QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2013 SKQB 357**

Date: **2013 10 01**
Docket: Q.B.G. No. 871 of 2012
Judicial Centre: Saskatoon

BETWEEN:

THE GOVERNMENT OF SASKATCHEWAN,

PLAINTIFF

- and -

ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., 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, CARRERAS ROTHMANS LIMITED, AND CANADIAN TOBACCO MANUFACTURERS' COUNCIL,

DEFENDANTS

Counsel:

Gary A. Meschishnick, Q.C., Colin D. Clackson and Robyn M. Ryan Bell	for the Government of Saskatchewan
Robert J. McDonell and Jeffrey J. Kay, Q.C.	for R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc. and JTI-MacDonald Corp.
Jay D. Watson	for Altria Group, Inc. and Philip Morris U.S.A. Inc.
David R. Byers and Gary D. Young, Q.C.	for British American Tobacco p.l.c.
Douglas C. Hodson, Q.C.	for Rothmans, Benson & Hedges Inc. and Rothmans Inc.

Chris Rusnak and David M. Stack	for Carreras Rothmans Limited
Craig P. Dennis and John R. Beckman, Q.C.	for British American Tobacco (Investments) Limited
Chris Rusnak and John R. Beckman, Q.C.	for B.A.T Industries p.l.c.
Fred C. Zinkhan and Kevin O'Brien	for Imperial Tobacco Canada Limited
James S. Ehmann, Q.C., and Barry Gorlick	for Philip Morris International, Inc.
Kevin L. Boonstra	for Canadian Tobacco Manufacturers' Council

FIAT R.S. SMITH J.
October 1, 2013

[1] The plaintiff, the Government of Saskatchewan (the "Crown"), has brought an action against the defendants to recover the cost of health care benefits contributed to or caused by the defendants' sale or promotion of cigarettes and other tobacco related wrongs as defined in a statute specifically passed to permit such an action, namely, *The Tobacco Damages and Health Care Costs Recovery Act*, S.S. 2007, c. T-14.2 (the "*Act*").

[2] Several defendants bring an application under Rule 99 of the former *Queen's Bench Rules* (now replaced by *The Queen's Bench Rules* 2013) objecting to the jurisdiction of the court. The said defendants are B.A.T Industries p.l.c., British American Tobacco p.l.c., British American Tobacco (Investments) Limited, R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., and Carreras Rothmans Limited (collectively the jurisdiction challenging defendants "JCDs").

[3] The remaining defendants, Imperial Tobacco Canada Limited, Philip Morris International, Inc., JTI-MacDonald Corp., and Canadian Tobacco Manufacturers' Council, bring an application under Rule 100 of former *Queen's Bench Rules* seeking an order allowing them to delay filing their statement of defence until the jurisdictional debate is resolved respecting the JCDs.

[4] The *Act* was passed in 2007, although not proclaimed into law until May 31, 2012. The Crown's original claim, issued in June 2012, was followed by an amended claim issued on October 9, 2012. It was immediately apparent that the JCDs would be seeking to strike out the claim on the basis of lack of territorial competence.

OVERVIEW OF THE *ACT*

[5] The *Act* creates the cause of action; it is *sui generis* and could not have been brought at common law.

[6] Section 3(1) of the *Act* provides, in part:

> **3**(1) The Government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco-related wrong.
>
> (2) An action under subsection (1) is brought by the Government in its own right and not on the basis of a subrogated claim.
>
> (4) In an action under subsection (1), the Government may recover the cost of health care benefits:
>
> (a) for particular individual insured persons; or
>
> (b) on an aggregate basis, for a population of insured persons as a result of exposure to a type of tobacco product.

[7] A tobacco-related wrong is defined at s. 2(m) as:

> (m) "tobacco-related wrong" means:
> (i) a tort committed in Saskatchewan by a manufacturer which causes or contributes to tobacco-related disease; or
> (ii) in an action under subsection 3(1), a breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons in Saskatchewan who have been exposed or might become exposed to a tobacco product.

