COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***British Columbia v. Imperial Tobacco Canada Ltd.,*** 2004 BCCA 269

Date: 20040520
Docket: CA030975; CA030976; CA030977; CA030978

Docket: CA030975

Between:

Her Majesty the Queen in Right of British Columbia

Appellant
(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.

Respondents
(Defendants)

- and -

Docket: CA030976

Between:

JTI Macdonald Corp.

Respondent
(Plaintiff)

And

Attorney General of British Columbia

Appellant
(Defendant)

- and -

Docket: CA030977

Between:

Imperial Tobacco Canada Limited

Respondent
(Plaintiff)

And

Attorney General of British Columbia

Appellant
(Defendant)

- and -

Docket: CA030978

Between:

Rothmans, Benson & Hedges Inc.

Respondent
(Plaintiff)

And

Attorney General of British Columbia

Appellant
(Defendant)

Before: The Honourable Mr. Justice Lambert
The Honourable Madam Justice Rowles
The Honourable Madam Justice Prowse

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L.D. Russell	Counsel for the Respondent Canadian Tobacco Manufacturers' Council
Place and Date of Hearing:	Vancouver, British Columbia 24 to 28 November 2003
Place and Date of Judgment:	Vancouver, British Columbia 20 May 2004

Written Reasons by:
The Honourable Mr. Justice Lambert

Written Reasons Concurring in the Result by:
The Honourable Madam Justice Rowles (p. 72, paragraph 118)

Written Reasons Concurring in the Result by:
The Honourable Madam Justice Prowse (p. 100, paragraph 182)

Reasons for Judgment of the Honourable Mr. Justice Lambert:

Introduction and Index

The ***Tobacco Damages and Health Care Costs Recovery Act***, S.B.C. 2000 c. 30 authorizes a direct action by the Government of British Columbia against manufacturers of tobacco products sold in British Columbia. The action is for the recovery of health care expenditures incurred in treating consumers of those tobacco products. This appeal concerns the constitutional validity of the ***Act***.

As an aid to comprehensibility I will start with an index.

Paragraph

I.

The Legislative and Judicial History

[1] The first enactment was the ***Tobacco Damages Recovery Act*** S.B.C. 1997 c. 41. It received royal assent on 28 July 1997. That ***Act*** was amended by the ***Tobacco Damages Recovery Act Amendment Act*** S.B.C. 1998 c. 45. On 12 November 1998 the Consolidated ***Act*** was brought into force by Order-in-Council. (The 1998 Consolidated ***Act***)

[2] The Crown brought an action under the 1998 Consolidated ***Act***. The Statement of Claim was filed on 12 November 1998. Three tobacco manufacturers launched actions, also on 12 November 1998, challenging the constitutionality of the 1998 Consolidated ***Act*** on a number of grounds.

[3] The constitutional questions were tried by Mr. Justice Holmes. On 21 February 2000 Mr. Justice Holmes gave judgment to the effect that the 1998 Consolidated ***Act*** was unconstitutional on the ground that it was in pith and substance in relation to extra-provincial civil rights. Mr. Justice Holmes dealt with other constitutional issues but did not consider that the Consolidated ***Act*** was unconstitutional on any other ground. Mr. Justice Holmes's reasons are reported at ***JTI-Macdonald Corp. v. British Columbia (Attorney General)*** (2000), 184 D.L.R. (4th) 335 (B.C.S.C.)(The 2000 Judgment).

[4] The 1998 Consolidated ***Act*** was then repealed and a new Act, the ***Tobacco Damages and Health Care Costs Recovery Act***, S.B.C. 2000 c. 30, was passed (The 2000 ***Act*** or the ***Act***). That is the ***Act*** under consideration in this appeal.

[5] The present actions were launched immediately after the 2000 ***Act*** was passed.

II.

The Actions

[6] There are four actions. The first is an action by the Attorney General of British Columbia against fourteen defendants. Three of the defendants, namely Imperial Tobacco Canada Limited; Rothmans, Benson & Hedges Inc.; and JTI-Macdonald Corp. are Canadian manufacturers of cigarettes. One of the defendants, Rothmans Inc., is a former Canadian manufacturer of cigarettes. One of the defendants, the Canadian Tobacco Manufacturers Council, is a trade organization. There are nine non-Canadian defendants, of whom three manufactured cigarettes which were sold in British Columbia, namely Philip Morris Incorporated, R.J. Reynolds Tobacco Company and Ryesekks, p.l.c.. The remaining six defendants, none of whom manufactured cigarettes sold in British Columbia, are said to be in some form of relationship

which attracts liability with one or more defendants who manufactured cigarettes sold in British Columbia.

[7] The cause of action in the first action is pleaded in the Statement of Claim as an aggregate action under the ***Tobacco Damages and Health Care Costs Recovery Act***. Eleven of the fourteen defendants were served out of British Columbia, without leave, under Rule 13(1)(h), (j), and (o). In that first action those defendants have applied to set aside the service on a number of grounds, one of which is that the 2000 ***Act*** is unconstitutional.

[8] The three other actions are brought, respectively, by the three Canadian manufacturers. Each of those three actions is for a declaration that the 2000 ***Act*** is unconstitutional.

III.

The Proceedings

[9] Mr. Justice Holmes, who was assigned overall supervision of the four actions, agreed to hear argument in all four actions on the constitutionality of the 2000 ***Act***.

[10] The arguments were framed by the tobacco companies so that they rested on three grounds, each of which, if successful, would be sufficient to support a decision that the

Act was unconstitutional. The three grounds are: first, that the ***Act*** in pith and substance is extra-territorial (Extra-territoriality); second, that the ***Act*** derogates materially from the independence of the judiciary (Judicial Independence); and, third, that the ***Act*** offends the rule of law (Rule of Law).

[11] Mr. Justice Holmes decided that the ***Act*** was unconstitutional on the Extra-territoriality ground. He would have found the ***Act*** to be constitutional on the Judicial Independence ground and on the Rule of Law ground. He dealt fully with all three grounds in his comprehensive reasons which are reported at ***British Columbia v. Imperial Tobacco Canada Ltd.*** (2003), 227 D.L.R. (4th) 323 (B.C.S.C.)(the 2003 Judgment). It is not necessary for the purposes of these reasons to summarize Mr. Justice Holmes's reasons at this stage. To the extent that it might be helpful to do so later, references to Mr. Justice Holmes's reasons will be incorporated in the separate consideration in these reasons of each of the three alleged grounds of unconstitutionality.

IV.

The Appeal

[12] The Attorney General of British Columbia has brought this appeal on the ground that Mr. Justice Holmes reached the wrong decision on the Extra-territoriality issue.

[13] The Canadian manufacturer respondents, Imperial Tobacco Canada Limited; Rothmans, Benson & Hedges Inc.; and JTI-Macdonald Corp., have responded by arguing that Mr. Justice Holmes reached the correct decision on Extra-territoriality, but that he should as well have found the ***Act*** unconstitutional on the Judicial Independence ground and on the Rule of Law ground. The Canadian manufacturer respondents filed a common *factum* and divided the argument so that counsel for Rothmans, Benson & Hedges Inc. argued the Extra-territoriality ground, counsel for Imperial Tobacco Canada Limited argued the Judicial Independence ground, and counsel for JTI-Macdonald Corp. argued the Retroactivity aspect of the Rule of Law ground.

[14] Counsel for British American Tobacco (Investments) Limited, a service *ex juris* defendant, supported the argument of the Canadian manufacturers on the Extra-territoriality issue, but also made an independent argument on that issue.

[15] Counsel for Philip Morris Incorporated and Philip Morris International Inc., also service *ex juris* defendants, adopted the Canadian manufacturers' arguments but argued also that the 2000 ***Act*** was unconstitutional as violating the Rule of Law. The same arguments were made by these two respondents before Mr. Justice Holmes and he dealt with them under the heading of Retroactivity, since that issue was an important aspect of the argument. But I will deal with retroactivity as a separate issue as well as a part of the Rule of Law issue.

[16] Counsel for the Canadian Tobacco Manufacturers Council adopted the arguments of the Canadian manufacturers and was excused at the outset from further attendance at the hearing.

[17] None of the other defendants appeared at this stage of the proceedings.

V.

The Legislation

[18] The ***Tobacco Damages and Health Care Costs Recovery Act*** has twelve sections. The general scheme of the ***Act*** is to create a direct action by the Government of British Columbia for the value of the expenditures by the Government to provide benefits under the ***Hospital Insurance Act,*** the ***Medicare Protection Act,*** the ***Continuing Care Act,*** and through other

government agencies, resulting from tobacco related disease caused or contributed to by a tobacco related wrong.

[19] I will set out some of the provisions:

> **Definitions and interpretation**
>
> **1** (1) In this Act:
>
> ...
>
> **"exposure"** means any contact with, or ingestion, inhalation or assimilation of, a tobacco product, including any smoke or other by-product of the use, consumption or combustion of a tobacco product;
>
> ...
>
> **"tobacco related wrong"** means,
>
> (a) a tort committed in British Columbia by a manufacturer which causes or contributes to tobacco related disease, or
>
> (b) 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;
>
> ...
>
> **Direct action by government**
>
> **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.
>
> ...
>
> (4) In an action under subsection (1), the government may recover the cost of health care benefits
>
> (a) for particular individual insured persons, or

(b) on an aggregate basis, for a population of insured persons as a result of exposure to a type of tobacco product.

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

(a) it is not necessary

(i) to identify particular individual insured persons,

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

(iii) to prove the cost of health care benefits for any particular individual insured person,

...

Recovery of cost of health care benefits on aggregate basis

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.

(2) Subject to subsections (1) and (4), the court must presume that

(a) the population of insured persons who were 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 referred to in subsection (1) (a), and
>
> (b) 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).
>
> (3) If the presumptions under subsection (2) (a) and (b) apply,
>
> (a) the court must determine on an aggregate basis the cost of health care benefits provided after the date of the breach referred to in subsection (1) (a) resulting from exposure to the type of tobacco product, and
>
> (b) each defendant to which the presumptions apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product.
>
> (4) The amount of a defendant's liability assessed under subsection (3) (b) may be reduced, or the proportions of liability assessed under subsection (3) (b) readjusted amongst the defendants, to the extent that a defendant proves, on a balance of probabilities, that the breach referred to in subsection (1) (a) did not cause or contribute to the exposure referred to in subsection (2) (a) or to the disease or risk of disease referred to in subsection (2) (b).

[20] **Section 4** provides for joint and several liability for joint breaches, for conspiracy or acting in concert, for cases of principal and agent, and in cases of vicarious liability.

Section 5 provides that statistical information and information from epidemiological and sociological and other studies, including information from sampling, is admissible

for the purpose of establishing causation and for quantifying damages.

Section 6 deals with limitation periods. No action is barred that is brought within two years after the limitation section came into force. Some actions already barred are revived.

Section 7 provides for risk contribution in actions other than those on an aggregate basis.

Section 8 provides for a defendant bringing an action for contribution against another person who may have contributed to the wrong for which the defendant has been found liable.

Section 9 deals with the regulations.

Section 10 deals with retroactive effect. It reads:

> **Retroactive effect**
>
> **10** 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.

Section 11 is spent.

Section 12 deals with commencement.

VI.

The Pleadings

[21] The Attorney General's Statement of Claim alleges that the defendants, Imperial Tobacco Canada Limited; Rothmans, Benson & Hedges Inc.; Rothmans Inc.; JTI-Macdonald Corp.; Philip Morris Incorporated; R.J. Reynolds Tobacco Company; and Ryesekks p.l.c manufactured and promoted cigarettes which reached consumers and were smoked as intended and that in doing so the defendants breached their duty to consumers in ways which may be gathered under these headings but which are further particularized in the Statement of Claim:

a) by providing a defective product;

b) by failing to warn of the risks of smoking their products;

c) by targeting children and adolescents;

d) by providing a product that was unjustifiably hazardous or which they should have known was unjustifiably hazardous;

e) through deceit and misrepresentation about their product;

f) through breach of the ***Trade Practices Act*** of British Columbia, by misrepresentation;

g) through breach of the ***Competition Act***, R.S.C. 1985, c. C-34 and its predecessor the ***Combines Investigation Act***, R.S.C. 1952 (supp.), c. 314, as amended by the ***Criminal Law Amendment Act***, S.C. 1968-69, c. 38, by misrepresentation.

I propose to describe the alleged wrongs as: sale of a defective product; failure to warn; and product misrepresentation.

[22] The remainder of the defendants are joined in the action because it is pleaded that they engaged in some form of concerted action with one or more of the defendants who breached their duties to consumers in the ways alleged.

VII.

Extra-territoriality: Constitutional Validity

[23] There are at least four different questions which may arise in relation to issues of Extra-territoriality. The first is whether legislation that is said to have an extra-territorial purpose or effect has constitutional validity. The second is whether legislation that is constitutional has an incidental extra-territorial application which makes that application of the legislation unconstitutional. The third is whether the courts of the Province have jurisdiction to deal with an issue or an aspect of an issue which has extra-territorial roots or connections. And the fourth is what should be the choice of law to be applied by the courts of a Province in dealing with a case where an issue or an aspect of an issue has extra-territorial roots or connections. These

are separate questions, each of which must be resolved by the analysis appropriate for that question. That is not to deny that the answer to one of the questions may have an impact on finding an answer to another of the questions.

[24] Only the first of those four questions is directly before the Court in this appeal, namely: "whether the ***Act*** is constitutionally valid."

VIII.

Extra-territoriality: *Churchill Falls*

[25] The leading case on constitutional validity in relation to extra-territoriality is ***Churchill Falls (Labrador) Corp. Ltd. v. Newfoundland A.G.***, [1984] 1 S.C.R 297. In that case an enactment of the Newfoundland Legislature profoundly affected contractual rights and property in Quebec. That consequence was considered to be the prime purpose of the statute and an unanimous Supreme Court of Canada decided that the statute was unconstitutional. The search, as in all matters of constitutional validity under the division of powers, was to find the "matter" of the enactment and to decide whether in its "pith and substance" that matter was in relation to one or more of the provincial heads of power in s.

92: the most relevant one, 92(13), and the other possibly relevant ones, being limited by the words "in the Province".

[26] After examining two lines of authority, Mr. Justice McIntyre, for the Court, preferred the line culminating in ***Ladore v. Bennett*** (1938), 3 D.L.R. 1, [1939] A.C. 468 (JCPC). Mr. Justice McIntyre quoted with approval from Professor Hogg in ***The Constitutional Law of Canada***, (Toronto: Carswell, 1977), who said, in part, at pp. 209-10:

> The general rule of constitutional law is that a law is classified by its pith and substance and incidental effects on subjects outside jurisdiction are not relevant to constitutionality.

[27] Mr. Justice McIntyre then summarized his conclusion on the relevant legal principle in this way, at p. 332:

> 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 a provincial enactment is the derogation from or elimination of extra-provincial rights then, even if it is cloaked in the proper constitutional form, it will be *ultra vires*. A colourable attempt to preserve the appearance of constitutionality in order to conceal an unconstitutional objective will not save the legislation.

[28] In this case, the Attorney General says that the "matter" of the ***Act***, in its "pith and substance", is "Property and Civil Rights in the Province" or one of the other heads of s. 92 limited as a class of subjects by the words "in the Province". The Attorney General argues that any effect on rights outside the Province is incidental and that any such incidental effect does not change the true pith and substance of the ***Act*** which is to address Property and Civil Rights in the Province.

[29] On the other hand, the tobacco manufacturers say that they do business all over the world and that the colourable intent of the legislation is to destroy, impair or modify their rights outside the boundaries of the Province.

[30] In ***Churchill Falls***, Mr. Justice McIntyre discussed the kind of extrinsic evidence that might be available in considering "pith and substance" and "colourability". There is very little extrinsic evidence in this case, simply some extracts from Hansard, an affidavit of Dr. Marais, and, I suppose, the Statement of Claim. There is no contested issue about the admissibility of that evidence. All parties refer almost exclusively to the ***Act*** itself in support of their arguments and I propose to do the same.

IX.

Extra-territoriality: Tobacco Related Wrong: "A Tort Committed in British Columbia": *Moran v. Pyle*

[31] The foundation of an action under the ***Act*** is a "tobacco related wrong". It is defined in these terms:

> "**tobacco related wrong**" means,
>
> (a) a tort committed in British Columbia by a manufacturer which causes or contributes to tobacco related disease, or
>
> (b) 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;
>
> ...

[32] I propose to start with paragraph (a). For paragraph (a) to apply, a tort must be committed in British Columbia. There is a good deal of jurisprudence on the place where a tort is committed. Is it where the duty arose, where the wrongful activity was initiated, where the wrongful activity was completed, where the breach occurred, where the damage occurred, where the parties or one of them resided or were domiciled, or is it established on some other basis? The answer to that question may vary, depending on the nature of the tort or wrong.

[33] However, the place of the tort in cases of defective products and of failures to warn of known defects has been dealt with by the Supreme Court of Canada in ***Moran v. Pyle National (Canada) Ltd.***, [1975] 1 S.C.R. 393. The issue in that case related to the validity of service out of the jurisdiction where the action was started in Saskatchewan and the Saskatchewan rule of court was that service out of the jurisdiction could be made without leave where the action was on a tort "committed within the jurisdiction". The action was brought after Mr. Moran was electrocuted and died while changing a defective light bulb. The defendant did its manufacturing of light bulbs in Ontario and the United States and sold its product to distributors and not directly to consumers. It did not employ salesmen or agents in Saskatchewan.

