



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

**STATEMENT OF DEFENCE OF
BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED**

GENERAL DENIAL

The Defendant, British American Tobacco (Investments) Limited ("Investments") denies, or where applicable does not admit, the allegations in the Statement of Claim, unless and except where expressly admitted herein, and puts the plaintiff to the strict proof thereof. In general answer to the whole of the Statement of Claim, Investments denies that it was the member of any alleged conspiracy or that it has acted in concert with any of the other defendants in the alleged breaches of duties to insured persons in British Columbia.

For convenience, paragraphs 1-200 of this Statement of Defence follow the paragraph numbering in the Statement of Claim.

PART I: RESPONSE TO SPECIFIC CLAIMS OF THE PLAINTIFF

1-2. Investments denies paragraphs 1 and 2 of the Statement of Claim except that it admits that this action is brought pursuant to s. 2 of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 (“*Act*”).

3-4. Investments admits only that the Statement of Claim states that the definitions referred to in paragraphs 3 and 4 of the Statement of Claim are for the purposes of the Statement of Claim but not otherwise.

5. Investments admits paragraph 5 of the Statement of Claim.

[6-17]

18. Investments denies that it is a “manufacturer” pursuant to the *Act* or that the *Act* has any permissible application to it.

[19-21]

PART II: THE MANUFACTURE AND PROMOTION OF CIGARETTES SOLD IN BRITISH COLUMBIA

[22-38]

PART III: ALLEGED TOBACCO RELATED WRONGS COMMITTED BY THE DEFENDANTS

39-41. Investments admits that nicotine occurs naturally in the tobacco plant and is a constituent of tobacco smoke. Nicotine has pharmacological properties; it has both a mild stimulant effect,

and a mild relaxing effect. For many people, smoking is difficult to quit and can be termed an addiction or a dependency. However, millions of smokers have quit without any medical help, and millions have modified how often, where and when they smoke in the light of differing social norms, and nothing about smoking precludes smokers from either quitting or understanding the serious health risks of smoking.

42. Smoke has over 4,000 constituents, most in minute quantities. These constituents include the constituents of tar, gases and the emissions listed on packages, such as nicotine. Water vapour is also produced by the combustion, because the burning of any organic material breaks down the chemical components and produces water.
43. Smoking is a cause, in some smokers, of very serious and fatal diseases, including lung cancer, emphysema, chronic bronchitis and coronary heart diseases. The health risks of smoking are derived from epidemiology. Science has not to date been able to identify biological mechanisms which can explain with certainty the statistical findings linking smoking and certain diseases, nor has science been able to clarify the role of particular smoke constituents in these disease processes.
- 44-46. Science cannot tell whether any individual became ill because they smoked. Likewise, causation of alleged “tobacco related disease” in aggregate populations is unknown. It has been known for centuries that smoking is difficult to quit and that smoking is a serious health risk.

[47-90]

PARTS IV–VI: ALLEGED CONCERTED ACTION

91-110. Investments denies that it jointly breached any of the alleged duties or that it is jointly and severally liable for any of the alleged cost of health care benefits. Investments denies that it controlled the activities of, or conspired, acted in concert or had a common design with the defendant, Imperial Tobacco Canada Limited (“Imperial”) as alleged. Between 1902 and July

23, 1976, Investments was the ultimate parent company of the collection of companies sometimes referred to (although without legal significance) as the BAT group of companies. During that time Imperial or its corporate predecessors was an associated company. At all material times Investments observed all formalities of corporate separateness with Imperial and neither functionally nor legally exerted control or undue influence over or dominated Imperial.

[111-173]

174-200. Investments denies the existence of any conspiracy or that it was a member of any such alleged conspiracy and denies that it conspired, had a common design or acts or has acted in concert with any other defendant.

201. In further answer to the allegations in paragraphs 91-200 of the Statement of Claim, Investments denies the existence of a conspiracy or of concerted action as alleged or at all and denies it agreed to adopt common policies or a common design as alleged or at all to carry out unlawful acts in British Columbia. In the alternative:

- (a) if there was any conspiracy, concerted action or a common policy or design as alleged in the Statement of Claim, then the plaintiff has no claim in respect thereof because it agreed to and adopted the design of what it alleges is a conspiracy or concerted action and became a party thereto and carried out acts in British Columbia in furtherance thereof that the plaintiff alleges are unlawful;
- (b) if the acts alleged in the Statement of Claim are found to be unlawful, which is denied, and a conspiracy or unlawful concerted action, which is denied, these acts were also done by the plaintiff itself; and further
- (c) the plaintiff agreed to and continued to agree to and condone the design, manufacture, marketing, distribution and sale of tobacco.

