Court File No. 33563

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

APPELLANT/RESPONDENT BY CROSS-APPEAL
(THIRD PARTY)

– 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 BY CROSS-APPEAL
(APPELLANTS)

– and –

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA

RESPONDENT
(RESPONDENT)

– and –

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA and HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEW BRUNSWICK

INTERVENERS

CONSOLIDATED FACTUM OF ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., PHILIP MORRIS USA INC. AND PHILIP MORRIS INTERNATIONAL INC. IN RESPONSE TO NEW ARGUMENTS IN THE FACTUM OF HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA

(pursuant to Sub-Rules 29(3) and 29(4) of the *Rules of the Supreme Court of Canada*)

COUNSEL FOR ROTHMANS, BENSON & HEDGES INC. AND ROTHMANS INC.
MACAULAY McCOLL LLP
1575 – 650 West Georgia Street
Vancouver, British Columbia V6B 4N9
Telephone: 604-687-9811
Facsimile: 604-687-8716
KENNETH N. AFFLECK, Q.C.

OTTAWA AGENT FOR ROTHMANS, BENSON & HEDGES INC. AND ROTHMANS INC.
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: 613-233-1781
Facsimile: 613-563-9869
HENRY S. BROWN, Q.C.

COUNSEL FOR PHILIP MORRIS USA INC.
DAVIS & COMPANY LLP
2800 – 666 Burrard Street
Vancouver, British Columbia V7Y 1K2
Telephone: 604-687-9444
Facsimile: 604-687-1612
D. ROSS CLARK, Q.C.

OTTAWA AGENT FOR PHILIP MORRIS USA INC.
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: 613-233-1781
Facsimile: 613-563-9869
HENRY S. BROWN, Q.C.

COUNSEL FOR PHILIP MORRIS INTERNATIONAL INC.
McCARTHY TÉTRAULT LLP
1300 – 777 Dunsmuir Street
Vancouver, British Columbia V7Y 1K2
Telephone: 604-643-5983
Facsimile: 604-622-5614
SIMON V. POTTER
MICHAEL A. FEDER

OTTAWA AGENT FOR PHILIP MORRIS INTERNATIONAL INC.
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: 613-233-1781
Facsimile: 613-563-9869
HENRY S. BROWN, Q.C.

COUNSEL FOR THE ATTORNEY GENERAL OF CANADA
DEPARTMENT OF JUSTICE
234 Wellington Street, East Tower
Ottawa, Ontario K1A 0H8
Telephone: 613-948-1483
Facsimile: 613-957-0195
PAUL VICKERY
TRAVIS HENDERSON

OTTAWA AGENT FOR THE ATTORNEY GENERAL OF CANADA
DEPARTMENT OF JUSTICE
234 Wellington Street, East Tower
Ottawa, Ontario K1A 0H8
Telephone: 613-941-2351
Facsimile: 613-954-1920
CHRISTOPHER RUPAR

COUNSEL FOR IMPERIAL TOBACCO CANADA LIMITED
HUNTER LITIGATION CHAMBERS
2100 – 1040 West Georgia Street
Vancouver, British Columbia V6E 4H1
Telephone: 604-891-2400
Facsimile: 604-647-4554
JOHN J.L. HUNTER, Q.C.

OSLER, HOSKIN & HARCOURT LLP
Box 50, 1 First Canadian Place
Toronto, Ontario M5X 1B8
Telephone: 416-362-2111
Facsimile: 416-862-6666
DEBORAH A. GLENDINNING

OTTAWA AGENT FOR IMPERIAL TOBACCO CANADA LIMITED
OSLER, HOSKIN & HARCOURT LLP
1900 – 340 Albert Street
Ottawa, Ontario K1R 7Y6
Telephone: 613-787-1009
Facsimile: 613-235-2867
PATRICIA J. WILSON

COUNSEL FOR JTI-MACDONALD CORP., R.J. REYNOLDS TOBACCO COMPANY AND R.J. REYNOLDS TOBACCO INTERNATIONAL, INC.
FARRIS, VAUGHAN, WILLS & MURPHY LLP
2500 – 700 West Georgia Street
Vancouver, British Columbia V7Y 1B3
Telephone: 604-684-9151
Facsimile: 604-661-9349
JEFFREY J. KAY, Q.C.
ROBERT J. McDONELL
TERESA M. TOMCHAK

OTTAWA AGENT FOR JTI-MACDONALD CORP., R.J. REYNOLDS TOBACCO COMPANY AND R.J. REYNOLDS TOBACCO INTERNATIONAL, INC.
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: 613-233-1781
Facsimile: 613-563-9869
HENRY S. BROWN, Q.C.

