National Programme, which were implemented through or under the direction of Health Canada Officials, namely, the Technical Advisory Committee on Health Education Concerning Smoking Hazards and the Technical Committee On Research Concerning Smoking Hazards.

40. The Technical Advisory Committee on Health Education Concerning Smoking Hazards, under the chairmanship of Health Canada Officials, and comprised of other Officials, as well as representatives of provincial governments including the Plaintiff, and representatives of the cigarette manufacturers, began meeting in January 1964. Its mandate was to review current approaches to education about smoking, to recommend the components of an effective programme to inform and/or remind smokers and non-smokers of the risks of cigarette smoking, to dissuade young people from acquiring the habit of smoking, and to identify the role of

different agencies in implementing the programme. The Committee's agenda included matters such as cigarette advertising and promotion practices, warnings, labelling of cigarette packages and smoking on television.

41. The Technical Committee On Research Concerning Smoking Hazards began meeting in February 1964, initially to make recommendations regarding operational research necessary to develop, improve and evaluate the components of the National Programme. Under the chairmanship of Health Canada Officials, it was composed of experts in various disciplines including sociology, psychology and epidemiology and included Officials of Health Canada with expertise in those disciplines.

42. From 1906, Agriculture Canada had conducted research to support the cigarette manufacturers to improve the quality of tobacco grown in Canada, and beginning in or about 1964, Officials of Agriculture Canada became involved in researching the ingredients in tobacco and tobacco smoke at the Delhi Research Station for the purpose of supporting the National Programme.

43. In 1965, Officials concluded that the public in general and smokers in particular had been adequately informed and were aware of the potential association between smoking and disease. Officials advised cigarette manufacturers that it was unnecessary or inadvisable to issue definitive public statements at that time on the relationship between smoking and health. ITCAN relied upon this advice and refrained from making any such definitive statements.

**B. Implementation of the National Programme: Informing Smokers and Non-Smokers of the Properties of Cigarettes 1963-1968**

44. In 1964, 1967 and 1968, Officials repeated that it was the duty of health agencies, including Health Canada, to ensure that the public was properly and adequately informed of the health risks of smoking and the properties of cigarettes.

45. The National Programme was implemented through a variety of different programmes. Officials routinely participated in nation-wide health education programmes relating to cigarette smoking. School programmes and other information and educational means



were employed to inform and educate children. Consumers were informed and/or reminded of the risks of smoking and the properties of cigarettes through media or by using intermediaries such as public interest groups and medical professionals. The level of public awareness of the risks of smoking was monitored and assessed. Officials also established cooperative working relationships with provincial governments, including the Plaintiff, and national or local organizations committed to the objectives of the National Programme. These efforts were coordinated through the Technical Advisory Committee on Health Education Concerning Smoking Hazards and through an internal committee of Health Canada on smoking and health.

46. In or about March 1964, on the recommendation of the Technical Advisory Committee on Health Education Concerning Smoking Hazards, Officials published a *Smoking and Health Reference Book (Canada)* which was provided to the Plaintiff and widely circulated to health professionals, media and others for the purpose of informing and/or reminding the public about the properties of cigarettes and the health risks of smoking.

47. In 1964, a Teachers' Information Kit was prepared as part of the National Programme. The Teachers' Information 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 and 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 were similarly prepared by Officials as part of the National Programme and made available to provincial authorities, including the Plaintiff, for incorporation in the B.C. schools curriculum.

48. 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", and 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.

49. In 1967, Officials of Health Canada stated that it had been and continued to be the duty of “public health officials” to implement a “preventive programme” in respect of smoking.

50. As part of the National Programme, Officials informed and/or reminded the public of the properties of cigarettes and the health risks of smoking through posters, publications, bibliographies, news releases, radio promotions, television commercials, audio visual aids and by encouraging newspapers to publish articles presenting the Federal Government’s position on smoking and health.

51. Although the public were adequately informed of the health risks of smoking and the properties of cigarettes prior to the National Programme, the information disseminated by Officials pursuant to the National Programme was effective to ensure beyond doubt that knowledge of the health risks and the properties of cigarettes was universal.

52. If, as alleged in the Statement of Claim, consumers 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 the National Programme lacked clear, credible, complete and current disclosure to permit 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 risk of addiction, habituation or dependence on the nicotine contained in tobacco; and
- (d) the risks inherent in the use of cigarettes.

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 and to the Plaintiff incurring the cost of health care benefits.

**C. Implementing the National Programme: Officials Advised Against Printed Warnings**

53. In 1965, warning label legislation was enacted in the United States. At that time, Officials took the position that warning labels were not necessary and that public awareness of the potential health risks of tobacco was ubiquitous.

53.1 In 1965, ITCAN sought the advice of Officials on whether the government position was that warning labels should be placed on packages of Canadian cigarettes. Officials advised ITCAN that warnings were not necessary, and in particular in May 1965 the Deputy Minister of Health advised ITCAN that the labelling of cigarette packages with health warnings was unrealistic and “silly”. ITCAN relied upon this advice and refrained from placing warning labels on packages at that time.

54. If, as alleged in the Statement of Claim, warnings on cigarette packages and other materials were required to inform consumers of the health risks of smoking, which is denied, then this was known or ought to have been known to Officials. Officials failed to advise or direct the placing of labels on cigarette packages before 1966 and, to the contrary, advised ITCAN against placing warning labels on cigarette packages. 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 and to the Plaintiff incurring the cost of health care benefits.

**D. Implementing the National Programme: Printed Warnings 1966-1972**

**(1) The position of Officials and in particular the Minister of Health**

55. The position of Officials about the advisability of warning labels began to change in or about 1966. In 1968, the Parliamentary Committee on Health and Welfare (the “Isabelle Committee”) was charged with the responsibility of reviewing several Bills relating to smoking and health and reporting to Parliament. In December 1968, the Minister of Health stated publicly that cigarette smoking was a serious health hazard and that consumers should avoid cigarette smoking entirely. The Minister also advised the Isabelle Committee that he intended to recommend to the Federal Cabinet that legislation be enacted to require health warnings to be placed on cigarette packages. The warning that the Minister favoured would have stated:

Warning: The smoke of these cigarettes contains cancer-producing chemicals, irritants, nicotine, carbon monoxide, and other toxic substances that should not be inhaled into the lungs.

56. The Isabelle Committee Report reported in late 1969. It recommended several possible forms of printed warnings, including warnings of dependency, to be placed on all cigarette packaging and advertising and promotional materials and on vending machines.

57. Officials considered and rejected the warning initially proposed by the Minister of Health and also that recommended by the Isabelle Committee. Instead, in June, 1971, the Minister of Health introduced Bill C-248 which, if enacted, would have required a warning on cigarette packaging in the following form:

Warning: Danger to health increases with the amount smoked,  
avoid inhaling.

This proposed warning reflected the considered judgment of Officials as to the terms of a warning they considered to be most effective to inform and/or remind smokers adequately of the risks of smoking and the properties of cigarettes. Bill C-248 died on the Order paper.

## **(2) The implementation of warnings by the tobacco industry**

58. In September 1971, the Canadian Tobacco Manufacturers Council (the "CTMC"), which had developed from the ad hoc committee referred to in paragraph 35 herein, after negotiations and in response to a request by Officials, announced that, effective about January 1, 1972, its then members (who together with their successor companies are referred to herein as the "cigarette manufacturers") would place a warning on cigarette packaging. The warning that was placed on cigarette packages by the cigarette manufacturers, including ITCAN, starting in or about May 1972 was as follows:

"Warning ... the Department of National Health and Welfare advises that danger to health increases with amounts smoked."