Investments pleads the doctrine of *ex turpi causa non oritur actio*.

ANSWERS TO THE STATEMENT OF CLAIM AS A WHOLE¹

GENERAL DEFENCES

A. Res Judicata

202. In Action No. C985776, Vancouver Registry, of the Supreme Court of British Columbia (the “Previous Action”), the plaintiff claimed a judgment against Investments for alleged expenditures for health care that had been or would be incurred by the government of British Columbia in respect of diseases allegedly related to tobacco. On 21 February 2000 the Supreme Court of British Columbia dismissed the Previous Action. Investments pleads the doctrine of *nemo debet bis vexari* and says that the plaintiff’s claim herein is a *res judicata* and the plaintiff is estopped from making the allegations in the Statement of Claim. [202]

B. No cause of action

203. The Statement of Claim discloses no cause of action because:

- (a) there has been no pecuniary damage suffered by insured persons in respect of the “cost of health care benefits” as defined by the *Act*;
- (b) the statutory liability the plaintiff alleges is an *ex post facto* attempt to make actionable conduct that was not actionable when it occurred;

¹ In this Part, numbers in brackets at the end of particular paragraphs correspond to paragraph numbers in the Statements of Defence of Rothmans, Benson & Hedges Inc., Imperial Tobacco Canada Limited, JTI-MacDonald Corp. and the Canadian Tobacco Manufacturers’ Council, in which the same or similar defences are advanced.

- (c) if the cost of health care benefits described in paragraph 1 of the Statement of Claim (the “Claimed Cost”) was incurred as alleged or at all, which is denied, it was incurred by the government of Canada by means of transfer payments, conditional grants and shared-cost programmes, and not by the plaintiff;
- (d) if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost was incurred to provide services to insured persons that the plaintiff was and is required to provide pursuant to the *Hospital Insurance Act*, R.S.B.C. 1996, c. 204, the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 and the *Continuing Care Act*, R.S.B.C. 1996, c. 70, as amended, and their predecessor statutes; and
- (e) if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost was caused by the conduct and acts or omissions of the government of Canada and of the plaintiff. [203]

C. No duty nor breach of duty

- 204. Investments denies that it owes or has ever owed any duty to the plaintiff.
- 205. Investments specifically denies that it owed or has ever owed any duties to the consumers in British Columbia referred to and defined in the Statement of Claim.
- 206. At all material times, it has been within the common knowledge of such consumers that, along with the pleasures of smoking, come real and serious health risks and that, for many people, smoking is difficult to quit.
- 207. Further, governments in Canada, both federal and provincial, have assumed responsibility for the regulation of cigarettes, including their sale and the provision of product information to consumers. The consumption of cigarettes in British Columbia which underlies the plaintiff’s claim resulted from the sale of cigarettes which was lawful, which was carried out in the manner

required by the applicable regulatory framework of the day, and from which the plaintiff, and other levels of government, knowingly benefited by the receipt of substantial tax revenues in excess of the Claimed Cost.

208. In answer to the entire Statement of Claim, Investments says:

- (a) Investments denies that persons have started or continued to smoke, or suffered any injury, as a consequence of any alleged breach of duty;
- (b) at all material times, the manufacture, sale, advertising and promotion of cigarettes in British Columbia and throughout Canada has been supervised, regulated and controlled by the plaintiff and the Government of Canada; and
- (c) the manufacture, sale, advertising and promotion of cigarettes in British Columbia and throughout Canada at all material times complied with the standards, regulations and directives imposed by those governments, and complied with their recommendations, suggestions and advice and thereby discharged any duties applicable to dealings with smokers or potential smokers. [204]

D. Causation

209. Causation of tobacco related diseases in aggregate populations is unknown. There are multiple risk factors associated with the incidence of tobacco related diseases. If Investments breached any duties, as alleged or at all, which is denied, no such breach caused or contributed to:

- (a) any tobacco related disease in any insured person; or
- (b) any increased risk of tobacco related disease in any insured person. [206]

E. No damage

210. In answer to the entire Statement of Claim, Investments says that:

- (a) if Investments breached any duty, as alleged or at all, which is denied, no such breach caused or contributed to the Claimed Cost as alleged or at all;
- (b) if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost was caused by one or more of the following:
 - (i) the requirement that the plaintiff provide services to insured persons pursuant to the *Hospital Insurance Act*, the *Medicare Protection Act* and the *Continuing Care Act*, as amended, and their predecessor statutes;
 - (ii) the conduct and acts or omissions of the government of Canada and of the plaintiff;
 - (iii) the conduct and acts or omissions of individual insured persons as further particularized herein; and
 - (iv) disease or risk of disease in individual insured persons unrelated to smoking cigarettes;
- (c) if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost has not been or will not be increased by the consumption of cigarettes by insured persons;
- (d) if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost is exceeded by the tax revenue received by the plaintiff from the sale of cigarettes in British Columbia so that no cost is ultimately incurred by the plaintiff; and

