IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***HMTQ v. Imperial Tobacco Canada Limited et al. ,***

2003 BCSC 877

Date: 20030605

Docket: S010421

Registry: Vancouver

Between:

Her Majesty The Queen in Right of British Columbia

Plaintiff

And

Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-Macdonald Corp., Canadian Tobacco Manufacturers' Council, B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris Incorporated, Philip Morris International, Inc., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., Rothmans International Research Division and Ryesekks p.l.c.

Defendants

- and -

Docket: S010423

Registry: Vancouver

Between:

JTI Macdonald Corp.

Plaintiff

And

Attorney General of British Columbia

Defendant

- and -

Docket: S010424

Registry: Vancouver

Between:

Imperial Tobacco Canada Limited

Plaintiff

And

Attorney General of British Columbia

Defendant

- and -

Docket: S010425

Registry: Vancouver

Between:

Rothmans, Benson & Hedges Inc.

Plaintiff

And

Attorney General of British Columbia

Defendant

Before: The Honourable Mr. Justice R.R. Holmes

Reasons for Judgment

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Date and Place of Trial:	November 4-8, 12-13, 18-22, & 25-28, 2002 Vancouver, B.C.

INTRODUCTION

[1] The three actions tried in this proceeding are for a declaratory judgment that the ***Tobacco Damages and Health Care Costs Recovery Act***, S.B.C. 2000 c.30 [the "***Act***" or "2000 ***Act***"] is *ultra vires* the powers of the Province and consequently of no force and effect. The plaintiffs in the actions are JTI-Macdonald Corporation, Imperial Tobacco Canada Limited, and Rothmans Benson & Hedges Inc., the three Canadian manufacturers named as defendants in the Supreme Court of British Columbia, Vancouver Registry Action No. S010421 commenced by Her Majesty the Queen in Right of British Columbia [the "government action"] pursuant to the statutory cause of action conferred under Section 2 of the ***Act***.

[2] The triparte grounds upon which the constitutional challenges are based are judicial independence, retroactivity, and extraterritoriality.

[3] There are applications in the government action under Rules of Court 14(6) and 19(24) for dismissal of the government action on the basis of the constitutional invalidity of the ***Act***.

[4] Applications are before the Court from eight *ex juris* defendants to set aside service of the Writ of Summons upon them in the government action. The *ex juris* defendant Rothmans International Research Division was not served, did not appear to Writ of Summons, and is therefore not before the Court.

[5] In the event the constitutional challenges to the ***Act*** succeed, the government action would be dismissed against all defendants. If the constitutional challenges are unsuccessful, the applications of the *ex juris* defendants must be determined.

[6] The matter has relevant history. A prior action was brought by the British Columbia government against the defendant tobacco manufacturers in 1998. The basis of that action was the ***Tobacco Damages Recovery Act***, S.B.C. 1997 c. 41 ["prior ***Act***" or "1997 ***Act***"]. In the same manner as here, the prior ***Act*** was challenged by the defendant tobacco manufacturers in actions seeking declaratory judgments of constitutional invalidity.

[7] The violations alleged were that the 1997 ***Act*** exceeded the territorial jurisdiction of the Province; presented an unconstitutional interference with judicial independence; and that it violated the rule of law in respect to protection of equality under the law and in respect to the prohibition on retroactive penal legislation.

[8] In the prior action there were no *ex juris* applications to set aside service before the Court, however by agreement of the parties the *ex juris* defendants participated at the trial of the constitutional challenge actions.

[9] This Court found that the prior ***Act*** did extend beyond the constitutionally permissible reach of the Province under the ***Constitution Act,*** 1867 (U.K.) 30 & 31 Victoria, c.3, rep. R.S.C. 1985 App. 11 No. 5. The manufacturers were granted a declaration to that effect and the government's action against the manufacturers was dismissed. Reasons for this decision can be found at ***JTI-Macdonald Corp. v. British Columbia (Attorney General)*** (2000), 74 B.C.L.R. (3d) 149, ["***JTI*** decision"].

[10] In response to the ***JTI*** decision, the British Columbia Legislature decided to repeal the 1997 ***Act***. Subsequently it enacted modified legislation said in part to address the consequence of the ***JTI*** decision and to provide greater clarity to the provisions and terms contained in the ***Act***.

[11] The new ***Act*** came into force January 24, 2001. The government instituted an action against the manufacturers that same day. The manufacturers again brought actions seeking declarations the ***Act*** was unconstitutional.

[12] The major changes made in the ***Act*** were succinctly outlined on second reading by the Honourable Minister Farnworth in the Legislative Assembly on June 7, 2000:

> In response to the Supreme Court's decision, the province has decided

to request that the Legislature repeal the original Tobacco Damages and Health Care Costs Recovery Act and re-enact the legislation with some modifications, to address the Supreme Court's concerns.

In particular, the enterprise liability provisions that would have permitted the government to sue foreign corporations on the basis of corporate relationship have been severed in this new legislation. However, it is important to note that there are new joint and several liability provisions which provide for joint liability where more than one manufacturer acted together to commit a breach of duty owed to people in British Columbia – that is, smokers or those who might become smokers – or where one manufacturer acted on behalf of another in committing a breach of duty.

In addition, the wording of several of the act's provisions has been changed to provide greater clarity. For example, there is a new definition of "cost of health care benefits", which among other things includes and confirms that recovery for expenditures will be calculated on a present-value basis for both past and future expenditures, and it includes the phrase "the risk of tobacco related disease" to clarify that health care benefits can be expended not only for the treatment of disease but also for treatments arising from the risk of disease.

The definition of "health care benefits" has also been expanded to ensure that all government's relevant expenditures are captured. Under the original act some benefits which were not included in the definition were to be designated by regulation. In the new act the language of this definition has been expanded to avoid the necessity of relying on regulations.

The definition of "tobacco related wrong" has been changed to make it clear that the government can only recover health care costs resulting from a breach of duty owed by tobacco companies to persons in British Columbia. This narrowing of the definition is needed to avoid an argument that the act is extraterritorial.

[13] Essentially the two ***Acts*** are similar in content, purpose and style. The stated position of the manufacturers is that they did not intend to make the same submissions and arguments rejected by the Court in the prior decision. They intended to base their arguments on the differences between the prior ***Act*** and the new ***Act***, changes in the law occurring since the ***JTI*** decision and on new affidavit evidence. At the same time the manufacturers noted and reserved the right on any appeal to re-argue the findings of fact arrived at in the ***JTI*** decision since the government chose to enact new legislation rather than appeal the decision, thereby preventing express determination by an appellate court as to the appropriateness of those findings.

[14] As in ***JTI***, no party contends that the Province does not have 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 merely local or private nature in the Province. [Sections 92(13), (14) and (16) of the ***Constitution Act***]. The issue is whether the powers have been exceeded.

[15] The new ***Act***, like the prior 1997 ***Act***, provides a civil cause of action that permits the government to directly recoup the costs of health care benefits paid out in respect of tobacco related diseases caused or contributed to by a tobacco related wrong, all of which are defined terms under the ***Act***. It is legislation that pertains to civil rights in the Province (s.92(13)).

[16] As in the prior ***Act***, it is the statutory cause of action imparted to the Province under s. 2(1) that is the central focus of the present declaratory actions. The statutory cause of action continues to provide the Province an aggregate cause of action to recoup health care costs incurred for British Columbia residents arising from tobacco related disease. The statutory cause of action continues to be a radical departure from traditional common law actions in tort because it does not require proof of individual causation and damages.

[17] The cause of action found in the new ***Act*** is different than that found in the 1997 ***Act***. In the 1997 ***Act***, the aggregate cause of action of the government contained basic tort elements. In the new ***Act***, the cause of action is described by counsel for the government as *sui generis*. Counsel for the government argues that as the aggregate action is no longer a tort action it does not have to adhere to the traditional rules of tort. The individual action provided for in the ***Act*** however, still requires that the traditional elements of tort be proven. Section 2(1) of the ***Act*** reads:

> **2**(1) The government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong.

[18] There are several defined terms within this statutory cause of action. These definitions are set out in Section 1 of the ***Act***. It is of assistance for purpose of analysis to set out the cause of action with the defined terms included, despite the result being lengthy and difficult to comprehend. Thus constructed, the fully defined cause of action reads:

> **The government has a direct and distinct action against a manufacturer** (a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past: Causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product; for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons; engages in, or causes directly or indirectly, other persons to engage in the promotion of a tobacco product, or; is a trade association primarily engaged in: the advancement of the interests of manufacturers, the promotion of a tobacco product, or causing, directly or indirectly, other persons to engage in the promotion of a tobacco product) **to recover the cost of health care benefits** (benefits as defined under the Hospital Insurance Act; benefits as defined under the Medicare Protection Act; payments made by the government under the Continuing Care Act, and; other expenditures, made

directly or through one or more agents or other intermediate bodies, by the government for programs, services, benefits or similar matters associated with disease) **caused or contributed to by a tobacco related wrong** (a tort committed in British Columbia by a manufacturer which causes or contributes to a tobacco related disease, or; in an action under section 2(1), a breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons in British Columbia who have been exposed or might become exposed to a tobacco product).

[Section 2 in bold -- definition of defined words in parentheses]

[19] Counsel for the tobacco manufacturers argued the cause of action in s. 2(1) is incomplete as to causation and characterized it as allowing a “breach in the air”. This conclusion however appears to be based upon a consideration of the changed definition of “a tobacco related wrong” in isolation of the other elements of the statutory cause of action in s. 2(1).

[20] The Attorney General argues that a full reading of the cause of action credited in s. 2 does not indicate a causal gap nor a “breach in the air”.

[21] The statutory cause of action requires:

(a) a breach of duty to British Columbians

(b) causing or contributing to exposure to tobacco

(c) resulting in tobacco related disease

(d) with health care costs incurred by the province for the treatment of disease.

[22] The position of the Attorney General is that the change made to the definition of “a tobacco related wrong” was intended to cure a redundancy inherent in s. 13(1) of the prior ***Act*** which established the prior statutory cause of action.

[23] Section 3 explains the proof required of the government in an action under Section 2:

3(1) In an action under section 2(1) for the recovery of the cost of health care benefits on an aggregate basis, subsection (2) applies if the government proves, on a balance of probabilities, that, in respect of a type of tobacco product,

(a) the defendant breached a common law, equitable or statutory duty or obligation owed to persons in British Columbia 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, was offered for sale in British Columbia.

[24] The Attorney General alleges that the manufacturers breached their duties to persons in British Columbia on several grounds. A summary from the Statement of Claim indicates the wide and extensive scope alleged:

a) Manipulating the level and bio-availability of nicotine in their cigarettes, particulars of which include the following:

I. Sponsoring or engaging in selective breeding or genetic engineering of tobacco plants to produce a tobacco plant containing increased levels of nicotine,

II. Increasing the level of nicotine by the methods used in blending the tobacco contained in their cigarettes,

III. Increasing the level of nicotine in their cigarettes by the addition of nicotine or substances containing nicotine,

IV. Introducing substances, including ammonia, into their cigarettes to enhance the bio-availability of nicotine to smokers, without advising consumers;

b) Incorporating into the design of their cigarettes ostensible safety features such as filters which were ineffective, yet which would lead a reasonable consumer to believe that the product was safer to use than it was in fact;

c) Failing to disclose to consumers the risks inherent in the ordinary use of their cigarette products including the risks of disease and addiction;

d) Engaging in collateral marketing, promotional and public relations activities to neutralize or negate the effectiveness of warnings provided to consumers;

e) Suppressing or concealing scientific and medical information regarding the risks of smoking;

f) Engaging in marketing and promotion activities having the tendency to lead consumers to believe that cigarettes have performance characteristics, ingredients, uses and benefits and approval that they did not have;

g) Misinforming and misleading the public about the risks of smoking by using innuendo, exaggeration and ambiguity having the tendency to mislead consumers about the material facts regarding smoking and health;

h) Making the following representations to consumers:

I. Representing that smoking has not been shown to cause any known diseases,

II. Representing that they were aware of no research, or no credible research, establishing a link between smoking and disease,

III. Representing that cigarettes were not addictive,

IV. Representing that smoking is merely a habit or custom as opposed to an addiction,

V. Representing that they did not manipulate nicotine levels in their cigarettes,

VI. Representing that they did not include substances in their cigarettes designed to increase the bio-availability of nicotine,

VII. Misrepresenting the actual intake of tar and nicotine associated with smoking their cigarettes,

VIII. Representing that certain of their cigarettes, such as "filter", "mild", "low tar" and "light" brand, were safer than other cigarettes,

IX. Representing that smoking is consistent with a healthy lifestyle,

X. Representing that the risks of smoking were less serious than they knew them to be; and

i) Failing to correct statements made by others to consumers regarding the risks of smoking, which they knew were incomplete or inaccurate, and thereby misrepresenting the risks of smoking by omission or silence.

