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OUR FILE NO. **B-2593-1**

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August 19, 1999

VIA COURIER

PERSONAL & CONFIDENTIAL

British American Tobacco
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I08

Attention: Philip Scourfield

Dear Sirs/Mesdames:

Re: British Columbia Government Litigation

We now enclose for your information and review a copy of the full argument delivered by Imasco in respect of the constitutional hearing scheduled for October. Imasco's argument is in substance identical to the argument delivered by the other Canadian Manufacturers.

Yours very truly,

SUGDEN, MCFEE & ROOS

PER: [Signature]

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Enclosure

Received

23 AUG 1998

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

IMPERIAL TOBACCO, a division of IMASCO LIMITED

PLAINTIFF

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

DEFENDANT

OUTLINE OF ARGUMENT

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LIST OF AUTHORITIES

INTRODUCTION

General

1. The plaintiffs (the "Manufacturers") in the three actions to be tried, together with the *ex juris* defendants to the government's action, all say the *Tobacco Damages and Health Care Costs Recovery Act* (the "Act") is inconsistent with the *Constitution of Canada* and must therefore be declared of no force and effect.

2. The Act received royal assent on July 28, 1997, and it provided that it was to be brought into force by regulation. An amending statute received royal assent on July 30, 1998, and the Act, as amended, with the exception of sections 2-12, was brought into force by regulation on November 12, 1998¹. These actions were commenced on the same day.

3. The Manufacturers' argument will be divided into four parts. In order to minimize repetition among counsel for the three Manufacturers, counsel for RJR-Macdonald will be principally responsible for developing parts 1 and 4 of the argument, counsel for Imperial will be developing part 2 of the argument, and part 3 of the argument will be developed by counsel for Rothmans.

¹Subsequently, on July 8, 1999, sections 2-12 were repealed by section 61 of the *Miscellaneous Statutes Amendment Act* (No. 3), 1999, and by sections 62-65 thereof, consequential amendments are made to sections 13, 14(b), 19 and 20.

Part 1: The proper construction of the Act

4. It is evident from the pleadings in the government action that there are three ways relevant to the constitutional issues in which the manufacturers' construction of the Act is different from the construction given the Act by the government.

5. The manufacturers say that, properly construed, the Act:

(i) gives the government a new cause of action for health care costs (resulting from a wrong to individual persons) that is based on a previously existing wrong at common law which is compensatory and subject to all the prerequisites to liability at common law;

(ii) has no retroactive or retrospective operation prior to the date of assent: July 28, 1997, and

(iii) does not revive liability for any wrong that had ceased to be capable of being asserted due to the expiry of a limitation period prior to the date of assent.

6. As appears from the Reply in the government action, it construes the Act as:

- (i) creating 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 and where therefore none of the prerequisites to liability for a wrong at common law apply;
- (ii) having retroactive operation for a period prior to the date of assent that is without any stated beginning, and
- (iii) rendering all limitation defences immaterial because the wrong which is the basis of the new cause of action had no previous existence to which a statutory bar could have applied.

Part 2: The Act is an unconstitutional interference with judicial independence

7. There is both a narrow and a broad basis to this constitutional challenge. The narrow basis is one which arises on both the Manufacturers' and the government's construction of the Act. The broad basis includes additional considerations that arise on the government's construction.

The narrow basis

8. It will be submitted that under both constructions the Act imposes a legislatively determined outcome on the judge. This

is achieved by depriving the court of the opportunity to receive tested material evidence and through the use of a series of presumptions, the consequences of which cannot be rebutted in a fair or proper manner. The effect is that the ability of the judge independently to assess material evidence and discharge the court's responsibility to find those facts to which the law is to be applied has been vitiated. Vital aspects of the judicial process for deciding the outcome of an action are contaminated by the legislation.

9. On this basis, the Act strikes at the heart of the judicial function. The judicial function is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties. Underlying this function is a judicial process by which facts are determined. The process by which the court finds facts is the foundation on which the law is applied, it is inherent in the very nature of a court as a court of law, and is a core function or element of the judicial process. Most importantly, the ability of the legislature to interfere with this core judicial function is constrained by the *Constitution*.

The broad basis

10. The additional considerations that arise on the government's construction are:

- (i) the Act creates a new wrong;

- (ii) it is penal in character;
- (iii) no proof of damage is required;
- (iv) no affirmative defences are material; and
- (v) because it has both retroactive and retrospective operation throughout a beginningless past acts are to be punished which were subject to no penalties at the time they were done.

On this basis the Act evinces a legislative plan to enlist the judiciary to ensure a finding of liability in favour of the government.

11. This constitutional challenge is about those attributes of judicial process that are at the heart of judicial independence. Judges are not the handmaidens of governmental policy. They have their own constitutional responsibilities to discharge, and must be left free from legislative interference to do so. Without an independent judiciary, the constitution and all the rights guaranteed by the Charter are worthless.

Part 3: The Act purports to have extra-territorial effect contrary to the limits of provincial legislative competence under the Constitution Act

12. The dominant characteristic or pith and substance of the Act is demonstrated by its purpose and effect. The purpose of the

Act is the recovery by the Province of tobacco-related health care expenditures (defined as the "cost of health care benefits") from the national and international tobacco industry.

13. This purpose is achieved by the interlocking provisions of sections 1, 13, 13.1, 15 and 17.1. These sections show that a "group" concept is a central mechanism of the Act. Under the Act the conduct of any member of the group in any country with consequences in that country or any other country can result in the liability of all group members provided only that a member of the group has offered for sale in British Columbia the type of tobacco product in question.

14. The British Columbia government has commenced an action against twenty foreign, or extra-provincially federally incorporated corporations, as well as three trade organizations. They are alleged to fall into four groups. None of the Manufacturers were incorporated under the laws of British Columbia, and the groups are described as "four world-wide multi-national tobacco enterprises".

15. It will be submitted:

(i) The Act Abolishes Corporate Personality for all Manufacturers

That sections 1, 13, 13.1, 17 and 17.1, to the extent that they purport to govern or affect the status, structure and

corporate personality of foreign corporations and purport to affect adversely the rights of their shareholders are extra-territorial in purpose and effect and are beyond the constitutional powers of the B.C. Legislature, and are ultra vires.

(ii) The Statutory Right of Action

The British Columbia legislature does not have the power to enact legislation whose purpose and effect is to create a right of action, for tortious conduct, against foreign or extra-provincial corporations, thereby imposing liability for acts or omissions outside the province.

(iii) Impairment of Extra-Provincial Contractual and Property Rights

The B.C. Legislature does not have the power to enact legislation whose purpose and effect is to affect adversely contractual and property rights outside the province.

(iv) Choice of Law

The B.C. Legislature does not have the power to override laws of Canada, of other provinces and of other countries governing torts, corporate status, shareholders' rights and liabilities, or contractual rights situate, occurring or domiciled in those other provinces or countries.

(v) The Artificial Connection with B.C.

The British Columbia Legislature does not have the power to enact an artificial connection between foreign and extra-provincial corporations and British Columbia in derogation of the extra-territorial civil rights of those corporations.

(vi) Limitations

The British Columbia Legislature does not have the constitutional power to impose the limitation provisions of Sections 15 and 20(2) on extra-territorial tobacco related wrongs.

(vii) Federally Incorporated Defendants

The provisions of Sections 1, 13, 13.1, 17 and 17.1, to the extent that they override the *Canada Business Corporations Act* by governing the status, structure and corporate personality of federally incorporated corporations and purport to affect the rights of their shareholders, are not only extra-territorial in their effect but trench upon an exclusive jurisdiction of the Parliament of Canada and are ultra vires.

Part 4: If the action authorized by the Act in section 13 is to be construed as based on a new wrong that gives rise to penal liability it is inconsistent with the constitution, and of no force and effect to the extent it is to be construed as authorizing the

recovery of such a penalty for acts committed before the Act making such acts a wrong that gave rise to penal liability came into force

16. Section 11 of the Constitution Act, 1982, reads in part, as follows:

"Proceedings in criminal and penal matters. - Any person charged with an offence has the right ...

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations; ...

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment."

17. It will be submitted that section 11 is the express part of a positive rule which is in part express and in part implied prohibiting the imposition of any penalty on account of any act or omission, unless it attracted such a penalty under the law at the time of the act or omission. This positive rule applies regardless of whether the penalty for the wrong is recoverable in criminal or civil proceedings.

18. It can hardly be disputed that the prohibitions in section 11 pre-existed the Charter as part of the implied Constitution of Canada. It will be submitted that the section 11 prohibition was and is merely part of the pre-Charter rule that

pertained to all retroactive penalties regardless of whether they are to be imposed in criminal or civil proceedings. This is so because it is the penal feature involving the imposition of a penalty or punishment that renders retroactivity repugnant to the rule of law guaranteed by the Constitution both before as well as after the Constitution Act, 1982.

19. In the result it will be submitted that if, as the government contends, the section 13 action is to be construed as having a penal character and not as being one for compensation then, to the extent the Act can be construed as purporting to make it retroactive, it is unconstitutional and of no force and effect because it is contrary to a positive rule of constitutional law, both express and implied, which prohibits the retroactive or retrospective imposition of penalties (whether provided for in civil or criminal proceedings) for acts which attracted no such penalty under the law at the time they were done.

20. There are in addition, rules of law which the manufacturers reserve the right to argue in a higher Court constitute rules of law capable of invalidating legislation. These rules are:

- (i) equal application of law as between subjects; and
- (ii) equal application of law as between subject and the Crown.

PART 1: THE PROPER CONSTRUCTION OF THE ACT

I. The manufacturers say that, properly construed, the Act gives the government a new cause of action for health care costs (resulting from a wrong to individual persons) that is based on a previously existing wrong at common law which is compensatory and subject to all the prerequisites to liability that arise at common law

21. Section 13 gives the government a cause of action against a manufacturer to recover health care costs resulting from a tobacco related wrong. There is, therefore, no question that the court is given jurisdiction to entertain such an action for the cost of health care benefits provided that they result from a tobacco related wrong to individual persons.

See section 13(1).

22. Therefore, a prerequisite to the maintenance of the action is proof that the health care costs "result from a tobacco related wrong". The definition of tobacco related wrong shows it consists of wrongs not to the government but the individual persons.

See section 1(1): definition of "tobacco related wrong".

23. Since there is, at law, no actionable wrong to anyone from a breach of statutory duty *per se*, it follows that the wrong described by this definition must consist of proof of the manufacturer's liability at common law to persons described in this definition (these persons do not include the government). The wrong described in this definition calls for proof of a duty and its breach.

See *The Queen v. Saskatchewan Wheat Pool*,
[1983] 1 S.C.R. 205.

24. In the result, there is no liability for such a wrong at common law where there is an affirmative defence such as voluntary assumption of risk, contributory negligence, *ex turpi*, laches, acquiescence, estoppel and other equitable defences and statutory bars.

25. In the case where the government can maintain a section 13 action by proving that costs of health care benefits have been incurred or will be incurred by the government resulting from a tobacco related wrong, the question that arises is what body of law is the basis for the cause of action given the government by this section?

See *MacNamara Construction v. The Queen*,
[1977] 2 S.C.R. 654; *Quebec North Shore Paper
v. Canadian Pacific*, [1977] 2 S.C.R. 1050;
Tropwood v. Sevaco et al., [1979] 2 S.C.R.
157.

26. The cause of action created by section 13 is one which permits A to sue B for costs resulting from B's wrong to C in an action brought by A against B in A's own right, and not on the basis of a claim subrogated to C's claim against B and brought in C's shoes. (See section 13(2)). It may be said that the common law can afford a basis for such an action provided, and provided only, that the tobacco related wrong that resulted in the costs of health care benefits visited the government with damage. At common law a legal basis for the manufacturers' liability to the government requires at least proof of damage to the government. Without damage to the government, there can be no liability. This submission rests on the trite proposition that the policy of the common law is that there can be no liability for negligence unless there is damage to the Complainant caused by a breach of duty.

See *Overseas Tankship (UK) Ltd. v. The Wagon Mound*, [1961] A.C. 388.
See *Canadian Tort Law*, Allen M. Linden (5th ed.) 94 and 95.
See *Law of Torts*, John G. Fleming (7th ed.) 171 and 172.

27. Apart from the common law of negligence, there is no body of law that can be said to nourish the cause of action for health care costs created by section 13(1). This is so unless it can be said that the statute itself makes acts wrongs to the government merely because they result in health care costs. As submitted below, there is simply no sufficient language to create such a

wrong that is both new to the law and being noncompensatory, is penal in character.

28. In the result, it is the Manufacturers' submission that on the proper construction of the Act the government cannot maintain a section 13 action without at least proof of damage to itself and without meeting all other prerequisites to liability that arise at common law. These include defences such as the voluntary assumption of the risk by the government, the government's contributory negligence, the government's own wrongful conduct, the government's laches, acquiescence, estoppel and other disqualifying conduct in equity, the government's failure to mitigate, and the availability of statutory bars to a claim in respect of a wrong to the government.

29. It is well established that the legislature is presumed not to depart from the general system of the law without expressing its intention so to do with "irresistible clearness", failing which the ordinary law remains undisturbed. There is a clear presumption against the implicit alteration of the law.

See *Goodyear Tyre Company v. T. Eaton Company*, [1956] S.C.R. 610, per Fauteaux C.J.C. at page 614; *R v. T(V)*, [1992] 1 S.C.R. 749 per L'Heureux-Dubé, J. at page 763.

30. One example of the presumption against unclear language in the ordinary law is the presumption in favour of a strict

construction of provisions in statutes said to give them penal consequences. The phrase "penal provision" is used to cover both provisions creating a crime and those providing for the recovery of a penalty in civil proceedings. In doubtful cases, where there is a reasonable interpretation which will avoid the penalty, the Court must adopt that construction. That is a settled rule for the construction of provisions said to have penal consequences.

See *Statutory Interpretation*, Sir Rupert Cross
(London: Butterworths, 1976) at page 149.
Regina v. Haggins (1953), 107 C.C.C. 225
Regina v. Johnson (1952), C.C.C. 57 at 61
In Re H.P.C. Productions Limited (1962) 1 Chancery 466 at
485

31. In the Manufacturers' submission there is no language in the Act, and certainly no language with the necessary "irresistible clearness", supporting a construction that the cause of action in section 13 can be maintained without meeting all the common law prerequisites to liability, including proof of damage. In order to escape the requirement to meet these prerequisites, the government has to contend that on a proper construction of the Act the new cause of action authorised by section 13(1) is based on a new penal wrong having retroactive operation and which is created by the Act in the place of the liability that arises under the ordinary common law.

32. This would be an extraordinarily draconian measure to which, it is submitted, no court would give effect without words of "irresistible clearness" that put beyond any reasonable doubt that

the legislature had intended such an egregious invasion of the rule of law. For these reasons it is the Manufacturers' submission that such a construction is not supported by any language in the Act, and is certainly not supported to the extent necessary to rebut the presumption against implicit alteration of the common law and the implicit imposition of retroactive penal liability.

Driedger on the Construction of Acts, R. Sullivan, (3d ed.) 322 - 326.

33. There is no doubt that there is language in the Act which purports to bestow fresh legal rights on the government in relation to the judicial process involved in the assessment of damages in the form of the costs of health care benefits, and apportioning that liability among manufacturers. However, all of these provisions (section 13(5), 13(6) and 13.1) only arise "in an action under" section 13(1). In the result these are provisions which arise only and are applicable only where it has been established that the court has jurisdiction to entertain an action under section 13(1) and there has been a wrong at common law giving rise to liability in favour of the government that supports the exercise of that jurisdiction. These three provisions are certainly not ones that enact a new, retroactive penal wrong. As already submitted, there is no language at all, anywhere in the Act, sufficient to support that.

See sections 13(5), 13(6) and 13.1.

34. Finally, the fact is the Act contains a significant provision (section 15(1)(a)) which would be superfluous if the underlying wrong supporting the section 13(1) jurisdiction were a wrong attracting penal consequence that had no previous existence.

