

**COURT OF APPEAL FOR BRITISH COLUMBIA**

Citation: **British Columbia v. Imperial  
Tobacco Canada Ltd.,**  
2004 BCCA 634

Date: 20041202

Docket: CA030975; CA030976; CA030977; CA030978

Docket: CA030975

Between:

**Her Majesty the Queen in Right of British Columbia**

Appellant  
(Plaintiff)

And

**Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges  
Inc., Rothmans Inc., JTI-Macdonald Corp., Canadian Tobacco  
Manufacturers' Council, B.A.T. Industries p.l.c., British  
American Tobacco (Investments) Limited, Carreras Rothmans  
Limited, Philip Morris Incorporated, Philip Morris  
International, Inc., R.J. Reynolds Tobacco Company, R.J.  
Reynolds Tobacco International, Inc., Rothmans International  
Research Division and Ryeseeks p.l.c.**

Respondents  
(Defendants)

- and -

Docket: CA30976

Between:

**JTI Macdonald Corp.**

Respondent  
(Plaintiff)

And

**Attorney General of British Columbia**

Appellant  
(Defendant)

- and -

Docket: CA030977

Between:

**Imperial Tobacco Canada Limited**

Respondent  
(Plaintiff)

And

**Attorney General of British Columbia**

Appellant  
(Defendant)

- and -

Docket: CA030978

Between:

**Rothmans, Benson & Hedges Inc.**

Respondent  
(Plaintiff)

And

**Attorney General of British Columbia**

Appellant  
(Defendant)

Before: The Honourable Madam Justice Huddart  
(In Chambers)

**Oral Reasons for Judgment**

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and J. Duvall

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Counsel for the Respondent  
Imperial Tobacco Canada  
Limited

L.D. Russell and  
M. Prohl

Counsel for the Respondent  
Canadian Tobacco  
Manufacturers' Council

Place and Date:

Vancouver, British Columbia  
2 December 2004

(application for stay pending stay applications to  
Supreme Court of Canada)

[1] **HUDDART J.A.:** This is an application for an order under s. 65.1 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as amended by S.C. 1994, c. 44, s. 101, to stay proceedings in Supreme Court action No. S010421 (the government's action) pending determination of leave applications filed with the Supreme Court of Canada on 22 June 2004, and, if leave is granted, pending the determination by that Court of applications for a stay pending the disposition of the appeal.

[2] The applicants have sought leave to appeal the decision of this Court made 20 May 2004 setting aside the order of R. Holmes J. finding unconstitutional the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c.30. That *Act* provides the statutory authority for the cause of action on which the government's action depends.

[3] The respondent does not suggest any prejudice to the government's action beyond that inherent in the delay in any ordinary proceeding before the courts. Nor does it suggest the constitutionality of the *Act* is not a serious issue. The government's position is that it is entitled to continue the usual process of document discovery without interruption in the absence of any irreparable harm to the applicants.

[4] Mr. Justice Holmes, the case management judge in the Supreme Court, took a different view when he placed

restrictions on the disclosure of the list of documents provided by the applicants to counsel for the government. He did so "to protect the integrity" of the rule of confidentiality set down in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, designed to ensure that information generated in litigation will be used only within the litigation, a rule seen to be necessary to ensure a fair trial process.

[5] In recognition of that rule, counsel for the government, who wants to begin viewing documents immediately, would accede to an order staying the proceeding if members of the Bull Housser Tupper legal team representing the government and no others are allowed to view documents they request from the list provided to them on whatever corollary conditions this Court would impose. Alternatively, they are agreeable to providing appropriate solicitors' undertakings to the same effect. These are stricter terms than those imposed by R. Holmes J. to protect the list.

[6] The respondent considers this to be sufficient protection to ensure any real risk of irreparable harm from inappropriate disclosure is precluded.

[7] The applicants do not agree. They consider such an order would be ineffective to confine disclosure to lawyers at Bull

Housser Tupper, and do not accept that an undertaking could have that effect.

[8] I agree with the applicants, and more particularly with what R. Holmes J. said at paras. 8 to 14 and 29 to 32 of his reasons for granting the confidentiality order. Given the public interest and political nature of this unique litigation, and the volume of documents, I am not persuaded the protection offered by a court order or undertaking is sufficient to protect copying and distribution of documents disclosed to counsel. This should not be seen as an affront to counsel for the government. Undoubtedly, they would do their best. It is simply in the nature of some issues that breaches of disclosure rules, orders or undertakings, are difficult to control.

[9] While that risk may be seen as minimal, I am persuaded it is real. Importantly, it is not met by any real prejudice to the respondent in this case. The application for leave was submitted to the Supreme Court of Canada on 22 November. If leave to appeal is not granted, the stay will terminate. If leave is granted, the Supreme Court will be considering a new application.

[10] For these reasons, I find the balance of convenience is with the applicants.

[11] The stay of the Supreme Court action is granted with two agreed conditions. The application to settle the order of R. Holmes J. may continue as may an application to consider the terms of a confidentiality order for the documents. The applicants will put themselves in a position to file their application for a stay of proceedings in the Supreme Court of Canada forthwith after an order granting leave is made, if one is made. The respondent will be at liberty to apply to vary this order should the need arise. Costs will be in the appeal.

"The Honourable Madam Justice Huddart"