SUPREME COURT OF CANADA

British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49

DATE: September 29, 2005
DOCKET: 30411

Imperial Tobacco Canada Limited Appellant

v.

Her Majesty The Queen in Right of British Columbia Respondent

and

Imperial Tobacco Canada Limited Appellant

v.

Attorney General of British Columbia Respondent

and

Rothmans, Benson & Hedges Inc. Appellant

v.

Her Majesty The Queen in Right of British Columbia Respondent

and

Rothmans, Benson & Hedges Inc. Appellant

v.

Attorney General of British Columbia Respondent

and

JTI-Macdonald Corp. Appellant

v.

Her Majesty The Queen in Right of British Columbia Respondent

and

JTI-Macdonald Corp. Appellant

v.

Attorney General of British Columbia Respondent

and

Canadian Tobacco Manufacturers' Council Appellant

v.

Her Majesty The Queen in Right of British Columbia Respondent

and

British American Tobacco (Investments) Limited Appellant

v.

Her Majesty The Queen in Right of British Columbia Respondent

and

Philip Morris Incorporated and Philip Morris International Inc. Appellants

v.

Her Majesty The Queen in Right of British Columbia Respondent

and

Attorney General of Ontario, Attorney General of Quebec,
Attorney General of Nova Scotia, Attorney General of
New Brunswick, Attorney General of Manitoba,
Attorney General for Saskatchewan, Attorney General of
Alberta and Attorney General of Newfoundland and Labrador Interveners

CORAM: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 78)

Major J. (McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ. concurring)

2005: June 8; 2005: September 29.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for british columbia

Constitutional law - Division of powers - Extra-territoriality - Limitation on provincial legislation - Provincial legislation authorizing civil actions by government of British Columbia against manufacturers of tobacco products for recovery of health care expenditures incurred by government in treating individuals exposed to those products - Tobacco manufacturers sued by government challenging constitutional validity of legislation - Whether legislation exceeds territorial limits on provincial legislative jurisdiction - Constitution Act, 1867, s. 92(13) - Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30.

Constitutional law - Judicial independence - Provincial legislation authorizing civil actions by government of British Columbia against manufacturers of tobacco products for recovery of health care expenditures incurred by government in treating individuals exposed to those products - Whether legislation constitutionally invalid as being inconsistent with principle of judicial independence - Whether rules of civil procedure contained in legislation interfere with adjudicative role of court hearing action - Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30.

Constitutional law - Rule of law - Provincial legislation authorizing civil actions by government of British Columbia against manufacturers of tobacco products for recovery of health care expenditures incurred by government in treating individuals exposed to those products - Whether legislation constitutionally invalid as offending rule of law - Whether Constitution, through rule of law, requires legislation to be prospective, general in character and devoid of special advantages for government (except where necessary for effective governance), as well as to ensure fair civil trial - Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30.

The Tobacco Damages and Health Care Costs Recovery Act (the "Act") authorizes an action by the government of British Columbia against a manufacturer of tobacco products for the recovery of health care expenditures incurred by the government in treating individuals exposed to those products. Liability hinges on those individuals having been exposed to tobacco products because of the manufacturer's breach of a duty owed to persons in British Columbia, and on the

government having incurred health care expenditures in treating disease in those individuals caused by such exposure. The appellants, each of which was sued by the government pursuant to the Act, challenged its constitutional validity. The British Columbia Supreme Court dismissed the government's actions, concluding that the Act was unconstitutional because it failed to respect territorial limits on provincial legislative jurisdiction. The Court of Appeal set aside the decision, finding that the Act's pith and substance is "Property and Civil Rights in the Province" within the meaning of s. 92(13) of the Constitution Act, 1867, and that the extra-territorial aspects of the Act, if any, are incidental to it. The court also found that the Act does not offend judicial independence or the rule of law. [1] [21-23]

Held: The appeals should be dismissed. The Act is constitutionally valid.

