

HCO124

TA4

Product Litigation cases

CANADA

Person
or Class Action

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FILE ENTRY FORM

File number	TA4
File title	Product Litigation - Canada
Lawyer	SPC
Security classification	open
Subject matter <i>F</i>	Perron v RJR-MacDonald (1988) - Buergers disease Writ of Summons
Territory	British Columbia
Operating Group	n/a
External parties	Perron
External lawyers instructed by BAT	n/a
External lawyers instructed by external parties	Russell V. Stanton - Vancouver
Significant legal aspects	
Advice received	
Related files	
Comments	Inactive

** and class action papers*

SENT BY: IMPERIAL TOBACCO

; 5- 5-95 ; 5:03PM ;

SECRETARIAL~

071 233 1438;# 4/36

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Court File No: 95-CU-82186

**ONTARIO COURT OF JUSTICE
(General Division)**

BETWEEN:

**DAVID CAPUTO, LUNA ROTH,
LORI CAWARDINE and RUSSEL HYDUK**

Plaintiffs

- and -

**IMPERIAL TOBACCO LIMITED,
ROTHMANS, BENSON & HEDGES INC.,
RJR-MACDONALD INC.**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff(s). The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff(s) lawyer(s) or, where the plaintiff(s) do(es) not have a lawyer, serve it on the plaintiff(s), and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

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IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST
YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

If you wish to defend this proceeding but are unable to pay legal fees, legal aid may be
available to you by contacting a local Legal Aid office.

Date _____ Issued by _____
Local Registrar

Address of court office:
361 University Avenue
Toronto, Ontario
M5G 1T3

TO: IMPERIAL TOBACCO LIMITED
3810 St. Antoine Street,
Montreal, Quebec.

ROTHMANS, BENSON & HEDGES INC.
1500 Don Mills Road,
North York, Ontario.

RJR-MACDONALD INC.
1 First Canadian Place,
60th Floor,
Toronto, Ontario.

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1. The plaintiffs each claim:
 - a. damages in the sum of \$1,000,000.00;
 - b. aggravated, punitive and exemplary damages;
 - c. a mandatory order for the creation and funding of nicotine addiction rehabilitation centres for those addicted to nicotine;
 - d. pre-judgement and post-judgement interest in accordance with the *Courts of Justice Act*, 1990 as amended;
 - e. their costs of this action; and
 - f. such further and other relief as the nature of this case may require and this honourable court deems just.

THE PARTIES

2. The plaintiff, David Caputo, resides in the City of Brampton, in the Regional Municipality of Peel. He was born on the 21st day of June 1968.
3. The plaintiff, Luna Roth, resides in the Regional Municipality of York. She was born on the 16th day of April, 1949.
4. The plaintiff, Lori Carwardine, resides in the City of Mississauga, in the Regional Municipality of Peel, and was born on May 28th, 1959.

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5. The plaintiff, Russel Hyduk, resides in the City of Mississauga, in the Regional Municipality of Peel, and was born on September 4th, 1938.

6. The defendants dominate the Canadian tobacco industry sharing the Canadian factory made cigarette market in the approximate proportion of 60%, 25% and 15% respectively.

7. The defendant, Imperial Tobacco Limited (ITL), is an incorporated company with its registered office located in the City of Montreal. ITL is a wholly owned subsidiary of IMASCO Limited of Montreal. IMASCO's major shareholder, with 40.5% of the common shares, is B.A.T. Industries p.l.c. (British American Tobacco), the world's second largest cigarette producer. Since no other shareholder owns more than 10% of IMASCO's common shares, B.A.T. exerts effective control over IMASCO and through it, ITL.

8. The defendant, Rothmans, Benson & Hedges Inc. (RBH) is an incorporated company with its registered office at North York, Ontario. RBH is 60% controlled by Rothmans Inc. of Toronto and 40% by Philip Morris International Finance Corporation (PM) of New York City. Rothmans Inc. is controlled by Rothmans International p.l.c. of Britain which owns 71.25% of Rothmans Inc.'s common shares. Rothmans International p.l.c. in turn is controlled by majority shareholder, Compagnie Financiere Richemont AG of Switzerland. Philip Morris is the largest tobacco company in the world.

