COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Attorney General) v. Rothmans Inc., 2013 ONCA 353
DATE: 20130530
DOCKET: C55001; C55003; C55008; C55010; and C55012

Doherty, Simmons and Blair JJ.A.

BETWEEN

Her Majesty the Queen in Right of Ontario

Plaintiff (Respondent)

and

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

Defendants (Appellants)

Charles F. Scott and Shaun Laubman, for the appellant B.A.T. Industries p.l.c.

David R. Byers, Adrian C. Lang and Lesley Mercer, for the appellant British American Tobacco p.l.c.

Craig P. Dennis and Owen James, for the appellant British American Tobacco (Investments) Limited

Guy J. Pratte, Ira Nishisato and Cindy Clarke, for the appellant R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc.

Christopher M. Rusnak and Steven Abramson, for the appellant Carreras Rothmans Limited

William J. Manuel, Lise G. Favreau, Edmund Huang and Kevin Hille, for the respondent Her Majesty the Queen in Right of Ontario.

Heard: November 5-7, 2012

On appeal from the order of Justice Barbara Ann Conway of the Superior Court of Justice, dated January 4, 2012.

Simmons and Blair JJ.A.:

A. OVERVIEW

[1] Like several provinces, Ontario has legislation giving it a stand-alone statutory right to sue tobacco manufacturers to recover the costs of health care services provided to the public as a result of "tobacco related disease" arising out of "tobacco related wrongs". In this action, Ontario seeks to assert that statutory right, claiming $50 billion against a large number of tobacco company defendants, some of which are domestic corporations and some of which are related foreign corporations.

[2] In substance, Ontario's claim is that, since the 1950's, several of the defendants have been committing "tobacco related wrongs" by manufacturing and distributing cigarettes in Ontario when they knew or ought to have known that smoking cigarettes and being exposed to second-hand smoke could cause or contribute to disease. In addition, Ontario asserts that all of the defendants have engaged in various conspiracies to mislead the government and the public about the dangers of smoking and to suppress information about those dangers. In conducting themselves in this manner, all of the defendants have breached a

number of common law obligations to the people of Ontario flowing from the dangerous nature of their product.

[3] Six of the foreign defendants assert that the Ontario courts do not have jurisdiction to determine the claims against them. They brought a motion to set aside the service *ex juris* of Ontario's statement of claim against them, and to stay or dismiss the action on the basis of lack of jurisdiction. Conway J. dismissed their motion. We are asked to reverse that decision.

[4] For the reasons that follow, we decline to do so.

B. LEGISLATIVE FRAMEWORK

[5] The *Tobacco Damages and Health Care Costs Recovery Act, 2009*, S.O. 2009, c. 13 (the "Tobacco Act"), was enacted to give Ontario the ability to recover from tobacco "manufacturers" on an aggregate basis the health care costs incurred and to be incurred by the province as a result of the treatment of "tobacco related disease" arising from "tobacco related wrongs".

[6] Section 2(1) of the Tobacco Act provides:

> 2. (1) The Crown in right of Ontario has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong.

[7] Section 2(4)(b) permits Ontario to recover health care costs "on an aggregate basis, for a population of insured persons as a result of exposure to a type of tobacco product."

[8] The parties agree that Ontario's cause of action is statutory and that it could not have been asserted at common law.

[9] "Manufacturer", "tobacco related disease", and "tobacco related wrong" are defined in s. 1(1) of the Tobacco Act:

> "manufacturer" means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past,
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> (a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,
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> (b) for any fiscal year of the person, derives at least 10 per cent of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons,
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> (c) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or
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> (d) is a trade association primarily engaged in,
>
> (i) the advancement of the interests of manufacturers,
>
> (ii) the promotion of a tobacco product, or
>
> (iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;
>
> …
>
> "tobacco related disease" means disease caused or contributed to by exposure to a tobacco product;
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> "tobacco related wrong" means,
>
> (a) a tort committed in Ontario by a manufacturer which causes or contributes to tobacco related disease, or

> (b) in an action under subsection 2(1), a breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons in Ontario who have been exposed or might become exposed to a tobacco product.

[10] The Act also contains joint liability provisions in s. 4. They are particularly important here because they provide the hook by which Ontario seeks to catch the foreign defendants.

[11] Under s. 4(1), two or more defendants are jointly and severally liable for the cost of health care benefits if (a) those defendants jointly breached a duty or obligation described in the definition of "tobacco related wrong", and (b) at least one of them is held liable under s. 2(1) for the cost of those health care benefits. Section 4(2) deems certain actions to constitute a joint breach. It states:

> 4. (2) For purposes of an action under subsection 2(1), two or more manufacturers, whether or not they are defendants in the action, are deemed to have jointly breached a duty or obligation described in the definition of "tobacco related wrong" in subsection 1(1) if,
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> (a) one or more of those manufacturers are held to have breached the duty or obligation; and
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> (b) at common law, in equity or under an enactment, those manufacturers would be held,
>
> (i) to have conspired or acted in concert with respect to the breach,
>
> (ii) to have acted in a principal and agent relationship with each other with respect to the breach, or
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> (iii) to be jointly or vicariously liable for the breach if damages would have been awarded to a person who suffered as a consequence of the breach.

C. FACTS

[12] The six foreign defendants appealing the order of Conway J. are the following: British American Tobacco (Investments) Limited ("Investments"); B.A.T. Industries p.l.c ("Industries"); British American Tobacco p.l.c. ("BAT plc"); Carreras Rothmans Limited ("Carreras"); and R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc. (together, the "RJR appellants").

[13] Each of these defendants is part of a larger multinational tobacco enterprise ("Group"). For the purposes of this action, there are four Groups, three of which have within them a Canadian manufacturer. They are: (i) the BAT Group (Imperial Tobacco Canada Limited is the Canadian manufacturer); (ii) the Rothmans Group (Rothmans, Benson & Hedges Inc. and Rothmans Inc. are the Canadian manufacturers); (iii) the RJR Group (JTI-Macdonald Corp. and Macdonald Tobacco Inc. are the Canadian manufacturers); and (iv) the Philip Morris Group (no Canadian manufacturer).

[14] The thrust of Ontario's claim against the appellants is that each is, or was, a "Lead Company" within their respective Groups: Investments (1902-1976), Industries (1976-1998) and BAT plc (1998-present) for the BAT Group; Carreras for the Rothmans Group (pre-1984); and the RJR appellants for the RJR Group. In that capacity, each is a "manufacturer", as broadly defined in the Tobacco Act. Ontario claims that as Lead Companies and manufacturers themselves, the

appellants conspired and acted in concert with their Canadian manufacturer Group members and with each other to mislead Ontario and persons in Ontario and elsewhere with respect to the harmful effects of tobacco use, including the risks of second-hand smoke.

[15] The details of this conspiracy, as pleaded in the statement of claim, will be developed in the section of these reasons dealing with the adequacy of the pleadings. In summary, it is framed as three separate but interrelated conspiracies: (i) an international conspiracy; (ii) a Canadian conspiracy; and (iii) an intra-Group conspiracy.

D. ISSUES

[16] There are five issues on the appeal:

1) Did the motion judge err in her ruling on the admissibility of documents?

2) Did the motion judge err in failing to resolve the issue about whether any potential judgment would be enforceable in the U.K. or the United States, based on the differing experts' opinions?

3) Did the motion judge err in concluding that Ontario's claim is "in respect of a tort committed within Ontario" as contemplated by rule 17.02(g) of the *Rules of Civil Procedure*?

4) Did the motion judge err in holding that the statement of claim – as pleaded and in light of the evidence filed by all parties – adequately sets out a "good arguable case" against the appellants for the purposes of the jurisdiction application?

5) Did the motion judge err in her award of costs in respect of the proceedings?

[17] We did not call on Ontario to respond to the first or second issue.