The Act is not unconstitutional by reason of extra-territoriality. The cause of action that constitutes the pith and substance of the Act is properly described as located "in the Province" under s. 92(13) of the Constitution Act, 1867. The Act is meaningfully connected to the province as there are strong relationships among the enacting territory (British Columbia), the subject matter of the law (compensation for the government of British Columbia's tobacco-related health care costs) and the persons made subject to it (the tobacco manufacturers ultimately responsible for those costs). The Act also respects the legislative sovereignty of other jurisdictions. Though the cause of action may capture, to some extent, activities occurring outside of British Columbia, no territory could possibly assert a stronger relationship to that cause of action than British Columbia. The breaches of duty to which the Act refers are of subsidiary significance to the cause of action created by it, and thus the locations where those breaches might occur have little or no bearing on the strength of the relationship between the cause of action and British Columbia. [37-38] [40] [43]

The Act does not violate the independence of the judiciary. A court called upon to try an action brought pursuant to the Act retains at all times its adjudicative role, and the ability to exercise that role without interference. It must independently determine the applicability of the Act to the government's claim, independently assess the evidence led to support and defend that claim, independently assign that evidence weight, then independently determine whether its assessment of the evidence supports a finding of liability. The fact that the Act shifts onuses of proof in respect of some of the elements of an aggregate claim or limits the compellability of certain information does not in any way interfere, in either appearance or fact, with the court's adjudicative role or any of the essential conditions of judicial independence. Judicial independence can abide unconventional rules of civil procedure and evidence. [55-56]

The Act does not implicate the rule of law in the sense that the Constitution comprehends that term. Except in respect of criminal law, the retrospectivity and retroactivity of which is limited by s. 11(g) of the Charter, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution. Nor does the Constitution, through the rule of law, require that legislation be general in character and devoid of special advantages for the government (except where necessary for effective governance), or that it ensure a fair civil trial. In any event, tobacco manufacturers sued pursuant to the Act will receive a fair civil trial: they are entitled to a public hearing, before an independent and impartial court, in which they may contest the claims of the plaintiff and adduce evidence in their defence. The court will

determine their liability only following that hearing, based solely on its understanding of the law as applied to its findings of fact. That defendants might regard the Act as unjust, or the procedural rules it prescribes as unprecedented, does not render their trial unfair. [69] [73] [76-77]

The judgment of the Court was delivered by

1 MAJOR J. - The Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30 (the "Act"), authorizes an action by the government of British Columbia against a manufacturer of tobacco products for the recovery of health care expenditures incurred by the government in treating individuals exposed to those products. Liability hinges on those individuals having been exposed to tobacco products because of the manufacturer's breach of a duty owed to persons in British Columbia, and on the government of British Columbia having incurred health care expenditures in treating disease in those individuals caused by such exposure.

2 These appeals question the constitutional validity of the Act. The appellants, each of which was sued by the government of British Columbia pursuant to the Act, challenge its constitutional validity on the basis that it violates (1) territorial limits on provincial legislative jurisdiction; (2) the principle of judicial independence; and (3) the principle of the rule of law.

3 For the reasons that follow, the Act is constitutionally valid. The appeals are dismissed, with costs to the respondents throughout.

I. Background

A. The Legislation

4 The Act, in its entirety, is reproduced in the Appendix. Its essential aspects are summarized below.

5 Section 2(1) is the keystone of the Act. It reads:

> The government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong.

6 The terms "manufacturer", "cost of health care benefits" and "tobacco related wrong" are defined in s. 1(1) of the Act. Their definitions in turn refer to other defined terms. Incorporating the definitions into s. 2, then paraphrasing to some degree, the section provides as follows:

> The government has a direct and distinct action against a manufacturer for the present value of existing and reasonably expected future expenditures by the government for (a) benefits as defined under the Hospital Insurance Act or the Medicare Protection Act; (b) payments under the Continuing Care Act; and (c) programs, services or benefits

associated with disease, where (a) such expenditures result from disease or the risk of disease caused or contributed to by exposure to a tobacco product; and (b) such exposure was caused or contributed to by (i) a tort committed in British Columbia by the manufacturer; or (ii) a breach of a common law, equitable or statutory duty or obligation owed by the manufacturer to persons in British Columbia who have been or might have become exposed to a tobacco product.

7 Viewed in this light, s. 2(1) creates a cause of action by which the government of British Columbia may recover from a tobacco manufacturer money spent treating disease in British Columbians, where such disease was caused by exposure to a tobacco product (whether entirely in British Columbia or not), and such exposure was caused by that manufacturer's tort in British Columbia, or breach of a duty owed to persons in British Columbia.

8 The cause of action created by s. 2(1), besides being "direct and distinct", is not a subrogated claim: s. 2(2). Nor is it barred by the Limitation Act, R.S.B.C. 1996, c. 266 s. 6(1). Crucially, it can be pursued on an aggregate basis - i.e. in respect of a population of persons for whom the government has made or can reasonably be expected to make expenditures: s. 2(4)(b).

