**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**RJR-MACDONALD INC.**

PLAINTIFF
ACTION No. C985777

**IMPERIAL TOBACCO LIMITED, a division of IMASCO LIMITED**

PLAINTIFF
ACTION No. C985780

**ROTHMANS, BENSON & HEDGES INC.**

PLAINTIFF
ACTION No. C985781

AND:

**ATTORNEY GENERAL OF BRITISH COLUMBIA**

DEFENDANT

- AND -

BETWEEN:

**HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA**

PLAINTIFF
ACTION No. C985776

AND:

**IMPERIAL TOBACCO LIMITED et al**

DEFENDANTS

# OUTLINE OF ARGUMENT

## ATTORNEY GENERAL OF BRITISH COLUMBIA
## and
## HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA

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## I. INTRODUCTION: SUMMARY OF ARGUMENT

### Mischief

1. The mischief the Legislature sought to address in the *Tobacco Damages and Health Care Costs Recovery Act* (the "*Act*") is the prevalence of tobacco use, the disease it causes in smokers, the damage to individual smokers and the costs to the government of British Columbia (the "government") of providing health care to victims of disease.

### Characterization of the *Act*: In Brief

2. The *Act* confers on the government a right to sue. It also addresses substantive rights and obligations and establishes rules of procedure and evidence governing lawsuits, against tobacco manufacturers, by individuals for damages and by the government to recover the cost of health care benefits attributable to tobacco related disease.

### Characterization of the *Act*: *In Extenso*

3. The *Act* confers on the government the right to sue for certain specifically defined economic consequences of behaviour grounded in tortious[1] or other wrongful conduct, namely the cost to the government of providing health care benefits for the treatment of tobacco related disease. The *Act* does not confer a right of action on individuals. If individuals seek to rely upon the *Act*, their claim must be grounded in a common law, equitable or statutory cause of action.

4. The substantive rights and obligations addressed by the *Act* include:

(i) an action by an individual or the government can be brought for tobacco related wrongs whenever they occurred - section 20(2);

[1] See Fleming, *The Law of Torts (8th ed.)* (Toronto: Carswell, 1992) at 1-5 and Keeton, *Prosser and Keeton on Torts (5th ed.)* (St. Paul, MN: West, 1984) at 1-7, and see also paras. 493 - 496 of this Outine of Argument, *infra*.

(ii) in both cases the limitation period runs for two years from the coming into force of the *Act* - section 15(1);

(iii) an action by an individual is revived if the action was dismissed because it was held by a court to be barred or extinguished by the *Limitation Act* - section 15(2)*;*

(iv) liability in an action by an individual, or an action by the government brought pursuant to section 13(5)(a), can be apportioned on the basis of risk contribution - section 16;

(v) the government may bring an action to recover the cost of health care benefits either in respect of named individuals - section 13(5)(a) - or on an aggregate basis - section 13(5)(b);

(vi) in an action by the government to recover the cost of health care benefits on an aggregate basis (an "aggregate action"), liability may be apportioned on the basis of market share - sections 13.1(3)(b) and (4);

(vii) in an action by an individual or the government all related manufacturers are to be considered as one manufacturer for the purposes of establishing a tobacco related wrong: s. 17.1 (1)(a); and

(viii) in an action by an individual or the government related manufacturers are jointly and severally liable for the tobacco related wrongs committed by any of the related manufacturers - section 17.1 (1)(b).

5. The rules of procedure and evidence include:

(i) in an action by an individual or the government statistical and epidemiological evidence may be admitted to prove causation and quantum - section 14;

(ii) in an aggregate action by the government there are rules relating to the identification of insured persons and discovery of health care records or documents relating to the provision of health care benefits - section 13(6); and

(iii) in an aggregate action the onus of proof is reversed with respect to certain elements of causation - section 13.1(2) and (4).

**The Legislative Record**

6. The court will look to the legislative record: see *Campbell v. British Columbia (Attorney General) et al*, [1999] B.C.J. No. 233 (S.C.) (QL), Williamson J.

7. In *Hansard*, Minister Joy MacPhail's speech (on second reading in July 1997, when the *Act* was passed), and Minister Penny Priddy's speech (on second reading of the amendments to the *Act* in July 1998), show that the Legislature sought to address the mischief caused by the prevalence of tobacco use, disease caused in smokers, the damage to individual smokers, and the health care costs entailed thereby. The Legislature sought to address this by enacting legislation conferring a right of action on the government, addressing substantive rights and obligations, and establishing rules of evidence and procedure governing lawsuits against tobacco manufacturers by individuals for damages, and by the government to recover the costs of health care benefits provided by the government, attributable to tobacco related disease.

8. The legislative record shows that British Columbia has from 1891 to the present enacted legislation relating to the use of tobacco by minors, has from 1971 to the present imposed taxes on the sale of tobacco, and has from 1971 enacted measures governing tobacco advertising, warnings on cigarette packages and licensing of vendors of cigarettes.

**Moran v. Pyle**

9. The legislation makes tobacco manufacturers liable for tobacco related wrongs, i.e, for tortious or other wrongful conduct which causes disease in persons who are entitled to be provided with health care benefits at public expense. So any manufacturer who introduces cigarettes into the stream of commerce foreseeing their sale in B.C. will be liable for a tobacco

related wrong, i.e., a breach of duty that causes tobacco related disease and consequent health care costs. In *Moran v. Pyle*, Dickson J., for a unanimous court, stated:

> ... 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.
>
> *Moran v. Pyle National (Canada) Ltd.* [1975] 1 S.C.R. 393 at 409, 43 D.L.R. (3d) 239 at 250-51.

10. Of course, other tortious conduct, such as conspiracy, deceit, negligent misrepresentation and breach of statutory duty, as well as breach of equitable duty, is comprehended by the expression "tobacco related wrong".

**Creation of a Statutory Right of Action**

11. The conferring on the government of a right to sue for costs of health care benefits arising out of the tortious or other wrongful conduct of tobacco manufacturers falls quite specifically within the *Constitution Act, 1867*, s. 92(13): "The creation of civil actions is generally a matter within provincial jurisdiction under s. 92(13) of the *Constitution Act, 1867*."

> *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 at 672, 58 D.L.R. (4th) at 277, per Dickson J.

**The Province's Legislative Jurisdiction: Substantive Rights, Procedure and Evidence**

12. Legislation in relation to substantive rights and obligations and rules of procedure and evidence comes within sections 92(13) and (14) of the *Constitution Act, 1867*: "[T]he law

relating to property, succession, the family, contracts and torts is mainly within provincial jurisdiction ...."

> Hogg, *Constitutional Law of Canada* (4th ed.) (Toronto: Carswell, 1997) at 546.
>
> [I]t is clearly competent to any Province to determine for the purpose of a civil action brought in such Province, what evidence is to be accepted and what defences may be set up to such an action. ... [It is] within the exclusive legislative competence of the Province under head 14 of s. 92.
>
> *Attorney-General (Ontario) v. Scott,* [1956] S.C.R. 137 at 148 *et seq.*, [1955] 1 D.L.R. (2d) 433 at 447 *et seq.*, per Abbott J.

**Specific Features of the *Act***

13. The Attorney General will discuss features of the legislation specific to the *Act*, i.e. the creation of a cause of action, the aggregate action and the use of statistical evidence, the use of presumptions, market share principles and enterprise liability. The Attorney General will show that in each instance there is a plenitude of statutory precedent and case authority, that each feature is a well-recognized element of statutes in B.C. and other jurisdictions, and that certain features reflect advances in the law developed by the courts themselves.

> *Agency for Health Care Administration et al. v. Associated Industries of Florida Inc.* 678 So.2d 1239 (Fla. 1996).

**The *Act* is not a Penal Statute**

14. The Manufacturers argue that the *Act* is penal in character. This argument is altogether unsound. A penal law must be designed to punish, not to compensate. It must contain a prohibition coupled with a penalty. The *Act* simply does not qualify because it is "restitutionary in nature and is not imposed with a view to punishment of the party responsible."

> *United States of America v. Ivey et al,* [1995] 26 O.R. (3d) 533 (Ont. Ct. Gen. Div.) at 544, per Sharpe J., aff'd (1996) 139 D.L.R. (4th) 570 (Ont. C.A.).

**The Manufacturers' Argument**

15. The Manufacturers' case is based on three arguments:

(a) Undermining the rule of law;

(b) Interference with the independence of the judiciary;

(c) Extraterritorial operation.

As to these points:

**The Rule of Law**

16. The rule of law is not undermined; neither the presumptions nor the provisions relating to retroactivity do so. Moreover, the principle of the rule of law does not provide an independent basis to strike down legislation:

> [It] does not create a restriction on Parliament's right to make laws, but is only a recognition that when they are made they are then applied to all, including governments.
>
> *Bacon v. Saskatchewan Crop Insurance Corp.*, [1999] 9 W.W.R. 258, S.J. No. 302 (Sask. C.A.) at para. 30 (QL), per Wakeling J.A.

**Independence of the Judiciary**

17. The legislation does not interfere with the independence of the judiciary in that it does not bear on security of tenure, security of remuneration or the administrative independence of the courts; nor can it be argued that the "core" fact-finding role of the courts has been undermined. At the end of the day the judge must determine the existence of a duty, whether there has been a breach of duty, causation, and damages or costs. There is no legislatively-mandated outcome. In

*Baron v. Canada* it was held that "…a residual discretion is a constitutional requirement." [emphasis added]

> *Baron v. Canada*, [1993] 1 S.C.R. 416 at 440, 99 D.L.R. (4th) 350 at 367, per Sopinka J.

18. The *Act* comes well within this requirement.

**Extraterritoriality**

19. The legislation relates to civil rights within the province; it is not aimed at extra-provincial rights. The Manufacturers make seven enumerated points under the rubric of extra-territoriality. Six of these are variants on the argument that the *Act* is aimed at civil rights outside British Columbia. The seventh point, choice of law, is altogether unsound.

(a) The legislation is obviously aimed at civil rights within British Columbia:

> Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights would not render the enactment *ultra vires*.
>
> *Churchill Falls (Labrador) Corporation Ltd. et al v. Attorney-General of Newfoundland et al*, [1984] 1 S.C.R. 297 at 332, 8 D.L.R. (4th) 1 at 30, per McIntyre J.

In any event the Manufacturers have adduced no evidence to show what the extra-provincial effects will be:

> Before the Court concludes that the Province has transcended its constitutional powers, the evidence must be clear and unmistakable; more than conjecture or speculation is needed to underpin a finding of constitutional incompetence.
>
> *Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545, 80 D.L.R. (3d) 449 at 468, per Dickson J. ("*C.I.G.O.L*").

(b) The Manufacturers' argument as to extraterritoriality insofar as it is based on the remaining point, i.e. choice of law, is without merit. There is no inconsistency between the *Act* and the principles established in *Morguard Investments v. De Savoye* (1990), 76 D.L.R. (4th) 256 (S.C.C.) and *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289. The Manufacturers' argument is really an argument that the *Act* ought not apply to certain *ex juris* defendants, and that the court ought not to assume jurisdiction. This is an argument to be made in the course of foreign defendants' challenges to service *ex juris*.

There is nothing extra-territorial about the provisions of the *Act*. They relate primarily to *Moran v. Pyle* torts, i.e., conduct which causes loss or damage within the province. In *Moran v. Pyle*, Dickson J. held:

> This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products whenever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce. [emphasis added]
>
> *Moran v. Pyle*, *supra* at 251.

20. The enactment of these measures is in relation to property and civil rights in the Province - s. 92(13) - and the rules of evidence and civil procedure - s. 92(14) - as well as matters of a purely local or private nature - s. 92(16).

**The Issue of Real and Substantial Connection**

21. The issue whether there is a real and substantial connection between the government's action brought in British Columbia and the *ex juris* defendants does not arise at this stage, but should be reserved to the hearing of the foreign defendants' motions to set aside service *ex juris*.

## II. THE LEGISLATIVE RECORD

### A. *Hansard*

22. In *R. v. Morgentaler* (1993), 107 D.L.R. (4th) 537 (S.C.C.) at 551, Sopinka J. held that the use of *Hansard* " ... to aid in determining the background and purpose of legislation now appears well established ...".

23. La Forest J. in *R.J.R. v. Canada* (for all members of the court), found the federal *Tobacco Products Control Act* to be in pith and substance criminal law. He said:

> I note in passing the well-established principle that a court is entitled, in a pith and substance analysis, to refer to extrinsic materials, such as related legislation, Parliamentary debates and evidence of the 'mischief' at which the legislation is directed: see *Morgentaler* ....
>
> *R.J.R. v. Canada (A.G.),* [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 at 25.

24. La Forest J. then referred to Minister Jake Epp's speech on second reading. He stated:

> Apart from shedding light upon the government's intent in introducing this legislation, this speech also gives some indication of the nature and scope of the societal problem posed by tobacco consumption.
>
> *R.J.R., supra* at 26.

25. In *R. v. G. (B.),* Bastarache, J., for the Supreme Court of Canada, said:

> In fact, it is settled that when courts are called upon to consider the constitutionality of an enactment, they may take into account the parliamentary history, which is generally not the case for the ordinary interpretation of an enactment. As Professor P.-A. Côté states in *The Interpretation of Legislation in Canada* (2nd ed. 1991), at p. 363:
>
> > The parliamentary history of the enactments whose constitutionality is being challenged may also be consulted, not with a view to interpreting the enactments, but in order to appreciate their validity, either from the standpoint of the division of powers, or of the *Charter of Rights and Freedoms*.

> The same is true when the issue is whether the interpretation of a given enactment is consistent with the values of the *Charter*.
>
> *R. v. G. (B.)* (1999), 135 C.C.C. 303 (S.C.C.) at 321.

26. Bastarache, J. then turned to a speech in the Commons by the Minister of Justice which, he said, "identified the interests the legislation was seeking to reconcile."

> *R. v. G (B.), supra* at 321.

27. In her speech on second reading, when the *Act* was passed in 1997, the Minister of Health, Joy MacPhail made it clear that the intent of the legislature in passing the legislation was to deal with the costs of tobacco related disease in the province, to enable the government to recover such costs, to deal with retroactivity and limitations, and to enact rules of evidence and procedure governing lawsuits by individuals and the government.

28. Minister MacPhail said:

> The Tobacco Damages Recovery Act will assist the government and individuals in British Columbia in getting the tobacco industry to pay for the devastating effects of its harmful products. Last year over 5,800 British Columbians died from the effects of tobacco, and that number will increase this year. Many of them have been addicted to a product the tobacco industry has promoted with images of excitement, glamour and fun.
>
> We know now that the health effects of smoking are not glamorous. But the tobacco industry captures its victims while they are young. Ninety percent of people who smoke started before the age of 19. Our British Columbia government is assisting young people so that they remain non-smokers. Funding for our tobacco reduction strategy has more than doubled this year to $5 million, to protect children from the devastating effects of tobacco. We will double the funding again next year to protect young people. We know that tobacco companies target children with their products, and we know why. Each 15-year-old who starts smoking will represent at least $25,000 in direct revenue for tobacco companies over their lifetime. That's to the tobacco companies. Every day another 20 B.C. kids take up smoking. The tragedy is that of those who keep smoking, half will die as a result of tobacco use.

Tobacco-related illnesses and disease cost the health system, and us as taxpayers, half a billion dollars every year. This legislation will assist government in making the tobacco industry pay for the health care costs of tobacco-related illnesses. Our government is working to ensure that tobacco companies are forced to take responsibility for the devastating effects of their harmful products. The initial responses of the tobacco companies to our challenge is unsatisfying, to say the least. There appears to be little willingness to recognize, own up to or provide compensation for the harm they inflict on our citizens. If this attitude on their part continues, it is our intent to proceed with legal action against the industry when this new law is in place.

This legislation, the Tobacco Damages Recovery Act, gives the government and individuals the legal authority to proceed to courts to collect hospital, medical and other prescribed costs resulting from tobacco-related illnesses such as cancer, heart disease and stroke. With this legislation, we are trying to ensure that court action is not thrown out on technical grounds. For too long, the tobacco industry has had an unfair advantage in court. Our proposed legislation allows for the introduction in court of statistical or epidemiological evidence. This will allow the case to be made even more strongly and more clearly that tobacco causes illness and death.

In addition, we are including a section regarding liability based on risk contribution. It will mean that the government or individuals involved in court actions against tobacco companies don't have to prove that each individual cigarette brand caused the harm, but that cigarettes generally cause harm. There have been situations where many people with tobacco-related illnesses have wanted to take the tobacco industry to court. Understandably, those people have had to concentrate on fighting their illness and getting well, but the Limitation Act states that the time has run out for most court actions while those persons were ill.

With this legislation, we are extending the limitation period to give those persons more time to file an action against the tobacco industry. An amendment that I've handed to the Clerk today provides that potential claimants will have a full two years following proclamation of this legislation to initiate their claim. The amendment also provides that prior dismissal of an attempted claim is not a bar to commencement of a new claim pursuant to this legislation.

All of these actions are designed to make the tobacco industry accountable for endangering the health of children, teens and adults. It's time tobacco companies provided just compensation to British Columbia's health system for the treatment

> and prevention of deadly tobacco-related illness. I'm proud that British Columbia is a leader in Canada in declaring war on the tobacco companies. [emphasis added]
>
> *Debates of the Legislative Assembly*, Vol.7, No.5 (July 22, 1997), at 6110 *et seq*.

29. A new Minister of Health, Penny Priddy, introduced the amending Act on July 29th, 1998. On second reading, she discussed at length the changes proposed in the *Act*:

> I move that Bill 30 now be read a second time.
>
> I'm pleased to have the opportunity to talk about the important topic of tobacco reduction strategies again this evening, and in Bill 30 we're really talking about the Tobacco Damages Recovery Act. This bill is another important step in our government's strategy. It's a building of pieces of strategy to change the way tobacco companies do business in British Columbia. In particular, this legislation supports our government's intent to make the tobacco industry accountable for the harm its products cause to the health of British Columbians and for the cost of treating tobacco-caused illnesses.
>
> Each year nearly 6,000 British Columbians — mothers, fathers, sisters, brothers, sons, daughters, friends, co-workers — die; 6,000 people die, and thousands more become ill or incapacitated as a result of tobacco use. Tobacco is a harmful product. In fact, it is a product that if used exactly as intended, is likely to kill you. B.C. spends nearly half a billion dollars yearly in health care costs alone to treat smoking-related diseases. Internal tobacco industry documents suggest that tobacco companies spend millions of dollars on marketing and promotion to enlist new replacement smokers, as they call them — replacement smokers is the phrase the tobacco company uses; we've seen that from the court cases — and to dissuade smokers from quitting. Children and all British Columbians have a right to be protected from a highly addictive substance that may kill or injure those who use it. There has to be greater accountability on the part of the tobacco industry for its products. A new legal strategy was adopted in B.C. last year to introduce such accountability.
>
> Last July this Legislature passed the Tobacco Damages Recovery Act. Under this act, smokers may bring individual lawsuits. They may also bring class actions. The Tobacco Damages Recovery Act also authorizes the provincial government to sue the tobacco companies to recover health care costs attributable to smoking-related diseases. This is a new departure in Canadian tort law, the area of law that deals with claims for wrongful action.

> The legislation passed a year ago permits the province to bring a tort claim in the aggregate. This is an innovation. The law of torts has grown up on the basis of individual claims related to individual wrongs. Even class actions are, in truth, individual actions in such cases. Certain issues may be tried and the results may be binding to all members of the class but damages must be assessed for each member of the class.
>
> The name of the act has been amended to make it clear that the government's direct action is for the recovery of the costs of health care benefits which the government has incurred in the treatment of tobacco-related disease. Claims for personal injuries or death arising as a result of a tobacco-related disease can continue to be brought by individuals, and we are now seeing more and more of those cases. There's quite a precedent-setting one in Florida that is currently going on. The act also contains a number of amendments that distinguish between a claim for damages by individuals and a claim for the cost of health care benefits incurred by the government.
>
> Since 1994 in the United States, more than 40 states have lodged legal action to enable state governments to recover health care costs attributable to smoking. The tobacco companies have settled prior to the commencement of a trial in Mississippi, Florida and Texas. The only suit by a state government which has actually gone to trial is a claim by Minnesota. This spring the tobacco companies settled before that trial concluded but after it began — not before it started — for $6.8 billion, payable over 25 years. The state of Washington's lawsuit goes to trial this coming September, 1998, and Oregon's lawsuit will proceed in 1999. Some state legislatures have passed legislation to allow lawsuits by state governments to recover tobacco-related health care costs.
>
> The act we passed last year and these amendments are based in large part on similar legislation passed in various states in the U.S., such as Florida, Vermont and Maryland. While British Columbia is the very first province in Canada to introduce such an act, the legislation is certainly not unprecedented. [emphasis added]

*Debates of the Legislative Assembly*, Vol.12, No.11 (July 29, 1998), at 10712 *et seq.*

30. She then discussed the changes relating to the burden of proof and the admission of statistical evidence. She said:

> I will describe the elements of the key changes which are being made to the Tobacco Damages Recovery Act. Although they are somewhat technical and legalistic, it is

important that the House understands the principles which underlie these changes. I will try and describe them as simply — for myself and for the House — as possible.

An important change involves shifting the burden of proof in relation to certain aspects of cause or causation. At trial, the government must initially prove three elements of the case: first, that the tobacco industry breached a legal duty, such as the failure to warn of dangers inherent in tobacco use or such as sale of a defective product; second, that exposure to tobacco products causes disease; and third, that the defendant manufacturers sold tobacco in this province.

Once these elements are proven, the burden shifts to the tobacco companies. It will then be their obligation to show that their breach of a legal duty did not cause or did not contribute to any or all of the costs of health care which were incurred. Now, if the tobacco industry can prove that any breach of duty which may have occurred did not cause or contribute to the health care costs incurred by the province — for example, because teenagers would have taken up smoking anyway, which is what they say, and those already smoking would have kept on smoking — then the industry will escape liability.

I must emphasize that these amendments do not relieve government in any way of its obligation to prove its case to the court. They merely ensure that the parties with the best information on causation — and those are the tobacco manufacturers — bear the responsibility for satisfying the court on the balance of probabilities that their activities did not affect the behaviour of those persons who took up smoking or continued to smoke. Shifting the burden in this way is appropriate here because the industry undoubtedly has the best evidence available respecting why people start and continue to consume tobacco products.

Hon. speaker, another important feature of these amendments is to clarify what constitutes an aggregate claim. The government is authorized to bring a direct claim for health care costs that have been provided or will be provided to residents of the province who have suffered disease as the result of exposure to tobacco products. In that regard, the amendments also establish that in an aggregate claim it is not necessary to identify specific individuals or to present evidence on an individual basis. Proof of such an aggregate claim will rely on statistical and epidemiological evidence which is derived from the population as a whole.

I should point out that such use of statistical and epidemiological evidence is not novel; this kind of evidence is introduced on a regular basis in the courts by individuals claiming damages for their injuries. In view of the special nature of an aggregate action, it’s essential to introduce some procedural modifications. Examination and production of documents relating to individuals will be limited to a statistically meaningful sample of those documents. Fairness is ensured by giving the court the discretion to determine what is statistically meaningful. So it will be at the discretion of the court to know what is a meaningful sample of

> documents. At trial, all documents relied on by any expert witness called by either the government or a defendant must be produced. Privacy of individuals will be protected by requiring the government to delete any personal identification from all information which is disclosed. [emphasis added]
>
> *Ibid.*

31. As to changes in the definition of "manufacturer" and the adoption of the concept of "related manufacturer", she said:

> Another important set of changes involves the corporate structure of the tobacco industry. The nature of these changes is to broaden the definition of what constitutes a tobacco 'manufacturer', and to widen the linkages to related companies. The effect of these changes is to establish a more accurate and realistic description of what constitutes a tobacco manufacturer. Provisions have been added to ensure that various corporate entities which effectively own, control, are related to or have a substantial interest in the manufacture, promotion or sale of tobacco products will be subject to this legislation.
>
> Any legal entity, whether in the form of an affiliate, a joint venture, a trust, a partnership or some other arrangement which has a beneficial interest in a corporation which produced, promoted or sold tobacco products that may give rise to a claim under the legislation will not be able to avoid liability behind some kind of corporate veil. [emphasis added]
>
> *Ibid,* at 10713.

32. She then referred to the amendments relating to market share:

> One further change involves the extent of liability of an individual manufacturer. These amendments establish a presumption that when the government presents its case against a manufacturer, the manufacturer will be liable for the proportion of health care costs equivalent to its share of the market for that product. However, it will be open to the manufacturer to show that such apportionment is unfair, if that's what they believe, or does not accurately reflect its contribution to exposure and disease. This presumption is a reasonable one, and in fact was the basis agreed upon for apportioning liability for health

care costs among tobacco companies in the Minnesota court case, which was resolved for $6.8 billion. [emphasis added]

*Ibid.*

33. She continued:

The proposed amendments are prompted by developments since the act was passed last year. At the time, it seemed, based on revelations in documents obtained from the tobacco industry, that a consensus had been reached that nicotine is addictive. In 1994, in sworn statements before a committee of the U.S. House of Representatives, CEOs of five U.S. tobacco companies swore that they did not believe nicotine to be addictive. A year ago it was thought that the tobacco companies would abandon that position.

Since that time, however, ambiguous statements by CEOs of the five main tobacco companies in the United States, testifying in January of this year before a committee of the U.S. House of Representatives, have placed this in doubt. In a statement to the committee, Geoffrey Bible, chairman of Philip Morris, declined to adopt the view expressed in the U.S. Surgeon General's report that tobacco is addictive. Apparently the industry believes that it's merely habit-forming; moreover, they apparently do not concede that tobacco can increase the likelihood of specific diseases in smokers.

To provide just a bit more background as I move towards conclusion ... .
Then came the Minnesota case. This is in fact the only case which has actually gone to trial. At trial the counsel for B.A.T. Industries PLC continued the rhetoric engaged in by the tobacco industry, suggesting, 'Well, you know, there's some controversy about health hazards associated with the use of tobacco products', and 'Tobacco products are not addictive'.

This position has been maintained despite the report of the U.S. Surgeon General ten years ago, which found that tobacco is addictive, and despite even earlier Surgeon General reports which confirmed the health hazards associated with the use of tobacco products. The industry now says that tobacco is not addictive.

The resources of the tobacco companies in many respects, as we know, exceed those of governments. They say they've been conducting scientific research for decades. Well, this will provide an opportunity for them to bring it forward. The issue of addiction lies at the heart of the controversy over tobacco.

Since the Legislature passed the Tobacco Damages Recovery Act last year, additional internal tobacco company documents have come to light which indicate that the entire tobacco industry knew as early as the 1950s that nicotine was

addictive and that indeed the industry has, over the years, conducted tests to enhance nicotine delivery. Moreover, those documents that have recently been disclosed prove that the industry has been targeting teenagers.

'Project 16', which was done in 1977 as a report for Imperial Tobacco, studies attitudes to smoking in 16- and 17-year-olds. The study says this about its purpose: 'Since how the beginning smoker feels today' — those are the 16-year-olds — 'has implications for the future of the industry, it follows that a study of this area would be of much interest'. 'Project 16' was to learn about how smoking begins, how high school students feel about smokers, and how they foresee their use of tobacco in the future This is a report that targets children, to figure out how we get more children to use tobacco It was over 20 years ago that that research was conducted.

'Project Plus-Minus' was another report prepared by the same firm for Imperial Tobacco in 1987, So now we're ten years later. It followed up on 'Project 16' and included males and females 16 to 24. The study was designed to examine why young people smoke and included probing the areas of quitting. They were very concerned about why young smokers were quitting. They wanted to know why. The study found that starters — kids just starting — no longer disbelieved the dangers of smoking, but they almost universally assume that these risks will not apply to themselves and that they won't become addicted. Once addiction does take place, it becomes necessary for the smoker to make peace with the accepted hazards, and this is obviously done by a wide range of rationalizations.

We've learned a lot, even in the last year. We've learned of the revelations from Minnesota earlier this year. So what is the significance of that? The significance is that research shows that if young people start to smoke before age 19 — and children in this province are smoking as young as eight on a regular basis — it's likely they will become long-term adult smokers. The industry has targeted these very young children and teenagers. Why do teenagers, once they take it up, continue to smoke as adults? We believe it's because nicotine is addictive. The companies say no. Well, they'll now have the opportunity to bring forward their research and show evidence that says: 'No, no, no, people continue to smoke because they want to, not because nicotine is addictive'.

Have the marketing activities of tobacco companies and their product caused or contributed to exposure to smoking? If the companies' marketing activities and their products have not resulted in anyone taking up smoking or continuing to smoke, it's appropriate to ask them to prove it. They introduced the commodity into the stream of commerce. If it turns out the tobacco manufacturers knew all along it was addictive, then the onus should be on them to establish that the nature of the commodity and their marketing didn't affect the behaviour of people who are now smoking.

In conclusion, the province will contend that the tobacco companies target young smokers to replace those who die or quit. That's what they're called; they're called replacement smokers. The province will also contend that any argument based on free choice cannot be sustained, because 90 percent of smokers are recruited at an age when most if them are not old enough to make a free and informed choice. All of these issues will have to await the judgments of the court.

The Tobacco Damages Recovery Amendment Act is an innovation in this country and is being looked at seriously by other provinces. The most serious attempt to enlist the justice system in the cause of public health by any province is in British Columbia. For all of these reasons, I ask for the support of the entire House for the amendments to the Act as set out in Bill 30. [emphasis added]

*Ibid,* at 10713 *et seq.*

34. She concluded the debate by saying:

Just a few comments in closing. If we could divert the dollars spent — because this is what the Tobacco Damages Recovery Amendment Act is about — and if we could recover or not have to spend those kinds of dollars on tobacco-related illnesses, the other things we would be able to do with our health care system around wait-times and things for children and all kinds of other programs that would make a huge difference in communities would be quite extraordinary. This government would gladly forgo any tobacco tax revenue if all tobacco sales stopped in B.C., with the subsequent improvement of health care and qualify of life to citizens of British Columbia. That would be more than worth it to this government.

I was not part of the debate last year, and I'd be surprised if the Premier and the Minister said that we would not devote the dollars from the Tobacco Damages Recovery Act to health care, but I want to assure the hon. member that we absolutely will. Money recovered from the Tobacco Damages Recovery Act will be directed towards the health care of British Columbians. That's what it's for, that's why we're doing it, and that's exactly where it should go. And that is what we will do.

<u>This is about being able to compensate this government for the costs it spends on tobacco-related illnesses, to be able to have additional dollars to support people with those illnesses and to improve the health care system in this province. That is its sole and only purpose, and that's what we will do when this legislation passes. I move second reading of Bill 30</u>. [emphasis added]

*Ibid,* at 10715.

## B. Prior Legislation

35. British Columbia has, as far back as 1891, enacted legislation for the control of tobacco use and sales. In 1891, the *Minor's Protection Act, 1891*, S.B.C. 1891, c.28, made it an offence to sell or give tobacco or opium, in any form or preparation, to anyone under the age of fifteen[2].

36. By 1897, this Act became known as the *Youths' Protection Act*, R.S.B.C. 1897, c.139. In 1902, the *Youths' Protection Act* was amended to increase the minimum age for tobacco sale to sixteen. In 1911, these provisions were incorporated into the *Infants Act*, R.S.B.C. 1911, c.107.

37. In 1971 the government took a more comprehensive approach to tobacco control; it began taxing tobacco products[3], and introduced the *Tobacco Advertising Restraint Act*, S.B.C. 1971, c. 65. The government also established a $25,000,000 fund called the "Drug, Alcohol and Cigarette Education, Prevention, and Rehabilitation Fund" to achieve precisely those ends, with the *Special Funds Appropriation Act*, S.B.C. 1971, c. 57.

38. The *Tobacco Advertising Restraint Act* prohibited the publishing, distribution or broadcasting of tobacco advertising save and except at point of sale; any person contravening the act was subject to a restraining order and injunctive process without proof of damage. Tobacco companies, *inter alia*, attacked this statute, and another statute relating to liquor advertising, as *ultra vires* on the grounds that: (1) they invaded the field of criminal law; (2) they invaded the field of trade and commerce; and (3) they affected the exercise of rights of companies incorporated under the then current *Canada Business Corporations Act*.

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[2] Excluding aboriginal persons, per section 4.

[3] The Attorney General for British Columbia advanced the argument that the *Cigarette and Tobacco Tax Act*, S.B.C. 1971, c. 7 was part of a comprehensive legislative scheme to control tobacco: *Benson & Hedges, infra*.

39. The Supreme Court of British Columbia rejected this challenge and found that the *Act* was merely regulatory in nature, and wholly within provincial power to regulate trade within the province.

> *Benson & Hedges (Canada) Ltd. et al. v. Attorney General of British Columbia* (1972), 27 D.L.R. (3d) 257 (B.C.S.C.).

