

**SUPERIOR COURT OF JUSTICE**

B E T W E E N:

JASMINE RAGOONANAN and PHILLIP RAGOONANAN,  
by their estate representative, DAVINA RAGOONANAN,  
and RANUKA BABOOLAL, by her estate representative, VASHTI BABOOLAL

Plaintiffs

-and-

IMPERIAL TOBACCO LIMITED, ROTHMANS,  
BENSON & HEDGES INC., and JTI-MacDONALD INC.

Defendants

**Proceeding Under the *Class Proceedings Act, 1992***

**STATEMENT OF CLAIM**

**TO THE DEFENDANTS:**

**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.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

**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:**

393 University Avenue  
10th Floor  
Toronto, Ontario  
M5G 1E6

**TO: Imperial Tobacco Limited**  
3810 St. Antoine Street  
Montreal, Quebec

**AND TO: Rothmans, Benson & Hedges Inc.**  
1500 Don Mills Road  
Suite 800  
Toronto, Ontario  
M3B 3L1

**AND TO: JTI-MacDonald Inc.**  
1 First Canadian Place  
60th Floor  
Suite 6000  
Toronto, Ontario  
M5X 1A4

## CLAIM

1. The Plaintiffs each claim:
  - (a) general damages;
  - (b) special damages;
  - (c) aggravated, punitive and exemplary damages;
  - (d) pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act*, 1990 as amended;
  - (e) the cost 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. Jasmine Ragoonanan died in a cigarette related fire which occurred in her home in Brampton, Ontario, during the early morning hours of January 18, 1998. She was three days shy of her fourth birthday. Her mother, Davina Ragoonanan, is her estate representative.
3. Philip Ragoonanan died in that same fire. He was only 16 years old when he died. His sister, Davina Ragoonanan, is his estate representative.

4. Ranuka Baboolal also died in the cigarette related fire of January 18, 1998. She was only 15 years old when she died. Her mother, Vashti Baboolal, is her estate representative.

5. The defendants are all tobacco companies. The three of them dominate the Canadian tobacco industry, as members of an oligopoly. Their market shares for the sale of cigarettes in Canada are 70%, 20%, and 10% respectively.

6. The defendant, Imperial Tobacco Limited ("ITL"), is an incorporated pursuant to the laws of Canada, with its registered office in the City of Montreal. ITL is a wholly owned subsidiary of Imasco Limited of Montreal ("Imasco"), which is in turn controlled by British American Tobacco plc ("BAT"), which holds 42% of Imasco's common shares. Through its subsidiaries and related corporations, BAT is the world's second largest cigarette producer. Since no other shareholder owns more than 10% of Imasco's common shares, BAT exerts effective control over Imasco and through it ITL.

7. The defendant, Rothmans, Benson & Hedges Inc. ("RBH") is incorporated pursuant to the laws of Canada with its registered office in Toronto. RBH is 60% controlled by Rothmans Inc. of Toronto and 40% by Philip Morris International Finance Corporation ("Philip Morris"). The major shareholder of Rothmans Inc. is Rothmans International B.V. of the Netherlands. Rothmans International B.V. is the fourth largest tobacco group in the world. Philip Morris is the world's largest tobacco group, controlling more than 16% of the global tobacco market.

8. The defendant JTI-MacDonald Inc. ("JTI-M") is an incorporated company with its registered office in the City of Toronto. Prior to December, 1999, JTI-M, had operated under the name RJR-MacDonald Inc. Prior to June, 1999, JTI-M had been a wholly owned subsidiary of RJ Reynolds Tobacco Company of the United States ("RJR"). In June of 1999, RJR sold JTI-M to Japan Tobacco International ("JTI"), a company incorporated in Japan.

#### THE INJURY

9. On January 18, 1998, a fire started in the townhouse residence of Davina Ragoonanan at 475 Bramalea Road, unit 208, in Brampton, Ontario (the "Ragoonanan Townhouse"). The fire broke out around 3:30 am. Present and sleeping in the Ragoonanan Townhouse when the fire started were Jasmine Ragoonanan, age 3, Philip Ragoonanan, age 16, Ranuka Baboolal, age 16, Jaden Ragoonanan, age 2, Davina Ragoonanan, age 23, and Ronald Balkarran, age 23.