Beal's Cardinal Rules of Legal Interpretation, A.E. Randall, (3d ed.) 309 - 310
The Queen v. The Bishop of Oxford (1879) 48 Q.B.L.J. 609 at 620
Barrett v. Winnipeg, [1891] 19 S.C.R. 374
R. v. Green, [1990] 100 N.S.R. (2d) 82 (C.A.), affirmed, [1992] 1 S.C.R. 614

II. Section 20 does not make any provision of the Act brought into force by regulation on November 12, 1998 (the date of commencement) retroactive prior to July 28, 1997, the date of royal assent to the Act (the date of assent)

35. This position rests on the submission that the only language in the Act that expressly or by necessary implication requires the Act to be construed as having retroactive operation is found in section 20, and that section contains nothing that calls for any such operation earlier than the date of assent.

36. This provision is supported by the fact section 20 is a commencement provision. It is a section which provides that the Act, or a portion of it, is to come into force on a day that is some indefinite length of time later than the day of assent.

37. At the same time section 3(3) of the Interpretation Act provides that such a commencement provision and the title of the statute are deemed to have come into force on the date of assent.

38. There is no language in the Act which expressly or by necessary implication provides for a period of retroactive operation that begins any earlier than the date of assent. To the contrary, the only implication as to the period of retroactive operation is the period between the date of assent and the date of commencement. That implication arises from the fact that the only express reference to retroactivity is found in the commencement section.

39. At bar, the date of assent to the *Tobacco Damages Recovery Amendment Act* was July 30, 1998. This act amended, *inter alia*, the title and the commencement section of the Act. The commencement section was amended by adding the retroactive provision as subsection (2) to section 20.

40. By virtue of section 3(3) of the Interpretation Act, the commencement section, as amended, became law by royal assent on July 30, 1998. Thereafter nearly four months passed before the additional portions of the Act, as amended, were brought into force by regulation on November 12, 1998.

41. Therefore at the time of the addition of the retroactive provision to the commencement section, over a year had passed since the original Act had received royal assent and the Act as amended continued to provide that it was to be brought into force by regulation. In the result, at the time of the enactment of the retroactivity provision, the legislature would have known that one year had already passed and an indefinite period of additional time was yet to pass before the Act, or portions of it, would be brought into force.

42. These, then, are the relevant circumstances surrounding the enactment of the retroactive provision. These circumstances support the implication that the intent of the legislature was to do nothing more than to provide for retroactivity during the period between assent and commencement.

43. There is nothing to support a construction that provides for retroactivity for an indefinite period of time prior to the date of assent. Certainly there is no "necessary" implication that the reference to a "tobacco related wrong, whenever it occurred" in the commencement section means one occurring before the date of assent. The only construction that is consistent with the presumption against alterations in the common law and the context in which these words are found (i.e. a commencement section) is that "whenever it occurred" means "whenever it occurred since the date of assent".

44. Similarly, the reference in the Act itself to "past" health costs is consistent with the retroactive operation back to but not earlier than the date of assent.

45. It is submitted that the Manufacturers' construction of the retroactive provision is one that is required by the well established presumption against retroactive operations of statutes. This presumption has been repeatedly laid down by the authorities, e.g. *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271, (1975), 66 D.L.R. (3d) 449 at 460 per Dickson J.:

The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the act.

Angus v. Sun Alliance Insurance Company, [1988] 2 S.C.R. 256 per La Forest J.:

The law is leery of retrospective legislation to begin with; the legislature will not lightly be presumed to have intended a provision to have retroactive effect when the provision substantially affects the vested rights of a party.

46. It is submitted that the language found in the commencement section is hopelessly insufficient to give the government the right to recover damages, let alone a penalty, based on the Manufacturers' conduct at any time in the distant and,

indeed, infinite past prior to the date of assent to the Act. Such a construction would be absurd. As a matter of law the court is not to give effect to an absurdity when a sensible construction that gives effect to all the words of the Act is at hand.

III. Section 15 of the Act does not revive liability for wrongs that have become statute barred prior to the date of assent to the Act

47. This position rests on the simple submission that there is no language whatsoever in section 15 of the Act or elsewhere that manifests an intention to revive to full life and being rights of action that had ceased to be capable of being asserted at all prior to the date of assent: July 28, 1997.²

48. It is submitted that the decision of the Supreme Court of Canada in *Martin v. Perrie*, [1986] 1 S.C.R. 41, is decisive authority on the point. In it, Mr. Justice Chouinard, delivering the judgment of the court, adopted the dissenting reasons of Thorson JA in the court below who said:

... if the legislature had intended to annul previously existing and accrued limitation defences and to revive to full life and being for an indefinite future time rights of action

²But for the retroactive provision that made the two year extension of limitations in section 15(1) retroactive to the date assent, this date would be the date of commencement: November 12, 1998.

that had ceased to be capable of being asserted at all under the law as it was before 1975 the section would surely have been worded in such a way as to make manifest that intention.

49. In arriving at their decision the Court concluded that an accrued right to plead a time bar which is acquired after the expiry of a limitation period is in every sense a vested right, even though it arises under an act that is procedural. It held it is a right which is not to be taken away by conferring on a statute a retrospective operation -- unless such a construction is unavoidable.

50. The Court also referred with approval to the judgment of Chief Justice Duff in *Spoooner Oils Limited v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629 at 638:

A legislative enactment is not to be read as prejudicially affecting accrued rights or, "an existing status" unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.

51. At bar, the fact that the legislature has failed to manifest any such intention is well illustrated by the language of

subsection (2) of section 15. In this subsection the legislature does evince an intention to revive an action which had been dismissed by a court prior to the date of commencement of the section where the court had held it extinguished by the *Limitation Act*.

52. While there is nothing in subsection (2) of section 20 to indicate it is applicable to a dismissal on the ground of an expiry of a limitation period prior to the date of assent, it nevertheless shows the language which the legislature employed when its intention was to revive a cause of action extinguished by a court after the date of assent.

53. In summary, there is nothing in section 15, and in subsection (1) in particular, to support a construction that the section does anything other than extend for two years after the date of commencement of the section any limitation periods that had not expired by the date of assent.

PART 2: UNCONSTITUTIONALITY RE THE INDEPENDENCE OF THE JUDICIARY

INTRODUCTION

54. In this part of the argument, it is submitted that the Act is unconstitutional because it interferes with the independence of the judiciary, a principle established by, *inter alia*, s. 96 of the Constitution Act, 1867.

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c.3.

55. The independence of the judiciary is a fundamental, indeed foundational, principle of the Canadian constitution. Legislation which interferes with the independence of the judiciary has been held by the Supreme Court of Canada to be unconstitutional. The judicature sections of the Constitution protect the independence of the judiciary by guaranteeing the institutional conditions necessary to ensure that courts and judges can fulfil their responsibilities free from improper interference. But those sections also protect the courts and judges from legislative interference in their independent exercise of core judicial functions. It is this aspect of judicial independence that is primarily in issue in this case.

56. The Act creates new legal rights which permit the government to recover health care costs alleged to result from

tobacco related wrongs (as those terms are defined by the statute). The Act facilitates a specific action directed against particular targeted defendants. The government has started an action pursuant to the Act. The Act alters the substantive law for this and only this proceeding. If the interpretation of the Act exemplified in the government's Reply is correct, the changes to the substantive law are draconian. In addition, given any interpretation, the Act changes the procedural and evidentiary rules by which both discovery and trial are conducted. Taken together, the Act reflects a legislative plan, *ex post facto*, to secure a determination of liability that penalizes specific targeted defendants. The Act's true nature is revealed by its impact on the judicial process in specific proceedings. It is a deliberate and grave incursion into the judicial function. It effectively strips the judge of normal judicial powers involved in adjudicating a dispute. It manipulates the judicial process in a most fundamental way.

57. It will be submitted that the Act has been specifically crafted to impose legislatively determined outcomes on the judge. This is achieved by depriving the court of the opportunity of receiving material evidence and through the use of a series of presumptions, the consequences of which cannot be rebutted in a fair or proper manner. The effect is that the ability of the judge independently to assess material evidence and discharge the court's responsibility to find those facts to which the law is to be

applied is vitiated. Vital aspects of the judicial process for making judicial findings and determinations are contaminated by the Act.

58. The Act does not interfere with the independent function of a judge in a merely peripheral or unessential way. It also does not simply modify the general rules governing the admissibility of evidence or the onus of proof. The Act strikes at the heart of the judicial function. The judicial function is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties. Underlying this function is a judicial process by which facts are determined to which the law is applied. The process by which the court finds facts as the foundation on which the law is applied is inherent in the very nature of a court as a court of law and is a core function or element of the judicial process. Most importantly, the ability of the legislature to interfere with this core judicial function is constrained by the Constitution.

59. The Act imposes legislated findings of fact on the judge which are obvious fictions. In particular, the Act compels the judge to conclude, on proof of breach of a duty, that all subsequent exposure to tobacco products is a result of that breach. The Act then fundamentally limits the rights of the Manufacturers to develop the evidence necessarily relevant to rebut the Act's legislated fictions. The court is then deprived of evidence

relevant to determine the truth, that is to say, to determine the true extent to which the proven breach of duty did cause exposure. In those circumstances, the court is then directed and compelled by the legislation to accept fictitious conclusions relating to the extent to which a breach has caused exposure. Thus in prohibiting proper rebuttal of the presumed fact, the legislature prevents a proper defence from being made, compels the court to treat what is known to be a fiction as a fact and impedes the ability of the judge to apply the law to adjudicate liability. In this way, the legislature radically interferes with the essential functions of the judge.

60. On the Manufacturers' interpretation of the Act, affirmative defences to the government's claim to recover medical costs alleged to arise from smoking remain "on foot". These defences are based on both individual and governmental conduct. The government's reply to the Manufacturers' Statements of Defence discloses an interpretation of the Act in which those defences are immaterial. The Act is unconstitutional on either interpretation. On the Manufacturers' interpretation the Act interferes with the judicial process. On the government's interpretation, the Act as a whole (including changes to the substantive law) evinces a legislative plan to use the judge and the judicial process to obtain a monetary judgment in favour of the government itself.

61. The argument is developed in the following way. In the first part the nature and effect of the Act is analyzed. The focus is on identifying those aspects of the Act that encroach on judicial independence. In the second part the principles underlying the constitutional protection of judicial independence are articulated. The third part addresses specifically the practical effect of the Act on the judicial process involved in the proceeding under the Act. The argument will therefore assert the following propositions:

- the principle of judicial independence is constitutionally protected;
- legislative interference with judicial independence is unconstitutional;
- the preservation of judicial independence requires the protection of the judicial process and the core judicial function;
- the Act improperly interferes with the judicial process and hence with judicial independence.

THE TOBACCO DAMAGES AND HEALTH CARE COSTS RECOVERY ACT

62. The Act creates fresh legal rights in favour of the government that did not exist before. The Act refers to a "direct and distinct action" against tobacco manufacturers to "recover the cost of health care benefits that have been incurred, or will be incurred, by the government resulting from a tobacco related wrong" (s.13(1)). In its original form the Act also gave individuals a right, indeed an obligation, to recover the cost of health care

benefits in actions brought by them as well as a right to the government to recover health care benefits in respect of particular persons or classes of persons apart from its rights under s.13. Those provisions have since been repealed.

63. Under the Act, the action brought by the government is brought in its own right and not on the basis of a subrogated claim (s.13(2)). In such an action the government may elect to recover the cost of health care benefits provided to particular individual insured persons or, alternatively, do so on an aggregate basis (s.13(5)).

64. If an action is brought on an aggregate basis, then the government may seek to recover some portion of the cost of health care benefits provided to that part of the population of insured persons who have suffered disease as a result of exposure to a type of tobacco product (s.13(5)(b)).

65. The government has indeed elected to start an aggregate action and in Vancouver Registry Action No. C985776 purports to claim for the cost of health care benefits paid to insured persons occasioned by the consumption of cigarettes.

66. The health care costs the government seeks to recover under the Act are those which have been provided to insured persons as that term is defined in s.1. An insured person is someone who

has been provided with health care benefits or is entitled to receive them. Health care benefits are in turn described as benefits as defined under the Hospital Insurance Act and the Medicare Protection Act and include any other health care benefits designated by regulation.

67. The Act purports, therefore, to create fresh legal rights with a number of distinctive characteristics. The cause of action is described as an "aggregate action". It is apparent also that on the government's interpretation of the legislation (as evidenced by its Reply to the Manufacturers' Statements of Defence), the Act is retrospective and retroactive (s. 20(2)) and cannot be defended on any limitations basis. Furthermore, according to the government no defences based either on individual or governmental conduct are available to the defendant manufacturers.

68. If the government's interpretation is correct, the Act is a regressive form of retrospective legislation that renders acts illegal that were not so at the time they were done, gives rights to the government which it did not previously have, and abolishes limitations and other defences that would otherwise be available to the defendants.

69. The Act purports to stipulate the procedures governing the action before trial as well as defining the scope and nature of evidence admissible at trial. Most significantly, the Act displays

an intention to eliminate evidence directly related to individuals and prescribes statistical evidence related to populations on an aggregate basis.

70. Section 14 of the Act provides that statistical information and information derived from epidemiological, sociological and other relevant studies, including information derived from sampling, is admissible as evidence for the purposes of establishing causation and quantifying damages or the cost of health care benefits respecting a tobacco related wrong in an action brought by the government under s.13.

71. Health care records and documents of particular individual insured persons or documents that relate to the provision of health care benefits to them are not compellable, except to the extent that a rule of law, practice or procedure requires production of documents relied on by an expert witness (s.13(6)(b)).

72. Section 13(6) also provides that no person is compellable to answer questions respecting the health of or the provision of health care benefits to particular individual insured persons.

73. The only right of discovery provided by the Act to the defendants is a right to receive a statistically meaningful sample of health care records and documents of particular individual

insured persons or documents relating to the provision of health care benefits to individuals. But even where such an order is made, the identity of particular individual insured persons must not be disclosed and any material that would identify individuals must be deleted (s.13(6)(e)). There is also nothing in the Act to suggest that this limited right goes beyond documents the government has direct possession or control over. It would not presumably encompass any right of discovery in relation to medical files and charts in the possession of doctors and controlled by patients. Yet these documents contain important probative medical information relevant to disease causation, smoking histories and medical advice given about the risks of smoking.

74. In summary, section 13(6) provides that in an aggregate action:

- (a) it is not necessary to identify particular insured persons;
- (b) it is not necessary to prove the cause of disease in any particular insured person;
- (c) it is not necessary to prove the cost of health care benefits that have been or will be provided to any particular individual insured person;
- (d) the health care records and documents of particular individual insured persons are not compellable;
- (e) no person is compellable to answer questions with respect to the health of particular insured individuals; and
- (f) no person is compellable to answer questions with respect to the provision of health care benefits to particular individual insured persons.

Thus it is not necessary to provide the court or the defendants with any information beyond a sampling of certain classes of documents under restrictive conditions. It is a question of interpretation of the statute as to whether the government can establish all constituent elements of its cause of action in the absence of establishing facts which section 13(6) provides are unnecessary.

75. The Act also contains provisions which dictate to the court how it must determine factual issues which are the basis for any ultimate finding quantification of recovery. So far as determining what costs the government can recover, in the first instance, the government is only required to show three things. These are, first, a breach of a duty owed to persons committed by a manufacturer. Secondly, in the context of this action as pleaded, that the consumption of cigarettes can cause or contribute to disease. And thirdly, that during all or part of the period of the breach, cigarettes manufactured by the defendant were sold in British Columbia.

See s.13.1(1)(c).

76. It is striking that in circumstances where duties are owed to individuals and any breach of a duty is a breach to an individual, the court and the defendants are deprived of evidence necessary to a proper and fair adjudication of that question.

77. Once the government has proven the initial three requirements stipulated by section 13.1(1), the court is directed to presume that all consumption of a manufacturer's cigarettes were, from the date of the breach forward, the result of the breach (s.13.1(2)(a)).

78. As will be argued fully below, this presumption is manifestly irrational. There is simply no relationship between the proven fact, that of a breach of a duty to a person, and the presumed fact, that all persons smoking a manufacturer's cigarettes from that date forward did so because of the proven breach. This provision is not merely a shift of an onus but it is a direction by the legislature as to the findings of fact the court must make. The irrationality of the presumption illustrates the seriousness of the interference with the judicial process by which the court determines the facts to which the law is to be applied.