The wording of this warning was insisted upon by the Minister of Health and was derived from the language of Bill C-248 save for the deletion of the reference to “avoid inhaling” and the inclusion of an attribution of the warning to the Department of National Health and Welfare.

59. In October 1972, the Legislature of British Columbia statutorily mandated the use of the same form of warning on cigarette packaging and advertising.

60. In December 1972, Officials requested the inclusion of the phrase, “avoid inhaling” on packaging and requested the same warning to be used in advertising, which changes were agreed to by cigarette manufacturers and introduced in 1975.

61. At all material times, numerous surveys including those conducted by Officials revealed that public awareness of the risks of smoking was at a very high level and the warnings placed on cigarette packages and advertising were unnecessary to inform the public of those risks or properties. Alternatively, if the public and consumers were inadequately informed, which is denied, the warning requested and endorsed by Officials in 1972 was sufficient to inform them adequately and was reasonable in the circumstances.

62. If, as alleged in the Statement of Claim the aforesaid warning was innocuous or ineffective, was insufficient to give consumers an adequate indication of each of the specific risks of smoking or failed to make clear, credible, complete and current disclosure to consumers of the risks inherent in the ordinary use of cigarettes in such a way as to allow consumers to make free and informed decisions concerning smoking, all of which is denied, then 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 and to the Plaintiff incurring the cost of health care benefits.

**E. Implementing the National Programme: Monitoring Advertising and Promotion**

63. At all material times, Officials monitored the advertising and promotion practices of the cigarette manufacturers, including ITCAN, to ensure that they complied with the National

Programme. In 1964, Officials commissioned their own analysis of Canadian tobacco product advertising and promotion and at material times thereafter requested changes to those practices.

63.1 As early as 1962, at the request or direction of Officials, ITCAN agreed not to advertise or promote its cigarettes on the basis of express or implied health claims about the safety or relative safety of its cigarettes, and in particular not to participate in what had become known as “tar derbys” in which different brands of cigarettes were promoted on the basis of the tar content of cigarette smoke.

64. In 1964, ITCAN and other cigarette manufacturers entered into a voluntary Cigarette Advertising Code, the contents of which were disclosed to, discussed with and accepted by Officials. The purpose of the Cigarette Advertising Code was to regulate the advertising and promotion of cigarettes in Canada by prohibiting, *inter alia*:

- (a) the making of claims that smoking a brand promotes physical health, or that smoking a particular brand was better for health than smoking any other brand;
- (b) advertising aimed at children; and
- (c) certain forms of “life-style” advertising.

65. 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.

66. 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.

67. ITCAN complied with its obligations under the various voluntary codes in effect from time to time and, thereby, met the standard of care set by Officials and, in so doing, did not

commit tobacco related wrongs as alleged or at all. If, as alleged in the Statement of Claim, ITCAN committed tobacco related wrongs through its advertising and promotion practices, which is denied, then the conduct of Officials in directing and monitoring the practices defined by the various codes, whether wrongful or otherwise, for the purposes of recovery pursuant to the *Act*, caused or contributed to exposure, tobacco related disease and to the Plaintiff incurring the cost of health care benefits.

**V. EVOLUTION OF THE NATIONAL SMOKING AND HEALTH PROGRAMME FROM THE MID 1960's**

**A. Implementing the National Programme: Introduction of the Less Hazardous Cigarette and Smoking Programme**

68. By the mid-1960's, the international and Canadian scientific consensus was that lowering the tar content of tobacco smoke would likely reduce the incidence of tobacco related diseases in the population of smokers. This view was shared by Officials based on their independent assessment of the epidemiological evidence correlating the risk of contracting tobacco related diseases to the deliveries of "tar" as measured by standard testing methods, their independent analysis of studies of smoking behaviour and its effect on deliveries of "tar", and their acceptance of the proposition that a likely dose/response relationship existed between deliveries of "tar" and the risk of contracting disease.

69. In the mid-1960's, Officials at Health Canada and Agriculture Canada explored ways to reduce "tar" in tobacco smoke. This approach reflected the conclusion of Officials that a programme of identifying and removing specific toxic constituents from tobacco smoke ("selective reduction") was unlikely to yield satisfactory results, and that a programme of general reduction of "tar" exposure might reduce the incidence of disease on a population or average basis.

70. 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 analyse the implications of that information in the context of the National Programme.

71. During 1966, Officials at Health Canada, including Dr. Pett, Dr. Colburn, Deputy Minister Crawford and Minister of Health MacEachen, examined whether the National Programme should be changed in a variety of ways, including providing information about “tar” and nicotine deliveries to smokers, an approach that had previously been rejected, setting maximum “tar” and nicotine deliveries for Canadian cigarettes, restricting cigarette advertising and altering the price of different brands of cigarettes by means of differential taxation to influence smokers in their choice of brands.

72. At that time, 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 that 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”). This programme, as further particularized below, involved providing information and advice to smokers about deliveries of “tar”, nicotine and carbon monoxide as measured by standard testing methods, as well as information and advice to smokers about smoking behaviour, and advice about the unreliability of standard testing methods using machines to determine the exposure of individual smokers. Officials also gave advice, made requests or gave directions to cigarette manufacturers about the development and promotion of light and mild products and the use of standard testing machines. The programme also involved co-operation with Officials at Agriculture Canada to develop strains of tobacco peculiarly suitable for use in light and mild products that were eventually sold to consumers in British Columbia.

73. Beginning in late 1968, Officials of Health Canada, including the Minister of Health, began to implement an operational programme, as further particularized below, to induce smokers to select light and mild products. In 1969, the Isabelle Committee endorsed the practice of Officials of Health Canada of encouraging smokers to use low “tar”, low nicotine cigarettes. 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.



74. On November 20, 1968, Officials of Health Canada began to publish tables showing the “tar” and nicotine yields of cigarette brands sold in Canada (the “League Tables”). This information was published to enable smokers to compare the “tar” and nicotine yield of cigarette smoke on a brand-basis and thereby encourage smokers to switch to lower “tar” products. Officials of Health Canada continued to publish League Tables, from time to time, until 1986.

75. In 1968, Dr. Chapman of Health Canada confirmed to representatives of the tobacco growers and to cigarette manufacturers that Officials of Health Canada intended to protect the health of smokers by, amongst other measures, implementing a programme to reduce the “tar” yield in cigarette smoke and by taking measures to promote the consumption of light and mild products. One of those measures was the publication of the League Tables.

76. The information contained in the League Tables was generated by a testing protocol selected by Officials that measured the “tar” and nicotine yields in the smoke of particular brands of cigarettes consistently and reproducibly over time. This protocol was recommended by Officials and was agreed to by the cigarette manufacturers.

77. Officials played the principal role in the collection of “tar” and nicotine information, in the publication of such information and in advising, requesting or directing that that information be printed on cigarette packaging and advertising.

78. Given the variations in individual smoking behaviour, it was never the purpose of the testing protocol to measure “tar” and nicotine yields to particular individual consumers. Rather, the protocol created a single, standardized test to ensure consistency and reproducibility and to provide consumers with comparative brand information. This testing protocol became a basis of “tar” and nicotine information provided to consumers by or at the direction of Officials throughout the material period. Officials knew at all material times that the machine-measured yields did not and could not measure the “tar” and nicotine yields to particular consumers. The third League Table in 1969 expressly stated that machine measurement may not be an accurate measure of individual exposure to “tar” and nicotine as some smokers may compensate.