10. The cause of the fire was an unextinguished cigarette manufactured by the defendant ITL.

11. The plaintiff, Phillip Ragoonanan, had been smoking and watching television on the couch in the second floor living room of the Ragoonanan Townhouse. He intended to sleep on

the couch that night.

12. The rest of the occupants of the Ragoonanan Townhouse were asleep in bedrooms on the third floor of the residence. Davina, Ronald and Jaden were asleep in the front bedroom on the third floor (the “Master Bedroom”). Ranuka and Jasmine were asleep in the rear bedroom on the third floor (the “Children’s Bedroom”).

13. Phillip Ragoonanan fell asleep while smoking.

14. One of the DuMaurier cigarettes that he had been smoking came in contact with the couch where he was sleeping. The cigarette smouldered for some time, before the couch ultimately burst into flames.

15. From there, the fire spread quickly through the rest of the Ragoonanan Townhouse, as well as into an adjoining townhouse.

16. Smoke detectors in the Ragoonanan Townhouse sounded the alarm. Ranuka Baboolal was the first to hear these alarms, and she called out to alert the others. By that time however, the fire had already spread and engulfed much of the lower level of the Ragoonanan Townhouse, and was fast consuming the third floor.

17. Davina Ragoonanan, Ronald Balkarran, and Jaden Ragoonanan found themselves trapped in the Master Bedroom. The fire was outside the room, and the bedroom door was too hot to open.

18. Davina Ragoonanan called 911 for emergency assistance. As smoke billowed into the room, Ronald Balkarran held the infant Jaden outside the third floor window so that he could breathe.

19. Then the fire burst through the bedroom door. Ronald dangled a terrified Jayden from the third floor window, before releasing the two year to the ground.

20. Jaden fell some 8.5 metres, but survived the fire.

21. Ronald then jumped from the third floor window. He suffered injuries as a result of his fall, but he survived the fire.

22. Ronald then called to Davina to jump. Davina jumped, and suffered a serious injury to her spine, and broke her ankle, as a consequence of her fall.

23. Ronald then tried to get back into the house to save Philip, Ranuka, and Jasmine. The front door to the Ragoonanan Townhouse was locked, and the fire was too intense.

24. The bodies of the plaintiffs, Philip, Ranuka, and Jasmine were found later that morning by Brampton fire fighters. They were all huddled together in the Children's Bedroom. They had all died of burns and smoke inhalation.

25. The Ragoonanan Townhouse was completely destroyed in the fire. There was also considerable damage to neighbouring townhouse. The Ragoonanan family lost virtually everything they had ever owned.

#### THE CLASS

26. The plaintiffs are representatives of a class of persons who have sustained damages arising out of the conduct of the defendants, their agents, servants or employees, for whom the defendants are in law responsible.

27. The plaintiffs states that the class in the main action is defined as:

- (1) persons in Canada who suffered a loss, or were injured, as a result of a fire occurring after October 1, 1987, where the fire occurred when a cigarette ignited upholstered furniture ("Injured Plaintiffs");



- (2) the estates of persons in Canada who were killed in fires occurring after October 1, 1987, where the fire occurred when a cigarette ignited upholstered furniture ("Deceased Plaintiffs"); and
- (3) persons who have an *Ontario Family Law Act* claim, derived from the claim of an injured plaintiff, or a deceased plaintiff ("FLA Plaintiffs").

28. The plaintiffs state that the following persons are excluded from recovery in this action (the "Excluded Class"):

- (1) the defendants, their heirs, assigns, and agents, subsidiary and parent corporations; and
- (2) officers and directors of the defendants, or of subsidiary or parent corporations of the defendants.

29. None of the representative plaintiffs in this case are members of the Excluded Class.

30. A class proceeding is the preferable method of litigation in respect of the actionable conduct of the defendants alleged herein, as the number of potential claims would make joinder

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

31. With regards to the issue of access to justice, the defendants are each part of extremely large, international tobacco empires, who together with their affiliated companies in the United States, have a documented history of aggressively outspending any plaintiff who should try to sue them, and conducting litigation in an oppressive manner purposefully designed to avoid responding to the claims, or the merits, in a timely way. Unless this action is allowed to proceed as a class, it is highly unlikely that the necessary practical incentives will ever exist for any plaintiff to bring a claim to Bar, in respect of the Defendants' negligent manufacture of defective products which cause household fires, as set out herein.

