COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***British Columbia v. Imperial Tobacco Canada Ltd.,*** 2006 BCCA 398

Date: 20060915
Docket: CA033179, CA033180, CA033184, CA033185, CA033186, CA033187, CA033188

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Between:

Her Majesty the Queen in Right of British Columbia

Respondent
(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.

Appellants
(Defendants)

Before: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Smith

J. Giles, Q.C.
J.J. Kay, Q.C.
D.R. Bloor
Counsel for the Appellants, R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc.

J.A. Macaulay, Q.C.
K.N. Affleck, Q.C.
I.G. Christman
Counsel for the Appellant, Rothmans Inc.

J.J.L. Hunter, Q.C.
C.P. Dennis
M.J. Westphal
Counsel for the Appellants, British American Tobacco (Investments) Limited

	and B.A.T. Industries p.l.c.
S. Potter C.A. Millar	Counsel for the Appellants, Philip Morris Incorporated and Philip Morris International Inc.
P.D.K. Fraser, Q.C. G.T. Clarke	Counsel for the Appellant, Carreras Rothmans Limited
R.B. Lindsay, Q.C. S.A. Braun	Counsel for the Appellant, Ryesekks p.l.c.
D.A. Webster, Q.C. C.E. Jones K.A. Kuntz	Counsel for the Respondent
Place and Date of Hearing:	Vancouver , British Columbia 1 – 3 February 2006
Place and Date of Judgment:	Vancouver, British Columbia 15 September 2006

Written Reasons by:
The Honourable Madam Justice Rowles

Concurred in by:
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Smith

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Reasons for Judgment of the Honourable Madam Justice Rowles:

I. Overview

[1] The ***Tobacco Damages and Health Care Costs Recovery Act***, S.B.C. 2000, c. 30 (the "***Act***"), which came into force on 24 January 2001, authorizes a direct action by the government of British Columbia against manufacturers of tobacco products sold in British Columbia.

[2] On the day the ***Act*** came into force, Her Majesty the Queen in Right of British Columbia (the "Government") brought an action in the Supreme Court of British Columbia against 14 defendants. The cause of action is pleaded as an aggregate action under the ***Act*** and is for the recovery of health care expenditures incurred in treating individuals exposed to tobacco products. Liability hinges on those individuals having been exposed to tobacco products due to the manufacturers' breach of a duty owed to persons in British Columbia and on the government's having incurred health care expenditures in treating disease in those individuals caused by such exposure.

[3] All but four of the defendants were served *ex juris*.

[4] Four of the defendants are Canadian companies. Three of those defendants, Imperial Tobacco Canada Limited, JTI-Macdonald Corp. and Rothmans, Benson & Hedges Inc., are Canadian manufacturers of cigarettes. Rothmans Inc., formerly Rothmans of Pall Mall Canada Limited, is a Canadian company with a registered office in Ontario and is a former Canadian manufacturer of cigarettes. The fifth Canadian defendant is the Canadian Tobacco Manufacturers' Council which is a

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trade organization. Of those five defendants, all but Rothmans Inc. were served in British Columbia.

[5] Of the nine non-Canadian defendants, three manufactured cigarettes sold in British Columbia: Philip Morris Incorporated (now Philip Morris USA Inc.); R.J. Reynolds Tobacco Company; and Ryesekks p.l.c.

[6] The remaining six defendants, R.J. Reynolds International Inc., Philip Morris International Inc., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, B.A.T. Industries p.l.c., and Rothmans International Research Division, did not manufacture cigarettes sold in British Columbia but are alleged to be liable because of their relationship with one or more of the appellants who did manufacture cigarettes sold in British Columbia.

[7] On the day the ***Act*** came into force, in addition to the action brought by the Government, the three Canadian manufacturers each brought an action seeking a declaration that the ***Act*** was unconstitutional. The challenges to the constitutional validity of the ***Act*** were brought on the grounds that the legislation failed to respect territorial limits on provincial legislative jurisdiction, derogated materially from the independence of the judiciary, and offended the rule of law. The defendants who had been served *ex juris* brought applications in the Government action to set aside service on the ground, among others, that the Government's action was bound to fail because the ***Act*** was unconstitutional.

[8] In the trial court, Holmes J. acceded to the defendants' constitutional challenge based on extraterritoriality but rejected their arguments on judicial

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independence and the rule of law. In reasons issued 5 June 2003, Holmes J. granted declarations that the ***Act*** was unconstitutional in the manufacturers' actions and granted the motions to set aside service *ex juris* in the Government action: ***British Columbia v. Imperial Tobacco Canada Ltd.*** (2003), 227 D.L.R. (4th) 323, 2003 BCSC 877.

[9] The Government brought appeals from the orders made by Holmes J. in the several actions. On 20 May 2004, this Court set aside the orders declaring the ***Act*** unconstitutional and ordered that the applications of the *ex juris* defendants to set aside service be remitted to the trial court for determination on the footing that the ***Act*** was constitutionally valid: ***British Columbia v. Imperial Tobacco Canada Ltd.*** (2004), 29 B.C.L.R. (4th) 244, 2004 BCCA 269.

[10] On 16 December 2004, the defendants obtained leave to appeal the decision of this Court to the Supreme Court of Canada.

[11] After this Court had allowed the appeals there was a further hearing before Holmes J. regarding the applications of the *ex juris* defendants to set aside service upon them. In reasons issued on 23 June 2005, Holmes J. dismissed the defendants' applications to have service *ex juris* set aside or to decline jurisdiction: ***HMTQ v. Imperial Tobacco Canada Limited et al.*** (2005), 44 B.C.L.R. (4th) 125, (2005) 13 C.P.C. (6th) 272, 2005 BCSC 946. In his reasons, Holmes J. referred to the difference in focus between the earlier case on constitutional validity and the applications of the defendants to set aside service:

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> [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 determines 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 focused on the claim as pleaded by the plaintiff Government.

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[12] Leave to Appeal the order of Holmes J. was obtained by R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., Rothmans Inc., British American Tobacco (Investments) Limited, B.A.T. Industries p.l.c., Carreras Rothmans Limited, Ryesekks p.l.c., Philip Morris Incorporated and Philip Morris International Inc.

[13] The appeals to the Supreme Court of Canada on the constitutional validity of the ***Act*** were dismissed on 29 September 2005, the unanimous Court holding that the pith and substance of the impugned legislation is property and civil rights in the Province within the meaning of s. 92(13) of the ***Constitution Act, 1867***, and that the extraterritorial aspects of the ***Act***, if any, are incidental to it: ***British Columbia v. Imperial Tobacco Canada Ltd.**,* [2005] 2 S.C.R. 473, 2005 SCC 49. The Supreme Court went on to reject the defendants’ arguments that judicial independence and the rule of law provided a foundation for attacking the constitutional validity of the ***Act***.

[14] The applications to set aside service *ex juris* were heard and decided by Holmes J. prior to the release of the Supreme Court of Canada’s decision on the constitutional validity of the ***Act***. While the Supreme Court’s analysis concerning the issue of extraterritoriality differs from the analysis of this Court, the difference in

emphasis, which is noted in paras 39 - 41 of the Supreme Court's decision, tends to strengthen rather than diminish the Government's arguments on the issue of jurisdiction *simpliciter* on these appeals.

