



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
CANADIAN TOBACCO MANUFACTURERS' COUNCIL**

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Defendants

**STATEMENT OF DEFENCE OF
CANADIAN TOBACCO MANUFACTURERS' COUNCIL**

GENERAL DENIAL

The Defendant Canadian Tobacco Manufacturers' Council ("CTMC") denies the allegations in the Statement of Claim, unless expressly admitted, and puts the Plaintiff to the proof thereof. Specifically, CTMC denies that it has breached any common law, equitable or statutory duty, or conspired or acted in concert with respect to such breaches, as alleged

in the Statement of Claim or at all. In particular, CTMC did not and does not manufacture, sell or market any product, fail to warn, make any deceitful or negligent misrepresentations, contravene any consumer protection or competition legislation, or take part in any conspiracy, concerted action or common design as alleged or at all.

PART I: RESPONSE TO SPECIFIC CLAIMS OF THE PLAINTIFF

1. The nature of the Plaintiff's claim

1. CTMC denies the allegations in paragraph 1 in the Statement of Claim except that it admits that this Action is brought pursuant to section 2 of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c.30 (hereafter the "*Act*") and says further that the *Act* is void and of no force or effect and this Action is an abuse of process of this Court. CTMC refers to and pleads in this Statement of Defence the allegations in Supreme Court Actions filed in the Vancouver Registry numbered S010423, S010424 and S010425, in which it is alleged that the *Act* is unconstitutional because it interferes with the independence of the judiciary, creates a trial by legislation or, alternatively, is a legislative abuse of process, violates the rule of law and exceeds the territorial limits of provincial legislative competence.

2. CTMC admits this Action is brought pursuant to sections 2(1) and 2(4)(b) of the *Act* but denies the other allegations in paragraph 2 of the Statement of Claim.

3-4. CTMC admits only that the Statement of Claim states the definitions referred to in paragraphs 3 and 4 of the Statement of Claim for the purposes of the Statement of Claim but not otherwise and CTMC repeats paragraph 1 hereof.

2. The Defendants

5-17. CTMC does not admit the allegations in paragraphs 5 to 17 of the Statement of Claim.

18. CTMC denies the allegations in paragraphs 18 of the Statement of Claim and repeats paragraph 1 hereof.

19. CTMC admits the allegations in paragraph 19 of the Statement of Claim.

20-21. CTMC admits that its current members are the Defendants Imperial Tobacco Limited, Rothmans, Benson & Hedges Inc., and JTI - Macdonald Corp. but denies the other allegations in paragraphs 20 and 21 of the Statement of Claim and repeats paragraph 1 hereof.

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

A. The Canadian Manufacturers

22. CTMC does not admit the allegations in paragraph 22 of the Statement of Claim.

1. The Defendant Imperial Tobacco Canada Limited

23-27. CTMC does not admit the allegations in paragraphs 23-27 of the Statement of Claim.

2. The Defendant Rothmans Inc.

28. CTMC does not admit the allegations in paragraph 28 of the Statement of Claim.

3. The Defendant Rothmans, Benson & Hedges Inc.

29-32. CTMC does not admit the allegations in paragraphs 29-32 of the Statement of Claim.

4. The Defendant JTI-Macdonald Corp.

33-36. CTMC does not admit the allegations in paragraphs 33-36 of the Statement of Claim.

37. CTMC admits the allegation in paragraph 37 of the Statement of Claim that the Defendants referred to in paragraphs 23-36 of the Statement of Claim are referred to therein as the "Canadian Manufacturers" and says that CTMC will refer to them as such in this Statement of Defence.

B. The Foreign Manufacturers

38. CTMC denies the allegations in paragraph 38 of the Statement of Claim and repeats paragraph 1 hereof.

PART III. TOBACCO RELATED WRONGS COMMITTED BY THE DEFENDANTS**A. Properties of Cigarettes**

39-43. CTMC admits cigarettes are made from tobacco which contains naturally occurring nicotine. CTMC denies all other allegations in paragraphs 39-43 of the Statement of Claim and further says that:

- (a) over many generations some smokers have expressed the opinion that they have had difficulty stopping smoking. There has been a widespread public belief for generations that smoking is "addictive". The common understanding and historical beliefs in the community about the habit forming nature of tobacco have been passed down from generation to generation for more than four hundred years;
- (b) CTMC acknowledges that in current non-scientific language cigarette smoking can potentially lead to an "addiction" in some people. However, smoking is a complex human behaviour which includes much more than the intake of nicotine. It is both the behavioural aspects of smoking and nicotine that may make it difficult for some people to stop smoking. The existence of an "addiction" or a "dependence" does not prevent people from quitting. In fact, millions of smokers have stopped smoking without so-called withdrawal symptoms as alleged in paragraph 41 of the Statement of Claim.