[8] Under the *Act*, the net to capture a manufacturer is cast widely. It is defined at s. 2(1)(h) as:

> (h) "manufacturer" means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past:
> (i) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product;
> (ii) for any fiscal year of the person, derives at least 10% 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;
> (iii) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product; or
> (iv) is a trade association primarily engaged in:
> (A) the advancement of the interests of manufacturers;
> (B) the promotion of a tobacco product; or
> (C) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product.

[9] The defendant's escape from the claim is further narrowed by a joint liability provision in the *Act*. Section 5 provides:

> **5**(1) Two or more defendants in an action under subsection 3(1) are jointly and severally liable for the cost of health care benefits if:

> (a) those defendants jointly breached a duty or obligation described in the definition of "tobacco-related wrong" in clause 2(1)(m); and
> (b) as a consequence of the breach described in clause (a), at least one of those defendants is held liable in the action under subsection 3(1) for the cost of those health care benefits.
>
> (2) For the purposes of an action under subsection 3(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 clause 2(1)(m) if:
> (a) one or more of those manufacturers are held to have breached the duty or obligation; and
> (b) at common law, in equity or under an enactment those manufacturers would be held:
> (i) to have conspired or acted in concert with respect to the breach;
> (ii) to have acted in a principal and agent relationship with each other with respect to the breach; or
> (iii) to be jointly or vicariously liable for the breach if damages would have been awarded to a person who suffered as a consequence of the breach.

THE CLAIM

[10] The Crown's claim seeks judgment against each of the defendants for health care expenditures attributable to tobacco-related disease or the risk of tobacco-related disease for each fiscal year from 1953 to the present. In addition, the Crown claims the present value of an estimated total expenditure of health care benefits which could reasonably be expected to result from tobacco-related disease in the future. The Crown did not specify an amount in its claim, but, suffice it to say, it is likely in the billions of dollars.

[11] To a great extent, the Crown's claim reflects the *Act* on which it is

grounded. To summarize its 187-paragraph statement of claim, the Crown alleges, *inter alia*, the following:

(a) At all material times the defendants, including the JCDs, manufactured, promoted, and offered cigarettes for sale in Saskatchewan and thus owed a duty to persons in Saskatchewan who have been exposed to or might become exposed to cigarettes.

(b) By 1950, the defendants knew or ought to have known that nicotine is addictive and that smoking cigarettes could cause or contribute to disease. Further, by 1960, the defendants knew or ought to have known that exposure to cigarette smoke could cause or contribute to disease.

(c) Notwithstanding the defendants' intimate knowledge of the dangers of smoking and exposure to cigarette smoke, the defendants, including the JCDs, committed tobacco-related wrongs (as defined in the *Act*) by breaching duties and obligations owed to persons in Saskatchewan. In particular, the defendants are alleged to have misrepresented the risks of smoking, breached their duty to warn of the risks, took steps to promote smoking to children and adolescents and breached their duty to design and manufacture a reasonably safe product thus breaching obligations under the *Act*, common law, equitable and statutory duties and obligations.

(d) In committing those tobacco-related wrongs, the defendants, including the JCDs, conspired and/or acted in concert to achieve their goal.

(e) In the beginning of 1953, the defendants, acting in concert, disseminated false and misleading information, suppressed research information on the

risks of smoking, and orchestrated false and misleading public relations programs to misrepresent the risk of exposure to cigarette smoke and generally promote the sale and use of cigarettes.

(f) The Crown asserts the conspiracy was implemented in Saskatchewan and throughout Canada by the Canadian defendants, namely Imperial Tobacco Canada Limited, JTI-MacDonald Corp., Rothmans, Benson & Hedges Inc., Rothmans Inc., and Canadian Tobacco Manufacturers' Council (collectively the "Canadian Defendants").

SIMILAR LEGISLATION IN OTHER PROVINCES

[12] The Province of Saskatchewan does not stand alone in passing tobacco cost recovery legislation. Similar legislation and proceedings have been implemented and brought in British Columbia, New Brunswick and Ontario.

[13] British Columbia enacted the first cost recovery statute, which was met with a constitutional challenge that such legislation was *ultra vires* provincial jurisdiction. The matter ultimately proceeded to the Supreme Court of Canada. In *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, the Supreme Court held that the legislation was, in substance, relating to property and civil rights and thus constitutionally valid.