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[15] A Constitutional Question Act Notice dated 16 January 2006, directed to the Attorney General of Canada and the Attorney General of British Columbia, was filed by the *ex juris* defendants. The Notice reads:

> TAKE NOTICE that on February 1, 2006 at the Law Courts … an Order will be sought setting aside service of the Writ of Summons and Statement of Claim on the Appellants for the reason that the Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30 (the "*Act*") is constitutionally inapplicable to the Appellants on the following grounds:
>
> 1. A provincial legislature has no constitutional jurisdiction to legislate judicial jurisdiction to impose civil liability on *ex juris* persons pursuant to a retroactive legislative provision that has no extraterritorial application;
>
> 2. A provincial legislature cannot impose civil obligations on an *ex juris* person for any liability-creating event that occurs outside that province's jurisdiction;
>
> 3. The *Act* is impermissibly extraterritorial in presuming consequences to occur in British Columbia without requiring such consequences to have occurred in fact in British Columbia;
>
> 4. A provincial statute such as the *Act* cannot determine the location of a wrong;
>
> 5. The *Act* exceeds the territorial capacity of a provincial legislature in that it is contrary to the constitutional imperatives of order and fairness by abrogating accrued limitation rights of *ex juris* persons and by reversing the burden of proof regarding the causal link between alleged conduct of a tortious nature and its consequences.

[16] The appeals of the *ex juris* defendants from the order dismissing their applications raise three questions: (1) Does the court have jurisdiction over each of

the *ex juris* defendants? (2) Is the ***Act*** constitutionally inapplicable in relation to any of the *ex juris* defendants? (3) Should the court have exercised its discretion to decline jurisdiction over any of the *ex juris* defendants on the basis of the doctrine of *forum conveniens*?

[17] Before us, the *ex juris* defendants advanced arguments in support of their own appeals and adopted those arguments advanced by their co-defendants which were applicable to their particular circumstances. The arguments were presented in much the same manner in the court below and, for the most part, appear to have been similar, if not identical, to the arguments advanced before Holmes J.

[18] The Government argues that the Supreme Court of Canada's reasons for upholding the constitutional validity of the ***Act*** undermines any foundation for the arguments the *ex juris* defendants have made concerning jurisdiction *simpliciter* and *forum conveniens*. The Government further argues that the Supreme Court's reasons for rejecting the defendants' arguments on extraterritoriality also undermine the defendants' constitutional applicability arguments.

[19] For the reasons which follow, I am of the view that the arguments put forward by the defendants on these appeals cannot succeed and that the appeals must be dismissed.

II. The *Act*

[20] The general scheme of the ***Act*** is to create a direct action by the Government of British Columbia to recover the expenditures made by the Government which

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have resulted from tobacco related disease, caused or contributed to by a tobacco related wrong. The provisions of the ***Act*** which are central to the arguments on these appeals are set out below.

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;

...

"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;

...

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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

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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).

[21] Section 4, which is relevant to the Government’s claim against the *ex juris* defendants who did not manufacture cigarettes sold in British Columbia, 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:

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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.

[22] Section 6 deals with limitation periods. No action is barred that is brought within two years after the limitation section came into force and some actions that are barred are revived:

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.*

[23] Section 10 deals with retroactive effect:

> **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.

III. Jurisdiction *simpliciter*

[24] Before a court has jurisdiction over foreign defendants, there must be a real and substantial connection between the court and the defendant or between the court and the subject matter of the litigation: ***Furlan v. Shell Oil Co.***, [2000] 7 W.W.R. 433, 77 B.C.L.R. (3d) 35, 2000 BCCA 404.

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[25] Generally speaking, jurisdiction is determined by the pleadings although that may be qualified in cases where the claim advanced by the plaintiff is extremely tenuous in which case the court may resort to affidavits to see if there is any evidence to support the claim: ***Furlan*** at paras. 14-16. In this case, the defendants have not filed any affidavit material challenging the facts pleaded in the statement of claim, including the allegations of conspiracy alleged against *ex juris* defendants who did not manufacture cigarettes sold in British Columbia. For the purposes of the defendants' challenge to jurisdiction, the facts pleaded are presumed to be true.

[26] It is convenient to note here that affidavit evidence tendered by B.A.T. Industries p.l.c. and Philip Morris International Inc., to the effect that they have no physical presence in British Columbia and sell no product here, does not rebut the allegations of wrongful conduct, breaches of duty and conspiracy particularized in the Government's statement of claim.

[27] Some of the defendants argue that service *ex juris* cannot be supported when the "real and substantial connection" test is applied. They submit that the Government's action is concerned with activities and wrongs that occurred in other jurisdictions and that it lacks the requisite connection to British Columbia to found jurisdiction under principles of private international law. The arguments made on this issue closely parallel the arguments made on the defendants' earlier challenge to the constitutionality of the ***Act***.

[28] In their challenge to the constitutional validity of the ***Act***, the defendants had argued that the cause of action set out in the legislation, and the allegations in the

statement of claim, were focused on extraterritorial activities, defendants, or wrongs. The essence of the defendants' extraterritoriality argument was that the ***Act*** permitted, and indeed mandated, its application to events and defendants beyond the constitutional reach of the Province.

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[29] The Supreme Court of Canada's reasons for rejecting the defendants' arguments explores the nature of the cause of action the ***Act*** creates and how that cause of action is grounded in British Columbia. As the essential features of the cause of action are central to the determination of whether, based on the pleadings, there is a real and substantial connection between the court and the defendants or the subject matter of the litigation, I think it is useful to set out the Supreme Court's analysis.

[30] In rejecting the defendants' arguments on extraterritoriality, the Supreme Court relied primarily on its decisions in ***Reference re Upper Churchill Water Rights Reversion Act***, [1984] 1 S.C.R. 297 and ***Unifund Assurance Co. v. Insurance Corp. of British Columbia***, [2003] 2 S.C.R. 63. In determining that the ***Act*** was not invalid, Major J. said this:

> 30 Where the pith and substance of legislation relates to a tangible matter — i.e., something with an intrinsic and observable physical presence — the question of whether it respects the territorial limitations in s. 92 is easy to answer. One need only look to the location of the matter. If it is in the province, the limitations have been respected, and the legislation is valid. If it is outside the province, the limitations have been violated, and the legislation is invalid.
>
> 31 Where legislation's pith and substance relates to an intangible matter, the characterization is more complicated. That is the case here.

32 The pith and substance of the Act is plainly the creation of a civil cause of action. More specifically, it is the creation of a civil cause of action by which the government of British Columbia may seek compensation for certain health care costs incurred by it. Civil causes of action are a matter within provincial legislative jurisdiction under s. 92(13) of the *Constitution Act, 1867*: “Property and Civil Rights in the Province”. See *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 672.

33 But s. 92(13) does not speak to “Property and Civil Rights” located anywhere. It speaks only to “Property and Civil Rights in the Province”. And, to reiterate, it is, like all provincial heads of power, qualified by the opening words of s. 92: “In each Province”. The issue thus becomes how to determine whether an intangible, such as the cause of action constituting the pith and substance of the Act, is “in the Province”.

34 *Churchill Falls* dealt with a similar issue. In that case, McIntyre J. was confronted with a Newfoundland statute, the pith and substance of which was the modification of rights existing under a contract between Churchill Falls (Labrador) Corporation Limited and Quebec Hydro-Electric Commission. Since the entity possessing those rights (namely, the Commission) was constituted in Quebec, and the parties had agreed that the Quebec courts had exclusive jurisdiction to adjudicate disputes concerning their contract, McIntyre J. regarded the rights created by that contract as situated in Quebec. The Newfoundland law that purported to modify them was thus invalid. It related to civil rights, but not to civil rights “in the Province”.

35 McIntyre J.’s approach to locating the civil rights constituting the pith and substance of the Newfoundland legislation illustrates the role, pointed out by Binnie J. in *Unifund*, at para. 63, that “the relationships among the enacting territory, the subject matter of the law, and the person[s] sought to be subjected to its regulation” play in determining the validity of legislation alleged to be impermissibly extra-territorial in scope. In *Churchill Falls*, an examination of those relationships indicated that the intangible civil rights constituting the pith and substance of the Newfoundland legislation at issue were not meaningfully connected to the legislating province, and could properly be the subject matter only of Quebec legislation. Put slightly differently, if the impugned Newfoundland legislation had been permitted to regulate those civil rights, neither of the purposes underlying s. 92’s territorial limitations would be respected. It followed that those civil rights should be regarded as located beyond the territorial scope of Newfoundland’s legislative competence under s. 92.

