

CANADA

SUPERIOR COURT

(Class Action)

PROVINCE OF QUÉBEC

CÉCILIA LÉTOURNEAU

DISTRICT OF MONTRÉAL

Plaintiff

No: 500-06-000070-983

vs.

JTI-MACDONALD CORP.

and

IMPERIAL TOBACCO CANADA LIMITED

and

ROTHMANS, BENSON & HEDGES INC.

Defendants

and

JTI-MACDONALD CORP. a corporation duly incorporated, having a place of business at 2455 Ontario Street East, City and District of Montreal, Province of Quebec, H2K 1W3

Plaintiff in Warranty

vs.

ATTORNEY GENERAL OF CANADA, Complexe Guy Favreau, East Tower, 200 René-Lévesque West, 9th floor, City and District of Montreal, Province of Quebec, H2Z 1X4

Defendant in Warranty

MOTION TO INSTITUTE PROCEEDINGS IN WARRANTY

**IN SUPPORT OF ITS MOTION, THE PETITIONER JTI-MACDONALD
CORP. (“JTIM”) STATES AS FOLLOWS:**

I INTRODUCTION

THE PRINCIPAL ACTION

1. Cécilia Létourneau (the “Plaintiff”) has instituted proceedings in a class action in damages against JTIM and other Defendant cigarette manufacturers (collectively the “cigarette manufacturers”), as appears from the Motion to Institute Proceedings in a Class Action filed by the Plaintiff (the “principal action”), a copy of which is appended hereto as Exhibit PW-1.
2. The Plaintiff essentially claims that each member of the Class should be compensated for an increased risk of contracting disease and/or because they have experienced some unquantifiable and unsubstantiated feelings of loss of self-esteem or humiliation or social reprobation caused by their failure to stop smoking.
3. The Plaintiff alleges that such failure to stop smoking is due to the members’ of the Class having an addiction to nicotine which deprives them of the ability to exercise a free choice as to whether to continue or to stop smoking. It appears to be alleged that such deprivation of the ability to choose freely whether to stop smoking or not and the damage suffered as a result thereof were themselves caused by any or all of:
 - a) the manufacture and sale of cigarettes by JTIM, for consumers to smoke, containing nicotine;
 - b) JTIM’s alleged manufacture and sale of products expressly designed to contain sufficient levels of nicotine to achieve this deprivation of Class members’ ability to choose whether to stop smoking or not;
 - c) JTIM’s alleged failure to warn Class members of the risk that smoking cigarettes might deprive them of the ability to choose whether to stop smoking or not;

all of which acts of the cigarette manufacturers including JTIM are said to constitute either a fault or a safety defect in their products.

4. The Plaintiff further alleges various other faults by JTIM such as a failure to warn of the potential health risks of smoking, the provision of misinformation as to these potential health risks, false advertising and marketing strategies and the promotion and sale of products to mislead consumers about these potential health risks.
5. The relevance of such further allegations with regard to the potential health risks of smoking is not clear. The Plaintiff's claim appears to be that members of the Class suffered from increased risks of certain diseases, humiliation, loss of self-esteem or social reprobation as a result of their inability to stop smoking. The reasons why the members of the Class started or continued to smoke prior to allegedly wanting but failing to stop, whether as a result of a fault or a safety defect by the cigarette manufacturers as alleged or of their own personal choice, therefore, appears not to be in issue.
6. JTIM denies all such allegations particularised at paragraphs 2 to 4 above, relevant and irrelevant, as are made against it in the principal action. In particular, JTIM states that it has manufactured and sold a legal product that at all relevant times complied in all material respects with all applicable regulation. Its products have at all such times provided the level of safety which a person would normally be entitled to expect. JTIM denies that its products have contained or otherwise suffered from any safety defect as supplied to consumers or that it has committed any fault with regard to the design, manufacture, promotion or sale of its products. JTIM further denies that it has deprived any member of the Class of his or her autonomous ability to choose whether to stop smoking or not, and to the extent that it is relevant, denies that it has otherwise caused members of the Class to smoke or to continue smoking. Furthermore, JTIM denies that any safety defect or fault as alleged, all of which are denied, has caused any damage allegedly suffered by the Plaintiff or any other member of the Class, and denies in any event that such

damage in the form of increased risk of disease or humiliation or loss of self esteem or social reprobation would be compensable under Québec law.

7. Moreover, as pleaded in the Defence, liability cannot be established and non-pecuniary and punitive damages cannot be awarded on a class-wide basis. JTIM specifically denies that the Plaintiff can prove with sufficient accuracy or particularity the aggregate amount of the claims of the Class members so as to entitle them to obtain collective recovery of damages. JTIM further states that the liability, if any and which is denied, of JTIM and the other cigarette manufacturers can only be determined upon individual proof in respect of each member of the Class of the various facts and matters relevant to each such member as are also pleaded in the Defence.
8. JTIM repeats and relies on its Defence in the principal action, a copy of which is communicated herewith as Exhibit PW-2. JTIM states that none of the statements of fact or allegations contained herein are intended to be, nor should they be construed as, admissions of any of the allegations or claims advanced by the Plaintiff in the principal action.

THE CLAIM AGAINST THE FEDERAL GOVERNMENT

9. If, however, as alleged in the principal action, JTIM committed a fault or manufactured a product suffering from a safety defect so as to have caused any compensable damage allegedly suffered by the Class or any of its members, all of which is denied, then the Federal Government, as a result of the conduct of its officials working in its departments and agencies (the “Officials”) particularised herein, is liable to JTIM to the extent of any liability of JTIM to the Class or any of its members and is solidarily liable to the Class or any of its members for the reasons more fully explained hereunder.
10. The principal action puts in issue a wide range of activities and conduct relating to tobacco in Québec and in Canada over many years. The Federal Government, which at all material times was responsible for protecting the health and well being of Canadians, was an important player, fully participating in these activities, shaping the views and behaviour of the public and consumers

and supervising, guiding and directing the actions of the industry in such a way as to form the rules of conduct which the cigarettes manufacturers, acting reasonably, met at all material times.