[34] Mr. Justice Dickson started his judgment, for the Court, in this way, at p. 394:

> This appeal from the Court of Appeal for Saskatchewan presents in a jurisdictional context the question of the place of commission of a tort.
>
> [Emphasis added]

[35] In the course of his reasons Mr. Justice Dickson referred with approval to the decision of the Judicial Committee of the Privy Council in ***Distillers Co. (Bio-Chemicals) Ltd. v.***

Thompson, [1971] 1 All E.R. 694 where a British supplier of thalidomide was sued in New South Wales. The Judicial Committee decided that the plaintiff had a cause of action in New South Wales. In discussing the case Mr. Justice Dickson said this at p. 408:

> In the result there was held to be negligence in New South Wales causing injury to the plaintiff in New South Wales. The goods were not defective or incorrectly manufactured, the negligence lay in "failure to give a warning that the goods would be dangerous if taken by an expectant mother in the first three months of pregnancy". It will be noted that the act, in this case the omission, on the part of the defendant which gave the plaintiff a cause of complaint in law occurred in a jurisdiction in which the defendant was neither resident nor carrying on business.
>
> [Emphasis added]

Mr. Justice Dickson expressed his conclusion in these words at p. 409:

> Applying this test to a case of careless manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures 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. 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. 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 is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.
>
> [Emphasis added]

In short, Mr. Justice Dickson answered the question that he stated at the outset of his reasons by saying that the place of commission of the tort was Saskatchewan, where the defective product was used and where the defective product caused the harm.

[36] Mr. Justice Dickson's reliance on and approval of the Judicial Committee's decision in ***Distillers v. Thompson***, where the sale by a British entity of thalidomide manufactured in Germany to a pregnant woman in New South Wales was described by Mr. Justice Dickson as "negligence in New South Wales" consisting of "failure to give a warning that the goods would be dangerous if taken by an expectant mother in the first three months of pregnancy", indicates that it was not simply the occurrence of the damage in Saskatchewan that made the tort in ***Moran v. Pyle*** a tort occurring in Saskatchewan, but the fact that the tortious act whose initiation occurred by

careless manufacture in Ontario or the United States was not complete as a tortious act until the breach of the specific tort duty that could result in liability was completed by the purchase of the defective product and the use of the product by a specific consumer in Saskatchewan who then was injured by the product. In short it is my opinion that both ***Distillers v. Thompson*** and ***Moran v. Pyle,*** although decided in the context of an issue about jurisdiction, stand for the proposition that the place where the breach of duty occurs and the place where the tort occurs in cases of defective products, cases of failure to warn, and cases of misrepresentation to the consumer and ultimate user, is the place of purchase, consumption and subsequent injury.

[37] Every head of claim in the Statement of Claim in this case, whether grouped as relating to the provision of a dangerous product, grouped as a failure to warn of the dangers of the product, or grouped as a misrepresentation about the product, is a claim of a type which, if brought in a straightforward action by an injured plaintiff, would be a claim in relation to a tort or wrong committed in British Columbia within the meaning of paragraph (a) of the definition of "tobacco related wrong".

[38] There is nothing in the more recent decisions of the Supreme Court of Canada which casts doubt on the continuing correctness and applicability of ***Moran v. Pyle*** in determining the location of the relevant breach of duty with respect to defective product torts. See particularly, ***Tolofson v. Jensen***, [1994] 3 S.C.R. 1022, and ***Unifund Assurance Co. v. I.C.B.C.***, [2003] 2 S.C.R. 63.

X.

Extra-territoriality: Tobacco Related Wrong: "A Breach of a ...Duty...Owed...to Persons in British Columbia"

[39] I now move on to paragraph (b) of the definition of "tobacco related wrong". I will repeat it.

> "**tobacco related wrong**" means,
>
> ...
>
> (b) 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;

[40] The duty, whether common law, equitable or statutory, must be one owed to persons in British Columbia. For the purposes of this case the relevant duties are a duty not to sell a defective product, a duty to warn of the dangers of the

product, and a duty not to misrepresent the nature of the product. Those are the same duties as are encompassed within the phrase "a tort committed in British Columbia" in paragraph (a) of the definition of a "tobacco related wrong."

[41] It may be that equitable or statutory duties might have aspects that are somewhat different from the common law duties as a matter of legal analysis, but in relation to exposure to a tobacco product the duties in their essential nature must be the same.

[42] The reason why a paragraph (b) is required in the definition is made clear in the opening words of the paragraph: "in an action under section 2(1)". Section 2(1) reads in this way:

> 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.

[43] The action described in s-s. 2(1) is an entirely new form of action. As s-s. 2(2) says, it is not a subrogated claim; and as s-s. 2(5) says, the government action may seek to recover the cost of health care benefits on an aggregate basis. The government action is not within the traditional description of a tort action. Accordingly, the tobacco

related wrong described in s-s. 2(1) does not come within paragraph (a) of the definition of "tobacco related wrong" as a tort committed in British Columbia. So a second paragraph was needed in the definition of "tobacco related wrong" to encompass the government action.

[44] But there is no reason to suppose that in enacting paragraph (b) of the definition of "tobacco related wrong" the legislature was seeking to expand the concept in paragraph (a) of a breach occurring in British Columbia of a duty owed to persons in British Columbia, as explained in ***Moran v. Pyle***, to encompass in paragraph (b) a breach anywhere in the world of a duty owed to persons in British Columbia. The relevant breach of duty is still the sale of a defective product, a failure to warn, or a misrepresentation about the nature of the product, all in relation to a sale of the product in British Columbia. The analysis in ***Moran v. Pyle*** which locates the breaches of these duties in British Columbia where the purchaser and consumer of the products are found and the act which constitutes the breach is completed must surely continue to constitute a valid analysis where the duty and the breach are, to all intents and purposes, the same under paragraph (b) of the definition as they are under paragraph (a).

[45] The chief government action contemplated by the ***Act*** is the aggregate action described in s-s. 2(5) and in s. 3. It depends, under paragraph 3(1)(a), on a duty owed to persons in British Columbia who have been exposed or might become exposed to a type of tobacco product. Accordingly the breach of duty which founds the government action must again be characterized as the sale of a defective product, a failure to warn, or a misrepresentation about the nature of the product. It follows that the analysis of Mr. Justice Dickson, for the Supreme Court of Canada, in ***Moran v. Pyle***, would apply with equal force to para. (b) of the definition of "tobacco related wrong." The breach of duty for selling a defective product to someone in British Columbia, for failure to warn a purchaser in British Columbia of the dangers of the product, or for participating in a misrepresentation about the product to someone in British Columbia is a breach completed by an act in British Columbia and is therefore correctly categorized as a breach in British Columbia of a duty owed to persons in British Columbia.

[46] An understanding of ***Moran v. Pyle*** makes it clear that an act of manufacture undertaken in Ontario or Quebec can initiate a breach of duty owed to persons in British Columbia which becomes a completed breach when the sale of the product

which is defectively manufactured occurs in British Columbia, without a warning or with a misrepresentation. And an understanding of ***Moran v. Pyle*** supports the view that manufacture in Ontario or Quebec can give rise to "a tort committed in British Columbia" within para. (a) of the definition of "tobacco related wrong." By the same token an understanding of ***Moran v. Pyle*** in the context of this legislation makes it clear that "a breach of a duty owed to persons in British Columbia" is a breach in British Columbia, within the meaning of para. (b) of the definition of "a tobacco related wrong", even if the tobacco product is manufactured in Ontario or Quebec.

[47] In my opinion, having regard to ***Moran v. Pyle***, it would have been redundant for the legislative expression in para. (b) of the definition of a "tobacco related wrong" to have been "a breach in British Columbia of a duty owed to persons in British Columbia." The legislature avoided that redundancy by saying simply "a breach of a duty owed to persons in British Columbia." There is no redundancy in para. (a) of the definition, where the reference is simply to "a tort committed in British Columbia." I conclude that ***Moran v. Pyle*** establishes that in both branches of the definition the

reference is to a breach committed in British Columbia of a duty owed to persons in British Columbia.

[48] In summary, where the breach of duty is defective manufacture, a failure to warn, or a misrepresentation about the product, and the product is sold in British Columbia, ***Moran v. Pyle*** establishes that the breach occurs in British Columbia; and that is so whether the breach is described as a tort committed in British Columbia, as in para. (a), or as a common law, equitable or statutory breach of a duty owed to persons in British Columbia, as in para. (b). If the breach on which the government action rests occurs in British Columbia, as in my opinion is required by this ***Act***, then in my opinion the ***Act*** is not in pith and substance extra-territorial, but is instead in pith and substance intra-territorial.

[49] The point that if the breach occurs in British Columbia then that makes the ***Act*** intraterritorial in its pith and substance was conceded, in my opinion properly so, by counsel for the Canadian manufacturers. Paragraph 26 of their factum reads:

> If the Act were damage-based, in the sense that it was necessary for the Government to prove that there has in fact been disease caused by misconduct in British Columbia, there would be a territorial link to British Columbia sufficient to satisfy the choice

> of law test found in either *Tolofson v. Jensen*, or *Unifund Assurance Co. v. Insurance Corp. of British Columbia.* But that is not so here because exposure and consequent disease anywhere in the world are captured by the presumptions in section 3 and because the definition of the wrong does not require it.
>
> [Emphasis added]

[50] As I have said, I consider that the definition of the wrong does require it. (Reference should also be made to the red-bound transcript of oral arguments in this appeal: Day 2, p. 51, lines 10 to 19.)

XI.

Extra-territoriality: The New Government Action

[51] It follows from my conclusion in the previous Part that the new action described in s-s. 2(1), which is at the very heart of the ***Act***, is an action on a wrong which is located in British Columbia. Sub-section 2(1) 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.

The "cost of health care benefits", occurs entirely in British Columbia. And in my opinion, as I have said, the "tobacco

related wrong" must, consistently with ***Moran v. Pyle***, be regarded as located in British Columbia.

XII.

Extra-territoriality: The Aggregate Action

[52] The next step is to consider the "aggregate action" dealt with in s-s. 2(4) and s-s. 3(1), which I will set out again:

> **2** (4) In an action under subsection (1), the government may recover the cost of health care benefits
>
> (a) for particular individual insured persons, or
>
> (b) on an aggregate basis, for a population of insured persons as a result of exposure to a type of tobacco product.
>
> ...
>
> **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.

[53] Subsection 2(4)(b) establishes that when an action is brought on an aggregate basis it relates to a population of insured persons as a result of exposure. So the population in question must, as insured persons, have been exposed.

[54] Then we come to s-s. 3(1)(a). Again the ***Act*** returns, in relation to an aggregate action, to a breach of a common law, equitable, or statutory duty or obligation owed to persons in British Columbia. Again I conclude, as I believe I must in pursuit of consistency of interpretation of the same phrase in the same short statute, that, by reference to ***Moran v. Pyle***, the relevant breach must mean a breach in British Columbia of a duty owed to persons in British Columbia.

[55] Counsel for the Canadian manufacturers on the Extra-territoriality argument and counsel for British American Tobacco (Investments) Limited, argued that under s-s. 28(3) of the ***Interpretation Act*** the singular includes the plural and *vice versa* and that a breach of a duty owed to only one person could trigger a complete aggregate action. In my opinion, that interpretation is wrong. I consider that the reference to "persons" in s-s. 3(1)(a) is within the exception encompassed by the words "unless the contrary intention appears ... in the enactment" in s-s. 2(1) of the ***Interpretation Act.*** That contrary intention appears in this

Act in the description of an aggregate action being for "a population of insured persons" in s-s. 2(4)(b).

[56] However, I think that in an aggregate action each member of the population of insured persons must be a person in British Columbia to whom a duty was owed in British Columbia and in relation to whom a duty was breached in British Columbia.

[57] In a similar vein, counsel for the Canadian manufacturers argued, as I understood the argument, that the duty referred to in paragraph 3(1)(a) is an abstract duty not a concrete duty with the result, so the argument goes, that once it is established that, in its concrete form, it is a duty owed to persons in British Columbia then, in its abstract form, that very same duty can be owed to persons anywhere in the world and still remain within the wording of para. 3(1)(a). In short, counsel say that under para. 3(1)(a) if a duty is owed to persons in British Columbia then it must also be owed to everyone anywhere who has been exposed anywhere to the same type of tobacco product. I reject that argument. I think that para. 3(1)(a) and other provisions of the ***Act*** refer to a specific concrete duty which is only relevant when it is owed to persons in British Columbia and is breached in British Columbia.

[58] A question was asked by the bench during oral argument about the significance of paragraph 3(1)(c) of the ***Act***. In my opinion that paragraph does not indicate that the breach could occur anywhere, including outside British Columbia, so long as the tobacco product in question was offered for sale in British Columbia. Rather, in my opinion, the paragraph was intended for greater certainty and in affirmation of the view that the breach occurs at the point of sale to the consumer and the point of consumption by the consumer and that the effect of the paragraph is to make sure that the manufacturer or producer will not be liable if the tobacco product on which liability rests was not purchased in British Columbia even if it was consumed in British Columbia.

[59] The reference to "part of the period of the breach" in paragraph 3(1)(c) is not immediately clear to me since in my opinion the breach consists of sale and consumption in British Columbia after defective manufacture, a failure to warn, or a misrepresentation about the product. But perhaps it was thought to be required to allow scope for liability where a sale was made in British Columbia but consumption of the very product purchased in British Columbia was delayed until after the type of tobacco product was no longer being offered for sale in British Columbia.

XIII.

Extra-territoriality: The Presumptions

[60] For convenience of reference, I will repeat s-s. 3(2) and 3(3):

> **3**(2) Subject to subsections (1) and (4), the court must presume that
>
> (a) the population of insured persons who were 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 referred to in subsection (1) (a), and
>
> (b) 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).
>
> (3) If the presumptions under subsection (2) (a) and (b) apply,
>
> (a) the court must determine on an aggregate basis the cost of health care benefits provided after the date of the breach referred to in subsection (1) (a) resulting from exposure to the type of tobacco product, and
>
> (b) each defendant to which the presumptions apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product.

[61] I approach paragraph (a) of s-s. 3(2) on the basis of the analysis I have described of the preceding provisions of the ***Act***. On that basis: all of "the population of insured persons" must be taken to be in British Columbia; all of the "exposure" that is relevant to the presumptions must have occurred in British Columbia, though irrelevant exposure could

have occurred elsewhere; and, ”the breach referred to in s-s. 1(a)" must be a breach occurring in British Columbia of a duty owed to persons in British Columbia. In short, whatever view is taken about the causation presumption as a matter of modification of the usual tort law of causation, the presumption is not extra-territorial. Exposure outside British Columbia is not, in my opinion, made the subject matter of the presumption. Once it is understood that the presumption is one flowing from the breach in British Columbia of a duty owed to persons in British Columbia then the presumption that the person would not have been exposed but for the breach is a presumption without any extra-territorial effect.

[62] The analysis in relation to s-s. 3(3)(a) is similar. The cost of health care benefits is a cost limited to British Columbia. That cost must be incurred after a breach in British Columbia of a duty owed to persons in British Columbia. There is nothing extra-territorial about the mandated determination under s-s. 3(3)(a).

XIV.

Extra-territoriality: The Liability Of Others

[63] Section 4 applies to joint breaches. It effectively defines a joint breach as one where one or more manufacturers breached in British Columbia a duty owed to persons in British Columbia and one or more other manufacturers, who presumably did not or are not shown to have breached such a duty themselves, are made liable in circumstances where at common law, in equity, or under an enactment, those other manufacturers are shown to have conspired or acted in concert, to have acted in a principal and agent relationship, or to be jointly or vicariously liable with the manufacturer or manufacturers who are shown to have acted in British Columbia in such a way as to attract liability.

[64] The operation of the section certainly seeks to bring into the British Columbia proceedings defendants who themselves may not have breached in British Columbia a duty owed to persons in British Columbia, and to do so on the basis of principles of law which may or may not be the proper law or the whole of the proper law for determining the kind of relationship which the ***Act*** contemplates as giving rise to some form of joint and several liability.

[65] Having regard to my analysis of the ***Act*** in relation to defendants and potential defendants who it is alleged have been shown to have violated in British Columbia a duty owed to persons in British Columbia, it is my opinion that the pith and substance of the ***Act*** is the matter of the legal liability owed to the government by tobacco manufacturers for the cost of health care benefits provided in British Columbia to insured persons in British Columbia as a result of exposure in British Columbia to tobacco products, in breach in British Columbia of a duty owed by tobacco manufacturers to persons in British Columbia. That matter is wholly within the Province and comes within head 92(13) of the ***Constitution Act, 1867***: "Property and Civil Rights in the Province". Reference should again be made to the proper concession by counsel for the Canadian manufacturers to which I have referred at the end of Part X of these reasons.

[66] That conclusion is unaffected and unimpaired by the possibility that any application of the ***Act*** to impose liability on entities outside the Province on the basis of laws which may not apply to them under the principles of private international law might be an unconstitutional application of a constitutionally valid ***Act***.

[67] However this appeal was focused exclusively on the constitutional validity of the ***Act***. Except as it might be thought to affect constitutional validity, the question of unconstitutional application was not comprehensively argued and, in my opinion, cannot be decided on the basis of the materials before us and the arguments that were directed to us. What is more, not all of the defendants interested in the question of unconstitutional application of the constitutionally valid ***Act*** appeared before us in this hearing which was restricted to the constitutional validity of the ***Act.*** I do not propose to decide at this time any question about the application of s. 4 of the ***Act*** beyond the question that it does not modify the "pith and substance" of the ***Act*** and does not impair its overall constitutional validity.