[14] In British Columbia, the JCDs also challenged the jurisdiction of the provincial superior court. The challenge was dismissed at the superior court level by Holmes J. in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 BCSC 946, 44 B.C.L.R. (4th) 125. This decision was confirmed by the British Columbia Court of Appeal in 2006 BCCA 398, [2006] 11 W.W.R. 191. Leave to the Supreme Court of

Canada was refused: [2006] S.C.C.A. No. 446 (QL).

[15] Similarly, in the New Brunswick proceeding, the JCDs' order seeking dismissal of the claim for want of jurisdiction was unsuccessful: *New Brunswick v. Rothmans Inc.*, 2010 NBQB 381, 373 N.B.R. (2d) 157. Leave to appeal to the New Brunswick Court of Appeal was denied: [2011] N.B.J. No. 116 (QL).

[16] A similar result was visited on the JCDs in a jurisdiction challenging application in Ontario: *Ontario v. Rothmans Inc.*, 2012 ONSC 22, 28 C.P.C. (7th) 68. That decision was confirmed by the Ontario Court of Appeal: 2013 ONCA 353, 115 O.R. (3d) 561.

[17] The JCDs submit that the British Columbia, New Brunswick and Ontario jurisdiction decisions are distinguishable and not binding on this court. They posit that there are evidentiary records and legal tests in Saskatchewan that differentiate the debate here from the other jurisdictions.

[18] I concede that I must deal with the applications at hand based on the Crown's claim in Saskatchewan, the relevant *Queen's Bench Rules*, the *Act* and the application of Saskatchewan law. At the same time, however, I should not disregard the thoughtful analysis in other jurisdictions where essentially identical legislation was considered.

LEGISLATIVE REGIME FOR TERRITORIAL COMPETENCE

[19] In relation to jurisdiction, the applicable statute in Saskatchewan is *The Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1 (the "*CJPTA*").

The only portion of the statute relevant to this action is s. 4(e), which provides that the court has territorial competence if "there is a real and substantial connection between Saskatchewan and the facts on which the proceeding against that person is based".

[20] The *CJPTA* provides at s. 9:

> 9 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between Saskatchewan and the facts on which a proceeding is based, a real and substantial connection between Saskatchewan and those facts is presumed to exist if the proceeding:
> ...
> (g) is brought for a tort committed in Saskatchewan; ... .

[21] I observe that the *CJPTA* is consonant with the Supreme Court's ruling in the touchstone jurisdictional decision, *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, which provided at para. 90:

> 90 To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, prima facie, entitle a court to assume jurisdiction over a dispute:
> (a) the defendant is domiciled or resident in the province;
> (b) the defendant carries on business in the province;
> (c) the tort was committed in the province; and
> (d) a contract connected with the dispute was made in the province.

[22] In Saskatchewan, the analytical steps to determine if Saskatchewan has jurisdiction of the cause of action pleaded are helpfully set out in *Wall Estate v. Glaxosmithkline Inc.*, 2010 SKQB 351, 367 Sask.R. 21, at para. 37:

> 37 In summary, the non-discretionary exercise for determining territorial competence ought to be conducted as follows:

> (A) The Court will look, in the first instance, at the plaintiffs' claim to determine whether a sufficient link between Saskatchewan and the facts has been pled to justify the assumption of jurisdiction to conduct the contemplated legal proceedings which may have an affect [sic] on persons and interests beyond the borders of this province. If not, the Court does not have territorial competence.
>
> (B) If the pleadings establish a sufficient link, a rebuttal presumption of jurisdiction *simpliciter* comes into operation. The Court would then consider the evidence adduced by the defendants, if any, in order to determine whether such evidence establishes that the plaintiffs' claim is tenuous in that it contradicts material facts pleaded by the plaintiffs or otherwise proves facts fatal to the plaintiffs' claim.
>
> (C)If the foreign defendants discharge this initial burden and rebut the presumption, the Court ought to then review the plaintiffs' evidence in order to assess whether the plaintiffs have made out an arguable case such that it would constitute a triable issue.
>
> (D) If the Court concludes that there is not a "real and substantial connection within the meaning of s.4 of the *CJPTA*, the Court ought to declare that it does not have territorial competence and dismiss the action against the foreign defendants.

