IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***HMTQ v. Imperial Tobacco et al.***
2004 BCSC 953

Date: 20040709
Docket: S010421
Registry: Vancouver

Between:

Her Majesty The Queen in Right of British Columbia

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 Ryesekks p.l.c.

Defendants

- and -

Docket: S010423
Registry: Vancouver

Between:

JTI Macdonald Corp.

Plaintiff

And

Attorney General of British Columbia

Defendant

- and -

Docket: S010424
Registry: Vancouver

Between:

Imperial Tobacco Canada Limited

Plaintiff

And

Attorney General of British Columbia

Defendant

- and -

Docket: S010425
Registry: Vancouver

Between:

Rothmans, Benson & Hedges Inc.

Plaintiff

And

Attorney General of British Columbia

Defendant

Before: The Honourable Mr. Justice Holmes

Oral Reasons for Judgment

July 9, 2004

Counsel for the Plaintiff:	D.A. Webster, QC E. Myers, QC
Counsel for JTI-Macdonald Corp., R.J. Reynolds Tobacco Co. and R.J. Reynolds Tobacco International, Inc.	D. Bloor
Counsel for Philip Morris Incorporated and Philip Morris International Inc.	D.R. Clark
Counsel for British American Tobacco (Investments) Limited	C. Dennis
Place of Hearing:	Vancouver, B.C.

[1] **THE COURT**: The defendant British America Tobacco Investments Ltd. ("Investments") applies for an order varying the scheduling order of the case management conference of June the 4th, 2004 for the continuation of the hearing of motions pursuant to then Rule 13(10) and 14(6) and remitted to this court by the Court of Appeal in their decision of May 20, 2003.

[2] The defendant Philip Morris joins in supporting that application. The *ex juris* defendants have filed for Leave to Appeal the decision in the aforementioned appeal to the Supreme Court of Canada. The applications for leave were filed June 22, 2004.

[3] At a case management conference June 4, 2004, an order was made scheduling an exchange of briefs among the parties and designating the week of October 12, 2004 for the hearing of submissions in respect of the motions. The order provided leave to the defendant Investments, indeed, to any *ex juris* defendants, to apply to vary the order and this application complies with the express request of the court that if a motion to vary was to be made, it should be done quickly so that if not successful compliance with the time schedule in place could be maintained.

[4] The variation sought by the applicant Investments proposes: One, the present schedule for exchange of outlines by the parties of July 12, August 23, September 6, 2004 be maintained. Secondly, the hearing of submissions in the week of October 12, 2004 will proceed if prior to October 1, 2004 the Supreme Court of Canada has dismissed the application for Leave to Appeal.

[5] Thirdly, that new hearing dates, if required, would be: (a) fixed forthwith following decision refusing leave to appeal; or (b) following a grant of Leave to Appeal subject to consideration and direction by this court as to whether the hearing should be deferred pending a decision of the Supreme Court of Canada regarding the constitutional validity of the ***Act***.

[6] The appellant puts forth the proposed hearing schedule as a reasonable compromise between the position of the plaintiff that the matter should proceed to completion in the week of October 12, 2004 in any event and the position of the jurisdictional defendants that the then Rule 13(10) application should abide the final determination of the constitutional validity of the ***Act*** which will occur either when the Supreme Court of Canada denies a pending appeal for a

Leave applications or after decision on appeal if they are allowed.

[7] The applicant submits that it is not a judicious use of the resources of the court or the parties to proceed with a hearing premised upon a foundation that could afterwards be changed materially because of the appellate decision. Counsel for Philip Morris argues that until the interpretation of the ***Act*** has been finalized through appeal this court should refrain from hearing argument and ruling on whether this court has jurisdiction over the *ex juris* defendants.

[8] It is unlikely that there will be a decision in respect of the leave applications that would permit the currently scheduled week of October 12, 2004 hearing of submissions to proceed. If leave is obtained, many months will pass before the hearing of the appeals and likely several months thereafter before a decision could be given. Inevitably, the delay will be significant.