COUNSEL FOR B.A.T INDUSTRIES P.L.C. AND BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED
SUGDEN, McFEE & ROOS LLP
700 – 375 Water Street
Vancouver, British Columbia V6B 5N3
Telephone: 604-687-7700
Facsimile: 604-687-5596
CRAIG P. DENNIS
MICHAEL D. SHIRREFF

OTTAWA AGENT FOR B.A.T INDUSTRIES P.L.C. AND BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED
STIKEMAN ELLIOTT LLP
1600 – 50 O'Connor Street
Ottawa, Ontario K1P 6L2
Telephone: 613-566-0546
Facsimile: 613-230-8877
NICHOLAS McHAFFIE

COUNSEL FOR CARRERAS ROTHMANS LIMITED
HARPER GREY LLP
3200 – 650 West Georgia Street
Vancouver, British Columbia V6B 4P7
Telephone: 604-687-0411
Facsimile: 604-669-9385
CHRIS RUSNAK

COUNSEL FOR HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA
BULL, HOUSSER & TUPPER LLP
3000 – 1055 West Georgia Street
Vancouver, British Columbia V6E 3R3
Telephone: 604-687-6575
Facsimile: 604-641-4949
DANIEL A. WEBSTER, Q.C.
RYAN D.W. DALZIEL

COUNSEL FOR THE ATTORNEY GENERAL OF ONTARIO
ATTORNEY GENERAL OF ONTARIO
8th Floor, 720 Bay Street
Toronto, Ontario M5G 2K1
Telephone: 416-326-4008
Facsimile: 416-326-4181
MALLIHA WILSON

COUNSEL FOR THE ATTORNEY GENERAL OF BRITISH COLUMBIA
ATTORNEY GENERAL OF BRITISH COLUMBIA
6th Floor, 1001 Douglas Street
Victoria, British Columbia V8W 9J7
Telephone: 250-356-8875
Facsimile: 250-356-9154
GEORGE H. COPLEY, Q.C.

OTTAWA AGENT FOR CARRERAS ROTHMANS LIMITED
STIKEMAN ELLIOTT LLP
1600 – 50 O'Connor Street
Ottawa, Ontario K1P 6L2
Telephone: 613-566-0546
Facsimile: 613-230-8877
NICHOLAS McHAFFIE

OTTAWA AGENT FOR HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA
BURKE-ROBERTSON LLP
70 Gloucester Street
Ottawa, Ontario K2P 0A2
Telephone: 613-566-2058
Facsimile: 613-235-4430
ROBERT E. HOUSTON, Q.C.

OTTAWA AGENT FOR THE ATTORNEY GENERAL OF ONTARIO
BURKE-ROBERTSON LLP
70 Gloucester Street
Ottawa, Ontario K2P 0A2
Telephone: 613-566-2058
Facsimile: 613-235-4430
ROBERT E. HOUSTON, Q.C.

OTTAWA AGENT FOR THE ATTORNEY GENERAL OF BRITISH COLUMBIA
BURKE-ROBERTSON LLP
70 Gloucester Street
Ottawa, Ontario K2P 0A2
Telephone: 613-566-2058
Facsimile: 613-235-4430
ROBERT E. HOUSTON, Q.C.

COUNSEL FOR HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEW BRUNSWICK
BENNETT JONES LLP
Box 130, 1 First Canadian Place
Toronto, Ontario M5X 1A4
Telephone: 416-777-7472
Facsimile: 416-863-1716
JEFFREY S. LEON

OTTAWA AGENT FOR HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEW BRUNSWICK
FASKEN MARTINEAU DuMOULIN LLP
1300 – 55 Metcalfe Street
Ottawa, Ontario K1P 6L5
Telephone: 613-236-3882
Facsimile: 613-230-6423
LESLIE MILTON

CONSOLIDATED FACTUM IN RESPONSE[1]

