Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

FACTUM OF QUEBEC CLASS COUNSEL

(Re: Motion for the Approval of the Quebec Class Counsel Fee Returnable on January 29, 2025)

January 22, 2025

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TO: THE COMMON SERVICE LIST

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Justice Marie-France Bich (English translation - extract from a Quebec Court of Appeal decision on an interlocutory matter, 2012 QCCA 622):

> *[5] First of all, it must be acknowledged that the litigation in which the parties are engaged is of uncommon complexity, particularly from a procedural point of view. (…) Riordan J. uses the qualifier "gargantuan", and even that seems an understatement.*

Justice Brian Riordan (extracts from the Trial Judgment, 2015 QCCS 2382):

> *[1200] Besides the simple, common-sense notion that it is high time that the Companies started to pay for their sins, it is also high time that the Plaintiffs, and their lawyers, receive some relief from the gargantuan financial burden of bringing them to justice after so many years.*

Justice Mark Schrager (extracts from the Court of Appeal judgment ordering the furnishing of security, 2015 QCCA 1737):

> *[44] (…) I am faced with a situation where on balance I conclude that the Respondents [QCAPs] are in jeopardy of not obtaining satisfaction of any substantial amount confirmed in appeal. (…)*

Quebec Court of Appeal (Unofficial English translation - extract from the Appeal Judgment on the merits, 2019 QCCA 358):

> *[1123] Given the extreme gravity of the appellants' faults, their duration, their persistence, the need to prevent and denounce the occurrence of similar behaviour in the future, the advisability of depriving a legal person of profits acquired while flouting the law and the wealth of the appellants, the amounts granted in this case have a genuine rational connection to the objectives of exemplarity, deterrence and denunciation. (...)*

Chief Justice Geoffrey Morawetz (extract from Endorsement, 2024 ONSC 6061):

> *[14] (…) these CCAA proceedings are among the most complex insolvency proceedings in Canadian history (…).*

PART I – INTRODUCTION

1. The Global Settlement Amount[1] of $32.5 billion memorialized in the CCAA Plans is pan-Canadian in scope and is by far the largest of its kind in Canadian history. This result would not have been possible without the enormous risk assumed, the staggering amount of time and effort devoted, and the extraordinary commitment of Quebec Class

[1] Where not defined herein, defined terms have the meanings ascribed to them in the CCAA Plans.

Counsel.[2] Against all odds, the entire Canadian tobacco industry was brought to justice in landmark trial and appeal judgments rendered in favour of the Quebec Class Action Plaintiffs (the "**QCAPs**"), the Quebec Appeal Judgment having been acknowledged by this Court as the singular event that precipitated these CCAA Proceedings.[3] It is not hyperbole to suggest that a case comparable to the Quebec Class Actions may never come before the courts again.

2. By the Motion for the Approval of the Quebec Class Counsel Fee,[4] and pursuant to sections 14.9(f) and 16.2 (note 8) of the CCAA Plans, Quebec Class Counsel request that this Honourable Court approve the CQTS Retainer Agreement (hereafter defined) and authorize the payment of the Quebec Class Counsel Fee in the amount of $901,177,915[5], representing 22% of the amount allocated in the CCAA Plans to compensate *Blais* Class Members,[6] plus applicable taxes.

3. In these unique circumstances, it is not surprising that the fee for which approval is requested is also unique. As described hereafter, the extent and quality of work performed by Quebec Class Counsel, the risks they took and the results they achieved, for Quebec Class Members and Canadian society at large, entitle them to the benefit of their fee agreement. It is respectfully submitted that public policy

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[2] Collectively, the law practices of Trudel Johnston & Lespérance ("**TJL**"), Kugler Kandestin s.e.n.c.r.l., L.L.P. ("**Kugler**"), De Grandpré Chait s.e.n.c.r.l., L.L.P. ("**DGC**") and Fishman Flanz Meland Paquin s.e.n.c.r.l., L.L.P. ("**FFMP**").
[3] *Imperial Tobacco Limited*, 2024 ONSC 6061, para. 15; *JTI-Macdonald Corp. (Re)*, 2019 ONSC 2222, para. 2.
[4] Filed with the QCAP Motion Record dated January 13, 2025 (the "**QCAP Fee Motion Record**").
[5] The amount of $901,177,915 is 22% of $4.119 billion ($906,180,000) less $5,002,085 previously paid to the FAAC (as defined herein) from insurance settlements achieved on behalf of the QCAPs in separate proceedings; Johnston Affidavit, para. 15, QCAP Fee Motion Record, Tab 2.
[6] Quebec Class Counsel are not seeking the reimbursement of disbursements incurred and to be incurred by them and are also not seeking any fee on account of the $131 million QCAP Cy-près Contribution allocated as consideration for the settlement of the *Létourneau* Class Action and paid to the public charitable Cy-près Foundation.

considerations strongly favour the approval of the requested Quebec Class Counsel Fee and the agreement upon which it is based.

PART II – BACKGROUND AND FACTS

Overview of the Quebec Class Actions

4. The representative plaintiff in the *Blais* Class Action, the *Conseil Québécois sur le Tabac et la Santé* ("**CQTS**") first approached a predecessor to one of the Quebec Class Counsel firms in 1997 to explore the possibility of launching a class action against the Tobacco Companies. The CQTS selected the late Jean-Yves Blais, a Quebecer diagnosed with lung cancer caused by smoking cigarettes since his youth, to act as the designated class member, and the *Blais* Class Action was instituted in November 1998. Shortly before, the *Létourneau* Class Action on behalf of class members addicted to the nicotine contained in the cigarettes made by the Tobacco Companies[7] had been launched by separate members of Quebec Class Counsel. Over the following years, the lawyers representing both files gradually became a single team, jointly representing both plaintiffs.

5. It took almost seven years to bring the cases to a joint authorization (certification) hearing and, on February 21, 2005, both cases were authorized. After dozens of judgments on interlocutory matters, including many appeals, the trial finally began on March 12, 2012.[8] The trial resulted in a judgment against the Tobacco Companies condemning them solidarily (jointly and severally) to more than $13.5 billion. The

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[7] Affidavit of Dr. André-H Dandavino sworn January 10, 2025 [with official translation] (the "**Dandavino Affidavit**"), paras. 18, 20; Johnston Affidavit, paras. 20, 122, QCAP Fee Motion Record, Tab 4 and Tab 2, respectively.

[8] Affidavit of Marc Beauchemin sworn January 7, 2025 (the "**Beauchemin Affidavit**"), para. 68, QCAP Fee Motion Record, Tab 6.

judgment was upheld in all significant respects by the Quebec Court of Appeal on March 1, 2019, triggering the present CCAA Proceedings.