9 Where the government's claim is made on an aggregate basis, it may use statistical, epidemiological and sociological evidence to prove its case: s. 5(b). It need not identify, prove the cause of disease or prove the expenditures made in respect of any individual member of the population on which it bases its claim: s. 2(5)(a). Furthermore, health care records and related information in respect of individual members of that population are not compellable, except if relied upon by an expert witness: ss. 2(5)(b) and (c). However, the court is free to order the discovery of a "statistically meaningful sample" of the health care records of individual members of that population, stripped of personal identifiers: ss. 2(5)(d) and (e).

10 Pursuant to ss. 3(1) and (2), the government enjoys a reversed burden of proof in respect of certain elements of an aggregate claim. Where the aggregate claim is, like the one brought against each of the appellants, to recover expenditures in respect of disease caused by exposure to cigarettes, the reversed burden of proof operates as follows. Once the government proves that

(a) the defendant manufacturer breached a common law, equitable or statutory duty or obligation it owed to persons in British Columbia who have been or might become exposed to cigarettes;

(b) exposure to cigarettes can cause or contribute to disease; and

(c) during the manufacturer's breach, cigarettes manufactured or promoted by the manufacturer were offered for sale in British Columbia,

the court will presume that

(a) the population that is the basis for the government's aggregate claim would not have been exposed to cigarettes but for the manufacturer's breach; and

(b) such exposure caused or contributed to disease in a portion of the population that is the basis for the government's aggregate claim.

11 In this way, it falls on a defendant manufacturer to show that its breach of duty did not give rise to exposure, or that exposure resulting from its breach of duty did not give rise to the disease in respect of which the government claims for its expenditures. The reversed burden of proof on the manufacturer is a balance of probabilities: s. 3(4).

12 Where the aforementioned presumptions apply, the court must determine the portion of the government's expenditures after the date of the manufacturer's breach that resulted from exposure to cigarettes: s. 3(3)(a). The manufacturer is liable for such expenditures in proportion to its share of the market for cigarettes in British Columbia, calculated over the period of time between its first breach of duty and trial: ss. 3(3)(b) and 1(6).

13 In an action by the government, a manufacturer will be jointly and severally liable for expenditures arising from a joint breach of duty (i.e. for expenditures caused by disease, which disease was caused by exposure, which exposure was caused by a joint breach of duty to which the manufacturer was a party): s. 4(1).

14 Pursuant to s. 10, all provisions of the Act operate retroactively.

15 The Act is the second British Columbia statute designed to enable the government to sue tobacco manufacturers for tobacco-related health care costs that has been challenged on the basis of its constitutionality. The Supreme Court of British Columbia struck down the earlier statute, the Tobacco Damages Recovery Act, S.B.C. 1997, c. 41, as being in pith and substance legislation in relation to extra-provincial civil rights and therefore ultra vires the Legislative Assembly of British Columbia: see JTI-Macdonald Corp. v. British Columbia (Attorney General), (2000), 184 D.L.R. (4th) 335, 2000 BCSC 312.

16 The legislative history of the Act confirms that it was drafted to address concerns about the extra-territorial aspects of the earlier statute and to avoid any further challenges with respect to extra-territoriality: see Debates of the Legislative Assembly, vol. 20, No. 6, 4th Sess., 36th Parl. (June 7, 2000), at p. 16314.

B. Procedural History

17 On January 24, 2001, the Act came into force. On the same day, the government sued 14 entities in the tobacco industry in the Supreme Court of British Columbia, pursuant to s. 2 of the Act.

18 The appellants are among the 14 entities sued by the government. The appellants Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., JTI-Macdonald Corp. and Canadian Tobacco Manufacturers' Council are Canadian corporations, and were served in British Columbia. The appellants Philip Morris Incorporated (now Philip Morris USA Inc.) and Philip Morris International Inc. are incorporated under the laws of Virginia and Delaware, respectively,

and were served ex juris. The appellant British American Tobacco (Investments) Limited is incorporated under the laws of the United Kingdom, and was also served ex juris.

19 The Canadian appellants applied for a declaration that the Act is unconstitutional. The appellants served ex juris applied to set aside service on the basis that the Act is unconstitutional, and thus that the government's actions founded on it were bound to fail.

20 Throughout the proceedings, the appellants' constitutional attack has been essentially tripartite. They argue that the Act exceeds the territorial limits on provincial legislative jurisdiction, violates judicial independence and infringes the rule of law.

II. Judicial History

A. Supreme Court of British Columbia ((2003), 227 D.L.R. (4th) 323, 2003 BCSC 877)

21 Holmes J. rejected the appellants' submissions concerning judicial independence and the rule of law, but accepted their submissions concerning extra-territoriality. He concluded that the Act fails to respect territorial limits on provincial legislative jurisdiction because, in his view, the exposure to tobacco products giving rise to liability is territorially unconfined, and the aim of the Act is recovery of health care costs "from the tobacco industry nationally and internationally" (para. 222).

