IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***HMTQ v. Imperial Tobacco Canada Limited et al.,***
2005 BCSC 946

Date: 20050623
Docket: S010421
Registry: Vancouver

Between:

Her Majesty the Queen in Right of British Columbia

Plaintiff

And

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

Defendants

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

Reasons for Judgment

Counsel for the Plaintiff:	T. Berger, Q.C. D.A. Webster, Q.C. E. Myers, Q.C. E. Araujo C. Jones K. Kuntz
Counsel for the Defendant, Carreras Rothmans Ltd.:	P. Fraser, Q.C. G. Clarke
Counsel for the Defendants, Rothmans, Benson & Hedges Inc., and Rothmans Inc.:	J. Macaulay, Q.C. K. Affleck, Q.C. S. Kurelek I. Christman

Counsel for the Defendants, B.A.T. Industries p.l.c., and British American Tobacco (Investments) Limited:	R. Sugden, Q.C. C. Dennis M. Westphal
Counsel for the Defendants, Philip Morris Incorporated and Philip Morris International Inc.:	D.R. Clark, Q.C. C.A. Millar
Counsel for the Defendants, JTI-Macdonald Corp., R.J. Reynolds Tobacco Company, and R.J. Reynolds Tobacco International Inc.:	J. Giles, Q.C. J.J. Kay, Q.C. D. Bloor
Counsel for the Defendant, Ryesekks p.l.c.:	R.B. Lindsay, Q.C. S. Braun C.H. Place
Date and Place of Trial:	November 4-8, 12-13, 18-22, & 25-28, 2002 October 12-14, 2004 Vancouver, B.C.

HISTORY

[1] Following upon the enactment of the ***Tobacco Damages and Health Care Costs Recovery Act***, S.B.C. 2000, c. 30 (the "***Act***"), four actions were commenced. The first action was by the Attorney General of British Columbia against fourteen defendants. Three of the defendants, Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., and JTI-Macdonald Corporation, are Canadian manufacturers of cigarettes.

[2] One defendant, Rothmans Inc. is a former Canadian manufacturer of cigarettes.

[3] Another defendant, the Canadian Tobacco Manufacturers Council is a trade organization.

[4] There are nine non-Canadian defendants and three of those, Philip Morris Incorporated, R.J. Reynolds Tobacco Company, and Ryesekks p.l.c. manufactured cigarettes sold in British Columbia. The remaining six of these defendants did not manufacture cigarettes sold in B.C. but are alleged to be liable because of their relationship with one or more of the defendants who did manufacture cigarettes sold in British Columbia.

[5] The cause of action in the first action is pleaded as an aggregate action under the ***Act***. Eleven of the fourteen defendants were served *ex juris* under Rule 13(1)(h), (j), and (o).

[6] The other three actions were commenced by the three Canadian manufacturers each seeking a declaration that the ***Act*** is unconstitutional.

[7] The *ex juris* defendants filed applications to set aside service on several grounds including the ***Act*** being unconstitutional.

[8] The constitutionality of the ***Act*** in regard to all four actions and the applications of the *ex juris* defendants to set aside service were heard in November 2002. Reasons for Judgment were given June 5, 2003, finding the ***Act*** was unconstitutional on the ground of extra-territoriality. [***British Columbia v. Imperial Tobacco Canada Ltd.*** (2003), 227 D.L.R. (4th) 323 (B.C.S.C.)]

[9] The decision that the ***Act*** was unconstitutional was successfully appealed by the Attorney General of British Columbia. The British Columbia Court of Appeal held

the ***Act*** constitutionally valid legislation, dismissed the three declaratory actions of the Canadian manufacturers and ordered:

> 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.
>
> [***British Columbia v. Imperial Tobacco Ltd***. (2004), 239 D.L.R. (4th) 412, 2004 BCCA 269, ¶116]

[10] A further hearing to supplement and update prior argument regarding the applications of the *ex juris* defendants to set aside service upon them in light of the Court of Appeals Reasons was held October 12-14, 2004.

[11] Four of the defendant *ex juris* applicants are alleged to have manufactured cigarettes sold in British Columbia, and there is no evidence denying that, or that denies they were involved in the sale of cigarettes in British Columbia. Those defendants are Philip Morris Incorporated (now Philip Morris U.S.A. Inc.), Rothmans Inc., R.J. Reynolds Tobacco Company, and Ryesekks p.l.c.

[12] Five of the defendant *ex juris* applicants did not manufacture cigarettes sold in British Columbia and have filed affidavits that confirm they were not involved in cigarette sales in British Columbia.

POSITION SUMMARIES OF THE *EX JURIS* DEFENDANTS

[13] The *ex juris* defendants advanced individual argument in support of their applications for dismissal. Each applicant adopted those arguments advanced by

co-defendants applicable to their circumstance. Some arguments are similar but with a different emphasis or presented from a different prospective. The applicants filed individual affidavit evidence in support of the differences in their corporate history, the locale of their assets, and regarding their involvement, or lack of involvement, in the manufacture or sale of cigarettes and their connection to British Columbia.

B.A.T. INDUSTRIES P.L.C. AND BRITISH AMERICAN TOBACCO (INVESTMENTS) LTD.

[14] B.A.T. Industries p.l.c. (“Industries”) and British American Tobacco (Investments) Ltd. (“Investments”) apply to set aside the service on them in England, without leave, the Writ and Statement of Claim filed on behalf of Her Majesty the Queen in right of British Columbia.

[15] Industries is a holding company incorporated in the United Kingdom with its registered office in London England.

[16] It has never manufactured tobacco products, sold them, been registered extra-provincially in British Columbia, or had a place of business, employees, or representatives in British Columbia. It has never contracted, advertised, or had assets in British Columbia.

[17] British American Tobacco (Investments) Limited is a public company incorporated in the United Kingdom with a registered office in London England. Commencing in 1912, Investments owned approximately 83% of the shares of the predecessor to Imasco Limited, now known as Imperial Tobacco Canada Limited.

Investments' ownership interest declined over time so that by 1976 it was a minority shareholder owning less than 50% of Imasco's shares.

[18] Counsel argues that the reach of provincial jurisdictions against foreigners requires there be a real and substantial connection ("jurisdictional *simpliciter*") and that the exercise of jurisdiction meets a reasonable measure of fairness and justice to satisfy the reasonable expectations of the national and international legal communities.

[19] Counsel focuses on the need for principles of order and restraint guiding jurisdictional inquiry.

[20] In ***Muscutt v. Courcelles*** (2002), 213 D.L.R. (4th) 577 (Ont. C.A.), the four major decisions of the Supreme Court of Canada impacting the law on jurisdiction were reviewed. These decisions were ***Morguard Investments Ltd. v. De Savoye***,[1990] 3 S.C.R. 1077; ***Hunt v. T&N plc***, [1993] 4 S.C.R. 289; ***Tolofson v. Jensen,*** [1994] 3 S.C.R. 1022; and ***Amchem Products Inc. v. British Columbia (Workers' Compensation Board),*** [1993] 1 S.C.R. 897.

[21] In ***Hunt v. T&N plc,*** *supra*, at 326 Mr. Justice La Forest observed that:

> …jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections.

[22] The real and substantial connection test in British Columbia was defined in ***Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C.*** (1997), 31 B.C.L.R. (3d) 24 (C.A.) at 30:

> It is common ground that the test to be applied in determining whether the B.C. Supreme Court has jurisdiction over these proceedings is whether there is a real and substantial connection between the court and either the defendant ... or the subject-matter of the litigation (occasionally referred to in the authorities as the "transaction" or the "cause of action"). Jurisdiction founded on this basis is referred to as "jurisdiction *simpliciter".*

[23] In ***Morguard***, *supra*, at 1103-1104 Mr. Justice La Forest states that:

> [I]t hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject matter of the suit ...
>
> Thus, fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction.

[24] Counsel for the applicant submits that as the connection here is the "artifice of statute" it does not accord with the "real and substantial" connection required.

[25] Counsel contends there is no valid cause of action and that is fatal to jurisdiction. There will not be a good arguable case if it is established the plaintiff's action is bound to fail. [***AG Armeno Mines and Minerals Inc. v. PT Pukuafu Indah*** (2000), 77 B.C.L.R. (3d) 1 at 8 (C.A.)]

[26] Counsel for the applicants argue the retroactive provisions in the ***Act*** cannot ground a cause of action against an *ex juris* defendant.

[27] The applicants submit that there is no real and substantial connection between this Court and either the *ex juris* defendants or the subject matter of the litigation.

[28] Counsel urges the evidence is that the applicants are in effect complete strangers to British Columbia having no connection to this jurisdiction.