Contingency Fee Retainer Agreement

6. The retainer agreement between the CQTS and Quebec Class Counsel (at the time, with a predecessor firm Lauzon Bélanger) was entered into on October 30, 1998 (including the amendment hereafter described, the "**CQTS Retainer Agreement**"). It provided for a contingency fee of 20% of amounts collected or benefits realized.[9]

7. Formed in 1976 to take on the tobacco industry and to expose the harm that tobacco causes to its users,[10] the CQTS is a sophisticated entity acting through an independent Executive Committee and Board of Directors[11] which considered and fully understood the contractual terms of the fee agreement it made with Quebec Class Counsel on behalf of the class members.

8. On March 16, 2017, the CQTS Retainer Agreement was amended to increase the contingency fee percentage by up to an additional 2%[12] to take into account the magnitude of additional work expected to be required in connection with insolvency proceedings, which were considered all but inevitable.[13] When the CQTS Retainer Agreement was modified in 2017, the CQTS knew the amount of the damages awarded

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[9] Dandavino Affidavit, paras. 66-68 and Schedule "B", QCAP Fee Motion Record, Tab 4.
[10] Dandavino Affidavit, paras. 2, 8, QCAP Fee Motion Record, Tab 4.
[11] Dandavino Affidavit, paras. 3, 17, 19-21, QCAP Fee Motion Record, Tab 4.
[12] As described in the Affidavit of Philippe H. Trudel sworn January 12, 2025 (the "**Trudel Affidavit**"), paras. 76-80, and generally in the Affidavit of Avram Fishman sworn January 12, 2025 (the "**Fishman Affidavit**"), QCAP Fee Motion Record, Tab 3 and Tab 8 respectively, the entire 2% was more than utilized to cover the costs associated with the insolvency proceedings of the Tobacco Companies.
[13] Riordan J. had ordered the Tobacco Companies to make deposits in the aggregate amount of approximately $1.131 billion within 60 days of the issuance of the trial judgment. The Tobacco Companies successfully appealed this Order on the basis, *inter alia*, that they did not have the financial capacity to satisfy that order which was supported by affidavits signed by their respective representatives. See Fishman Affidavit, paras. 40-41, 44, QCAP Fee Motion Record, Tab 8. See also: Dandavino Affidavit, paras. 71-74 and Schedule "C", QCAP Fee Motion Record, Tab 4.

in first instance and nonetheless considered the amended fee percentage to be fair and reasonable.[14] The CQTS[15] and Lise Blais,[16] the wife and heir of the designated class member, the late Jean-Yves Blais, both support the present Motion.

Overview of the Evidence in Support of the QCAP Fee Motion

9. It is impossible in this factum to do justice to the challenges undertaken and overcome by Quebec Class Counsel in their prosecution of the Quebec Class Actions and in the subsequent CCAA Proceedings, as well as the enormous impact of their success on the Quebec Class Members, the other Claimants and Canadian society at large.[17] The extensive Quebec judgments constitute irrefutable evidence of the quality of this work, the risks and challenges faced, and the outcome achieved. Some of the key factual elements germane to this Court's assessment of the fairness and reasonableness of the requested Quebec Class Counsel Fee are set forth below:

a. The fees sought have been earned over a period of 26 years. Many of the lawyers involved have dedicated the majority of their careers to this file in which they knew they could not prevail without going through trial, appeal(s) and beyond. They faced and overcame every risk originally contemplated.

b. As at January 10, 2025, Quebec Class Counsel have devoted at least 203,849 hours of professional time to this file without receiving any payment on account thereof. Almost every one of those hours was invested under the pressure of being constantly

[14] Dandavino Affidavit, paras. 58-69, QCAP Fee Motion Record, Tab 4.
[15] Dandavino Affidavit, para. 76, QCAP Fee Motion Record, Tab 4.
[16] Affidavit of Lise Boyer Blais sworn January 13, 2025, paras. 21-23, QCAP Fee Motion Record, Tab 5.
[17] Dandavino Affidavit, para. 62, QCAP Fee Motion Record, Tab 4: referring to the statement by a lawyer representing Canadian victims outside of Quebec about the "historic" Plans adding that but for the Quebec legal team's efforts, victims outside of the province would never have been entitled to compensation.

outnumbered by teams of top-tier lawyers, and knowing that they would have to answer in court for every move and decision they made.[18]

c. It is also anticipated that an additional 8,000 hours will be devoted to the file by the end of the Quebec Class Action Administration Plan, such that the total time of Quebec Class Counsel in this matter will be at least 211,849 hours with an estimated straight-line billing value of at least $214,653,500.[19]

d. Included in the Quebec Class Counsel Fee is an amount of at least $46,598,926 which must be reimbursed or paid to third parties to cover litigation and related costs, including the past and future fees of Proactio, a division of Raymond Chabot, plus all disbursements paid by Quebec Class Counsel over the years from their own funds.[20]

e. Of the Quebec Class Counsel firms, TJL in particular were forced to rely on a patchwork combination of revenue generated from other files, regular bank financing, high-interest loans, personal debts, debts secured against personal assets, litigation financing, deferred payment agreements and contingency-based deals.[21] Furthermore, as appears from the affidavits of senior counsel from the four firms, all

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[18] Johnston Affidavit, para. 60, QCAP Fee Motion Record, Tab 2.
[19] Trudel Affidavit, paras. 58, 65-69, 72-74, QCAP Fee Motion Record, Tab 3. As appears from the Trudel Affidavit, most of the hours devoted by Quebec Class Counsel were by firms that do not use the hourly-rate model nor charge clients hourly rates for the work of their lawyers. For purposes of this analysis, Quebec Class Counsel used blended hourly rates of $1,150 for senior lawyers and $550 for associates. Notably, these indicative hourly rates are lower than the hourly rates over the period of 2019 to December 1, 2024 paid by the Applicants to PCC Representative Counsel ($1,250 for Raymond Wagner and $650 for Kate Boyle) as well as the hourly rates charged by counsel to the Applicants. The actual professional time devoted by Quebec Class Counsel was greater than the numbers referenced, which underestimate their actual time spent.
[20] Trudel Affidavit, paras. 101, 106, 109-110, QCAP Fee Motion Record, Tab 3. The third-party professionals to whom litigation and related costs must be paid from the Quebec Class Counsel Fee have all agreed to work on a contingency basis and will only issue invoices at the time of payment since sales taxes must be remitted upon such issuance.
[21] Trudel Affidavit, paras. 84, 112, 114-121, QCAP Fee Motion Record, Tab 3.

of them were called upon to make meaningful sacrifices and to incur significant opportunity costs as a result of their involvement in this matter.

f. The Tobacco Companies had delivered a knockout blow to a significant tobacco class action in Ontario just months prior to the authorization hearing, which exponentially increased the risk to Quebec Class Counsel at a critical moment that the Quebec Class Actions would not be authorized.[22]

g. After a lengthy battle to have the Quebec Class Actions authorized, including a battery of grueling depositions and complex preliminary motions and an unprecedented 14-day authorization hearing, it took seven more years of intensely contested litigation as well as more than 85 case management conferences to get the case to trial, at which point the Quebec Class Actions had already resulted in 49 judgments of the Quebec Superior Court and 17 judgments of the Quebec Court of Appeal on interlocutory matters.[23] Many of the interlocutory appeals, if granted, would have sounded the death knell to the Quebec Class Actions.[24]

h. The Tobacco Companies insisted upon obtaining before discovery the medical records of Ms. Létourneau and Mr. Blais, which took a year to assemble. Ms. Létourneau, Mr. Blais and Dr. Boulanger (then President of the CQTS) were examined on discovery for 20 days in total.[25]