[9] The plaintiff takes the position that the applicant is seeking a stay of the order of the Court of Appeal that remitted the *ex juris* defendants' motions to this court for determination. I agree with counsel for the plaintiff that is the practical effect of the application. Technically it is less in the sense that it proposes a stepped process for

consideration of deferral of proceeding on the *ex juris* motions occurring if leave to appeal is granted.

[10] I do not doubt, based on the submissions that I have heard in this matter, that a deferral would be sought by the *ex juris* defendants if they are granted Leave to appeal. The plaintiff argues that this court has no power to grant a stay of proceedings in respect of a Court of Appeal decision pending an appeal to the Supreme Court of Canada. I agree.

[11] The plaintiff notes that the standard to be met for a grant of a stay by the Court of Appeal involves a tripartite test requiring some merit to the appeal, irreparable harm to the applicant if any stay were refused, and finally that the balance of convenience favour the applicant.

[12] The plaintiff suggests that that test could not be met by the applicant here. It is not for me to make that determination. The applicant is free to bring a stay application in the Court of Appeal if advised. I accept, however, that the high standard applicable to a stay application brought in the appropriate appellate court does have general significance to the deferral of scheduling for completion of the jurisdictional motions that I am being asked to consider which in practical effect equate to a stay. I must be cognizant of the fact of the hearing of motions

regarding the *ex juris* defendants have been heard. What is contemplated here is that the parties can supplement their submissions in light of the Court of Appeal decision as to the validity of the ***Act,*** changes in the law that may have occurred and make a restated summary of their positions.

[13] Constitutional challenges to the ***Act*** and the constitutional challenges of the *ex juris* defendants were heard at the same time by direction of the court. The *ex juris* defendants favoured that position. The plaintiff had wished to proceed separately on the two issues with the jurisdictional issue to be heard in advance of the issue of the constitutional validity of the ***Act***.

[14] At a case management conference of June 30, 2003, the court was advised of an agreement of the parties which was to the effect that if the Court of Appeal were to find in favour of the validity of the ***Act*** the applications of the *ex juris* defendants would be remitted to the Supreme Court for consideration and decision on the basis that the ***Act*** was constitutionally valid.

[15] A change to the judgment was made to afford the *ex juris* defendants status on the appeal as to the constitutional validity of the ***Act***. The Court of Appeal was requested to remit the applications of the *ex juris* defendants in

accordance with the agreement reached by the parties if the ***Act*** was held to be constitutionally valid. It did so.

[16] Mr. Justice of Appeal Lambert for the court directed:

> "The applications of the *ex juris* defendants pursuant to the then rules 13(10) and 14(6) regarding the issue of jurisdiction are remitted to the Supreme Court of British Columbia for consideration and decision on the basis that the ***Tobacco Damages and Health Care Costs Recovery Act*** is constitutionally valid legislation."

[17] I share the view of counsel for the plaintiff that the spirit of that agreement did not envision that there would be a deferral or stay of this court proceeding to decision on the *ex juris* defendants' applications until the matter of the constitutional validity of the ***Act*** had been finally determined by decision of the Supreme Court of Canada. If that was desired, it would surely have been made explicit in the agreement.

[18] In my view, the decision of the Court of Appeal grants the plaintiff the right to proceed with the determination by this court of the jurisdictional issue without delay. That is not contingent upon whether Leave to Appeal is granted or not.

[19] The court must balance the plaintiff's right to proceed with reasonable accommodation to the parties in respect of

preparation, hearing time and counsel availability. I am satisfied that those accommodations have been met within the present schedule and the week of October 12th hearing date.

[20] What is now at issue is essentially a supplemental argument, I do not see in the context of this proceeding or in law, it is either an injudicious use of time and resources of the court or the parties to see this matter proceed. The application for variance is dismissed.

"R.R. Holmes, J."
The Honourable Mr. Justice R.R. Holmes