

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

IMPERIAL TOBACCO CANADA LIMITED

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

STATEMENT OF DEFENCE

1. The defendant admits the allegations contained in paragraphs 4, 5, 6, 7, 9, 10 (first sentence), 12, 13, 15, 16, 17 (second and third sentences), 18 (first sentence) and 33 of the statement of claim (the “claim”).
2. The defendant denies the allegations contained in paragraphs 1, 3, 8, 10 (“15%” and second sentence), 11, 14, 17 (first and fourth sentences), 18 (second sentence), 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32 of the claim, except as expressly admitted below.
3. The defendant has no knowledge in respect of the allegations contained in paragraph 2 of the claim.

A. THE PARTIES

4. The plaintiff Imperial Tobacco Canada Limited (“ITCAN”) is a corporation which manufactures and sells tobacco products.

5. ITCAN is one of three companies that dominate the Canadian tobacco market. The other two companies in this oligopoly are JTI-Macdonald Corp. (formerly known as RJR-Macdonald Inc.) (“JTIM”) and Rothmans, Benson & Hedges Inc. (“RBH”).

6. Together, ITCAN, JTIM and RBH control approximately 92% of the legal Canadian tobacco market. The sale of tobacco products in Canada generates enormous profits for these three companies.

7. ITCAN, JTIM and RBH are wholly-owned by foreign corporations. They are each members of multinational groups of companies which dominate the international tobacco market.

8. Pursuant to section 23 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, proceedings against the Crown may be taken in the name of the Attorney General of Canada (“AGC”).

B. THE HEALTH RISKS OF TOBACCO USE

9. Tobacco use is the leading preventable cause of illness and premature death in Canada. It is responsible for more than 37,000 premature deaths or 17% of deaths each year. As many as one half of long-term smokers die from tobacco-related illnesses.

10. Tobacco use is a known or probable cause of more than 30 debilitating and often deadly cancers, lung diseases and circulatory-system diseases, including the following:

- (a) Cancers: trachea, lung, bronchus, lip, pharynx, larynx, oesophagus, kidney, bladder, pancreas, liver, stomach, cervix, colorectal and acute myeloid leukemia;
- (b) Lung diseases: chronic obstructive pulmonary disease, asthma, chronic bronchitis and emphysema; and
- (c) Circulatory system diseases: cerebrovascular disease, pulmonary circulatory disease, coronary heart disease and atherosclerosis.

11. Smoking can cause impotence among male smokers. It has also been strongly associated with serious eye diseases such as age-related macular degeneration and cataracts.

12. In addition, tobacco product consumption and exposure to tobacco smoke by pregnant women is injurious to foetuses. It can have serious consequences, including premature delivery, stillbirth and sudden infant death syndrome. In 2002, exposure to second-hand smoke caused 92 deaths in infants under the age of one in Canada. More than 60% of these deaths were due to low birth weight and premature delivery.

13. Exposure to second-hand smoke also poses serious health risks to non-smokers, including increasing their risk of lung cancer and heart disease.

14. The health care costs attributable to tobacco use in Canada are estimated to be more than \$4 billion per year.

C. THE NATURE AND PREVALENCE OF TOBACCO USE

15. The nicotine in tobacco is a powerfully addictive drug. The pharmacological and behavioural processes that underlie tobacco addiction are similar to those of other drugs such as heroin and cocaine.

16. For decades, ITCAN denied that its tobacco products were addictive and neglected to inform its customers of the addictive properties of nicotine.

17. Tobacco addiction is one of the hardest addictions to conquer and many addicts try to quit repeatedly, without success.

18. Tobacco consumption continues to be prevalent in Canadian society. Approximately 4.7 million people in Canada, or 17% of the population aged 15 and older, smoke tobacco. Most smokers begin smoking as teenagers. Smoking is especially common among young adults, people of lower-social economic status and Aboriginals.

19. A strong majority (some 60% to 70%) of smokers say that they want to quit. New smokers, especially young adults, continue to be unaware of, or in denial about, the possibility of addiction and the dangers of smoking. There is a continued need for Canadian consumers and the general public to be better informed and reminded of both the dangers of smoking and about smoking cessation and the availability of smoking cessation services.

20. The AGC denies the characterization in paragraphs 3 and 18 of the claim of smoking as a “lifestyle choice”. The reality is that most smokers would prefer to quit smoking but find it very difficult to do so because of the addictive properties of tobacco.