[68] My decision not to embark on any question about the applicability of the ***Act*** to defendants who are brought into the action only under s. 4 applies not only to the existence of the liability of those defendants but also applies to the fullness of the scope of the liability of any other defendant whose liability arises from a breach in British Columbia of a duty owed to persons in British Columbia but whose liability is shared under s. 4 with a defendant whose liability only arises through the application of s. 4.

XV.

Extra-territoriality: The Trial Judgment

[69] Mr. Justice Holmes's reasons on the extra-territoriality issue start at p. 364 in the report at (2003), 227 D.L.R. (4th) 323. Paragraphs 172 to 220 set out the arguments made by the Canadian manufacturers and by the Attorney General on this issue. Mr. Justice Holmes's own conclusions are contained in paragraphs 221 to 244 on pages 378 to 382.

[70] Mr. Justice Holmes's first point in paragraphs 221 to 227 is that nine of the fourteen defendants in the action are foreign, and only three of the nine foreign defendants are alleged to have engaged in the manufacture and promotion of cigarettes sold in British Columbia. As I have said, the defendants who did not themselves sell or promote the sale of cigarettes in British Columbia, but who are brought into the action only through the application of s. 4 of the ***Act,*** are not specifically dealt with in these reasons. Most of them were not represented at the hearing of this appeal. But I do not consider that the inclusion of s. 4 in the ***Act***, or the bringing of an action against six "foreign" defendants, changes the pith and substance of the ***Act***, which is not determined by counting defendants by place of incorporation or principal place of business. The pith and substance of the

Act and its constitutional validity are derived, in my opinion, from the ***Act***'s linkage to the occurrence of tobacco related wrongs within British Columbia. The application of the ***Act*** to foreign defendants is, in my opinion, a question of constitutional application and not a question of constitutional validity.

[71] Mr. Justice Holmes's other point is derived from his view that relevant "exposure" to tobacco products could occur anywhere in the world. It is true that exposure could occur anywhere in the world either after prior exposure in British Columbia and before further exposure in British Columbia or simply before exposure in British Columbia. And Mr. Justice Holmes took judicial notice of the substantial immigration to British Columbia and of the probability that many of the immigrants would have had prior exposure outside British Columbia. But in my opinion exposure outside of British Columbia is not relevant exposure. For there to be a cause of action under the ***Act***, in my opinion, the exposure must occur through a breach in British Columbia of a duty owed to persons in British Columbia and that exposure in British Columbia must be the tobacco related wrong which causes or contributes to the incurring by the government of the costs of health care benefits in British Columbia. The presumptions in s-s. 3(2)

are "subject to s-s. (1)" which requires, as I have said, that the only relevant exposure is exposure in British Columbia due to breaches in British Columbia of a duty owed to persons in British Columbia. If that interpretation presents problems in the calculation of cost of treatment then those problems will have to be argued and dealt with in the context of the action itself.

XVI.

Extra-territoriality: Conclusion

[72] As I have said, it is my opinion that the pith and substance of the ***Act*** is the matter of the legal liability owed to the Government of British Columbia by tobacco manufacturers for the cost of health care benefits provided in British Columbia to insured persons in British Columbia as a result of exposure in British Columbia to tobacco products, in breach in British Columbia of a duty owed by tobacco manufacturers to persons in British Columbia. That matter is wholly within the Province and comes within s-s. 92(13) of the ***Constitution Act*****, 1867**: "Property and Civil Rights in the Province".

[73] In my opinion, both the purpose and the effect of the ***Act*** are intra-territorial. Any extra-territorial purpose or effect of an application of the ***Act*** to entities outside

British Columbia under s. 4, about which I reach no conclusion, is incidental to the "matter" of the ***Act***, which is, in pith and substance, within the Province. Following the ***Churchill Falls*** case I therefore conclude that the ***Act*** is not unconstitutional on the basis of extra-territoriality.

XVII.

Judicial Independence: The Issue

[74] The Canadian manufacturers argued before Mr. Justice Holmes that the ***Tobacco Damages and Health Care Costs Recovery Act*** was unconstitutional because it prevented the independent exercise of the judicial fact-finding process which should be required before liability could be imposed against the Canadian manufacturers and others in favour of the government on the new cause of action created by s-s. 2(1) of the ***Act***.

[75] Mr. Justice Holmes decided that it was premature to conclude, on the basis only of the provisions of the ***Act*** and Dr. Marais's opinion with respect to the statistical evidence which might be led in this case, that the ***Act*** was unconstitutional on the basis of an infringement of judicial independence. The Canadian manufacturers say that Mr. Justice Holmes's decision on the constitutional issue of judicial independence is wrong and seek to uphold his decision that the

Act is unconstitutional on the ground that it is said to have an extraterritorial purpose and effect on the additional basis that it is unconstitutional because it impermissibly infringes judicial independence.

[76] The Canadian manufacturers state the core question in this way:

> Is it an unconstitutional breach of the principle of judicial independence if in creating a cause of action for the benefit of the Government a Legislature:
>
> (a) directs a court to find essential facts based on an irrational presumption;
>
> (b) limits the ability of the Court to receive relevant evidence necessary to a fair and reliable determination of essential facts in the action, including the rebuttal of the presumption; and
>
> (c) doing so in circumstances where the effect of the statutory rules is to facilitate a favourable outcome for the Government in its capacity as a party?

[77] Incorporating what may be taken to be the legal test for judicial independence into the phrasing of the question, the Canadian manufacturers have restated it:

> ...Would an objective observer who is properly informed of:
>
> (a) the true nature of the aggregate action created by subsection 2(1) of the ***Act***, including its retroactivity;

> (b) the operation and effect of the statutory provisions relating to the definition of the cause of action and its proof; and
>
> (c) the scope and magnitude of the claim;
>
> conclude, from a reasonable and practical perspective, that the Court trying the case was not, in appearance or in fact, independent of the parties or capable of trying it impartially or both?

[78] The position of the Canadian manufacturers is that an objective observer would conclude that the independence of the court was compromised by the legislation, based on these key factors:

> (a) the action has been created for the benefit of the Government;
>
> (b) the rules of evidence and procedure in the ***Act*** were in substance created by a party;
>
> (c) the ***Act*** does not create rules of civil procedure of general application. The ***Act*** creates rules of civil procedure for the benefit of this Plaintiff in this trial against this category of Defendant;
>
> (d) the ***Act*** combines presumptions with evidentiary rules in such a way that the freedom of the Court to find facts based on evidence is subverted;
>
> (e) the ***Act*** bars the Court from receiving evidence which is necessary to a fair and reliable determination of essential facts in the action;
>
> (f) the Court is directed to reach arbitrary and fictional findings of fact favourable to the Government as Plaintiff;

(g) the ***Act*** deprives the Court of the capacity to know the impact of the evidentiary restrictions on its factual findings;

(h) the action is given unrestricted retroactive effect and applies to conduct decades old; and

(i) the ***Act*** is written in support of a claim of unprecedented magnitude.

[79] The provisions of the ***Act*** which give rise to the core of the Canadian manufacturers' arguments are contained in the presumptions in s-s. (2), (3) and (4) of s. 3, arising from the elements of the cause of action set out in s-s. 3(1), when coupled with the privacy provisions in s-s. 2(5). I will set out s. 3 and then s-s. 2(5):

Recovery of cost of health care benefits on aggregate basis

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.

(2) Subject to subsections (1) and (4), the court must presume that

(a) the population of insured persons who were 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 referred to in subsection (1) (a), and

(b) 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).

(3) If the presumptions under subsection (2) (a) and (b) apply,

(a) the court must determine on an aggregate basis the cost of health care benefits provided after the date of the breach referred to in subsection (1) (a) resulting from exposure to the type of tobacco product, and

(b) each defendant to which the presumptions apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product.

(4) The amount of a defendant's liability assessed under subsection (3) (b) may be reduced, or the proportions of liability assessed under subsection (3) (b) readjusted amongst the defendants, to the extent that a defendant proves, on a balance of probabilities, that the breach referred to in subsection (1) (a) did not cause or contribute to the exposure referred to in subsection (2) (a) or to the disease or risk of disease referred to in subsection (2) (b).

...

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

(a) it is not necessary

(i) to identify particular individual insured persons,

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

> (iii) to prove the cost of health care benefits for any particular individual insured person,
>
> (b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits 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,
>
> (c) a person is not compellable to answer questions with respect to the health of, or the provision of health care benefits for, particular individual insured persons,
>
> (d) despite paragraphs (b) and (c), on application by a defendant, the court may order discovery of a statistically meaningful sample of the documents referred to in paragraph (b) and the order must include directions concerning the nature, level of detail and type of information to be disclosed, and
>
> (e) if an order is made under paragraph (d), the identity of particular individual insured persons must not be disclosed and all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons must be deleted from any documents before the documents are disclosed.

[80] The Canadian manufacturers say that the presumptions that any breach of duty proven against them must be taken to have been the cause of the exposure to tobacco, and that no exposure would have occurred but for the breach of duty, move the onus of disproving that causal connection, on the balance of probabilities, onto the Canadian manufacturers under s-s. 3(4), and then takes away the tools for discharging that onus by preventing the Canadian manufacturers from adequately

responding to the presumption of causation by the only means at their disposal, namely, compelling the production of health care records and the answering of questions about the health care of individuals.

[81] The Canadian manufacturers acknowledge that, standing alone, the shift in onus comprised in the presumptions of s-s 3(2) and the rebuttal contemplated in s-s. 3(4) is not necessarily constitutionally problematical. The constitutional problem comes, they say, because the rebuttal process is clogged by the privacy provision in s-s. 2(5). In support of that point they filed a report by Dr. M. Laurentius Marais, an expert on statistical analysis in a medical context, which pointed to the importance of precise details of the history of a representative sampling of known individuals as a check on the statistical information obtained through analysis of a much larger number of anonymous persons. He said this:

> ...the reliability of statistical evidence of the type anticipated in this matter cannot be properly assessed without access to input data pertaining to individual persons, even if the ultimate purpose of the analysis is a cost determination on an aggregate basis alone. Absent such access the reliability of a 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.

[82] Mr. Justice Holmes, in paragraph 67 of his reasons, noted the importance of the exception in privacy provision 2(5)(b), namely, that health care records of individuals may be compelled in accordance with a rule of law, practice, or procedure that requires the production of documents relied on by an expert witness. He noted also in paragraphs 71 and 72 of his reasons that the privacy provisions in paragraphs 2(5)(d) and (e) permit the Court to order the disclosure of a statistically meaningful sample of health care records shorn of personal identifiers. And in paragraph 74 of his reasons, Mr. Justice Holmes noted that the defendants could develop their own evidence by survey and by waivers by individuals. Mr. Justice Holmes concluded that the privacy provisions represent a *bona fide* attempt by the legislature to balance the interests of justice in permitting access to the sources of persuasive evidence, on the one hand, with the interests of patients in the privacy of their individual records and information, on the other hand. He examined cases from the United States where a similar balance was striven for and achieved.

[83] Mr. Justice Holmes's overall conclusion on this constitutional issue was that the raising of the issue at this

stage was premature and that the issue should be dealt with in the discovery and evidentiary processes of the trial action.

XVIII.

Judicial Independence: The Test

[84] The test applied by Mr. Justice Holmes as the test for the determination of whether judicial independence has been infringed has not been disputed by the Canadian manufacturers. It is derived from the reasons of Chief Justice Howland in ***R. v. Valente (No. 2)***(1983), 145 D.L.R. (3d) 452 (Ont. C.A.), Mr. Justice Le Dain for the Supreme Court of Canada in the same case, (1985), 24 D.L.R. (4th) 161, and Mr. Justice Gonthier, for the majority of the Supreme Court of Canada, in ***Mackin v. New Brunswick*** (2002), 209 D.L.R. (4th) 564 at p. 585. Would a reasonable person, fully informed of all of the circumstances, consider that a particular court enjoyed the necessary independent status. Not only does the court have to be truly independent but it must also be reasonably seen to be independent. Both individual independence and institutional independence are required, but, nevertheless, in each of those dimensions, independence is designed to prevent any undue interference in the judicial decision-making process, which must be based solely on the requirements of law and justice. Furthermore, within those two dimensions will be found the

three essential characteristics of judicial independence, namely, financial security, security of tenure and administrative independence. (I am paraphrasing the synthesis made by Mr. Justice Gonthier in ***Mackin*** at p. 585.)

XIX.

Judicial Independence: Conclusions

[85] I propose now to state my own conclusions on the issue of whether the ***Act*** is unconstitutional on the basis that it infringes on judicial independence.

[86] Every aspect of the litigation under the ***Act*** will be tried by a judge of the British Columbia Supreme Court. In the case of such a judge there is neither an infringement of individual independence or of institutional independence through violation of the three elements which Mr. Justice Gonthier in ***Mackin*** said formed the essential characteristics of judicial independence, namely, financial security, security of tenure and administrative independence.

[87] What the ***Act*** does is shift, from the government to the defendants, the burden of proving or disproving that the breach of duty caused the exposure to the tobacco product. And then the ***Act***, in the interests of privacy of patients,

circumscribes to some extent the way in which the burden of disproving that causation can be discharged. In my opinion those provisions, like the provisions for the new cause of action itself, represent a change in the law. That change, like the new cause of action itself, may be thought to be unfair or unjust or not in accordance with established legal principles in what may be thought to be similar cases. But there is no authority that I know to the effect that a distaste for the newly created law, whether constitutionally, legislatively or judicially created, has been found to compromise judicial independence. The judge's function is to apply the law as the judge discerns it. It is at the very heart of judicial independence that the law be applied, however distasteful it may be thought to be. See ***Authorson v. (Canada) Attorney General*** (2003), 227 D.L.R. (4th) 385 (SCC). The provisions of the ***Act*** relating to the presumptions of causation and to the protection of privacy do not compromise judicial independence in a way which would make the ***Act*** unconstitutional on that ground.

[88] The judge who tries this case, applies the presumptions, and assesses the evidence to determine whether, on the balance of probabilities, the presumptions have been rebutted, will have to address issues about the weight of the evidence and

about the proper terms of a disclosure order under paragraphs 2(5)(d) and (e). It may be open to him to address questions about whether a particular application of the provisions of the ***Act*** would be constitutionally impermissible, all of which I cannot now predict. But I do not agree with Mr. Justice Holmes that the argument that the whole ***Act*** is unconstitutional on the ground that it infringes judicial independence is simply premature. In my opinion the ***Act*** as a whole is not unconstitutional on the ground that the whole act or any part of it infringes judicial independence and I would make that decision now, for once and for all.

[89] In relation to the complaints about the ***Act*** referred to in the Canadian manufacturers' factum under letter headings (a) to (i) as I set them out in Part XVII, it is my opinion that they are complaints about the alleged unfairness of the law which the judge is required to make the basis of his or her decision and are not complaints about the independence of the judge individually. A judge is not permitted to apply absolute standards of fairness in carrying out the judicial function and a reasonably informed member of the public, understanding the ***Act*** and the circumstances of the litigation, would not conclude that the judge trying an action under the

Act had lost either judicial independence or judicial impartiality.

XX.

Retroactivity: The Canadian Manufacturers' Issue

[90] The Canadian manufacturers do not rely on the rule of law in all its aspects to assert that the ***Tobacco Damages and Health Care Costs Recovery Act*** is unconstitutional. Rather they say this:

> The retroactivity provided by s. 10 of the ***Act*** is unconstitutional because:
>
> (i) the wrong created by the ***Act*** has the character of an offence or prohibition, the consequences of the commission of this wrong include amounts that are penal and the ***Act*** itself has the character of an attainder.
>
> (ii) in any event, even if the wrong is not characterized as penal, it is nevertheless a wrong which was not known to the civil law prior to its enactment.

[91] I will repeat s. 10 of the ***Act***:

> **Retroactive effect**
>
> 10 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.

Section 6 is also relevant to the retroactivity question since it revives actions formerly barred by limitation periods, but it was not a significant part of the focus of the Canadian manufacturers' argument and I will not set it out or discuss it.

[92] As I understand the position of the Canadian manufacturers they concede that the constitutional principles encompassed within the rule of law are not free-standing grounds for striking down a legislative enactment of the Parliament of Canada or a Provincial Legislature unless the relevant principle has been incorporated into the constitution, a statute, or a judicial decision having the force of general law. In this respect their position differs from the position argued on behalf of Philip Morris Incorporated and Philip Morris International Inc., to which I will come later in these reasons.

[93] The Canadian manufacturers' argument is not that the legislature cannot make an Act retroactive by a specific provision doing so. Rather they say that in this particular case the retroactive provision is such that in its application it would so offend established principles of law that it must, in itself, be unconstitutional.

[94] The essence of the Canadian manufacturers' first overall submission as set out at the start of this Part is that the ***Act*** is penal and so offends s. 11, paragraph (g), of the ***Canadian Charter of Rights and Freedoms*** which prohibits the retroactive application of law to acts or omissions that constitute offences under Canadian law, international law, or the general principles of law recognized by the community of nations. Reference is also made by the Canadian manufacturers to paragraphs (a), (b), (d), and (i) of s. 11 of the ***Charter*** in support of their argument that if the ***Act*** is penal it is unconstitutional.

