Citation: JTI-MACDONALD v. AG-BC ET AL
2000 BCSC 0312

Date: 20000221
Docket: C985777
Registry: Vancouver

2000 BCSC 312 (CanLII)

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JTI-MACDONALD CORP.

PLAINTIFF

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

DEFENDANT

Docket: C985780
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

IMPERIAL TOBACCO LIMITED, a division of IMASCO LIMITED

PLAINTIFF

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

DEFENDANT

Docket: C985781
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ROTHMANS, BENSON & HEDGES INC.

PLAINTIFF

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

DEFENDANT

2000 BCSC 312 (CanLII)

Docket: C985776
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

2000 BCSC 312 (CanLII)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA

PLAINTIFF

AND:

IMPERIAL TOBACCO LIMITED, IMASCO LIMITED, BRITISH AMERICAN TOBACCO (INVESTMENTS) LTD., B.A.T. INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO p.l.c., BROWN & WILLIAMSON TOBACCO CORPORATION, AMERICAN TOBACCO COMPANY, B.A.T. #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., ROTHMANS INTERNATIONAL LIMITED, ROTHMANS INTERNATIONAL p.l.c., ROTHMANS INTERNATIONAL N.V., ROTHMANS #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, PHILIP MORRIS COMPANIES INC., PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL INC., PHILIP MORRIS #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, RJR-MACDONALD INC., R.J. REYNOLDS TOBACCO COMPANY, RJR NABISCO INC., R.J. REYNOLDS TOBACCO INTERNATIONAL INC., RJR #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, LIGGETT GROUP INC., CANADIAN TOBACCO MANUFACTURERS' COUNCIL, THE COUNCIL FOR TOBACCO RESEARCH - U.S.A. INC., THE TOBACCO INSTITUTE INC.

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HOLMES

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Place and Date of Trial:	October 5-8, 12-15, and 18 - 22, 1999 Vancouver, B.C.

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TOBACCO ACTION

[1] The three actions for trial concern the constitutional validity of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 1997 c.41 [the "*Act*"]. The plaintiffs in the three actions are named defendants ["manufacturers"] in the Supreme Court of British Columbia, Vancouver Registry Action No. C985776 commenced by Her Majesty the Queen in Right of British Columbia (the "government action") pursuant to the statutory cause of action conferred by Section 13 of the *Act*. They are the Canadian manufacturers of tobacco products whose products have been marketed in British Columbia.

[2] The plaintiffs seek declaratory judgments that the *Act* is *ultra vires* the Constitution of Canada and consequently of no force and effect.

[3] The Council for Tobacco Research-U.S.A. Inc. and Tobacco Institute, Inc. ["Tobacco Institute"]; British America Tobacco p.l.c, British American Tobacco Investments, British American Tobacco Industries ["B.A.T."]; Brown & Williamson Tobacco Corporation ["Brown & Williamson"], American Tobacco Company; and Phillip Morris Companies Inc., Phillip Morris Incorporated and Phillip Morris International Inc.; collectively termed the "*ex juris* defendants", are defendants named in the government action who have been served *ex juris*.

[4] The *ex juris* defendants have motions pending pursuant to Rule 13(10) of the *Rules of Court* to set aside service of the Writs of Summons and Statements of Claim but by agreement they appear in these proceedings to argue in support of the constitutional invalidity of the *Act*. The balance of their Rule 13 motions are to be heard at a later date.

[5] The manufacturers' and the *ex juris* defendants' attack upon the *Act* is broadly based and essentially tripartite. They allege the *Act* exceeds the territorial jurisdiction of the Province; that it is an unconstitutional interference with judicial independence; and that it violates the rule of law protection of equality under the law and against retroactive penal legislation.

LEGISLATIVE HISTORY OF THE *ACT*

[6] The *Tobacco Damages Recovery Act*, S.B.C. 1997, c.41 received Royal Assent July 28, 1997. It was to be brought into force by regulation. By virtue of the *Interpretation Act*, R.S.C. 1985, c.I-21, only the title of the *Act* and the commencement section came into force July 28, 1997 and the balance of the *Act* remained unproclaimed.

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[7] For convenience, I refer hereafter to the manufacturers and the *ex juris* defendants collectively as "the manufacturers".

[8] The *Act* remained dormant for approximately a year. On July 30, 1998 the *Tobacco Damages Recovery Amendment Act*, S.B.C. 1998, c.45, which provided for extensive amendments to the original *Act*, received Royal Assent. The original *Act* and the Amendments were brought into force by Regulation, November 12, 1998 [Order in Council No. 1357]. The three manufacturers' actions now being tried were commenced immediately thereafter.

[9] The status of the *Act* following the amendment was that Section 1 and Sections 13 to 19 were added to the title and the commencement section (s.20) previously in force. Sections 2 to 12 of the original *Act* remained unproclaimed.

[10] The *Act* was further amended by Sections 61 to 65 of the *Miscellaneous Statutes Amendment Act* (No.3), 1999. On July 16, 1999, Royal Assent was given and on July 19, 1999, Order in Council No. 870 brought Sections 61 to 65 into force. The unproclaimed Sections 2 to 12 of the original *Act* were repealed.

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[11] It is not contentious that the Province has an exclusive right to make laws in respect of Property and Civil Rights in the Province; in respect of the Administration of Justice in the Province including matters of Civil Procedure in the Courts; and generally all matters of a merely local or private nature in the Province. [Sections 92(13),(14), and (16) of the *Constitution Act, 1867* (U.K.) 30 & 31 Victoria, c.3, rep R.S.C. 1985 App. II No. 5].

[12] The *Act* creates a new civil cause of action in British Columbia permitting the government to directly recoup a cost incurred on behalf of another and in addition deals substantively with rights and obligations. It is therefor legislation that deals with "Civil Rights in the Province" under s.92(13). [***General Motors of Canada Ltd. v. City National Leasing*** (1989), 58 D.L.R. (4th) 255 (S.C.C.); ***Attorney General (Ontario) v. Scott***, [1955] 1 D.L.R. (2d) 433 (S.C.C.)].

[13] There are several provisions of the *Act* directed to "Procedure in Civil Matters" coming under s.92(14). [***Reference re Status of the Supreme Court of British*** **Columbia** (1882), 1 B.C.R. 243 (S.C.C.); ***Re Joseph Jacob Holdings Ltd. and City of Prince George*** (1980), 118 D.L.R. (3d) 243 (B.C.S.C.); ***Hunt v.***

T&N plc, [1993] 4 S.C.R. 289 at 320, 109 D.L.R. (4th) 16 at 37].

[14] The *Act* may also be said to relate to an aspect of the organization and delivery of health care within a Province which comes within s.92(16).

[15] One illustration of prior Canadian legislation that provides government a direct cause of action to recoup from a third party costs incurred on behalf of another is found in the *Canada Shipping Act*, R.S.C. 1985, c.S-9, at ss.284-286. The federal government is accorded a right of action to recover from a ship owner, regardless of fault, the medical expenses paid to treat an illness of a seaman.

[16] In fact, industry specific liability laws have long existed in the area of worker compensation legislation in England, U.S.A., and Canada.

[17] A number of British Columbia statutes currently have liability provisions relating to specific industries, including:

Mines Act, R.S.B.C. 1996, c.293, s.17

Pipeline Act, R.S.B.C. 1996, c.364

Securities Act, R.S.B.C. 1996, c.418, at s.131

Livestock Act, R.S.B.C. 1996, c.270, at s.11

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Architects Act, R.S.B.C. 1996, c.17, at s.66

[18] The *Act* is modelled in significant degree on the State of Florida's *Medicaid Third-Party Liability Act*, 409.910 Fla.Stat. (1995). On challenge in the Supreme Court of Florida, in ***Agency for Health Care Administration et al v. Associated Industries of Florida Inc. et al*** 678 So. 2d 1239 at 1257(Florida Supreme Court 1996), the Court upheld the statutory cause of action conferred on the state to recover health care costs on the basis that the state "… must have the freedom to craft causes of action to meet society's changing needs".

[19] The arguments of the manufacturers here are predicated upon alleged constitutional inconsistencies that require the *Act* be invalidated entirely rather than remedied by severance or reading down. The Attorney-General without conceding that *Act* is unconstitutional in any way takes the position that reading down or severance could be appropriate in the event certain aspects of the *Act* are found to be unconstitutional.

[20] The provisions of the *Act* have application to actions brought by the government and provide for a direct action for recovery of the cost of health care benefits incurred on

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behalf of an individual insured person, a number of individual insured persons or "on an aggregate basis".

[21] It is the statutory cause of action under s.13(5)(b) in respect of the "aggregate action" that is the focus of the present declaratory actions. That is essentially because the provisions of the *Act* that formulate an aggregate cause of action are a radical departure from traditional common law damage actions requiring proof of individual causation and damages.

[22] All arguments advanced cannot necessarily be segregated to the three main headings of constitutional analysis. There is some overlap and a flow of reasoning and analysis in common.

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INTERFERENCE WITH INDEPENDENCE OF THE JUDICIARY

[23] The manufacturers claim that the *Act* constitutes an impermissible interference by the government with the judicial independence of the Court. The manufacturers argue that the effect of the scheme allowing the government an aggregate action for recovery of health care costs interferes with the Court's right to hear from relevant witnesses and receive the evidence necessary and appropriate to a determination of the facts. The manufacturers perceive the *Act* to involve the Court in a process that gives the appearance of partiality to the government's case and is, in reality, inherently unfair.

[24] The argument of the manufacturers is grounded upon interference with judicial function and though centered upon the principle of judicial independence also raises issues as to separation of powers, the rule of law, and inviolability of the core judicial function of fact-finding, which in combination renders the *Act* constitutionally invalid.