D. THE HISTORY OF HEALTH WARNING MESSAGES ON CIGARETTE PACKAGES

21. The health risks inherent in tobacco consumption have long been, and continue to be, a national public health concern. Parliament has taken steps to address this concern by, among other things, requiring tobacco companies to display health warning messages (“HWMs”) on

cigarette packages informing existing and potential tobacco users of the health risks associated with tobacco use.

22. The evidence as to the importance and effectiveness of HWMs on tobacco product packages has continued, and continues, to grow. HWMs are effective in increasing public awareness of the health hazards of smoking and in directly influencing tobacco users in their decision not to smoke. In fact, tobacco companies, including ITCAN, have admitted that studies have shown that HWMs on tobacco products increase public awareness of the dangers of smoking and reduce the overall incidence of smoking in our society.

23. The science also establishes that larger warnings and graphic images in warnings have greater effects, including increased smoker awareness.

24. HWMs began voluntarily appearing on cigarette packages in 1972 as single text warnings attributable to the Minister of Health. They were displayed in both official languages on one side of the packages. No legislative mandate was in effect at the time.

25. In 1988, Parliament enacted the *Tobacco Products Control Act*, S.C.1998, c.20 (“*TPCA*”). The *TPCA* prohibited all advertising for tobacco products, with specific exceptions for some forms of advertising, such as sponsorship of sports and cultural events.

26. A significant element of the *TPCA* is that it required manufacturers to place unattributed HWMs on their products.

27. Regulations introduced in 1989 required text-only HWMs in contrasting colours occupying 20% of the bottom portion of the principal display surfaces of cigarette packages.

28. In 1994, the size requirements for HWMs were increased, having to occupy approximately 33% of the top portion of the principal display surfaces.

29. In 1997, the *Tobacco Act*, S.C. 1997, c. 13 (“*TA*”) and, in 2000, the *Tobacco Products Information Regulations*, SOR/2000-272 (“*TPIR*”) were enacted. The *TPIR* required graphic HWMs covering at least 50% (not 50% as alleged in paragraphs 14 and 15 of the claim) of the principal display area of cigarette packages, as well as other tobacco products, and equally distributed during the year.

30. The *TPIR* also introduced other measures to convey information with the packages of cigarettes. They required health information messages (“HIMs”) to be included either on a leaflet or on the package, other than the principal display surface or the bottom; or in the case of slide and shell packages, on the back of the slide or on a leaflet, and toxic emissions statements (“TES”) to be printed on another side the package.

31. These measures were part of a comprehensive tobacco-control scheme set out in the *TA*. This scheme as a whole also placed limits on tobacco promotion, advertising and sponsorships. The *TA* was Parliament’s legislative response to the 1995 judgment of the Supreme Court of Canada on the *TPCA*.

E. THE *TPLR* AND THE IMPUGNED REGULATION

32. Cigarettes and little cigars account for approximately 95% of the tobacco market in Canada. Like the *TPIR*, the *Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)*, SOR/2011-177 (“*TPLR*”) use a combination of HWMs, HIMs and TES to inform users of the health risks of smoking cigarettes and little cigars. The HWMs requirements are one

component of the government of Canada's policy response to the public health problem caused by tobacco use.

33. The HWMs required by the *TPIR*, which had been in place since 2000, eventually reached maximum effectiveness and then became less effective at informing Canadians about the health hazards of tobacco use. As a result, in order to increase their effectiveness, a new set of HWMs for cigarettes and little cigars was introduced in the *TPLR* on September 22, 2011.

34. The 16 new graphic HWMs provided for in the *TPLR* are more noticeable, memorable and engaging than their predecessors. They inform consumers about a more inclusive list of the health impacts of tobacco, including illnesses not included in the previous HWMs, thereby increasing not only general awareness of the hazards of smoking, but also awareness of specific diseases.

35. The new HWMs are also more understandable to Canadians with lower literary skills and are more effective at reaching older smokers and hard-core smokers.

36. The *TPLR* also require information regarding cessation support services, namely a toll-free pan-Canadian Quitline and Web portal address, to be included with the HWMs. In Canada, HWMs had never before included cessation support information.