- (c) most of the substances listed in paragraph 42 of the Statement of Claim have been identified in cigarette smoke, though in many cases the substances are found in trace amounts measured in billionths of a gram, many of which are present in the environment in commonly consumed products to which non-smokers are also exposed in equal or greater amounts;
- (d) CTMC admits that publicly available statistical and epidemiological research identifies smoking as a risk factor for certain diseases. This reported association between smoking and certain diseases has been well-known for many decades.

B. Alleged Knowledge of the Defendants that Cigarettes Were Dangerous

44-46. CTMC denies the allegations in paragraphs 44-46 of the Statement of Claim.

C. Breaches of Duty

47. CTMC denies the allegations in paragraph 47 of the Statement of Claim and repeats paragraph 1 hereof.

48. CTMC does not admit the allegations in paragraph 48 of the Statement of Claim.

1. Alleged defective product

49-50. CTMC denies the allegations in paragraphs 49 and 50 of the Statement of Claim.

51. CTMC denies the allegations in paragraph 51 of the Statement of Claim. In further answer, CTMC says that there was in fact a government of Canada programme which led to the development of a high nicotine tobacco plant.

52. CTMC denies the allegations in paragraph 52 of the Statement of Claim. In further answer, CTMC specifically denies that filters increased the risks of smoking cigarettes and denies that reasonable consumers were led to believe that the product was safer to use than it was in fact.

53. CTMC denies the allegations in paragraph 53 of the Statement of Claim. In further answer, CTMC says that at all material times it was the independently arrived at position of the government of Canada that low tar cigarettes were less hazardous than high tar cigarettes, and the government of Canada urged the introduction of low tar cigarettes into the market in Canada and encouraged their marketing and promotion so as to persuade Canadian consumers to switch to such cigarettes.

54. CTMC specifically denies each and every allegation in paragraph 54 of the Statement of Claim and in particular, says, that the net cost to the Plaintiff of health care benefits has not been increased and will not be increased in the future by the consumption of tobacco products by insured persons in British Columbia.

2. Alleged failure to warn

55-62. CTMC denies the allegations in paragraphs 55-62 of the Statement of Claim.

3. Alleged sale of cigarettes to children and adolescents

63-69. CTMC denies the allegations in paragraphs 63-69 of the Statement of Claim and, in further answer, says:

- (a) at all material times the Plaintiff had and undertook the obligation of informing children and adolescents within British Columbia of the risks believed associated with the consumption of tobacco products, and if such persons have not been informed of such risks, which is denied, the Plaintiff failed to perform that obligation adequately;
- (b) at all material times the Plaintiff alone had the obligation to enforce all relevant statutes and regulations pertaining to the sale of tobacco products to under-aged smokers, as defined from time to time by statutes or regulations, and failed to do so;
- (c) CTMC repeats paragraphs 49, 54 and 204 hereof.

70. CTMC denies the allegations in paragraph 70 of the Statement of Claim and in further answer says the allegations in paragraph 70 disclose no cause of action and are frivolous and vexatious and are an abuse of the process of the Court.

71. CTMC denies the allegations in paragraph 71 of the Statement of Claim and, in further answer, repeats paragraphs 63-69 hereof.

4. Alleged strict liability

72-75. CTMC denies the allegations in paragraphs 72-75 of the Statement of Claim, and further says that there is no cause of action known as "strict liability" and that generally these paragraphs disclose no cause of action against CTMC or the Canadian Manufacturers and are frivolous and vexatious and CTMC repeats paragraph 54 hereof.