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9. The defendant RJR-Macdonald Inc. (RJR-M) is an incorporated company with its registered office at the City of Toronto. RJR-Macdonald (RJR-M) is a wholly owned subsidiary of R. J. Reynolds Tobacco Company (RJR) of the United States.
10. The plaintiff, David Caputo, began smoking at age thirteen products manufactured by the defendants. He was diagnosed with carcinoma of the tongue and underwent surgery for the tongue cancer in 1988. He was warned by his physician to quit smoking but was unable to do so and continued smoking after the surgery. He is addicted to smoking.
11. The plaintiff, Luna Roth, began smoking cigarette products manufactured by the defendants at age 17. She has developed shortness of breath and smoker's cough. While she has managed to reduce her intake to some extent, she still continues to smoke 50 cigarettes per day. She has attempted to quit smoking on numerous occasions, spending in excess of \$3,000.00 for various forms of assistance, but has been unsuccessful in her attempts. She is addicted to smoking.
12. The plaintiff, Lori Carwardine began smoking cigarettes produced by the defendants at age 11. She has been diagnosed with bilateral collapsed lungs and underwent surgery on her left lung. She has also been diagnosed with the early stages of emphysema. She has been told by her doctors to quit smoking on numerous occasions and has been unsuccessful at each attempt. She is addicted to smoking.

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13. The plaintiff, Russell Hyduk began smoking cigarettes produced by the defendants at age 16. He has been diagnosed with emphysema and asthma and has suffered a heart attack and a stroke. He has been told by his treating physicians to stop smoking. He has attempted to stop smoking on numerous occasions but has been unsuccessful at each attempt. He is addicted to smoking.

THE CLASS

14. The plaintiffs state that they are representative of a class of persons who have all sustained damages arising out of the conduct of the defendants, their agents, servants or employees, for whom the defendants are in law responsible.
15. The plaintiffs state that the class is defined as:
- Persons who due to the conduct of the defendants, their agents, servants or employees, have become addicted to the nicotine in the defendants' products, namely cigarettes, or who have had such addiction heightened or maintained through the consumption of said products, and who have as a result of said addiction suffered loss, injury and damage, persons with *Family Law Act* claims in respect to the claims of such addicted persons, and estates of such addicted persons.
16. The plaintiffs state that a class proceeding is the preferable method of litigation as the number of potential claims would make joinder of all such claims an

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impracticality. Further, a class action would improve access to justice for all class members and ensure judicial efficiency.

THE FACTS

- 17.** At all material times the plaintiffs purchased and smoked cigarette products designed, manufactured and distributed by the defendant tobacco companies.
- 18.** The plaintiffs became addicted to the defendants' products. Specifically, the plaintiffs are addicted to the nicotine contained in cigarette products manufactured by the defendant tobacco companies.
- 19.** Nicotine is a highly addictive substance which acts on various parts of the human body. Consumption of products containing nicotine creates "reinforcing behaviour" which causes the continued and further consumption of products containing nicotine. Such behaviour creates an addiction to the product and compels the addicted individual to consume products which deliver nicotine.
- 20.** Cigarettes are recognized as a highly effective nicotine delivery device.
- 21.** The plaintiffs' nicotine addiction compels them to purchase and consume the products of the defendants as cigarettes are the only readily available nicotine delivery device.

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22. At all material times the defendant tobacco companies, their agents, servants or employees, were aware or should have been aware of the addictive nature of the nicotine in their products.

23. The defendants and others carried out extensive scientific and medical research regarding the harmful and addictive nature of nicotine. The research, including the "PROJECT JANUS" carried out by the Battelle Memorial Laboratory between 1965 and 1978, establishes, but is not limited to the following:

- a. that nicotine is a highly addictive substance;
- b. that the reason people continue to purchase cigarettes is because they are addicted to nicotine; without nicotine, people would not purchase cigarettes;
- c. nicotine and other substances contained in cigarettes cause cancer.