37. Callers to the pan-Canadian toll-free Quitline number are seamlessly redirected to existing cessation services provided by the provinces and territories. These services provide one-on-one counselling, self-help materials, referrals to community services and online cessation support.

38. Enhanced regulatory requirements significantly increase visibility and legibility of HWMs on all types and sizes of packages. In order to make the warnings more effective, and to accommodate the addition of the Quitline and Web portal, these new requirements include in subsection 13(1) of the *TPLR* (the “impugned regulation”) an increase in the size of the HWMs from at least 50% to at least 75% of the display areas required by the regulations of cigarette and little cigar packages and of one such panel in the case of two-sided packages. This represents an additional coverage of at least 25% over what was required by the *TPIR*.

39. In addition to the new requirements for the HWMs, the *TPLR* also replace the previous requirements for the other components of the labelling of cigarette and little cigar packages, specifically the HIMs and the TES.

40. HIMs are separate and distinct from HWMs. HIMs are to be separately displayed on interior panels of packages or on a leaflet inserted in the package.

41. TES are also separate and distinct from HWMs and HIMs. They are to be displayed on one side of the package, or in the case of cartons, on the remaining sides other than those on which the HWM is displayed.

42. Manufacturers are not confined to a particular size or style of package.

43. Industry can also use a leaflet inserted inside the package, as well as other permitted forms of promotion in order to communicate brand and other messages. The AGC denies the allegations made in paragraphs 17, 22, 23, 24, 27, 30, 31 and 32 of the claim that as a result of the *TA* and the *TPLR* “75+%" or “more than” 75% of the principal display surfaces of cigarette packages are not available to manufacturers.

44. True informational and brand-preference advertising continues to be permitted in publications and on signs in accordance with the parameters set out under subsection 22(2) of the *TA*.

45. Sections 20 and 21 of the *TA* provide the only restriction on the content of this form of promotion, requiring that promotions not be false, misleading or deceptive or likely to create an erroneous impression and that they not promote a product by means of a testimonial or endorsement, unless that testimonial or endorsement is in the form of a trade-mark that appeared on a tobacco product for sale on December 2, 1996.

46. The AGC denies that the impugned regulation has the effect of appropriating any display surfaces of cigarette packages from manufacturers, as alleged in paragraph 17 of the claim. The impugned regulation does not grant government the exercise of control over, or possession of, cigarette packages, or any part thereof.

47. The impugned regulation was enacted solely to serve the public interest, not an economic interest. Requiring a product's packaging to display HWMs does not constitute appropriation of the ownership of packaging. Inclusion of health information on a product itself is a standard requirement for many regulated products. It is the most effective way of providing important information about the product and its health hazards, as is the case with tobacco products. Placing information on package labels will result in more reach than even the most successful media campaigns could likely achieve on their own.

48. For tobacco manufacturers the package is a promotional tool. It is used to promote the brand image, but also to camouflage the harmful effects of cigarettes.

49. The AGC denies that the impugned regulation deprives consumers of useful information on the product brand as alleged in paragraph 20 of the claim. Little, if any information about the product itself is provided on cigarette packages beyond the brand name and trademark.

50. The AGC denies the allegation in paragraphs 22, 23, 24 and 25 of the claim that the increase in size of HWMs prevents manufacturers from displaying their trade-marks, branding and other information.

51. In response to those allegations, the AGC pleads that consumers do not have problems identifying or recognizing brands on packages with larger HWMs, including those covering 100% of the two principal display surfaces of the package.

52. The AGC also denies the allegation in paragraph 17 of the claim that amendments to the *Stamping and Marking of Tobacco Products Regulations*, SOR/2003-288 (“*SMTPR*”), adopted pursuant to the *Excise Act, 2001*, S.C. 2002, c. 22, constitute an “appropriation” of additional space on cigarette packages. Section 4.2(e) of the *SMTPR* requires an excise stamp confirming payment of federal excise duty to be affixed to tobacco products in a manner that does not obstruct any information required by and under an Act of Parliament to appear on the package. It does not grant the government control over or possession of cigarette packages.

53. In addition, sections 7 and 11 of the *TPLR* permit excise stamps to partially cover HWMs. Prepublication of subsection 11(2) provided that an excise stamp could conceal a maximum of 120mm² of the surface area of a HWM. However, as a result of comments received from tobacco manufacturers, including ITCAN, the permitted encroachment was increased to 180mm² to respond to industry concerns about complying with both the *TPLR* and the *SMTPR* for certain type of packages.