11. There were two main groups of actors involved in the same for the Federal Government. The first group was the Officials of Health Canada, the successor to the Department of National Health and Welfare, the Department of Pensions and National Health and the Products Safety Branch of the former Department of Consumer and Corporate Affairs (collectively referred to as “Health Canada”), established pursuant to the *Department of Health Act*, S.C. 1996, c.8 and predecessor statutes. At material times, Health Canada has had a statutory duty and responsibility under Section 4 of the *Department of Health Act* and predecessor sections to promote and preserve the health and well being of the people of Canada.
12. Health Canada made operational decisions and engaged in operational and commercial conduct through its Ministers, Deputy Ministers, its Health Services and Promotion Branch and its officials, its Health Protection Branch (including at material times the Tobacco Product Section, the Tobacco Bureau and the Non-Medical Use of Drugs Directorate) and its committees and inter-departmental committees and administrative heads, its Assistant Deputy Ministers and Executive Directors General and through other Officials known and unknown to JTIM. Ministers of Health who acted in ways material to this action include Mr Monteith, Ms LaMarsh, Mr MacEachen, Mr Munro, Mr Lalonde, Ms Begin and Mr Epp. Deputy Ministers of Health include Drs Cameron, Crawford, Morrison and LeClair. Assistant Deputy Ministers of Health include Dr A. J. Liston. Committee members include Drs Colburn and Watkinson. Other Officials include Dr Best, M. Palko, Dr Pett, Dr Chapman, Dr Draper, Dr Layton, J. Nightscales and G.B. Schreiber.
13. The second main group of actors for the Federal Government were the Officials of Agriculture Canada, established pursuant to the *Department of Agriculture and Agri-Food Act*, R.S.C., 1985, c.A-9, s.4, and predecessor statutes which have conferred broad powers, duties and functions with respect to agriculture,

agriculture products, and research related to agriculture and products derived from agriculture including the operation of experimental farms.

14. Agriculture Canada made operational decisions and engaged in operational and commercial conduct through its Ministers, Deputy Ministers and Assistant Deputy Ministers, and through its research divisions, committees and inter-departmental committees, as well as Officials of Agriculture Canada, known and unknown to JTIM, including those employed as research scientists at the Delhi Research Station. Ministers of Agriculture who acted in ways material to this action include Mr Whelan. Committee members include Dr Hamilton. Other Officials include B.B Migicovsky, B.F. Zilkey, L.S Vickery, R. Sims, P.W Johnson, Drs Pandey and Court at the Delhi Research Station, and W.H Cherry and Dr W.F Forbes at the University of Waterloo.
15. Separate and apart from their responsibilities under their respective governing statutes, Health Canada and Agriculture Canada have assumed or otherwise been subject to certain other duties, obligations and rules of conduct including those arising from the conduct of Officials as particularized herein, in relation to consumers in Québec, including members of the Class, and in relation to cigarette manufacturers, including JTIM, in respect of the habituating, dependency creating or addictive properties of cigarettes, and to the extent that it is relevant, of smoking and health issues.
16. Without limiting the foregoing, Officials of the Federal Government, based on their knowledge of the risk of habituation, dependence or addiction, as those terms have been defined from time to time, and to the extent that it is relevant, of smoking and health matters:
 - (a) made certain representations and provided certain information and advice about the habituating, dependency creating or addictive properties of cigarettes and, to the extent that it is relevant, the potential health risks of smoking, to consumers in Québec, including members of the Class, intending that they would rely, and they did rely, on such representations, information and advice, and;

- (b) made certain representations and requests, provided certain information and advice and gave direction to cigarette manufacturers, including JTIM, in relation to the same intending that they would comply with such requests and directions and would rely on such representations, information and advice. The cigarette manufacturers, including JTIM, did rely on these representations, information and advice and did comply with these requests and directions;
17. The representations made and information provided by cigarette manufacturers, including JTIM, to consumers in Québec, including the members of the Class, concerning the risk of habituation or dependence or addiction to cigarettes and, to the extent that it is relevant, the potential health risks of smoking, some of which were similar to the representations made and information provided by the Federal Government on the same and/or in respect of which the cigarette manufacturers, including JTIM, were advised or directed by the Federal Government, are now alleged to have resulted in a deprivation for the members of the Class of their ability to exercise a free choice to continue or to stop smoking.
18. Furthermore, again without limiting the generality of the foregoing, the Federal Government, through its Officials, including through Officials of Agriculture Canada at the Delhi Research Station and elsewhere, carried out a programme which included:
- (a) research into, development, and commercial licensing of varieties of tobacco strains including the genetic modification of tobacco leaf yielding higher levels of nicotine for use in cigarettes manufactured and sold in Canada, including in Québec, and in the export market;
 - (b) the promotion to cigarette manufacturers of the same for use in the manufacture of cigarettes sold in Québec, with a view, *inter alia*, to reducing the potential risks of smoking;
 - (c) giving advice, recommendations and directions to the cigarette manufacturers on the need for them to promote cigarettes to consumers

in Québec, including members of the Class, with a lower yield of tar, *inter alia*, through the use of higher nicotine tobaccos designed by them; and

(d) working with the cigarette manufacturers to design and develop potentially less hazardous cigarettes, *inter alia*, through the use of higher nicotine tobaccos licensed by them, and, indeed, taking a position of leadership in relation to the same,

19. All of these operational activities have led to the manufacture, promotion and sale by JTIM of products which are now claimed by the Plaintiff to have resulted in a deprivation for the members of the Class of their ability to exercise a free choice to continue or to stop smoking.

20. Therefore, based on the facts set forth herein, if JTIM is liable to the Class or any of its members, which is denied, then the Federal Government is liable to JTIM and is solidarily liable to the Class or any of its members for the damage caused by the fault of its agents or servants or Officials or resulting from a thing manufactured or supplied by it under the *Crown Liability and Proceedings Act*, R.S.C. 1985, c-50, and JTIM has a recourse in warranty against the Federal Government for any condemnation (in capital, interest, and costs) rendered against JTIM in the principal action and/or for a proportionate share of any such liability.