24. At all relevant times, the defendants concealed from the general public their own research establishing the addictive nature and effects of nicotine and further, they misinformed the public regarding that research.

25. The defendants have denied the validity of the scientific and medical research carried out by governmental and private agencies which establishes the addictive nature of nicotine and its connection to smoking behaviour.

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26. Notwithstanding their own research, and the research of others, at all material times the defendants have maintained the position that nicotine is not addictive and not the reason why people continue to purchase their products.
27. Through their research, the defendants, their agents, servants or employees have developed or adopted methods to manipulate the nicotine content in their tobacco products.
28. The defendants have been and are able to precisely control the amount of nicotine which is contained in their products by increasing the amount of nicotine in the tobacco they use to produce their products or altering the design of their cigarettes. They are able to artificially raise the nicotine level in their products to a level higher than that naturally occurring in the tobacco plant and do so.
29. The defendants hold numerous patents in respect of the alteration of nicotine levels in their products or are licensees of such patents.
30. Through their research, the defendants have been and are aware that the actual levels of nicotine and tar consumed by the smoker are greater than those measured by conventional measurement techniques and those reported to consumers, which include the class representative plaintiffs and the members of the class.

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31. Through their research, the defendants have been and are able to and do manipulate the nicotine in their low tar cigarettes in order to raise the nicotine dose received by a smoker so as to ensure addiction even to low tar cigarettes.
32. The defendants, their servants, agents and employees have persisted in denying to the present that their cigarette products, as a result of nicotine contained therein, are addictive. The defendants, their servants, agents and employees have managed to conceal their long held knowledge that their cigarettes were in fact addictive by concealing and suppressing evidence and research to that effect. The representative plaintiffs and members of the class discovered that cigarettes were in fact addictive, and that the tobacco industry had long been aware of the addictive nature of cigarettes, as a result of the evidence presented at hearings of the United States House Subcommittee on Health and the Environment in Washington, D.C. in 1994.
33. At all material times the defendants , their servants, agents or employees were aware of the serious and often fatal health consequences associated with the consumption of their products. These include but are not limited to various forms of cancer, respiratory and cardiovascular diseases.
34. The defendants have denied the serious and often fatal health consequences of consumption of their products.

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35. At all relevant times, the defendants, their agents, servants or employees have engaged in advertising, media and public relations campaigns designed to increase the sales of their products through explicit and implicit denial of any and all health related consequences.

36. The defendants conducted extensive market research whose results indicated that 90% of smokers begin smoking before age 18 and that if a person did not start smoking before age 20, he was unlikely to ever start. Their advertising campaigns have therefore targeted vulnerable groups such as children and young adults and have employed various methods to attract new consumers. Such methods include but are not limited to using cartoon characters, promotional giveaways, and sponsorship of various public events.

37. The defendants have intentionally attempted to create, heighten and maintain addiction to nicotine so as to promote and ensure continued purchase of their products and thereby replace with new, young and healthy recruits those who died or became diseased as the result of the use of their cigarettes.

THE COMMON ISSUES

38. The plaintiffs state that the members of the class which they represent have common issues including the following:

- a. Whether nicotine is addictive;

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- b. Whether the defendants, their agents, servants or employees knew or ought to have known of the addictive nature of nicotine;
- c. Whether the defendants intentionally manipulated the levels of nicotine in their products;
- d. Whether the defendants' manipulation of the levels of nicotine in their products was intended to create, heighten and or maintain the addiction to their product;
- e. Whether the nicotine and tar levels which are actually received by a smoker's lungs are higher than what are reported by the defendants, their agents, servants or employees through the use of inaccurate conventional measurement techniques;
- f. Whether the defendants, their agents, servants or employees knew or should have known of the inaccurate measurements of nicotine and tar and the erroneous reporting of such inaccurate measurements;
- g. Whether the consumption of the defendants' products causes or materially contributes to serious medical conditions such as cancer, respiratory and cardiovascular disease;
- h. Whether the defendants, their agents, servants or employees knew or ought to have known that consumption of their product causes or materially contributes to serious medical conditions;
- i. Whether the defendants, their agents, servants or employees conducted research or caused research to be conducted which establishes the addictive