[1] In response to the cross-appeals, Canada and British Columbia seek to uphold the judgment of the Court of Appeal on four main grounds not relied on by any member of that court: (i) *Costs Recovery Act* s. 8(2) exhaustively states the defendants' contribution rights, denying the defendants contribution from Canada or, for that matter, any third party; (ii) Canada is constitutionally immune from provincial legislation, including the *Costs Recovery Act*; (iii) assuming Canada is constitutionally immune, the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, does not make Canada liable under the *Costs Recovery Act*; and (iv) Canada did not owe any duties to smokers. This factum is filed pursuant to Sub-Rule 29(4) and addresses only ground (i). Ground (i) is also addressed, anticipatorily, in Imperial Tobacco Canada Limited's Factum on Cross-Appeal, at paras. 88-103. These defendants adopt the other defendants' submissions in response to grounds (ii), (iii) and (iv) as well. This factum uses terms, including "Canada", "British Columbia" and "*Costs Recovery Act*", as they are already defined in these defendants' Consolidated Factum of Respondents on Appeal and Consolidated Factum of Respondents on Cross-Appeal.

PART I – ARGUMENT

1. British Columbia argues that *Costs Recovery Act* s. 8(2) is impliedly exhaustive of the contribution rights of the defendant "manufacturers" whom British Columbia has chosen to sue. It says that a defendant may not invoke the *Negligence Act* (or the common law) to seek contribution from anyone British Columbia has not sued, even if that non-defendant's wrongdoing (or "fault") contributed to the very costs British Columbia claims. A defendant may seek contribution under s. 8(2) only from another "manufacturer" whom British Columbia has chosen to sue, and even then only if that "manufacturer" jointly committed the same "tobacco related wrong" as the defendant.

2. According to British Columbia, a defendant may not seek contribution

(a) from another "manufacturer" whose "tobacco related wrong" caused or contributed to the very same costs as the defendant if British Columbia has decided for its own reasons not to sue that other "manufacturer",

(b) from a "wrongdoer" liable to British Columbia under the generic *Health Care Costs Recovery Act* for those costs,[2] or

(c) even from another "manufacturer" whom British Columbia *has* sued but whose *separate* "tobacco related wrong" caused or contributed to those costs.

3. British Columbia says this must be so, because of the statute it drafted, even though, in each of these scenarios, the defendant has a right of contribution under the well developed case law on *Negligence Act* s. 4,[3] and even though British Columbia's statute never actually says so.

4. This implausible but draconian interpretation of s. 8(2) should not be accepted, particularly on a motion requiring British Columbia to show that it is, though implausible, plain and obvious. It should be rejected for at least four reasons:

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[2] Similarly, British Columbia and Canada also argue that no one is liable under the generic *Health Care Costs Recovery Act* for costs arising from an injury to which a "tobacco related wrong" by a "manufacturer" has contributed: see Factum of British Columbia, at paras. 67-70 and Canada's Factum on Cross-Appeal, at paras. 44-45. This cannot be right. Were it the case, the generic *Health Care Costs Recovery Act* would be useless: every claim for health care costs would be met by the defence that smoking caused by a "tobacco related wrong" had contributed, however minimally, to the injury in question.

[3] See, *e.g.*, *E.D.G. v. Hammer*, [2003] 2 S.C.R. 459, 2003 SCC 52, at para. 32 (contribution rights between parties who consecutively cause same loss); *McVea (Guardian ad litem of) v. British Columbia (Attorney General)*, 2005 BCCA 104, at paras. 23 and 29, aff'd, [2008] 1 S.C.R. 21, 2008 SCC 3 (contribution rights between parties jointly and severally liable for same loss); and *Hutchings v. Dow*, 2007 BCCA 148, at paras. 22-25, leave to appeal refused, [2007] S.C.C.A. No. 244 (QL) (contribution rights between parties who concurrently cause same loss).

(a) it conflicts with British Columbia's own position and arguments at first instance, and is therefore not plain and obvious;

(b) it contradicts s. 8(2)'s permissive language – "may" – which signals an addition to the defendants' well established contribution rights, not the elimination of them;

(c) it requires this Court to rule now on the *Costs Recovery Act*'s scheme of liability, in the absence of any information about the statistical and epidemiological evidence that the *Act* explicitly contemplates being used in that complex scheme; and

(d) it rests on the unsupported assertion that s. 8(2) was intended to simplify an action under the *Act*, even though simplification would not be achieved on British Columbia's interpretation, and could have been achieved by express language and less drastic means.

5. The contribution right given by s. 8(2) can co-exist comfortably with the defendants' well established contribution rights under *Negligence Act* s. 4. It is certainly not plain and obvious that the former eradicates the latter.