[29] Counsel argues that whether a real and substantial connection exists with the subject matter of the litigation leads to the ***Act*** which is the foundation of the plaintiff's claim. The applicants brand the base of the plaintiff's claim a statutory fiction which deems them a manufacturer, and allegations of conspiracy are vague and general, lacking the specificity and substance required and should be struck. [***Furlan v. Shell Oil Co.*** (2000), 77 B.C.L.R. (3d) 35 (C.A.) at 40-41]

[30] The applicants submit it is apparent from the definition of "manufacturer" in s. 1(1) and 1(2) of the ***Act*** that it is conceived to target foreigners and to exclude persons such as wholesalers or retailers, who are the most likely persons or entities to carry on business in British Columbia.

[31] The applicants submit that the conduct the plaintiff asserts gives rise to a cause of action is located outside of British Columbia and therefore the predominating element which might tie a defendant to the jurisdiction is absent.

[32] Counsel argues that unlike ***Moran v. Pyle National (Canada) Ltd.*** (1973), 43 D.L.R. (3d) 239, [1975] 1 S.C.R. 393, where the predominating element was found to be the damage suffered, here the plaintiff's position was that pecuniary damage was immaterial to its cause of action. It is argued that cannot be considered a real and substantial connection.

[33] The applicants argue that the cause of action asserted by the plaintiff is for the recovery of the cost of health care benefits based on an alleged breach of a common law, equitable or statutory duty or obligation owed to persons in British Columbia, not the Government, who as a result have been or might become exposed to tobacco product, irrespective of whether those persons have suffered pecuniary damage in respect of the cost of health care benefits.

[34] On that basis, the "predominating element of the cause of action must be the conduct said to amount to a breach of duty or obligation as it is immaterial to the cause of action whether damage results.

[35] The plaintiff associates the applicants to the breaches of others through allegations of conspiracy triggering s. 4 of the ***Act***. Whatever conduct occurred was outside of British Columbia.

[36] Counsel urges the position of the applicants is therefore unlike a common law claim based on the tort of conspiracy, as the cause of action the ***Act*** confers on the Government does not require consequences within the territory resulting from the alleged wrongful conduct outside the territory.

> ...the mere fact that another state (or province) has an interest in a wrong committed in a foreign state (or province) is not enough to warrant its exercising jurisdiction over that activity in the foreign state, for a wrong in one state will often have an impact in another.
>
> [***Tolofson***, *supra*]

[37] In ***Nutreco Canada Inc. v. F. Hoffmann-La Roche Ltd.*** (2001), 10 C.P.C. (5th) 351 at 363 (B.C.S.C.), Sigurdson J. noted at ¶62 that the "enforceability of a

judgment is one factor upon which a court may decide that it is not appropriate to exercise its extra-territorial jurisdiction".

[38] Counsel notes the British Columbia Court of Appeal has described the issues of jurisdiction and enforceability as "closely intertwined":

> The likelihood of enforceability of a judgment can be used as a measure against which to assess the reasonableness of a finding of jurisdiction. [***Cook v. Parcel***, *supra* at ¶41]

[39] In ***Muscutt***, *supra*, at ¶102 and ¶109, Justice of Appeal Sharpe considered the enforceability of a judgment in the *ex juris* defendants home locale to be one of the eight factors of relevance to the real and substantial connection test.

[40] The applicants rely upon the evidence of Sir Anthony Evans that a judgment against Industries would not be enforceable in England by reason of the revenue rule.

[41] In Sir Anthony's opinion:

> The Act therefore imposes a financial liability on specified persons to contribute towards a part of government expenditure. They are identified as wrongdoers, but their liability under the Act is measured by reference to the expenditure rather than the consequences of their wrongdoing.
>
> These characteristics, in my opinion, justify describing the relevant provisions of the Act as a 'revenue or penal' law within the rule which precludes enforcement outside British Columbia, and as an assertion of sovereignty which by international law is not enforceable outside its territory.
>
> [Affidavit of Sir Anthony Evans sworn May 8, 2002, ¶48-49]

[42] The applicants urge the evidence of Sir Anthony is far more persuasive than that of Mr. Adrian Briggs whose affidavit opinion was tendered by the plaintiff. Counsel notes that in cross-examination on his affidavit Mr. Briggs was uncertain if he had read the Statement of Claim prior to giving his opinion, did not attach importance to Hansard, or to give specific consideration to the definition of "manufacturer" in the ***Act***, particularly s. 1(2) which tends to target foreigners and to exclude persons most directly involved in the cigarette market.

[43] The appellants in general accuse Mr. Briggs of basing his opinion on the form which the Government claim takes rather than the true substance of the claim which is the appropriate principle.

[44] Investments submits there is a parallel to be drawn with the facts in ***Unifund Assurance Co. of Canada v. Insurance Corp. of British Columbia***, [2003] 2 S.C.R. 63, which would deny the Government the real and substantial connection between British Columbia and the statutory claim under the ***Act*** against the *ex juris* defendants. In ***Unifund***, Investments submits that regardless of whether the Government is correct in asserting a real and substantial connection between British Columbia and a tort claim by an individual consumer in British Columbia against the out of province alleged tortfeasor, it does not follow there exists a real and substantial connection between British Columbia and a *sui generis* claim under a British Columbia statute against the out of province alleged tortfeasor.

[45] Investments takes issue with the view of the Government that ***Muscutt*** is distinguishable as it was decided in the context of an Ontario Rule governing *ex juris*

service that differs from Rule 13 of the British Columbia ***Rules of Court***. The Court in ***Muscutt*** makes clear in ¶48-53 that the rule is procedural in nature and cannot of itself confer jurisdiction over a claim in respect of a tort committed outside the province. A Court must consider whether the cause of action has a real and substantial connection to the province but be guided by the principles "… of order and fairness" described by Mr. Justice La Forest in ***Hunt v. T&N plc***, *supra*, at 326.

THE RJR DEFENDANTS

[46] Counsel for the *ex juris* defendants R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc. (the “RJR defendants”) forcefully argue that service must be set aside as the cause of action relied upon did not exist during the relevant time and was therefore then unknown and unknowable and the only basis for asserting the existence of such a cause of action is an intra-territorial retroactive provision in a provincial statute that can therefore have no extra-territorial operation.

[47] It is the applicant’s position that for the purpose of the court’s extra-territorial jurisdiction an intra-territorial retroactive provision cannot determine the existence of a cause of action which otherwise did not in fact exist during the relevant time in the case at bar. They reason that is so because for that purpose, the cause of action must have existed in fact and been knowable at the time.

[48] Counsel argues the conduct of the manufacturers is all alleged to have occurred before the existence of the ***Act***. At the time of the conduct therefore the cause of action did not exist.

[49] The applicants submit the real and substantial connection test depends on the existence of a cause of action that, at the material time, was in law and fact "likely to have been in the reasonable contemplation of the parties". [***Moran***, *supra* at 408-409]

[50] Prior to the ***Act*** coming into force there was no "*locus delicti commissi*" as the *delict* did not exist prior to the enactment of the ***Act***.

[51] As the impugned conduct of the *ex juris* defendants pre-date the existence of the ***Act***, the applicants urge they were not a *delict* under the ***Act*** and for the purpose of the court's extra-territorial jurisdiction no cause of action arises out of the conduct of the applicants.

[52] The applicants submit that the principle of order and fairness must govern a finding of jurisdiction over foreign residents. [***Morguard***, *supra* at 1097]

[53] That principle, it is argued, finds expression in the principle of reciprocity between finding jurisdiction over foreign residents and recognizing and enforcing foreign judgments. The finding of extra-territorial jurisdiction and giving recognition to and enforcing foreign judgments has been said to be correlative. [***Morguard***, *supra* at 1107]

[54] The applicants argue that the court should not find jurisdiction where it is not prepared to recognize and enforce a foreign judgment granted on the same jurisdictional basis. [***Muscutt***, *supra* at ¶93]

[55] The applicants submit that our courts would not be prepared to recognize and enforce a foreign judgment granted against a British Columbia resident on the basis of a cause of action that was unknown and unknowable when the British Columbia resident committed itself to the course of action alleged to give rise to it, particularly where vested rights of repose were also removed by special law.

[56] The applicants submit the ***Act*** provides for recovery by the Government for breaches of statutory duties created, defined and imposed solely by penal laws, with such laws made retroactively applicable. [***Trades Practice Act***, S.B.C. 1974 c. 96 and the ***Combines Investigation Act***, R.S.C. 1952 (Supp.) c. 314]

[57] The Government alleges in the Statement of Claim breaches of duty defined by those statutes to come within the ***Act***'s definition of a tobacco related wrong. [s. 2(1) of the ***Act***; Statement of Claim pp. 20, 24, 25]

[58] The Supreme Court of Canada has held that Courts will not enforce a foreign judgment in favour of a foreign state for payment based directly or indirectly on the breach of foreign penal or revenue laws. [***United States of America v. Harden***, [1963] S.C.R. 366; ***Government of India, Ministry of Finance (Revenue Division) v. Taylor***, [1955] A.C. 491; ***Peter Buchanan Ld. & Macharg v. McVey***, [1955] A.C. 516; and ***Moore v. Mitchell***, (1929) 30 F. 2d 660]

[59] The applicants submit that on the opinion evidence of Sir Anthony Evans, any judgment under the ***Act*** against them would be unenforceable in their home jurisdiction.