79. The Act imposes on the court a second presumption, namely that the smoking which is presumed to have been caused by the breach, is presumed to have caused disease in a portion of those individuals smoking the defendant manufacturer's cigarettes.

See s.13.1(2)(b).

80. This presumption itself is founded upon the irrational presumption legislated in s.13.1(2)(a) that all cigarettes are

consumed as a result of a breach of duty. The finding imposed upon the court is, therefore, similarly irrational and for practical purposes a "fiction".

81. The Act compels the court to apply the findings that the presumptions dictate to determine the aggregate cost of health care benefits that have been or will be provided after the date of the proven breach resulting from disease caused or contributed to by exposure to a type of tobacco product. Each defendant manufacturer is then liable for a portion of those costs equal to its market share.

82. On the Manufacturers' interpretation of the Act, the government bears the burden of demonstrating the cost of health care benefits that have been caused or contributed to by smoking. But, nevertheless, 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 that statistical evidence has been generated.

83. It is only at this stage in the proceeding that the Manufacturers are given any opportunity to reduce the ultimate finding of liability by rebutting the effect of the presumptions. Section 13.1(4) purports to provide an opportunity to rebut the effect of the presumptions in the following way. First, the Manufacturers are given an opportunity to demonstrate that their

breach did not cause or contribute to the consumption of cigarettes. Secondly, the Manufacturers are given an opportunity to demonstrate that their breach did not cause or contribute to a disease.

84. It is important to note what cannot be rebutted under the Act. It would appear that the Manufacturers cannot directly rebut the factual claim that their breach caused or contributed to the incurring of health care benefits. This is because the Manufacturers are restricted to showing that their breach did not cause or contribute to exposure or disease. Hence the Act provides no means by which Manufacturers could challenge improper payments made to individual recipients on any basis including fraud, misdiagnosis or unnecessary treatments. In this sense the statutory provisions even on their face result in a conclusive presumption that every payment of health care benefits is proper and necessitated by a Manufacturer's product. It should be noted that provisions with a similar effect were struck down as unconstitutional in Florida.

Agency for Health Care Administration et al v. Associate Industries of Florida Inc. et al. 678 So. (2d) 1239 (Florida Supreme Court 1996)

85. While the Act purports to provide a right of rebuttal, that right is fundamentally compromised by the provisions found in s.13(6) which deprive the court and the Manufacturers of the evidence and the means necessary effectively to challenge the

findings of fact which have been imposed upon the court by the Act. It is submitted that the combined effect of these presumptions and the restrictions on discovery and evidence at trial deprive the court of the means necessary to properly adjudicate on the facts as the foundation of any determination of liability. The Act interferes with the judicial process by first imposing fictions and then preventing the court from receiving important and centrally relevant evidence to ascertain the truth. The Act therefore turns the judicial process into a sham proceeding which is premised upon truncating the process for ascertaining the truth for the sole purpose of facilitating a court order for a monetary judgment in favour of the government.

86. It is clear that there are a number of central questions involved in an action under s.13 of the Act. These include the following:

- whether a duty owed to individuals was breached and when;
- whether the breach of the duty caused or contributed to individuals' smoking or whether individuals smoked for reasons other than a breach of duty;
- whether smoking causes or contributes to disease and of what kinds;
- whether a breach of duty caused or contributed to disease (and what kinds) in smokers;
- whether a breach of duty resulted in the incurring of health care costs by the government.

87. Each of these issues is key to the outcome of a trial under the Act because the government is entitled to recover only

those health care costs that result from a "tobacco related wrong". Whether and to what extent the government has incurred health care costs resulting from a tobacco related wrong is the ultimate issue the court must adjudicate to attach liability to the Manufacturers. The judicial process by which each of these issues is determined by the court is profoundly and improperly compromised by the provisions of the Act.

88. Integral to the adjudication of these key issues, is the ability of the Court to explore the evidence and reach conclusions. The Act interferes at each stage of the process, the inherently judicial process, by which those conclusions are reached. The interference is in part because of the findings the court is instructed to make on proof of certain other facts, for example, that all smoking after the date of a breach is the result of the breach. It is in part because, apparently, neither the parties nor the court can inquire into the factual relation between the breach and the incurring of the cost of health care benefits. And it is in part because, as will be demonstrated below, the restrictions on the compellability of essential material evidence on these issues is denied to the Manufacturers and hence also to the court.

89. It is important to stress that this Act does much more than merely reverse an onus by shifting the burden of proof from one party to another. The Act dictates the facts that the court must find subject to a statutory right of rebuttal that is in turn

seriously undermined by the restrictions on proof that may be adduced in relation to the central factual questions at issue in the trial.

90. In summary, the legislation mandates an unfair and non-judicial process favouring a successful outcome of issues vital to the government's success in an action brought by the government for its own monetary benefit in a court of justice by:

- (1) restricting enquiry into the actual facts relevant to the question of the commission of a breach;
- (2) mandating an irrational conclusion of a decisive fact governing the question of whether a breach so proved increased exposure to tobacco;
- (3) mandating an equally irrational conclusion of a decisive fact governing the question of whether a breach so proved increased tobacco related disease, and in so doing depriving the defendants of a real trial, and
- (4) mandating a claim for unchallengeable health care "expenditures" as a result of an increase in tobacco related disease established by an irrational presumption which (on the government's construction of the Act) is recoverable without proof of damage.

JUDICIAL INDEPENDENCE IS CONSTITUTIONALLY PROTECTED IN CANADA

91. Principles of judicial independence have been discussed in a number of Supreme Court of Canada cases. These cases have established a number of fundamental propositions including:

- (a) the judicature provisions of the *Constitution Act, 1867* were intended to protect the principle of judicial independence;

- (b) judicial independence is an unwritten constitutional principle exterior to, although incorporated within, the written provisions of the Constitution. It is an unwritten constitutional norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*;
- (c) judicial independence includes independence from interference with the judicial function by the executive, the legislature or parties interested in a case;
- (d) judicial independence requires that a judge have complete liberty to hear and decide the cases that come before them;
- (e) judicial independence requires that the court be separate in authority and function from other branches of government; and
- (f) judicial independence renders unconstitutional a legislative interference with core judicial functions.

The application of these principles to the Act will be articulated below.

The purpose of judicial independence

92. The principle that judicial independence is protected by the Constitution is clear beyond any doubt. It is equally clear that the independence of the judiciary is guaranteed against interference from provincial and federal legislatures, provincial and federal executives and the parties themselves.

McEvoy v. Attorney General (N.B.), [1983] 1 S.C.R. 704.
R. v. Valente (No. 2), [1985] 2 S.C.R. 673, (1985), 24 D.L.R. (4th) 161.
R. v. Beaugard, [1986] 2 S.C.R. 56, (1986), 30 D.L.R. (4th) 481.
MacKeigan v. Hickman, [1989] 2 S.C.R. 796, 61 D.L.R. (4th) 688.
R. v. Lippe, [1991] 2 S.C.R. 114, 64 C.C.C. (3d) 513.

Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3. [hereinafter *Judges' Salary Reference*.]

93. In *R. v. Lippe*, supra, Gonthier J., at 153, referred to section 2.02 of the *Universal Declaration on the Independence of Justice*, First World Conference on the Independence of Justice, Montreal, June 10, 1983, which provides:

2.02 Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

94. The cases disclose that judicial independence serves a number of different purposes within the constitutional framework of Canada. Within the context of the judicature provisions of the Constitution Act, judicial independence is protected from attempts by the legislatures to deprive the courts of traditional superior court functions. Indeed most of the cases dealing with the judicature provisions deal with attempts by legislatures to transfer powers from so called s. 96 courts to inferior tribunals. The classic cases on s.96 of the *Constitution Act, 1867* reflect the commitment to preserve the independent role of the superior courts of justice within the Canadian constitutional framework as well as a desire to preserve a uniform national system for the administration of justice.

A.G. for Ontario and Display Service Company Ltd. v. Victoria Medical Building Ltd., [1960] S.C.R. 32.
Residential Tenancies Act, 1979 (Re), [1981] 1 S.C.R. 714, (1981), 123 D.L.R. (3d) 554.
McEvoy v. Attorney General (N.B.), supra.
Reference re Amendments to the Residential Tenancies Act (N.S.), [1996] 1 S.C.R. 186.

95. Judicial independence also plays a vital role in promoting and maintaining the integrity of the constitutional structure of Canada. It is an aspect of the separation of powers and the courts play a vital role in ensuring, through judicial review, that the constitutional framework of Canada is protected and enhanced. Furthermore, judicial independence is necessary to ensure the integrity of the administration of justice by guaranteeing that the ability of judges independently, impartially and objectively to decide cases is not compromised.

Judges' Salary Reference, supra.
Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854, (1996), 140 D.L.R. (4th) 193.

96. The right to a fair trial, be it criminal or civil, is constitutionally protected. These protections are reflected in sections 7 and 11(d) of the *Charter of Rights and Freedoms* and are found in the unwritten foundational constitutional principles, one of which is the rule of law as reflected in the preamble to the *Charter* and the preamble to the *Constitution Act, 1867*. The right to a fair trial is a basic requirement of the rule of law. The Act mandates an unfair and non-judicial process favouring a successful

outcome of issues vital to the government's success in an action brought by the government for its own benefit in a court of justice. The Act accordingly improperly interferes with the Manufacturers' right to a fair trial and is unconstitutional as being repugnant to or operating contrary to the rule of law.

97. The independence of the judiciary is necessary to maintain and uphold the rule of law. For this reason, the courts have recognized that there is within the Constitution a degree of separation of powers between the legislative, executive and judicial branches. The judiciary is the guardian of the rule of law and the integrity of the constitutional structure. The independence of the judiciary is necessary to ensure that it can fulfil its responsibilities.

Judges' Salary Reference, supra.

98. Most cases dealing with the independence of the judiciary focus on the institutional conditions necessary to guarantee that independence. Protecting the independence of the institutional status of the courts is not an end in itself. It is clear that any attempt to interfere directly with the execution of the judicial function is unconstitutional. No one, whether it be a party to litigation, the executive or the legislature can purport to direct or interfere with how a judge will exercise his or her inherent judicial functions. In *MacMillan Bloedel v. Simpson*, [1995] 4

S.C.R. 725, the Supreme Court of Canada made it clear that there are core judicial functions which inhere in the very nature of a court acting as a court, that cannot be compromised. It is submitted that in this case the Act interferes with core judicial function.

The test for judicial independence.

99. The Supreme Court of Canada has endorsed a test to determine whether judicial independence has been violated. The test is whether:

"a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically [would conclude that the tribunal or court was independent]".
(at para. 113)

*R. v. Valente (No. 2) (1983), 2 C.C.C. (3d) 417, 145 D.L.R. (3d) 452 (Ont. C.A.).
Judges' Salary Reference, supra.*

The court's consideration of the principles of judicial independence

100. The principle of judicial independence has been constitutionally protected in Canada since at least Confederation. The judicature provisions of the *Constitution Act, 1867*, (i.e. sections 96 to 101) incorporated into Canada institutional

safeguards of judicial independence founded on the Act of Settlement, 1701.

Judges' Salary Reference, supra.
W.R. Lederman, "The Independence of the Judiciary" (1956), 34
Can. Bar Rev. 769, 1139.
Toronto Corporation v. York Corporation, [1938] A.C. 415.

101. Other provisions of the Constitution also bear directly on judicial independence. The Charter rights found in section 11(d) are an example. But these express provisions are not exhaustive of the source of judicial independence as a constitutional principle. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution Act, 1867. The principle of judicial independence is an unwritten constitutional principle exterior to, though also incorporated within, the written provisions of the Constitution.

102. The essence of individual independence, and indeed, of judicial independence as a whole is the judiciary's "fundamental entitlement to adjudicative independence." As expressed by the Chief Justice in *R. v. Beauregard*:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider -be it government, pressure group, individual or even another judge- should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his

decision. This core continues to be central to the principle of judicial independence.

R. v. Beauregard, *supra* at 69.

Reilly v. Alberta (Provincial Court, Chief Judge), [1999] A.J. No. 464 (Q.B.).

Interference with core judicial functions

103. Judicial independence serves a number of constitutionally protected values. The separation of powers underscores that there is a protected core judicial function: a core protected from interference by the legislature as much as any other threat. The notion that there is a constitutionally protected core jurisdiction that inheres in the judicial function of a superior court is confirmed by *MacMillan Bloedel Ltd. v. Simpson*, *supra*. This conclusion is consistent with two British Columbian decisions:

Re Greater Vancouver School District and Goudie (1984), 59 B.C.L.R. 176 (S.C.).
Re Hertel and The Queen (1986), 34 D.L.R. (4th) 706 (B.C.S.C.).

104. *MacMillan Bloedel*, *supra*, dealt with the purported transfer by the Federal Parliament to youth court of the superior court's powers to punish contempt in the face of the court. If this power fell within a core jurisdiction of a superior court, then it could not be transferred to an inferior court without constitutional amendment. The British Columbia Court of Appeal concluded, based on *McEvoy v. New Brunswick (AG)*, *supra*, that

superior courts are independent of both levels of government and, based on *Reference re Young Offenders Act (Canada)*, *supra*, that superior courts do have a core jurisdiction that is "untouchable".

105. The British Columbia Court of Appeal judgment was upheld by the Supreme Court of Canada. Lamer CJC writing for the majority stated:

The superior courts have a core or inherent jurisdiction which is integral to their operations. The jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution. Without this core jurisdiction, s. 96 could not be said either to ensure uniformity in the judicial system throughout the country or to protect the independence of the judiciary. Furthermore, the power of the superior courts to fully control their own process is, in our system where the superior court of general jurisdiction is central, essential to the maintenance of the rule of law itself. (Emphasis added)

106. It is submitted that the core jurisdiction of the court includes the right of the judge independently to determine the facts necessary to adjudicate liability. This aspect of judicial process cannot be interfered with improperly by the legislature or the executive, least of all in a case in which the government is itself a party and stands to benefit financially from a successful outcome to the case.

107. As recognised by the Supreme Court of Canada, the constitutionally protected core judicial functions are those essential to the administration of justice and the maintenance of the rule of law. It is submitted that no court can properly administer justice and maintain the rule of law if its independence in assessing evidence and determining the facts is compromised by legislation that both directs the facts to be found and deprives the court of essential material evidence necessary for an impartial adjudication of the factual issues before the court. The judicial function necessarily involves the adjudication of disputes and the determination of the rights and liabilities of the parties. An essential step in discharging the responsibility of the court is that the necessary facts must be found by it. This fact finding role inheres in the very nature of the court as such; it is integral to the very character of a court. The legislation at issue here goes beyond the regulation of procedure or evidence and strikes at the heart of the court process. As stated by Wigmore:

The judicial function under the Constitution is to apply the law in controverted cases; to apply the law necessarily involves the determination of the facts; to determine facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function. Hence to make a rule of conclusive evidence, compulsory upon the Judiciary, is to attempt an infringement upon their exclusive province.

J.H. Wigmore, *Evidence in Trials at Common Law*, (Boston: Little, Brown and Company, 1972) Vol. 4 at para. 1353.

See also, *A.G. for Ontario and Display Service Co. v. Victoria Medical Building, Ltd.*, *supra*.

Cases from Other Jurisdictions

108. It is exceedingly rare for legislatures or governments to attempt to interfere directly in the exercise of the judicial function. The Act is unlike any legislation in the cases reviewed by counsel. There are therefore very few cases that deal directly with issues of this kind. There are, however, some cases which offer guidance.

109. The most repugnant example of legislative usurpation of the administration of justice occurs when the legislature enacts a law which clearly targets particular parties. In *Liyanage v. The Queen*, [1967] A.C. 259 (P.C. (Ceylon)), the legislature of Ceylon enacted special criminal laws directed at persons believed to have been involved in an attempted coup. Lord Pearce for the Privy Council observed that the Constitution of Ceylon did not expressly vest the judicial function solely with the judiciary. However, as the Constitution was silent on the subject it had to be concluded that it was intended that the judiciary alone would exercise the judicial function. In that case, the law was held unconstitutional because of the way in which the legislation altered both procedural and substantive law governing the trial of certain specified persons. The legislature was directing the courts in the latter's treatment of identified targets and the sentence to be imposed upon

them. To alter legal process in respect of a specified class of citizenry only was found to be legislative interference in the judicial process. The legislation was held incompatible with a system in which the judicial function is to be performed by the judiciary alone.