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[22] Johnston Affidavit, paras. 165-166, QCAP Fee Motion Record, Tab 2.
[23] Johnston Affidavit, paras. 37-39, 146, 168; Beauchemin Affidavit, para. 68, QCAP Fee Motion Record, Tab 2 and Tab 6, respectively.
[24] Beauchemin Affidavit, paras. 29, 31 (suspension of the CQTS/Blais case), paras. 44, 54-55 (standing), paras. 56-62 (examination of class members/communication medical records), paras. 64-65 (destruction of evidence), paras. 78-82 (postponement of the trial), para. 87 (documentary evidence rules); Affidavit of Gordon Kugler sworn January 10, 2025 (the "**Kugler Affidavit**"), paras. 61-62, QCAP Fee Motion Record, Tab 4 and Tab 7, respectively.
[25] Johnston Affidavit, paras. 154-156, 185, QCAP Fee Motion Record, Tab 2.

i. In the context of seeking disclosure of the medical records of 150 class members, the Tobacco Companies claimed before the Quebec Court of Appeal that they intended to examine class members at trial. This forced Quebec Class Counsel to prepare these individuals to testify at trial, while the trial was ongoing. In the end, the Tobacco Companies did not call a single one of them.[26]

j. The trial spanned 253 judicial days over the course of almost three years, involving the filing of thousands of exhibits (the admissibility of many of which were forcefully contested by the Tobacco Companies), as well as the examination and cross-examination of 76 witnesses, including 26 experts, resulting in over 60,000 pages of trial transcripts.[27]

k. The complexity of the questions of fact and evidence was extraordinary, involving the disclosure and review of hundreds of thousands of documents (representing many millions of pages of materials) prior to trial, and the production of over two dozen expert reports by the parties in highly specialized and complex areas, including addiction, oncology, pneumology, epidemiology, pathology, toxicology, chemistry, psychiatry, history, marketing, public opinion, political economics and econometrics.[28]

l. During the trial, the Tobacco Companies brought interlocutory appeals to the Quebec Court of Appeal, sometimes at a rate of one every few weeks, resulting in 30 additional Quebec Court of Appeal judgments.[29]

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[26] Johnston Affidavit, para. 216, QCAP Fee Motion Record, Tab 2.
[27] Johnston Affidavit, paras. 22, 42, 263, QCAP Fee Motion Record, Tab 2.
[28] Johnston Affidavit, paras. 41, 247, QCAP Fee Motion Record, Tab 2.
[29] Johnston Affidavit, para. 43, QCAP Fee Motion Record, Tab 2.

m. The Tobacco Companies had every advantage of size, virtually unlimited resources to devote to their vigorous no-compromise defense strategy,[30] and were represented by forceful and well-respected lawyers from three top-tier national firms. Two of their counsel are now judges on the Supreme Court of Canada.[31] The Defendants' experts were highly qualified, including, among other leaders in their fields, a Nobel Prize-winning economist.[32]

n. The historic trial judgment (over 1250 paragraphs long) was confirmed on appeal in a further historic judgment (over 1280 paragraphs long) by an expanded bench of five members after an appeal hearing lasting an exceptional seven days.[33]

o. Due to the enormity of the more than $13.5 billion damages awarded in the Quebec Class Actions and the risk that the judgment debt would never be satisfied, the Quebec Court of Appeal ordered the furnishing of security (suretyship) as a condition of the appeals in the unprecedented aggregate amount of approximately $1 billion, an amount that dwarfs the next largest such award ever granted in Quebec by a factor of 58 times.[34]

p. Although the table of contents for the materials filed with the Quebec Court of Appeal in respect of the appeal of the Riordan Judgment is an astounding 1,168 pages long, and the appeal record totals 267,000 pages comprising 688 volumes, this still excludes much of the procedural history of the Quebec Class Actions.[35] Indeed, Quebec Class Counsel appeared before the Superior Court of Quebec on at least

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[30] Trudel Affidavit, paras. 82, 97, QCAP Fee Motion Record, Tab 3.
[31] Johnston Affidavit, para. 59, QCAP Fee Motion Record, Tab 2.
[32] Johnston Affidavit, paras. 249, 276, QCAP Fee Motion Record, Tab 2.
[33] Johnston Affidavit, paras. 22, 44, 46, 291, QCAP Fee Motion Record, Tab 2.
[34] Fishman Affidavit, para. 38, QCAP Fee Motion Record, Tab 8.
[35] Johnston Affidavit, paras. 78-81, 289, QCAP Fee Motion Record, Tab 2.

357 judicial days and before the Quebec Court of Appeal on at least 45 days,[36] an exceptional dedication of time and effort that far exceeds what has ever been demanded of any other class counsel in any other Canadian class action to date. There are at least 119 reported judgments that resulted from the Quebec Class Actions.

q. The Quebec Court of Appeal's decision is the definitive statement on the law in Quebec on numerous complex and controversial issues in the areas of civil liability, civil procedure, human-rights law and consumer protection, among others. The doctrinal and jurisprudential impact of the judgment, which has been cited hundreds of times, speaks to the extraordinary level of legal indeterminacy faced by Quebec Class Counsel over the decades. No appeal judgment in Canadian legal history has ever awarded such a significant amount.[37]

r. Because of the success of Quebec Class Counsel in obtaining the Quebec Judgments, the Tobacco Companies filed for CCAA protection.[38] Since mid-2019, Quebec Class Counsel have actively participated in numerous CCAA Court hearings and hundreds of confidential mediation sessions. They have played a pivotal role in the process which culminated with the filing of the CCAA Plans.[39]

s. The CCAA Plans contemplate that *Blais* Class Members should receive the capital amounts awarded to them in the Quebec judgments (the basis of which was also

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[36] Johnston Affidavit, paras. 39, 81 and Schedules "A" and "B", QCAP Fee Motion Record, Tab 2. In addition to these more than 400 judicial days, there were dozens upon dozens of case management hearings before the Quebec Superior Court where no judgments were rendered on such days.
[37] Johnston Affidavit, para. 22, QCAP Fee Motion Record, Tab 2.
[38] Johnston Affidavit, para. 294, QCAP Fee Motion Record, Tab 2.
[39] Fishman Affidavit, para. 78, QCAP Fee Motion Record, Tab 8; Johnston Affidavit, para. 301, QCAP Fee Motion Record, Tab 2.

used to model compensation to eligible PCCs) by way of a novel claims process designed to be simple, non-adversarial and cost-free to class members.