PHILIP MORRIS INCORPORATED AND PHILIP MORRIS INTERNATIONAL INC.

[60] The applicants' position is that to found jurisdiction over the applicants, the plaintiff must establish:

- a "good arguable case" against the applicants;
- a real and substantial connection between the jurisdiction and the defendants or the action;
- that the courts of British Columbia are the *forum conveniens*;
- that a reasonable measure of fairness and justice sufficient to meet the reasonable expectations of the national and international legal communities will be preserved if the court exercises jurisdiction.

[61] The applicants submit that the real and substantial connection test must conform to the broad constraint of order and fairness governing principles of private international law generally. [***Morguard***, *supra* at 1097; ***Tolofson***, *supra* at 1049; ***Hunt & T&N, plc***, *supra* at 325-6]

[62] In regard to a good arguable case the Court of Appeal upheld the constitutional validity of the ***Act*** and the applicants' positions reserved pending further appeal. The Court of Appeal however expressly declined to decide whether from the standpoint of extra-territoriality s. 4 of the ***Act*** was constitutionally applicable to foreign defendants who would be rendered liable by virtue of the provision in respect of the market share of other defendants. The ***Act*** was held intra-territorial in pith and substance as applying, apart from s. 4, only to defendants

who had committed breaches of duty in British Columbia. [2004 BCCA 269 at ¶48, ¶180 and ¶232-5]

[63] The evidence shows the defendant Philip Morris International Inc. is a Delaware corporation, incorporated in 1987, and has never manufactured or sold cigarettes in Canada.

[64] The defendant Philip Morris Incorporated (now Philip Morris U.S.A. Inc.) is a Virginia corporation, and has not manufactured cigarettes for the Canadian domestic market since 1989, and between 1981-1988 cigarettes manufactured by Philip Morris Incorporated represented approximately 1/8 of 1% of the Canadian domestic market.

[65] The Court of Appeal declined to consider the constitutional applicability of the ***Act*** to a defendant whose liability was solely or primarily premised on s. 4. In ***Unifund***, *supra* at ¶56, the doctrine of constitutional applicability serves to prevent the applicability of the law of a Province to matters not sufficiently connected with it as measured against the principles of order and fairness which underlie the whole of private international law:

> 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.

[66] The applicants submit that as the Court of Appeal found the ***Act*** was, in pith and substance, intra-territorial based primarily on the finding that, apart from s. 4, it applied only to defendants who had committed breaches of duty in British Columbia and therefore s. 4 should be considered constitutionally inapplicable on the ground of extra-territoriality to foreign defendants.

[67] Counsel submits that as Philip Morris International Inc. never manufactured cigarettes, and never sold cigarettes in British Columbia, and who are not themselves alleged to have owed or breached a duty of care to British Columbia residents, the ***Act*** is constitutionally inapplicable to them and therefore no good arguable case exists to sustain jurisdiction.

[68] Philip Morris Incorporated submits a good arguable case against it does not exist in respect potentially of s. 4 as it is extra-territorial in application when no breach of a duty to a British Columbia resident existed except through the breach of another defendant.

[69] As the Government had no cause of action until the ***Act*** was enacted there could not have existed a “real and substantial connection” between the jurisdiction and the action.

[70] Absent a real and substantial connection s. 92 (14) of the ***Constitution Act***, 1867, limits the courts ability to take jurisdiction to administration of justice in the Province.

[71] The applicants submit the attempt by the Government to gain jurisdiction by making its cause of action retroactive under s. 10 of the ***Act*** is an impermissible and ineffective attempt to cure the existing constitutional deficiency.

[72] The applicants submit there is no real and substantial connection between the jurisdiction and the applicants when it is not alleged a duty of care was owed or breached to a British Columbia resident, and the only basis for potential liability is under s. 4 in respect of some other defendants breach of duty.

[73] It is urged that in respect of Philip Morris Incorporated its traditional “minimal” Canadian market share cannot support the "substantial" aspect of the “real and substantial” requirement.

[74] The applicants submit to promote the broad principles of “order and fairness” underlying the “real and substantial test” it is intended that people will only be exposed to the laws of a jurisdiction where their connections with that jurisdiction make the exposure foreseeable.

[75] The applicants argue that their home jurisdiction would be the most suitable *forum conveniens* to attain the “ends of justice”. The ***Act*** is one sided and retroactive to heavily favour the Government by attaching radically new

consequences to past events and is far removed from common law principles which would ordinarily govern.

[76] The applicants submit the affidavit evidence of Messrs. Redish and Brand supports the viewpoint that a United States court would decline to apply the ***Act*** as being in violation of United States constitutional requirements, and Setsu Kobayashi deposes that "…it would be very unlikely [that the judgment] would be enforced in light of the unconstitutional content and procedure of the statute under Japanese law". [Affidavit of Setsu Kobayashi sworn June 20, 2002, Exhibit "A", p. 6, ¶5]

[77] The applicants urge that the issue of enforceability of a judgment is of major import to the *forum conveniens* and taking of jurisdiction in one territory and enforcement in another "... must be viewed as correlatives." [***Marion (c.o.b. Bacchus Group) v. Monarch Co.***, [1998] B.C.J. No. 74 (S.C.) at ¶10; ***Cook v. Parcel,*** *supra* at ¶ 41-2; ***Exta-Sea Charters Ltd. v. Formalog Ltd.*** (1991), 55 B.C.L.R. (2d) 197 (S.C.) at ¶ 40; ***Morguard***, *supra* at 1103]

[78] The applicants' evidence is that Philip Morris International Inc. for practical purposes has no assets outside of United States. Philip Morris Incorporated has assets in the United States, Japan, and machinery in Germany, Ireland and Switzerland, but it is submitted on the affidavit evidence of Christoph Paulus, Christian Tomuschat, and Setu Koyabchi a judgment would not be enforceable in these jurisdictions.

[79] Finally the applicants submit that the Government is obliged to convince the court that exercise of jurisdiction would be consistent with the reasonable expectations of the national and international legal community.

[80] The Court of Appeal in ***Bushell v. T&N plc***, *supra* at ¶8 noted that the court's extra territorial jurisdiction over foreign defendants "... should be carefully scrutinized and exercised with appropriate restraint if we expect our judgments to be respected and enforced in other jurisdictions".

[81] Counsel argues that the assessment of "fairness" and "justice" is linked to the reasonable expectation of the parties at the time of the transaction in question and reinforces the underlying object of private international law to ensure "security of transactions with justice". [***Michalski v. Olson*** (1998), 15 C.P.C. (4th) 106 (Man. C.A.) at ¶19; ***Morguard***, *supra* at ¶14 & ¶33]

[82] The applicants cite the main features of the ***Act*** which defy the reasonable expectations of the parties include:

- the retroactive creation of a direct cause of action by the Government against tobacco companies in the absence of any prior legal privity between the parties;
- the presumption in respect of causation in favour of the Government in s. 3 (2) of the ***Act*** in combination with the blocking provisions of s. 2 (5) impairing a defendants ability to rebut the presumption;
- elimination of accrued limitations and revival of actions previously barred from effluxion of time;

- s. 10 allowing manufacturers to be punished retroactively for tobacco related wrongs “where the tobacco related wrong occurred”;

- permitting an aggregated claim for damages without proof of loss in the usual common law context.

[83] The applicants' position, based upon the opinion evidence of Professor Brand, is that regulation in the form of a judgment under the ***Act***, based upon revival of expired claims, would constitute expropriation under NAFTA.

[84] Counsel argues that the opinion evidence in the applicants' affidavits is to the effect that application of the ***Act*** would result in the violation of numerous fundamental constitutional precepts in both the United States and Japan.

CARRERAS ROTHMANS LIMITED

[85] The applicants’ position is that the plaintiff’s claim does not come within the Rule 13(1)(h), (j) or (o) grounds relied upon in the service *ex juris* of process upon them, and leave was not obtained pursuant to Rule 13 (3).

[86] Alternatively if the plaintiff’s claim does come within a Rule 13(1) ground, the plaintiff has failed to demonstrate a real and substantial connection between this jurisdiction and either the cause of action or the applicant.

[87] Carreras Rothmans Limited is a United Kingdom company with registered office in London, England. It is a non-operating company that has been dormant since 1986.

[88] The plaintiff does not allege the applicant ever manufactured, promoted, marketed or distributed tobacco products sold or intended for sale in British Columbia. The company has never had assets or a presence of any type in British Columbia and has never owned shares in a Canadian tobacco company.

