



NO. SO10421
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA

PLAINTIFF

AND:

IMPERIAL TOBACCO CANADA LIMITED, ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., JTI-MACDONALD CORP., CANADIAN TOBACCO MANUFACTURERS' COUNCIL, B.A.T. INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, CARRERAS ROTHMANS LIMITED, PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL, INC., R.J. REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS TOBACCO INTERNATIONAL, INC., ROTHMANS INTERNATIONAL RESEARCH DIVISION AND RYSEKKS p.l.c.

DEFENDANTS

**STATEMENT OF DEFENCE
OF JTI-MACDONALD CORP.**

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STATEMENT OF DEFENCE OF JTI-MACDONALD CORP.

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GENERAL DENIAL

The Defendant JTI-Macdonald Corp. ("JTI") 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. Specifically JTI denies that it has breached any common law, equitable or statutory duty as alleged in the Statement of Claim or at all and, in particular, in all the circumstances JTI 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. JTI 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. JTI refers to and pleads in this Statement of Defence the allegations in Supreme Court Actions filed in the Vancouver Registry numbered S010423, S010424, 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. JTI 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. JTI 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 JTI repeats paragraph 1 hereof.

The Defendants

5.- 8. JTI does not admit the allegations in paragraphs 5 through 8 of the Statement of Claim.

9. JTI admits the allegations in paragraph 9 of the Statement of Claim.

10.-15. JTI does not admit the allegations in paragraphs 10 through 15 of the Statement of Claim.

16.-17. JTI admits the allegations in paragraphs 16 and 17 of the Statement of Claim.

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

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

20.-21. JTI admits that the current members of the CTMC are Imperial Tobacco Canada Limited, 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. JTI admits it is one of the manufacturers of cigarettes sold in British Columbia.

1. The Defendant Imperial Tobacco Canada Limited

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

2. The Defendant Rothmans Inc.

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

3. The Defendant Rothmans, Benson & Hedges Inc.

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

4. The Defendant JTI-Macdonald Corp.

33. JTI admits the allegations in paragraph 33 of the Statement of Claim.

34. JTI admits that in 1978 RJR-Macdonald Inc. acquired all the shares in Macdonald Tobacco Inc. and that in 1999, RJR-Macdonald Inc. changed its name to RJR-Macdonald Corp. and that later in 1999, RJR-Macdonald Corp. changed its name to JTI-Macdonald Corp., but does not admit any other allegations in paragraph 34 and puts the Plaintiff to the proof thereof.

35. JTI does not admit the allegations in paragraph 35 of the Statement of Claim and puts the Plaintiff to the proof thereof.

36. JTI admits that it is Canada's third largest manufacturer of cigarettes but does not admit any other allegations in paragraph 36 of the Statement of Claim and puts the Plaintiff to the proof thereof

37. JTI 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. JTI 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. JTI admits cigarettes are made from tobacco which contains naturally occurring nicotine and admits that for persons who consume cigarettes nicotine has mild psychoactive effects on some body systems. JTI 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", and JTI admits that in non-scientific language cigarette smoking can reasonably be referred to as "addictive" but in fact millions of smokers have stopped

smoking without any medical or other assistance and without so-called withdrawal symptoms as alleged in paragraph 41 of the Statement of Claim. 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) 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;
- (c) JTI 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.-45. JTI denies the allegations in paragraphs 44-45 of the Statement of Claim.

46. JTI denies the allegations in paragraph 46 of the Statement of Claim but admits that after its incorporation it was aware of the presence of nicotine in cigarettes which is a substance that for persons who consume cigarettes has mild physiological effects.

C. Alleged Breaches of Duty

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

48. JTI admits that since its incorporation 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. In further answer to paragraph 49 of the Statement of Claim, JTI says that it complied with all common law, equitable and statutory duties that, in the circumstances, existed at various places and times.

50. In further answer to paragraph 50 of the Statement of Claim, JTI says that it complied with all common law, equitable and statutory duties that, in the circumstances, existed at various places and times, and JTI says that at all material times it was to the knowledge of the government of British Columbia and the government of Canada that it was and still is impossible to manufacture a cigarette acceptable to smokers the use of which would not be a risk factor for certain diseases. At all times JTI acted reasonably in changes and alterations made to the design and manufacture of cigarettes.