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36 From the foregoing it can be seen that several analytical steps may be required to determine whether provincial legislation in pith and substance respects territorial limits on provincial legislative competence. The first step is to determine the pith and substance, or dominant feature, of the impugned legislation, and to identify a provincial head of power under which it might fall. Assuming a suitable head of power can be found, the second step is to determine whether the pith and substance respects the territorial limitations on that head of power — i.e. whether it is in the province. If the pith and substance is tangible, whether it is in the province is simply a question of its physical location. If the pith and substance is intangible, the court must look to the relationships among the enacting territory, the subject matter of the legislation and the persons made subject to it, in order to determine whether the legislation, if allowed to stand, would respect the dual purposes of the territorial limitations in s. 92 (namely, to ensure that provincial legislation has a meaningful connection to the enacting province and pays respect to the legislative sovereignty of other territories). If it would, the pith and substance of the legislation should be regarded as situated in the province.

37 Here, the cause of action that is the pith and substance of the Act serves exclusively to make the persons ultimately responsible for tobacco-related disease suffered by British Columbians — namely, the tobacco manufacturers who, through their wrongful acts, caused those British Columbians to be exposed to tobacco — liable for the costs incurred by the government of British Columbia in treating that disease. There are thus strong relationships among the enacting territory (British Columbia), the subject matter of the law (compensation for the government of British Columbia's tobacco-related health care costs) and the persons made subject to it (the tobacco manufacturers ultimately responsible for those costs), such that the Act can easily be said to be meaningfully connected to the province.

38 The Act respects the legislative sovereignty of other jurisdictions. Though the cause of action that is its pith and substance may capture, to some extent, activities occurring outside of British Columbia, no territory could possibly assert a stronger relationship to that cause of action than British Columbia. That is because there is at all times one critical connection to British Columbia exclusively: the recovery permitted by the action is in relation to expenditures by the government of British Columbia for the health care of British Columbians.

39 In assessing the Act's respect for the territorial limitations on British Columbia's legislative competence, the appellants and the Court of Appeal placed considerable emphasis on the question of whether, as a matter of statutory interpretation, the breach of duty by a

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> manufacturer that is a necessary condition of its liability under the cause of action created by the Act must occur in British Columbia. That emphasis was undue, for two reasons.
>
> 40 First, the driving force of the Act's cause of action is compensation for the government of British Columbia's health care costs, not remediation of tobacco manufacturers' breaches of duty. While the Act makes the existence of a breach of duty one of several necessary conditions to a manufacturer's liability to the government, it is not the mischief at which the cause of action created by the Act is aimed. The Act leaves breaches of duty to be remedied by the law that gives rise to the duty. Thus, the breaches of duty to which the Act refers are of subsidiary significance to the cause of action created by it, and the locations where those breaches might occur have little or no bearing on the strength of the relationship between the cause of action and the enacting jurisdiction.
>
> 41 Second, and in any event, the only relevant breaches under the Act are breaches of duties (or obligations) owed "to persons in British Columbia" (s. 1(1) "tobacco related wrong", s. 3(1)(a)) that give rise to health care expenditures by the government of British Columbia. Thus, even if the existence of a breach of duty were the central element of the Act's cause of action (it is not), the cause of action would remain strongly related to British Columbia.
>
> 42 The question of whether other matters, such as exposure and disease, to which the Act refers, must occur or arise in British Columbia is equally or more irrelevant to the Act's validity. Those matters too are conditions precedent to success in an action brought pursuant to the Act and of subsidiary significance to it.
>
> 43 It follows that the cause of action that constitutes the pith and substance of the Act is properly described as located "in the Province". The Act is not invalid by reason of extra-territoriality, being in pith and substance legislation in relation [to] "Property and Civil Rights in the Province" under s. 92(13) of the *Constitution Act, 1867*.
>
> [Underlining added.]

[31] Jurisdiction is a fundamental question in the determination of the appeals of all the *ex juris* defendants. With respect to those defendants who manufactured cigarettes sold in British Columbia, the claims made by the Government in the statement of claim include wrongs that may be described as the sale of a defective

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product, failure to warn, and product misrepresentation. In addition to the three Canadian manufacturers with whom we are not concerned on these appeals, those claims apply to Rothmans Inc., the Ontario *ex juris* defendant, and the three non-Canadian defendants who manufactured cigarettes sold in British Columbia: Philip Morris Incorporated (now Philip Morris USA Inc.); R.J. Reynolds Tobacco Company; and Ryesekks p.l.c.

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[32] In its statement of claim, the Government alleges that as a result of these wrongs, British Columbians started to smoke cigarettes or continued to smoke cigarettes and suffered disease. All of those alleged wrongs occurred in British Columbia and resulted in harm in British Columbia. Jurisdiction over these *ex juris* defendants is derived directly from the analysis in ***Moran v. Pyle National (Canada) Ltd.,*** [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239. In that case, Dickson J., recognizing "the important interest a state has in injuries suffered by persons within its territory", held for a unanimous Court (at 409):

> ... where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the formal 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.

[33] In ***Harrington v. Dow Corning Corp.*** (2000), 82 B.C.L.R. (3d) 1, 2000 BCCA 605, this Court considered the issue of whether a British Columbia court could adjudicate a British Columbia class action in which some victims had received allegedly faulty breast implants outside British Columbia but had subsequently

moved to this jurisdiction. In finding that the court could take jurisdiction, Huddart J.A. reviewed the history of the real and substantial connection test and then said, at para. 84:

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

[34] The principles enunciated in ***Moran v. Pyle*** and ***Harrington*** apply regardless of whether the cause of action is founded in the common law or statute. An example of the latter is ***Robson v. Chrysler Canada Ltd.*** (2002), 2 B.C.L.R. (4th) 1, 2002 BCCA 354, in which British Columbia's ***Trade Practices Act*** provided the basis for a claim against a U.S. car maker.

[35] In my view, there is no basis for interfering with the conclusion of Holmes J. that the court has jurisdiction over those *ex juris* defendants who sold cigarettes in British Columbia. As the Government's factum put it, "[f]rom a factual point of view, insofar as this action is concerned, there is no distinction between the domestic manufacturers and this group of *ex juris* manufacturers, save the location of their factories."

[36] The action against the foreign defendants who did not manufacture cigarettes sold in British Columbia (the "joint breach defendants") is brought pursuant to s. 4 of the ***Act***. Section 4 provides that defendants may be found jointly and severally liable

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if they jointly participated or conspired in the breach, or would otherwise be liable for the consequences that flowed from it.

[37] Under s. 4, defendants can only be held liable where, at common law, they would be liable for wrongs committed within British Columbia. In the Supreme Court of Canada, Major J., at para. 13, referred to the liability described in s. 4 as one for a "joint breach of duty", suggesting acceptance of the following interpretation placed on the section found in the reasons of Rowles J.A. at para. 161 of this Court's earlier decision:

> 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.*

[38] To show the foundation for the Government's claims against the joint breach defendants, I have attached a portion of the pleadings as an appendix to these reasons.

[39] In its statement of claim, the Government alleges that all the joint breach defendants conspired or acted in concert with the manufacturers who sold cigarettes in British Columbia, to prevent consumers in British Columbia from acquiring knowledge of the harmful nature and addictive properties of cigarettes. The Government alleges that pursuant to the conspiracy or common design, the defendants who manufactured cigarettes sold in British Columbia carried out the alleged breaches of duty in British Columbia. The Government further alleges that those defendants who did sell cigarettes in British Columbia in violation of their duties owed in the province were acting as agents for the joint breach defendants.