[89] The applicants submit Rule 13(1) grounds are procedural and do not confer extra-territorial jurisdiction on the Court. The Rule must be viewed in light of constitutional principles of "order and fairness" and "real and substantial connection". [***Muscutt***, *supra* at ¶8-9]

[90] A failure to bring the cause of action within Rule 13(1) results in failure of the *ex juris* service and doubt is to be resolve in favour of the "foreigner". [***Canadian Westinghouse Co. Ltd. v. Davey and United Engineering Co. Ltd.***, [1964] 2 O.R. 282 (Ont. C.A.) at 284]

[91] Counsel argues Rule 13(1)(h) requires the cause of action be a tort committed in British Columbia. The proceeding here is entirely statutory and not "founded on a tort committed in British Columbia". [s. 2(1) and 2(4)(b) of the ***Act***]

[92] Rule 13(1)(j) requires that Carreras Rothmans Limited is a proper party to this proceeding, which has been properly brought against another defendant that was duly served in British Columbia.

[93] Counsel submits that to make the applicant, as a foreign defendant, a "necessary or proper party", the same cause of action must be pleaded against it and a domestic defendant. Section 2(1) of the ***Act*** defines the Government's claim

as a “direct and distinct action” which belies a common cause of action with a domestic defendant. [***Jan Poulsen & Co. v. Seaboard Shipping Co.*** (1994), 100 B.C.L.R. (2d) 175 (S.C.); ***Bangkok Bank of Commerce Public Co. v. City Trading Corp***. (1997), 13 C.P.C. (4th) 324 (B.C.S.C.)]

[94] Carreras Rothmans Limited also submits that a “proceeding” referred to in Rule 13(1)(j) must fall within one of the other enumerated grounds and does not expand the example of cases where, *prima facie*, a real and substantial connection between either the *lis* and the cause of action or the defendant exists. [***Furlan***, *supra* at 37]

[95] Rule 13(1)(o) it is submitted applies only where goods or merchandise are sold or delivered in British Columbia to the plaintiff and that has not been alleged here.

[96] It is the applicants' submission that the *ex juris* service fails under Rule 13(1) as an application is required under Rule 13(3) before service can be made and application under the Rule requires a real and substantial connection to be shown between British Columbia and either the defendant Carreras or the cause of action.

[97] The applicant opposes the plaintiff seeking to apply here for leave to serve *ex juris*, and alternatively submits if allowed to apply cannot rely on its pleadings to satisfy Rule 13(3). [***Northland Properties Ltd. v. Equitable Trust Co.***, [1991] B.C.J. No. 4068 (S.C.) at ¶3 & ¶9]

[98] The applicant alternatively argues that the plaintiff has failed to show there is a real and substantial connection between the jurisdiction and either the cause of action or the applicant. [***Hunt v. T & N plc***, *supra*; ***Bushell v. T & N plc*** (1991), 60 B.C.L.R. (2d) 294 (C.A.); ***Teja v. Rai*** (2002), 97 B.C.L.R. (3d) 44; ***Cook v. Parcel***, *supra*]

[99] The applicant submits the real and substantial connection test is not rigid [***Hunt***, *supra*], that judicial restraint is to be exercised [***Morguard***, *supra*] and the several factors identified by Mr. Justice of Appeal Sharpe in ***Muscutt***, *supra*, are to be taken into consideration.

[100] The applicant urges that considering the many factors the courts have identified as relevant (including the mentioned ***Muscutt*** factors) there are a least six primary factors that should preclude this court taking jurisdiction.

1. The locus of the predominating element of the plaintiff's cause of action, being the conduct alleged, is outside of British Columbia.

2. No cause of action existed at the time the alleged wrongful acts were committed which excludes the possibility of a real and substantial connection between that cause of action and any jurisdiction.

3. The complete absence of any alleged connection between British Columbia and Carreras precludes the establishment of a real and substantial connection on that basis.

4. The retroactive effect of the ***Act*** violates the principles of order and fairness that underlie all private international law, and weights heavily against the Court assuming jurisdiction.

5. The international nature of the plaintiff's claim, as opposed to one that is inter-provincial, should weigh against the Court assuming jurisdiction.

6. Commity and enforcement of a judgment under the ***Act*** would on the evidence of Sir Anthony Evans be unenforceable in the United Kingdom as it is based on a foreign revenue law.

RYESEKKS P.L.C

[101] The applicant Ryesekks aligns itself with the defendants B.A.T. Industries p.l.c. and Carreras Rothmans Limited and adopts the arguments made on behalf of those *ex juris* defendant applicants.

ROTHMANS INC.

[102] The applicant submits the Government seeks to impose a new liability retroactively on extraterritorial parties.

[103] Counsel argues that the inapplicability of the ***Act*** and absence of jurisdiction arise from the retroactivity of the ***Act***.

[104] The applicant sold its tobacco business to domicile in Ontario and withdrew from British Columbia in 1985.

[105] Counsel submits that British Columbia law cannot be applied extraterritorially and the ***Act*** itself cannot give jurisdiction to the court that conflicts of laws rules would not permit.

[106] The applicants argue that for jurisdiction to be taken there must be a cause of action and a real and substantial connection between the cause of action and British Columbia, or between British Columbia and the defendant. Here, the cause of action under s. 10 is centrally a creature of statute which cannot change the rules of private international law to confer a jurisdiction upon a foreign defendant it would not otherwise have.

[107] The applicants' position is that in private international law changes of domicile or residence are relevant to the outcome when the question arises whether the proper law at the time of the change or under retroactive statutes should apply. [***Ambrose v. Ambrose*** (1959), 21 D.L.R. (2d) 722 (B.C.S.C.), Aff'd (1960), 25 D.L.R. (2d) 1 (B.C.C.A.)]

GOVERNMENT RESPONSE TO APPLICATIONS AND CONCLUSIONS

[108] The plaintiff responds to the several challenges by the *ex juris* defendants in a comprehensive and organized fashion that integrates into their opposition to the defendants' arguments, collectively and individually, the basis on which they contend this court does have jurisdiction.

[109] I agree in large measure with the position of the Government in answer to the arguments of the *ex juris* applicants and propose to follow generally the format of their response.

BASIS OF JURISDICTION

[110] The ***Act*** has been held to be constitutionally valid by the Court of Appeal. It is the subject matter of the action, not the ***Act***, which determine jurisdiction. The subject matter of the action is by reference to the Statement of Claim. Whereas the constitutional challenge relates to the characterization of the ***Act***, the jurisdictional challenge is focussed on the claim as pleaded by the plaintiff Government.

[111] The Government's action is one of a product liability nature. It concerns cigarettes sold to British Columbia residents who as a result of smoking contracted disease, for which they received medical treatment that has been paid for by the Province of British Columbia. It is alleged cigarettes are a dangerous product and that smoking causes disease and is addictive.

[112] The Government alleges the defendants committed wrongs in British Columbia with respect to cigarettes that were sold and smoked in the Province and the factual core of the action is rooted in British Columbia.

[113] The defendants who manufactured cigarettes sold in British Columbia include both domestic and foreign manufacturers. The claims against them are that they failed to warn of the risks of smoking; they intentionally misrepresented to British Columbians their product characteristics; and they breached provisions of the

Trades Practice Act and ***Competition Act***. As a result of these wrongs, British Columbians started to smoke or continued to smoke and suffered disease.

[114] It is alleged the wrongs all occurred in British Columbia and resulted in harm to British Columbians.

[115] It is the plaintiff's position that factually for the purposes of this action there is no distinction between a domestic manufacturer and the group of foreign manufacturers, except the location of their factories.

FOREIGN DEFENDANTS WHO DID NOT MANUFACTURE CIGARETTES SOLD IN BRITISH COLUMBIA

[116] The Government claims these defendants acted in concert and conspired with the foreign and domestic defendants who did manufacture the cigarettes sold in British Columbia. The two groups conspired to commit the wrongs alleged in the Statement of Claim.

[117] A conspiracy occurs in British Columbia if the harm is suffered here and the court will take jurisdiction over foreign defendants who are alleged parties to the conspiracy. Further, once jurisdiction over a wrong, including conspiracy, is established, all defendants who are potentially liable to the plaintiff may properly be joined in the action.

SUMMARY OF THE GOVERNMENT POSITION WITH RESPECT TO JURISDICTION SIMPLICITER AND THE DISCRETION TO DECLINE JURISDICTION

[118] The Government position is that there is no lack of a real and substantial connection because the wrong and the existence of the Government's cause of action are not contemporaneous.

[119] The Government submits the court has jurisdiction over a proceeding where there is a real and substantial connection between the court and either the defendant or the subject matter of the litigation. It is the conduct of the foreign defendants and the effects of that conduct within the jurisdiction that creates the connection to the jurisdiction. I agree with the Government's position that a real and substantial connection does not require the wrongful conduct be immediately actionable and a cause of action existing at the time of the commencement of the action is sufficient.

[120] The Government takes issue with the applicant's position that the predominant element of the action is foreign conduct alone. The Government's claim is in respect of breaches of duty in British Columbia which caused disease in British Columbia. I accept that it is irrelevant to the issue of jurisdiction that the ***Act*** does not require pecuniary loss by an individual.