PART III – ISSUES, LAW AND ARGUMENT

Overview

10. While the precise statutory schemes differ, all courts across Canada consider essentially the same factors in approving class counsel retainer agreements, fees and disbursements. In both Ontario and Quebec, contingency fee agreements in the class-action context are presumptively valid legal contracts, subject to judicial oversight and approval. In evaluating whether class counsel fees are fair and reasonable, courts consider the risks undertaken by counsel; the time, efforts and resources deployed in bringing the case to its conclusion; and the ultimate results obtained for class members and the public. These factors are all evaluated in light of the overarching objectives of class action litigation — access to justice, behaviour modification, and judicial economy — as well as with sensitivity for the public policy implications and market incentives that follow from a decision to approve or modify the fees sought by class counsel in a given case.

Uniqueness of the Quebec Class Actions

11. The judicial precedents used to provide guidance to courts in the exercise of their judicial control over class counsel fees, which almost always involve cases that settled before trial, are of marginal assistance in the context of the Quebec tobacco litigation which, as stated, is unprecedented and unique in virtually every way.

12. In 1998, Quebec Class Counsel were well aware of the already infamous litigation strategy consistently deployed by *Big Tobacco* and, prior to instituting proceedings, had

considered an article on the history of tobacco litigation in the United States written by Professor Robert Rabin, which described that strategy as follows:[40]

> From the beginning, the cigarette companies decided that they would defend every claim, no matter what the cost, through trial and any possible appeals.
>
> This no-compromise strategy warrants special consideration. In the first place, it is unique in the annals of tort litigation. As a general proposition, personal injury lawyers estimate that more than 90 percent of accident claims result in settlement. (…) By contrast, over a period exceeding thirty-five years, the tobacco industry never offered to settle a single case. (…)
>
> As a tobacco industry lawyer would put it (…) the industry's hardball tactics made the litigation "extremely burdensome and expensive for plaintiffs' lawyers (...) To paraphrase Gen. [George] Patton, the way we won these cases was not by spending all of Reynolds' money, but by making [the enemy] spend all his.

13. No other class action in Canada ever presented such extreme risks and the very litigation tactics described by Prof. Rabin fully materialized in the Quebec cases.[41]

14. It was thus apparent from the start that the actions could not succeed unless a series of objectively improbable events occurred, including winning every one of several existential disputes and devoting tens of thousands of hours in doing so. Even a complete win on the merits did not guarantee that there would be any recovery. The only way out was through to final judgment, and then some.[42] The potential conflict of interest which can exist between class counsel and class members in a settlement context simply does not exist in this case. Quebec Class Counsel's interests were fully aligned with those of class members at all times.

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[40] Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, Stanford Law Review, vol. 44, No. 4 (Apr. 1992) (the "**Rabin Article**"), pp. 857-858, 868. Johnston Affidavit, paras. 94, 96-104, 108, QCAP Fee Motion Record, Tab 2.
[41] Johnston Affidavit, para. 106, QCAP Fee Motion Record, Tab 2.
[42] Johnston Affidavit, para. 273, QCAP Fee Motion Record, Tab 2.

Legal Principles for Approval of Class Counsel Fees

Jurisdiction of the CCAA Court to Approve Class Counsel Fees

15. The authority of a CCAA Court to make orders regarding matters that are not explicitly addressed in the statute, such as the resolution of class actions and the approval of class counsel fees, is derived from its statutorily given discretion under s. 11.[43] Moreover, the "single proceeding model" favours all litigation involving an insolvent company being addressed within a single forum.[44]

16. It is therefore not surprising that the CCAA Court, when requested to do so, has determined the fairness and reasonableness of the fees of "foreign" class counsel, particularly when the principles to assess fees in the foreign jurisdiction are comparable to the principles in the jurisdiction of the CCAA Court.

17. By way of illustration, in *Sino-Forest*,[45] Morawetz J. (as he then was) approved the requested class counsel fees for both Canadian and U.S. counsel. With respect to the request for approval of U.S. class counsel fees, it was asserted that "*the requested fees and disbursements are consistent with the retainer agreement entered into with the U.S. Class Action plaintiffs, comply with U.S. and Canadian law, and are otherwise fair and reasonable based on the risks undertaken by U.S. Counsel and the success achieved* (…) *and are within the range of percentages that Ontario courts, as well as U.S. courts,*

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[43] Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013) at pp. 123-125.
[44] *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41. The principles were also reiterated in the Endorsements issued by this Honourable Court on December 10, 2024: *Imperial Tobacco Limited*, 2024 ONSC 6885 and *Imperial Tobacco Limited*, 2024 ONSC 6890.
[45] *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2014 ONSC 62 [***Sino-Forest***], paras. 33, 38, 41-45, 52, 54 [aggregate of 17.3% of the settlement value of $117 million was approved].

have approved in the past."[46] Ontario and U.S. jurisprudence were cited to support this assertion. Decisions to the same effect were rendered in *Cash Store*[47] and *CannTrust*.[48]

18. The exclusive role of the CCAA Court in this matter in respect of the approval of class counsel fees at the Sanction Hearing, and the payment in full thereof at the time of plan implementation, were issues specifically considered by the Court-Appointed Mediator and Monitors and explicitly stipulated in the CCAA Plans they developed.[49]

Provincial Legislation Regarding Reasonableness of Class Counsel Fees

19. The CCAA Court will normally refer to applicable provincial law to assess the reasonableness of class counsel fees. Although the determination of the Quebec Class Counsel Fee would ordinarily be based upon the law of Quebec, given that the principles are virtually the same in Quebec and Ontario and that the CCAA Court's underlying jurisdiction is Ontario, Quebec Class Counsel are satisfied that the CCAA Court will apply Ontario law.[50] For comparative purposes, however, reference will also be made herein to the corresponding Quebec law.

20. Provincial legislation in both Ontario and Quebec provide for judicial determination of the fairness and reasonableness of class counsel fees in the context of the settlement

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[46] Factum of the U.S. Plaintiffs (Motion for Approval of U.S. Counsel Fees, returnable December 13, 2013) filed in *Sino-Forest* (online (FTI Consulting): <http://cfcanada.fticonsulting.com/sfc/docs/Factum_11.pdf>), paras. 40, 44, see also paras. 5, 37, 46.

[47] *The Cash Store Financial Services Inc. (Re)*, 2015 ONSC 7535, paras. 1, 3, 8-9 [***Cash Store***]: in an Order rendered in the CCAA proceedings, Morawetz J. (as he then was) approved the fees and disbursements of Canadian class counsel and U.S. class counsel [i.e., 25.29% of the settlement amount of approximately $13.8 million].