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nature of nicotine and that their products cause or materially contribute to serious medical conditions;

- j. Whether the defendants, their agents, servants or employees have concealed the results of their research;
- k. Whether the defendants, their agents, servants or employees engaged in a course of conduct which denied and concealed their research and knowledge of the addictive nature of nicotine, their intentional manipulation of nicotine, the accurate measurements of nicotine and tar received by a smoker's lungs and the serious medical consequences associated with consumption of their product;
- l. Whether the defendants, their agents, servants or employees have failed to warn the public, which includes the representative plaintiffs and the members of the class, of the addictive nature of nicotine, their intentional manipulation of nicotine, the accurate measurements of nicotine and tar received by a smoker's lungs and the serious medical consequences associated with consumption of their product;
- m. Whether the defendants, their agents, servants or employees engaged in advertising, media and public relations campaigns designed to negate or diminish the scientific and medical research carried out by governmental and private agencies which report the dangers associated with consumption of the defendants' product;
- n. Whether the defendants, their agents, servants or employees engaged in advertising, media and public relations campaigns designed to negate or diminish health warnings, including those imposed by government on their product packaging;

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- o. Whether the defendants, their agents, servants or employees engaged in advertising, media and public relation campaigns aimed at inducing children and young men and women to start smoking;
- p. Whether the defendants, their agents, servants or employees, are liable for the manufacture, sale and distribution of a defective product;
- q. Whether the conduct of the defendants, their agents, servants or employees, constitutes negligence;
- r. Whether the defendants, their agents, servants or employees, are liable for breaching a duty to inform the consumers of their products of the addictive nature of nicotine and the serious medical consequences associated with consumption of their product;
- s. Whether the defendants, their agents, servants or employees, are liable for negligent misrepresentation;
- t. Whether the defendants, their agents, servants or employees, are liable for breaches of consumer protection legislation;
- u. Whether the defendants, their agents, servants or employees, are liable for breaches of the implied warranties of merchantability and fitness;
- v. Whether the defendants, their agents, servants or employees, are liable for the tort of conspiracy;
- w. Whether the defendants, their agents, servants or employees, are liable for the tort of deceit;

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- x. Whether the class representative plaintiffs and the members of the class have suffered loss, injury and damages as a result of the course of conduct pursued by the defendants;
- y. Whether the class representative plaintiffs and the members of the class are entitled to compensatory, aggravated, punitive or exemplary damages as a result of the defendants' conduct;
- z. Whether the class representative plaintiffs and the members of the class are entitled to equitable relief;

NEGLIGENCE ALLEGATIONS

39. The class representative plaintiffs allege that their injury, loss and damage were caused or contributed to by the negligence of the defendants, their agents, servants or employees, particulars of which include the following:

- a. They knew at all material times or should have known of the inherently defective, dangerous and addictive nature of their product and that the manufacture and distribution of their product would cause injury, loss and damage to the consumer of their product and in particular would cause injury to the representative plaintiffs and the class members;
- b. They knew at all material times or should have known of the serious medical consequences associated with cigarettes and that the manufacture and distribution of their product would cause injury, loss and damage to the consumer of their product and in particular would cause injury to the representative plaintiffs and the class members;

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- c. They knew at all material times or should have known of the manipulation of nicotine levels in cigarettes and that the manufacture and distribution of their product would cause injury, loss and damage to the consumer of their product and in particular would cause injury to the representative plaintiffs and the class members;
- d. They failed to design, manufacture and market products which were not addictive;
- e. They failed to design, manufacture and market products which did not contain manipulated levels of nicotine;
- f. They failed to design, manufacture and market cigarettes without nicotine;
- g. They failed to design, manufacture and market cigarettes with fewer medical consequences;
- h. They designed, manufactured and marketed products which created or perpetuated a potentially hazardous activity;
- i. They failed to warn of the addictive nature of nicotine;
- j. They failed to warn and inform of the accurate measurements of nicotine and tar actually consumed by a smoker when the defendants knew or ought to have known that the accurate measurements were in excess of those they disclosed;
- k. They failed to warn of the serious health dangers associated with cigarettes;

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- l. They failed to ensure that their cigarettes would not be available to young persons under 21 years of age;
- m. They failed to ensure that their advertising would not induce young persons to commence or persist in smoking;
- n. They failed to ensure that their advertising accurately reflected the effects of smoking on health;
- o. They failed to ensure that their advertising did not negate or induce the disregard of health warnings;

40. The negligence of the defendants, their servants, employees or agents, has caused the loss, injury and damage suffered by the class representative plaintiffs or has materially increased the risk of the loss, injury and damage occurring.