See also, S.A. deSmith, "The Separation of Powers in New Dress" (1966) 12 McGill L.J. 491.

110. The legislation in that case:

- targeted specific defendants;
- altered the mode of trial for the offences in question;
- retrospectively allowed arrest without a warrant;
- altered the penalty for an offence;
- altered the definition of the offence itself in terms that created a new offence *ex post facto* to meet the circumstances of facts which had already occurred;
- altered the laws of evidence applicable to the proceeding by sweeping away a number of evidentiary protections for the accused; and
- rendered all of these changes specific to the proceedings at issue.

111. Lord Pearce, speaking for the Privy Council, determined first that the independence of the judiciary was constitutionally protected under the Constitution of Ceylon. He said at p. 287:

These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a constitution which intends that judicial power shall be vested only in the judicature.

112. The Privy Council concluded that under the Constitution, Parliament was not entitled to pass legislation which usurped the judicial power of the judicature, e.g., by passing an act of attainder against some person or instructing a judge to bring in a verdict of guilty against someone who is being tried.

113. Here, the legislature interfered with the independence of the judiciary and the processes of the court by enacting a series of legislative changes targeting particular defendants for particular proceedings:

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...

114. While the *Liyanage* case dealt with a highly unusual circumstance, the legislative response to an attempted coup, the principles stated in that judgment are applicable to this legislation.

115. This Act reflects a legislative plan to secure an outcome. It contains the principal elements and more that were found to be offensive in the *Liyanage* case as:

- A. on the Manufacturers' interpretation, it:
1. targets specific defendants;
 2. alters the mode of trial to facilitate the operation of fresh legal rights;

3. alters the rules of evidence for a specific judicial proceeding; and
- B. on the government's interpretation, it also:
4. creates what is a penalty which is unrelated to compensation for loss suffered by the government;
 5. purports to withdraw from the defendants the right to rely on affirmative defences whether they relate to governmental or individual conduct;
 6. purports to retroactively alter the law and make the defendants liable to the government in respect of conduct which could have given rise to no such liability absent the Act.

Hence while the *Liyanage* case deals with criminal law, the principles it articulates are applicable to this legislation which is, therefore, equally repugnant to the principle of judicial independence as the legislation at issue in that case.

116. The Irish case, *Maher v. Attorney General*, [1973] I.R. 140 is also instructive. *The Road Traffic Act* provided that a certificate, stating that a specimen of a person's blood contained a specified concentration of alcohol, should be "conclusive evidence" that, when the specimen was taken, the concentration of alcohol in that person's blood was as specified in the certificate. The statute was struck down as an unconstitutional interference with judicial power.

117. While the *Maher* case dealt with a certificate of conclusive evidence, the same unconstitutional elements are found within the Act. As in *Maher*, the Act imposes conclusive findings

upon the judge and precludes the exercise of independent judgment. As in *Maher*, the Act removes from the judge the ability to determine the most essential elements at issue. Finally, as in *Maher*, the Act attenuates the right of rebuttal and the receipt of material evidence to such an extent that the judge is unable to exercise his or her judgement in relation to the factual issues before the court.

118. To the extent that the Act imposes a conclusive presumption on the judge, there is a clear interference with judicial independence. Provisions having a similar effect in legislation authorising actions against tobacco companies were struck down on due process grounds in Florida. In *Agency for Health Care Administration et al v. Associate Industries of Florida Inc., supra*, the Supreme Court of Florida found unconstitutional a provision of the Florida statute that provided that the government shall not be required to identify the individual recipients for which medicaid payments had been made. In striking the provision down Overton J., speaking for the court, said:

We can find no way in which this subsection would allow a defendant to challenge improper payments made to individual recipients. The paragraph clearly relieves the State of any obligation to reveal the identities of those recipients. Procedural due process, in our view, requires that a defendant be able to rebut a statutory presumption... The current Act would prevent a defendant from demonstrating the impropriety of individual payments. Impropriety could be the result of fraud, misdiagnosis of a patient's condition, or unnecessary treatments. The defendant's

inability to determine individual Medicaid recipients would also preclude a defendant from proving that its product was never used by the recipient. Hence, the statutory provision results in a conclusive presumption that every Medicaid payment is proper and necessitated by the defendant's product. It is illogical and unreasonable to call this a fair process. A defendant cannot rebut this presumption because there is no mechanism for determining to whom the payments were made. This type of conclusive presumption is violative of the due process provisions of our constitution, see, e.g., *State Farm Mut. Auto. Ins. Co. v. Malmberg*, 639 So. 2d 615 (Fla. 1994), and consequently the challenged paragraph must be stricken as unconstitutional.

119. While many cases in the United States involving presumptions have been viewed through the prism of due process, it is also recognized that conclusive presumptions have a deeper flaw. Beyond interfering with the rights of individuals, conclusive presumptions flout the integrity of the judicial process as a whole in precluding the judge from determining the facts necessary to administer justice.

120. Courts in the United States have recognized the inherent jurisdiction of the court to determine the rights and liabilities of the parties.

Broadway v. State, 60 So. 2d 701 (Sup. Ct. Alabama) (1952).
People ex. rel. Attorney General v. Holschuh, 209 N.W. 2d 613 (1958).

121. United States courts have also given extensive consideration to the constitutionality of presumptions. In brief form, a presumption which is irrational in the sense that there is no rational connection between the proven fact and the presumed fact is unconstitutional even if it is rebuttable and legislatures may not, under the guise of regulating the presentation of evidence, preclude a party from a right to present a full and fair defence. Equally, conclusive presumptions are unconstitutional if they are attempts by the legislature to impose factual findings on the court.

Birdsong v. Brooks, 7 Ga. 88 (1849).
Vega Steamship Co. v. Consolidated Elevator Co. 75 Minn.
308, 77 N.W. 973 (1899).
Little v. Ritchey, 174 N.E. 2d 52 (1961).
State v. Burling, 400 N.W. 2d 872 (1987).

122. In this case, it is important to note, the complaint is not about the use of presumptions *per se*. Presumptions are commonly used in statutes and in the common law. What matters is whether presumptions are used in the particular case in a manner that interferes with judicial independence. Whether they are or not depends on the use that is made of them in a particular statutory framework and the nature of the rights to rebut their effect. Under the Act the presumptions found in s.13.1 (2) are irrational and their irrationality illustrates the extent of the interference with judicial independence.

123. It has not yet fallen to a Canadian court to determine whether statutory presumptions may interfere with judicial independence. It is submitted that a statutory presumption may interfere with judicial independence where the parties are denied a fair opportunity to rebut the presumption, especially where the judges are directed to accept a presumed fact. But, the constitutionality of the legislative scheme does not, it is submitted, turn on whether the presumption is rational or irrational. Rather, it is the operation of the presumption in the context of the Act coupled with the impediments to rebut the presumptions that constitute that interference. Nevertheless, the irrationality of the presumptions illustrate the extent to which the legislature is interfering with the judicial process.

124. The only consideration of the constitutionality of irrational presumptions in Canada has occurred in the context of Charter litigation. The issue in those cases was not the independence of the judiciary but was rather whether an irrational presumption must fail one aspect of the *Oakes* test in determining whether a breach of a constitutional right is demonstrably justifiable in a free and democratic society.

R. v. Oakes, [1986] 1 S.C.R. 103.

R. v. Whyte, [1988] 2 S.C.R. 3.

Downey v. The Queen, [1992] 2 S.C.R. 10, (1992).

R. v. Laba [1994] 3 S.C.R. 965.

125. The Manufacturers' submissions are consistent with the jurisprudence from the Supreme Court of Canada. In a series of cases the Court has examined whether a so-called "internally irrational" presumption (that is a presumption where there is no rational connection between proven and the presumed fact) necessarily fails a specific part of the Oakes section one test. The issue is whether the means chosen to achieve a pressing and substantial objective is rationally connected to the objective. To satisfy that aspect of the test it is sufficient if the presumption is rationally connected to the achievement of the legislative purpose; in other words it is enough so far as this part of the test is concerned if the presumption is "externally rational". The fact that a presumption is internally irrational is not necessarily sufficient to ensure that it fails the Oakes test, if the presumption is an externally rational means of achieving a pressing and substantial objective. That does not mean that internal rationality is irrelevant to the ultimate constitutionality of the presumption. To the contrary. The considerations related to the internal rationality of the presumption fall to be considered in connection with the other elements of the test including whether the presumption minimally violates the right in question and creates no unnecessary deleterious effects.

126. In these cases, *Laba* for example, the presumption at issue merely placed an onus on the defendant to rebut the effect of the presumption. The ability or capacity of the defendant to do so

was not in anyway compromised by the statutory scheme. Hence, although there may have been no rational connection between the fact proven and that presumed, the prospects of a court being compelled to act on a possible fiction created by the presumption is remote. In the case at bar, because of the practical barriers to effective rebuttal, that risk is acute. In this case, unlike those considered by the Supreme Court of Canada, there is every prospect of the court being coopted by the legislature to make findings of fact known to be fictitious and which are imposed for the purpose of achieving a "judicial" result in favour of the government.

127. The Act does not purport to merely alter the substantive law through the deployment of presumptions. These are presumptions that go not to the application of the substantive law but to the process by which the court finds the facts to which the substantive law is applied. Since these presumptions go to an issue of judicial process and are not alterations of the substantive law, it is no answer to this challenge simply to point out that presumptions and deeming provisions are known to Canadian law.

THE ACT INTERFERES WITH JUDICIAL INDEPENDENCE

128. There are a number of central questions involved in an action under s.13 of the Act. These include the following:

- whether a duty owed to individuals was breached and when;

- whether the breach of the duty caused or contributed to individuals smoking or whether individuals smoked for reasons other than a breach of duty;
- whether smoking causes or contributes to disease and what kinds;
- whether a breach of duty caused or contributed to disease in smokers and what kinds;
- whether a breach of duty resulted in the incurring of health care costs by the government.

129. The court must answer each of these complex and contestable factual questions in order to make an ultimate determination of liability. But in answering these questions the court and the Manufacturers are deprived of key evidence that is necessary not only to test the validity of the aggregate statistical and sampling evidence but also to establish the real facts.

130. All of the expert evidence to be used in this case, including statistical evidence, requires a proven evidentiary foundation in order to have any weight. This point is made in *R. v. Lavallee* [1990] 1 S.C.R. 852 at 131 by Wilson J. writing for the majority. It is summarized by Sopinka J. in the same case at p. 132 where he states that an expert opinion relevant in the abstract but based entirely upon unproven hearsay is admissible but entitled to no weight. Clearly evidence from insured persons will form the most important data relied on by any expert, statistical or medical. Yet the judge, who is bound by the Act to find certain facts based on expert evidence, is deprived of all mechanisms

necessary to determine the accuracy of that data and the credibility of the individuals who contributed to it.

131. Fundamental to the accuracy of survey evidence, for example, is the right to cross-examine whatever representative sample is used and determine whether the evidence is based on hearsay.

Gordon Campbell Ltd. v. Metro Transit Operating Co., [1983] B.C.J. No. 1311 (S.C.).
Regina v. Times Square Cinema Ltd., [1971] 3 O.R. 688 (C.A.).
Building Products Ltd. v. BP Canada Ltd. (1961), 36 C.P.R. 121, 21 Fox. Pat. C. 130 (Ex. Ct. of Can.).
In re Fibreboard Corporation, 893 F. 2d 706 (5th Circuit 1990).

132. The right to cross-examination to test the inherent reliability of evidence placed before the court is constitutive of a fair procedure in a court of law.

R. v. Osolin, [1993] 4 S.C.R. 595.
J.H. Wigmore, *Evidence in Trials at Common Law*, Vol. 5 (Toronto: Little Brown and Co., 1974) para. 1367.

133. The Act clearly deprives the Manufacturers of a right to cross examine any individuals about the individual issues at the heart of the case.

134. The Supreme Court of Canada recently confirmed in *R. v. Seaboyer* that the judiciary has a constitutional mandate to determine the facts in issue.

R. v. Seaboyer [1991], 2 S.C.R. 577 at 609.

135. The court cannot discharge this mandate unless the parties have a sufficient opportunity to cross examine a representative sample of individuals to test conclusions generated by statistics and sampling and set those conclusions in a proper context.

136. Thus the Act discloses an intention to deprive the court of its ability to inquire into the most material facts relevant to the issue before it: to what extent did British Columbians smoke cigarettes or smoke what are alleged to be more dangerous cigarettes as a result of a breach of duty by cigarette manufacturers and did that breach cause or contribute to illnesses, to what extent and at what cost.

137. As a result, the restrictions on evidence found in s.13(6) constitute an interference with the judicial function quite apart from the way in which they interrelate with the presumptions contained in the Act.

138. The presumption sections also directly interfere with the judicial process. Section 13.1(2)(a) mandates a presumption that once the requirements of subsection 1 have been proven (principally that a breach of duty has occurred), then all cigarette smoking from that day forward must be presumed to be the result of the

breach of duty. Subject to the right of rebuttal, the court is required to find that all smoking resulted from the breach.

139. The scope of this presumption is breathtaking.

140. This presumption is clearly irrational. There is simply no rational connection between the fact proved (the breach of a duty owed to one person) and the fact that "must" be presumed, namely that the breach caused universal exposure to smoking. This is not a shift in any onus or burden of proof. The court is required to presume universal exposure resulting from a single breach of duty.

141. The presumption imposes a fiction on the court and whereas it may well be that certain aspects of this fiction can readily be rebutted under the provisions of 13.1(4), the Act so seriously limits the ability of the defendants to develop evidence except of a statistical kind, that any meaningful rebuttal of the fiction that one breach has caused universal exposure is rendered virtually impossible by the restrictions on the compellability of evidence found in s.13(6).

142. The road to truth must pass through an exhaustive, detailed and unrestricted investigation of the probative evidence. By curtailing the investigation of individual facts the Act interferes with the court's ability to assess probative evidence in

order to reach the conclusions of fact which are foundational to an adjudication of legal rights.

143. The same kind of considerations apply in respect of the second presumption, i.e. that from the date of a breach disease is presumed to have occurred in a portion of the population as a result of the deemed universal exposure to smoking. This presumption is irrational because it too is based on and flows from the irrationality of the first presumption. Further, there is no provision for the rebuttal of this deemed connection between exposure and disease. It is legislated science.

144. Finally, the Act imposes a conclusive presumption. Whereas there is a statutory right to rebut the connection between the breach and exposure and the breach and disease and to that extent indirectly to reduce liability for health care benefits, there is no direct right to lead evidence and argue that the tobacco related wrong did not cause the government to incur the cost of health care benefits. As a result, the Act contains a conclusive presumption that each expenditure is proper and necessitated by the manufacturer's conduct.

145. Such a conclusive presumption is an interference with the judicial process.

146. As has been submitted, the Act as a whole has been crafted in order to secure an outcome favourable to the government and in order to achieve that objective the system of presumptions and limitations on the compellability of evidence have the practical effect of imposing on court findings of fact in relation to key elements of the claim. While it is true that there is an opportunity for the manufacturers to avoid liability altogether by demonstrating that there has been no breach of any duty, even the opportunity to do that has been contaminated by the restrictions on evidence that may be adduced. But in relation to key issues of causation and damage, the presumptions when combined with the largely nominal right to rebut have the effect of imposing findings of fact on the court designed to secure a result in favour of the government.

147. Taken as a whole the Act interferes in key aspects of the judicial process and invades the core function of the court to decide facts for itself.

148. There is no doubt that if the legislature had wanted to impose a direct tax on any tobacco manufacturers in British Columbia to recover the cost of any proportion of health care costs on any public policy ground whatsoever, it could be done without any constitutional impediment. As long as the legislature does not trench on the federal powers in section 91 of the Constitution Act 1867, exceed its territorial competence or violates any other

constitutional restrictions, the provincial legislatures are constitutionally empowered to re-allocate economic resources and wealth in the province in the way they see fit.