40. The tobacco companies appealed this decision, but discontinued their appeal.

41. In 1972, the legislature repealed the ban on advertising in the *Tobacco Advertising Restraint Act Repeal Act,* S.B.C. 1972, c. 12, and immediately replaced this act with the *Tobacco Products Act,* S.B.C., 1972, c. 13, introducing a legislative framework to enable the provincial government to make regulations respecting labelling, including warnings, packaging, distribution, sale and advertising of tobacco within the province.

42. The *Tobacco Product Amendment Act, 1992,* S.B.C. 1992, c. 81 was introduced in 1992 and changed the name of the act to the *Tobacco Sales Act*. Regulations introduced in 1994, under the authority of that Act, made it an offence to sell tobacco to anyone under the age of nineteen. The *Tobacco Sales Amendment Act, 1995,* S.B.C. 1995, c. 16, added certain penalties for failure to comply with the act, for example, the suspension of a retailer's tobacco tax permit after two or more offences in the same business location.

## III. THE PROVINCE'S LEGISLATIVE JURISDICTION

### A. Sections 92(13), 92(14) and 92(16) of the *Constitution Act*, 1867

43. The Attorney General submits that the *Act* is within provincial legislative jurisdiction under the *Constitution Act, 1867*. That jurisdiction is based primarily on s. 92(13) and (14), but also derives support from s. 92(16). Those provisions read as follows:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say, - …
>
> 13. Property and Civil Rights in the Province.
> 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
> ...
>
> 16. Generally all Matters of a merely local or private Nature in the Province.
>
> The *Constitution Act, 1867* (U.K.) 30 & 31 Vict., c. 3., rep. R.S.C. 1985, App. II, No. 5.

44. The first step to be taken in determining whether or not legislation challenged on federalism grounds has been validly enacted is to determine the "matter" or "pith and substance" of the legislation. In order to determine the "matter" of legislation it is necessary to identify the dominant or most important characteristic of the challenged law.

> Hogg, *supra* at 382.

45. The Attorney General submits that the "matter" or "pith and substance" of the *Act* is as follows:

> The *Act* confers on the government a right to sue. It also addresses substantive rights and obligations and establishes rules of procedure and evidence governing lawsuits, against tobacco manufacturers, by individuals for damages and by the government to recover the cost of health care benefits attributable to tobacco related disease.

46. That this is the “matter” of the *Act* is evident from a reading of the *Act* as well as the speeches of Ministers of Health MacPhail and Priddy in the Legislative Assembly when the *Act* in its original form and then in its amended form was given second reading. The creation of the new cause of action in the government, the provisions relating to substantive rights and obligations and rules of procedure and evidence governing lawsuits, against tobacco manufacturers, by individuals for damages and by the government for recovery of health care costs, lie at the heart of the *Act* - they are, in other words, its “dominant characteristic”.

47. The second step in the process of determining whether legislation is valid is to determine which class or classes of subject within ss. 91 and 92 of the *Constitution Act, 1867* the "matter" can properly be said to "come within". The Attorney General submits that the above "matter" can properly be said primarily to "come within" s. 92(13) because, being legislation that creates a new civil cause of action within the province of British Columbia, and dealing with substantive rights and obligations as it does, it is legislation in relation to "Civil Rights in the Province". However, the *Act* also draws significant support from s. 92(14) because of the provisions it contains relating to "Procedure in Civil Matters" in the courts to which s. 92(14) refers. Additional support is also provided by s. 92(16) by virtue of the fact that the organization and delivery of health care has been held to fall within this head of power.

48. That legislation creating new civil causes of action "comes within" s. 92(13) was explicitly acknowledged by Chief Justice Dickson in *General Motors v. City National Leasing* when he said that:

> The creation of civil actions is generally a matter within provincial jurisdiction under s. 92(13) of the *Constitution Act, 1867*.
>
> *General Motors v. City National Leasing, supra* at 277 (D.L.R.), (672) S.C.R.

49. Moreover, he went on to add that “[t]his provincial power over civil rights is a significant power ....”

*Ibid*.

50. In more general terms, but to the same effect, is Professor Hogg, who says:

> It remains true, however, that even after proper accommodation has been made for the catalogue of exclusive federal powers, property and civil rights in the province still covers most of the legal relationships between persons in Canada. The law relating to property, succession, the family, contracts and torts is mainly within provincial jurisdiction under s. 92(13). [emphasis added]
>
> Hogg, *supra* at p. 547.

51. The power under s. 92(13) to create new causes of action extends to the power to determine what defences shall and shall not be available to the defendants in such actions. This is made clear in the following passage from the reasons for judgment of Locke J. in *A.-G. v. Scott*, a case involving a challenge to provincial legislation providing for the reciprocal enforcement of maintenance orders in section 5 of the *Reciprocal Enforcement of Maintenance Orders Act*, R.S.O. 1950, c. 334. The legislation made specific provision for the kind of defences that could be pleaded when actions to enforce such orders were brought. His lordship said:

> It is, in my opinion, a valid exercise of provincial powers under head (13) of s. 92 ... to declare that the defences which may be relied upon in proceedings of this nature shall be those permissible under the laws of England, those laws in substance being adopted and declared to be the law in the Province.
>
> *A.-G. v. Scott*, *supra* at 443.

52. If any support is needed for the proposition that s. 92(14) provides the necessary jurisdiction for those provisions of the *Act* that bear on the rules of evidence and civil procedure pursuant to which claims under the *Act* are to be brought, that support can be found in the results of a constitutional reference to the Supreme Court of Canada in 1883 relating to the question of whether rules governing procedure in the Supreme Court of B.C. could be made by the legislature under s. 92(14). The Court held that not only is the Supreme Court of British

Columbia a "Provincial Court" for the purposes of s. 92(14), but also that the provincial legislature has the power to make rules of civil procedure in respect of matters coming before that court.

> *Reference re Status of the Supreme Court of British Columbia* (1882), 1 B.C.R. 243 (S.C.C.) [appendix to the *Thrasher Case*].
>
> See also *Re Joseph Jacob Holdings Ltd. and City of Prince George* (1980), 118 D.L.R. (3d) 243 (B.C.S.C) at 250.

53. More recent support for this proposition comes from the following statement by La Forest J. in *Hunt v. T&N plc*:

> [92(14) of the *Constitution Act, 1867*] relates to the creation of courts in the province and their procedures.
>
> *Hunt v. T&N plc* [1993] 4 S.C.R. 289 at 320, 109 D.L.R. (4th) 16 at 37, per La Forest J.

54. This power under s. 92(14) extends to the rules of evidence to be applied in civil proceedings in the courts covered by their provisions, as was made clear in *A.-G. v. Scott.* In that case Abbott J. writing for Fauteux J. and himself, said:

> ... [I]t is clearly competent to any Province to determine for the purpose of a civil action brought in such Province, what evidence is to be accepted and what defences may be set up to such an action.
>
> *A.-G. v. Scott., supra* at 447.

55. He continued:

> Section 5 is in my opinion legislation in relation to the administration of justice in the Province, including procedure in civil matters in the provincial courts, and as such, within

the exclusive legislative competence of the Province under head 14 of section 92.

*A.-G. v. Scott, supra* at 447-8.

56. The relevance of s. 92(16) to the government's claim that the *Act* is valid provincial legislation flows from the fact that s. 92(16) has been held to be the source of the provincial legislatures' general jurisdiction over matters pertaining to health and, in particular, the health care delivery system, and the cost and efficiency of health care services.

*Schneider v. The Queen*, [1982] 2 S.C.R. 112, 139 D.L.R. (3d) 417.

*Morgentaler, supra* at 558-59, per Sopinka J.

57. It is said that the *Act* may adversely affect some extra-provincial rights. But the *Act* can only be held to be *ultra vires* if it is held to have been "aimed at" extra-provincial rights.

*Churchill Falls, supra*.

See also *Canadian Indemnity v. Attorney General of British Columbia* (1976), 73 D.L.R. (3d) 111 (S.C.C.) and *Carnation Co. Ltd. v. Quebec Agriculture Marketing Board,* [1968] S.C.R. 238, 67 D.L.R. (2d) 1.

58. The leading case in respect of challenges to provincial legislation because of its effect on extra-provincial rights is *Churchill Falls, supra*. A Newfoundland statute expropriated all the assets and water rights of a company generating electricity at Churchill Falls (in Labrador). The expropriation, for which the company received no compensation, destroyed the ability of the company to perform (or pay any damages for the breach of) a 1969 contract under which the company had undertaken to deliver virtually all its production of electricity, at a low price, to Hydro-Quebec, for a term of 65 years.

59. In *Churchill Falls, supra* McIntyre J. considered two differing lines of authority.

60. In *Royal Bank v. The King*, [1913] 9 D.L.R. 337 (P.C.), and several subsequent cases that followed it, it was held that provincial legislation that has the effect of derogating from extra-provincial rights is *ultra vires*.

61. McIntyre J. in *Churchill Falls* preferred instead to follow *Ladore v. Bennett*, [1939] 3 D.L.R. 1 (P.C.). In that case Lord Atkin had rejected the argument that merely derogating from extra-provincial rights renders provincial legislation *ultra vires*,

62. McIntyre J. said the distinction is this: the *Royal Bank* line of cases states that any provincial enactment "not wholly confined in its effect to the province would on that account be *ultra vires*". He goes on to cite the following passage from Professor Hogg's text:

> But where the cases go wrong ... is in refusing to recognize that a statute whose pith and substance is a matter inside the province may incidentally destroy or modify rights outside the province.
>
> *Churchill Falls, supra* at 29 (D.L.R.), 331 (S.C.R.)

63. McIntyre J. said that *Ladore* "states the law correctly". Then he said:

> Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*. Where, however, the pith and substance of the provincial enactment is the derogation from or elimination of extra-provincial rights then, even if it is cloaked in the proper constitutional form, it will be *ultra vires*. A colourable attempt to preserve the appearance of constitutionality in order to conceal an unconstitutional objective will not save the legislation. I refer to the words of Lord Atkin quoted above that 'a colourable device will not avail'.
>
> *Ibid*, at 30 (D.L.R.), 332 (S.C.R.).

64. The question therefore is, what is the "dominant characteristic of the *Act*" or what is the *Act* "aimed at"? To repeat, the Attorney General submits that the "dominant characteristic" of the *Act* - and what the *Act* is "aimed at" - is:

- conferring a cause of action on the government and facilitating actions by individuals against tobacco manufacturers;

- addressing substantive rights and obligations and establishing rules of procedure and of evidence to enable individuals and the government to sue and, where tortious or other wrongful conduct is established, to recover damages or the costs of health care benefits;

### B. Modernizing Tort Law, the Rules of Evidence, and Procedure

65. The authority to make such changes to tort law rests with the legislative branch of government, and in particular, under s.92(13) and s.92(14), with the provincial legislatures. In fact, the Supreme Court of Canada has made it clear in a number of recent cases that significant changes to the law in this and other areas of the common law can *only* be made by the legislatures.

*Winnipeg Child and Family Services v. G.(D.F.)*, (1998), 152 D.L.R. (4th) 193 (S.C.C.).

*Dobson (Litigation Guardian of) v. Dobson* (1999), 174 D.L.R. (4th) 1 (S.C.C.).

66. The courts have also engaged in modernizing tort law, the rules of evidence and civil procedure. For example, in *Husky Oil v. St. John Shipbuilding* (1997), 153 D.L.R. (4th) 385 (S.C.C.), McLachlin J., for the Supreme Court, at p. 417 *et seq.*, held that contributory negligence should no longer be a bar to recovery in maritime cases. This was done because, as McLachlin, J. said: "Judges and commentators are united in condemning the [contributory negligence] bar." This shows how far courts are prepared to go to modernize the law of torts.[4]

[4] In *R. v. Simon*, [1985] 2 S.C.R. 387 at 408, Dickson C.J. said the laws of evidence must be adapted so as to avoid placing "an almost impossible burden of proof" on Aboriginal peoples and "rendering nugatory" any rights they have. In *R. v. Van der Peet*, [1996] 2 S.C.R. 507 it was held that the ordinary rules of evidence must be approached and adapted in light of the evidentiary difficulties in adjudicating Aboriginal claims. In *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193 (S.C.C.), it was held that oral histories of Aboriginal peoples, though they are hearsay, should be admitted as proof on their own merits without the need for corroborative evidence.

67. Where modernizing the law is beyond the proper role of the courts, it is appropriate for the legislature to act. In *Winnipeg Child and Family Services, supra* it was sought to have the courts detain a pregnant woman whose propensity to alcoholism would, it was believed, damage the fetus she was carrying. McLachlin, J. said:

> Taken together, the changes to the law of tort that would be required to support the order for detention at issue are of such magnitude, consequence, and policy difficulty that they exceed the proper incremental law-making powers of the courts. Whether such changes should be made, and if so, how far the law should go in making them, is a task more appropriate to the legislatures than the courts. [emphasis added]
>
> *Winnipeg Child and Family Services, supra* at 214.
>
> See also *Watkins v. Olafson* (1989), 61 D.L.R. (4th) 577 (S.C.C.) at 583-4, per McLachlin J.

68. In *Dobson v. Dobson, supra* the issue was whether a child, once born, could sue its mother for negligent acts committed while the child was *en ventre sa mere*. Cory J., for the majority, said:

> At trial, Miller J. observed that the existing jurisprudence permits recovery from third parties, and permits a child to sue his or her parents for postnatal negligence. He held that to permit an action by a child against his mother for prenatal negligence is a 'reasonable progression' in tort jurisprudence. With respect, I believe that the imposition of a duty of care upon pregnant women in these circumstances cannot be characterized as a reasonable progression. Rather, in my view, it constitutes a severe intrusion into the lives of pregnant women, with attendant and potentially damaging effects on the family unit. This case raises social policy concerns of a very real significance. Indeed, they are of such magnitude that they are more properly the subject of study, debate and action by the legislature. [emphasis added]
>
> *Dobson v. Dobson, supra* at 16.

69. The Legislature of British Columbia has acted.

## IV. SPECIFIC FEATURES OF THE *ACT*

70. The Manufacturers punctuate their submissions with assertions that the *Act* is an example of "exceedingly rare" legislation, "unlike any… reviewed by counsel", and assert that there are "few cases that deal directly with issues of this kind" [para. 108]. They say that aspects of the *Act* are "breathtaking" [para. 139], impose "a new form of liability" [para. 156], or grant "fresh legal rights" [para. 67], and ultimately even jeopardize the "safety of all citizens" [para. 285].

71. Although complaints of the *Act's* allegedly 'draconian' nature carry little or no weight constitutionally, the frequency of their appearance and the vehemence of the Manufacturers' tone invites a detailed response.

72. The impugned features of the *Act* have roots in the legislation and jurisprudence of the common law nations.

### A. A Right of Action Specific to the Tobacco Industry: Section 13(1)

#### (1) Establishing A New Cause of Action by Statute

73. Section 13 of the *Act* provides that the government has a direct cause of action against a manufacturer to recover the costs of health care benefits that have been incurred because of a tobacco related wrong - section 13(1). It also provides that such an action may be brought in respect of such costs that have been incurred in respect of particular insured persons, or alternatively on an aggregate basis in respect of that portion of the population of insured persons who have suffered disease as a result of exposure to tobacco - section 13(5).

74. The Manufacturers state that the *Act* establishes a new, indeed novel cause of action and that the rights it creates are "fresh" and unprecedented (para 62). They point to the statutory language that refers to the cause of action as "direct and distinct."

75. This is an overstatement. The *Act* is an extension of existing law. The words "direct and distinct" do not indicate that the rights conferred are extraordinary. These words simply indicate that the action is brought by the government directly in its own right as opposed to an action brought on behalf of insured persons, and "distinct" from an action by the government based on subrogation.

76. The Supreme Court of Canada has held that "[T]here is nothing improper in a statute creating a specific cause of action."

> *Clark v. C.N.R.* (1988), 54 D.L.R. (4th) 679 (S.C.C.) at 701.

77. And further:

> ... [T]he creation of civil actions is generally a matter within provincial jurisdiction under s. 92(13) of the *Constitution Act, 1867*.
>
> *General Motors v. City National Leasing, supra* at 277 (D.L.R.), 672 (S.C.R.) per Dickson J.

**(2) Health Care Costs Recovery Legislation**

78. In *U.S. v. Standard Oil* 332 U.S. 301 (1947) the Supreme Court of the United States (U.S.) held that unless Congress expressly conferred on the federal government a cause of action against a third party to recover hospitalization costs provided to a serviceman, the federal government had no independent right to sue a tortfeasor for recovery of these costs. The Supreme Court made it clear, however, that Congress could so legislate if it wished:

> Here the United States is the party plaintiff to the suit. And the United States has power at any time to create the liability. The only question is which organ of the Government is to make the determination that liability exists. That decision, for the reasons we have stated, is in this instance for the Congress, not for the courts. Until it acts to establish the liability, this Court and others should withhold the creative touch.
>
> *U.S. v. Standard Oil* 332 U.S. 301, 316-317 (1947).

79. The legislation which followed is referred to in *Phillips v. Trame*. It is the *Medical Care Recovery Act*, Section 2651, Title 42, U.S.C.A. (*"MCRA"*), which said at the time:

> (a) In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment * * to a person who is injured * * *, under circumstances creating a tort liability upon some third person * * * to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person * * * has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished. The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person, * * *, to assign his claim or cause of action against the third person to the extent of that right or claim.
>
> *Phillips v. Trame* 252 F.Supp. 948, 950 (1966) (U.S.D.C.E.D. Ill.).

80. In *Phillips v. Trame, supra* Chief Judge Juergens of the U.S. District Court, E.D., Illinois, interpreted the *MCRA* as conferring a *direct* right of action on the U.S. Government to recover the cost of care and treatment furnished to persons injured by a third party. He referred to other statutes conferring a right of action on the U.S.:

> The statute does not stand alone in providing recovery by the government from negligent third parties. Provisions have been made for similar recovery in the *Federal Employees' Compensation Act* concerning benefits to injured civilian employees (5 U.S.C.A. ss. 751 et seq.). The principle of providing payment from negligent third parties has also been recognized by Congress in the *Railroad Unemployment Insurance Act* (45 U.S.C.A. ss. 362 (*o*)) and the *Longshoremen's and Harbor Workers' Compensation Act* (33 U.S.C.A. s. 933).
>
> *Phillips v. Trame, supra* at 951.

81. In 1997, the *Medical Care Recovery Act* 42 U.S.C. s. 2651 was amended to provide in explicit language that the U.S. Government's action is direct and not subrogated:

> ... United States shall have a right to recover (independent of the rights of the injured or diseased person) from said third person ...
>
> *Medical Care Recovery Act* 42 U.S.C. s. 2651.

82. The *Canada Shipping Act*, R.S.C. 1985, c. S-9 includes a provision whereby the government of Canada can sue to recover from a ship-owner medical expenses paid to treat an illness incurred by a seaman, whether or not the ship-owner was in any way at fault. The following passages, which are cited from the current version of the *Canada Shipping Act*, appeared in almost identical form in the 1906 Revised Statutes of Canada (*Canada Shipping Act*, R.S.C. 1906, c. 113, at ss. 215-217).

83. The statute provides that the owner of a ship is liable to pay the medical costs of illnesses incurred by a seaman, regardless of whether the owner or his servants or agents are at fault:

> 284. (1) Where ... a seaman ... suffers from any illness, not being an illness due to his own wilful act or default or to his own misbehaviour, the expense of providing the necessary surgical and medical advice and attendance and medicine... shall be defrayed by the owner of the ship, without any deduction on that account from his wages.

84. Should the federal government pay the expenses of the seaman's care, the owner is liable to repay the Crown:

> 286. (1) Where any of the expenses attendant on the illness... of a seaman that are to be paid under this Act by the master or owner are paid by any authority on behalf of the Crown ... those expenses shall be repaid to the authority by the master or owner of the ship.
>
> (2) Where the expenses described in subsection (1) are not repaid, the amount thereof is, with costs, a charge on the ship, and is recoverable as a debt to the Crown, either by ordinary process of law or in the court and in the manner in which wages may be recovered by the seaman from the master or owner of the ship for the time being or, where the ship has been lost, from the person who was the owner of the ship at the time of the loss, or, where the ship has been transferred to a person not being a British subject, either from the owner for the time being or from the person who was the owner of the ship at the time of the transfer. [Emphasis added]

85. It is also provided that:

> (3) In any proceeding for recovery of expenses under subsection (2), a certificate of the facts, signed by the authority referred to in subsection (1), together with such vouchers, if any, as the case requires, is sufficient proof that the expenses were duly paid by that authority.
>
> *Canada Shipping Act*, at s. 284.

86. This is a federal statute providing for recovery of health care costs, which provides none of the safeguards found in the *Act* (where causation may be rebutted, the amounts of health care costs disputed, etc.). It has been the law of Canada in essentially its present form for over nine decades.

87. In *Associated Industries, supra,* the Supreme Court of Florida considered legislation which conferred on the State an independent cause of action under the State's *Medicare Third Party Liability Act*[5].

88. The challenge to the provision in the Florida legislation conferring a cause of action on the State was dismissed by the majority of the Supreme Court of Florida, on the basis that "[t]he legislature must have the freedom to craft causes of action to meet society's changing needs".

> *Associated Industries, supra* at 1257, per Overton J.

89. Overton J., for the majority summarized the position in his introduction:

> At issue is the State's ability to fashion a cause of action to recover health care expenditures made on behalf of Floridians and occasioned by the allegedly tortious conduct of others. At the outset, we note that the judicial branch must be cautious when evaluating the choices made by the legislative branch as to the appropriate funding for programs it has deemed important to the public welfare. We must avoid unnecessarily limiting the funding options available to the legislature when addressing today's policy problems. With this philosophy in mind, we now proceed.

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[5] Elizabeth A. Frohlich, in an article entitled "Statutes Aiding States' Recovery of Medicaid Costs from Tobacco Companies: A Better Strategy for Redressing An Identifiable Harm", in 21 Am. J. Law & Med. (4)1995 at 445, discussed the Florida legislation and the Massachusetts legislation and the constitutional challenges in the U.S. to that legislation.

> In summary, we affirm the judgment in part and reverse the judgment in part. First, we find no legal infirmity in the structure of the Agency. We next, with two significant caveats, find the Act to be facially constitutional. We have no cause to invalidate, on its face, this legislative enactment aimed at the recoupment of Medicaid expenditures necessitated by the tortious conduct of others. The State concedes that it must demonstrate a defective product or negligent conduct, it must establish causation, and it must prove damages. Certainly the legislature may pursue these legitimate public-policy objectives. We do, however, limit our holding in the following two ways. First, a ruling of facial constitutionality does not preclude a later action challenging the manner in which the Act is applied. Indeed, some provisions of the Act may give rise to some serious constitutional issues at a later point in time. Second, while the essential aspects of the Act are facially constitutional, the following provisions must be modified or stricken to avoid offending the due process guarantees of the Florida Constitution: (1) the authority to pursue an action without identifying individual Medicaid recipients must be stricken; (2) the abolition of a statute-of-repose defense is ineffective to revive time-barred claims; and (3) the provision for combining the theories of market share liability and joint and several liability must be stricken even though either theory may be used separately.
>
> We therefore strike the offensive provisions and leave the remainder of the Act intact.[6] [emphasis added]
>
> *Ibid*, at 1243-44.

90. Overton J. went on to hold that prior to the amendments to the Florida statute, the State was limited to traditional notions of subrogation, assignment and lien, and that the amendments established an independent cause of action. Discussing the main features of the Act, he said:

> After the modifications made in 1994, there can be no doubt that the Act is intended to create an independent cause of action to which traditional affirmative defenses do not apply. The major modifications made in 1994 are summarized below. First, the Act restated and expanded its language indicating that all affirmative defenses be abrogated to the extent necessary to ensure the State's recovery. Second, the Act now relieves the State of any duty to identify the individual recipients of Medicaid payments. Third, the statute of repose defense was abrogated in any action pursued by the Agency under the Act. Fourth, the Act now clarifies that the State has the authority to pursue all of its claims in one proceeding. Fifth, the State was given the authority to utilize theories of market

[6] The Attorney General will deal with the issue of identification of individual insured persons *infra*. The ruling on Florida's Statute of repose is based on the due process clause in Florida's constitution. The *Act* does not combine market share liability with joint and several liability, see *infra*.

share liability in conjunction with the theory of joint and several liability. Sixth, the State was given the authority to use statistical analysis in proving causation and damages. Indeed, these six modifications are the six substantive aspects of the Act challenged in this action.

Once again, there can be no argument after 1994 that the State's cause of action is derivative in the nature of subrogation, assignment, or lien. Rather, it is a new, independent cause of action that requires the State to prove: (1) either negligence or a defective product; (2) causation; and (3) damages. We have now defined the cause of action as it exists after the 1994 amendments. We now address the constitutional challenges to each of the six specific 1994 amendments to the Act. [emphasis added]

*Ibid,* at 1249-50.

91. Overton, J. continued:

The United States Supreme Court has recognized the states necessarily have the ability to fashion new tort remedies to confront new situations. The ability of states to properly address the needs of their citizens is an important function of state government. Indeed, to rule otherwise would put the states in a straitjacket. Justice Marshall responded in the following way when confronted with the contention that California could not alter the common law of trespass:

> Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstances. The Due Process Clause does not require such a result.

*Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 94, 100 S. Ct. 2035, 2047, 64 L. Ed. 2d 741 (1980)(Marshall, J., concurring).

Admittedly, the scope of due process jurisprudence has not been as well defined as other areas of American law. It has been written that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972). We approach the due process analysis in this case by way of analogy.

In 1919, the United States Supreme Court reviewed the Employers' Liability Law enacted by the State of Arizona. That law was challenged as being violative of employers' due process rights. The United States Supreme Court disagreed and affirmed. In a passage strikingly relevant to today's decision, it wrote:

> Some of the arguments submitted to us assail the wisdom and policy of the act because of its novelty, because of its one-sided effect in depriving the employer of defenses while

> giving him (as is said) nothing in return, leaving the damages unlimited, and giving to the employee the option of several remedies, as tending not to obviate but to promote litigation, and as pregnant with danger to the industries of the state. With such considerations this court cannot concern itself. Novelty is not a constitutional objection, since under constitutional forms of government each state may have a legislative body endowed with authority to change the law. In what respects it shall be changed, and to what extent, is in the main confided to the several states; and it is to be presumed that their Legislatures, being chosen by the people, understand and correctly appreciate their needs. The states are left with a wide range of legislative discretion, notwithstanding the provisions of the Fourteenth Amendment; and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts.

*Arizona Copper Co. v. Hammer*, 250 U.S. 400, 419, 39 S. Ct. 553, 555, 63 L. Ed. 1058 (1919).

The *Hammer* ruling is appropriate today for two reasons. First, it demonstrates that states have the power to address contemporary problems by creating new causes of action. Such actions need not provide all of the defenses to which some potential defendants have become accustomed. Second, the Hammer decision reminds us that we must refrain from evaluating the wisdom of acts adopted by the legislative branch. *See, e.g., University of Miami v. Echarte*, 618 So. 2d 189, 195 (Fla.), *cert. denied*, 114 S. Ct. 304, 126 L. Ed. 2d 252 (1993) (discussing deference to be given to legislative determinations of public policy and facts in construing the medical malpractice provisions attacked as violative of the due process and access-to-the-courts provisions of the Florida Constitution). At bottom, we can find no case from the United States Supreme Court that would prohibit the Florida Legislature from abolishing affirmative defenses in the circumstances addressed by the Act. We do not stop our analysis at this point, though. We now discuss the precedents from this Court demonstrating the propriety of our conclusion. [emphasis added]

*Ibid*, at 1250-51.

**(3) Industry-Specific Liability Laws**

92. Prior to the enactment of workers' compensation and employers' liability statutes, workers in England and other common law jurisdictions were generally barred from recovering damages from their employers for injuries suffered at work through the operation of the common law principles of contributory negligence, voluntary assumption of risk, and the related defence of common employment. Dissatisfaction with the common law rules regarding employer liability led to the enactment of remedial legislation throughout the common law world.

Epstein, “The Historical Origins and Economic Structure of Workers' Compensation Law” (Summer, 1982) 16 Georgia L. Rev. 775.

93. England passed the *Employers' Liability Act*, 43 & 44 Vict., Ch. 42, in 1880. The Act provided that an injured employee (or his representatives in a case of death), had a cause of action against his employer despite the common law bars.

94. The English *Workmen's Compensation Act of 1906,* 6 Edw. 7, Ch. 58 went further, and established a cause of action for employees against their employer regardless of fault. There were provisions for ‘deemed liability’, and statutory apportionment among multiple employers for the compensation.

95. This 1906 act also ‘singled out’ particularly identified industries for liability. Under the Schedules to the Act, certain diseases were *deemed to have been caused* by exposure in particular industries.

*Workmen's Compensation Act of 1906,* 6 Edw. 7, Ch. 58, at s.8(2).

96. In *Usery v. Turner Elkhorn Mining Co*. 428 U.S. 1 (1975), the Supreme Court of the United States upheld the constitutionality of the U.S. *Coal Mine and Safety Act* which applied to a particular industry, namely coal mining, and enacted a series of presumptions relating to the cause of respiratory disease in miners.

97. In *Associated Industries, supra,* the legislation in question applied to all industries but, by executive order of the Governor of the State, it was limited in its application to the tobacco industry: *Associated Industries, supra* at 1246.

98. British Columbia’s *Employers' Liability Act of 1891,* S.B.C. 1891, c. 10 also singled out the railway industry for special liability rules. It went so far as to provide that injuries suffered in certain circumstances by rail-workers are "deemed and taken to have been caused by reason of [an actionable] defect”. That Act also explicitly banned the defence of voluntary assumption of

risk, and provided that in certain circumstances "the person for whom the work is being done", though neither the workman's employer nor necessarily liable at common law, could be held to account for the injuries.

99. As we have seen, the *Canada Shipping Act, supra,* imposes particular liabilities on the shipping industry.

100. There are many current examples of statutes in which the Legislature has chosen to legislate in relation to liability for specific industries.

101. The *Nuclear Liability Act,* R.S.C. 1985, c.N-28 provides, at s.4, that an operator of a nuclear installation is, “without proof of fault or negligence, absolutely liable for a breach of duty imposed on him”. If more than one operator is at fault and it is not possible to separate the damages caused by each, they are, by virtue of s.5, jointly and severally liable. Certain consequential damages may be also according to s. 6, be “deemed... to be attributable to that breach of duty”.

102. The federal *Carriage by Air Act,* R.S.C. 1985, c. C-26 provides for the implementation of the *Warsaw Convention* of 1929 and the *Hague Convention* of 1955, which set out liabilities, and limits thereof, for international air travel. The act and schedules thereto, taken together, provide *inter alia* that carriers are presumed liable for deaths or injuries sustained by passengers while on board an aircraft, to a specified limit.

103. In Saskatchewan, the *Agricultural Safety Net Act,* S.S. 1990-91, c. A-14.2 as amended by S.S. 1992, c. 51, effectively defeated certain persons’ rights to enforce claims for breach of contract, and extinguished claims that were even then before the courts. It was upheld as constitutional (not offending the rule of law) by the Saskatchewan Court of Appeal in *Bacon, supra*.

104. The *Mines Act*, R.S.B.C. 1996, c. 293, allows an inspector to order that work be done in an abandoned mine to improve safety or reduce pollution. Section 17 of that act provides that the "amount expended plus interest at a prescribed rate is a debt due to the government and forms a lien and charge on the mine or mineral title in favour of the government."

105. The *Pipeline Act*, R.S.B.C. 1996, c. 364, at s. 8 provides that a pipeline "company must do as little damage as possible, and ... must make full compensation in the manner provided in this *Act* to all persons interested for all damage sustained by them by reason of the exercise of those powers."

106. The *Securities Act*, R.S.B.C. 1996, c. 418, at s. 131 provides that if a prospectus contains a misrepresentation, a person is deemed to have relied on it when purchasing stock, and may claim damages against the issuer, the underwriters, the directors, and signatories. Sections 132 and 136 of that act also establish civil liabilities for acts or omissions dealing with securities transactions.

107. The *Livestock Act*, R.S.B.C. 1996, c. 270, at s. 11 holds persons who have an interest in livestock responsible for damage caused by animals at large.

108. The *Architects Act*, R.S.B.C. 1996, c. 17, at s. 66 says that "[a]n act prohibited in section 27 (2), 28, 63, 64 or 65 (1) [unauthorized practice of architecture] is a tort actionable by the institute without proof of damage."

## B. The Aggregate Action and Statistical Evidence

### (1) The Aggregate Action: Section 13(5)

109. In addition to permitting a direct action by government, the *Act* also provides two different modes of proceeding. The government may seek recovery of the cost of health care benefits in respect of particular individual insured persons - section 13(5)(a) - or on an aggregate basis in respect of that portion of the population of insured persons who have suffered disease as a result of exposure to tobacco - section 13(5)(b).