[95] The Canadian manufacturers' first point on their first submission is that the wrong created by the ***Act*** has the character of an offence or prohibition. That is said to be so because once a tobacco related wrong is proven against a Canadian manufacturer the presumptions establish that the wrong caused the exposure to the tobacco product and the presumptions also set an artificial cost to the government and so an artificial recovery. This point is simply wrong. The presumption is rebuttable. And the point is supported in the argument by the wrong premises, namely, that a breach of duty to one person triggers a liability to the government for the cost of providing health care to everyone exposed anywhere at

any time. The errors in those conclusions are discussed in the Parts of these reasons relating to extra-territoriality and I will not repeat them.

[96] The Canadian manufacturers' second point on their first submission is that the ***Act*** is penal because it includes statutory breaches as tobacco related wrongs and the ***Trade Practices Act***, the ***Competition Act***, and the ***Combines Act*** all contain penal provisions. That point is wrong because the penal provisions of those ***Act***s are not incorporated by reference or otherwise in the ***Tobacco Damages and Health Care Costs Recovery Act.***

[97] The Canadian manufacturers' third point on their first submission is that the retroactivity is penal because evidence disappears or becomes twisted with the passage of time. That is true. It affects all parties who bear burdens of proof or rebuttal, including the government. It may hit the defendants hardest. But it does not make the ***Act*** penal or unconstitutional.

[98] The Canadian manufacturers' fourth point on their first submission is that the definition of "cost of health care benefits" to include future costs; the definition of "disease" to include general deterioration of health; and the attribution of quantums of damages on the basis of market

share, show that the ***Act*** is penal in character. In my opinion future costs and general deterioration of health are traditional elements of tort damages and the market share attribution of quantum is to some extent arbitrary but is rebuttable.

[99] The Canadian manufacturers' fifth point on their first submission is that the ***Act*** imposes liability on tobacco manufacturers who commit a tobacco related wrong but does not impose any liability on wholesalers or retailers who commit such a wrong. And so, it is said, the ***Act***, by its lack of wider scope, is said to be penal. In my opinion an Act does not become penal simply because it might have been cast more widely or its bases for liability made more extensive. Perhaps tobacco related wrongs could not have been proven against wholesalers or retailers. I do not understand that the Canadian manufacturers are saying that they could.

[100] Finally, on the Canadian manufacturers' first overall submission, the Canadian manufacturers say that the ***Act*** is like a Bill of Attainder in that the legislature has made findings of wrong-doing and imposed liability for damages and that the courts are simply a cipher to give an air of judicial legitimacy to a legislative condemnation. I reject that argument.

[101] The essence of the Canadian manufacturers' second overall submission, as I have set it out at the beginning of this Part, and as I understand it, is that if the ***Act*** creates a wrong in the past which was not known to the civil law at the relevant time in the past or, indeed, at any time before the enactment, then the retroactivity of that enactment is contrary to established principles of law (and not simply the rule of law) and the ***Act***, at least to the extent of that retroactivity, should be struck down. (If I have not understood this point correctly and if, indeed, it is an argument that this retroactivity is contrary to the rule of law and that the rule of law is part of our constitution, the breach of which in the enactment makes the enactment unconstitutional, then I will address that argument in relation to the Philip Morris submissions on the rule of law.)

[102] The Canadian manufacturers say on their second overall submission that the presumptions in s. 3 create "incontestable fictions" that if a defendant committed a tobacco related wrong then the wrong caused the exposure. But that is not so under the ***Act.*** The liability of a defendant is reduced and may be reduced to nil if the defendant proves, on a balance of probabilities, that the breach proven against the defendant did not cause or contribute to the exposure of the population

of insured persons to the tobacco product. The burden of proof is moved, some may think unfairly, but it is still rebuttable on the balance of probabilities, and that does not give rise to an "incontestable fiction."

[103] And the Canadian manufacturers say, in this submission, that Mr. Justice Holmes considered that the retroactivity of the ***Act*** was permissible because the tobacco related wrong on which liability depends must have been a wrong when it occurred; but, so the manufacturers say, the implication is that if the tobacco related wrong was not a wrong in the past, then to make it a wrong retroactively would have caused Mr. Justice Holmes to decide this point differently. The argument goes on then to say that the new action by the government depends on a new and different wrong and if only Mr. Justice Holmes had realized that then his decision on retroactivity would have been different. This argument is nimble but it is not right. No such implication can be drawn from Mr. Justice Holmes's reasons; quite the contrary.

[104] The Canadian manufacturers also say that the ability to know laws that create wrongs must be a constitutional right, because without it other constitutional rights are undermined, including the supremacy of the rule of law, the supremacy of Parliament, the constitutional guarantee of the right to vote,

an independent bar and an independent judiciary. Reference was also made to the fact that the text of the European Convention has constitutionally banned retroactive legislation. The rational connection of these arguments to the issue of unconstitutional retroactivity in this case is not sufficiently firm to make the arguments persuasive.

[105] I do not consider that the retroactivity aspects of the ***Act*** are such as to make either the ***Act*** as a whole or any retroactive application of the ***Act*** unconstitutional.

XXI.

The Rule of Law: The Philip Morris Issue

[106] The argument advanced by Philip Morris is that a number of aspects of the rule of law are infringed by the ***Tobacco Damages and Health Care Costs Recovery Act***, namely: the requirement of generality in the laws; the requirement that laws should be prospective and not retroactive; the requirement of equality in the law; the requirement that the Crown be bound by the ordinary law; and the requirement of a fair trial.

[107] The second step in the argument is that the rule of law is part of the constitution of Canada. Reference is made to

the preamble to the ***Constitution Act, 1867***: that the Provinces be united into One Dominion under the Crown "with a constitution similar in principle to that of the United Kingdom." Reference is also made to the preamble to the ***Constitution Act, 1982***: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:" and s-s. 52(2) of the ***Constitution Act, 1982*** which says that the Constitution of Canada "includes" listed and scheduled Acts. The word "includes" may be used to infer that other elements, including the rule of law, may also be included.

[108] The third step in the argument is to say that principles underlying the rule of law are not simply guidelines to constitutional and statutory interpretation but legal norms which are a part of the positive law and can be enforced as such, including, where appropriate, being used to strike down legislation on the ground of its infringement of the rule of law. Reference is made, among other cases, to ***Reference Re. Provincial Court Judges***, [1997] 3 S.C.R. 3 at paragraphs 91-2, 95 and 109; ***Reference Re. Secession of Quebec***, [1998] 2 S.C.R. 217, at paragraphs 49-54 and 72; ***Robert c. Quebec [Conseil de la magistrature]***, [2000] J.Q. No. 470 (Quebec C.A.); ***Mackin v. New Brunswick***, [2002] 1 S.C.R.

405 at paragraph 69-70; and ***Ell v. Alberta***, 2003 SCC 35 at paragraphs 18-24 and 52-53. Additional confirmation of this step in the argument rests on s-s. 52(1) of the ***Constitution Act, 1982***. That subsection says that "any law that is inconsistent with the provisions of the constitution is of no force or effect".

[109] In my opinion the weakness in this argument lies in the fact that the "Rule of Law" has two distinct and different meanings.

[110] The first meaning is revealed by the phrase: "A government of laws and not of men." Even the Sovereign, or the Sovereign in Parliament, or Parliament and the Legislatures alone, are not above the law. It is a fundamental principle of democracy that we are all, without exception, subject to the law in our persons and in our institutions. In this meaning the rule of law is absolute.

[111] The second meaning of the "Rule of Law" is that it embraces a collection of very fundamental principles which our society and many other societies regard as badges of sound democratic government under law. The principles listed by Philip Morris and set out in the first paragraph of this Part are among those fundamental principles. But in my opinion those principles are not absolute. They must be balanced,

often against each other, and certainly against other laws which promote societal goals and purposes. In my opinion this is the point that was being made by Chief Justice McLachlin in ***Babcock v. Canada (Attorney General)*** (2002), 214 D.L.R. (4th) 193 where, in these paragraphs of her reasons, which were agreed with by all of the judges, she said this:

> 54 The respondents in this case challenge the constitutionality of s. 39 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.
>
> 55 The unwritten principles must be balanced against the principle of Parliamentary sovereignty.
>
> ...
>
> 57 I share the view of the Federal Court of Appeal that s. 39 does not offend the rule of law or the doctrines of separation of powers and the independence of the judiciary. It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.
>
> [Emphasis added]

[112] It is inherent in the concept of balancing, that the balance must be capable of falling either way. Where one side of the balance is an enactment of Parliament or a Legislature then the other side of the balance, an infringement of one of

the fundamental principles comprised within the second meaning of the rule of law, must be weighed carefully before the balance could be thought to fall in favour of striking down an enactment of a duly elected legislative body.

[113] I do not think that I should try to describe in any general terms the guidelines for the weighing and balancing process I have described. They should be allowed to develop case by case in this new area of constitutional law.

[114] In this particular case I consider that there is no real infringement of the principle of equality, the principle of generality, the principle that the Crown be bound by the ordinary law, or the principle that the trial should be fair, though I would say that each of those principles does not necessarily carry the same weight. Any infringement of those principles in this case is immediately outweighed in the balance by the principle of legislative sovereignty. The principle that legislation should be prospective rather than either retrospective or retroactive presents in this case a more even balance, but a significant component of that balance is that the tobacco manufacturers will not be held liable to the government except in relation to a tobacco related wrong which constituted a breach of a duty at the time the breach occurred. In my opinion the balance must fall in this case in

favour of legislative sovereignty and against the principle that laws should generally be either prospective or only benignly retroactive.

[115] Philip Morris has asked that, on the basis of the rule of law, the ***Act*** be struck down as unconstitutional; or alternatively, that the application of the ***Act*** to these proceedings be declared unconstitutional; or finally, that the ***Act*** be declared to be contrary to the rule of law. For the reasons I have given I would not grant any of those remedies.

XXII.

Conclusions

[116] I would allow the appeal and I would make the following declarations and orders:

a) The ***Tobacco Damages and Health Care Costs Recovery Act*** is constitutionally valid legislation.

b) The Orders of Mr. Justice Holmes dated 5 June 2003 in action numbers S010423, S010424, and S010425, and the Order of Mr. Justice Holmes dated 5 June 2003 in action number S010421 are set aside.

c) In so far as action numbers S010423, S010424 and S010425 seek declarations that ***The Tobacco Damages and Health Care Costs Recovery Act*** is not constitutionally valid legislation or that it violates the rule of law, the actions are dismissed.

d) The applications of the *ex juris* defendants pursuant to (then) rules 13(10) and 14(6), regarding the issue of jurisdiction, are remitted to the Supreme Court of British Columbia for consideration and decision on the basis that the ***Tobacco Damages and Health Care Costs Recovery Act*** is constitutionally valid legislation.

e) The Crown should have its costs in this Court and in the Court below.

[117] This appeal was confined to the question of whether the ***Tobacco Damages and Health Care Costs Recovery Act*** was constitutionally valid. In the course of my reasons I said that the question of whether the ***Act*** was applicable to the defendants who were brought into the action only through s. 4 was not being decided by me in these reasons, but that the overall constitutional validity of the ***Act*** was not compromised by the unresolved issue of whether the ***Act*** was constitutionally applicable to those defendants, even if it were ultimately to be decided that the ***Act*** was not constitutionally applicable to them. Subject to that unresolved question of constitutional applicability, I would like to add that my decision that the ***Act*** is constitutionally valid is not made in an abstract vacuum but is made in the context of the ***Act***'s application to the Canadian manufacturers who, it is alleged, committed "tobacco related wrongs" in British Columbia, and that to that extent the decision on

constitutional validity cannot be separated, in its constitutionally relevant factual context, from a decision on the constitutional applicability of the ***Act*** to the Canadian manufacturers. But that is not part of the formal order which I would make, as set out in the previous paragraph of these reasons, since it is my understanding that the question of constitutional applicability was not directly a part of the question before the Court.

"The Honourable Mr. Justice Lambert"

Reasons for Judgment of the Honourable Madam Justice Rowles:

I. Introduction

[118] Mr. Justice Lambert has provided a brief legislative history of the ***Tobacco Damages and Health Care Costs Recovery Act***, S.B.C. 2000, c. 30, (the ***Act***) including the striking down of the ***Tobacco Damages Recovery Act***, S.B.C. 1997, c. 41 on grounds of extraterritoriality. He has also set out the history of the present litigation and outlined the positions of the parties on the appeals.

[119] Two orders are under appeal. The order made in S010421, which is the Province's aggregate action, reads:

> THIS COURT ORDERS that the applications are granted and this action is dismissed.

[120] The applications referred to in that order are those brought under (then) Rule 14(6) and Rule 19(24) by JTI-Macdonald Corp.; Imperial Tobacco Canada Limited; Rothmans, Benson & Hedges Inc.; and the Canadian Tobacco Manufacturers' Council, as well as those brought by the defendants R.J. Reynolds Tobacco Company; R.J. Reynolds Tobacco International, Inc.; Rothmans Inc.; British American Tobacco (Investments) Ltd.; B.A.T. Industries p.l.c.; and Carreras Rothmans Limited under (then) Rule 13(10), and of the defendants Ryesekks

p.l.c.; Philip Morris Incorporated; and Philip Morris International, Inc., under (then) Rules 13(10) and 14(6).

[121] The other order under appeal is the declaratory order made in the Canadian manufacturers actions S010423, S010424 and S010425, which reads:

> THIS COURT ORDERS AND DECLARES that the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, Chapter 30, is and was at all material times inconsistent with the provisions of the Constitution of Canada, *ultra vires* the Legislative Assembly of British Columbia, invalid, and of no force and effect;

[122] I agree with my colleagues that the appeals brought by the Province from those orders must be allowed and the orders set aside.

[123] I agree with Mr. Justice Lambert, for the reasons he states, that the ***Act*** is not unconstitutional on the ground that it interferes with judicial independence or violates the rule of law. I also agree with Mr. Justice Lambert's reasons for concluding that the retroactivity provision in s. 10 of the ***Act*** is not unconstitutional.

[124] The only issue I will address in these reasons is whether the ***Act*** is constitutionally flawed because it is impermissibly extraterritorial in its purpose or effect.

[125] I do not regard these reasons on the question of the constitutional validity of the ***Act*** to be at variance with those of Mr. Justice Lambert but they explain in somewhat different terms my reasons for concluding that the aggregate cause of action created by the ***Act*** does not, in pith and substance, derogate from or eliminate extra-provincial rights.

[126] The ***Act*** enables the government to bring an aggregate action against tobacco manufacturers to recover health care costs incurred in British Columbia that have been caused or contributed to by a tobacco related wrong. The ruling of Mr. Justice Holmes on the issue of extraterritoriality was based on his conclusion that, in the cause of action created by the legislation, the defendant manufacturers would be liable for "exposure" which might occur anywhere.

[127] Mr. Justice Holmes was of the view that "unconfined exposure" is what would give the cause of action created by the ***Act*** its extraterritorial effect:

> [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.
>
> [the 2003 Judgment]

[128] In holding that the ***Act*** is unconstitutional by virtue of what he regarded as its extraterritorial scope, Mr. Justice Holmes stated, at paragraph 221, that the "structure of the 2000 *Act* has the *prima facie* appearance of being *intra vires* the power of the Province, however close analysis substantially undermines that view." He concluded:

> [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.
>
> [Underlining added.]

[129] It is the appellant's position that Mr. Justice Holmes misconstrued the provisions of the ***Act*** and, in particular, those provisions which ground the aggregate cause of action in British Columbia, when he reached his conclusion concerning the basic purpose and effect of the ***Act***. I agree with the appellant that if, on a proper construction of the ***Act***, the fault element in the aggregate cause of action created by the ***Act*** is established only if it takes place in British Columbia, the respondents' argument that the purpose or effect of the ***Act***, in pith and substance, is extraterritorial, fails.

II. Provincial legislative jurisdiction

[130] The appellant submits that the ***Act*** is within provincial legislative jurisdiction under the ***Constitution Act, 1867 (U.K.)***, 30 & 31 Vict., c. 3 because the Province has exclusive jurisdiction under s. 92 to make laws in relation to:

> 13. Property and Civil Rights in the Province.
>
> 14. The Administration of Justice in the Province, including ... Procedure in Civil Matters in those Courts.
>
> * * *
>
> 16. Generally all Matters of a merely local or private Nature in the Province.

[131] There is no issue that under head 13 of s. 92 of the ***Constitution Act, 1867***, the Province has exclusive jurisdiction to make laws in relation to property and civil rights in the Province. What is meant by "civil rights" is described by Professor Hogg in *Constitutional Law of Canada*, looseleaf ed., vol. 1 (Toronto: Carswell, 1997) at 21-4, as follows:

> The civil rights referred to in the Constitution Act, 1867 comprise primarily proprietary, contractual or tortious rights; these rights exist when a legal rule stipulates that in certain circumstances one person is entitled to something from another.

[132] That legislation creating new civil causes of action comes within s. 92(13) is undisputed: ***General Motors of Canada Ltd. v. City National Leasing Ltd.***, [1989] 1 S.C.R. 641.

[133] There is also no issue that head 14 of s. 92 of the ***Constitution Act, 1867*** provides the necessary legislative authority for those provisions in the ***Act*** that bear on the rules of civil procedure and evidence: ***Reference re Status of the Supreme Court of British Columbia*** (1882), 1 B.C.R. 153 at 243 (S.C.C.) (appendix to ***Sewell v. British Columbia Towing Co.***, the "Thrasher" Case); ***Hunt v. T&N plc***, [1993] 4 S.C.R. 289 at 320; ***Ontario (A.G.) v. Scott***, [1956] S.C.R. 137 at 141 and 147-148.