[25] As a result of these breaches, the Attorney General alleges that persons in British Columbia started to smoke or continued to smoke cigarettes manufactured and promoted by the defendant manufacturers and thereby suffered tobacco related disease and an increased risk of such disease for which the government has and will continue to provide health care benefits.

[26] The manufacturers deny these allegations but in this proceeding do not argue the merits. Rather the focus is on the manner in which these allegations are brought. The manufacturers argue that the ***Act*** under which the British Columbia government is attempting to enforce these duties is *ultra vires* of the Province based primarily on the following grounds: judicial independence, retroactivity, and extraterritoriality.

JUDICIAL INDEPENDENCE

[27] The manufacturers assert that the 2000 ***Act*** is an unconstitutional interference with the independence of the judiciary which is essentially the same position they advanced in ***JTI*** in respect of the 1997 ***Act***. Counsel for the manufacturers characterized their present position as converting a "facial challenge" in the ***JTI*** action to one where there is now an evidentiary foundation for asserting the adjudicative function of the Court is affected.

[28] Counsel intend their present submissions will be within the confines of the previous decision which they do not seek to appeal but do seek to revisit on the basis of a new record. The revisitation concerns two findings in the ***JTI*** action relating to judicial independence. First, that the argument with respect to judicial independence was premature; and second, that the evidence withheld from the Court by blocking provisions of the ***Act*** was not, on the record before the Court, relevant to the aggregate action created by the ***Act***.

[29] The new record contains a detailed report of Dr. M. Laurentius Marais concerning evidentiary issues raised by provisions of the ***Act***. Dr. Marais is of the view that evidence relating to the attributes of individuals is necessarily relevant to the issues in an action under the ***Act*** pursued on an aggregate or statistical basis.

[30] The manufacturers argue that the "blocking provisions" contained in the ***Act*** prevent or hinder obtaining relevant information of the attributes of representative individuals taken from the larger population. [Section 2(5)] The reliability of the statistical study is thereby compromised and the Court deprived of the probative evidence that is essential to properly test it and adjudicate the issues that arise in an aggregate action.

[31] Counsel urges that the evidence in the report of Dr. Marais no longer makes a determination of the operation and effect of the ***Act*** premature.

[32] The manufacturers concede the ***Act*** does empower the Court to make an order requiring disclosure of a representative sample of health care documents. [Section 2(5)(d)] This is taken as an indication of the clear recognition of the relevance and importance of individual attributes in an aggregate action. The blocking provision as to the identity of individuals however prevents the ability to gather, place before the Court, and test relevant evidence.

[33] The manufacturers accept a Province may create an aggregate cause of action that is constitutional and that statistical evidence could be relevant in such a proceeding. The position of the manufacturers is however that in an aggregate action in which a Province is the plaintiff, it undermines the judicial process to have the enabling statute block probative evidence in any way that undercuts the fundamental fairness of the proceeding.

[34] The manufacturers contend that the rules have been written to interfere with the Court's ability to find the facts and to influence the outcome in favour of the plaintiff.

[35] The manufacturers' position is that the operation and effect of the ***Act*** must be

assessed from the stand point of an informed, reasonable and objective observer. The question is whether in the eyes of such person the independence of the Court and its ability to determine the case independently and impartially has been compromised either in appearance or in fact.

[36] The manufacturers deny that access to individual records of persons is an attempt to drive an aggregate action back to an accumulation of individual ones. They acknowledge an ability of the Legislature to create an aggregate action, focused upon a target population and make acceptable the use of statistical and epidemiological evidence. Evidentiary matters, such as no need for individual causation, would be reasonably ancillary.

[37] The operation of the 2000 ***Act*** in many respects mirrors the 1997 ***Act*** with the wording of some sections unchanged.

[38] The ***Act*** creates a direct and distinct action against manufacturers for the recovery of health care benefit payments caused or contributed to by a tobacco related wrong. It is not a subrogated action. [Section 2(1) and 2(2)].

[39] The defendant manufacturers owed no duty to the Province, however the ***Act*** permits the Province, a third party, to recover the cost of the health care benefits it paid on behalf of individuals for the breach of duties owed to them by the defendants. [Section 2(3)]

[40] The ***Act*** allows recovery on either an individual or aggregate basis. [Section 2(4)(a) and (b)]. The aggregate action concerns health care benefits within the population of insured persons. In an aggregate action, the Court determines to what extent tobacco exposure causes or contributes to disease in the insured population, to what extent the conduct of the defendants and their alleged breaches of duty caused or contributed to exposure in the population, and the aggregate cost of the health care benefits for treatment of the disease caused.

[41] The ***Act*** contains certain procedural and evidentiary rules that appear reasonably ancillary to the nature of an aggregate action and are therefore not the focus of the challenge in these proceedings. The ***Act*** provides that it is not necessary to prove causation of tobacco related disease on an individual basis, or the cost of health care benefits of any particular person. Statistical evidence is admissible to establish causation and to quantify health care benefits in respect of a tobacco related wrong. [Section 5].

[42] Section 2 of the ***Act*** provides a limited right to discover certain classes of documents with information relevant to the aggregate proceeding. The limitations are that the documents are discoverable in accordance with a rule of law practice or procedure requiring production of documents by an expert witness [Section 2(5)(b)]; and that the Court may order a meaningful sample of the documents subject to certain expressed conditions [Section 2(5)(d)].

[43] The ***Act*** prohibits the disclosure of personal identities and identifiers of any individual insured person. [Section 2(5)(b) and (e)] Additionally Section 2(5)(c) provides that no one is compellable to answer questions with respect to the health of, or the provision of health care benefits for, any particular insured person.

These restrictions, termed “blocking provisions” by the manufacturers curtail the ability to obtain information otherwise accessible under discovery provisions of the Rules of Court.

[44] The ***Act*** also contains presumptions that the manufacturers contend operate in tandem with the blocking provisions. A tobacco related wrong is defined in Section 1 as “a breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons in British Columbia who have been exposed or might become exposed to a tobacco product.”

[45] Section 3 of the ***Act*** requires the Province, as plaintiff in an aggregate action, prove on the balance of probabilities that:

> (1) the defendant breached a common law, equitable or statutory duty or obligation owed to persons in British Columbia who have been exposed or might become exposed to the type of tobacco product;
>
> (2) exposure to the type of tobacco product can cause or contribute to disease; and
>
> (3) 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, was offered for sale in British Columbia.

[46] Upon the required proof being met, the ***Act*** provides that the population of insured persons exposed to the type of tobacco product manufactured or promoted by the defendant, would not have been exposed to the product but for the breach. [Section 3(2)(a)]. The manufacturers argue the presumption is an interference with judicial independence because it restricts the Court’s ability to receive evidence in rebuttal of the presumption.

[47] The manufacturers, while agreeing the ***Act*** permits that statistical evidence may be admitted in respect of several factual issues, makes clear that statistical evidence, no less than non-statistical evidence, must be accurate, reliable and reasonably complete so as to allow for its validity to be tested. It is the contention here that the rules under the ***Act*** for admitting, testing and determining the content of the statistical evidence permit manipulation for the benefit of only one party, the Province, in a manner that compromises the independence and impartiality of the trier of fact to the eyes of an informed, objective and reasonable observer.

[48] It is the position of the manufacturers that the filing of the Marais report shows that data at the level of the individual insured person within the samples used for statistical analysis is required to test the validity of the analysis, and generally the data for such testing cannot be assembled absent personal identifiers.

[49] Dr. Marais’ opinion is that it may be possible to draw conclusions about a population by use of statistics if the analysis is well constructed. One means of determining whether the analysis is well constructed is to draw a sample from the population and test that sample for reliability and accuracy. A reliable statistical

analysis concerning issues in the government action would require information about the attributes of the individual insured persons within the sample. In Dr. Marais' view, that personal information cannot be assembled without access to the identities of individual persons comprising the sample.

[50] Dr. Marais concludes that "absent such access the reliability of statistical projection of the aggregate effect of tobacco exposure on health care costs cannot be tested and there can be no assurance that it is reasonably accurate."

[51] Dr. Marais explains in footnote 4 of his report the effect of the epidemiological phenomenon known as "confounding". That is the problem that occurs when one attempts to measure the contribution of one factor and it becomes necessary to collect data which might also be a contributing factor. It becomes an object of a well constructed statistical analysis to control for confounding by separating factors extraneous to the subject of the study. Dr. Marais in paragraph 6 of his report concludes: "Thus, it is not possible to determine reliably the effect of the tobacco exposure per se without accounting for the effects of other risk factors correlated with tobacco exposure".

[52] It is the position of the manufacturers that knowledge of individual identities is demonstrably necessary for assembling a data base that is sufficiently complete to test the reliability of an appropriate statistical model in this action. Shielding individual identifiers is not necessary to prevent the action reverting to individualized ones, however identification information is necessary and has direct statistical relevance to the proper testing for reliability of the statistical analysis.

[53] Dr. Marais opines that:

> Coverage of other important determinants of health outcomes including members' history of diet and exercise is also likely incomplete or nonexistent in such databases maintained for routine administrative purposes. Indeed these factors are likely not to be covered in a comprehensive and systematic fashion in the notes and files of the medical offices that provided services to insured persons, even supposing that such records could be consolidated and linked to administrative records using the "Identifiers" in column group [A].14.

[54] The Attorney General's position remains essentially two fold. First, it is common ground that aggregate actions are not unconstitutional and that statistical evidence may have relevance to the issues. The ultimate significance of statistical analysis and its relationship to other forms of evidence in an action is a matter for trial. Secondly, the impugned blocking provisions of the ***Act*** do not impair a core adjudicative function of the Court inherent to judicial independence.

[55] The focus of the manufacturers argument centers on the blocking provisions of Section 2(5)(b) to (e) of the ***Act***. They existed in the prior 1997 ***Act*** and the manufacturers arguments were considered and rejected in the ***JTI*** decision. The manufacturers seek reconsideration in this proceeding relying upon the Marais report as being the evidentiary base the Court found previously lacking.

[56] The Attorney General submits that the report fails to meet the standard of "clear and unmistakeable" proof that evidence of individual attributes from insured persons is necessary. [***Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan***, [1978] 2 S.C.R. 545 at 573-4].

[57] The Attorney General submits that the Marais report does not address the use of statistical evidence in regard to what has been termed "the first presumption —- why an insured started, continued, stopped or tried to stop smoking". Paragraphs 3 and 4 of his report indicate he is dealing with the issue following upon a breach of duty for the part of health care costs caused by smoking and he is not addressing what portion of those costs were caused by the breach.

[58] I accept the general thrust of the Attorney General's argument that Dr. Marais is throughout his report really speculating as to what the evidence of the government at trial will be. The foundation of Dr. Marais' knowledge of the matters before the Court are reported to consist only of the 1997 ***Act***, the 2000 ***Act*** and the decision in ***JTI***.

[59] There is no evidence Dr. Marais has knowledge as to the nature or quality of the data contained in the health care records at issue (Section 5(b)). There is no evidence of ancillary or collateral records or data banks that may be available.

[60] It is unknown whether available records or data bank information can be linked, and whether in sum the information presented is sufficient to assess the reliability of evidence presented by the government.

[61] It is unknown whether some of the information Dr. Marais suggests might be missing can be accounted for from the manufacturers own records or data.

[62] Dr. Marais has no knowledge of whether the government has constructed a data base with sample surveys of individuals, linked to pre-existing records or pre-existing data, and how it compares to his suggested ideal model.

[63] I am of the view that the Court must have knowledge of the health care records actually in issue, and that the evidence of the government be generally known before a decision is made in regard to expert evidence as to their worth and reliability to the adjudicator of fact. In somewhat simplistic fashion, you cannot make a decision on what may be required until it is known what you have.

[64] The Court is being asked to speculate as to the type of evidence, statistical or otherwise, that will be adduced in another action. The Court is then asked to weigh that evidence now and make a determination on the incomplete state of present knowledge that the evidence to be led will be arbitrary, fictional and unreliable.