110. In an aggregate action, the government's claim is not presented on an individual-by-individual basis. Instead, the claim is presented as a whole, using statistical, epidemiological and other appropriate evidence. The government must prove that exposure to tobacco has caused disease in a portion of the population, and must also demonstrate the extent of that disease and its cost. However, the government is not obliged to prove its claim one person at a time.

111. The concept of an aggregate action is ideally suited to large-scale torts or other civil wrongs, involving toxic substances affecting many people. The aggregate procedure has two important advantages over an individual-by-individual approach. The first of these advantages is judicial economy. The second is accuracy and efficiency in proof of causation and the measurement of harm.

112. The ordinary law of tort and the rules of civil procedure are individualistic. The paradigm is a traumatic injury caused to an individual through observable causal events (such as an intersection collision). In such cases, existing law and procedure, involving evidence of observable causal effects on specific individuals, is well suited to a claim for compensation.

113. However, while the judicially developed law of tort and rules of civil procedure have sought to keep pace with modern medical, environmental and technological change, large-scale or "mass" torts raise problems with which these rules are ill-suited to deal.

114. In large-scale torts, especially those involving large numbers of persons who have been exposed to toxic substances, which cause adverse health effects through non-observable modes of causation, the traditional rules of law and procedure are both inefficient and unfair. Modes of procedure and evidence that require proof and assessment on a particularistic, individual-by-individual basis do not easily accommodate claims based on such incidents. Such claims may be adjudicated fairly, and more efficiently, on an aggregate basis, utilizing evidence based on statistical and epidemiological studies and sociological and other relevant studies, rather than on the basis of analyzing the cumulative claims relating to thousands of individuals one-by-one.

Fleming, “Probabilistic Causation in Tort Law” (1989) 68 Can. Bar. Rev. 661.

Fleming, “Probabilistic Causation in Tort Law: A Postscript” (1991) 70 Can. Bar. Rev. 136.

Rosenberg, “The Causal Connection in Mass Exposure Cases: A ‘Public Law’ Vision of the Tort System” (1984) 97 Harvard L.R. 851.

115. While it is conceptually possible to take a one-by-one approach in a mass tort case, it is too burdensome on the parties and on the judicial system. In measuring the quantity of sand on a beach, it would be possible to count and separately analyze each grain. However, to require a plaintiff, and the court, to engage always in a grain-by-grain (or claim-by-claim) approach would be beyond the means of the parties, and would strain the capacity of the courts of British Columbia beyond any reasonable bounds.

Gaskins, *Environmental Accidents: Personal Injury and Public Responsibility* (Philadelphia: Temple U. Press, 1989).

Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Court* (Boston: Belknap Press, Harvard University, 1987).

Weinstein, "Preliminary Reflections on the Law's Reaction to Disasters" (1986) 11 Columbia J. Env. L. 1.

Rubin, "Mass Torts and Litigation Disasters" (1986) 20 Ga. L.R. 429.

116. In addition to reasons of judicial economy, an aggregate action is better suited than an individual-by-individual claim to determining causation and the quantum of damages in a mass

tort. The primary advantage of an aggregate action is that it resolves the problem of "individual attribution." In cases of injury caused by a toxic substance, science can demonstrate that in an affected population, the incidence of a disease has increased by a certain amount. But it is not always practical or possible to prove which of the specific individuals in that population contracted their disease from exposure to the substance, as opposed to some other cause. In such a case, insistence on proof of causation on an individual-by-individual basis frustrates every claim. For example, it may easily be proved on the balance of probabilities that exposure to a toxic substance has increased the incidence of cancer in a group by 30%. However, in no specific individual is it possible to attribute the disease to that exposure as opposed to some other cause. In such a case, though it is known that a defendant has caused 30% of the injuries in a group, the defendant will not be liable to anyone.

117. The problem of individual attribution in cases involving toxic substances therefore gives rise to a paradox. It can be proved with certainty that the defendant caused 30% of the injuries suffered by a group of persons exposed to its product. However, each individual in that group can only prove a 30% chance that their injury was caused by that exposure, and is thus unable to prove their claim. Insistence on individual proof in such widespread toxic torts, therefore, undermines the fundamental objectives of tort law: deterrence and compensation.

> Brennan, "Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous Substance Litigation" (1988) 73 Cornell L. Rev. 469.
>
> Brennan, "Helping Courts with Toxic Torts: Some Proposals Regarding Alternative Methods for Presenting and Assessing Scientific Evidence in Common Law Courts" (1989) 51 U. of Pittsburgh L. Rev. 1.

118. The use of an aggregate procedure upholds those objectives. In an aggregate procedure, the claims of all affected persons are grouped together and causation is proved in respect of the group, though not of individuals. The most appropriate evidence in such cases is epidemiological. Epidemiology is the science "concerned with the patterns of disease occurrence in human populations and [with] factors that influence these patterns."

Lilienfeld et al, *Foundations of Epidemiology* (2d ed.) (New York: Oxford, 1980) at p. 3.

119. In *Rothwell v. Raes,* Osler J. explained the principles of epidemiology as follows:

> Epidemiology may be described as the study, control and prevention of disease with respect to the population as a whole, or to defined groups thereof, as distinguished from disease in individuals. Clinical epidemiological studies can be carried out for the purpose of investigating the relationship between a particular condition existing in the environment, or population, and a particular disease or condition of health. A clinical epidemiological study cannot in itself prove causation but it may justify an inference that a statistical association reflects a causal link. ... As indicated, no epidemiological study can conclusively prove a cause-and-effect hypothesis. Nevertheless, evidence of varying weight can be found in various types of study.
>
> *Rothwell v. Raes* (1988), 54 D.L.R. (4th) 193 (Ont. H.C.J.) at 210, aff'd. (1990) 76 D.L.R (4th) 280 (Ont C.A,), leave to app. ref. (1991) 79 D.L.R. (4th) vii (S.C.C.).

120. In an aggregate action the government is obliged to present sufficient evidence to establish that exposure to tobacco products causes or contributes to disease in a portion of the population. But the government is not obliged to prove which specific individuals in that population contracted their disease from exposure to tobacco products as opposed to some other source. This is fair to the defendant. While the defendant is not permitted to insist on specific proof on a case-by-case basis (and thus escape liability altogether), it is held liable only for that portion of injuries in the population that it in fact caused.

> Rosenberg, "The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System" (1984) 97 Harvard L.R. 851.
>
> Rosenberg, "Class Actions for Mass Torts: Doing Individual Justice by Collective Means" (1986-7) 62 Ind. L.J. 561.

121. The manufacturers object to the provisions permitting an aggregate claim, as depriving them of traditional defences and as undermining the independence of the judiciary. This is a mischaracterization of the *Act*, based on an assumption that an individual tort claim is the only constitutionally permissible means by which a government insurer may recover the cost of health care benefits. It is true that the *Act* deprives the manufacturers of the usual advantages of

individual litigation in which affected individuals may be unable to establish causation conclusively, but as explained above, this does not make the Act unfair, much less unconstitutional.

### (2) The Use of Statistical and Epidemiological Evidence: Section 14

122. The Manufacturers claim that they are deprived of fundamental rights because the government, in a suit under the *Act*, is allowed to prove causation and the costs of health care benefits on an aggregate basis, through use of statistical and epidemiological evidence, and that particularized evidence relating to specific individuals is restricted.

123. While statistical and epidemiological evidence is used in civil cases to prove causation, it is generally only a 'touchstone' on the way to proof of individual causation, serving as a basis for assessing expert opinions. This is appropriate in individual litigation since such evidence proves the risk of disease in a group of persons, but not in the particular claimant.

124. However, when the government sues in respect of injuries caused to all members of the affected group, statistical and epidemiological evidence is vital, since the question at issue is causation in the group and not in individual members of the group. There has been some uncertainty in the law regarding the admissibility of such evidence in light of the hearsay rule (see for example *Rothwell v. Raes*, *supra).* However, it is plainly within the authority of the legislature to authorize the use of such evidence in civil proceedings.

125. British Columbia's *Class Proceedings Act*, R.S.B.C. 1996, c.50 ("*Class Proceedings Act*") provides that:

> For the purposes of determining issues relating to the amount or distribution of an aggregate monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.
>
> *Class Proceedings Act*, at s. 30(1).

126. The *Act* leaves it to the Court to assess the credibility and weight of such evidence.

127. The Attorney General submits that the use of statistics as proof in various kinds of proceedings is common. Moreover, it is in fact necessary in situations where the problem to be addressed is apparent only when viewed in the aggregate. Discussing the proposals that would lead to the US 'superfund' environmental legislation, the *Comprehensive Environmental Response, Compensation and Liability Act*, 1980 42 U.S.C., s. 9607(a) ("*C.E.R.C.L.A.*"), the inadequacy of traditional 'individual' proofs was starkly set out by the U.S. National Research Council's Panel on Statistical Assessments as Evidence in the Courts:

> The use of statistical assessments is important in establishing the causal connection [between toxic waste dumps and disease]. In fact, it is the only way to do so.
>
> Fienberg, ed. *The Evolving Role of Statistical Assessments as Evidence in the Courts* (New York: Springer-Verlag, 1988), at 129.

128. Two further examples of where statistical proof is frequently used will suffice.

129. In equality cases, where a complainant is seeking to prove that a particular group is suffering from 'adverse impact' or 'systemic' discrimination, it is not only permissible, but legally required, to bring forward statistical evidence to support the claim. This is because, while it may not be possible to prove discrimination on a case-by-case basis, it is the overall problem that is sought to be addressed in the public interest. Obviously, the overall problem is only apparent when viewed in the aggregate. This approach was pioneered in the U.S. under Title VII of the *Civil Rights Act of 1964*[7], and quickly found support in that country's Supreme Court:

> Our cases make it unmistakably clear that "statistical analyses have served and will continue to serve an important role" in cases in which the existence of discrimination is a disputed issue.
>
> *International Brotherhood of Teamsters v. U.S.* 431 U.S. 334 (1977) at 339.

[7] The U.S. federal legislation establishes equality rights for minorities.

130. Very complex and sophisticated statistical models have been developed to determine when a workforce disparity is statistically significant enough to warrant redress. These rules have found widespread acceptance in both Canada and the U.S.

> *Hazelwood School District v. U.S.* 433 U.S. 301 (1977).
>
> Vining et al, "Use of Statistical Evidence in Employment Discrimination Litigation" (1986) 64 Can. Bar Rev. 660.

131. In antitrust cases, again the wrong is often not measurable without an aggregate view, and therefore without recourse to statistics. To give but one example, if it is alleged that a defendant's practices resulted in an unfair market advantage, statistics must be used to demonstrate the extent of the market penetration.

> Fienberg, *supra* at 104-18.

132. Fienberg provides another:

> A second statistical issue arises under Section 1 of the *Sherman Act*, which proscribes joint behaviour ....
>
> Statistical methods are critical in establishing the inference that certain forms of conduct are unlikely to be arrived at short of agreement. A simple example would be when all the firms in an industry announce an identical increase in price at the identical time. That competitive firms will have similar prices is not inconsistent with individual decision making; that they would all reach an identical decision at the identical time strains credibility.
>
> Fienberg, *supra* at 112-113.

133. In these situations, statistics are being used to establish the wrong complained of, not simply to estimate or apportion the costs of health care benefits, and it is appropriate that this be so. If courts can adopt the use of statistical evidence when required, there can be no bar to the legislature mandating that they do so where appropriate.

134. Now consider the *Act*. It provides for an action by the government to recover its health care costs expended on sick smokers. Is there any other effective method for the determining that

exposure to tobacco causes disease and the cost of treating that disease without resort to statistics? To take an example, it may be very likely that, among 100 people treated for disease X, 40 contracted the disease through smoking. It may be impossible to determine on a balance of probabilities that any particular person of the 100 contracted disease X in this way, but that legal obstacle does not change the fact that on the balance of probabilities, the harm from smoking can be accurately established.

### (3) Statistical Proofs and Restrictions on Individual and Personal Evidence: Section 13(6)

135. A central characteristic of the aggregate action is that proof and assessment of causation and the costs of health care benefits is not done on an individual-by-individual basis, but rather on the basis of harm caused to a group of persons exposed to a toxic substance. As a necessary corollary, the *Act* places restrictions on the use of personal and particularistic evidence - section 13(6).

136. The Manufacturers argue that the guidelines set out in section 13(6) of the *Act* are unfair and so restrictive as to undermine judicial independence. This mischaracterizes the statute and misses the point of an aggregate action.

137. In an aggregate claim involving toxic substances, the most reliable and relevant evidence is statistical and epidemiological. The claim is not conceived or presented on a case-by-case basis. The medical histories and records of individual persons are only relevant insofar as they make up the larger group from which the statistical conclusions are drawn.

138. To specifically respond to the Manufacturer's objections (in para. 74):

- It is true that it is not necessary under the *Act* for the government to identify <u>particular insured persons</u>; however, this does not mean that the government is able to claim compensation in respect of persons who are not insured. The government must establish

that the compensation it seeks is in respect of health care benefits that have been, or will be provided to persons who are in fact insured.

- It is true that it is not necessary to prove the cause of disease in any particular insured person; however this does not mean that the government is able to claim compensation except in respect of diseases caused by exposure to tobacco. The government is obliged to prove its claim is made in respect only of diseases caused by exposure to tobacco. The point of the aggregate action is that this will not be done on an individual-by-individual basis, but rather through the presentation of appropriate epidemiological and statistical evidence.

- It is true that it is not necessary to prove the cost of health care benefits that have been provided to any particular insured person; however this does not mean that the government is able to claim costs that have not been proved to have been caused by exposure to tobacco and provided to insured persons. The point of the aggregate action is that such proof is not required to be made individual-by-individual.

- It is true that the health care records and documents of particular individual insured persons are not compellable; however this does not mean that the manufacturer is denied access to records and documents sufficient to challenge the government's claim. It means that the manufacturers are not permitted to request discovery and examination of every insured person in the province who received health care benefits for tobacco related disease, and that the identities of those persons whose records are produced will be protected.

- It is true that no person is compellable to answer questions with respect to the health of particular individual insured persons; however this does not mean that the connection between tobacco exposure and health must not be fully proved by government and cannot be fully defended by the manufacturers. The point is that in an aggregate action questions

concerning the health of any particular individual are not in issue, since the claim is not pursued on an individual basis.

139. The health care records of particular individuals are not compellable because they are not relevant. Given that the government's claim will be established through the use of statistical and epidemiological evidence, the records of any one individual are not relevant, except insofar as they may show that the statistical and epidemiological evidence is based on accurate sampling and analysis. The Manufacturers are entitled, under subsections 13(6)(b) and (d), to production of sufficient evidence to permit a thorough airing of this issue.

140. The Manufacturers argue (at paragraph 82 of their Outline) that the court is "forced" to make a finding as to the quantum of costs on the basis of statistical evidence while being prevented from examining the basis upon which the statistical evidence has been generated. This is incorrect. The Manufacturers, and thus the court, will have access to the experts' reports and records and will be entitled to cross-examine the expert evidence presented by the government. Moreover, under section 13(6) (d) the court may order discovery of a statistically meaningful sample of records and documents of individuals, and documents relating to the provision of health care benefits to individuals, in order to assess the basis upon which the statistical evidence has been generated. This provision is in place precisely to permit the Manufacturers to make a full defence and to permit the court to assess the basis and accuracy of the government's evidence. Under this section, the court may give directions regarding the nature, level of detail and type of information to be disclosed.

141. The Manufacturers assert that "provisions with a similar effect were struck down as unconstitutional in Florida." This is an incomplete account of what occurred. The direct and aggregate actions were upheld in Florida. The Court did hold that the statute was defective because in prohibiting the disclosure of the identities of Medicaid recipients the statute lacked a mechanism to permit the defendant to challenge improper payments made to persons as the result of fraud, misdiagnosis or unnecessary treatment, and thus created an irrebuttable presumption regarding such payments. Two points must be emphasized. First, these provisions were struck

down on the basis of the due process requirement in the Florida constitution which has no equivalent in Canadian law[8]. Second, the British Columbia *Act* does in fact contain a provision, section 13(6)(b) and (d), permitting the disclosure of records sufficient to allow the manufacturers to present defences, and this provision closely resembles the very mechanism devised by the Florida courts to mend the defect in the Florida legislation.

142. Although the particular measure in the Florida statute was held to be 'unconstitutional' (again, according to due process requirement of the *State* constitution), it was later held that proof by way of a sampling of numerically coded records would be sufficient to meet even the stringent Florida 'due process' requirements. A similar regime is provided for in s. 13(6)(b) of the *Act*.

> *State of Florida et al. v. The American Tobacco Company et al*. (October 18,1996) District Court Case No. CL 95-1466 AH (in Chambers, West Palm Beach County), Cohen J.

**C. The Presumptions: Section 13.1(2)**

143. Earlier in this Outline we referred to the long history of legislated presumptions in the U.K., the U.S., and Canada.

144. In the U.K. it was provided, in the *Workmen's Compensation Act of 1906*, 6 Edw. 7 that certain diseases were deemed to have been caused by exposure in particular industries. For instance, if a miner contracted Ankylostomiasis (Sched. 3), he was deemed to have contracted the disease from his work at the mine, "unless the employer proves to the contrary".

145. The idea of deeming that diseases were caused by exposure in certain industries took root in the U.S. as well, in the form of statutory presumptions of disease causation in workers' compensation schemes:

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[8] The Florida Constitution protects "life, liberty and property" from due process infringements (*Constitution of the State of Florida*, Art. I, S.9).

> When states first began to compensate workers for occupational diseases, they grafted coverage for such diseases onto existing accident compensation systems. Thus, a disease or illness was considered to be "occupational" if ... it arose out of or in the course of employment. Yet establishing the causation of a disease is often complicated: a disease's etiology may be unknown and undeterminable ... Moreover, diseases tend to develop over a period of years rather than at a single moment in time. States therefore developed various methods to determine whether a disease arose out of or in the course of employment.
>
> The first solution to [this problem] was the development of schedules, which listed diseases that medical science had demonstrated to be employment related. Listed diseases were presumed compensable and, under some statutory schemes, the listing was conclusive ....
>
> McElveen and Postol, "Compensating Occupational Disease Victims Under the Longshoremen's and Harbour Workers' Compensation Act" 32 Am. U.L. Rev. 717, 720 (Spring 1983).

146. To give but one example, the *Workers' Compensation Law (N.Y.), infra*, in place since 1914, and amended significantly in 1920, 'deems' that 23 diseases were presumed to be caused by workplace exposure (in named industries), and gives a right to an employee to recover from an employer regardless of that employer's fault. The New York statute has been frequently litigated, and has withstood constitutional attack.

> *An Act to Amend the workmen's compensation law, in relation to occupational disease, and making an appropriation therefor,* Laws of New York 1920, chap. 538
>
> *Swan v. F.W. Woolworth Co.* 222 N.Y.S. 111 (1927)(S.Ct., Monroe Cty).
>
> *Szold v. Outlet Embroidery Supply Co*. 8 NE2d 858 (1937) (Ct. A.N.Y.), app. dism'd 303 US 623.

147. New York courts have held that the policy of applying remedial statutes to claims being adjudicated after the effective date of such statutes, *even though exposure, disease, disability and death occurred prior thereto,* is "well-established".

> *Citny v. Atlas Steel Casting Co.* 33 A.D. 2$^{d}$ 853 (1969) (S.Ct.A.D.Th.Dept.).

148. The U.S. *Coal Mine and Safety Act, 1969* provided that when a coal miner developed respiratory disease, there is a rebuttable presumption that, if he had worked in a coal mine for 10 years, it was caused by mining. There was a further, *irrebuttable* presumption that a miner so afflicted is completely disabled. Both of these presumptions were upheld in *Usery, supra*.

149. Marshall J., who wrote for the Court in *Usery,* dealt with the presumptions of disease causation in the statute. He said:

> We have consistently tested presumptions arising in civil statutes such as this, involving matters of economic regulation, against the standard articulated in Mobile, J. & K.C.R. Co. v. Turnispeed, 19 U.S. 35, 43...1910):
>
> > "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate"
>
> ... Moreover, as we have recognized:
>
> > "The process of making the determination of rationality is, by its nature, highly empirical, and <u>in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it</u>." United States v. Gainey, 380 US 63,67[…]" [emphasis added]
>
> *Usery, supra* at 15.

150. British Columbia's *Employers' Liability Act of 1891,* S.B.C. 1891, c. 10 provided that injuries suffered in certain circumstances by rail workers are "deemed and taken to have been caused by reason of an [actionable] defect". In today's B.C. *Worker's Compensation Act,* R.S.B.C. 1996, c. 492, it is provided in section 6(3) that a worker's disablement by disease in certain scheduled industries "is deemed to have been due to the nature of that employment unless the contrary is proved."

151. The Manufacturers' claim that such presumptions are "legislated science" is spurious.

152. The *Act* contains two presumptions regarding causation - section 13.1(2). The first presumption is that where the government proves a breach of duty by a tobacco manufacturer a court will presume that this breach of duty caused persons to be exposed to the manufacturer's tobacco product. The second presumption is that such exposure will be presumed to have caused or contributed to disease in some of those persons so exposed (when the government has shown that exposure to the product generally causes disease). Both presumptions are rebuttable.

### (1) The First Presumption: Breach of Duty Causes Exposure

153. The Manufacturers argue that the presumption in section 13.1 (2)(a) is "irrational" and "imposes" findings of fact upon the court which cannot be effectively rebutted by the Manufacturers (paras 78-85). They conclude that the *Act* therefore creates a "sham proceeding" which undermines judicial independence.

154. The Attorney General submits that this mischaracterizes the *Act*.

#### *(a) The Presumption is Rational*

155. The presumption in section 13.1(2)(a) provides that where the government establishes that the Manufacturers breached a duty to persons who have been or might be exposed to tobacco, it will be presumed that persons who were in fact exposed to the defendant's tobacco would not have been exposed but for the breach. In other words, it is presumed that the breach caused exposure.

156. This presumption is in place to meet the problem that in an aggregate action, the plaintiff cannot and should not be required to prove causation on an individualized basis. It counters the likelihood that the government's case could not meet a strict "but for" test of causation - namely, proof on a balance of probabilities that each person in question would not have been exposed to the product, but for the manufacturer's breach of duty.

157. The “but for” test is difficult to satisfy whenever the consequences of the defendant’s wrong are combined with other factors (caused by human agency or otherwise) that might have been enough by themselves to cause the harm. In such cases, courts have held that causation can be proved by showing that the defendant’s wrongful conduct materially contributed to the risk of harm to the plaintiff and so, as a matter of common sense, could be found to have contributed to the injury itself. The ‘material contribution’ test is, by definition, a liberalization of the ‘but for’ test, made for the practical reason that, because of the combination of causes for his or her injury, the plaintiff cannot hypothetically isolate the defendant’s wrong and prove that it made the difference between injury and no injury.

*Athey v. Leonati,* [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 at 239-240, per Major J.

158. There is nothing “irrational” about the provision in the *Act* that proof of breach of duty by a manufacturer towards a smoker raises a presumption that the breach of duty caused the smoker’s exposure to the manufacturer’s product. This presumption is similar to the principle that where wrongful conduct increases the risk of injury, and the injury in fact occurs, it may be inferred that the conduct caused that injury, and the evidentiary burden of proof shifts to the defendant.

*Wilsher v. Essex Area Health Authority,* [1988] 2 W.L.R. 557 (H.L.) citing *McGhee v. National Coal Board*, [1973] 1 W.L.R. 1 (H.L.).

*Walker Estate et al. v. York Finch General Hospital* (1999) 169 D.L.R. (4th) 689.

159. It can hardly be suggested that the approach adopted by the House of Lords and a unanimous Ontario Court of Appeal is ‘irrational’. The presumption that a breach of duty by a tobacco manufacturer increases the risk, and thus causes or contributes to exposure of persons to tobacco products, accords with common sense.

160. For example, if the breach of duty by the Manufacturers, as alleged by the government, is the manipulation of nicotine so as to addict smokers to the product, it is not irrational to presume

that had such manipulation not taken place, persons would have refrained from or given up smoking.

161. If, as alleged by the government, the breach of duty was the manufacture of an unsafe and hazardous product which causes disease and death when used as intended, it is not irrational to presume that had such breach not occurred persons would not have been exposed to the unsafe and hazardous product.

162. If the breach is a failure to provide an appropriate warning to persons of the risks of smoking, it is reasonable to presume that had such a warning been given, persons would have refrained from or given up smoking. If, as alleged by the government, the breach of duty is fraud or misrepresentation by the Manufacturers regarding the health effects of tobacco, it is not irrational to presume that had persons been aware of the truth they might have refrained from or given up smoking.

163. There is a rational connection between the facts that the government must prove (breach of duty), and the facts which the courts are directed prima facie to presume (exposure).

164. The Supreme Court of Canada has held that the onus of proof is not immutable and may be shifted. It is certainly open to the legislature to adopt such a principle. As Sopinka J stated:

> If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives.
>
> *Snell v. Farrell,* [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289 at 299.

165. Courts do draw "robust inferences" about causation from the facts. A common example arises in cases of tortious misrepresentation, where the plaintiff says that he or she was induced to make a particular decision by a misstatement on the part of the defendant. The decision may have been made for many reasons, of which the misstatement was only one. The B.C. Court of Appeal recently affirmed that the plaintiff in such a case does not have to prove that he or she

would not have made the decision (there, to invest in certain debentures) but for the misrepresentation. It is not an actual reversal of the onus of proof, but it is a direction to the courts that they must infer causation unless the defendant adduces sufficient evidence at least to neutralize the inference of causation.

> *Kripps v. Touche Ross & Co.* (1997), 33 B.C.L.R. (3d) 254 (C.A.), (leave to appeal refused 6 Nov. 1997 (S.C.C.)).

166. These cases show that Canadian courts have recognized that a strict 'but for' test of causation is sometimes inappropriate because it leaves the plaintiff unable to demonstrate causation in circumstances where, on a pragmatic view, it is shown to be present. The *Act* here goes one step further in actually placing the onus on the defendant to show causation is not present. This is by no means without precedent. In *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 643, 129 D.L.R. (4th) 609 the majority of the Supreme Court of Canada held that a patient who suffered injury because of a manufacturer's failure to warn her doctor about the risks of a medical product did not have to prove causation in the sense of proving that the doctor would have passed the warning on to her. The dissenting judges argued that this was to dispense with the need to prove causation, but the majority held that it would be unjust to require the plaintiff to prove what the physician would have done if the warning had been given to him. This was actually more stringent than a reverse onus. Causation was conclusively presumed, because the manufacturer "cannot raise as a defence" that the doctor could have ignored the information (at para. 61). Thus in a particular context, for policy reasons, the court was prepared to set aside the general rule that the plaintiff must prove causation.

167. We referred earlier to a long history of statutory presumptions. In our own time, too, statutes contain similar presumptions. For example, the *Securities Act*, R.S.B.C. 1996, c. 418, at s. 131 says that if a prospectus contains a misrepresentation, a person is deemed to have relied on it when purchasing stock, and may claim the costs of health care benefits against the issuer, the underwriters, the directors, and signatories.

168. A similar issue to this arose in the Florida tobacco litigation. The defendant manufacturers moved to strike out the State's civil cause of action based on Florida's *Racketeer Influenced and Corrupt Organization Act*, Florida Statutes, Chapter 895. The manufacturers argued that the state had failed to plead that the alleged fraudulent practices of the defendants caused detrimental reliance. The Circuit Court held that such pleading and proof of causation was not required:

> To require the State in a civil action to allege and prove detrimental reliance as if it were a private party would negate the ability of the state to obtain any civil relief for racketeering activity based on fraud.
>
> *State of Florida et al v. The American Tobacco Company et al* (Dec. 13, 1996) District Court Case No. CL 95-1466 AH (in Chambers, West Palm Beach County), Cohen J.

169. In *Sidhu Estate v. Bains* the B.C. Court of Appeal held that where a plaintiff establishes a misrepresentation which might reasonably lead to the loss claimed, the onus shifts to the defendant to prove that the misrepresentation was not in fact relied upon.

> *Sidhu, supra* (1996), 25 B.C.L.R. (3d) 41 (C.A.) at 56, per Finch J.A.

***(b) The Presumption is Rebuttable***

170. If it is the case, as the Manufacturers argue, that not all exposure to tobacco is caused by the breach of duty proved by the government, the Manufacturers may adduce evidence to this effect - 13.1 (4). The Manufacturers may seek to demonstrate, for example, that even had persons been fully informed of the truth regarding cigarettes and health, they might have chosen to smoke in any event.

171. The Manufacturers claim that the *Act* unfairly deprives them of the opportunity to present evidence to rebut the presumption that their breach of duty caused persons to be exposed to tobacco products. The Attorney General disagrees. The statutory scheme expressly provides that the Manufacturers may present evidence that their breach did not cause exposure to tobacco or disease. In making this argument, the Manufacturers are permitted to introduce any evidence they

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

172. It must be remembered that before this presumption is operative, the government must prove that the manufacturers have breached a duty and that their product causes disease. As manufacturers and distributors of the product, it is not at all unreasonable to place the onus of disproof upon them. Courts have long recognized that when a plaintiff says that a defendant's wrong has caused or contributed to the plaintiff's injury, the plaintiff often can only prove it by asking the court to draw a common sense inference from the proved facts. The "breach causes exposure" presumption in the *Act* is consistent with that approach. It does take it one step further than *Snell v. Farrell* did because it actually places the legal onus on a manufacturer to disprove the causal link.

173. The Manufacturers argue that it is impossible for them to rebut the presumption. But the statute clearly permits them to rebut, and they have offered no evidence that they cannot do so.

174. The statement of Dickson, J. in *C.I.G.O.L, supra,* is apposite. Dickson, J. dissented but not on this point. He said:

> This Court is sensitive to the freedom of action which must be allowed to the Legislatures to safeguard their legitimate interests as in their wisdom they see fit. It presumes they have acted constitutionally. The onus of rebutting that presumption is upon the appellant. Before the Court concludes that the Province has transcended its constitutional powers, the evidence must be clear and unmistakable; more than conjecture or speculation is needed to underpin a finding of constitutional incompetence. [emphasis added]
>
> *C.I.G.O.L, supra* at 468.

175. Earlier, writing for the Court in *Kruger et al v. The Queen,* [1978] 1 S.C.R. 104, 75 D.L.R. (3d) 434 Dickson J. had written:

> The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former. If, of course, it can be shown in future litigation that the Province has acted in such a way as to oppose conservation and Indian claims to the detriment of the latter—to "preserve moose before Indians" in the words of Gordon J.A. in *R. v. Strongquill*—it might very well be concluded that the effect of the legislation is to cross the line demarking laws of general application from other enactments. It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians. Were that so, s. 88 would not operate to make the Act applicable to Indians. But that has not been done here and in the absence of clear evidence the Court cannot so presume. [emphasis added]
>
> *Kruger, supra* at 112.
>
> See also *Anniston v. Davis* 301 U.S. 337, 81 L. ed. 1143 (1937), per Hughes C.J.

**(2) The Second Presumption: Exposure Causes Disease**

176. The presumption in section 13.1(2)(b) provides that where the government is able to establish a breach of duty by a manufacturer, and that exposure to a type of tobacco product causes disease, it can be presumed that: "the exposure described in paragraph (a) [exposure to the defendant's product] caused or contributed to disease in a portion of the population described in paragraph (a) [the persons who were exposed to the defendant's product]."

177. Such a presumption is in a direct line of descent from the presumptions referred to earlier. Section 13.1(2)(b) provides that once the government has shown that exposure to a type of tobacco product causes or contributes to disease, it will be presumed that exposure to a specific manufacturer's tobacco product of that type, also causes disease in a portion of the population.

178. The presumption must be read in conjunction with other parts of the *Act*:

- The government is obliged to prove that the manufacturer breached a duty to smokers - 13.1(1)(a);
- the government is obliged to prove that exposure to a type of tobacco product causes disease -13.1(1)(b);
- the government must also provide evidence that will enable a court to determine the extent of disease caused by particular tobacco products in the population - 13.1(3)(a); and
- the government must provide evidence that will enable a court to determine the proportion of tobacco exposure over the relevant period of time that is attributable to the defendant's particular product (by use of market share data) - 13.1(3)(b).

179. In light of these requirements, the presumption in 13.1(2)(b) is neither startling nor unusual. It simply requires a court to presume, in the absence of evidence to the contrary, that persons who were exposed to the defendant's particular product contracted disease in the same way as others who were exposed to other manufacturers' products of the same type (which the government must establish). It relieves the government of the obligation to prove, brand-by-brand, that exposure to tobacco products causes disease. The government will provide epidemiological data that demonstrate the connection between exposure to a type of tobacco product, and the quantity of disease in people who are exposed. The presumption simply directs a court to assume that this data applies in a similar fashion to each specific manufacturer's product. If it does not apply, the manufacturer may offer evidence to rebut the presumption - section 13.1(4).