#### THE FACTS

32. In 1993, cigarettes were the source of some 13,000 residential fires in Canada. These fires resulted in the deaths of 120 Canadians, with many hundreds of others injured. Total property loss from these fires has been estimated at \$211 million.

33. Cigarette related fires are responsible for 25% of all residential fire deaths in Canada each year. They are the leading cause of fire fatalities.

34. All of these deaths, injuries, and property losses could have been avoided if the defendants would simply agree to make a few changes in the design of their product. Specifically, the defendants could prevent the damages listed above by manufacturing and selling in Canada "fire safe cigarettes", also known as "less fire prone cigarettes".

35. The definition of a "fire safe cigarette", or "less fire prone cigarette", as it is used in these pleadings, and as has been recognized by the U.S. National Institute of Standards and Technology ("NIST") is a cigarette which has "a reduced propensity for igniting upholstered furniture and mattress fires." This objective is achieved by making certain design changes to the cigarette, in particular, a fire safe cigarette can be manufactured if it has one or more of the following features: 1) reduced circumference, 2) reduced tobacco packing density, and 3) reduced paper porosity.

36. Collectively, these three design changes are referred to herein as "fire safety design features."

37. Each of these design changes, on their own, or in combination, contributes to a reduction in the heat energy of the burning tip of the cigarette ("the coal"), thereby reducing the tendency and capacity of the cigarette to ignite soft fabrics. When all three of these fire safety design features are combined in a single cigarette, that cigarette has virtually no ability to ignite soft fabrics. In contrast, the conventional cigarettes sold by the defendants in Canada are almost 100% effective in igniting soft fabrics.

38. The single most important and effective of the fire safety design features is the reduction of the tobacco packing density. This is achieved by quick freezing processed tobacco, and then allowing it to thaw. This process does not alter the taste of the tobacco, nor its ability to addict people, or cause cancer. Further, this process does not significantly add to the cost of producing a cigarette. This freezing and thawing process does however, cause the tobacco to expand, or "puff up", thereby altering its density. This lower density tobacco, when it burns, generates significantly less heat energy than conventional cigarette tobacco, thereby dramatically reducing the tendency and capacity of a cigarette to ignite household fabrics, mattresses, and upholstered furniture.

39. The defendants have known, or ought to have known, of the availability of fire safety design features since at least October 1, 1987.

40. A number of companies affiliated with the defendants currently sell cigarettes in the United States which have certain fire safety design features. In particular, popular brands sold in the United States, such as Virginia Slims, have a considerably reduced propensity to cause household fires because they have a smaller circumference than other commercially available cigarettes.

41. Brands such as Virginia Slims, albeit safer in terms of their reduced propensity to cause household fires, have never been expressly marketed to consumers by the American tobacco companies as having fire safety design features.

42. The defendants have never sold cigarettes in Canada which incorporate fire safety design features.

43. The United States Congress has developed testing methods for assessing the fire safe qualities of various commercially manufactured cigarettes pursuant to the US *Fire Safe Cigarette Act, 1990*.

44. Fire safe cigarette testing standards developed by the US Congress are known, or ought to be known, to the defendants.

45. The defendants have consistently refused to manufacture cigarettes in Canada which incorporate fire safety design features in their manufacture, despite the availability of such cigarettes in other countries. They have repeatedly blocked efforts by government and public health officials to create standards for the manufacture and sale of cigarettes with fire safe design features in Canada.

46. Fire safe cigarettes are no more costly for the defendants to produce than the conventional cigarettes currently sold by the defendants. In fact, they may be less costly as they use less tobacco.

47. Fire safe cigarettes are virtually indistinguishable to consumers from regular cigarettes. Their appearance, taste, packaging and ability to deliver nicotine do not differ from that of regular cigarettes. In blind consumer tests smokers have not been able to tell fire safe cigarettes apart from regular cigarettes.