- (e) if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost is exceeded by monies received by the plaintiff from the government of Canada by means of transfer payments, conditional grants and shared-cost programmes for the purpose of funding the Claimed Cost so that no cost is ultimately incurred by the plaintiff. [205]

F. Limitations

211. Investments pleads and relies upon the provisions of the *Limitation Act*, R.S.B.C. 1996, c. 266, as amended, both in respect of the plaintiff's claim and in respect of the health care costs of those persons on which the plaintiff's claim is alleged to be based and calculated. [207]

DEFENCES ARISING OUT OF THE PLAINTIFF'S CONDUCT AND KNOWLEDGE

G. General

212. The plaintiff's claim to recover the Claimed Cost is subject to complete defences by reason of information the plaintiff knew or should have known, and the plaintiff's own conduct, including:
- (a) the plaintiff's knowledge of health risks associated with smoking cigarettes;
 - (b) the plaintiff's licensing and regulation of the production, manufacture and sale of cigarettes, including its failure to implement or enforce such regulation to the extent constitutionally permissible;
 - (c) the plaintiff's voluntarily undertaking obligations to pay the cost of health care benefits allegedly caused or contributed to by cigarette smoking;
 - (d) the plaintiff's failure to establish or delay in developing, or both, policies and practices, including health care expenditure and taxation policies and practices, when the plaintiff knew or should have known of the alleged risks and costs of cigarette smoking;

- (e) the plaintiff's failure to fund, develop and implement health promotion and smoking cessation practices and policies, when the plaintiff knew or should have known of the alleged risks and costs of cigarette smoking;
 - (f) the plaintiff's failure to take any steps prior to commencement of this action to attempt to recover the alleged cost of health care benefits by subrogation;
 - (g) the plaintiff's delay in implementing, and failure to enforce, law prohibiting the sale to and use of cigarettes by people under the legal age for purchasing them as defined by law from time to time;
 - (h) the plaintiff's taxation of cigarettes and derivation of other revenue from tobacco commerce in excess of the cost (if any) of health care benefits allegedly resulting from tobacco related disease or the risk thereof; and
 - (i) the plaintiff's own breaches of duty or duties to insured persons as further particularized herein. [208]
213. At all material times and at least since 1950, the plaintiff, through its ministers, ministries, departments, servants and agents, is charged with the knowledge that was available according to the standard of art of the day regarding any risks associated with smoking cigarettes. [210]
214. Despite its knowledge of risks associated with smoking cigarettes, the plaintiff continued to license and regulate the production, manufacturing, advertising, promotion and sale of cigarettes in British Columbia and to impose heavy taxation upon, *inter alia*, manufacturers, distributors and consumers of cigarettes. [211]
215. The plaintiff benefits from the taxes imposed on and in relation to the sale of cigarettes in British Columbia. [212]

216. Despite its knowledge of risks associated with cigarette smoking, the plaintiff took no steps to restrict or limit the sale of cigarettes save for restrictions on sale to persons below a prescribed age and in that case, delayed in implementing such restrictions, and subsequently took no reasonable steps to enforce the law. [213]
217. Despite its knowledge of risks associated with cigarette smoking, the plaintiff voluntarily undertakes the obligation of paying for the cost of health care benefits including such costs as it alleges are caused or contributed to by cigarette smoking, and sets its taxation and health care policies accordingly. [214]
218. Despite its knowledge of risks associated with cigarette smoking, the plaintiff, on the judgment of the government of the day based on everything that was knowable, permitted the sale and consumption of cigarettes in British Columbia and derived substantial revenue therefrom.

H. Voluntary assumption of risk

219. Investments repeats paragraphs 212-218 hereof and says that at all material times the plaintiff has been aware of health risks associated with smoking cigarettes. Accordingly, the plaintiff voluntarily assumes such risks, whatever their extent, in incurring the alleged cost of health care benefits which are provided to smokers. [215]

I. Contributory negligence

220. Investments repeats paragraphs 212-218 hereof and says that if the Plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, then the Claimed Cost was caused or contributed to, in whole or in part, by the plaintiff's own acts or omissions as pleaded herein, and not any act or omission of Investments. Investments pleads and relies upon the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333, as amended. [216]

J. The plaintiff cannot profit from its wrongful conduct

221. Investments repeats paragraphs 212-218 hereof and says that the plaintiff is barred from recovering any damages or costs it has suffered, the existence of which is denied, as any damages or costs flowed from its participation as set out herein in conduct which the plaintiff itself alleges in the Statement of Claim constituted breaches of duty. [217]