E. ANALYSIS

(1) Admissibility of Documents

[18] The parties agreed that any appeal from the motion judge's order with respect to admissibility of evidence[1] would be deferred until the determination of the jurisdiction hearing itself and would be dealt with at the same time as any appeal from the order regarding jurisdiction. Given that agreement, and the fact that the admissibility motion was simply a step in the overall proceeding attacking jurisdiction, the appeal from the admissibility order is appropriately dealt with in this Court.

[19] We would not give effect to it, however.

[20] The appellant Investments, in particular, argued that the motion judge erred in admitting certain documentary evidence for purposes of authenticity, certain other documentation for purposes of the truth of its contents, and still other documentation for purposes of both authenticity and truth of contents. In most cases, the motion judge's decision was based on the "documents in possession" rule, and/or on the business records exception to the hearsay rule

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[1] *Ontario v. Rothmans*, 2011 ONSC 5356.

under s. 35 of the *Evidence Act*, R.S.O. 1990, c. E.23. In at least one case, it was based on the admissions exception.

[21] Investments' complaint rests on the premise that the decision to admit these documents was based on an inadequate evidentiary foundation. This is primarily a question of fact, however, and our attention has not been directed to any palpable or overriding error in the motion judge's findings or in the inferences she drew from those findings which would undermine her admissibility decision.

[22] The motion judge recognized that the mere presence of a document in a company's files is not sufficient to establish corporate possession for purposes of authenticity. Instead, notice of the documents' contents must come to the attention of someone with authority to deal with its contents: see *R. v. Ash-Temple Co.* (1949), 93 C.C.C. 267 (Ont. C.A.), at paras. 20-24. She also recognized that the document must be created in the ordinary course of business to be admissible for the truth of its contents under the business records exception. Investments submitted that there was insufficient evidence in the record for her to conclude those tests had been met.

[23] The motion judge reviewed the documentation itself as well as the evidence and cross-examinations of the appellants' witnesses, including answers to undertakings given. She considered who the directors, officers and employees of each company were at the relevant times, as well as the nature of the

positions they held and their responsibilities with the company. In particular, she relied on the evidence of Mr. Cordeschi – Investments' affiant on which the BAT Group appellants also relied for evidence concerning the historical business activities of their Group – to the effect that the documents presented to him would be business records if prepared today and written by an Investments employee. She also relied on the fact that the very same documents were still in Investments' files some 30 or 40 years later.

[24] On the basis of that examination, the motion judge made findings and drew inferences from those findings that supported her conclusions as to the admissibility of the documentation and evidence. We see no basis for interfering with her admissibility ruling.

(2) The Role of Experts

[25] The appellants also argued that the motion judge erred in failing to give effect to their submission that a real and substantial connection with Ontario could not be found because an order in the Ontario action may not be enforceable against them in the U.K. or the United States.

[26] There was conflicting expert opinion on this issue. Lord Grabiner, Q.C., opined that attempting to enforce an order such as that sought by Ontario under the Tobacco Act, providing for recovery on an aggregate basis, would be viewed by the English courts as an attempt to enforce a "penal, revenue or other public

law" and would therefore not be enforceable against the U.K. appellants in the U.K. Professor Briggs gave the opposite opinion. Professor Reimann gave an opinion on behalf of the RJR appellants similar to that of Lord Grabiner that an Ontario judgment would be potentially unenforceable in the United States. Professor Silberman presented a differing view on behalf of Ontario.

[27] The motion judge recognized the credentials and credibility of all of these experts. The appellants say that she erred in not choosing between them, and argue that the evidence on the record supports the view of their particular experts.

[28] The enforceability of a judgment obtained in Ontario in a foreign defendant's jurisdiction is a factor that may be considered in weighing the relative strengths and weaknesses of the connection between the claim, the foreign defendant and the jurisdiction: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, 1 S.C.R. 572, at para. 103. For the purposes of this appeal, it is not necessary to determine whether the enforceability issue is more appropriately weighed in the *forum conveniens* exercise rather than in determining jurisdiction *simpliciter*, as Ontario argued. Nor was it necessary, in our view, for the motion judge to choose between the experts for the purpose of determining the jurisdiction issue (if, indeed, it would have been appropriate for her to do so at all on a motion such as this one, based as it was on affidavit evidence and transcripts of cross-examinations).

[29] Enforceability is simply one factor to be considered. The motion judge's conclusion on the enforceability point is found at para. 116 of her reasons:

> In my view, it is far from clear that an Ontario judgment would be unenforceable in England and the U.S. With this degree of uncertainty I am not prepared to say that the issue of enforceability should weigh in favour of [the appellants] and weaken the strength of the connection to the Province of Ontario.

[30] This conclusion was sensible and entirely open to her on the record.

(3) Tort Committed in Ontario and Service under Rule 17.02(g)

[31] In *Van Breda*, the Supreme Court of Canada confirmed that a claim in respect of a tort committed within the jurisdiction gives rise to a "presumptive connecting factor" sufficient to establish a "real and substantial connection" with the jurisdiction. Unless rebutted, this is sufficient to provide the domestic court with jurisdiction *simpliciter* to determine the dispute before it. The appellants argue the motion judge erred in holding that Ontario's statutory claim under the Tobacco Act constituted such a claim or was sufficiently analogous to such a claim that it qualified as a presumptive connecting factor. Alternatively, they argue that the motion judge erred in failing to hold that the evidence filed on their behalf rebutted such a presumption. Finally, they argue that, even if a claim under the Tobacco Act was sufficiently analogous to a *Van Breda* presumptive connecting factor to qualify as one itself, that was not sufficient to justify service out of the jurisdiction under rule 17.02(g) – "tort committed in Ontario".

[32] We would not give effect to these submissions, for the following reasons.

[33] It is central to the appellants' argument that Ontario's claim is a *sui generis* statutory claim not existing at common law. Moreover, they say, Ontario amended its statement of claim and expressly withdrew its common law tort allegations against them. How can Ontario now assert that the cause of action it is putting forward relates to "a tort committed within Ontario"?

[34] There is an old saying, however, that if something looks like a duck, walks like a duck, and quacks like a duck, it probably is a duck. So it is, in our view, with Ontario's claim against the appellants under the Tobacco Act. The Act creates, in effect, a statutory tort claim, founded on a tort or tortious conduct. This is apparent from the combined effect of ss. 2(1) and 4 and the definition of "tobacco related wrong". In this case, the tort is conspiracy.

[35] Ontario's claim is derived from s. 2(1), which gives the Crown "a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong." To repeat, a "tobacco related wrong" means:

> (a) a tort committed in Ontario by a manufacturer which causes or contributes to tobacco related disease, *or*
>
> (b)*in an action under subsection 2(1)*, *a breach of a common law*, equitable or statutory *duty or obligation owed* by a manufacturer to persons in Ontario who have been exposed or might become exposed to a tobacco product. [Emphasis added.]

[36] Ontario amended its statement of claim to withdraw the type of claim referred to in paragraph (a) above, but continues to assert its s. 2(1) claim for breach of a common law duty or obligation owed to persons in Ontario.

[37] It is a breach of a common law duty or obligation to engage in a civil conspiracy that causes harm to others. Moreover, it is well established that a conspiracy occurs in the jurisdiction where the harm is suffered regardless of where the wrongful conduct occurred: *British Columbia v. Imperial Tobacco Canada Ltd.,* 2006 BCCA 398, 56 B.C.L.R. (4th) 263, at para. 43; *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.* (2002), 20 C.P.C. (5th) 351 (Ont. S.C.). Here, that jurisdiction is Ontario.