48. Rather than change their product, the defendants, or their agents, have publicly suggested that household furniture be redesigned to make it more fire resistant, and that government standards and regulations be imposed on the furniture industry instead of on the tobacco industry. This is an entirely impractical for a number of reasons:

- (a) it could be decades before furniture currently in the homes of Canadians is replaced by more fire resistant designs; in contrast, the entire existing Canadian inventory of cigarettes is consumed by smokers in less than three months; thus, all cigarettes presently sold in Canada could be replaced with fire safe models in a very short time; and

- (b) furniture redesign, unlike the redesign of cigarettes, is expensive, and to pursue it would unfairly shift the costs of fires caused by the tobacco industry onto the backs of non-smokers.

49. Rather than redesign their product, the defendants, or their agents, have also publicly suggested that government health officials should instead pursue a strategy of public education, in order to encourage people "not to smoke in bed", and that steps be taken to encourage people to purchase smoke detectors for their homes. These are worthwhile strategies, which have been pursued by public health officials for many decades, to the knowledge of the defendants, but such strategies are of limited effectiveness, and the majority of cigarette fires will not be prevented by such strategies. Deadly fires continue to happen. Only by making slight changes to the defendants' product can the risk of household fires caused by smoking materials be eliminated.

50. Indeed, the defendants could eliminate the risk of household fires caused by cigarettes at very little cost to themselves. Given their ability to do this, it is not open for them to say that other strategies should be pursued by public health officials, when such strategies have been found to be both more expensive, and less effective.

## HISTORY

51. There are over 130 patents worldwide describing various means of making a fire safe cigarette. The earliest of these patents was issued in the US in 1882.

52. In 1929, at the request of US Congress, the US Federal Bureau of Standards developed a fire safe cigarette. The results of the US Federal Bureau of Standard's research were published in the scientific journal *Industrial and Engineering Chemistry*.

53. In 1951, the California Fire Marshal's office developed a fire safe cigarette. The results of its research were published in *Reader's Digest*.

54. In 1974, the United States Senate, passed a bill requiring U.S. tobacco manufacturers to produce a fire safe cigarette. The U.S. tobacco companies spent millions of dollars to derail this bill, and were ultimately successful in blocking its passage through the House of Representatives so that the bill died.

55. In 1982, Philip Morris in the United States began "Project Hamlet". This was a research project to develop a commercially successful, fire safe cigarette. The nickname for the project was derived from intended humour on the part of Philip Morris researchers, referring to the opening of Hamlet's soliloquoy in Shakespeare's play: "to burn or not to burn".



56. By 1987, Philip Morris' Project Hamlet had proven to be a complete success. It had developed an experimental prototype of fire safe cigarette (the "Hamlet Prototype") which expressly incorporated various fire safe design features. It had sent the Hamlet Prototype to 77 "taste testers" across America that it employs on an ongoing basis to monitor the quality of its products.

57. These taste testers were asked, in a blind test, to compare the flavour and consumer acceptability of the Hamlet Prototype along side two of America's most popular conventional cigarette brands, Marlboros and Winstons.

58. The taste testers responded that they could not tell the difference between the Hamlet Prototype, and a Winston or a Marlboro.

59. Philip Morris never marketed the Hamlet Prototype, and discontinued Project Hamlet after the successful consumer test.

60. Philip Morris owns 40% of the Canadian defendant, RBH.

61. Despite the success of Project Hamlet in consumer testing, and despite the facts that the results of Project Hamlet are known to the defendants, none of the defendants have ever applied

the research and technology gained from Project Hamlet for the purpose of offering Canadian consumers a safer product.

62. In 1986, Philip Morris launched a revised version of its Virginia Slims brand in the United States. The brand was targeted at young women, and subsequently proved to be quite popular. While deliberately never advertised as such, Virginia Slims incorporates certain design characteristics which make them markedly less likely to cause household fires. Specifically, they have a reduced circumference which make them less likely to ignite household fabrics than conventional cigarettes.

63. In 1984, the U.S. Congress passed the *Cigarette Safety Act*. The *Cigarette Safety Act* created a Technical Study Group of 15 experts to determine the feasibility of making a fire safe cigarette ("TSG"). The heads of research for Philip Morris, RJR Reynolds, American Tobacco and Lorillard Tobacco Company were represented by the TSG.

64. Also included on the TSG were representatives of :

- (a) the International Association of Fire Chiefs;
- (b) the National Fire Protection Association;
- (c) the National Cancer Institute;
- (d) the Consumer Product Safety Commission;
- (e) the American Medical Association;

- (f) the U.S. Furniture Industry;
- (g) the American Burn Association;
- (h) the U.S. Fire Administration;
- (i) the National Bureau of Standards;
- (j) the Federal Trades Commission; and
- (k) the Trauma Foundation.