[25] The principle of independence of the functions of the judiciary is grounded in the preamble to the *Constitution Act* and Section 96. Chief Justice Lamer traced the origins of judicial independence in ***Reference Re: Public Sector Pay Reduction Act***, [1997] 3 S.C.R. 3 at 76, 150 D.L.R. (4th) 577:

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> The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the *Act of Settlement* of 1701. And as we said in *Valente, supra,* that Act was the "historical inspiration" for the judicature provisions of the *Constitution Act, 1867*. Admittedly, the Act only extends protection to judges of the English superior courts. However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms have grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

[26] And concluded at pp. 77-78 that:

> … the express provisions of the *Constitution Act, 1867*, and the *Charter* are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. …

[27] The *Act* is specific legislation for the benefit of the government who is plaintiff in the recovery action commenced. A new and unusual statutory cause of action is created that incorporates specific evidentiary rules and procedures and targets only the tobacco industry.

[28] The *Act* gives the government:

> … a direct and distinct action against a manufacturer to recover the cost of health care benefits …
>
> [Section 13(1)].

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[29] The action is neither a subrogated action of individual claims, nor is it a class action. [Section 13(2)]. It permits two separate and divergent routes by which the government may recover health care benefits:

> In an action under subsection (1), the government may recover the cost of health care benefits
>
> (a) that have been provided or will be provided to particular individual insured persons, or
>
> (b) on an aggregate basis, that have been provided or will be provided to that portion of the population of insured persons who have suffered disease as a result of exposure to a type of tobacco product
>
> [Section 13(5)(a) and (b)].

[30] The *Act* provides that if the government in an aggregate action proves, on a balance of probabilities, in respect of a type of tobacco product:

> (a) the defendant manufacturer breached a common law, equitable or statutory duty or obligation owed to persons who have been exposed or might become exposed to the type of tobacco product,
>
> (b) exposure to the type of tobacco product can cause or contribute to disease, and
>
> (c) during all or part of the period of the breach referred to in paragraph (a), the type of tobacco product, manufactured or promoted by the defendant manufacturer or the manufacturers

related to the defendant manufacturer, was offered for sale in British Columbia

[Section 13.1(1)(a), (b) and (c)].

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[31] The Court must presume:

13.1(2) Subject to subsections (1) and (4) … that

(a) the population of insured persons who were exposed to a tobacco product, manufactured or promoted by the defendant manufacturer or the manufacturers related to the defendant manufacturer, would not have been exposed to the product but for the breach referred to in subsection (1)(a), and

(b) the exposure described in paragraph (a) caused or contributed to disease in a portion of the population described in paragraph (a).

[32] The manufacturers argue this shifts the onus to them to disprove the presumptions, while s.13(6) denies them access to the evidence necessary to rebut the inference:

13(6) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,

(a) it is not necessary

(i) to identify particular individual insured persons,

(ii) to prove the cause of disease in any particular individual insured person, or

(iii) to prove the cost of health care benefits that have been provided or will be provided to any particular individual insured person,

(b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits to particular individual insured persons are not compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness,

(c) no person is compellable to answer questions with respect to the health of, or the provision of health care benefits to, particular individual insured persons

[33] The manufacturers therefore allege that these legislative provisions allow the government, a party before the Court as plaintiff in the recovery action, to manipulate and interfere with the adjudicative process. More specifically, the manufacturers allege the inter-relationship of the sections of the *Act* structuring the aggregate form of action creates an interference striking at the core judicial fact-finding function, thus impairing the Court's ability to fairly determine the action. They rely upon judicial independence to safeguard against what they consider as legislative abuse.

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[34] The manufacturers, as an ancillary argument, point to the lack of separation between the legislative and executive branches of government in the present circumstance. They allege the effect is that the government as a party to the action has conscripted the legislature to interfere with the independence of the trier of fact.

[35] The manufacturers' view the *Act* as the executive seeking a method to recover health care costs from the tobacco manufacturers by employing their controlling legislative capacity to create an entirely new cause of action. Clear and explicit language is required to extinguish rights that have been previously conferred. [***Wells v. Newfoundland*** (September 15, 1999), No. 26362 (S.C.C.), [1999] S.C.J. No. 50 (Q.L.) p.41-42].

[36] There is however no strict separation of powers doctrine in Canada. In any event, I do not accept that the *Act* does violate the separation of powers doctrine:

> There is no general "separation of powers" in the Constitution Act, 1867. The Act does not separate the legislative, executive and judicial functions and insist that each branch of government exercise only "its own" function. As between the legislative and executive branches, any separation of powers would make little sense in a system of responsible government; and it is clearly established that the Act does not call for any separation. As between the judicial and the two political branches, there is likewise no general separation of powers.

> [Peter W. Hogg, Constitutional Law of Canada (4th ed.) (Toronto: Carswell, 1997), p.190].

[37] In ***Reference re Secession of Quebec***, [1998] 2 S.C.R. 217 at 233, 161 D.L.R. (4th) 185, the Court noted:

> … the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to s.96 courts.

[38] I accept that research by counsel for the Attorney-General disclosed only four cases attempting a challenge to the validity of legislation in Canada based on separation of powers and none succeeded on that ground. The most notable was ***Singh v. Canada (Attorney General)***, [1999] F.C.J. No. 1056 (T.D.) affirmed on appeal January 14, 2000 in ***Westergard-Thorpe et al v. The Attorney General of Canada***, docket number A-426-99, Federal Court of Appeal.

[39] I do not accept as tenable the manufacturers' argument that the right to a fair trial is a component of the rule of law. Comparison to s.7 or 11(d) *Charter* rights, although not directly relied upon, is a poor analogy as the *Charter* does not guarantee property rights.

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[40] In regard to economic interests within the context of a civil action:

> The omission of property rights from s.7 greatly reduces its scope. It means that s.7 affords no guarantee of compensation or even of a fair procedure for the taking of property by government. It means that s.7 affords no guarantee of fair treatment by courts, tribunals or officials with power over the purely economic interests of individuals or corporations. It also requires … that [liberty and security of the person] be interpreted as excluding economic liberty and economic security; otherwise, property, having been shut out of the front door, would enter by the back.
>
> [Hogg, *supra*, at p.1074; **Wells *v. Newfoundland***, *supra*].

[41] Madam Justice McLachlin, in ***MacKeigan v. Hickman***, [1989] 2 S.C.R. 796, 61 D.L.R. (4th) 688, noted a distinction between independence of the judiciary and impartiality of the judiciary:

> It should be noted that the independence of the judiciary must not be confused with impartiality of the judiciary. As Le Dain J. points out in *Valente v. The Queen*, impartiality relates to the mental state possessed by the judge; judicial independence, in contrast, denotes the underlying relationship between the judiciary and other branches of government which serves to ensure that the court will function and be perceived to function impartially. Thus the question in a case such as this is not whether the government action in question would in fact affect a judge's impartiality, but rather whether it threatens the independence which is the underlying condition of judicial impartiality in the particular case.

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> [***Reference Re: Public Sector Pay Reduction Act***, *supra*; ***R. v. Beauregard***, [1986] 2 S.C.R. 56 at 84, (1986), 30 D.L.R. (4th) 481].

[42] Chief Justice Lamer noted in ***R. v. Lippe***, [1991] 2 S.C.R. 114 at p.139 "… the overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality.

[43] Chief Justice Dickson in ***R. v. Beauregard***, *supra*, described the principle of judicial independence as:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider - be it government, pressure group, individual or even another judge - should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.
>
> [***R. v. Beauregard***, p.420, para.71].

[44] A test to determine judicial independence emphasizing that the legislation must be viewed objectively from the standpoint of an informed reasonable person was proposed by Chief Justice Lamer in ***R. v. Valente (No. 2)*** (1983), 2 C.C.C. (3d) 417, 145 D.L.R. (3d) 452 (Ont.C.A.), [1985] 2 S.C.R. 673, 24 ED.L.R. (4th) 161, that:

> … a reasonable person, who was informed of the relevant statutory provisions, their historical

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> background and the traditions surrounding them, after viewing the matter realistically and practically [would conclude that the tribunal or court was independent].
>
> [***R. v. Valente (No. 2)***, *supra*, at p.684].

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[45] The Court in ***Canada v. Tobiass***, [1997] 3 S.C.R. 391, after considering these prior comments on how to determine whether the appearance of judicial independence has been maintained, formulated as a simple objective test:

> … whether a reasonable observer would perceive that the court was able to conduct its business free from the interference of the government and of other judges.
>
> [***Canada v. Tobiass,*** *supra*, para.72].

[46] The manufacturers' central contention is that, where the government purports to go beyond creating a cause of action and enacts legislation which interferes with the fact-finding process required of the judge to determine the action, the judicial independence of the Court is compromised. The manufacturers' view is that the "blocking" provisions of s.13(6), restricting the admissibility of evidence, creates this impermissible effect.

[47] The manufacturers argue the legislature having dealt with the creation of a cause of action and necessary procedural matters then engages the judicial fact-finding function.

Having done so it may not immediately interfere and frustrate the independence of the judge in a core adjudicative function by keeping from him or her the evidence necessary to a fair decision.

[48] The manufacturers see the government's cause of action as founded upon a breach of duty to an individual or a group of individuals. The definition of the "cost of health care benefits" in s.1(1) of the *Act* relates to the treatment of an individual person. The definition of an "insured person" in the *Act* is "a person … provided with [or entitled to] health care benefits" [Section 1(1)].

[49] The plaintiffs analyze the government's aggregate cause of action as giving rise to four major issues of fact to be determined by the Court; regardless of the party upon whom the onus of proof lies:

1. What was the knowledge of the person or persons to whom the duty was owed as to the facts related to the acts or omissions, which are the basis of the alleged breach of duty?

2. Did any of the acts or omissions of the defendants cause individuals to start smoking, or fail to quit smoking?

3. Did smoking cause disease to individuals and did smoking cause the government to incur the health care costs claimed?

4. Were the health care costs incurred properly in all respects?

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[50] The manufacturers, stressing the need in their view for proof in regard to "individual persons", argue that the pool of evidence available for the Court to determine these necessary factual issues consists of:

1. Direct evidence of the individuals who received health care;
2. Direct evidence of doctors and others involved in delivering the health care;
3. Other relevant direct evidence from persons relating to 1 & 2;
4. Health care records of the government and others;
5. Statistical evidence that correlates the direct and the documentary evidence.