[38] Section 4 of the Tobacco Act addresses this sort of breach, and provides for joint and several liability where two or more defendants jointly breach a duty or obligation described in the definition of "tobacco related wrong". In addition, s. 4(2) underscores the tort-like nature of the claim by deeming certain conduct to constitute a joint breach. For our purposes, two or more manufacturers are deemed to have jointly breached such a duty or obligation where one or more of them is held to have done so, and if, per s. 4(2)(b)(i), "at common law, in equity or under an enactment, those manufacturers would be held to have conspired or acted in concert with respect to the breach".

[39] Cutting to the core of the statutory framework, then, Ontario's claim in this action is founded on the common law tort of conspiracy – a conspiracy alleged in this instance to have been committed in Ontario because the damage flowing from the conspiracy was, and is, sustained in Ontario. It is therefore an action "in respect of a tort committed within Ontario" as contemplated by rule 17.02(g).

[40] The courts in British Columbia and New Brunswick have come to similar conclusions with respect to tobacco litigation involving virtually identical statutory provisions, virtually identical government allegations, and the identical parties. In each of those cases, leave to appeal to the Supreme Court of Canada was refused. See *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 BCSC 946; aff'd 2006 BCCA 398, 56 B.C.L.R. (4th) 263; leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 446; and *New Brunswick v. Rothmans Inc.*, 2010 NBQB 381, 373 N.B.R. (2d) 157; leave to appeal refused, [2011] N.B.J. No. 116 (C.A.); leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 221.

[41] In the British Columbia Court of Appeal, Rowles J.A. cited with approval the B.C. motion judge's description of the cause of action created by the exact equivalent of s. 2(1) of the Ontario Tobacco Act. The same considerations apply here. At paras. 67-68, Rowles J.A. said:

> In his reasons … Holmes J. described the nature of the cause of action created by the *Act* this way:
>
> > [215] … The cause of action here is pursuant to the *Act* however the tobacco related wrongs

> pleaded by the Government are founded on torts and tortious conduct.
>
> [216] Claims brought pursuant to an Act but founded on a tort are not uncommon. [*Moran, supra;2 S.D. Eplett & Sons Ltd v. Safety Freight Lines Ltd.*, [1955] O.W.N. 386 (H.C.J.)]
>
> [217] The torts and tortious conduct on which the Government action is founded all occurred in British Columbia. Carreras Rothmans Ltd. are alleged to have conspired with domestic and other foreign defendants, and the damage resulting was in British Columbia.
>
> [218] The torts and tortious conduct which [form] the subject matter of conspiracy, and in respect of which Carreras Rothmans Ltd. acted in concert with the other defendants is alleged to have occurred in British Columbia. …
>
> In my view, that description of the cause of action is correct. This is a cause of action created by statute but it is founded on common law torts, as may be seen from the definition of "tobacco related wrongs" in s. 1(1) of the *Act*.

[42] We agree with that description of the statutory cause of action.

[43] We also agree with the observations of Rowles J.A. (at para. 70) that "[t]he reason why para. (b) is required in the definition of 'tobacco related wrong' is that the action described in s. 2(1) is not within the traditional description of a tort action; instead, it is a new form of action that is not a subrogated claim, in which the Government may seek to recover health care benefits on an aggregate

[2] *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393.

basis." But this does not mean this "new form of action" is not in substance a tort-related claim, in our view.

[44] If Ontario's statutory claim, founded as it is on a common law tort, is not technically a claim "in respect of a tort committed in Ontario", it is tantamount to such a claim and therefore qualifies as such, because it has all the characteristics of such a tort. At the very least, the statutory claim is sufficiently analogous to a tort committed in Ontario that it qualifies as "a new connecting factor" of the sort contemplated in *Van Breda*. The Supreme Court recognized in *Van Breda* that over time new factors may be identified that would also presumptively entitle a court to assume jurisdiction. "In identifying new presumptive factors", LeBel J. said, at para. 91, "a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors", one of which is a tort committed in the province. In that regard, he continued, one relevant consideration is the "[s]imilarity of the connecting factor with the recognized presumptive connecting factors".

[45] Here, all of the considerations that apply to the common law tort of conspiracy apply to the statutory tort claim created by the legislature. If a tort committed in Ontario is a presumptive factor entitling Ontario courts to assume jurisdiction over a dispute, a statutory tort with all of the same trappings, committed in Ontario, should be one too. Recognizing that connection is also in

keeping with principles of comity, order and fairness – notions that underpin the objectives of the conflict of laws regime.

[46] To return to the observations of LeBel J. in *Van Breda,* at para. 92, the presumptive connecting factors stemming from the commission of the statutory tort in Ontario,

> … point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum. Where such a relationship exists, one would generally expect Canadian courts to recognize and enforce a foreign judgment on the basis of the presumptive connecting factor in question, and foreign courts could be expected to do the same with respect to Canadian judgments. The assumption of jurisdiction would thus appear to be consistent with the principles of comity, order and fairness.

[47] It follows that, because Ontario's s. 2(1) claim is a claim "in respect of a tort committed within Ontario", or one sufficiently analogous thereto, that characteristic gives rise to a presumptive connecting factor as between the subject matter of the litigation, the appellants and the province, entitling Ontario courts to assume jurisdiction over the dispute: *Van Breda*, at paras. 88-92.

[48] However, the presumption can be rebutted. The appellants argue that this presumption should have been rebutted based on the record here. We do not agree.

[49] The burden of rebutting the presumption is on the appellants, as they are the parties challenging the assumption of jurisdiction. They "must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them": *Van Breda*, at para. 95.

[50] Here, rather than the presumptive connecting factor not pointing to any real relationship, or only a weak one, between the subject of the litigation and Ontario, quite the contrary is the case. What is alleged is a conspiracy to breach common law duties and obligations owing to persons in Ontario, and causing $50 billion in health care costs to be incurred by Ontario as a result of tobacco related wrongs. In *Van Breda,* the Supreme Court of Canada underscored the difficulty in rebutting the presumption where the connecting factor involves a tort committed in the jurisdiction. At para. 96, LeBel J. said:

> [W]here the presumptive connecting factor is the commission of a tort in the province, rebutting the presumption of jurisdiction would appear to be difficult, although it may be possible to do so in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province.

[51] It can hardly be said that "a relatively minor element of the tort" has occurred in Ontario in this case, assuming that the conspiracy as alleged is made out. Fifty billion dollars in health care costs incurred by the province can hardly

be said to be "minor", particularly when one considers the underlying harm suffered by persons in Ontario which those costs reflect.

[52] In our view, the motion judge did not err in concluding that Ontario's claim under the Tobacco Act constituted a claim in respect of a tort committed in Ontario or an analogous type of claim sufficient to found a presumptive connecting factor and trigger the right to effect service out of Ontario under rule 17.02(g). Nor did she err in concluding that the presumption had not been rebutted in the circumstances of this case.

(4) Did the motion judge err in holding that Ontario established a "good arguable case" for assuming jurisdiction?

[53] In addition to arguing that Ontario's statutory cause of action is not a tort committed within Ontario and is not sufficiently analogous to such a claim to qualify as a presumptive connecting factor, the appellants submit that Ontario has not established a "good arguable case" for assuming jurisdiction.

[54] It is well established that an Ontario court will assume jurisdiction against a foreign defendant only where the plaintiff establishes a "good arguable case" for assuming jurisdiction through either the allegations in the statement of claim or a combination of the allegations in the statement of claim and evidence filed on a jurisdiction motion: *Tucows.Com Co. v. Lojas Renner S.A.*, 2011 ONCA 548; 106 O.R. (3d) 561, at para. 36; *Ecolab Ltd. v. Greenspace Services Ltd.* (1998), 38

O.R. (3d) 145 (Div. Ct.), at pp. 149-154; *Schreiber v. Mulroney* (2007), 88 O.R. (3d) 605 (S.C.), at para. 18.

[55] The appellants raise two main issues concerning whether Ontario established a good arguable case for assuming jurisdiction in this instance. One issue relates largely to the elements of the good arguable case standard; the second relates largely to the application of the standard.