II THE DUTIES AND OBLIGATIONS ASSUMED BY THE FEDERAL GOVERNMENT IN INFORMING CONSUMERS ABOUT HABITUATION, DEPENDENCE OR ADDICTION

21. Since at least the 1940s, and thereafter at all material times, the fact that certain smokers report difficulty quitting smoking was known by the Federal Government. The same was also widely known to consumers in Québec, including members of the Class. However, insofar as the same was not sufficiently known to consumers in Québec, including the members of the Class, then the Federal Government, having assumed duties and obligations in that regard towards both consumers in Québec, including members of the Class,

and the cigarette manufacturers, including JTIM, should be held liable for any damage arising as a result thereof.

22. In particular, insofar as express warnings regarding the risk of habituation or dependence or addiction to cigarette were ever necessary, which is denied, then the Federal Government, having known of the same since at least the 1940s but having, until as late as the 1990s, not introduced specific warnings in that respect, should be held liable to JTIM and to the members of the Class for any damage arising as a result thereof.
23. In the 1940s, Officials published a booklet, in a series of publications on health, entitled “Smoking” which specified potential risks associated with smoking and more specifically the “habituating” or “addictive properties” of smoking, including “auto-intoxication for tobacco addicts”.
24. In 1945, a study of the role of nicotine in the smoking “habit” sponsored by a cigarette manufacturer was published in a scientific journal and then summarized by Officials in Agriculture Canada’s publication, “The Lighter”.
25. The study suggested that, for many individuals, nicotine was a major factor in their smoking habit, although the study also concluded that it was “equally certain” that “with many individuals nicotine is not a factor in their cigarette habit” and that, even among those for whom nicotine was a “major factor...a cigarette containing no nicotine would be grudgingly accepted as better than no cigarette at all.”
26. Several years later, in April 1962, the Dominion Council of Health, a body in which the Federal Government and all the Provinces were represented, produced six statements on smoking and health that were justified “on the basis of numerous studies” including the following:

“[S]ince smoking is a form of addiction, the most practical preventive measure is to encourage young people not to commence the habit of smoking”

27. A year later, in April 1963, at the request of Officials, the Dominion Council of Health recommended that the Minister of National Health and Welfare undertake a national health education programme and emphasized that it was essential for Provincial and Federal health departments to work together to inform and/or remind consumers, including those in Québec and including members of the Class, of the potential risks associated with cigarette smoking, including the difficulty of quitting.
28. In 1963, the Minister of Health provided a confidential memorandum to Cabinet entitled 'The Effect of Smoking on Health,' dated 4 June 1963. The memorandum outlined "the gravity of the problem" of the difficulty of quitting and canvassed public and expert opinion. It referred to the above mentioned statement from the Dominion Council on Health that "smoking is a form of addiction".
29. In June 1963, Ms LaMarsh, then Minister of National Health and Welfare, made a public statement that the Federal Government had "a duty to inform the public of the risk to health of cigarette smoking" and that special efforts should be made to dissuade children and adolescents from acquiring the smoking habit. Ms LaMarsh further announced that a conference with representatives of the Provinces, health agencies and professionals as well as cigarette manufacturers would be held to address initiatives directed to the potential risks of smoking, including the risk of habituation, dependence or addiction.
30. The Canadian Conference on Smoking and Health was held in November 1963. The Canadian Medical Association made submissions there that "the smoking habit is most difficult to give up".
31. On 26 November 1963, at the conclusion of the conference, the Minister of National Health and Welfare, Ms. LaMarsh, announced in the House of Commons that the Federal Government was "prepared to expend the sum of \$200,000 to add to funds already available for research on lung cancer and motivational research into the smoking habit – why it is picked up and why it persists so strongly".

32. The Globe and Mail reported this announcement, stating that Ms. LaMarsh had indicated after the conference that the extra funds would be available “for research into why a person starts smoking and why he finds it so difficult to stop”.
33. Subsequently, Officials at Health Canada developed a national smoking and health programme (hereafter the “National Programme”). The National Programme resulted in Officials taking steps intended to protect smokers from the potential risks of smoking, including the risk habituation, dependence or addiction, through a nationwide programme of education, information exchange with the Provinces and research into the potential risks of smoking and the possibilities of reducing those potential risks.
34. In a 13 January 1964 report to Health Canada entitled ‘The Report of the Meeting of the Technical Advisory Committee on Health Education concerning Smoking and Health,’ it was stated that “the smoking habit is not an addiction, but rather habituation, since it is psychological rather than pharmacological in nature”.
35. In 1965, Officials concluded that Canadian consumers, including members of the Class, had been adequately informed and were aware of the potential risks of smoking, including the risk of habituation, dependence or addiction. Officials advised certain cigarette manufacturers that it was unnecessary or inadvisable for them to issue definitive statements to consumers, at that time, concerning the relationship between smoking and health.
36. In particular, even as warning labels legislation were enacted in the United States, Officials of Health Canada concluded that warnings were not necessary, would be ineffective, were undesirable and could be counterproductive. In May 1965, the Deputy Minister of Health asserted to cigarette manufacturers, including JTIM, that the labelling of cigarette packages with warnings was unrealistic and “silly”. JTIM relied on the above-mentioned advice, request or direction and did not place warnings on cigarette packages at that time,

including on the habituating, dependency creating or addictive properties of cigarettes.

37. In 1968, Health Canada started to encourage smokers to choose cigarettes with lower nicotine (as well as tar). Health Canada issued a press release on 20 November 1968 accompanying the Munro Report, which encouraged people to quit smoking, stating that “many people find it difficult to stop smoking and we feel it is important to help them to reduce the inhalation of cigarette smoke constituents”, noting further that “nicotine is assumed to be the basis of the dependency that develops to cigarette smoking”.
38. In November 1969, Parliament’s Standing Committee on Health, Welfare and Social Affairs was empowered “to study the subject-matter of tobacco advertising.” With Mr. Isabelle as chair, the Committee (known as the “Isabelle Committee”) heard testimony for almost a year, and ultimately addressed not only advertising, but issues surrounding “less hazardous smoking” and “research into less hazardous products and ways to smoke”.
39. Health Canada, now for the first time, publicly raised the issue of warning in relation to habituation, dependence or addiction. They proposed three alternative warnings to the Isabelle Committee, one of which did address the risk of habituation, dependence or addiction. It was: “Cigarette smoking can cause dependency, damage health and shorten life”.
40. While the Isabelle Committee heard expert evidence over many months about the hazards of smoking, its report did not adopt the term ‘addiction’. The final report of the Isabelle Committee made the following two statements regarding dependence:
 - (i) “It has been argued repeatedly that whether or not one smokes is a matter of free choice for mature individuals. This is true in the sense that one has the ultimate responsibility for what one does to one’s own body. It is equally true, however, that the basis of the widespread use of the cigarette is dependence that one develops on smoking and everyone knows that a large proportion of cigarette sales arise from

sale to persons who are unable to stop smoking. There appears to be varying degrees of dependence based on different mixes of pharmacological, social, and psychological factors. In any case, their dependence would certainly seem to remove the freedom of choice for many cigarette smokers”;