22 In the result, Holmes J. declared the Act invalid, dismissed the government's actions brought pursuant to the Act and set aside all ex juris service by the government.

B. Court of Appeal for British Columbia ((2004), 239 D.L.R. (4th) 412, 2004 BCCA 269)

23 The Court of Appeal for British Columbia allowed the respondents' appeals. Lambert, Rowles and Prowse JJ.A. each gave reasons concluding that the Act's pith and substance is "Property and Civil Rights in the Province" within the meaning of s. 92(13) of the Constitution Act, 1867; that the extra-territorial aspects of the Act, if any, are incidental to it; and therefore that the Act is not invalid by reason of extra-territoriality. All agreed that the Act does not offend judicial independence or the rule of law.

24 In the result, the court dismissed the appellants' applications for declarations that the Act is invalid, set aside Holmes J.'s orders dismissing the government's actions and remitted to the Supreme Court of British Columbia the applications of the appellants served ex juris to have service set aside, with such applications to be decided on the basis that the Act is constitutionally valid.

III. Issues

25 McLachlin C.J. stated the following constitutional questions:

1. Is the Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, ultra vires the provincial legislature by reason of extra-territoriality?

2. Is the Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, constitutionally invalid, in whole or in part, as being inconsistent with judicial independence?

3. Is the Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, constitutionally invalid, in whole or in part, as offending the rule of law?

IV. Analysis

A. Extra-territoriality

26 Section 92 of the Constitution Act, 1867 is the primary source of provincial legislatures' authority to legislate. Provincial legislation must therefore respect the limitations, territorial and otherwise, on provincial legislative competence found in s. 92. The opening words of s. 92 - "In each Province" - represent a blanket territorial limitation on provincial powers. That limitation is echoed in a similar phrase that qualifies a number of the heads of power in s. 92: "in the Province".

27 The territorial limitations on provincial legislative competence reflect the requirements of order and fairness underlying Canadian federal arrangements and discussed by this Court in Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, at pp. 1102-1103, Hunt v. T&N plc, [1993] 4 S.C.R. 289, at pp. 324-25, and Unifund Assurance Co. v. Insurance Corp. of British Columbia, [2003] 2 S.C.R. 63, 2003 SCC 40, at para. 56. They serve to ensure that provincial legislation both has a meaningful connection to the province enacting it, and pays respect to "the sovereignty of the other provinces within their respective legislative spheres": Unifund, at para. 51. See also, generally, R. E. Sullivan, "Interpreting the Territorial Limitations on the Provinces" (1985), 7 Sup. Ct. L.R. 511.

28 Where the validity of provincial legislation is challenged on the basis that it violates territorial limitations on provincial legislative competence, the analysis centres on the pith and substance of the legislation. If its pith and substance is in relation to matters falling within the field of provincial legislative competence, the legislation is valid. Incidental or ancillary extra-provincial aspects of such legislation are irrelevant to its validity. See Reference re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297 ("Churchill Falls"), at p. 332, and Global Securities Corp. v. British Columbia (Securities Commission), [2000] 1 S.C.R. 494, 2000 SCC 21, at para. 24.

29 In determining the pith and substance of legislation, the court identifies its essential character or dominant feature: see Global Securities Corp., at para. 22, and Reference re Firearms Act (Can.), [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 16. This may be done through reference to both the purpose and effect of the legislation: see Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture), [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 53. See also Fédération des producteurs de volailles du Québec v. Pelland, [2005] 1 S.C.R. 292, 2005 SCC 20, at para. 20.

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

31 Where legislation's pith and substance relates to an intangible matter, the characterization is more complicated. That is the case here.

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

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

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

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

36 From the foregoing it can be seen that several analytical steps may be required to determine whether provincial legislation in pith and substance respects territorial limits on

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

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

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

39 In assessing the Act's respect for the territorial limitations on British Columbia's legislative competence, the appellants and the Court of Appeal placed considerable emphasis on the question of whether, as a matter of statutory interpretation, the breach of duty by a manufacturer that is a necessary condition of its liability under the cause of action created by the Act must occur in British Columbia. That emphasis was undue, for two reasons.