180. In other words, the presumption is little more than a common sense inference that may be rebutted by the manufacturer. It prevents a manufacturer, without evidence, from "exempting" their <u>particular</u> product from what has been established about the health risks of that <u>type</u> of product, unless the manufacturer has good evidence for such exemption. For example, once the government proves that smoking cigarettes causes cancer, a court will presume that smoking the particular cigarettes manufactured by the defendant also causes cancer. This presumption is fair and reasonable. Having proved the general proposition that cigarettes cause cancer, it is

reasonable to place the onus of disproof upon the manufacturer (who has the best knowledge about its specific products) to demonstrate that its product is somehow different.

181. Sopinka J. in *Snell v. Farrell, supra,* said that:

> In many malpractice cases, the facts lie particularly within the knowledge of the defendant. In these circumstances, very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary.
>
> *Snell v. Farrell, supra* at 328-29.

182. There are several examples of the way in which the presumption may operate: Some manufacturers may wish to argue that their product does not cause or contribute to disease in the people who are exposed to their product. For example, a particular manufacturer may say that its product is safe compared to others and does not cause disease in smokers. They will say that smokers of their product do not contract tobacco related diseases, or that if their smokers do contract such diseases it is because of some other factor (e.g. exposure to some other manufacturer's product, exposure to some other environmental factor, or some peculiar genetic characteristic of the population that smokes their cigarettes).

183. Or the manufacturer may take the position that their product is smoked in a way that does not cause disease. For example, they may say that their product is used by beginning smokers only for a few years, before those smokers graduate to another brand and that therefore their product does not account for the tobacco related illness in the portion of persons who were exposed to their product. The presumption places the onus of proof of such arguments upon the manufacturer. In the absence of such proof it will be presumed that all exposure to a type of tobacco product has the same effect on average.

184. Essentially, then, this presumption relieves the government of the necessity of proceeding brand-by-brand to establish that tobacco related diseases are caused by each manufacturer's product. It provides that, once the government proves that a type of product causes disease, a

court will presume (in the absence of contrary evidence) that each manufacturer's specific product of that type causes disease. Combined with the provisions on market share liability, the presumption provides that each product causes disease and the resulting costs of health care benefits in proportion to the quantity of that product consumed by insured persons.

### D. Market Share Apportionment of Liability: Section 13.1 (3) and (4)

185. Once the issues of breach, causation and disease are established, the government must introduce evidence that it has incurred the cost of health care benefits in respect of those diseases. The *Act* then provides that a court must determine the aggregate cost of health care benefits that have been provided after the date of the breach and that each defendant manufacturer will be liable in proportion to their market share - section 13.1(3).

186. This provision is a reasonable legislative way to implement the goal of compensation in an aggregate action involving a toxic tort. The direction to the court to determine the aggregate cost of health care benefits does not "conscript" the court to award the costs of health care benefits. It is consistent with the common law principle that once a cause of action is completed, a court must assess damages, though their exact quantum might be uncertain, or difficult to measure. The government must, of course, provide the best evidence available to assist the court in determining the total costs of health care benefits caused by tobacco related disease, for a court is not obliged simply to speculate.

187. Courts will not shirk the assessment of damages merely because the task is difficult or uncertain. Where the defendant has committed a wrong and has injured the plaintiff, justice requires that the plaintiff should not be denied compensation for harm merely because the quantum of that harm is difficult to measure. As Cory J.A. (as he then was) stated:

> The court, I believe, would be shirking its duty if it were to say that no damages should flow because of the difficulty of calculating and assessing such damages and that they are therefore too remote. An assessment of future loss of profits must, of necessity, be an estimate ...The task will always be difficult but not insurmountable. It poses no greater obstacle to a court than the assessment of general damages in a serious personal injury claim.

*Canlin Ltd.* v. *Thiokol Fibres Canada Ltd.* (1983), 40 O.R. (2d) 687 (C.A.) at 691.

188. The *Act* sets out a prima facie guideline that the defendant's market share will be used to estimate its share of the costs of health care benefits. This is consistent with U.S. common law tort developments in this area. It is the only practicable way in an aggregate action to apportion liability.

189. Once it is determined that a type of tobacco product causes specific diseases and the costs associated with those diseases, liability is apportioned amongst the culpable manufacturers *prima facie* according to their market share in that type of product. This concept is familiar in both the jurisprudence and scholarship of tort law. It is well-suited to an aggregate action. Where a group of persons has suffered injury due to their exposure to generically similar products manufactured by several different culpable manufacturers, it is both fair and efficient to apportion liability among the manufacturers according to their market share. When it is proved that tobacco causes disease, it is a fair starting point to assume that the amount of disease caused by a particular manufacturer's product is proportional to its market share. To require strict proof of a causal link between each person injured and the specific manufacturer's product that caused their injury would likely be impossible, and in a case involving large numbers, would be an unjustifiable waste of judicial resources. Again, it is a common sense inference in an aggregate action, that of the total injury done by a generically similar product, each maker of that product is responsible for a portion of that injury in relation to the amount of their product that has been disseminated in the marketplace.

190. In Fleming, "Probabilistic Causation in Tort Law", (1989), 68 Can. Bar Rev. 661, it is said, at pp. 662-3:

> The dilemma is that insistence on the traditional criteria of proof will deprive many victims of any tort recovery. This result offends not only one's sense of equity as between an innocent plaintiff and multiple defendants whose negligence contributed in some (albeit uncertain) measure to his injury; it also leads to serious under-deterrence of the harmful activity. On the other hand, the same sense of equity shrinks from holding a defendant liable for the whole harm, although part of it was, or may have been, due to other independent causes, some perhaps 'background risks' of non-culpable origin. Least complicated in terms of

> equity are cases where the negligence of two or more defendants alternatively or cumulatively caused the injury. Rather than denying plaintiffs all recovery obedient to the 'more probable than not' standard of proof, several alternatives have suggested themselves. One is to lower the conventional standard and accept exposure to the risk of injury instead of actual injury as a compensable event. Another is to limit liability in an amount proportionate to the risk created by each individual agent. Both of these modifications have gained reluctant and by no means universal acceptance by Anglo-American courts. Failing an unlikely legislative prescription, they represent the outer limit of what judicial craft can do to modify the legal rule without too seriously straining the bounds of the traditional tort system.

191. In *Sindell v. Abbott Labs* 607 P. 2d 924 (Cal. S.C.), cert. denied 449 U.S. 912 (1980), the California Supreme Court adopted a theory of market share liability. In *Martin v. Abbott Labs*, 689 P. 2d 368 (1984) (Wash. S.Ct.), the Washington Supreme Court developed an alternative theory on the basis of contribution to risk; this is the theory on which s. 16 of the *Act* is based. *Martin v. Abbott Labs, supra,* proceeds on the footing that by introducing diethylstilbestrol (DES) into the stream of commerce, each defendant, even though it may not have caused or contributed to the plaintiffs' injury, increased or contributed to the risk. This, of course, is consistent with *Cook v. Lewis*, [1951] S.C.R. 830.

192. Thus far have the courts advanced. It is not necessary, in the case at bar, to choose between theories.

193. In Florida, the legislation under which the State sought recovery from the tobacco industry provided for market share liability. Considering the statute in *Associated Industries, supra*, Overton, J. held:

> Market-Share Liability and Joint and Several Liability
>
> Associated Industries challenges the concept of market-share liability as enacted by the 1994 amendments to the Act. The market-share provision reads, in pertinent part, as follows:
>
> > In any action brought pursuant to this subsection wherein a third party is liable due to its manufacture, sale, or distribution of a product, the agency shall be allowed to proceed under a market share theory, provided that the products involved are substantially interchangeable among

> brands, and that substantially similar factual or legal issues would be involved in seeking recover against each liable third party individually.
>
> 409.910(9)(b), Fla. Stat. (1995).
>
> In addition to this allowance for the use of market-share theory, the Act also instructs that all recoveries shall be joint and several. We find no constitutional basis to prohibit the legislature from endorsing the use of a market-share theory for claims pursued under the Act. However, we find that it cannot be utilized with the concept of joint and several liability. In *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 285 (Fla. 1990), we expressly held: "The cornerstone of market share alternate liability is that if a defendant can establish its actual market share, it will not be liable under any circumstances for more than that percentage of the plaintiff's total injuries." (Quoting *George v. Parke-Davis*, 733 P. 2d 507, 513 (Wash. 1987)). The State's ability to pursue a claim against any defendant for all damages under the theory of joint and several liability would frustrate the express holding in *Conley* that a defendant should be able to limit its liability to its market share. We find that the theories of market-share liability and joint and several liability are fundamentally incompatible. Consequently, we find that the two theories cannot be used together, and that to do so would violate due process. On the other hand, we find that either theory may be used independently of the other and, consequently, we need not strike any statutory language as unconstitutional as to this point. [emphasis added]
>
> *Associated Industries, supra* at 1255-56.

194. The underlined passage reflects the regime established under the *Act*. See s. 13.1(3).

195. It is important to note two additional features of the *Act*. Each manufacturer is permitted to rebut the *prima facie* liability apportioned to it - section 13.1(4). If a manufacturer wishes to argue that its breach did not cause the exposure of persons to its product, or that its product did not cause disease in proportion to its market share, it may do so.

196. The second feature of note is that the *Act* does not provide for a combination of market share and joint and several liability. Joint and several liability is available to the government only where it establishes that all of the manufacturers committed a wrong in concert - section 13.2 - or where they committed the same tobacco related wrong - section 17(2)[9].

[9] The *Act* does not, therefore, contain the constitutional infirmity noted by the Supreme Court of Florida in *Associated Industries (supra).*

197. There is one further aspect of quantification that the Manufacturers object to. The *Act* provides that a manufacturer's liability runs from the date of the breach; that is, that they are liable for costs resulting from tobacco related disease from the day of the breach. It is likely the case that not all such costs will have been caused by the breach; for example, some of those costs may have been incurred in respect of tobacco related diseases resulting from exposure prior to the breach. The manufacturers are permitted to reduce their liability by proving on a balance of probabilities that their breach was not the cause of some of those costs - section 13.1(4). Thus, the quantum rule set out in section 13.1(3) is a *prima facie* measure only, in the nature of a rebuttable presumption. Such presumptions about the measure of the costs of health care benefits are rational, and within the constitutional competence of the legislature.

### E. Enterprise Liability

198. The *Act* creates a limited form of enterprise liability under which members of a family or group of related companies are jointly liable for the tobacco related wrongs of other members of that group.

199. Section 17.1 is coupled with s. 1(2), (3) and (4). According to s. 1(2) a manufacturer is related if it is an affiliate as defined by section 1 of the B.C. *Company Act*.

*Company Act* R.S.B.C. 1996 c. 62 s.1.

200. According to s. 1(3), a manufacturer is related if it has 50% ownership of a manufacturer or derives 50% of its revenue from a manufacturer.

201. According to s. 1(4), a manufacturer is related if it has *de facto* control of a manufacturer.

202. Pursuant to s. 17.1(1)(a) a related manufacturer can be treated, together with the manufacturer to whom it is related, as one manufacturer for the purposes of establishing a tobacco related wrong.

203. Pursuant to s. 17.1(1)(b) a related manufacturer is jointly and severally liable for the tobacco related wrongs committed by a manufacturer to whom it is related.

204. A number of points can be made to justify the adoption by the Legislature of a theory of enterprise liability:

1. The *Act* does not abolish limited liability. It merely expands the circumstances under which a court will pierce the corporate veil. It does so in a way that is harmonious with common law developments and legal scholarship. With increasing financial integration of corporate groups, the application of the "corporate veil" to related companies within an industrial group is by no means a foregone or unalterable conclusion as a matter of social and legal policy. Indeed, it is of very recent origin, and subject to reconsideration. *Salomon v. Salomon*, [1897] A.C. 22 (H.L.) developed limited liability in a very different social and legal context. Until the end of the 19th century there were no industrial enterprises made up of numerous corporations because generally a corporation could not own shares in another corporation unless it was specifically authorized to do so.

> Blumberg, "The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities" 1996 Conn. L.R. 295.

As Blumberg concludes:

> Both as an academic and a political matter, the application of limited liability to corporate groups has never undergone the scrutiny and debate that such a fundamental extension of the doctrine deserves. With the increasing predominance of large corporate groups on the world economic scene, and the increasing emergence of an interdependent world economic order, such re-examination is not only desirable, but inevitable.
>
> *Ibid,* at 297.
>
> See also, Aronofsky, "Piercing the Transnational Corporate Veil: Trends, Developments and the Need For Widespread Adoption of Enterprise Analysis" (1985) 10 N. Carolina J. of Int. L. and Commercial Reg.31.

2. In establishing the shared liability of related companies, the *Act* is based upon considerations that are well developed in judicial and scholarly writing on the subject. These considerations include the fact that joint liability exists only when members of a group are financially integrated participants in the tobacco industry, or have a proprietary or controlling interest therein. The principle of joint liability within an industrial group is particularly suited to situations where there is financial integration within a group, but where particularly hazardous operations are segmented into separate corporate entities.

> Stone, "The Place of Enterprise Liability in the Control of Corporate Conduct" (1980) 90 Yale L.R. 1.

3. The *Act* casts the net narrowly: The *Act* only imposes shared liability on "related manufacturers." The statute only pierces the veil when there is industrial integration, and a close relationship of ownership and control over the immediate wrongdoer by another participant in the tobacco industry.

4. The *Act* does not impose liability on individual shareholders. The primary principle of limited liability is preserved since individuals in their personal capacity as investors are not affected. The principles of joint liability apply only when the entity sought to be held accountable is a commercial entity, being a corporation, partnership, trust or joint venture, or person with a controlling influence over the manufacturer. The academic literature supports the preservation of limited liability for passive individual shareholders, but supports making an exception to the principle in the case of related companies that own or control the wrongdoer. For example, Leebron states "With regard to integrated subsidiaries, there is little reason to respect the separate corporate entities when non-contractual tort claimants are involved."

> Leebron, "Limited Liability, Tort Victims and Creditors" (November 1991) 91 Columbia L.Rev. (7) 1565 at 1617.

5 The *Act* does not abrogate limited liability in respect of corporate debts and liabilities generally, but only in respect of liabilities arising out of proven wrongdoing. Limited

liability in respect of all ordinary business transaction and voluntary creditors is preserved. The shared liability in the *Act* arises only in respect of debts arising out of wrongful behaviour. The academic literature is nearly unanimous that the sound arguments in favour of limited liability between corporate entities and their voluntary commercial creditors do not apply to involuntary tort creditors. Contract creditors know in advance that they are dealing with a limited liability company, voluntarily accept this risk, and take steps to protect themselves (personal guarantees) or demand *ex ante* compensation (a higher rate of return). Involuntary creditors, such as tort victims, have no choice in the matter. As between a major commercial beneficiary of a hazardous industry such as the tobacco industry is alleged to be, and involuntary creditors such as tort victims and the government as health insurer, it is reasonable and just that entities

that have benefited financially from wrongdoing should bear the risk of loss.

See especially Leebron, *supra*.

Welling, *Corporate Law in Canada: The Governing Principles* (Toronto: Butterworths, 1984) at 146-149.

Hansmann, "The Uneasy Case for Limiting Shareholder Liability for Corporate Torts" (1990) U. of T. Law and Economics Workshop Series WS 1990/91-(7).

6. The change in limited liability is consistent with sound social policy in the area of hazardous enterprises. Easterbrook and Fischel, explain:

> Courts' greater willingness to allow creditors to reach the assets of corporate as opposed to personal shareholders is again consistent with economic principles.
>
> Allowing creditors to reach the assets of parent corporations does not create unlimited liability for any people. Thus the benefits of diversification, liquidity and monitoring by the capital markets are unaffected. Moreover, the moral hazard problem is probably greater in parent-subsidiary situations because subsidiaries have less incentive to insure… If limited liability is absolute the parent can form a subsidiary with minimal capitalization for the purpose of engaging in risky activities. If things go well the parent captures the benefits. If things go poorly the subsidiary declares bankruptcy… This asymmetry between benefits and costs, if limited liability were absolute, would create incentives to engage in a socially excessive amount of risky activities.
>
> Easterbrook and Fischel, "Limited Liability and the Corporation" (1985) 52 University of Chicago Law Review 89, at 110-11.

7. There are numerous statutory regimes creating enterprise liability based on relationships of control and subordination among a corporate group.

See Blumberg, *supra.*

8. The United States Supreme Court has already addressed this issue in *Pinney v. Nelson* 183 U.S. 144 (1901) and *Thomas v. Matthiessen* 232 U.S. 221 (1914), in the context of the American Constitution. California's law, which held that out-of-state corporations were subject in California to that State's *unlimited* liability laws, was held valid and

judgments under it were held to be enforceable against out-of-state corporations.

## V. THE PROPER CONSTRUCTION OF THE ACT

### A. Retroactivity and the Date of Assent

205. The Manufacturers, in Part II of their submission (at paras. 35 - 46) put forward an argument concerning the retroactive effect of the *Act* as set out in s. 20. Section 20 of the *Act* provides as follows:

> (1) This Act comes into force by regulation of the Lieutenant Governor in Council.
>
> (2) When brought into force under subsection (1), 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 13, arising from a tobacco related wrong, whenever it occurred.

206. Since the *Act* is to come into force by regulation, s. 3(3) of the *Interpretation Act*, R.S.B.C. 1996, c. 238 applies. It provides:

> (3) If an Act contains a provision that the Act or a portion of it is to come into force on a day other than the date of assent to the Act or on proclamation or by regulation of the Lieutenant Governor in Council, that provision and the title of the Act are deemed to have come into force on the date of assent to the Act.

207. The Manufacturers argue that taking these provisions together means that s. 20 must be construed as providing for retroactive operation only as far back as the date of assent to the *Act*.

208. The Manufacturers urge in paragraph 38 of their Argument that there is no language which expressly or by necessary implication provides for a period of retroactive operation that begins any earlier than the date of assent. They say that this is implied because the only express reference to retroactivity is found in the *commencement* section.

209. The Manufacturers also refer to the circumstances related to the passage and coming into force of the statute and its amending Act as support for the *implication* that the Legislature intended only to provide for retroactivity between the date of assent and commencement.

### (1) Clear and Plain; Manifest Intention

210. There is nothing in s. 20(2) of the *Act* which depends upon *implication*. The provision is clear and plain on its face. It stipulates that a provision of the *Act* has the retroactive effect necessary to give the provision *full effect for all purposes* including *allowing an action to be brought under s. 13* arising from a tobacco related wrong *whenever it occurred*.

211. To give the *Act* retroactive effect, it would have been sufficient for the Legislature to enact a provision stating that the *Act* is retroactive to the extent necessary to give effect to its provisions.

*Martelli v. Martelli* (1981), 33 B.C.L.R. 145 (C.A.).

212. But here the legislation goes further. It states that its provisions are retroactive for all purposes and expressly includes bringing an action based on wrongs whenever they occurred.

213. The Legislature manifestly turned its mind to *both* the right to take action *and* the circumstances giving rise to that right. It intended to bring both within the retroactive effect of the *Act*. This manifest intention ousts the presumption against retroactive application.

### (2) The effect of Subsection 3(3) of the *Interpretation Act*

214. It is true that s. 20 of the *Act* is headed "commencement" but that must be construed as being inserted for convenience of reference only.

*Interpretation Act*, *supra* at s. 11.

*Re Peters and District of Chilliwack et al.* (1987), 43 D.L.R. (4$^{th}$) 523 (B.C.C.A.), at 527.

215. Although the Manufacturers' argument concerning subsection 3(3) is difficult to follow, it appears to depend upon the conclusion that both s. 20(1) and s. 20(2) came into force on the date of assent. For example, the Manufacturers urge at para. 40 that: "By virtue of section 3(3)

of the Interpretation Act, *the commencement section as amended*, became law by royal assent on July 30, 1998." [emphasis added]

216. However, s. 3(3) of the *Interpretation Act* refers to *provisions*, not to *sections*.

217. When a statute says that certain "provisions" may come into effect before others, that term encompasses sections, subsections, or even parts of subsections.

*Re Criminal Law Amendment Act* (1970), 10 D.L.R. (3d) 699 (S.C.C.) at 711.

218. The plain meaning of s. 3(3) is to deem that the title of the *Act* and the commencement *provision*, i.e. s. 20(1), come into force on the date of assent.

219. The purpose of s. 3(3) of the *Interpretation Act* is to give the Lieutenant Governor in Council the power, under the Act, to bring the legislation into force by regulation. Without subsection 3(3), the Lietenant Governor in Council would not have the power under the statute to bring an Act into force.

220. The balance of section 20, and the other provisions of the *Act*, came into force by regulation. The effect of s. 20(2) is clear and plain.

### (3) Other Principles of Interpretation

221. Although the plain meaning of s. 20(2) is sufficient to dispose of this point, two other principles should be mentioned.

#### *(a) Ordinary Meaning*

222. Subsection 20(2) gives the Act retroactive effect necessary to allow an action to be brought arising from a tobacco related wrong *whenever it occurred*.

223. Terms such as “whenever it occurred” are to be given their ordinary meaning:

> As it is presumed that the legislator wishes to be understood by the citizen, the law is deemed to have been drafted in accordance with the rules of language in common use.
>
> Côté, *The Interpretation of Legislation in Canada* (Cowansville (PQ): Yvon Blais Inc., 1991) at 219.

.

224. The ordinary meaning of “whenever it occurred” is simply *any* time at which an event occurred. It is absurd to suggest that an ‘ordinary citizen’ using ‘common language’ would interpret the legislation to mean “whenever it occurred between the dates of July 30, 1998 and November 12, 1998” as the Manufacturers urge.

### *(b) Consistency in Interpretation*

225. When a statute states that its application is “retroactive to the extent necessary to give full force and effect to its provisions” or simply “retroactive,” the courts give the legislation that effect and do not apply the presumption against retroactive operation. The *Act*, which is more explicit, must be given a consistent interpretation.

> *Martelli, supra.*
>
> *Nanaimo (Regional District) v. Spruston Enterprises Ltd.* (1998), 167 D.L.R. (4th) 317 (B.C.C.A.).
>
> *Shell Canada Ltd. v. British Columbia (Assessor of Area No. 10 - Burnaby/New Westminster)* (1991), 83 D.L.R. (4th) 178 (B.C.S.C.), aff’d (1992) 94 D.L.R. (4th) 142 (B.C.C.A.).

## B. Limitations

226. The Manufacturers also argue at paras. 47 - 53, that the *Act* is ineffective to revive a statute-barred cause of action.

227. Section 15(1) of the *Act* provides:

> (1) No action that is commenced within two 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,
>
> for damages or the cost of health care benefits, alleged to have been caused by a tobacco related wrong is barred under the *Limitation Act*.

228. Section 15(2) provides:

> (2) Any action for damages alleged to have been caused 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*.

229. The Manufacturers argue that s. 15 does not manifest an intention to *revive* rights of action that were barred or had ceased to be capable of being asserted prior to the date of assent to July 28, 1997.

230. They do not say which causes of action were barred.

#### (1) Clear and Plain; Manifest Intention

231. The applicable principle is stated in the authorities cited by the Manufacturers. A vested right to rely upon a time bar is not extinguished unless the legislation plainly manifests that

intention.

*Martin v. Perrie,* [1986] 1 S.C.R. 41, 24 D.L.R. (4th) 1, per Chouinard J.

232. It is true that in s. 15(1) of the *Act*, the Legislature has not revived any cause of action. Rather, the Legislature has declared that the *Limitation Act* does not bar any action commenced with two years of the coming into force of that section.

233. An action that *is not barred* does not need to be revived.

234. No intention could be more manifest or more clear and plain. An action by the government for the cost of health care benefits or by a person for damages alleged to have been caused by a tobacco wrong is *not barred* by the *Limitation Act* if it is commenced within two years. Therefore, it is not *extinguished* by s. 9 of that Act and is not barred. It has not ceased to be capable of being asserted.

235. The Legislature has many legislative means available to it. It can revive causes of action or simply declare that actions are not barred. It has chosen the latter course in this case. Lazarus need not be revived because he is not dead.

236. On the other hand, the Legislature *has* chosen, in s. 15(2), to revive causes of action for any action that was *dismissed* as out of time by a court before the coming into force of the section. The Legislature had to revive any cause of action barred by the principle of *res judicata.* It did not need to revive any other cause of action because, under subsection 15(1), such an action was not barred.

**(2) No Ambiguity**

237. The Manufacturers rely on the presumption against retroactivity or retrospectivity, and the presumption against interference with vested rights.

238. However, the presumption against retroactive legislation, as well as any presumption against abrogation of vested rights, is rebutted by the explicit expression of legislative intent - s. 20(2) - to apply the section retroactively of the *Act* and to declare that an action begun within two years is not barred.

239. In *R. v. Beaton*, Pratte J.A. said:

> ... one must have present in mind the rule of statutory construction according to which, it is presumed, in the absence of clear intention to the contrary, that Parliament did not intend to interfere with vested rights. However, one should not forget that, as Driedger says, that presumption "is not a *prima facie* presumption, but only a presumption that may be invoked when the statute is reasonably susceptible of two meanings".
>
> *R. v. Beaton*, [1982] 1 F.C. 545 (C.A.) at 548.

240. There is only one meaning for s. 15(1). Actions are not barred if brought within two years. And that provision is retroactive to the extent necessary to allow an action to be brought for a tobacco related wrong whenever it occurred - s. 20(2).

### (3) Consistent Interpretation

241. Limitation periods are routinely changed by the legislature to permit causes of action that would otherwise be barred, and to revive expired actions.

> See for instance *Limitation Amendment Act 1992*, S.B.C. 1992, c. 44 and *Limitation Amendment Act 1994*, S.B.C. 1994, c. 8.

242. Similarly, B.C. Courts apply these statutes to remove bars, or revive actions, where the legislation is sufficiently explicit.

> *R.A. v. Children's Foundation* (1996), 23 B.C.L.R. (3d) 149 (S.C.), aff'd (1997) 41 B.C.L.R. (3d) 344 (C.A.).

243. Finally, the Attorney General submits that, in suits pursued by the state under medical cost recovery legislation, the limitation periods governing the underlying or 'foundational' civil

wrongs are not effective to bar the government's recovery. Rather it is the limitation period specific to the government's action that applies.

*United States v. Gera* 409 F.2d 117, 120 (1969).

244. In the case at bar, the relevant limitation period is expressed within the *Act* itself.

### C. The *Act* is Not a Penal Statute

245. The Manufacturers argue that the government construes the *Act* as penal in character. They say that it creates a cause of action that is based on a wrong giving rise to penal liability which is new and which displaces a compensatory common law wrong.

246. The Attorney General submits that the *Act* is not a penal statute.

247. The Manufacturers go on to urge that the "penal and retroactive" character of s. 13 makes the *Act* unconstitutional: Manufacturers' Outline of Argument, p. 111, para. 245.

248. Of course, whether or not the legislation is retroactive has no bearing on whether it is penal. The repeated references to retroactivity are simply a make-weight.

249. This aspect of the Manufacturers' argument is directed exclusively to actions pursuant to s. 13, which confers a cause of action on the government, and does not consider suits by individuals that may also be facilitated by the *Act*. For this reason, in our discussion of the supposed 'penal' aspects of the *Act*, we will concentrate exclusively on its effect on the lawsuit by the government.

**(1) The Act Does Not Come Within the Definition of Penal Law**

250. It is a general principle of Canadian law that criminal prohibitions may not be applied retroactively. The principle is observed in section 11(g) of the *Charter of Rights*, and it encompasses quasi-criminal law.

251. Criminal law, even in its broadest definition, is designed to punish, not to compensate, and, while it may have other features, *at the very least* it takes the form of a prohibition coupled with a penalty. Professor Hogg, however, states that even this definition is too broad, and suggests that although every criminal law must couple a prohibition with a penalty, not every law that does so is to be considered criminal.

Hogg, *supra* at 477-80.

252. The *Act* is clearly designed to be compensatory and remedial, in that it:

1. contains no prohibitions;
2. allows recovery by the government only for the cost of health care benefits that have been incurred or will be incurred resulting from tobacco related wrongs.

253. Under the *Act*, the defendants in an action brought by the government may establish that, although they committed the wrongs alleged, there were no costs incurred by the government within the meaning of the *Act*. If they do so, there is no recovery by the government. There is therefore no 'punishment' for committing the wrong alleged, but simply a cause of action enabling the government to recover the costs that have flowed from the wrong. If no health care costs have been incurred within the meaning of the *Act*, then no recovery is allowed. This distinguishes the *Act* from all penal laws, which impose penalties based simply on the commission of an act or an omission. The *Act* provides for compensation to the government only if it can prove it has suffered a loss.

**(2) Affirmative Defences**

254. The Manufacturers appear to argue that the *Act* must be viewed as penal in nature unless they have the benefit of affirmative defences which would have been available to them in an action by an individual smoker or in a subrogated action by the government.

255. The Manufacturers offer no authority for this proposition. It is without merit. Legislative abrogation of affirmative defences is commonplace; it has never been suggested that such a measure is penal in character. The most obvious example is the abrogation of contributory negligence by statutes and by the courts.

256. In *Husky Oil, supra*, as already noted, the Supreme Court of Canada held that contributory negligence should no longer be a bar to recovery in maritime cases.

257. In *R. v. Finta*, [1994] 1 S.C.R. 701, La Forest J. considered the retroactive operation of war crimes legislation. Discussing section 7 of the *Charter* at p. 780, he said that "justifications and excuses are commonly restricted in their application, and there is no suggestion that this violates the principles of fundamental justice." It necessarily follows that to restrict the availability of "justifications and excuses" on the civil side similarly cannot be said to violate those same principles.

258. In *Associated Industries, supra*, the Supreme Court of Florida considered whether such abrogation violated the State constitution's guarantee of due process. It was held that it did not. Overton J.'s reasons, for the majority, deserve to be considered at length:

> Associated Industries is essentially arguing that there is an absolute constitutional right to particular affirmative defenses once they have been created. We disagree. Certainly any abolition of an affirmative defense must satisfy the notions of fairness dictated by our due process jurisprudence. That recognition is quite different, however, from creating an absolute bar to the elimination of affirmative defenses. Florida's case law and existing statutes clearly demonstrate that such a bar has never existed.
>
> *Associated Industries, supra* at 1251.

259. Overton J. continued, giving several examples of the abrogation of affirmative defences, both by statute and through the intervention of the courts. His first example is of abrogation by the courts, the second of abrogation by the legislature:

> First, we recall a striking example. In 1973, this Court eliminated the defense of contributory negligence, which prohibited a claimant from recovering any damages if the claimant was even one percent negligent. In its place, the Court adopted a pure form of comparative negligence, which allows a claimant to recover even though the claimant is ninety-nine percent negligent. *See Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).
>
> Associated Industries, *supra* at 1251.

260. Overton J. moved to his second example. He continued:

> Second, in *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987), we recognized, by denying constitutional attacks upon section 768.81, Florida Statutes (Supp. 1986), *id*. at 1090, 1091, the legislature's authority to legislate in respect to comparative negligence by legislative modification of the common-law doctrine of joint and several liability. It is noteworthy that pursuant to section 768.81, Florida Statutes (1995), the common-law doctrine of joint and several liability remains applicable to economic damages in instances in which a party's percentage of fault equals or exceeds that of a particular claimant. Thus, in respect to economic damages, we have recognized the legislature has the constitutional authority to statutorily authorize a qualifying plaintiff to secure a total recovery from a party who, though jointly liable, has very minimal comparative fault. This is significant because the Act, in abolishing affirmative defenses, is likewise setting forth, by statute, the basis for liability for purely economic damages and how liability for those damages is to be apportioned. [emphasis added]
>
> *Associated Industries, supra* at 1251-52.

261. After citing some further examples, Overton, J. concluded:

> Providing medical coverage for those in need is a legislative function. How the costs of such coverage are financed is also, primarily, a legislative decision. Many options exist by which the legislature can fund such medical services. Three such options are as follows: (1) the use of general revenue collected from all taxpayers; (2) the creation of a new cause of action with which to recoup medical expenditures from those product manufacturers that may have wrongfully caused the recipients' health problems; or (3) the enactment of a tax to be assessed to those products that cause the health problems, with the proceeds dedicated to funding health care.

> This choice is for the legislative branch and not the judicial branch. The wisdom of any choice made by the legislature is not the issue, and we are obligated to construe an act as constitutional if at all possible.
>
> Not all tort actions carry with them the same elements or affirmative defenses. The legislature must have the freedom to craft causes of action to meet society's changing needs. The United States Supreme Court has acknowledged this necessity and has tempered the legislative power of the states only with the rule against arbitrary or capricious actions. The State's action, as we have interpreted it, is neither arbitrary nor capricious. It is a rational response to a public need. [emphasis added]
>
> *Associated Industries, supra* at 1256-57.