79. Notwithstanding the known shortcomings of the League Tables to indicate “tar” and nicotine yields for any particular consumer, Officials continued to publish League Tables from time to time until 1986. In publishing the League Tables, Officials disclosed the parameters of the standard testing protocol that was used. That information was widely publicized in the media and elsewhere and was used by health professionals and others in advising consumers about the health risks of smoking, the properties of cigarettes and in encouraging smokers to switch to light and mild products.

80. In June 1969, representatives of the ad hoc committee referred to in paragraph 35 herein advised the Isabelle Committee that the cigarette manufacturers would make no health claims for low yield cigarettes and recommended that such representations should not be made by Officials to the public.

81. The publication of the League Tables was accompanied by Press Releases containing representations or advice to smokers. In particular, smokers were advised, typically by the Health Minister, not to be concerned about small differences in “tar” and nicotine yields, that brands could be compared within test periods by ranking brands in relation to others, that the tables were to be used by smokers to help reduce exposure to smoke constituents, but that smokers should not rely on the brand of cigarette as the only way to reduce exposure and that smokers could reduce exposure by changing the manner in which they smoked a cigarette.

82. Smokers were also advised, or it was represented to them, by Officials that the amount of “tar” and nicotine inhaled by a smoker depended upon how the smoker smoked the cigarette as well as the “tar” and nicotine level of the cigarette, and that reduction in “tar” and nicotine intake achieved by choosing low “tar” and nicotine brands may be nullified if more cigarettes were smoked, more puffs taken, or cigarettes were smoked more vigorously or to a shorter butt length, thereby advising smokers of the means by which “compensation” could be avoided.

83. As further particularized herein, publication of the League Tables by Officials was suspended in 1975 when, on the advice, request or direction of Officials, the cigarette manufacturers agreed to publish “tar” and nicotine yields on all cigarette packages and on advertising, as measured by the same or comparable testing protocol as selected by Officials for

use in the League Tables. Officials thereafter monitored the accuracy of the information published by the cigarette manufacturers on the packages and advertising.

84. As early as 1971, ITCAN agreed, on the advice, request or direction of Officials, to comply with maximum limits for “tar” and nicotine in cigarettes as measured by the standard testing methods approved by Officials. The maximum limits were subsequently lowered in stages until 1984.

84.1 On the advice, request or direction and with the active guidance and assistance of Officials, ITCAN designed and developed cigarettes that complied with the maximum limits established by Officials and as a result delivered lower average “tar” content as measured by the standard testing methods. The design features, which lowered the “tar” and nicotine yields of cigarettes as measured by standard testing methods, were all known to Officials. The design features were applied to all cigarettes so that the “tar” and nicotine yields decreased materially from the early 1970’s to the mid 1980’s.

85. At all material times, Officials knew and kept abreast of advances in medical and scientific knowledge on all matters pertaining to the smoking of tobacco and its effects on health, including matters relating to cigarette design. Without limiting the generality of the foregoing, Officials knew and kept abreast of research relating to the so-called phenomenon of smoker “compensation”. The Federal Government sponsored research into compensation at the University of Waterloo, and in the 1970’s Officials and researchers from the University of Waterloo attended international smoking and health conferences at which they published statements that the phenomenon of compensation did not affect most smokers.

86. Officials also knew and kept abreast of advances in chemical, biological, medical and technical knowledge and technique concerning the growing, harvesting, curing and manufacture of tobacco and tobacco products.

87. The advice, requests or direction to ITCAN to lower the “tar” and nicotine content of cigarettes occurred during a series of meetings between representatives of the cigarette manufacturers and Officials starting in about January 1970. Relevant meetings were attended by Mr. Munro, the Minister of Health, Dr. LeClair, the Deputy Minister of Health, Dr. Watkinson, Director General of Health, and Dr. Colburn, Director of Use of Tobacco Programme, during

which scientific research into bioassays, smoking behaviour and compensation were also discussed.

88. Representatives of the CTMC, which represented ITCAN in these discussions, attended a meeting of the Inter-departmental Committee on Less Hazardous Smoking on May 20, 1971. This Inter-departmental Committee included Officials from Health Canada including Drs. Colburn and Watkinson, and Officials of Agriculture Canada including Dr. Hamilton and B. F. Zilkey. Officials of Health Canada again advised or requested agreement to a “tar” reduction programme. Representatives of CTMC raised the issue of smoker compensation. The CTMC representatives advised that for some smokers there was a tendency to change smoking patterns to obtain a minimum daily level of nicotine when using low yield cigarettes, and that this could increase the total intake of “tar” and gases. Officials of Health Canada advised or represented to the CTMC that the evidence was that only a minority of smokers compensated when smoking light and mild products and that health benefits existed from choosing to smoke them. In response to the tendency of some smokers to change their smoking patterns, it was decided to breed tobacco varieties with higher levels of nicotine which could be filtered down to obtain a safer low “tar” and medium nicotine cigarette. The position of Officials of Health Canada, until approximately 1999, was that these lower yield cigarettes were safer than higher “tar” cigarettes. This view was repeated to representatives of the CTMC, including ITCAN, on subsequent occasions as the basis for the low “tar” programme as further particularized herein.

89. In February 1973, and again in March 1974, the Minister of Health, in publishing the League Tables, and reiterating the representations and advice that were typical on the occasion of such publication, commended the manufacturers for their efforts to bring down yields of “tar” and nicotine and in 1973 commended them for accepting maximum “tar” and nicotine yields in cigarettes. Mr. Lalonde, in repeating the advice that switching to low “tar” and nicotine brands is only one way for smokers to reduce exposure, also recommended that switching to low “tar” brands be only one step to discontinuing smoking altogether. Smokers were also advised that some brands of cigarettes were ventilated on or near the filter and that “tar” and nicotine deliveries might be increased if the “openings” were blocked. This advice or warning continued in subsequent publications of the League Tables.

90. In the fiscal year preceding March 31, 1973, responsibility for the National Smoking and Health Programme was assumed by the Use of Tobacco Bureau of the Non-Medical Use of Drugs Directorate.

91. On January 22, 1973, Mr. Lalonde announced publicly that Health Canada was financing research into a "safer" cigarette and that Health Canada's research efforts should be coordinated with that of the cigarette manufacturers.

92. In April 1973, Mr. Lalonde stated at a meeting with CTMC that Health Canada supported research into a "safer" cigarette and that Officials of Health Canada were doing research with Agriculture Canada and cigarette manufacturers towards developing tobacco varieties that would lead to lower "tar" and nicotine yields in cigarettes. On May 16, 1973, Officials confirmed that they were continuing to request Agriculture Canada and cigarette manufacturers to direct their research and production efforts into lowering the "tar" yield in cigarettes.

92.1 In or about February 1974, the research financed by Health Canada at the Delhi Research Station to further the production of light and mild products was discussed with ITCAN.

93. In March 1975, the requests to the CTMC to develop and promote the light and mild products were reiterated by Mr. Lalonde.

