Supreme Court File No. 33563

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

B E T W E E N:

THE ATTORNEY GENERAL OF CANADA

Appellant/Respondent on Cross-Appeal
(Third Party in the Court below)

and

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA

Respondent/Cross-Appeal 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, R.J. REYNOLDS TOBACCO COMPANY and R.J. REYNOLDS TOBACCO INTERNATIONAL, INC.

Respondents/Cross-Appeal Appellants
(Appellant in the Court below)

FACTUM OF THE RESPONDENT/CROSS-APPEAL APPELLANT IMPERIAL TOBACCO CANADA LIMITED ON THE CONSTITUTIONAL QUESTION

(Pursuant to Rule 29(4) of the *Rules of the Supreme Court of Canada*)

OSLER, HOSKIN & HARCOURT LLP
Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Deborah A. Glendinning
Tel: (416) 362-2111
Fax: (416) 862-6666
E-mail: dglendinning@osler.com

Counsel for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

HUNTER LITIGATION CHAMBERS LAW CORPORATION
2100 – 1040 West Georgia Street
Vancouver, BC V6E 4H1

John J. L. Hunter, Q.C.
Tel: (604) 891-2401
Fax: (604) 647-4554
E-Mail: jhunter@litigationchambers.com

Counsel for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

OSLER, HOSKIN & HARCOURT LLP
Suite 1900, 340 Albert Street
Ottawa, ON K1R 7Y6

Patricia J. Wilson

Tel: (613) 787-1009
Fax: (613) 235-2867
E-mail: pwilson@osler.com

Agent for Counsel for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

ORIGINAL TO: **THE REGISTRAR**

COPIES TO:

ATTORNEY GENERAL OF CANADA
Bank of Canada Building – East Tower
Room 1001
234 Wellington Street
Ottawa, ON K1A 0H8

Per: Paul Vickery
Tel: (613) 948-1483
Fax: (613) 957-5879
E-mail: paul.vickery@justice.gc.ca

Per: Travis Henderson
Tel: (613) 957-1304
Fax: (613) 957-0195

Counsel for the Appellant/Respondent on Cross-Appeal the Attorney General of Canada

ATTORNEY GENERAL OF CANADA
Bank of Canada Building – East Tower
Room 1212
234 Wellington Street
Ottawa, ON K1A 0H8

Per: Christopher M. Rupar
Tel: (613) 941-2351
Fax: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

Agent for the Appellant/Respondent on Cross-Appeal the Attorney General of Canada

BULL, HOUSSER & TUPPER LLP
3000 – 1055 West Georgia Street
Vancouver, BC V6E 3R3

Daniel A. Webster, Q.C.
Tel: (604) 641-4874
Fax: (604) 646-2517
E-mail: daw@bht.com

Counsel for the Respondent/Cross-Appeal Respondent Her Majesty the Queen in Right of British Columbia

BURKE-ROBERTSON
70 Gloucester Street
Ottawa, ON K2P 0A2

Robert E. Houston, Q.C.
Tel: (613) 566-2058
Fax: (613) 235-4430
E-mail: rhouston@burkerobertson.com

Agent for the Respondent/Cross-Appeal Respondent Her Majesty the Queen in Right of British Columbia

MACAULAY MCCOLL
1575 – 650 West Georgia Street
Vancouver, BC V6B 4N9

Kenneth N. Affleck, Q.C.
Tel: (604) 687-9811
Fax: (604) 687-8716
E-mail: kaffleck@macaulay.com

Counsel for the Respondent/Cross-Appeal Appellant Rothmans, Benson & Hedges Inc. and Rothmans Inc.

GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Henry S. Brown, Q.C.
Tel: (613) 233-1781
Fax: (613) 788-3433
E-mail: henry.brown@gowlings.com

Agent for the Respondent/Cross-Appeal Appellant Rothmans, Benson & Hedges Inc. and Rothmans Inc.

FARRIS, VAUGHAN, WILLS & MURPHY LLP
2600 – 700 West Georgia Street
Vancouver, BC V7Y 1B3

Jeffrey J. Kay, Q.C.
Robert J. McDonell

Tel: (604) 684-9151
Fax: (604) 661-9349
E-mail: jkay@farris.com

Counsel for the Respondent/Cross-Appeal Appellant JTI-MacDonald Corp., R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc.

GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Henry S. Brown, Q.C.
Tel: (613) 233-1781
Fax: (613) 788-3433
E-mail: henry.brown@gowlings.com

Agent for the Respondent/Cross-Appeal Appellant JTI-MacDonald Corp., R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc.

SUGDEN, McFEE & ROOS
700 – 375 Water Street
Vancouver, BC V6B 5N3

Craig P. Dennis
Tel: (604) 646-1003
Fax: (604) 687-5596
E-mail: cdennis@smrlaw.ca

Counsel for the Respondent/Cross-Appeal Appellant B.A.T. Industries p.l.c.. and British American Tobacco (Investments) Limited

STIKEMAN ELLIOTT LLP
1600 – 50 O'Connor Street
Ottawa, ON K1P 6L2

Nicholas Peter McHaffie
Tel: (613) 566-0546
Fax: (613) 230-8877
E-mail: nmchaffie@stikeman.com

Agent for the Respondent/Cross-Appeal Appellant B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited

HARPER GREY LLP
3200 – 650 West Georgia Street
Vancouver, BC V6B 4P7

Christopher M. Rusnak
Tel: (604) 687-0411
Fax: (604) 669-9385
E-mail: crusnak@harpergrey.com

Counsel for the Respondent/Cross-Appeal Appellant Carreras Rothmans Limited

STIKEMAN ELLIOTT LLP
1600 – 50 O'Connor Street
Ottawa, ON K1P 6L2

Nicholas Peter McHaffie
Tel: (613) 566-0546
Fax: (613) 230-8877
E-mail: nmchaffie@stikeman.com

Agent for the Respondent/Cross-Appeal Appellant Carreras Rothmans Limited

DAVIS LLP
2800 Park Place
666 Burrard Street
Vancouver, BC V6C 2Z7

D. Ross Clark, Q.C.
Tel: (604) 687-9444
Fax: (604) 687-1612

Counsel for the Respondent/Cross-Appeal Appellant Philip Morris USA Inc.

GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Henry S. Brown, Q.C.
Tel: (613) 233-1781
Fax: (613) 788-3433
E-mail: henry.brown@gowlings.com

Agent for the Respondent/Cross-Appeal Appellant Philip Morris USA Inc.

MCCARTHY TÉTRAULT LLP
2500 – 1000 rue de la Gauchetière Ouest
Montreal QC H3B 0A2

Simon V. Potter
Andrew F. Wilkinson, Q.C.
Michael A. Feder
Tel: (514) 397-4268
Fax: (514) 875-6246
E-mail: spotter@mccarthy.ca

Counsel for the Respondent/Cross-Appeal Appellant Philip Morris International, Inc.

GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Henry S. Brown, Q.C.
Tel: (613) 233-1781
Fax: (613) 788-3433
E-mail: henry.brown@gowlings.com

Agent for the Respondent/Cross-Appeal Appellant Philip Morris International Inc.

ATTORNEY GENERAL OF BRITISH COLUMBIA
6th Floor, 1001 Douglas St.
Victoria, B.C. V8W 9J7

George H. Copley, Q.C.
Tel: (250) 356-8875
Fax: (250) 356-9154
E-mail: george.copley@gov.bc.ca

Counsel for the Intervener Attorney General of British Columbia

ATTORNEY GENERAL OF BRITISH COLUMBIA
Burke-Robertson
70 Gloucester Street
Ottawa, ON K2P 0A2

Robert E. Houston, Q.C.
Tel: (613) 566-2058
Fax: (613) 235-4430
E-mail: rhouston@burkerobertson.com

Agent for the Intervener Attorney General of British Columbia

ATTORNEY GENERAL OF NEW BRUNSWICK
Fasken Martineau DuMoulin LLP
55, rue Metcalfe
Bureau 1300
Ottawa, ON K1P 6L5

Leslie J. Milton
Tel: (613) 236-3882
Fax: (613) 230-6423
E-mail: lmilton@fasken.com

Agent for the Intervener Attorney General of New Brunswick

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEW BRUNSWICK
Bennett Jones LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, ON M5X 1A4

Jeffrey S. Leon
Tel: (416) 777-7472
Fax: (416) 863-1716

Counsel for the Intervener Her Majesty the Queen in Right of the Province of New Brunswick