[51] Section 13(6)(a)(i),(ii), and (iii) together provide that the government is not required to identify any particular individual insured person, to prove the cause of disease in any particular insured person, or to prove the cost of health care benefits provided to any individual insured person.

[52] Section 13(6)(b),(c),(d), and (e) together effectively bar access to records and evidence relating to individual insured persons.

[53] First the production of individual health care records is restricted:

13(6) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,

…

(b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits to particular individual insured persons are not compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness,

[54] Secondly:

13(6) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,

…

(c) no person is compellable to answer questions with respect to the health of, or the provision of health care benefits to, particular individual insured persons[.]

[55] However the Court has a discretion and may on application of a defendant:

13(6)(d) despite paragraphs (b) and (c), … order discovery of a statistically meaningful sample of the documents referred to in paragraph (b) and the order must include directions concerning the nature, level of detail and type of information to be disclosed[.]

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[56] Additionally, in any statistical sample ordered:

> 13(6)(e) if an order is made under paragraph (d), the identity of particular individual insured persons must not be disclosed and all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons must be deleted from any documents that are disclosed.

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[57] In sum, the manufacturers characterize s.13(6) as a "blocking" provision, effectively eliminating the defendants' access to direct evidence of the individuals the cost of whose health care benefits have been aggregated in the action. They view this as ensuring their inability to defend themselves in rebutting the onus shifted upon them. They urge these provisions demonstrate legislative interference, by preventing the Court receiving the evidence necessary to fairly perform its core adjudicative fact-finding function.

[58] They urge the effect of the provisions of the *Act* compels the Court to determine the facts on a fictional, statistical basis because the *Act* effectively bans any inquiry into the medical history of the actual individuals whose costs of health care benefits are aggregated. The manufacturers argue the Court is left without the ability to test the statistical

evidence of experts against the direct evidence of the persons who comprise the cohort from which samples are taken.

[59] The manufacturers argue the process mandated by the *Act* prevents and interferes with the ability to hear, test and weigh evidence on the issues to be decided and forces the trier of fact to rely on secondary hypothetical evidence of questionable accuracy.

[60] The concept of a constitutionally protected core judicial function was recognized by the Supreme Court of Canada in ***MacMillan Bloedel Ltd. v. Simpson***, [1995] 45 S.C.R. 725. At issue was s.47(2) of the *Young Offenders Act*, R.S.C. 1985, c.Y-1, which granted to the youth court exclusive jurisdiction in respect of *ex facie* contempt by a youth of any Court. A Superior Court was thus deprived of jurisdiction to deal with an *ex facie* contempt of its own Court.

[61] The Court held that the grant of jurisdiction to the youth court of the power to deal with contempt of a Superior Court was within the test for s.96 of the *Constitution Act, 1867,* in ***Re Residential Tenancies Act, 1979***, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554. The Court however was divided on the issue of whether it was constitutionally permissible to remove the contempt jurisdiction from the Superior Court.

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[62] The majority of the Court, led by Chief Justice Lamer, held that where a non-section 96 body received a grant of exclusive jurisdiction which formed part of the core jurisdiction of a Superior Court it was constitutionally invalid.

[63] In ***MacMillan Bloedel Ltd. v. Simpson,*** *supra*, a specific jurisdiction of the Court was entirely removed. By contrast, an interference with jurisdiction by a concurrent grant to the youth court was insufficient to constitutionally invalidate the grant.

[64] In relation to the case at bar the Province clearly has power to legislate in the field of civil procedure. The facts of this case do not trigger s.96. There is no core jurisdiction of Court that is removed when it is directed by legislation in regard to evidentiary or procedural matters ancillary to a civil cause of action. The *Rules of Court* and *B.C. Evidence Act* are examples.

[65] I do not accept that the principle of judicial independence can be extended to a trier of fact in a civil action having an unfettered right to determine what evidence may be adduced.

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[66] The provisions of the *Act* do not remove from the Court its function of finding the facts necessary to reach a decision. The fact-finding process may at most be said to suffer some interference or constraint as a result of procedural provisions, but I do not consider that inference impairment of a core judicial function.

[67] The manufacturers draw an analogy to the decision in ***R. v. Seaboyer***, [1991] 2 S.C.R. 577 striking down the Rape Shield Law. Madam Justice McLachlin said at p.609:

> It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues. This goal is reflected in the basic tenet of relevance which underlies all our rules of evidence.
>
> …
>
> In general, nothing is to be received which is not logically probative of some matter requiring to be proved and everything which is probative should be received unless its exclusion can be justified on some other ground. A law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial.

[68] The issue concerned a criminal law of general application. There was no reverse onus, and the application of the *Act* was specific not general. The restrictions in the

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case at bar apply only to the government's ability to bring an aggregate action and do not apply to an individual action.

[69] The manufacturers also rely upon the recent decision of the Supreme Court of Canada in ***R. v. Mills***, [1999] S.C.J. No. 68 (Q.L.); 248 N.R. 101, concerning the constitutionality of ss.278.1 to 278.91 of the *Criminal Code* and the production of records in sexual offence proceedings. McLachlin and Iacobucci JJ. write at para.89:

> From our discussion of the [accused's] right to make full answer and defence, it is clear that the accused will have no right to the records in question so far as they contain information that is either irrelevant or would serve to distort the search for truth, as access to such information is not included with the ambit of the accused's right … However, the accused's right must prevail where the lack of disclosure or production of the record would render him unable to make full answer and defence. This is because our justice system has always held that the threat of convicting an innocent individual strikes at the heart of the principles of fundamental justice. However, between these extremes lies a spectrum of possibilities regarding where to strike a balance between these competing rights in any particular context.

[70] Certainly, the case at bar invokes the right of the manufacturers to make "full answer and defence", but the right applies to a set of facts significantly different from the position of an individual defending against an accusation of sexual misconduct in the criminal context. Moreover, as both

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R. v. Seaboyer, *supra*, and ***R. v. Mills***, *supra*, clearly indicate, the threshold requirement that triggers any analysis of the content of the right to make full answer and defence is that the information sought must be relevant to the inquiry. But the relevance of the evidence is precisely what is disputed when access to individual health records is sought for the purposes of defending against an aggregate cause of action.

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[71] I do not agree that the analysis of the manufacturers which focuses on evidence of insured individuals and the application of traditional rules regarding tort-based actions and conventional civil procedures may be fairly transferred to the statutory aggregate cause of action created under the *Act*.

[72] The aggregate action is intended to provide for relief where the traditional, individually oriented tort action does not realistically meet the need of a large-scale loss-recovery action, where very substantial numbers of people have been exposed to toxic substances said to have resulted in adverse health effects through non-observable means of causation.

> Fleming, "Probabilistic Causation in Tort Law" (1989), 68 Can. Bar. Rev. 661.
>
> Fleming, "Probabilistic Causation in Tort Law: A Postcript" (1991), 70 Can. Bar. Rev. 136.

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[73] The legislature has accepted that the conduct of tobacco companies and the related effect of tobacco smoking on health has become a tort of a dimension which, to approach on an individual basis, is entirely uneconomic, an unreasonable strain on judicial resources, but may be fairly dealt with on an aggregate basis utilizing evidence based on statistical, epidemiological and sociological studies.

[74] The basic tenet that causation within a population may be more accurately identified statistically than by means of attribution of individual causation in a multiplicity of conventional tort-based actions appears sound.

[75] The use of statistical and epidemiological evidence is an essential aspect of an aggregate action. The question in issue becomes causation in the group rather than of any individual group member.

[76] It is important to note the *Act* provides only for the admission of the evidence. The credibility and weight remain for the trier of fact.

[77] The central focus of the argument of the manufacturers, that the *Act* is "unfair" and that the independence of the judge charged with deciding the facts becomes compromised, is

that s.13(6) severely restricts access to and use of particular evidence of individual group members.

[78] The argument of the manufacturers tends to mischaracterize the *Act* and fails to accord recognition of the main feature of an aggregate action. The group is not simply a collection of individual claimants such that proof is the product of the evidence supplied by each constituent member.

[79] The aggregated claims are at once a collection and a mixture in which individual identity is lost.

[80] The evidence, histories, and medical and health records of individuals within the population lose their individual relevance but assume a statistical relevance as part of the cohort of the larger group from which statistical conclusions are drawn.

[81] The most reliable and relevant evidence in an aggregated claim becomes statistical and epidemiological, and access to those forms of evidence is of import.

[82] As the individual records of members of the aggregate group have only statistical relevance the shielding of the identification of individuals prevents the action reverting to an individualized action permitting individual forms of discovery. The information in respect of the individuals

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subsumed in the aggregate group has statistical relevance; their personal identification does not. In this case, there is sufficient reason for names being protected from disclosure.

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[83] Recognizing however the statistical relevance and importance of the individual records, the *Act* provides the Court with the power to order a "meaningful sample" of the population and to control the detail required to be disclosed [Section 13(6)(d)].

[84] A "meaningful sample" is not defined in the *Act* and might therefore, in appropriate circumstances, approach the whole of the population.

[85] A similar direct and aggregate action to that contemplated by the *Act* was upheld in ***State of Florida et al v. The American Tobacco Company et al*** (October 18, 1996) (District Court Case No. CL 95-1466 AH). The enabling statute was there held defective because it prohibited disclosure of the identification of Medicaid recipients without providing a mechanism that would permit the manufacturers to challenge improper payments made to persons as the result of fraud, misdiagnosis or unnecessary treatment; the resulting prohibition thus amounted to an irrebuttable presumption regarding such payments. The provisions were struck down on

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the basis of protection of "life, liberty and property" pursuant to due process under Florida law.

[86] This defect in the Florida statute however was later remedied by a mechanism for disclosure of records, subject to a restriction on the identification of individuals.

