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OUR FILE NO. B-2593-1

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March 17, 1999

**PERSONAL & CONFIDENTIAL**

British American Tobacco  
Globe House  
4 Temple Place  
WC2R 2PG  
United Kingdom

**VIA FAX**

Attention: Neil R. Withington  
Assistant General Counsel  
Senior Litigation Counsel

Dear Sirs\Mesdames:

**Re: Jurisdiction Issues**

Enclosed herewith please find a copy of D.A. Webster's letter to the Supreme Court of B.C. dated March 11, 1999.

Yours very truly,

SUGDEN, MCFEE & ROOS  
Per:

*S. Fitzgerald*  
for RICHARD R. SUGDEN, Q.C.  
RRS:sf  
Encls.

c.c. Jay Pultman  
Simpson Thacher & Bartlett

David Byers  
Stikeman Elliott

Stuart Chalfen  
British American Tobacco p.l.c.

Bruce Sheffler  
Chadbourne & Parke

Mark Huleatt-James  
Lovell White Durrant

John Meltzer  
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Philip Scourfield  
Brown & Williamson

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# BULL, HOUSSER & TUPPER

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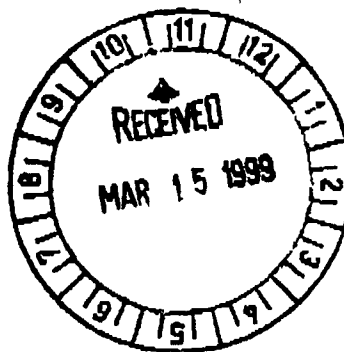
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# COPY

Reply Attention of: D.A. Webster, Q.C.  
Direct Line: 641-4874  
e-mail: DAW@bht.com  
Our File No.: 97-6255  
Date: March 11, 1999

## BY COURIER

The Supreme Court of British Columbia  
The Law Courts  
800 Smithe Street  
Vancouver, B.C.  
V6Z 2E1



Attention: Trial Division

Dear Sirs/Mesdames:

Re: **British Columbia v. Imperial Tobacco Limited et al (No. C985776)**  
**RJR-Macdonald Inc. v. Attorney General of B.C. (No. C985777)**  
**Imperial Tobacco v. Attorney General of B.C. (No. C985780)**  
**Rothmans, Benson & Hedges Inc. v. Attorney General of B.C. (No. C985781)**

### The action by the Province of British Columbia:

On November 12, 1998, the Province of British Columbia commenced an action pursuant to section 13 of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 1997, c. 41 and amendments thereto (the "Act") against a number of companies involved in the manufacture and promotion of tobacco products to recover the cost of health care benefits that have been provided or will be provided to that portion of the population of insured persons who have suffered disease caused or contributed to by smoking cigarettes.

The defendants include the three major Canadian manufacturers of tobacco products, Imperial Tobacco Limited, Rothmans, Benson & Hedges Inc. and RJR-Macdonald Inc. (the "Canadian manufacturers").

*A Member of*

MCMILLAN BULL CASGRAIN

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The writ of summons and statement of claim has been served within the jurisdiction upon the three Canadian manufacturers and as well as upon the defendants Imasco Limited and the Canadian Tobacco Manufacturers' Council. Each of the aforementioned defendants has entered an appearance.

It will be necessary to serve the writ and statement of claim upon the remaining defendants ex juris (the "ex juris defendants"). Pursuant to an agreement which is described below, the ex juris defendants will be served promptly.

In this letter the action by the Province of British Columbia will be described as "the government's action".

**The constitutional challenge:**

The three Canadian manufacturers have each commenced an action naming the Attorney General of British Columbia as defendant seeking a declaration that the Act "...is and was at all material times inconsistent with the provisions of the Constitution of Canada, *ultra vires* the Legislative Assembly of British Columbia, invalid and of no force or effect".

The writ of summons and statement of claim in each of the three actions has been served and appearances and statements of defence have been filed and served.