[134] Head 16 of s. 92 of the ***Constitution Act, 1867*** may also be relevant because it has been held to be the source of the Province's general jurisdiction over matters pertaining to health and, in particular, the health care delivery system, and to the cost and efficiency of health care services: ***Schneider v. The Queen***, [1982] 2 S.C.R. 112; and ***R. v. Morgentaler***, [1993] 3 S.C.R. 463 at 490-491.

[135] The governing authority respecting challenges to provincial legislation on the basis of its effect on extra-provincial rights is ***Reference re Upper Churchill Water Rights Reversion Act 1980 (Newfoundland)***, [1984] 1 S.C.R. 297 ("***Churchill Falls***"). In that case, the Supreme Court of Canada concluded that legislation can only successfully be impugned if it is held to have been, in pith and substance,

legislation in relation to extra-provincial rights. In that regard, Mr. Justice McIntyre stated, at 332:

> Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial 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 if it is cloaked in the proper constitutional form, it will be *ultra vires*.

[136] In *Constitutional Law of Canada*, *supra*, Professor Hogg states, at 15-7, that the "matter" or "pith and substance" of legislation challenged on division of powers grounds is a function of the "dominant ... characteristic" of that legislation. As to identifying the pith and substance of legislation, Professor Hogg observes at 15-14 to 15-15:

> In characterizing a statute – identifying its "matter" or "pith and substance" – a court will always consider the effect of the statute, in the sense that the court will consider how the statute changes the rights and liabilities of those who are subject to it.

[137] In this case, identifying the pith and substance of the ***Act*** requires a careful examination of its various provisions, including the definitions it contains.

III. What are the territorial constraints on an aggregate action brought under s. 2(1) of the *Act*?

[138] The thrust of the argument on behalf of the Canadian manufacturers regarding the effect of the legislation is summed up in the respondents' submission that, "All breaches anywhere in the world are captured so long as there was at some time a single breach of duty owed to a person in British Columbia and once that kind of breach of duty has occurred, the Act's presumptions come into play".

[139] For the reasons which follow, I do not agree that that is the effect of the legislation.

[140] To determine whether the ***Act*** falls within the field of provincial competence, it is essential to examine the elements that ground the aggregate cause of action contemplated by ss. 2(1) and 2(4) of the ***Act***.

[141] The statutory cause of action conferred on the government is set out in s. 2(1) of the ***Act***:

> **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.
>
> [Underlining added.]

[142] Under the ***Act***, an action brought by the government may be for the recovery of "the cost of health care benefits"

caused or contributed to by a "tobacco related wrong". Those terms are defined in s. 1(1) of the ***Act***:

> "**cost of health care benefits**" means the sum of
>
> (a) the present value of the total expenditures by the government for health care benefits provided for insured persons resulting from tobacco related disease or the risk of tobacco related disease, and
>
> (b) the present value of the estimated total expenditure by the government for health care benefits that could reasonably be expected will be provided for those insured persons resulting from tobacco related disease or the risk of tobacco related disease;
>
> * * *
>
> "**tobacco related wrong**" means,
>
> (a) a tort committed in British Columbia by a manufacturer which causes or contributes to tobacco related disease, or
>
> (b) 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;

[143] I agree with Mr. Justice Lambert that the reason why paragraph (b) is required in the definition of "tobacco related wrong" is that the action described in s. 2(1) is not within the traditional description of a tort action; instead, it is a new form of action that is not a subrogated claim, in which the government may seek to recover health care benefits

on an aggregate basis. An examination of the ***Act***, which is attached as an appendix to the reasons of Madam Justice Prowse, shows that a traditional tort action brought by an individual or as a class action is also contemplated by, and to some extent may benefit from, some of the provisions it contains.

[144] I also agree with Mr. Justice Lambert's analysis and conclusion that ***Moran v. Pyle National (Canada) Ltd.*** (1973), [1975] 1 S.C.R. 393, which adopted the analysis of the Judicial Committee of the Privy Council in ***Distillers Co. (Biochemicals) Ltd. v. Thompson***, [1971] A.C. 458, stands for the proposition that the place where the breach of duty occurs in cases of defective products, cases of failure to warn, and cases of misrepresentation to the consumer and ultimate user, is the place of purchase, consumption and subsequent injury.

[145] The term "tobacco related disease" which appears in part (a) of the definition of "tobacco related wrong" is also defined in s. 1(1). It means "disease caused or contributed to by exposure to a tobacco product." The word "exposure" is defined as well. It means "any contact with, or ingestion, inhalation or assimilation of, a tobacco product, including any smoke or other by-product of the use, consumption or combustion of a tobacco product".

[146] If the defined terms were included in s. 2(1) of the ***Act,*** the section, read as a single sentence, would provide:

> 2 (1) The government has a direct and distinct action against a manufacturer to recover [the present value of the total expenditure by the government for health care benefits provided for insured persons resulting from] [disease caused or contributed to by exposure to a tobacco product] caused or contributed to by 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].

[147] Subsection 2(4) provides:

> (4) In an action under subsection (1), the government may recover the cost of health care benefits
> (a) for particular individual insured persons, or
> (b) on an aggregate basis, for a population of insured persons as a result of exposure to a type of tobacco product.

[148] As noted earlier, Mr. Justice Holmes concluded that "exposure" is an essential element of the aggregate action and that "unconfined exposure" gives the cause of action an extraterritorial component. The essence of his judgment leading to the conclusion that the ***Act*** is constitutionally colourable is this:

> [242] ... 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.

[149] In my respectful view, exposure is not the element upon which liability under the ***Act*** is founded.

[150] The fault element of the aggregate action created by the ***Act*** is territorially limited through the definition of "tobacco related wrong", namely, a breach of a duty owed to persons in British Columbia who have been exposed or might become exposed to a tobacco product.

[151] The cause of action conferred by s. 2(1) and brought on an aggregate basis pursuant to s. 2(4) provides for recovery of expenditures provided for a population of insured persons. The population of insured persons in respect of whom expenditures can be claimed must consist of persons who at the time of the breach were persons to whom the duty was owed, namely, persons in British Columbia. The expenditures that can be recovered under s. 2(1) are only expenditures which are incurred by the Government of British Columbia and, as such, are entirely grounded in the Province.

[152] It is true that the ***Act*** does not expressly stipulate that the "exposure" must have occurred within British Columbia

but the relevant exposure is nevertheless grounded in the Province by two important requirements of the ***Act***:

(i) The exposure must result from a breach of duty against persons in British Columbia. The cause of action described in s. 2(1) provides for recovery only of those expenditures for health care benefits provided to a population of insured persons where the exposure and the resulting disease were caused or contributed to by the breach of duty that triggers liability. This is a breach of duty owed to this population of insured persons, who at the time of the breach must be persons in British Columbia.

(ii) The exposure must lead to disease in, and the expenditure of health care benefits for, a population of insured persons in British Columbia.

[153] While the process of disease in an individual smoker can begin anywhere, it is only tobacco related disease present in British Columbia (i.e. disease in a population of insured persons for which the Government of British Columbia has incurred the costs of health care benefits) that can come within the government's aggregate action. Although disease may develop and may manifest itself over time, and possibly in more than one jurisdiction, it is not the subject of any

rights or liabilities under the ***Act*** unless and until it becomes disease present in British Columbia.

[154] The ***Act's*** treatment of "exposure" reflects a recognition that it is unrealistic to expect that British Columbians who have smoked or who have continued to smoke as a result of a breach of duty owed by a manufacturer will have confined their smoking to British Columbia. It is possible that following the breach, some insured persons may leave British Columbia, continue to smoke and may even suffer disease outside the Province and then return to British Columbia where they become part of the population of insured persons for whom treatment is provided. However, the right of the government to recover expenditures for health care benefits provided to these insured persons depends on the extent to which the exposure and the resultant disease can be said to have been caused or contributed to by the breach of duty owed to these insured persons as British Columbians.

[155] Similarly, it is also possible that persons resident outside British Columbia may begin to smoke and then immigrate from other countries or migrate from other provinces to British Columbia, suffer tobacco related disease and become part of the population of insured persons for whom treatment is provided. The right of the government to recover the

expenditures for that treatment will depend upon whether the requirements of the cause of action conferred by s. 2(1) of the ***Act*** are met. If immigrants or migrants stopped smoking before coming to British Columbia, the expenditures are not recoverable. If immigrants or migrants continued to smoke after coming to British Columbia, the expenditures incurred by the government will be recoverable, but only if

(a) the immigrants or migrants continued to smoke as a result of a breach by a manufacturer of a duty owed to them when they were in British Columbia, and

(b) the breach can be found to have caused or contributed to the disease and expenditures.

[156] Sections 2(5) and 3 of the ***Act*** set out procedural rules for an action by the government for the recovery of the cost of health care benefits on an aggregate basis.

[157] Subsection 2(5)(a) provides that, in an aggregate action, it is not necessary to provide information or proof related to particular individual insured persons, or the identity of those persons. Subsections 2(5)(b) and (c) set out that, except as provided under a rule that requires the production of documents relied on by an expert witness, health care records and documents for individual insured persons are not compellable, and no person is compellable to answer

questions regarding the health of, or provision of health care benefits for, particular individual insured persons. These restrictions are qualified by ss. 2(5)(d) and (e), which set out a mechanism for the discovery of a "statistically meaningful sample" of those records, shorn of personal identifiers.

[158] Subsection 3(1) provides that in such an action the government must prove, on a balance of probabilities, that: (a) the defendant breached a duty owed to persons in British Columbia in respect of a type of tobacco product (for instance, cigarettes); (b) exposure to that type of tobacco product can cause or contribute to disease; and (c) during all or part of the period of the breach of duty or obligation, the type of tobacco product, manufactured or promoted by the defendant, was offered for sale in British Columbia.

[159] Once this burden has been met by the government, two presumptions are triggered under s. 3(2). The court must presume: (a) that the population of insured persons who were exposed to the type of tobacco product, manufactured or promoted by the defendant, would not have been exposed but for the breach; and (b) that such exposure caused or contributed to disease or the risk of disease in a portion of that population of insured persons.

[160] Subsection 3(3) makes each defendant to whom the presumptions in s. 3(2) apply *prima facie* liable for the cost of health care benefits paid after the date of the breach for the treatment of disease related to the type of tobacco product in question on the basis of the defendant's market share in that type of tobacco product. Under s. 3(4), the share of such liability can be reduced or readjusted among defendants to the extent that a defendant proves that its breach did not cause or contribute to the exposure or disease in the population of insured persons.

[161] Section 4 of the ***Act*** provides a mechanism for joint liability. Subsection 4(1) provides that defendants may be jointly and severally liable for the consequences under the ***Act*** if they jointly breached the duty referred to under s. 2(1). The effect of s. 4(2) is to provide that whether a joint breach under s. 4(1) has occurred will depend on common law, equitable or statutory rules that exist independently of the ***Act***.

[162] The question of whether or to what extent the government is entitled to recover the cost of health care benefits claimed in its action is a matter of evidence. Speculation as to the effect of immigration and migration on the aggregate claim is not a proper foundation for making such

determinations and is irrelevant to the proper construction of the ***Act***.

IV. The distinction between choice of law and constitutional principles

[163] A fundamental difference between the positions of the parties is the relevance of the *lex loci delicti* choice of law rule to the validity and applicability of the statutory cause of action created by s. 2(1) of the ***Act***. The Canadian manufacturers argue that that rule generally governs questions of territoriality and even suggest that the rule was constitutionalized by Mr. Justice La Forest in ***Tolofson v. Jensen***, [1994] 3 S.C.R. 1022. The appellant argues that the rule is not applicable to the wrong which grounds the aggregate cause of action created by the ***Act*** but even if it were applicable, the statutory cause of action does not violate it because the *locus* of the wrong is in British Columbia.

[164] Choice of law and constitutional validity questions stand in close proximity to one another in this case because the impugned ***Act*** creates a statutory cause of action in which relevant characteristics of the defendants are clearly identified. Nevertheless, it is fundamental to a proper analysis of the territoriality issue in this case to recognize

that choice of law principles and constitutional principles are distinct from one another.

[165] The respondents focus on the choice of law question and rely in large part upon ***Tolofson***, *supra*. However, as Mr. Justice La Forest wrote, at 1039, the question of which choice of law rule is appropriate in a tort action is contingent upon the tort "arising outside a court's territorial jurisdiction". In other words, some extra-territoriality must be determined to be present before it is appropriate to turn to questions of choice of law. Thus, even if the analogy could be drawn between a tort such as that under consideration in ***Tolofson***, *supra*, and the "tobacco related wrong" in the ***Act***, it must first be established that the wrong at issue does, in fact, arise "outside the [British Columbia] court's territorial jurisdiction" before choice of law becomes relevant.

[166] Both the legislature and the courts of a province are limited with regard to the territorial scope of their authority. The relationship between the limits imposed on each of those bodies describes the relationship between constitutional territoriality principles and choice of law principles. In ***Tolofson***, *supra*, Mr. Justice La Forest said in *obiter*, at 1065, that "the courts would appear to be limited

in exercising their powers to the same extent as the provincial legislatures". A more graded demarcation of the relationship was revealed further in the words of Mr. Justice Binnie in ***Unifund Assurance Co. v. Insurance Corp. of British Columbia***, [2003] 2 S.C.R. 63 in his discussion of the effect of territorial limits on the scope of provincial legislative authority on the applicability of laws of the province to matters with varying degrees of connection to the province. He said at paragraph 58, and again at paragraph 80, that, "a 'real and substantial connection' sufficient to permit the court of a province to take jurisdiction over a dispute may not be sufficient for the law of that province to regulate the outcome".

[167] In this case, the ***Act*** itself defines "tobacco related wrong" and describes the parties. Thus, if the aggregate cause of action, which already limits the scope of the action and the parties, is constitutionally valid in its territoriality, it would be reasonable to say that no choice of law question will arise. If the cause of action is constitutionally valid in its territoriality, when a manufacturer is properly named under the statutory cause of action there will inherently be a "sufficient connection" in the cause of action for the law of British Columbia to apply.

[168] The relationship between the choice of law "sufficient connection" test and the constitutional "pith and substance" test is a difficult one to draw in stark lines. However, Mr. Justice Binnie does suggest in ***Unifund***, *supra*, that the "sufficient connection" test might bear upon both the validity and the applicability of the provincial legislation. In reviewing recent jurisprudence concerning the territorial application of provincial statutes he states at paragraph 65:

> In each case, the court assessed the relationship between the enacting jurisdiction and the out-of-province individual or entity sought to be regulated by it in light of the subject matter of the legislation to determine if the relation was "sufficient" to support the validity or applicability of the legislation in question.
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> [Underlining added.]

[169] It seems to me that the Canadian manufacturers conflate choice of law and constitutional principles more radically than the decisions in either ***Tolofson*** or ***Unifund*** would support. For example, in their factum, the manufacturers refer to the "choice of law/constitutional problem inherent in the structure of the *Act*". The manufacturers ground their position in an analysis that takes Mr. Justice La Forest's reasoning about the choice of law for interjurisdictional torts and translate it directly into the constitutional analysis for the territorial validity of the legislation.

Thus, the constitutional analysis comes to rest entirely on the "*locus*" of the wrong in the manufacturers' argument, as an analysis that parallels Mr. Justice La Forest's reasoning about the choice of law for a case arising out of a car accident. Mr. Justice Holmes adopted this reasoning about the importance of the "*locus*" of the wrong, thereby finding the ***Act*** unconstitutional because it can be read so that "exposure", the logical core of the wrong as he saw it, may occur outside the Province.

[170] However, it appears to me that Mr. Justice La Forest did not intend that his reasoning about the importance of *locus* for choice of law in the case of a car accident should necessarily carry into other sorts of wrongs that are of a different nature. After setting out the general rule that "the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*", he states at 1050 of ***Tolofson****:*

> 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. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There territorial considerations may become muted; they may conflict and other considerations may play a determining role.

[171] Moreover, Mr. Justice La Forest did not constitutionalize the *lex loci delicti* rule, as the Canadian manufacturers suggest in their factum. He noted only, at 1064-1065, that one advantage of the *lex loci delicti* is that it is well within the margins of the constitutional requirements of territoriality, but that he wished to go no further into the subject.

[172] Based on Mr. Justice Binnie's suggestion in ***Unifund*** that the sufficient connection test might be applicable to validity and applicability, the appellant submits in its factum that the relationship between the choice of law and constitutional analysis is:

> 82. In the case of applicability, it is enough to show that the legislation may not apply to a particular defendant because there is no sufficient connection. If the "sufficient connection" test can be used at all to challenge validity, it would be necessary to show that the connection among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it is so attenuated that it meets the *Churchill Falls* [[1984] 1 S.C.R. 297] test, that is, the only conclusion to be drawn is that the legislation is in pith and substance in relation to extraprovincial rights.
>
> * * *
>
> 85. The analysis thus returns to the *Churchill Falls* test. Is the legislation colourable? The Respondents must show that there is no sufficient relationship here among the Province, the cause of action and the defendant, and that the relationship is so attenuated that only one conclusion can be

> drawn: the *Act* is not in pith and substance legislation in relation to matters coming under ss. 92(13), (14) and (16) but is in reality "aimed at" civil rights outside the Province.
>
> * * *
>
> 124. The Attorney General submits that the *Churchill Falls* test requires, in the context of Holmes J.'s analysis of extraterritoriality, that the Respondents must show not only that there is no sufficient relationship connecting the Province of B.C., the government's cause of action and the defendants, but that the relationship is so attenuated that no other conclusion is open except that the *Act* is aimed at extraprovincial rights.