STRICT PRODUCTS LIABILITY

41. The defendants are strictly liable for the manufacture, design, sale and distribution of their defective products.

PRODUCTS LIABILITY ALLEGATIONS

42. In the alternative, the class representative plaintiffs allege that their injury, loss and damage were caused or contributed to by the manufacture, design, sale and distribution of the defendants' products. As a direct and proximate cause of the

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defendants' design, manufacture and marketing of a defective product, the class representatives plaintiffs and members of the class have suffered and will suffer injury, loss, and damage, particulars of which include the following:

- a. At all material times, the defendants manufactured, sold and distributed their cigarettes for ultimate retail to the consumer. The cigarettes were expected to and did reach the class representatives and the members of the class without substantial change in their condition as manufactured;
- b. The class representative plaintiffs and the members of the class consumed the cigarettes in the manner in which they were intended to be used;
- c. The defendants' products are intended for ultimate consumption by the consumer.
- d. The defendants' products are dangerously defective products particulars of which include:
 - i. Cigarettes which contain nicotine, a highly dangerous and addictive substance;
 - ii. Cigarettes whose nicotine content had been manipulated so as to create, heighten or maintain addiction;
 - iii. Cigarettes which created or aggravated serious life threatening medical and psychiatric illnesses;
- e. The defendants and or agents, servants and employees of the defendants knew or ought to have known, that they manufactured, sold and distributed

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products, that were dangerous or defective products by reason of the following:

- i. The defendants' own research and that of others regarding the highly addictive nature of nicotine;
- ii. The defendants' own and others' research and tests of the nicotine manipulation techniques and their implementation in nicotine level manipulated cigarettes;
- iii. The defendants' own and others' research which established the serious diseases associated with cigarettes;
- iv. The defendants' own research and that of others which establishes that the amount of tar and nicotine actually received by the lungs of a smoker are higher than the amounts measured by conventional methods and reported to the public;
- v. The research and development carried out by the Council for Tobacco Research - USA, of which sister companies of the defendants are members, establishing the addictive nature of nicotine, the heightening of the addictive capabilities of cigarettes by manipulating the nicotine content in cigarettes, the actual amounts of tar and nicotine received by the smoker and the serious health consequences of smoking cigarettes;
- vi. The reports, studies and other document of Government authorities and the private sector related to the dangers of smoking and the addictive nature of nicotine.

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- f. The representative plaintiffs further allege that their injuries, loss and damage were caused by reason of the negligence and breach of duty of the Defendants, their agents, servants or employees. Particulars of which include the following:
- i. They designed, manufactured and marketed cigarettes which were dangerous, not of merchantable quality and not fit for the purpose for which they were intended;
 - ii. They designed, manufactured and marketed cigarettes which they knew or ought to have known were inherently dangerous and capable of creating or perpetuating addiction and causing serious medical illnesses;
 - iii. They failed to warn or adequately warn the ultimate consumer of their product which included the class representative plaintiffs and members of the class of the dangers which they knew or ought to have known were inherent in the design and manufacture of cigarettes, these dangers include, but are not limited to, the following:
 - (1) the addictive substance of nicotine;
 - (2) the increased addictive potential of manipulated levels of nicotine;
 - (3) the actual amounts of tar and nicotine received by a smoker's lungs;

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(4) the serious medical dangers which they knew or ought to have known were inherent in the design and manufacture of cigarettes;

iv. The defendants engaged in advertising, media and public relations campaign designed to negate health warnings, including government decreed warnings and to confuse the class representative plaintiffs and members of the class about the warnings related to the serious health dangers associated with smoking and the addictive nature of nicotine;

v. They engaged in advertising, media and public relations campaign calculated to induce the belief that cigarettes did not pose a serious health hazard and that nicotine was not an addictive substance;

vi. They failed to design, manufacture and market a cigarette which did not contain any levels of nicotine;

g. They breached the implied warranties that their products were not defective and fit for the purpose.

h. They failed to design, manufacture and market a cigarette with fewer medical consequences.