The allegations raised in each of the three actions are identical. In this letter the three actions will be collectively described as "the constitutional challenge".

**Identification of counsel:**

Mr. Thomas Berger, Q.C. and Mr. D. A. Webster, Q.C. are counsel for the Province of British Columbia in the government's action and counsel for the Attorney General in the constitutional challenge.

Mr. W.S. Berardino, Q.C. of the firm of Russell & DuMoulin is counsel for Imperial Tobacco Limited and Imasco Limited.

Mr. James A. Macaulay, Q.C. of the firm of Macaulay McColl is counsel for Rothmans Benson & Hedges Inc.

Mr. Jack Giles, Q.C. of the firm of Farris, Vaughan, Wills and Murphy is counsel for RJR-Macdonald Inc.

Ms. Loryl Russell of the firm of L.D. Russell & Company is counsel for the Canadian Tobacco Manufacturers' Council.

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**Case management discussions by counsel:**

The aforementioned counsel have met on a number of occasions to discuss the pre-trial management of the government's action and the constitutional challenge.

Counsel have agreed that the constitutional challenge should proceed to trial before the trial of the government's action and that it is in the interests of all parties to have the issue of the constitutional validity of the *Act* decided, at first instance, as quickly as is reasonably possible.

**Request for the appointment of a case management judge and a trial date in the constitutional challenge:**

Counsel request the appointment of a case management judge to deal with the constitutional challenge and the government's action. In making this request it is the expectation of counsel that the case management judge would preside at the trial of the constitutional challenge and, subject to the outcome of the challenge, would be available thereafter to continue to manage the government's action.

Counsel believe that all pre-trial procedures in the constitutional challenge can reasonably be completed by the end of September, 1999. Counsel agree that three weeks will be required to hear the evidence and argument. Counsel request that three weeks be reserved for the trial of the constitutional challenge commencing on October 4, 1999 or as soon thereafter as the trial schedule will allow.

**Pre-trial procedures in the constitutional challenge:**

In order to facilitate the timely completion of all pre-trial matters in the constitutional challenge, it has been agreed that counsel for the three Canadian manufacturers will provide counsel for the Attorney General with an outline of the evidence they intend to lead at trial by April 1, 1999 and will produce the evidence (ie. reports, affidavits etc.) by May 1, 1999.

Counsel for the Attorney General will produce any evidence they intend to lead at trial by July 1, 1999.

Any rebuttal evidence will be produced by July 23, 1999.

At the present time counsel do not believe that discovery or cross examination on affidavits is required but they reserve their position on this issue pending disclosure of the evidence. Further, the July 1, 1999 date has been set without counsel for the Attorney General knowing the nature and extent of the evidence that will be adduced on behalf of the Canadian manufacturers. Once this evidence is disclosed, if counsel for the Attorney General believe that the July 1, 1999 date is not realistic, the July 1, 1999 date may have to be adjusted. Similarly counsel for the Canadian

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manufacturers may feel that the date for the delivery of rebuttal evidence may have to be adjusted. Failing agreement of counsel, these issues will be immediately brought to the attention of the case management judge.

Counsel for the Canadian manufacturers will deliver outlines of argument on August 3, 1999. Counsel for the Attorney General will deliver an outline of argument by September 3, 1999. Reply, if any, will be delivered by September 17, 1999. A joint book of authorities will be prepared by September 24, 1999.

**The government's action:**

Counsel have also agreed that the government's action should not be held in abeyance pending a determination of the constitutional validity of the *Act*. Statements of defence will be delivered by the Canadian manufacturers and by Imasco Limited and the Canadian Tobacco Manufacturers' Council on or before April 15, 1999. A Reply, if any, is to be filed within a reasonable time but not later than June 1, 1999. It has also been agreed that the government and the aforementioned defendants should be in a position to deliver a first list of documents in the government's action on or before November 15, 1999.

