File No. 33563

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

BETWEEN:

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., R.J. REYNOLDS TOBACCO COMPANY AND R.J. REYNOLDS TOBACCO INTERNATIONAL INC., B.A.T INDUSTRIES P.L.C., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED and CARRERAS ROTHMANS LIMITED

RESPONDENTS/
APPELLANTS ON CROSS-APPEAL
(Appellants)

and

ATTORNEY GENERAL OF BRITISH COLUMBIA and ATTORNEY GENERAL OF NEW BRUNSWICK

INTERVENERS

FACTUM OF B.A.T INDUSTRIES P.LC. AND BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED IN RESPONSE TO NEW ARGUMENTS IN THE FACTUM OF THE ATTORNEY GENERAL OF CANADA ON CROSS-APPEAL

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

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1. Canada argues for an affirmative answer to the constitutional question by asserting a "distinct category" of constitutional immunity (Canada cross-appeal factum, para. 77) resting on a claimed constitutional principle that the "provinces do not have the legislative competence to bind the federal Crown" (Canada, para. 5). That claimed constitutional principle serves two purposes for Canada's argument: (1) in respect of the British Columbia *Interpretation Act*, which in 1974 reversed for both the federal and the provincial Crown the presumption of governmental immunity from statute, Canada asserts that, "since the *Interpretation Act* is provincial legislation, it is not capable of altering, whether by positive enactment or repeal of an existing provision, the liabilities of the federal Crown (Canada, para. 36); and (2) the *Tobacco Damages and Health Care Costs Recovery Act* ("*Tobacco Damages/Costs Recovery Act*") is "inapplicable to it" (Canada, para. 5). These defendants submit that the constitutional principle on which Canada relies does not exist; alternatively, it is not plain and obvious that it exists or, if it does, that it would apply on the facts of this case.

2. In disputing the existence of Canada's claimed constitutional principle, these defendants cannot improve upon the following submissions made in the factum of the Attorney General of British Columbia in the Court of Appeal in this case:

- The correct applicable principle of constitutional law is that, acting within their allotted exclusive areas of legislative authority, provincial legislatures possess the same legislative competence to bind the federal Crown as does Parliament to bind the provincial Crown (para. 54 of the AGBC's factum in the court below).
- One searches in vain in the text of the *Constitution Act, 1867* for any support for Canada's assertion that there is a principle that the provinces do not have legislative competence to bind the federal Crown *(ibid*., para. 48).
- If the federal Crown were not bound by otherwise applicable provincial legislation enacted pursuant to "exclusive" powers to legislate granted to the province, this would be a violation of the rule of law (*ibid*., para. 50).
- Absent a federal law to the contrary (paramountcy), the federal Crown cannot authorize Her Majesty's government officials to act contrary to constitutionally valid and applicable provincial legislation where in doing Her Majesty's business

those officials have brought themselves and Her Majesty within the ambit of that provincial legislation (*ibid*., para. 51).

- There is no reason in either constitutional law or constitutional policy for the federal Crown to be exempt from the operation of the *Tobacco Damages/Costs Recovery Act* once the actions of its public officials have brought it within the four corners of the *Tobacco Damages/Costs Recovery Act* (*ibid*., para. 72).
- Accepting as true the facts pleaded in the third party notices (which this Court must on a preliminary pleadings motion), the federal Crown does not possess a legal right as a matter of Crown prerogative (i) to manufacture tobacco, (ii) to commit tobacco related wrongs, (iii) to cause or contribute to tobacco related diseases suffered by British Columbians, or (iv) to precipitate health care costs to treat those tobacco related diseases (*ibid*., para. 67).

3. To that these further points can be added:

- Canada overreaches in arguing that courts "have long recognized the principle that provinces do not have legislative competence to bind the federal Crown" (Canada, para. 70). To the contrary, Hogg writes that the highest authorities "have left in doubt the question whether provincial Legislatures have the constitutional power to enact statutes binding on the federal Crown" (Hogg, *Constitutional Law of Canada,* 5th ed., supp. (Thomson Carswell ll. ed.), vol. 1, p. 10-20). When the point arose in 1989, this Court went only so far as to refer to "a putative doctrine of constitutional immunity of the federal Crown," without deciding upon its existence: *Alberta Government Telephones v. C.R.T.C*., [1989] 2 S.C.R. 225, 286 *per* Dickson C.J. [emphasis added]
- *AGT* does decide that the provinces enjoy no constitutional immunity from valid federal legislation. Dickson C.J. stated, at p. 275: "In my view, it would be wrong to accept a theory of constitutional inter-governmental immunity. If Parliament has the legislative power to legislate or regulate in an area, emanations of the provincial Crown should be bound if Parliament so chooses." And there are numerous legislative examples of Parliament so choosing.[1]

[1] Among them, *Aeronautics Act*, R.S.C. 1985, c. A-2, s. 2; *Canada Agricultural Products Act*, R.S.C. 1985, c. 20 (4th Supp), s. 3; *Depository Bills and Notes Act*, S.C. 1998, c. 13, s. 3; *Gwich'in Land Claim Settlement Act*, S.C. 1992, c.