[56] The appellants first argument is that, as a preliminary matter, the good arguable case standard required that the motion judge determine whether Ontario's statement of claim discloses a reasonable cause of action under rule 21.01(1)(b) of the *Rules of Civil Procedure*. Instead, the motion judge held that Ontario's pleading is sufficient "for jurisdictional purposes", thus implying that a lesser standard of pleading is acceptable on a jurisdiction motion. The appellants say this conclusion is an error in law. Moreover, they contend that Ontario's pleading fails to disclose a reasonable cause of action within the meaning of rule 21.01(1)(b) and that it was not therefore capable of meeting the good arguable case standard.

[57] Second, the appellants say that the motion judge erred by treating undenied allegations in the statement of claim as true for the purposes of the jurisdiction motion. The appellants argue that, in a broadly framed cause of action such as this one, Ontario cannot rely on the allegations in its pleadings alone to establish

jurisdiction, but must also lead evidence demonstrating a good arguable case. Some of the appellants also argue that the motion judge made palpable and overriding errors in assessing whether Ontario established a good arguable case.

[58] Before addressing the appellants' arguments in detail, we will briefly review the statement of claim and the motion judge's reasons concerning this issue.

(a) The statement of claim

[59] Ontario's statement of claim names 14 corporations as defendants. Ontario alleges that four of the defendants are Canadian tobacco companies, that one of the defendants is the trade association for the Canadian tobacco industry, and that the remaining nine defendants are foreign tobacco companies (or former tobacco companies). Ontario claims that:

- all of the defendants are "manufacturers" as defined in the Tobacco Act;
- there are four multinational tobacco Groups whose member companies have engaged directly or indirectly in the manufacture and promotion of cigarettes sold in Ontario and throughout the world;
- each of the Canadian tobacco companies is a member of one of the four multinational tobacco Groups;
- each of the Canadian tobacco companies has engaged directly or indirectly in the manufacture and promotion of cigarettes in Ontario;

- the manufacturers within each multinational tobacco Group had common policies relating to smoking and health and these common policies were directed and coordinated by one or more of the defendants ("Lead Companies"); and
- each of the foreign defendants is or was a Lead Company within their respective multinational tobacco Group.

[60] As the motion judge noted, Ontario alleges that, by 1950, the defendants knew or ought to have known that nicotine is addictive and that smoking cigarettes can cause or contribute to disease. By 1970, they knew that exposure to second-hand smoke can also cause or contribute to disease.

[61] The statement of claim asserts that, while armed with this knowledge, the defendants committed tobacco related wrongs by breaching four duties owed to persons in Ontario:

- the duty to design and manufacture a reasonably safe product;
- the duty to warn the public about the risks of smoking;
- the duty not to misrepresent to the public the risks of smoking; and
- the duty to prevent children and adolescents from starting or continuing to smoke.

[62] Among other ways, Ontario alleges that the defendants breached these duties and thereby committed tobacco related wrongs by the following conduct:

- manufacturing, selling and promoting the sale of cigarettes knowing that cigarettes are addictive to smokers and cause serious disease and that exposure to second-hand smoke also causes disease;
- manipulating the level and availability of nicotine in their cigarettes, thus increasing the risk of smoking;
- suppressing information and scientific and medical data about the risks of smoking and of exposure to second-hand smoke;
- misrepresenting to the public and government that filters reduce the risk of smoking and that “filtered”, “mild”, “low tar” and “light” cigarettes were safer than other cigarettes;
- misrepresenting the risks of smoking and exposure to second-hand smoke by, for example, misrepresenting that the defendants were aware of no credible research establishing a link between smoking or exposure to second-hand smoke to disease;
- failing to adequately warn the public that cigarettes are addictive and cause disease, and engaging in promotional activities to neutralise the effectiveness of the warnings on cigarette packaging; and
- targeting children and adolescents in advertising, promotional and marketing activities for the purpose of inducing them to start or continue to smoke.

[63] As a result of the tobacco related wrongs, Ontario alleges that Ontarians started or continued to smoke cigarettes manufactured and promoted by the defendants and suffered tobacco related disease as well as an increased risk of tobacco related disease.

[64] According to Ontario, the defendants conspired, and acted in concert in committing tobacco related wrongs, through three levels of conspiracy: i) a conspiracy within the international tobacco industry; ii) a conspiracy within the Canadian tobacco industry; and iii) conspiracies within the multinational tobacco Groups.

[65] Ontario claims that the international conspiracy originated in 1953 and early 1954 and was intended to prevent Ontario and persons in Ontario and other jurisdictions from acquiring knowledge of the harmful and addictive properties of cigarettes. It alleges that in a series of meetings and communications, representatives of the Lead Companies or of their predecessors agreed to:

- jointly disseminate false and misleading information regarding the risks of smoking;
- make no statement or admission that smoking causes disease;
- suppress or conceal research regarding the risks of smoking;

- orchestrate public relations programs with the objects of promoting cigarettes, protecting cigarettes from attack based on health risks and reassuring the public that smoking was not hazardous.

[66] According to Ontario, to facilitate this conspiracy, between late 1953 and the early 1960s, the Lead Companies formed or joined several research organisations so that they could publicly misrepresent that objective research was being conducted concerning the link between smoking and disease. In reality, the Lead Companies conspired with these research organisations to distort the research and publicise misleading information.

[67] Subsequently, the Lead Companies, and some or all of the defendants, continued to meet and formulate policies aimed at suppressing research regarding the risks of smoking and providing misinformation to governments and the public.

[68] Ontario alleges that the conspiracy within the Canadian tobacco industry was aimed at preventing the Crown and persons in Ontario from acquiring knowledge of the harmful and addictive properties of cigarettes and at committing tobacco related wrongs. The conspiracy was entered into and continued through committees, conferences and meetings convened and held in Canada and through written and oral directives and communications among some or all of them.

[69] The Canadian conspiracy was continued through actions such as the following:

- agreeing not to compete with each other by making health claims regarding the risks of smoking;
- misrepresentations to the Canadian Medical Association that there was no causal connection between smoking and disease;
- formation of an Ad Hoc Committee on Smoking and Health, which later became the Canadian Tobacco Manufacturers' Council (collectively "CTMC");
- misrepresentations to the House Of Commons, Standing Committee on Health, Welfare and Social Affairs, that there was no causal connection between smoking and disease;
- ongoing lobbying and dissemination of misinformation by CTMC.

[70] The statement of claim also includes allegations that the multinational tobacco Groups entered into the international and Canadian conspiracies and that the Lead Companies were involved in directing and coordinating the smoking and health policies of their respective Groups.

(b) The motion judge's reasons

[71] The motion judge dealt with the good arguable case issue in three parts.

[72] First, she reviewed the law in relation to the assumption of jurisdiction in Ontario, including the good arguable case standard.

[73] Concerning this issue, she noted, at para. 36, that the "starting point on a jurisdiction motion is the pleading, as it contains the material facts from which the cause of action arose."

[74] She said: "Any allegation of fact that is not put into issue by the defendant is presumed to be true for the purposes of the motion" and "[t]he plaintiff is under no obligation to call evidence for any allegation that has not been challenged by the defendant."[3] However, "[i]f a foreign defendant files affidavit evidence challenging the allegations in the statement of claim that are essential to jurisdiction, the threshold for the plaintiff to meet is that it has a good arguable case on those allegations."

[75] The motion judge observed that the threshold test of a good arguable case is a low standard. It has been compared to a "serious issue to be tried" or a "genuine issue" or as having "some chance of success".