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEW BRUNSWICK
Fasken Martineau DuMoulin LLP
55, rue Metcalfe
Bureau 1300
Ottawa, ON K1P 6L5

Leslie J. Milton
Tel: (613) 236-3882
Fax: (613) 230-6423
E-mail: lmilton@fasken.com

Agent for the Intervener Her Majesty the Queen in Right of the Province of New Brunswick

ATTORNEY GENERAL OF ONTARIO

8th Floor- 720 Bay Street
Toronto, ON M5G 2K1

Malliha Wilson

Tel: (416) 326-4008
Fax: (416) 326-4181
E-mail: malliha.wilson@ontario.ca

Counsel for the Intervener Attorney General of Ontario

ATTORNEY GENERAL OF ONTARIO

Burke-Robertson
70 Gloucester Street
Ottawa, ON K2P 0A2

Robert E. Houston, Q.C.

Tel: (613) 566-2058
Fax: (613) 235-4430
E-mail: rhouston@burkerobertson.com

Agent for the Intervener
Attorney General of Ontario

1. Imperial Tobacco Canada Limited ("Imperial") makes this reply under subrule 29(4) of the *Rules of the Supreme Court of Canada*, in respect of the following constitutional question stated by the Chief Justice:

> Is the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30, constitutionally inapplicable to the federal Crown because the latter is constitutionally immune from liability under the Act?

2. Imperial submits that the cross-appeal can be determined without addressing the constitutional question, which should therefore not be decided by this Court. In particular, Imperial submits that: (i) it is this Court's policy that courts should not decide constitutional issues that are not necessary (ii) the constitutional question is not necessary to decide the cross-appeal, and (iii) in any event, it is not plain and obvious that the federal Crown is constitutionally immune from liability under the *Costs Recovery Act.*[1]

(i) Courts Should Not Decide Unnecessary Constitutional Issues

3. While courts are generally reluctant to comment on matters that are not necessary to decide the case at hand, this policy is especially apposite with respect to constitutional issues.[2]

4. This Honourable Court has repeatedly confirmed its policy of restraint over constitutional issues:

> The policy which dictates restraint in constitutional cases is sound. It is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen. Early in this century, Viscount Haldane in *John Deere Plow Co. v. Wharton*, [1915] A.C. 330, at p. 339, stated that the abstract logical definition of the scope of constitutional provisions is not only "impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases".[3]

(ii) It is Not Necessary to Decide the Constitutional Question

---

[1] *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30, Imperial's Cross-Appeal Factum, p. 86, Appellants' Joint Book of Authorities, Vol. V, Tab 76.

[2] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, et al.*, [1997] 3 S.C.R. 3 at para. 301, per La Forest J. (dissenting in part), Imperial's Supplementary Joint Book of Authorities ("SJBA"), Vol. I, Tab 7, p. 142.

[3] *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para. 9, SJBA, Vol. I, Tab 6, p. 114; *Attorney General of Quebec v. Cumming*, [1978] 2 S.C.R. 605 at 610-611 SJBA, Vol. I, Tab 2, pp. 16-17; *The Queen in Right of Manitoba v. Air Canada*, [1980] 2 S.C.R. 303 at 320, SJBA, Vol. I, Tab 8, p. 150.

5. This appeal of the motion to strike Imperial's Third Party Notice (the "TPN") against Canada can be determined without addressing the constitutional question. That is, the resolution of the constitutional question is not necessary to the resolution of the cross-appeal.

6. Indeed, Imperial need not rely on the premise that provincial statutes can bind Canada to support the claims pleaded against Canada in the TPN. Rather, Imperial argues that Canada may be liable under (i) the *Costs Recovery Act*; by virtue of the federal *Crown Liability and Proceedings Act*.[4] That is, Imperial does not submit that Canada is potentially liable under the *Costs Recovery Act* by virtue of a provincial statute – rather, Imperial submits that Canada is potentially liable under the *Costs Recovery Act* by virtue of a federal statute – the Federal CLPA.

7. Furthermore, the stated constitutional question is complex and closely intertwined with questions of statutory interpretation, including the applicability and scope of the presumption of federal Crown immunity from statute.[5] As this constitutional question was raised in the context of a preliminary motion to strike a pleading, this Court simply does not have a sufficient factual or evidentiary record on which to perform a satisfactory constitutional analysis.[6]

8. An abstract analysis of the constitutional issue based on an insufficient factual and evidentiary record and limited argument poses the very risk that Viscount Haldane cautioned against in *John Deere*.

