

**IN THE SUPREME COURT OF CANADA**

**(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)**

Court File No. 33563

BETWEEN:

**THE ATTORNEY GENERAL OF CANADA**

Appellant/Respondent on Cross-Appeal  
(Third Party)

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA**

Respondent  
(Respondent)

- and -

**IMPERIAL TOBACCO CANADA LIMITED, ROTHMANS, BENSON & HEDGES INC.,  
ROTHMANS INC., JTI-MACDONALD CORP., B.A.T. INDUSTRIES P.L.C., BRITISH  
AMERICAN TOBACCO (INVESTMENTS) LIMITED, CARRERAS ROTHMANS  
LIMITED, PHILIP MORRIS USA INC., PHILIP MORRIS INTERNATIONAL INC.,  
R.J. REYNOLDS TOBACCO COMPANY and R.J. REYNOLDS TOBACCO  
INTERNATIONAL, INC.**

Respondents/Appellants on Cross-Appeal  
(Appellants)

(style of cause continues inside cover page)

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**FACTUM OF THE RESPONDENTS JTI-MACDONALD CORP.,  
R.J. REYNOLDS TOBACCO COMPANY ON APPEAL  
AND R.J. REYNOLDS TOBACCO INTERNATIONAL, INC.  
ON APPEAL**

- and -

**FACTUM OF THE APPELLANTS JTI-MACDONALD CORP.,  
R.J. REYNOLDS TOBACCO COMPANY ON APPEAL  
AND R.J. REYNOLDS TOBACCO INTERNATIONAL, INC.  
ON CROSS-APPEAL**

**(Pursuant to Rules 42 and 43 of the *Rules of the Supreme Court of Canada*)**

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**FACTUM OF RESPONDENTS ON APPEAL**

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**FACTUM OF APPELLANTS ON CROSS-APPEAL**

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### **PART I – STATEMENT OF FACTS**

1. In order to avoid duplication, JTI-Macdonald Corp. (“JTI”), R.J. Reynolds Tobacco Company (“RJRT”) and R.J. Reynolds Tobacco International, Inc. (“RJRTI”) adopt the Statement of Facts set out in the Consolidated Factum of Respondents on Appeal of Rothmans, Benson & Hedges Inc., Rothmans Inc., Philip Morris USA Inc. and Philip Morris International Inc.

### **PART II - QUESTIONS IN ISSUE**

2. The essential question on this appeal is whether it is so obvious that the defendants’ negligent misrepresentation claim against the Appellant, the Attorney General of Canada (“Canada”) is radically defective and bound to fail that it should be struck preliminary, depriving the defendants of any response by Canada, discovery or trial. As the Court of Appeal concluded, the answer to that question is “no”.

### **PART III – STATEMENT OF ARGUMENT**

3. JTI, RJRT and RJRTI adopt the Statement of Argument set out in the Consolidated Factum of Respondents on Appeal of Rothmans, Benson & Hedges Inc., Rothmans Inc., Philip Morris USA Inc. and Philip Morris International Inc.

### **PART IV – SUBMISSIONS CONCERNING COSTS**


4. JTI, RJRT and RJRTI seek their costs in this appeal and in the courts below.

### **PART V - ORDERS REQUESTED**

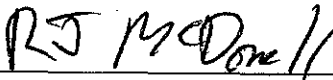
5. JTI, RJRT and RJRTI submit that the appeal should be dismissed.

RESPECTFULLY SUBMITTED BY

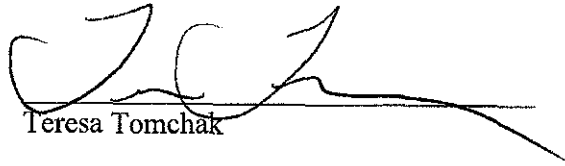
Counsel for the Respondents on Appeal, JTI-Macdonald  
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Robert McDonnell



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Teresa Tomchak

Dated: January 7, 2011

### PART I – STATEMENT OF FACTS

1. In order to avoid duplication, JTI-Macdonald Corp. (“JTI”), R.J. Reynolds Tobacco Company (“RJRT”) and R.J. Reynolds Tobacco International, Inc. (“RJRTI”) adopt the Statement of Facts set out in the Consolidated Factum of Appellants on Cross-Appeal of Rothmans, Benson & Hedges Inc., Rothmans Inc., Philip Morris USA Inc. and Philip Morris International Inc.

### PART II - QUESTIONS IN ISSUE

2. The essential question on these cross-appeals is whether it is plain and obvious that the defendants have no possible claim against Canada apart from their claim in negligent misrepresentation, despite Canada’s involvement in and direction of the very conduct now alleged by British Columbia to constitute “tobacco related wrongs”, despite Canada’s central and participatory role in the tobacco industry over many decades and despite Canada’s development, licensing and promotion to the defendants of tobacco strains specifically intended, on health grounds, for the low-“tar” cigarettes that are now alleged to have in fact been more dangerous.

3. Given the allegations in the third party notices, it is arguable, at a minimum, that the defendants have the following claims:

- (a) a claim for contribution and indemnity under s. 4 of the *Negligence Act* or at common law;
- (b) a claim for equitable indemnity; and
- (c) claims for negligent design and failure to warn.

### PART III – STATEMENT OF ARGUMENT

4. JTI, RJRT and RJRTI adopt the Statement of Argument set out in the Consolidated Factum of Appellants on Cross-Appeal of Rothmans, Benson & Hedges Inc., Rothmans Inc., Philip Morris USA Inc. and Philip Morris International Inc.

**PART IV – SUBMISSIONS CONCERNING COSTS**

5. JTI, RJRT and RJRTI seek their costs in this cross-appeal and in the courts below.

**PART V - ORDERS REQUESTED**

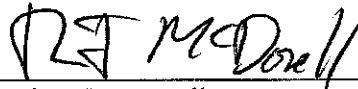
6. The cross-appeal should be allowed. The portion of the Court of Appeal's order that strikes claims by the defendants against Canada should be set aside, with no order made in substitution for it.

RESPECTFULLY SUBMITTED BY

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