5. Alleged deceit and misrepresentation

76. CTMC denies the allegations in paragraph 76 of the Statement of Claim but repeats paragraphs 49-54 and 204 hereof.

77-83. CTMC denies the allegations in paragraphs 77-83 of the Statement of Claim. No representations were made by CTMC which were false or made with wilful blindness or recklessness as to their truth or falsity. CTMC repeats paragraphs 49-54 and 204 hereof.

6. Trade Practices Act

84. CTMC admits that paragraph 84 of the Statement of Claim states that the definition in paragraphs 85 and 86 of the Statement of Claim is the same as the definition of consumer provided by the *Trade Practices Act* S.B.C. 1974, c.96.

85-87. CTMC denies the allegations in paragraphs 85-87 of the Statement of Claim and further says that generally these paragraphs of the Statement of Claim disclose no cause of action and are frivolous and vexatious.

7. Competition Act

88-90. CTMC denies the allegations in paragraphs 88-90 of the Statement of Claim and further says that generally these paragraphs of the Statement of Claim disclose no cause of action and are frivolous and vexatious.

PART IV. ALLEGED CONCERTED ACTION WITHIN CORPORATE GROUPS

91-158. CTMC denies the allegations in paragraphs 91-158 of the Statement of Claim and repeats paragraph 1 hereof.

PART V. ALLEGED CONCERTED ACTION OF THE TOBACCO INDUSTRY IN CANADA

159-161. CTMC denies the allegations in paragraphs 159-161 of the Statement of Claim and repeats paragraphs 1 and 39-90 hereof.

162. CTMC admits that it was incorporated in 1982 but denies all other allegations in paragraph 162 of the Statement of Claim and repeats paragraphs 1 and 39-90 hereof.

163. CTMC denies the allegations in paragraphs 163 of the Statement of Claim and repeats paragraph 176(a) hereof.

164-165. CTMC denies the allegations in paragraphs 164-165 of the Statement of Claim.

166. CTMC denies the allegations in paragraph 166 of the Statement of Claim and repeats paragraphs 1 and 39-90 hereof.

167-176. CTMC denies the allegations in paragraphs 167-176 of the Statement of Claim and repeats paragraphs 1 and 39-166 hereof.

176(a). In further answer to the allegations in paragraphs 91-158 of the Statement of Claim, CTMC 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. CTMC repeats paragraphs 49-54 hereof. 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.

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

PART VI. ALLEGED CONCERTED ACTION OF THE TOBACCO INDUSTRY INTERNATIONALLY

177-200. CTMC denies the allegations in paragraphs 177-200 of the Statement of Claim.

201. In further answer to paragraphs 177-200 of the Statement of Claim, the CTMC repeats paragraphs 1 and 176(a) hereof.

ANSWERS TO THE STATEMENT OF CLAIM AS A WHOLE**GENERAL DEFENCES****A. Res judicata**

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

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) the alleged cost of health care benefits incurred by the Plaintiff were incurred to provide services to insured persons that the Plaintiff was required to

provide pursuant to the *Hospital Insurance Act*, the *Medicare Protection Act* and the *Continuing Care Act* and their predecessor statutes;

- (d) the cost of health care benefits, as defined, if any, was caused by the conduct and acts or omissions of the government of Canada as further particularized herein; and

in further answer CTMC repeats paragraph 1 hereof.

C. No breach of duty

204. In answer to the entire Statement of Claim:

- (a) CTMC denies that it has breached any common law, equitable or statutory duties as alleged in the Statement of Claim or at all. Specifically, CTMC did not and does not manufacture, sell or market any product, nor, given the widespread knowledge of consumers of the risks believed to be associated with the use of tobacco products, did CTMC fail to warn, make any deceitful or negligent misrepresentations, contravene any consumer protection or competition legislation, or take part in any conspiracy, unlawful concerted action or common design as alleged or at all;
- (b) CTMC denies that persons have started or continued to smoke, or suffered any so-called tobacco related disease, as a consequence of any alleged breach of duty;
- (c) at all material times CTMC has cooperated with governments in Canada when the latter have properly exercised its constitutional authority in its regulation of the tobacco industry. In particular, CTMC has been guided by,

encouraged and participated with the governments and public health agencies in product development initiatives, including the development of raw materials, the reduction of tar and nicotine content in cigarette smoke, the design and manufacture of "low tar" cigarettes, as well as advertising and promotion initiatives designed in pursuit of government health objectives to encourage smokers to switch to lower tar products;