(ii) “Many smokers, of course, become strongly dependent on cigarettes and the cigarette itself often gives rise to the stress leading to the need for the next cigarette. It is this strong dependence which is one of the most disturbing aspects of cigarette smoking. For many, it removes the element of choice as to whether they smoke or not and, when stopping becomes imperative because of disease, may mean the difference between life and death”;

41. The Isabelle Committee recommended that a suitable warning should be placed on all cigarette packaging and cigarette vending machines but did not specifically recommend the adoption of any precise wording for the same, although among the possible warnings put forward by the final report were several which referred to the ‘dependency’ that could be caused by cigarettes.

42. Officials considered and rejected the warnings initially favoured by the Minister of Health and also rejected those put forward by the Isabelle Committee. Instead, in June, 1971, the Federal Government introduced Bill C-248 which, if enacted, would have required a warning on cigarette packaging in the following form:

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

43. This proposed warning reflected the judgment of Officials as to the terms of a warning they considered to be effective to inform and/or remind smokers of the potential risks of smoking and the properties of cigarettes. It did not refer in any way to the risk of habituation or dependence or addiction to cigarettes. Bill C-248 was not enacted into law.

44. In September 1971, the CTMC, after dialogue and in response to a request by Officials, announced that, effective about April 1972, its then members would place a warning on cigarette packaging. The warning that was placed on cigarette packages, starting from about May 1972, was as follows:

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

45. The wording of this warning was insisted upon by the Minister of Health and was derived from the language of Bill C-248, save for the deletion of the reference to “avoid inhaling” and the inclusion of an attribution of the warning to the Department of Health and Welfare.
46. In short, despite the conclusions of the Isabelle Committee, it was not considered necessary by the Federal Government in 1971 to place a specific warning pertaining to the risk of habituation or dependence or addiction to cigarettes and thus the cigarette manufacturers, including JTIM, did not place any such warning.
47. Also in 1971, Health Canada produced a ‘Resource Guide on Smoking and Health for Teachers,’ which stated that smoking was “usually addictive”.
48. On 14 November 1973, the Commission of Inquiry into the Non-Medical Use of Drugs released its final report which stated that “psychological dependence does develop to tobacco”, that “[t]he majority of those who smoke more than a few cigarettes become regular users, and very few people who have ever become daily smokers are able to quit tobacco permanently”, and that , “a pattern of heavy tobacco use is difficult to break, and relapse may occur even after years of successful abstinence”.
49. In a 1974 press release, Health Minister Lalonde recommended that Canadians smokers cut down on their smoking, or switch to a lower tar brand, as a step towards quitting altogether. However, he also recognized a category of those “unable to quit smoking,” for whom he recommended reducing consumption to 10 cigarettes per day.

50. Also during this period, Health Canada regularly published resource guides on smoking and health for educators to use in the classroom. Included in the ‘1976 Resource Guide on Smoking and Health (2d ed.)’ was a lesson on ‘psychological factors.’ It stated that “(m)any experts are convinced that smoking for many or most smokers is a true addiction and that young people are being misled if they are told it is a habit they can control once established and readily relinquish whenever they wish to do so.” However, the Resource Guide referred to tobacco as a “dependence-producing drug,” which it defined as “a drug having the capacity to interact with a living organism to produce a state of psychic or physical dependence or both.” It followed the recommendation of the WHO in using the term ‘drug dependence’ instead of ‘drug addiction’ or ‘drug habituation’.
51. In 1979 Health Canada indicated that it considered the habit to be one that the individual could decide to break and stated that “[d]ependency on smoking can be ‘psycho-social or psychological.’ Most people decide to quit because of the serious health hazard cigarette smoking poses”.
52. Only nine years later, in July 1988, after internal debates about the use of the term ‘addiction’, did Officials of Health Canada for the first time publicly consider an addiction warning message. They did so when Health Canada circulated its ‘principles for the development of tobacco regulation’, which culminated in the enactment of the *Tobacco Products Control Act*.
53. Notwithstanding this conclusion, Officials rejected a warning regarding addiction when the Tobacco Products Control Regulations, SOR/89-21 (the “**1988 Regulations**”) were enacted. Indeed, the 1988 Regulations, in addition to requiring tar and nicotine and carbon dioxide levels (based on ISO standards) to appear on the side panel of cigarette packages, only required cigarette manufacturers to display, in rotation, one of four warning messages as follows:
- (i) “Smoking reduces life expectancy. L’usage du tabac réduit l’espérance de vie.”

- (ii) “Smoking is the major cause of lung cancer. L’usage du tabac est la principale cause du cancer du poumon.”
 - (iii) “Smoking is a major cause of heart disease. L’usage du tabac est une cause importante de la cardiopathie.”
 - (iv) “Smoking during pregnancy can harm the baby. L’usage du tabac durant la grossesse peut être dommageable pour le bébé.”
54. In June 1989, Health Canada commissioned the Royal Society of Canada to report on “the most appropriate term to characterize the risk of dependence on nicotine... and all other tobacco products”.
55. Statements by the Minister of Health, as reported in an article in The Globe and Mail, disclosed that the motivation for the report was to determine whether from a Canadian perspective, it was appropriate to add a new warning label stating that cigarettes are addictive.
56. In August 1989, the Royal Society of Canada submitted the Royal Society Report on Tobacco, Nicotine and Addiction, 1989, which propounded a new definition of addiction:
- “Drug addition is a strongly established pattern of behaviour characterized by (1) the repeated self-administration of a drug in amounts which reliably produce reinforcing psychoactive effect; and (2) great difficulty in achieving voluntary long-term cessation of such use, even when the user is strongly motivated to stop.”
57. It then concluded:
- “Cigarette smoking can, and frequently does, meet the criteria for the definition of drug addiction. When it does, it should be described as nicotine addiction, because the clinical and experimental evidence supports the view that the addictive behaviour in such cases is generated and maintained by psychoactive and reinforcing effects of nicotine.”