[76] Second, the motion judge addressed the appellants' preliminary objection that the Ontario's pleading was deficient in that it failed to properly plead the

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[3] The motion judge cited the following decisions in support of these principles: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 BCSC 946; 44 B.C.L.R. (4th) 125, at paras. 132-134; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398; 56 B.C.L.R. (4th) 263, at para. 25; *Ontario New Home Warranty Program v. General Electric Co.* (1998), 36 O.R. (3d) 787 (Gen. Div.); *AG Armeno Mines and Minerals Inc. v. PT Pukuafu Indah*, 2000 BCCA 405; 77 B.C.L.R. (3d) 1, at para. 26; *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592; 314 D.L.R. (4th) 618, at para. 70; *Furlan v. Shell Oil Co.*, 2000 BCCA 404; 77 B.C.L.R. (3d) 35, at paras. 13-14.

allegations of conspiracy and therefore could not be relied upon to establish a good arguable case or to support a connection to Ontario. At paras. 51 and 52 of her reasons, she found that the statement of claim was "sufficient for jurisdictional purposes." She said, at para. 51:

> In this case, and for the purposes of these motions only, I am satisfied that the Claim pleads the essential elements of the Crown's cause of action under s. 2(1). It "connects the dots" between the [appellants] and the Province of Ontario through the allegations that the appellants, either directly or by conspiring or acting in concert with others, breached duties to persons in Ontario. The Claim describes the acts that constitute the alleged breaches of duty and the means by which the JCDs allegedly conspired and acted in concert with others. The Claim itemises the Groups, the Lead Companies and the Canadian members of each Group, and the acts alleged to have been taken by each of the JCDs as a Lead company within its corporate Group.
>
> *The pleading is sufficient for jurisdictional purposes. If there are any other pleading issues with the Claim, they can be addressed at subsequent motions.* [Emphasis added.]

[77] Third, the motion judge dealt with whether Ontario had established a good arguable case in relation to each appellant. The motion judge briefly reviewed the evidence filed by each of the appellants, and the responding evidence, if any, filed by Ontario.

[78] With respect to each appellant, the motion judge concluded that the evidence filed on the motion failed to put into issue many of the key allegations in the statement of claim connecting the appellant to Ontario. Specifically, she

noted that the various appellants had not denied the allegations of conspiracy. To the extent that other important allegations had been denied, the motion judge found that Ontario's evidence established a good arguable case in support of the allegation. In relation to each appellant, the motion judge summarized the good arguable case established by Ontario.

[79] In particular, in relation to each appellant, the motion judge found a good arguable case that the specific appellant is or was a manufacturer as defined in the Tobacco Act.

[80] Further, she found a good arguable case that each appellant "had knowledge of the addictive quality of cigarettes and the health risks of smoking and exposure to second hand smoke."

[81] Finally, in relation to each appellant, the motion judge found a good arguable case that the particular appellant conspired with members of its international tobacco Group in committing tobacco related wrongs. Further, in relation to one of the RJR defendants, R.J. Reynolds Tobacco Company, she found a good arguable case, in effect, that that company committed tobacco related wrongs through cigarette sales in Ontario. We set out below the specific examples the motion judge provided to support these findings in relation to each appellant:

Investments

…by, for example, developing policies on smoking and health for the Group; conducting advisory conferences attended by Group members dealing with smoking and health issues; preparing guidelines and directives on smoking to be followed by Group members; distributing pamphlets and materials to group members about smoking and health issues; meeting with research scientists in Ontario; and visiting tobacco farms in Ontario. [Footnotes omitted.]

Industries

…by, for example, developing objective/strategies and policies for "key areas" of the Group, including smoking and health; maintaining a Group position on smoking and health; and through its involvement with Imasco on proposed research projects. [Footnotes omitted.]

PLC

…by, for example, setting global strategies to be implemented by Group members; developing Group policies on advertising of tobacco products and public smoking bans; and setting marketing standards for the Group. [Footnotes omitted.]

Carreras

Mr. Corsdeschi does not deny the allegations that Carreras participated in a conspiracy in the pre-1984 period. He does not deny the allegations that Carreras … directed and coordinated common policies on smoking and health for the Rothmans Group, including Rothmans Ltd. and Rothmans, Benson & Hedges Inc.; and … influenced or advised how the Canadian companies in the Group should vote at CTMC meetings on smoking and health issues … Given that the pre-1984 allegations have not been put into issue … the jurisdiction analysis for Carreras can therefore be conducted on the basis of [those allegations].

> RJR Defendants
>
> …by, for example, directing or coordinating the RJR Groups common policies on smoking and health; providing strategic direction to RJR Group members; and communicating with RJR Group members on CTMC grant requests.
>
> In addition, Mr Adams' evidence is that [R.J. Reynolds Tobacco Company] sold US blend cigarettes in Canada between 1974 and 1999 through RJR MacDonald Inc. While there is no evidence as to the exact amount of sales into Ontario, Mr Adams's evidence is that some of those US blend cigarettes were sold into the province of Ontario. [R.J. Reynolds Tobacco Company] argues that the Canadian market share of the RJR brand cigarettes was at most only 0.6% between 1977 and 1999 and that this is insufficient to ground a connection. I disagree - according to the evidence, 0.6% represents millions of dollars of sales and millions of cigarettes sold. [Footnotes omitted.]

(c) Analysis

(i) Did the motion judge err in hold that Ontario's pleading is sufficient for jurisdictional purposes?

[82] We turn now to the appellants' first argument. The appellants claim that, as a precondition to determining whether the plaintiff can benefit from a presumptive connecting factor, the good arguable case standard requires an assessment of whether the plaintiff's statement of claim asserts a viable cause of action. They submit that this assessment requires a determination of whether the statement of claim meets the standard of a pleading required on a motion brought under rule 21.01(1)(b) of the *Rules of Civil Procedure*. In support of their position, they rely

primarily on *Tucows.Com Co. v. Lojas Renner S.A.*; *Schreiber v. Mulroney*; and *Wall Estate v. Glaxosmithkline Inc.*, 2010 SKQB 351; 367 Sask.R. 21.

[83] Under rule 21.01(1)(b), the court may strike out a statement of claim where it fails to disclose a reasonable cause of action. This may occur where the allegations do not fall within a cause of action known to law, or because the statement of claim fails to plead all the essential elements of a recognized cause of action: *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (C.A.), at para. 10.

[84] In this case, the appellants say that Ontario's statement of claim fails to meet the rule 21.01(1)(b) standard because, in relation to the tobacco related wrongs, Ontario "lumped" the defendants and the alleged breaches of duty together, and failed to specify what particular breaches of duty it alleges as against each defendant – and at what particular point in time. As a result, the appellants say that Ontario failed to adequately plead the material facts that support the alleged cause of action.

[85] Particularly on a jurisdiction motion, where a finding of jurisdiction depends on principles of comity, order and fairness – and particularly in the context of a statutory cause of action that permits Ontario to claim aggregate damages for a myriad of breaches in relation to events that occurred during a period spanning over 50 years – the appellants assert that a proper pleading is essential.

[86] A proper and fully particularized pleading is necessary not only to enable the foreign defendants to know who Ontario alleges did what and when, but also to ensure that jurisdiction is assumed only if Ontario has established that it has a viable cause of action against each appellant.

[87] Concerning the tobacco related wrongs alleged, the appellants say the statement of claim fails to specify, for example: on what particular basis Ontario alleges any of the appellants is a manufacturer; in what particular respect Ontario alleges that any warnings that were given by tobacco manufacturers to the public were deficient; and what specific misrepresentations Ontario alleges were made when and by whom

[88] In addition, the appellants rely on the fact that, in oral submissions before the motion judge, Ontario acknowledged that it is not advancing a direct cause of action for tobacco related wrongs against Carreras, BAT plc, and Industries. Rather, its cause of action against those appellants rests solely on its claim under s. 4 of the Tobacco Act that those appellants conspired with domestic defendants who committed tobacco related wrongs. In the result, the appellants claim that the statement of claim, which advances claims for tobacco related wrongs against all defendants, is hopelessly confusing.

