

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

SUPERIOR COURT

No.:

**IMPERIAL TOBACCO CANADA LIMITED**, a body corporate having a place of business at 3711 St-Antoine, in the City and District of Montreal, Quebec, H4C 3P6

**and**

**ROTHMANS, BENSON & HEDGES INC.**, a body corporate having a place of business at 185 Laurentian Autoroute, in the City and District of Quebec, Quebec, G1K 7L2

**and**

**JTI-MACDONALD CORP.**, a body corporate having a place of business at 2455 Ontario Street East, in the City and District of Montreal, Quebec, H2K 1W3

**Plaintiffs**

**v.**

**ATTORNEY GENERAL OF QUEBEC**,  
1, Notre-Dame Street East, Bureau 8.00,  
Montreal, Quebec, H2Y 1B6

**Defendant**

**MOTION TO INSTITUTE PROCEEDINGS FOR DECLARATORY JUDGMENT**  
(Articles 110 and seq., 453 C.C.P.)

**PLAINTIFFS IMPERIAL TOBACCO CANADA LIMITED ("ITCAN"), ROTHMANS BENSON & HEDGES ("RBH") AND JTI-MACDONALD CORP. ("JTIM") RESPECTFULLY SUBMIT THE FOLLOWING:**

1. On June 19, 2009, the Government of Québec (the "**Government**") sanctioned Bill 43: the *Tobacco-related Damages and Health Care Costs Recovery Act* into law (the "**Act**"), thereby establishing special rules for lawsuits seeking the recovery of tobacco-related health care costs and damages against tobacco manufacturers;

2. ITCAN, RBH and JTIM hereby seek a declaration from this Honourable Court that the Act is in whole or in part inoperative and of no legal effect on the ground that it infringes upon rights guaranteed explicitly and implicitly by the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"), by the *Constitution Act, 1982* and the *Constitution Act, 1867* ("*Canadian Constitution*");

**The business and interest of ITCAN, RBH and JTIM**

3. Established in 1908, ITCAN is Canada's largest tobacco manufacturer;
4. ITCAN employs over 800 individuals and has its head offices situated in the St. Henri district of Montréal and regional sales offices throughout Canada;
5. Currently, ITCAN, through trademarks such as du MAURIER, Player's, Peter Jackson and Matinée, offers products to over five million Canadian adults who choose to smoke;
6. JTIM also carries on business in Quebec and throughout Canada as a manufacturer of tobacco products;
7. JTIM conducts its manufacturing operations in Montreal, mainly producing manufactured cigarettes and fine cut tobacco under various brand names and styles, including Export A, Macdonald Special, Vantage, Camel and Winston;
8. RBH carries on business in Quebec and throughout Canada as a manufacturer of tobacco products;
9. RBH was formed in 1986 as a result of the merger of two competitors. Predecessor companies have been manufacturing tobacco products in Canada for over 100 years;
10. RBH currently sells tobacco products under a variety of brand names including Rothmans, Viscount and Benson & Hedges;
11. ITCAN, RBH and JTIM have an obvious interest in challenging the constitutionality of the Act as they are tobacco manufacturers within the meaning of the Act and also because the Act has an impact on legal proceedings that were already pending against them before the Québec Superior Court when the Act came into force and which are still pending, namely the two class actions bearing court numbers 500-06-000076-980 and 500-06-000070-983;
12. No subsequent action by the Government is required to put an end to the difficulty;
13. The Court, the parties and the public need a decision on the issue of the constitutional validity of the Act;
14. The factual context of the present motion is sufficient for the Court to decide the constitutional issues;
15. It is imperative that the Court rule upon the constitutionality of the Act as soon as possible so that ITCAN, RBH and JTIM can take the appropriate course of action in full knowledge of their civil rights and obligations;

## The Act

16. Draft Bill 43 was introduced by the Minister of Health and Social Services on May 14, 2009;
17. After being passed into law on June 18, 2009, it was sanctioned and entered into force on June 19, 2009;
18. The stated purpose of the Act is described in its explanatory notes as follows:

*The purpose of this bill is to establish special rules for the recovery of tobacco-related health care costs attributable to a wrong committed by one or more tobacco product manufacturers. It also seeks to make some of those rules applicable to the recovery of damages for a tobacco-related injury.*