43. The negligence of the defendants, their servants, employees or agents in the design, manufacture and marketing of a defective product has caused the loss, injury and damage suffered by the class representative plaintiffs or has materially increased the risk of the loss, injury and damage occurring.

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INFORMED CONSENT

44. The class representative plaintiffs and the members of the class allege that they have suffered and will suffer loss, injury and damage as a result of the breach by the defendants, their agents, servants or employees of the duty to inform of all material risks associated with consumption of the defendants' products. The class representative plaintiffs and the members of the class as a direct result of the defendants' breach of the duty to inform of the serious risks associated with smoking have suffered and will suffer loss, injury and damage, particulars of which are as follows:

- a. The knew or ought to have known of the material risks associated with their products, such as the material risks of:
 - i. Addiction due to the nicotine content in their products;
 - ii. Creating or heightening addiction through the manipulation of nicotine levels in their products;
 - iii. Serious health consequences associated with their products;
- b. The defendants failed to warn or adequately warn the class representative plaintiffs and the members of the class of the material risks associated with their products;

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45. The breach of the defendants, their servants, employees or agents, has caused the loss, injury and damage suffered by the class representative plaintiffs or has materially increased the risk of the loss, injury and damage occurring.

DECEIT ALLEGATIONS

46. The class representative plaintiffs allege that their injury, loss and damage were caused or contributed to by the deceit of the defendants particulars of which are as follows:

- a. The defendants or their servants, agents or employees, have at all times made the misrepresentation that nicotine is not addictive and that cigarette smoking does not cause serious and life threatening illnesses. The defendants have perpetuated these misrepresentations in order to addict new smokers and keep all current smokers purchasing their products;
- b. The defendants have possessed scientific and medical data which establishes that cigarettes are dangerous and that nicotine is addictive, however, they suppressed such knowledge and misrepresented their knowledge to the detriment of the public and the class representatives;
- c. The defendants have manipulated the nicotine levels in cigarettes with the intention of addicting new smokers and continuing the addiction in all current smokers while misrepresenting to the public and the class representatives their manipulation of nicotine levels;
- d. The defendants have intentionally kept the ingested levels of nicotine high in cigarettes with lower tar through changes in the design of their cigarettes but

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have intentionally not informed the public and the class representatives of the actual ingested or ingestible nicotine levels so as to maintain their addiction;

- e. The defendants have intentionally misrepresented the actual levels of nicotine and tar consumed by a smoker by publicizing levels of tar and nicotine measured by mechanisms which fail to measure the actual quantities of nicotine and tar ingested;

47. The defendants were under a duty to disclose the addictive nature of nicotine, the serious health hazards of smoking, their manipulation of nicotine levels, their scientific and medical data confirming the dangers of smoking, their intentional miscalculation of tar and nicotine levels and the defendants' intention to addict members of the public and maintain the addiction of the class representatives and the class in order to maintain the consumption of their product. Their failure to do so constitutes a material omission.

48. The class representatives and the members of the class did not know that the defendants' representations or material omissions were misleading and the class representatives and members of the class relied on the defendants' representations.

49. The class representatives and members of the class relied on the defendants' misrepresentations and omissions and have as a consequence become addicted to cigarettes and have suffered serious medical consequences.

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50. The defendants are liable for compensatory, exemplary, aggravated and punitive damages for their reckless, wanton, and wilful disregard for the safety of the class representative plaintiffs and members of the class in their manipulation of nicotine, in their concealment and denial of the dangers of smoking and in their denial of the addictive nature of nicotine, all for the purpose of maximizing sales and profits of their product.