[89] As for Ontario's conspiracy claims under s. 4 of the Tobacco Act, the appellants say the statement of claim fails to plead with the particularity and

precision required the specific overt acts alleged to have been taken by each appellant in furtherance of any of the three conspiracies. In addition, the statement of claim improperly "lumps" appellants together as defendants, alleging in many instances that "some or all" of them committed various acts.

[90] The appellants say that similar pleadings have been held not to meet the standard of a pleading required to assert a viable cause of action under rule 21.01(1)(b) and accordingly have been struck on those grounds. They point to such cases as: *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744; 27 C.P.C. (7th) 32, at paras. 167-170; *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.), at para. 25; *D.G. Jewelry Inc. v. Cyberdiam Canada Ltd.* (2002), 21 C.P.C. (5th) 174 (Ont. S.C.), at para. 33; and *J.G. Young & Son Ltd. v. Tec Park Ltd.* (1999), 48 C.P.C. (4th) 67 (Ont. S.C.), at para. 6.

[91] The appellants rely in particular on the fact that, in her reasons, the motion judge rejected the appellants' preliminary objection concerning the adequacy of Ontario's statement of claim by holding that it was "sufficient for jurisdictional purposes". According to the appellants, in doing so, and in failing to apply the rule 21.01(1)(b) standard to the pleadings to make a preliminary assessment of whether Ontario pled a viable cause of action, the motion judge erred in law.

[92] We do not accept these submissions. As a starting point, we are not satisfied that *Tucows*, or any of the other cases relied upon by the appellants, stand for the proposition that, on a jurisdiction motion, the motion judge must first assess whether the statement of claim meets the rule 21.01(1)(b) standard for pleadings.

[93] In *Tucows*, the plaintiff applied for a declaration that it was not using the domain name "renner.com" in bad faith and that the defendant was not entitled to a transfer of the domain name. The issue was whether the claim could properly be served outside of the jurisdiction under rule 17.02(a) as a claim "in respect of … personal property in Ontario."

[94] In holding that the claim fell within rule 17.02(a), this Court rejected an argument that a claim for declaratory relief could not meet the good arguable case standard because a claim for a declaration does not constitute a cause of action. In doing so, this Court relied on decisions made under rule 21.01(1)(b) declining to strike claims for declarations as failing to disclose a reasonable cause of action. Further, Weiler J.A., speaking for this Court, said the following at para. 33:

> Regard must be had to the *Rules of Civil Procedure* in deciding whether the originating process used by Tucows to invoke the jurisdiction of the Ontario Superior Court asserts a cause of action.

[95] The appellants point to this Court's reliance in *Tucows* on rule 21.01(1)(b) cases and the above quotation in support of their position that, on a jurisdiction motion, the motion judge must make a preliminary determination of whether the pleadings meet the rule 21.01(1)(b) standard.

[96] In our view, the decision in *Tucows* does not go that far. In *Tucows*, the motion judge had determined, in effect, that the plaintiff's claim for a declaration did not assert a cause of action known to law. This Court's statement, as quoted above, was made in direct response to that finding. The balance of this Court's reasons were focused on determining whether a claim for a declaration can constitute a cause of action, and if so, whether the claim related to personal property in Ontario.

[97] In *Tucows*, there was no issue as to the adequacy of the pleadings. Rather, the issue was whether the claim for a declaration in that case constituted a cause of action. And while this Court in *Tucows* confirmed that the good arguable case standard continues to be accepted, it said nothing intended to expand upon or modify that standard.

[98] Similarly, in our view, neither *Schreiber nor Wall Estate* stand for the proposition that, on a jurisdiction motion, the motion judge must first assess whether the statement of claim meets the rule 21.01(1)(b) standard for pleadings.

[99] In *Schreiber*, the issue addressed was whether sufficient connecting factors had been established under the *Muscutt* test[4] to support an assumption of jurisdiction. At para. 31 of his reasons, the motion judge specifically noted that he had not been asked to decline jurisdiction on the basis that the evidence did not establish a good arguable case. Nor is there any indication that he was asked to determine, as a preliminary matter, that the cause of action had not been sufficiently pled.

[100] In *Wall Estate*, the statement of claim failed to particularize *any* specific acts connecting the foreign defendants to Saskatchewan. Importantly, the evidence filed by the foreign defendants established there was no such connection.

[101] As we will discuss below, while the good arguable case standard can apply solely to the pleadings, where a defendant adduces evidence to challenge the allegations in the statement of claim, the good arguable case standard applies to the combination of the pleadings and the evidence adduced by the parties.

[102] In this case, the motion judge's reasons did not begin and end with her findings on the appellants' preliminary objection. Rather, in relation to each appellant, the motion judge examined whether the combination of the pleadings and evidence, if any, established a good arguable case for assuming jurisdiction.

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[4] *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.)

[103] After doing so, the motion judge concluded that Ontario had established a good arguable case for assuming jurisdiction in relation to each appellant based on the conspiracy allegations (and, in relation to RJR Company, based on the allegations of sales of cigarettes/carrying on business in Ontario). For each appellant, the motion judge gave examples of how that appellant had participated in the conspiracy. In the case of Carreras Rothmans Limited, the examples were drawn from undenied allegations in the pleadings. In the case of all other appellants, the examples were drawn from a combination of undenied allegations in the pleadings and evidence adduced on the motion.

[104] Whether Ontario's pleading is technically deficient because of "lumping" defendants or failing to fully particularize the allegations of misconduct against each defendant, the examples given by the motion judge were sufficient to persuade her that the conspiracy claim against each appellant has some prospect of success, and that, because of the nature of the conspiracy alleged, Ontario has established a good arguable case for assuming jurisdiction.

[105] Even if Ontario's statement of claim is deficient, clearly the motion judge was of the view that it is capable of amendment. We see no error in the motion judge's conclusion in this respect. And, for the purposes of a jurisdiction motion, in our view, that is all that was required.

[106] In our opinion, on a jurisdiction motion, the motion judge is not required to subject the pleadings to the scrutiny applicable on a rule 21 motion. So long as a statement of claim advances the core elements of a cause of action known to law and appears capable of being amended to cure any pleadings deficiencies such that the claim will have at least some prospect of success, the issue for the motion judge is whether the claimant has established a good arguable case that the cause of action is sufficiently connected to Ontario to permit an Ontario court to assume jurisdiction. If an Ontario court can assume jurisdiction, the issue of the adequacy of the pleadings is properly dealt with on a motion brought under rule 21.01(1)(b).

[107] This approach ensures that a foreign defendant will not be required to come to Ontario to respond to what are nothing more than frivolous allegations but, at the same time, affords persons in Ontario advancing claims against foreign defendants the same opportunity to amend a technically deficient claim as is provided to domestic defendants.

(ii) Did the motion judge err in applying the good arguable case standard?

[108] Turning to the second issue, the appellants argue that, in holding that Ontario established a good arguable case for assuming jurisdiction, the motion judge erred by treating undenied allegations in the statement of claim as true. In

addition, some of the appellants argue that the motion judge made palpable and overriding errors in her assessment of the evidence that was before her.

[109] We did not call on Ontario to respond to either of these arguments.

[110] In its factum, Ontario argues that the motion judge was entitled to rely on allegations in the statement of claim as true if those allegations have not been rebutted by affidavit evidence. Ontario submits that allegations on a jurisdiction motion should be assessed as follows:

- The facts pleaded in the statement of claim are taken as true, and if they are sufficient to establish a good arguable case, the pleadings alone can satisfy the court that it has jurisdiction over the claim: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 BCSC 946; 44 B.C.L.R. (4th) 125, at paras. 132-134.

- The foreign defendants may put forward affidavit evidence for the purpose of challenging the factual allegations in the statement of claim, but any allegations in the statement of claim that remain unchallenged by the defendants may be taken as true for the purpose of the jurisdiction motion: *Ontario New Home Warranty Program v. General Electric Co.* (1998), 36 O.R. (3d) 787 (Gen. Div.), at pp. 797-799.