K. Legal and equitable bars

222. Investments repeats paragraphs 212-218 hereof and says that by reason of the facts set out therein and the knowledge, conduct and delay of the plaintiff and the prejudice thereby caused to Investments, the plaintiff is barred in law and in equity from advancing the claims made in the Statement of Claim against Investments. [218]

L. Mitigation

223. Investments repeats paragraphs 212-218 hereof and says in further answer to the whole of the Statement of Claim, if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, the plaintiff has failed to mitigate the Claimed Cost. [219]

DEFENCES ARISING OUT OF INDIVIDUAL CONDUCT

M. General

224. In answer to the whole of the Statement of Claim, if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost was caused by, and the plaintiff's claim to recover the Claimed Cost is subject to complete defences by reason of, the conduct of individual insured persons, including their voluntary decisions to commence or continue smoking with awareness of the associates risks. [220]

225. All of the insured persons who smoke or have smoked cigarettes were aware of risks associated with smoking. [221]
226. Each insured person became aware of risks associated with smoking by various means, including, without limitation, one or more of the following:
- (a) warnings on the packaging of cigarettes, as required from time to time pursuant to federal and provincial legislation and regulations;
 - (b) mandatory displays, signs and other warnings required by provincial legislation in premises where sales of cigarettes take place;
 - (c) discussions and writing, including advertising, in all forms of media including newspapers, magazines, journals, television, movies and radio;
 - (d) education programmes including courses, seminars and lectures and educational literature and other media;
 - (e) oral and written warnings from physicians and other health practitioners;
 - (f) oral and written warnings from family members, friends and other acquaintances; and
 - (g) the common general understandings and historical beliefs about the habit-forming nature of tobacco and its risks to health passed down from generation to generation for more than 400 years. [222]
227. By reason of the foregoing, Investments says that all of the insured persons who smoke or have smoked cigarettes were aware of associated risks. [223]

228. Each of those insured persons who commenced or continued to smoke cigarettes did so with awareness of the risks associated with smoking, and each such insured person voluntarily consented to accept such risks. [224]
229. The cause in fact and in law of the commencement and continuation of the use of cigarettes by insured persons was a voluntary choice to smoke cigarettes with awareness of the associated risks. Investments had and has no legal duty to such persons, or, alternatively, no legal duty that has not been fulfilled. [225]
230. Investments denies that any insured persons began, continued or were unable to cease smoking by reason of any of the alleged breaches of duty of Investments, or that any alleged breach of duty caused or contributed to any alleged tobacco related disease or increased risk of tobacco related disease in any insured person. [226]

N. Voluntary assumption of risk

231. Investments repeats paragraphs 224-230 hereof and says that at all material times individual insured persons were aware of health risks associated with smoking cigarettes. Accordingly, such persons voluntarily assume such risks, whatever their extent, when they decide to commence and continue smoking [227]

O. Contributory negligence

232. Investments repeats paragraphs 224-230 hereof and says that if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, then the Claimed Cost was caused or contributed to, in whole or in part, by the acts or omissions of individual insured persons as pleaded herein, and not any act or omission of Investments. Investments pleads and relies upon the provisions of the *Negligence Act*, as amended. [228]

P. Legal and equitable bars

233. Investments repeats paragraphs 224-230 hereof and says that by reason of the facts set out therein and the knowledge and conduct of insured persons and the prejudice thereby caused to Investments, the plaintiff is barred at law and in equity from advancing the claims made in the Statement of Claim against Investments. [229]

Q. Limitations


234. Investments pleads and relies upon the provisions of the *Limitation Act*, as amended, in respect of the claims of any individual insured person upon which the plaintiff's cause of action is alleged to rest. [230]

R. Mitigation

235. Investments repeats paragraphs 224-230 hereof and says in further answer to the whole of the Statement of Claim, if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, individual insured persons have failed to mitigate the Claimed Cost. [231]

WHEREFORE the defendant, British American Tobacco (Investments) Limited, submits that the plaintiff's claim should be dismissed, with costs to this defendant.

January 12, 2007
Dated



Sugden, McFee & Roos (Craig P. Dennis),
Counsel for the Defendant, British American Tobacco
(Investments) Limited

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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 (INDUSTRIES) 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

STATEMENT OF DEFENCE OF B.A.T INDUSTRIES P.L.C.

GENERAL DENIAL

The Defendant, B.A.T Industries p.l.c. ("Industries") denies, or where applicable does not admit, the allegations in the Statement of Claim, unless and except where expressly admitted herein, and puts the plaintiff to the strict proof thereof. In general answer to the whole of the Statement of Claim, Industries denies that it was the member of any alleged conspiracy or that it has acted in concert with any of the other defendants in the alleged breaches of duties to insured persons in British Columbia.