94. In March 1976, Mr. Lalonde wrote to the CTMC making a number of requests including a listing of "tar" and nicotine levels in advertisements, the use of posters in tobacco sales outlets to draw attention to the "tar" and nicotine levels printed on packages, the reduction of "tar" and nicotine maximums in Canadian cigarettes, the elimination of the promotion of higher "tar" brands, and the preparation of a report on the potential effectiveness of using differential pricing of cigarettes according to "tar" and nicotine levels.

95. ITCAN and other cigarette manufacturers subsequently complied with a number of Mr. Lalonde's requests and began publishing "tar" and nicotine levels on its packages of light and mild products, as measured by the standard testing protocol approved by Officials.

96. A comprehensive public report was prepared by Officials of Health Canada in March 1977, entitled "Smoking and Health in Canada" which noted, *inter alia*, that:

- (a) in response to pressure from Officials, cigarettes were being marketed with much lower yields of "tar and nicotine than previously;
- (b) low yield cigarettes may be "safer";
- (c) low yield cigarettes may be susceptible to compensation making a high nicotine but low "tar" cigarette desirable; and
- (d) filters have been an important improvement to cigarettes making them increasingly safe and more effective in removing carcinogens in cigarette smoke.

97. In June 1977, Mr. Lalonde publicly stated that Health Canada continued to have the objective of reducing "tar" and nicotine yields in cigarettes.

98. In published reports, following a meeting of the federal and provincial Health Ministers in June 1977, the participants (including Health Canada Officials) requested or directed that cigarette manufacturers lower the level of "tar" and nicotine yields in cigarettes. Officials also wished to examine ways to modify the federal excise tax on cigarettes so that those with higher "tar" levels would be taxed at a higher rate. Officials represented that the introduction of "light cigarettes" by cigarette manufacturers was an appropriate reaction to Health Canada's campaign to warn Canadians of the health risks of smoking. Officials noted the increase in sales of "light" products with approval.

99. In 1978 and thereafter, CTMC representatives met repeatedly with Officials at the Health Protection Branch of Health Canada, at which time Dr. Morrison informed CTMC that the goal of Officials of Health Canada continued to be to ensure further reductions in "tar" and nicotine yields of cigarettes. Officials requested ITCAN and other Canadian cigarette manufacturers to accept targets for the reduction of "tar" and nicotine in cigarettes sold in Canada. ITCAN and other cigarette manufacturers agreed to attempt to reduce the "Sales Weighted Average Tar" content of cigarettes (or "SWAT" level) in accordance with government targets, namely, to reduce SWAT to 12 milligrams by December 31, 1984. SWAT levels are a measurement of the average tar content of cigarettes as measured by the standard testing

methods, taking into account the sales volumes of the brands. To comply with the SWAT levels set by Officials, cigarette manufacturers had to introduce and promote brands with lower “tar” yields. ITCAN successfully reduced the SWAT levels of its brands from about 15 milligrams in 1978 to 12 milligrams in 1984. ITCAN did not promote its brands on the basis that cigarettes containing lower levels of “tar” as measured by the standard testing methods were “safer” or “less hazardous” than cigarettes containing higher levels of “tar”.

100. In 1978, the Minister of Health, Ms. Begin, took credit for the availability of light and mild products on the market, asserting the fact that their availability was in response to the efforts of Health Canada, triggered initially by publication in 1968 of the first comprehensive report on “tar” and nicotine levels in Canadian cigarettes.

101. In League Tables from 1973 to 1984, Officials at Health Canada publicly acknowledged that Health Canada at material times actively requested the production and marketing of light and mild products.

102. From 1968 until at least 1983, Officials of Health Canada, including the Minister of Health, Ms. Begin, in 1981, repeatedly informed smokers that they could reduce their intake of harmful substances by switching to brands with lower “tar” and nicotine yields, provided they did not compensate by smoking more cigarettes per day or smoking more intensively. In 1983, Ms. Begin made further reference to “compensation” and, in particular, to smokers blocking ventilation openings which was one of the means known to Officials by which some smokers compensated.

103. On January 24, 1983, Ms. Begin informed smokers who switched from high yield to low yield cigarettes that after switching, and depending on how they smoked, they could experience an even higher yield than experienced before switching. Notwithstanding this information, Ms. Begin continued to recommend that smokers switch to low yield cigarettes.

104. In January 1983 and again in January 1984, Ms. Begin published a Press Release to advise smokers of the carbon monoxide yield in brands of Canadian cigarettes. She advised the public of her request of the cigarette manufacturers to reduce the SWAT level to 12 milligrams, nicotine to 1 milligram and carbon monoxide not to exceed “tar”, all by the end of

1984, expressed optimism of the continuing efforts by cigarette manufacturers to reduce “tar” and nicotine yields, and repeated the advice, based on tests conducted for Health Canada, that actual deliveries are affected by the way in which cigarettes are smoked. Her advice or representation to consumers was that “tar” and nicotine values printed on packages were a satisfactory buyer’s guide to cigarettes with lower average yields, but that Health Canada’s studies showed that actual intake depended at least as much on how the cigarette was smoked as the published yield levels.

105. On August 1, 1985, Officials of Health Canada, again in furtherance of the National Smoking and Health Programme, encouraged the production of light and mild products and lowering “tar” and nicotine yields as measured by standard testing methods.

106. In January 1986, Health Canada informed smokers that:

- (a) they might 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 yields;
- (c) nevertheless, these printed “tar” and nicotine yields were not good estimates of the hazard to health for individual smokers; and
- (d) that some cigarettes may be less hazardous than others.

107. Officials of Health Canada published and widely disseminated other information, beyond the League Tables, all 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 cigarette manufacturers or ITCAN.

108. During the almost 20 years after 1968 in which Health Canada continued to publish the League Tables and continued to encourage smokers to switch to light and mild products, Officials knew of the relevant epidemiological and scientific research pertaining to the



smoking of tobacco, including compensation, the effects of smoking on health, and the methods by which the “tar” and nicotine yield of tobacco smoke was or could be reduced.

109. Until August 2003, Health Canada’s website continued to encourage or advise smokers that light and mild products reduced cancer risk.

**B. Design and Development of a “Less Hazardous Cigarette” by Officials**

110. For many years, Officials of Agriculture Canada, and particularly those at 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 to further Health Canada’s Less Hazardous Cigarette programme, as particularized below.

111. 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 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.

112. In or about 1969, Officials of Agriculture Canada at the Delhi Research Station embarked upon a programme to develop a less hazardous cigarette (hereinafter the “Less Hazardous Cigarette Programme”). The Programme continued until the late 1980’s and, without limiting the generality of the foregoing, included:

- (a) identifying and reducing 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).

113. In or about 1971, Officials at Agriculture Canada and Health Canada, as one component of the Less Hazardous Cigarette Programme, established the Inter-departmental Committee on Less Hazardous Smoking in order to develop a cigarette capable of being marketed as “less hazardous” than alternative or pre-existing cigarettes.

114. On July 14, 1971, Dr. Hamilton, Assistant Director, General Eastern Division of the Research Branch of Agriculture Canada, announced that Agriculture Canada would assume an important role in developing programmes related to smoking and health, by undertaking research into factors that affect tobacco plants physiology and chemistry, and that control the “tar” and nicotine levels in tobacco smoke. This research became an integral component of the Less Hazardous Cigarette Programme.

115. On or about November 18, 1971, Dr. Chapman of Health Canada confirmed to representatives of the tobacco growers and ITCAN and other cigarette manufacturers that Officials of Health Canada were interested in protecting the health of smokers by, amongst other things, reducing the “tar” and nicotine content of cigarette smoke and by producing light and mild products.