54. Moreover, the excise stamp does not cover any portion of the principal display surfaces of standard flip-top cigarette packages. In most cases, it occupies a smaller portion of slide-and-shell cigarette packages than was occupied by the plastic tear-tape (known as an “easy opening device”) previously required by the *SMTPR* to confirm payment of federal excise duty.

55. The excise stamp is intended to help curtail the contraband tobacco market complained about by ITCAN at paragraph 31(b) of the claim. It is designed to facilitate identification and detection of contraband tobacco products by enforcement officials and the general public including consumers. ITCAN and the other major tobacco companies sought and may in fact benefit from these sorts of measures to reduce contraband tobacco sales.

F. RESPONSE OF OTHER GOVERNMENTS, THE WORLD HEALTH ORGANIZATION AND NON-GOVERNMENTAL ORGANIZATIONS

56. Governments around the world have taken measures to inform their residents of the health hazards of tobacco use and to discourage people from smoking, including requiring health warnings on cigarette packages. There is a trend to increasing the size of the warnings, with some countries exceeding warnings covering 75% of the display areas of packages.

57. The Conference of the Parties to the World Health Organization Framework Convention on Tobacco Control (“WHO FCTC”) adopted guidelines for the implementation of Article 11 regarding the size of HWMs, recommending a move to larger warnings.

58. Many non-governmental organizations support Canada’s regulatory response, including the increase in size of HWMs.

G. VALUE OF THE EXPRESSION

59. The impugned regulation does not affect values that are at the heart of what s. 2(b) of the *Charter of Rights and Freedoms* (“*Charter*”) is intended to protect. The promotion of tobacco products does not pertain to the search for truth, participation in the decision-making process on social and political issues or relate to the protection of the diversity and forms of personal enrichment and development. The sole value of the expression from the ITCAN’s perspective is economic.

60. The only value for the consumer is to obtain information. The impugned regulation does not take away valuable information, but rather ensures the consumer receives more.

H. ANY VIOLATION OF RIGHT TO FREEDOM OF EXPRESSION IS JUSTIFIED

61. The AGC concedes that the impugned regulation interferes with how ITCAN chooses to express itself and that section 2(b) of the *Charter* is infringed by the requirement. To the extent that it does so, that limit is demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter*.

62. The government of Canada, using the regulation-making authority delegated by Parliament, weighed the interests of all groups, some divergent, affected by the regulation and made a choice to increase the size of HWMs based on the necessity to inform the consumer of the risks of tobacco use, within the larger need to protect public health.

63. The government of Canada also considered the commercial interests of the tobacco manufacturers and has balanced all interests in the policy choice it has made.

64. The response to the need for tobacco control and protecting public health is a matter of complex social policy which requires Parliament to balance divergent interests, including the interests of vulnerable segments of Canadian society. Parliament should be granted a high degree of deference by the court because the answers to such complex social problems may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable.

a. The Objectives of the Impugned Regulation are Pressing and Substantial

65. The objectives of the impugned regulation are to:

- a) better inform and remind Canadians, especially tobacco users and potential users, about the health risks of tobacco use and the health benefits of quitting;
- b) inform tobacco users about the availability of cessation services through the display on the HWMs of a pan-Canadian toll-free Quitline number and cessation Web portal;
- c) support provincial and territorial partners in their efforts to provide cessation services; and
- d) bring Canada into greater compliance with the WHO FCTC.

66. These objectives are designed to further Parliament's broader goal of protecting the health of Canadians and responding to a national public health concern by discouraging tobacco consumption and by preventing new smokers from becoming addicted.

67. The purpose of the *TA* is to provide a legislative response to a national public health problem of substantial and pressing concern, and in particular:

- (a) To protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
- (b) To protect young persons and others from inducements to use tobacco products and the consequent dependence on them;

(c) To protect the health of young persons by restricting access to tobacco products;
and

(d) To enhance public awareness of the health hazard of using tobacco products.

68. Canadians are generally aware that tobacco is bad for their health, but are less aware of the range and seriousness of diseases caused by smoking. In particular, smokers are less likely than non-smokers to see tobacco use as a major health concern.

69. In view of this lack of awareness, the objectives of informing and reminding potential users of the health hazards of tobacco products, advising them of cessation services and supporting the provinces and territories in the provision of those services, are clearly pressing and substantial.