[121] The base of the Government's claim is mass marketing of tobacco products for the past 50 years and the wrong done to the population of British Columbia smokers over that time cannot be other than substantial.

[122] Breaches of duty in relation to products sold in the jurisdiction and participation in a conspiracy causing harm within the jurisdiction are a recognized basis for the taking of jurisdiction. Jurisdiction assumed on these grounds, based on a real and substantial connection, satisfy the required standard of order and fairness.

THE SUBJECT MATTER OF THE GOVERNMENT CLAIM

[123] The Government alleges that the foreign defendants Rothmans Inc., Philip Morris Incorporated (now Philip Morris U.S.A. Inc.), R.J. Reynolds Tobacco Company and Ryesekks p.l.c. manufactured cigarettes sold in British Columbia and that they breached their duty of care to British Columbia consumers as particularized in paragraphs 47-90 of the Statement of Claim.

[124] The breaches of duty are, generally

- failing to take all reasonable measures to eliminate or minimize the risks of smoking their cigarettes;
- failing to warn of the risks of smoking their cigarettes;
- failing to take all reasonable means to prevent children and adolescents in British Columbia from starting or continuing to smoke;
- manufacturing, marketing, distributing and selling cigarettes which were unjustifiably hazardous, or alternatively they knew or should have known, were unjustifiably hazardous;

- making representations to consumers with respect to smoking which they knew were false and deceitful or which were made with wilful blindness or recklessness as to their truth or falsehood.

[125] Rothmans Inc., R.J. Reynold Tobacco Company, and Ryesekks p.l.c. do not deny they were involved in the sale of cigarettes in British Columbia. Philip Morris Incorporated sold cigarettes in British Columbia for a limited time and latterly what they consider was a *de minimus* and insignificant market share.

CONSPIRACY RESULTING IN INJURY TO CONSUMERS IN BRITISH COLUMBIA

[126] The Government alleges that the foreign defendants who did not manufacture cigarettes sold in British Columbia, namely, B.A.T. p.lc., British American Tobacco (Investments) Ltd., R.J. Reynolds Tobacco International Inc., Philip Morris International Inc., and Carreras Rothmans Ltd. conspired, or had a common design, with other manufacturers, foreign and domestic who did sell cigarettes in British Columbia. The effect of the conspiracy was to prevent, by unlawful means, consumers in British Columbia from acquiring knowledge the defendants knew or ought to have known as to the harmful nature and the addictive properties of cigarettes, and that injury to consumers would result from the acts done in furtherance of the conspiracy or common design. The alleged breaches of duty owed by the foreign defendants to British Columbia consumers are particularized in paragraphs 91 to 200 of the Statement of Claim and are alleged to constitute acts in furtherance of the conspiracy or common design.

GENERAL APPROACH TO JURISDICTIONAL ISSUES

[127] Whether the court has jurisdiction *simpliciter* and its discretion to decline jurisdiction are for sequential consideration with jurisdiction *simpliciter* the threshold issue. [***Canadian International Marketing Distributing Ltd. v. Nitsuko Ltd.*** (1990), 56 B.C.L.R. (2d) 130 (C.A.) at 131-132; ***Jordan v. Schatz*** (2000), 77 B.C.L.R. (3d) 134 (C.A.) at ¶21 and ¶27; ***Ell v. Con-Pro Industries Ltd.*** (1992), 11 B.C.A.C. 174 at 184; ***Harrington v. Dow Corning Corp.*** (2000), 82 B.C.L.R. (3d) 1 (C.A), at ¶69]

[128] The court either has jurisdiction *simpliciter* or it does not based upon the existence of a real and substantial connection between British Columbia and either the defendant or the subject matter of the litigation. [***Cook v. Parcel***, *supra* at ¶20; ***Furlan v. Shell Oil Co***., *supra* at ¶3; ***Jordan v. Schatz***, *supra* at ¶ 27; ***Harrington v. Dow Corning Corp***., *supra* at ¶69]

[129] The real and substantial connection test inherently insures that taking jurisdiction comports with the standard of order and fairness. [***Morguard***, *supra* at 1108; ***Harrington v. Dow Corning***, *supra* at ¶87]

[130] A further assurance that the assumption of jurisdiction is appropriately restrained is the courts exercise of a discretion to decline jurisdiction, where jurisdiction *simpliciter* has first been established, under the doctrine of *forum conveniens* if it is established there is clearly a more appropriate forum elsewhere. [***Tolofson v. Jensen***, *supra* at 1049; ***Cook v. Parcel***, *supra* at ¶ 21; ***Moellenbeck v. TRW Vehicle Safety Systems Inc.*** (2000), 145 B.C.A.C. 269 at ¶15]

JURISDICTION *SIMPLICITER*

THE REAL AND SUBSTANTIAL CONNECTION TEST

[131] The Court of Appeal in Cook set the test for jurisdiction *simpliciter* in British Columbia as the existence of a real and substantial connection between the court and either the defendant or the subject matter of the litigation.

THE GOOD ARGUABLE CASE

[132] The burden is on the plaintiff to demonstrate it has a good arguable case with a real and substantial connection between the court and each of the defendants or the subject matter of the litigation. [***Cook v. Parcel***, *supra* at¶20; ***Furlan v. Shell Oil***, *supra* at ¶3; ***Jordan v. Schatz***, *supra* at ¶ 27; ***Harrington v. Dow Corning Corp***., *supra* at ¶69]

[133] The facts as to a real and substantial connection may be established from the plaintiff's pleadings. Supplementary evidence will be required where the pleadings do not clearly allege facts to support jurisdiction under Rule 13(1) or 13(3) or where the defendant has tendered evidence that puts facts necessary to the plaintiff's case in question, and the plaintiff's case is bound to fail.

[134] I accept the foreign defendants have not tendered evidence placing in issue pleaded facts essential to the plaintiff's case and the facts as pleaded in the Statement of Claim may be presumed true for consideration of the jurisdictional challenge.

REAL AND SUBSTANTIAL CONNECTION WITH THE SUBJECT MATTER OF THE GOVERNMENT CASE

[135] Rothmans Inc., Philip Morris Incorporated, R.E. Reynolds Tobacco Company, Ryesekkes p.l.c., as well as the local defendants, participated in the sale of cigarettes in British Columbia and committed breaches of duty owed consumers in British Columbia.

[136] Foreign manufacturers are subject to the jurisdiction of a court in any forum where they might reasonably foresee their products would be used or consumed. A real and substantial connection with the jurisdiction exists in these circumstances. [***Moran v. Pyle***, *supra* at 408-409]

PARTICIPATION IN A CONSPIRACY RESULTING IN INJURY TO CONSUMERS IN BRITISH COLUMBIA

[137] The Statement of Claim alleges all defendants whether they manufactured cigarettes sold in British Columbia or not, participated in a conspiracy which resulted in injury to British Columbia consumers and that there is a real and substantial connection between the conspiracy alleged and British Columbia that gives this court jurisdiction over the foreign defendants.

[138] A real and substantial connection between the jurisdiction and the subject matter of the action has been found where a conspiracy causing injury in the jurisdiction is alleged. [***Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*** (2002), 20 C.P.C. (5th) 351 (Ont. S.C.J.) at ¶70, ¶95-97, ¶100-102; ***Nutreco***

Canada Inc., *supra* at ¶52; ***WIC Premium Television Ltd. v. General Instrument Corp.*** (1999), 73 Alta. L.R. (3d) 365 (Q.B.) at ¶18, ¶22-23]

[139] When a real and substantial connection exists between the jurisdiction and subject matter of the action, any defendants who are potentially liable for the wrongs alleged are properly joined in the action [***Furlan v. Shell Oil***, *supra* at ¶3 and ¶21]. Mr. Justice Low observed in ***Yu-Ccan Corp. v. Master Professional Services Ltd.***, [2000] B.C.J. No. 839, 2000 BCSC 676 at ¶17 that "…[it] makes no sense to prosecute a claim for civil conspiracy without having the principal parties to the alleged conspiracy before the court as parties".

DEFENDANTS ARGUMENTS REGARDING REAL AND SUBSTANTIAL CONNECTION

TIMING OF RIGHT OF ACTION

[140] The focus in determining whether a real and substantial connection exists is the subject matter of the cause of action rather than when the cause of action arose. It is not the right of action bestowed by the ***Act*** which creates the required connection to the jurisdiction, rather is the underlying factual basis of the action.

[141] It is not uncommon that there may be breaches of duty without immediate damages occurring and therefore not actionable at the time of the breach. There does not appear to be authority which would limit a real and substantial connection to only those instances where the wrongful conduct was immediately actionable.

[142] The applicant foreign defendants argue the real and substantial connection test is not met because the Government's cause of action was not within the defendants' contemplation at the time of the alleged wrongful conduct. I agree with the Government's position that the articulation by the Supreme Court of Canada in ***Moran v. Pyle*** does not support the suggested necessity that the law of the affected state be within the contemplation of the parties. It is the contemplation that a person's activities would cause injury in the jurisdiction which is the essence of a real a substantial connection.