[23] The JCDs contend that the Crown has failed to plead the material facts necessary to establish a real and substantial connection to Saskatchewan. They say that even if the Crown had pleaded facts to establish a sufficient link to Saskatchewan, the majority of the JCDs have provided evidence that rebuts the presumption of jurisdiction. This evidence, say the JCDs, has gone unanswered by the Crown.

[24] In addressing the adequacy of pleadings, *Wall Estate, supra*, provided at paras. 41 and 42:

41 In determining whether the plaintiffs have adequately pled a sufficient link between Saskatchewan and the facts on which the action is based against the foreign defendants, I am mindful of the requirement that the plaintiffs' claim must properly frame the cause of action by sufficiently setting forth the material facts. *The Queen's Bench Rules* expressly require that each pleading set forth the factual foundation for a claim:

> 139(1) Every pleading shall contain and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which the facts are to be proved. A pleading shall be as brief as the nature of the case will permit.
>
> (2) Where necessary full particulars of any claim, or defence shall be stated in the pleading.
>
> ...
>
> 141 A party may raise any point of law in his pleading. Conclusions of law may be pleaded provided that the material facts supporting such conclusions are pleaded.

The importance of sufficiently drafted pleadings cannot be overstated. In *Plotnikoff v. Saskatchewan*, 2004 SKCA 59, [2005] 3 W.W.R. 257, Tallis J.A., at paragraph 57, commented that a statement of claim which alleges a breach of fiduciary duty,

> 57 ... involve(s) the need to properly define the issues in pleadings and comply with *The Queen's Bench Rules* designed to achieve that end. This Court commented on the importance of this in *Ducharme v. Davies*, [1984] 1 W.W.R. 699, noting that the function of pleading is, among others, to clearly and precisely define the question in controversy. We also made the point that pleadings remain an important component of every lawsuit, they are to be framed with care and in accordance with the Rules, and that they are expected to set forth such facts as are material to the cause or causes of action being advanced.

42 In other words, it is not sufficient to simply assert that the foreign defendants have engaged in actionable wrongdoing. The pleadings must disclose enough material facts to form a basic factual foundation for such allegations.

[25] Notwithstanding the learned arguments of the various counsel for the JCDs, I am of the view that the claim does articulate a real and substantial connection between Saskatchewan and the facts on which the action taken against the JCDs is based.

[26] In *Ontario v. Rothmans, supra*, the Ontario Court of Appeal opined at paras. 37-39:

> [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* [s. 5 of the Saskatchewan 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).

[27] I am satisfied that the claim in this case sets out a plausible causal connection between Saskatchewan and the JCDs grounded in the tort of conspiracy. However, my analysis on the issue of jurisdiction does not stop there.

[28] In *Wall Estate*, the learned trial judge found that the plaintiff had not made adequate allegations in the claim to establish a substantial connection. However, he went on to opine at paras. 45-48:

> **45** Even if the plaintiffs had made adequate allegations in the claim to establish a sufficient connection, the evidence that has been filed in the proceedings conclusively demonstrates that there is no reasonable factual basis to substantiate the necessary link between Saskatchewan and the alleged wrongdoing on the part of the foreign defendants.
> ...
>
> **47** The unequivocal and unchallenged evidence is that none of the foreign defendants has ever been:
> * federally or provincially incorporated in Canada;
> * registered to do business in Canada; and/or
> * conducted any activities relating to the manufacturing, promoting, labelling, marketing and/or selling of Avandia in Canada.
>
> **48** In light of the unequivocal and uncontradicted affidavit evidence filed in this proceeding, it is painfully clear that not only are the plaintiffs' pleadings devoid of establishing the requisite "real and substantial connection" but that the evidence conclusively determines that there is, in fact, no real and substantial connection between this province and the facts on which the proceeding against the foreign defendants is based.

[29] Here, each of the JCDs have also filed affidavits which seek to underpin the argument that there is only a tenuous relationship between the JCDs and the allegations by the Crown as to their activities in Saskatchewan. Large swaths of those

affidavits relate to internal corporate interplay among the JCDs and related corporations. Carreras Rothmans Limited posits that its corporate history is such that it should not have been named at all as "it was not there".