[87] That concept appears analogous in effect to the controlled disclosure allowed in section 13(6)(d) of the *Act*.

[88] The *Act* contains two rebuttable presumptions in regard to causation. When the government proves a breach of duty by a tobacco manufacturer it is presumed:

> 13.1(2) Subject to subsections (1) and (4) … that
>
> (a) the population of insured persons who were exposed to a tobacco product, manufactured or promoted by the defendant manufacturer or the manufacturers related to the defendant manufacturer, would not have been exposed to the product but for the breach referred to in subsection (1)(a), and
>
> (b) the exposure described in paragraph (a) caused or contributed to disease in a portion of the population described in paragraph (a).

[89] The first presumption is necessary to remove the need in an aggregate action to provide proof of individual causation. There is a rational connection between the facts that are

required to prove a breach of duty and the fact of exposure the presumption mandates.

[90] The reversal of onus in respect of a causation issue is an accepted remedial procedure. As Sopinka J. wrote in ***Snell v. Farrell***, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289 at 299:

> … If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives. …

[91] In ***Kripps v. Touche Ross & Co.*** (1997), 33 B.C.L.R. (3d) 254 (C.A.) the court held that a plaintiff alleging a negligent misrepresentation need not prove their decision or action would not have been made but for the misrepresentation. This is where there may have been a number of reasons of which the misrepresentation was only one.

[92] Another example where the general rule that a plaintiff must establish the reasonableness of a variation in proof of causation is found in ***Hollis v. Dow Corning Corp.,*** [1995] 4 S.C.R. 643, 129 D.L.R. (4th) 609. The Supreme Court of Canada held that a patient who suffered injury because of a manufacturer's failure to warn her doctor about the medical risks of a product did not have to prove causation by showing the doctor would have communicated the warning to her.

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[93] Section 131 of the *Securities Act,* R.S.B.C. 1996, c.418 is an example of a statutory assumption of detrimental reliance once a misrepresentation is shown. The Court of Appeal in ***Sidhu Estate v. Bains*** (1996), 25 B.C.L.R. (3d) 41 (C.A.) held that upon establishing a misrepresentation which might reasonably lead to a claimed loss the onus shifts to the defendant to prove the misrepresentation was not in fact relied upon.

[94] It is the Attorney-General's position that the constitutional challenge is premature as there is no proper factual basis to test whether the challenged "blocking" provisions of s.13(6), after exercise of the Court's discretion as to a "meaningful sample", prevents access to any information relevant to a required factual decision. I agree that it would be preferable.

[95] The Court in ***R. v. Mills,*** at paragraph 105, supports the view that constitutional complaint should not precede utilization of procedures the legislation may provide to access disputed records.

[96] I do not accept on present evidence that the inability to identify individual insured persons or to have unlimited access to the records of all insured persons unfairly prevents manufacturers from presenting evidence to rebut the

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presumption that their breach of duty caused persons to be exposed to tobacco products.

[97] The manufacturers may present evidence as outlined by the Attorney-General in argument including:

> … direct and particularistic evidence of health officials, medical professionals and smokers themselves regarding what causes persons to smoke. They may bring expert medical, behavioural and psychological evidence, based on studies and surveys to support their claims about smoking behaviour - for example, to show that a portion, or all, of their customers would have smoked and would have incurred disease in any event, even if the Manufacturers had not breached any duty to them.
>
> [Attorney-General Brief, p.62]

[98] The second presumption, namely that exposure to tobacco causes disease, provides that if the government is able to establish a breach of duty by a manufacturer, and that exposure to a tobacco product causes disease it should be presumed the exposure to the product caused or contributed to disease in a portion of the population who were exposed to the product.

[99] The presumption provides that if exposure to a generic tobacco product causes or contributes to disease, it will be presumed that exposure to a specific type of that tobacco product also caused or contributed to disease in a portion of the population.

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[100] The presumption eliminates the necessity of proof on a brand by brand basis. The presumption appears neither illogical nor unfair. Section 13.1(4) provides that the manufacturer may offer evidence in rebuttal. It may be assumed a manufacturer would be most familiar with the effects of his own product and have access to the necessary evidence to demonstrate a brand differential. [***Snell v. Farrell***, *supra*, Sopinka J., at p.300]:

> In many malpractice cases, the facts lie particularly within the knowledge of the defendant. In these circumstances, very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary. …

[101] I do not accept that the impugned legislation here predetermines the result. The presumptions involved have a logical connection to the factual issues.

[102] The aggregate action, after resolution of issues of breach of duty, causation and disease, requires the government to introduce evidence as to cost of health care benefits in respect of those diseases.

[103] The *Act* requires the Court to determine the aggregate cost of health care benefits that have been provided after the date of breach and the defendants then become liable

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on the basis of proportionality in market share. [Section 13.1(3)].

[104] An award is a matter of assessment by the Court. There is no award upon certification by the government as to the amount of the health care costs it has or will incur. The amount of any award is to be by assessment based upon the evidence. As in many tort actions the assessment would not be without difficulty or amenable to precise measurement. However, as Cory J.A. observed:

> The court, I believe, would be shirking its duty if it were to say that no damages should flow because of the difficulty of calculating and assessing such damages and that they are therefore too remote. An assessment of future loss of profits must, of necessity, be an estimate. … The task will always be difficult but not insurmountable. It poses no greater obstacle to a court than the assessment of general damages in a serious personal injury claim.
>
> [***Canlin v. Thiokol Fibres Canada Ltd.*** (1983), 40 O.R. (2d) 687 (C.A.) at 691].

[105] Equally, the “market” share theory appears a logical and fair method in an aggregate action to ensure that a defendant manufacturer is held responsible only for that portion of injury that represents their product's contribution to the market place.

[106] The provisions of the *Act* preclude a combination of market share and joint and several liability, the two being

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inconsistent concepts. Joint and several liability is permitted only where it is established that all of the manufacturers either committed a wrong in concert [Section 13.2] or where they committed the same tobacco related wrong [Section 17(2)].

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[107] I conclude the provisions of the *Act* permitting the government an aggregate cause of action for the recovery of the costs of health care benefits it has incurred is within the constitutional competence of the Province. The procedural and evidentiary components of the legislation are necessary features ancillary to the new cause of action created.

[108] At this time, adopting a broad view of the legislation, I do not find on the basis of the test suggested by Chief Justice Lamer in ***R. v. Valente (No. 2),*** that the independence of a trier of fact is compromised or interfered with. A reasonable person, informed as to the tenets of an aggregate action together with all the evidentiary and procedural provisions enacted in respect of the new cause of action, would not, viewing the matter realistically and practically, believe the trier of fact was unfairly kept from evidence required to adjudicate the issues raised.

[109] In my view the *Act* does not offend against the independence of the judiciary by interfering with the Court's

fact-finding power and is not constitutionally invalid on that ground.

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THE RULE OF LAW

[110] The manufacturers argue that the *Act* breaches the equality rights and principles enshrined within the rule of law. They argue that the *Act* offends against both equality between subjects and between subject and Crown.

[111] It is also the manufacturers' position that if the *Act* is not compensatory in nature it is retroactive and penal, a designation rendering even legislation of a civil nature unconstitutional under the rule of law.

[112] The manufacturers complain the *Act* singles out tobacco manufacturers from all others and applies a different standard of product liability law in respect of them.

[113] They argue that inequality arises because the effect of the legislation permits a defendant manufacturer to be found liable without having committed any actionable wrong against anyone and to be required to pay large sums of money to the government which may have suffered no loss.

[114] In the result, a retrospective penalty occurs because the *Act* targets a specific group of politically vulnerable manufacturers based on past acts related to the manufacture, sale and use of tobacco products that have passed

beyond their control and are now associated with the payment of health care benefits.

[115] Section 11(g) of the *Charter* deals specifically with retroactive criminal offences and s.15 with aspects of equality rights under law. The manufacturers argue that protection to similar effect exists based on the rule of law. The manufacturers therefore do not rely directly on provisions of the *Charter*, rather they rely upon the rule of law as an integral aspect of the Constitution to invalidate the *Act*.

[116] The manufacturers argue that the rule of law, which is constitutionally entrenched, is a source of the prohibition on retroactive penal legislation and of equality rights. It is part of the foundation of the *Charter* and specifically referenced in its preamble.

[117] The rule of law is an unwritten component of the Canadian Constitution and without need for specific provision; it is taken to be "… a fundamental principle of the Canadian constitutional order." [***Reference re Manitoba Act (1870) s.23***, [1985] 1 S.C.R. 721 at 724, (1985), 19 D.L.R. (4th) 1, W.W.R. 385].

[118] That unwritten constitutional principles form part of the fabric of the Canadian Constitution is clear. As

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expressed by Chief Justice Lamer, the provisions of the preamble to the *Constitution Act, 1867* provide "organizing principles" that may be used to "fill out gaps in the express terms of the constitutional scheme. [***Reference Re: Public Sector Pay Reduction Act***, at paras. 83 and 95].

[119] Section 52(2) of the *Constitution Act, 1982* does not purport to provide an exhaustive list of instruments defining the ambit of the Canadian constitution.

[120] Section 26 of the *Charter of Rights and Freedoms* expressly excludes the fact of express *Charter* rights "… denying the existence of any other rights or freedoms that exist in Canada".

[121] ***Reference re Secession of Quebec,*** *supra*, affirms that there are unwritten rules that are considered an integral part of our Constitution.

[122] ***R. v. Beauregard*** recognized that judicial independence was passed to Canada as a constitutional principle by the language of the preamble to the *Constitution Act, 1867*.

[123] Our system of government has evolved to a system of constitutional supremacy rather than just parliamentary supremacy [***Reference re Secession of Quebec***].

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[124] The manufacturers' position is that retroactive legislation obviously violates the rule of law, on which the Constitution rests, as it changes the law in respect of past events making discovery of law unascertainable until after the event.