65. In 1987, the TSG produced its report to Congress. The members of the TSG unanimously concluded as follows:

"The Technical Study Group finds that it is technically feasible and may be commercially feasible to develop cigarettes that will have a significantly reduced propensity to ignite upholstered furniture or mattresses. Furthermore, the overall impact on other aspects of the United States society and economy may be minimal. Thus it may be possible to solve this problem at costs that are less than the potential benefits, assuming the commercial feasibility of the modified cigarettes."

66. The best fire safe cigarette design which has actually been tested by the NIST pursuant to its mandate under the U.S. *Cigarette Safety Act* of 1984 to develop fire safety standards for American cigarettes, was a cigarette manufactured by RJR in 1987 (the "RJR Prototype"). The RJR Prototype used lower density tobacco. This lower density was achieved by adding a freezing and thawing stage to the processing of the tobacco that went into the manufacture of the RJR Prototype.

67. In testing done by NIST, it was found that the RJR Prototype was virtually incapable of generating sufficient heat energy to ignite upholstered furniture.

68. In 1990, U.S. Congress passed the *Fire Safe Cigarette Act*. Again, the same 15 members of the TSG convened to develop a performance standard or test method that the government could be use to test fire safety qualities of various cigarette designs.

69. In 1993, the TSG again reported to Congress. Eleven members of the TSG determined that a performance standard was available, and submitted their recommendations to Congress. The 4 representatives of the U.S. tobacco companies on the TSG all dissented, and argued that there was no possible performance standard for fire safety.

70. The performance standard adopted by the TSG simulates conditions in North American homes. A smoldering cigarette is exposed to a pad of cotton fabric and foam. If the material consistently catches fire when exposed to a smoldering cigarette then that particular brand is deemed unsafe. If the material does not catch fire on a consistent basis, then the cigarette is deemed to pass proposed TSG safety standards. A fire safe cigarette will generally not cause the cotton and foam to ignite in more than 90% of tests. A conventional cigarette is the exact opposite and will generally cause the test material to ignite in over 90% of its exposures.

71. From December 4 to 8, 1995, the Ontario Coroner held an inquest into the issue of fire safe cigarettes (the "Babony Inquest"). The inquest was in respect of the death of Ann Babony.

72. At the inquest, the Ontario Fire Marshal's office presented a study of fire losses from 1990 to 1994. The study analysed some 114,204 fires in the province during that period. The study found that cigarette related fires were, by far, the leading cause of death due to fires in the province.

73. On December 8, 1995, the Coroner's jury made the following recommendations:

"For the purpose of assisting readers of this report to understand the reasons for our recommendations, we offer the following synopsis of our analysis of the evidence presented in court. Based on the evidence, the cause of Ann Babony's death was due to smoke inhalation as a result of a fire which originated in an upholstered chair. The damage to the chair is consistent with a smouldering fire caused by the careless disposal of smoker's material. Smoke detectors were present in the home but were not effective in preventing this death. We the jury recommend:

1. That the federal government of Canada require by law that all cigarettes sold in Canada meet the condition of being fire-safe.
2. The federal government should issue standards regarding the manufacture and sale of cigarettes in Canada. There are presently standards in the United States which define fire-safe cigarettes that may be studied and implemented in Canada."

74. The defendants are intimately familiar with the findings of the Babony Inquest. Lawyers for the defendants participated in preliminary meetings with Crown counsel for the Ontario

Coroner before the beginning of the inquest, and provided documents to Crown counsel suggesting that furniture should be made more fire resistant, rather than that cigarettes should be redesigned.

75. The defendants ultimately refused to participate in the Babony Inquest. However, just as the inquest was commencing, a Mr. Francis Albert, who described himself as the President of Prevention Canada, a purported branch of the Canadian Association of Fire Chiefs, attended, and demanded to give evidence.

76. Mr. Albert sought to present the exact same documents to the inquest jury as the lawyers for the defendants had tried to present to Crown counsel in preliminary meetings, before the beginning of the Babony Inquest.