70. Larger HWMs may reduce morbidity and improve mortality rates among smokers who successfully quit. Other potential beneficial impacts include reduced exposure to second-hand smoke and improved quality of life for all Canadians.

b. The Impugned Regulation is Rationally Connected to the Objective

71. The increase in size was necessary for the HWMs to have a greater impact, as well as to accommodate additional Quitline and Web portal information to enable smokers and potential smokers to learn more about the health consequences of smoking and how to avoid those consequences. This objective is rationally connected to the goal of increasing awareness of the health risks of tobacco products and to the broader goal of the overall federal tobacco control strategy of discouraging tobacco consumption and preventing new smokers from forming the habit.

72. The inclusion of health information on the product packaging itself is a standard requirement for a large range of products, and is the most effective way of providing information about the product.

73. The provision of health-related information on tobacco products in particular is recognized as one of the best approaches to inform users of the health risk of tobacco use. Package labels have the greatest capacity to reach current and potential smokers. Tobacco companies, including ITCAN, have admitted that HWMs on tobacco product packages increase public awareness of the dangers of smoking and reduce the overall incidence of smoking. The Supreme Court of Canada has accepted this as proven.

74. Increasing the size of the warnings from at least 50% to at least 75% increases their effectiveness. Simply put, larger HWMs are more effective in communicating risks. This is substantiated by the sound research available to and considered by Health Canada.

75. Evidence of the international experience establishes that cessation services such as telephone help lines are effective and further establishes that the promotion of cessation services information on tobacco packaging is an effective means of informing tobacco users of the existence of those services.

76. Similar packaging measures in other countries have increased the number of calls to the help-lines. Ongoing promotion of the cessation services on tobacco packaging is a way of communicating their existence and encouraging their use.

77. Users are reminded of the existence of cessation services every time they look at the pack, and the information is readily available when they are thinking about quitting.

78. In order to add the cessation support information, it was necessary to increase the size of the HWMs. Had the size not been increased, the impact of the graphic and textual component of the HWM would have been diminished, and/or the Quitline and Web portal information would have been too small to be effective. Warning someone about the consequences of smoking alone is not as effective as also providing information on how to avoid the consequences.

79. The AGC denies that increasing the size of HWMs will not increase awareness because the public is already highly well-informed of the health risks caused by smoking, as alleged in paragraph 29 of the claim. Increasing awareness of specific health risks and of health benefits is still necessary:

- a) Almost 5 million Canadians continue to smoke;
- b) While Canadians are generally aware that tobacco use is bad for their health, many are still not aware of the range and seriousness of the diseases that smoking causes. This is particularly true with respect to young people;
- c) It is important for smokers and potential smokers to know the specific health risks to which they are exposed. The new HWMs inform people about diseases recently linked to smoking, increasing both general awareness, but also awareness of specific diseases; and
- d) Previous HWMs, in some cases, were beyond some people's literacy skills and some of the new HWMs target specific messages to the needs of vulnerable groups.

80. The new, improved HWMs are more effective at increasing awareness and reaching the public and therefore the impugned regulation is rationally connected to the objectives of the *TPLR*.

81. The increased size of the HWMs work together with the other measures used to improve them. The combination of these measures, including the increase in size, is rationally connected

to the objective of reaching Canadian smokers and potential smokers, including youth, more effectively. These include:

- a) Messages that are intended to appeal to tobacco users of different ages, genders, socio-economic levels and literacy levels;
- b) A diversity of images, including photos of real people impacted by smoking, photos of organs and other attention-grabbing images;
- c) Fresh communication approaches such as short headings, catchy phrases and causal statements; and
- d) A more inclusive list of diseases associated with tobacco use.

82. All studies conducted by Health Canada before the enactment of the *TPLR* were methodologically sound, were conducted in accordance with both government and industry standards, and were conducted in a good faith effort to consider whether changes to HWMs were warranted.

c. The Impugned Regulation Minimally Impairs the Right

83. A broad range of reasonable regulatory options to improve the effectiveness of HWMs were considered by Health Canada.

84. HWMs occupying 75% are more effective than the HWMs occupying 50%, but the 90% and 100% scenarios are even more effective. In short, larger warnings are more effective. Health Canada conducted studies which established this, and these studies were considered in the decision-making process.