58. After at least two decades of debate and hesitation as to how to characterise the difficulty certain smokers experience in quitting, it was only in the 1990s that Officials of Health Canada finally resolved to adopt the concept of addiction in relation to smoking.
59. In January 1990, the Minister of Health announced in a press conference that he would be introducing four new warning messages, including one stating that “Cigarette smoking is addictive.” The Minister also stated that the addiction warning was “a direct result of the Royal Society report on addiction...”.
60. The 1988 Regulations were amended in 1993 (effective in September 1994) to provide, *inter alia*, for eight new warning messages, including one which read: “*Cigarettes are addictive. La cigarette crée une dépendence.*” Ever since then, legislation has required a specific warning that cigarettes are addictive.
61. At all material times prior to 1994, the potential habituating or dependency creating or addictive properties of cigarettes were already known to consumers in Québec, including members of the Class. The information provided by the Federal Government, including under the National Programme and by way of mandatory warnings put in force in 1994, further ensured that consumers in Québec knew or were reinforced in their knowledge of the same.
62. If and to the extent that JTIM and other cigarette manufacturers had obligations to provide information to consumers, including members of the Class, about the habituating or dependency creating or addictive properties of cigarettes, the Federal Government had the same or similar obligations. Where it provided such information, the Federal Government had the obligation to ensure that such information was adequate and correct.
63. At all material times, the cigarette manufacturers met regularly with Officials. The Officials made certain requests and gave directions to cigarette manufacturers, including JTIM, regarding their communications to the public on the risk of habituation or dependence or addiction to cigarettes. JTIM complied with such requests and directions of Officials, at all material times. The requests or directions of Officials, including with respect to warnings as to

the risk of habituation, dependence or addiction to cigarettes, and JTIM's subsequent reliance and actions thereon, were reasonable and lawful in the circumstances. As a result, JTIM committed no fault as alleged or at all.

64. If, however, as it is alleged in the principal action, prior to the appearance of the addiction warning on cigarette packages in September 1994, JTIM committed faults by failing to inform consumers in Québec, including members of Class and/or at any time by misinforming or by inadequately or ineffectively informing them about the habituating or dependency creating or addictive properties of cigarettes, including through warnings on cigarette packages, or manufactured or designed a product suffering from a safety defect, so as to have caused any compensable damage allegedly suffered by the Class or any of its members, all of which is denied, then the Federal Government, as a result of the conduct of its Officials particularised in paragraphs 21 to 62 above, is liable to JTIM to the extent of any liability of JTIM to the Class or any of its members and is solidarily liable to the Class or any of its members.

III THE DESIGN, DEVELOPMENT AND PROMOTION BY THE FEDERAL GOVERNMENT OF TOBACCO STRAINS AND VARIETIES WITH HIGHER LEVELS OF NICOTINE

65. The Federal Government, at all material times, advised and directed the cigarette manufacturers, including JTIM, in the design and manufacture of products that Officials believed would reduce the potential risks of smoking. They themselves created new strains and varieties of tobacco which they believed would contribute directly and substantially to this aim. These new strains and varieties contained higher levels of nicotine than previously available varieties. As a result of their promoting same, these strains and varieties are now comprised in nearly all tobacco products consumed in Québec. Hence, to the extent that JTIM manufactured or sold products suffering from a safety defect including in respect of the risk of habituation, dependence or addiction, the Federal Government should be held liable for any damage arising as a result thereof.

66. Since 1906, Officials of Agriculture Canada have conducted research to improve the quality of tobacco grown in Canada. Agriculture Canada established the Delhi Research Station in 1933 as part of a tobacco development program undertaken by Officials, although it did not receive its name until 1967.
67. Beginning in or about 1964, Officials of Agriculture Canada became involved in researching the ingredients in tobacco and tobacco smoke at the Delhi Research Station for the purpose of supporting the National Programme. The mandate of the Delhi Research Station included improving the quality of Canadian tobacco leaf, and the development of domestic and export markets, including the sale of cigarettes and tobacco to consumers in Québec.
68. In 1968, Officials of Health Canada initiated studies at the University of Waterloo including a chemical and physical analysis of currently marketed Canadian cigarettes and an analysis of tar, nicotine and carbon monoxide yields, butt length and paper, as well as studies of how smoking behaviour changes with the use of lower yield cigarettes. Officials of Health Canada also initiated studies involving the monitoring of tar, nicotine and carbon monoxide yields in currently marketed Canadian cigarettes. These studies were for the purpose of publishing League Tables and for the purpose of developing a potentially less hazardous cigarette.
69. In or about 1969, Officials of Agriculture Canada at the Delhi Research Station embarked upon a programme to further the development and marketing of a potentially less hazardous cigarette (hereafter the “Less Hazardous Cigarette Programme”). The programme continued until the late 1980s and included:
 - (a) identifying and reducing compounds believed to be deleterious to health in existing varieties of tobacco plants;
 - (b) development of new varieties of tobacco which, when smoked, yielded a lower tar to nicotine ratio; and
 - (c) development of new tests to assess the relative safety of the new varieties of tobacco plants (bioassay).