For convenience, paragraphs 1-200 of this Statement of Defence follow the paragraph numbering in the Statement of Claim.

PART I: RESPONSE TO SPECIFIC CLAIMS OF THE PLAINTIFF

1-2. Industries denies paragraphs 1 and 2 of the Statement of Claim except that it admits that this action is brought pursuant to s. 2 of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 (“*Act*”).

3-4. Industries admits only that the Statement of Claim states that the definitions referred to in paragraphs 3 and 4 of the Statement of Claim are for the purposes of the Statement of Claim but not otherwise.

[5]

6. Industries admits paragraph 6 of the Statement of Claim.

[7-17]

18. Industries denies that it is a “manufacturer” pursuant to the *Act* or that the *Act* has any permissible application to it.

[19-21]

PART II: THE MANUFACTURE AND PROMOTION OF CIGARETTES SOLD IN BRITISH COLUMBIA

[22-38]

PART III: ALLEGED TOBACCO RELATED WRONGS COMMITTED BY THE DEFENDANTS

39-41. Industries admits that nicotine occurs naturally in the tobacco plant and is a constituent of tobacco smoke. Nicotine has pharmacological properties; it has both a mild stimulant effect and a mild relaxing effect. For many people, smoking is difficult to quit and can be termed an addiction or a dependency. However, millions of smokers have quit without any medical help, and millions have modified how often, where and when they smoke in the light of differing social norms, and nothing about smoking precludes smokers from either quitting or understanding the serious health risks of smoking.

42. Smoke has over 4,000 constituents, most in minute quantities. These constituents include the constituents of tar, gases and the emissions listed on packages, such as nicotine. Water vapour is also produced by the combustion, because the burning of any organic material breaks down the chemical components and produces water.

43. Smoking is a cause, in some smokers, of very serious and fatal diseases, including lung cancer, emphysema, chronic bronchitis and coronary heart diseases. The health risks of smoking are derived from epidemiology. Science has not to date been able to identify biological mechanisms which can explain with certainty the statistical findings linking smoking and certain diseases, nor has science been able to clarify the role of particular smoke constituents in these disease processes.

44-46. Science cannot tell whether any individual became ill because they smoked. Likewise, causation of alleged "tobacco related disease" in aggregate populations is unknown. It has been known for centuries that smoking is difficult to quit and that smoking is a serious health risk.

[47-90]

PARTS IV-VI: ALLEGED CONCERTED ACTION

91-110. Industries denies that it jointly breached any of the alleged duties or that it is jointly and severally liable for any of the alleged cost of health care benefits. Industries denies that it controlled the activities of, or conspired, acted in concert or had a common design with the defendant, Imperial Tobacco Canada Limited (“Imperial”) as alleged. From 1976 until 1998, Industries was the ultimate parent company of the collection of companies sometimes referred to (although without legal significance) as the BAT group of companies. Prior to 1976, Industries was an investment trust company named Tobacco Securities Trust Company Limited. Between 1976 and 1998, while Industries was the ultimate parent company of the collection of companies that were its affiliates and associates, Industries owned under 50% of the shares of Imasco Limited (to which Imperial is a corporate successor), which made Imperial an associated company. At all material times Industries observed all formalities of corporate separateness with Imperial and neither functionally nor legally exerted control or undue influence over or dominated Imperial.

[111-173]

174-200. Industries denies the existence of any conspiracy or that it was a member of any such alleged conspiracy and denies that it conspired, had a common design or acts or has acted in concert with any other defendant.

201. In further answer to the allegations in paragraphs 91-200 of the Statement of Claim, Industries denies the existence of a conspiracy or of concerted action as alleged or at all and denies it agreed to adopt common policies or a common design as alleged or at all to carry out unlawful acts in British Columbia. In the alternative:

- (a) if there was any conspiracy, concerted action or a common policy or design as alleged in the Statement of Claim, then the plaintiff has no claim in respect thereof because it agreed to and adopted the design of what it alleges is a conspiracy or concerted action

and became a party thereto and carried out acts in British Columbia in furtherance thereof that the plaintiff alleges are unlawful;

- (b) if the acts alleged in the Statement of Claim are found to be unlawful, which is denied, and a conspiracy or unlawful concerted action, which is denied, these acts were also done by the plaintiff itself; and further
- (c) the plaintiff agreed to and continued to agree to and condone the design, manufacture, marketing, distribution and sale of tobacco.

Industries pleads the doctrine of *ex turpi causa non oritur actio*.