85. Consideration was given to informing users of the health hazards of tobacco use through a public education and social marketing campaign rather than by increasing the size of the

HWMs. However, research establishes that this option would not accomplish that objective as effectively and would be far too costly.

86. Tobacco users are exposed to packaging several times a day. Even the most successful of media campaigns could not equal that reach and visibility.

87. Similarly, consideration was given to options for adding the cessation support information to cigarette packages without increasing the size of the principal display area occupied by the HWMs. Those options included requiring new HWMs which focus solely on promoting the Quitline and Web portal information, displaying the information as a watermark on the HWMs or imbedding the information on the HWMs.

88. Consideration was also given to displaying the Quitline number and Web portal information on some of the TES, or placing the information inside the package on the HWMs.

89. However, none of these options accomplished the objectives of informing Canadians of the health risks of tobacco use and the availability of cessation services as effectively as increasing the size occupied by the HWMs to at least 75%.

90. At the same time, Health Canada opted to include cessation services information. This was based on the international experience that demonstrates that the inclusion of cessation services information is an important tool in informing tobacco users of these services and may lead to increased information to users about the health benefits of quitting.

91. Telling consumers about the consequences of smoking alone is not as effective as also providing information on how to avoid the consequences. Therefore, the most effective approach is to combine the HWMs and the cessation services information. However, integrating

the cessation services information with the HWMs would impact the legibility of the information, depending on the size of the display.

92. Health Canada did not want to diminish the effectiveness of the current HWMs by reducing their size to accommodate the additional cessation services information, and reasonably concluded that more space was needed.

93. In the interests of balancing the goal of improving the effectiveness of the HWMs with tobacco companies' desire to communicate product-related information to their customers, the impugned regulation increases the size of HWMs to at least 75% as opposed to 90% or 100%. This is the least restrictive option at this time that accomplishes the objective of informing tobacco users and potential tobacco users of health risks inherent in tobacco use, the health benefits of quitting and the availability of cessation help.

94. The impugned regulation does not prevent ITCAN from communicating its trade-mark, brand and other product information on its cigarette packages. To communicate with its customers through its packaging, ITCAN can utilize:

- a) Up to 25% of the display areas not required by the regulations to carry HWMs on the exterior of the packages;
- b) The remaining exterior sides of the packages upon which the *TPLRs* do not require any HWMs, or TES;
- c) The interior surfaces that do not carry a component of the HWMs; and
- d) A leaflet that does not carry a HIM and that is inserted in the package.

95. Health Canada considered the 2011 amendments to the regulations regarding the excise stamp requirements. Health Canada and the Canada Revenue Agency worked together to address industry concerns about having to comply with both sets of regulatory requirements. To

this end, the *TPLR* allow for some encroachment of the HWM to accommodate the excise stamp.

After receiving feedback from the tobacco industry, the permitted encroachment was increased from 120mm² to 180mm².

96. The AGC specifically denies the suggestion at paragraphs 17, 20, 21, 25 and 31(a) of the claim that the impugned regulation constitutes a restriction of ITCAN's property rights and/or its right to use its trade-marks. In any case, neither property nor economic rights are protected by the *Charter*.

97. In addition, a trade-mark registration does not confer on a registered owner a positive right to use the trade-mark. Rather, it serves to prevent the use by others of the trade-mark in association with similar wares and services. Therefore, the use of a trade-mark may be regulated notwithstanding a trade-mark registration.

98. Although the impugned regulation requires the HWMs to occupy "at least" 75% of the display areas required by the regulations of cigarette and little cigar packages, since the impugned regulation came into effect, HWMs have not exceeded 75% of the principal display areas.

99. Tobacco manufacturers including ITCAN have employed marketing techniques on the package to increase their ability to communicate with customers through the pack and/or detract attention from HWMs. For example, manufacturers have altered the dimensions of cigarette packages and utilized promotional leaflets inserted into their packages and visible interior surfaces to communicate with their customers.

100. The only restrictions on ITCAN's use of its packaging to communicate with its customers are set out in Part IV of the *TA* and related regulations. Promotion on tobacco product packages cannot include testimonials or endorsements, cannot be false, misleading or deceptive, or likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions, and cannot suggest that the product contains a prohibited additive. These restrictions are found in sections 21, 20 and 23.1 of the *TA*.