70. In or about 1971, Officials of Agriculture Canada and Health Canada, as one component of the Less Hazardous Cigarette Programme, established the Inter-departmental Committee on Less Hazardous Smoking with a mandate to develop a cigarette capable of being marketed as potentially “less hazardous” than alternative or pre-existing cigarettes.
71. On July 14, 1971, Dr. Hamilton, Assistant Director, General Eastern Division of the Research Branch of Agriculture Canada, announced that Agriculture Canada would assume an important role in developing programmes related to smoking and health, by undertaking research into factors that affect the physiology and chemistry of tobacco plants, and that control the tar and nicotine levels in tobacco smoke. This research became an integral component of the Less Hazardous Cigarette Programme.
72. In 1972, the CTMC joined with Agriculture Canada in a research agreement to develop reconstituted sheet tobacco for use in the manufacture of cigarettes, with the objective of reducing the overall yield of tar and nicotine from a cigarette, a manufacturing process which is specifically alleged in the principal action to constitute a fault on the part of the cigarette manufacturers, including JTIM, or a safety defect in their product.
73. By late 1972, Officials of Agriculture Canada, particularly those at the Delhi Research Station, were responsible for leading the research and development of a potentially less hazardous cigarette under the Less Hazardous Cigarette Programme.
74. On January 22, 1973, the Ministers of Agriculture, Mr. Whelan, and Health, Mr. Lalonde, announced the use of new laboratories, which were then constructed, at the Delhi Research Station to develop tobacco varieties and cultural, curing, and other processing techniques that could contribute to the production of potentially less hazardous cigarettes. It was contemplated the new tobacco varieties would contain a lower percentage of tar-producing constituents than the existing varieties. The objective was that new types of tobacco, when combined with changes in manufacturing processes, such as the use of reconstituted tobacco sheet

and advancements in filter design, would enable further steps to be taken in the production of lower yield products that would expose smokers to fewer harmful substances.

75. The Federal Government at this time presented Canada as taking a major role, internationally, in the development of potentially less harmful cigarettes. In January 1973, the Minister of Health announced a three-way programme of co-operative research, to be undertaken by Health Canada, Agriculture Canada, and the University of Waterloo. Its objective was to contribute to international efforts to produce new forms of lower tar products, to develop the types of tobacco products that would be required in the future and to facilitate Health Canada's guidance of the tobacco industry in matters affecting health.
76. As part of the Less Hazardous Cigarette Programme, in 1973, Health Canada through, *inter alia*, Dr. Colburn and Dr. Forbes at the University of Waterloo, undertook studies of smoking behaviour and responses of smokers to modified cigarettes. Also in 1973 and 1974, Officials at the Delhi Research Station were researching the phenomenon of compensation and noted their belief that smokers need to maintain sufficient nicotine "dose levels".
77. In 1977, Officials at the Delhi Research Station and Health Canada Officials conducted a project entitled "Delhi Tobacco and Health Bio-Assay Programme" as part of the Less Hazardous Cigarette Programme.
78. In 1977, Officials at Health Canada published a report identifying the potential need for cigarettes with lower tar and carbon monoxide yields but with a sufficient nicotine yield to satisfy certain smokers.
79. In June, 1977, representatives of the cigarette manufacturers were advised by Officials that the Federal Government was sponsoring research into developing strains of tobacco consistent with this objective, which when combined with filtering technology would be suitable for use in light and mild products. Officials further advised these representatives of progress in product developed at the Delhi Research Station; of the effects of nicotine concentration on smoking behaviour; of

options to obtain reductions of maximum constituent levels; reductions in biological activity, and of long-range research and development.

80. At material times, the Federal Government publicized the results of the research particularised above.
81. The key outcome of the Less Hazardous Cigarette Programme was that Officials of Agriculture Canada at the Delhi Research Station created for the commercial market varieties of tobacco leaf, including Nordel, Delgold, Newdel and Candel, which contained higher levels of nicotine than previously available varieties.
82. These varieties, when smoked, produced a lower tar to nicotine ratio. They were therefore believed, including by Officials, to produce a safer cigarette. These varieties were tested at the Delhi Research Station. These tests were intended to determine whether cigarettes manufactured from these varieties were consistent with acceptable levels of biological activity or mutagenicity and whether they would be acceptable to consumers in Canada, including members of the Class. Officials promoted these varieties and licensed them on a commercial basis for use by all growers of tobacco in Canada and for use by JTIM and other cigarette manufacturers in their products for sale to consumers including to consumers in Québec.
83. By the summer of 1980, Officials at Agriculture Canada were advising the public and cigarette manufacturers that the new varieties of tobacco “that Agriculture Canada had developed, could be tailor-made for today's light cigarette brands, combining low-tar and high nicotine”.
84. By the spring of 1981, Officials at Health Canada advised and represented to the public and to the cigarette manufacturers in published material that “The relatively low-tar/nicotine ratio of Canadian tobacco offers manufacturers greater flexibility in producing lighter cigarettes and still maintains sufficient nicotine and flavour to satisfy consumer demands.” Similar statements were published on multiple occasions including those in Volumes 53, 54 and 55 of “The Lighter”, a publication of Agriculture Canada.

85. By the 1980s, the tobacco varieties developed and licensed by Officials of Agriculture Canada and promoted by Agriculture Canada and Health Canada for use in lower yield cigarettes comprised about 95% of the tobacco available to cigarette manufacturers and therefore nearly all tobacco products consumed in Québec were manufactured from these varieties.
86. Commercial income in the form of licensing fees and royalties earned on those tobacco strains has been earned by the Federal Government.
87. In summary, Officials encouraged and directed the cigarette manufacturers in the design and manufacture of products that Officials believed would reduce the potential risks of smoking. They created new strains and varieties of tobacco with higher nicotine content but which they believed would contribute directly and substantially to this aim. All these actions were again reasonable and lawful in the circumstances.
88. If, however, as alleged in the principal action, JTIM committed a fault by designing or manufacturing cigarettes as it did, including by manufacturing a product which suffered from a safety defect, so as to have caused any compensable damage allegedly suffered by the Class or any of its members, all of which is denied, then the Federal Government, as a result of the conduct of its Officials particularised in paragraphs 65 to 87, is liable to JTIM to the extent of any liability of JTIM to the Class or any of its members and is solidarily liable to the Class or any of its members.

IV THE DUTIES AND OBLIGATIONS ASSUMED BY THE FEDERAL GOVERNMENT IN INFORMING CONSUMERS ABOUT HEALTH RISKS

89. If and insofar as it is claimed in the principal action that JTIM's failure to warn of the potential health risks of smoking, the provision of misinformation as to these potential health risks, false advertising and marketing strategies and the promotion and sale of products to mislead consumers about the potential health risks associated with smoking caused members of the Class to smoke or to continue to smoke prior to allegedly wanting, but failing, to stop, and that such

conduct on the part of JTIM caused the damage claimed, JTIM states as follows.