ANSWERS TO THE STATEMENT OF CLAIM AS A WHOLE¹

GENERAL DEFENCES

A. Res Judicata

202. In Action No. C985776, Vancouver Registry, of the Supreme Court of British Columbia (the "Previous Action"), the plaintiff claimed a judgment against Industries for alleged expenditures for health care that had been or would be incurred by the government of British Columbia in respect of diseases allegedly related to tobacco. On 21 February 2000 the Supreme Court of British Columbia dismissed the Previous Action. Industries pleads the doctrine of *nemo debet bis vexari* and says that the plaintiff's claim herein is a *res judicata* and the plaintiff is estopped from making the allegations in the Statement of Claim. [202]

¹ In this Part, numbers in brackets at the end of particular paragraphs correspond to paragraph numbers in the Statements of Defence of Rothmans, Benson & Hedges Inc., Imperial Tobacco Canada Limited, JTI-MacDonald Corp. and the Canadian Tobacco Manufacturers' Council, in which the same or similar defences are advanced.

B. No cause of action

203. The Statement of Claim discloses no cause of action because:

- (a) there has been no pecuniary damage suffered by insured persons in respect of the “cost of health care benefits” as defined by the *Act*;
- (b) the statutory liability the plaintiff alleges is an *ex post facto* attempt to make actionable conduct that was not actionable when it occurred;
- (c) if the cost of health care benefits described in paragraph 1 of the Statement of Claim (the “Claimed Cost”) was incurred as alleged or at all, which is denied, it was incurred by the government of Canada by means of transfer payments, conditional grants and shared-cost programmes, and not by the plaintiff;
- (d) if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost was incurred to provide services to insured persons that the plaintiff was and is required to provide pursuant to the *Hospital Insurance Act*, R.S.B.C. 1996, c. 204, the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 and the *Continuing Care Act*, R.S.B.C. 1996, c. 70, as amended, and their predecessor statutes; and
- (e) if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost was caused by the conduct and acts or omissions of the government of Canada and of the plaintiff. [203]

C. No duty nor breach of duty

204. Industries denies that it owes or has ever owed any duty to the plaintiff.

205. Industries specifically denies that it owed or has ever owed any duties to the consumers in British Columbia referred to and defined in the Statement of Claim. In the alternative, Industries denies that it owed any such duty before 1976 or after 1998.
206. At all material times, it has been within the common knowledge of such consumers that, along with the pleasures of smoking, come real and serious health risks and that, for many people, smoking is difficult to quit.
207. Further, governments in Canada, both federal and provincial, have assumed responsibility for the regulation of cigarettes, including their sale and the provision of product information to consumers. The consumption of cigarettes in British Columbia which underlies the plaintiff's claim resulted from the sale of cigarettes which was lawful, which was carried out in the manner required by the applicable regulatory framework of the day, and from which the plaintiff, and other levels of government, knowingly benefited by the receipt of substantial tax revenues in excess of the Claimed Cost.
208. In answer to the entire Statement of Claim, Industries says:
- (a) Industries denies that persons have started or continued to smoke, or suffered any injury, as a consequence of any alleged breach of duty;
 - (b) at all material times, the manufacture, sale, advertising and promotion of cigarettes in British Columbia and throughout Canada has been supervised, regulated and controlled by the plaintiff and the Government of Canada; and
 - (c) the manufacture, sale, advertising and promotion of cigarettes in British Columbia and throughout Canada at all material times complied with the standards, regulations and directives imposed by those governments, and complied with their recommendations, suggestions and advice and thereby discharged any duties applicable to dealings with smokers or potential smokers. [204]

D. Causation

209. Causation of tobacco related diseases in aggregate populations is unknown. There are multiple risk factors associated with the incidence of tobacco related diseases. If Industries breached any duties, as alleged or at all, which is denied, no such breach caused or contributed to:

- (a) any tobacco related disease in any insured person; or
- (b) any increased risk of tobacco related disease in any insured person. [206]

E. No damage

210. In answer to the entire Statement of Claim, Industries says that:

- (a) if Industries breached any duty, as alleged or at all, which is denied, no such breach caused or contributed to the Claimed Cost as alleged or at all;
- (b) if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost was caused by one or more of the following:
 - (i) the requirement that the plaintiff provide services to insured persons pursuant to the *Hospital Insurance Act*, the *Medicare Protection Act* and the *Continuing Care Act*, as amended, and their predecessor statutes;
 - (ii) the conduct and acts or omissions of the government of Canada and of the plaintiff;
 - (iii) the conduct and acts or omissions of individual insured persons as further particularized herein; and