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[125] The rule against Bills of Attainder is suggested by the manufacturers to represent one of the component parts of an implied bill of rights. The manufacturers equate any non-compensatory view of s.13 of the *Act* as targeting tobacco manufacturers for punishment for acts that attracted no penalty at the suit of government at the time they occurred.

[126] Bills of Attainder are expressly prohibited under the *American Constitution Article 1*, s.9, CL.3. Although there is no equivalent written *Charter* or constitutional prohibition in Canada:

> … it would surely be unthinkable today that Parliament could enact a Bill of Attainder or a Bill of Pains and Penalties …
>
> …
>
> In England and in Canada, such methods of Parliamentary trial and punishment have passed into desuetude. As I have said, it may be assumed that, even apart from the Charter, such a method of finding guilt and imposing punishment would be generally regarded as beyond the power of Parliament in a country like Canada which has "a Constitution similar in Principle to that of the United Kingdom" …

> [*R. v. Bowen*, [1989] 2 W.W.R. 213 (Alta.Q.B.) at 259-60, aff'd at [1991] 1 W.W.R. 466 (Alta.C.A.); p.32 *Ex Juris* Brief].

[127] The experience in American law has been that governments should not be permitted to manipulate the form of proceeding and Courts have recognized that criminal prohibition in the guise of a civil statute will not succeed. [***Cummings v. Missouri***, 71 U.S. 277 (1866); and ***United States of America v. Lovett***, 328 U.S. 303 at 315-16 (1946)].

[128] I do not consider that any party has raised a serious issue as to the *Act* being interpreted as other than compensatory legislation intended to recoup health care costs incurred by the government. In my view, no reasonable interpretation of the *Act* would make it penal legislation. It imposes neither prohibitions nor penalties. [***United States of America v. Ivey et al***, [1995] 26 O.R. (3d) 533 at 544 (Ont.Ct.Gen.Div.), aff'd (1996) 139 D.L.R. (4th) 570 (Ont.C.A.)]:

> The scope of the category "penal" laws was defined by the Privy Council in *Huntington v. Attrill*, [1893] A.C. 150 at p.157, 20 O.A.R. App. 1, as (quoting Gray J. in *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265):
>
> > … all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection

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> of its revenue or other municipal laws, and to all judgments for such penalties.

> In my view, the C.E.R.C.L.A. provisions imposing liability against the defendants cannot be classified as penal in nature. In *United States v. Monsanto*, 878 F.2d 160 (4th Cir., 1988) at pp.174-75, C.E.R.C.L.A. was characterized as follows:
>
> > C.E.R.C.L.A. does not exact punishment. Rather it creates a reimbursement obligation on any person judicially determined responsible for the costs of remedying hazardous conditions at a waste disposal facility. The restitution of cleanup costs was not intended to operate, nor does it operate in fact, as a criminal penalty or a punitive deterrent.
>
> The measure of recovery is directly tied to the cost of the required environmental clean-up. The court must be satisfied that the amounts it seeks to recover were actually expended in response to the environmental threat, and that those costs were incurred in the manner prescribed by C.E.R.C.L.A. and the National Recovery Plan. While the nature of liability imposed may be unexpected, it is restitutionary in nature and is not imposed with a view to punishment of the party responsible.

[129] The manufacturers urge that the *Act* offends against four basic tenets of the rule of law.

1. It is presumed the legislature did not intend one law for one class and a different law for others.
2. It is presumed there is no departure from an existing system of law except by words of irresistible clearness.

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3. It is presumed no vested rights are abolished, such as defenses or immunity to suit prospectively or retrospectively unless plainly expressed.
4. It is presumed there is no retrospectivity or retroactivity except to the extent made unavoidable by 1 or 2 or any reasonable construction to the contrary.

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[130] The *Act* is clearly intended to apply only to the tobacco industry but it treats all within that industry equally. The intent is that there be departures from the existing product liability and tort law is patently manifest.

[131] The manufacturers argue that the *Act* should be interpreted according to the statutory language. Extra-statutory material such as the Minister's speeches in the Legislature or the views of the executive are of assistance only in understanding a problem calling for a legislative solution and are not to be considered in interpretation of the solution adopted.

[132] The gist of the Attorney-General's position is that the *Act* does not offend against any principle of the rule of law, and, in any event, the rule of law is not capable of

being used to strike down legislation in the manner the manufacturers advocate.

[133] The manufacturers' view is that by any reasonable interpretation the *Act* singles out the tobacco industry for special treatment. They stress the *Act* creates a new wrong but fails to provide a customary fundamental protection requiring there be proof of damage to someone. It abolishes vested rights on limitation of claims for compensation and, in light of the Reply pleading of the Attorney-General in the government action, has removed or abolished all defences traditionally available to a person defending a damage action.

[134] I agree with the submissions on behalf of the Attorney-General that it is premature to rule in the abstract on the limitation provisions in the *Act*. I do not consider it a constitutional issue to be determined at this time. It should be decided in the progress of the action when clothed with factual context.

[135] I also make no determination as to the status of affirmative defences raised and pleaded in the action commenced. The *Act* does not appear to specifically abolish any particular defence although in respect of aggregate actions the nature of some defences may by necessary implication become inapplicable or change in form. I do not

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take either the fact, in the recovery action commenced, that the manufacturers have plead a particular defence, or that the Attorney-General has denied the existence of the defence, as a definitive interpretation of the *Act*.

[136] It is alleged the words of the *Act* have not conveyed with the "irresistible clearness" required the intention of the legislature to override the application of the principle of the rule of law.

> … The principle of the sovereignty of Parliament requires judicial obedience to the strict terms of the statute. In the process of applying a statute, however, uncertainties concerning its scope or effect in particular circumstances are bound to arise. The rule of law requires that these uncertainties be resolved, so far as possible, in a manner which would most conform to the reasonable understanding of the subject to whom the statute is primarily addressed. Implicit in this understanding is the expectation that Parliament will conform to the generally accepted notions of fairness and justice -- that punishment will not be authorized for acts which were not known to be unlawful when committed, that vested rights will not be destroyed without reasonable compensation, that the powers of officials are to be limited by proper respect for the liberty of the citizen. "If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognized as a matter fairly to be taken in account".
>
> [T.R.S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985), 44 C.L.J. 111 at 121].

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[137] The manufacturers argue that when legislation creates a wrong without damage to an individual or the government, for example, a departure from the principles in ***Moran v. Pyle National (Canada) Ltd.***, [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239, it is necessarily arbitrary and penal.

[138] The manufacturers say the cumulative effect of the wide and encompassing breaches of the principle of the rule of law should therefore lead to invalidation of the legislation.

[139] It is of some significance, as the Attorney-General has noted, that the cases upon which the manufacturers rely to demonstrate a constitutional entrenchment of the rule of law and its application to invalidate the legislation arose only in circumstances where the legislation was also found unconstitutional on the basis of specific provisions of the *Charter* or a specific written provision of the *Constitution Act, 1867*.

[140] Examples include ***R. v. Valente***; ***R. v. Lippe,*** *supra*; ***Reference Re: Public Sector Pay Reduction Act***; ***R. v. Seaboyer***, all these cases were decided on the basis of s.11(d) of the *Charter*; ***R. v. Beauregard,*** was decided on the basis of s.100 of the *Constitution Act, 1867* and s.1(b) of the *Canadian Bill of Rights*; ***MacMillan Bloedel v. Simpson,*** was decided on the basis of s.96 of the *Constitution Act, 1867*.

[141] The ability to use the rule of law in sword-like fashion to strike down legislation was directly considered in ***Singh v. Canada (Attorney General)***, [1999] F.C.J. No. 1056 (T.D.) (Q.L.). The issue in that case concerned provisions of the *Canada Evidence Act*, R.S.C. 1985, c.C-5, that prohibited the production of cabinet documents. There is factual similarity to the issue raised in this proceeding, specifically the provisions of s.13(6) of the *Act* which deny access to the records and information on individual insured persons. The applicants in ***Singh v. Canada (Attorney General)***, *supra*, at para.18, relied upon the constitutional supremacy view expressed in ***Reference re Secession of Quebec***:

> The applicant argues that, given the supremacy of the Constitution, Section 39 should be declared invalid.

[142] In the analysis, the following was at issue (at para.28):

> The applicants submit that the decision in the Quebec Human Rights case, … is not determinative of this application since the Supreme Court of Canada "has now made it clear that Canada is a constitutional democracy". To support their position that the Constitution and not Parliament is now supreme, the applicants rely on the *Quebec Secession* case … at p.258:
>
> > The constitutional principle bears considerable similarity to the rule of

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> law, although they are not identical. The essence of constitutionalism in Canada is embodied in s.52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. … The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p.455). They may not transgress its provisions; indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

[143] The position argued, founded on the ***Reference re Secession of Quebec,*** is the essence of the manufacturers' argument here.

[144] Mr. Justice McKeown held at para.39:

> The Supreme Court of Canada has concluded that unwritten constitutional norms may be used to fill a gap in the express terms of the constitutional text or used as interpretive tools where a section of the Constitution is not clear. However, as noted by La Forest J., dissenting in *Provincial Court Judges Reference*, the principles of judicial review do not enable a Court to strike down legislation in the absence of an express provision of the Constitution which is contravened by the legislation in question.

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[145] Mr. Justice Edwards in ***Babcock et al v. The Attorney General*** (28 July 1999), Vancouver Registry No. C963189 (S.C.B.C.), followed ***Singh v. Canada (Attorney General).***

[146] The decision of McKeown J. in ***Singh v. Canada (Attorney General)*** was upheld in ***Westergard-Thorpe et al v. The Attorney General of Canada,*** *supra*.