[30] Further, the JCDs have filed affidavits by those learned in the law who have opined that a judgment obtained in Saskatchewan under the *Act* would be unenforceable in foreign jurisdictions where the respective JCDs have assets. I am of the view that those opinions do not bear on the debate respecting jurisdiction, but on a debate respecting *forum conveniens*.

[31] The JCDs maintain that a reasonable review of the affidavits should result in the conclusion that the named JCD defendants were not part of any program in Saskatchewan or elsewhere either in relation to the manufacture or sale of cigarettes or in relation to conspiracy to suppress the knowledge that smoking is dangerous or those other representations that were a natural incident thereto.

[32] Given the breadth of the claim and the fact that the alleged conspiracy is said to have started in 1953, it might be difficult for any given affidavit to address all the material issues. However, in short and in sum, the material filed by the JCDs is insufficient to rebut the presumption set out in the Crown's claim that there is a plausible causal connection between them and Saskatchewan. In reaching that conclusion I am aided by the reasons set out in the plaintiff's brief at paras. 38-42:

> 38. ... the claim discloses material facts that form a factual foundation for the allegations against each of the Jurisdiction Challenging Defendants. In particular:
>
> (a) Each of the Jurisdiction Challenging Defendants is alleged to be a Manufacturer as defined in *The Recovery Act*. Each is alleged, through a variety of particularized

means, to have exerted control and direction over the Canadian operating company in its Group and that control and direction is alleged to have extended to the manufacture and promotion of their cigarettes.

(b) The control and direction by each of the Jurisdiction Challenging Defendants over the Canadian operating company in its Group has involved the implementation of the Group's position and policies on smoking and exposure to cigarette smoke and health, as particularized in the claim. Each of the Jurisdiction Challenging Defendants, as Lead Companies of their respective Groups, has communicated and directed these policies on smoking and exposure to cigarette smoke and health for the Canadian operating company in its Group by a variety of particularized means.

(b) [*sic*] Each of the Canadian operating companies or their predecessors was a founding member of the CTMC and CTMC itself was an allied member of ICOSI.

(c) Each of the Jurisdiction Challenging Defendants, by reason of these pleaded facts, is alleged to be jointly liable with and vicariously liable for the tobacco-related wrongs of the Canadian operating company in their respective tobacco Group. The Province has also alleged that each of the Canadian operating entitles acted as agent for one or more of the Jurisdiction Challenging Defendants, as set out in the claim, in committing tobacco-related wrongs in Canada.

39. The Province also alleges that each of the defendants is responsible in law for the actions and conduct of its predecessors as identified in the claim. In particular, in responding to BAT plc's motion, the Province alleges in the claim that BAT plc is responsible in law for the wrongful conduct of its predecessors, Investments and Industries, both former parent companies of the BAT Group. The Province has alleged that the common policies of the BAT Group have continued notwithstanding changes in the corporate structure of the Group. There continues to be central coordination of the BAT Group's international strategy, of which Canada is an integral part, and central control and management of the Group's policies on smoking and health issues. The Province

alleges that the BAT Group's policies on smoking and health have been maintained in Canada from 1950 to the present under the control and direction of the former parent companies, Investments and Industries, and the current parent company of the Group, BAT plc.

40. Section 5 of *The Recovery Act* provides for joint and several liability in the direct and distinct action by the Province under subsection 3(1). Subsection 5(2) provides:

> For the purposes of an action under subsection 3(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 clause 2(1)(m) if:
>
> (a) one or more of those manufacturers are held to have breached the duty or obligation; and
>
> (b) at common law, in equity or under an enactment those manufacturers would be held:
>
> (i) to have conspired or acted in concert with respect to the breach;
>
> (ii) to have acted in a principal and agent relationship with each other with respect to the beach; or
>
> (iii) to be jointly or vicariously liable for the breach if damages would have been awarded to a person who suffered as a consequence of the breach.