40 First, the driving force of the Act's cause of action is compensation for the government of British Columbia's health care costs, not remediation of tobacco manufacturers' breaches of duty. While the Act makes the existence of a breach of duty one of several necessary conditions to a manufacturer's liability to the government, it is not the mischief at which the cause of action created by the Act is aimed. The Act leaves breaches of duty to be remedied by the law that gives rise to the duty. Thus, the breaches of duty to which the Act refers are of subsidiary significance to the cause of action created by it, and the locations where those breaches might occur have little or no bearing on the strength of the relationship between the cause of action and the enacting jurisdiction.

41 Second, and in any event, the only relevant breaches under the Act are breaches of duties (or obligations) owed "to persons in British Columbia" (s. 1(1) "tobacco related wrong", s. 3(1)(a)) that give rise to health care expenditures by the government of British Columbia. Thus, even if the existence of a breach of duty were the central element of the Act's cause of action (it is not), the cause of action would remain strongly related to British Columbia.

42 The question of whether other matters, such as exposure and disease, to which the Act refers, must occur or arise in British Columbia is equally or more irrelevant to the Act's validity. Those matters too are conditions precedent to success in an action brought pursuant to the Act and of subsidiary significance to it.

43 It follows that the cause of action that constitutes the pith and substance of the Act is properly described as located "in the Province". The Act is not invalid by reason of extra-territoriality, being in pith and substance legislation in relation "Property and Civil Rights in the Province" under s. 92(13) of the Constitution Act, 1867.

B. Judicial Independence

44 Judicial independence is a "foundational principle" of the Constitution reflected in s. 11(d) of the Canadian Charter of Rights and Freedoms, and in both ss. 96-100 and the preamble to the Constitution Act, 1867: Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3, at para. 109. It serves "to safeguard our constitutional order and to maintain public confidence in the administration of justice": Ell v. Alberta, [2003] 1 S.C.R. 857, 2003 SCC 35, at para. 29. See also Application under s. 83.28 of the Criminal Code (Re), [2004] 2 S.C.R. 248, 2004 SCC 42, at paras. 80-81.

45 Judicial independence consists essentially in the freedom "to render decisions based solely on the requirements of the law and justice": Mackin v. New Brunswick (Minister of Finance), [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 37. It requires that the judiciary be left free to act without improper "interference from any other entity" (Ell, at para. 18) - i.e. that the executive and legislative branches of government not "impinge on the essential 'authority and function' ... of the court" (MacKeigan v. Hickman, [1989] 2 S.C.R. 796, at pp. 827-28). See also Valente v. The Queen, [1985] 2 S.C.R. 673, at pp. 686-87, Beauregard v. Canada, [1986] 2 S.C.R. 56, at pp. 73 and 75, R. v. Lippé, [1991] 2 S.C.R. 114, at pp. 152-54, Babcock v. Canada (Attorney General), [2002] 3 S.C.R. 3, 2002 SCC 57, at para. 57, and Application under s. 83.28 of the Criminal Code (Re), at para. 87.

46 Security of tenure, financial security and administrative independence are the three "core characteristics" or "essential conditions" of judicial independence: Valente, at pp. 694, 704 and 708, and Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, at para. 115. It is a precondition to judicial independence that they be maintained, and be seen by "a reasonable person who is fully informed of all the circumstances" to be maintained: Mackin, at paras. 38 and 40, and Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice), 2005 SCC 44, at para. 6.

47 However, even where the essential conditions of judicial independence exist, and are reasonably seen to exist, judicial independence itself is not necessarily ensured. The critical question is whether the court is free, and reasonably seen to be free, to perform its adjudicative role without interference, including interference from the executive and legislative branches of government. See, for example, Application under s. 83.28 of the Criminal Code (Re), at paras. 82-92.

48 The appellants submit that the Act violates judicial independence, both in reality and appearance, because it contains rules of civil procedure that fundamentally interfere with the adjudicative role of the court hearing an action brought pursuant to the Act. They point to s. 3(2), which they say forces the court to make irrational presumptions, and to ss. 2(5)(a), (b) and (c), which they say subvert the court's ability to discover relevant facts. They say that these rules impinge on the court's fact-finding function, and virtually guarantee the government's success in an action brought pursuant to the Act.

49 The rules in the Act with which the appellants take issue are not as unfair or illogical as the appellants submit. They appear to reflect legitimate policy concerns of the British Columbia legislature regarding the systemic advantages tobacco manufacturers enjoy when claims for tobacco-related harm are litigated through individualistic common law tort actions. That, however, is beside the point. The question is not whether the Act's rules are unfair or illogical, nor whether they differ from those governing common law tort actions, but whether they interfere with the courts' adjudicative role, and thus judicial independence.