19. The Act significantly departs from the rules of evidence and substantive civil law that are generally applicable in the Province of Québec;
20. The Act purports to confer procedural and substantive advantages to the Government in the recovery from tobacco manufacturers of health care costs allegedly related to tobacco, by introducing certain modifications to the substantive rules of civil liability and to the evidentiary rules otherwise applicable;
21. The Act also purports to benefit private parties in the recovery of tobacco-related damages against tobacco manufacturers, by extending the application of some of the above-mentioned modifications to recourses previously instituted or which could eventually be instituted by these private parties against tobacco manufacturers;
22. As appears from the statement of purpose found under section 1 of the Act and also from its operative provisions, its purpose and effect are:
  - (a) to create a right of action in favour of the Government, which is direct and not by way of subrogation, allowing for the recovery from Canadian and foreign manufacturers of tobacco-related health care costs, either by way of a so-called *collective* (meaning *aggregate*) action in respect of a wide, unidentified, population of smokers, or by way of individual action, in respect of health care costs incurred by particular individuals, and to set out a number of extraordinary provisions in order to facilitate the pursuit of the Government's claim;
  - (b) to facilitate the recovery of damages by persons exposed to tobacco in the Province of Quebec against Canadian and foreign manufacturers, either by way of individual or class actions, by derogating retroactively, via extraordinary provisions, from the ordinary application of civil law in favour of plaintiffs, to the detriment of tobacco manufacturers, allowing for the recovery of such costs or damages "*regardless of when the wrong was committed*" (section 1), i.e. by retroactively eliminating the defence of prescription available to defendant manufacturers;

23. For example, and without limitation, the Act sets forth the following extraordinary rules applicable only to lawsuits against tobacco manufacturers:
- (a) If the Government brings an action on a collective basis, it is not required to identify particular health care recipients individually or prove the cause of the disease suffered by, or the general deterioration of health of, a particular health care recipient or the portion of the health care costs incurred for such a recipient. Moreover, the Government may not be compelled to answer questions on the health of, or the health care provided to, particular health care recipients or to produce the medical records and documents of, or the documents related to health care provided to, particular health care recipients, except as provided by a law or a rule of law, practice or procedure that requires the production of documents relied on by an expert witness (section 13 of the Act);
  - (b) In a Government action, proof of causation between alleged facts and health care costs or between exposure to a tobacco product and the disease suffered by, or the general deterioration of health of, the recipients of that health care, may be established on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies, including information derived from a sampling. The same applies to proof of the health care costs whose recovery is being sought in such an action (section 15 of the Act);
  - (c) In the event that a Court finds that tobacco manufacturers failed in their duty to abide by the rules of conduct to which they are bound, that exposure to a type of tobacco product may cause or contribute to a disease or to the general deterioration of a person's health and that the said product was offered for sale in Québec during all or part of the period of the said failure, the Court must then presume that the persons who were exposed to this type of tobacco product would not have been exposed had the tobacco manufacturer not failed in its duty and it must also presume that the exposure to the type of tobacco product manufactured by the tobacco manufacturer caused or contributed to the disease or general deterioration of health, or the risk of disease or general deterioration of health, of a number of persons who were exposed to that type of product (section 17 of the Act);
  - (d) Certain rules relating to actions brought on an individual basis by the Government apply to actions brought by a person or the person's heirs or other successors for the recovery of damages for any tobacco-related injury (sections 25 and 27 of the Act), although the Plaintiffs deny that these rules apply to on-going proceedings (with the exception of the elimination of prescription which the Act does purport to apply on-going proceedings);
  - (e) An action, including a class action, to recover tobacco-related health care costs or damages for tobacco-related injury may not be dismissed on the ground that the right of recovery is prescribed, if it is in progress on June 19, 2009 or brought within three years following that date. Actions dismissed on that ground before June 19, 2009 may also be revived within three years following that date (section 27 of the Act); and
  - (f) The Act has a retroactive effect (section 31 of the Act).