- The plaintiff may respond to any evidence put forward by the foreign defendant in order to satisfy the court that there is a good arguable case:

Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd. (2002), 20 C.P.C. (5th) 351 (Ont. S.C.), at para. 64.

[111] The appellants contend that Ontario's position, which the motion judge adopted, takes the authorities too far. In particular, they say that two decisions stand for the proposition that where facts relevant to jurisdiction are not sufficiently particularised, it is incumbent on the claimant to lead evidence to support those facts: *Furlan v. Shell Oil Co.*, 2000 BCCA 404; 77 B.C.L.R. (3d) 35, at para. 16; and *Schreiber*, at paras. 27 and 32.

[112] Further, even if the general principles adopted by the motion judge are correct, the appellants say that the breadth of the statutory cause of action makes this case different and required that Ontario call evidence to establish a good arguable case for assuming jurisdiction. They point to the fact that the allegations upon which Ontario relies are broadly framed and span a period of over 60 years. They claim that, in these circumstances, it is unfair to require them to assert in an affidavit what would be nothing more than a bald denial made in response to general allegations that are completely lacking in particulars.

[113] On our review of the two decisions relied upon by the appellants, at their highest, they stand for the proposition that a claimant may be required to call evidence to support undenied allegations in a statement of claim or other originating process either where the cause of action as pleaded appears to be

devoid of merit or where the pleadings fail to demonstrate any air of reality concerning the possible existence of a presumptive connecting factor.

[114] As we have said, in this case, it is apparent that the motion judge was satisfied that, even if deficient from a pleadings perspective, Ontario's statement of claim can at least be amended to advance causes of action against the appellants that will have some prospect of success, and which, if they do succeed, clearly have a real and substantial connection to Ontario. We have found no error in her conclusions in this respect. Moreover, we are not persuaded that the motion judge's reliance on the fact that the appellants failed to deny the conspiracy allegations created any unfairness to the appellants in the circumstances of this case.

[115] The core allegations against the appellants are that they participated in three levels of conspiracy to breach duties to persons in Ontario: an international conspiracy, a Canadian conspiracy and intra-Group conspiracies.

[116] The duties at issue are clear cut: the duty to design and manufacture a reasonably safe product; the duty to warn the public about the risks of smoking; the duty not to misrepresent to the public the risks of smoking; and the duty to prevent children and adolescents from starting or continuing to smoke.

[117] The manner in which Ontario alleges the appellants breached these duties is equally clear cut. In essence, it is alleged that they conspired with Canadian

members of their respective Groups, and with members of other Groups, to mislead Ontario and persons in Ontario about the health risks of smoking and to suppress information about the dangers of smoking. In relation to each appellant, the motion judge gave examples derived from the pleadings, or from the pleadings and the evidence adduced on the motion, concerning how Ontario alleges this was done.

[118] In short, this is not a case where the statement of claim contains nothing more than a series of bald allegations devoid of any factual foundation. We are satisfied that the pleadings, in combination with the affidavit evidence filed by the parties, adequately establish a cause of action known to law with a sufficient connection to Ontario. While the appellants take issue with the particularization of some of the plaintiff's allegations in its statement of claim, that issue may be addressed on a motion under rule 21.01(1)(b). A jurisdiction motion is not the appropriate proceeding for scrutinizing in detail the adequacy of the pleadings, nor is it the proper place for engaging in a rigorous assessment of whether the plaintiff's claim will ultimately succeed.

[119] As for the argument that the motion judge made palpable and overriding errors in holding that Ontario established a good arguable case for assuming jurisdiction against each appellant, we are not persuaded that any of the appellants have demonstrated any such error. The motion judge referred to evidence and undenied allegations that were capable of supporting her findings

and drew inferences that were available on the record that was before her. We see no basis on which to interfere with her conclusions.

(5) Costs Award

[120] The motion judge awarded costs of the jurisdiction motion to Ontario in the amount of $425,000 for fees and $152,520 for disbursements.[5] Of these amounts, she ruled that the BAT Group appellants (Investments, Industries and BAT plc) and Carreras would be jointly and severally liable for $340,000 in fees and roughly one-half of the disbursements. The RJR appellants would be jointly and severally liable for $85,000 in fees and the other half of the disbursements. She made this award in spite of the appellants' arguments that:

> a) costs should be calculated on a distributive basis (i.e., they should reflect that the appellants and Ontario had each been successful, or partly successful on some, but not all of the motions leading up to the actual jurisdiction hearing);
>
> b) Ontario's costs should be reduced because Ontario did not produce evidence of the actual hourly rates of Crown counsel involved in the proceedings;
>
> c) Ontario ought not to be entitled to its costs relating to the cross-examinations of the appellants' affiants, per rule 39.02(4)(b); and,
>
> d) the appellants ought not to be held to be jointly and severally liable for costs.

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[5] *Ontario v. Rothmans et al.,* 2012 ONSC 1804; 28 C.P.C. (7th) 103.

[121] The appellants seek leave to appeal, and if leave is granted, appeal the costs award, raising essentially the same objections. While we would grant leave, we would dismiss the appeal.

[122] Awarding costs of a proceeding is a discretionary remedy. The motion judge is the case management judge of these proceedings and was very familiar with all of the motions leading up to the ultimate jurisdictional hearing. She was aware of the factors in play in those procedural skirmishes, including the results and partial results. We see no error in principle or law in her exercise of discretion and therefore no basis for interfering with the conclusion to which it led.

(a) Costs Award on a Global Basis as Opposed to a Distributive Basis

[123] Prior to the actual jurisdiction hearing there were four proceedings within that proceeding that are relevant for the purposes of the costs debate:

i) Ontario cross-examined the appellants' fact and expert witnesses (in the United Kingdom with respect to the BAT Group and Carreras appellants for seven days; and in the United States with respect to the RJR appellants for one day).

ii) Ontario brought a refusals motion arising out of some of these cross-examinations, which, although initially successful before the Master, was ultimately unsuccessful before a Superior Court judge and before the Divisional Court.

iii) The parties argued a seven-day evidentiary motion before the motion judge concerning the admissibility of certain evidence on the jurisdiction motion itself. In the result, portions of the affidavit of Ontario's affiant – but not all, as requested by the appellants – were struck out. Some of the many documents attached to that affidavit were ruled inadmissible, some were ruled authentic and admissible, and still others were ruled both authentic and admissible for the truth of their contents.

iv) Finally, Industries and Investments brought a partially successful motion to strike out certain paragraphs in Ontario's revised factum.

[124] In her costs reasons, the motion judge noted that counsel had agreed to defer the issue of costs for the steps leading up to the substantive hearing on the jurisdiction motion until the end of that hearing.

[125] The substantive hearing of the jurisdiction motion itself lasted eight days.

[126] The appellants recognize that courts generally resist making distributive costs awards based on issues in a particular proceeding: see *Armak Chemicals Ltd. v. Canadian National Railway Co.* (1991), 5 O.R. (3d) 1 (C.A.), at paras. 17-19. They submit, however, that the foregoing steps were substantially discrete and separate proceedings, and, in some cases, were proceedings in which costs would generally have been awarded had it not been for the agreement of counsel to treat them otherwise.

[127] Given the agreement of counsel, it seems to us however that the parties must have contemplated that the motion judge would deal with costs on a global basis, as she in fact did. She was aware that she had to consider all of the steps in determining costs, and her reasons show that she factored in the varying levels of success throughout the proceedings in arriving at her ultimate conclusion as to quantum. We see no error in that approach, or in her finding that all of those steps were part of, and "integrally related to", the jurisdictional challenge.

