



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
IMPERIAL TOBACCO CANADA LIMITED**

STATEMENT OF DEFENCE OF IMPERIAL TOBACCO CANADA LIMITED

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GENERAL DENIAL

The Defendant Imperial Tobacco Canada Limited ("Imperial") denies, or where applicable does not admit, the allegations in the Statement of Claim, unless expressly admitted, and puts the Plaintiff to the proof thereof. Imperial denies that it has breached any common law, equitable or statutory duty as alleged in the Statement of Claim or at all. In particular, in all the circumstances, Imperial did not and does not manufacture a defective or dangerous product, and did not and does not fail to warn, unlawfully sell or market to children and adolescents, 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

The nature of the Plaintiff's claim

1. Imperial 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. Imperial refers to and pleads in this Statement of Defence the allegations in the Statements of Claim 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, violates the rule of law and exceeds the territorial limits of provincial legislative competence.

2. Imperial 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. Imperial 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 Imperial repeats paragraph 1 hereof.

The Defendants

5-7. Imperial does not admit the allegations in paragraphs 5 through 7 of the Statement of Claim.

8. Imperial admits the allegations in paragraph 8 of the Statement of Claim except that it has a registered office at 3810 St Antoine Street, Montreal Quebec.

9-17. Imperial does not admit the allegations in paragraphs 9 through 17 of the Statement of Claim.

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

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

20-21. Imperial admits that the current members of the CTMC are Imperial, Rothmans, Benson & Hedges Inc., and JTI-Macdonald Corp. but denies the other allegations in paragraphs 20-21 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. Imperial admits it is one of the manufacturers of cigarettes sold in British Columbia.

1. The Defendant Imperial Tobacco Canada Limited

23. Imperial admits that it was incorporated in 1912 and that effective December 1, 1970 it changed its name to Imasco Limited.

24. Imperial does not admit the allegations in paragraph 24 of the Statement of Claim but admits that Imperial Tobacco, a division of Imasco Limited manufactured cigarettes after 1970.

25. Imperial does not admit that the allegations in paragraph 25 of the Statement of Defence accurately describes the corporate transactions of February 2000 and denies that British American Tobacco (Canada) Limited ever was a parent company of Imasco Limited. Imperial does admit that the relevant corporate transactions involved amalgamations which led to Imperial Tobacco Canada Limited.

26-27. Imperial admits that it is one of the manufacturers of cigarettes sold in British Columbia and currently is the largest manufacturer of cigarettes in Canada.

2. The Defendant Rothmans Inc.

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

3. The Defendant Rothmans, Benson & Hedges Inc.

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

4. The Defendant JTI-Macdonald Corp.

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

37. Imperial 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".

B. The Foreign Manufacturers

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

PART III. ALLEGED TOBACCO RELATED WRONGS COMMITTED BY THE DEFENDANTS

A. Properties of Cigarettes

39-43. Imperial admits cigarettes are made from tobacco which contains naturally occurring nicotine. Imperial 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;

Imperial 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 involves much more than the intake of nicotine. It is both the behavioural aspects of smoking and nicotine which may make it difficult for some people to stop smoking. But, the existence of an "addiction" or a "dependence" does not prevent people quitting. In fact, millions of smokers have stopped smoking without so-called withdrawal symptoms as alleged in paragraph 41 of the Statement of Claim.

- (b) 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 or in commonly consumed products to which non-smokers are also exposed in equal or greater amounts;

- (c) Imperial 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. Imperial denies the allegations in paragraphs 44-46 of the Statement of Claim

C. Alleged Breaches of Duty

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

48. Imperial admits that it has manufactured cigarettes which have reached consumers without any change in their condition and which have been smoked by consumers.

1. Alleged Defective Product

49. Imperial denies the allegations in paragraph 49 of the Statement of Claim and in further answer Imperial says that it complied with all common law, equitable and statutory duties that, in the circumstances, existed at various places and times.

50. Imperial denies the allegations in paragraph 50 of the Statement of Claim and in further answer Imperial says that it complied with all common law, equitable and statutory

duties that, in the circumstances, existed at various places and times. At all times Imperial acted reasonably in changes and alterations made to the design and manufacture of cigarettes.

51. Imperial denies the allegations in paragraph 51 of the Statement of Claim and in further answer Imperial says that it complied with all common law, equitable and statutory duties that, in the circumstances, existed at various places and times and says further that there was in fact a government of Canada programme which led to the development of a high nicotine tobacco plant.

52. Imperial denies the allegations in paragraph 52 of the Statement of Claim and in further answer Imperial says that it complied with all common law, equitable and statutory duties that, in the circumstances, existed at various places and times and specifically denies that filters increased the risks of smoking cigarettes and denies that it led reasonable consumers to believe that the product was safer to use than it was in fact.