149. What is objectionable about the Act and the action provided for by section 13 is that instead of making an open policy choice by itself, which is otherwise within its powers, the legislature seeks a *curial imprimatur* on its policy choice to take wealth away from certain persons in order to allocate it to a public purpose. The legislature appears to have decided that this re-allocation can be effected only if it is made to appear that the tobacco manufacturers have breached their civil obligations in a way that makes such re-allocation just.

150. This is done by enlisting the branch of government duty bound to decide issues of justice, the judiciary, while at the same time mandating an unfair and non-judicial process to ensure an outcome favourable to the government on issues vital to its success. Hence the Act.

151. On July 29, 1998, in speaking to the Act in the Legislature, the Minister of Health described the Act as:

"an innovation in this country ... the most serious attempt by any province is in British Columbia to enlist the justice system in the cause of public health."

152. In the result, a fundamental reason the Act runs afoul of the Constitution is that it contravenes the essential separation of powers between the judicial branch of government on one hand, and the political branch on the other. It implicates the judiciary in something they ought not to be doing, and it fetters their independence by mandating the outcome of essential issues in an action in a superior court.

153. The Act provides for a political process that masquerades as a judicial one, and thereby makes a mockery of judicial independence and the rule of law. A passage from the decision of the Supreme Court of the United States in *Mistretta v. United States*, 488 U.S. 361 (1989), which was adopted with approval in a decision of the High Court of Australia, *Wilson v. Minister for Aboriginal and Torres Strait Island Affairs* (1996), 70 A.L.J.R. 743 at 753, made the point in this way:

The legitimacy of the judicial branch ultimately depends upon its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colours of judicial action.

PART 3: UNCONSTITUTIONALITY RE EXTRA-TERRITORIALITY

The Construction of the Act

154. Counsel for RJR has described two basic constructions which may be placed on the Act: the Manufacturers' construction that, while the Act provides for a new government cause of action, the action, nevertheless, may rest on a pre-existing common law wrong, and the government's construction, that the Act creates an entirely new government cause of action which rests on a newly created wrong. Whether, however, the court adopts the construction favoured by the Manufacturers or that favoured by the government, the Act is *ultra vires* because of its extra-territorial purpose and effect.

The Purpose and Effect of the Act

155. The dominant characteristic or pith and substance of the Act is demonstrated by its purpose and effect. The purpose of the Act is the recovery by the Province of tobacco-related health care expenditures (defined as the "cost of health care benefits") from the national and international tobacco industry.

156. The effect of the Act is to impose a new form of liability retroactively on mostly extra-territorial Defendants founded on shareholdings and other types of property ownership,

wherever those property rights may be situate, for acts or omissions of some Defendants whether the locus of those acts or omissions were in British Columbia or elsewhere.

157. This purpose and effect can best be determined by an analysis of the Act's provisions and by a consideration of the manner in which the cause of action provided in the Act has been implemented by the Province. The Act, and its predecessor, were government-sponsored legislation. The cause of action provided in the Act has been implemented by the government in two ways. Firstly, by a Regulation dated 10 November 1998, approved and ordered by the Lieutenant Governor in Council, under the power conferred by Section 19 of the Act, having the effect of giving a significantly extended meaning to the term "cost of health care benefits" as defined in Section 1(1) of the Act. Secondly, and more importantly, the government commenced an action under Section 13 of the Act in the name of Her Majesty the Queen in Right of the Province. In the circumstances, the Statement of Claim in the government's action, and the Reply to each Statement of Defence, are very strong evidence of the Act's purpose and effect, regardless of any difference between the parties as to the proper construction of the Act.

**The Extra-Territorial
Purpose and Effect revealed by the Act and Pleadings**

158. The dominant extra-territorial purpose and effect of the Act is achieved by the interlocking provisions of Sections 1, 13, 13.1, 15, 17 and 17.1. The "Group" concept is the central mechanism of both the Act and the Statement of Claim. It has the following features:

- (a) the Group is created by Sections 1(5) and 17.1(1)(a) for the purposes of establishing liability and imposing judgment. The foreign and federally incorporated Defendants in the government's pleading, except for Liggett, are amalgamated into Groups and are assigned names - viz "the BAT Group", "the Rothmans Group", "the Philip Morris Group" and "the RJR Group". The government pleads the effect of those Sections as follows (taking paragraph 62 of the Statement of Claim as an example):

"The companies described in paragraphs 47, 57 and 58 are related manufacturers within the Rothmans Group and, pursuant to section 17.1(1) of the Act, must be considered to be one manufacturer for the purposes of establishing the tobacco related wrongs hereinafter described and each is jointly and severally liable for the tobacco related wrongs committed by any of the related manufacturers."

- (b) the conduct of any member of the Group in any country with consequences in that country or in any other country

can result in liability of all Group members provided only that a member of the Group has offered for sale in B.C. the type of tobacco product in question. - See Section 1(1) "tobacco related wrong", Section 13, Section 13.1 and Section 17.1. Where such conduct cannot be shown to have consequences in British Columbia, a statutory presumption makes the causal connection;

- (c) the composition of the Group is provided for by the definition of "manufacturer" in Section 1(1) and by Section 1(2), Section 1(3) and Section 1(4);
- (d) membership in the Group is based on shareholdings [Section 1(3)(a)] entitlement to profits or assets on dissolution [Section 1(3)(b)] direct or indirect influence whether exercised or not [Section 1(4)]. It is confined to those who qualify as "manufacturers" of tobacco products under Section 1(1) and this includes owners of tobacco trade marks and those whose sources of worldwide revenue include 10% traceable to tobacco [Section 1(1)];
- (e) the conduct of foreign manufacturers in foreign countries is to be judged by a B.C. court, presumably under the common law and statutes (e.g., *Trade Practice Act*) of British Columbia. [Section 13.1(1)(a)] Once that has

been done the Act is to be applied by the court in determining liability of the Group to which the foreign manufacturers belong for health care costs. [Section 13.1(3)];

- (f) a Group, one of whose members acquires or has acquired a tobacco related part of a business of another manufacturer by any means is liable for the past wrongful conduct of the latter, whatever the contractual terms of the acquisition may be or may have been or whatever country or province's laws govern their interpretation. - [Section 17.1(2)] The location of the acquired business and of the wrongful conduct does not affect or modify this liability. The vendor need not be a member of a Group in order to bring this provision into effect;

- (g) since the members of a Group are to be considered "one manufacturer" for the purpose of establishing a tobacco related wrong for which all Group members are liable, the effect is to impose an artificial "real and substantial connection" on all Group members. This is so because each Group includes a British Columbia resident.

159. When the relevant provisions of the Act were proclaimed the government commenced an action against twenty foreign or extra-provincial federally incorporated corporations (and also three

trade organizations). Four of the federally incorporated corporations were identified in the government's Statement of Claim as manufacturers of cigarettes sold in B.C.. They are registered as extra-provincial companies under B.C. laws (Imasco, Imperial Tobacco Ltd., Rothmans, Benson & Hedges Inc., and RJR-Macdonald Inc.). Another Defendant is identified as a federally incorporated company with its registered office in Ontario (Rothmans Inc.). The remainder are identified as foreign companies incorporated under foreign laws with registered offices or places of business in the United Kingdom, the United States of America and the Netherlands. None of the Defendants in the government's action was incorporated under the laws of B.C.. As mentioned, the Statement of Claim in the government's action describes the Groups as "four worldwide multinational tobacco enterprises".

Source of Territorial Limits of Provincial Power

160. The *Constitution Act, 1867* places an express territorial limit on the legislative powers of provinces. This arises from the bargain made by the Fathers of Confederation as set out in the London Resolutions, 1866 and particularly the first three paragraphs thereof. The London Resolutions formed the basis for the *Constitution Act, 1867*, drafted by the United Kingdom law officers and the Canadian delegates to the London Conference. The intent of Section 92 thereof was to confer on the provinces legislative power to "control local matters in their respective

sections" (London Resolution 2). This was achieved by listing the matters to be exclusively reserved to the provincial legislatures by London Resolution 41 (with revisions not relevant to the issues dealt with here) and by adding the phrase "in the Province" or like expressions of territorial limitation in most descriptions of provincial matters.

Peter W. Hogg, Constitutional Law of Canada
(Loose-leaf ed.) pages 13-14

Senate of Canada, Report Pursuant to
Resolution of the Senate to The Honourable
Speaker by The Parliamentary Counsel (1939)
Annex IV

Sullivan: Interpreting the Territorial
Limitations on the Provinces (1985), Supreme
Court L. Rev. 511 at pp. 525-527

161. The territorial limit on provincial legislative power was referred to by the Lord Chancellor on second reading of the Statute of Westminster, 1931 bill.

"Most of the following clauses have been put in after consultation with the Dominions. Would your Lordships kindly look at Clause 7. The first subsection says:

'Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the *British North America Acts, 1867 to 1930*, or any order, rule or regulation made thereunder.'

I will not trouble you with the other subsections, but I will tell you the reasons for them. The clause now included was drafted in Canada as the result of a Conference held in April, 1931, between representatives of the Dominions and the Provinces. It will be seen

that it is proposed that the powers in relation to the Colonial Laws Validity Act conferred by Clause 2 should be extended to the Provinces, but not the power of legislating with extra-territorial effect."

Parliamentary Debates (U.K.) 5th Series, Vol. 83 p. 183

While the Canadian Parliament gained extra-territorial legislative competence in 1931, the provinces never did.

Reference re Seabed & Subsoil of Continental Shelf Offshore Nfld., [1984] 1 S.C.R. 86, (1984), 5 D.L.R. (4th) 385 at pp. 400-401

Interprovincial Co-operatives Ltd. v. The Queen in the Right of Manitoba, [1976] 1 S.C.R. 477, (1975), 53 D.L.R. (3rd) 321 at p. 356

See Edinger, E., "Territorial Limitations on Provincial Powers" (1982), 14 Ottawa L. Rev. 57 at pp. 60-61

Sullivan, *op. cit.* at p. 522

162. No matter which head or heads of legislative power within Section 92 of the Constitution Act, 1867 the Act is said to fall (assuming it falls within any of them), the Act is *ultra vires* the Province because, despite the foregoing express territorial limitation on provincial legislative competence, its dominant purpose is to create an effect which, in respect of most of the Defendants, must be extra-territorial. The balance of this submission describes those extra-territorial purposes and effects.

The Act Abolishes Corporate Personality for all Defendants

It is submitted that Sections 1, 13, 13.1, 17 and 17.1 to the extent that they purport to govern or affect the status, structure and corporate personality of foreign corporations and purport to affect the rights of their shareholders are extra-territorial in purpose and effect and are beyond the constitutional powers of the B.C. Legislature and are ultra vires.

163. For the purposes of the Act and the government's claim for health care costs thereunder, the Act abolishes the separate corporate personalities of companies incorporated under federal or foreign statutes whose domicile is outside British Columbia.

164. A corporation is a legal entity distinct from its shareholders.

Salomon v. Salomon & Co. Ltd., [1897] A.C. 22
(H.C.)
Palmer's Company Law 24th ed., Schmitthoff,
C.M. Ed., (London: Stevens & Sons, 1987) p.
200
Fraser & Stewart Company Law of Canada 6th ed.,
(Carswell, 1993) at p. 17
Canada Business Corporations Act R.S., 1985 c.
C-44, S. 15(1)

165. The distinction between a corporation and its shareholders is equally applicable to parent and subsidiary corporations and to related corporations owned by a common shareholder.

Fraser & Stewart, op. cit. at p. 21
Davies, P.L., Gower's Principles of Modern
Company Law 6th ed. (London: Sweet & Maxwell,
1997) at pp. 80, 159-163
*BC Preeco I (Pacific Coast) Ltd. v. Bon Street
Developments Ltd.* (1989), 60 D.L.R. (4th) 30
(B.C.C.A.)

166. The location of a corporation's registered office determines its domicile.

Gasque v. Inland Revenue Commissioners, [1940]
2 K.B. 80
Fraser & Stewart, op. cit. at p. 144

The laws of the corporation's domicile govern not only its creation and continuing existence (i.e., the definition of its corporate personality) but also all matters of internal management, the creation of share capital, the rights of its shareholders and related matters.

"Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation. This domicile is in the state or province of incorporation or organization and cannot be changed during the corporation's existence even if it carries on business elsewhere. Thus, the law of the state or province under which a corporation has been incorporated or organized determines whether it has come into existence, its corporate powers and capacity to enter into any legal transaction, the persons entitled to act on its behalf, including the extent of their liability for the corporation's debts, and the rights of the shareholders."

Castel, J.G., Canadian Conflict of Laws 4th ed., (Toronto: Butterworths, 1997) pp. 574-5
Voyage Co. Industries v. Craster, [1998] B.C.J. No. 1884 (unreported) (S.C.)
National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd., [1954] 3 D.L.R. 326 (Ont. H.C.)
 Fraser & Stewart, op. cit. p. 144
Palmer's Company Law (Loose-leaf ed.) Vol. I, (London: Sweet & Maxwell, 1997) pp. 2105-2106

167. Canadian constitutional law draws a distinction between the power to incorporate a company and the power to regulate its activities. The incorporation power is the power to bring a company into existence. It authorizes the conferral of legal personality on an association of persons. It also authorizes the creation of corporate structure, including shareholder's rights. These are laws of a "company law" character.

Hogg, op. cit. at pages 23-7, 23-8
Dobie v. Temporalities Board (1881), 7 App. Cas. 136 (P.C.)
Multiple Access v. McCutcheon, [1982] 2 S.C.R. 161
Esso Standard (Inter America) Inc. v. J.W. Enterprises Inc., [1963] S.C.R. 144

168. The Act purports to override the laws of the domicile of foreign corporations that govern their corporate personality and the rights and liabilities of their shareholders; laws of a company law character. It does so by abolishing the distinct legal personality of both foreign and federally incorporated corporations by merging or amalgamating them in "Groups" liable for each other's wrongful acts, and exposing them to a judgment on the basis of the

market share in B.C. of a member of the Group. These measures are the core of the Act. They are central to its purpose and effect.

169. The provisions of the Act do not constitute merely a statutory piercing of the corporate veil. The provisions go further and are of a different character. They are virtually statutory merger or amalgamation provisions for the purposes of the Act. There is no precedent in Canada for such provincial legislation. These provisions of the Act are not limited in a territorial sense. They apply to foreign corporations - those incorporated under foreign law and domiciled in foreign countries. They apply whether or not a foreign corporation is resident in B.C. or has any significant connection with B.C. The Act is legislation in relation to the very status of foreign companies as legal persons. Its provisions are enacted to achieve the extra-territorial purpose and effect.

The Statutory Right of Action

It is submitted that the British Columbia legislature does not have the power to enact legislation whose purpose and effect is to create a right of action, for tortious conduct, against foreign or extra-provincial corporations, thereby imposing liability for acts or omissions outside the province.

170. 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.

Interprovincial Co-operatives Ltd. et al. v. The Queen in the Right of Manitoba, supra.

Tolofson v. Jensen [1994] 3 S.C.R. 1022, (1995), 120 D.L.R. (4th) 289

171. The Act places in issue the conduct of defendant manufacturers outside British Columbia, attaching legal consequences to such conduct. This conduct is defined by Section 1 as a "tobacco related wrong". It is expressed in terms of a breach of duty owed by a manufacturer to persons who have been or might become exposed to a tobacco product.

172. The manufacturer referred to in this definition is, in fact, a Group and the members thereof. This is the effect of Section 17.1(1)(a). Since the conduct of one related corporation is the conduct of all the relatives in the Group, there is no territorial limitation or requirement. Any defendant manufacturer, foreign or resident, that is a member of a Group qualifies as a "manufacturer" as that word is used in Sections 1 and 13.1.

173. The terms "persons" and "insured persons" are both used in Section 13.1. They have quite different meanings. The "persons" referred to in Section 13.1(1)(a) are those to whom a

"health care benefits" means

- (a) benefits as defined under the *Hospital Insurance Act*, and
- (b) benefits as defined under the *Medicare Protection Act*, and includes any other health care benefits designated by regulation;

178. An "insured person" is a B.C. resident who qualifies as a beneficiary under the *Medicare Protection Act* or the *Hospital Insurance Act*.