[128] We also agree with the motion judge's observations on the irony of the appellants' position in this regard, had they been successful. The effect of their submissions – which would have seen them recover costs for the bulk of the seven-day evidentiary hearing – was that they would receive almost $1 million in costs on a jurisdiction motion that they ultimately lost (and, incidentally, for which the successful party only received approximately $577,000 in total). The motion judge correctly viewed this as unreasonable, in our opinion.

(b) Principle of Indemnity: Hourly Rates

[129] Although the hourly rates sought by counsel for Ontario were approximately one-half of those being claimed by the appellants for counsel with comparable years of experience, the appellants contend that the province's hourly rates were "unjustified, excessive and beyond the reasonable expectations of the parties."[6] They further submit that the province is only entitled to partial indemnity for the costs incurred and that it was therefore required to supply proof of its actual costs for lawyers' time – in effect, the salaries of Crown counsel – in order to establish a basis for the motion judge to determine a correct partial indemnity rate for the province.

[130] We do not agree.

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[6] Joint factum of the BAT appellants and Carreras regarding costs, para. 7.

[131] The appellants rely on rule 57.01(1)(0.a), rule 57.01(6) and Form 57B for their argument that the province was required to file information establishing its hourly rates.

[132] Rule 57.01(1)(O.a) reflects the indemnity principle underlying much of the rationale for the recovery of costs. It states:

> (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
>
> > (O.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer.

[133] Rule 57.01(6) requires the parties to exchange a Form 57B costs outline, and Form 57B contains a column for "the hours spent, the rates sought for costs and the rate actually charged by the party's lawyer".

[134] There is no issue that actual rates charged may be a relevant consideration in determining costs: see *Stellarbridge Management Inc. v. Magna International (Canada) Inc.* (2004), 71 O.R. (3d) 263 (C.A.), at paras. 94-99. However, hourly rates and the notion of indemnification, while clearly important, are not the *only* relevant considerations: see *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 82 O.R. (3d) 757 (C.A.); and *Chiefs of Ontario v. Ontario*, [2007] O.J. No. 4068 (S.C.), paras. 12-14 and 17. The court's authority under rule 57.01(1) remains discretionary, and it is significant that under rule

57.01(1)(0.a), information regarding "rates charged and hours spent" is called for in applying the principle of indemnity only "*where applicable*". Rates and hours spent are not particularly "applicable" in situations where counsel are salaried employees of their employer litigant. In those circumstances, the salaried lawyer does not generally send a bill to his or her employer for services rendered, with or without hourly rates.

[135] Section 131(2) of the *Courts of Justice Act*, R.S.O 1990, c. C.43, and s. 36 of the *Solicitors Act*, R.S.O. 1990, c. S.15 both affirm the Crown's right to recover its partial indemnity costs in proceedings in which it has been successful, even though it is represented by salaried counsel. They provide:

> *Courts of Justice Act*
>
> 131(2) In a proceeding to which Her Majesty is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown …
>
> *Solicitors Act*
>
> 36. Costs awarded to a party in a proceeding shall not be disallowed or reduced on assessment merely because they relate to a solicitor or counsel who is a salaried employee of the party.

[136] As Ontario acknowledges, these provisions do not deprive the court of its discretion in fixing costs. However, the courts in many jurisdictions have adopted the principle that, where a successful party is represented by a salaried lawyer, the proper method of fixing costs is to deal with them as though they were the

costs of an independent outside counsel. The theory behind this approach is that it will roughly and fairly approximate the actual amount of expenses incurred: see *Re Eastwood (deceased)*, [1974] 3 All E.R. 603, at p. 608 (where the "English Rule" appears to have been first articulated); *City of Edmonton and Public Utilities Board* (1985), 16 D.L.R. (4th) 459 (Alta. C.A.), at p. 464; *872245 N.W.T. Ltd. v. Dowdall*, [1989] N.W.T.J. No. 114 (S.C.); *Grand & Toy Ltd. v. Aviva Canada Inc.*, 2010 ONSC 372, at paras. 3-5.

[137] The motion judge followed this approach. She was entitled to do so.

[138] In the end, the motion judge simply followed the test signalled by Armstrong J.A. in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 26: "the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, *rather than an amount fixed by the actual costs incurred by the successful litigant*" (emphasis added).

(c) Cross-Examinations

[139] Rule 39.02(4)(b) provides that a party who cross-examines on an affidavit (other than on a motion for summary judgment) is liable for the partial indemnity costs of every adverse party with respect to the cross-examination, regardless of the outcome of the proceeding, *unless the court orders otherwise.*

[140] The motion judge recognized her discretion to order otherwise. She exercised it in favour of Ontario in the circumstances, and gave unassailable reasons for doing so. These reasons included: (i) that the appellants did not contest jurisdiction solely on the basis of the allegations in the pleadings, but relied heavily on the evidence of their affiants; (ii) that she herself relied on the cross-examination evidence, including the answers to undertakings, in arriving at her decision; and (iii) that it was reasonable and necessary for Ontario to cross-examine the BAT Group appellants' U.K. expert, because the BAT Group appellants had decided to do the same with Ontario's expert.

[141] There is no basis for interfering with that decision.

[142] We note that once again, the motion judge was not oblivious to what appears to us to be an irony in the appellants' position with respect to costs of the cross-examinations. She observed that the appellants themselves were seeking to recover the costs of *their* cross-examinations of Ontario's affiants.

(d) Joint and Several Liability

[143] Nor do we see any error in the decision to make costs payable on the basis of joint and several liability.

[144] The motion judge appropriately distinguished between the RJR moving parties on the one hand, and the BAT Group and Carreras moving parties on the other hand. Although there was some overlap between the respective positions

of these Groups, she concluded that there were sufficient differences to militate against making all moving parties jointly and severally responsible for costs. No one contests this decision.

[145] Industries, Investments, BAT plc, and Carreras attack the decision to hold them jointly and severally liable for their portion of the costs, however. They argue that a joint and several award of costs is unusual and was unwarranted in this case. They say the motion judge unfairly penalized them for doing exactly what she as the case management judge had asked them to do: namely to cooperate in their filings and submissions in order to expedite and simplify the proceedings.

[146] The motion judge's decision was based on more than administrative efficiency, however. Her decision to make the BAT Group appellants and Carreras jointly and severally liable for their portion of the costs was based on the overlap in factual and legal issues among them, their inter-corporate relationships, and their adoption of common arguments. In addition, we note that this was a case of multiple parties launching a proceeding in which they sought like remedies against the same responding party.

[147] The authorities relied upon by the appellants are distinguishable.

[148] In *Society of Lloyd's v. Saunders*, [2001] O.J. No. 5144 (C.A.), the key to this Court's decision not to allow costs on a joint and several basis was the fact

that the parties against whom the award was sought were defending the proceedings, not bringing them, and were therefore required to defend. The Court felt that a joint and several award in those circumstances would be "onerous and potentially unfair" and would penalize the parties for having to defend. Here, that rationale does not apply.

[149] *Bossé v. Mastercraft Group Inc.* (1995), 123 D.L.R. (4th) 161 (Ont. C.A.) was an action in which a number of financial institutions sought to recover from approximately 170 investors on loans that were in default as a result of a failed tax-driven arrangement concerning the purchases of condominiums. The issue on appeal was whether those investors were required to pay costs on a solicitor/client basis. The fact that the award had been made on a joint and several basis was not contested. While the Court did observe, at para. 66, that the joint and several award was "admittedly a highly unusual one", the comment was based on the fact that the award could cause an onerous unfairness on various investors, who had no business relationship between them but who could be called upon to pay an award that exceeded their mortgage debt to the institution. Again, that is not the case here.

[150] While joint and several costs awards may be unusual, it was open to the motion judge, in our view, to exercise her overall discretion with respect to costs

by making them payable in the joint and several fashion that she did, for the reasons she did.

Released:

"MAY 30 2013" "Janet Simmons J.A."
"DD" "R.A. Blair J.A."
"I agree Doherty J.A."