50 The primary role of the judiciary is to interpret and apply the law, whether procedural or substantive, to the cases brought before it. It is to hear and weigh, in accordance with the law, evidence that is relevant to the legal issues confronted by it, and to award to the parties before it the available remedies.

51 The judiciary has some part in the development of the law that its role requires it to apply. Through, for example, its interpretation of legislation, review of administrative decisions and assessment of the constitutionality of legislation, it may develop the law significantly. It may also make incremental developments to its body of previous decisions - i.e. the common law - in order to bring the legal rules those decisions embody "into step with a changing society": R. v. Salituro, [1991] 3 S.C.R. 654, at p. 666. See also Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, at paras. 91-92. But the judiciary's role in developing the law is a relatively limited one. "[I]n a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform": Salituro, at p. 670.

52 It follows that the judiciary's role is not, as the appellants seem to submit, to apply only the law of which it approves. Nor is it to decide cases with a view simply to what the judiciary (rather than the law) deems fair or pertinent. Nor is it to second-guess the law reform undertaken by legislators, whether that reform consists of a new cause of action or procedural rules to govern it. Within the boundaries of the Constitution, legislatures can set the law as they see fit. "The wisdom and value of legislative decisions are subject only to review by the electorate": Wells v. Newfoundland, [1999] 3 S.C.R. 199, at para. 59.

53 In essence, the appellants' arguments misapprehend the nature and scope of the courts' adjudicative role protected from interference by the Constitution's guarantee of judicial independence. To accept their position on that adjudicative role would be to recognize a constitutional guarantee not of judicial independence, but of judicial governance.

54 None of this is to say that legislation, being law, can never unconstitutionally interfere with courts' adjudicative role. But more is required than an allegation that the content of the legislation required to be applied by that adjudicative role is irrational or unfair, or prescribes rules different from those developed at common law. The legislation must interfere, or be reasonably seen to interfere, with the courts' adjudicative role, or with the essential conditions of judicial independence. As McLachlin C.J. stated in Babcock, at para. 57:

> It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.

55 No such fundamental alteration or interference was brought about by the legislature's enactment of the Act. A court called upon to try an action brought pursuant to the Act retains at all times its adjudicative role and the ability to exercise that role without interference. It must independently determine the applicability of the Act to the government's claim, independently assess the evidence led to support and defend that claim, independently assign that evidence weight, and then independently determine whether its assessment of the evidence supports a finding of liability. The fact that the Act shifts certain onuses of proof or limits the compellability of information that the appellants assert is relevant does not in any way interfere, in either appearance or fact, with the court's adjudicative role or any of the essential conditions of judicial independence. Judicial independence can abide unconventional rules of civil procedure and evidence.

56 The appellants' submission that the Act violates the independence of the judiciary and is therefore unconstitutional fails for the reasons stated above.

C. Rule of Law

57 The rule of law is "a fundamental postulate of our constitutional structure" (Roncarelli v. Duplessis, [1959] S.C.R. 121, at p. 142) that lies "at the root of our system of government" (Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 70). It is expressly acknowledged by the preamble to the Constitution Act, 1982, and implicitly recognized in the preamble to the Constitution Act, 1867: see Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, at p. 750.

58 This Court has described the rule of law as embracing three principles. The first recognizes that "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power": Reference re Manitoba Language Rights, at p. 748. The second "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order": Reference re Manitoba Language Rights, at p. 749. The third requires that "the

relationship between the state and the individual ... be regulated by law": Reference re Secession of Quebec, at para. 71.

59 So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded. See R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 Can. Bar Rev. 67, at pp. 114-15.

60 This does not mean that the rule of law as described by this Court has no normative force. As McLachlin C.J. stated in Babcock, at para. 54, "unwritten constitutional principles", including the rule of law, "are capable of limiting government actions". See also Reference re Secession of Quebec, at para. 54. But the government action constrained by the rule of law as understood in Reference re Manitoba Language Rights and Reference re Secession of Quebec is, by definition, usually that of the executive and judicial branches. Actions of the legislative branch are constrained too, but only in the sense that they must comply with legislated requirements as to manner and form (i.e. the procedures by which legislation is to be enacted, amended and repealed).