[65] The Court is being asked to accept as fact the evidence that will be adduced by the government will be incomplete and unreliable, particularly in relation to confounding by other health risk factors as suggested by Dr. Marais. I accept that is not presently appropriate.

[66] Section 2(5)(b) of the ***Act*** reads:

> **2**(5) 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 for 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,

[67] This exception is of import. Dr. Marais' report focuses entirely upon statistical evidence. Statistical evidence in proof of the government's case will necessarily involve the use of expert evidence.

[68] In the event the government relies upon statistical evidence in proof of the amount of its claim, there is no evidence that the documents relied upon by the experts will be bereft of the data reasonably required to test the validity of the opinions given.

[69] Importantly, section 2(5)(b) does not require the removal of personal identifiers from the health care records or other documents that the expert relies upon.

[70] Production of expert reports and issues relating to them are matters that generally come under trial case management. Issues that arise can be dealt with in timely fashion.

[71] Section 2(5)(d) provides for an application by the defendants. There is no present ability to know if an application will be made, or if made, would succeed. If a sample was permitted the appropriate size cannot now be foretold. The Court has a broad discretion as to what information will be disclosed and is restricted only as to personal identifiers.

[72] Shorn of personal identifiers, the information disclosed by the Court from the records might still be an answer to what is sought. The disclosure can be ordered with a unique identifier so that full linkage may occur to other records without disclosure of personal identifiers.

[73] It would seem inherent in this action that even without the effect of Section 2(5)(e) it is highly unlikely that there will be much scope for obtaining direct personal information. The recovery claim apparently goes back nearly fifty years. The nature of illnesses involved and the long time span suggests many will be deceased and others now untraceable.

[74] The defendants are of course also free to develop their own evidence by survey, and to obtain access to records by obtaining consent or waivers from individuals. Existing statistical studies and epidemiological evidence may be available to the defendants to challenge or cast doubt upon the government's evidence model.

[75] The Court must weigh all evidence and should the evidence of the Province fail to persuade the reliability of its statistical models, that failure will be visited

upon it in its attempted cost recovery.

[76] It is not possible to predict whether suggested alternate sources of data or investigation will provide an answer to information the defendants might seek from an insured individual which will be barred by the blocking provisions that prohibit disclosure of personal identifiers. The issue of whether a core jurisdiction of the Court has been compromised must however await consideration of evidence that is disclosed, or is otherwise reasonably available, in the trial action. In that trial context there may well be more than the type of evidence contemplated and dealt with by Dr. Marais in his report.

[77] Dr. Marais' report does not address whether statistical evidence can be used to determine the issue raised by the first presumption as to why insured persons started, continued, quit or tried to quit, smoking. There is no evidence of the statistical analysis that would be performed and what information would be required.

[78] The manufacturers argue that the presumption is an irrational one. That was previously argued in the ***JTI*** action and my view to the contrary remains unchanged.

[79] The sample used by Dr. Marais for purposes of determining health care costs attributable to smoking contains both smokers and non-smokers, however a sample dealing with the first presumption issue would presumably contain only smokers. It would seem that populations used to sample smokers might vary and need not be drawn only from the insured group. There is also no indication in any event that information useful to that issue would be found in health care records.

[80] I do not accept the manufacturers view that the intent of the blocking provisions is to keep from them relevant and necessary information to their defence, and to unfairly increase the government's prospect of success. I prefer the view that the reason for the blocking provisions is the public interest in protection of confidentiality of sensitive personal information and respect of an individual's privacy. That purpose must be a matter of concern and weigh in the balancing of interests. The Attorney General notes examples of other statutory protection of privacy rights are present in the ***Evidence Act***, R.S.B.C. 1996, c.124 regarding information developed by a hospital inquiry committee [s. 51], and the ***Statistics Act,*** R.S.B.C. 1996 c.439 with respect to probability of disclosure of identifiable individual information [ss. 9 and 10].

[81] The common law has also evolved to afford greater concern to individual privacy rights in the context of civil litigation. The issue in similar context to that presented here has been the subject in several cases in the United States in which judicial crafting occurred to provide maximum protection of individual confidentiality and privacy but to also provide where required, a method of limited access to persons or information.

[82] In ***York v. American Medical Systems***, 1998 U.S. App. LEXIS 30105, records were ordered produced, but only in a redacted form to protect the identity of physicians and patients. In ***Wolpin v. Phillip Morris***, 189 F.R.D. 418 (C.D. Cal. 1999), raw data of a study on smoking was ordered disclosed in the interest of checking accuracy and completeness, however personal information was ordered redacted. In ***Terre Haute-Regional Hospital***, 600 N.E.2d 1358 (Ind. S.C. 1992), it was held that it did not

violate physician-patient privilege in a malpractice case against a hospital for medical records of non-party patients to be disclosed with personal identifiers redacted.

[83] In the Florida litigation involving the ***Agency for Health Care Administration*** case [678 So.2d 1239 (Fla. 1996)], Justice Overton held that provisions of the ***Medicaid Third Party Liability Act*** were unconstitutional under the State's due process jurisdiction. The trial court then ordered disclosure of the identity of every individual Medicaid recipient for whom damages were claimed. The plaintiffs complied by assigning each Medicaid patient a unique number as an identifier. On challenge it was held that was sufficient compliance with the disclosure order. A subsequent order of the Court however allowed 25 of the recipients to be deposed.

[84] The Attorney General notes the extraordinary lengths the Court went to in protecting individual identities, and the extremely limited direct contact that in the end was permitted. There is no indication of the information the manufacturers sought by deposition and therefore whether it would be information caught under Section 2(5)(c) of the 2000 ***Act*** in present context. Depositions were allowed of only 25 of what appears was a huge number of Florida Medicaid recipients for whom recovery was sought. The matter was dealt with in discovery process during the course of litigation and not in a separate constitutional-type challenge.

[85] Examples from the Medicaid litigation in Minnesota and Mississippi show the ingenuity of Court and counsel used in protection of individual privacy and confidentiality yet responding to a need for balance in provision of information and a check upon reliability.

[86] Some portions of a population may be canvassed through the Court, or a third party, to see if they will waive access rights to their records or to provide information voluntarily. Parties have also been ordered to consult and collaborate on plans to provide access to individual information but maintain the greatest degree of confidentiality and privacy possible.

[87] In my view if any blocking provision was found unconstitutional as interfering with the adjudicative functions and offending judicial independence of the fact adjudicator in the trial process, severance of the offending blocking provision would be a likely remedy rather than the ***Act*** itself being set aside or the plaintiff's action dismissed. Any void that then occurred could be cured by common law remedies and by devising reasonable methods that would balance the competing interests just as has occurred in the United States when such issues were confronted.

[88] I conclude the issue of judicial independence raised here is premature and ought not to be decided in this action. The matter ought to be dealt with in the discovery and evidentiary process of the trial action.

[89] My conclusion in ***JTI*** remains that an objective test as suggested by the review of Le Dain J. in ***R. v. Valente (No. 2)***, [1985] 2 S.C.R. 673, at this time does not permit a finding or a reasonably founded perception that the independence of a trier of fact has been interfered with. That of course is in part because a reasonable person viewing the matter, just like the Court, has yet to know of the evidence to be presented, the nature and availability of further evidence, or the nature and need for information sought and said to be blocked.

[90] I therefore do not find the impugned sections of the ***Act*** to be unconstitutional on grounds of judicial independence by interference in the Courts fact finding function.

RULE OF LAW

Retroactivity

[91] The ***Act*** explicitly allows for the recovery of past health care costs paid by the government prior to the Statute coming into force. Section 10 of the ***Act*** reads:

> When brought into force under section 12, a provision of this Act has the retroactive effect necessary to give the provision full effect for all purposes including allowing an action to be brought under section 2(1) arising from a tobacco related wrong, whenever the tobacco related wrong occurred.

[92] The manufacturers' position is that this provision renders the ***Act*** unconstitutional as it violates a long standing principle of the rule of law, that the law must be knowable. The manufacturers submit that this constitutional violation is so egregious that it cannot be justified under the measure of any test found in Canadian law.

[93] The kind or class of retroactivity in issue where the past law is changed and a liability unknown in the past is imposed, is characterized by the manufacturers as the “worst kind” of retroactivity. It constitutes a violation of the right of every person to be able to know and be guided by the law.

[94] The manufacturers argue that this class of retroactivity is an obvious violation of constitutional principles that cannot be justified. As such, the ***Act*** should be struck down and the government action dismissed.

[95] This argument although under the aegis of the rule of law differs from the rule of law based argument advanced by the manufacturers in the prior ***JTI*** action in respect of the 1997 ***Act*** which centered upon the penal aspect of the legislation.

[96] The preamble of the Constitution sets out the supremacy of the rule of law in Canada. It is one of the primary tenants of the Canadian legal system and one entitled to serious scrutiny and concern where violations are alleged. The Supreme Court of Canada in ***Reference re: Manitoba Language Rights***, [1985] 1 S.C.R. 721 at 748-751 confirmed the role of the rule of law as a fundamental principle of the Constitution.

> The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure; one governed by the rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.

[97] The Court also affirmed its earlier statement in the ***Patriation Reference*** [1981] 1 S.C.R. 753 at pp. 805-06, that the rule of law conveys a "…sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority."

[98] In ***Canadian Council of Churches v. Canada (M.E.I.)***, [1992] 1 S.C.R. 236 at 250, Mr. Justice Cory recognized the rule of law "…as a corner stone of the democratic form of government" that "…guarantees the rights of citizens to protection against arbitrary and unconstitutional government action".

[99] The manufacturers argue that there can be no clearer example of an arbitrary government action than the institution of a retroactive law such as that found in the ***Act***. *Driedger on the Construction of Statutes* (3rd ed.)at 513,provides a concise definition of retroactivity:

> A retroactive statute or provision is one that applies to facts that were already past when the legislation came into force. It changes the law applicable to past conduct or events; in effect, it deems the law to have been different from what it actually was. This is the standard definition of retroactivity in current Canadian law, as explained in the leading case on the temporal application of legislation, *Gustavson Drilling (1964) Ltd. v. M.N.R.* …

[100] The manufacturers submit that prior to this ***Act*** coming into force there was no known law which would provide a basis for the government's present claim against the tobacco manufacturers on the facts alleged in the Statement of Claim. It is alleged that the manufacturers committed such grievous wrongs in the Province, when and where no such wrongs existed.

[101] The manufacturers submit that several implications result. Primarily they urge that this type of retroactivity undermines the stability and reliability of the law. Penalties are created for conduct which was considered legal, or at least not illegal, in the past whence it was executed. Therefore, the ***Act*** violates the individual's unwritten constitutional right to know and be guided by the law. Further, it interferes with the principle of *stare decisis* and prevents "access to the law" in the most fundamental manner of the citizen being able to know the law. The result, the manufacturers submit, is an attack on the integrity of the legal system itself, whereby "law is made not law".

[102] The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance the legal consequences that will flow from it. [Lord Diplock, ***Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*** (H.L. (E)) [1975] A.C. 591 at 638].

[103] The manufacturers' argument largely parallels the comments in *Dreidger* at p. 513 et seq.

> Because a retroactive law applies to past events, its practical effect is to change the law that was applicable to those events at the time they occurred. To change the law governing a matter after it has already passed violates the rule of law. In fact, it makes compliance with the law impossible. As Raz points out, the fundamental tenet on which the rule of law is built is that in order to comply with the law, or rely on it in a useful way, the subjects of the law have to know in advance what it is. By definition, a retroactive law is unknowable until it is too late.
>
> No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. And when retroactive legislation results in a loss or disadvantage for those who relied on the previous law, it is not only arbitrary but also unfair. Even for persons who are not directly affected, the stability and security of law are diminished by the frequent or unwarranted enactment of retroactive legislation.
>
> In short, retroactive legislation is undesirable because it is arbitrary and because it tends to be unfair. It upsets plans and undermines expectations and it may impose penalties or other disadvantages without fair warning. It is helpful to have these reasons for disliking retroactivity in mind when considering whether a particular application of legislation should be condemned as retroactive.

[104] The manufacturers argue that section 10 of the ***Act*** violates the constitutional rights of persons in British Columbia or legal persons doing business therein directly for the reasons enunciated in *Driedger*.

[105] Madam Justice McLachlin (as she then was) in ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1995] 3 S.C.R. 199 at p. 329, explained how an Act which violates a constitutional principle such as the rule of law is to be narrowly justified.