77. Crown counsel ultimately refused to accept the documents from Mr. Albert, and did not present them to the jury.

78. During the mid 1980's, fire service organization in both the United States and Canada were quite vocal in expressing their demands that governments pass regulations to mandate the sale of fire safe cigarettes because such cigarettes would reduce the risk of residential fires, and therefore, would help save lives, including the lives of fire fighters.

79. As the issue of fire safe cigarettes became more widely known, the defendants, and their US affiliates, made large donations to various fire service organizations in the United States and Canada. Following these donations, the recipients of these funds ceased in their advocacy for fire safe cigarettes, and began to argue that the furniture industry should make changes to its product to prevent cigarette related fires.

80. In particular, Peter Sparber, who had formerly been employed with the American Tobacco Institute, began to work as a lobbyist for the US Fire Marshal's Association. After he began working for the US Fire Marshal's Association, that organization began to advocate for changes in furniture design, rather than advocate for changes in cigarette design, as a way to prevent household fires.

81. In a similar fashion, Francis Albert surreptitiously advocates for the defendants under the false guise of advocating for the persons in fact injured by, or at risk of injury from, conventional cigarettes, and attempted to give evidence at the Babony Inquest in furtherance of a deliberate attempt by the defendants to conceal the risks of fire posed by conventional cigarettes.

82. On many occasions, the Canadian Non-Smoker's Rights Association (NSRA) has written to the defendants, to alert them of the need to make changes to their product in order to protect public safety. These letters have specifically put the defendants on notice of the fact that they may

be exposed to the risk of a civil lawsuit for fire damage, if they continue to refuse to make design changes to their product necessary to avoid the risk of fires.

83. Specifically, counsel for the NSRA, David Sweanor, wrote the C.E.O. of ITL, Jean-Louis Mercier, on October 29, 1986, advising him of the risk that ITL could be liable in negligence if it refused to redesign its products to incorporate fire safety design features.

84. Jean-Louis Mercier acknowledged receipt of the letter on November 7, 1986, but ITL, to this date, still does not manufacture a cigarette which incorporates fire safety design features.

#### COMMON ISSUES

85. Members of the class which the plaintiffs represent have common issues which include the following:

- (1) whether the defendants owe a duty of care to the plaintiffs, and to the Injured Plaintiffs, the Deceased Plaintiffs and the FLA Plaintiffs (collectively, the “Class Members”);
- (2) whether the defendants have breached that duty of care;



- (3) whether the defendants are liable for the manufacture, sale and distribution of a defective product;
- (4) whether the conduct of the defendants constitutes negligence;
- (5) whether the defendants are liable for the tort of conspiracy;
- (6) whether the defendants have breached a fiduciary duty to the Class Members;
- (7) whether the Class Members have suffered loss, injury and damages as a result of the conduct pursued by the defendants; and
- (8) whether the Class Members are entitled to compensatory, aggravated, punitive or exemplary damages as a result of the defendants conduct.

#### NEGLIGENCE ALLEGATIONS

86. The plaintiffs allege that their injuries, losses, and damages were caused or contributed to by the negligence of the defendants, particulars of which include the following:

- (1) the defendants knew at all material times, or ought to have known, that their product was inherently defective and dangerous; and
- (2) the defendants knew, or ought to have known, how to manufacture a safer product and have no justification for not doing so.

#### STRICT PRODUCTS LIABILITY

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

#### PRODUCT LIABILITY ALLEGATIONS

88. In the alternative, the plaintiffs allege that their injuries, losses and damages and that of the Class Members were caused or contributed to by the manufacture, design, sale and distribution of the defendants' products. As a direct and proximate cause of the defendants' design, manufacture, marketing of the defective product, and of the defendants' failure to design, manufacture and market a safer product which would have a reduced propensity for causing fires, the plaintiffs and the Class Members have suffered or will suffer injury and loss.

### CONSPIRACY ALLEGATIONS

89. The plaintiffs alleges that their injuries, losses and damages, and those of the Class Members, were caused or contributed by a conspiracy between the defendants and defendants' various officers, directors and employees, the known particulars of which are as follows:

- (1) the defendants conspired to deprive the public of information regarding the availability of fire safe cigarettes;
- (2) the defendants conspired to prevent the Canadian federal and provincial governments from regulating their product, developing fire safety codes for their product, or otherwise requiring the sale of fire safe cigarettes in place of conventional ones; and
- (3) the defendants conspired to not manufacture or sell fire safe cigarettes in Canada, even though they knew, or ought to have known, how to make such a product, and even though it was commercially feasible for them to make such a product.