A. British Columbia has reversed itself, including regarding s. 8(2)'s interpretation.

6. In this Court, British Columbia argues that s. 8(2) forecloses the defendants' contribution claim against Canada, and says its interpretation is plain and obvious. Before the chambers judge, however, British Columbia *opposed* Canada's motion to strike the defendants' claims, including their contribution claim. British Columbia also argued at length that the *Costs Recovery Act* applies to Canada, which could matter only if the defendants may claim contribution from Canada. On the basis of British Columbia's reversed posture alone, its current interpretation of s. 8(2) cannot be plain and obvious.

B. British Columbia's new interpretation of s. 8(2) contradicts its permissive language.

7. British Columbia opens its argument by stating that "a defendant *may only* seek" contribution on s. 8(2)'s terms.[4] But that is not what s. 8(2) says. Its wording is permissive, and does not contain the "only" that British Columbia would now insert: it says that "[a] defendant who is found liable … *may* commence ... an action or proceeding for contribution" on its terms. This language signals that the provision is meant to supplement the defendants' ordinary contribution rights, not to erase them.

[4] Factum of British Columbia, at para. 4 (emphasis added).

8. British Columbia admits that explicit statutory language is required to eliminate rights otherwise enjoyed at law,[5] but tries to overcome the absence of that language in s. 8(2) by claiming that it "comprehensively articulates the defendants' rights of contribution".[6] British Columbia's argument is circular. Subsection 8(2) can be a comprehensive code only if it eliminates the defendants' ordinary contribution rights, and the defendants can be deprived of those rights only by explicit language that s. 8(2) does not contain. If the Legislature had intended to divest defendants sued under the *Costs Recovery Act* of the rights granted by s. 4 of the *Negligence Act*, it would have said so expressly and was, indeed, required to do so.

C. British Columbia's new interpretation of s. 8(2) would require this Court to rule prematurely on the *Costs Recovery Act*'s scheme of liability.

9. British Columbia seeks to justify its new interpretation of s. 8(2) by way of an elaborate argument concerning the *Costs Recovery Act*'s scheme of liability under s. 3, which it says "diminishes" (but does not eliminate) a defendant's need to seek contribution.[7] British Columbia says this Court can rule on the *Act*'s liability scheme now, based merely on its argument, since evidence is "neither necessary nor appropriate" in determining questions of statutory interpretation.[8]

10. British Columbia ignores that the *Costs Recovery Act* explicitly contemplates very specific types of evidence being used, and not being used, to determine liability.[9] This Court has no information about the extent to which, if any, that statistical, epidemiological and other evidence is workable within the scheme described, given the current limitations of regression analysis, econometric modelling and the like. British Columbia's argument regarding s. 8(2) may therefore rest on an interpretation of the *Act*'s liability rules that is irreconcilable with its evidentiary ones – there is simply no way to know in this context of a motion to strike. This is another reason to reject British Columbia's s. 8(2) argument at this early stage.

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[5] See, *e.g.*, *Morguard Properties Ltd. v. Winnipeg (City)*, [1983] 2 S.C.R. 493, at pp. 508-09 and *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60, 2004 SCC 3, at para. 43.

[6] Factum of British Columbia, at para. 58.

[7] Factum of British Columbia, at para. 43.

[8] Factum of British Columbia, at para. 18.

[9] For example, s. 5 states that "statistical information and information derived from epidemiological, sociological and other relevant studies, including information derived from sampling" is admissible to establish causation and the cost of health care benefits. On the other hand, s. 2(5)(a) may relieve British Columbia of the conventional burden of proving causation in or the cost of treating any particular smoker in respect of whom health care costs are claimed.

11. British Columbia's conception of the *Act*'s liability scheme anyway does little to demonstrate why the need for contribution is somehow diminished for those sued under the *Act*. British Columbia refers repeatedly to the use of a defendant's market share to determine an initial allocation of liability for health care costs, but does not explain why it would be remotely just or sensible to prevent contribution from a non-defendant whose "fault" has contributed overwhelmingly to those particular costs. To borrow British Columbia's colloquialisms, the proposition that the *Act* pre-cuts the liability pie or creates silos of liability does not logically bear on a defendant's rights to seek contribution from another whose wrongdoing has resulted in a bigger pie being baked, or taller silo being built.

D. British Columbia's new interpretation of s. 8(2) rests on an undemonstrated statutory purpose of simplification that would not in any event be achieved.