> The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.

[106] The manufacturers submit that the retroactivity at hand is so heinous and polar to the principles of a free and democratic society that it cannot possibly be

justified. They argue that it is unfair and arbitrary, not rationally connected to any legitimate prospective objective and that it not only impairs the constitutional rights of persons to be able to know and rely on the law, it in effect destroys

[106]such rights altogether for an unlimited time into the past. The manufacturers submit that as the ***Act*** is not proportionate to the infringement of the manufacturers' rights, it cannot be justified, and it must be struck down.

[107] The Attorney General countered with the submission that neither the ***Act*** nor retroactive legislation in general is unconstitutional.

[108] The Attorney General grounds his submission on the fact that there is only one specific constitutional exclusion for retroactive legislation, and that is found in section 11(g) of the ***Charter***. Professor Hogg in *Constitutional Law of Canada* (4th ed.)(Toronto: Carswell, 1997) at 382, succinctly summarizes:

> Apart from section 11(g), Canadian constitutional law contains no prohibition of retroactive (or *ex post facto)*laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common. For example, a taxation law is often made retroactive to budget night, when the law was publicly proposed; otherwise there would often be room for avoidance action by taxpayers during the hiatus between the budget and the enactment of the law … The power to enact retroactive laws, if exercised with appropriate restraint, is a proper tool of modern government. Section 11(g) diminishes this power only by excluding the creation of retroactive criminal offences. Other kinds of laws may still be made retroactive.

[109] The Attorney General argues that both Parliament and the Courts have the authority and ability to impose civil and especially compensatory liability retroactively and that there has been no fundamental shift in the law to suggest otherwise. A decision from the United States with some factual similarity to the case at bar was cited by the Attorney General for the clarity of its explanatory reasoning. In ***Usery v. Turner Elkhorn Mining Co.*** 428 U.S. 1 (1976), Marshall J. addressed retroactive liability for instances of black lung disease resulting from mining operations as follows:

> To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect – although, as we have noted, the Act imposes no liability on operators until 1974, and it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations… This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

[110] The Attorney General submits that it is just and reasonable to apportion the social and financial costs of smoking to those responsible as was done in the black lung cases. It is alleged that in both instances, the damage done could have been avoided with proper exposure of the truth, however this did not occur and as such, responsibility can and must ensue. The Attorney General notes that the legislation must only be explicit in its retroactivity to be given effect, and as can be seen by section 10 of the ***Act***, the Legislature is clear in its intent to be retroactive.

[111] The Attorney General takes issue with the manufacturers' claim that the wrongs alleged, to which liability is now attached, were not wrongs in the past. The Attorney General submits that all of the wrongs alleged in the Statement of Claim were clearly actionable at the time they were committed and that the ***Act*** does not alter or create new wrongs. The ***Act*** permits the new form of aggregate action and alters the limitation periods to suit the nature of the claims.

[112] The Attorney General also referenced the U.S. decision of ***Marootian et al. v. New York Life Insurance Company*** 2001 U.S. Dist. LEXIS 22274 (C.Dist.Cal.), a constitutional property case, in support and noted the Court's comments at 45 wherein it stated:

> …NYLIC cannot be said to have a reasonable expectation that a particular statute of limitations would apply to claims arising under the policies in question, since a legislature may always choose to change a statute of limitations, even in such a way as to revive an action which was previously barred. See *Plaut v. Spendthrift Farm, Inc.* 524 U.S. 211, 229… (statutes of limitation can be extended even after an action arose and after the preexisting statute of limitations has expired, as long as the claims at issue have not already been litigated to final judgement).

[113] The Attorney General's position is that the manufacturers were never denied access to the law or the courts, nor does the ***Act*** infringe upon an individual's ability to access the law. The importance of these issues was canvassed in ***John Carten Personal Law Corp. v. British Columbia (Attorney General)*** (1997), 40 B.C.L.R. (3d) 181 (C.A.):

> I consider that everyone in Canada has a right to come to court and seek the help of the court in obtaining a resolution of the legal issues that have given rise to that person's problem. Everyone in Canada has a right to seek the protection of the court from any perceived oppression by the state.… [Paragraph 9]
>
> . . .
>
> There are many reasons why the cost of legal services, or a lack of funds, may restrict, hamper, or even prevent a person from exercising rights of access to the courts or rights of access to other legal services. What would be required in order to find this ***Act*** wholly unconstitutional or even unconstitutional in its application in a particular case, would be proof that people, or a class of people, in general, or some person in particular, who would have been able to exercise the legal rights in question if this tax

> were not in effect, were or was prevented by this tax from exercising those rights. It would not be sufficient to found an argument that the Act was unconstitutional in concept or in application merely to show that the tax operated as an impediment or a discouragement to the exercise of a protected right. What would be required would be proof that the right was denied, or its exercise was prevented, by the existence or operation of this tax. In other words, that a right which would have been exercised but for this tax could not be exercised because of this tax.
> [Paragraph 13]

[114] The Attorney General emphasizes that the manufacturers have always had the ability to know the law in respect of now impugned conduct and to seek advice on their liability at relevant times in the past and of their risk of exposure to actions in the future. The manufacturers have also not been denied access to the law or the courts as this and the previous constitutional actions taken in respect of this ***Act*** and its predecessor demonstrate.

[115] The Attorney General submits that the manufacturers continue to use the rule of law as an improper means to attack the 2000 ***Act*** as they did the 1997 ***Act***, despite contrary authority that is present. This Court in ***JTI*** and other Courts in decisions subsequent have held that the rule of law cannot be used as an independent basis upon which to attack legislation. The Attorney General notes this Court's comment at paragraph 150 of the ***JTI*** decision:

> 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.

[116] In further support the Attorney General cites the decision of the New Brunswick Court of Appeal in ***Charlebois v. Moncton (City)***, [2001] 25 M.P.L.R. (3d) 171 at ¶58:

> As I understand the effect of the statements made by the Supreme Court concerning the use of these principles, I think that the argument that this unwritten and underlying principle can also be used independently of any constitutional text, as a basis of an application for judicial review to strike down government action is not very convincing. I believe that the "powerful normative force" referred to by the Supreme Court concerns the interpretation of constitutional texts and not the creation of rights outside of the constitutional texts.

[117] A similar view was expressed by Allan J. in ***Johnson v. British Columbia (Securities Commission)*** (1999), 67 B.C.L.R. (3d) 145 (S.C.), ¶25 that:

> The principles enshrined in the preamble – the supremacy of God and the rule

> of law – inform the interpretation of the substantive sections of the Charter. They are not discrete justiciable principles intended by the drafters to be "rights" which, if breached, will permit a challenge to legislation.

[118] Indeed, there can be some quite legitimate uses of retroactive legislation. As noted above by Professor Hogg, its use in taxation law is important and beneficial to both the government and the general public as a means of creating equity and fairness.

[119] Equally important and beneficial however, is the stability and continuity of the law. These principles can be thwarted by retroactive legislation, which does in effect change the law of the past. Thus the Court must be on firm guard, as was intuited by McLachlin J. (as she then was) in ***RJR-MacDonald,*** *supra*.

[120] Part of the problem with the concept of retroactivity, one which was proffered by the manufacturers in this case, is the interference such legislation has with fair notice of the law to the citizen. Indeed, an individual cannot comply in the present with a law created in the future. Gonthier J., although directly speaking to the issue of vagueness, made several pertinent remarks regarding fair notice in ***R. v. Nova Scotia Pharmaceutical Society***, [1992] 2 S.C.R. 606 at ¶46-48. He used the example of the homicide provisions of the ***Criminal Code*** to effectively illustrate the point. The premise was that "… principles of fundamental justice … must have a substantive as well as a procedural content." He found that:

> The substantive aspect of fair notice is therefore a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society.

[121] In this analysis, Gonthier J. concluded at ¶62 that it could not be argued:

> … that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective.

[122] These comments directly bear on the situation at hand. The manufacturers argue that their right to know the law has been violated by the retroactivity of the ***Act***. While this is true with respect to the actual cause of action created by the ***Act***, if one looks at the conduct therein that comprises the cause of action, such conduct has long been held as unacceptable in Canadian society. The allegations made in the Statement of Claim such as failure to warn, misrepresentation, conspiracy, deceit and product tampering clearly delineate the type of behaviour condemned within the cause of action, and these are actions which the manufacturers must have

substantively known were not acceptable either in the present or in the past (See ***Canadian Indemnity Insurance Co. v. Andrews & George Co.***, [1953] 1 S.C.R. 19 (S.C.C.), ***Lambert v. Lastoplex Chemicals Co.***, [1972] S.C.R. 569 (S.C.C.), and ***Varga v. John Labatt Limited et al.***, [1956] O.R. 1007 (S.C.C.)).

[123] The purpose of the law is to guide the behaviour of individuals, not to definitively direct it. There has been sufficient legislation and common law in the Province of British Columbia since the 1950s to provide guidance to the manufacturers with respect to harm resulting from their products. The mere fact that the legal cause of action in its *sui generis* form was not in place is an insufficient reason to find that the ***Act*** violates the individual's ability to know the law.

[124] I am of the view that the impugned retroactivity of the ***Act*** is within the constitutional compass outlined by McLachlin J. in ***RJI-Macdonald Inc.***, *supra*, as the goals the Legislature seeks to achieve are reasonable and proportionate to enforcement of rights involved.

[125] I find that section 10 of the ***Act*** is not unconstitutional by reason of violation of the rule of law.

THE RULE OF LAW – Generality, Prospectivity and Equality; and THE RIGHT TO A FAIR TRIAL

[126] Counsel for Phillip Morris Incorporated raised in argument that the Province has by the structure and intent of the ***Act*** violated several of the principles of the rule of law.

[127] Several aspects of these principles, and elements of the arguments in support, were directly or tangentially referred to in the specific, directed, and detailed arguments of counsel for the three Canadian manufacturers both in the present as well as the prior ***JTI*** action.

[128] In addition, some of the issues raised by Mr. Clarke were argued in the prior ***JTI*** action and rejected.

[129] As my view over all in regard to these issues remains unchanged, I propose a more truncated and summary review.

[130] Principles addressed by counsel included the law of generality, prospectivity and equality in the law, and the right to a fair trial. The position advanced is that he rule of law is a "fundamental postulate of our constitutional structure", therefore the violation of these rule of law norms results in an unconstitutional ***Act*** by the Government of British Columbia. Counsel's position is these violations have not and cannot be justified.

[131] The argument of counsel is grounded upon the Canadian Constitution being the supreme law of the land and that the Constitution includes several unwritten principles. The ***Reference Re Secession of Quebec***, [1998] 2 S.C.R. 217 at paragraph 32 clearly enunciated that these unwritten principles must be considered a " …necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution." Two of the central

unwritten principles established by the cases are judicial independence and the rule of law.

[132] Part of the rule of law as raised in the argument is the requirement of generality. It was argued that generality of the law requires that a legal rule take the form of "a … command that is directed to unknown people and that is abstracted from all particular circumstances of time and place and refers only to such conditions as may occur anywhere and at any time." (Flatham, "*Liberalism and the Suspect Enterprise of Political Institutionalization: The Case of the Rule of Law*", in Ian Shapiro, ed., "*The Rule of Law*" (New York University Press) at p.305.)

[133] I do not find this to be a constitutionally entrenched rule as advocated by counsel. The basis of the submission appears to place it more as a derivative of an ideal constitutional principle that is a synthesis of economic, philosophical and social perspective rather than specifically descriptive of the reality of Canadian Constitutional law.

[134] I do not accept the concept that legislation must be directed to unknown persons and no identifiable group targeted. Legislation may target many industries, persons, or groups. The judgment in ***JTI*** specifically referred to targeted groups in the product liability context.

[135] It is urged that the ***Act*** created by the Province has specifically targeted a finite and relatively small group of tobacco manufacturers. It is directed to known or supposed past events rather than future hypothetical events as counsel urges it should. It is said to attach entirely new consequences to those past events, eliminates all practical defences and artificially bypasses all evidentiary gaps, all of which is done in the favour of the Province's financial gain. The position is therefore taken that there is no generality to this law.

[136] The argument is that the ***Act*** also violates the notion of equality under the law through the specific targeting of the tobacco manufacturers. The tobacco manufacturers are said to be treated uniquely to any other manufacturer who is not a member of the tobacco industry.