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Thus all of the foreign defendants who did not manufacture cigarettes sold in British Columbia are implicated in a "joint breach" of duties owed to British Columbians. As such, all the activities alleged against the joint breach defendants are all wrongs whose *locus* is in British Columbia.

[40] In my opinion, the ***Moran v. Pyle*** analysis that applies to the manufacturers who either now or previously sold cigarettes in British Columbia can properly be applied to the joint breach defendants.

[41] A conspiracy occurs in British Columbia if the harm is suffered here, regardless of where the "wrongful conduct" occurred. On that basis, the court has jurisdiction over the *ex juris* defendants who are alleged to be parties to the conspiracy. Further, once jurisdiction over any wrong, including conspiracy, is established, all defendants potentially liable to the plaintiff are properly joined in the action: ***Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*** (2002), 20 C.P.C. (5th) 351 (Ont. S.C.J.); ***Nutreco Canada Inc. v. F. Hoffmann-La Roche*** (2001), 10 C.P.C. (5th) 351, 2001 BCSC 1146 at paras. 44, 46 and 52; ***WIC Premium Television Ltd. v. General Instrument Corp***., [2000] 2 W.W.R. 417 at paras. 18, 22 and 23 (Alta. Q.B.); aff'd [2001] 2 W.W.R. 431, 2000 ABCA 233.

[42] In ***Vitapharm***, Cumming J. considered allegations that a number of foreign companies had conspired to fix prices of vitamin products sold in Ontario. The foreign defendants did not themselves sell the vitamins in Canada (or in some cases at all), and as such were in a position similar to the joint breach defendants at bar.

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Cumming J. held at paras. 63-86 that there were four bases upon which jurisdiction could properly be asserted over the foreign conspirators:

(1) On the basis of a tort committed in Ontario, because “[i]f an actionable conspiracy is proven and damage occurs in Ontario, then a tort has been committed in Ontario";

(2) Damage occurred in Ontario because under the applicable antitrust laws, such damages were presumed as a matter of law once the existence of a conspiracy was proven;

(3) Foreign conspirators are necessary and proper parties to the action:

> "[T]he balance of convenience favours trying all of the defendants in each action together. The claims against all defendants in a given action arise out of the same alleged conspiracy. The issues will involve common questions of fact and law. It is logical that the claims against all the alleged conspirators in an alleged single price-fixing scheme be tried together. Each of the alleged co-conspirators is a necessary and proper party."

(4) As the foreign conspirators were alleged to have acted through their agents, they were properly joined in the action on the basis that they carried on business in the jurisdiction:

> "[T]he moving defendants plead that they are not responsible in law for the unlawful conduct of separate entity subsidiaries or affiliates. If the conspiracies are proven, it is arguable that a price-fixing scheme concocted outside Canada, but then implemented inside Canada through subsidiaries or affiliates, constitutes carrying on business in Canada on the part of the co-conspirators. It is arguable that the corporate veil of a

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> domestic subsidiary or affiliate may be pierced in such a situation and that the principal (parent or affiliated corporation) involved in the conspiracy is itself carrying on business in Ontario. In such instance, it is arguable that the subsidiaries or affiliates are in reality mere agents of the principals for the purposes of the conspiracy."

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[43] In this case, Holmes J. decided that the court had jurisdiction over those defendants involved in “joint breaches”, at paras. 152-54:

> [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.”

[44] In my opinion, the conclusion of Holmes J. that the court has jurisdiction over all of the *ex juris* defendants – whether manufacturers of cigarettes sold in British Columbia or the joint breach defendants – is correct.

[45] Finally I should note that some of the *ex juris* defendants submitted that the application of the eight factors set out in ***Muscutt v. Courcelles*** (2002), 213 D.L.R. (4th) 577 (Ont. C.A.), respecting jurisdiction *simpliciter* would bring about the opposite conclusion to that reached by Holmes J. I respectfully disagree. For the reasons I have already stated, the real and substantial connection test has been met in this case and nothing said in the defendants' arguments persuades me that Holmes J. was wrong in concluding as he did.

IV. Constitutional applicability

A. Constitutional inapplicability is distinct from constitutional invalidity

[46] The second issue before us is whether certain provisions of the ***Act*** are constitutionally inapplicable to some or all of the defendants located outside the province. The ***Act*** was previously found to be constitutionally valid, but constitutional inapplicability is distinct from constitutional invalidity.

[47] Professor Hogg in *Constitutional Law of Canada*, loose-leaf ed. (Scarborough: Carswell, 1997-) has described the distinction between constitutional validity and applicability as follows, at 15-25:

> First, it may be argued that the law is *invalid*, because the matter of the law (or its pith and substance) comes within a class of subjects that is outside the jurisdiction of the enacting legislative body…
>
> A second way of attacking a law that purports to apply to a matter outside the jurisdiction of the enacting body is to acknowledge that the law is valid in most of its applications, but to argue <u>that the law should be interpreted so as not to apply to the matter that is outside the jurisdiction of the enacting body. If this argument succeeds, the law is</u>

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> not held to be invalid, but simply *inapplicable* to the extra-jurisdictional matter…
>
> [Underlining added.]

[48] In ***Unifund***, Binnie J. outlined the framework for considering constitutional inapplicability:

> [50] It is well established that a province has no legislative competence to legislate extraterritorially. If the Ontario Act purported to regulate civil rights in British Columbia arising out of an accident in that province, this would be an impermissible extraterritorial application of provincial legislation…
>
> …
>
> [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.

[49] As noted earlier in these reasons, notice was given to the Attorneys-General of British Columbia and Canada that the *ex juris* defendants were seeking an order

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setting aside service on them on the grounds that the ***Act*** is constitutionally inapplicable to them.

[50] Counsel for the R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc. put forward two arguments which would have application to all the *ex juris* defendants. The first was based on the recent decision of the Supreme Court of Canada in ***Castillo v. Castillo***, [2005] 3 S.C.R. 870, 2005 SCC 83, which held that changing the previously existing civil rights of foreigners that were acquired under the proper law of the alleged wrongful conduct would involve the extraterritorial operation of a provincial statute and is therefore outside the legislative capacity of the province under s. 92(13). The second argument was that changing the rights of foreigners acquired under the proper law of the alleged wrongs would be contrary to the constitutional imperative of Canada's private international law, specifically the principle of order and fairness, which protects the rights of foreigners acquired under our law from arbitrary action.

[51] Counsel for British American Tobacco (Investments) Limited put forward submissions on the constitutional applicability of the ***Act*** in relation to foreigners who had never done business nor had any presence in British Columbia. In essence, the argument advanced was that s. 4 of the ***Act*** presumes the connection between the province and a foreign defendant who has never been present in British Columbia, though for such defendants, the breach of duty alleged *must* have taken place outside the province. Counsel further argued that it is outside the jurisdiction of a province to impose civil obligations on persons outside the province arising from events occurring outside the province.

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[52] In the next section of these reasons, I will outline in somewhat more detail the arguments of the *ex juris* defendants on constitutional applicability.

B. Arguments of the *ex juris* defendants on constitutional applicability

(i) Inapplicability based on retroactivity

[53] It is the retroactive nature of the provisions in the statute which results in its extraterritorial operation. Under the law that existed at the time the alleged tobacco related wrongs took place, the foreign defendants had acquired certain rights. Those "rights" included the right to manufacture and sell cigarettes and to promote their sale. Those rights belong to the foreign defendants and do not constitute civil rights "in the Province". By legislating that the ***Act*** applies retroactively, the Province has altered the previously acquired rights of the foreign defendants, for the law is "deemed" to be different from what it actually was when the alleged wrongs occurred. The alteration of rights of foreign defendants therefore constitutes an impermissible extraterritorial operation of the statute.