90. As early as the 1950s, it was widely known by consumers in Québec, including members of the Class, that smoking was potentially harmful to health and at all material times, the Federal Government assumed duties and obligations in that regard.
91. The Federal Government's actions and initiatives, in addition to the regulatory framework prevailing from time to time, shaped and contributed to the Québec public's expectations as the reasonable level of safety to be provided by tobacco products. The public's attitude to these products was influenced to a significant degree by the information provided to the public by the Federal Government.
92. In particular, in 1963, Officials at Health Canada developed the National Programme through which they implemented governmental policy on smoking and health.
93. The National Programme resulted in Officials taking steps intended to protect smokers from the potential risks of smoking and tobacco related disease through a nationwide programme of education, information exchange with the Provinces and research into the potential risks of smoking and the possibilities of reducing those potential risks. Officials expressly acknowledged that it was the duty of Health Canada to ensure that smokers were properly and adequately informed of the potential risks of smoking to health and the properties of cigarettes.
94. Health Canada, through its Officials, asserted and maintained throughout the material time, leadership in developing and executing smoking and health initiatives, including the National Programme. This included acquiring knowledge of all material aspects of smoking and health issues including epidemiological studies, clinical and experimental studies, studies in the chemical composition of tobacco and tobacco smoke, techniques of measuring smoke constituents, as well as techniques for developing and manufacturing

cigarettes and studies intended to consider smoking behaviour, including in relation to habituation, dependence or addiction and compensation.

95. Officials embarked upon a course of conduct to:
- (a) inform and/or remind smokers and potential smokers about the potential risk to health of smoking and the risk of habituation, dependence or addiction;
 - (b) encourage smokers to smoke in moderation or stop smoking;
 - (c) dissuade non-smokers, particularly children and adolescents, from starting to smoke;
 - (d) conduct research into manufacturing a potentially less hazardous cigarette; and
 - (e) conduct research into the extent and nature of smoking.
96. These initiatives were implemented through a variety of means:
- (a) Officials routinely participated in nationwide health education programmes relating to cigarette smoking;
 - (b) school programmes and other information and educational means were adopted to inform and educate children.
 - (c) consumers in Québec, including members of the Class, were informed and/or reminded of the potential risks of smoking and the properties of cigarettes through media (posters, publications, bibliographies, news releases, radio promotions, television commercials, audio visual aids and by encouraging newspapers to publish articles on the same) or intermediaries such as public interest groups and medical professionals.
 - (d) the level of awareness of consumers in Canada of the potential risks of smoking was monitored and assessed.

- (e) officials also established cooperative working relationships with Provincial Governments and national or local organisations committed to the objectives of the National Programme.
97. Officials also provided information to smokers to guide them in making choices about their smoking behaviour. This programme included encouraging smokers to choose brands of cigarettes with a lower yield of tar and nicotine as measured by standard testing methods (“light and mild products”). Conversely, Officials also gave advice, made requests or gave directions to cigarette manufacturers involving the development and promotion of “Light” and “Mild” products involving the reduction of the ratio of tar to nicotine in tobacco and the use of standard testing machines. The development and promotion of light and mild products are specifically pleaded at paragraphs 151 *et seq.* of the principal action to constitute a fault on the part of the cigarette manufacturers, including JTIM, or a safety defect in their relevant products.
98. Officials also provided information and advice to smokers by means of the League Tables about tar, nicotine and carbon monoxide yields as measured by standard testing methods until 1986. They also gave information and advice to smokers about smoking behaviour and advice about the unreliability of standard testing methods using machines to determine the exposure of individual smokers. Officials further advised, requested or directed cigarette manufacturers to print tar, nicotine and carbon monoxide yields on cigarette packaging and advertising.
99. As regards warnings, prior to 1968, the position of Officials, stated to cigarette manufacturers, was largely that public awareness of the potential risks of smoking was ubiquitous. JTIM relied on that advice, request or direction and did not place warnings on cigarette packages at that time.
100. It was only in September 1971 that the CTMC, after negotiations and in response to a request by Officials, announced that, effective about April 1972, its then members would place a warning on cigarette packaging. Then after, JTIM always complied with the warnings required by the Federal Government.

101. Finally, at all material times, Officials monitored the advertising and promotional practices of the cigarette manufacturers to ensure that they were consistent with the National Programme. In 1964, JTIM and other cigarette manufacturers entered into a Cigarette Advertising Code, the contents of which were developed in consultation with and endorsed by Officials.
102. From time to time, the cigarette manufacturers amended the voluntary advertising codes with the knowledge and assent of Officials to ensure that cigarette advertising and promotion did not target underage smokers, make implied or explicit health claims about the relative safety of different brands of cigarettes or depend on “life-style” promotion.
103. At material times, Officials agreed that the advertising codes established promotional and advertising practices that were consistent with their public education programme, including the National Programme.
104. At all material times and regarding all material matters alleged in the principal action, the Officials made requests and gave advice and directions to cigarette manufacturers, including JTIM, in relation to smoking and health issues. JTIM complied with such advice, requests and directions of Officials, at all material times. The advice, requests or directions of Officials, and cigarette manufacturers’ subsequent reliance and actions thereon, were reasonable and lawful in the circumstances. As a result, JTIM committed no fault as alleged or at all.
105. At all material times, the potential health risks of smoking were known to consumers in Québec, including members of the Class. The information provided by the Federal Government, including under the National Programme, further ensured that consumers in Québec knew or were reminded of the same.
106. If and to the extent that JTIM and other cigarette manufacturers had obligations to provide information to consumers, including members of the Class, about the properties of cigarettes and the potential health risks of smoking, the Federal Government had the same or similar obligations. Where it provided such

information, the Federal Government had the obligation to ensure that such information was adequate and correct.