NEGLIGENT MISREPRESENTATION

51. The class representative plaintiffs allege that their loss, injury and damage were caused or contributed to by the negligent misrepresentations of the defendants; particulars of which include the following:

- a. They misrepresented their actual knowledge in public statements, advertising, media and public relations campaigns as follows:
 - i. They misrepresented their knowledge regarding the addictive nature of nicotine in their products;
 - ii. They misrepresented their manipulation of nicotine levels in their products;
 - iii. They misrepresented their knowledge regarding the serious health consequences associated with cigarettes;
 - iv. They misrepresented their knowledge regarding the actual amounts of tar and nicotine received by a smoker's lungs;

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- b. The class representative plaintiffs and the members of the class reasonably relied on the misrepresentations made by the defendants;
- c. The reliance on the defendants' misrepresentations was reasonably foreseeable by the defendants;

52. By reason of their reliance on the negligent misrepresentations of the defendants, the class representative plaintiffs and the members of the class have suffered loss, injury and damages.

CONSUMER PROTECTION LEGISLATION/IMPLIED WARRANTIES

53. The class representative plaintiffs allege that their loss, injury and damage were caused or contributed by the defendants' unfair business practices, particulars of which include the following:

- a. They designed, manufactured and marketed products which they impliedly warranted were merchantable, fit for the purpose at the time of sale, and posed no serious health consequences;
- b. They further impliedly warranted that nicotine was not an addictive substance;
- c. The class representative plaintiffs and members of the class relied on the defendants' implied warranties when purchasing the defendants' products;

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d. The defendants' breached their implied warranty particulars of which include the following:

- i. They designed, manufactured and marketed products which were inherently defective, posed serious medical risks and contained the highly addictive substance of nicotine;
- ii. They failed to disclose and warn that their products would addict the user;
- iii. They failed to disclose and warn that their products contained manipulated levels of nicotine;
- iv. They failed to disclose and warn that their products posed a serious health risk;
- v. They failed to disclose the actual levels of nicotine and tar consumed by the smoker;
- vi. They engaged in advertising, media and public relations campaigns which were designed to negate any and all public health and specific warnings associated with their product and perpetuate the belief that cigarette smoking did not pose serious health consequences and that nicotine was not addictive;

54. As direct and proximate results of the defendants' breaches of their implied warranties, the class representative plaintiffs and the members of the class have suffered and will suffer loss, injury and damage.

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CONSPIRACY ALLEGATIONS

55. The class representative plaintiffs allege that their injury, loss, and damage were caused or contributed by the conspiracy of the defendants particulars of which are as follows:

- a. The servants, agents or employees of each of the defendants conspired to deprive the public of scientific and medical data regarding the serious medical dangers of smoking and the addictive nature of nicotine in order to attract new smokers and keep all smokers addicted to cigarettes and therefore, consuming their products;
- b. The servants, agents or employees of each of the defendants have conspired to deny the incidence of serious illnesses associated with smoking and the addictive nature of nicotine;
- c. The servants, agents and employees of each of the defendants have conspired to promote an advertising campaign aimed at creating new smokers especially young children, teenagers, women and minorities;
- d. The servants, agents and employees of each of the defendants have conspired to implement advertising campaigns aimed at negating or diminishing the health warnings placed on cigarette packages and general public health concerns of the serious medical consequences of smoking and the addictive nature of nicotine;

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- e. The servants, agents and employees of each of the defendants have conspired to develop a public relations strategy to combat the medical and scientific data which report the dangers and addictive nature of smoking;
- f. The servants, agents and employees of each of the defendants have conspired to create scientific and medical data refuting government and private scientific and medical data which establish the addictive nature of nicotine and the serious illnesses which are caused or are materially contributed to by smoking.
- g. The servants, agents or employees of each of the defendants have conspired to suppress research of the Council for Tobacco Research - USA, as well as the results of the "PROJECT JANUS" among others which confirmed the addictive nature of nicotine and the health problems associated with smoking;
- h. The servants, agents or employees of each of the defendants have conspired to use those portions of tobacco leaves which contain the greatest amount of nicotine so as to reinforce the smoker's addiction;
- i. The servants, agents or employees of each of the defendants have conspired to design cigarettes which maximize the nicotine and tar content received by the smoker while reducing the measurement of nicotine through conventional measuring mechanisms;
- j. The servants, agents or employees of each of the defendants have conspired to retain on the market a cigarette with nicotine when cigarettes without nicotine can be produced;

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56. As a result of the actions of the defendants, the class representatives have become addicted to smoking and have suffered damages.