[137] The liability of manufacturers generally is governed by the law surrounding products liability. A manufacturer will be liable to a consumer or to a third party upon proof:

- Of a breach of duty owing by the manufacturer to the plaintiff;
- That the breach of duty caused injury to the plaintiff; and
- That the plaintiff incurred resulting damages.

[138] The ***Act*** is attacked as being a radical departure from these principles, and in the argument of counsel has the effect that:

- No breach of duty owing to the plaintiff Government is required.

Indeed, counsel notes the Government need only establish a breach of duty to someone who "might become exposed" to cigarettes (s.3(1) of the ***Act***), the Government can succeed in an action under the Act without establishing any actionable breach of duty to anyone at all. The newly-created statutory obligation owing by the tobacco manufacturers to Government is, moreover, imposed not just prospectively, but retroactively as well, in a manner abolishing all limitation defences and indeed reviving actions previously dismissed on the basis of limitation defences.

- Causation is in effect presumed under s.3(2) of the ***Act*** on two distinct levels. If warnings about the danger of tobacco use failed to reach even one British Columbia consumer – resulting in a breach of a defendant's duty to warn – the court would be required to presume that no smoker in B.C., past or present, would have smoked the defendant's cigarettes absent this failure to warn. The defendants' ability to rebut this presumption is substantially limited by the "blocking provisions" found in s.2(5) of the ***Act***. Section 3(2)(b) of the ***Act*** in addition requires the court to presume that "the exposure described in paragraph (a) caused or contributed to disease or the risk of disease in a portion of the population described in paragraph (a)". Therefore the effect of the s.2(5) "blocking provisions" in this context would be to preclude proper assessment of the manner required to ensure that the data is reasonably accurate. The defendants' ability to properly rebut the Government's evidence, materially undermined.

- The ***Act*** does not, on the Government's position, require it to prove that it has incurred any financial loss at all in order to succeed in an aggregate claim. Rather, the ***Act*** creates a claim for a category of expenses known as "health care benefits", which the Government says would enable it to collect vast sums of money from the tobacco industry without the necessity of proving any loss in the sense required at common law.

[139] The position advanced by counsel for Phillip Morris Incorporated is these alterations to the law brings into effect the fears espoused by the Supreme Court of Canada in ***Reference Re Secession of Quebec***, *supra* at ¶74, wherein it stated:

> … a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection.

[140] It is argued that equality under the law is the constitutionally entrenched safeguard against the Province's action. It is urged that it must be employed in these circumstances to preserve equality among subjects in the British Columbia

regime.

[141] The ***Act*** does target tobacco manufacturers. The legislation however treats all within that group equally. There is no other group excluded who would appear to be included within the ambit of the impugned conduct in issue. I have in this and the prior ***JTI*** action canvassed in detail my views in relation to other arguments advanced concerning retroactivity, inability to defend or interference in the right to defend, and several evidentiary and procedural issues and aspects of the ***Act***.

[142] The ***Act*** permits an aggregate action and the ability of the Province to pursue an aggregate action was a subject canvassed in the ***JTI*** action. At least some of the manufacturers now appear to accept the legislative ability of the Province to enable an aggregate form of action.

[143] There are indeed many differences inherent in the formula for, and proof of, an aggregate claim as opposed to the traditional form of a tort claim. I feel these differences have been identified, argued, analyzed, and decided in respect of the independence, retroactivity, and penal legislation, arguments and ancillary submissions.

[144] It is the further position of the manufacturers that the guarantee of equality between subjects and the Crown has also been violated by the ***Act***. The ***Act*** affords the Government, in advancing its claim, special and unprecedented exemptions and privileges which neither it nor any other similarly situated claimant would be entitled to at common law.

[145] Counsel urges that tyranny is prevented through the equal application of law to both Government and subject. As Professor Walker stated in "*The Rule of Law: Foundation of a Constitutional Democracy*" (Carlton, Australia: Melbourne University Press, 1988) at p. 24-25:

> The government must be bound by substantive law, not only by the constitution, but also as far as possible by the same laws as those which bind the individual. …We should come on guard whenever we find governments giving themselves the power to do things to people that people are prohibited from doing to one another. … Arbitrary conduct on the part of the government against an individual citizen is the antithesis of the rule of law.

[146] There are certain legitimate privileges and distinctions which are made in favour of the government, however, such privileges and distinctions must be objectively justified. The Courts are said to be taking increasingly probative examinations of the powers government affords itself. Sir William Wade, in his text *Administrative Law*, 7th ed. (Oxford: Clarendon Press, 1994) at 26 notes that:

> A fourth meaning is that the law should be even-handed between government and citizen. Clearly it cannot be the same for both, since every government must necessarily have many special powers. What the rule of law requires is that the government should not enjoy unnecessary privileges or exemptions from ordinary law. It was a "lacuna in the rule of law" that until 1947 the Crown was in law exempt from the ordinary law of employer's liability for wrongs

> done by its employees, since there was no necessity for this immunity and in practice the Crown did not claim it. The Crown also is not required to obey Acts of Parliament unless they contain some indication to that effect. It was "a black day for the rule of law" when the High Court held that the law was unenforceable against ministers and civil servants. In principle all public authorities should be subject to all normal legal duties and liabilities which are not inconsistent with their governmental functions.

[147] It is the view of the manufacturers that the exemptions from the ordinary requirements of proof and limitation laws, together with the imposition of an unprecedented retroactive liability on a targeted class of defendants, are not advantages which are clearly justified or necessary incidents of the powers of the government *qua* government, and are therefore a form of tyranny.

[148] Finally, counsel argues that a legitimate law is one which is known. [***Black-Clawson International Ltd. v. Papierwerke A.G.***, *supra*]

[149] They argue retroactive legislation is widely regarded as repugnant to the notion of justice. The ***Act*** gives full retroactive effect to this new concept of "tobacco-related wrong", with new and radical consequences. Their position is such an ***Act*** wholly undermines the values of certainty and predictability which lie at the heart of the rule of law.

[150] I do not accept the apparent suggestion that the Crown's ability to recover from tobacco manufacturers by an action must be the same as that of an individual smoker. That ignores the unique nature of the aggregate action, the nature of the loss sustained and who sustained it, and the procedural differences occasioned by the nature of the claim and the need for the aggregate form of action.

[151] The values at issue in the allegations made in the pleadings in this action, if correct and proven, do not lessen the comfort or security an alleged perpetrator would expect of the law granting some form of immunity. The predictability of the law generally should be that if wrongs are committed remedies to address them will avail.

[152] The manufacturers summarize the result of these constitutional violations as a violation of the right to a fair trial. The right to a fair trial, while in the civil context is not a constitutional right, should remain a principle of fundamental justice and part of the rule of law.

[153] The right to a fair trial requires that parties to a proceeding have a reasonable opportunity of presenting their case under conditions which do not place either party under a substantial disadvantage. Where the right to a fair trial is violated, the rule of law is offended.

[154] I find this issue of fair trial again to be subsumed in arguments in support of other issues, primarily that of judicial independence in both the ***JTI*** and the present action.

[155] In the ***JIT*** decision, it was noted at ¶39-40:

> 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.
>
> 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*].

[156] There is nothing inherently unfair about an aggregate action. In fact, it may often balance unfairness of proceeding either by individual actions or by other forms of collective proceeding. Neither is the use of statistical or epidemiological evidence itself evidence of an unfair trial. They are aids to the resolution of issues in a unique but appropriate form of action.

[157] In the constitutional challenge to the 1997 ***Act***, this Court determined that legislation could not be set aside as being unconstitutional on the basis of a violation of the rule of law. Counsel for the manufacturers suggests that subsequent decisions from the Supreme Court of Canada have altered the situation such that the Government's conduct in commencing action under the ***Act*** can be set aside for violating unwritten constitutional principles.

[158] In ***Mackin v. New Brunswick (Minister of Finance)***, [2002] 1 S.C.R. 405, a strong majority of the Supreme Court held that provincial legislation which violated both section 11(d) of the Constitution and unwritten principles of the Constitution, in this case judicial independence, was invalid. At ¶69-70 the Court held that:

> In short, I consider that the opinion stated by this Court in the Provincial Judges Reference, supra, requires that any change made to the remuneration conditions of judges at any given time must necessarily pass through the institutional filter of an independent, effective and objective body so that the relationship between the judiciary, on the one hand, and the executive and legislative branches, on the other, remain depoliticized as far as possible. That is a structural requirement of the Canadian Constitution resulting from the separation of powers and the rule of law. By failing to refer the question of the elimination of the office of supernumerary judge to such a body, the government of New Brunswick breached this fundamental duty. … Consequently, Bill 7 must be declared invalid.
>
> However, the foregoing reasoning must not be interpreted as negating or ossifying the exercise by the provinces of their legislative jurisdiction

> under s.92(14) of the ***Constitution Act***, 1867. While the provincial legislative assemblies have exclusive jurisdiction over "the Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both Civil and of Criminal Jurisdiction", that jurisdiction must nevertheless be exercised in accordance with the structural principles of the Canadian Constitution, including the independence of the judiciary.

[159] Counsel argues that the Court finds that in justifying such an infringement, the standard that the government must be held to is one which is more demanding even than that of section 1 of the Charter and an in-depth analysis is required into the fundamental nature of the right violated.

[160] A further Supreme Court of Canada case which counsel contends demonstrates this principle is ***Babcock v. Canada (Attorney General)***, [2002] S.C.J. No. 58, wherein the Court stated at ¶54-55:

> The respondents in this case challenge the constitutionality of s.39 [***Canada Evidence Act***] and argue that the provision is *ultra vires* Parliament because of the unwritten principles of the Canadian Constitution: the rule of law, the independence of the judiciary, and the separation of powers. Although the unwritten constitutional principles are capable of limiting government actions, I find that they do not do so in this case.
>
> The unwritten principles must be balanced against the principle of Parliamentary sovereignty. …

[161] The manufacturers' position is that it may no longer be said that unwritten constitutional principles, in particular the rule of law, cannot be used to strike down legislation found in violation. It is urged that the Court clearly now has jurisdiction to do so in this matter and that it should, given what they view as egregious violations against the rule of law committed by the Province under the ***Act***.

[162] The Court in ***Mackin*** was relying explicitly on the Charter, and I do not take from the decision that the Court sanctions reliance upon an unwritten principle of the rule of law to strike down legislation.

[163] Chief Justice McLachlin in ***Babcock*** addressed three unwritten principles: the rule of law, the independence of the judiciary, and the separation of powers. She observed that:

> It is well within the power of the legislature to enact laws, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.

[164] I do not interpret ***Mackin*** or ***Babcock*** as providing support for the view expressed by counsel for Phillip Morris Incorporated that the rule of law may be

invoked to provide freestanding rights to individuals. In my view, Madam Justice Allan in ***Johnson v. British Columbia (Securities Commission)*** (1999), 67 B.C.L.R. (3d) 145 (S.C.) at ¶25 encapsulated the correct view:

> … The principles enshrined in the preamble -- the supremacy of God and the rule of law -- inform the interpretation of the substantive sections of the Charter. They are not discrete justiciable principles intended by the drafters to be "rights" which, if breached, will permit a challenge to legislation.

[165] It is the ultimate premise of counsel for Phillip Morris Incorporated that breach of an individual element of the rule of law is a constitutional breach that will invalidate the legislation or action taken under its authority. I accept neither premise.

[166] A detailed argument was made, centered upon the import of the recent decision of the House of Lords in ***Fairchild et al. v. Glenhaven Funeral Services Ltd.***, [2002] 3 All E.R. 305. ***Fairchild*** illustrates the advance in common law remedies relating to problematic causation issues allowing issues to be resolved on a risk assessment basis as an alternative to the use of presumptions as in the present ***Act***. Neither basis can be said to be unfair.

[167] Counsel for Phillip Morris Incorporated and counsel for the Attorney General are completely disparate in their view of the effect of the decision in ***Lalonde v. Ontario (Commission de restructuration des services de santé)***, [2001] O.J. No. 4767. Counsel for Phillip Morris Incorporated interprets the decision as a relevant example of the use of or violation of the unwritten principle of protection of minorities to strike down the commission's decision taken pursuant to the statutory authority under the ***French Language Services Act***, R.S.O. 1990, c. F.32.

[168] I prefer the view of counsel for the Attorney General that ***Lalonde*** does not provide authority for striking down legislation because of violations of a unwritten constitutional provision. Rather the unwritten principle is but an aid to the interpretation of the legislation itself.