61 Nonetheless, considerable debate surrounds the question of what additional principles, if any, the rule of law might embrace, and the extent to which they might mandate the invalidation of legislation based on its content. P. W. Hogg and C. F. Zwibel write in "The Rule of Law in the Supreme Court of Canada" (2005), 55 U.T.L.J. 715, at pp. 717-18:

> Many authors have tried to define the rule of law and explain its significance, or lack thereof. Their views spread across a wide spectrum. ... T.R.S. Allan, for example, claims that laws that fail to respect the equality and human dignity of individuals are contrary to the rule of law. Luc Tremblay asserts that the rule of law includes the liberal principle, the democratic principle, the constitutional principle, and the federal principle. For Allan and Tremblay, the rule of law demands not merely that positive law be obeyed but that it embody a particular vision of social justice. Another strong version comes from David Beatty, who argues that the "ultimate rule of law" is a principle of "proportionality" to which all laws must conform on pain of invalidity (enforced by judicial review). In the middle of the spectrum are those who, like Joseph Raz, accept that the rule of law is an ideal of constitutional legality, involving open, stable, clear, and general rules, even-handed enforcement of those laws, the independence of the judiciary, and judicial review of administrative action. Raz acknowledges that conformity to the rule of law is often a matter of degree, and that breaches of the rule of law do not lead to invalidity.

See also W. J. Newman, "The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation" (2005), 16 N.J.C.L. 175, at pp. 177-80.

62 This debate underlies Strayer J.A.'s apt observation in Singh v. Canada (Attorney General), [2000] 3 F.C. 185 (C.A.), at para. 33, that "[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be".

63 The appellants' conceptions of the rule of law can fairly be said to fall at one extreme of the spectrum of possible conceptions and to support Strayer J.A.'s thesis. They submit that the rule of law requires that legislation (1) be prospective; (2) be general in character; (3) not confer special privileges on the government, except where necessary for effective governance; and (4) ensure a fair civil trial. And they argue that the Act breaches each of these requirements, rendering it invalid.

64 A brief review of this Court's jurisprudence will reveal that none of these requirements enjoy constitutional protection in Canada. But before embarking on that review, it should be said that acknowledging the constitutional force of anything resembling the appellants' conceptions of the rule of law would seriously undermine the legitimacy of judicial review of legislation for constitutionality. That is so for two separate but interrelated reasons.

65 First, many of the requirements of the rule of law proposed by the appellants are simply broader versions of rights contained in the Charter. For example, the appellants' proposed fair trial requirement is essentially a broader version of s. 11(d) of the Charter, which provides that "[a]ny person charged with an offence has the right ... to ... a fair and public hearing". But the framers of the Charter enshrined that fair trial right only for those "charged with an offence". If the rule of law constitutionally required that all legislation provide for a fair trial, s. 11(d) and its relatively limited scope (not to mention its qualification by s. 1) would be largely irrelevant because everyone would have the unwritten, but constitutional, right to a "fair ... hearing". (Though, as explained in para. 76, infra, the Act provides for a fair trial in any event.) Thus, the appellants' conception of the unwritten constitutional principle of the rule of law would render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers. That is specifically what this Court cautioned against in Reference re Secession of Quebec, at para. 53:

> Given the existence of these underlying constitutional principles, what use may the Court make of them? In [Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island], at paras. 93 and 104, we cautioned that the recognition of these constitutional principles ... could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. [Emphasis added.]

66 Second, the appellants' arguments overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court - most notably democracy and constitutionalism - very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms). Put differently, the appellants' arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that

some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box. See Bacon v. Saskatchewan Crop Insurance Corp. (1999), 180 Sask. R. 20 (C.A.), at para. 30, Elliot, at pp. 141-42, Hogg and Zwibel, at p. 718, and Newman, at p. 187.

67 The rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text.

68 A review of the cases showing that each of the appellants' proposed requirements of the rule of law has, as a matter of precedent and policy, no constitutional protection is conclusive of the appellants' rule of law arguments.

(1) Prospectivity in the Law

69 Except for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(g) of the Charter, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution. Professor P. W. Hogg sets out the state of the law accurately (in Constitutional Law of Canada (loose-leaf ed.), vol. 1, at p. 48-29):

> Apart from s. 11(g), Canadian constitutional law contains no prohibition of retroactive (or ex post facto laws). There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common.

70 Hence, in Air Canada v. British Columbia, [1989] 1 S.C.R. 1161, at p. 1192, La Forest J., writing for a majority of this Court, characterized a retroactive tax as "not constitutionally barred". And in Cusson v. Robidoux, [1977] 1 S.C.R. 650, at p. 655, Pigeon J., for a unanimous Court, said that it would be "untenable" to suggest that legislation reviving actions earlier held by this Court (in Notre-Dame Hospital v. Patry, [1975] 2 S.C.R. 388) to be time-barred was unconstitutional.