[48] *CannTrust Holdings Inc., et al. (Re)* (December 17, 2021) [***CannTrust***], the Court approved 25% of the settlement amount of $126.3 million: Order (Fee Approval for CCAA U.S. Representative Counsel), para. 3 and Endorsement, Ontario, Court file No: CV-00638930-00CL (ON SC). In their factum, the U.S. class counsel asserted the similarities that exist between Ontario and U.S.: Factum of the CCAA U.S. Representatives (Motion For Approval of U.S. Counsel's Fees) (online (EY): <https://documentcentre.ey.com/api/Document/download?docId=34735&language=EN>), mainly in paras. 5e, 7.

[49] The CCAA Plans also provide that the Quebec Administration Plan, which is the basis for the settlement and distribution of the QCAP Settlement Amount, would be approved by the CCAA Court.

[50] *Aviva Insurance v. Security National Insurance*, 2017 ONSC 4924, para. 42.

of a class action ("transaction" in the CCP).[51] Judges in one jurisdiction regularly cite judgments in the other as persuasive authority.

Presumptive Validity of the CQTS Retainer Agreement

21. In both Ontario[52] and Quebec[53], the courts consider that a contingency fee agreement benefits from a presumption of validity and will only be set aside if it is demonstrated that it is not fair and reasonable or is contrary to the provisions of the law. Each application for approval must be determined on the basis of its specific facts.[54]

22. It is respectfully submitted that there is no principled reason whatsoever in the particular facts of this matter to question the presumption of validity with regard to the CQTS Retainer Agreement. None of the factors that are often considered to justify a rebuttal of the presumption is remotely present. In the circumstances of this litigation, where the CQTS Retainer Agreement was crystallized by groundbreaking trial and appeal judgments on the merits, the integrity of the profession will only be enhanced by respecting the fee agreement.

23. By way of analogy, in *New Brunswick v. Rothmans Inc.*,[55] the court was seized of motions by the same Tobacco Companies contesting, *inter alia*, the validity of a 2007 contingent fee agreement between New Brunswick and their lawyers in proceedings against the Tobacco Companies (the "**NB Fee Agreement**"). The NB Fee Agreement

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[51] Article 593 of the Quebec *Code of Civil Procedure* (Chapter C-25.01) (the "**CCP**") and section 32(2.1) of the Ontario *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (the "**CPA**").
[52] *Sino-Forest*, *supra* note 45, para. 43; *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, paras. 8-9.
[53] *A.B. v. Clercs de Saint-Viateur du Canada*, 2023 QCCA 527, paras. 28, 51 [***A.B.***] [unofficial English translation]; *Gauthier c. Baazov*, 2023 QCCS 4283, paras. 48-49; *Pellemans c. Lacroix*, 2011 QCCS 1345 [***Pellemans***], para. 50.
[54] *Moushoom v. Canada (Attorney General)*, 2023 FC 1739 [***Moushoom***], para. 110.
[55] *New Brunswick v. Rothmans Inc.*, 2009 NBQB 198 [***New Brunswick***], aff'd *Imperial Tobacco Canada Limited et al. v. Her Majesty the Queen in Right of the Province of New Brunswick*, 2010 NBCA 35, leave to the SCC was dismissed, 2010 CanLII 61137 (SCC).

was entered into following a request for proposals (RFP) made by New Brunswick to private law firms, and an evaluation by a team comprised of representatives of the Attorney General, Department of Health and Department of Finance. The New Brunswick court commented that the action was unprecedented and one of the largest civil lawsuits ever filed in that Province.[56] Justice Cyr also commented that "[*a*]*ccess to contingent fee agreements exists for individuals in this province and such an arrangement is available, in my view, when the Province of New Brunswick puts forward a claim for its citizens collectively.*"[57]

24. The NB Fee Agreement contains an ascending contingency fee scale based on the stage of the litigation at which a settlement would occur; including, notably, 20% if the settlement occurs during the stage of the trial on the merits and 22% if it occurs during the stage of the appeal process, plus disbursements in all cases and taxes.[58] A reviewing officer of the Law Society of New Brunswick independently determined that: "(…) *in all of the circumstances, the contingent fee agreement is not unfair or unreasonable under the circumstances existing at the time the agreement was entered into*."[59]

25. The New Brunswick court ultimately decided that the retainer agreement did not contravene any laws or breach any professional rules or regulations. Consequently, a province entered into a fee agreement with private lawyers through an open solicitation process that would yield the same 22% fee percentage, at a comparable stage of litigation, as Quebec Class Counsel are hereby requesting.

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[56] In the CCAA Plans, at s. 1.1 under the definition of "Negative Notice Claim", the Claim of New Brunswick was evaluated for voting purposes at nearly $23 billion.
[57] *New Brunswick*, *supra* note 55, paras. 59-64.
[58] *New Brunswick*, *supra* note 55, para. 106.
[59] *New Brunswick*, *supra* note 55, para. 89.

Range of Contingency Fees

26. Contingency fees in the range of 20% to 30% are common in Canadian class proceedings and Ontario and Quebec courts routinely approve fees in this range.[60] To determine whether the contingency fee percentage set out in the CQTS Retainer Agreement is fair and reasonable, the rules of professional conduct in Ontario and Quebec provide comparable non-exhaustive lists of the factors for a court to consider.[61] However, the principal factors considered both in Ontario and Quebec[62] are the success achieved and the risks assumed. As stated by Winkler J. (as he then was):[63]

> If the CPA is to achieve the legislative objective of providing enhanced access to justice, then in large part it will be dependent upon the willingness of counsel to undertake litigation on the understanding that there is a risk that the expenses incurred in time and disbursements may never be recovered. (…) the case law that has developed in Ontario holds that the fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined [by the court] in light of the risk undertaken by the solicitor in conducting the litigation and the degree of success or result achieved.

27. Courts are more hesitant, however, to apply the fee percentage stipulated in a retainer agreement in the context of "mega-fund settlements".[64] These cases are not applicable to the case at bar for a number of reasons. First, as noted above, virtually all mega-fund cases settle before a trial on the merits.[65] Second, in most Canadian mega-fund settlement cases, the courts must make the difficult assessment of what constitutes

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[60] In Ontario: *Baroch v. Canada Cartage*, 2021 ONSC 7376, para. 25 [30% of a settlement of $22.25 million]. In Quebec: *F. c. Frères du Sacré-Coeur*, 2021 QCCS 3621, para. 172 [***Sacré-Coeur***] [30% of a settlement of $60 million]; *Pellemans, supra* note 53, paras. 52-58.

[61] *Sacré-Coeur*, *ibid*, para. 146, citing the factors set out in article 102 of the *Code of Professional Conduct of Lawyers*, chapter B-1, r. 3.1. In Ontario, the Courts consider the factors listed in the *Rules of Professional Conduct*, R. 3.6-1 without explicitly referencing the legislation.

[62] With respect to Quebec see: *Dubé c. Coopérative de Services EnfanceFamille.org*, 2024 QCCS 998, para. 34.

[63] *Parsons v. Canadian Red Cross Society,* 2000 CanLII 22386 (ON SC), appeals were quashed, 2001 CanLII 24094 (ON CA) [***Parsons***], para. 13.