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

52. In further answer to paragraph 52 of the Statement of Claim, JTI says that it complied with all common law, equitable and statutory duties that, in the circumstances, existed at various places and times and JTI 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. In further answer to paragraph 53 of the Statement of Claim, JTI says that it complied with all common law, equitable and statutory duties that, in the circumstances, existed at various places and times, and JTI 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 JTI and the other members of the Canadian tobacco industry to manufacture low tar cigarettes and encouraged JTI to market and promote them so as to persuade Canadian consumers to switch to such cigarettes.

54. JTI 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. JTI denies the allegations in paragraphs 55 through 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 and JTI refers to paragraph 204(h) *supra*.

3. Alleged Sale of Cigarettes to Children and Adolescents

63.-69. JTI 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) JTI repeats paragraphs 49-54 and 204 hereof.

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

5. Alleged Deceit and Misrepresentation

76. JTI admits that it owed the duty as alleged in paragraph 76 of the Statement of Claim but repeats paragraphs 49-54 and 204 hereof.

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

6. Trade Practice Act

84. JTI admits that paragraph 84 of the Statement of Claim states that the definition of "consumer" 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. JTI 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. JTI 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.-200. JTI 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, JTI 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. JTI 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.

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

in further answer JTI repeats paragraph 1 hereof.

C. No breach of duty

204. In answer to the entire Statement of Claim:

- (a) JTI 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, JTI did not and does not manufacture a dangerous or defective product, nor, given that knowledge, breach a duty to warn. JTI did not and does not 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, unlawful concerted action or common design as alleged or at all;
- (b) JTI 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 JTI has cooperated with governments in Canada when the latter have properly exercised their constitutional authority in

their regulation of the tobacco industry. In particular, JTI 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 material 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 JTI and other 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 JTI 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; and
 - (v) communications by JTI and other Canadian manufacturers with consumers about the properties of cigarettes including their health effects, alleged addictive character and their tar and nicotine content when measured by standard smoking machines;
 - (vi) the acceptability of the types of advertising and other forms of promotion used by JTI and other Canadian manufacturers to promote the sale of their products.
- (e) at all material times JTI complied reasonably with the standards, regulations, and directives imposed by the said governments, and complied with their recommendations, suggestions and advice 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 JTI 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 JTI which the said governments knew or ought to have known would be relied upon by JTI 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 or 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) 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 health effects of smoking and the alleged addictive properties of cigarettes;
- (vii) whether the phenomenon of so-called smoker "compensation" was real; and
- (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 JTI and other Canadian tobacco manufacturers to promote the sale of their products.

JTI 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) Further, JTI says that:
 - (i) neither it, nor RJR-Macdonald Inc. ("Macdonald") ever sold a tobacco product in Canada without a written health warning on the packaging of the product fully visible to the consumer that was not approved or mandated by the government;
 - (ii) in 1972, twenty-nine years before this action was commenced and six years before Macdonald was incorporated, all tobacco manufacturers in Canada voluntarily placed written health warnings written by the government on the packages of tobacco products and have continued to do so ever since. In addition, in that year 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. In addition, in that year Macdonald ceased all outdoor billboard brand advertising in British Columbia and has conducted no such advertising since; and

(iii) in January of 1989, almost thirteen years before this action was commenced, Macdonald ceased all advertising in newspapers.

D. No damage

205. In answer to the entire Statement of Claim, JTI 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. JTI 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, JTI 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 JTI 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, JTI 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 JTI.

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 JTI.

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

L. Mitigation

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

226. JTI denies that any insured persons began, continued, or were unable to cease to smoke by reason of any of the alleged breaches of duties of JTI, 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 JTI. JTI pleads and relies upon the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333.

P. Legal and equitable bars

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

Q. Limitations

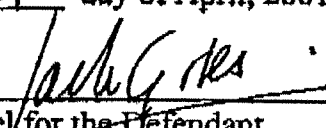
230. JTI pleads the provisions of the *Limitation Act* in respect of the claims of any individual insured persons upon which the Plaintiff's cause of action is alleged to rest.

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 JTI 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
JTI-Macdonald Inc.

THIS STATEMENT OF DEFENCE is filed and delivered by Jack Giles, Q.C. of the law firm of Farris, Vaughan, Wills & Murphy, whose place of business and address for delivery is 2600 - 700 West Georgia Street, Vancouver, B.C., V7Y 1B3. Telephone: (604) 684-9151.