116. In 1972, CTMC 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 a cigarette.

117. By late 1972, Officials of Agriculture Canada, particularly those at the Delhi Research Station, asserted responsibility and leadership for the research and development of a less hazardous cigarette under the Less Hazardous Cigarette Programme.

118. On January 22, 1973, the Minister of Agriculture, Mr. Whelan, and the Minister of Health, Mr. Lalonde, announced the construction of new laboratories at the Delhi Research Station in order to develop tobacco varieties and cultural, curing and other processing techniques that could contribute to the production of light and mild products. The contemplated tobacco varieties were ones containing a lower percentage of “tar” producing constituents than the

existing varieties. The objective was that new types of tobacco, when combined with improvements in manufacturing processes, such as the production of reconstituted tobacco sheet and advancements in filter design, would enable further steps to be taken in the production of light and mild products that would expose smokers to fewer harmful substances.

119. On January 22, 1973, the Minister of Health announced a three-way programme of cooperative research between Health Canada and Agriculture Canada, and the University of Waterloo to contribute to international efforts to produce less hazardous light and mild products, to develop types of tobacco products that would be required in the future, and to facilitate Health Canada's leadership and guidance of the tobacco industry in matters affecting health. The Minister of Health confirmed that regular communications on these matters between the two government departments and the cigarette manufacturers were continuing. The Minister also confirmed that Health Canada was involved in a programme which was one component of a broad programme (the Less Hazardous Cigarette Programme) to reduce the hazards of cigarette smoking, which included public education, studies of ways to help Canadians avoid or discontinue smoking, and surveillance of cigarettes on the market.

120. As part of the Less Hazardous Cigarette Programme, in 1973, Health Canada through, *inter alia*, Dr. Colburn and Dr. Forbes at the University of Waterloo, undertook studies of smoking behaviour and responses of smokers to modified cigarettes. Also in 1973 and 1974, Officials at the Delhi Research Station were researching the phenomenon of compensation and noted the need of some smokers to maintain sufficient "dose levels".

121. As part of the Less Hazardous Cigarette Programme, beginning in 1974, the Non-Medical Use of Drugs Directorate of Health Canada sponsored research at Guelph University into developing biological tests of the relative safety of both commercial and experimental cigarettes.

122. In 1975, the Non-Medical Use of Drugs Directorate of Health Canada sponsored research into the mutagenicity of Canadian experimental cigarettes.

123. In 1977, Officials at the Delhi Research Station and Health Canada Officials conducted a project entitled “Delhi Tobacco and Health Bio-Assay Programme” as part of the Less Hazardous Cigarette Programme.

124. In 1977, Officials at Health Canada in a published report identified the potential need for cigarettes with lower “tar” and carbon monoxide yields but with a sufficient nicotine yield to satisfy certain smokers. In June 1977, representatives of the cigarette manufacturers were advised by Officials that the Federal Government was sponsoring research into developing strains of tobacco consistent with this objective, which when combined with filtering technology would be suitable for use in light and mild products. Officials further advised of progress in product developed at the Delhi Research Station, of studies into mutagenicity of tobacco leaf, the effects of nicotine concentration on dose/response reaction, options to obtain reductions of maximum constituent levels, reductions in biological activity and long-range research and development.

125. At material times, the Federal Government publicized the results of its research.

126. The Delhi Research Station also manufactured cigarettes from the tobacco varieties that it had designed or developed for evaluation by various cigarette manufacturers.

127. The result of the Less Hazardous Cigarette Programme was that Agriculture Canada Officials at the Delhi Research Station had between about 1979 and 1983 created varieties of tobacco with a lower “tar” to nicotine ratio, including Nordel, Delgold, Newdel and Candel, which contained significantly higher levels of nicotine than previously available varieties, which when smoked produced a lower “tar” to nicotine ratio and were therefore believed to produce a safer cigarette. These 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 the cigarette manufacturers, including ITCAN, in their products for sale to consumers in British Columbia.

128. By the summer of 1980, Officials at Agriculture Canada were advising the public and the cigarette manufacturers that its new varieties of tobacco “could be tailor-made for today’s light cigarette brands, combining low-tar and high nicotine.” By the spring of 1981, Officials at Health Canada advised or represented to the public and the cigarette manufacturers in published material that, “The relatively low-tar/nicotine ratio of Canadian tobacco offers manufacturers greater flexibility in producing lighter cigarettes and still maintains sufficient nicotine and flavour to satisfy consumer demands.” Similar statements were made on multiple occasions including those in Volumes 53, 54 and 55 of *The Lighter*, a publication of Agriculture Canada.

129. By 1983, the tobacco varieties developed by Agriculture Canada Officials, in response to grower requirements and the international market for tobacco leaf, and in order to satisfy consumer demand for light and mild products, comprised about 95% of the tobacco available to cigarette manufacturers. By 1983, nearly all tobacco products consumed in British Columbia were manufactured from these varieties.

130. Licensing fees and royalties earned on those tobacco varieties have been paid by ITCAN and others to the Federal Government.

131. By reason of the foregoing, the Federal Government is a manufacturer within the terms of the *Act*. At material times, 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.

**C. Continued Monitoring, Encouragement and Endorsement of the Advertising and Promotion of Light and Mild Cigarettes**

132. In the period between 1972 and 1988, Officials of the Federal Government continued to monitor, encourage and endorse the advertising and promotion practices set out in the voluntary advertising codes. At material times, Officials of Health Canada requested or

directed that cigarette manufacturers use their promotional expertise to market light and mild cigarettes to meet their SWAT and SWAN targets and thereafter monitored the promotional activities of the cigarette manufacturers. Particulars include advice or requests by Drs. Colburn and Draper of Health Canada in February 1974 for ITCAN to use its skills to advertise and promote light and mild products, and requests by the Minister of Health, Mr. Lalonde, in February 1973 to decrease the promotion of higher “tar” brands, reduce “tar” yields in widely available higher “tar” products and develop and promote light and mild products in preference to higher “tar” products. Such requests were repeated at meetings that took place between Officials of Health Canada and ITCAN, and other cigarette manufacturers, on a regular basis over the material period.

133. Officials at Health Canada monitored the introduction of “mild” versions of popular brands by tobacco manufacturers and their increasing market share noting that, in 1977, their introduction had been made in response to public demand and the requests of Officials.

134. At all material times, Officials at Health Canada influenced the content of and monitored compliance with the voluntary cigarette advertising and promotion codes agreed to from time to time by the CTMC. These codes prohibited advertising or promotion on the basis of relative health claims for different brands of cigarettes. Officials at Health Canada brought any infractions to the attention of the cigarette manufacturers. Until approximately 1999, Officials at Health Canada raised no objections to the use of the descriptors “Light” and “Mild” on the cigarette manufacturer’s products.

134.1 Beginning in or about 1976, Officials at Health Canada endorsed the use of the descriptors “Light” and “Mild” in ITCAN’s marketing and promotion practices.

135. Officials at Health Canada also monitored the advertising budgets of the Canadian cigarette manufacturers including ITCAN on a regular basis, until advertising and promotion were banned by legislation. Officials at Health Canada requested that resources devoted to advertising and promoting the light and mild products be increased.