Medicare Protection Act, R.S.B.C. 1996, c.286
S.1
Hospital Insurance Act, R.S.B.C. 1996, c.204
S.1

179. "Insured persons" comprise virtually the entire population of British Columbia. If the legislature intended that "persons" and "insured persons" should be synonymous the definition of a "tobacco related wrong", and the provisions of subsection 13.1(1)(a), would have used the restrictive words "insured persons".

180. The government's Statement of Claim refers to duties and alleged breaches thereof in a manner consistent only with the absence of territorial limitation insofar as the locus of the duty, the persons and the breaches are concerned. In the paragraphs entitled "Duty of Care" and "Failure to Warn" (122 to 133) the duty alleged is said to be owed to consumers, children and adolescents

and the public. The breaches of duty are said to have resulted in persons beginning to smoke. These "persons" are not necessarily B.C. residents and that is not alleged. The duty on which liability is based need not be a duty owed in British Columbia nor must the breach be in British Columbia: it can be anywhere.

181. As in the case of the members of a "Group", whose individual identities are dissolved, the Act dissolves territorial boundaries in respect of "persons" to whom duties are owed. For the purposes of the Act it does not matter where breaches of duty occur or where these "persons" are. These legislative strategies are designed to enable the government to recover health care costs in the international and extra-provincial context - the "world wide multinational tobacco enterprises" referred to in paragraph 6 of the government's Statement of Claim.

182. In *Interprovincial Cooperatives Ltd. v. The Queen in the Right of Manitoba, supra*, (hereafter "*IpcO*") the Supreme Court of Canada considered the validity of Provincial legislation conferring a statutory right of action on the government against parties resident in the province but whose conduct that gave rise to liability was outside the province. The statute was held to be *ultra vires*.

183. The Act has much stronger extra-territorial elements than had the Manitoba statute considered in *IpcO*. Under the scheme

imposed by the Act liability does not depend on residence. It depends on membership in a Group in which most members are not residents. Liability for wrongful acts is not confined to conduct in the province. Even the consequences do not have to be shown to have occurred in B.C. That is presumed whatever the facts are.

184. In *IpcO Pigeon, J.* (Martland and Beetz, J.J. concurring) referred to the limits on the power of provincial legislatures in the following terms:

"it must be noted that s. 7(2) of the Statute of Westminster, 1931 has made applicable to the provincial Legislatures only the provisions of s. 2 dealing with conflict with Imperial statutes, not those of s. 3 which declare that the federal Parliament "has full power to make laws having extra-territorial operation."

"The basic principle of the division of legislative powers in Canada is that all legislative power is federal except in matters over which provincial Legislatures are given exclusive authority. Such authority is under every head expressly or impliedly restricted to the provincial territory." (at pp. 356-357 D.L.R.)

and held that:

"in respect of injury caused by acts performed outside its territory, I cannot accede to the view that this can be treated as a matter within its legislative authority when those acts are done in another Province any more than when they are accomplished in another country. In my view, although the injurious acts cannot be justified by or under legislation adopted in the Province or State where the plants are operated, by the same token, Manitoba is restricted to such remedies

as are available at common law or under federal legislation." (at p. 359 D.L.R.)

185. Pigeon, J. concluded that the Manitoba statute was ultra vires because it purported to create a statutory right of action with respect to acts done outside Manitoba whether or not the common law provided remedies for those acts.

186. Ritchie, J. also found the Manitoba statute to be ultra vires. He based his decision on the issues of derogation from extra-territorial civil rights and choice of law. These issues will be addressed, *infra*.

187. The judgments of Pigeon, J. and of Ritchie, J. in *Ipco* are supported by the subsequent Supreme Court of Canada judgment in *Tolofson v. Jensen, supra*. The new rule expounded in *Tolofson* concerning the law that is to govern in the case of torts, the *lex loci delicti*, is based in part on constitutional considerations. Its effect is to limit territorially the power of provincial legislatures to impose the province's laws on claims sounding in tort. It follows from the rule in *Tolofson* that a provincial legislature cannot by attaching new consequences to extra-territorial acts or omissions impose its own law on a tort whose situs is outside the province.

Impairment of Extra-Provincial Contractual and Property Rights

It is submitted that the B.C. Legislature does not have the power to enact legislation whose purpose and effect is to affect adversely contractual and property rights outside the province.

188. A provincial legislature does not have the power to make laws whose effect is the impairment of rights outside the province or other extra-provincial consequences unless such effect is merely collateral or incidental to legislation otherwise falling within a head of provincial legislative power.

Churchill Falls (Labrador) Corp. Ltd. v. A.G. Newfoundland, [1984] 1 S.C.R. 297, (1984), 8 D.L.R. (4th) 1
Hogg, op. cit. at pp. 13-8

189. It has been submitted in paragraph 155 that the dominant purpose of the Act is to impose a judgment on the "four worldwide multinational tobacco enterprises". The extra-provincial purpose of the Act lies at and constitutes its core. The principal features of the Act are the creation of a new right of action; the creation of four largely extra-territorial Groups; the imposition of joint and several liability for each other's acts, and the imposition of liability for conduct occurring anywhere in the world, whether or not such conduct had consequences in British Columbia. Not surprisingly the action commenced by the government

under the Act is mostly against foreign and non resident defendants.

190. This is not a case of a collateral or incidental effect on extra-territorial rights, the exception to the general rule against extra-territorial exercise of provincial legislative power. In its very essence the Act is a purported exercise of such power, not permitted to a province under our Constitution.

191. The rights and liabilities of extra-territorial shareholders have been addressed in paragraphs 163 to 169 but only in the sense that the definition of such rights and liabilities are part of the fundamental structure and status of corporations. The rule in *Churchill Falls* is relevant also in this context.

192. The effect of the Act on shareholders is that it makes them liable, if a sufficient number of shares are held, for the conduct of the corporations that issued the shares.

193. The Statement of Claim in the government's action alleges that the Defendant Rothmans Inc. is a federally incorporated corporation with its registered office in Ontario, that it owns 60% of the shares of the Defendant Rothmans, Benson & Hedges Inc., that the latter manufactures cigarettes and is a B.C. resident selling cigarettes there. (Statement of Claim paragraphs 41, 43, 44 and 45)

194. These two Defendants are "related" according to Sections 1(2) and 1(3) of the Act. Both Defendants are "manufacturers". In the case of Rothmans, Benson & Hedges Inc., this is because it manufactures and promotes cigarettes. Rothmans Inc. acquires the "manufacturer" qualification if 10% of its revenues are generated from the manufacture or promotion of tobacco products by anyone including Rothmans, Benson & Hedges Inc. Both Defendants are members of a Group by virtue of Section 17.1(1). Rothmans Inc. is, therefore, liable for Rothmans, Benson & Hedges Inc.'s acts or omissions because it is a majority shareholder, provided the dividends from that shareholding constitute 10% of its revenue.

195. The liability of Rothmans Inc. to the B.C. government under Section 13 and the amount thereof under Section 1(5) arises because of its shareholder's rights to elect directors and to receive dividends, provided Rothmans, Benson & Hedges Inc. has acted in a way that can be characterized as a "tobacco related wrong". Its own knowledge of the activities of Rothmans, Benson & Hedges Inc. or its participation in them are not relevant to liability under the Act.

196. The same result is achieved at another level. If the Defendant Rothmans International N.V. owns the majority of shares of Rothmans Inc. and derives 10% of its revenue from tobacco it will qualify as a member of the Group and will be liable for the conduct of Rothmans Inc. and of Rothmans, Benson & Hedges Inc. who

are Group members. Its own knowledge or conduct (apart from being a shareholder and having revenue from tobacco sales) is not relevant to liability under the Act.

197. Shares in a corporation are personal estate and transferable as such by the shareholder. (See Fraser & Stewart, op. cit. p. 241) The rights of shareholders are governed by the law under which the corporation has been created. (Castel, op. cit. pp. 574-5).

198. In the examples referred to above the ownership of the shares and of the rights attached to them are extra-territorial (the Netherlands and Ontario). Those rights are governed by federal and Netherlands law. They are extra-territorial property rights in every sense. An attempt to alter or to derogate from those rights by the British Columbia legislature is beyond its powers and the Sections of the Act that have this effect - Sections 1(1), 1(2), 1(3), 1(5), 13 and 17.1 offend against the rule in *Churchill Falls*.

199. Another basis for liability under the Act arises from contracts involving the acquisition of part of a tobacco related business [Section 17.1(2)]. Rights under such a contract are defined by the terms of the contract. 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. The term is imposed by the Act; it involves the assumption of liability by the purchaser or lessee for any wrongful conduct on the part of the vendor or lessor that would qualify as a tobacco related wrong. It attaches consequences retroactively to any such commercial transaction by the provisions of Sections 17.1(2) and Section 20(2). In the case of a transaction involving an extra-territorial purchaser or lessor, extra-territorial contractual rights are adversely affected and this effect offends against the rule in *Churchill Falls*.

200. The Act attaches consequences to the ownership of a tobacco trade mark and of licenses for the use of such a trade mark. In the former case the trade mark must be in use before the consequences take effect; in the latter case the fact that triggers the consequence is the existence of a relationship to a manufacturer [Section 1(1) "manufacturer"]. The consequence is that the owner or licensee is a "manufacturer". The status of "manufacturer" does not itself lead to liability but such ownership creates the pre-condition to Group membership.

201. Ownership of a trade mark used in Canada is a property right governed by the *Trade Marks Act*, 1985 c. T-13 and is a matter over which the Parliament of Canada has jurisdiction under Section 91(2) of the *Constitution Act*, 1867. Section 19 of the federal statute confers on the owner of a trade mark registered under the *Trade Marks Act* the exclusive right to use it throughout Canada.

The Trade Marks Act governs generally the use, transfer, registration, limits on the use of and other conditions affecting the rights and obligations of trade mark owners.

Asbjorn Horgard A/S v. Gibbs Nortac Industries Ltd. (1987), 38 D.L.R. (4th) 544 (Fed. Ct.)

The definition of "manufacturer", insofar as it attaches new consequences to the ownership of a trade mark raises a constitutional question concerning the power of a provincial legislature to trench upon a recognized federal jurisdiction. There is also an extra-territorial issue.

202. None of the Defendants in the government's action is domiciled in British Columbia. Few are resident in the province. If any of them or their affiliates own trade marks, they are owned extra-provincially. If, notwithstanding the Federal jurisdiction over trade marks, trade names, etc., the Province has any power to affect the rights attached to trade mark ownership, which may be doubted, the provisions in question are not limited to trade marks used in British Columbia. They cover tobacco and trade marks owned or licensed or used anywhere. This extra-territorial application of the trade mark provisions constitutes a derogation from extra-provincial property rights and offend against the rule in *Churchill Falls*.

Choice of Law

It is submitted that the British Columbia legislature does not have the power to override laws of Canada, of other provinces and of other countries governing torts, corporate status, shareholders' rights and liabilities or contractual rights situate, occurring or domiciled in those other provinces or countries.

203. A provincial legislature does not have the power to impose its own laws on extra-territorial status, contracts, conduct or property. Choice of law rules are part of provincial common law. They are subject to the same constitutional limits as are all other legislative endeavours.

Hogg, *op. cit.* at pp. 13-22, 13-23

204. The Act purports to do all those things. The effect of the Act on extra-territorial status and corporate personality has been dealt with at pages 10 to 15. The effect of the Act on extra-territorial conduct also has been referred to at pages 15 to 24 hereof.

205. The Act purports to apply to contracts such as purchase agreements, leases and other unspecified commercial transactions by Section 17.1(2). The provisions of that sub-section are so broad that it seems to apply to such transactions as the lease of a tobacco warehouse by a U.K. Tobacco manufacturer from a small

Quebec tobacco manufacturer thirty years ago. Such a lease would appear to be within the intended scope of the Section since the warehouse would qualify as a "tobacco related part of a business". Under Section 17.1(2) the U.K. lessee will be liable to the B.C. government for any tobacco related wrong committed in Quebec by the Quebec lessor. Assuming that Section 13.1 applies to this vicarious liability, the Quebec manufacturer's wrongful act committed thirty years ago in Quebec is deemed to have caused exposure and disease in British Columbia. It is a causal connection that almost certainly the B.C. government could never prove. For the same reason, the U.K. manufacturer is very unlikely to be able to rebut the presumption. Whatever right of rebuttal may be provided by Section 13.1(4) does not change the fact that the lessee's extra-provincial contractual rights have been adversely affected by Section 17.1(2).

206. For the purposes of the Act the proper law of the contract is not relevant, nor are its actual terms. The Act imposes British Columbia statute law, overriding the proper law of the contract for the purpose of imposing liability. Factors such as the place of performance, the system of laws with which the transaction is most closely connected, the place of contracting, the places of residence or business of the parties and the nature and subject matter of the contract must be ignored by the court for the purposes of Section 17.1(2).

207. The rights and liabilities of shareholders are adversely affected by Sections 1(3), 1(5), 13 and 17.1(1) of the Act. The combined effect of these sections is to make a shareholder whose shareholdings carry 50% of votes for the election of directors or 50% of the fair market value of the issued shares of a corporation liable to the B.C. government for the acts or omissions of the corporation whether or not the shareholder knew of or participated in the acts or omissions of the corporation.

208. The Canadian Defendants in the B.C. government's action are federally incorporated. Their shareholders' rights and liabilities are governed by the *Canada Business Corporations Act*, Section 45 and by the *Interpretation Act* R.S.C. 1985, c. I-21. Likewise the foreign Defendants' shareholders rights are governed by the statutes incorporating them, under the articles or by-laws of the corporation in which shares are held and by the general law of the corporations' domiciles.

Canada Business Corporations Act R.S.C., 1985
c. C-44, S. 45
Interpretation Act R.S.C. 1985, c. I-21
Fraser & Stewart, op. cit. p. 167, 207-208
Allen v. Standard Trust Co. (1919), 49 D.L.R.
399; aff'd (1921), 57 D.L.R. 105 (Man. C.A.)
Gower's Principles of Modern Company Law 6th
ed., op. cit. pp. 77-83
Castel, Canadian Conflict of Laws, op. cit. p.
574-5

209. The Act overrides the statutes, both federal and foreign, under which the Defendants in the B.C. government's action were

incorporated. The articles or by-laws of these corporations and the general law of the domiciles of the corporations that govern their shareholders' rights and liabilities are overridden by making shareholders liable for wrongful conduct of the corporations in which the shares are held on the basis only of the fact that a certain percentage or market value of the corporations are held, and nothing more.

210. The Act imposes the extra-territorial application of its provisions instead of the substantive law of Canada or of foreign countries in four situations:

- a) in respect of the status and corporate personalities of corporate tobacco manufacturers with domiciles outside British Columbia;
- b) in respect of legal consequences of acts or omissions outside British Columbia, characterised as tobacco related wrongs;
- c) in respect of contracts relating to the purchase, lease or acquisition by any means whatsoever of any part of a tobacco related business wherever situate and whatever the proper law of the contracts; and
- d) in respect of shareholders rights and liabilities regarding shares of federal or foreign corporations.

The Act purports to remove the Court's jurisdiction to apply "choice of law" rules of private international law in each of the above circumstances.

211. The Supreme Court of Canada in *Tolofson v. Jensen, supra*. has held that where a tortious act has been committed in another

province and involves extra-provincial parties, the substantive law of that province must be applied by the courts of the province where the action is tried. The decision was made on a "choice of law" issue but the ruling had a constitutional dimension.

"an attempt by one province to impose liability for negligence in respect of activities that have taken place wholly in another province by residents of the latter or, for that matter, residents of a third province, would give rise to serious constitutional concerns." (per La Forest, J. at p. 316 D.L.R.)

212. The rule in *Tolofson* that the *lex loci delicti* must govern is made applicable to extra-provincial torts in Canada. In regard to foreign torts La Forest, J. observed that:

"because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary." (at pp. 307-308 D.L.R.)

In the case at bar the remarks quoted above are particularly apt. Under the Act there is no necessary connection in fact between the "tobacco related wrong" and the health care costs claimed. The connection is presumed. That is contrary to *Tolofson*. *Tolofson* requires that the court must connect the alleged wrongful conduct to the place of its occurrence so that the parties will be judged under the laws that they know and had in contemplation when they

acted and the Court must make its decision on the choice of law on that basis.