57. The conspiracy constitutes a wanton and outrageous disregard for the health and well being of the plaintiffs and members of the class through the concerted effort to profit irrespective of the damage caused.

58. As a result thereof, the class representatives and members of the class have sustained serious and permanent injury and are entitled to an award of aggravated, punitive and exemplary damages.

59. The plaintiffs plead and rely upon the provisions of the *Sale of Goods Act*, R.S.O. 1990 as amended.

DAMAGES SUSTAINED

60. As a result of the conduct of the defendants, their agents, servants and employees specified above, the plaintiff, David Caputo has been and is addicted to the defendants' products and has sustained loss, damage and injury; he has suffered and will suffer permanent and serious injuries and more particularly he developed cancer of the tongue. He has sustained a severe physical and emotional shock to his system and his life expectancy has been materially affected. He has been and will be confined to hospital, his home or to other institutional facilities, he has been

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and will be unable to work, or attend to his personal and family needs, his earning capacity has been and will be lessened and his enjoyment of life has been and will be impaired. He has been and will be put to expense for hospital and medical attention and otherwise, as well as expenses of smoking and smoking cessation treatments.

61. As a result of the conduct of the defendants, their agents, servants and employees specified above, the plaintiff, Luna Roth has been and is addicted to the defendants' products and has sustained loss, damage and injury thereby. She has developed shortness of breath and smoker's cough. She has sustained a severe physical and emotional shock to her system and her life expectancy has been materially affected. Her enjoyment of life has been and will be impaired. She has been and will be put to expense for medical attention and otherwise, as well as expenses of smoking and smoking cessation treatments.

62. As a result of the conduct of the defendants, their agents, servants and employees specified above, the plaintiff, Lori Carwardine has been and is addicted to the defendants' products and has sustained loss, damage and injury thereby. She has suffered and will suffer permanent and serious disability, more particularly bilateral collapsed lungs and emphysema. She has sustained a severe physical and emotional shock to her system and her life expectancy has been materially affected. She has been and will be confined to hospital, her home or to other institutional facilities, she has been and will be unable to work or attend to her personal and

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family needs, her earning capacity has been and will be lessened and her enjoyment of life has been and will be impaired. She has been and will be put to expense for medical attention and otherwise, as well as expenses of smoking and smoking cessation treatments.

63. As a result of the conduct of the defendants, their agents, servants and employees specified above, the plaintiff, Russell Hyduk, has been and is addicted to the defendants' products and has sustained loss, damage and injury; he has suffered and will suffer permanent and serious injuries to his lungs, more particularly emphysema and asthma, heart attack and stroke. He has sustained a severe physical and emotional shock to his system, his life expectancy has been materially affected. He has been and will be confined to hospital, his home or to other institutional facilities, he has been and will be unable to work or attend to his personal and family needs, his earning capacity has been and will be lessened and his enjoyment of life has been and will be severely impaired. He has been and will be put to expense for hospital and medical attention and otherwise, as well as expenses of smoking and smoking cessation treatments.

64. As a result of the conduct of the defendants, their agents, servants or employees, the families of the class representative plaintiffs and those of members of the class have and will sustain loss and damages pursuant to the *Family Law Act*, R.S.O. 1990 as amended. The families have lost the financial support as well as the care, guidance and companionship they would have otherwise expected to receive from

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the class representative plaintiffs and members of the class. They have been put to the time and expense related to the care associated with and arising from the injuries sustained by the class representative plaintiffs and members of the class.

65. The plaintiffs propose that this action proceed under the *Class Proceedings Act*, 1992.

66. The plaintiffs propose that this action be tried at Toronto.

Date: January 13, 1995

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Solicitors for the Plaintiff

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CLASS ACTION

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