[143] In a jurisdictional analysis it is contemplation of the forum, rather than the law of the forum which is of first concern. Jurisdiction and choice of law are separate and discrete matters for determination.

[144] A defendant who knows his activity has impact in another jurisdiction should expect however the laws of that jurisdiction may have application and that might include the risk of changes that would permit retroactive recover.

[145] The Government correctly notes that the wrongs committed by the defendants were actionable by individuals prior to the ***Act*** therefore knowledge by the foreign defendants of actionability for the breaches of duty would have existed except not by the Government.

DEFINITION OF MANUFACTURER

[146] B.A.T. Industries p.l.c argued that the definition of "manufacturer" creates an artificial connection between it and the Government action.

[147] It s not the ***Act*** however which creates a real and substantial connection. The definition in the ***Act*** only allows for B.A.T. Industries p.l.c. to be a potential defendant. It is the wrongful conduct of B.A.T. Industries p.l.c. as detailed in the Statement of Claim which provides the real and substantial connection with British Columbia. [***Robinson v. Chrysler Canada Ltd.*** (2002), 2 B.C.L.R. (4th) 1 (C.A.)]

LOCATION OF THE PREDOMINANT ELEMENT OF THE CAUSE OF ACTION

[148] Counsel fro B.A.T. Industries p.l.c. and Carreras Rothmans Ltd. argue that as the predominating element of the Government claims against them is for conduct which occurred outside of British Columbia there is no real and substantial connection with British Columbia. In my view, ***Moran v. Pyle*** does not support that view. The Supreme Court of Canada in ***Moran v. Pyle*** referred to the predominating element of a tort only in the context of where it may be said a tort was committed not that the predominating element defined jurisdiction.

[149] There is also substance to the Government position that as the action concerns breach of duties to British Columbia smokers, tobacco related disease suffered as a result of the breaches, and the cost to the Government of treating those diseases, those breaches of duty and their consequences constitute the predominant element of the action.

[150] B.A.T. Industries p.l.c.'s argument that the common law of conspiracy has no application to the Government claim because unlike a common law claim based on the tort of conspiracy the Government claim is for conduct occurring outside of British Columbia regardless of whether damage resulted.

[151] Although the Government position is that pecuniary damage suffered by persons in British Columbia to whom the defendants breached a duty is not relevant to the Government's cause of action as damage, the form of disease suffered by these persons is clearly relevant. The elements of the Government claim are on an aggregated basis as opposed to individual, in sum they encompass breach of duty, injury, and health care costs occasioned by the injury all in British Columbia.

[152] Carreras Rothmans Ltd. and B.A.T. Industries p.l.c. are liable for the breaches of duty and consequent injury carried out pursuant to the conspiracy because it is alleged they conspired or acted in concert and not because of Section 4 of the ***Act*** which is only a codification of the common law and does not create a responsibility for wrongs in circumstances where it would not otherwise exist. A practical application of the distinction is illustrated in an English patent infringement case where it was held not to matter"...whether the agreement which is the basis of such design was made in this court or outside the jurisdiction nor does it matter that the person sued has not himself done within the jurisdiction any act which taken by itself could be said to amount to several infringement." [***Morton-Norwich Products Inc. et al v. Intercen Limited***, [1978] R.P.C. 501 at 514-15 (H.C.J.)]

[153] I accept that the claims against the foreign defendants should be considered together with the claims against domestic manufacturers for determining if a substantial connection exists with a focus upon where the factual core of the action exists. [***McNichol Estate v. Woldnik*** (2001), 13 C.P.C. (5th) 61 (Ont. C.A.) at ¶12-13]

[154] This accords with the view expressed by the British Columbia Court of Appeal in ***Furlan***, *supra* at ¶21 that "...once jurisdiction over the tort is established then any defendants potentially liable to the plaintiff for the tort are properly joined in the action."

***MUSCUTT* FACTORS**

[155] The argument advanced by B.A.T. Industries p.l.c. and Carreras Rothmans Ltd. that based on factors formulated in determination of jurisdiction *simpliciter* a real and substantial connection is absent here must be viewed in its procedural context.

[156] In ***Muscutt*** the injury occurred out of the jurisdiction and the only connection to Ontario was consequential loss sustained. The Ontario Rules permitted service *ex juris* on that basis whereas the British Columbia Rules would not. The factual circumstances might often fail to show a real and substantial connection with reference to further factors.

[157] The proper approach here to determine jurisdiction simplicitor is that provided by the Court of Appeal decision in ***Jordan v. Schatz*** which guards against considering *forum conveniens* principles until after jurisdiction has been first established based on the existence of a real and substantial connection between the jurisdiction and the defendant or the cause of action. [***Jordan v. Schatz***, *supra* at ¶27]

ENFORCEABILITY

[158] The decision in ***Cook v. Parcel*** is not in my view authority that the likelihood of enforcement of a judgment should be used to determine jurisdiction simplicitor.

[159] The circumstances in ***Cook*** were unusual as the judgment sought would have directly interfered with the conduct of proceedings in another jurisdiction. The remedy sought was akin to an anti-injunction suit raising comity considerations common to those applications, but not usual in service *ex juris* applications. I am in accord with Sigurdson J.'s view of this distinction expressed in ***Nutreco***, *supra* at ¶59.

[160] In ***Morguard***, *supra* at 1103, Mr. Juctice LaForest noted:

> ...that the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives, and I added that recognition in other provinces should be dependent on the fact that the court giving judgment "properly" or "appropriately" exercised jurisdiction.

[161] I agree with the plaintiff's reasoning that this was intended in regard to the situation in Canada rather than developed as a test for determination of either jurisdiction of enforceability. The test required in ***Morguard*** is that of a real and substantial connection with the forum seeking to take jurisdiction and judgment given in that circumstance should be enforceable in all Canadian provinces, given the symmetry, within Canada between the criteria for taking jurisdiction and for enforcing a judgment. It does not require that the court, prior to taking jurisdiction, consider whether their judgments would be enforceable outside Canada where enforcement

is subject to the varying requirements of the recognition and enforcement regimes in place throughout the world.

ENFORCEABILITY AND RECIPROCITY

[162] The RJR defendants argue that jurisdiction simplicitor cannot be found because a notional foreign judgment granted pursuant to a statute like the ***Act***, which allows for recovery on the basis of breaches of duty defined by the ***Trade Practices Act*** and the ***Combines Investigation Act***, would not be enforced by British Columbia court because those Acts are penal. Canadian courts will not enforce a foreign judgment in favour of a foreign state for payment based on the breach of foreign penal or revenue laws.

[163] Additionally they argue Canadian courts would not on the basis of public policy recognize and enforce a foreign judgment against a local resident if the cause of action was unknown or unknowable at the time the resident engaged in the impugned conduct.

[164] The ***Trade Practice Act*** and ***Combine Investigation Act*** however both provide restitutionary remedies in favour of individuals and I accept that Canadian courts will enforce foreign judgments that are based on those provisions even when in favour of a state. [***United States (Securities and Exchange Commission) v. Cosby,*** [2000] B.C.J. No. 626, 2000 BCSC 338; ***United States of America v. Levy*** (1999), 45 O.R. (3d) 129 (S.C.J.)]

DISCRETION TO DECLINE JURISDICTION

[165] Once a real and substantial connection to the jurisdiction has been established as I find it has, the court still retains a discretion to decline jurisdiction through application of the *forum conveniens* test. That test is to determine the appropriate forum, not the more convenient forum. [***Cook v. Parcel***, *supra* at ¶ 21; ***472900 B.C. Ltd. v. Thrifty Canada, Ltd***. (1998), 57 B.C.L.R. (3d) 332 (C.A.) at ¶36-37; ***Moellenbeck v. T.R.W.,*** *supra*, at ¶19]

[166] *Forum conveniens* directs the action to the jurisdiction with the closest connection to the action and not to secure to one of the parties a juridical advantage in an otherwise Inappropriate jurisdiction. [***Amchem***, *supra* at 912; ***Westec Aerospace Inc. v. Raytheon Aircraft Co.*** (1999), 67 B.C.L.R. (3d) 278 (C.A.) at ¶18-21; ***Moellenbeck***, *supra*, at ¶ 44-46; ***Western Union Insurance et al v. Re-Con Building Products Inc***. (2000), 36 C.C.L.I. (3d) 242 (B.C.S.C.) at ¶39]

BURDEN OF PROOF

[167] The burden of proof is upon the defendants to establish a clearly more appropriate forum where, as is the case here, there are no parallel foreign proceedings. [***Spar Aerospace Ltd. v. American Mobile Satellite Corp.,*** [2002] 4 S.C.R. 205 at ¶75, 77-78; ***Amchem***, *supra* at 921; ***472900 B.C. Ltd. v. Thritfy Canada Ltd.***, *supra* at ¶44; ***Na v. Renfrew Security Bank & Trust (Offshore) Ltd.*** (2003), 16 B.C.L.R. (4th) 345 (S.C.) at ¶67-69; ***Vanderpol v. Aspen Trailer Co.*** (2002), 100 B.C.L.R. (3d) 381 (S.C.) at ¶16; ***Imagis Technologies Inc. v. Red Herring Communications Inc.*** (2003), 15 C.C.L.T. (3d) 140 (B.C.S.C.) at ¶15]