### BREACH OF FIDUCIARY DUTY

90. Tobacco smokers are nicotine addicts. The defendants know this, and specifically formulate and design their products to heighten the impact of nicotine on smokers, and to thereby increase its addictive qualities.

91. As a result of their nicotine addiction, many smokers are vulnerable to the risk of fire caused by conventional cigarettes. Further, many non-smokers, who live or work with or near smokers, also share that same vulnerability to the risk of fires caused by conventional cigarettes.

92. The power of nicotine addiction is such that many smokers cannot sleep through an entire night without smoking. Many smokers will keep cigarettes on their night table, and will awaken in the middle of the night with nicotine cravings. They may then smoke in bed to attempt to satisfy those cravings. Such behaviour is a direct result of the design of the defendants' product, which is expressly designed to have maximum addictive qualities.

93. Further, many smokers are also alcoholics, and will often consume tobacco and alcohol in combination. Again, the defendants are aware of this, and have undertaken marketing studies,

and advertising efforts, to link the consumption of tobacco with the consumption of alcohol in the minds of the public.

94. The fact that smokers are addicted to nicotine places them in a position of vulnerability in relation to defendants. Smokers, as addicts, and non-smokers affected by their actions, are necessarily reliant on the defendants to design products with the best interests of the public in mind, and to exercise their discretion in respect of the design, manufacture and marketing of cigarettes with particular attention to the known risks of injury.

95. Consequently, the defendants owe a fiduciary duty to smokers, and to persons who may be injured by smokers, because the addictive nature of cigarettes creates a relationship of vulnerability as between smokers and non-smokers, and the defendants.

96. The defendants have breached their fiduciary duties to the plaintiffs and the Class Members, in that they have failed to make reasonable modifications to a product which they knowingly sell to persons suffering from nicotine addiction.

DAMAGES SUSTAINED

97. Jasmine Soleile Ragoonanan died in the fire of January 18, 1998. She was 3 old.
98. Philip Ragoonanan died in the fire of January 18, 1998. He was 16 years old.
99. Ranuka Baboolal died in the fire of January 18, 1998. She was 15 years old.

#### PUNITIVE DAMAGES AND MOTIVES OF DEFENDANTS

100. In attempting to assess the defendants motives for not producing a fire safe cigarette, Ontario Coroner Donald Bunt, at the conclusion of the Babony Inquest, wrote as follows:

"It would appear that the reason cigarette manufacturers are not producing Fire Safe Cigarettes is not because they are not acceptable to the consumer, or can not be produced, or can not be produced cheaply. Neither manufacturing capabilities nor consumer acceptance have anything to do with why Fire Safe Cigarettes are not being produced."

101. There are however, a number of explanations to account for the defendants' behaviour, including the following:

- (1) The defendants are opposed to the idea of admitting that any changes can be made to their product which will make them safer. If they admit that fires can be prevented by redesigning cigarettes, then they may also have to admit that lung cancer can be prevented by redesigning cigarettes, or that cigarettes can be redesigned to make them less addictive, or less attractive to children.

- (2) Specifically, with regards to the defendants ability to design a safer cigarette, BAT patented in 1967 a cigarette that was less carcinogenic. The research behind this patent was known as Project Ariel. The Ariel cigarette heats tobacco, to create a nicotine mist, rather than burning it, to create harmful smoke. The result is a product which is less likely to cause lung cancer. In the same way that the defendants have never marketed a fire safe cigarette in Canada, despite having the technology and means to do so, they have also never marketed a less carcinogenic cigarette in Canada, despite again, having the means and the technology to do so.
- (3) The defendants are opposed to absolutely any form of government regulation of their product. They spend enormous sums of money on lobbying government officials, and have vigorously opposed any attempts to control their industry, for fear that this could lead to government regulation of their product to enforce fire safety codes, or control nicotine content, pesticide content, additive content, addictiveness, and general health risks of their product.
- (4) The defendants have opposed changing their product because they can. No one has had the power to force them to change their ways. Their power to prevent changes to their product stems from the following sources:

- (i) Their wealth has enabled them to influence government into not regulating them as an industry. There is currently no government pressure for the defendants to make their product safer;
  
- (ii) For most of their history the defendants have enjoyed a virtual immunity from civil lawsuits. They defend product liability lawsuits aggressively. Their American counterparts went more than 40 years without losing a case, while succeeding in defeating more than 800 claims. In Canada, their resources were so vast that until recently no one even tried to sue them, and then, in Ontario, only as a class action. There is therefore no legal pressure for the defendants to make their product safer; and
  
- (iii) The defendants have no competition. One company controls 70% of the Canadian market, and will soon control 90%. There are no competing companies which advertise that the availability of a "fire safe" product. There is therefore no market pressure for the defendants to make their product safer.

102. Recently, documents have come to light as a result of litigation in the United States which provide answers as to why Canadian tobacco companies have refused to make changes in their product so as to make them fire safe. Specifically, on August 22, 23, and 24, 1990, ITL hosted in Montreal, Quebec, a Product Development Conference for all of the affiliated companies of its



parent corporation, BAT (the "Montreal Conference"). The meeting was secret. It was attended by executives and research scientists from ITL, BAT (UK), BAT Deutschland (Germany), Souza Cruz (BAT's subsidiary in Brazil), and by Brown & Williamson (BAT's subsidiary in the USA).

103. The purpose of the Montreal Conference was to co-ordinate research activities for the various BAT subsidiaries around the world, and to assign priorities for future research and product development.

104. Various research projects were ranked from 1 to 5 according to their priority. Research projects which involved efforts to make cigarettes more addictive for consumers, by treating tobacco with ammonia so as to alter the pH chemistry of the tobacco, and thereby boosting the impact of nicotine, were given the highest priority by the BAT companies. These projects were ranked as priority number 5 by all of the BAT companies, including ITL.

105. With regards to a project to develop fire safe cigarettes, this project was assigned the lowest priority by ITL. In contrast however, in the United States and Britain, where there existed government regulatory pressure to market fire safe cigarettes, the BAT affiliated companies in those jurisdictions gave the production of fire safe cigarettes their highest priority, assigning a ranking of 5. On this issue of priorities with regards to the development of fire safe cigarettes, the minutes of the Montreal Conference read in part:

"Project or Concept Name: Reduced Ignition Potential Cigarettes

Company Priority: 5

<u>Group Priority:</u>	Souza Cruz (Brazil)	1
	Germany	1
	BATCo. (UK)	5
	B&W (USA)	5 (highest priority)
	ITL (Canada)	1 (lowest priority)

Project Objectives

To investigate how cigarette parameters affect ignition potential, particularly in the context of a US blended cigarette, in order to develop prototype cigarette designs with reduced ignition potential. The initial thrust is towards finding a reliable and acceptable method of measurement of ignition potential.

Consumer Need/ Target Market

U.S. regulatory pressures

Group Priority

No regulatory pressure in Brazil, Germany and Canada

BUT - the project is a high priority for B & W and some BATCo. countries."

106. What the above document reveals is that the companies in the BAT empire will only take action to protect public safety where such action is required by government, and that in the absence of such pressure, they will conduct themselves with reckless and callous indifference to the foreseeable damages occasioned by conventional cigarettes.

107. A further document which reveals the reasons why the defendants have refused to make a safer product, even while capable, is a letter sent by Sir Patrick Sheehy, C.E.O. of BAT, to his subordinate, Purdy Crawford, C.E.O. of Imasco, in 1986. Apparently, Purdy Crawford had

suggested that Imasco should undertake research to develop a safer product, and in particular, to develop a less carcinogenic product. Sir Patrick Sheehy wrote back from BAT headquarters in London, England:

"In attempting to develop a 'safe' cigarette you are, by implication, in danger of being interpreted as accepting that the current product is 'unsafe' and this is not a position I think we should take."

108. The defendants have therefore demonstrated an incredible, brazen disregard for the public good. The defendants' conduct cries out for court censure, and merits a large punitive and exemplary damages award so that the defendants may held responsible for their actions, and so that others may be deterred from engaging in this sort of reckless disregard for the general good in the future.

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

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

**DATE:** January 11, 2000

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