262. In *State of Minnesota et al. v. Philip Morris et al*., the Government of the State sued the tobacco companies to recover health care costs. The tobacco companies, as in the case at bar, argued that defences available against individual smokers should also be available in the government's action. The State brought a motion for summary judgement dismissing those affirmative defenses that were based on the conduct of individual smokers. Fitzpatrick J. granted the motion:

> WHEREAS the Minnesota Supreme Court held in *State of Minnesota v. Philip Morris Inc. et. al*. 551 N.W. 2d 490 (Minn. 1996) that Plaintiff Blue Cross and Blue Shield of Minnesota and, by implication, Plaintiff State of Minnesota, have a direct action against the defendants for their injuries;
>
> WHEREAS, defenses that a party may have against third parties are not imputed against others; likewise, defenses available against individual smokers cannot be imputed as defenses against Plaintiff's equitable claims;
>
> WHEREAS, there is no basis for the submission of the purported fault of individual smokers ...
>
> *State of Minnesota et al. v. Philip Morris et al.* (Order dated January 27, 1998) District Court File C1-94-8565 (Dist. Ct.).

263. This brief canvass of recent U.S. jurisprudence reveals how far off the mark the Manufacturers are in pursuing their argument that the *Act* is a penal statute. The Manufacturers are unable to cite a single case in support of the proposition that the unavailability of affirmative

defences under the *Act*, i.e. defences that would be available in suits by individual smokers, requires that the *Act* be characterized as 'penal'.

264. In any event the Manufacturers may adduce evidence of the behaviour of individual smokers as it may bear on causation in an aggregate action.

**(3) *United States of America v. Ivey et al.***

265. The Manufacturers' "penal law" argument can be disposed of by reference to the recent case of *United States v. Ivey, supra*. In that case the Ontario Court of Appeal considered whether the US environmental legislation known as *C.E.R.C.L.A.*, which imposes liability on owners of hazardous sites, regardless of fault, for cleanup costs arising from environmental damage, could be characterized as "penal" and was thus unenforceable in Canada. The argument was made that one state should not enforce the "penal" laws of another state. The Court adopted the reasoning of the trial judge, who had relied on the characterization of *C.E.R.C.L.A.* in *United States v. Monsanto* 858 F.2d 160 (1988) (4th Cir.).

*United States v. Ivey (Ont. C.A.), supra* at 573.

266. At the trial level, Sharpe J. had said:

> The scope of the category "penal" laws was defined by the Privy Council *in Huntington v. Attrill*, [1893] A.C. 150 at p. 157, 20 O.A.R. App. 1, as (quoting Gray J. in *Wisconsin v. Pelican Insurance Co*., 127 U.S. 265):
>
> > . . . all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.
>
> In my view, the C.E.R.C.L.A. provisions imposing liability against the defendants cannot be classified as penal in nature. In *United States v. Monsanto*, 878 F.2d 160 (4th Cir., 1988) at pp. 174-75, C.E.R.C.L.A. was characterized as follows:
>
> > C.E.R.C.L.A. does not exact punishment. Rather it creates a reimbursement obligation on any person judicially determined responsible for the costs of remedying hazardous conditions at a waste disposal facility. The restitution of cleanup costs was not intended to operate, nor does it operate in fact, as a criminal penalty or a punitive deterrent.

> The measure of recovery is directly tied to the cost of the required environmental clean-up. The court must be satisfied that the amounts it seeks to recover were actually expended in response to the environmental threat, and that those costs were incurred in the manner prescribed by C.E.R.C.L.A. and the National Recovery Plan. While the nature of liability imposed may be unexpected, it is restitutionary in nature and is not imposed with a view to punishment of the party responsible.
>
> *United States v. Ivey, supra* at 544.

267. It should be noted that *C.E.R.C.L.A.* assigns liability without proof of tortious fault; nevertheless, it was found not to be 'penal'. In the *Act*, as in *C.E.R.C.L.A.*, recovery is tied to the costs incurred. The court must be satisfied that the amounts the government seeks to recover were actually expended for health care benefits incurred as the result of tobacco related wrongs. Moreover, recovery is restitutionary and not imposed with a view to punishment.

268. Leave to appeal *Ivey* to the Supreme Court of Canada was dismissed with costs.

> *United States of America v. Ivey et al*. [1996], S.C.C.A. No. 582.

## VI. THE MANUFACTURERS' ARGUMENT

### A. Introduction

269. The Manufacturers attack the constitutionality of the *Act* on three grounds. They contend that the *Act* is unconstitutional because:

(a) It interferes with judicial independence;
(b) It is directed at extra-provincial rights; and
(c) It offends the rule of law.

270. Before addressing each of these arguments, the Attorney-General wishes to make two observations about the attack that the Manufacturers have launched against the constitutionality of the *Act*.

271. The first observation is that the object of that attack is the *Act* in its entirety. There are occasional claims made in the course of the Manufacturers' Outline of Argument that particular provisions of the *Act* are unconstitutional, but those claims are invariably made in the context of larger claims that the *Act* as a whole is unconstitutional. There are certainly no claims made in the alternative that, even if the *Act* as a whole is upheld, particular provisions should be held to be invalid.

272. Nor is there any claim made that, if the *Act* as a whole is upheld, it may nevertheless be constitutionally inapplicable to particular entities or in particular contexts.

273. Since the Manufacturers have elected not to advance these arguments, the Attorney-General does not intend to say anything further about them.

274. Secondly, the Manufacturers make no claim that the *Act* violates any of the rights and freedoms in the *Canadian Charter of Rights and Freedoms*. This distinguishes this challenge from challenges brought to similar legislation in the United States. In the U.S. cases, as noted

earlier in this Outline of Argument, much reliance was placed on the due process rights contained in the United States Constitution and the relevant state constitutions, and to the extent that those challenges have been successful – and they have only been successful to a very limited degree – it has been because of the availability of such arguments in that country.

275. Given the differences in text between the *Charter* and its American counterpart, as well as the jurisprudence that the *Charter* has so far generated, it is clear that none of the rights and freedoms for which the *Charter* provides would have been of any assistance to the Manufacturers. In particular, s. 7 of the *Charter*, the provision that bears some resemblance to the due process clauses found in the Fifth and Fourteenth Amendments to the United States' Constitution, would not be available to them.

> *Edwards Books & Art Ltd. v. The Queen et al.* (1986), 35 D.L.R. (4th)1 (S.C.C.).
> *Irwin Toy v. A.-G (Quebec)* (1989), 58 D.L.R. (4th) 577 (S.C.C).

276. In spite of the fact that the Manufacturers make no claim that the *Act* violates any C*harter* rights or freedoms, a significant part if not most of their argument (particularly under the 'Judicial Independence' and 'Rule of Law' rubrics), is of a 'rights-based' character. Hence, one finds a great deal of reliance placed on American due process jurisprudence under the former rubric, and on American Bill of Attainder jurisprudence under the latter.

277. We turn now to a detailed response to the arguments advanced by the Manufacturers. These arguments will be dealt with in the following order:

> The rule of law;
> Judicial independence; and
> Extra-territoriality.

## B. Rule of Law

### (1) Introduction

278. The Manufacturers invoke the rule of law at several points in their Outline of Argument. It is invoked, for example, in a number of the arguments they make to support the principle of judicial independence. However, the rule of law also appears as a heading in its own right, and under that heading two distinct arguments are made. One of these arguments is made by the Manufacturers generally and the other is made by Philip Morris Inc. in its separate supplemental Outline of Argument. The former argument, that of the Manufacturers, asserts that the *Act* is unconstitutional because it is both "retroactive and penal", while Philip Morris asserts that the *Act* is unconstitutional because it violates the principle of equality before the law.

279. This part of the Attorney General's Outline of Argument deals only with the rule of law insofar as it is invoked in support of the latter two arguments. Other arguments based on the rule of law are dealt with under the other headings in which those arguments are made.

280. Each of these two arguments will be dealt with in turn, focussing on its specific features. The Attorney General will then deal with a feature common to both arguments – the assumption that the rule of law provides an independent basis upon which to challenge the validity of legislation.

### (2) Equality before the law: The Philip Morris Argument

281. This argument has two distinct branches. Both branches proceed on the basis that the rule of law embodies the principle of equality before the law. The first claims that the *Act* violates this principle because it treats Manufacturers differently from the manufacturers of other products that can cause injury or disease. The second claims that the *Act* violates this principle because it treats the government differently from one set of "subjects", the Manufacturers.

282. The Attorney General concedes that the rule of law incorporates within it the notion of equality before the law. However, that notion, while important, is of limited scope. In particular,

it relates merely to the manner in which the law is applied, and simply requires that the law must be applied or administered equally to all those to whom the law by its terms applies.

> Dicey, *Introduction to The Study of the Law of the Constitution* (London: MacMillan, 1897) at 175 *et seq.* See also *Wells v. Newfoundland* (September 15, 1999), No. 26362 (S.C.C.), [1999] S.C.J. No. 50 (Q.L).

283. Philip Morris cites the decision in *Attorney General for Canada v. Lavell,* [1974] S.C.R. 1349, 38 D.L.R. (3d) 481 in support of its argument. Properly understood, the decision in that case not only does not support that argument, it contradicts it. In endorsing the notion of equality before the law incorporated within the rule of law, Ritchie J. was seeking to avoid having to follow the lead of American courts which, having adopted what he described as an "egalitarian" conception of equality, were in a position to use the right to equality to hold legislation invalid. The advantage of the rule of law conception of equality, as Ritchie J. understood it, was precisely that it did *not* permit the courts to question the validity of legislation, but limited their role to that of ensuring that the law, whatever its content might be, was not being applied or administered unequally.

284. Moreover, if the rule of law conception of equality before the law invoked by the Manufacturers could be used to strike legislation down, the effect would be to render s. 15 of the *Canadian Charter of Rights and Freedoms* redundant. At the same time, it would undo the careful work of the Supreme Court of Canada in interpreting that provision. According to the Supreme Court's interpretation, only those who can demonstrate that impugned legislation discriminates against them on the basis of one of the enumerated grounds of s. 15 or a ground analogous thereto can claim the benefit of its protection. Needless to say, neither industry type

nor product category qualifies as a protected ground.

> *Law Society of B.C. v. Andrews*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.
>
> *Law v. Canada (Minister of Employment and Immigration)* (1999), 170 D.L.R. (4th) 1 (S.C.C.).

285. Insofar as the other branch of the Philip Morris argument is concerned, that based on the inequality of treatment between subject and Crown reflected in the *Act*, the Attorney General invokes the same arguments in support of its contention that it too is lacking in merit. Again, the argument is based on a flawed understanding of the meaning of equality before the law as an element of the rule of law. And again, to redefine that conception in the manner suggested would render s. 15 of the *Charter* irrelevant and undo the work that the Supreme Court of Canada has done in interpreting it. And finally, it is clear that, given the nature of the problem being addressed by the *Act*, the government and the Manufacturers can hardly be said to be similarly situated. The government has been obliged for many years, and is still obliged, to cover the costs of health care associated with tobacco related diseases. By contrast, the Manufacturers produce, market and sell the products that cause or contribute to those diseases.

286. An important decision in this last regard is that of the Supreme Court of Canada in *Rudolf Wolff Co. v. Canada*. The plaintiffs in that case challenged on s. 15 grounds the validity of federal legislation granting to the Federal Court exclusive jurisdiction over claims against the federal Crown. That claim failed for a number of reasons, one of which was that "the Crown cannot be equated with an individual". In the words of Cory J.:

> The Crown represents the State. It constitutes the means by which the federal aspect of our Canadian society functions. It must represent the interests of all members of Canadian society in court claims brought against the Crown in right of Canada. The interests and obligations of the Crown are vastly different from those of private litigants making claims against the Federal Government.
>
> *Rudolf Wolff Co. v. Canada* (1990), 69 D.L.R. (4th) 392 (S.C.C.) at 397.

287. In the Attorney General's submission, this passage makes it clear that the position of the government of British Columbia "cannot be equated with" that of the Manufacturers in the present context.

288. For all of these reasons, the Philip Morris argument fails.

### (3) Retroactive and Penal: The Manufacturers' Argument

289. This argument is to the effect that, (a) according to the interpretation of the *Act* attributed to the government, the *Act* is "both retroactive and penal", and (b) because a statute "of even a purportedly civil nature" with such characteristics is unconstitutional, the *Act* is unconstitutional.

290. This argument is explicitly premised on the assumption that the *Act* may be characterized as "penal" in nature. For the reasons given earlier in this Outline of Argument, this assumption is invalid. Hence, on that basis alone, this argument is without merit.

291. However, even if the *Act* were to be characterized as "penal" in nature, and hence as both "retroactive and penal", it is the position of the Attorney General that the *Act* would not be unconstitutional. That is so because there is no principle known to Canadian constitutional law that, apart from the situations caught by s. 11(g) of the *Charter*, prevents Parliament and the provincial legislatures from enacting "retroactive and penal" legislation. As Professor Chevrette put it upon the *Charter's* introduction in 1982:

> It is well established that up to the present time in Canadian law the non-retrospective character of penal legislation was merely a rule of construction. The legislature could thus derogate from this rule, provided it did so clearly.
> [*Gagnon v. The Queen,* [1971] C.A. 454 (Que.)].
>
> Chevrette, "Protection Upon Arrest or Detention and Against Retroactive Penal Law" in Tarnopolsky & Beaudoin, eds., *Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982).

292. The current constitutional position with respect to the status of retroactive legislation in Canada is set forth in the following passage:

> Apart from section 11(g) [of the *Charter*], Canadian constitutional law contains no prohibition of retroactive (or *ex post facto*) laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common. For example, a taxation law is often made retroactive to budget night, when the law was publicly proposed; otherwise there would often be room for avoidance action by taxpayers during the hiatus between the budget and the enactment of the law…The power to enact retroactive laws, if exercised with appropriate restraint, is a proper tool of modern government. Section 11(g) diminishes this power only by excluding the creation of retroactive criminal offences. Other kinds of laws may still be made retroactive (p. 1193).
>
> Hogg, *supra* at 382.
>
> See also *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 at 1192-93, 59 D.L.R. ($4^{th}$) 161, per La Forest J.

293. It is also worth noting in this regard that when the courts, in the exercise of their common law powers, have created new causes of action or extended the reach of existing causes of action, those new or extended causes of action have always had what amounts to retroactive effect, in the sense that they apply to events that took place prior to their creation, including the events that took place in the very cases in which those causes of action were created or extended.

> *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.).
> *Guerin v. The Queen* (1984), 13 D.L.R. ($4^{th}$) 321 (S.C.C).

294. The Manufacturers cite no Canadian authority in support of their proposition that there is a constitutional prohibition against the enactment of "retroactive and penal" legislation in the civil sphere. That is because there is, of course, no Canadian authority that they *could* cite to support that proposition.

295. The Manufacturers attempt to muster support for such a proposition on the basis of several disparate Canadian and American constitutional principles. The first of these is the principle articulated in s. 11(g) of the *Charter*. Without doubting that that principle is important,

and that it extends beyond the strictly "criminal" realm to catch proceedings in "penal matters" as well, the Attorney General notes that the Manufacturers concede that it can have no application in this case. That is because, they say, it is clear that "other subsections of s. 11 (which address issues such as bail and presumed innocence) accommodate neither torts nor the type of *sui generis* civil wrong created upon a non-compensatory interpretation of s. 13 of the *Act*", and the Supreme Court of Canada has "advocated a coherent development of s. 11 which the Manufacturers have neither the desire nor the need to distort" (paragraph 256).

296. The Manufacturers claim, however, that "the constitutional principle which s. 11(g) illustrates, can be (and is) broader than the subsection itself", and invoke in support of this assertion the proposition endorsed by Lamer C.J. in *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at 64, 150 D.L.R. (4th) 577 at 617 that "there are serious limitations to the view that the express provisions of the Constitution comprise an exhaustive and definitive code for the protection of judicial independence".

297. The attempt to draw support from that passage fails. For one thing, it refers specifically to the principle of judicial independence, not the rule against *ex post facto* criminal and penal laws articulated in s. 11(g). More importantly, by virtue of the *Act of Settlement, 1701*, the principle of judicial independence is clearly captured by the invocation in the preamble to the *Constitution Act, 1867* of the principles underlying the constitution of the United Kingdom, since those principles obviously included, in 1867, the principle of judicial independence. By contrast, those principles cannot be said to have included a prohibition against penal and retroactive laws in the civil sphere because no such principle was recognized in the United Kingdom in 1867.

*Reference re Remuneration of Judges, supra*.

298. The Manufacturers also seek support from the rule of law, which, they claim, is violated by *all* retroactive law-making. However, they cite no case authority for this proposition, and the Attorney General is unaware of any. Even if the proposition were valid, it would only be of assistance to them if, as their entire rule of law argument assumes, the rule of law provides a

basis upon which legislation can be struck down. The validity of that assumption will be addressed shortly.

299. In any event, for reasons that are not explained, the Manufacturers state that they "[do not] rely directly… on the general rule of law" (at paragraph 264). Instead, they say that they prefer to rely on another principle, that of an "implied bill of rights".

300. The Manufacturers go on to a discussion of the notion of an "implied bill of rights", the viability of which they point out has recently been endorsed by the Supreme Court of Canada. However, they cite no authority in support of the proposition that such an 'implied bill of rights' prohibits penal and retroactive laws in the civil sphere. Nor do they point out that the passages in the relevant Supreme Court of Canada judgments indicate that such an 'implied bill of rights' applies to protect only those rights that can said to be integral to the 'structural imperatives' of the Constitution of Canada. Those 'structural imperatives', it seems clear, would be limited primarily to those rights and freedoms that are integral to the proper functioning of the institutions in the self-governing society that the Constitution of Canada creates. On this basis, the 'implied bill of rights' would be limited to such rights as freedom of speech, assembly, association and the press. On no account could it be said to protect the right to be free from 'retroactive and penal' legislation in the civil sphere.

> *Re Alberta Legislation*, [1938] 2 D.L.R. 81, per Duff C.J. at pp. 108-9.
> *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, 41 D.L.R. (4th) 1.

301. The Manufacturers seek to find support for the inclusion of this latter principle in the "implied bill of rights" in American jurisprudence and legal scholarship relating to bills of attainder. No attempt is made, however, to explain how those *American* materials could possibly be of relevance in defining the scope of a *Canadian* "implied bill of rights". In any event, it is the Attorney General's position that, properly understood, American jurisprudence with respect to bills of attainder does not support the Manufacturers' claim, and neither does that with respect to the prohibition on *ex post facto* laws.

302. In the early case of *Calder v. Bull* 3 U.S. 386 (1792), Chase J. considered *ex post facto* laws. In that case, Connecticut legislature set aside a decree of the Court of Probate, refused to record the will in question, and granted a new hearing by the Court of Probate. The argument was made that this legislation was *ex post facto* law contrary to the constitutions of the State and Nation. The court found, however, in four concurring judgments, that *ex post facto* legislation should be prohibited only in the context of criminal laws, where the liberty of the individual was at stake. As Chase J. said at 390:

> I do not think [the prohibition] was inserted to secure the citizen in his private rights, of either property or contract.

303. The bill of attainder prohibition in the U.S. Constitution has no Canadian equivalent, for a very good reason: It "was intended... as an implementation of the separation of powers" explicit in (and the Attorney General submits particular to) the U.S. Constitution, "... a general safeguard against legislative exercise of the judicial function, or more simply - trial by legislature".

> *United States v. Brown* 381 U.S. 437, 442 (1965).

304. The U.S. Supreme Court in *Nixon v. Administrator of General Services* 433 U.S. 425, 469 (1977) saw the clause as equivalent to the 'cases and controversies' restriction in the U.S. Constitution, which prohibits federal courts from entertaining references from the U.S. Government, and which also (obviously) has no Canadian equivalent.

305. While the Bill of Attainder Clause has been interpreted in the U.S. to protect rights beyond the purely criminal sphere, it has never served as a guarantee of equal treatment. The Manufacturers' argument, that they should be treated identically with other manufacturers of "dangerous products" such as (the Manufacturers say) alcohol and red meat, is analogous to the argument advanced by former U.S. President Nixon and dismissed by the U.S. Supreme Court. In *Nixon*, Brennan J., writing on this point for six members of the Court, held that:

> [Appellant suggests] ... that an individual or defined group is attainted whenever he or it is compelled to bear burdens which the individual or group dislikes ... His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality. Furthermore, every person or group made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment ...
>
> *Nixon, supra* at 470-71.

306. Brennan J. continued by pointing out what a 'bill of attainder' is *not*:

> However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals. In short, while the Bill of Attainder Clause serves as an important "bulwark against tyranny," it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all. [citations omitted, emphasis added]
>
> *Nixon, supra* at p. 470-471.

307. In fact, the only viable basis[10] upon which to challenge such legislation in the U.S. would be under the rubric of the 'due process' clauses of the Fifth and Fourteenth Amendments. However, as is apparent from a review of *Usery, supra*, discussed below, it is not an avenue of promise for the Manufacturers.

308. The only Canadian authorities cited in support of the Manufacturers' position in this regard are *R v. Bowen*, [1989] 2 W.W.R. 213 (Alta. Q.B.) and *R. v. Hess* (No. 2), [1949] 4 D.L.R. 199 (B.C.C.A.). Neither of these cases supports that position in fact: both were cases in the

[10] Perhaps one more thing needs to be said on the topic of Article III of the U.S. Constitution. The bill of attainder prohibition, as discussed, prohibits 'singling out' individuals for 'punishment' (though not necessarily criminal punishment). The *ex post facto* ban protects against retroactive *criminal* laws. Despite the fact that these two prohibitions appear in the same sentence of the U.S. Constitution, the jurisprudence surrounding them is markedly different; it is thus only by combining the two together (as the Manufacturers do explicitly at page 115 of their Argument) that the Manufacturers are able to cobble together any sort of argument that might apply to retroactive legislation in the civil sphere.

realm of criminal law and the second has nothing to say about the constitutionality of "retroactive and penal" legislation, in either the criminal or the civil sphere.

309. The Manufacturers proceed finally to make a number of arguments of a policy nature for the creation of a constitutional prohibition against "retroactive and penal" legislation in the civil sphere. All but one of the authorities cited in support of these arguments are American and the overwhelming majority of those are articles from American legal journals. In the Attorney General's submission, those arguments provide no basis upon which to seek to persuade a Canadian court to take what can only fairly be described as the revolutionary step of incorporating as a principle of Canadian constitutional law a principle for which no support whatsoever exists in our jurisprudence.

310. Before leaving this part of the Manufacturers' argument, the Attorney General notes that a due process-based challenge to an American statute, Title IV of *the Federal Coal Mine Health and Safety Act*, that shares many features with the *Act*, including its retroactive character, was dismissed by the United States Supreme Court in *Usery:*

> ... [L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations ... This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.
>
> *Usery, supra* at 16.

311. In *Usery* the Court upheld the application of a statute altering existing common law liability to actions taken before the effective date of the statute. The statute at issue in *Usery* altered common law liability for mineworkers' respiratory disease by creating a series of causal presumptions that held mine operators liable for workers' illnesses. The Court upheld the retroactivity of the *Usery* statute because, as Marshall J. stated:

> To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect — although, as we have noted, the Act imposes no liability on operators until 1974, and it may be that the liability imposed by the Act for disabilities suffered by former

> employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.
>
> *Usery, supra* at 15-16.

312. He continued:

> This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. See *Lichter v. United States*, 334 U.S. 742, 92 L.Ed. 1694, 68 S.Ct. 1294 (1948); *Welch v. Henry*, 305 U.S. 134, 83 L.Ed. 87, 59 S.Ct. 121, 118 A.R. 1142 (1938); *Funkhouser v. Preston* Co. 290 U.S. 16, 78 L.Ed 243, 54 S.Ct. 134 (1933).
>
> *Usery, supra* at 16.

313. Marshall J. concluded by pointing out that it was rational to compensate those injured by an industry from the profits of that industry:

> We find, however, that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor — the operators and the coal consumers. The Operators do not challenge Congress' power to impose the burden of past mine working conditions on the industry. They do claim, however, that the Act spreads costs in an arbitrary and irrational manner by basing liability upon past employment relationships, rather than taxing all coal mine operators presently in business. The Operators note that a coal mine operator whose work force has declined may be faced with a total liability that is disproportionate to the number of miners currently employed. And they argue that the liability scheme gives an unfair competitive advantage to new entrants into the industry, who are not saddled with the burden of compensation for inactive miners' disabilities. In essence the Operators contend that competitive forces will prevent them from effectively passing on to the consumer the costs of compensation for inactive miners' disabilities, and will unfairly leave the burden on the early operators alone.
>
> ... [I]t is for Congress to choose between imposing the burden of inactive miners' disabilities on all operators, including new entrants and farsighted early operators who might have taken steps to minimize black lung dangers, or to impose that liability solely to those early operators whose profits may have been increased at the expense of their employees' health. We are unwilling to assess the wisdom of Congress' chosen scheme by examining the degree to which the 'cost-savings' enjoyed by operators in the pre-enactment period produced 'excess' profits, or the degree to which the retrospective

> liability imposed on the early operators can now be passed on to the consumer. It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension. See, e.g., *Ferguson v. Skrupa*, 37 U.S., at 730-732, 110 L.Ed. 2d 93, 83 S.Ct. 1028, 95 A.L.R. 2d 1347 (1963); *Williamson v. Lee Optical Co.* 348 U.S., at 488, 99 L.Ed. 563, 75 S.Ct. 461 (1955).
>
> *Usery, supra* at 18.

314. It is this 'rational' cost spreading that is the central feature of the *Act* in the present case.

315. None of the elements of the U.S. Constitution that the Manufacturers seek to 'import' into the Canadian jurisprudence can assist them. With respect to the rule of law, in particular, the manufacturers cannot avail themselves of the U.S.'s 'bill of attainder', *'ex post facto'*, or 'due process' clauses and, even if they could, the American jurisprudence cannot afford them shelter in Canada. In short, the *Act* is not penal and, even if it was, there is no support whatsoever for the claim that legislation of a "retroactive and penal" character in the civil sphere is unconstitutional in Canada.

### (4) The Rule of Law is Not an Independent Basis for Striking Down Legislation

316. Even if the Manufacturers' and Philip Morris' rule of law arguments did not suffer from the infirmities already identified, those arguments would fail. That is because they are both based on a fundamental misconception about the nature and role of the rule of law as an underlying principle of the Canadian Constitution.

317. That fundamental misconception is that the rule of law provides an independent basis upon which to strike down otherwise valid federal and provincial legislation. This misconception was recently laid bare in the most explicit of terms by the Saskatchewan Court of Appeal.

*Bacon, supra.*

318. *Bacon* involved an attempt to strike down provincial legislation on the basis that it violated the rule of law. The issue whether or not that principle could be so used was therefore squarely before the Court of Appeal. After a careful review of numerous authorities, including several recent judgments of the Supreme Court of Canada in which the rule of law had been the subject of comment, Wakeling, J.A., writing for the court, held emphatically that the rule of law could *not* be so used:

> The protection we treasure as a democratic country with the rule of law as a "fundamental postulate" of our constitution is twofold. Protection is provided by our courts against arbitrary and unlawful actions by officials while protection against arbitrary legislation is provided by the democratic process of calling our legislators into regular periods of accountability by the ballot box. This concept of the rule of law is not in any way restricted by the Supreme Court's statement that nobody including governments is beyond the law. That statement is a reference to the law as it exists from time to time and does not create a restriction on Parliament's right to make laws, but is only a recognition that when they are made they are then applicable to all, including governments. [emphasis added]

*Bacon, supra* at para. 30 (QL). See also *Wells v. Newfoundland* (S.C.C.), *supra*.

319. The decision of the Saskatchewan Court of Appeal in the *Bacon* case has now been applied in two other cases in which attempts have been made to use the rule of law to impugn the validity of legislation. Each attempt has failed.

*Pfizer Inc. v. Canada*, [1999] F.C.J. No. 1122 (T.D.).
*Singh et al v. Canada (Attorney General)*, [1999] F.C.J. No. 1056 (T.D.).

320. Given that the rule of law cannot be used as an independent basis upon which to impugn the validity of otherwise valid legislation, it is of no assistance to Philip Morris Inc. or to the Manufacturers to invoke the rule of law as they do in their attack on the validity of the *Act*. On this basis alone both of the arguments that the Manufacturers advance under this rubric must be held to fail.

## C. Independence of the Judiciary

### (1) Introduction

321. The Manufacturers contend that the *Act* is unconstitutional because it interferes with the principle of the independence of the judiciary. Their argument in this regard suggests that it is based not only on that principle but on a number of other principles as well. Those other principles include the separation of powers, the rule of law (interpreted in this context to include the right to a fair trial), and what might be described as the inviolability of core judicial functions.

322. It is far from clear whether the Manufacturers intend these other principles to form the basis of distinct lines of argument in support of their attack on the constitutional validity of the *Act*, or whether they are intended merely to buttress the argument based on judicial independence.

323. Each of these principles must be analyzed separately. That is because, as will become apparent, each of these principles has a distinct character and purpose. For example, assuming it applies in Canada, the separation of powers doctrine in this context operates to prevent the legislative branch from usurping a judicial function; by contrast, the principle of judicial independence assumes the continuing exercise by the judicial branch of a particular function, and is designed to ensure that the judicial branch remains independent in the exercise of that function. (This means that, as a matter of logic, these two principles cannot be invoked alongside each other in challenging the validity of legislation, but rather must be relied upon in the alternative).

324. It is the position of the Attorney General that none of the four principles relied upon by the Manufacturers provides a basis upon which they can successfully impugn the validity of the *Act*. Neither as independent bases on which to attack the validity of the *Act*, nor as a combination of principles organized and employed under the general rubric of judicial independence, are they capable of performing the work that the Manufacturers are seeking to have them perform.

325. The Attorney General proposes to deal with each of these principles in the following order:

(a) separation of powers;
(b) rule of law;
(c) inviolability of core judicial functions; and
(d) judicial independence.

**(2) Separation of Powers**

326. Explicit references are made by the Manufacturers to the separation of powers principle in paragraphs 95, 97, 103 and 152. That principle is also invoked by implication in paragraph 56 ("…the *Act* reflects a legislative plan, *ex post facto*, to secure a determination of liability that penalizes specific targeted defendants".), paragraph 91 (" (e) judicial independence requires that the court be separate in authority and function from other branches of government;"), paragraphs 109-115 (in which reference is made to *Liyanage v. The Queen*, [1967] A.C. 259 (P.C.), a separation of powers case), and paragraphs 116-117 (in which reference is made to *Maher v. Attorney General*, [1973] I.R. 140 (Sup. Ct. of Ireland), another separation of powers case).

327. The separation of powers doctrine holds that the legislative, executive and judicial functions within a given jurisdiction can only be exercised by the legislative, executive and judicial branches respectively of the governing system within that jurisdiction. In those countries in which this doctrine is constitutionally entrenched, such as the United States and Australia, it precludes *inter alia* both the legislature and executive branches from performing judicial functions, and the judicial branch from performing both legislative and executive functions.

See Hogg, *supra* in sections 7.3(a), 8.6(c), 9.4(e), 14.2(a).

328. It is instructive that, in two of the cases relied on by the Manufacturers on this topic, the separation of powers doctrine was invoked in an attempt to prevent judges from performing functions that in Canada they would be able to perform, namely conducting a commission of

inquiry in the Australian case of *Wilson v. Minister for Aboriginal and Torres Strait Island Affairs* (1996), 70 A.L.J.R. 743 (H.C.A.) and sitting on an advisory committee in the U.S. case of *Mistretta v. United States* 488 U.S. 361 (1989).

329. The position of the Attorney General with respect to this argument is that:

(a) there is no general or strict separation of powers doctrine in Canada; and

(b) even if there is a separation of powers doctrine in Canada, the *Act* does not violate it.

### *(a) There is No General Separation of Powers Doctrine in Canada*

330. In the Attorney General's submission, the separation of powers doctrine, at least as it is generally understood, has no application in Canada:

> There is no general 'separation of powers' in the *Constitution Act, 1867*. The *Act* does not separate the legislative, executive and judicial functions and insist that each branch of government exercise only 'its own' function. As between the legislative and executive branches, any separation of powers would make little sense in a system of responsible government; and it is clearly established that the *Act* does not call for any separation. As between the judicial and the two political branches, there is likewise no general separation of powers. [emphasis added]
>
> Hogg, *supra* at 190.

331. This also represented the view of Lamer C.J. in his separate concurring reasons for judgement in *Cooper v. Canada (Human Rights Commission)* where he noted that there was no "strict" separation of powers in Canada. In particular, he noted that, subject to the constraints flowing from s. 96 of the *Constitution Act, 1867*:

> judicial functions, including the interpretation of law, may be vested in non-judicial bodies..., and conversely the judiciary may be vested with non-judicial functions.
>
> *Cooper v. Canada (Human Rights Commission)* [1996] 3 S.C.R. 854 at 872, 140 D.L.R. (4th) 193 at 201.