[54] While the retroactivity of the law did not affect the validity of the statute, it must have an impact on the applicability of the ***Act*** through its extraterritorial operation on specific *ex juris* defendants. The extraterritorial operation of the ***Act*** is neither express, nor intended. The Supreme Court of Canada, in determining that the ***Act*** was constitutionally valid, expected the statute to operate intra-territorially. However, as Beetz J. observed in ***Canadian Broadcasting Corp. v. Quebec (Police Commission)***, [1979] 2 S.C.R. 618, at 641, statutes may be drafted in general terms, thereby imposing on the courts a constitutional issue to be resolved:

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> Many statutes are drafted in terms so general that it is possible to give them a meaning which makes them *ultra vires*. It is then necessary to interpret them in light of the Constitution, because it must be assumed the legislator did not intend to exceed his authority.

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[55] Section 10 of the ***Act*** should be interpreted so as to give effect to the principle that the legislature does not intend to act outside its jurisdiction. ***Castillo*** provides support for the principle that statutes must be given an interpretation, where possible, that does not alter the substantive legal rights, including vested rights, of foreigners. In this case both residents and foreigners had vested rights at the time of the conduct alleged to be a tobacco related wrong. It is within the legislative jurisdiction of the province to alter the vested rights of the domestic parties, but for the statute to alter the vested rights of foreigners, it would have to be given extraterritorial effect. While it is within the jurisdiction of a legislature to abolish the rights of residents within its jurisdiction, that cannot be so for non-residents.

(ii) Private international law requires adherence to order and fairness

[56] When constitutional applicability is being considered, the test of real and substantial connection is separate and distinct from the principle of order and fairness. The concept of order and fairness is a constitutional imperative of our private international law and its requirements may not be met even though a real and substantial connection may be demonstrated. If the requirements of order and fairness are not met, the statute may be constitutionally inapplicable to non-residents.

[57] The principle of order and fairness ensures that foreigners doing business in our country enjoy security in transactions. To take away rights by retroactively abolishing the right not to be sued is arbitrary and therefore violates that principle.

[58] Comity dictates that the court must consider whether the ***Act*** adheres to the principle of order and fairness, thus conforming to the reasonable expectations of the international legal community.

[59] Expert opinion evidence before the court in affidavit form shows that the ***Act*** would violate the domestic laws of the U.S., Japan and Europe, and that judgments obtained under the ***Act*** in British Columbia are unlikely to be enforced in those foreign jurisdictions due to its violation of private international law principles. They say that to grant orders that are known to violate the domestic laws of other countries, including countries where the government might seek to enforce them, does not comport with principles underpinning comity.

(iii) Constitutional inapplicability based on the effect of s. 4

[60] The arguments summarized in this section are relevant only to those *ex juris* defendants who have been brought into the lawsuit through the operation of s. 4 of the ***Act***.

[61] The test for constitutional applicability set out in ***Unifund*** requires the plaintiff to demonstrate a connection between breach and harm. Here, there is no connecting factor between British Columbia and those foreign companies that have never been present nor done business in British Columbia, except through the

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presumption of harm contained in s. 3(2) of the ***Act***. From the fact that there is a breach that *could* have caused the loss, the finding via presumption that *it did* cause the loss and damage in British Columbia artificially creates the connection between British Columbia (the enacting jurisdiction), the recovery of health care costs (the subject matter of the statute), and the particular defendant (not just defendants in general).

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[62] ***Moran v. Pyle*** dealt with tort law in which there is a requirement that to be an actionable wrong, there must be harm done. A breach of duty cannot be in the air -- it must also have caused harm. By contrast, the ***Act*** defines a “tobacco related wrong” as the breach, but does not require damage to have been caused. Instead, the ***Act*** builds in a presumption that if exposure to the product (the breach) can cause damage, then it did cause damage, and had it not been for the breach, the smoking would not have happened. The presumption is not just a procedural mechanism to prove there was damage, as would be the case for a defendant who was in British Columbia and committed a breach according to the statute; rather, the presumption operates to fill the gap in proving causation for foreign defendants who were never present in British Columbia.

[63] The case is analogous to the situation in ***Unifund*** which also involved a statutory cause of action. But for the ***Act***, there would not be any claim against the defendants as none is recognized in the common law. The British Columbia legislature has sought to bootstrap its decision to sue for recovery of health care costs into obtaining the jurisdiction to implead acts of foreigners committed outside of British Columbia. The statute should not be able to supply, through the use of

presumptions, the ingredients necessary to bring foreigners within the legislative jurisdiction of the statute.

[64] Any argument that the gap in causality is cured by the fact that the presumptions are rebuttable cannot be sustained. Such an argument is again similar to the ***Unifund*** case, in which the Supreme Court of Canada rejected the proposition that I.C.B.C. should be subject to the decision of an arbitrator determining his own jurisdiction. A foreigner should not have to submit to the jurisdiction and comply with the provisions of a statute which, on its face, does not apply to the foreigner. The foreigner should not be forced to come to British Columbia to attempt to rebut the presumption against it.

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C. Analysis of the arguments on constitutional applicability

(i) Nature of the cause of action

[65] Regardless of the Supreme Court of Canada's analysis concerning the nature of the cause of action the ***Act*** creates, the characterization of the cause of action continues to be contentious. The defendants maintain that the ***Act*** creates a *sui generis* cause of action that has never before been seen in law. Much argument was devoted to whether the cause of action should be seen as a 'tort-like', or whether it is purely statutory in nature, and what effect that would have on the constitutional applicability of the ***Act*** to the various defendants.

[66] Some *ex juris* defendants see the distinction in how the ***Act*** is characterized as important because of their argument that the presumptions in s. 3 of the ***Act***

relieve the Government from having to prove all the elements of a traditional tort claim against them, thereby bypassing the necessity of demonstrating a meaningful connection between the cause of action and the foreign defendant.

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[67] In his reasons of 23 June 2005, Holmes J. described the nature of the cause of action created by the ***Act*** this way:

> [215] …The cause of action here is pursuant to the *Act* however the tobacco related wrongs pleaded by the Government are founded on torts and tortious 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 tortious 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 tortious conduct which [form] 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.)]

[68] In my view, that description of the cause of action is correct. This is a cause of action created by statute but it is founded on common law torts, as may be seen from the definition of "tobacco related wrongs" in s. 1(1) of the ***Act***:

“**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.

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[69] The cause of action is described 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.

[70] The reason why para. (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.

[71] Subsection 3(2) of the ***Act*** contains the presumption which the *ex juris* defendants assert makes the ***Act*** constitutionally inapplicable to them. However, the presumptions in subsection (2) are subject to subsection 3(1) which requires that the Government prove, 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.

[72] For ease of reference, I will repeat s. 3 of the ***Act***:

> **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

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> > 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).

[Underlining added.]

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[73] In my opinion, what the Government is required to prove on the balance of probabilities before the presumptions can come into play defeats the argument of the *ex juris* defendants that no meaningful connection between the cause of action and the foreign defendant need be shown.

[74] The ***Act*** is premised on recovering costs incurred to treat those who suffered damage from tobacco products. To succeed, the Government must show that the damage and consequent health care costs must have been caused by tobacco. Further, the defendants are alleged to have either sold tobacco products in British Columbia, or conspired to do so, during the material times. The statutory presumption is simply a means for the Government to recover on an aggregate basis.

(ii) Retroactivity of the *Act*

[75] Two of the five grounds set out in the Constitutional Question Act Notice raise the issue of the retroactivity of the ***Act*** and its effect on constitutional applicability.