9. The British Columbia Court of Appeal correctly held that it was not necessary to decide the constitutional question in this case, noting the clear jurisprudence that courts should not decide constitutional issues unnecessary to a resolution of the case or the appeal.[7]

10. While the chambers judge did decide the constitutional issue at first instance, Imperial submits that she erred in both finding it necessary to decide the constitutional issue, and in concluding that it is plain and obvious that Canada is constitutionally immune to liability

---

[4] R.S.C. 1985, c. C-50 ["Federal CLPA"], Imperial's Cross-Appeal Factum, p. 69.

[5] P.W. Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough: Thomson Carswell Limited, 2007) at 10-19, SJBA, Vol. I, Tab 10, p. 161.

[6] See *Adbusters Media Foundation v. Canadian Broadcasting Corp.*, 2009 BCCA 148, 92 B.C.L.R. (4th) 9 at paras 7-11, leave to appeal refused, [2009] S.C.C.A. No. 227, SJBA, Vol. I, Tab 1, pp. 4-5.

[7] *Knight v. Imperial Tobacco Canada Limited*, 2009 BCCA 541, 99 B.C.L.R. (4th) 93 at para. 36, SJBA, Vol. I, Tab 5, p. 77, citing *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97.

under the *Costs Recovery Act*.[8]

(iii) It is Not Plain and Obvious that Canada is Constitutionally Immune to Liability under the *Costs Recovery Act*

11. Canada correctly notes that the threshold question is whether the British Columbia legislature intended to bind the federal Crown, but incorrectly asserts that it is plain and obvious that the presumption of federal Crown immunity applies to the *Costs Recovery Act*.

12. For all of the reasons set out in the factum of the cross-appeal Appellant, B.A.T., Imperial submits that the presumption of federal Crown immunity from statute has been abolished by the *1974 Interpretation Act* of British Columbia. In any event, Imperial respectfully submits that this Court needs the benefit of a full factual and evidentiary record, and full and comprehensive submissions, in order to properly consider the scope of the purported presumption of federal Crown immunity from statute.

13. In *Bropho v. State of Western Australia*, the High Court of Australia departed from the strict application of the presumption of Crown immunity from statute, noting that while there may have been a justification for the presumption when the "Crown" meant little more than the Sovereign and his direct representatives, the presumption is no longer applicable in the contemporary context:

> ...[W]here the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour and where it is a commonplace for governmental commercial, industrial and developmental instrumentalities and their servants and agents, which are covered by the shield of the Crown either by reason of their character as such or by reason of specific statutory provision to that effect, to compete and have commercial dealings on the same basis as private enterprise.[9]
>
> ...
>
> That being so, earlier judicial statements to the effect that it must be manifest from the very terms of the statute itself that it was the legislative intent that the general words of a statute should bind the Crown, or that it must be apparent that the purposes of the statute would be wholly frustrated unless the Crown were bound, should be read as applying to the context of the particular statutory provisions involved in the cases in which they were made. Such statements should no longer be seen as precluding the

---

[8] *British Columbia v. Imperial Tobacco Canada Ltd.*, 2008 BCSC 419, 82 B.C.L.R. (4th) 362 at paras. 65-66, SJBA, Vol. I, Tab 3, p. 34.

[9] [1990] HCA 24, 93 ALR 207 [*Bropho*], SJBA, Vol. I, Tab 4, p. 39 at 216, SJBA, Vol. I, Tab 4, p. 48.

> identification of such a legislative intent in other circumstances or as warranting the overriding of a legislative intent which can be discerned in the provisions of a statute when construed in context.[10]

14. Such a legislative intent must, of course, be found in the provisions of the statute – including its subject matter and disclosed purpose and policy – when construed in a context which includes permissible extrinsic aids.[11] Extrinsic aids, of course, are not permitted on a motion to strike a pleading.