**D. Conclusion**

136. The conduct of Officials as particularized in paragraphs 68 through 135 inclusive herein was reasonable in all of the circumstances. ITCAN complied with the advice, requests of direction received from time to time from Officials in relation to the design, manufacture, advertising and promotion of its light and mild products, and, thereby, did not commit tobacco related wrongs as alleged or at all. If, as alleged in the Statement of Claim, consumers were misinformed or deceived about the attributes or properties of light and mild products, which is denied, then 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 and to the Plaintiff incurring the cost of health care benefits.

**VI. THE POST 1988 ERA**

**A. Warnings after 1988**

137. After 1988, the Federal Government legislated or regulated the tobacco industry in relation to the form and content of warnings on cigarette packages, advertising, promotion and sponsorship practices and the form and content of disclosure of smoke constituents.

138. Warnings endorsed and requested by the Officials in 1975 and thereafter remained on cigarette packages with the approval of Officials until the content of the warnings was changed by legislation and regulation effective in 1989. Since that time, the warnings on cigarette packages have been in the terms set forth in the Regulations. Between 1988 and 1996, the warnings required by legislation had the authority of law. In 1995, the Supreme Court of Canada declared the legislation authorizing the Regulation requiring specific warnings to be *ultra vires* the Parliament of Canada but suspended the effect of the declaration for one year. Until the passage of the *Tobacco Act*, S.C. 1997, c. 13, warnings stipulated by the *ultra vires* Regulation remained on cigarette packages voluntarily, and since that time they have been legislated.

139. In 1990, Officials proposed a printed warning of addiction to the cigarette manufacturers and since 1994 Regulation has required a specific warning that cigarettes are addictive. Prior to 1990, it was the position of the Officials that there should be no warning that cigarettes were addictive. Officials considered and rejected an addiction warning when the 1988 Regulations were enacted.

140. Notwithstanding the regulation of the cigarette manufacturers, Officials continued to communicate 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.

141. At all material times, ITCAN complied with the Regulations in place from time to time and thereby committed no tobacco related wrongs.

142. If as alleged in the Statement of Claim, consumers were misinformed about the properties of cigarettes or were inadequately warned of the risks of smoking, which is denied, then 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 and to the Plaintiff incurring the cost of health care benefits.

## **VII. FEDERAL GOVERNMENT INVOLVEMENT IN CAUSES OF ACTION SET OUT IN STATEMENT OF CLAIM**

### **A. Defective Product**

143. At all material times, ITCAN acted upon the advice, request or direction of Officials in pursuing research in relation to cigarette design, including the design of tobacco products with lower levels of “tar”, as measured by standard testing protocols, which were acceptable to consumers.

144. When advised, requested or directed to do so, ITCAN pursued an approach to product design intended generally to reduce the “tar” and nicotine in cigarette smoke as



particularized herein. ITCAN cooperated with Officials in developing, manufacturing and promoting cigarettes, including light and mild products.

145. At all material times, Officials advised, requested or directed ITCAN to use varieties of tobacco leaf that were designed and developed by Officials of Agriculture Canada, including tobacco leaf that had been tested by Agriculture Canada for its relative biological activity and its effects on smoking behaviour.

146. At all material times, the cigarette manufacturers and ITCAN, upon the advice, requests or direction of Officials, developed, manufactured and promoted lower yield cigarettes, which were described to consumers as “mild” or “light” cigarettes with descriptors such as “Ultra Mild”, “Special Mild”, “Extra Mild” and “Ultra Light”.

147. If, as alleged in the Statement of Claim, ITCAN’s products were unreasonably dangerous, or unreasonably increased the health risks to consumers, which is denied, then such dangers or increased risks existed because of the conduct of Officials. 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 and to the Plaintiff incurring the cost of health care benefits.

## **B. Failure to Warn**

148. ITCAN repeats paragraphs 53 to 62 herein.

149. If, as alleged in the Statement of Claim, warnings of the health risks of smoking cigarettes should have been provided prior to 1972, which is denied, then that was known or ought to have been known by Officials and the failure to provide such warnings resulted from the conduct of Officials. 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 and to the Plaintiff incurring the cost of health care benefits.

150. If, as alleged in the Statement of Claim, warnings after 1972 were inadequate and were innocuous and ineffective or insufficient to give consumers an adequate indication of each

of the specific risks of smoking cigarettes or otherwise failed to make clear, credible, complete and current disclosure to smokers of the risks inherent in the ordinary use of cigarettes in such a way as to allow smokers to make free and informed decisions concerning smoking, which is denied, then that was known or ought to have been known by Officials. This conduct of Officials, whether wrongful or otherwise, for the purposes of recovery under the *Act*, caused or contributed to exposure, tobacco related disease and to the Plaintiff incurring the cost of health care benefits.

**C. Sale of Cigarettes to Children and Adolescents**

151. Responsibility to take all reasonable measures to prevent children and adolescents from starting or continuing to smoke resides with Officials and has long been acknowledged by Officials to be a duty of the Federal Government as reflected in legislation beginning with the *Tobacco Restraint Act* of 1908.

152. As particularized herein, Officials with the knowledge and cooperation of the Plaintiff designed, developed and implemented operational programs to prevent or discourage children and adolescents from starting or continuing to smoke. Nevertheless, Officials knew or ought to have known that children and adolescents in British Columbia were smoking or might begin to start smoking cigarettes and Officials failed to take adequate measures to enforce the relevant legislation preventing the sale of cigarettes to children and adolescents.

153. At all material times, ITCAN complied with the advice, requests or directions of Officials in relation to the advertising and promotion of its products to children and adolescents, and ITCAN neither sold nor promoted cigarettes to children or adolescents.

154. If, as alleged in the Statement of Claim, ITCAN's advertising and promotion of its products resulted in children or adolescents starting or continuing to smoke, which is denied, then the conduct of Officials in failing to take reasonable measures to prevent children and adolescents from starting or continuing to smoke, whether wrongful or otherwise, for the purposes of recovery under the *Act*, caused or contributed to exposure, tobacco related disease and to the Plaintiff incurring the cost of health care benefits.

**D. Strict Liability**

155. At all material times, Officials were fully aware, as particularized herein, of the properties of cigarettes and the health risks associated with their use. Officials authorized, licensed, and promoted the development, manufacture and distribution of cigarettes, and the Federal Government derived substantial tax revenue from the sale of cigarettes and took no steps to prohibit the manufacture and distribution of cigarettes.

156. If, as alleged in the Statement of Claim, ITCAN's products were unjustifiably hazardous, which is denied, then 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 and to the Plaintiff incurring the cost of health care benefits.

**E. Deceit and Misrepresentation**

157. The Statement of Claim alleges deceit and misrepresentation by ITCAN and other cigarette manufacturers, which is denied. At material times, Officials, with full knowledge of the risks of smoking including addiction and disease, made representations to consumers, which were reasonable in the circumstances. Particulars include:

- (a) prior to 1963, that smoking had not been shown to cause any known diseases;
- (b) that cigarettes were not addictive and that smoking was a habit or custom as opposed to an addiction;
- (c) that tar and nicotine measuring standards provided accurate information to smokers on which smokers could make informed smoking decisions; and
- (d) that the use of light and mild cigarettes was less hazardous than higher yield cigarettes.

158. If smokers in British Columbia were unaware of the risks of smoking and the properties of cigarettes as alleged in the Statement of Claim, which is denied, then smokers were misinformed or misled because of the conduct of Officials. This conduct of Officials, whether

wrongful or otherwise, for the purposes of recovery under the *Act*, caused or contributed to exposure, tobacco related disease and to the Plaintiff incurring the cost of health care benefits.