[64] Generally a settlement amount that exceeds $100 million.

[65] *Brown v. Canada (Attorney General)*, 2018 ONSC 3429, para. 56. Although the court was critical of the use of the percentage of the fund approach in the context of mega-fund settlements, it also opines that it comes down to an examination of the risk in the particular case to determine if the amount requested is indeed fair and reasonable.

"success" (and whether class counsel were in a conflict of interest with their class members when agreeing to the settlement) because it is impossible to know how well the plaintiff would have fared had the proceedings been adjudicated on the merits.[66] Third, courts often have little information as to whether the class representative truly had the capacity to determine the reasonableness of the fees, or the percentage stipulated, when the retainer agreement was signed. Finally, mega-fund settlement cases often present situations where the action "piggy-backed" on other actions or settlements, did not raise entirely novel claims, were not "self-made", and/or presented significantly lower risk,[67] none of which situations is remotely applicable to the Quebec Class Actions.

Risk

28. The risk assumed by Quebec Class Counsel must be viewed at the time the action was brought, not at the time it concluded after decades of hard-fought litigation.[68] In 1998, no smoker had ever received a penny from a tobacco company and, as mentioned, Quebec Class Counsel knew that no tobacco company had ever offered to settle any lawsuit brought against it by a smoker. Quebec Class Counsel understood that their opponents would try to exhaust their resources and press them to their limits.[69] Despite the risk (the partners in several firms felt the tobacco file was hopeless and a moonshot at best[70]), Quebec Class Counsel accepted the "*quixotic*"[71] challenge and embarked on this epic litigation journey.

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[66] For example, in *Fresco c. Canadian Imperial Bank of Commerce*, 2024 ONCA 628 [***Fresco***], para. 78 the Court of Appeal remarked on the view of the motion judge that the $153 million settlement was good but not excellent (as the maximum recovery could have been $426 million).
[67] *Moushoom*, *supra* note 54, paras. 5, 124, 138]; *MacDonald et al. v. BMO Trust Company et al.*, 2021 ONSC 3726, para. 20.
[68] *Manuge v. Canada,* 2013 CF 341, para. 37; *Sacré-Coeur*, para. 165.
[69] Johnston Affidavit, para. 58, QCAP Fee Motion Record, Tab 2.
[70] Johnston Affidavit, para. 129, QCAP Fee Motion Record, Tab 2.
[71] Johnston Affidavit, para. 133, QCAP Fee Motion Record, Tab 2.

29. A compelling example of the exceptional risk assumed by Quebec Class Counsel is evidenced by the way the *Fonds d'aide aux recours collectifs* (the "**FAAC**"[72]) assessed the QCAPs' chances of success. In March 2001, in what were two very rare decisions, the FAAC rejected requests for financial assistance that had been made in connection with the Quebec Class Actions largely on the grounds that they felt that the cases were doomed to failure.[73]

30. Myriad novel legal issues greatly increased the complexity and risk of the litigation. Indeed, the Quebec Class Actions are responsible for the evolution and clarification of a multitude of areas of the law, including (i) the appointment of a plaintiff as the representative of the class when the alleged harm relates only to one of the multiple defendants; (ii) the availability of collective recovery in a case involving a manufacturer's liability; (iii) the client-lawyer relationship between class counsel and class members (iv) the conditions for manufacturers' liability (v) punitive damages, human rights and the Quebec Charter; (vi) consumer protection; and (vii) the rules on causation and the application of the TRDA.[74]

31. As the lawsuit extended over decades, the financial and professional risks only increased.[75]

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[72] The Quebec government agency mandated to assist with the financing of Quebec class actions.
[73] The decision of the FAAC was contested and reversed by a decision rendered on December 12, 2002: Trudel Affidavit, paras. 90-94, QCAP Fee Motion Record, Tab 3.
[74] Johnston Affidavit, paras. 147, 221, 222, 235, 236, 245; Beauchemin Affidavit, paras. 60-62, QCAP Fee Motion Record, Tab 2 and Tab 4, respectively. Note that the constitutional validity of the *Tobacco-Related Damages and Health Care Costs Recovery Act*, chapter R-2.2.0.0.1 (**TRDA**) was affirmed by the Quebec Court of Appeal, as noted in *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358, para. 672.
[75] Johnston Affidavit, paras. 124, 171, 210, 270, 305; Beauchemin Affidavit, paras. 29, 31, 44, 54-55, 56-62, 64-65, 78-82, 87, QCAP Fee Motion Record, Tab 2 and Tab 4, respectively.

32. After the Riordan Judgment was rendered, Justice Schrager J.C.A. recognized that the QCAPs were in jeopardy of not receiving any substantial amount that may be confirmed on appeal.[76] Then, after the Quebec Court of Appeal judgment, the exceptional risk faced in the litigation was amplified by the near-immediate decision of the Tobacco Companies to seek insolvency protection in Ontario.

33. Indeed, the complex multinational corporate structure of the Tobacco Companies, their recourse to insolvency proceedings, the systematic transfer of their profits to their parent corporations, and their efforts to "*structure their affairs in a manner that drastically, if not completely, reduces their exposure to satisfy any substantial condemnation that might be made against them*" in this litigation [77] presented an enormous risk that the victory could be Pyrrhic at best.

34. Even now, there exists substantial risk due to the uncertainty as to whether one or more of the Tobacco Companies will contest the granting of the Sanction Order in these CCAA Proceedings. The increasing nature of risk during a negotiation process was described by Winkler J. (as he then was) as follows:

> (…) it is apparent that the time and resources committed to the negotiations by the class counsel meant that the risk was increasing rather than decreasing as the negotiations continued. As the parties moved toward a settlement, the negotiations became more difficult as the issues narrowed with the result that the risk of an insurmountable impasse increased rather than diminished. (…).[78]

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[76] *Imperial Tobacco Canada Ltd. c. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1737, para. 44 [**Security Judgment**].
[77] Fishman Affidavit, para. 37 (citing Schrager J.C.A. in the Security Judgment, para. 44), 60-64, QCAP Fee Motion Record, Tab 8.
[78] *Parsons*, *supra* note 63, para. 38.

Scope of the Work

35. The scope of the work is summarized in paragraph 9 of this factum and detailed at length in the affidavits filed in support of this Motion. As aptly remarked by Justice Bich, J.C.A.[79] nearly 13 years ago, the word "gargantuan" does not do justice to the scope of the legal work performed by Quebec Class Counsel in this file. Notably, to our knowledge, no other class action in Canada has required even a small fraction of the time that was devoted and required of Quebec Class Counsel in this matter.[80]

Outcome: An Unprecedented Victory and Recovery

36. It cannot be emphasized enough that the Quebec Class Actions delivered a result never achieved anywhere else in the world,[81] which is due in large part to the resilience and commitment of the Quebec and Canadian judicial systems and the judges entrusted with this seminal case. The misconduct of the Tobacco Companies has been exposed and Canadian creditors will now share a historic $32.5 billion.