71 The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust: see E. Edinger, "Retrospectivity in Law" (1995), 29 U.B.C. L. Rev. 5, at p. 13. Those who perceive it as such can perhaps take comfort in the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that the legislature has turned its mind to such effects and "determined that the benefits of retroactivity [or retrospectivity] outweigh the potential for disruption or unfairness": Landgraf v. USI Film Products, 511 U.S. 244 (1994), at p. 268.

72 It might also be observed that developments in the common law have always had retroactive and retrospective effect. Lord Nicholls of Birkenhead recently explained this point in In re Spectrum Plus Ltd., [2005] 3 W.L.R. 58, [2005] UKHL 41, at para. 7:

> A court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively. The ruling will have a retrospective effect so far as the parties to the particular dispute are concerned, as occurred with the manufacturer of the ginger beer in Donoghue v Stevenson [1932] AC 562. When Mr Stevenson manufactured and bottled and sold his ginger beer the law on manufacturers' liability as generally understood may have been as stated by the majority of the Second Division of the Court of Session and the minority of their Lordships in that case. But in the claim Mrs Donoghue brought against Mr Stevenson his legal obligations fell to be decided in accordance with Lord Atkin's famous statements. Further, because of the doctrine of precedent the same would be true of everyone else whose case thereafter came before a court. Their rights and obligations would be decided according to the law as enunciated by the majority of the House of Lords in that case even though the relevant events occurred before that decision was given.

This observation adds further weight, if needed, to the view that retrospectivity and retroactivity do not generally engage constitutional concerns.

(2) Generality in the Law, Ordinary Law for the Government and Fair Civil Trials

73 Two decisions of this Court defeat the appellants' submission that the Constitution, through the rule of law, requires that legislation be general in character and devoid of special advantages for the government (except where necessary for effective governance), as well as that it ensure a fair civil trial.

74 The first is Air Canada. In it, a majority of this Court affirmed the constitutionality of 1981 amendments to the Gasoline Tax Act, 1948, R.S.B.C. 1960, c. 162, that retroactively taxed certain companies in the airline industry. The amendments were meant strictly to defeat three companies' claims, brought in 1980, for reimbursement of gasoline taxes paid between 1974 and 1976, the collection of which was ultra vires the legislature of British Columbia. The legislative amendments, in addition to being retroactive, were for the benefit of the Crown, aimed at a particular industry with readily identifiable members and totally destructive of that industry's ability to pursue successfully their claims filed a year earlier. Nonetheless, the constitutionality of those amendments was affirmed by a majority of this Court.

75 The second is Authorson v. Canada (Attorney General), [2003] 2 S.C.R. 40, 2003 SCC 39, in which this Court unanimously upheld a provision of the Department of Veterans Affairs Act, R.S.C. 1985, c. V-1, aimed specifically at defeating certain disabled veterans' claims, the merits of which were undisputed, against the federal government. The claims concerned interest owed by the government on the veterans' benefit accounts administered by it, which interest it had not properly credited for decades. Though the appeal was pursued on the basis of the Canadian Bill of Rights, S.C. 1960, c. 44, the decision confirmed that it was well within Parliament's power to enact the provision at issue - despite the fact that it was directed at a known class of vulnerable veterans, conferred benefits on the Crown for "undisclosed reasons" (para. 62) and routed those veterans' ability to have any trial - fair or unfair - of their claims. See para. 15:

The Department of Veterans Affairs Act, s. 5.1(4) takes a property claim from a vulnerable group, in disregard of the Crown's fiduciary duty to disabled veterans. However, that taking is within the power of Parliament. The appeal has to be allowed.

76 Additionally, the appellants' conception of a "fair" civil trial seems in part to be of one governed by customary rules of civil procedure and evidence. As should be evident from the analysis concerning judicial independence, there is no constitutional right to have one's civil trial governed by such rules. Moreover, new rules are not necessarily unfair. Indeed, tobacco manufacturers sued pursuant to the Act will receive a fair civil trial, in the sense that the concept is traditionally understood: they are entitled to a public hearing, before an independent and impartial court, in which they may contest the claims of the plaintiff and adduce evidence in their defence. The court will determine their liability only following that hearing, based solely on its understanding of the law as applied to its findings of fact. The fact that defendants might regard that law (i.e. the Act) as unjust, or the procedural rules it prescribes as unprecedented, does not render their trial unfair.

77 The Act does not implicate the rule of law in the sense that the Constitution comprehends that term. It follows that the Act is not unconstitutional by reason of interference with it.

V. Conclusion

78 The Act is constitutionally valid. The appeals are dismissed, with costs to the respondents throughout. Each constitutional question is answered "no". The stay of proceedings granted by McLachlin C.J. on January 21, 2005 is vacated.