[169] Counsel for Phillip Morris Incorporated also advanced a further or alternative view of use of unwritten constitutional principle to strike legislation. This view is, by terms of s. 2(b) of the ***Attorney General Act***, R.S.B.C. 1996, c. 22, based upon the requirement that the Attorney General "must see that the administration of public affairs is in accordance with law". Counsel argues therefore the Attorney General could not commence an action under the ***Act*** as it is not in accordance with the unwritten principles of the law.

[170] In the present proceeding, there is no suggestion the Attorney General has acted contrary to the provisions of the ***Act*** in commencement and prosecution of the aggregate action. I agree with observations of counsel for the Attorney General the contrary is indicated. In ***Lalonde***, however, the legislation required the public good be taken into account, and, contrary to that stricture, it was not.

[171] In the circumstances I do not find the breaches, individually or collectively,

of the unwritten principles as contended for by counsel for Phillip Morris a basis to strike the legislation. If breaches do exist they may inform interpretation of the ***Act*** but do not operate to invalidate it constitutionally.

EXTRATERRITORIALITY

[172] In the ***JTI*** decision, it was found that the 1997 ***Act*** had exceeded its constitutional limits with respect to extraterritoriality. In making this determination, the Court had to discern the purpose and the effect of the ***Act***. At paragraph 151 of the decision, this Court determined that "[t]he 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." In determining effect, this Court found that it was "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 whether the locus of the acts or omissions was within British Columbia, Canada, or elsewhere in the world." [At paragraph 152].

[173] This Court further found that sections of the 1997 ***Act***, namely the "enterprise liability sections", were specifically designed to extend the territorial reach of the Province with respect to national and multinational companies. In noting that a Province's legislative power is strictly curtailed to its territorial limitations under Section 92 of the ***Constitution Act***, it was found at paragraph 168 that:

> 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.

[174] The Court thus determined that "the cumulative effect of the provisions evinces a legislative intention to craft the ***Act*** in a form that ensures on 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***." (At paragraph 169).

[175] The 1997 ***Act*** was held to be unconstitutional. As stated previously, the Province's response was to repeal the legislation and redraft the provisions in an attempt to resolve the constitutional issues.

[176] The manufacturers argue that despite the changes made to the ***Act***, constitutional difficulties still remain, thus rendering the extraterritorial reach of the ***Act*** *ultra vires* of the Province.

[177] Five main arguments are submitted by the manufacturers under this heading:

1. The ***Act*** purports to create a cause of action with respect to acts or omissions whose locus is outside British Columbia;

2. The ***Act*** purports to modify constitutional choice of law rules by imposing its provisions on acts or omissions whose locus is outside British Columbia;

3. The ***Act*** has a retroactive effect on *ex juris* persons and denies to them, contrary to the rules of private international law, the right to be judged by the law of the place of their acts or omissions as it existed at the time those acts or omissions occurred;

4. The ***Act*** derogates from extra-territorial civil rights; and

5. The **Act** purports to create a jurisdictional connection.

[178] The manufacturers argue that the 2000 ***Act*** has the same purpose as the 1997 ***Act***, "to facilitate a lawsuit aimed at a specific type of defendant most of which are foreign corporations." The manufacturers note that nine of the fourteen defendants are foreign, and that of those nine, only three are expressly alleged to have "engaged … in the manufacture and promotion of cigarettes sold in B.C.". It is alleged that the other foreign defendants are members of "four multinational tobacco enterprises" which engage "in the manufacture and promotion of cigarettes sold in British Columbia and throughout the world".

[179] The manufacturers allege that the "predominating elements of the aggregate action, including the place of the conduct which constitutes the breach of duty and the place of "exposure" to tobacco products need not be in British Columbia before liability is imposed", thereby leaving the locus of the act or omission outside the Province.

[180] The manufacturers argue that under the definition of the cause of action in section 3 of the ***Act***, liability is established merely by the exposure or the possibility of future exposure of an insured person to tobacco products and the exposure provisions are assisted by mandated presumptions to the Court. There is no requirement that the individual suffer damage and there are no restrictions on the time or place of the exposure. All that is required, they argue, is that the claim be made on behalf of "insured persons" and that there was a breach of a duty owed to at least two such insured persons.

[181] The manufacturers contend that Section 4 of the ***Act*** creates a presumption that attaches legal consequences to foreign conduct by creating a presumption of joint liability for certain types of conduct. The manufacturers note that under this presumption, "the Court need not consider whether a foreign manufacturer's conduct which constitutes a breach of duty caused exposure or disease in British Columbia, because both facts are presumed by the combined effect of sections 3(2) and 4(2)".

[182] The manufacturers' position is that this area of law is generally governed by the *lex loci delecti* rule. The purpose of such rule can be gleaned from the words of La Forest J. in ***Tolofson v. Jensen,*** [1994] 3 S.C.R. 1002 at paragraph 43:

> I have thus far framed the arguments favouring the *lex loci delicti* in theoretical terms. But the approach responds to a number of sound practical considerations. The rule has the advantage of certainty, ease of application and predictability. Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected. Stability of transactions and well grounded legal expectations must be respected. Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided.

[183] The manufacturers also argue that section 10 of the ***Act***, the retroactivity clause, has a profound effect on extraterritoriality. By changing the law of the past the ***Act*** creates a cause of action that can be applied to foreign manufacturers for their conduct in the past for a wrong which they never knew existed in British Columbia or anywhere else in the world given that exposure is not limited to the Province. Thus the legislature has created a *locus delicti* of fiction.

[184] It is submitted that large portions of the population have resided out of the Province before coming to British Columbia, leading to the logical result that much of the exposure to tobacco products with which the ***Act*** is concerned, occurred outside the Province. The only direct territorial connection to the Province is the incidence or more properly, the culmination of tobacco related disease by an insured person.

[185] The manufacturers further proffer that the Province does not have the ability to create legislation which thwarts the rules of private international law, by trying to artificially create a real and substantial connection that would not otherwise exist between the foreign manufacturers and British Columbia. The manufacturers submit that this flies in the face of the principles laid down in ***Tolofson***, *supra,* especially given that so many of the named defendants are foreign companies who have no business in British Columbia, have no presence in British Columbia and have never acted in any capacity in British Columbia.

[186] The manufacturers also cite this Court’s comments in the ***JTI*** decision at ¶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.

[187] And further at ¶197 and 198:

> 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.
>
> 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].

[188] The manufacturers argue that the allegations made in the Statement of Claim under the ***Trade Practice Act*** R.S.B.C. 1996, c.457 also fall afoul of this locus issue. It is alleged that the foreign manufacturers are jointly liable for breach of a statutory duty under the ***Trade Practice Act***. Section 4 of the ***Act*** does not specify a locus for the breach of duty and the manufacturers submit that it can be assumed that most if not all of the foreign defendants' conduct alleged to be part of the breach, was conduct that occurred outside the Province. The manufacturers argue that the 2000 ***Act*** thus impermissibly extends the territorial reach of the ***Trade Practice Act***, which is outside the constitutional power of the Province. The manufacturers again cite the ***JTI*** decision for the comments at ¶209-210 that:

> 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.
>
> A provincial legislature has no power to impose its own laws on extra-

territorial status, contracts, conduct or property.

[189] The manufacturers submit that the same holds true for the 2000 ***Act*** and that this Court must again act to uphold these principles to prevent injustice in the international arena.

[190] The manufacturers further allege that the extraterritorial reach of the 2000 ***Act*** interferes with the civil rights of foreign entities, in particular those rights established under the ***U.K Human Rights Act***, 1998 and the ***European Convention on Human Rights***, 1950 (adopted into U.K. law through the ***U.K. Human Rights Act***). It is asserted that consideration of these Acts requires consideration of the decisions of the European Court of Human Rights (the "Strasbourg Court"), as a means of interpreting the rights.

[191] The manufacturers cite and explain several cases arising from the U.K. and Strasbourg Courts, from which the following conclusions proffered to the Court were drawn:

> (a) The overarching principle of the rule of law informs all *European Convention* rights;
>
> (b) A component of the rule of law is the quality required of statutes in order to conform with the *European Convention*; one of these qualities is forseeability;
>
> (c) The Strasbourg Court does not readily admit the propriety of retroactive statutes. Attempts to justify them must be treated with the greatest possible degree of circumspection;
>
> (d) To outweigh the general prohibition on retroactive legislation, the public interest must go well beyond the mere financial interests of the state;
>
> (e) Retroactive laws designed to influence the outcome of litigation in favour of the state will be very difficult to justify.

[192] The manufacturers argue that the 2000 ***Act*** is retroactive and is designed to influence in favour of the British Columbia government, the determination of the claim against the manufacturers for the cost of health care benefits. The influential factors, which take several forms and have a cumulative negative effect, include:

> (a) The definitions of Section 1, particularly those concerning “disease” and “exposure”;
>
> (b) The blocking provisions of Section 2(5);
>
> (c) The light onus of proof provided for by Section 3(1);

(d) The presumptions under Section 3(2) and Section 4(2);

(e) The onus on the manufacturers under Section 3(4) to prove matters that occurred long ago;

(f) The provision under Section 5 for the admissibility of sampling evidence on causation and quantum issues;

(g) Retroactivity as provided by Section 10. The wrongs alleged against the manufacturers go back 50 years involving all the difficulties inherent in the defence of stale claims.

(h) The British Columbia Government's regulations making power under the 2000 ***Act***.

[193] In essence, the manufacturers argue that the ***Act*** "interferes with the *European Convention* rights of English defendants, who have done no business in British Columbia in respect of their conduct in England, by purporting to make them liable for a "tobacco related wrong" previously unknown to the law for enormous sums not recoverable against them under any law before the enactment of the [***Act***], which was designed and enacted solely to enhance the B.C. government's prospects of success. To the extent that those defendants' *European Convention* rights are interfered with, the [***Act***] has a constitutionality impermissible extra-territorial character".

[194] Further the manufacturers argue that the ***Act*** interferes with foreign property rights. Protocol 1, Article 1, of the *European Convention* reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

The term "possessions" under this Article, has been interpreted to include money as per ***Aston Cantlow PCC v. Wallbank***, [2001] 3 All E.R. 393, at 403.

[195] In the end, the manufacturers submit that the cause of action does not create a sufficient territorial link between liability and conduct. The only direct territorial link is that the duty owed is owed to persons in British Columbia. It does not matter where this duty was breached, or when the duty was breached, whether there was exposure outside the Province, inside the Province, and such exposure need not even necessarily occur. All that matters is that an insured person contracted a tobacco related disease by virtue of exposure or presumed exposure somehow, somewhere, sometime and they were subsequently treated for that disease in British Columbia.

[196] The manufacturers argue therefore that the ***Act*** is clearly attempting to create legal consequences for conduct outside the Province and that such aim is an inherent part of the structure of the ***Act***, not a mere incidental effect. The ***Act***, they allege, therefore violates constitutional principles of Canadian law and the rules of

private international law and should be ruled *ultra vires*.

[197] The position of the Attorney General in this matter is that the ***Act*** is constitutional and *intra vires* of the Province and thus should be upheld. The following two broad arguments were submitted:

> a. The "matter" or "pith and substance" of the ***Act*** is the creation of a cause of action in the Government of British Columbia, permitting it to sue to recover health care costs incurred in the province as a result of breaches of duty owed to residents of British Columbia that have led to tobacco-related disease. The ***Act*** also addresses substantive rights and obligations and establishes rules of procedure and evidence governing lawsuits, against tobacco manufacturers, by individuals for damages and by the government to recover the costs of health care benefits paid; and
>
> b. The "matter" comes within, or is anchored by, a combination of ss.92(13),(14) and (16) of the ***Constitution Act, 1867***, with particular reference to ss.92(13) and (14).

[198] Counsel for the government acknowledged this Court's finding that the 1997 ***Act*** was beyond the territorial scope of the Province. It submitted however, that the instances of extraterritoriality were very distinct and centred around two central problems:

> First, that the Court interpreted the recovery provisions of the 1997 ***Act*** as being triggered by tobacco related wrongs committed anywhere in the world; and second, that the "enterprise liability" amendments of 1998 changed the focus of the ***Act*** to one that was, in pith and substance, extraterritorial because it could impose liability on companies simply on the basis of their corporate relationship with those companies that committed wrongs. In reaching this conclusion, the Court found that the 1997 ***Act*** imposed jurisdiction and choice of law rules that were not consistent with the constitutional standard of order and fairness.