[147] Justice of Appeal Wakeling writing for the Saskatchewan Court of Appeal in ***Bacon v. Saskatchewan Crop Insurance Corporation*** (14 May 1999) S.J. No. 302 (Sask.C.A.), 9 W.W.R. 258 (Sask.Q.B.) provides an insightful analysis of the "… one law for all" concept based on the rule of law providing the law be supreme over both the acts of government and private persons:

> The observation of the Supreme Court (para.78) that the rule of the law and the constitution are not in conflict is a compelling statement. It is a statement made in 1998 with full knowledge that on many occasions over the preceding years Parliament has passed and relied upon legislation restricting or eliminating contractual and property rights which would otherwise have been available. Since the Supreme Court does not find this historical background to constitute a conflict with the rule of law, it must of necessity indicate they accept that legislation constitutes an important source of the laws which rule us and the sole restriction on that right to legislate is contained in the relevant Constitution.
>
> I am unable to accept that these justices of the Supreme Court, whilst providing an analysis of our

> federal system, were at the same time engaged in changing that system. That is particularly so when we are not talking of a subtle or marginal change, but one which would reduce the supremacy of Parliament by subjecting it to the scrutiny of superior court judges to be sure it did not offend the rule of law and if it did, to determine whether it was an arbitrary action. If the Supreme Court of Canada meant to embrace such a doctrine, I would expect it would see the need to say so very clearly in a case where that was the issue before them. This is particularly so when they are not only cognizant of the many cases in various jurisdictions acknowledging the supremacy of Parliament, but must also be aware of their own previous judgments which have endorsed that principle such as: *PSAC v. Canada*, [1987] 1 S.C.R. 424, *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525, *Attorney General for British Columbia v. Esquimalt & Nanaimo Railway*, [1950] A.C. 87 (P.C.). Furthermore, I am unable to accept that when the justices were laying a foundation for their decisions in the *Secession* case by reviewing the historical and legal development of federalism in this country, that they were also engaged in changing that foundation. If that were so, it would surely not be done in such a subtle manner as to be questionable whether it had happened at all.
>
> [***Bacon v. Saskatchewan Crop Insurance Corporation,*** *supra*, at pp.14-15].

[148] In ***Bacon v. Saskatchewan Crop Insurance Corporation,*** the Court held that ***Reference re Secession of Quebec*** does not provide authority that allows the Courts on the basis of the preamble to the *Constitution Act, 1867* to strike down legislation as offending the rule of law.

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[149] I find the manufacturers have not shown that the provisions of the *Act* offend against specific principles of the rule of law in constitutional context.

[150] I also accept the reasoning and the result in ***Singh v. Canada (Attorney General)***, and ***Bacon v. Saskatchewan Crop Insurance Corporation***, and by Edwards J. in ***Babcock et al v. The Attorney General,*** *supra,* that in any event the rule of law of itself is not a basis for setting aside legislation as unconstitutional.

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EXTRA-TERRITORALITY

[151] Analysis of the purpose and effect of the *Act* demonstrates its dominant characteristic or pith and substance. The purpose of the *Act* is the recovery by the Province of the tobacco related health care costs it has incurred from the tobacco industry nationally and internationally.

[152] The effect of the *Act* is to impose a new form of liability on the mostly extra-territorial defendants founded on shareholdings and other types of property ownership, wherever those rights may be situate, for the acts or omissions attributable to some of them. This result follows regardless of whether the locus of the acts or omissions was within British Columbia, Canada, or elsewhere in the world.

[153] The purpose and effect of the *Act* at this stage is to be discerned from the history of the legislation and analysis of the *Act*'s provisions, as assisted by what may be gleaned from the Statement of Claim and Reply to Defences in the government action commenced pursuant to the statutory cause of action.

[154] Sections 1(5) and 17.1(1)(a) impose a Group liability on the defendants. Foreign and federally

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incorporated defendant companies are divided into four major Groups: namely, Imperial Tobacco Limited, a division of Imasco Limited; Rothmans, Benson & Hedges Inc.; British American Tobacco ("B.A.T."); and JTI-Macdonald Corp.

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[155] The conduct of a member of a Group in any country with adverse consequences in that country or in any other country can result in liability to all the members of the Group if any one member of that Group has offered a tobacco product for sale in British Columbia. [Section 1(1), "tobacco related wrong"; Section 13.1 and Section 17.1].

[156] Group membership is determined by the comprehensive definition of "manufacturer" in s.1(1) and ss.1(2),(3), and (4), the relation and affiliation provisions.

[157] Affiliation between companies is based on shareholdings that entitle election of a director, or have a market value equal to 50% of the total shares [Section 1(3)(a)]; a partnership, trust or joint venture having an entitlement to 50% of the profits or assets on dissolution [Section 1(3)(b)]; control by direct or indirect influence [Section 1(4)].

[158] In Section 1(1), manufacturers, by definition, include owners of tobacco trademarks or persons who generate

10% of their worldwide income from the manufacture or promotion of tobacco products.

[159] The effect of the *Act* is that the conduct of foreign manufacturers in foreign countries is to be judged by a British Columbia Court. [Section 13.1(1)(a)]. The result is that the cost of health care benefits is imposed on all members of the Group to which the foreign manufacturer belongs. [Section 13.1(3)].

[160] If a Group member acquires a tobacco related part of the business of another manufacturer by any means, the Group is liable for any past wrongful conduct of the acquired business regardless of the contractual terms of acquisition or the law of the Province or country that governs the terms of the purchase contract. [Section 17.1(2)].

[161] The locus of the acquired business or of the wrongful conduct does not affect or modify the determination of liability. The vendor need not be a member of the Group to effect this result.

[162] Each Group has one British Columbia resident corporation. An immediate effect of the *Act* therefore is to impose an artificial "real and substantial" connection to British Columbia on all Group members since the members of a

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Group must be considered "one manufacturer" for purposes of determining liability arising from a tobacco related wrong.

[163] Four of the defendants in the government action commenced are federally incorporated and manufacture cigarettes sold in British Columbia. They are registered as extra-provincial companies under British Columbia law. The balance of the defendants are foreign companies, incorporated under foreign law, with registered offices or places of business in foreign countries.

[164] None of the companies were incorporated in British Columbia. The Statement of Claim describes the Groups as "four worldwide multinational tobacco enterprises".

[165] Section 17.1 and sections 1(2), (3) and (4) of the *Act*, which encompass what the Attorney-General terms the "theory of enterprise liability", were not part of the original *Act*. They were added by amendment in 1998. The Attorney-General argues an amendment to an *Act* could not have the effect of transforming its essential character. I disagree. The addition of the enterprise liability provisions given the wide meaning of manufacturer indicates a deliberate shift in the territorial reach and is designed to give the *Act* global application.

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[166] That is not an incidental effect of the legislation. It becomes a central feature and an integral part of the aim and focus of the amended *Act*.

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[167] The Minister's speech relating to the amendments lends substance to the view that the *Act* attacks national and international companies and makes them accountable for tobacco related health care benefit costs in British Columbia:

> Another important set of changes involves the corporate structure of the tobacco industry. The nature of these changes is to broaden the definition of what constitutes a tobacco "manufacturer", and to widen the linkages to related companies. The effect of these changes is to establish a more accurate and realistic description of what constitutes a tobacco manufacturer. Provisions have been added to ensure that various corporate entities which effectively own, control, are related to or have a substantial interest in the manufacture, promotion or sale of tobacco products, will be subject to this legislation.
>
> Any legal entity, whether in the form of an affiliate, a joint venture, a trust, a partnership or some other arrangement which has a beneficial interest in a corporation which produced, promoted or sold tobacco products that may give rise to a claim under the legislation will not be able to avoid liability behind some kind of corporate veil.
>
> [British Columbia, *Debates of the Legislative Assembly*, Vol.12, No. 11 (July 29, 1988) at 10713].

[168] It is difficult to characterize such sophisticated and specifically crafted amendments to the *Act* as intending to produce only an incidental effect on the territorial reach of

the legislation. The provisions demonstrate, as a dominant aspect, the targeting of extra-territorial entities, ensnaring a variety of legal personalities including shareholders, control persons, foreign purchasers and lessors, trademark holders, and substantial investors. These consequences are too purposeful and far-reaching to qualify as an incidental aspect of seeking recovery from manufacturers directly marketing or selling tobacco products in British Columbia.

[169] The Attorney-General submits that the manufacturers ought not to "lump together a series of qualitatively different extra-provincial rights that are or might be adversely affected by the legislation and ask the Court to deal with all those rights concurrently". I am of the view that the cumulative effect of the provisions evinces a legislative intention to craft the *Act* in a form that ensures in a global basis that no action of the international tobacco industry or location of their assets would be beyond the reach of the Province's attempt to recover health care costs under the *Act*.

[170] The legislative power of a Province is to be found under Section 92 of the *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c.3. The section contains words of clear territorial limitation.

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[171] The federal parliament, in the *Statute of Westminster 1931*, (U.K.), 22 & 23 Geo. 5, c.4, reprinted in R.S.C. 1985, App. II, No. 27, gained extra-territorial legislative competence, but the Provinces did not. [***Re Seabed & Subsoil, Continental Shelf Offshore Nfld.***, [1984] 1 S.C.R. 86 at pp.102-103, (1984), 5 D.L.R. (4th) 385 at pp.400-401; ***Interprovincial Co-operatives Ltd. et al v. The Queen in the Right of Manitoba***, [1976] 1 S.C.R. 477 at 512, (1975), 53 D.L.R. (3rd) 321 at p.356; ***Reference re Offshore Mineral Rights of British Columbia***, [1967] S.C.R. 792; See Edinger, E., *"Territorial Limitations on Provincial Powers"* (1982), 14 Ottawa L. Rev. 57 at pp.60-61; *Sullivan: Interpreting the Territorial Limitations on the Provinces* (1985), Supreme Court L. Rev. 511 at pp.525-527].

[172] The combined effect of Sections 1, 13, 13.1, 17 and 17.1 purport to affect the status, structure and corporate personality of foreign corporations and the rights of their shareholders.

[173] The *Act* has the effect of abolishing the separate corporate personalities of companies incorporated under federal or foreign law with domiciles outside British Columbia.