**F. Statutory Breaches under the *Trade Practices Act* and *Competition Act***

159. If, as alleged in the Statement of Claim, breaches of statutory duties occurred in relation to the disposition or supply, or the promotion of the disposition or supply, of cigarettes by ITCAN to consumers in British Columbia, which is denied, then Officials knew or ought to have known that ITCAN in so doing was acting on their advice, request or direction.

160. If, as alleged in the Statement of Claim, breaches of statutory duties occurred in relation to the promotion, disposition or supply of ITCAN's cigarettes, which is denied, then such breaches, including but not limited to the representations set forth in paragraph 157 herein, did not arise from the conduct of ITCAN. In the alternative, if such breaches occurred and if ITCAN committed a tobacco related wrong, which is denied, the conduct of Officials, whether wrongful or otherwise, for the purposes of recovery under the *Act*, caused or contributed to exposure, tobacco related disease and to the Plaintiff incurring the cost of health care benefits.

**VIII. IF ITCAN IS LIABLE TO THE PLAINTIFF, OFFICIALS OF THE  
FEDERAL GOVERNMENT BREACHED DUTIES TO CONSUMERS**

**A. Duties to Consumers**

161. Officials, at all material times, owed duties of care to consumers, arising from their conduct in the development and implementation of operational programmes and initiatives respecting smoking and health, and in particular respecting tobacco related disease or the risk of tobacco related disease. Officials assumed duties to consumers to take reasonable care in the development and implementation of those smoking and health programmes and initiatives.

162. Officials, including the Minister of Health, have acknowledged at material times a duty to consumers to implement programmes to ensure that consumers are adequately informed of the risks of smoking and the properties of cigarettes.

**B. The Role of Federal Government Officials in Defining Duties and Setting Standards**

163. Through their conduct, publications, representations, advice, request of and directions to ITCAN and other cigarette manufacturers, Officials defined duties and set standards of care for ITCAN and other cigarette manufacturers in their relations with consumers. Officials were intimately involved in the development, marketing and sale of tobacco to consumers, in the testing of cigarettes for their relative safety, and in the supervision, direction and guidance of ITCAN in matters relating to smoking and health and requested ITCAN to act in certain ways now alleged by the Plaintiff to involve the commission of tobacco related wrongs.

164. In particular, Officials defined and delineated duties and set standards of care of the cigarette manufacturers in relation to, *inter alia*:

- (a) the nature and scope of research into the properties of cigarettes to be undertaken by cigarette manufacturers including ITCAN;
- (b) the nature of advertising, marketing and promotion of tobacco;
- (c) whether warnings of the alleged health risks and properties of cigarettes, including their alleged addictive character, should be provided to consumers;
- (d) the content and placing 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, distribution and sale of cigarettes containing lower yields of “tar” and nicotine as measured by standard testing devices; and
- (g) communications by cigarette manufacturers including ITCAN with consumers about the properties of cigarettes including their alleged health affects, alleged addictive character, and their “tar” and nicotine yields when measured by standard testing devices.

165. In complying with the advice, requests or directions of Officials, ITCAN has discharged its obligations to consumers and has not committed any tobacco related wrongs as alleged or at all. If, in the alternative, ITCAN has committed tobacco related wrongs, which is

denied, it has done so because of the conduct of Officials. This conduct of Officials, whether wrongful or otherwise, for the purposes of recovery under the *Act*, caused or contributed to exposure, tobacco related disease and to the Plaintiff incurring the cost of health care benefits.

**C. Federal Government Officials Breached Duties and Standards of Care to Consumers**

166. If, as alleged in the Statement of Claim, consumers were inadequately warned, misinformed or misled about the properties of cigarettes or the health risks of smoking, or consumed defective products, all of which is denied, then Officials breached duties and the standard of care in the operation of the Federal Government's National Smoking and Health Programme as particularized herein. If ITCAN committed tobacco related wrongs, which is denied, the Federal Government in its capacity as a manufacturer also committed tobacco related wrongs through the conduct of its Officials, whether wrongful or otherwise, which caused or contributed to exposure, tobacco related disease and the Plaintiff incurring the cost of health care benefits. Particulars include:

- (a) consumers relied on Officials for accurate information about the properties of cigarettes and the health risks of smoking. If consumers were misinformed or misled about the properties of cigarettes and the health risks of smoking, which is denied, it was because those Officials failed to provide adequate information to consumers, misrepresented information to them and developed educational and other programmes that failed to communicate information adequately;
- (b) consumers relied on Officials to develop warnings adequate to inform them of the specific risks of smoking and to make clear, credible, complete and current disclosure of the risks inherent in the ordinary use of cigarettes so as to allow them to make free and informed decisions concerning smoking;
- (c) Officials published and requested the publication of "tar" and nicotine and other smoke constituent yields as measured by standard smoking methods. Consumers in British Columbia relied on Officials for accurate information about the purpose of standard testing methods and "tar" and nicotine yields of cigarettes as measured by those standard testing methods. If the publication of such information misinformed or misled consumers about the properties of light and mild cigarettes and the health risks of smoking them, which is denied, this is because of the breach of

duty or fault of Officials who knew or ought to have known that consumers would be misled;

- (d) Officials of Health Canada promoted light and mild cigarettes over higher “tar” cigarettes as measured by standard testing methods. If cigarettes yielding low “tar” are not associated with the reduced incidence of tobacco related diseases in the population of smokers, this fact was known or ought to have been known to those Officials;
- (e) Officials of Health Canada misrepresented information to consumers that they knew or ought to have known would mislead consumers and that consumers would reasonably rely upon, including:
  - (i) information concerning “tar” and nicotine levels in light and mild cigarettes that did not reflect actual deliveries to smokers;
  - (ii) information concerning the relative yields of “tar” and nicotine in light and mild cigarettes in comparison to regular cigarettes;
  - (iii) information containing messages of health reassurances to consumers in the course of promoting light and mild products; and
  - (iv) information concerning the relative and overall safety of light and mild products.

167. Based on their knowledge of smoking and health matters, Officials at Health Canada made representations and provided information and advice to consumers as particularized herein, which was reasonable in the circumstances, intending that consumers would rely on such representations, information and advice. If, in the alternative, certain allegations in Parts III, IV or V of the Statement of Claim are correct, which is denied, Officials ought to have known that such representations were false and knew or ought to have known that their information and advice was negligent.

168. This conduct of Officials, that was relied on by consumers, whether wrongful or otherwise, for the purposes of recovery under the *Act*, caused or contributed to exposure, tobacco related disease and to the Plaintiff incurring the cost of tobacco related disease.

**IX. IF ITCAN IS LIABLE TO THE PLAINTIFF, OFFICIALS OF THE  
FEDERAL GOVERNMENT BREACHED DUTIES OWED TO ITCAN**

**A. Assumption of Duty of Care to ITCAN**

169. By virtue of their conduct as particularized herein, and based upon their knowledge in smoking and health matters and the relationship between Officials and ITCAN and other cigarette manufacturers, Officials assumed a duty of care to ITCAN in giving advice and making representations or requests or in giving directions to ITCAN in the development and implementation of the National Smoking and Health Programme and other programmes.

170. At all materials times, Officials knew or ought to have known that ITCAN would reasonably rely on their advice, representations, requests and directions.