37. The recovery of $4.25 billion on behalf of Quebec Class Members is an extraordinary result, especially in an insolvency context. The innovative claims process for *Blais* Class Members provides compensation even to the heirs of heirs of Tobacco-Victims in order to address the dire consequences of the lengthy delays, and the process to distribute monies has been streamlined and is non-adversarial.[82] Quebec Class Counsel have agreed to pay the costs of Raymond Chabot (Proactio) from their Quebec Class Counsel Fee, to assist *Blais* Class Members in a no-cost claims process. In addition, because the PCC Compensation Plan is derivative of the success achieved in

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[79] *Imperial Tobacco Canada ltée c. Létourneau*, 2012 QCCA 622, para. 5.
[80] *Moushoom*, *supra* note 54, para. 118: the largest time commitment referenced in a mega-fund settlement case was "*[a]pproximately 24,000 hours of billable time (…) recorded by legal professionals across the five Class Counsel firms*", in proceedings where the risk was considered at the lower end of the scale.
[81] Johnston Affidavit, para. 69, QCAP Fee Motion Record, Tab 2.
[82] Johnston Affidavit, paras. 73-74, 312, QCAP Fee Motion Record, Tab 2.

Quebec, thousands of Canadian victims who are not members of the *Blais* class will share approximately $2.5 billion of compensation that they would never have been able to receive otherwise.

Public Policy Considerations

38. To ensure that the integrity of the profession would not be put into disrepute by the approval of the requested fees, courts consider whether the amount sought is tantamount to a "*sweetheart deal*" or a "*windfall*" for the lawyers.

39. As discussed above, class actions are conceived to enhance access to justice, behaviour modification, and judicial economy. These public policy considerations cannot be divorced from one another.[83] The courts also recognize that class proceedings depend on entrepreneurial lawyers and class counsel compensation should reflect this. Compensation must be sufficiently rewarding to "*provide a real economic incentive to lawyers to take on class proceedings and do it well.*"[84]

40. The judicial victories achieved by Quebec Class Counsel despite the enormous challenges fully met the broad policy objectives of the class action regime, notably access to justice and behaviour modification through punishment, deterrence and denunciation. It is difficult to improve on the words of Riordan J. in his trial judgment:[85]

> (…) If the Companies are allowed to walk away unscathed now, what would be the message to other industries that today or tomorrow find themselves in a similar moral conflict?
>
> The Companies' actions and attitudes over the Class Period were, in fact, "particularly reprehensible" and must be denounced and punished in the sternest of

[83] Both the Ontario and Quebec courts indicate that the goals of class actions are threefold: access to justice, behaviour modification, and judicial economy: *Fresco, supra* note 66, para. 24; *Parsons, supra* note 63, para. 11; *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, para. 6; *A.B. supra* note 53, para. 55.
[84] *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962, para. 37; *Parsons, supra* note 63, paras. 11, 63, 68, citing *Gagne v. Silcorp Ltd.*, 1998 CanLII 1584 (ON CA).
[85] *Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382, [***Létourneau***], paras. 1037-1038.

> fashions. To do so will be to favour prevention and deterrence both on a specific and on a general societal level.

41. It is almost unheard of for large Canadian class actions instituted against deep-pocketed, highly motivated and litigious defendants to actually arrive at a judgment day with judicial findings of fault, liability and damages. In notable contrast, the precedent-setting judgments on the merits in the Quebec Class Actions exposed the truth about the reprehensible conduct of the Tobacco Companies over many decades and the devastating consequences of their tortious misconduct on Quebec smokers. Quebec Class Counsel took on the entire Canadian tobacco industry, won and forced them to a place where they had no alternative but to "*pay for their sins*".[86] Hopefully, this great success will discourage other bad actors from thinking themselves above the law, and encourage those who feel that justice is beyond their reach to seek the assistance of the courts.

42. As previously referenced, the CQTS Retainer Agreement provided for a contingency fee percentage at the low end of the acceptable range. In a case such as the present one where the risk, duration, professional commitment and complexity are at the highest conceivable end of the scale, class counsel remuneration should be predictable and it is vital that parties can rely on the agreements that they enter into. It goes without saying that had Quebec Class Counsel achieved a lesser recovery for their members, the fee percentage would not have been increased. In the present case, the bargain agreed to by the parties has been fully satisfied by Quebec Class Counsel,[87] and more.

43. In these *sui generis* circumstances, the requested fee cannot possibly be seen as a "*sweetheart deal*" or a "*windfall*", nor would it impugn the integrity of the profession.

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[86] *Létourneau*, *ibid*, para. 1200.
[87] And upon which they relied to make commitments to many parties to assist them with the litigation.

Indeed, in assessing the reasonableness of the fee in relation to the results achieved, it is essential to consider the causal relationship between the efforts of class counsel and the benefits conferred on the class claimants by the resulting recovery.[88] In the present case, the straight-line connection between the effort expended and the success achieved is undeniable.

44. Justice Schrager J.C.A, while recognizing the important supervisory role of judges to guard against unfair or unreasonable class counsel fees, nevertheless affirmed the principle that class counsel lawyers should be entitled to expect that their agreements on compensation will be respected:[89]

> I would add, however, that judges should resist the temptation to always seek to reduce the amount of professional fees provided for in fee agreements, at the risk of provoking a practice among lawyers of asking for more, knowing that the court will certainly reduce the agreed amount.
>
> Percentage agreements are very common in class actions. This type of agreement has considerable advantages, namely in that it (…) promotes "access to justice for citizens who would not otherwise be able to afford it". There is no question here of reviewing the validity and usefulness of this method of remuneration. Lawyers must be encouraged to accept class action mandates with the knowledge that any risk they accept will be compensated. In this regard, lawyers are entitled to expect that their fee agreements will be respected. [Unofficial translation]

45. In *Endean*,[90] Justice Smith cautioned that arbitrary reductions of class counsel fees should be resisted:

> In my opinion, to say that the fee is "simply too much" invites a completely arbitrary assessment, one that depends upon the subjective opinions and whims of the particular judge hearing the application. If the proposed fees are to be reduced on the ground that they impair the integrity of the profession, some principled basis must be suggested for doing so. None has been suggested and I cannot agree that the proposed fee should be reduced by an arbitrary amount ostensibly to protect the integrity of the profession.

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[88] *Endean v. The Canadian Red Cross Society*; *Mitchell v. CRCS*, 2000 BCSC 971 [***Endean***], para. 41, appeals were struck, 2000 BCCA 638.
[89] *A.B., supra* note 53, paras. 56-57.
[90] *Endean, supra* note 88, para. 85.

46. In *Green*, the court remarked that *"[a] failure to award fair costs to the plaintiffs will encourage and reward a defence strategy of wearing down the plaintiffs by wearing down their lawyers*."[91]

47. Finally, the approach to determining "reasonable" class counsel fees, should be holistic rather than "forensic".[92] The affidavits in support of the Motion amply document the huge number of professional hours invested by Quebec Class Counsel which, on its face, has a direct relationship to the caliber and intensity of the required work.