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[174] A company's registered office establishes its domicile. [***Gasque v. Inland Revenue Commissioners***, [1940], 2 K.B. 80; Fraser & Stewart, op. cit. at p.144; ***National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.,*** [1954], 3 D.L.R. 326 (Ont.H.C.); ***Voyage Co. Industries v. Craster***, [1998] B.C.J. No. 1884 (Unreported) (B.C.S.C.)].

[175] A corporation's domicile determines the law respecting its creation and continuation (corporate personality), matters of internal management, share capital structure, and shareholder rights. [Castel, J.G., Canadian Conflict of Laws 4th ed., (Toronto: Butterworths, 1997) pp.574-575; ***Voyage Co. Industries v. Craster***, *supra*; ***National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.***, *supra*; Fraser & Stewart, op. cit. p.144; Palmer's Company Law (looseleaf ed.) Vol. I, (London: Sweet & Maxwell, 1997) pp.2105-2106]:

> Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation. This domicile is in the state or province of incorporation or organization and cannot be changed during the corporation's existence even if it carries on business elsewhere. Thus, the law of the state or province under which a corporation has been incorporated or organized determines whether it has come into existence, its corporate powers and capacity to enter into any legal transaction, the

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> persons entitled to act on its behalf, including the extent of their liability for the corporation's debts, and the rights of the shareholders.
>
> [Castel, *supra,* at p.574-575].

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[176] It is a fundamental principle of company law that a corporation is a legal entity distinct from its shareholders. [***Salomon v. Salomon & Co. Ltd.***, [1897] A.C. 22 (H.C.); Palmer's Company Law 24th ed., Schmitthoff, C.M. Ed., (London: Stevens & Sons, 1987) pp.200-201; Fraser & Stewart Company Law of Canada 6th ed., (Carswell, 1993) at p.17; *Canada Business Corporations Act*, R.S.C. 1985, c.C-44, S.15(1)].

[177] This distinction is operative in a parent and subsidiary relationship and applies to related corporations owned by a common shareholder. [Fraser & Stewart, op. cit. at p.21, Davies, P.L., Gower's Principles of Modern Company Law 6th ed. (London: Sweet & Maxwell, 1997) at pp.80, 159-163; ***BG Preeco I (Pacific Coast) Ltd. v. Bon Street Developments Ltd.*** (1989), 60 D.L.R. (4th) 30 (B.C.C.A.)].

[178] There is a distinction in Canadian constitutional law between the power to incorporate and the power to regulate the activities of a company. The power to incorporate a company is the ability to bestow legal personality on an

association of persons, regulate a corporate structure and define the rights of shareholders.

[179] A company once incorporated however will be responsible to the laws of jurisdictions in which it operates. A federally incorporated company is, for example, accountable under provincial security laws.

[180] The provisions of the *Act*: Sections 1(1), 1(2), 1(3), 1(5), 13 and 17.1 attempt to alter or derogate from the rights of shareholders of federal and foreign companies.

[181] The *Act* makes shareholders liable, where they hold a sufficient number of shares, for the conduct of the company itself.

[182] A company domiciled anywhere in the world that owns the majority of shares of any company, which by the terms of the *Act* is a member of a Group and obtains 10% of its revenue from tobacco, becomes a member of the Group and is liable for the conduct of the other members.

[183] In such a manner may a completely passive foreign investor be made liable under the *Act*.

[184] An example of the destruction of immunity from liability of a federally-incorporated company by the operation

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of the provisions of the *Act* is the claim the government makes in its action against the defendant ***Rothmans Inc.***

[185] The government alleges in its Statement of Claim that ***Rothmans Inc.*** owns the majority of the shares of the defendant ***Rothmans, Benson & Hedges Inc.*** It is alleged ***Rothmans Inc.*** sold the tobacco related part of its business in 1985 and this business is now that of ***Rothmans, Benson & Hedges Inc.*** The effect of the provisions of the *Act* make ***Rothmans Inc.***, solely on proof of its shareholdings, liable for any tobacco related wrong on the part of ***Rothmans, Benson & Hedges Inc.*** since it commenced business and will be assessed for recovery of health care benefit costs based on the market share of ***Rothmans, Benson & Hedges Inc.***

[186] All the *ex juris* defendants appear, on the extremely limited evidence before the Court, to have been made parties because of the *Act*'s extended definitions relating to manufacturers. Those definitions include the associated, related, and grouping of company provisions in the *Act* that make all related manufacturers one and each jointly and severally liable for the acts of any other in their group.

[187] It does not appear from the recovery action commenced by the government that any of these defendants are

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alleged to actually have manufactured or to have sold tobacco products in British Columbia.

[188] Several of the *ex juris* companies are not operating companies but are joined because of their shareholdings, derivation of income, control positions, by virtue of past acquisition, or because they are a trade association.

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[189] The *Act* therefore attempts to alter and derogate from what are clearly domiciliary rights under the law of foreign jurisdictions, a legislative manoeuvre that is impermissible and against the rule in ***Churchill Falls (Labrador) Corp. Ltd. v. A.G. Newfoundland (Attorney General)***, *supra.*

[190] The *Act* extends to and attaches legal consequences to the conduct of a defendant manufacturer outside of British Columbia. The definition of a tobacco related wrong envisages a breach of duty owed by a manufacturer to a person who has or might become exposed to a tobacco product.

[191] The manufacturer referenced is a Group and its members [Section 17.1(1)(a)]. The conduct of any member of the Group becomes the conduct of all, without territorial limitation.

[192] The *Act* defines both "persons" and "insured persons". Section 13.1(1)(a) refers to persons to whom a duty is owed. The definition of tobacco related wrong imposes the duty in respect of persons who have been exposed or might be exposed to a tobacco related wrong". There appears to be no territorial boundary to the use of "persons" and it could have global reach.

[193] In contrast, Section 13.1(1)(c) contains a territorial limitation, namely, "… the type of tobacco product [that] … was offered for sale in B.C."

[194] The wide and territorially unrestricted use of the word "persons" in Section 13.1(1)(a) is to be contrasted with the precisely defined term "insured persons", which by definition of "health care benefits" is territorially restricted to British Columbia, and was not used. Those who qualify as "insured persons" are British Columbia residents who qualify as beneficiaries under the *Medicare Protection Act*, R.S.B.C. 1996, c.286 or the *Hospital Insurance Act*, R.S.B.C. 1996, c.204 that comprise under the Provincial universal medicare system nearly the entire population of British Columbia.

[195] The *Act* therefore provides that the duty on which liability is based is not necessarily a duty owed in British

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Columbia; the person affected may be domiciled outside British Columbia and the alleged breach may occur elsewhere.

[196] In ***Interprovincial Co-operatives Ltd. et al v. The Queen in the Right of Manitoba,*** *supra*, at 516 (per Pigeon J.) a Provincial statute conferring a statutory cause of action on government against parties in the Province, but applied to conduct outside the Province giving rise to liability, was held to be *ultra vires*:

> … [I]n respect of injury caused by acts performed outside its territory, I cannot accede to the view that this can be treated as a matter within its legislative authority when those acts are done in another province any more than when they are accomplished in another country. In my view, although the injurious acts cannot be justified by or under legislation adopted in the province or state where the plants are operated, by the same token, Manitoba is restricted to such remedies as are available at common law or under federal legislation.

[197] In ***Tolofson v. Jensen***, [1994] 3 S.C.R. 1022, (1995), 120 D.L.R. (4th) 289 La Forest J. notes that the *lex loci delecti* rule relating to the jurisdiction of a claim in tort is based partly on constitutional considerations. The effect of the rule is that a Province cannot, by attaching new consequences to extra-territorial acts or omissions, impose its law on a tort which occurs beyond its borders.

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[198] A Province may not pass legislation that has the effect of imposing obligations outside the Province or has other extra-provincial consequences unless the effect is merely collateral or incidental to legislation otherwise within its power. [***Churchill Falls (Labrador) Corp. Ltd. v. A.G. Newfoundland (Attorney General)***, [1984] 1 S.C.R. 297, (1984), 8 D.L.R. (4th) 1; Hogg, Constitutional Law of Canada (looseleaf ed.) pp.13-14].

[199] In particular, section 17.1(2) purports to alter and affect the contractual terms of the acquisition of part of a tobacco related business by imposing upon the purchasers or lessee the assumption of liability for any wrongful conduct on the part of the vendor or lessor that would qualify as a tobacco related wrong.

[200] Additionally, retroactive consequences arise pursuant to Sections 17.1(2) and 20(2) in any commercial transaction of this type. Where the transaction involves an extra-territorial purchaser or lessor, the legislation affects adversely the extra-territorial contractual rights of the parties and therefore offends the rule in ***Churchill Falls (Labrador) Corp. Ltd. v. A.G. Newfoundland (Attorney General).***

[201] The *Act* also attaches consequences to the ownership of a tobacco trademark or a right to the use of a trademark.

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Each of these rights is caught by the extended definition of "manufacturer".

[202] Trademark ownership is governed in Canada by the *Trade Marks Act*, 1985 c. T-13 and jurisdiction under section 91(2) of the *Constitution Act, 1867* is with the Parliament of Canada.

[203] But the *Act* does not restrict the application of its provisions to trade mark use in British Columbia, and the legislation consequently has an extra-territorial effect, thus derogating from extra-provincial property rights and offending against the rule in ***Churchill Falls (Labrador) Corp. Ltd. v. A.G. Newfoundland (Attorney General)***.

[204] The *Act* by its manifold effects imposes the law of British Columbia on the extra-territorial status, contracts, property, and conduct of parties.

[205] The *Act* overrides the substantive laws of extra-territorial Canadian or foreign jurisdictions in four major areas:

(a) in respect of the status and corporate personalities of corporate tobacco manufacturers with domiciles outside British Columbia;

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(b) in respect of legal consequences of acts or omissions outside British Columbia, characterized as tobacco related wrongs;

(c) in respect of contracts relating to the purchase, lease or acquisition by any means whatsoever of any part of a tobacco related business wherever situate and whatever the proper law of contract applicable; and

(d) in respect of shareholder's rights and liabilities regarding shares of federal or foreign corporations.