41. Each of the Jurisdiction Challenging Defendants committed tobacco-related wrongs by breaching duties and obligations to persons in Saskatchewan, those being their duties and obligations not to misrepresent the risks of smoking, to warn of the risks of smoking, not to promote cigarettes to children and adolescents, to design and manufacture a reasonably safe product and other common law, equitable and statutory duties and obligations, as pleaded. "[T]obacco-related wrong" is defined in *The Recovery Act* to mean:

> (i) a tort committed in Saskatchewan by a manufacturer which causes or contributes to tobacco-related disease; or
>
> (ii) in an action under subsection 3(1) [the direct and distinct action by the Province against a manufacturer], a breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons in Saskatchewan who have been exposed or might become exposed to a tobacco product.

> 42. In committing tobacco-related wrongs, the Jurisdiction Challenging Defendants, together with the other defendants, engaged in the Conspiracy to prevent the Government of Saskatchewan and persons in Saskatchewan from acquiring knowledge of the harmful and addictive properties of cigarettes in circumstances where they knew or ought to have known that their actions would cause increased health care costs. The Conspiracy was continued in Canada by each of the Groups, including the Jurisdiction Challenging Defendants, using the means particularized in the claim.

[33] I observe that the courts in New Brunswick and Ontario both had similar types of affidavits filed on behalf of the JCDs and they were, as well, unpersuaded on the argument of jurisdiction.

[34] Accordingly, the JCDs' application to dismiss the claim for want of jurisdiction is dismissed.

APPLICATION FOR DELAY

[35] The non-JCD defendants (the "Remaining Defendants") apply under Rule 3-12(1) (former Rule 100) to extend the time for the filing of their respective statements of defence until such time as the jurisdictional challenges to the Crown's claim have been resolved.

[36] The Remaining Defendants submit that it would be cumbersome, and more to the point, wrong, to allow the claim to move in a two-track format and that the issue of jurisdiction should be settled before they are asked to file their defences or bring their preliminary applications.

[37] The Crown complains that the application by the Remaining Defendants is a blatant attempt at delay and that the court should not countenance same.

[38] The Crown asserts that there is no inherent problem with this matter moving on multiple tracks during the course of litigation. Of course, at some point all must converge, presumably prior to the pre-trial settlement conference. The fact that the parties are at different stages of litigation is a non-issue.

[39] The Crown pleads that the court has the inherent power to control its own process and that it should dismiss the request by the Remaining Defendants so that the action can move along in a timely fashion. The Crown points to New Brunswick where the court has permitted the Government's claim to proceed on two tracks.

[40] In my view, a reasonable observer would anticipate that all the defendants may be inclined to file a demand for particulars and/or other preliminary motions objecting to the claim. Each of those would be argued at Queen's Bench level and, then, likely at the Court of Appeal.

[41] The issue of jurisdiction is significant as it affects a large number of defendants. If it is resolved that the JCDs shall remain defendants, then I would anticipate they would also file a demand for particulars triggering a motion before me to resolve the debates. In addition, there would be other preliminary objections to the claim from the JCDs which are similar to the Remaining Defendants.

[42] I confess I am uncertain as to the correct approach. At this juncture I am inclined to side with the position advanced by the Remaining Defendants. We should firstly determine who is in the litigation. Once that is resolved then the arguments

concerning any demands for particulars or other preliminary objections can be held at one time and addressed in one judgment.

[43] I observe Rule 4-7(1)(b) and Rule 4-7(1)(f), in particular, give a case management judge the power to set or adjust dates by which a step in the action is expected to be completed and order the parties to comply with the dates and the power to make any procedural order that judge considers necessary.

[44] I acknowledge that this approach will delay the resolution of the claim. However, in fairness, the Crown has chosen to pass an act allowing it to bring a claim which spans 60 years. Such a singular piece of litigation must, by definition, involve some delay.

[45] Therefore, in the event this judgment is appealed, the Remaining Defendants are relieved from filing a demand for particulars or other preliminary objection or their statement of defence until such time as the jurisdiction issue raised by the JCDs is ultimately resolved. In the event this decision is not appealed, the Remaining Defendants shall file any demand for particulars, or other preliminary objection or, alternatively their statement of defence within 30 days from the date the period for filing an appeal expires.

COSTS

[46] I leave to the parties to see if they can agree on the issue of costs at this

preliminary stage. If they cannot, then any party may apply to the Registrar to seek a time to appear before me to debate that issue.

J.
R.S. SMITH