107. In particular, if a smoking and health warning on cigarette packages and other materials was ever necessary, which is denied, the warnings required by the Federal Government from time to time were sufficient to inform and/or remind consumers in Québec, including members of the Class, of the properties of cigarettes and the potential health risks of smoking and were reasonable in the circumstances. JTIM complied with the relevant regulations in force in all material respects and at all material times and committed no fault as alleged or at all.
108. If, however, as alleged in the principal action, JTIM committed a fault by failing to provide any warning or by providing only an inadequate or ineffective warning or supplied a product suffering from a safety defect so as to have caused any damage allegedly suffered by the Class or any of its members, all of which is denied, then the Federal Government, as a result of the conduct of its Officials, is liable to JTIM to the extent of any liability of JTIM to the Class or any of its members and is solidarily liable to the Class or any of its members.
109. Furthermore, advertising and promotion permitted under the advertising codes agreed to and endorsed by Officials were reasonable and lawful in the circumstances. Likewise, the introduction of “Light” or “Mild” versions of popular brands by tobacco manufacturers at the request and direction of Officials, the Officials’ express endorsement of the use of the descriptors “Light” and “Mild” and, prior to the ban on advertising and promotion, the Officials requests that cigarette companies increase the resources they devote to advertising and promoting the light and mild products, were all reasonable and lawful in the circumstances. JTIM complied with the various advertising codes in effect from time to time in all material respects and at all material times and acted in accordance with the requests and directions and rules of conduct established by the Federal Government with regard to the advertising and promoting of its “Light” and “Mild” products. JTIM, therefore, did not commit any faults as alleged or at all.

110. If, however JTIM's advertising or promotion, including with respect to light and mild products, constituted a fault or if JTIM manufactured or supplied a product suffering from a safety defect so as to have caused any damage allegedly suffered by the Class or any of its members, all of which is denied, then the Federal Government, as a result of the conduct of its Officials, is liable to JTIM to the extent of any liability of JTIM to the Class or any of its members and is solidarily liable to the Class or any of its members.

V CONCLUSIONS

111. In short, the Federal Government and its Officials played a leading and formative role in the Canadian tobacco industry over many years as particularised herein. They were particularly active in relation to the information provided to the Canadian public, and the public in Québec, on the risk of habituation, dependence or addiction to cigarettes, and to the extent that it is relevant, which is denied, on the potential health risks of smoking. They advised, made representations and requests and gave directions to cigarette manufacturers in respect of the design, manufacture, marketing and promotion of tobacco products to consumers in Québec, including members of the Class. Further, the Federal Government and its Officials acted likewise in relation to the cigarette manufacturer's communications to consumers in Québec, including members of the Class, concerning the risk of habituation, dependence or addiction and, to the extent that it is relevant, which is denied, the potential health risks of smoking, including in the form of printed warnings on packs and other materials and in relation to the promotion of "Light" and "Mild" products.
112. In acting in these ways, the Federal Government and its Officials specified and promoted rules and standards of conduct by which it was lawful and reasonable for the cigarette manufacturers to abide. By complying with these rules of conduct and with all other relevant requirements and obligations imposed by Federal legislation in all material respects and at all material times, JTIM has committed no fault as alleged or at all, relevant or irrelevant to this case, and did not manufacture or supply products which suffered from any safety defect.

113. If, however, as a result of abiding by rules and standards of conduct specified and promoted by the Federal Government and its Officials, JTIM committed a fault or manufactured or supplied a product suffering from a safety defect so as to have caused any compensable damage allegedly suffered by the Class or any of its members, all of which is denied, then the specification of these rules and standards by the Federal Government and its Officials must of necessity have also constituted a fault. To the extent that this fault resulted in JTIM's liability to the Class or any of its Members, the Federal Government and its Officials are liable to JTIM. For these reasons, JTIM claims damages from the Federal Government to the extent of any liability of JTIM to the Class or any of its members.
114. Further, if, as alleged in the principal action, JTIM committed a fault by making or failing to make certain representations about the risk of habituation, dependence or addiction to cigarettes and, to the extent that it is relevant, which is denied, the potential health risks of smoking, or manufactured or supplied a product suffering from a safety defect, then the Federal Government and its Officials also committed a fault, including through their same or similar failures and by reason of their own representations, information and advice to consumers, and also participated in the manufacturing or supplying of a product suffering from a safety defect, and, if, and to the extent, that all or any of the above caused any compensable damage allegedly suffered by the Class or any of its members, which is denied, the Federal Government and its Officials are solidarily liable to members of the Class. For these reasons, JTIM claims contribution from the Federal Government to the extent of its share of the obligation to make reparation for injury caused to the Class or any of its members.
115. As stated at paragraph 7 above, JTIM denies that, in the principal action, any liability of itself or the other cigarette manufacturers, which is denied, can be established and that any non-pecuniary or punitive damages can be awarded on a class-wide basis. If, however, any liability of JTIM is so determined and damages against it are awarded in the principal action on the basis of collective recovery, then JTIM is entitled to recover from the Federal Government the

damages sought herein, both by way of indemnity and contribution, on the same basis.

116. JTIM's motion to institute proceedings in warranty is well-founded in fact and in law.

WHEREFORE THE PLAINTIFF IN WARRANTY PRAYS FOR JUDGEMENT:

GRANTING its motion to institute proceedings in warranty;

CONDEMNING the Defendant in Warranty to indemnify the Plaintiff in Warranty from any condemnation that it could be subject to in capital, interest and costs in relation to the principal action;

CONDEMNING the Defendant in Warranty to reimburse the Plaintiff in Warranty to the extent of its share in any condemnation that it could be subject to in capital, interest and costs in relation to the principal action;

RESERVING all of Plaintiff in Warranty's rights and recourses herein;

THE WHOLE, with costs against the Defendant in Warranty, including the costs of experts.

Montréal, February 29, 2008

BORDEN LADNER GERVAIS LLP
Attorneys for the Plaintiff in Warranty
JTI-Macdonald Corp.

TABLE OF CONTENTS

I	INTRODUCTION.....	2
	THE PRINCIPAL ACTION	2
	THE CLAIM AGAINST THE FEDERAL GOVERNMENT	4
II	THE DUTIES AND OBLIGATIONS ASSUMED BY THE FEDERAL GOVERNMENT IN INFORMING CONSUMERS ABOUT HABITUATION, DEPENDENCE OR ADDICTION	8
III	THE DESIGN, DEVELOPMENT AND PROMOTION BY THE FEDERAL GOVERNMENT OF TOBACCO STRAINS AND VARIETIES WITH HIGHER LEVELS OF NICOTINE	18
IV	THE DUTIES AND OBLIGATIONS ASSUMED BY THE FEDERAL GOVERNMENT IN INFORMING CONSUMERS ABOUT HEALTH RISKS	23
V	CONCLUSIONS.....	29