**B. Representations, Advice and Direction of Federal Government Officials  
Were Reasonably Relied on by ITCAN**

171. Officials made representations to ITCAN and provided it with advice and direction in relation to matters alleged in the Statement of Claim to be tobacco related wrongs.

172. At all material times, ITCAN reasonably relied on the knowledge of Officials in matters of smoking and public health.

173. The representations and advice described herein were made or given by Officials during numerous meetings and on many occasions, including those particularized herein.

174. In respect of ITCAN, the representations, advice and directions began in and around the mid 1950's and continued until at least the mid 1980's, during which time ITCAN's light and mild products were developed and marketed, and such representations, advice and directions were intended by Officials to be relied on by ITCAN and to influence its conduct.

175. Representations made by those Officials to ITCAN include the following:



- (a) that warnings labels were unnecessary, ineffective and potentially counterproductive to inform consumers of the health risks of smoking and the properties of cigarettes;
- (b) that warning labels used were adequate to inform the public of the risks of smoking;
- (c) that “tar” and nicotine measuring standards provided reliable information to consumers on which consumers could make informed smoking decisions;
- (d) that deliveries of “tar” and nicotine yields to smokers of light and mild cigarettes are reduced relative to regular cigarettes;
- (e) that light and mild cigarettes would reduce the incidence of tobacco related diseases in the population of consumers;
- (f) compensation, to the extent it occurs, is partial; and
- (g) there are no increased health risks associated with or caused by the design or development of tobacco strains by Officials at Agriculture Canada that were sold or licensed to ITCAN for use in its tobacco products sold in British Columbia.

176. ITCAN reasonably relied on all of the aforesaid representations, in relation to the placing of warning labels on cigarette packages and advertisements, the content of those warnings, developing light and mild products, publishing “tar” and nicotine yields as measured by standard testing methods, marketing and promoting light and mild products and using tobacco strains sold or licensed by Officials at Agriculture Canada.

177. If ITCAN is liable to the Plaintiff, as alleged or at all, which is denied, then some or all of the aforesaid representations were false, and ought to have been known to Officials to be false, and ITCAN reasonably relied on those representations to its detriment.

178. Officials, drawing upon their knowledge and expertise in smoking and health matters, provided advice and directions to ITCAN including:

- (a) in the period up to the mid-to-late 1960’s, advice that warnings were unnecessary, ineffective and potentially counterproductive;
- (b) advice and directions relating to the content of warnings from the early 1970’s until warnings and their content were legislated in the late 1980’s;

- (c) advice and directions in the 1950's until the mid-to-late 1960's that ITCAN should support product research based on the "selective reduction" of potentially toxic constituents in smoke, and subsequently that cigarette manufacturers should focus their product research on the general reduction of "tar" in cigarette smoke;
- (d) advice and directions that light and mild products should be developed and marketed by cigarette manufacturers;
- (e) advice and directions that machine tested "tar" and nicotine yields of cigarettes should be published to consumers having regard to the fact that those numbers do not and could not reflect actual intake by individual smokers;
- (f) advice and directions that the "tar" and nicotine measuring standards provided accurate and reliable information to consumers which consumers could use to make informed smoking decisions and compare brand information;
- (g) advice that compensation, to the extent it occurs, is partial;
- (h) advice that the use of light and mild cigarettes by continuing smokers would reduce the incidence of tobacco related disease; and
- (i) advice that the tobacco strains designed and developed by Officials of Agriculture Canada, and sold or licensed to ITCAN for use in its tobacco products sold in British Columbia, would not increase health risks to consumers or otherwise be harmful to them.

179. ITCAN reasonably relied upon all of the aforesaid advice and directions in relation to product research, the placing or not placing warnings on cigarette packages and advertisements, the content of warnings, developing light and mild products, publishing "tar" and nicotine deliveries as measured by standard testing methods, marketing and promoting light and mild products and using tobacco strains sold or licensed by Officials of Agriculture Canada.

180. If ITCAN is liable to the Plaintiff, as alleged or at all, which is denied, then some or all of the aforesaid advice was negligent, or was known or ought to have been known by Officials to be negligent, and ITCAN reasonably relied on that advice to its detriment.

**C. Reasonable Foreseeability of the Damage or Loss Being Claimed**

181. Officials knew or ought to have known that ITCAN would reasonably rely on their representations, advice and directions and would comply with their advice, requests or directions respecting product research, warnings, and the development, marketing and promotion of cigarettes including light and mild products.

182. It is alleged in the Statement of Claim that ITCAN committed tobacco related wrongs in relation to those matters in respect of which Officials provided ITCAN with representations, advice or directions.

183. It was reasonably foreseeable to Officials that if ITCAN acted on the representations and directions and followed the advice of Officials, and if ITCAN thereby breached any duties to consumers as alleged in the Statement of Claim, ITCAN could come under a statutory liability or liability for a breach of duty.

184. If certain allegations in Parts III, IV or V of the Statement of Claim are correct, which is denied, then the representations, advice and directions as particularized herein, made by Officials, were false or were made negligently. This conduct of Officials, whether wrongful or otherwise, caused or contributed to ITCAN suffering damage or loss as measured by the extent of any liability to the Plaintiff.

**X. IN THE ALTERNATIVE, THE FEDERAL GOVERNMENT IS  
LIABLE TO ITCAN FOR LEGAL OR EQUITABLE INDEMNITY**

185. At material times, ITCAN acted at the request of Officials as particularized herein. The requests, recommendations, advice or directions made by Officials resulted in ITCAN acting in a manner that was not manifestly tortious or apparently illegal. If in so acting, ITCAN comes under a liability to the Plaintiff, the Federal Government is required to indemnify ITCAN to the extent of the liability so incurred.

XI.

IN THE ALTERNATIVE, THE FEDERAL GOVERNMENT IS LIABLE  
FOR CONTRIBUTION AND INDEMNITY UNDER THE NEGLIGENCE  
ACT

186. To the extent that the Federal Government acted as a manufacturer, as that term is defined by the *Act*, and as particularized herein, and to the extent it breached duties to consumers, it is capable of being liable to the Plaintiff for the cost of health care benefits. ITCAN claims contribution and indemnity pursuant to the *Negligence Act*, R.S.B.C. 1996, c. 333.

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

- (a) 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
- (b) 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

- (a) YOU FAIL to file the Appearance within the Time for Appearance provided for below, or
- (b) 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).

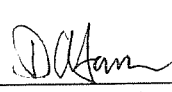
If this notice is served on a person outside British Columbia, the time for appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

#### TIME FOR DEFENCE

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

(1)	The ADDRESS OF THE REGISTRY is:  800 Smithe Street Vancouver, British Columbia, V6Z 2E1
(2)	The Defendant's ADDRESS FOR DELIVERY is:  Suite 2100, 1040 West Georgia Street Vancouver, British Columbia, V6E 4H1  Fax number for delivery: (604) 647-4554
(3)	The NAME and OFFICE ADDRESS of the Defendant's SOLICITORS are:  Hunter Litigation Chambers Suite 2100, 1040 West Georgia Street Vancouver, British Columbia, V6E 4H1

Dated: June 6, 2007

 Hunter Litigation Chambers  
Solicitors for the Defendant,  
Imperial Tobacco Canada Limited

**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  
RYESEKKS p.l.c.

DEFENDANTS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

THIRD PARTY

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**THIRD PARTY NOTICE**

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David C. Harris, Q.C.