- (iv) disease or risk of disease in individual insured persons unrelated to smoking cigarettes;
- (c) if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost has not been or will not be increased by the consumption of cigarettes by insured persons;
- (d) if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost is exceeded by the tax revenue received by the plaintiff from the sale of cigarettes in British Columbia so that no cost is ultimately incurred by the plaintiff; and
- (e) if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost is exceeded by monies received by the plaintiff from the government of Canada by means of transfer payments, conditional grants and shared-cost programmes for the purpose of funding the Claimed Cost so that no cost is ultimately incurred by the plaintiff. [205]

F. Limitations

211. Industries pleads and relies upon the provisions of the *Limitation Act*, R.S.B.C. 1996, c. 266, as amended, both in respect of the plaintiff's claim and in respect of the health care costs of those persons on which the plaintiff's claim is alleged to be based and calculated. [207]

DEFENCES ARISING OUT OF THE PLAINTIFF'S CONDUCT AND KNOWLEDGE

G. General

212. The plaintiff's claim to recover the Claimed Cost is subject to complete defences by reason of information the plaintiff knew or should have known, and the plaintiff's own conduct, including:
- (a) the plaintiff's knowledge of health risks associated with smoking cigarettes;

- (b) the plaintiff's licensing and regulation of the production, manufacture and sale of cigarettes, including its failure to implement or enforce such regulation to the extent constitutionally permissible;
- (c) the plaintiff's voluntarily undertaking obligations to pay the cost of health care benefits allegedly caused or contributed to by cigarette smoking;
- (d) the plaintiff's failure to establish or delay in developing, or both, policies and practices, including health care expenditure and taxation policies and practices, when the plaintiff knew or should have known of the alleged risks and costs of cigarette smoking;
- (e) the plaintiff's failure to fund, develop and implement health promotion and smoking cessation practices and policies, when the plaintiff knew or should have known of the alleged risks and costs of cigarette smoking;
- (f) the plaintiff's failure to take any steps prior to commencement of this action to attempt to recover the alleged cost of health care benefits by subrogation;
- (g) the plaintiff's delay in implementing, and failure to enforce, law prohibiting the sale to and use of cigarettes by people under the legal age for purchasing them as defined by law from time to time;
- (h) the plaintiff's taxation of cigarettes and derivation of other revenue from tobacco commerce in excess of the cost (if any) of health care benefits allegedly resulting from tobacco related disease or the risk thereof; and
- (i) the plaintiff's own breaches of duty or duties to insured persons as further particularized herein. [208]

213. At all material times and at least since 1950, the plaintiff, through its ministers, ministries, departments, servants and agents, is charged with the knowledge that was available according to the standard of art of the day regarding any risks associated with smoking cigarettes. [210]
214. Despite its knowledge of risks associated with smoking cigarettes, the plaintiff continued to license and regulate the production, manufacturing, advertising, promotion and sale of cigarettes in British Columbia and to impose heavy taxation upon, *inter alia*, manufacturers, distributors and consumers of cigarettes. [211]
215. The plaintiff benefits from the taxes imposed on and in relation to the sale of cigarettes in British Columbia. [212]
216. Despite its knowledge of risks associated with cigarette smoking, the plaintiff took no steps to restrict or limit the sale of cigarettes save for restrictions on sale to persons below a prescribed age and in that case, delayed in implementing such restrictions, and subsequently took no reasonable steps to enforce the law. [213]
217. Despite its knowledge of risks associated with cigarette smoking, the plaintiff voluntarily undertakes the obligation of paying for the cost of health care benefits including such costs as it alleges are caused or contributed to by cigarette smoking, and sets its taxation and health care policies accordingly. [214]
218. Despite its knowledge of risks associated with cigarette smoking, the plaintiff, on the judgment of the government of the day based on everything that was knowable, permitted the sale and consumption of cigarettes in British Columbia and derived substantial revenue therefrom.

H. Voluntary assumption of risk

219. Industries repeats paragraphs 212-218 hereof and says that at all material times the plaintiff has been aware of health risks associated with smoking cigarettes. Accordingly, the plaintiff voluntarily assumes such risks, whatever their extent, in incurring the alleged cost of health care benefits which are provided to smokers. [215]

I. Contributory negligence

220. Industries repeats paragraphs 212-218 hereof and says that if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, then the Claimed Cost was caused or contributed to, in whole or in part, by the plaintiff's own acts or omissions as pleaded herein, and not any act or omission of Industries. Industries pleads and relies upon the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333, as amended. [216]

J. The plaintiff cannot profit from its wrongful conduct

221. Industries repeats paragraphs 212-218 hereof and says that the plaintiff is barred from recovering any damages or costs it has suffered, the existence of which is denied, as any damages or costs flowed from its participation as set out herein in conduct which the plaintiff itself alleges in the Statement of Claim constituted breaches of duty. [217]