[168] The forum proposed by the *ex juris* defendants should be a specific one where there are no parallel foreign proceedings and not propose several possible alternative forums. [***Great Canadian Gaming Corp. v. Allegiance Capital Corp.***, [2003] B.C.J. No. 2717, 2003 BCSC 1799 at ¶25; ***JLA & Associates, Inc. v. Kenny*** (2003), 41 C.P.C. (5th) 151 (B.C.S.C.) at ¶39, ¶42-44; ***Spar Aerospace***, *supra* at ¶66-67, ¶75]

[169] I find the *ex juris* defendant should be prepared to attorn to the forum it proposes. [***Cook v. Parcel***, *supra* at ¶21; ***SC International Enterprises Inc. v. Consolidated Freightways Corp. of Delaware***,(2002), 21 C.P.C. (5th) 238 (B.C.S.C.) at ¶29-31]

[170] In my view the *ex juris* defendants here have not shown there is a specific more appropriate forum to which they are prepared to attorn.

APPLICATION OF THE FORUM CONVENIENS TEST

[171] Philip Morris defendants are the only *ex juris* defendant to support a more appropriate forum. They suggest their home jurisdiction is more appropriate and appear to rely on juridical advantage in support. The direction in ***Amchem***, "…that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants…" has not however been heeded. [***Amchem***, *supra* at 912]

[172] The factual underpinning of the plaintiff's action clearly identifies British Columbia as the jurisdiction most closely connected to the action.

EXPECTATION OF THE NATIONAL AND INTERNATIONAL COMMUNITIES

[173] The question of whether "a reasonable measure of fairness and justice sufficient to meet the reasonable expectations of the national and international legal communities will be preserved if the court exercises jurisdiction", which has been termed "the international expectations question" referred to in ***Bushell*** is on balance a discrete jurisdictional issue.

[174] It is treated as part of the *forum conveniens* analysis and that accords with the approval of the Supreme Court of Canada that the application of the real and substantial connection test and the *forum conveniens* test is sufficient to ensure that assertions of jurisdiction are properly restrained. [***Leisure Time Distributors Ltd. v. Calzaturificio S.C.A.R.P.A.-S.P.A***. (1996), 5 C.P.C. (4th) 320 at ¶42 (B.C.S.C); ***Seine River Resources Inc. v. Pensa Inc.*** (1998), 25 C.P.C. (4th) 360 (B.C.S.C.) at ¶40-50; ***Tolofson v. Jensen***, *supra* at 1049]

INTERNATIONAL EXPECTATIONS MUST BE RELATED TO THE REASONABLENESS OF THE EXERCISE OF JURISDICTION

[175] I do not find the law supports the applicant defendants' view that the court is required to assess the law applicable to the action against constitutional standards of the other states and standards of international law..

[176] The reference by Chief Justice McEachern in ***Bushell*** to the "reasonable measure of fairness and justice sufficient to meet the reasonable expectations of the national and international legal communities" was related to the need for jurisdiction

to be exercised with appropriate restraint, an concept drawn from ***Morguard***. [***Bushell v. T & N p.l.c.,*** *supra* at ¶48]

[177] The appropriate restraint of jurisdiction in ***Morguard*** was ensured by requiring a real and substantial connection between the jurisdiction and the foreign defendant or the subject matter of the action prior to the court exercising jurisdiction over the foreign defendant. [***Morguard***, *supra* at 1108]

[178] The reliance of the Philip Morris defendants on Mr. Justice La Forest's comment in ***Morguard***, *supra* at 1103 "...that fairness requires that the judgment be issued by a court acting through fair process with properly restrained jurisdiction" is misplaced.

[179] The comment must be placed in the context that his reference was to enforcement of judgments and not the taking of jurisdiction.

[180] It is not rational to expect a domestic court to assess the fairness of its own procedures or domestic law in determining whether to take jurisdiction. Mr. Justice La Forest found that in the context of enforcement of foreign judgments questions of fairness are irrelevant in the Canadian context. [***Morguard***, *supra* at 1103]. It does of course make sense in determining whether to enforce a judgement from a foreign legal system to consider if the foreign court acted through fair process.

[181] I adopt the concept that flows from the evidence and analysis of Dean Slaughter, filed by the Government, that "...from the international point of view [the "international expectations question"] is most reasonably understood as a reference

to international standards governing judicial jurisdiction". From the international perspective standards "...all unequivocally uphold the power of a state to assert such jurisdiction over an alleged tortfeasor when the tort was committed within the national territory." [Dean Slaughter, affidavit, para. 52]

[182] In this context the reasonableness of the application of a particular law to foreign parties, has nothing to do with international standards regarding the exercise of jurisdiction over foreign defendants and for this reason I reject the opinion and evidence of Professor Brand in this regard tendered on behalf of the defendants.

[183] In determining whether to decline jurisdiction it is not appropriate to consider if the domestic law (the ***Act***) lives up to "...the reasonable expectation of the national and international legal communities", but rather to consider assuming jurisdiction over the action the court would be acting in a way contrary to "the reasonable expectation of the national and international communities".

[184] When courts determine that the laws of their domestic jurisdiction are applicable on choice of law principles they do not then decline to apply those laws on the basis of "international expectations" or any other purported standard of fairness. [***Tolofson v. Jensen***, *supra* at 310-311; ***Attorneys-General for Provinces of Ontario et al. v. Attorney-General for Dominion of Canada et al.*** (1912), 3 D.L.R. 509 (J.C.P.C.) at 512-3 and 517-518]

[185] There are parallels in decisions where constitutional validity is not to be confused with fairness [***Manitoba v. Interprovincial Co-operatives Ltd.***, [1973] 3 W.W.R. 673 (Man. C.A.) at 679, aff'd on other grounds [1976] 1 S.C.R. 477]; and

sovereign intent of the legislature faces ***Charter*** values challenge [***Bell ExpressVu Limited Partnership v. Rex***, [2002] 2 S.C.R. 559 at ¶62].

[186] I agree with the Government's rationale that if a court will not imbue a statute with Charter values, or measure fairness in assessing its constitutional validity, it would be inappropriate to decline to take jurisdiction over a defendant on the basis that it does not conform to some undefined standard of “international expectation”.

[187] It is also to be noted that courts will take jurisdiction over foreign defendants once a real and substantial connection has been found even in the face of express blocking legislation. [***Wilson v. Servier Canada Inc.*** (2000), 50 O.R. (3d) 219 (S.C.J.) at ¶28 and ¶30; ***Vitapharm v. F. Hoffmann-La Roche Ltd***., *supra* at ¶117; ***Armstrong v. Servier Canada Inc.*** (2002), 24 C.P.C. (5th) 103 (B.C.S.C.) at ¶32-33; ***Laker Airways v. Sabena, Belgian World Airlines*** (1984), 731 F. 2d 909 at 935-6 (1996 DC Cir.)]

IF INTERNATIONAL EXPECTATIONS ARE RELATED TO REASONABLENESS OF THE LAW APPLICABLE TO THE ACTION, THE *ACT* MEETS THESE EXPECTATIONS.

[188] The Government argues in the alternative that if the international expectations are related to reasonableness of the law applicable to the action the ***Act*** meets these expectations. On the evidence there is substance to their position.

[189] Professor Brand cites the ***Act***’s retroactivity as violating the international communities expectation of transparency. He is also of the opinion that a judgment based on the ***Act*** would constitute an expropriation of property rights without proper

compensation under Article 1110 of the North America Free Trade Agreement ("NAFTA").

[190] The Philip Morris defendants accept that an expectation of transparency is not a principle of customary international law, but do rely upon Professor Brand's view expressed in his further affidavit that "an international expectation need not raise to the level of customary international law to constitute an 'expectation'".

[191] Professor Brand relies upon the decision of the NAFTA Chapter 11 Arbitral Tribunal in ***Metalclad Corporation v. Mexico*** (Aug. 30, 2000) 40 ILM 36, however transparency was only an issue in ***Metalclad*** because of the specific language in NAFTA Article 102(1). The arbitrators were not in any sense deciding that transparency is generally recognized as a reasonable expectation of the international community.

[192] In any event the tribunals decision was reversed by Mr. Justice Tysoe who found there was no basis for the decision as there was no evidence that transparency amounted to customary international law and there was no independent transparency obligation found in the NAFTA Chapter 11. [***Mexico v. Metalclad Corp.*** (2001), 89 B.C.L.R. (3d) 259 (S.C.) at ¶68 and ¶70-71]

[193] Dean Slaughter noted some courts in the United States have approved revival of time barred claims, while other courts have found they violate due process. Any international expectation of transparency could not be said to include an expectation the defendants would not be subject to retroactive laws.