**Ex juris defendants:**

It is anticipated that once the ex juris defendants are served, most, if not all of them will not attorn to the jurisdiction but will attack the validity of the service and/or the jurisdiction of the court. One of the grounds that the ex juris defendants may want to raise is the constitutional validity of the *Act*. Other grounds become academic if the *Act* is struck down.

Subject to the direction of the court, counsel would like to establish a process which will give the ex juris defendants an opportunity to participate in challenging the constitutional validity of the *Act* and at the same time preserve their ability to challenge service and/or jurisdiction on other grounds if the *Act* is not struck down.

Counsel for the Canadian manufacturers have had discussions with ex juris defendants, many of whom have already consulted local counsel. As a result of these discussions, counsel and the ex juris defendants (with the exception of two or three ex juris defendants from whom confirmation is expected within the next few days) have agreed to the following:

- (1) The government will promptly serve the ex juris defendants.
- (2) As soon as they are served those ex juris defendants who are not prepared to attorn to the jurisdiction of the court will immediately file and serve a notice of motion challenging service and/or jurisdiction.

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- (3) The motions will be returnable on the first day of the trial of the constitutional challenge by the Canadian manufacturers.
- (4) The notices of motion will clearly identify the grounds for the order(s) sought. In the interests of time, counsel for the government agree that the materials (ie. reports, affidavits etc.) to be relied upon in support of the order(s) sought can be filed at a later date.
- (5) The ex juris defendants will immediately notify counsel for the government if there is any issue with respect to the manner of service so that any "technical" issues with respect to the manner of service can be addressed.
- (6) Ex juris defendants who raise the constitutional validity of the Act as one of the grounds for opposing service and/or jurisdiction, will argue the constitutional component of their motion at the same time as the constitutional challenge by the Canadian manufacturers.
- (7) The ex juris defendants will co-ordinate their challenge with the challenge brought by the Canadian manufacturers, including adhering to the same pre-trial schedule described above for the disclosure of evidence and argument.
- (8) If the court does not strike down the Act, the ex juris defendants can then proceed to challenge service and/or jurisdiction on grounds other than those referred to in sub-paragraphs (5) and (6).
- (9) The motions referred to in sub-paragraph 8 will not be heard until the trial judge has rendered judgment in the constitutional challenge.
- (10) The ex juris defendants agree not to assert any prejudice by reason of the time that has passed before the motions are heard and, in particular, will not object to any order that might require the writ and statement of claim to be renewed.

As soon as the writ of summons and statement of claim are served the ex juris defendants will confirm in writing their acceptance of the procedure described in this letter. If there is any dispute or disagreement, the matter will be immediately brought to the attention of the case management judge.

Although the terms of this letter have not been reviewed with the defendant, Liggett Group, Inc. counsel for the government believe it is likely that Liggett Group, Inc. will not want to actively participate in the constitutional challenge.

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The arrangements described in this letter are predicated upon reserving a trial date for the constitutional challenge commencing on October 4, 1999 or a date shortly thereafter. If this is not possible it will be necessary to reconsider these arrangements.

In the event that the proposed trial date can be reserved and a case management judge is appointed, counsel would be pleased to meet with the case management judge at whatever time the case management judge considers appropriate.

Counsel all agree that they should continue to try to resolve pre-trial case management issues amongst themselves on the understanding that failing agreement any contentious issues will be brought before the case management judge.

If the case management judge is content to have the government's action and the constitutional challenge proceed in the manner described in this letter and is prepared to let counsel continue to try to resolve matters themselves, counsel propose that a case management conference be scheduled for early May, 1999. At that time counsel will report on how matters are progressing.

Counsel for the Canadian manufacturers, Imasco and the Canadian Tobacco Manufacturers' Council have reviewed and agree with the contents of this letter.

Counsel would be pleased to receive directions from the court.

Yours truly,

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D.A. Webster

DAW/tv

CC. Mr. T. Berger, Q.C.  
Mr. W.S. Berardino, Q.C. ✓  
Mr. James Macaulay, Q.C.  
Mr. Jack Giles, Q.C.  
Ms. Loryl Russell

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