(d) at all materials times, the manufacture, sale, advertising and promotion of tobacco products in British Columbia and throughout Canada has been supervised, regulated and controlled by the Plaintiff and the government of Canada. The government of British Columbia encouraged or participated in such supervision, regulation and control in British Columbia either directly or indirectly through agreements, express or implied with the government of Canada. Together the said governments have defined and delineated the duties of CTMC and tobacco manufacturers throughout Canada including British Columbia and have given advice, recommendations, directions and suggestions in relation to, *inter alia*:

- (i) the nature and scope of research into the properties of cigarettes to be undertaken by CTMC;
- (ii) whether warnings of the alleged health risks and properties of cigarettes, including their alleged addictive character, should be provided to consumers;
- (iii) the content and placing of any such warnings to be provided;
- (iv) product modifications including the development, manufacture, promotion, distribution and sale of cigarettes containing lower amounts of tar and nicotine as measured by standard smoking machines;
- (v) communications by CTMC with consumers about the properties of cigarettes including their alleged health effects, alleged addictive

character and their tar and nicotine content when measured by standard smoking machines; and

- (vi) the acceptability of the types of advertising and other forms of promotion;
- (e) at all material times, CTMC complied reasonably with the standards, regulations, directives, recommendations, suggestions, and advice of the said governments and thereby discharged its duties and standards in its dealings with consumers or potential consumers;
- (f) by complying with the various standards, regulations, directives, recommendations, suggestions and advice of the said governments CTMC acted reasonably in all the circumstances prevailing at various material times and CTMC committed no tobacco related wrongs as alleged in the Statement of Claim or at all;
- (g) at various material times the said governments made representations to CTMC which the said governments knew or ought to have known would be relied upon by CTMC including representations relating to:
 - (i) the prevalence of public awareness of the health risks of smoking including the alleged addictive properties of cigarettes;
 - (ii) whether warnings of the health risks of smoking including the alleged addictive properties of cigarettes were necessary or effective to inform consumers of those risks of properties;
 - (iii) whether warnings of the health risks of smoking including the alleged addictive properties of cigarettes would be effective to persuade consumers not to start or to stop smoking;
 - (iv) the form and placing of warnings on packages and other materials;

- (v) diminished the health risks to consumers of smoking cigarettes containing lower levels of tar and nicotine as measured by standard smoking machines;
- (vi) whether tar and nicotine measuring standards provided accurate information to consumers on which they could make informed smoking decisions having regard to the health effects of smoking and the alleged addictive properties of cigarettes;
- (vii) whether the phenomenon of so-called smoker "compensation" was real;
- (viii) whether altering the tar/nicotine ratio in cigarettes would have less risk to public health;
- (ix) the types of advertising and other forms of promotion used to promote the sale of tobacco products; and

CTMC on the said representations and thereby complied with the duties, standards, regulations, directives, recommendations, suggestions, advice and representations of the said governments and committed no tobacco related wrongs as alleged in the Statement of Claim or at all;

- (h) in 1972 all tobacco manufacturers in Canada voluntarily ceased all brand advertising for tobacco products on radio and television and have not conducted any such advertising ever since.

D. No damage

205. In answer to the entire Statement of Claim, CTMC says that:

- (a) if it has breached or has conspired or acted in concert with respect to a breach of any duty to insured persons, as alleged or at all, which is denied,

no such breach has been the proximate cause of any tobacco related disease or cost of health care benefits as alleged or at all;

- (b) if the Plaintiff has incurred the cost of health care benefits as alleged or at all, which is denied, then the proximate cause of the Plaintiff incurring such costs is the requirement in the statutes providing for health care in the province of British Columbia, namely the *Hospital Insurance Act*, the *Medicare Protection Act* and the *Continuing Care Act* and predecessor statutes;
- (c) if the Plaintiff has incurred the cost of health care benefits as alleged or at all, which is denied, then such costs have not been or will not be increased by the consumption of tobacco products by insured persons;
- (d) if the Plaintiff has incurred the cost of health care benefits as alleged or at all, which is denied, the Plaintiff has not and does not incur any costs in providing health care services to insured persons who have suffered tobacco related disease, as such costs are exceeded by the tax revenue received from the sale of tobacco products in British Columbia; and
- (e) if the Plaintiff has incurred the cost of health care benefits as alleged or at all, which is denied, the Plaintiff has not and does not incur any net cost in providing health care services to insured persons who have suffered tobacco related disease.