Success on either of those arguments would entitle the defendants to have the service upon them set aside. For ease of reference I will repeat those grounds:

> 1. A provincial legislature has no constitutional jurisdiction to legislate judicial jurisdiction to impose civil liability on *ex juris* persons pursuant to a retroactive legislative provision that has no extraterritorial application;
>
> …
>
> 5. The *Act* exceeds the territorial capacity of a provincial legislature in that it is contrary to the constitutional imperatives of order and fairness by abrogating accrued limitation rights of *ex juris* persons and by reversing the burden of proof regarding the causal link between alleged conduct of a tortious nature and its consequences.

[76] The defendants rely on ***Castillo*** to support the proposition that the retroactive nature of the ***Act***, which operates to eliminate some limitation periods, results in extraterritorial operation of the ***Act*** as against foreign defendants. The ***Castillo*** case involved a determination of the proper interpretation and constitutional validity of s. 12 of the Alberta ***Limitations Act***, R.S.A. 2000, c. L-12, which provides:

> 12. The limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction.

[77] In ***Castillo***, a husband and wife were involved in a car accident while on vacation in California. Both were residents of Alberta at the material time. The appellant wife filed a statement of claim in Alberta to recover damages against her husband within the limitation period applicable in that province. The limitation period applicable in California had already expired when she filed her action.

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[78] The majority in ***Castillo*** relied on ***Tolofson v. Jensen***, [1994] 3 S.C.R. 1022, which held that the substantive law of the place where the tort occurred is the law of the action. ***Tolofson*** also stands for the proposition that limitation periods constitute substantive law. The Court held that California law applied to the action in tort, including the California limitation period, and that the wife's action was therefore time-barred. The majority rejected the argument that the wording of s. 12 operated to revive otherwise time-barred actions, and held that s. 12 was meant to operate when the foreign law that is the proper law of the action has a longer limitation period than Alberta. In that case, s. 12 would operate to time-bar an action being brought in Alberta that was otherwise a live claim in another jurisdiction.

[79] Counsel for R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International, Inc. submitted that he was relying on the majority decision in ***Castillo*** in that the retroactive provision in the ***Limitations Act*** was held not to be effective to deprive foreigners of a right they acquired under the proper law of the alleged wrongs, that is, the benefit of an accrued time bar under that law. Counsel submitted that in this case too the retroactive provision in the ***Act***, like s. 12 of the Alberta Act, is not effective to deprive foreigners of their vested rights. In both cases, counsel argued, it is the proper law at the time that vests the rights in the foreigners.

[80] What that argument fails to take into account is whether the result in ***Castillo*** might have been different if it had not involved an Alberta limitations statute, but a subsequently enacted California statute that retroactively extended the limitation

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period for tort actions. In my view, the fact that the ***Act*** in the case at bar contains a retroactivity provision restricts the comparability of the two cases.

[81] The reasons of the majority in ***Castillo*** did not address the constitutionality of the limitations provision, but Bastarache J. did so in his concurring reasons. Bastarache J. found s. 12 of the Alberta Act to be of no force or effect because there was no meaningful connection between Alberta, the civil rights affected by s. 12, and the persons made subject to it. He concluded the "purpose and effect of s. 12 is to apply Alberta law so as to destroy accrued and existing rights situate without the province, regardless of whether Alberta has a meaningful connection to those rights or right-holders" (para. 46). Further, Bastarache J. concluded that s. 12 also failed the second test for constitutional validity because it "simply disregards the legislative sovereignty of other jurisdictions within which the substantive rights at issue are situated" (para. 50). It is the test for constitutional validity stated in ***British Columbia v. Imperial Tobacco Canada Ltd.***, 2005 SCC 49, that Bastarache J. applies.

[82] It appears to me that the argument advanced by counsel for the R.J. Reynolds defendants about the nature of limitation periods harks back to the arguments advanced on the earlier challenge to the constitutional validity of the ***Act.*** In essence, counsel was relying on the observations of Bastarache J. while ignoring the context in which those observations were made. Bastarache J. stated that "limitation periods have the effect of cancelling the substantive rights of plaintiffs, and of vesting a right in defendants not to be sued in such cases" (para. 35).

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[83] While that is so, this case is unlike ***Castillo*** in that the cause of action in the ***Act*** is made retroactive. In this case, the substantive law of the province is the law which should be applied. This is not a case like ***Castillo***, in which a potential defendant has accrued an existing right in another jurisdiction, which a British Columbia law purports to destroy. Any rights that a potential defendant might have accrued in British Columbia, such as a right not be sued (which is a questionable proposition, at best), can be altered by virtue of the meaningful connection that British Columbia has to those rights and those defendants sought to be bound by the cause of action.

[84] In its factum, the Government directly addresses the contention that the retroactive nature of the ***Act*** results in an impermissible alteration of the defendants' previously accrued rights of repose. The Government's first argument is that the defendants had not acquired a right of repose, since such a right cannot pre-date the right to make a claim. It was the passage of the ***Act*** that created the cause of action and commenced the corresponding limitation period and the eventual right of repose. Thus while the limitation period to bring an action in tort might have expired for the individuals to whom the defendants owed a duty according to the definition of "tobacco related wrong" and s. 3(1)(a) of the ***Act***, the Government's cause of action is statutory in nature and the limitation period begins at the point at which the Government obtains the right to sue. That date was 24 January 2001, and the statement of claim was filed that day. That is also the date on which the limitation period begins to run. The limitation period would have expired on 24 January 2003, and it is that date on which a right of repose would accrue.

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[85] The Government's second argument on this point is that even if a right of repose did accrue, the rights are not portable from the *situs* in which they were accrued. The rights are situated in British Columbia, and just as the rights of domestic defendants can be altered through retroactive legislation, so too can the substantive rights of foreign defendants. I agree with the Government's arguments.

[86] It cannot be that the mere location of a potential defendant can determine the differential application of a statute or alteration of rights of repose, when so many other significant connecting factors exist. Simply because a defendant happens not to be in the province when the retroactive statute is enacted does not mean that that defendant maintains a right of repose that is extinguished for defendants who remained in the province. The *ex juris* defendants maintain that they accrued a right of repose under British Columbia law. However, this assertion carries with it the acceptance that British Columbia law applies to the claim, and British Columbia law now includes this ***Act***. Accordingly, any right of repose that had accrued has been altered with the passage of the ***Act***.

(iii) Order and fairness

[87] The defendants assert that the retroactive nature of the ***Act*** results in its application against the defendants which does not comport with the principle of order and fairness. The Government counters this assertion by arguing that the principle of order and fairness does not invite the court to engage in an evaluation of the "fairness" of the substantive law being applied. Rather, the principle of order and fairness underlies the process of determining jurisdiction. It is not a discrete test

nor is it a substitute for the real and substantial connection test as the defendants appear to suggest. Demonstrating a real and substantial connection between the forum and the defendant or the forum and the cause of action satisfies the requirement for order and fairness. I agree with the Government's submissions on this point.

[88] The defendants also complain that the alleged wrongful conduct took place decades ago, creating evidentiary gaps which will affect the fairness of applying the provisions of the ***Act*** to the defendants. This argument does not go to constitutional applicability; instead it is an issue to be dealt with at trial in terms of weight of evidence and whether the Government can meet its burden of proof.

[89] In summary, I am of the view that the retroactivity of the ***Act*** does not result in its inapplicability against foreign defendants. The legislation is part of the substantive law of British Columbia and it does not act to alter or deprive a foreigner of a right that accrued in another jurisdiction. Any rights that the foreign defendants accrued with respect to not being sued have accrued in British Columbia and remain rights that are situated in British Columbia. These rights can be altered equally for both foreign and domestic defendants by a statute that retroactively creates a cause of action and imposes a new limitation period.