213. Castel, 4th ed. suggests that a constitutional doctrine of order and fairness is applicable to statutory conflict of law rules in inter-provincial situations such as those that clearly are intended to be covered by the Act and relies on the judgment of the Supreme Court of Canada in *Tolofson* in that connection.

"In a series of cases beginning in 1990³, the Supreme Court of Canada held that, to be constitutionally valid, statutory or judicial conflict of laws rules applicable to interprovincial situations must conform to the demands of territoriality and the principles of order and fairness. Thus, there are now two grounds for challenging the constitutionality of a statutory or judicial rule of the conflict of laws: the traditional limitation on the power of the provinces to legislate extra-territorially and the new constitutional principles of order and fairness. These principles which have their source in the notions of full faith and credit and due process implicit in the Canadian Constitution, were first applied to the general rules of jurisdiction of Canadian courts and the common law rules of recognition and enforcement of sister-province judgments. More recently, they seem to have influenced the adoption of a new common law choice of law rule for interprovincial torts."

Castel, op. cit. p. 52

³eg. *Morguard Investments v. De Savoye* (1990), 76 DLR (4th) 256; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, [1995] 120 D.L.R. (4th) 289.

214. The problem inherent in the Act having the purpose and effect of overriding extra-provincial and foreign law governing the conduct of its domiciliaries is presented in its most extreme form by the definition of a "tobacco related wrong" as including breaches of statutory duty. The statutory duty referred to in Section 1 is a duty imposed by British Columbia statutes (e.g., the *Trade Practice Act*). Foreign corporations with no presence in British Columbia are to be judged under the provisions of Section 13.1(1)(a) by reference to the standard of conduct specified by those British Columbia statutes for acts or omissions in their own countries. In most cases foreign corporations, their officers and legal advisors will have in mind the laws of their own countries when they act there. Probably they will not even know of the statute law of British Columbia. There is neither order nor fairness in such a regime as that imposed by the Act with respect to inter-provincial and international elements.

215. Problems arising from attempts by provincial legislatures to affect extra-territorial property, status or contractual rights are usually dealt with on the basis that provinces have no power to do such things under the powers conferred by Section 92 of the *Constitution Act*, because of the territorial limitations. There is, however a "choice of law" dimension to these problems. Ritchie, J.'s judgment in *Ipco*, and La Forest J.'s judgment in *Tolofson*, where the constitutional aspect of provincial interference with choice of law rules was addressed, were in the context of actions

sounding in tort. The same considerations should apply with equal vigour to cases where a provincial legislature seeks to override the laws of other provinces or countries governing property, status or contracts situate beyond the province's borders.

The Artificial Connection with B.C.

It is submitted that the British Columbia legislature does not have the power to enact an artificial connection between foreign and extra-provincial corporations and British Columbia in derogation of the extra-territorial civil rights of those corporations.

216. Section 17.1(1) merges the Defendant tobacco manufacturers for the purpose of establishing a tobacco related wrong and joint and several liability for the same. Section 13.1(2) directs the court to presume that such conduct, wherever it occurred, caused exposure and disease in British Columbia.

217. The effect of each of these two provisions is to create a connection between foreign and extra-provincial manufacturers and British Columbia.

218. The "Group" provisions of Section 17.1 imposes on all Group members liability for its B.C. resident member's actions or omissions in British Columbia. This is tantamount to deeming all Group members, foreign and extra-provincial, to be acting in

British Columbia through their B.C. "Division". This is the imposition of a B.C. residence on foreign and extra-provincial manufacturers; whatever the facts may be.

219. The presumptions provided by Section 13.1(2) create the same effect in respect of conduct. Tobacco related wrongs wherever they may have been committed, and whatever country or place felt their consequences, are presumed to have caused exposure and disease in British Columbia.

220. The extra-territorial civil rights of manufacturers who are not B.C. residents and whose acts or omissions have had no consequences in B.C. are adversely affected by Sections 13.1(2) and 17.1(1) in the following ways:

- (a) the foreign manufacturer with no actual connection with B.C. is made subject to British Columbia law including the Act;
- (b) if the court applies the Act on an application under Rule 13 the court must consider the applicant manufacturer to be residents carrying on business in B.C.

Limitations

It is submitted that the British Columbia legislature does not have the constitutional power to impose the limitation provisions of Sections 15 and 20(2) on extra-territorial tobacco related wrongs.

221. The following part of this submission is predicated on adopting the Manufacturers' construction of the Act. Unlike the earlier parts of this submission, it is here assumed that the proper construction of the Act is that the government's claim is inextricably bound to a wrong done to persons (i.e. a "tobacco related wrong") which wrong, by definition, is a common law wrong which must pre-date the Act. While the government's cause of action is new, and previously unknown to the law, the underlying wrong is not. The underlying wrong is therefore, depending on its nature and the provisions of the *Limitation Act*, potentially subject to a time bar. To the extent such bar had already arisen prior to the proclamation of the Act, the defendants enjoy vested rights of repose. Those rights could be defeated by appropriate language. That language would eliminate defences based on the expiry of time in respect of the underlying tobacco related wrong. The Manufacturers have earlier submitted that the language of the Act is insufficient to achieve this result by reviving stale claims but, even assuming the language was sufficient, there is a constitutional restraint on a province's power to affect vested

statutory limitation rights. It cannot be done where the purpose and effect of the legislative change are extra-territorial.

222. The right to raise a limitation defence to a claim for damages or other remedy is a vested right. It is a civil right whose situs must be either the domicile or residence of its owner. This limitation right is defined by the law of the place where the act or omission occurred (*lex locus delicti*).

Martin v. Perrie, [1986] 1 S.C.R. 41.
Tolofson v. Jensen, *supra*.

223. The Court in *Martin v. Perrie* held that if a provincial legislature wished to give retroactive effect to amendments to its limitation legislation in derogation of vested rights it would have to do so clearly and unambiguously. On the government's construction, the Act purports to do so by Section 20(2).

224. Sections 15 and 20(2) of the Act have an extra-territorial purpose and effect in two respects:

- (a) they purport to abolish limitation defences for tobacco related wrongs that have occurred outside British Columbia. This involves overriding the applicable foreign or extra-provincial limitation statute; and
- (b) they are intended to extinguish limitation rights vested in foreign and extra-provincial "manufacturers".

225. It is implicit in the government's Reply that the legislature intended to confer on the government a right of action

untrammelled by limitation defences. Under Section 20(2)(b) a claim in an action brought under Section 13 "arising from a tobacco related wrong, whenever it occurred" is to be "allowed". In the case of a tobacco related wrong occurring outside British Columbia that can be achieved only by overriding the limitation laws of foreign or extra-provincial places where a tobacco related wrong has occurred.

226. It has been submitted (at page 92) that the British Columbia legislature does not have the power to override the laws of other provinces and other countries governing torts occurring in these other provinces or countries. Under the "choice of law" rule in *Tolofson* the limitation law of the province or country where the wrongful act occurred is applicable. The British Columbia legislature's attempt to impose its own limitation provisions found in Section 20(2) on tobacco related wrongs, wherever the wrongful act occurred, is beyond its constitutional powers.

227. Quite apart from the "choice of law" issue that arises from the effect of Section 20(2) the British Columbia legislature has exceeded its powers. By this Section it purports to govern extra-territorial torts involving foreign or extra-provincial parties and to derogate from extra-territorial rights. It can do neither of those things.

Interprovincial Co-Operatives Ltd. v. The Queen in the Right of Manitoba, supra
Churchill Falls (Labrador) Corp. Ltd. v. A.G. Newfoundland, supra.

228. On the other hand, there is the government's construction of the Act as it must be applied to the limitations sections. On the government's construction there is an entirely new wrong which came into being on the date of proclamation of the Act. On this construction, Section 15 cannot be interpreted as providing for an extension of time or revival of the government's aggregate claim because such a provision would be superfluous. The wrong did not exist before the date of proclamation and so, of course, could not be subject to a time bar. No manufacturer could have relied on a vested limitation right because none existed. Nevertheless, the government's construction does not avail to avoid the *ultra vires* consequence. That consequence arises for the same reason as those given at pages 78 through 91 of this submission: i.e. the legislature does not have the power to create a cause of action, relating to acts or omissions, contracts or property rights which are outside the province and then to impose such cause of action on foreign or extra-territorial corporations.

Federally Incorporated Defendants

It is submitted that the provisions of Section 1, 13, 13.1, 17 and 17.1, to the extent that they override the *Canada Business Corporations Act* by governing the status, structure and corporate

personality of federally incorporated corporations and purport to affect the rights of their shareholders, are not only extra-territorial in their effect but trench upon an exclusive jurisdiction of the Parliament of Canada and are *ultra vires*.

229. Different constitutional principles apply to the federally incorporated Defendants (Imasco, Imperial, Rothmans Inc., RBH and RJR-Macdonald). Their status, structure, corporate personality and shareholders' rights are governed by the Canada *Business Corporations Act*. Relevant provisions include:

Part III S. 15(1) Capacity of a corporation -

Capacity & Powers a corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.

Part V S. 45(1) The shareholders of a
Corporate Finance corporation are not, as shareholders, liable for any liability, act, or default of the corporation except under subsection 38(4), 146(5) or 226(5).

The *Interpretation Act* R.S.C. 1985, c. I-21 provides:

S. 21 Words establishing a corporation shall be construed:

(d) as exempting from personal liability for its debts, obligations or acts individual members of the corporation who do not contravene the provisions of the enactment establishing the corporation.

It should be noted that the exemption of shareholders from liability for acts of the corporation are classified as pertaining to "Corporate Finance". That classification underlines the obvious point that the elimination of this exemption strikes at the corporation's financial status and its ability to raise capital.

230. Amalgamation is dealt with in Part XV of the *Canada Business Corporations Act* under the heading "FUNDAMENTAL CHANGES":

"Though the origin of the term is unclear, its meaning is not. It is the term given to those changes or alterations to the powers, objects, share capital, structure or nature of the business of a corporation that are so fundamental as to require an amendment to the articles of the corporation itself. Such changes affect the "very life-blood" of its existence."

Fraser & Stewart, op. cit. p. 550

231. Two of the effects of amalgamation are that the amalgamating corporations become one corporation, and the amalgamated corporation becomes liable for the obligations of or civil claims against the amalgamating corporations.

Canada Business Corporations Act R.S.C. 1985
c. C-44, S. 186

These are also the effects of Sections 1, 13, 13.1, 17 and 17.1 of the Act, but these effects are achieved not by resolutions of shareholders, agreements between amalgamating corporations or the other procedures required by Part XV of the *Canada Business*

Corporations Act. Nevertheless they are "fundamental changes" to the status, structure, constitution and share capital of the corporations merged into amalgamated "groups" and made liable for each other's acts or omissions.

232. Parliament has the exclusive legislative power to incorporate companies with other than provincial objects by virtue of the residuary character of the peace, order and good government power in the opening words of Section 91 of the Constitution Act, 1867.

Citizens Insurance Co. v. Parsons (1881), 7
App. Cas. 96 (P.C.)

That exclusive federal power is exercised under the *Canada Business Corporations Act*.

233. It follows that a provincial legislature does not have the power to affect the fundamental structure, status, or essential powers of federally incorporated companies. It is not a power assigned to a province under the Constitution.

John Deere Plow Co. v. Wharton, [1915] A.C.
330 (P.C.)
Great West Saddlery Co. v. The King, [1921] 2
A.C. 91 (P.C.)
A.G. Manitoba v. A.G. Canada, [1929] A.C. 260
(P.C.)
See Hogg, op. cit. at p. 23-10

234. It has been submitted that the purpose of the Act is to enable the B.C. government to recover health care costs from the national and international tobacco industry. This includes the five federally incorporated Defendants. It has been submitted also that the effects of the Act include the abolition of the separate corporate personalities of the Defendants in the government's action, adversely affecting their status, structure and shareholders' rights. These effects apply to the five federally incorporated Defendants.

235. The Act purports to override the provisions of the *Canada Business Corporations Act* in regard to the federally incorporated Defendants, particularly Sections 15(1), 45(1) and Part XV.

236. Sections 1(2), (3), (4), (5) and 17.1(1)(a) of the Act eliminate separate identities both for the purpose of establishing liability for a tobacco related wrong committed by any related corporation and for the purpose of calculating the amount to be assessed against the federally incorporated Defendants. These Defendants are no longer legal persons distinct from their shareholders. This distinct or separate legal personality is conferred on those Defendants by Section 15(1) of the *Canada Business Corporations Act*; it is the fundamental right conferred by that statute.

237. Sections 1(2), (3), (4), (5) and 17.1(1)(b) destroy the immunity from liability conferred on federally incorporated corporations whose liability under the Act arises from the ownership of shares in subsidiaries. An example of this effect of the Act is the case of Rothmans Inc. It is alleged in paragraph 45 of the Statement of Claim in the B.C. government's action that Rothmans Inc. owns a majority of the shares of the Defendant Rothmans, Benson & Hedges Inc.

238. It is alleged also that Rothmans Inc. sold the tobacco related part of its business in 1985 and that this business is now that of Rothmans, Benson & Hedges Inc. (Statement of Claim, paragraph 52). Under the Act, on proof of that shareholding and nothing more, Rothmans Inc. will be liable for any tobacco related wrong on the part of Rothmans, Benson & Hedges Inc. since the latter corporation started business and the amount assessed against it will be in proportion to the latter's B.C. market share.

239. This liability, based solely on the ownership of shares for the act or default of the corporation in which the shares are held, eliminates the rights conferred on Rothmans Inc. by Section 45(1) of the *Canada Business Corporations Act* and by the provisions of the *Interpretation Act*, R.S.C. 1985 c.I-21 Section 21(d).

240. The scheme of the Act as a whole creates groups of affiliated or related corporations liable for each other's tobacco

related wrongs. The retroactive provisions (Section 20) demonstrate that there is to be no temporal limitation to this vicarious liability. Each group is to be considered as "one manufacturer" for the purposes of Section 1(5) and 17.1(1). The overall effect is a very like amalgamation.

241. A change of this magnitude is aptly characterized in the *Canada Business Corporations Act* as a "FUNDAMENTAL CHANGE". The learned author of *Fraser & Stewart* describes such a change as affecting "the very life blood of its [the corporation's] existence".

242. It is appropriate, therefore, to describe the changes imposed on the federally incorporated Defendants by the provisions of the Act that produce the group identity situation as striking at their "status and essential powers" as those words are used in the relevant jurisprudence.

John Deere Plow Co. v. Wharton, supra
Great West Saddlery Co. v. The King, supra
A.G. Manitoba v. A.G. Canada, supra
Churchill Falls (Labrador) Corp. Ltd. v. A.G. Newfoundland, supra

243. Since the Act purports to impair or destroy the status and essential powers of federally incorporated Defendants, the provisions of the Act that produce this effect - Sections 1(2)(3)(4)(6) and 17.1(1) - are antithetical to and cannot operate concurrently with, *inter alia*, Sections 15(1) and 45(1) of the *Canada Business Corporations Act*.

244. If the Act were one of general application whose purpose and effect were for a valid provincial matter, the doctrine of paramountcy might apply. The impugned provisions would not apply to federal corporations, including the five federally incorporated Defendants. (See *Bank of Montreal v. Hall* (1990), 65 D.L.R. (4th) 362 at pp. 383-387.) That is not the case. The Act is not otherwise validly enacted. This is because its dominant character, given its purpose and effect, is extra-territorial and beyond the powers conferred on provincial legislatures by the *Constitution Act, 1867* and the *Statute of Westminster, 1931*.

PART 4 UNCONSTITUTIONALITY RE: THE RULE OF LAW

If the Manufacturers' statutory interpretation argument is rejected, the Act violates the constitutional guarantee to be free from retroactive penal legislation

I. Constitutional sources of the prohibition on retroactive penal legislation

245. If the Act is not interpreted in the manner that the Manufacturers suggest, s. 13 is both retroactive and penal. The combination of these characteristics renders legislation of even a purportedly civil nature, at either the federal or provincial level, unconstitutional.

246. The above is the positive rule of constitutional law on which the Manufacturers base this portion of their argument. This positive rule is manifest in, but broader than, s. 11(g) of the *Canadian Charter of Rights and Freedoms*, which deals explicitly with a subset of the same legislated proceedings. The rule is also supported by, although in its positive form narrower than, the various links (both express and implied) between the Constitution and the rule of law.