### **Grounds of contestation**

24. The *Act* is inoperative as it violates the *Quebec Charter* and the *Canadian Constitution*, on the following grounds:
- (a) The Act deprives ITCAN, RBH and JTIM of their right to a fair, full and equal trial, as guaranteed by the *Quebec Charter* and the *Canadian Constitution*;
  - (b) The Act deprives ITCAN, RBH and JTIM of their vested right to prescription, and therefore violates sections 6 and 24 of the *Quebec Charter*;
  - (c) The Act, to the extent that it purports to apply to on-going proceedings between private parties, constitutes a breach of the rule of law protected by the *Canadian Constitution* and a violation of Section 23 of the *Quebec Charter* as it represents an unconstitutional encroachment by the legislative power into on-going judicial proceedings, the obvious intent being to benefit, without any valid public purpose, private parties suing tobacco manufacturers;
- a) Violation of the right to a fair, full and equal hearing**
25. The Act infringes upon JTIM, RBH and ITCAN's right to a fair hearing in full equality for the determination of their civil obligations, as guaranteed by Section 23 of the *Quebec Charter* and by the principle of the rule of law afforded by the *Canadian Constitution*;
26. The provisions of the Act relating to the Government action and the denial of the defence of prescription lead to a situation of unfairness and inequality of arms, in violation of Section 23 of the *Quebec Charter* and of the principle of the rule of law;
27. Generally speaking, the tobacco manufacturers are led into a trial of an action about their alleged civil liability towards smokers in which their right to defend themselves is severely limited through the creation of special evidentiary rules in favour of the Government, the removal of usual discovery rights, the imposition of presumptions of causation and by unfairly imposing upon the tobacco manufacturers the burden to disprove such "presumed" causation;
28. When taken as a whole, the Act impairs the ability of the tobacco manufacturers to present a full defence to liability, causality and damages;
29. In respect of the Government's health care costs recovery action, the Act therefore constitutes, as described above, retroactive legislation whereby the Government creates conditions of inequality for the trial of the case in a manner such as to tilt the balance in its own favour;
30. The Act places tobacco manufacturers at a clear disadvantage in any litigation where it applies, and therefore deprives them of their right to equal recognition under the law and of the full exercise of their civil rights;

**b) Violation of the due process clause of Articles 6 and 24 in relation to property rights**

31. At the time the Act was adopted, ITCAN, RBH and JTIM had a vested right in the extinction of their obligations, assuming any such obligations existed, to any plaintiff whose claim was prescribed;
32. Said vested right to the extinction of obligations resulting from prescription constitutes property protected by Article 6 of the *Quebec Charter*;
33. Section 27 of the Act, by retroactively eliminating the defence of prescription, violates the due process clause of Article 24 of the *Quebec Charter*, as it deprives ITCAN, RBH and JTIM of the enjoyment of their vested right in the prescription of claims;

**c) Violation of the right to a fair trial in on-going proceedings**

34. The enactment of the Act amounts to an attempt by the legislature, without any valid public purpose, to knowingly assist and benefit private plaintiffs involved in on-going class actions against tobacco manufacturers by purporting to modify, in the middle of such proceedings, some substantive and evidentiary rules otherwise applicable to determine civil liability, as described hereinafter;
35. Thus, as stated above, Section 27 of the Act, which applies expressly even to on-going proceedings at the time of the Act's entry into force, retroactively denies ITCAN, RBH and JTIM of their vested right to invoke prescription as a defence in each of the on-going class actions;
36. By denying tobacco manufacturers the right afforded to every citizen to invoke prescription, the Act breaches their right to a fair trial and to a full defence;
37. Furthermore, to the extent that Section 15 of the Act is applicable to on-going proceedings (which is denied) and is interpreted in such a way as to exempt plaintiffs from the requirement to prove individual causation by allowing them to establish causality by means of mere aggregate statistical evidence, it would then deny defendants, including ITCAN, RBH and JTIM, of means of proof and of substantive defences that would otherwise apply in any other civil actions;
38. In Pleas filed in 2008 in the above-mentioned class actions, both ITCAN, RBH and JTIM specifically plead that any claim against them is prescribed and additionally that to succeed in such a claim, any individual would have to demonstrate the existence of a causal link, on a personal basis, between the alleged fault and damages, in accordance with the prevailing law of civil liability in Quebec;
39. Defendants in those class actions, including ITCAN, RBH and JTIM, are therefore not afforded the equality of arms and a fair trial, as guaranteed by section 23 of the *Quebec Charter* and the principle of the rule of law afforded by the *Canadian Constitution*;
40. The legislature thereby interferes *de facto* with the judicial process to the material detriment of the tobacco manufacturers, for no legitimate public purpose and in a most

unique fashion, by targeting a particular industry, and depriving its members of grounds of defence already raised in on-going class actions and which are available to any other citizen;

41. The legislative attempt to influence, determine or assist in the outcome of on-going class actions constitutes an invalid encroachment by the legislative branch into the judicial process, contrary to the rule of law principle sanctioned by the *Canadian Constitution*;