[173] The manufacturers rely upon Mr. Justice Holmes's finding at paragraph 222 that the pith and substance of the ***Act*** is that the "Province seeks to recover from the tobacco industry nationally and internationally the tobacco related health care costs it has expended". However, recovering from a defendant outside of the province does not, in itself, make the action extraterritorial. Discussing the evolution of the extraterritoriality rule, Mr. Justice Binnie writes at paragraph 63 of ***Unifund***:

> Later formulations of the extraterritoriality rule put the focus less on the idea of actual physical presence and more on the relationships among the enacting territory, the subject matter of the law, and the person sought to be subjected to its regulation. The potential application of provincial law to relationships with out-of-province defendants became more nuanced. The evolution of the rule was perhaps inevitable given the reality, as La Forest J. commented in *Morguard* [*Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R.

> 1077], that modern states "cannot live in splendid isolation" (p. 1095).

[174] Moreover, Mr. Justice McIntyre clearly states in ***Churchill Falls***, at 332, that "incidental or consequential effects on extra-provincial rights will not render the enactment *ultra-vires*", as long as the legislation is in pith and substance in relation to matters falling within the Province.

V. Purpose and Effect of the *Act*

[175] In determining the constitutional validity of the purpose of the ***Act***, the emphasis should not be on the fact that recovery is sought from foreign defendants but on whether the "wrong" for which recovery is sought, consisting of the elements described in ss. 2(1) and 2(4)(b), is sufficiently connected to British Columbia. At paragraph 65 of ***Unifund***, Mr. Justice Binnie discusses the different degrees of connection to the enacting province which may be required according to the subject matter of the dispute:

> Yet in a products liability case, the presence of the defendant manufacturer in the jurisdiction is considered unnecessary. The relationship created by the knowing dispatch of goods into the enacting jurisdiction in the reasonable expectation that they will be used there is regarded as sufficient: *Moran v. Pyle National (Canada) Ltd.,* [1975] 1 S.C.R. 393, at p. 409.

[176] In ***Morgan v. Prince Edward Island (Attorney General)***, [1976] 2 S.C.R. 349, the constitutional validity of provincial legislation that applied solely to non-residents was upheld. Using that case as a foundation, the appellant argued that, "If a province is legislating within its powers, it can matter not at all that the majority – or even every one – of the persons who is affected by the legislation lives outside the province. Were this not the case, British Columbia would be unable to make laws regarding the products sold in B.C. of a host of industries centred in other provinces or countries". I agree with that submission which has much force in the present context.

[177] The view expressed by Mr. Justice Holmes, and on which the respondents so heavily rely, that the purpose of the ***Act*** is to recover from defendants outside the Province, should have a very limited bearing on the constitutional analysis. The significance of the defendants should not be found in their foreignness but in what connection they have to British Columbia in respect of the wrong articulated in the ***Act***. Without evidence suggesting that their relationship to the Province is one more detached than that described in ***Moran v. Pyle***, in which "[t]he relationship created by the knowing dispatch of goods into the enacting jurisdiction in the

reasonable expectation that they will be used there is regarded as sufficient" (***Unifund,*** at paragraph 65), it is reasonable to find that the purpose of the ***Act*** is *intra vires* the Province.

[178] The focus of the analysis on effect must be on the wrong, which is properly described by the elements of the aggregate action. In order to invoke the reasoning surrounding choice of law, the manufacturers rely upon the widest possible reading of the first two elements of the wrong, so as to construct the wrong as being one entirely relating to foreign conduct. In their factum, they further list the effects of the ***Act*** entirely in terms of foreign conduct.

[179] Quite apart from the fact that this approach disregards the proper construction of the ***Act***, it is an inappropriate constitutional analysis. If there are competing constructions of an act, one of which maintains its validity and one which does not, the presumption of constitutionality mandates the interpretation the court should take. In this case, for reasons I have already endeavoured to explain, it is not necessary to rely on that presumption.

[180] The purpose of the ***Act*** is properly characterized as the recovery by the Government of British Columbia from tobacco

manufacturers of health care expenditures as a result of tobacco related disease caused or contributed to by breaches of duty by those manufacturers against insured persons in British Columbia. Its effect on the rights and liabilities of those who are subject to it is to bring manufacturers who have committed tobacco related wrongs, wrongs which are grounded in British Columbia, into its ambit. Its pith and substance is thus *intra vires* the legislative competence of the Province of British Columbia, and the ***Act*** is constitutionally valid.

VI. Conclusion

[181] For the reasons stated, I am of the opinion that the ***Act*** is constitutionally valid. I agree with the orders proposed by Mr. Justice Lambert. I also agree with the observations my colleague has made in the concluding paragraph of his judgment.

"The Honourable Madam Justice Rowles"

Reasons for Judgment of the Honourable Madam Justice Prowse:

INTRODUCTION

[182] I have had the privilege of reading, in draft form, the reasons for judgment of Mr. Justice Lambert and Madam Justice Rowles. I agree with them that this appeal must be allowed on the basis that the trial judge erred in finding that the ***Tobacco Damages and Health Care Costs Recovery Act***, S.B.C. 2000, c. 30 (the "***Act***") is unconstitutional as being, in pith and substance, extraterritorial legislation beyond the competence of the provincial Legislature. I would prefer, however, to state my own reasons for coming to this conclusion. In so doing, I will refer to several Supreme Court of Canada decisions which, although not directed specifically to the issue of constitutional validity, support the conclusion that the ***Act*** is *intra vires* the province.

[183] I do not find it necessary to address the other issues raised by the respondents since I agree with Mr. Justice Lambert, substantially for the reasons given by him, that the ***Act*** is not unconstitutional as offending the rule of law, being impermissibly retroactive (or retrospective) or interfering with judicial independence.

DISCUSSION

Extraterritoriality

[184] In addressing this issue, I rely on the background to the ***Act***, and to this appeal, set forth at Parts I through VI of Mr. Justice Lambert's reasons for judgment.

(1) The *Act*

[185] The ***Act*** is annexed as an Appendix to this judgment. While the entire ***Act*** must be reviewed to determine its pith and substance, I will set forth and discuss some of the more relevant provisions later in my reasons.

[186] In general terms, the ***Act*** provides for a direct cause of action by the Government of British Columbia against tobacco manufacturers to recover the cost of health care benefits expended (or to be expended) by the government to treat tobacco related disease caused or contributed to by a tobacco related wrong.

(2) The Trial Judge's Decision on Extraterritoriality

[187] The trial judge found that, despite amendments to the predecessor ***Act*** (which he had earlier declared unconstitutional on the basis of extraterritoriality), he could not find that "the basic purpose and effect of the 2000

Act, its pith and substance in constitutional terms, has varied essentially from the predecessor 1997 *Act*." (Para. 222.) In coming to that conclusion, he emphasized that nine of the fourteen defendants were foreign; that only three of the nine foreign defendants were alleged to have directly engaged in the manufacture and promotion of cigarettes sold in British Columbia; that an essential element of the wrong was "exposure", which had no locus attached to it and which could occur in any province or country; and that, because of large numbers of immigrants coming to British Columbia "the potential number of persons whose claims could be impermissibly brought within the jurisdictional reach of the province and its statutory claim" was substantial. He also found that there was a potential for double recovery if other provincial governments sued for the recovery of similar costs as a result of the same "exposure", which had the potential for disrupting the stability and finality of court decisions.

[188] In the result, with a focus on exposure as the underlying and critical element of the wrong, the trial judge concluded that ***Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon***, [1994] 3 S.C.R. 1022, was the relevant authority to assist him in his analysis, having earlier identified ***Reference re Upper Churchill Water Rights Reversion***

Act 1980 (Newfoundland), [1984] 1 S.C.R. 297 ("***Churchill Falls***"), as the leading case calling for a "pith and substance" approach to the issue of constitutional validity.

[189] The trial judge stated his conclusion at para. 244 of his decision:

> 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*.

(3) Submissions of the Parties

[190] This appeal was argued over a period of five days and I do not propose to review the submissions of counsel in detail.

[191] In essence, counsel for the appellant submits that the pith and substance of the aggregate action under s. 2(1) of the ***Act*** is grounded in British Columbia. In that regard, he describes the four elements of the action as (1) the expenditure of health care costs for populations of insured persons (2) resulting from disease in that population of insured persons (3) caused or contributed to by a tobacco product (4) where the exposure resulting in disease was caused or contributed to by a breach of a duty to persons in British Columbia. He says it is implicit in the fact that the duty is

owed to persons in British Columbia that the breach of duty must occur in British Columbia. He says it is also implicit in the ***Act*** (and from a common sense application of the common law) that the persons to whom the duty was owed had to be in British Columbia at the time of the breach. In his submission, "the *sine qua non* of liability" is the breach of duty owed to persons in British Columbia.

[192] Counsel for the appellant refers to the pleadings and states that at all material times virtually all of the cigarettes sold in British Columbia have been manufactured and promoted by manufacturers who are, or have been, members of one of the four groups of defendants.

[193] Counsel for the appellant emphasizes that the onus is on the respondents to establish that there is no sufficient connection among the province, the cause of action and the defendants such that the only conclusion that can be drawn is that the legislation is aimed at civil rights outside the province. He submits that the trial judge erred in finding that this onus had been met. He also submits that the trial judge erred by focussing on exposure and the choice of law analysis set forth in ***Tolofson***, rather than on the pith and substance analysis required when the constitutional validity of a statute is in issue.

[194] Counsel for the appellant further submits that the trial judge erred in taking judicial notice of immigration patterns into British Columbia as a basis for finding that the ***Act*** was unconstitutional, and in finding that there could be double recovery and resulting chaos in the courts if all provinces passed similar legislation. He submits that, not only was there no evidence as to the patterns of immigration into British Columbia, but that the effects of such immigration were a matter for expert evidence and did not go to the validity of the legislation. Further, he submits that there could not be double recovery in the event that each province passed similar legislation since the only "damages" which could be claimed by each province is the amount that province actually expended on health care costs.

[195] Finally, to the extent that the definition of "tobacco related wrong" may be viewed as ambiguous as to whether the breach of duty must occur in British Columbia, and to the extent this may be considered essential to the constitutional validity of the ***Act***, counsel for the appellant relies on the presumption of constitutional validity, and the use of reading down as an interpretive tool, to place the breach of duty in British Columbia.

[196] The respondents submit that that this is both a constitutional validity and a choice of law case and that the trial judge was justified in relying on the ***Tolofson*** decision. In their submission, the ***Act*** is aimed at parties, exposure, and breaches outside British Columbia and, thus, beyond the territorial competence of the province. They also submit that the definition of "tobacco related wrong" in relation to the aggregate cause of action does not require the breach of duty to persons in British Columbia to occur in British Columbia. They also state that the presumptions of causation under s. 3 of the ***Act*** create artificial connections with British Columbia and effectively preclude them from meeting the case against them, thereby adversely affecting their civil rights as foreign defendants.

[197] Finally, the respondents submit that the retroactive effect of s. 10 of the ***Act*** affects their civil rights by making them liable in British Columbia for conduct which has never been, and is not, a wrong in their jurisdictions, contrary to their property and other civil rights under the ***Human Rights Act 1998*** (U.K.), 1998, c. 42 (which came into effect on October 2, 2000) and the ***European Convention on Human Rights***, 1950, 213 U.N.T.S. 221.

[198] Counsel for British Imperial Tobacco (Investments) Limited ("BAT") submits that the invasion of his client's civil rights is particularly egregious since BAT has never done business in British Columbia or sold cigarettes in British Columbia and is potentially liable by virtue only of its association with other respondents. He further submits that the only necessary connection to British Columbia required by the ***Act*** is the expenditure for the cost health care benefits in British Columbia.

(4) The Law Relating to Extraterritoriality

[199] The issue on this aspect of the appeal is whether the ***Act***, and, in particular, the provisions of the ***Act*** relating to the aggregate cause of action, is *ultra vires* the province. This involves questions of statutory interpretation as well as the application of constitutional law principles.

[200] In addressing the respondents' challenge to the ***Act*** on the basis of its extraterritorial effect, I find it useful to begin with the following extract from para. 23 of Mr. Justice Lambert's reasons, with which I agree:

> There are at least four different questions which may arise in relation to issues of Extra-territoriality. The first is whether legislation that is said to have an extra-territorial purpose or effect has constitutional validity. The second is whether legislation that is constitutional has an

> incidental extra-territorial application which makes that application of the legislation unconstitutional. The third is whether the courts of the Province have jurisdiction to deal with an issue or an aspect of an issue which has extra-territorial roots or connections. And the fourth is what should be the choice of law to be applied by the courts of a Province in dealing with a case where an issue or an aspect of an issue has extra-territorial roots or connections.

[201] I would respectfully add to this list a fifth question involving extraterritorial considerations; namely, that of enforceability of foreign judgments.

[202] These questions are addressed in a series of Supreme Court of Canada decisions: ***Churchill Falls***, *supra*, (constitutional validity); ***Moran v. Pyle National (Canada) Ltd.***, [1975] 1 S.C.R. 393 (jurisdiction); ***Morguard Investments Ltd. v. De Savoye***, [1990] 3 S.C.R. 1077 (enforceability); ***Tolofson***, *supra*, (choice of law); and ***Unifund Assurance Co. v. Insurance Corp. of British Columbia***, [2003] 2 S.C.R. 63 (constitutional applicability).

[203] I agree with Mr. Justice Lambert that these are separate questions which must be resolved by an analysis appropriate to each question. One of the appellant's arguments in this case, for example, is that the trial judge erred in relying on ***Tolofson***, which is fundamentally a choice of law decision, in finding the ***Act*** to be constitutionally

invalid. In that regard, it is common ground that ***Churchill Falls*** is the leading authority in determining the constitutional validity of a statute. It requires the court to focus on the pith and substance of the legislation to determine whether the legislation is *intra vires* or *ultra vires*.

[204] In my view, however, these cases develop a common theme which is of assistance in a constitutional validity analysis. All of them discuss the relevant territoriality issue by reference to "real and substantial connection(s)". In that respect, an analysis of a statute's pith and substance may be aided by an examination of the nature and extent of intra or extraterritorial connections between the statute, the activity or conduct governed by the statute, and the defendants affected by its provisions.

[205] The starting point for this analysis is, of course, the ***Churchill Falls*** decision. In that regard, I adopt, in its entirety, the discussion of that decision in Mr. Justice Lambert's reasons at paras. 25-30.

[206] I turn, next, to ***Moran v. Pyle***, upon which Mr. Justice Lambert places considerable reliance in determining the location of the breach of duty referred to in the definition of "tobacco related wrong". There, the question of

extraterritoriality arose by virtue of a claim brought by the dependants of Mr. Moran under the ***Fatal Accidents Act***, R.S.S. 1965, c. 109, in which they sought to serve the defendant manufacturer *ex juris*, without leave, on the basis of a tort committed within the jurisdiction.

[207] Mr. Moran, an electrician resident in Saskatchewan, had been electrocuted in Saskatchewan while unscrewing a light bulb manufactured in Ontario by the defendant. The plaintiffs claimed that the defendant was negligent in the manufacture and construction of the light bulb and also negligent in failing to provide adequate safety checks to prevent its product containing faulty wiring from being distributed, sold or used. The defendant did not carry on business in Saskatchewan, had no assets in Saskatchewan, and had no salespersons or agents in Saskatchewan. It manufactured its product in Ontario and the United States.

[208] Mr. Justice Dickson commenced his reasons by stating that the appeal "presents in a jurisdictional context the question of the place of commission of a tort." (Emphasis added.) He observed that prior authorities had suggested three possible theories for determining the location of a tort, based on a division of the tort into its constituent elements — the duty of care, breach of that duty and damages.

The three theories were: (1) the place of acting theory, which located the tort where the wrongful act occurred; (2) the complete tort theory, which required all elements of the tort to occur within the jurisdiction; and (3) the last event theory, which determined the situs of the tort by the place the damage was suffered.

[209] Mr. Justice Dickson did not adopt any one of these theories as determinative of the situs of the tort of "careless manufacture". Rather, he noted that the courts (including Lord Pearson in ***Distillers Co. (Biochemicals) Ltd. v. Thompson***, [1971] A.C. 458) were moving toward a form of "real and substantial connection" test as the relevant approach to this question. This is evident from the following passage at pp. 408-9 of his reasons:

> Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. In the *Distillers*' case and again in [*Cordova Land Co. Ltd. v. Victor Brothers Inc.* [1966] 1 W.L.R. 793 (Q.B.)] a real and substantial connection test was hinted at. Cheshire, 8th ed., 1970, p. 281, has suggested a test very similar to this; the author says that it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. Applying this test to a case of careless

> manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures 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. 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. 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 is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.
>
> In the result, I am of the opinion that the Courts of the Province of Saskatchewan have jurisdiction to entertain the action herein.
>
> [Emphasis added.]

[210] As will become clear later in my reasons, I agree with Mr. Justice Lambert that, to the extent the definition of a "tobacco related wrong" refers in (a) to "a tort committed in British Columbia by a manufacturer which causes or contributes to tobacco related disease", it does not have any impermissible extraterritorial effect. In my view, this is apparent from the definition itself. In fact, I do not

understand there to be any issue with respect to the territorial reach of definition (a) on this appeal. Rather, the issue of extraterritorial reach is focussed on the definition of "tobacco related wrong" in (b), which does not expressly place the breach of duty in British Columbia. In that regard, I have difficulty with the proposition that it follows from ***Moran v. Pyle*** *per se* that the breach of duty, which is a constituent element of the "tobacco related wrong" in (b), necessarily occurs in British Columbia. Instead, as will become clear later in these reasons, I reach that conclusion by a somewhat different route.