53. Imperial denies the allegations in paragraph 53 of the Statement of Claim and in further answer Imperial says that it complied with all common law, equitable and statutory duties that, in the circumstances, existed at various places and times. Imperial says, further, 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 encouraged Imperial and the other members of the Canadian tobacco industry to manufacture low tar cigarettes and encouraged Imperial to market and promote them so as to persuade Canadian consumers to switch to such cigarettes.

54. Imperial specifically denies each and every allegation in paragraph 54 of the Statement of Claim and 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. Imperial denies the allegations in paragraphs 55-62 of the Statement of Claim and in further answer says that it complied with whatever common law, equitable and statutory duties, if any, that in the circumstances existed at various places and times.

3. Alleged Sale of Cigarettes to Children and Adolescents

63-69. Imperial denies the allegations in paragraphs 63 through 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) Imperial repeats the allegation in paragraph 54 hereof.

70. Imperial 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. Imperial 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. Imperial 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 Imperial and are frivolous and vexatious and Imperial repeats paragraph 54 hereof.

5. Alleged Deceit and Misrepresentation

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

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

6. Trade Practice Act

84. Imperial admits for the purpose of this action only 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 in the *Trade Practices Act* S.B.C. 1974, c.96.

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

7. *Competition Act*

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

PART IV. ALLEGED CONCERTED ACTION WITHIN CORPORATE GROUPS

91-200. Imperial denies the allegations in paragraphs 91-200 of the Statement of Claim and repeats paragraph 1 hereof.

201. In further answer to the allegations in paragraphs 91-200 of the Statement of Claim, Imperial 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. Imperial 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 and continued to agree and condone the design, manufacture, marketing, distribution and sale of tobacco.

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

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 Imperial 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. Imperial 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 and omissions of the government of Canada and of the Plaintiff acting in concert with the government of Canada as further particularized herein; and

in further answer Imperial repeats paragraph 1 hereof.

C. No breach of duty

204. In answer to the entire Statement of Claim:

- (a) Imperial denies that it has breached any common law, equitable or statutory duties as alleged in the Statement of Claim or at all. Specifically, given the widespread knowledge of consumers of the risks believed to be associated with the use of tobacco products, Imperial did not and does not manufacture a dangerous or defective product. Nor given that knowledge did it nor does it fail to warn. Imperial did not nor does it unlawfully sell or market to children and adolescents, make any deceitful or negligent misrepresentations, contravene any consumer protection or competition legislation or take part in any conspiracy as alleged or at all;

- (b) Imperial 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 Imperial has cooperated with governments in Canada when the latter have properly exercised their constitutional authority in their regulation of the tobacco industry. In particular, Imperial 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 in pursuance of government health objectives of the time 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 Imperial and other tobacco manufacturers throughout Canada including British Columbia and gave 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 Imperial and other Canadian tobacco manufacturers;
 - (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 Imperial and other Canadian manufacturers with consumers about the properties of cigarettes including their alleged health effects, allegedly 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 used by Imperial and other Canadian manufacturers to promote the sale of their products.
- (e) at all material times Imperial 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 reasonably with the various standards, regulations, directives, recommendations, suggestions and advice of the said governments, Imperial acted reasonably in all the circumstances and 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 Imperial which the said governments knew or ought to have known would be relied upon by Imperial including representations relating to:
 - (i) the prevalence of public awareness of the health risks of smoking including the allegedly addictive properties of cigarettes;

 - (ii) whether warnings of the health risks of smoking including the allegedly 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 allegedly 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) the health benefits 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 alleged health effects of smoking and the allegedly 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 beneficial public health effects; and
- (ix) the types and advertising and other forms of promotion used by Imperial and other Canadian tobacco manufacturers to promote the sale of their products.

Imperial relied on the said representations and thereby complied with the 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, Imperial says that:

- (a) if it has breached 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. Imperial 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, Imperial 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 Imperial to believe that its 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, Imperial has 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 Imperial

210. At all material times 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 Imperial

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. Imperial 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. Imperial 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 Imperial Imperial 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. Imperial 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 are denied, as any damages or costs flowed from its participation in such breaches of duty as set out herein. Imperial 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. Imperial 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 Imperial, the Plaintiff is barred in law and in equity from advancing the claims made in the Statement of Claim against Imperial.

L. Mitigation

219. Imperial 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, Imperial 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 manufactured by Imperial 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. Imperial had and has no legal duty to such persons that has not been fulfilled.

226. Imperial 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 Imperial or that such breaches of duty 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 Imperial. Imperial pleads and relies upon the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333.

P. Legal and equitable bars

229. Imperial 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 Imperial, the Plaintiff is barred at law and in equity from advancing the claims made in the Statement of Claim against Imperial

Q. Limitations

230. Imperial 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 Imperial Tobacco Canada Limited submits that the Plaintiff's claim should be dismissed, with costs to this Defendant.

Dated: April 12, 2001

J. Hoffman
Counsel for the Defendant
Imperial Tobacco Canada Limited