101. In addition, contrary to the allegation at paragraph 21 of the claim, product packaging is not the last meaningful way for tobacco manufacturers to communicate with their customers and compete with one another at point of sale. Pursuant to section 22 of the *TA*, ITCAN may engage in informational or brand-preference advertising in publications that are mailed to an adult who is identified by name, and on signs in places where young persons are not permitted by law.

102. In any case, the increase in the size of the HWMs does not impact consumers' ability to recognize and differentiate between different brands of cigarettes and little cigars. The impugned regulation does not limit tobacco companies' ability to compete with one another at point of sale.

103. Regulatory actions in other countries are consistent with the Canadian approach. Several countries have designed laws requiring tobacco manufacturers to display graphic HWMs over a substantial portion of the principal display areas of cigarette packages.

104. Australia has responded to the threat to human health posed by tobacco consumption by prohibiting the use of trademarks, logos and brand-specific colours on cigarette packages altogether. In that country, cigarettes must be sold in plain olive brown packages displaying only

HWMs and the brand name of the cigarettes in simple font of a prescribed size. This approach is referred to as plain packaging.

105. HWMs are also larger in Australia than in Canada. They must cover 90% of one of the principal sides of the plain packaging, and 75% of the other principal side.

106. New Zealand, which at the time of pleading requires HWMs to occupy an average of 60% of the front and back of cigarette packages, has indicated its intention to table legislation by the end of 2013 requiring tobacco products to be sold in plain packaging, and to carry larger HWMs. Ireland has also announced its intention to implement standardized packaging.

107. Thailand recently adopted regulations increasing the size of HWMs on cigarette packages from 55% to 85% of the principal display surfaces, and adding information regarding cessation services. In Uruguay and Sri Lanka, HWMs occupy 80% of both the front and back of cigarette packages, leaving only twenty percent for trademarks, branding and other product information. Like Canada, Brunei's HWMs occupy 75% of the principal display surfaces.

108. As at the time of pleading, European countries are moving towards increasing the size of HWMs. In 2001, the European Union ("EU") adopted a Tobacco Products Directive requiring HWMs surrounded by a black border to cover an average of not less than 35%, 39% or 43% (depending on whether the member state has one, two or three official languages) of the front and back of cigarette packages. The Tobacco Products Directive binds all of the EU's twenty-seven member states.

109. In June 2013, the Council of the European Union agreed upon a general approach on a revised Tobacco Products Directive which would increase the size of HWMs to 65% of the front

and back of cigarette packages. The new, larger warnings, which were proposed in response to new evidence of effectiveness, include a combination of pictures and text as well as information on cessation services. These warnings will be mandatory for all cigarette and roll-your-own tobacco packages. Member states will remain free to introduce plain packaging subject to certain conditions.

110. Canada's policy choice is also consistent with international obligations. Canada is a party to the WHO FCTC, an international treaty adopted in 2003 in response to the globalization of the tobacco epidemic. A vehicle mandated by the WHO FCTC to reduce the demand for tobacco is the regulation of package labelling.

111. The WHO FCTC also clearly contemplates HWMs that are larger than 50% of the principal display area. Article 11 provides that HWMs "should be 50% or more of the principal display areas but shall be no less than 30% of the principal display area".

112. Guidelines adopted by the Conference of the Parties to the WHO FCTC for the implementation of Article 11 state that, given the evidence that the effectiveness of HWMs increases with their size, parties should consider using HWMs that are more than 50% of the principal display areas and aim to cover as much of the principal display areas as possible.

113. Many NGOs approved of Canada's move to larger, tougher new warning labels, especially the increase in the size of the health warning messages to at least 75%.

114. Health organizations, including the Canadian Medical Association, the Canadian Public Health Association and the Canadian Cancer Society, also support the larger, graphic health warnings.

d. The Effects of the Impugned Regulation are Proportionate to the Objective

115. There is proportionality between the effects of the increase in size of HWMs and the objective of the legislation to better inform Canadians about the health risks of tobacco use, the health benefits of quitting, and the availability of cessation services.

116. These beneficial effects far outweigh any harmful effects on the plaintiff's right to advertise for financial gain products that are addictive, damaging to the health of Canadians, affecting vulnerable groups, and raise a serious public health concern. The value of ITCAN's right to freedom of commercial expression under section 2(b) of the Charter is tenuous, and at best, low.