[211] While ***Moran v. Pyle*** is very useful in determining the situs of the tort of negligent manufacture in a jurisdictional context, I regard it as being significant primarily because it indicates that the court will not look to only one connecting factor in making that determination. In my view, the same reasoning applies when one is examining whether the Legislature has territorial jurisdiction over a matter. In most cases, it will be several connecting (or extraterritorial) factors that determine territorial competence (or pith and substance). All relevant factors must be taken into account. These factors will vary in their

significance according to the precise nature of the issue at stake.

[212] While ***Moran v. Pyle*** adopted a real and substantial connection analysis in relation to an issue of jurisdiction, ***Morguard*** examined that approach in relation to the enforceability of a judgment properly obtained in a foreign jurisdiction. In ***Morguard***, Mr. Justice La Forest, speaking for the Court, observed that the courts had moved from a strict application of territorial rules, limiting the effect of a state's laws to its own jurisdiction, to rules of private international law which rely on principles of "order and fairness" in the context of the global community. Mr. Justice La Forest noted, with approval, the manner in which Mr. Justice Dickson had analyzed the jurisdictional issue in ***Moran v. Pyle*** and stated that similar principles would apply to actions in contract. He then went on to draw a link between the real and substantial connections necessary to found the court's jurisdiction over a matter and the similar connections (or restraints) which apply to the Legislature's jurisdiction over a matter. At pp. 1108-9 of the decision, he stated:

> It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions

having little or no connection with the transaction or the parties. In a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from province to province, it is simply anachronistic to uphold a "power theory" or a single situs for torts or contracts for the proper exercise of jurisdiction.

The private international law rule requiring substantial connection with the jurisdiction where the action took place is supported by the constitutional restriction of legislative power "in the province". As Guérin J. observed in *Dupont v. Taronga Holdings Ltd.* (1986), 49 D.L.R. (4th) 335 (Que. Sup. Ct.), at p. 339, [TRANSLATION] "In the case of service outside of the issuing province, service *ex juris* must measure up to constitutional rules." The restriction to the province would certainly require at least minimal contact with the province, and there is authority for the view that the contact required by the Constitution for the purposes of territoriality is the same as required by the rule of private international law between sister-provinces. That was the view taken by Guérin J. in *Taronga* where, at p. 340, he cites Professor Hogg, op. cit., at p. 278, as follows:

> In *Moran v. Pyle*, Dickson J. emphasized that the "sole issue" was whether Saskatchewan's rules regarding jurisdiction based on service *ex juris* had been complied with. He did not consider whether there were constitutional limits on the jurisdiction which could be conferred by the Saskatchewan Legislature on the Saskatchewan courts. But the rule which he announced could serve satisfactorily as a statement of the constitutional limits of provincial-court jurisdiction over defendants outside the province, requiring as it does a substantial connection between the defendant and the forum province of a kind which makes it reasonable to infer that the defendant has voluntarily submitted himself to the risk of litigation in the courts of the forum province.
>
> [Emphasis added.]

[213] Mr. Justice La Forest went on to state that he found this approach "attractive" but that he did not have to pronounce definitively on the issue since no constitutional issue was argued in ***Morguard***. In the case before us, of course, the constitutional issue is front and centre.

[214] The ***Tolofson*** decision, upon which the trial judge relied, focussed on a choice of law issue arising from actions for damages by plaintiffs resident in one jurisdiction against defendants resident in another jurisdiction where the motor vehicle accidents giving rise to the plaintiffs' injuries occurred. Although ***Tolofson*** was not concerned with an issue of validity (pith and substance), it did address the territorial reach of courts over defendants outside the jurisdiction and, as in ***Morguard***, compared that reach to the reach of provincial Legislatures within their area of constitutional competence. At p. 1049 of ***Tolofson***, Mr. Justice La Forest, speaking for the majority, stated:

> To prevent overreaching, however, courts have developed rules governing and restricting the exercise of jurisdiction over extraterritorial and transnational transactions. In Canada, a court may exercise jurisdiction only if it has a "real and substantial connection" (a term not yet fully defined) with the subject matter of the litigation; see *Moran v. Pyle National (Canada) Ltd.*, [citation omitted]; *Morguard*, *supra*; and *Hunt*, *supra*. This test has the effect of preventing a court from unduly entering into matters in which the

> jurisdiction in which it is located has little interest.

[215] ***Tolofson***, therefore, is another example of the Supreme Court of Canada relying on the ordering principle of "real and substantial connections" as being relevant to the territorial reach of both courts and Legislatures. To that extent, the trial judge was justified in referring to the ***Tolofson*** decision in the context of the constitutional validity of the ***Act***. In my view, however, he erred in the application of the real and substantial connection analysis by focussing on exposure as the critical factor leading him to conclude that the ***Act*** had an extraterritorial purpose and effect.

[216] The final case I will mention in this regard is ***Unifund***, a decision which was not available to the trial judge.

[217] Unifund Assurance Company was an Ontario insurer which sought to rely on s. 275 of the ***Insurance Act***, R.S.O. 1990, c. I.8, to have an arbitrator appointed, with a view to obtaining indemnification from the Insurance Corporation of British Columbia ("ICBC") for benefits Unifund had paid to Ontario motorists who had been injured in a motor vehicle accident in British Columbia. The motorists had sued in British Columbia and had been awarded damages there, but their damages had been

reduced by the amount of benefits they had received under the Ontario statute. The constitutional question stated for the court was as follows:

> Is s. 275 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, constitutionally inapplicable to the appellant because its application in the circumstances of this case would not accord with territorial limits on provincial jurisdiction? [para. 22]

[218] Mr. Justice Binnie, speaking for the majority in allowing ICBC's appeal, noted that the underlying issue was whether, in light of the territorial limitation on provincial legislation, the respondent, Unifund, had a viable cause of action against the out-of-province appellant. Although the Court was dealing primarily with the constitutional applicability of legislation, it also discussed basic principles relating to the constitutional validity of legislation.

[219] In dealing with principles relating to constitutional applicability, Mr. Justice Binnie stated (at para. 56):

> Consideration of constitutional *applicability* can conveniently be organized around the following propositions:
>
> 1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;

> 2. What constitutes a "sufficient" connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it;
>
> 3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements;
>
> 4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation.

[220] In discussing the concept of "sufficient connection" he referred to ***Tolofson***, ***Morguard***, ***Moran v. Pyle***, ***Ladore v. Bennett***, [1939] A.C. 468 (P.C.) (applied in ***Churchill Falls***) and other decisions which had considered these connections in various contexts. In other words, he did not limit his remarks concerning territoriality solely to the connections that would be necessary to determine whether a statute was constitutionally applicable. (I make this point in reference to comments by counsel that ***Unifund*** was strictly a constitutional applicability case.)

[221] Mr. Justice Binnie pointed out that the concept of territorial limits had been modified in more recent decisions to place less emphasis on the actual physical presence of a defendant within the enacting state, and more on "the relationships among the enacting territory, the subject matter

of the law, and the person sought to be subjected to its regulation." (para. 63.) He referred to that transition as a reflection of the fact that the application of provincial law to relationships with out-of-province defendants had become "more nuanced". In so doing, he referred to cases involving both constitutional validity and constitutional applicability and stated (at para. 65):

> In each case, the court assessed the relationship between the enacting jurisdiction and the out-of-province individual or entity sought to be regulated by it in light of the subject matter of the legislation to determine if the relation was "sufficient" to support the validity or applicability of the legislation in question.
>
> [Emphasis added.]

[222] In para. 66, Mr. Justice Binnie spoke of the "evolving sophistication in respect of the true scope of the territorial limitation" and specifically referred to ***Ladore v. Bennett*** and ***Churchill Falls***.

[223] In summary, all of these cases discuss the concept of territoriality in different contexts, but with the common link being the nature and degree of connections, or relationships, between the enacting jurisdiction, the defendant, and the subject-matter of the legislation. In so doing, the Court has noted that the nature and extent of connections necessary to

found a court's jurisdiction may differ, for example, from the nature and extent of connections necessary to justify a statute's applicability or validity.

[224] In utilizing the real and substantial connection approach as an aid to determining the pith and substance of legislation, therefore, it is obvious that the greater the connections between the enacting jurisdiction, the cause of action, and the defendant, the greater the likelihood that the impugned legislation will be found to be valid.

(5) Application of the Law to the *Act*

[225] As earlier stated, the ***Act*** provides for a direct cause of action by the Government of British Columbia against tobacco manufacturers to recover health care costs expended (or to be expended) by the government to treat tobacco related disease caused or contributed to by a tobacco related wrong.

[226] The impugned provisions of the ***Act*** for the purpose of this constitutional analysis are those dealing with the aggregate action established under s. 2(1) of the ***Act***. I will, therefore, set out only those provisions of the ***Act*** which are most directly related to the aggregate action.

[227] The following definitions in s. 1 of the Act are significant:

"**cost of health care benefits**" means the sum of

(a) the present value of the total expenditure by the government for health care benefits provided for insured persons resulting from tobacco related disease or the risk of tobacco related disease, and

(b) the present value of the estimated total expenditure by the government for health care benefits that could reasonably be expected will be provided for those insured persons resulting from tobacco related disease or the risk of tobacco related disease;

* * *

"exposure" means any contact with, or ingestion, inhalation or assimilation of, a tobacco product, including any smoke or other by-product of the use, consumption or combustion of a tobacco product;

"**health care benefits**" means

(a) benefits as defined under the *Hospital Insurance Act*,

(b) benefits as defined under the *Medicare Protection Act*,

(c) payments made by the government under the *Continuing Care Act*, and

(d) 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;

"**insured person**" means

(a) a person, including a deceased person, for whom health care benefits have been provided, or

> (b) a person for whom health care benefits could reasonably be expected will be provided;
>
> "**tobacco related disease**" means disease caused or contributed to by exposure to a tobacco product;
>
> "**tobacco related wrong**" means,
>
> (a) a tort committed in British Columbia by a manufacturer which causes or contributes to tobacco related disease, or
>
> (b) 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;

I have two comments with respect to these definitions. The first is that "exposure" in this action is synonymous with "smoking cigarettes" (although the definition in the ***Act*** is somewhat wider). The second is that the ***Hospital Insurance Act***, R.S.B.C. 1996, c. 204, and the ***Medicare Protection Act***, R.S.B.C. 1996, c. 286, contain residency requirements for the receipt of benefits, which include a requirement that the recipients make their home in British Columbia and be physically present in British Columbia at least six months of a calendar year.

[228] The aggregate cause of action giving rise to these proceedings is established and described in s. 2 of the ***Act***, which provides, in part:

Direct action by government

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.

(2) An action under subsection (1) is brought by the government in its own right and not on the basis of a subrogated claim.

. . .

(4) In an action under subsection (1), the government may recover the cost of health care benefits

(a) for particular individual insured persons, or

(b) on an aggregate basis, for a population of insured persons as a result of exposure to a type of tobacco product.

[229] Section 3 of the ***Act*** sets out what the government must prove under s. 2(1) in order to recover the cost of health care benefits on an aggregate basis:

Recovery of cost of health care benefits on aggregate basis

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.

(2) Subject to subsections (1) and (4), the court must presume that

(a) the population of insured persons who were 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 referred to in subsection (1) (a), and

(b) 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).

(3) If the presumptions under subsection (2) (a) and (b) apply,

(a) the court must determine on an aggregate basis the cost of health care benefits provided after the date of the breach referred to in subsection (1) (a) resulting from exposure to the type of tobacco product, and

(b) each defendant to which the presumptions apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product.

> (4) The amount of a defendant's liability assessed under subsection (3) (b) may be reduced, or the proportions of liability assessed under subsection (3) (b) readjusted amongst the defendants, to the extent that a defendant proves, on a balance of probabilities, that the breach referred to in subsection (1) (a) did not cause or contribute to the exposure referred to in subsection (2) (a) or to the disease or risk of disease referred to in subsection (2) (b).

[230] Section 4 of the ***Act*** deals with joint and several liability in an action brought under s. 2(1).

[231] Section 10 of the ***Act*** provides for retroactivity, as follows:

> **Retroactive effect**
>
> **10** 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.

[232] At this point, I note that the principal factors connecting the aggregate cause of action with British Columbia are as follows:

> (1) the sole plaintiff in the aggregate action is the Government of British Columbia;

(2) the health care benefits expended by the government must be incurred in British Columbia;

(3) the recoverable health care benefits can only be incurred for those who were residents of the province;

(4) the breach must be of a duty owed to persons in British Columbia who have been exposed or might become exposed to a tobacco product;

(5) the type of tobacco product manufactured or promoted by the defendant must have been offered for sale in British Columbia during all or part of the breach.

[233] In my view, it is also implicit from the definition of "tobacco related wrong", in particular, that the health care costs are only recoverable for insured persons who were in British Columbia at the time of the breach.

[234] These are significant factors connecting the cause of action to British Columbia, and they support the appellant's submission that the pith and substance of the ***Act*** is property and civil rights in the province within the meaning of s. 92(13) of the ***Constitution Act, 1867*** (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[235] There is a nice question, however, as to whether, apart from these connecting factors, the breach of duty owed to persons in British Columbia must occur in British Columbia in order to ensure the constitutional validity of the

legislation. All parties agree that the answer to this question is significant since, if the ***Act*** requires the breach of duty to occur in British Columbia, this, in itself, would go a long way to establishing that the pith and substance of the legislation is intraterritorial. That is, it is a connecting factor of considerable magnitude.

[236] The issue of the situs of the breach arises primarily from the definition of "tobacco related wrong" and, in particular, part (b) of the definition which is tied directly to the aggregate action. The resolution of that issue, in my view, is largely a matter of statutory interpretation. As such, it is governed by the approach adopted by Mr. Justice Iacobucci, speaking for the Court in ***Rizzo & Rizzo Shoes Ltd. (Re)***, [1998] 1 S.C.R. 27, at para. 21, where he adopted the following statement from Elmer Driedger on the ***Construction of Statutes***, 2nd ed. (Toronto: Butterworths, 1983) at 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[237] As earlier stated, the full definition of "tobacco related wrong" provides:

> "**tobacco related wrong**" means,

> (a) a tort committed in British Columbia by a manufacturer which causes or contributes to tobacco related disease, or
>
> (b) 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;

[238] I note that definition (a) expressly requires that the tort be committed "in British Columbia". Definition (b), on the other hand, does not expressly require that the breach occur in British Columbia. Thus, at first blush, one is attracted to the view, espoused by the respondents, that the absence of the words "in British Columbia" in (b) indicates that the breach in (b) need not occur in British Columbia. One of the difficulties with that view is that it creates an apparent internal inconsistency in the definition of "tobacco related wrong". No reasonable explanation (or any explanation) has been suggested as to why the legislators would require the tobacco related wrong in (a) to occur within British Columbia, but not the "tobacco related wrong" referred to in (b). While the respondents are not required to provide such an explanation, I would not be quick to accept that the Legislature intended to distinguish between the definitions in (a) and (b) in that respect. This is particularly so since

definition (b) makes a point of tying the breach to a duty "owed to persons in British Columbia".

[239] In that regard, I agree with para. 43 of Mr. Justice Lambert's reasons in which he states that s. 2(1) of the ***Act*** required a second definition of "tobacco related wrong" to encompass the government action, and with his conclusion that definition (b) was not intended to provide a more expansive definition of "tobacco related wrong", in terms of its territorial effect, than definition (a).

[240] I also note that the definition of "tobacco related wrong" does not exist in a vacuum but must be considered in the context of other provisions of the ***Act***. One provision which is of particular significance is s. 3(1). Subsection 3(1)(c) makes it clear that the presumptions of causation, which are critical to the ***Act***, only apply where:

> (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, . . .

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.
>
> [Emphasis added.]

[241] In other words, s. 3(1) links the breach of duty to British Columbia, not only by making it a breach of a duty owed to persons in British Columbia (s. 3(1)(a)), but also by linking it to the offering of tobacco products for sale in British Columbia (ss. 3(1)(c)).

[242] Section 3(1)(c) also makes it clear, through the use of the words "during all or part of the breach", that the breach need not be one event isolated in time, but that it can be part of a continuing breach. This is consistent with the nature of the breaches contemplated by the ***Act*** as a whole, the most obvious of which are reflected in the statement of claim. These include misrepresentation, failure to warn, and the promotion and distribution of a defective product. All of these breaches could be said to originate in the jurisdictions where the tobacco products are manufactured and to continue until the misrepresentations and/or the products reach consumers in British Columbia where the products are offered for sale, thereby leading to exposure in British Columbia.

[243] In my view, the full definition of "tobacco related wrong", the fact that the duty is owed to insured persons who are in British Columbia at the time of the breach, and the requirement in s. 3(1) that the breach or part thereof occur while the type of tobacco product is offered for sale in

British Columbia strongly support the appellant's position that the relevant breaches under the ***Act***, which lead to liability and to health care costs incurred in British Columbia, are those breaches, or parts thereof, which occur in British Columbia.

[244] I do not find it necessary to employ the presumption of constitutionality or the interpretive aid of "reading down" to come to this conclusion.

[245] Nor have I found it necessary to found my conclusion with respect to the location of the breach on ***Moran v. Pyle***, although I view that decision as supporting my conclusion.

[246] Thus, I would add to the factors connecting the cause of action to British Columbia set out in paras. 232-33, *supra*, the factor that the breach of duty (or part of a continuing breach of duty) within the meaning of part (b) of the definition of "tobacco related wrong", must occur in British Columbia.