E. Causation

206. Causation of alleged "tobacco related disease" in aggregate populations is unknown. There are alternative theories of causation for so called tobacco related diseases.

F. Limitations

207. CTMC pleads the provisions of the *Limitation Act* 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.

DEFENCES ARISING OUT OF THE PLAINTIFF'S CONDUCT AND KNOWLEDGE**G. General**

208. If the Plaintiff has incurred or will incur the cost of health care benefits, that have been or will be provided to insured persons who have suffered tobacco related disease, as alleged, or at all, which is denied, CTMC says that such costs were caused, and the Plaintiff's claim to recover such costs is subject to complete defences, by reason of the Plaintiff's own conduct and knowledge including:

- (a) the Plaintiff's own knowledge of health risks believed to be associated with the consumption of tobacco products;

- (b) the Plaintiff's licensing and regulation of the production, manufacture and sale of tobacco products, including its failure to enforce or implement 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 exposure to tobacco products;
- (d) the Plaintiff's establishment of policies and practices, including health care expenditures and taxation policy and practices, with knowledge of the alleged risks and costs of exposure to tobacco products;
- (e) 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;
- (f) the Plaintiff's failure to enforce laws prohibiting the sale to and use of tobacco products by under-aged smokers as defined by law from time to time;
- (g) the Plaintiff's taxation of tobacco products in excess of the cost (if any) of health care benefits;
- (h) the Plaintiff's own breaches of its duty or duties to insured persons; and
- (i) the Plaintiff has undertaken a course of conduct consisting of legislative and regulatory actions, representations, omissions and voluntary actions which the Plaintiff intended, knew, or ought to have known would lead CTMC and the Canadian Manufacturers to believe that their conduct in British Columbia was not in breach of any provincial statute or regulation and that its conduct was not actionable. In reliance on that course of conduct, CTMC and the

Canadian Manufacturers have continued to allow its tobacco products to be sold and consumed in British Columbia, it has complied with applicable legislation and regulations and it has paid the applicable fees and taxes.

209. At all material times, the sale, advertising, promotion and consumption of tobacco products have been legal in British Columbia subject to certain exceptions and restrictions all of which have been fully complied with by the Canadian Manufacturers and CTMC.

210. At all material times and at least since 1950, the Plaintiff, through its ministers, ministries, departments, servants and agents, has known as much regarding any risks believed to be associated with the consumption of tobacco products as the Defendants.

211. Despite its knowledge of risks believed to be associated with the consumption of tobacco products, the Plaintiff continued to license and regulate the production, manufacturing, advertising, promotion and sale of tobacco products in British Columbia and to impose heavy taxation upon, *inter alia*, manufacturers, distributors and consumers of tobacco products.

212. The Plaintiff has benefited from the taxes imposed on and in relation to the sale of tobacco products in British Columbia.

213. Despite its knowledge of risks believed to be associated with the consumption of tobacco products, the Plaintiff took no steps to restrict or limit the sale of tobacco products save for restrictions on the sale of tobacco to persons below a prescribed age and in that case took no reasonable steps to enforce the law.

214. Despite its knowledge of risks believed to be associated with the consumption of tobacco products, the Plaintiff voluntarily undertook the obligation of paying for the costs of health care benefits including such costs it alleges are caused or contributed to by the consumption of tobacco products and set its taxation and health care policies accordingly.

H. **Voluntary assumption of risk: The Plaintiff with knowledge assumed any risk of paying health care costs associated with tobacco use**

215. CTMC repeats paragraphs 208-214 hereof and says that at all material times the Plaintiff has been aware of health risks believed associated with exposure to tobacco. Accordingly, the Plaintiff voluntarily assumed such risks, if any, whatever their extent when it incurred and continues to incur the alleged cost of health care benefits that have been provided and will be provided to persons who are and have been exposed to tobacco products.

I. **Contributory negligence**

216. CTMC repeats paragraphs 208-214 hereof, and says if the Plaintiff has incurred the cost of health care benefits as alleged or at all, which is denied, then such costs were 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 CTMC. CTMC pleads and relies upon the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333.