K. Legal and equitable bars

222. Industries repeats paragraphs 212-218 hereof and says that by reason of the facts set out therein and the knowledge, conduct and delay of the plaintiff and the prejudice thereby caused to Industries, the plaintiff is barred in law and in equity from advancing the claims made in the Statement of Claim against Industries. [218]

L. Mitigation

223. Industries repeats paragraphs 212-218 hereof and says in further answer to the whole of the Statement of Claim, if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, the plaintiff has failed to mitigate the Claimed Cost. [219]

DEFENCES ARISING OUT OF INDIVIDUAL CONDUCT

M. General

224. In answer to the whole of the Statement of Claim, if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, the Claimed Cost was caused by, and the plaintiff's claim to recover the Claimed Cost is subject to complete defences by reason of, the conduct of individual insured persons, including their voluntary decisions to commence or continue smoking with awareness of the associates risks. [220]
225. All of the insured persons who smoke or have smoked cigarettes were aware of risks associated with smoking. [221]
226. Each insured person became aware of risks associated with smoking by various means, including, without limitation, one or more of the following:
- (a) warnings on the packaging of cigarettes, as required from time to time pursuant to federal and provincial legislation and regulations;
 - (b) mandatory displays, signs and other warnings required by provincial legislation in premises where sales of cigarettes take place;
 - (c) discussions and writing, including advertising, in all forms of media including newspapers, magazines, journals, television, movies and radio;

- (d) education programmes including courses, seminars and lectures and educational literature and other media;
 - (e) oral and written warnings from physicians and other health practitioners;
 - (f) oral and written warnings from family members, friends and other acquaintances; and
 - (g) the common general understandings and historical beliefs about the habit-forming nature of tobacco and its risks to health passed down from generation to generation for more than 400 years. [222]
227. By reason of the foregoing, Industries says that all of the insured persons who smoke or have smoked cigarettes were aware of associated risks. [223]
228. Each of those insured persons who commenced or continued to smoke cigarettes did so with awareness of the risks associated with smoking, and each such insured person voluntarily consented to accept such risks. [224]
229. The cause in fact and in law of the commencement and continuation of the use of cigarettes by insured persons was a voluntary choice to smoke cigarettes with awareness of the associated risks. Industries had and has no legal duty to such persons, or, alternatively, no legal duty that has not been fulfilled. [225]
230. Industries denies that any insured persons began, continued or were unable to cease smoking by reason of any of the alleged breaches of duty of Industries, or that any alleged breach of duty caused or contributed to any alleged tobacco related disease or increased risk of tobacco related disease in any insured person. [226]

N. Voluntary assumption of risk

231. Industries repeats paragraphs 224-230 hereof and says that at all material times individual insured persons were aware of health risks associated with smoking cigarettes. Accordingly, such persons voluntarily assume such risks, whatever their extent, when they decide to commence and continue smoking. [227]

O. Contributory negligence

232. Industries repeats paragraphs 224-230 hereof and says that if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, then the Claimed Cost was caused or contributed to, in whole or in part, by the acts or omissions of individual insured persons as pleaded herein, and not any act or omission of Industries. Industries pleads and relies upon the provisions of the *Negligence Act*, as amended. [228]

P. Legal and equitable bars

233. Industries repeats paragraphs 224-230 hereof and says that by reason of the facts set out therein and the knowledge and conduct of insured persons and the prejudice thereby caused to Industries, the plaintiff is barred at law and in equity from advancing the claims made in the Statement of Claim against Industries. [229]

Q. Limitations

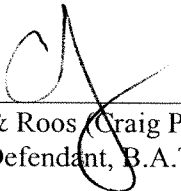
234. Industries pleads and relies upon the provisions of the *Limitation Act*, as amended, in respect of the claims of any individual insured person upon which the plaintiff's cause of action is alleged to rest. [230]

R. Mitigation

235. Industries repeats paragraphs 224-230 hereof and says in further answer to the whole of the Statement of Claim, if the plaintiff has incurred the Claimed Cost as alleged or at all, which is denied, individual insured persons have failed to mitigate the Claimed Cost. [231]

WHEREFORE the defendant, B.A.T Industries p.l.c., submits that the plaintiff's claim should be dismissed, with costs to this defendant.

January 12, 2007
Dated



Sugden, McFee & Roos (Craig P. Dennis),
Counsel for the Defendant, B.A.T Industries p.l.c.

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 (INDUSTRIES) 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

STATEMENT OF DEFENCE OF B.A.T INDUSTRIES P.L.C.

**Sugden, McFee & Roos
Barristers and Solicitors
700 - 375 Water St.
Vancouver BC V6B 5N3
CPD/gm
January 12, 2007**