- This Court's disapproval of asymmetric federalism in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, para. 45 (the "'asymmetrical' application of interjurisdictional immunity is incompatible with the flexibility and coordination required by contemporary Canadian federalism") adds support to the view that, if the provinces enjoy no constitutional immunity from valid federal legislation, the federal Crown likewise should enjoy no constitutional immunity from valid provincial legislation. As also stated in *CWB*: "In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest" (para. 37, *per* Binnie and LeBel JJ.). The reasons there given for limiting the scope of interjurisdictional immunity apply with greater force as reasons for rejecting the distinct category of immunity Canada asserts: (i) immunity from the effects of valid legislation by a coordinate branch of government is incompatible with our flexible federal arrangement (para. 42); (ii) immunity increases the risk of a legal vacuum by creating spheres immune from the reach of the legislative body with constitutional responsibility to legislate on the subject (para. 44); and (iii) broader immunity is unnecessary given Parliament's recourse to the federal paramountcy power (para. 46).
- To grant Canada the immunity for which it contends could undermine the aims not only of the *Tobacco Damages/Costs Recovery Act* and the *Health Care Costs Recovery Act* but also of other provincial statutes across the country which by their terms intend to bind the federal Crown[2]. And it also would be contrary to the views of constitutional scholars such as Hogg ("… there should be no such immunity": Hogg, *Constitutional Law of Canada, supra*) and Gibson (rejecting such an immunity "would … be more consistent with constitutional law and less destructive of the principle of Crown responsibility": Gibson, *Interjurisdictional Immunity in Canadian Federalism* (1969), 47 Can. Bar Rev. 40, p. 56).

53, s. 3; *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25, s. 7; *Patent Act*, R.S.C. 1985, c. P-4, s. 2.1; *Telecommunications Act*, S.C. 1993, c. 38, s. 3.

[2] See Alberta *Family and Community Support Services Act*, c. F-3, s. 1(b)(v); Alberta *Emergency Management Act*, s. 2; Alberta *Blind Persons Rights Act,* c. B-3, s. 2(2); *Dangerous Goods (Transportation) Act*, R.S.P.E.I. 1988, c. D-3, s. 2(5); *Endangered Species Act*, S.N.S. 1998, c. 11, s. 4(2); *Conservation Easements Act*, S.N.S. 2001, c. 28, s. 3; and *Crown Forest Sustainability Act*, S.O. 1994, c. 25, s. 4.

- Even if this Court were to establish the principle of constitutional immunity for which Canada contends, it would remain to consider on the facts and evidence whether the conduct alleged in the third party notice went beyond the limits of any such immunity. There may be immunity in some circumstances, but not others (*R. v. Eldorado Nuclear,* [1983] 2 S.C.R. 551, 565-566).
- The "limited application" of interjurisdictional immunity is not available to Canada because this is not a situation "already covered by precedent" (*CWB*, para. 77). The *Tobacco Damages/Costs Recovery Act* does not impair a core federal power any more than does any liability-creating statute within the terms of which the actions of Canada or its officials place Canada.

4. Lastly, identifying the two uses to which Canada puts its claimed constitutional principle reveals a contradiction in Canada's position which arises because Canada also argues that, unless "the British Columbia legislature intended to bind the federal Crown, it is unnecessary for the Court to pronounce on its constitutional capacity to do so" (Canada, para. 66). Therein lies the contradiction: Canada first must be correct on the constitutional issue that Canada says it is unnecessary to decide in order for the Court to be able to accept the reason Canada gives for why the British Columbia legislature did not intend that the *Tobacco Damages/Costs Recovery Act* bind the federal Crown.

5. Canada, for its argument that the British Columbia legislature did not intend to bind the federal Crown, relies on the presumption of governmental immunity from statute: the *Tobacco Damages/Costs Recovery Act* "does not indicate the necessary intention to displace the federal Crown's immunity from statute" (Canada, para. 30). But, unless the constitutional principle for which Canada contends exists, there is in British Columbia no presumption available to the federal Crown of governmental immunity from statute. The only way that Canada can invoke such a presumption in its favour is if (as Canada argues) British Columbia lacked legislative competence to do what it purported to do in the 1974 *Interpretation Act*, namely to reverse for both the provincial and the federal Crown the presumption of governmental immunity from statute.

6. Canada cannot have it both ways: Canada cannot rely, as it does, on a presumption in favour of the federal Crown of governmental immunity from statute (Canada, para. 30) and then also argue that it is unnecessary to decide whether the constitutional principle for which it contends exists (Canada, para. 66). If (as the defendants submit) the constitutional principle for which Canada contends does not exist, then there is in British Columbia no presumption available to the federal Crown of governmental immunity from statute. And that is so regardless of the effect (or not) of any subsequent legislative change to the 1974 *Interpretation Act*. Once legislation alters a common law rule, subsequent change to the legislation does not revive the prior common law rule: *Interpretation Act*, s. 35(1)(a); *R. v. Firkins* (1977), 37 C.C.C. (2d) 227 (B.C.C.A.) (the repeal of s. 142 of the *Criminal Code* does not revive the common law rule); *R. v. Camp* (1977), 79 D.L.R. (3d) 462 (Ont. C.A.) (same); *Greer Estate v. MacLeod* (1980), 22 B.C.L.R. 51 (S.C.) (the repeal of s. 11 of the *Evidence Act* did not have the effect of reviving the former common law rule).

7. This Court cannot in deciding the cross-appeal both give Canada the benefit of governmental immunity from statute and refrain from deciding whether the constitutional principle for which Canada contends exists in law. To recognize governmental immunity from statute for Canada necessarily entails recognizing a constitutional principle that the provinces lack legislative competence to bind Canada (as Canada at least impliedly concedes by advancing the argument it does at para. 36). Put another way, Canada's excuse for avoiding the constitutional question (that there remains a presumption of governmental immunity from statute that the *Tobacco Damages/Costs Recovery Act* does not displace) depends on the 1974 *Interpretation Act* having been ineffective to repeal the presumption, and thus on the constitutional question being answered in the affirmative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: February 7, 2011

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TABLE OF AUTHORITIES

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