12. British Columbia acknowledges that its interpretation of s. 8(2) would allow it to select who among all those at "fault" for its health care costs must alone bear liability, denying those sued any rights of contribution from others who were not. It seeks to explain this injustice as a "practical choice" by the Legislature "to simplify the action and permit this case to one day see the inside of a trial courtroom".[10]

13. There is no support in the words, scheme or object of the *Costs Recovery Act* even to hint that s. 8(2) was intended to sacrifice fairness for the sake of speed by depriving defendants of all rights of contribution from third parties. There is only British Columbia's uncorroborated assertion.

14. In any event, British Columbia's interpretation of s. 8(2) hardly simplifies anything. British Columbia expressly admits that its interpretation would not prevent claims against third parties based on any theory other than contribution.[11] Yet these types of third party claims will complicate this case no more or less than the contribution claims that s. 8(2) is said to deny. If s. 8(2)'s purpose were simplification, that purpose still would not be achieved on British Columbia's own interpretation.

15. If the Legislature had wished to ensure that this case was not bogged down, it could have done so in any number of more plain and less drastic ways. For example, it could have required contribution claims against third parties, or for that matter *all* third party claims, to be tried after other issues in the case, or pursued in a separate action. There is no plain and obvious link between British Columbia's imagined concerns about speed or simplification and its current interpretation of s. 8(2).

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[10] Factum of British Columbia, at para. 47.

[11] Factum of British Columbia, at para. 61. On this basis, British Columbia "takes no position on the defendants' [non-contribution] claims against Canada": para. 3.

E. Subsection 8(2) can co-exist with contribution rights under the *Negligence Act*.

16. There is no conflict between s. 8(2) and the contribution rights enjoyed by defendants under the *Negligence Act*. Subsection 8(2) is utterly silent on the contribution rights to which the *Negligence Act* expressly speaks. To the extent there may be a theoretical overlap, it does not surface and need not be resolved here: this case is about contribution from a non-defendant, Canada, which s. 8(2) does not address. British Columbia cannot say it is plain and obvious that the defendants' contribution claim is bound to fail because of a hypothetical conflict that has not arisen.

17. There may *never* be any overlap or conflict. According to British Columbia, s. 8(2) only permits contribution between defendants whom *Costs Recovery Act* s. 4 deems jointly and severally liable, such as defendants who conspire to commit a "tobacco related wrong".[12] Yet the law is unsettled as to whether ordinary contribution legislation permits contribution between co-conspirators.[13] Subsection 8(2) may thus do nothing more than give defendants a contribution right that the *Negligence Act* does not, ensuring that the joint and several liability deemed by s. 4 admits of contribution.

18. In any case, there would be nothing strange about contribution between defendants being governed by a regime (s. 8(2)) different from the regime governing contribution between defendants and third parties. The factors listed in *Costs Recovery Act* s. 7(3), which the former regime incorporates, may not be apposite to a contribution claim against a "manufacturer" who did not act jointly with a defendant, or against someone who is a not a "manufacturer" at all. However, a court called upon to consider a contribution claim under *Negligence Act* s. 4 would, through the concept of "fault", be free to consider the sort of factors listed in s. 7(3), if that court considered it appropriate.[14]

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 7th day of February, 2011.

Kenneth N. Affleck	D. Ross Clark	Simon V. Potter
KENNETH N. AFFLECK, Q.C., counsel for Rothmans, Benson & Hedges Inc. and Rothmans Inc.	**D. ROSS CLARK, Q.C.**, counsel for Philip Morris USA Inc.	**SIMON V. POTTER** and **MICHAEL A. FEDER**, counsel for Philip Morris International Inc.

[12] Factum of British Columbia, at para. 49.

[13] *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643, at paras. 47-65, aff'd, 2010 ONCA 841. See also *Main v. Cadbury Schweppes plc*, 2010 BCSC 816, at para. 19, aff'd, oral reasons given January 17, 2011 in CA038259, CA038260 and CA038261 (B.C.C.A.).

[14] See, *e.g.*, the list of factors relevant to "fault" provided in *Nonis v. Granata*, 2010 BCSC 1570, at para. 15. There is some resemblance in the list to the factors in *Costs Recovery Act* s. 7(3).

PART II – TABLE OF AUTHORITIES

PART III – PROVISIONS DIRECTLY AT ISSUE

The *Negligence Act*, R.S.B.C. 1996, c. 333 is reproduced in Part VII of these defendants' Consolidated Factum of Respondents on Cross-Appeal.

The *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 is reproduced in Part VII of these defendants' Consolidated Factum of Respondents on Appeal.