[199] It is the Attorney General's position that these issues have been addressed and rectified in the 2000 ***Act*** and that the territorial limits have been refined under s.3(1)(a) so that the duty owed is one which must be owed to persons in British Columbia. Thus, it is asserted that the ***Act*** follows the principle enunciated in ***Moran v. Pyle National (Canada) Ltd.***, [1975] 1 S.C.R. 393 at 409 that:

> … where a foreign defendant carelessly manufacturers a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant.

[200] The Attorney General further submitted the more recent British Columbia Court of Appeal case ***Harrington v. Dow Corning Corp.***, 2000 B.C.C.A. 605. This decision concerned individuals who had had breast implantations done in another jurisdiction, but who had later relocated to this Province and become ill as a result of those implants. In addressing the issue of "real and substantial connection", the Court found that:

> In my view, this rule is sufficient to justify the inclusion in the resident class of all women resident in British Columbia who allege they are suffering harm from the use of silicone breast implants manufactured and put into the flow of commerce negligently by an appellant. Any manufacturer of breast implants would understand that any injury would follow the user in whom they were implanted into whatever jurisdiction the user might reside from time to time.
>
> [Paragraph 84]

[201] The Attorney General asserts that the situation in regards to the tobacco manufacturers is largely the same. The damage caused by smoking or being exposed to tobacco products follows the injured person into the jurisdiction of British Columbia wherein the related health care costs have or will be incurred by the Province.

[202] The Attorney General further argues that it is really the 'pith and substance' of the ***Act*** which is determinative of the division of powers or constitutionality argument. The determination of the pith and substance of a statute establish its "dominant characteristic". The Attorney General cites the decision of ***Reference re: Upper Churchill Water Rights Reversion Act 1980 (Newfoundland)***, [1984] 1 S.C.R. 297 at 332 in which McIntyre J. adopted the following proposition from ***Ladore v. Bennett***, [1939] 3 D.L.R. 1 (P.C.):

> Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*. Where, however, the pith and substance of the provincial enactment is the derogation from or elimination of extra-provincial rights, then, even it is cloaked in the proper constitutional form, it will be *ultra vires.*

[203] Thus, the Attorney General argues, since the pith and substance of the ***Act*** is to recover health care costs accrued as the result of a breach of duty owed only to British Columbians, the ***Act*** can in no way be seen as attempting to derogate or eliminate extra-provincial rights. Any extraterritorial effect is incidental and where it exists, it can be rectified by virtue of s.3(4) of the ***Act***. The Attorney General notes that under this section, "any costs related to exposure that is shown not to have been caused or contributed to by the tobacco related wrong (i.e. a breach of duty owed to British Columbians) are not recoverable. Section 3(4) of the 2000 ***Act*** provides that " a defendant's liability … may be reduced … [if the] defendant

proves, on a balance of probabilities, that the breach … did not cause or contribute to the exposure referred to in subsection (2)(a)" – the exposure in (2)(a) being that exposure presumed to be caused by the breach.

[204] Therefore, the Attorney General argues, any incidental extraterritorial effect is rendered nugatory by these sections.

[205] Further, the Attorney General submits that even if the ***Act***'s dominant characteristic is extraterritorial, it has long been held in both Canadian and American jurisprudence that a Legislature may impose liability for conduct occurring outside its borders where that conduct affects those within the territorial limits. The Attorney General submits that in ***P.E.I. (A.G.) v. Morgan***, [1976] 2 S.C.R. 349, the Supreme Court of Canada upheld the constitutional validity of Provincial legislation even where the impugned statute applied solely to non-residents of the enacting Province. It is submitted that this principle is widely recognized in the U.S., demonstrated by the decisions of ***United States v. Aluminum Co. of America*** 148 F.2d 416 (2nd Circ. 1945) and in ***Laker Airways v. Sabena, Belgian World Airlines*** 731 F.2d 909 (D.C. Circ. 1984).

[206] In ***United States v. Aluminum Co. of America***, *supra*, a monopoly of foreign corporations had affected the prices of imports and exports of aluminium and the Court approved a government initiative to curtail the activity. In addressing the propriety of such action, Learned Hand J. stated at page 443 of the decision:

> [I]t is settled law … that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize…

[207] The ***Laker Airways*** decision, *supra*, addressed anti-trust legislation being utilized in an alleged conspiracy case. The Court held that what behaviour a legislature could properly regulate within its borders, it could also attach consequences to such behaviour outside its borders but which had affect within the jurisdiction. At p. 922 the Court held:

> It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory.

[208] Further, at page 923, the Court confirmed that civil legislation could be applied to offshore conspiracies such as in the case at bar:

> [L]egislation to protect domestic economic interests can legitimately reach conduct occurring outside the legislating territory intending to damage the protected interests within the territory. As long as the territorial effects are not so inconsequential as to exceed the bounds of reasonableness imposed by international law, prescriptive jurisdiction is legitimately exercised.

[209] Thus, the Attorney General argues that these two cases and ***Moran v. Pyle***, *supra,* support the Legislature's ability and inherent power to enact legislation such as the ***Act***.

[210] With respect to the issue of locus of cause of action, the Attorney General submits that the manufacturers have in essence confused the location of the actor with the location of the legal wrong. It is argued that the locus of the manufacturer(s) is largely irrelevant to the ***Act***, but has been made the focus of the argument against it. The Attorney General questioned itself as to whether the ***Act*** imposes "choice of law rules on the "foreign defendants" for the wrongs attributed to them that are in conflict with the order and fairness standard formulated by the Supreme Court of Canada in ***Morguard v. De Savoye***, ***Hunt v. T&N plc.***, [1990] 3 S.C.R. 1077] and ***Tolofson v. Jensen***". The response was threefold.

[211] First, the Attorney General asserted that the ***Act*** does not impose either choice of law rules or jurisdiction on the foreign defendants as the ***Act*** is silent on both those issues. Therefore, any determination of those issues must be resolved by virtue of the real and substantial connection requirement and applicable choice of law rule in the context of any action brought under the ***Act***. The ***Harrington v. Dow Corning Corp.***, decision, *supra* was referenced at paragraph 85 for the proposition that even where legislation provides for extraterritorial operation, it will be limited in its application to those situations where the reach is constitutionally permissible. ***Muscutt et al. v. Courcelles et al.***, (2002), 213 D.L.R. (4th) 577 (Ont. C.A.) at paragraph 49 was also referenced for the proposition that:

> It follows [from ***Morguard*** and ***Hunt***] that provincial rules of court allowing for service out of the jurisdiction … must now be read in the light of the constitutional principles of "order and fairness" and "real and substantial connection."

[212] Second, the Attorney General asserted that the mere fact that the Statement of Claim joins a number of foreign defendants in an action to be held in the British Columbia Supreme Court in accordance with the provisions of the ***Act,*** does not mean that the ***Act*** speaks to jurisdiction or choice of law. The Attorney General argued that these issues hinge on the establishment of a real and substantial connection, which the government has shown is the intent through its response to the manufacturers' challenge of service ex juris. The response is based solely on the relevant provisions of Rule 13 of the Rules of Court, not the ***Act*** itself. The Attorney General further reminded the Court that it should not be tempted to read such an implicit intention into the ***Act*** due to the presumption of constitutionality. The presumption of constitutionality requires that, "where a law is open to both a narrow and a broad interpretation, and under the broad interpretation the law's application would extend beyond the powers of the enacting legislative body, the Court should "read down" the law so as to confine it to those applications that are within the power of the enacting legislative body." (Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at p.397).

[213] Third, the Attorney General asserted that even if the ***Act*** could be read as

dictating jurisdiction and choice of law, it would not be of significance as the ***Act*** meets the required tests of real and substantial connection and order and fairness. The Attorney General rebuffed the accusation of the manufacturers that the ***Act*** violates the *lex loci delecti* rules established in ***Tolofson v. Jensen,*** *supra* by arguing that ***Tolofson*** is not applicable to the case at bar and that even if it were, the law of British Columbia would be the applicable law.

[214] ***Tolofson*** does not apply, argued the Attorney General, because the cause of action conferred on the government by the ***Act*** is not an action in tort. It was explained that there are four distinct elements to the cause of action:

> 1. A tobacco related wrong – defined as a breach of duty owed to persons in British Columbia – in relation to a particular type of tobacco product;
>
> 2. The offering for sale of that type of product in British Columbia;
>
> 3. Tobacco related diseases suffered by British Columbia residents who qualify for provincial health care benefits; and
>
> 4. The expenditure by the Government of British Columbia of funds to provide those benefits in respect of the treatment of those diseases.

[215] While the cause of action does bear a resemblance to a traditional tort action, it in fact differs in a number of important respects, the most obvious being that the duty of care owed is owed to third parties rather than the plaintiff government. However, the pecuniary loss claimed is loss resulting to the plaintiff, not those to whom the duty is owed. The major difference is that it is not necessary for the government to establish all the elements of a tort in order for it to be found that a tobacco related wrong had occurred. For that reason, it is asserted that ***Tolofson*** does not apply.

[216] The Attorney General contends that the proper law to be applied to the ***Act*** is the law of British Columbia. All four elements of the cause of action are either confined to or very closely connected to British Columbia, and in particular the duties alleged to have been breached were owed to British Columbians and the harm for which the government is seeking compensation was suffered in British Columbia.

[217] In the event that the Court was to find that ***Tolofson*** would be applicable in these circumstances, the Attorney General argues that the rule must be properly applied. It is submitted that:

> The rule in *Tolofson v. Jensen* is not, as the Manufacturers suggest, concerned with where the allegedly wrongful *conduct* on the part of the defendant occurred, but rather with where the alleged *wrong* occurred, which necessitates including a consideration of where the consequences of that wrongful conduct were felt. That there is a distinction between where the conduct occurred and where the wrong occurred is apparent from the language used by La Forest J. in his reasons for judgment. After setting out the

rule… he says:

> "There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues." [emphasis added].

(Outline of argument at 137-38)

[218] The Attorney General submits that properly, ***Moran v. Pyle***, *supra*, is the decision that should govern this case. This is so because "firstly, like the light bulb in ***Moran v. Pyle***, the cigarettes and other tobacco products manufactured by the Manufacturers have entered and continue to enter "into the normal channels of trade"; and secondly, like the defendant in ***Moran v. Pyle***, the Manufacturers have known or ought to have known, and know or ought to know, both: i) that as a result of [their] carelessness [or other wrongful act or omission] a consumer may well be injured; and ii) that "it is reasonably foreseeable that the product would be used or consumed where the [insured persons] used or consumed it"". (Outline of argument at p.139).

[219] The Attorney General further asserts that not only is the principle in ***Moran v. Pyle,*** *supra*, applicable to the situation at hand, but so too is the rationale for it given by Dickson J., wherein he stated at p.409 of the decision:

> By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods.
>
> . . .
>
> This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered.

Further, the Attorney General argues that Dickson J. rejected the "place of acting" theory for determining the *situs* of a tort, as identified in p. 404-405 of ***Moran v. Pyle***:

> For myself, I have great difficulty in believing that a careless act of manufacture is anything more than a careless act of manufacture. A plaintiff does not sue because somebody has manufactured something carelessly. He sues because he has been hurt. The duty owed is a duty not to injure. As Pollock [*On Torts,* 2nd ed., p.14], has said:
>
> Our law of torts, with all its irregularities, has for its main purpose nothing else than the development of the precept *–alterum non*

> *laedere*—"Thou shalt do no hurt to thy neighbour."
>
> - a truth to which Atkin, L.J. gave judicial expression in *Donoghue v. Stevenson* [[1932] A.C. 562]. The same thought is found in Salmond [*On Torts*], 15th ed. (1969), p.10: "A tort is a species of civil injury or wrong" and in Fleming *4th* ed. (1971), p.1: "Tort liability exists … primarily to compensate the person injured."
>
> If the essence of a tort is the injury or wrong, a paramount factor in determining *situs* must be the place of the invasion of one's right to bodily security. In a *Donoghue v. Stevenson* case, can carelessness in manufacture be separated from resulting injury? The jurisdictional act can well be regarded, in an appropriate case, as the infliction of injury and not the fault in manufacture. Pyle is being sued because Moran suffered harm, not because some unidentified employee of Pyle's was allegedly careless.