[247] The respondents, on the other hand, support the trial judge's emphasis on the location of the respondents outside the jurisdiction, and the fact that exposure under the ***Act*** is not confined to British Columbia, as extraterritorial connections strongly supportive of his conclusion that the ***Act***

has an impermissible extraterritorial effect. They also support the trial judge's reference to immigration as supportive of his conclusion in that regard. They further submit that the presumptions in s. 3(2) of the ***Act*** create artificial connections to British Columbia which present an almost insurmountable obstacle to the respondents being able to rebut liability under s. 3(4). Finally, they point to the retroactive impact of s. 10 of the ***Act*** and its extraterritorial effect on their clients' civil rights. In short, they emphasize the factors which, they submit, demonstrate that the predominant connecting factors created by the ***Act*** in the aggregate action are extraterritorial. The respondent, BAT, adds to this list the fact that it is potentially liable under the ***Act*** only by virtue of the application of s. 4 of the ***Act***.

[248] In my view, in finding that the respondents had met the burden upon them to establish that the ***Act*** was invalid as being extraterritorial in pith and substance, the trial judge misconceived, and placed inordinate weight on, the role played by "exposure" under the ***Act***. He tended to equate "exposure" with the "tobacco related wrong", or the breach, under the ***Act***. In fact, although exposure is encompassed in the definition of "tobacco related wrong", insofar as it modifies

the persons in British Columbia to whom the duty is owed, it is not the essence of the tobacco related wrong, or of the aggregate cause of action under s. 2(1). (In that regard, I find the appellant's reference to "exposure" as being synonymous with "smoking cigarettes" for the purposes of this action, of some assistance in placing the concept of "exposure" in perspective (recognizing that "exposure" has a somewhat broader meaning under the ***Act***)).

[249] While the trial judge was correct in stating that exposure could take place outside British Columbia, exposure under the ***Act*** is directly linked to the population of insured persons in British Columbia under part (b) of the definition of "tobacco related wrong". The only relevant exposure under the ***Act*** is exposure by persons in British Columbia to whom the duty is owed, which results in "tobacco related disease" which, in turn, gives rise to health care costs in the province. Section 3(4) of the ***Act***, which permits the respondents to rebut the presumptions of causation created by s. 3(2), has the effect of making other exposure irrelevant for the purposes of establishing ultimate liability under the ***Act***.

[250] With respect to the significance of exposure under the ***Act***, I would also adopt Madam Justice Rowles's comments at paras. 148-155 of her reasons for judgment.

[251] Nor am I persuaded that the presumptions of causation under s. 3 of the ***Act*** create an artificial connection between the "tobacco related wrong" and the province sufficient to support the respondents' position that the ***Act*** has an impermissible extraterritorial reach. In my view, the presumptions are evidentiary matters within the province's legislative competence to legislate under s. 92(14) of the ***Constitution Act, 1867***; namely, the administration of justice in the province, which includes matters of civil procedure and evidence. I fail to see how the presumptions, or the difficulty they present to the respondents as an evidentiary matter, can be viewed as fatal to the ***Act***'s validity on the grounds of extraterritoriality.

[252] With respect to the trial judge's reliance on patterns of immigration to the province as an indication of the ***Act***'s extraterritorial scope, I agree with the appellant that there was no basis upon which the trial judge could draw any reliable inference about the ultimate impact of immigration on the ***Act***'s constitutional validity. The trial judge's reliance on this factor is directly tied to his reliance on exposure as

the focus, or fundamental underpinning, of the ***Act***. As counsel for the appellant noted, the fact of immigration of smokers, or potential smokers, to British Columbia is no more determinative of the constitutional validity of the ***Act***, than the fact of emigration of smokers, or potential smokers, from Newfoundland would be determinative of the validity of its ***Act***. The impact of immigration on liability is an evidentiary problem which will undoubtedly have to be dealt with by way of statistics and probability, as is true of many other evidentiary matters arising in relation to the aggregate action.

[253] Further, I am unable to agree with the respondents that the retroactive effect of the ***Act*** on their civil rights is a basis for finding that the ***Act*** is invalid. If the ***Act*** is otherwise constitutional, the fact that some of the respondents may not enjoy the full protection available to them under the U.K. ***Human Rights Act*** and/or the ***European Convention on Human Rights*** is not fatal to its validity.

[254] Finally, I reject BAT's submission that s. 4 of the ***Act***, which provides for joint and several liability on the basis set out therein, renders the ***Act*** unconstitutional. In my view, BAT's argument in this regard is more appropriately dealt with as an issue of applicability, rather than validity.

Since the constitutional applicability of the ***Act*** was not fully argued before us and is not necessary to a resolution of this appeal, I do not propose to rule on it.

[255] In conclusion, I observe that the appellants have focussed their submissions primarily on the purpose of the ***Act***, while the respondents and the trial judge have focussed primarily on its effects. Both are relevant to the analysis of constitutional validity. In the result, while the ***Act*** undoubtedly has some extraterritorial effect, I am not persuaded that it falls outside the power of the province to legislate under ss. 92(13) and 92(14) of the ***Constitution Act, 1867***. Like Mr. Justice Lambert and Madam Justice Rowles, I am satisfied that the extraterritorial effects of the legislation are incidental, rather than primary. In my view, the pith and substance of the ***Act***, taking into account the real and substantial connections to the province to which I have referred, is property and civil rights within the province and, to a lesser extent, the administration of justice in the province under s. 92(14).

[256] I would allow the appeal on this ground.

Rule of Law (Including Retroactivity) and Judicial Independence

[257] As earlier stated, I am in substantial agreement with the reasons for judgment of Mr. Justice Lambert with respect to the remaining issues raised by the respondents; namely, rule of law (including retroactivity) and judicial independence.

CONCLUSION

[258] In the result, I would allow the appeal. I would adopt the form of order set forth at para. 116 of Mr. Justice Lambert's reasons for judgment.

"The Honourable Madam Justice Prowse"

APPENDIX

Tobacco Damages and Health Care Costs Recovery Act

Definitions and interpretation

1 (1) In this Act:

"**cost of health care benefits**" means the sum of

(a) the present value of the total expenditure by the government for health care benefits provided for insured persons resulting from tobacco related disease or the risk of tobacco related disease, and

(b) the present value of the estimated total expenditure by the government for health care benefits that could reasonably be expected will be provided for those insured persons resulting from tobacco related disease or the risk of tobacco related disease;

"**disease**" includes general deterioration of health;

"**exposure**" means any contact with, or ingestion, inhalation or assimilation of, a tobacco product, including any smoke or other by-product of the use, consumption or combustion of a tobacco product;

"**health care benefits**" means

(a) benefits as defined under the *Hospital Insurance Act*,

(b) benefits as defined under the *Medicare Protection Act*,

(c) payments made by the government under the *Continuing Care Act*, and

(d) 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;

"**insured person**" means

(a) a person, including a deceased person, for whom health care benefits have been provided, or

(b) a person for whom health care benefits could reasonably be expected will be provided;

"**joint venture**" means an association of 2 or more persons, if

(a) the relationship among the persons does not constitute a corporation, a partnership or a trust, and

(b) the persons each have an undivided interest in assets of the association;

"**manufacture**" includes, for a tobacco product, the production, assembly or packaging of the tobacco product;

"**manufacturer**" means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past

(a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,

(b) 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,

(c) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or

(d) is a trade association primarily engaged in

(i) the advancement of the interests of manufacturers,

(ii) the promotion of a tobacco product, or

(iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;

"**person**" includes a trust, joint venture or trade association;

"**promote**" or "**promotion**" includes, for a tobacco product, the marketing, distribution or sale of the tobacco product and research with respect to the tobacco product;

"**tobacco product**" means tobacco and any product that includes tobacco;

"**tobacco related disease**" means disease caused or contributed to by exposure to a tobacco product;

"**tobacco related wrong**" means,

(a) a tort committed in British Columbia by a manufacturer which causes or contributes to tobacco related disease, or

(b) 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;

"**type of tobacco product**" means one or a combination of the following tobacco products:

(a) cigarettes;

(b) loose tobacco intended for incorporation into cigarettes;

(c) cigars;

(d) cigarillos;

(e) pipe tobacco;

(f) chewing tobacco;

(g) nasal snuff;

(h) oral snuff;

(i) a prescribed form of tobacco.

(2) The definition of "manufacturer" in subsection (1) does not include

(a) an individual,

(b) a person who

(i) is a manufacturer only because they are a wholesaler or retailer of tobacco products, and

(ii) is not related to

(A) a person who manufactures a tobacco product, or

(B) a person described in paragraph (a) of the definition of "manufacturer", or

(c) a person who

(i) is a manufacturer only because paragraph (b) or (c) of the definition of "manufacturer" applies to the person, and

(ii) is not related to

(A) a person who manufactures a tobacco product, or

(B) a person described in paragraphs (a) or (d) of the definition of "manufacturer".

(3) For the purposes of subsection (2), a person is related to another person if, directly or indirectly, the person is

(a) an affiliate, as defined in section 1 of the *Company Act*, of the other person, or

(b) an affiliate of the other person or an affiliate of an affiliate of the other person.

(4) For the purposes of subsection (3)(b), a person is deemed to be an affiliate of another person if the person

(a) is a corporation and the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, owns a beneficial interest in shares of the corporation

(i) carrying at least 50% of the votes for the election of directors of the corporation and the votes carried by the shares are sufficient, if exercised, to elect a director of the corporation, or

(ii) having a fair market value, including a premium for control if applicable, of at least 50% of the fair market value of all the issued and outstanding shares of the corporation, or

(b) is a partnership, trust or joint venture and the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, has an ownership interest in the assets of that person that entitles the other person or group to receive at least 50% of the profits or at least 50% of the assets on dissolution, winding up or termination of the partnership, trust or joint venture.

(5) For the purposes of subsection (3)(b), a person is deemed to be an affiliate of another person if the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, has any direct or indirect influence that, if exercised, would result in control in fact of that person except if the other person deals at arm's length with that person and derives influence solely as a lender.

(6) For the purposes of determining the market share of a defendant for a type of tobacco product sold in British Columbia, the court must calculate the defendant's market share for the type of tobacco product by the following formula:

$$dms = \frac{dm}{MM} \times 100\%$$

where

dms = the defendant's market share for the type of tobacco product from the date of the earliest tobacco related wrong committed by that defendant to the date of trial;

dm = the quantity of the type of tobacco product manufactured or promoted by the defendant that is sold within British Columbia from the date of the earliest tobacco related wrong committed by that defendant to the date of trial;

MM = the quantity of the type of tobacco product manufactured or promoted by all manufacturers that is sold within British Columbia from the date of the earliest tobacco related wrong committed by the defendant to the date of trial.

Direct action by government

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.

(2) An action under subsection (1) is brought by the government in its own right and not on the basis of a subrogated claim.

(3) In an action under subsection (1), the government may recover the cost of health care benefits whether or not there has been any recovery by other persons who have suffered damage caused or contributed to by the tobacco related wrong committed by the defendant.

(4) In an action under subsection (1), the government may recover the cost of health care benefits

(a) for particular individual insured persons, or

(b) on an aggregate basis, for a population of insured persons as a result of exposure to a type of tobacco product.

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

(a) it is not necessary

(i) to identify particular individual insured persons,

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

(iii) to prove the cost of health care benefits for any particular individual insured person,

(b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits 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,

(c) a person is not compellable to answer questions with respect to the health of, or the provision of health care benefits for, particular individual insured persons,

(d) despite paragraphs (b) and (c), on application by a defendant, the court may order discovery of a statistically meaningful sample of the documents referred to in paragraph (b) and the order must include directions concerning the nature, level of detail and type of information to be disclosed, and

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

Recovery of cost of health care benefits on aggregate basis

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.

(2) Subject to subsections (1) and (4), the court must presume that

(a) the population of insured persons who were 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 referred to in subsection (1)(a), and

(b) 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).

(3) If the presumptions under subsection (2)(a) and (b) apply,

(a) the court must determine on an aggregate basis the cost of health care benefits provided after the date of the breach referred to in subsection (1)(a) resulting from exposure to the type of tobacco product, and

(b) each defendant to which the presumptions apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product.

(4) The amount of a defendant's liability assessed under subsection (3)(b) may be reduced, or the proportions of liability assessed under subsection (3)(b) readjusted amongst the defendants, to the extent that a defendant proves, on a balance of probabilities, that the breach referred to in subsection (1)(a) did not cause or contribute to the exposure referred to in subsection (2)(a) or to the disease or risk of disease referred to in subsection (2)(b).

Joint and several liability in an action under section 2(1)

4 (1) Two or more defendants in an action under section 2(1) are jointly and severally liable for the cost of health care benefits if

(a) those defendants jointly breached a duty or obligation described in the definition of "tobacco related wrong" in section 1(1), and

(b) as a consequence of the breach described in paragraph (a), at least one of those defendants is held liable in the action under section 2(1) for the cost of those health care benefits.

(2) For purposes of an action under section 2(1), 2 or more manufacturers, whether or not they are defendants in the action, are deemed to have jointly breached a duty or obligation described in the definition of "tobacco related wrong" in section 1(1) if

(a) one or more of those manufacturers are held to have breached the duty or obligation, and

(b) at common law, in equity or under an enactment those manufacturers would be held

(i) to have conspired or acted in concert with respect to the breach,

(ii) to have acted in a principal and agent relationship with each other with respect to the breach, or

(iii) to be jointly or vicariously liable for the breach if damages would have been awarded to a person who suffered as a consequence of the breach.

Population based evidence to establish causation and quantify damages or cost

5 Statistical information and information derived from epidemiological, sociological and other relevant studies, including information derived from sampling, is admissible as evidence for the purposes of establishing causation and quantifying damages or the cost of health care benefits respecting a tobacco related wrong in an action brought

(a) by or on behalf of a person in the person's own name or as a member of a class of persons under the *Class Proceedings Act*, or

(b) by the government under section 2(1).

Limitation periods

6 (1) No action that is commenced within 2 years after the coming into force of this section by

(a) the government,

(b) a person, on his or her own behalf or on behalf of a class of persons, or

(c) a personal representative of a deceased person on behalf of the spouse, parent or child, as defined in the *Family Compensation Act*, of the deceased person,

for damages, or the cost of health care benefits, alleged to have been caused or contributed to by a tobacco related wrong is barred under the *Limitation Act*.

(2) Any action described in subsection (1) for damages alleged to have been caused or contributed to by a tobacco related wrong is revived if the action was dismissed before the coming into force of this section merely because it was held by a court to be barred or extinguished by the *Limitation Act*.

Liability based on risk contribution

7 (1) This section applies to an action for damages, or the cost of health care benefits, alleged to have been caused or contributed to by a tobacco related wrong other than an action for the recovery of the cost of health care benefits on an aggregate basis.

(2) If a plaintiff is unable to establish which defendant caused or contributed to the exposure described in paragraph (b) and, as a result of a breach of a common law, equitable or statutory duty or obligation,

(a) one or more defendants causes or contributes to a risk of disease by exposing persons to a type of tobacco product, and

(b) the plaintiff has been exposed to the type of tobacco product referred to in paragraph (a) and suffers disease as a result of the exposure,

the court may find each defendant that caused or contributed to the risk of disease liable for a proportion of the damages or cost of health care benefits incurred equal to the proportion of its contribution to that risk of disease.

(3) The court may consider the following in apportioning liability under subsection (2):

(a) the length of time a defendant engaged in the conduct that caused or contributed to the risk of disease;

(b) the market share the defendant had in the type of tobacco product that caused or contributed to the risk of disease;

(c) the degree of toxicity of any toxic substance in the type of tobacco product manufactured or promoted by a defendant;

(d) the amount spent by a defendant on promoting the type of tobacco product that caused or contributed to the risk of disease;

(e) the degree to which a defendant collaborated or acted in concert with other manufacturers in any conduct that caused, contributed to or aggravated the risk of disease;

(f) the extent to which a defendant conducted tests and studies to determine the risk of disease resulting from exposure to the type of tobacco product;

(g) the extent to which a defendant assumed a leadership role in manufacturing the type of tobacco product;

(h) the efforts a defendant made to warn the public about the risk of disease resulting from exposure to the type of tobacco product;

(i) the extent to which a defendant continued manufacture or promotion of the type of tobacco product after it knew or ought to have known of the risk of disease resulting from exposure to the type of tobacco product;

(j) affirmative steps that a defendant took to reduce the risk of disease to the public;

(k) other considerations considered relevant by the court.

Apportionment of liability in tobacco related wrongs

8 (1) This section does not apply to a defendant in respect of whom the court has made a finding of liability under section 7.

(2) A defendant who is found liable for a tobacco related wrong may commence, against one or more of the defendants found liable for that wrong in the same action, an action or proceeding for contribution toward payment of the damages or the cost of health care benefits caused or contributed to by that wrong.

(3) Subsection (2) applies whether or not the defendant commencing an action or proceeding under that subsection has paid all or any of the damages or the cost of health care benefits caused or contributed to by the tobacco related wrong.

(4) In an action or proceeding described in subsection (2), the court may apportion liability and order contribution among each of the defendants in accordance with the considerations listed in section 7(3)(a) to (k).

Regulations

9 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations prescribing a form of tobacco for the purposes of paragraph (i) of the definition of "type of tobacco product" in section 1(1).

Retroactive effect

10 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.

Section Spent

11 [Repeal. Spent. 2000-30-11.]

Commencement

12 This Act comes into force by regulation of the Lieutenant Governor in Council.