15. In the result, the High Court held that the legislative intent to bind the Crown was clear because "in a context where ninety-three per cent of Western Australian land is Crown land and approximately fifty per cent of Western Australian land is what is described as "Vacant Crown land", the Act would be extraordinarily ineffective to achieve its stated purpose of preserving Western Australia's Aboriginal sites and objects if it applied only in respect of the comparatively small proportion of the State which is not Crown land."[12]

16. Likewise, with respect to the *Costs Recovery Act,* in a context where it is pleaded that, by 1983, approximately 95 percent of the available tobacco on the Canadian market was designed and licensed by Canada,[13] the *Costs Recovery Act* would be extraordinarily ineffective to achieve its stated purpose of recovering health care costs from the industry responsible, if it did not apply to Canada.

17. Imperial notes that Professor Hogg has consistently endorsed the adoption of the *Bropho* approach in Canada as a "modest and incremental judicial reform" that is "more easily reconciled with the principle of the rule of the law, a basic precept of which is the subjection of government to law. As the High Court in *Bropho* pointed out, in an era when government is involved in virtually all areas of the economy, the notion that government is presumed not to be bound by the general law of the land appears increasingly anachronistic."[14]

18. With respect to the question of constitutional federal Crown immunity to provincial statutes, the answer is simply not plain and obvious. Leading constitutional law academics agree:

---

[10] *Bropho, ibid.* at 218, SJBA, Vol. I, Tab 4, p. 50.
[11] *Bropho, ibid.* at 217, SJBA, Vol. I, Tab 4, p. 49.
[12] *Bropho, ibid.* at 219-20, SJBA, Vol. I, Tab 4, pp. 51-52.
[13] Imperial's Third Party Notice at para. 129, Appellant's Costs Recovery Record, Vol. II, p. 97.
[14] P.W. Hogg & P. Monahan, *Liability of the Crown*, 3d ed. (Scarborough: Thomson Carswell Limited, 2000) at 282, SJBA, Vol. I, Tab 11, p. 168.

> There is no doubt that the federal Parliament may adopt by reference the laws of a province and make them applicable to the federal Crown. What is in doubt is the extent to which the laws of a province may be made binding upon the federal Crown by their own force, that is to say, without any adoption by the federal Parliament. In *Gauthier v. The King* (1918), the question was whether the federal Crown was bound by Ontario's Arbitration Act. ... The Supreme Court of Canada held that the federal Crown was not bound by the Ontario statute. ...
>
> A few years later, however, the Privy Council reached a different result. In *Dominion Building Corp. v. The King* (1933), one of the questions to be decided was whether an Ontario statute applied to the federal Crown. ... But the Privy Council determined that the general language of the Ontario statute was applicable to the federal Crown, notwithstanding the absence of express words or a necessary implication to that effect. And by implication the Privy Council also determined that there was no constitutional impediment to a provincial law binding the federal Crown.
>
> These two inconsistent decisions have left in doubt the question whether provincial Legislatures have the constitutional power to enact statutes binding on the federal Crown. Later decisions have not clarified the position, although the weight of dicta supports a constitutional immunity from provincial statutes for the federal Crown. In my opinion, however, there should be no such immunity.[15] (emphasis added)

19. The chambers judge, however, referred only to the *Gauthier* line of cases, and did not even advert to the conflicting *Dominion* line of cases, and clearly erred in concluding that this issue is "plain and obvious."

20. Imperial agrees with the other Respondents that the *Dominion* line of case is correct and authoritative, such that there is no rule that Canada is constitutionally immune to liability under provincial statutes. Imperial adopts the submissions of the other cross-appeal appellants in their replies under subrule 29(4).

COSTS

21. Imperial seeks its costs in this cross-appeal, and in the courts below.

ORDER SOUGHT

---

[15] Hogg, *supra* note 5 at 10-19 to 10-20, SJBA, Vol. I, Tab 10, pp. 161 and 162. See also, K. Horsman & G. Morley, *Government Liability: Law and Practice* (Aurora: Canada Law Book, 2006) at 1-29 and 1-30–1-31, SJBA, Vol. I, Tab 9, pp. 155-157.

22. Imperial respectfully asks that this cross-appeal be allowed, with costs here and below.

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

for Deborah A. Glendinning

Counsel for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

for: John J.L. Hunter, Q.C.

Counsel for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

23.

for: Patricia Wilson

Agent for Counsel for the Respondent/Cross-Appeal Appellant Imperial Tobacco Canada Limited

AUTHORITIES CITED