332. To the same effect is the following statement made in the reasons for judgment of the Supreme Court of Canada in the *Reference Re Secession of Quebec*:

> ... the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to s. 96 Courts.
>
> *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at 233, 161 D.L.R. (4th) 385 at 398.

333. The Attorney General has only been able to find four cases in which attempts have been made to challenge the validity of legislation in Canada on the basis of the separation of powers doctrine. In none of these cases did the attempt succeed.

> *R. v. Gagnon and Vallieres* (1971), 47 D.L.R. (3d) 378 (Que C.A.).
>
> *R. v. Shand* (1976), 13 O.R. (2d) 65 (C.A.).
>
> *Commission des droits de le personne v. Canada (A.-G.)*, [1977] C.S. 47 (Que. S.C.).
>
> *Singh et al. v. Canada (Attorney General)*, [1999] F.C.J. No. 1056 (T.D.).

334. The decision in *Singh* is particularly important in this regard. Not only is it the most recent of these cases, it is the only one in which a careful analysis is made of the question whether the separation of powers doctrine applies in Canada. McKeown J. concluded as follows at para. 52:

> I find that an implied doctrine of the separation of powers has not been recognized in the context of the Canadian Constitution. As a result, I conclude that the doctrine of separation of powers cannot be used to strike down *intra vires* legislation that is not contrary to the *Charter.*

335. The Manufacturers refer in paragraph 103, under the heading "Interference with core judicial functions", to the case of *Re Hertel and The Queen* (1986), 37 D.L.R. (4th) 706 (B.C.S.C.). The judge in that case, Bouck, J., discussed the separation of powers doctrine in relation to certain provisions of the *Income Tax Act*, R.S.C. 1952, c. 148 the constitutionality of

which he himself had called into question. It would appear from his brief discussion of this doctrine that he considered it to have application in the Canadian context. In the Attorney General's submission, however, the case provides scant support for the existence of that doctrine in Canada. Several of the Canadian cases to which Bouck J. referred, including *R. v. Hess (No. 2), supra,* by which he considered himself to be bound, made no mention of the separation of powers doctrine, but involved instead the principle of judicial independence. Moreover, in spite of Bouck J.'s apparent enthusiasm for the doctrine, he did not use it as a basis upon which to strike the legislation in question down.

336. The question of whether or not the separation of powers doctrine forms part of the constitutional law of a given jurisdiction was the subject of careful analysis by the High Court of Australia in its recent decision in *Kable v. D.P.P. for N.S.W.* (1997), 189 C.L.R. 51 (H.C.A.). At issue in that case was the validity of certain legislation passed by the legislature of the State of New South Wales. One of the grounds upon which that legislation was challenged was that it offended the separation of powers doctrine. That argument was not considered by all six members of the High Court that decided that case. However, all four who did consider it (Brennan, C.J. and Dawson, Toohey, and McHugh, J.J.) were unanimous in rejecting it. Their rejection of it was based on a finding that the separation of powers doctrine did not form part of the constitution of the State of New South Wales.

337. That finding was in turn based primarily on the fact that, although the *Constitution Act, 1902* of New South Wales had a separate part devoted to "The Judiciary", "nowhere does it provide that the judicial power of the State is vested in the judiciary".

> *Kable, supra* at 74, per Dawson, J.

338. This conclusion was unaffected by provisions in the *Constitution Act, 1902* designed to protect the security of tenure and hence independence of members of the State judiciary:

> Whilst these provisions are concerned with the preservation of judicial independence, they cannot be seen as reposing the exercise of judicial power exclusively in the holders of judicial office, nor can they be seen as precluding the

> exercise of non-judicial power by persons in their capacity as holders of judicial office. They clearly do not constitute an exhaustive statement of the manner in which the judicial power of the State is or may be vested. Had [the Judiciary part of the *Constitution Act, 1902*] attempted such an exercise, it would have cut across a long history of non-judicial power by the courts and the exercise of judicial power by bodies exercising non-judicial functions.
>
> *Kable, supra* at 74-75, per Dawson J.

339. Dawson, J. then went on to contrast the relevant provisions of the Commonwealth of Australia's Constitution with those of the constitution of New South Wales. After noting that the former formally vests the legislative power of the country in the Commonwealth Parliament, the executive power in the Executive and the judicial power in the Judicature, he said that

> ... it is because the judicial power of the Commonwealth is vested by Ch. III in those courts which it identifies and is dealt with nowhere else (save for s. 51 (xxxix)) that this Court was compelled to conclude that no functions other than judicial functions may be reposed in the federal judicature and that no powers which are foreign to the judicial power may be attached to courts created by or under that Chapter.
>
> *Kable, supra* at 77.

340. As a matter of principle, then, the separation of powers doctrine will only apply in those jurisdictions the constitutions of which either explicitly or impliedly vest legislative, executive and judicial powers *exclusively* in the legislative, executive and judicial branches respectively. On no reading can that be said to be true of the Constitution of Canada.

341. The Manufacturers invoke the decision of the Privy Council in *Liyanage, supra* in support of their separation of powers submissions. The decision in that case shows that such support is not forthcoming, either at the level of principle – that is, in relation to the question of whether or not the separation of powers doctrine applies in Canada – or at the level of application – that is, assuming that that doctrine applies here, whether or not it has been violated in the circumstances of this particular case. At this point the Attorney General is concerned only with the question of principle.

342. The willingness of the Privy Council to find that the separation of powers was a feature of the Constitution of Ceylon (now Sri Lanka) was based on the fact that the Ceylon *Charter of Justice of 1833*, which created the court system that had been used in Ceylon prior to independence and that, in the view of the Privy Council, had been continued by the Constitution after independence, had explicitly provided that the judicial power in Ceylon was "vested exclusively" in the courts that had then been created.

> *Liyanage, supra*.
> *Kable, supra at* 79-80.

343. There is no counterpart in Canada to the *Charter of Justice of 1833*. Nor is the Attorney General aware of any other Imperial instrument that can be said to have vested judicial power exclusively in the courts of British North America. The circumstances in Canada therefore differ in a fundamental respect from those in Ceylon, and as a result, the reasoning of the Privy Council in *Liyanage* has no application here.

344. The Manufacturers also rely on the decision in *Maher v. Attorney General, supra*, a decision of the Supreme Court of Ireland. However, that case too fails to provide the support claimed by the Manufacturers. The decision in that case holding unconstitutional the impugned provision of the *Road Traffic Act 1961*, as amended, was clearly based on provisions of the Irish Constitution that have no counterparts in Canada's Constitution. Those provisions were Article 34, s. 1 providing that "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution…", and Article 37, which prohibits the exercise of limited functions and powers of a judicial nature in criminal matters by any person or body other than a judge or a court appointed or established under the Constitution. In the words of FitzGerald, C.J., speaking for a unanimous Supreme Court of Ireland:

> The administration of justice, <u>which in criminal matters is confined exclusively by the Constitution to the Courts and judges set up under the Constitution,</u> necessarily reserves to those courts and judges the determination of all the

> essential ingredients of any offence charged against an accused person. [emphasis added].
>
> *Maher*, *supra* at 146.

345. Based on the above analysis, the Attorney General submits that the separation of the powers doctrine does not exist in Canada.

### *(b) Even if the Doctrine Exists in Canada, It Is Not Violated by the* Act.

346. Even if the separation of powers doctrine were to be accepted as part of Canadian constitutional law, the Attorney General submits that that doctrine is not violated by the *Act*. In particular, the Attorney General submits that the *Act* does not amount to a usurpation of the judicial function.

347. In order to establish that the *Act* amounts to a usurpation of the judicial function, it is incumbent on the Manufacturers to establish that the *Act* amounts to a "legislative judgment" or, to put it somewhat differently, effectively eliminates, "by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings".

> *Liyanage*, *supra* at 290.

348. The holding in *Liyanage* that the legislation at issue in that case -- which was directed at particular known individuals who had been arrested because of their alleged involvement in an abortive coup -- offended the separation of powers doctrine, was based on the following reasoning:

> As has been indicated already, legislation ad hominem which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary. But in the present case their Lordships have no doubt that there was such interference; that it was not only the likely but the intended effect of the impugned enactments; and that it is fatal to their validity. The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed, and they take their colour, in particular, from the

> alterations they have purported to make as to their ultimate objective, the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere. Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years' imprisonment, and compelled to order confiscation of his possessions, even though his part in the conspiracy may have been trivial.
>
> *Liyanage, supra* at 290-91.

349. The *Act* cannot be characterized in terms similar to these. In no sense, in other words, can it be said to force a court adjudicating a claim made under it to come to any pre-ordained conclusion, nor obviously, to impose any pre-ordained sentence.

350. On the contrary, a court adjudicating a claim under the *Act* is free to come to judicially sound conclusions in respect of every element of the cause of action for which s. 13.1 provides:

- The government is obliged to prove that the manufacturers committed a tobacco related wrong by proving that each of them breached a legal duty - section 13.1(1)(a). The court is free to reject the government's claim that there has been such a breach by the manufacturers

- The government must prove that exposure to tobacco causes disease - section 13.1(1)(b). The defendants are free to present evidence that this is not the case, and the court is free to find that the government's evidence that tobacco exposure causes disease is inadequate.

- The government must prove the total amount of the cost of health care benefits that it has incurred as a result of tobacco related diseases - section 13.1(3). The court is not restricted in how it may assess the evidence and is not bound to accept any figure that is not fully supported by the best epidemiological, medical, economic and other evidence.

- The *Act* creates a rebuttable presumption that if the government proves that a manufacturer has committed a wrong, that wrong caused exposure to the manufacturer's product - section

13.1(2)(a). Contrary to the argument of the Manufacturers, this presumption is rational, and may be rebutted by the production of admissible evidence. For example, a manufacturer is entitled to present evidence based on medical and social science studies that persons would have been exposed to tobacco products even had no breach of duty occurred - 13.1(4). The court is in no way bound to conclude that a manufacturer's wrong caused exposure to a product where there is evidence acceptable to the court that this is not the case.

- A particular manufacturer is only liable for the cost of health care benefits caused by exposure to its products. It is presumed that these costs are in proportion to its market share - section 13.1(3)(b). It is a rational presumption that in the absence of other evidence, a generically similar product causes disease roughly in proportion to the amount of that product that is consumed. This presumption can be rebutted by appropriate evidence which is admissible under the *Act* - 13.1(4).

351. The case at bar can also be distinguished from *Maher, supra*. Not only was the decision in that case based on the language of particular provisions in the Irish Constitution, the legislation at issue stipulated that the courts had to accept, as "conclusive evidence" of the facts asserted in it (relating to the consumption of alcohol in an accused's blood), a certificate issued by a government official. It is clear that such a stipulation completely eliminated the ability of the court to make its own finding in relation to those facts – facts that were critically important to the outcome of the kind of case in question. Again, as noted above, there is nothing in the *Act* that can be said to have such an effect.

352. It is apparent from even a cursory review of *Liyanage* and *Maher* that the facts therein would fall squarely within the protections afforded by the *Charter* to criminal defendants. But those protections are not available to the Manufacturers in a challenge to the *Act*, a remedial, compensatory statute which provides for the recovery of health care costs by way of the creation of a civil remedy.

353. In the year following *Liyanage, supra*, there was another appeal from Ceylon. In *Kariapper v. Wijesinha*, [1968] A.C. 717 (P.C.), the Privy Council upheld a statute enacted by the Parliament of Ceylon which imposed *civil* disabilities on persons found by a commission of inquiry to have committed bribery. These said persons were named in a schedule to the statute. It was argued that the statute was an exercise by the legislature of judicial power because it imposed punishment for guilt without trial by a competent court, etc. The Privy Council held that there was no interference with or usurpation of judicial power:

> It is the commission's finding that attracts the operation of the Act not any conduct of a person against whom the finding was made. Parliament did not make any finding of its own against the appellant or any other of the seven persons named in the schedule. [emphasis added]
>
> *Kariapper*, *supra* at 736.

354. Nor has there been any finding made in the *Act* against any of the tobacco manufacturers.

**(3) Rule of Law**

355. The Manufacturers' rule of law argument as it bears on the contention that the *Act* interferes with the independence of the judiciary, is made primarily in paragraph 96 of their Outline of Argument. As the Attorney General understands it, that argument proceeds as follows:

(a) "the right to a fair trial is a basic requirement of the rule of law", and hence is to be considered as included within and protected by the rule of law;

(b) the *Act*, because it "mandates an unfair and non judicial process", violates the Manufacturers' right to a fair trial; and

(c) the *Act* is therefore "unconstitutional as being repugnant to or operating contrary to the rule of law".

356. In order for the Manufacturers to succeed with this argument, they must establish the validity of all three of these propositions. If any one of them is held not be valid, their argument fails.

357. It is the Attorney General's position that none of these three propositions can be sustained.

### *(a) The Rule of Law Does Not Protect the Right to a Fair Trial*

358. With respect to the first of these propositions, that the right to a fair trial is a component of the rule of law, it is to be noted that the Manufacturers cite not a single supporting authority for it. It is simply a bald assertion.

359. Used as a purely rhetorical device, as it often is, the rule of law has been and can be used to mean a broad range of different things. However, when used as a legal principle, the rule of law in Canada at least has, as a result of the consideration given to it by the Supreme Court of Canada, been given a definition that is not only reasonably precise but that also serves significantly to circumscribe its scope. According to that definition, the rule of law embodies the following four principles:

(1) First, there must be a basis in law for any action on the part of the state or its officials which limits individual liberty.

Dicey, *Introduction to the Study of the Law of the Constitution*, (London: Macmillan, 1897), at 175 *et seq*.

*Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689.

(2) Second, the law must be applied equally to all those to whom the law by its terms applies.

Dicey, *Ibid.*

*Lavell, supra.*

(3) Third, if the effect of declaring legislation invalid on the basis that it violates a provision of the Constitution of Canada would be to destroy the institutions of government within the jurisdiction in question, and thereby produce a state of legal chaos, the declaration of invalidity should be suspended for such time as is necessary to permit the remedying of the problem that gave rise to the constitutional violation.

*Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 4 W.W.R. 385.

(4) And finally, all action on the part of governments in Canada must be consistent with the provisions of the Constitution of Canada and any governmental action that is found by the courts to be "inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect", in accordance with the provisions of s. 52(1) of the *Constitution Act, 1982* (this principle, known as the principle of constitutionalism, often stands on its own as

an independent principle).

*Reference Re Secession of Quebec, supra.*

360. Running through all of these interpretations, and hence lying at the heart of the rule of law as a legal principle, is a commitment to governing by and in accordance with law, rather than by and in accordance with the exercise of unfettered discretion, a commitment to ‘a government of laws and not of men’.

361. None of these definitions of the rule of law is capable of incorporating, or providing protection for, the right to a fair trial.

362. No one doubts that the cause of the rule of law is advanced if the courts in the exercise of their civil as well as criminal jurisdiction conduct the proceedings which come before them in a manner consistent with procedural fairness. In that sense, the rule of law and the right to a fair trial are related. But that does not mean, as the Manufacturers take it to mean, that the rule of law *means* a right to a fair trial.

363. As a constitutional right, the right to a fair trial is protected by both s. 7 and s. 11 (d) of the *Canadian Charter of Rights and Freedoms*. However, in the case of the latter, the right is clearly one that applies only in the context of criminal prosecutions. In the case of the former, the right extends beyond the context of criminal prosecutions, but only to a limited degree. It is only in those non-criminal proceedings in which a claimant can establish that his or her "life, liberty or security of the person" is placed at risk that a claim under s. 7 can be made. Although the terms "life, liberty and security of the person" have not yet had their scope and meaning definitively determined by the Supreme Court of Canada, it is clear that they do not protect property rights. Hence, s. 7 affords no protection to persons involved in civil proceedings of the kind with which the *Act* is concerned. So the Manufacturers cannot avail themselves of either s. 7 or s. 11 (d) of the *Charter*. And indeed they have not invoked either of these provisions.

364. That the omission of property rights from s. 7 has profound implications for the reach of this provision of the *Charter* is noted by Professor Hogg in the following terms:

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

365. This 'back door' that Professor Hogg so resoundingly locks is precisely the same one at which the Manufacturers now knock. It simply will not open. With respect to the "purely economic interests of individuals or corporations", Professor Hogg is unequivocal:

> The courts will imply a duty to observe the rules of "natural justice" in the absence of an express legislative provision to the contrary, *but there is no constitutional impediment to an express legislative provision to the contrary*. [emphasis added]
>
> Hogg, *supra* at 58. See also *Wells v. Newfoundland* (S.C.C.) *supra*.

***(b) The Act Provides for a Fair Trial***

366. As for the second proposition relied upon by the Manufacturers in their rule of law argument, that the *Act* "mandates an unfair and non-judicial process" and therefore infringes on their right to a fair trial, the Attorney General emphatically denies that this is the case. It is the Attorney General's position that the procedures that the *Act* prescribes for the purpose of the proceedings that it contemplates more than comply with the requirements of procedural fairness in the context of civil proceedings of the kind contemplated by the *Act*.

367. The Supreme Court of Canada has made it clear that the requirements of procedural fairness are "variable standards", and depend on a range of contextual factors including the

interests at stake, the nature and purpose of the proceedings, and so on.

> *Syndicat des employes de production du Quebec et de l'Acadie v. Canada (Canadian Human Rights Commission),* [1989] 2 S.C.R. 879, 62 D.L.R. (4th) 385 at 425.

368. In the Attorney General's submission, the critical contextual factor to take into account in this case is the fact that the government's new cause of action under s. 13.1 is an aggregate action.

369. In large-scale torts, especially those involving large numbers of persons who have been exposed to toxic substances which cause adverse health effects through non-observable modes of causation, the traditional rules of law and procedure are both inefficient and unfair[11]. Modes of procedure and evidence that require proof and assessment on a particularistic, individual by individual, basis do not easily accommodate claims based on such incidents. Such claims may be adjudicated fairly, and more efficiently, on an aggregate basis, utilizing expert evidence based on statistical, epidemiological and social sciences, rather than on the basis of analyzing the cumulative claims relating to thousands of individuals one by one.

> Fleming, "Probabilistic Causation in Tort Law" (1989) 68 Can. Bar. Rev. 661
>
> Rosenberg, "The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System" (1984) 97 Harvard L.R. 851.

370. In an aggregate claim involving toxic substances, the most reliable and relevant evidence is statistical and epidemiological. The claim is not conceived or presented on a case-by-case basis. The most relevant and reliable evidence, therefore, is evidence based on statistical and epidemiological science. The medical histories and records of individual persons are only relevant insofar as they make up the larger group from which the statistical conclusions are drawn.

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[11] Much of the argument that follows in this section is repeated from the earlier section on "Specific Features of the *Act*". The passages are repeated here because they are directly responsive to the Manufacturers' argument on this aspect of the case.

371. To specifically respond to the Manufacturer's objections (in their Argument paragraph 74):

- It is true that it is not necessary under the *Act* for the government to identify particular insured persons; however, this does not mean that the government is able to claim compensation in respect of persons who are not insured. The government must establish that the compensation it seeks is in respect of health care benefits that have been, or will be provided to persons who are in fact insured.

- It is true that it is not necessary to prove the cause of disease in any particular insured person; however this does not mean that the government is able to claim compensation except in respect of diseases caused by exposure to tobacco. The government is obliged to prove its claim is made in respect only of diseases caused by exposure to tobacco. The point of the aggregate action is that this will not be done on an individual-by-individual basis, but rather through the presentation of appropriate epidemiological and statistical evidence.

- It is true that it is not necessary to prove the cost of health care benefits that have been provided to any particular insured person; however this does not mean that the government is able to claim costs that have not been proved to have been caused by exposure to tobacco and provided to insured persons. The point of the aggregate action is that such proof is not required to be made individual-by-individual.

- It is true that the health care records and documents of particular individual insured persons are not compellable; however this does not mean that the manufacturer is denied access to records and documents sufficient to challenge the government's claim. It means that the manufacturers are not permitted to request discovery and examination of every insured person in the province who received health care benefits for tobacco related disease, and that the identities of those persons whose records are produced will be protected.

- It is true that no person is compellable to answer questions with respect to the health of particular individual insured persons; however this does not mean that the connection between tobacco exposure and health must not be fully proved by government and cannot be fully defended by the manufacturers. The point is that in an aggregate action questions concerning the health of any particular individual are not in issue, since the claim is not pursued on an individual basis.

372. The health care records of particular individuals are not compellable because they are not relevant. Given that the government's claim will be established through the use of statistical and epidemiological evidence, the records of any one individual are not relevant, except insofar as they may show that the statistical and epidemiological evidence is based on accurate sampling and analysis. The Manufacturers are entitled under subsections 13(6)(b) and (d) to production of sufficient evidence to permit a thorough airing of this issue.

373. Although the provision of the Florida statute prohibiting the disclosure of the identities of Medicaid recipients was held to be 'unconstitutional' in *The State of Florida et al., v. The American Tobacco Company et al*.(again, according to the due process requirement of the state constitution), it was later held that proof by way of a sampling of numerically coded records would be sufficient to meet even the stringent Florida 'due process' requirements. A similar regime is provided for in s. 13(5) of the *Act*.

> *State of Florida et al. v. The American Tobacco Company et al*. (October 18,1996) District Court Case No. CL 95-1466 AH (in Chambers, West Palm Beach County), per Cohen J.

374. The Attorney General submits that, once account is taken of the nature of the aggregate action for which the *Act* provides, the procedures that are to govern the conduct of that action more than satisfy the requirements of the Manufacturers' alleged "right to a fair trial".

### *(c) The Rule of Law Cannot be Used to Strike Down Legislation*

375. This brings us to the third proposition embodied in the Manufacturers' rule of law argument. They say that, if the *Act* is found to violate their right to a fair trial, then the *Act* is "unconstitutional as being repugnant to or operating contrary to the rule of law". This proposition once again misconceives the legal status of the rule of law. It assumes that the rule of law provides an independent basis upon which to attack the validity of legislation passed by Parliament and the provincial legislatures. It does not[12].

*Bacon, supra.* See also *Wells v. Newfoundland* (S.C.C.) *supra*.

376. Even if, therefore, one accepts that the rule of law protects the right to a fair trial in civil proceedings, and even if one accepts that the *Act* violates that right, the validity of the *Act* is unaffected.

377. In summary, none of the three propositions embodied in the Manufacturers' rule of law argument is valid, and the argument itself must therefore be rejected.

### (4) Inviolability of Core Judicial Functions

378. The Manufacturers' main contention with regard to its claim that the *Act* interferes with the independence of the judiciary, as set out in paragraphs 98 and 103-107 of their Outline of Argument, is that the *Act* is unconstitutional because it "interferes" improperly with a constitutionally protected core judicial function. That function, it is said, is that of fact finding in the course of adjudicating a civil dispute.

379. It is the Attorney General's position that this line of argument, like those based on the separation of powers doctrine and the rule of law, is untenable. The notion of a constitutionally

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[12] The Manufacturers cite Robert Bolt's fictional Sir Thomas More advocating giving "the Devil benefit of the Law." While it is true that the historical Sir Thomas did say something similar, More's view of the 'rule of law' was dependent upon Parliamentary supremacy. Parliament authorized More to sign bills of attainder (one against More's own predecessor, Cardinal Wolsey, who subsequently died in prison), to preside over the notorious Court of Star Chamber, and to have Protestants burned alive. With respect to 'due process', one of More's first tasks as Lord Chancellor was to sign an Act of Parliament - releasing the King from his debts.

See Ackroyd, *The Life of Thomas More* (London: Vintage Books, 1999) at 285-303.

protected core jurisdiction was developed by the Supreme Court of Canada to deal with a narrowly defined issue that arose in a very different context than the one with which this case is concerned. Moreover, even if that notion can be extended beyond the narrow context within which it was developed, it has no application here.

380. It is important when addressing this argument on the part of the Manufacturers to remember that the provincial legislatures have been given exclusive jurisdiction under s. 92(14) of the *Constitution Act, 1867* over "procedure in civil matters". To accept the Manufacturers' core jurisdiction argument would be to circumscribe to a very significant degree this important grant of power. In fact, if one were to accept that provincial legislation that interferes with the fact finding process in civil proceedings is impermissible because that process is part of a constitutionally protected core of superior court jurisdiction, the provincial power under s. 92(14) might well be rendered nugatory.

381. The notion of a constitutionally protected core judicial function was recognized by the Supreme Court of Canada in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, 130 D.L.R. (4th) 385. At issue in that case was the validity of s. 47 (2) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, which granted to the youth court *exclusive* jurisdiction in respect of *inter alia* "every contempt of court committed by a young person against any other court otherwise than in the face of that court". That meant that contempt *ex facie* by a youth of a superior court could not be dealt with by that court. The attack on the validity of this provision was based on s. 96 of the *Constitution Act, 1867*. The Supreme Court of Canada was unanimous in holding that, under the governing test for s. 96 prescribed by *Reference Re Residential Tenancies Act*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, the *grant* to the youth court of jurisdiction over contempt *ex facie* by young offenders in relation to superior courts was permissible. However, the Court divided sharply on the question of whether that was enough to sustain the validity of s. 47(2). Five members of the court, writing through Lamer C.J.C., held that it was not. In their view, it was necessary to go further and decide whether or not the *removal* of this same jurisdiction from the provincial superior courts was permissible.

382. It was the view of the majority in that case that, in those s. 96 cases in which the impugned legislation purports to grant not merely concurrent but exclusive jurisdiction to a non-section 96 body, it is necessary to consider whether the function or power in question forms part of the inherent or core jurisdiction of superior courts. If it does, the power or function in question cannot be removed from those courts, and the grant of exclusive jurisdiction over it to the non-section 96 body will be held unconstitutional. In that particular case, it was held that the power over contempt *ex facie* (as well as contempt *in facie*) did form part of the inherent or core jurisdiction of provincial superior courts and hence was a power that could not constitutionally be removed from such courts.

*MacMillan Bloedel, supra* at 402 *et seq.* (D.L.R.), 753 *et seq.* (S.C.R.).

383. It is evident that the notion of a constitutionally protected core jurisdiction of superior courts was devised by the majority in *MacMillan Bloedel* to deal with the particular problem that that case was seen to raise. That problem was rooted in the perceived inadequacy of the jurisprudence relating to s. 96 to deal fully and comprehensively with attempts to remove particularly important functions from s. 96 courts and assign those functions exclusively to non-section 96 bodies. There is nothing in the reasons for judgment of the majority to indicate that this notion was to be applied in other contexts. Such general pronouncements about the importance of the core jurisdiction of superior courts as were made in that case must, it is submitted, be read in context and that context is one defined by the special characteristics of s. 96 jurisprudence.

384. One of the special characteristics of s. 96 jurisprudence is its focus on the special position within not only the court system but our legal system generally of the provincial superior courts. It is not particular judicial functions *per se* that this jurisprudence is concerned with; it is rather particular judicial *functions performed by the provincial superior courts*. The reason for this narrow focus is in part that the provincial superior courts are seen to be integral to the maintenance of the uniform national court system that is one of this country's defining constitutional features, and in part because of the special role played by provincial superior courts

- the only courts of inherent jurisdiction in this country – in the maintenance of the rule of law and the principle of constitutionalism.

*Residential Tenancies, supra* at 566 *et seq.* (D.L.R.), 208 *et seq.* (S.C.R.).

*MacMillan Bloede v. Simpson, supra.*

385. The argument of the Manufacturers fails to take account of this special characteristic of the s. 96 jurisprudence. Their argument is not based upon, nor does it draw any meaningful support from, the special role played by the provincial superior courts in our system of justice. In fact, it is formulated simply in terms of a constitutionally protected core judicial function.

386. Even if the notion of a constitutionally protected core of superior court jurisdiction can be extended beyond the context of s. 96, it is important to note that the kind of protection granted to that jurisdiction by the majority in *MacMillan Bloedel* is protection against *removal*. It is not protection against "interference". The language used in the reasons for judgment of the majority is consistently that of removal, and that term is used not just a few but a great many times. There is nothing in those reasons to suggest that the protection to be afforded to this core jurisdiction is to be extended to "interference".

*MacMillan Bloedel v. Simpson, supra.*

387. By contrast, the language used by the Manufacturers is – as it can only be, given the provisions of the impugned legislation here – that of *interference*. On that basis alone, the Attorney General submits that the reasoning in *MacMillan Bloedel* can have no direct application here.

388. Even if one accepts that the notion that a constitutionally protected core of superior court jurisdiction can be extended beyond the context of s. 96, and even if one accepts that that core is to be protected not only against removal but mere interference, this argument on the part of the Manufacturers must fail. That is because the fact finding process in a new statutorily created civil cause of action cannot be said to form part of that constitutionally protected core.

389. Although the majority in *MacMillan Bloedel* did not purport to provide an exhaustive list of the constitutionally protected core functions of a provincial superior court, it is clear from their reasons for judgement that the functions they had in mind were of a very different character than the fact finding process in a civil proceeding. The functions that they had in mind were the power of provincial superior courts to exercise judicial review in respect of administrative tribunals on questions of jurisdiction, and the power of those same courts to rule on the constitutional validity of federal legislation. Given the special role played by provincial superior courts within our system of government, their ability to continue to exercise both of these powers was seen to be integral both to the maintenance of the rule of law and to the principle of constitutionalism.

*Canada (A.G.) v. Crevier* (1978), 2 C.R. (3d) 38 (Que. C.A.).
*A.G. (Canada) v. Law Society of B.C.*, [1982] 2 S.C.R. 307, 137 D.L.R. (3d) 1.

390. Insofar as the particular power in question in that case was concerned, i.e. jurisdiction over contempt *ex facie*, it was held to be a part of the protected core because it was seen to be necessary to the ability of the superior court "to maintain its authority and to prevent its process from being obstructed and abused" (taken from an article by Master Jacob that is quoted with approval in the reasons of the majority). The ability of the provincial superior courts to exercise this power was seen by the majority to be integral to the maintenance of the rule of law. As Lamer C.J.C. put it, “Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected”.

*MacMillan Bloedel, supra* at 402 (D.L.R.), 753 (S.C.R.).

391. An important authority in this regard is *Farrell v. Workmen’s Compensation Board* (1961), 31 D.L.R. (2d) 177 (S.C.C.) in which it was held that there was no constitutional bar to provincial legislatures legislating to preclude judicial review of administrative tribunals on questions of law within their jurisdiction. If the power to have the final say on questions of law can constitutionally be transferred from the courts to administrative tribunals – and hence by

implication be held not to be part of the core jurisdiction of s. 96 courts – it is difficult to see how the fact finding process could be said to qualify for core jurisdiction status.

392. There is clear authority in the jurisprudence relating to s. 96 that it is permissible for a provincial legislature to transfer from the provincial superior courts to administrative tribunals jurisdiction over certain kinds of civil proceedings, including landlord and tenant disputes and disputes between employees and their employers. This means that such tribunals have complete control over the fact finding process in such proceedings subject only to jurisdictional review by the superior courts. If it is constitutionally permissible for provincial legislatures to do this, it is difficult to see how it could be constitutionally impermissible for a provincial legislature to interfere in the fact finding process in a particular kind of civil proceeding.

*Sobeys Stores Ltd. v. Yeoman,* [1989] 1 S.C.R. 289, 57 D.L.R. (4th) 1.
*Residential Tenancies, supra.*

393. The Manufacturers refer to *Re Greater Victoria School District and Goudie* (1984), 59 B.C.L.R. 176 (Co. Ct). The legislative provision that was held to be constitutionally invalid in that case (s. 95 of the *School Act*, R.S.B.C. 1979, c. 375) provided that, if a defendant School Board in a civil action could establish that it had "acted under the authority of this *Act* or a regulation, rule or order made under it…the court shall dismiss the action". Tyrwhitt-Drake, Co. Ct. J. held that it was unconstitutional for a provincial legislature to require a judge to dismiss an action on this basis because it amounted in effect to the legislature telling the court "how to exercise its judgment" (p. 180). With respect, the legislation simply created a statutory defence to civil actions against school boards. It is difficult to see how that could possibly be viewed as constitutionally infirm. Moreover, the analysis of the constitutional issue in that case, which the trial judge appeared himself to have raised *ex proprio motu*, was far from considered. Only one case is cited in support of his position, and the issue was dealt with in three brief paragraphs[13].

[13] The decision may be treated as non-binding: *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.). In any event, no notice was given under the *Constitutional Questions Act*, R.S.B.C. 979, c. 63 c.f. *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, 142 D.L.R. (4th) 385.