117. The only value to the consumer in brand and product-information advertising is the receipt of information. The information required by the impugned regulation provides far more information to the consumer than that which would be provided by ITCAN.

118. To the extent that information from ITCAN about the product has any value for the consumer, it has other means available to it to provide that information. The AGC specifically denies the allegation to the contrary made in paragraph 21 of the claim.

119. The increase in size of HWMs has no harmful effect on the consumer and as such it cannot be said that the harmful effects outweigh the objective. In this case, the impugned regulation provides a greater benefit to consumers.

120. The balance struck by Parliament between the consumer's need for product information and the need for information about the risks of tobacco use and information about smoking cessation services is a constitutionally valid policy choice which meets both needs. This is

particularly so in light of the important contextual factor that continued smoking is not a choice, as alleged by ITCAN in paragraphs 3 and 18, but is an addiction.

121. The AGC denies the allegation in paragraph 31(b) of the claim that larger warnings will diminish product differentiation among brands and incent consumers to purchase contraband tobacco products. As indicated above, the increase in the size of the warnings does not impact consumers' ability to recognize and differentiate between different brands of tobacco products.

122. The AGC also denies the suggestion in paragraph 31(b) that regulation has restricted legitimate tobacco producers' ability to defend their brands against the appearance of contraband cigarettes. Contraband cigarettes accounted for 10 to 15% of the Canadian cigarette market in 2010, and approximately 20% of the Ontario market in 2011. This is contrary to the plaintiff's claim that, since 2006, contraband cigarettes have made up between 18% and 33% of the Canadian market, and close to 50% of the Ontario market. ITCAN and the two other major tobacco companies in Canada have participated in this market by distributing cigarettes sold as contraband.

123. The beneficial effects of the increased size of HWMs which include smoking cessation information are clear and outweigh the hypothetical and denied detriments alleged by ITCAN at paragraph 31(b).

124. The size of the contraband tobacco market in Canada is in the range of 10 to 15% of total consumption which is comparable to the size of the global contraband tobacco market. The excise stamp is intended to help curtail the contraband tobacco market in Canada. In any case, these considerations are not relevant to the constitutional validity of the impugned regulation.

I. NO VIOLATION OF CONSUMERS' RIGHTS OR OTHER DETRIMENTAL EFFECT ON CONSUMERS

125. The impugned regulation does not violate consumers' rights to freedom of expression as alleged in paragraphs 19, 22, 23, 24, 26, 30, 31(a) and 32 of the claim by preventing consumers from receiving information about tobacco products. The *TPLR* does not apply to consumers.

126. In any event, ITCAN has no legal standing to assert the violation of consumers' right to freedom of expression.

127. Moreover, the AGC denies the suggestion at paragraphs 31 and 32 of the claim that the impugned regulation has a negative impact on consumers. The purpose of the impugned regulation, and indeed the purpose of the *TPLR* as a whole, is to protect consumers by informing them of the health risks of tobacco use and by making them aware of cessation services.

128. The *TPLR* do not deprive consumers of cigarette products of information regarding the product brand. On the contrary, they increase the information available to the consumer regarding the products.

129. To the extent that consumers of cigarettes have an interest in information regarding the source and brand the cigarettes, and in knowing that they are legal, the impugned regulation does not limit ITCAN's ability to communicate with its customers on these issues. Indeed, the same amount of information is conveyed on ITCAN's product packaging under the *TPLR* as was conveyed under the *TPIR*.

130. In addition, and in any case, smokers and non-smokers of all ages strongly support requiring tobacco companies to display HWMs on the principal display areas of tobacco

products. They consider HWMs to be an accurate and important source of information about the impact of smoking on their health, as well as a tool for increasing smokers' desire to quit smoking and enabling smokers to access assistance via Quitline numbers.

131. The AGC submits that, to the extent that section 13(1) of the *TPLR* interferes with how ITCAN chooses to express itself and thereby infringes section 2(b) of the *Charter*, the alleged violation is justified under section 1.

132. In addition, the Supreme Court of Canada has already determined the issues raised in this claim in *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30; [2007] 2 SCR 610. ITCAN was an applicant in that case and is barred from re-litigating these issues. The Attorney General relies on the doctrines of *res judicata* and issue estoppel.

133. The AGC asks that this action be dismissed with costs.

July 19, 2013

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