J. The Plaintiff cannot profit from its own wrongful conduct

217. CTMC repeats paragraphs 91-200 and 208-214 hereof and says 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. CTMC relies on the doctrines of *ex turpi causa non oritur actio* and *in pari delicto potior est conditio defendentis*.

K. Legal and equitable bars

218. CTMC repeats paragraphs 208-214 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 CTMC, the Plaintiff is barred in law and in equity from advancing the claims made in the Statement of Claim against CTMC.

L. Mitigation

219. CTMC repeats paragraphs 208-214 hereof and says in further answer to the whole of the Statement of Claim, if the Plaintiff has incurred the cost of health care benefits, as alleged or at all, it has failed to mitigate such costs.

DEFENCES ARISING OUT OF INDIVIDUAL CONDUCT

M. General

220. In answer to the whole of the Statement of Claim, if the Plaintiff has incurred, will incur or will continue to incur the cost of health care benefits that have been or will be provided to insured persons alleged to have suffered tobacco related disease, which is denied, such costs were caused, and the Plaintiff's claim to recover such costs is subject to complete defences, by reason of the conduct of individual insured persons, including their voluntary decision to commence or continue smoking with knowledge of risks believed to be associated with the consumption of tobacco products.

221. All of the insured persons who consume or have consumed tobacco products were aware, or had been warned of risks believed to be associated with the consumption of tobacco products.

222. Such knowledge or warnings of risks believed to be associated with tobacco products have been received by each insured person by various means, including, without limitation, one or more of the following:

- (a) warnings voluntarily included on the packaging of tobacco products, and 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 tobacco products 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 or other medical 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.

223. By reason of the foregoing, CTMC says that all of the insured persons who consume or have consumed tobacco products knew or have been warned of risks believed to be associated with the consumption of tobacco products.

224. Each of those insured persons who commenced or continued to consume tobacco products did so with knowledge of risks believed to be associated with the consumption of tobacco products, and each such insured person voluntarily consented to accept such risks.

225. The cause in fact and in law of the commencement and continuation of the use of tobacco products by insured persons was a voluntary choice to consume such tobacco products in light of risks believed to be associated with the use of such products. CTMC had and has no legal duty to such persons that has not been fulfilled.

226. CTMC denies that any insured persons began, continued or were unable to cease to smoke by reason of any of the alleged breaches of duty of CTMC or the Canadian Manufacturers or that such breaches of duties were the cause, proximate or otherwise, of any alleged tobacco related disease or cost of health care benefits.

N. Voluntary assumption of risk

227. At all material times individual insured persons were aware of health risks believed associated with exposure to tobacco. Accordingly, such persons voluntarily assume such risks, if any, whatever their extent when they decide to commence using and to continue to use tobacco products.

O. Contributory negligence

228. If the Plaintiff has incurred the costs of health care benefits as alleged or at all, which is denied, then such costs were caused by the acts or omissions of individual insured persons and not any act or omission of CTMC or the Canadian Manufacturers. CTMC pleads and relies upon the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333.

P. Legal and equitable bars

229. CTMC repeats the allegations herein and says that by reason of the facts set out herein and the knowledge and conduct of the insured persons and the prejudice thereby caused to CTMC, the Plaintiff is barred at law and in equity from advancing the claims made in the Statement of Claim against CTMC.

Q. Limitations

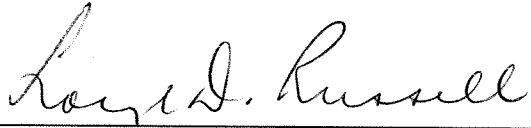
230. CTMC pleads the provisions of the *Limitation Act* in respect of the claims of any individual insured persons upon which the Plaintiff's cause of action is alleged to rest.

R. Mitigation

231. In the alternative, and in further answer to the whole of the Statement of Claim, if the Plaintiff has incurred the cost of health care benefits, as alleged or at all, individual insured persons have failed to mitigate such costs.

WHEREFORE the Defendant CTMC submits that the Plaintiff's claim should be dismissed, with costs to this Defendant.

DATED at Vancouver, British Columbia, this 12th day of April, 2001.



Counsel for the Defendant,
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