[194] Professor Brand's opinion that the ***Act*** would constitute expropriation of property rights without compensation under NAFTA is challenged and contradicted on the evidence of Professor Lowenfeld.

[195] Professor Lowenfeld does not consider the ***Metalclad*** decision authoritative nor applicable to the facts of the present action.

CONSTITUTIONAL STANDARDS OF OTHER STATES

[196] The Philip Morris defendants argued the constitutional standards of other states are relevant because as a consequence of the ***Act***'s frailties under the law of those various jurisdictions a judgment under the ***Act*** would not be enforced.

[197] Professor Lowenfeld notes concisely in his affidavit, para. 41, the reasons why constitutional standards of a state cannot be said to reflect its expectations with regard to foreign laws:

> …courts in the United States accord wider latitude to foreign judgments than they do to enactments of their own legislatures, because within broad limits foreign courts and legislatures cannot be expected to replicate the rules and values of the recognizing state.

ENFORCEABILITY CONSIDERATIONS

[198] I agree with the Governments position that the enforceability of a monetary judgment is not a matter the court should consider in determining whether to decline jurisdiction as an indicia of international standards or otherwise.

[199] There is no British Columbia precedent for the court to decline jurisdiction over a foreign defendant on this basis. [***Armstrong v. Servier Canada Inc. et al***, *supra*; ***Nutreco Canada Inc. v. F. Hoffman-La Roche***, *supra*; ***Petersen et al. v. AB Bahco Ventilation et al.*** (1979), 17 B.C.L.R. 335 (S.C.) at 348]

[200] I agree that the "jurisdictional enforcement tour" of the several jurisdictions in which the *ex juris* defendants have assets is unnecessary, premature and is not relevant.

[201] Enforceability is not relevant to the issue of whether a real and substantial connection with the jurisdiction exists.

[202] It is not necessary to decide the issue of potential enforcement of a judgment because the defendant has the ability to have that issue decided after judgment, if any, is given.

[203] The enforceability of a judgment is premature as it calls upon the court to anticipate the manner in which the litigation may proceed through trial to judgment, and calls upon the court to anticipate how a foreign court will characterize ultimate adjudication or the action.

[204] I adopt the view expressed by the Government regarding the practical effect of pursuing ultimate enforceability of a potential judgment in the context of a jurisdictional challenge is exemplified in this action where in relation to only one jurisdiction, England, experts have considered the effect of:

- international law and expectations of the international legal community;

- constitutional traditions of European Community law;
- European Convention on Human Rights; and
- the domestic law of England

and their opinions are in conflict.

[205] The affidavit evidence of Adrian Briggs, Armand de Mestral, Yasuhiro Fujita, Dean Anne-Marie Slaughter and Andreas Lowenfeld supports the Government position that a judgment obtained under the ***Act*** could be enforced in the United States, the United Kingdom, Europe and Japan.

[206] The affidavit evidence relied upon by the defendants of Ronald Brand, Martin Redish, Professor Setsu Kobayashi, Christian Tomuschat, Cristoph Paulus and Sir Anthony Evans is to the contrary.

[207] A core difference in approach of the opposing expert groups is to equate the constitutionality of the ***Act***, if enacted in the other jurisdiction, with the likely enforceability in those jurisdictions of a judgment obtained under the ***Act***. The evidence of the experts for the Government is that even if the ***Act*** violates constitutional norms of the United States, England, Europe, or Japan, that will not necessarily prevent the enforcement of a judgment in those countries.

[208] Considering the whole of the affidavit evidence relied upon by the parties, and the arguments made supporting the various views and conflicting nature of the opinions regarding enforceability, in my view, it remains an open question whether a

judgment obtained by the Government would be enforceable in the countries where assets are situated.

[209] The issue of enforceability in England is illustrative. The defendants' position is that a judgment under the ***Act*** would be unenforceable in England on the basis of the revenue rule, public policy, or natural justice.

[210] Sir Anthony Evans is of the opinion the ***Act*** would be categorized a revenue statute by the English courts and by virtue of the common law revenue rule be unenforceable. Adrian Briggs holds the contrary opinion that it is unlikely that the ***Act*** would be construed as a revenue statute.

[211] Briggs is of the view that although it is open to an English court to consider public policy grounds based on the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) principles, there is no authority that an English court in an enforceability proceeding is required by the ECHR to review the fairness of the proceedings of the foreign court of a non-member state as to compatibility with the Convention. Paulus, however, is of the view that if the ***Act*** conflicts with guarantees of the ECHR, courts of the European Community member states would be obliged to enforce judgment obtained under the ***Act*** on public policy grounds. I do not find the authorities and arguments advanced would necessarily oblige an English court in an enforcement proceeding to evaluate whether the foreign judgment of a country that was a non-signatory to the Convention has bet the standards set solely by the ECHR.

[212] The question of procedure fairness ("natural justice") as a ground for refusing enforcement is a matter incapable of assessment and remains speculative until the trial has concluded and the procedures and effect are certain.

[213] The evidence is not clear that a judgment in this action would most likely be enforceable in the jurisdiction where the applicant *ex juris* defendant's assets are located. Issues of enforcement would be contentious, difficult, and obviously seriously resisted. The risk of a judgment being ultimately unenforceable is one the plaintiff must consider and assume. In my view the enforceability of any judgment obtained by the Government should be after the advantage of a specific judgment with full knowledge of how it was based, the trial process that was involved, and on decision from the court of the jurisdiction where enforcement is sought.

PROCEDURAL OBJECTIONS OF CARRERAS ROTHMANS LIMITED

[214] Carreras Rothmans Ltd. objects that it does not come within Rule 13(1)(h), (j), or (o) and service upon it should be set aside.

[215] Rule 13(1)(h) allows *ex juris* service where:

> (h) the proceeding is founded on a tort committed in British Columbia.

The cause of action here is pursuant to the ***Act*** however the tobacco related wrongs pleaded by the Government are founded on torts and tortuous conduct.

[216] Claims brought pursuant to an Act but founded on a tort are not uncommon. [***Moran***, *supra*; ***S.D. Eplett & Sons Ltd. v. Safety Freight Lines Ltd.***, [1955] O.W.N 386 (H.C.J.)]

[217] The torts and tortuous conduct on which the Government action is founded all occurred in British Columbia. Carreras Rothmans Ltd. are alleged to have conspired with domestic and other foreign defendants, and the damage resulting was in British Columbia.

[218] The torts and tortuous conduct which from the subject matter of conspiracy, and in respect of which Carreras Rothmans Ltd. acted in concert with the other defendants is alleged to have occurred in British Columbia. The tort of negligence in respect of a defective product occurs where it causes harm [***Moran***, *supra*]; negligent misrepresentation where the misrepresentation was received [***Canadian Commercial Bank v. Carpenter*** (1989), 39 B.C.L.R. (2d) 312 (C.A.)]; and the torts of fraud and deceit based on false representations of facts occur in the place in which they were acted upon [***Original Blouse Co. Ltd. v. Bruck Mills Ltd.*** (1963), 45 W.W.R. 150 (B.C.S.C.)]

RULE 13(1)(j)

[219] Carreras Rothmans Limited argues that the claim against the foreign and domestic defendants must be the same and that it is not because section 2(1) of the ***Act*** states the Government has “a direct and distinct action”.

[220] In my view, s. 2(1) provides it is the aggregate claim of the Government that is direct and distinct. The Government's cause of action against the domestic and foreign defendants is the same. The claims against the defendants arise out of the same conspiracy and the issue will necessarily involve common questions of fact and law making each of the alleged co-conspirators a necessary and proper party. [***Vitapharm Canada Ltd.***, *supra* at ¶78]

RULE 13(1)(o)

[221] Service *ex juris* under this Rule is permitted where:

> (o) the claim arise out of goods or merchandise sold or delivered in British Columbia.

The base of this action is the sale of cigarettes in British Columbia. Carreras Rothmans is alleged to have acted in concert with the defendants who manufactured the cigarettes sold in British Columbia and in that manner they participated in the sale and related wrongs.

[222] I find the service *ex juris* did conform with Rule 13(1) and was procedurally valid. In any event as I have found a real and substantial connection between the subject matter of the action and jurisdiction has been shown I would validate service *nunc pro tunc*. [***Strukoff v. Syncrude Canada Ltd.***, [1998] B.C.J. No. 2660 (S.C.) at ¶20, aff'd [2000] B.C.J. No. 2010, 2000 BCCA 537]

CONCLUSION

[223] I am satisfied that a real and substantial connection exists between British Columbia and the *ex juris* defendants, and between the subject matter of the action and the *ex juris* defendant applicants. Jurisdiction *simpliciter* has been shown. This court is also the *forum conveniens* and I would not exercise a discretion against the taking of jurisdiction.

[224] The *ex juris* defendant applications are dismissed.

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