247. Although the Manufacturers do not rely directly either on s. 11(g) alone or on the constitutionalized rule of law (in its general form) to invalidate the Act, each demonstrates the existence and importance of the constitutional rule to which this task falls.

A. Section 11(g) of the Charter

248. Section 11 of the Charter states:

Any person charged with an offence has the right

...

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations...

...

(i) if found guilty of the offence and if the punishment for the offence has been varied

between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

249. Section 11 unquestionably prohibits the retroactive application of more than the *Criminal Code*. First, there is no doubt that provincial legislation falls within its scope. Wilson J. held in *R. v. Wigglesworth* that "[t]he rights guaranteed by s. 11 of the Charter are available to persons prosecuted by the State for public offences involving punitive sanctions...either federally or provincially enacted". Indeed, prosecutions in provincial quasi-criminal proceedings are "automatically subject to s. 11".

[1987] 2 S.C.R. 541 at 554, 560 (emphasis added).

250. Second, there is no doubt that the prohibition in s. 11(g) is not confined to "criminal" or "quasi-criminal" legislation. In this regard, it is significant that the words "criminal" or "quasi-criminal" do not qualify the "offence" around which the various subsections of s. 11 revolve. The marginal note (which Wilson J. in *Wigglesworth* consulted) for s. 11 instead refers more broadly to "[p]roceedings in criminal and penal matters".

Supra at 556-58.

251. "Penal matters" encompass more than criminal or quasi-criminal charges:

The word "penal" is inherently a much broader term than "criminal" since it pertains to any punishment or penalty and relates to acts which are not necessarily delineated as criminal. Action is essentially "penal" if amount sought to be recovered is arbitrarily exacted for some act or omission of the defendant.

Black's Law Dictionary, 6th ed. (Abr.) (St. Paul, Minn.: West Publishing Co., 1991) at 784.

252. Wilson J. in *Wigglesworth* thus concluded that a proceeding could fall within the scope of s. 11 "either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence". A proceeding that fails the first test still attracts the s. 11(g) prohibition if it passes the second. In other words, "where there are potential 'true penal consequences,' s. 11 will be engaged regardless of the type of provision or proceeding".

Wigglesworth, *supra* at 559, 561, 563 (emphasis added);
and
Johnson v. British Columbia (Securities Commission),
[1999] B.C.J. No. 552 at para. 10 (B.C.S.C.).

253. In *Wigglesworth*, Wilson J. described true penal consequences in terms similar to those which would be used to describe the damages exacted under a non-compensatory interpretation of the Act: "a true penal consequence which would attract the application of s. 11 is a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society".

Supra at 561, 562.

the type of *sui generis* civil wrong created upon a non-compensatory interpretation of s. 13 of the Act. In *Wigglesworth*, Wilson J. advocated a coherent development of s. 11 which the Manufacturers have neither the desire nor the need to distort.

Supra at 558;
Russell v. Radley, [1984] 1 F.C. 543 at 565 (T.D.); and
Kalin v. Canadian Imperial Bank of Commerce (1993), 141
 A.R. 286 (C.A.).

257. The constitutional principle which s. 11(g) illustrates can be (and is) broader than the subsection itself: restrictions placed on s. 11(g) in order to ensure consistency with its immediate written context do not render retroactive penal legislation in the wider civil arena constitutional. Addressing the possible exhaustiveness of the written Constitution in *Judges' Salary Reference*, *supra*, Lamer C.J. stated:

Notwithstanding the presence of s. 11(d) of the Charter, and ss. 96-100 of the Constitution Act, 1867, I am of the view that judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the Constitution Acts...The specific provisions of the Constitution Acts, 1867 to 1982, merely "elaborate that principle in the institutional apparatus which they create or contemplate"...

I arrive at this conclusion, in part, by considering the tenability of the opposite position -- that the Canadian Constitution already contains explicit provisions which are directed at the protection of judicial independence, and that those provisions are exhaustive of the matter...

...[U]pon closer examination, there are serious limitations to the view that the express provisions of the Constitution

260. The rule of law was included as well in the Preamble to the *Constitution Act, 1867* through its reference to "a constitution similar in principle to that of the United Kingdom".

Reference re Manitoba Act, 1870 s-23, [1985] 1 S.C.R. 721, (1985), 19 D.L.R. (4th) 1 at 23 [hereinafter *Manitoba Language Reference*];

Reference re Amendment of the Constitution of Canada [1981] 1 S.C.R. 753, (1981), 125 D.L.R. (3d) 1 at 46; and *Judges' Salary Reference*, *supra* at paras. 94-95.

261. The constitutional importance of the rule of law is also evident in the very structure and idea of having a constitution. According to the Supreme Court of Canada:

[T]he principle is clearly implicit in the very nature of a constitution. The Constitution, as the supreme law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of rule of law is clearly a principle of our Constitution.

Manitoba Language Reference, *supra* at 24.

262. Retroactive lawmaking self-evidently violates the rule of law on which the Constitution rests.

Because a retroactive law applies to past events, its practical effect is to change the law that was applicable to those events at the

time they occurred. To change the law governing a matter after it has already passed violates the rule of law. In fact, it makes compliance with the law impossible... [T]he fundamental tenet on which the rule of law is built is that in order to comply with the law, or rely on it in a useful way, the subjects of the law have to know in advance what it is. By definition, a retroactive law is unknowable until it is too late.

R. Sullivan, *Driedger on the Construction of Acts*, 3d ed. (Toronto: Butterworths, 1994) at 513 (emphasis added); S. Munzer, "A Theory of Retroactive Legislation" (1982) 61 *Texas L. Rev.* 425 at 427; J. Raz, "The Rule of Law and Its Virtue" in *Liberty and the Rule of Law*, ed. R.L. Cunningham (College Station: Texas A&M University Press, 1979), 3 at 7; and H.J. Krent, "The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking" (1996) 84 *Geo. L.J.* 2143 at 2143.

263. In terms of priority, it can even be stated that "[t]he first requirement of the rule of law, in the context of statute law, is that the citizen should be bound by, and be entitled to rely on, the law as it is expressed."

T.R.S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 *C.L.J.* 111 at 117 (emphasis added).

264. The Manufacturers rely directly not on the general rule of law, however, but instead on a positive rule of constitutional law that arguably may be characterized, to the extent that it is unwritten, as part of Canada's implied bill of rights.

C. Implied bill of rights

265. The positive prohibition on retroactive penal legislation of even a seemingly civil nature derives from the general context set out above but acquires additional legal force through specificity. The Supreme Court of Canada has in some circumstances held that such specific - albeit unwritten - constitutional principles are sufficiently powerful to render legislation of no force or effect.

Switzman v. Elbling, [1957] S.C.R. 285 at 307, Rand J. and 328, Abbott J.;
Oil, Chemical and Atomic Workers International Union, Local 16-1601 v. Imperial Oil Ltd., [1963] S.C.R. 584 at 600, Abbott J.;
Reference re: Alberta Acts, [1938] S.C.R. 100 at 134, Duff J. and 146, Cannon J.;
Saumur v. Quebec (City), [1953] 2 S.C.R. 299 at 330-31, Rand J. and 354, Kellock J.; and
R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 273 at 584-86, McIntyre J.

266. In this regard, s. 52(2) of the Constitution Act, 1982 defines the Constitution for the purpose of sections such as 52(1) - which requires courts to declare legislation of no force or effect to the extent of its inconsistency with the Constitution - only as "includ[ing]" the documents specified. It does not specifically exclude unwritten principles as yardsticks for judicial review.

267. Even Beetz J., who had earlier questioned the existence of an implied bill of rights (to the extent that it was alleged to

comprise freedoms of speech, assembly, association, press and religion), stated in *O.P.S.E.U. v. Ontario (Attorney General)* that "quite apart from Charter considerations, the legislative bodies in this country must conform to...basic structural imperatives and can in no way override them".

Canada (Attorney General) v. Montreal, [1978] 2 S.C.R. 770 at 796; and
[1987] 1 S.C.R. 2 at 57.

268. In this regard, in *Judges' Salary Reference*, Lamer C.J. referred to the "existence of many...unwritten rules" that may ultimately fill gaps between express constitutional provisions.

Supra at para. 94.

269. Recognized as one of these rules is a constitutional prohibition on bills of attainder, which are statutes that in effect determine the guilt and (traditionally, but now not necessarily, capital) punishment of named or easily identified individuals.

J. Welsh, "The Bill of Attainder Clause: An Unqualified Guarantee of Process" (1983) 50 Brooklyn L. Rev. 77; and T.B.G., "Beyond Process: A Substantive Rationale for the Bill of Attainder Clause" (1984) 70 Va. L. Rev. 475.

270. If interpreted in a non-compensatory manner, s. 13 of the Act resembles a bill of attainder since members of a specifically targeted group (the manufacturers of tobacco products) face

punishment for acts that attracted no penalty at the suit of the government at the time they were done.

271. Legislation of even a purportedly civil nature has been characterized as a bill of attainder: "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder..."

Cummings v. Missouri, 71 U.S. 277 (1866); and
United States v. Lovett, 328 U.S. 303 at 315-16 (1946)
(emphasis added).

272. Bills of attainder are often a form of retroactive penal legislation held to be unconstitutional even without the express constitutional prohibition found in Art. I, § 9, cl. 3 of the American Constitution.

[E]ven were it not for the Charter...it would surely be unthinkable today that Parliament could enact a Bill of Attainder or a Bill of Pains and Penalties.

....

In England and Canada, such methods of Parliamentary trial and punishment have passed into desuetude. As I have said, it may be assumed that, even apart from the Charter, such a method of finding guilt and imposing punishment would be generally regarded as beyond the power of Parliament in a country like Canada which has "a Constitution similar in Principle to that of the United Kingdom".

R. v. Bowen, [1989] 2 W.W.R. 213 (Alta. Q.B.), aff'd [1991] 1 W.W.R. 466 (Alta. C.A.) (emphasis added); and Rex v. Hess (No. 2), [1949] 1 W.W.R. 586 (B.C.C.A.).

273. The above reasoning signals the existence of a positive prohibition - implied as well as express - on retroactive penal legislation in the civil arena of which the recognized prohibition on bills of attainder is an example.

II. Content of the positive rule: a prohibition on all retroactive penal legislation, even in the civil arena

A. Blurred reality

274. The inclusion within the scope of the prohibition on retroactive penal legislation even of apparent civil suits (such as that set out in s. 13 of the Act) is a necessary acknowledgment of the following reality:

The criminal domain is not the only area of...law that involves the application of punishments. Many laws that take civil form in fact serve the purpose and have the effect of punishing an offender.

In this vein, "a legislature determined to make retroactive criminal prohibitions can formulate a civil statute to the same effect".

J.H. Aiken, "Ex Post Facto in the Civil Context: Unbridled Punishment" (1993) 82 Ky. L.J. 323 at 336; *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994); and L. Ricciardi & M.B.W. Sinclair, "Retroactive Civil Legislation" (1996) 27 U. Tol. L. Rev. 301 at 325-26.

275. Governments cannot be allowed the opportunity to violate basic norms simply by manipulating the form of the law.

[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against the deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

Cummings, *supra* at 325;
Weaver v. Graham, 450 U.S. 24 at 31 (1980); and
Aiken, *supra* at 325.

B. Ex post facto clause

276. American jurisprudence confirms that more than retroactive legislation in strictly the criminal or quasi-criminal arena must be unconstitutional. The U.S. Supreme Court has stated simply that the ex post facto clause of the American Constitution "flatly prohibits retroactive application of penal legislation". In this context, civil legislation with an "unmistakabl[y]...punitive intent" has been found to violate the ex post facto clause.

Landgraf, *supra* at 1497 (emphasis added);
Fleming v. Nestor, 363 U.S. 603 at 619 (1960); and
D.E. Troy, Retroactive Legislation (Washington D.C.: AEI Press, 1998) at 53.

277. Although an American opponent of retroactive civil legislation faces the difficult burden of proving the dominantly or exclusively punitive nature presumed only in the criminal context, the bottom line is that this proven punitive nature will render even retroactive civil legislation unconstitutional.

Aiken, *supra*.

278. In this case only the bottom line matters: the government itself will have argued successfully, for this point in the argument to be reached, that the Act is penal in nature.

C. Principle reinforces the need for vigilance

279. Compelling reasons of principle as well as precedent suggest that an artificial distinction between civil and criminal law does not constrict the constitutional prohibition on retroactive penal legislation.

280. First, enforcing the prohibition on retroactive penal legislation to its fullest extent furthers both fairness and individual autonomy. The establishment and maintenance of norms in advance of conduct allows persons to form plans and carry them out with regard to what they know are the rights of others. What otherwise prevails is a "dog law" unsuited to human society: in such a context, persons are trained by waiting until they act in a certain way and then punishing them for their conduct.

Munzer, *supra* at 427; and
M. McDonald, "An Inquiry into the Ethics of Retrospective
Liability: The Case of British Columbia's Bill 26" (1995)
29 U.B.C. L. Rev. 63 at 70-71.

281. A second benefit of upholding with the utmost vigour the prohibition on retroactive penal legislation is the promotion of economic, social and cultural advances. Such advances depend on a stable legal framework in which the law as enforced meets settled expectations. Where governments legislate retroactively, the required certainty is lost:

Decisionmaking in the pre-enactment period becomes problematic because those making decisions are without knowledge concerning one critical variable - the probability that existing law will continue in the future. As a result of this uncertainty, decisionmaking during the pre-enactment period may be chilled. Individuals will be reluctant to act if they are unable to predict the likely outcome of a decision. They may be deterred by the possibility of a change in the law with secondary retroactive effects. These behaviour changes in anticipation of retroactivity generate social costs which take the form of deferred investments and reduced risk-taking. By contrast, laws announced in advance of private action allow individuals to predict how rules will be applied to their future behaviour. Such predictability is critical to legal order.

J.G. Laitos, "Legislative Retroactivity" (1997) 52 Wash. U. J. Urb. & Contemp. L. 81 at 102.

282. Thus "[i]n a free, dynamic society, creativity in both commercial and artistic endeavours is fostered by a rule of law that gives people confidence about the legal consequences of their actions".

Landgraf, supra at 1497.

283. A third objective achieved by recognizing the prohibition on all retroactive penal legislation is practical or political: such a prohibition prevents legislators from arbitrarily singling out, or embarking on a campaign of retribution against, unpopular groups based on acts that their members are known to have committed in the past. Legislators are likely to exercise greater caution and undertake more extensive deliberation when legislating prospectively, because they cannot be certain on whom the burdens of the law will fall.

Krent, supra at 2170;
Landgraf, supra at 1497;
Troy, supra at 19-20; and
E.J. Armstrong, "A Survey of Developments in North Carolina Law, 1986: III" (1987) 65 N.C.L. Rev. 1195 at 1201.

284. The Act demonstrates the dangers of not respecting fully the constitutional prohibition on retroactive penal legislation. The government has taken the opportunity to target for punishment (if the Manufacturers' interpretation of s. 13 of the Act as compensatory is rejected) a specific group of politically vulnerable manufacturers based on acts (ultimately the manufacture, sale and use of tobacco products associated in some manner with the payment of health care benefits) that have long passed beyond their control.

285. The singling out of the Manufacturers for such treatment puts other citizens at risk in the future. The following commentary on the due process branch of the rule of law is in this sense particularly apt:

If there is a single lesson to be learned here, it is one most powerfully expressed by the character Sir Thomas More, a champion of due process, as he addressed his son-in-law, William Roper, in *A Man for All Seasons*:

What would you do? Cut a great road through the law to get after the Devil?...And when the last law was down and the Devil turned round on you where would you hide, Roper, the laws all being flat?...[D] 'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil the benefit of the law, for my own safety's sake.

The government cannot be permitted to violate in this case a prohibition on retroactive penal legislation let alone the guarantee of an independent judiciary on which the safety of all citizens ultimately depends.

R.A. Levy, "Tobacco Medicaid Litigation: Snuffing Out the Rule of Law" (1998) 22 S. Ill. U.L.J. 601 at 649.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Counsel for the Plaintiff

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