[90] The principle of order and fairness relates to the analysis involved in exercising jurisdiction over an action. The purpose of the principle is to ensure that the court is not arbitrarily taking jurisdiction over a matter to which there is no real and substantial connection. That is not the case here.

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(iv) Section 4 of the *Act*

[91] The remaining grounds set out in the defendants' Constitutional Question Act Notice relate to s. 4 of the Act:

> 2. A provincial legislature cannot impose civil obligations on an *ex juris* person for any liability-creating event that occurs outside that province's jurisdiction;
>
> 3. The *Act* is impermissibly extraterritorial in presuming consequences to occur in British Columbia without requiring such consequences to have occurred in fact in British Columbia;
>
> 4. A provincial statute such as the *Act* cannot determine the location of a wrong.

[92] It is the defendants who were brought into the action through the operation of s. 4 of the ***Act*** that are concerned about these points.

[93] Section 4 allows a foreign defendant to be brought into the action even though the defendant never manufactured or distributed tobacco products at all and was never physically present in British Columbia. They assert that the ***Act*** must have extraterritorial operation because it is clearly regulating conduct that occurred outside British Columbia. What the Supreme Court of Canada said in regard to extraterritoriality on the constitutional validity question, set out above, is relevant to the point these defendants raise now on applicability.

[94] The Supreme Court of Canada has described the ***Act*** as creating a civil cause of action that allows the Government of British Columbia to recover compensation for certain health care costs from those entities ultimately responsible for those costs. It also stressed that the manufacturers' breaches of duty, in order to

be caught within the ***Act***, must be those owed to *persons in British Columbia*. The foreign defendants cannot argue that the ***Act*** presumes a connection between the province and a defendant who has never been present in British Columbia, because s. 4 requires that the defendants have conspired or acted in concert with other manufacturers. That is the connection which has been pleaded. The location of the breach is not important, as stated in para. 40 of the Supreme Court's reasons. It is the location of the harm that is relevant. That location is British Columbia. That is within the legislative jurisdiction of the province and, based on the allegations in the statement of claim, the ***Act*** thus applies to the foreign defendants.

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[95] The pleadings are generally presumed to be true when determining the issue of jurisdiction and there is no reason to depart from that presumption in this case. As the sample portion of the pleadings attached as an Appendix to these reasons show, the defendants served only by virtue of s. 4 of the ***Act*** are alleged to have either conspired or acted in concert with a domestic defendant.

[96] Although particular defendants may not have been present in British Columbia, the activities alleged against the joint breach defendants are wrongs situated in British Columbia and the harm that resulted was situated in British Columbia. This is enough to demonstrate a meaningful connection between the jurisdiction and the foreign defendants.

[97] Even though the ***Act*** in this case is not dealing specifically with a common law tort, as was the case in ***Moran v. Pyle***, the situation is analogous. The manufacturers in ***Moran v. Pyle*** were not necessarily present in the particular

jurisdiction in which the action was eventually brought, but the law to be applied to the tort was determined to be the *lex loci delicti* – the law where the harm is incurred. That is the case here, but it goes a step further. Although the foreign defendants were never physically present in British Columbia and they claim that any wrongful conduct must have occurred outside British Columbia, the ***Act*** requires the harm and the cost of the harm to have been incurred in British Columbia. An added feature of this case is that the statement of claim alleges a conspiracy. There is case authority to support the view that the common law does not require that all members of the conspiracy be present in the same jurisdiction to be held liable: see ***Nutreco Canada Inc. v. F. Hoffmann-La Roche*** (2001), 10 C.P.C. (5th) 351, 2001 BCSC 1146. It seems to me that it could also be argued that it was in the reasonable contemplation of these defendants that their wrongful conduct could cause people to smoke in British Columbia. That is enough to ground the wrongful conduct in British Columbia and to determine that the statute in its application does not reach beyond the legislative jurisdiction of the province.

[98] Another argument put forward by these defendants is that the presumptions in s. 3 of the ***Act*** establish the artificial connection between the jurisdiction and the defendant. They argue that the lack of a requirement for the breach of duty to have, in fact, caused exposure or disease in British Columbia means the Government does not have to prove the wrongful conduct actually had any consequences in British Columbia.

[99] I have already addressed this argument as it relates to all of the defendants and I find it no more compelling as it relates to the argument of the joint breach

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defendants that the British Columbia ***Act*** is notionally purporting to regulate civil rights in a foreign jurisdiction arising out of a wrongful act that occurred in that foreign jurisdiction, thereby constituting an extraterritorial application of provincial legislation. In my view, that is not what the ***Act*** purports to do. The ***Act*** is regulating civil rights within the Province of British Columbia. That is not equivalent to an artificial connection with the province, or to an extraterritorial operation of the ***Act***. The fact that the legislation provides for an assumption of causation does not amount to bootstrapping foreign defendants into provincial jurisdiction.

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[100] I would not give effect to any of the arguments the *ex juris* defendants advanced concerning constitutional applicability.

V. ***Forum conveniens***

[101] In arguing that Holmes J. ought to have exercised his discretion to decline jurisdiction, the *ex juris* defendants do not suggest that there is any other forum in which the action could be heard. Instead, the arguments advanced are either a repetition of the submissions made earlier on whether there is a real and substantial connection between the court and the defendants or between the court and the subject matter of the litigation, or an assertion that the principle of order and fairness would be violated by the court taking jurisdiction.

[102] As noted at the outset, it is the Government's position that the Supreme Court of Canada rejected the very foundation for the arguments made by the defendants concerning jurisdiction and *forum conveniens*.

[103] It is certainly the case that in upholding the constitutional validity of the ***Act***, the Supreme Court of Canada held that there are “strong relationships” between British Columbia, the subject matter of the ***Act***, and the persons made subject to it. The Supreme Court held that, for purposes of validity, the pith and substance of the cause of action set out in the ***Act*** is not determined by the location of the wrongs or wrongful activities, but on the right of recovery for expenditures in British Columbia (at paras. 39-40). Of even greater importance to the present appeal, however, is Major J.’s consideration of the connection of the wrongs to the jurisdiction (para. 41):

> 41 …[T]he only relevant breaches under the Act are breaches of duties (or obligations) owed “to persons in British Columbia” (s. 1(1) “tobacco related wrong”, s. 3(1)(a)) that give rise to health care expenditures by the government of British Columbia. Thus, even if the existence of a breach of duty were the central element of the Act’s cause of action (it is not), the cause of action would remain strongly related to British Columbia.

[104] In their challenge to the constitutional validity of the ***Act***, the defendants also asserted that, due to its evidentiary and procedural rules, as well as its retroactivity, the ***Act*** was “unfair” in its operation and, in particular, provided for an unfair trial. The Supreme Court of Canada did not accept those arguments. In respect to the defendants’ characterization of the ***Act*** as “unfair”, Major J. made these observations at paras. 49 and 76:

> The rules in the Act with which the Appellants take issue are not as unfair or illogical as the Appellants submit.
>
> …
>
> …[T]obacco manufacturers sued pursuant to the Act will receive a fair civil trial…

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[105] As to the defendants' arguments concerning the application of the principle of order and fairness to the *forum conveniens* analysis, I agree with the Government's submission that the *ex juris* defendants are attempting to turn the principle into something it has never been, nor was ever intended to be, namely, an invitation to a court to engage in an assessment of the fairness of the substantive law to be applied to an *ex juris* defendant.

[106] In this case, the Government has amply met the real and substantial connection test for jurisdiction and nothing that has been put forward in argument by the *ex juris* defendants persuades me that Holmes J. was wrong in concluding that British Columbia was the *forum conveniens*.