**Conclusions**

42. It is imperative that the Court rule upon the constitutionality of the Act as soon as possible so that ITCAN, RBH and JTIM can take the appropriate course of action in full knowledge of their civil rights and obligations;
43. ITCAN, RBH and JTIM respectfully submit that the present Motion is well founded in fact and in law;

**WHEREFORE MAY IT PLEASE THIS COURT TO:**

**GRANT** the present Motion;

**DECLARE** that the *Tobacco-related Damages and Health Care Costs Recovery Act*, S.Q. 2009, c. 33, is inoperative and of no legal effect as it violates the *Québec Charter of Human Rights and Freedoms* and the *Canadian Charter of Rights and Freedoms*;

**THE WHOLE** with costs.

Montreal, August 24, 2009

Montreal, August 24, 2009

*Osler, Hoskin & Harcourt LLP*

**OSLER, HOSKIN & HARCOURT LLP**

Attorneys for the Plaintiff

Imperial Tobacco Canada Limited

*Borden Ladner Gervais LLP*

**BORDEN LADNER GERVAIS LLP**

Attorneys for the Plaintiff

JTI-Macdonald Corp.

Montreal, August 24, 2009

*McCarthy Tétrault LLP*

**MCCARTHY TÉTRAULT LLP**

Attorneys for the Plaintiff

Rothmans, Benson & Hedges Inc.

TRUE COPY

*Osler, Hoskin & Harcourt LLP*  
**Osler, Hoskin & Harcourt LLP**

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

SUPERIOR COURT

No.: 500-17-052494-0910

**IMPERIAL TOBACCO CANADA  
LIMITED**

**and**

**ROTHMANS, BENSON & HEDGES  
INC.**

**and**

**JTI-MACDONALD CORP.**

**Plaintiffs**

**v.**

**ATTORNEY GENERAL OF QUEBEC**

**Defendant**

**NOTICE TO DEFENDANT**  
(Article 119 C.C.P.)

**TO: ATTORNEY GENERAL OF QUEBEC**  
1, Notre-Dame Street East  
Bureau 8.00  
Montreal (Qc) H2Y 1B6

**TAKE NOTICE** that the Motion to Institute Proceedings for Declaratory Judgment will be presented before the Court on September 25, 2009 at 9:00 a.m., in room 2.16 of the Montreal Courthouse situated at 1 rue Notre-Dame East, Montreal, Quebec, H2Y 1B6. On that date, the Court may exercise such powers as are necessary to ensure the orderly progress of the proceeding or the Court may hear the case, unless you have made a written agreement with the Plaintiff or the Plaintiff's attorneys on a time-table for the orderly progress of the proceeding. The timetable must be filed in the office of the Court.

Take notice that the Plaintiffs have filed this Motion to Institute Proceedings for Declaratory Judgment in the office of the Superior Court of the judicial district of Montreal.

To file an answer to this Motion, you must first file an Appearance, personally or through an attorney, at the Courthouse of Montreal, located at 1 Notre-Dame Street West, within 10 days of service of this Motion.



If you fail to file an Appearance within the time limit indicated, a judgment by default may be rendered against you without further notice upon the expiry of the 10-day period.

If you file an Appearance, the Motion will be presented before one of the Justices of the Superior Court of Quebec on the date and place indicated on the notice of presentation, unless a written agreement is made by the parties before that date to determine a time-table for the orderly progress of the proceeding.

Take notice that there are no Exhibits in support of the Motion.

**Request for transfer of a small claim**

If the amount claimed by the plaintiff does not exceed \$7,000, exclusive of interest, and if you could have filed such an action as a plaintiff in Small Claims Court, you may make a request to the Clerk for the action to be disposed of pursuant to the rules of Book VIII of the *Code of Civil Procedure* (R.S.Q., c. C-25). If you do not make such a request, you could be liable for costs higher than those provided for in Book VIII of the Code.

Montreal, August 24, 2009

Osler, Hoskin & Harcourt LLP

**OSLER, HOSKIN & HARCOURT LLP**

Attorneys for the Plaintiff

Imperial Tobacco Canada Limited

Montreal, August 24, 2009

Borden Ladner Gervais LLP

**BORDEN LADNER GERVAIS LLP**

Attorneys for the Plaintiff

JTI-Macdonald Corp.

Montreal, August 24, 2009

McCarthy Tétrault LLP

**MCCARTHY TÉTRAULT LLP**

Attorneys for the Plaintiff

Rothmans, Benson & Hedges Inc.

**TRUE COPY**

Osler, Hoskin & Harcourt LLP

Osler, Hoskin & Harcourt LLP