[206] The Supreme Court of Canada has held that a tortious act committed in another Province involving extra-Provincial parties makes the applicable law the substantive law of that Province and must be applied by the Courts of the Province where the action is tried:

> … [A]n attempt by one province to impose liability for negligence in respect of activities that have taken place wholly in another province by residents of the latter or, for that matter, residents of a third province, would give rise to serious constitutional concerns.
>
> [***Tolofson v. Jensen,*** *supra*, at 1066]
> …
>
> … because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal

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> with such circumstances. I can, however, imagine few cases where this would be necessary.
>
> [***Tolofson v. Jensen***, at 1054]

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[207] The *Act* does not require a connection between "a tobacco related wrong" and the health care benefits claimed. The connection is artificial, a presumption, and contrary to ***Tolofson v. Jensen.***

[208] The rationale of the choice of law rule requires the Court to connect the alleged wrongful conduct to the place of its occurrence. The parties will be judged under the law governing them where they took the action in question.

[209] A "tobacco related wrong" includes a breach of "statutory duty". There are statutory duties imposed under British Columbia statutes like the *Trade Practice Act,* R.S.B.C. 1996, c.457. These can lead to foreign corporations with no presence in British Columbia, conducting their affairs in conformity with their domestic law, being judged under Section 13.1(1)(a) according to standards of conduct under British Columbia statutes for acts or omissions that occur in their own country.

[210] A provincial legislature has no power to impose its own laws on extra-territorial status, contracts, conduct or property.

[211] Choice of law rules are part of the Provinces' common law and subject to the same constitutional limits as are all legislative endeavors. [Hogg, op. cit. At pp.13-23].

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[212] There are four federally-incorporated defendants in the government action. Parliament has an exclusive legislative power to incorporate companies with other than provincial objects under the residual power of the peace, order and good government provisions of Section 91 of the *Constitution Act, 1867*.

[213] Sections 1, 13, 13.1, 17, and 17.1, when they purport to govern the status, structure and corporate personality of a federally-incorporated company under the *Canada Business Corporations Act* are not only extra-territorial in effect they trench upon the exclusive jurisdiction of the Parliament of Canada.

[214] There is much force to the argument that a practical cumulative effect of these provisions of the *Act* is to "amalgamate" or "merge" defendant tobacco companies such that those “amalgamated” by the operation of the provisions of the *Act* incur liability for civil claims against others in the involuntary merger. That is a fundamental interference with a federal jurisdiction reserved under Part XV of the *Canada Business Corporations Act*.

[215] The combined effect of Sections 1(2), (3), (4), (5) and 17.1(1)(a) of the *Act* ignores the separate identities of federally-incorporated companies for the purpose of establishing a tobacco related wrong committed by a related company and for the purpose of calculating amounts assessed against them.

[216] The separate legal personality conferred under s.15(1) of the *Canada Business Corporations Act* is removed and the corporation loses its legal status as distinct from its shareholders.

[217] The reach of the *Act* encompasses the conduct of the national and international tobacco industry worldwide to found liability for costs incurred by the government on behalf of tobacco users in British Columbia.

[218] The provisions of the *Act* appear not so much designed to "pierce the corporate veil" as they are to strip away separate identities and treat them as if they had legally merged or amalgamated. The effect of provisions of the *Act* is not to look through the façade of a company shell; it is to deny the right to any separate corporate existence.

[219] The plaintiff manufacturers in these proceedings have shown a strong case that the *Act* in pith and substance,

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according to its purpose and effect, is extra-territorial and beyond the powers of the Province under the *Constitution Act, 1867* and the *Statute of Westminster, 1931*.

[220] I have not found it necessary as a result of my finding to address the paramountcy argument which assume both valid, but conflicting, federal and provincial legislation.

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CONSTITUTIONAL INVALIDITY, SEVERANCE OR READING DOWN

[221] I have found the dominant characteristic, or pith and substance of the *Act*, to be the pursuit nationally and internationally of the tobacco industry for the cost of health care benefits incurred by the government of B.C relating to residents of the Province who suffered from a tobacco related disease.

[222] The extra-territorial reach of the *Act* places it beyond the constitutional competence of the Province.

[223] The Attorney-General argues if the enterprise liability provisions of the *Act* give rise to constitutional concern, as I find they do, they may be easily severed or read down as appropriate and the balance of the *Act* would remain viable and conform to the original legislative intent.

[224] The course suggested is that the *Act* could be read down as required so it applies only to tobacco related wrongs with the requisite real and substantial connection to British Columbia; a ***Moran v. Pyle***, *supra*, type of analysis.

[225] The Attorney-General reasons that as the impugned provisions were added to an existing *Act* by amendment in 1998 they could be as easily removed. The basic intent of the legislature would then still be fulfilled relying on a ***Moran***

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v. Pyle view of liability. This would treat the impugned provisions of the present *Act* as embellishments that did not change its essential character.

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[226] The manufacturers urge that the *Act* is a carefully integrated legislative scheme, the central purpose of which is the ability to recover the very substantial costs of health care benefits related to tobacco disease from the national and international tobacco industry following upon a unique streamlined civil proceeding. The *Act* cannot be unraveled in piecemeal fashion and is rendered *ultra vires* in its entirety.

[227] Reading down is a doctrine of constitutional remedy that may be employed as an interpretive technique to preserve the validity of statutory provisions. When alternative constructions exist the Court should select a construction that is consistent with the legislative intent and constitutionally valid.

[228] However, the reading down doctrine is not to be employed if the effect is to alter the essence of the legislation:

> … In this respect, I agree with the following comment made by Carol Rogerson in her article …
>
> While the courts continue to describe reading down as a technique of interpretation rather than of invalidation, as a practical matter reading down is

> difficult to distinguish from a remedy which would operate to declare particular applications of a law unconstitutional. Reading down does require an initial determination by the court that particular applications of the statute would be unconstitutional.
>
> The process of interpreting a statutory provision that is susceptible of more than one meaning was traditionally governed by the basic precept that the Court's function is to discover the intention of the legislature. In a case in which the ordinary rules of construction yield two equally plausible meanings, policy considerations are a factor in resolving the conflict. In constitutional cases before the *Charter* this was reflected in the practice of interpreting statutes by applying a presumption that a legislative body does not intend to exceed its powers under the Constitution.
>
> …
>
> In the final analysis, a law that is invalid in so many of its applications will, as a result of wholesale reading down, bear little resemblance to the law that Parliament passed and a strong inference arises that it is invalid as a whole.
>
> [***Osborne v. Canada (Treasury Board)***, [1991] 2 S.C.R. 69, Sopinka J., at pp.103-105].

[229] The use of severance as a technique to preserve the constitutional validity of legislation is described by Hogg in the following terms:

> Occasionally, however, it is possible to say that part only of a statute is invalid, and the balance of the statute would be valid if it stood alone. Of course, the balance does not stand alone; and the question arises whether the court should "sever" the bad part, thereby preserving the good part, or whether the court should declare the entire statute to be bad. The rule which the courts have developed

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> is that severance is inappropriate when the remaining good part "is so inextricably bound up with the part declared invalid that what remains cannot independently survive"; in that event, it may be assumed that the legislative body would not have enacted the remaining part by itself. On the other hand, where the two parts can exist independently of each other, so that it is plausible to regard them as two laws with two different "matters", then severance is appropriate, because it may be assumed that the legislative body would have enacted one even if it had been advised that it could not enact the other.
>
> [Hogg, at 15-21, 15-22, Tab 4].

[230] In ***Schachter v. Canada***, [1992] 2 S.C.R. 679 at 697, Chief Justice Lamer refers to a classic test for severance:

> Where the offending portion of a statute can be defined in a limited manner, it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are.

[231] It is an essential feature of severance that in deleting some legislative provisions the Court must be satisfied the legislature: "… would have enacted what survives without enacting the part that is *ultra vires* at all." [***Attorney-General for Alberta v. Attorney-General for Canada***, [1947] A.C. 503 at 518].

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[232] The impugned *Act* does not impose liability in the ***Moran v. Pyle*** context where a tobacco manufacturer breaches a duty that causes disease in a person in British Columbia resulting in a health care cost to the government.

[233] The design of the *Act* imposes liability upon a foreign defendant not on the basis of wrongful conduct but on the basis of being deemed a member of a group in which another member commits a wrongful act.

[234] The constituent provisions of the theory of enterprise liability resulting in the *Act*'s extra-territorial effect are inextricably bound up with the remaining features of the *Act*. I do not have confidence they may be read down or severed in a manner that would leave remaining an *Act* clearly identifiable with the original intent of the legislature.

[235] There are several provisions of the *Act* necessary to the consideration of a reading down or severance. They include the s.1(1) definition of "manufacturer" with its several subsections; s.1(2), (3) and (4), the "related" and "affiliate" provisions; s.1(5), the definition of market share on a related company basis; s.13, concerning whether it imposes a duty upon a person not in British Columbia; and s.17.1.

[236] I am of the view that any attempt to craft change through severance or reading down would inevitably result in a form of legislative redrafting.

[237] In the result, the plaintiff manufacturers have shown entitlement on the basis of the extra-territorial reach of the *Act* to the declaration they seek. I find the *Tobacco Damages and Health Care Costs Recovery Act* to be inconsistent with the provisions of the Constitution of Canada as *ultra vires* the Legislative Assembly of British Columbia.

[238] It follows that action C985776, **Her Majesty the Queen in Right of British Columbia v. Imperial Tobacco Limited et al**, that is founded entirely upon a statutory cause of action under the invalidated *Tobacco Damages and Health Care Costs Recovery Act*, is dismissed.

"R. R. Holmes, J."

February 22, 2000 -- Memorandum issued advising the addition of counsel to the Action No. C985780. Amendment has been made to judgment.

February 28, 2000 -- Corrigendum issued by Justice Holmes advising the above.

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