VI. Conclusion

[107] I would dismiss the appeal.

"The Honourable Madam Justice Rowles"

I Agree:

"The Honourable Mr. Justice Hall"

I Agree:

"The Honourable Mr. Justice Smith"

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APPENDIX

Statement of Claim

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IV. CONCERTED ACTION WITHIN CORPORATE GROUPS

A. Generally

91. Historically there have been four multinational tobacco enterprises ("Groups") whose member companies engage directly or indirectly in the manufacture and promotion of cigarettes sold in British Columbia and throughout the world. The four Groups are:

(a) the BAT Group;

(b) the RJR Group;

(c) the Philip Morris Group; and

(d) the Rothmans Group.

92. At all times material to this action 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.

93. At all times material to this action the manufacturers within each Group have had common policies relating to smoking and health. The common policies have been directed or co-ordinated by one or more of the Defendants within each group (the "Lead Companies").

94. At material times, the Lead Companies of the four Groups were as follows:

Group	Lead Companies
BAT Group	the Defendant British American Tobacco (Investments) Limited (formerly British-American Tobacco Company Limited) the Defendant B.A.T. Industries p.l.c. (formerly B.A.T. Industries Limited, and before that Tobacco Securities Trust Limited)

RJR Group	the Defendant R.J. Reynolds Tobacco Company the Defendant R.J. Reynolds Tobacco International, Inc.
Philip Morris Group	the Defendant Philip Morris Incorporated the Defendant Philip Morris International Inc.
Rothmans Group	the Defendant Carreras Rothmans Limited the Defendant Ryesekks p.l.c. the Defendants Rothmans International Research Division

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B. Joint Liability of the BAT Group Defendants

95. During all or part of the period in which the tobacco related wrongs described herein were committed, the members of the BAT Group have included the following companies (the "BAT Group Members"):

(a) Imasco Limited and Imperial Tobacco Limited (now the Defendant Imperial Tobacco Canada Limited);

(b) the Defendant B.A.T. Industries p.l.c.; and

(c) the Defendant British American Tobacco (Investments) Limited.

96. After about 1950, some or all of the BAT Group Members conspired, or had a common design, to prevent, by unlawful means, consumers in British Columbia and in other jurisdictions acquiring knowledge of the harmful nature and addictive properties of cigarettes, as described in paragraphs 39 – 43 herein, in circumstances where the BAT Group Members knew or ought to have known that injury to consumers would result from acts done in furtherance of the conspiracy or common design.

97. In furtherance of the aforementioned conspiracy or common design, Imperial Tobacco Limited and Imasco Limited, or either of them, breached their duties to consumers in the manner described in Part III herein.

98. The aforementioned conspiracy or common design was entered into or continued at or through committees, conferences and meetings established, organized and convened by the Defendants British American Tobacco (Investments) Limited and B.A.T. Industries p.l.c., or either of them, and attended by senior personnel of the BAT Group Members, including those of Imperial Tobacco Limited

and Imasco Limited, or either of them, and through written and oral directives and communications amongst the BAT Group Members.

99. The committees utilized by the Defendants British American Tobacco (Investments) Limited and B.A.T. Industries p.l.c., or either of them, to direct or co-ordinate the BAT Group's common policies on smoking and health include the Chairman's Policy Committee, the Research Policy Group, the Scientific Research Group, the Tobacco Division Board, the Tobacco Executive Committee, and the Tobacco Strategy Review Team.

100. The conferences utilized by the Defendants British American Tobacco (Investments) Limited and B.A.T. Industries p.l.c., or either of them, to direct or co-ordinate the BAT Group's common policies on smoking and health include the Chairman's Advisory Conferences, BAT Group Research Conferences, and BAT Group Marketing Conferences.

101. The Defendants British American Tobacco (Investments) Limited and B.A.T. Industries p.l.c., or either of them, further directed or co-ordinated the BAT Group's common policies on smoking and health by preparing and distributing to the members of the BAT Group, including Imperial Tobacco Limited and Imasco Limited, written directives and communications including "Smoking Issues: Claims and Responses", "Consumer Helplines: How To Handle Questions on Smoking and Health and Product Issues", "Smoking and Health: The Unresolved Debate", "Smoking: The Scientific Controversy", "Smoking: Habit or Addiction?", and "Legal Considerations on Smoking and Health Policy". These directives and communications set out the BAT Group's position on smoking and health issues to ensure that the personnel of the BAT Group companies, including the personnel of Imperial Tobacco Limited and Imasco Limited, understood and disseminated the BAT Group's position.

102. The Defendants British American Tobacco (Investments) Limited and B.A.T. Industries p.l.c., or either of them, further directed or co-ordinated the smoking and health policies of Imperial Tobacco Limited and Imasco Limited, or either of them, by directing or advising how they should vote in committees of the Canadian Manufacturers and at meetings of the Defendant CTMC on issues relating to smoking and health, including the approval and funding of research by the Canadian Manufacturers and by the Defendant CTMC.

103. Further particulars of the manner in which the conspiracy or common design was entered into or continued and of the breaches of duty committed by Imperial Tobacco Limited and Imasco Limited, or either of them, in furtherance of the conspiracy or common design, are peculiarly within the knowledge of the BAT Group Members.

104. By reason of the foregoing, the Defendants British American Tobacco (Investments) Limited and B.A.T. Industries p.l.c., or either of them, conspired with Imperial Tobacco Limited and Imasco Limited, or either of them, with respect to the

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breaches of duty committed by Imperial Tobacco Limited and Imasco Limited, referred to in Part III herein.

105. In the alternative, by reason of the foregoing, the Defendants British American Tobacco (Investments) Limited and B.A.T. Industries p.l.c., or either of them, acted in concert with Imperial Tobacco Limited and Imasco Limited, or either of them, with respect to the breaches of duty committed by Imperial Tobacco Limited and Imasco Limited, referred to in Part III herein.

106. In the further alternative, if the BAT Group Members did not agree or intend that unlawful means be used in pursuing the common design referred to in paragraph 96, they knew or ought to have known that one or more of the BAT Group Members might commit breaches of duty in furtherance of the common design. As a consequence, the Defendants British American Tobacco (Investments) Limited and B.A.T. Industries p.l.c., or either of them, acted in concert with Imperial Tobacco Limited and Imasco Limited, or either of them, with respect to the breaches of duty committed by Imperial Tobacco Limited and Imasco Limited, referred to Part III herein.

107. In the further alternative, in breaching the duties referred to in Part III herein, Imperial Tobacco Limited and Imasco Limited, or either of them, were acting as agents for the Defendants British American Tobacco (Investments) Limited and B.A.T. Industries p.l.c., or either of them.

108. In the further alternative, the Defendants British American Tobacco (Investments) Limited and B.A.T. Industries p.l.c., or either of them, directed the activities of Imperial Tobacco Limited and Imasco Limited, or either of them, to such an extent that the breaches of duty committed by Imperial Tobacco Limited and Imasco Limited, or either of them, were also breaches committed by the Defendants British American Tobacco (Investments) Limited and B.A.T. Industries p.l.c., or either of them.

109. By reason of the allegations made in paragraphs 95 to 108 herein, the BAT Group Members have, under section 4 of the *Act*, jointly breached the duties particularized in Part III herein and the Defendants Imperial Tobacco Canada Limited, B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited are jointly and severally liable for the cost of health care benefits attributed to Imperial Tobacco Limited and Imasco Limited.

110. In any event, by reason of the allegations made in paragraphs 95 to 108 herein, the Defendants Imperial Tobacco Canada Limited, B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited are, at common law or in equity, jointly and severally liable for the cost of health care benefits attributed to Imperial Tobacco Limited and Imasco Limited.

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