[220] The Attorney General notes that the core of its case against the manufacturers is a products liability claim. The manufacturers produced tobacco products which were sold in British Columbia, they failed to warn people of the risks associated with those products and as a result of their failure to warn, people continued to use those products and suffered a tobacco related disease. As in ***Moran v. Pyle***, *supra*, "[t]he negligence of a foreign manufacturer, whose products are manufactured in one jurisdiction but sold in another, and cause harm there, is deemed in law to have occurred in the latter jurisdiction." Therefore, it is submitted that British Columbia law is the only applicable law in this case.

[221] I find the manufacturers' position that the 2000 ***Act*** is constitutionally flawed by virtue of extraterritorial scope is one of merit. The structure of the 2000 ***Act*** has the *prima facia* appearance of being *intra vires* the power of the Province, however close analysis substantially undermines that view.

[222] I do not find the basic purpose and effect of the 2000 ***Act***, its pith and substance in constitutional terms, has varied essentially from the predecessor 1997 ***Act***. The Province seeks to recover from the tobacco industry nationally and internationally the tobacco related health care costs it has expended.

[223] As with the interpretation of the 1997 ***Act,*** to discern the purpose of the enactment of the 2000 ***Act*** I have looked to the history of the legislation and the assistance offered by the pleadings of the parties in the statutory cause of action commenced.

[224] Nine of fourteen defendants are foreign. Only three of the nine foreign defendants are alleged to have directly "engaged … in the manufacture and promotion of cigarettes sold in B.C.".

[225] The foreign defendants are described as members of "foreign multinational tobacco enterprises" which are engaged "in the manufacture and promotion of cigarettes sold in B.C. and throughout the world". There is reference to the Tobacco Industry Internationally in Part VI of the Statement of Claim.

[226] The Province has abandoned its pursuit of some defendants joined in the prior action whose liability rested upon theories of “enterprise” and “financial relationship”.

[227] The recast legislation of the 2000 ***Act*** must however stand separate scrutiny as to whether it has an impermissible although different extraterritorial reach than the predecessor 1997 ***Act***.

[228] The main issue with this section of the ***Act*** is the use of the term "exposure". The exposure which forms part of the basis for the overall action, has, as suggested by the manufacturers, no locus attached to it. Exposure is a highly important part of the logical chain of action for this wrong. Without exposure to tobacco products there can be no basis for a tobacco related disease. Without the existence of a tobacco related disease, there can be no costs incurred for health care. With no health care costs incurred for tobacco related disease, there is no reason for the government to become involved in an aggregate action against the manufacturers. Therefore, exposure is an essential element to the wrong.

[229] A reasonable reading of the ***Act*** allows a person to be “exposed” to a tobacco product in another Province or another country; contract a tobacco related disease in that other Province or country as a result; and indeed receive treatment for that disease in another Province or country. That disease resulting from the exposure might then be transported to B.C. either by a resident or former resident returning, or by a new immigrant to the Province, with treatment continuing or commencing in British Columbia.

[230] Although the statutory cause of action created is not properly a "tort" as argued by the Attorney General, certain rules of procedure must be considered in deciding the issue of extraterritoriality. There must be sufficient ties between an act, the parties, any harm suffered and the jurisdiction in which the action is brought in order to properly satisfy the boundaries of international law and custom. The *lex loci delicti*, or the place of injury, is one of the more prevalent considerations in a review of jurisdiction or choice of law.

[231] An issue of interpretation of the ***Act*** in these circumstances then is what is the "*delecti*"? Does the injury or tobacco related disease for which health care benefits are bestowed begin with exposure? Disease is linked to exposure and thus integral to the injury.

[232] Exposure may be likened to the impact between two vehicles in a motor vehicle accident. The impact (or exposure) causes the injury. The result is, for example, a broken leg (or a tobacco related disease).

[233] In ***Tolofson v. Jensen***, *supra*, the application of the *lex loci* was proffered by the Supreme Court of Canada as an appropriate choice of law rule. [La Forest J. paragraph 45].

[234] Although I accept that the cause of action created is not properly a "tort" as known before in British Columbia, it is nonetheless a "wrong" and as such there is a similarity of elements. If exposure is a key factor to the wrong, then the requirement for the place of exposure must also be considered. The legislature has

refined the ***Act*** so that the alleged duty breached, is one that is owed to persons in British Columbia. Therefore, the damage resulting is properly a matter of a local or private nature and a matter in relation to property and civil rights in the Province [S.92(16) and (13), ***Constitution Act***]. This assertion is however not totally correct. The only definitive ties to the Province are that the costs associated with a tobacco related disease are incurred by the British Columbia government and that the duty upon which the claim for recompense is based is a duty that is owed to persons in British Columbia. The root of the harm, the exposure, could theoretically occur anywhere in the world given the construction of the ***Act***. Further, the actual disease could be caused, occur and manifest itself in places other than British Columbia. Treatment might occur in places other than British Columbia.

[235] In response to this, the Attorney General cites the position of Dickson J. in ***Moran v. Pyle***, *supra* at p. 409 wherein he stated: "… a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce".

[236] In ***Moran v. Pyle*** the tort was not complete until the product of negligent manufacture caused injury and damage. The completed tort gave rise to a jurisdiction. Under the 2000 ***Act*** injury and damage may occur anywhere in the world. The recovery of health care costs incurred in British Columbia may only be incidental to a completed tort or wrong occurring in another jurisdiction.

[237] As it is not clear that the "injury" being suffered within the contemplation of the ***Act*** is one that is occurring within the territory of the Province, it has the attributes of an economic injury. It has features of an economic injury to the Province caused by a physical injury to individuals resulting from exposure to tobacco products. There is a ripple down effect, not unlike the theory behind pure economic loss. I do not accept however the 2000 ***Act*** was intended to impose liability on that theory.

[238] If the route of manufacturers' liability is undertaken as suggested by the Attorney General under the ***Moran v. Pyle*** decision, *supra*, then the question of reasonable forum contemplation must be considered. Certainly for those manufacturers who produce and sell tobacco products directly in or to British Columbia, it is reasonable to assert that liability for harm would be dealt with in this Province. However, the same logic may not hold true for those manufacturers who sell or distribute tobacco products in other parts of the world. As La Forest J. clearly stated in ***Tolofson v. Jensen,*** *supra*, this is fast becoming a world of easy travel. Therefore, an individual could potentially be exposed to a tobacco product in another part of the world, even develop a tobacco related disease in another part of the world and then come to British Columbia and incur health care costs in further aid of that disease here. In response to such a proposition, the Attorney General argued that such individuals would be "weeded out" of the claim both on an overall statistical basis and if need be on a more scrupulous level. Further, it was argued that consideration of this issue is premature until the actual evidence upon which the claim is based is produced. I am inclined in part to agree. In the absence of the evidence, there is no means by which the Court can assess consideration of the effect of immigration to the Province of exposed persons. This does not however,

diminish the Court's duty to consider the effects of the legislation.

[239] If the extraterritorial effect, or component of the ***Act*** was minor or an occasional incidental feature, it need not be considered a constitutional bar. I am of the view however that the effect under the 2000 ***Act*** cannot be treated as minor or of occasional incident.

[240] I agree with counsel for the manufacturers that I may take judicial notice that British Columbia has over the time covered by the Province's claim, had a large immigrant increase to the population coming from many parts of the world. There has also been substantial migration amongst residents of the Canadian provinces. I conclude the potential number of persons whose claims could be impermissibly brought within the jurisdictional reach of the Province and its statutory claim by the provisions of the 2000 ***Act*** must be considered as substantial.

[241] If exposure were confined to British Columbia, then the *lex loci* would be more closely tied to this jurisdiction. Such a limitation would prove expedient in both the present and the future, especially given the structure of Canada. Mobility between provinces has a significant potential impact on claims made. It is beyond occasional that an individual could be exposed, develop a tobacco related disease and receive some treatment for that disease in another Province. Then such individual could come to British Columbia and receive further treatment in aid of the disease. If both Provinces have competing legislation and sue for the costs to treat that individual, it would be difficult to determine who has jurisdiction over such an individual. The same argument could be extended outside the Country. These conflicts are likely to occur and must be considered by the Court regardless of whether evidence is presented at this juncture.

[242] Unconfined "exposure" gives the cause of action an extraterritorial component. This component is not incidental or inconsequential. It is an essential element to the wrong. Without exposure, there is no cause for the tobacco related disease. Without causation, there is nothing to tie the injury for which the costs were incurred to the tobacco manufacturers. Exposure is the common link. Even in this unusual form of action, there must be a common link upon which to base liability.

[243] In my view this is different than the ***Harrington*** **v.** ***Dow***, *supra* situation argued by the Attorney General. There, the Court allowed an individual to sue in a specific jurisdiction for injury originating in another Province. The difference is that the individual can only sue the company once. There was no potential that the individuals involved could go to another jurisdiction and sue Dow for a second time for the same injury. The same does not hold true in these circumstances. The individual is not suing in these cases, and different governments could attempt to sue for injuries resulting from the same exposure. Given the lack of identifying information, there would be little if no possible way to account for such persons. To allow this would disrupt the stability and finality of issues sought by our Courts.

[244] I conclude the 2000 ***Act*** in respect of the aggregate cause of action of the Province is in pith and substance extraterritorial in its purpose and effect. It is legislation beyond the competence of the Province under the ***Constitution Act 1867*** and

the ***Statute of Westminster 1931***.

CONSTITUTIONAL INVALIDITY, SEVERANCE OR READING DOWN

[245] I have found the dominant purpose of the 2000 ***Act*** is essentially unchanged from the 1997 ***Act***. The pith and substance of the 2000 ***Act*** continues to be the pursuit nationally and internationally of the tobacco industry for the health care costs the government has incurred on behalf of persons who suffer a tobacco related disease.

[246] The extraterritorial reach of the ***Act*** again exceeds the Province's constitutional competence.

[247] I have considered whether the offending wording could be easily severed or read down as would be required for it to be *intra vires* and still conform to the original legislative intent.

[248] The problem does not lend itself to severance. At best perhaps some form of reading down to impose a territorial limitation on acts and conduct to confine the effect of the ***Act*** to a true ***Moran v. Pyle***, *supra*, type of liability would be required. The heart of the ***Act*** is the unique statutory cause of action permitting the Province, as a third party, to recoup the substantial health costs it has incurred in care and treatment of tobacco related disease and illness from the broad spectrum of the global tobacco industry.

[249] I do not find the interpretation of the extra territorial reach of the ***Act*** occurs coincident with two equally plausible interpretations, one that is within the constitutional jurisdictional boundaries and another without. To engage in reading down would result in a marked departure from the broad circumstances the ***Act*** purports to encompass in allowing recovery by way of an aggregate action and in my view "…a strong inference arises that it is invalid as a whole". [***Osborne v. Canada (Treasury Board)*** [1911] 2 S.C.R. 69; p. 103-105].

[250] The case of ***A.G. for Alberta v. A.G. for Canada*** [1947] 4 D.L.R. 1 at 11 mandates the Court if it is to read down portions of a statute must be satisfied the "…legislature would have enacted what survives without enacting the part that is *ultra vires* at all".

[251] I do not have that confidence. The history of the legislation indicates the emphasis is upon regaining health care costs paid that related to tobacco illness or disease and not a concern with jurisdictional boundaries that might circumscribe that recovery.

[252] The Province seeks to create a new and unique action to effect extraordinarily large monetary recovery, retroactively over fifty years, from several national and international companies all within a singular industry. The limits to the legislation permitting that action should be clearly scrutinized and carefully interpreted. The Court should not in the guise of severance or reading down engage in crafting a legislative approach that is presumably designed to maximize recovery. I conclude that severance or reading down would engage the Court in legislative redrafting.

RESULT

[253] I find on the basis of the extraterritorial reach of the ***Act*** the plaintiff manufacturers are entitled to the declaration they seek. The ***Act*** is inconsistent with the provisions of the ***Constitution Act*** of Canada as *ultra vires* the competence of the British Columbia Legislature. The defendants' applications under Rules 14(6) and 19(24) are allowed.

[254] Supreme Court of B.C., Vancouver Action #S010421, ***Her Majesty the Queen v. Imperial Tobacco et al*** which is founded upon the statutory aggregate cause of action in the ***Act*** is dismissed.

[255] In the result it is unnecessary to rule upon the Rule 13 applications of the *ex juris* defendants.

"R.R. Holmes, J."
The Honourable Mr. Justice R.R. Holmes