394. The implausibility of the Manufacturers' argument in this regard becomes clear if one accepts their assertion that the fact finding process in civil cases is one of the protected core judicial functions. The statute books, both federal and provincial, are full of provisions that bear both directly and indirectly on the fact finding process. Consider, for example, the evidence statutes in force both federally and within all of the various provinces. Can it seriously be suggested that all or parts of these statutes are now vulnerable to constitutional challenge on the ground that they "interfere" in the fact finding process? Surely not.

395. In summary, the Attorney General submits that the Manufacturers' attempt to invoke the principle of a constitutionally protected core superior court jurisdiction is inappropriate in this context. It is inappropriate because this principle arose in, and should be limited in its application to, the context of s. 96 of the *Constitution Act, 1867*. Moreover, the principle protects against the *removal* of such core jurisdiction, not *interference* with it, which is what the Manufacturers allege here. And finally, the fact-finding process in civil proceedings of the kind contemplated by the *Act* does not qualify for core jurisdiction status.

396. The point of the Attorney General's argument here has been to make it clear that the Manufacturers derive no support from the s. 96 jurisprudence relating to the notion of a constitutionally protected core provincial superior court jurisdiction. The argument grounded in the principle of judicial independence must, in other words, stand on its own. It is to that argument that we now turn.

**(5) Judicial Independence**

397. The principle of judicial independence has been the subject of considerable judicial scrutiny in recent years. The focus of that scrutiny has been on the institutional or structural dimension of judicial independence. Insofar as that dimension is concerned, the Supreme Court of Canada has held on numerous occasions that there are three central or core characteristics to judicial independence – security of tenure, financial security and administrative independence.

*R. v. Valente (No. 2),* [1985] 2 S.C.R. 673, 24 D.L.R. (4th) 161.
*Reference re Remuneration of Judges, supra*.

398. There is nothing in the *Act* that can be said to threaten any of these central characteristics of the institutional dimension of judicial independence, and the Manufacturers appear to concede as much.

399. The Manufacturers contend, however, that the *Act* violates the principle of judicial independence because it is said to compromise the ability of courts adjudicating claims under the *Act* independently to assess the evidence and to make findings of fact. They go so far as to claim that "the *Act* as a whole has been crafted in order to secure an outcome favourable to the government" (paragraph 146).

400. Before addressing the merits of this claim, it is important to note that the Manufacturers cite no authority in support of the proposition that legislation prescribing the evidentiary and procedural rules relating to a particular kind of civil proceeding can violate the principle of judicial independence. Their claim in this regard is therefore a novel one, and on that basis alone one which the courts must treat with great caution.

401. The Manufacturers cite in support of their argument a number of American authorities relating, in particular, to the constitutionality of presumptions in civil proceedings. Although it is true, as they contend, that some of these presumptions have been struck down as unconstitutional, the Manufacturers make no claim that in any of the cases cited was the decision

based on the principle of judicial independence. Rather, in each of these cases, the principle relied upon was due process, a principle upon which the Manufacturers neither do nor can rely here.

402. The Attorney General is unaware of a single American case in which a due process-based challenge to statutorily created presumptions in civil proceedings has been rejected, in which an American court has suggested that the principle of judicial independence was even engaged, let alone might have provided an alternative basis upon which to challenge the legislation. In other words, the principle of judicial independence appears to have played no role whatsoever in the analysis in these cases.

403. It is also striking to note that the principle of judicial independence has likewise played no role whatsoever in the adjudication of challenges to reverse onus clauses in the realm of criminal law under s.11(d) of the *Canadian Charter of Rights and Freedoms*. That is the case even though s.11(d) makes explicit reference to that principle, and even though the government is the beneficiary of such reverse onus clauses.

404. In truth, the real claim being made here by the Manufacturers is a claim grounded not in the principle of judicial independence but in the principle of due process. Having concluded, no doubt rightly, that, because of important differences between the American Constitution and the Canadian *Charter*, a due process claim was not available to them in Canada, they have attempted to circumvent that obstacle by fashioning an argument that, in form at least, appears to be based on the principle of judicial independence, but that in substance is based on due process. This, the Attorney General submits, they should not be permitted to do.

405. The Manufacturers rely in support of their argument on a passage from the speech given in the Legislative Assembly by Minister of Health Priddy on July 29, 1998. However, it is clear when the brief passage in question is placed in its proper context, not only in terms of the entire speech given by the Minister on that occasion, but also in terms of the speech given by Minister of Health MacPhail when the *Act* was originally introduced and the provisions of the *Act* itself,

that the words in question cannot be interpreted in the manner implied by the Manufacturers. In no sense was she suggesting that the government was co-opting the courts or using them as an instrument of government policy. On the contrary, the Minister obviously understood that the government would have significant hurdles to surmount in the bringing of a claim under the *Act* if it were to succeed in recovering from the Manufacturers the health care costs that it has been obliged to expend in treating tobacco related diseases.

*Debates of the Legislative Assembly, supra.*

406. The Manufacturers' claim that the *Act* undermines the independence of the judiciary is based primarily on two features of it:

(1) the restrictions on evidence relating to medical information regarding particular individuals contained in s.13(6); and

(2) the presumptions contained in s.13.1(2).

407. It is the Attorney General's position that the Manufacturers mischaracterize these provisions of the Act, and also mistakenly conflate the notion of judicial independence with the traditional rules of tort law and civil procedure[14]. The Manufacturers' arguments are based on a failure to appreciate the nature of an aggregate action, and amount in essence to an objection to that form of action. Contrary to their assertions, the provisions to which they object flow naturally from the use of an aggregate, as opposed to individualized procedure, and these provisions in no way undermine the fairness of the procedure or the independence of the judiciary.

408. The *Act* does not interfere with the independence of the judiciary. Instead, it alters the substantive and procedural law to permit a form of procedure (the aggregate action) that is distinct from a traditional individual tort claim. The *Act* does not, as the Manufacturers say,

[14] Much of the argument that follows can be found *supra* in the Section headed "IV.Specific Features of the *Act*". These passages are repeated here because they are directly responsive to the Manufacturers' arguments on this issue.

interfere with judicial independence by dictating that the courts must reach a particular conclusion. Nor does the *Act* unfairly deprive the Manufacturers of defences or of the opportunity to produce evidence to rebut the government's claims. The *Act* does preclude the Manufacturers from attempting to force the procedure back into an unworkable series of individual claims.

409. Nothing in the *Act* undermines the independence of the judiciary. Contrary to what the Manufacturers say, the statute does not dictate any pre-ordained result, nor force the court to come to any pre-ordained conclusion. As noted above, the court is free to come to judicially sound conclusions in every respect:

- The government is obliged to prove that the manufacturers committed a tobacco related wrong by proving that each of them breached a legal duty - section 13.1(1)(a). The court is free to reject the government's claim that there has been such a breach by the manufacturers.

- The government must prove that exposure to tobacco causes disease - section 13.1(1)(b). The defendants are free to present evidence that this is not the case, and the court is free to find that the government's evidence that tobacco exposure causes disease is inadequate.

- The government must prove the total amount of the cost of health care benefits that it has incurred as a result of tobacco related diseases - section 13.1(3). The court is not restricted in how it may assess the evidence and is not bound to accept any figure that is not fully supported by the best epidemiological, medical, economic and other evidence.

- The *Act* creates a rebuttable presumption that if the government proves that a manufacturer has committed a wrong, that wrong caused exposure to the manufacturer's product - section 13.1(2)(a). Contrary to the argument of the Manufacturers, this presumption is rational, and may be rebutted by the production of admissible evidence. For example, a manufacturer is entitled to present evidence based on medical and social science studies that persons would have been exposed to tobacco products even had no breach of duty occurred - 13.1(4). The

court is in no way bound to conclude that a manufacturer's wrong caused exposure to a product where there is evidence acceptable to the court that this is not the case.

- A particular manufacturer is only liable for the cost of health care benefits caused by exposure to its products. It is presumed that these costs are in proportion to its market share - section 13.1(3)(b). It is a rational presumption that in the absence of other evidence, a generically similar product causes disease roughly in proportion to the amount of that product that is consumed. This presumption can be rebutted by appropriate evidence which is admissible under the *Act* - 13.1(4).

410. The main reason for the Manufacturers' mischaracterization of the Act is the underlying assumption that an individual tort claim is the only constitutionally permissible means by which a government insurer may recover the cost of health care benefits. Combined with this is the corresponding assumption that a departure from the rules of civil procedure developed in the past to deal with individual claims undermines judicial independence. This argument stems from a failure to appreciate, or a fundamental rejection of, the notion of an "aggregate action."

411. The ordinary law of tort and rules of civil procedure are individualistic. The paradigm is a traumatic injury caused to one or a few individuals through observable causal chains (such as a collision). In such cases, existing law and procedure, involving evidence of observable causal effects on specific individuals, is well suited to a claim for compensation.

412. However, while the judicially developed law of tort and rules of civil procedure have sought to keep pace with modern medical, environmental and technological change, largescale or "mass" torts raise problems with which this body of law and these rules are ill-suited to deal.

413. The Manufacturers' objections to the statute are based upon the premise that courts are independent only when adjudicating mass tort cases on a purely individual, or at best, cumulative basis. The Manufacturers say that it is wrong to deny them rights of proof and disproof on an individual basis, and to prevent them from inquiring into the smoking habits and medical

histories of each individual in respect of whom benefits have been provided. They argue that they must be permitted to raise individual defences one by one and that to deny them this right is to interfere with judicial independence. The Manufacturers thus take the position that the government must prove its case on an individual-by-individual basis.

414. The Attorney General takes the opposite view. In a case involving potentially hundreds of thousands of affected persons it would be socially and legally unjustifiable to require the parties to conduct a mini-trial in respect of each and every smoker. It is within the scope of provincial power to alter both procedural and substantive rules of civil law to the extent necessary to permit an aggregate action by the government.

415. The Manufacturers argue (para 82) that the court is "forced" to make a finding as to the quantum of costs on the basis of statistical evidence while being prevented from examining the basis upon which the statistical evidence has been generated. This is incorrect. The Manufacturers, and thus the court, will have access to the experts' reports and records and will be entitled to cross-examine the expert evidence presented by the government. Moreover, under section 13(6)(d) the court may order discovery of a statistically meaningful sample of records and documents of individuals, and documents relating to the provision of health care benefits to individuals, in order to assess the basis upon which the statistical evidence has been generated. This provision is in place precisely to permit the Manufacturers to make a full defence and to permit the court to assess the basis and accuracy of the government's evidence. Under this section, the court may give directions regarding the nature, level of detail and type of information to be disclosed.

416. In summary, the Manufacturers' objections to section 13(6) misapprehend the nature of an aggregate action. Such an action is not brought on behalf of, or in respect of particular individuals, whose claims are tallied up one by one. Such an approach would completely overwhelm the resources of the parties and of the courts.

417. The Manufacturers argue that the presumption in section 13.1 (2)(a) is "irrational" and "imposes" findings of fact upon the court which cannot be effectively rebutted by the Manufacturers (paras 78-85). They conclude that the *Act* therefore creates a "sham proceeding" which undermines judicial independence.

418. The Attorney General submits that this mischaracterizes the *Act*. The presumption is rational and constitutional.

419. The presumption in section 13.1(2)(a) provides that where the government establishes that the Manufacturers breached a duty to persons who have been or might be exposed to tobacco, and also proves that such exposure to tobacco causes disease, it will be presumed that persons who were in fact exposed to the defendant's tobacco and contracted disease would not have been exposed but for the breach. There is nothing "irrational" about this presumption. It is based on the principle that where wrongful conduct increases the risk of injury, and the injury in fact occurs, it may be presumed that the conduct caused that injury and the evidentiary burden of proof shifts to the defendant.

> *McGhee v. National Coal Board, supra.*
>
> *Wilsher v. Essex Area Health Authority, supra.*
>
> *Walker Estate et al. v. York Finch General Hospital, supra.*

420. While this principle has not been adopted by Canadian courts as part of the common law[15], courts have held that the onus of proof in tort cases is not immutable and may be shifted. It is certainly open to the legislature to adopt such a principle. As Sopinka J stated:

> If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives.
>
> *Farrell v. Snell, supra* at 299.

[15] But see *Walker Estates, supra*.

421. The Manufacturers argue that there is no rational connection between proof that they breached a duty towards smokers and the presumption that that breach caused exposure to tobacco and the resulting disease. The Attorney General disagrees.

422. For example, if the breach of duty by the Manufacturers, as alleged by the government, is the manipulation of nicotine so as to addict smokers to the product, it is not irrational to presume that had such manipulation not taken place, persons would have refrained from or given up smoking.

423. If, as alleged by the government, the breach of duty was the manufacture of an unsafe and hazardous product which causes disease and death when used as intended, it is rational to presume that had such breach not occurred persons would not have been exposed to the unsafe and hazardous product.

424. If the breach is a failure to provide an appropriate warning to persons of the risks of smoking, it is reasonable to presume that had such a warning been given, persons would have refrained from or given up smoking. If, as alleged by the government, the breach of duty is fraud or misrepresentation by the Manufacturers regarding the health effects of tobacco, it is not irrational to presume that had persons been aware of the truth they would have refrained from or given up smoking.

425. There is a rational connection between the facts that the government must prove (breach of duty), and the facts which the courts are directed *prima facie* to presume (exposure).

426. If it is the case, as the Manufacturers argue, that not all exposure to tobacco is caused by the breach of duty proved by the government, the Manufacturers may produce evidence to this effect. The Manufacturers may seek to demonstrate, for example, that even had persons been fully informed of the truth regarding cigarettes and health, they might have chosen to smoke in any event.

427. The Manufacturers claim that the statute unfairly deprives them of the opportunity to present such evidence. The Attorney General disagrees. The statutory scheme provides that the Manufacturers may present evidence that their breach did not cause exposure to tobacco or disease - 13.1(4). In making this argument, the Manufacturers are permitted to rely on precisely the same evidence as the government. If they wish, they may present evidence of health officials, medical professionals and smokers themselves regarding what causes persons to smoke. They may bring expert medical, behavioural and psychological evidence, based on studies and surveys, to support their claims about smoking behaviour – for example, to show that a portion of the population would have smoked and would have incurred disease in any event.

428. The only restrictions are those contained in section 13(6) pertaining to the health records and documents of particular individuals. The reason why this evidence is not permitted is because it is irrelevant, and the legislature wishes to protect the privacy of persons who are not parties to the litigation. The government's claim is not one made in respect of particular individuals. In an aggregate claim, based on statistical data covering thousands of individuals, the reason why evidence regarding one or more particular individuals is excluded is because it has no bearing. The only relevant evidence in such a claim is evidence that bears on the larger group. And the Manufacturers are fully permitted to bring such evidence.

429. The Manufacturers similarly argue (at paragraph 84) that the statute precludes them from challenging "improper payments made to individual recipients on any basis, including fraud, misdiagnosis or unnecessary treatments." The only restriction in the *Act* is that precluding the production of individual health records and documents of particular persons. Again, in an aggregate claim, such documents are precluded because they are irrelevant (except insofar as they represent a large enough sample to draw meaningful conclusions). The Manufacturers are free to develop and present such evidence through the direct testimony of experts and recipients of health care benefits. The Manufacturers are also entitled, under sections 13(6)(b) and (d) to production of sufficient evidence to permit a thorough airing of this issue. Nothing in the *Act* precludes the court from reducing the government's claim in light of such evidence.

430. The Manufacturers argue that the statute is “draconian” in that it deprives them of the right to invoke individual defences, such as voluntary assumption of risk and contributory negligence. They argue that they are precluded from examining the smoking behaviour of particular individuals and therefore, from showing that their breach of duty did not cause the harm complained of.

431. Again, such evidence is precluded because it is irrelevant in an aggregate claim. Moreover, the complaint is based on a substantial overstatement of the effect of the *Act*. The defendants are not barred from pleading (and in fact in their Statements of Defence they do plead) that their wrongs did not cause the injuries complained of, or that smokers are the authors of their own misfortune due to their voluntary assumption of risk or their contributory negligence. The legislation directs that such arguments be framed terms of causation (as they often are even in the common law of tort), and presented in an aggregate fashion.

432. For example, if the Manufacturers wish to present evidence that smokers were aware of the risks of smoking and freely chose to accept those risks, they are free to present such evidence, both directly, and through the use of expert and survey evidence. Such evidence may be presented under section 13.1(4) of the Act to reduce or eliminate the Manufacturer’s liability. The statute does not eliminate these defences, but incorporates them in a way that is consistent with the statutory scheme as a whole.

433. The only Canadian case which deals with a challenge to legislation on the basis that it interfered unduly with judicial independence in a particular adjudicative context is *Baron v. Canada*, *supra.*

434. In that case Sopinka J., for the court, held that s. 231.3 of the *Income Tax Act*, authorizing issuance of search warrants, violated s. 8 of the *Charter*. Section 231.3 of the Act set out certain conditions for issuance of warrants, and provided that if these conditions were met the judge was required to issue a warrant (the word “shall” was used). Sopinka J. said, at p. 523:

In my view, an analysis of the principles on which *Hunter* was based shows that the exercise of a judicial discretion in the decision to grant or withhold authorization for a warrant of search was fundamental to the scheme of prior authorization [for search warrants] which Dickson J. prescribed as an indispensable requirement for compliance with s. 8 in that case.

435. He went on, at pp. 526-527:

Not only is the existence of a discretion indispensable to the balancing of interests which *Hunter* envisaged, but the requirement that the officer authorizing the seizure be independent and capable of acting judicially is inconsistent with the notion that the state can dictate to him or her the precise circumstances under which the right of the individual can be overborne. I agree with the statement of Morden J.A. in *Re Paroian, Courey, Cohen & Houston and the Queen* (1980), 54 C.C.C. (2d) 272 at p. 283, 113 D.L.R. (3d) 322 at p. 333, [1980] C.T.C. 131 (Ont.C.A.), that 'The function of the Judge is the most important safeguard. It is implicit in the provision that the Judge is not to act as a rubber stamp.' This statement was quoted with approval in *Selye v. Quebec*, [1982] R.D.F.Q. 173, at p. 176. This statement, which was made in a pre-Charter case, would apply with greater force in the era of the Charter. The concept of a rubber stamp role would be completely inconsistent with the role assigned to the judiciary as expressed by Dickson J. in *Canada v. Beauregard* (1986), 30 D.L.R. (4th) 481 at p. 493, [1986] 2 S.C.R. 56, 26 C.R.R. 59:

> Secondly, the enactment of the *Canadian Charter of Rights and Freedoms* (although admittedly not relevant to this case because of its date of origin) conferred on the courts another truly crucial role: the defense of basic individual liberties and human rights against intrusions by all levels and branches of government. Once again, in order to play this deeply constitutional role, judicial independence is essential.

Having found that a residual discretion is a constitutional requirement, the next question is whether s. 231.3(3) removes or impermissibly restricts this discretion. It is clear to me that the answer is yes. I would adopt the reasoning of the Federal Court of Appeal on this point, in preference to that of the British Columbia Court of Appeal in *Kourtessis, supra*. Section 231.(1) states that, on an *ex parte* application, a judge 'may' issue a warrant for the search of premises. However, s. 231.3(3) provides that a judge 'shall' issue the warrant once satisfied that the three statutory conditions set out therein have been satisfied.. As Hugessen J.A. pointed out, the word 'shall' is normally to be construed as imperative.

436. He concluded, at p. 529:

Bearing all this in mind, I conclude that s. 231.3(3), by using the words 'shall issue', denies the issuing judge the discretion to refuse to issue a warrant where in

> all the circumstances a search or seizure would be unreasonable, In fact, the subsection makes it possible for a judge to be statutorily bound to authorize an unreasonable search or seizure. For this reason the use of the word 'shall' brings s. 231.3(3) into conflict with s. 8 of the Charter.
>
> *Baron v. Canada, supra.*

437. All of which shows how far short the *Act* falls of ordaining a particular outcome. The judge is not, under the *Act*, to be a rubber stamp. Under the *Act* the judge retains far more than a residual discretion as to whether there should be a finding of liability in any case.

## D. Extraterritoriality

### (1) Introduction

438. In Part III of this Outline of Argument, the Attorney General explained why the *Act* should be held to be valid provincial legislation under s. 92(13), (14) and (16) of the *Constitution Act, 1867*. It is the Attorney General's position that:

(a) the "matter" or "pith and substance" of the *Act* is that the *Act* confers on the government a right to sue. It also addresses substantive rights and obligations and establishes rules of procedure and evidence governing lawsuits, against tobacco manufacturers, by individuals for damages and by the government to recover the cost of health care benefits attributable to tobacco related disease; and

(b) that "matter" comes within, or is anchored by, a combination of s. 92(13), (14) and (16), with particular reliance on s. 92(13) and (14).

439. The Manufacturers challenge the government's characterization of the *Act*. They contend that the *Act* should be characterized in terms of its extra-territorial effects. Those extra-territorial effects relate, it is alleged, *inter alia*, to extra-provincial contractual and property rights, liability said to be imposed for conduct committed outside the province of British Columbia, and the rights of shareholders in extra-provincial companies; in particular the rights of shareholders in

federally-incorporated companies. These alleged effects are discussed under seven distinct headings.

440. For the sake of conceptual coherence, the Attorney General proposes to deal with this argument on the part of the Manufacturers under two separate sub-headings:

(a) Effect on extra-provincial rights; and
(b) Choice of law principles.

441. The Attorney General's submission is that the Manufacturers' argument based on extra-territorial effects relates to the proper characterization to be given to the *Act*. By contrast, the choice of law argument requires that the *Act* be measured against a normative standard, specifically (as will be developed below), the order and fairness standard prescribed by the *Morguard* and *Tolofson* cases.

*Morguard Investments v. De Savoye, supra.*

*Tolofson v. Jensen, supra.*

**(2) Extraterritorial Effects**

442. The Manufacturers concede at paragraph 155 of their Outline of Argument that the "matter" or "pith and substance" of legislation challenged on federalism grounds is a function of the "dominant characteristic" of that legislation.

Hogg, *supra* at p. 383.

443. The Manufacturers contend that the "dominant characteristic" of the *Act* is that it affects extra-territorial rights. In fact, they go so far as to claim that the very purpose of the *Act* is to derogate from extra-provincial rights.

444. As noted above in Part III of this Outline, the governing authority in respect of challenges to provincial legislation on the basis of extra-territorial effects is *Churchill Falls, supra*. At issue in that case was the validity of a Newfoundland statute that was intended to, and did, expropriate all the assets and water rights of a company generating electricity at Churchill Falls in Labrador. That expropriation, for which the company received no compensation, destroyed the ability of the company to perform (or pay any damages for the breach of) a contract pursuant to which it had undertaken to deliver almost all of its production of electricity at a low price to Hydro-Quebec for a term of 65 years. The attack on the validity of this statute was based on two different grounds, one of which was that it derogated from extra-provincial rights. In order to determine whether or not the attack on this ground could succeed, McIntyre, J. had to resolve the question of which of two conflicting lines of authority regarding the proper way to analyze such claims should prevail. One, based on *Royal Bank v. The King,* suggested that it was sufficient in order to impugn the validity of provincial legislation to show that the legislation had <u>some</u> adverse effect on extra-provincial rights. The other, based on *Ladore v. Bennett*, suggested that the legislation could only successfully be impugned if it were held to have been <u>aimed at</u> extra-provincial rights.

*Churchill Falls, supra.*

*Royal Bank v. The King, supra.*

*Ladore v. Bennett, supra.*

445. In the result, McIntyre, J. held at p. 332 that *Ladore v. Bennett* "states the law correctly". He then adopted the following proposition:

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

*Churchill Falls, supra.*

446. McIntyre, J. went on to hold that the legislation at issue in that case, which on its face was an expropriation of property rights in Newfoundland, amounted to "a colourable attempt to interfere with the Power Contract and thus to derogate from the rights of Hydro-Quebec to receive an agreed amount of power at an agreed price", at 31. He held further that, because the rights in question were rights held outside the province of Newfoundland, the legislation was unconstitutional.

447. McIntyre J. based this holding in part on the provisions of the *Reversion Act*, but also on some of the extrinsic evidence that had been adduced regarding the intentions that the Government of Newfoundland had in enacting it. Particular reliance was placed on a brochure published by that Government and directed to the financial community. In that brochure, the Government indicated that it considered the terms of the Power Contract to be unconscionable, and for that reason wished to nullify it:

> ... The increasing inequity of the Power Contract adds impetus to the Government's determination to reach a resolution to its right of access.
>
> *Churchill Falls, supra* at 31 (D.L.R.), 333 (S.C.R.).

448. It is the position of the Attorney General that the effects on extra-provincial rights attributed by the Manufacturers to the *Act* amount to no more than "incidental or consequential effects", and hence are insufficient to render the *Act ultra vires*. In no sense can it be said that the "pith and substance of the [*Act*] is the derogation from or elimination of [these] rights". Hence, this line of argument on the part of the Manufacturers fails.

> *Churchill Falls, supra*.

449. This position on the part of the Attorney General is based on a number of considerations. Some of these considerations are general in nature in that they apply to the overall claim made by the Manufacturers, while others are specific to particular points made by the Manufacturers in the course of developing that claim.

450. The first and most important of the general considerations is that this argument on the part of the Manufacturers is based primarily on those provisions of the *Act* that incorporate the theory of enterprise liability. These provisions are found in s. 17.1 and the companion provisions of s. 1(2), (3) and (4) defining "related manufacturer". The Attorney General acknowledges that these provisions may have a bearing on the manner in which a tobacco related wrong may be proved, and that they may also enlarge the number of defendants liable to pay a judgment, but denies that they can be said to lie at the heart of the statute. Without them, the government would still be able to bring proceedings under the *Act*, and would be able to recover any amount that might result from such action from the Canadian Manufacturers and from any others shown to have committed tobacco related wrongs. In other words, the *Act* would remain viable even if these provisions were removed from it.

451. These provisions did not form part of the statute when it was originally enacted in 1997. They were only included in the *Act*, along with a number of other new provisions, when the *Act* was amended in 1998. Clearly, they could have had no bearing on the characterization of the *Act* in its original form. Nor is it plausible to suggest that their inclusion in a package of amendments a year later altered the nature of the *Act* to such an extent as to transform its characterization. The original statute conferred a cause of action on the government, facilitated the bringing of actions by individuals, allowed statistical evidence to be adduced, etc.; all of these, the main features of the statute, are found in the original *Act*.

452. Second, there is nothing in the extrinsic evidence in this case to suggest that the purpose or "aim" of the *Act* was to destroy or derogate from extra-provincial rights. There is no counterpart here, in other words, to the government brochure that was so important to the decision to strike the legislation down in *Churchill Falls*, *supra*.

453. The third general consideration is that, again unlike in *Churchill Falls, supra,* where the extra-provincial effect in question was immediate and direct, any effect that the *Act* might have on extra-provincial rights is contingent and indirect. In the course of his reasons in that case McIntyre J. noted at p. 31 that, "As soon as the *Reversion Act* came into force, Hydro-Quebec's

right to receive power according to the terms of the power contract were effectively destroyed." By contrast, in this case, in order for the extra-provincial rights in question to be adversely affected, (a) the government has to bring an action under the *Act*; (b) in that action, the government has to join defendants on the basis of the provisions in question; (c) attempts by those of such defendants that are served *ex juris* to have such service set aside must be unsuccessful; (d) the government has to succeed in showing that any such defendants joined pursuant to s. 17.1 meet the requirements of the definition of "related manufacturer" in s. 1(1) of the *Act*; and (e) the government has to succeed in its claim under s. 13 against the *ex juris* defendants or against a related manufacturer. Only if all of those contingencies are met will the kind of effects of which the Manufacturers complain be experienced. Given that fact, it seems implausible to describe such effects as the "dominant characteristic" of the *Act*.

454. The fourth general consideration flows out of an important aspect of the reasoning of McIntyre, J. in *Churchill Falls, supra.* Those seeking in that case to have the legislation in question struck down relied not only on the effect that it would have on the rights of Hydro-Quebec under the Power Contract, but also on the effect that it would have on the rights of the many secured creditors outside the province. McIntyre, J. 's response to that line of argument was as follows:

> In my opinion, there is nothing in the *Act* itself nor in the extrinsic evidence to indicate that the Act is aimed at the rights of the secured creditors. Any effect on these rights would be of an incidental nature and, in accordance with the principle of *Ladore v. Bennett* discussed above, would not of itself be grounds for declaring the *Act ultra vires* .
>
> *Churchill Falls, supra* at 32-33 (D.L.R.), 333 (S.C.R.).

455. The implication of this holding on the part of the Supreme Court of Canada is that, as in the case at bar, when provincial legislation is challenged on the basis that it adversely affects a range of extra-provincial rights, *each right (or set of rights) must be examined separately*. In other words, in respect of each right or set of rights the question must be asked whether or not the legislation in question is aimed *at those particular rights.* If it cannot be said that the legislation

is aimed at those particular rights, the effect on those rights must be held to be of an incidental nature and, hence, irrelevant to the characterization of the legislation.

456. Putting the matter somewhat differently, the challenger in such circumstances cannot lump together a series of qualitatively different extra-provincial rights that are or might be adversely affected by the legislation and ask the court to deal with all of those rights cumulatively. That, in effect, is what the Manufacturers are attempting to do in this case.

457. The implausibility of the attempt by the Manufacturers to have the *Act* characterized in terms of its alleged extra-provincial effects becomes even more apparent if each of the extra-provincial rights that the *Act* is said to affect adversely is examined separately. On no account, for example, could it reasonably be said that the "dominant characteristic" of the *Act* is its effect on the rights of shareholders in the Manufacturers (federally-incorporated or otherwise) that have sold or are selling their products in British Columbia. Nor could it reasonably be said that the "dominant characteristic" of the *Act* is its effect on rights arising under a contract relating to the acquisition of part of a tobacco related business outside the Province. That is also true with respect to any of the other specific kinds of extra-provincial rights said to be at risk of being adversely affected by the *Act*.

458. Fifth, it is apparent when reading the Manufacturers' Argument that the number of extra-provincial effects they complain of is in fact less than the number of headings under which they complain of them. Some of those effects, in other words, appear under more than one heading – each time wearing a different guise. This is particularly true insofar as the *Act's* potential impact on the principle of limited liability is concerned.

459. Sixth, some of the extra-provincial effects of which the Manufacturers complain – for example, effects on extra-provincial contract rights - are of such a nature that their import for constitutional purposes cannot be determined without evidence. In the Attorney General's submission, in cases like this, where the challenger is relying on the alleged effect of the impugned legislation in support of its constitutional challenge (as the Manufacturers do

throughout their argument on extraterritoriality), it is incumbent upon the challenger to adduce evidence in support of its position. See *C.I.G.O.L.,* and *Kruger v. The Queen,* both *supra*.

460. In this case, there is no "clear and unmistakable evidence" relating to the impact of the *Act* on any of the extra-provincial rights identified, as required by Dickson J. in *C.I.G.O.L., supra*. Instead the challenge is based on “conjecture [and] speculation” as to the *Act's* effect on such rights. In *Re Alberta Legislation,* the Privy Council examined evidence regarding the impact on banks of the tax which Alberta proposed and characterized the statute as one in relation to banking rather than taxation: *A.-G. Canada v. A.-G. Alberta* [1939] A.C. 117 (P.C.).

461. In *Texada Mines v. A.G.B.C.,* [1960] S.C.R. 713 the Supreme Court of Canada examined the evidence regarding the effect of a provincial statute imposing a tax on iron ore, and held that the tax was so heavy as to make it uneconomic to sell the ore outside the province, so the court held the statute as one in relation to interprovincial trade under s. 91(2) rather than direct taxation within the province under s. 92(2).

> See also *Central Canada Potash Co. v. Government of Saskatchewan,* [1979] 1 S.C.R. 42.

462. These cases illustrate the extent to which the Manufacturers have altogether failed to make out a case of colourability.

463. These considerations, particularly when taken together, are sufficient in the Attorney General’s submission to dispose of the arguments advanced by the Manufacturers in support of characterizing the *Act* in terms of its extra-provincial affects. However, for the sake of thoroughness, the Attorney General wishes to respond to a number of specific points made by the Manufacturers in support of this argument.

464. The Manufacturers claim that the "Group" concept is central to the *Act* (paragraph 158). The Attorney General concedes that this concept – which is simply another way of labelling the enterprise theory of liability for which the *Act* provides in s. 1 and s. 17.1 – is an important feature of the *Act*. However, for the reasons already given, that concept, which the

Manufacturers proceed to elaborate in terms of the *Act's* extra-provincial effects, cannot be said to be the "dominant characteristic" of the *Act*. The Attorney General also notes in this regard that the "Group" concept is set out in the formal admissions by the Manufacturers regarding the structure of the tobacco industry. It is not a creation of the *Act*.

465. The Manufacturers rely on the fact that the *Statute of Westminster, 1931* did not remove from the provincial legislatures, as it removed from the Parliament of Canada, the prohibition against legislating with extra-territorial effect (paragraph 161). However, this is of no significance given the judgment of the Supreme Court of Canada in *Churchill Falls, supra*, which is the governing authority with respect to the nature and scope of that limitation.

> *Statute of Westminster, 1931 U.K.* (22 and 23 Geo. 5, c. 4, reprinted in R.S.C. 1985, App. II, No. 27).

466. The Attorney General concedes that the *Act* has the potential to affect the principle of limited liability insofar as some of the Manufacturers domiciled outside British Columbia are concerned. However, the Attorney General notes first that the *Act* does not abolish limited liability. It merely expands the range of circumstances under which a court is in a position to pierce the corporate veil. Moreover, it does so in a way that is harmonious with common law principles as well as the academic scholarship relating to enterprise liability which the Attorney General has cited elsewhere in this argument.

467. It is also important to note that the *Act* does not impose liability on all shareholders in such Manufacturers. The primary principle of limited liability is therefore preserved. The *Act* only imposes liability on "related manufacturers" – companies that are themselves involved in the manufacture of cigarettes, and who control a Canadian cigarette manufacturer. Thus, the statute only pierces the veil when there is industrial integration, ownership and control of the immediate tortfeasor by another commercial participant in the industry.

468. In the Attorney General’s submission, the attack on s. 17.1 amounts to an attack on the ability of provincial legislatures to ensure that those who reside within their respective provincial

boundaries, and who are harmed by the tortious conduct of one or more corporate entities functioning within a complex and carefully constructed multinational corporate structure, can obtain effective relief therefor through the processes of civil justice. Were such an attack to succeed, not only would an important element of provincial autonomy in the area of property and civil rights in the province be lost, but the legitimate interests of the victims of such tortious conduct – including in this instance the government and taxpayers of British Columbia – would be sacrificed to the interests of those responsible for it.

469. The Manufacturers claim that the fact that the *Act* authorizes the court to pierce the corporate veil in respect of some of the Manufacturers gives this law a "company law" character. However true that may be, it is of no significance insofar as the characterization of the *Act* is concerned unless that "company law" character or aspect can be said to be the "dominant characteristic" or "pith and substance" of the whole *Act*. Such a claim would be absurd, of course; and it is not a claim that the Manufacturers make.

470. The claim by the Manufacturers that, "no provincial legislature has the constitutional power to create a right of action against foreign or extra-provincial corporations arising from acts or omissions occurring outside British Columbia" (paragraph 170) is, in the Attorney General's submission, more appropriately dealt with under the rubric "choice of law", and that is where the Attorney General proposes to deal with it. However, to the extent that such an argument is based on the contention that it is beyond the power of a provincial legislature to attach legal consequences within its boundaries to conduct that has occurred extra-provincially (which claim appears to be made in paragraph 171), the Attorney General is content to respond to that claim here. The claim is without merit.

471. Provincial legislatures *are* permitted to attach legal consequences within their boundaries to conduct that takes place extra-provincially. In *Workmen's Compensation Board v. C.P.R.*, the Judicial Committee of the Privy Council held that benefits could be paid under a provincial workers' compensation scheme in respect of accidents that had taken place outside the province in question. To the same effect are *Re Legault* and *Re Underwood McLellan.* In both of these

cases it was held that provincial legislation authorizing disciplinary bodies within self-governing professions to deal with conduct occurring in other jurisdictions was valid.

*Workmen's Compensation Board v. C.P.R.,* [1920] A.C. 184 (P.C.).

*Re Legault* (1975), 8 O.R. (2d) 585 (C.A.).

*Re Underwood McLellan* (1979), 103 D.L.R. (3d) 268 (Sask. C.A.).

472. The claim of the Manufacturers in paragraph 198 that the *Act* has the potential to adversely affect extra-provincial property rights is, given the form it takes, essentially the same claim that is made in respect of the *Act's* potential effect on the principle of limited liability. The property rights referred to are shares in the corporations in respect of which, for the limited purposes of the *Act*, the corporate veil would be pierced. The potential adverse effect on those rights, which are said to be extra-territorial, relates to the fact that those who own them may be held liable for acts or omissions committed by the company in which they are held. As such, it is the Attorney General's position that this claim adds nothing to the previous claim made in terms of the principle of limited liability.

473. The Manufacturers claim that the *Act* has the potential adversely to affect extra-provincial contractual rights, specifically those relating to the acquisition of part of a tobacco related business. The claim is that the "*Act* purports to add a term to the contract that certainly would not be agreed to by the parties to such a commercial transaction in the normal course of business" (paragraph 199). In the Attorney General's submission, this claim misconceives the effect that the *Act* would have in such circumstances. In order for the *Act* to have an effect on contractual rights, it would have to have an effect on the rights of the parties to the contract *inter se*. It is clear, however, that the *Act* has no such effect. As between purchaser and vendor, the contract and the rights arising thereunder remain unchanged.

*R. v. Thomas Equipment Ltd.*, [1979] 2 S.C.R. 529, 96 D.L.R. (3d) 1 at13.

474. The Attorney General concedes that the *Act* has the potential to attach "new consequences to the ownership of a trademark" (paragraph 201). However, The Attorney General denies that

the *Act* has any effect, potential or otherwise, on "the rights attached to trademark ownership" (paragraph 202). It also denies that, by attaching a new consequence to trademark ownership, it can be said to be legislating either in relation to trademarks (which it concedes to be within federal jurisdiction under s. 91(2) of the *Constitution Act, 1867),* or in relation to extra-provincial property rights. At worst, the addition of that new consequence can be said to give the *Act,* or at least one minor provision thereof, a "trademark" and "extra-provincial rights" aspect or feature. But it is clear that those aspects are far from being the "dominant characteristics" of the *Act*. They are merely incidental and consequential features of the *Act,* hence irrelevant for constitutional purposes.

475. The claim based on the alleged inability of the British Columbia Legislature to create what is described as an "artificial connection" between foreign and extra-provincial companies in British Columbia adds nothing to the Manufacturers' arguments on extra-territoriality made in the previous paragraphs. The "artificial connection" of which they complain appears to be based on the same concerns that they have expressed in connection with the choice of law and enterprise theory of liability features of the *Act*.

476. The claim that it is beyond provincial legislative jurisdiction to eliminate a limitation defence to a claim for damages or other remedy in respect of acts or omissions occurring outside the province is explicitly premised on the assumption that the cause of action in respect of which the prior limitation period has been abolished was a cause of action to which the law of a jurisdiction other than the province in question would have otherwise applied. The claim therefore stands or falls on the validity of that assumption. Whether that assumption is valid is one of the questions raised by the Manufacturers' choice of law argument, and that question is addressed by the Attorney General in the following section.

477. The Attorney General denies that the right to raise a limitation defence is "a civil right whose *situs* must be either the domicile or residence of its owner". The *situs* of such a right is the jurisdiction whose law is the applicable law for the purposes of the cause of action to which

the limitation defence applies. This part of the manufacturers' argument is therefore also really a choice of law argument.

478. The Manufacturers contend that support for their proffered characterization of the *Act* is found in the fact that five of the defendants in the government's action are federally incorporated companies. The Attorney General denies that this is the case. It is evident from the argument made by the Manufacturers in this regard that the extra-provincial effect complained of in respect of these companies is the potential piercing of the corporate veil, the same effect complained of in respect of all of the defendants. That potential effect is no greater in law in respect of the federally incorporated companies than it is in respect of the other companies that have been impleaded in the government's action. The fact that five of the defendants are federally incorporated companies therefore adds nothing to the Manufacturers' claim in this regard.

479. The Manufacturers invoke in support of this contention the jurisprudence relating to the immunity that federally incorporated companies have on occasion been able to claim from otherwise valid provincial legislation. But that jurisprudence does not support the Manufacturers' argument. The Manufacturers are not claiming immunity from the *Act* or any of its provisions. They are claiming that the *Act* in its entirety is invalid. But that claim could only be sustained if it could be shown that the "dominant characteristic" of the *Act* was an incursion into federal legislative jurisdiction with respect to the incorporation of companies with other than provincial objects. Without denying that the potential piercing of the corporate veil with respect to federally incorporated companies could be said to give the *Act* a "federal company law" aspect, it would be absurd to suggest that it was the "matter" or "pith and substance" of the *Act*.

480. The Attorney General submits further that, even if the jurisprudence relied upon by the Manufacturers were used in an appropriate manner – that is, as providing the basis for a claim for immunity from the *Act's* provisions on the part of the federally incorporated defendants – that jurisprudence would not entitle them to such immunity. The only cases in which federally incorporated companies have been granted immunity from provincial legislation are those in which the effect of applying the provincial legislation to those companies would have been to

deny to them the capacity to function as a viable corporate entity – to carry on business, to raise capital and to sue.

*Morgan v. P.E.I. (A.G.),* [1976] 2 S.C.R. 349, 55 D.L.R. (3d) 527 at 539.

*Canadian Indemnity Co., supra.*

*Churchill Falls, supra.*

481. The federally incorporated defendants would still remain viable corporate entities in British Columbia – that is, entities capable of conducting business, raising capital and suing – even if the relevant provisions of the *Act* are applied to them. They would therefore not qualify for immunity from these provisions under the test laid down in the cases.

482. Of particular importance in this regard is the decision in *Multiple Access Ltd. v. McCutcheon.* One of the issues in that case was whether or not the insider trading provisions of provincial securities legislation could constitutionally be applied to federally incorporated companies. In spite of the fact that when so applied, the provincial legislation would clearly take on a "federal company law" character, since it would impose liability for insider trading on the part of directors and officers of a federally incorporated company, the Supreme Court of Canada was unanimous in holding that the provincial legislation could be so applied.

*Multiple Access Ltd. v. McCutcheon,* [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1.

**(3) Choice of Law**

483. The Manufacturers contend that the *Act* is unconstitutional because it offends the constitutional principles recently established by the Supreme Court of Canada in the *Morguard* and *Tolofson* cases. Their argument in this regard is found in paragraphs 170-187 (under the heading "The Statutory Right of Action") and paragraphs 203-215 (under the heading "Choice of Law").

*Morguard Investments v. DeSavoye, supra.*

*Tolofson v. Jensen, supra.*

484. The Attorney General begins by noting that the procedural provisions found in the *Act* are not vulnerable to challenge on the basis of the constitutional choice of law principles derivable from *Morguard* and *Tolofson*. The law is clear that procedure is governed by the law of the forum, in this case the law of B.C.

*Tolofson v. Jensen, supra*.
Castel, *Canadian Conflict of Laws* (4th) (Toronto: Butterworths, 1997), chapter 6.

485. The Manufacturers contend that the *Act* offends the *Morguard* and *Tolofson* principles not only in relation to the question of which body of substantive law should apply to the government's cause of action, but also in relation to the rights and liabilities of their shareholders and the rights and liabilities of parties to contracts "such as purchase agreements, leases, and other unspecified commercial transactions" (in paragraphs 205-209). It is the position of the Attorney General that those principles have no application in relation to these latter matters. Those principles are limited in their application to the question of which body of substantive law – that of the province in question or that of some other jurisdiction – is to apply to a particular cause of action.

486. The Attorney General notes in this regard that the proper law of a contract is relevant only if a court is dealing with a dispute arising from the contract between the parties to it. It is simply wrong to claim, as the Manufacturers do (in their paragraph 205) that, "the *Act* purports to apply to [such] contracts". The *Act* does no such thing. Such contracts are relevant solely for definitional purposes; they assist in defining what is meant by "related manufacturer" in s. 1.

487. This is confirmed by the decision of the Supreme Court of Canada in *R. v. Thomas Equipment Ltd., supra*, in which the issue was whether an Alberta statute imposing a buy-back obligation on manufacturers of farm equipment could constitutionally be applied to a New Brunswick manufacturer who refused to buy back farm equipment it had sold to an Alberta retailer. Martland J. for the majority said as follows, at p. 13:

> In addition to supporting the grounds of decision of the majority of the Appellate Division, counsel for Thomas also urged that it was necessary to determine the proper law of the contract [of sale and purchase] because, it was argued, the Legislature of Alberta could not affect the rights and obligations of contracting parties upon the discharge of the contract unless the proper law of the contract was the law of Alberta. This submission was not accepted by any of the Judges of the Appellate Division and I agree with them. The present case is not concerned with the contractual rights and obligations of the parties *inter se*. This case arises as a result of the imposition of statutory obligations upon vendors of farm implements who sell such machinery in Alberta. The agreement in question here involved the delivery of farm implements by a vendor to a dealer in Alberta for resale there and, in consequence, Thomas became subject to the duties imposed by the statute irrespective of what might be the proper law of the contract which, apart from the statute, would govern the rights of the parties *inter se*.

488. Similarly, the law of the place of incorporation, the corporate domicile, is applicable only to resolve matters relating to the constitution and internal organization of the corporation. The *Act* cannot be characterized as legislation directed at the internal management or constitutions of corporations even though in imposing liability for health care costs expended in this province, it may have an incidental effect on corporations not domiciled in the province.

489. The Attorney General accepts that, as a result of the decisions in *Morguard* and *Tolofson*, there are now constitutional constraints on the ability of provincial legislatures (and the courts) to create choice of law rules relating to disputes that fall to be adjudicated by the courts of the province in question. The ultimate standard against which such rules are to be measured is that of "order and fairness", which in turn imports a requirement of a real and substantial connection between the cause of action to which the choice of law rule is to be applied and the province in question.

> *Morguard Investments v. DeSavoye, supra.*
>
> *Tolofson v. Jensen, supra.*

490. The Attorney General denies that the *Act* fails to satisfy the order and fairness standard. Its position is that the *Act* more than meets that standard, because the new cause of action that it

creates in the government clearly has a real and substantial connection with the province of British Columbia.

491. The claim by the Manufacturers that the *Act* offends the *Morguard* and *Tolofson* principles is flawed in the following respects:

1) It is based on an erroneous assumption that those principles are to be applied, not to the government's cause of action as a whole, but only to one element thereof, namely the existence of a "tobacco related wrong";
2) Even if those principles were to be applied to that one element, at least in those instances in which the tobacco related wrong is founded on a tort, the *Act* cannot be said to be inconsistent with them;
3) If the application of British Columbia law to some of the tobacco related wrongs would violate those principles, there is nothing in the *Act* that would preclude the application to those wrongs of the law of the appropriate jurisdiction; and
4) Even if that were not possible, the appropriate remedy is not to strike down the *Act* in its entirety, but simply to read it down so that it applies only to those tobacco related wrongs to which the law of British Columbia can properly and constitutionally apply.

492. The Manufacturers' argument in this regard is premised on the assumption that the choice of law question to be answered relates solely to the allegedly tortious conduct on the part of a tobacco manufacturer that forms the basis of a tobacco related wrong for the purposes of the *Act*. In the Attorney General's submission, that assumption is incorrect. It is incorrect because it in turn is based on another faulty assumption, namely, that the government's cause of action is grounded solely in a tobacco related wrong, or, as the Manufacturers tend to put it, tortious conduct. It is not.

493. The new cause of action conferred on the government in s. 13.1 of the *Act* has four distinct elements:

1) A tobacco related wrong committed in relation to a particular type of tobacco product;
2) The offering for sale in British Columbia of that type of product;
3) Tobacco related diseases suffered by British Columbia residents who qualify for provincial health care benefits; and
4) The expenditure by the government of British Columbia of funds to provide those benefits in respect of the treatment of those diseases.

494. While this cause of action clearly bears some resemblance to a traditional tort action, it also differs from such an action in a number of important respects. In fact, it can fairly be described - as the Manufacturers themselves describe it elsewhere in their Argument - as *sui generis*. The most obvious difference is that the underlying duty of care is owed not to the plaintiff but to third parties. Another is the fact that the losses in respect of which the claim is being made have been suffered in only one jurisdiction. Yet another is the fact that those losses have not been suffered by the person to whom the underlying duty of care was owed. However, perhaps the most important difference, at least for present purposes, is that although the definition of a tobacco related wrong includes the word "tort", it is not necessary in order for a tobacco related wrong to have been found to have occurred that the government establish all the elements of a tort. On the contrary, it is sufficient if the government establishes a "breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons who have been exposed or might become exposed to a tobacco product that causes or contributes to disease."

495. The real question, therefore, is not whether the tobacco related wrong that constitutes one of the elements of the government's new cause of action has a real and substantial connection with British Columbia, but whether that new cause of action <u>in its entirety</u> has such a connection with the province.

496. Moreover, in the Attorney General's submission, that question can only be answered in the affirmative. Of the four elements of the cause of action, three are very closely connected to British Columbia. In fact, it can be fairly said that those three are always located in this province.

Regardless of where the tobacco related wrong element can be said to be located, therefore, this cause of action can arguably still be said to satisfy the real and substantial connection test, particularly when account is taken of *Moran v. Pyle*, discussed below.

497. However, even if the appropriate question to ask in those instances in which the government's claim is grounded in tort is whether the tobacco related wrong, independently of the other elements of the government's new cause of action, has a real and substantial connection to British Columbia, the Attorney General submits that the answer is in the affirmative. Tobacco related wrongs may arise from acts or omissions. Formulating a fair and just test for determining the *situs* of wrongs whose components touch multiple jurisdictions is a problem with which courts in Canada and elsewhere have struggled. The leading Canadian authorities are *Moran v. Pyle* and *R. v. Thomas Equipment*, both *supra*. The location of tobacco related wrongs for purposes of the *Act* must be determined in accordance with the tests set out by the Supreme Court of Canada in those cases.

498. The first of these cases, *Moran v. Pyle,* arose because of a challenge to the authority of Saskatchewan courts to take jurisdiction over a tort action brought by a Saskatchewan plaintiff against an *ex juris* defendant. However, the relevant rule for *ex juris* service was formulated in terms that meant that the real question raised by the case was whether or not the alleged tort in question could be said to have been committed within the province of Saskatchewan. That alleged tort was said to have been the manufacture by the defendant, a resident of Ontario who not only did not conduct any business operations in Saskatchewan but who had no presence in that province whatsoever, of a defective lightbulb. Dickson, J., speaking for the Court, held that the alleged tort, assuming it could be established that it had been committed by the defendant, did take place in the province of Saskatchewan.

*Moran v. Pyle, supra.*

499. The principle underlying the holding in *Moran v. Pyle* was expressed by Dickson, J. in the following terms:

> [W]here a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant.
>
> *Moran v. Pyle, supra* at 250-51 (D.L.R.), 409 (S.C.R.).

500. The Attorney General submits that this is the appropriate principle to apply in the circumstances of this case. Moreover, it submits that if that principle is applied, the result is that the tort-based tobacco related wrong – or more accurately, the various different tort-based tobacco wrongs – that constitute one of the four elements of the government's new cause of action have, for choice of law purposes, taken place in British Columbia. That is so because a) like the lightbulb in *Moran v. Pyle,* the cigarettes and other tobacco products manufactured by the Manufacturers have entered and continue to enter "into the normal channels of trade"; and b) like the defendant in *Moran v. Pyle*, the Manufacturers have known or ought to have known, and know or ought to know, both: i) that as a result of [their] carelessness [or other wrongful act or omission] a consumer may well be injured; and ii) that "it is reasonably foreseeable that the product would be used or consumed where the [insured persons] used or consumed it".

> *Moran v. Pyle National* (Canada), *supra*.

501. Not only is the principle in *Moran v. Pyle* applicable to this case, so too is the rationale given for it by Dickson, J. That rationale is as follows, *ibid*:

> [B]y tendering his products in the marketplace directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods.
>
> *Moran v. Pyle, supra* at 251 (D.L.R.), 409 (S.C.R.).

502. Also applicable to this case is the following statement of Dickson J. in *Moran v. Pyle* in respect of the principle or rule he adopted:

> This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. [emphasis added]
>
> *Moran v. Pyle, supra* at 251 (D.L.R.), 409 (S.C.R.).

503. In *R. v. Thomas Equipment, supra*, the Supreme Court of Canada held that a failure by a New Brunswick manufacturer to comply with a request from an Alberta retailer made pursuant to an Alberta statute to buy back unsold farm machinery in Alberta was an omission in Alberta and so subject to the Alberta statute. The manufacturer could have complied in Alberta and so the failure to comply occurred there.

> *R. v. Thomas Equipment, supra* at 12.

504. The decision in *Thomas Equipment* means that, for the purposes of the *Act*, a failure to warn, whether the duty is tortious, equitable or statutory, can be said to be an omission occurring in B.C. because the warning could have been given in this province.

505. The Manufacturers contend that "[n]o provincial legislature has the constitutional power to create a right of action against foreign or extra-provincial corporations arising from acts or omissions occurring outside of British Columbia" (paragraph 170), and cite in support both *Interprovincial Co-operatives Ltd. v. The Queen in the Right of Manitoba* and *Tolofson v. Jensen*. Not only is neither of these cases authority for that proposition, that proposition is erroneous in law.

> *Interprovincial Co-operatives Ltd. v. The Queen in the Right of Manitoba* [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321 ("*I.P.C.O.*").
>
> *Tolofson v. Jensen, supra.*

506. *Tolofson v. Jensen* is authority for the proposition that the applicable law to apply to extra-provincial torts in Canada is the *lex loci delicti*. However, it is *not* authority for the

position that the *locus delicti* is invariably or even in the majority of cases the place where the act or omission complained of took place. In that case, all of the elements of the tort in question had taken place in one particular province; hence, the *locus delicti* was the province in which the activities complained of – negligent driving on the part of the two defendants – had taken place. However, there is nothing in the reasons for judgment of LaForest, J. to suggest that, in cases in which the acts or omissions complained of took place in one province while the losses were suffered (and perhaps other relevant conduct took place) in another province, the *locus delicti* must be the former province. Such a holding would have been in direct contradiction to *Moran v. Pyle* and there is nothing in LaForest J.'s reasons for judgment to suggest that he had any difficulty with the holding in that case.

507. In *Moran v. Pyle*, Dickson J. rejected the "place of acting" theory for determining the *situs* of a tort. In the course of his judgment, he wrote:

> For myself, I have great difficulty in believing that a careless act of manufacture is anything more than a careless act of manufacture. A plaintiff does not sue because somebody has manufactured something carelessly. He sues because he has been hurt. The duty owed is a duty not to injure. As *Pollock on Torts*, 2nd ed., p. 14, has said:
>
> > Our law of torts, with all its irregularities, has for its main purpose nothing else than the development of the precept---*alterum non laedere*—"Thou shalt do no hurt to thy neighbour."
>
> a truth to which Atkin, L.J., gave judicial expression in M'Alister (or Donoghue) v. Stevenson, [1932] A.C. 562. The same thought is found in *Salmond on Torts*, 15th ed. (1969), p. 10: "A tort is a species of civil injury or wrong" and in *Fleming on Torts*, 4th ed. (1971), pp. 1-2: "Tort liability exists primarily to compensate the person injured...".
>
> If the essence of a tort is the injury or wrong, a paramount factor in determining *situs* must be the place of the invasion of one's right to bodily security. In a *Donoghue v. Stevenson* case, can carelessness in manufacture be separated from resulting injury? The jurisdictional act can well be regarded, in an appropriate case, as the infliction of injury and not the fault in manufacture. Pyle is being sued because Moran suffered harm, not because some unidentified employee of Pyle'' was allegedly careless.
>
> *Moran v. Pyle, supra* at 250 (D.L.R.), 404-5 (S.C.R.).

508. Moreover, it is to be noted that in the first of the two passages from his reasons for judgment in *Tolofson, supra*, quoted by the Manufacturers in their Outline of Argument (in

paragraph 211), LaForest, J. speaks of "activities that have taken place *wholly* in another province" (emphasis added), and not simply, as he might have, of "activities that have taken place in another province". Torts of which the various elements can be said to have taken place in different provinces cannot be said to have been based on "activities that have taken place wholly [in a given] province", and hence cannot be said to have been in his contemplation when he drafted the passage in question.

*Tolofson v. Jensen, supra*.

509. This becomes abundantly clear in the following passage, in which La Forest J. specifically distinguished *Tolofson* from other cases as follows:

> From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, *i.e.*, the *lex loci delicti*. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There, territorial considerations may become muted; they may conflict and other considerations may play a determining role. But that is not this case. Though the parties may, before and after the wrong was suffered, have travelled from one province to another, the defining activity that constitutes the wrong took place wholly within the territorial limits of one province, in one case, Quebec, in the other Saskatchewan, and the resulting injury occurred there as well. [Emphasis added]

*Tolofson v. Jensen, supra* at 305 (D.L.R.), 1049-50 (S.C.R.).

510. Reliance on the decision in *I.P.C.O.* is also misplaced. Neither Ritchie, J. nor Pigeon, J. (writing for himself and two other members of the Court) can be said to have based his decision to strike down the Manitoba statute at issue in that case simply on the fact that the acts or omissions in question occurred outside that province's boundaries. Ritchie, J. based his decision on the fact that the statute purported to deny defendants the right to plead in their defence to an action by the Government of Manitoba the fact that they had been given permission by the

appropriate authority in the province in which the acts or omissions did take place to conduct themselves in the manner complained of. The removal of this potential defence was, in his view, an attempt to derogate from an extra-provincial right. As Ritchie J. himself noted, Pigeon, J. based his decision on the fact that, because the acts or omissions involved the polluting of interprovincial waterways, legislative jurisdiction over all aspects of those acts or omissions lay exclusively with the Parliament of Canada.

*I.P.C.O., supra.*

511. In fact, the only members of the Court in *I.P.C.O.* to address squarely and comprehensively the question of where the *locus delicti* was in that case were the three members of the minority, who wrote through Laskin C.J. They held that the *locus delicti* was the province of Manitoba, in which the harm caused by the introduction in another province of pollutants that found their way into that province was suffered. Their reasoning in that regard is similar in important respects to that used by Dickson, J. in *Moran v. Pyle,* which case, it should be noted,

was relied upon by Laskin, C.J. in support of his holding.

*I.P.C.O., supra*.
*Tolofson v. Jensen, supra.*

512. In summary, the Attorney General submits that neither *Tolofson v. Jensen* nor the *I.P.C.O.* case supports the proposition that provincial legislatures lack the power to create causes of action against foreign or extra-provincial defendants based on acts or omissions occurring outside their provincial boundaries. Moreover, given the decisions in *Moran v. Pyle* and *Thomas Equipment*, both *supra*, it is clear that provincial legislatures do have such power, provided only that the cause of action in question can be said to have a real and substantial connection with the province in question. And it is clear that that proviso will be met in the circumstances governed by the principles in *Moran v. Pyle* and *R. v. Thomas Equipment*, which principle, for the reasons given, should be held to govern the *locus delicti* of tobacco related wrongs for the purposes of the *Act*.

*Moran v. Pyle, supra.*

513. If, in spite of the decisions in *Moran v. Pyle* and *Thomas Equipment*, the court were to conclude that not all of the tobacco related wrongs contemplated by the *Act* can be said to have taken place in the province of British Columbia, or otherwise to have the requisite real and substantial connection with this province, the Attorney General notes that there is nothing in the *Act* that requires that the applicable law for the purposes of those wrongs be the law of British Columbia. The *Act* contains no express choice of law rules with respect to tobacco related wrongs. It is therefore possible for the court to apply the law of whatever jurisdiction the court finds to be the *locus delicti* of such tobacco related wrongs.

514. On this reading of the *Act*, it should be noted, the *Act* is immune from challenge on the basis of the constitutionalized choice of law principles articulated in *Morguard* and *Tolofson*.

515. That is because, so interpreted, there is no attempt in the Act to impose the law of British Columbia on tobacco related wrongs that have no real and substantial connection with this province. On the contrary, the only tobacco related wrongs in respect of which the law of British Columbia is to apply are those that satisfy that requirement.

516. In the alternative and finally, if the *Act* is interpreted as having the potential of requiring that the law of British Columbia apply to any tobacco related wrongs that lack the requisite real and substantial connection with this province, the appropriate remedy is not to strike the *Act* down or even to strike down the definition of tobacco related wrong. It is, rather, to hold the *Act* constitutionally inapplicable to such tobacco related wrongs.

*Hunt v. T.&N. p.l.c., supra*.

517. In other words, the appropriate remedy is to read down the *Act* so that it applies only to those tobacco related wrongs that have the requisite real and substantial connection to British Columbia.

Hogg, *supra* at 399-401.

518. In conclusion, the Attorney General submits that the Manufactures' extraterritoriality argument fails. Insofar as it is based on the alleged effect the *Act* will have on extra-provincial rights, it fails because the Manufacturers have failed to establish that such effects constitute the "dominant characteristic" or "pith and substance" of the *Act*. Such effects, assuming they materialize, are merely incidental and consequential to the true "pith and substance" of the *Act*, which is the creation of a new civil cause of action in the government, and the facilitating of actions by individuals, against tobacco manufacturers, as well as the substantive rights and obligations and rules of evidence and procedure relating thereto.

519. Insofar as this argument is based on the choice of law principles established in *Tolofson*, *supra*, it fails because the Manufacturers have failed to establish that the *Act* is inconsistent with those principles. Moreover, even if the *Act* could be said to be inconsistent with those principles,

it could only be plausibly held to be so in respect of some but not all of the tobacco related wrongs upon which an action by the government might be based. Hence, the appropriate remedy for the Manufacturers to be seeking is not a declaration that the *Act* is unconstitutional, but a declaration that the *Act* should be read down to the extent necessary to avoid conflict between it and those principles.

### (4) Globalization

520. The *Act* acknowledges the globalization of industry that is the hallmark of commerce today (see *Amchem Products v. B.C. (W.C.B.*) (1993), 77 B.C.L.R. (2d) 62 (S.C.C.), at 72, per Sopinka J.), and has adopted a view of liability designed to make the tobacco industry accountable for damages or health care costs awarded in suits by individual smokers or by the government.

521. La Forest J. said in *Jensen v. Tolofson* that earlier conflicts rules were conceived in "anarchic" times. In *Hunt v. T & N p.l.c.*, he referred to the fact that "numerous transactions and interactions spill over the borders defining legal communities in our decentralized world legal order", so there must be a "workable method of co-ordinating this diversity".

> *Hunt v. T &N plc, supra* at 20(D.L.R.), 295 (S.C.R.).

522. In recent years, the Supreme Court has shown itself willing to interpret Canada's constitution to fit the international reality. Consider this passage from *Thomson Newspapers Ltd. v. Canada*, per La Forest J.

> ... The courts in Canada, no less than those in the United States, cannot remain oblivious to the concrete social, political and economic realities within which our system of constitutional rights and guarantees must operate. ... Effective regulation of the many private and democratically unaccountable institutions which are capable of exercising virtually coercive powers within their sphere of operations is also crucially important. ... I add that as the Canadian economy becomes increasingly integrated with the American and, indeed, the global economy, we should be wary of giving an interpretation to the Constitution that

> shackles the government's capacity to cope with problems that other countries ... are quite able to deal with in ... planning for freedom. [emphasis added]
>
> *Thomson Newspapers Ltd. v. Canada*, [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161 at 241.

523. In *Amchem Products v. B.C. (W.C.B.), supra,* a *forum conveniens* case, Sopinka, J. said, at p. 72, under the heading "Choosing the Forum in Modern Litigation":

> This Court has not considered this question since its decision in *Antares Shipping Corp. v. "Capricorn" (The),* [1977] 2 S.C.R. 422. Meanwhile, the business of litigation, like commerce itself, has become increasingly international. With the increase of free trade and the rapid growth of multi-national corporations it has become more difficult to identify one clearly appropriate forum for this type of litigation. The defendant may not be identified with only one jurisdiction. Moreover, there are frequently multiple defendants carrying on business in a number of jurisdictions and distributing their products or services world wide. As well, the plaintiffs may be a large class residing in different jurisdictions. It is often difficult to pinpoint the place where the transaction giving rise to the action took place. Frequently, there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives. In some jurisdictions, novel principles requiring joinder of all who have participated in a field of commercial activity have been developed for determining how liability should be apportioned among defendants. In this climate, courts have had to become more tolerant of the systems of other countries. The parochial attitude exemplified by *Bushby v. Munday* (1821), 5 Madd. 297, 56 E.R. 908, at p. 308 and p. 913, that "the substantial ends of justice would require that this Court should pursue its own better means of determining both the law and the fact of the case" is no longer appropriate. [emphasis added]
>
> *Amchem, supra* at 72.

524. The legislation at bar is intended to deal with a local mischief, it establishes a legal regime relating to lawsuits for *Moran v. Pyle* and other civil wrongs, and seeks to provide adequate remedies in a global economy.

## VII. THE ISSUE OF REAL AND SUBSTANTIAL CONNECTION

525. The Manufacturers have failed to raise any true constitutional issue. Much of their argument in support of their claim that the *Act* is extraterritorial in its effects is directed to the issue of whether there is a "real and substantial connection" between the government's action brought in British Columbia and the *ex juris* defendants. This is an issue they can argue on the motion by foreign defendants to set aside service *ex juris*.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

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**Counsel for the Attorney General of British Columbia**
**and Her Majesty the Queen in Right of British Columbia.**

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