Conclusion

48. In sum, the requested fees are provided for by the CQTS Retainer Agreement, fully satisfy all applicable legal principles governing class counsel fee approval, and are otherwise fair and reasonable in every respect.

PART IV – RELIEF REQUESTED

49. Accordingly, Quebec Class Counsel respectfully request that the QCAP Fee Motion be granted in accordance with the draft Order attached as Tab 9 to the QCAP Motion Record re: Quebec Class Counsel Fee Approval.

January 22, 2025

Fishman Flanz Meland Paquin

FISHMAN FLANZ MELAND PAQUIN LLP

Trudel Johnston & Lespérance

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Lawyers for the Quebec Class Action Plaintiffs

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[91] *Green v. CIBC*, 2022 ONSC 373, para. 90, citing Justice Strathy's decision on certification in the same file (2016 ONSC 3829).
[92] *Moushoom*, *supra* note 54, para. 104.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Imperial Tobacco Canada ltée c. Létourneau*, 2012 QCCA 622
2. *Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382
3. *Imperial Tobacco Canada Ltd. c. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1737
4. *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358
5. *Imperial Tobacco Limited*, 2024 ONSC 6061
6. *JTI-Macdonald Corp. (Re)*, 2019 ONSC 2222
7. Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, Stanford Law Review, vol. 44, No. 4 (Apr. 1992) [Attached hereto as Tab 1]
8. Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013)
9. *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41
10. *Imperial Tobacco Limited*, 2024 ONSC 6885
11. *Imperial Tobacco Limited*, 2024 ONSC 6890
12. *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2014 ONSC 62
13. Factum of the U.S. Plaintiffs (Motion for Approval of U.S. Counsel Fees, returnable December 13, 2013) filed in *Sino-Forest* (online (FTI Consulting): <http://cfcanada.fticonsulting.com/sfc/docs/Factum 11.pdf>)
14. *The Cash Store Financial Services Inc. (Re)*, 2015 ONSC 7535
15. *CannTrust Holdings Inc., et al. (Re)* (December 17, 2021): Order (Fee Approval for CCAA U.S. Representative Counsel) and Endorsement, Ontario, Court file No: CV-00638930-00CL (ON SC)
16. Factum of the CCAA U.S. Representatives (Motion For Approval of U.S. Counsel's Fees) (online (EY): <https://documentcentre.ey.com/api/Document/download?docId=34735&language=EN>)
17. *Aviva Insurance v. Security National Insurance*, 2017 ONSC 4924
18. *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686

19. *A.B. v. Clercs de Saint-Viateur du Canada*, 2023 QCCA 527

20. *Gauthier c. Baazov*, 2023 QCCS 4283

21. *Pellemans c. Lacroix*, 2011 QCCS 1345 [Unofficial English translation attached hereto as Tab 2]

22. *Moushoom v. Canada (Attorney General)*, 2023 FC 1739

23. *New Brunswick v. Rothmans Inc.*, 2009 NBQB 198

24. *Imperial Tobacco Canada Limited et al. v. Her Majesty the Queen in Right of the Province of New Brunswick*, 2010 NBCA 35

25. Imperial Tobacco Canada Limited v. Her Majesty the Queen in Right of the province of New Brunswick, 2010 CanLII 61137 (SCC)

26. *Baroch v. Canada Cartage*, 2021 ONSC 7376

27. *F. c. Frères du Sacré-Coeur*, 2021 QCCS 3621

28. *Dubé c. Coopérative de Services EnfanceFamille.org*, 2024 QCCS 998

29. *Parsons v. Canadian Red Cross Society,* 2000 CanLII 22386 (ON SC)

30. *Parsons v. Canadian Red Cross Society*, 2001 CanLII 24094 (ON CA)

31. *Brown v. Canada (Attorney General)*, 2018 ONSC 3429

32. *Fresco c. Canadian Imperial Bank of Commerce*, 2024 ONCA 628

33. *MacDonald et al. v. BMO Trust Company et al.*, 2021 ONSC 3726

34. *Manuge v. Canada,* 2013 CF 341

35. *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35

36. *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962

37. *Gagne v. Silcorp Ltd.*, 1998 CanLII 1584 (ON CA)

38. *Endean v. The Canadian Red Cross Society*; *Mitchell v. CRCS*, 2000 BCSC 971

39. *Endean v. British Columbia*, 2000 BCCA 638

40. *Green v. CIBC*, 2022 ONSC 373

41. *Green v. Canadian Imperial Bank of Commerce*, 2016 ONSC 3829

42. *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673 (ON SC)

43. *Adrian v. Canada (Minister of Health)*, 2007 ABQB 377

44. *Quenneville v. Volkswagon*, 2017 ONSC 3594

45. *CIBC v. Deloitte & Touche,* 2017 ONSC 5000

46. *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC Lavalin Group Inc.*, 2018 ONSC 6447

47. *McLean v. Canada*, 2019 FC 1077

48. *Tataskweyak Cree Nation v. Canada,* 2021 FC 1442

49. *Tallcree First Nations v. Rath & Co.,*2022 ABCA 174

50. *Manuge v. Canada*, 2024 FC 68

SCHEDULE "B"

TEXT OF STATUTES & REGULATIONS

***Companies' Creditors Arrangement Act*, RSC 1985 c C-36**

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Ontario *Class Proceedings Act*, 1992, S.O. 1992, c.6.

Fees and disbursements

32 (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

Fees must be fair and reasonable

(2.1) The court shall not approve an agreement unless it determines that the fees and disbursements required to be paid under the agreement are fair and reasonable, taking into account,

(a) the results achieved for the class members, including the number of class or subclass members expected to make a claim for monetary relief or settlement funds and, of them, the number of class or subclass members who are and who are not expected to receive monetary relief or settlement funds;

(b) the degree of risk assumed by the solicitor in providing representation;

(c) the proportionality of the fees and disbursements in relation to the amount of any monetary award or settlement funds;

(d) any prescribed matter; and

(e) any other matter the court considers relevant.

Same

(2.2) In considering the degree of risk assumed by the solicitor, the court shall consider,

(a) the likelihood that the court would refuse to certify the proceeding as a class proceeding;

(b) the likelihood that the class proceeding would not be successful;

(c) the existence of any other factor, including any report, investigation, litigation, initiative or funding arrangement, that affected the degree of risk assumed by the solicitor in providing representation; and
(d) any other prescribed matter.

Same
(2.3) In determining whether the fees and disbursements are fair and reasonable, the court may, by way of comparison, consider different methods by which the fees and disbursements could have been structured or determined.

(…)

Agreements for payment only in the event of success
33 (1) A solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.
(2) REPEALED: 2020, c. 11, Sched. 4, s. 30 (2).

Ontario *Rules of Professional Conduct*, R. 3.6-1

SECTION 3.6 Fees and Disbursements

Reasonable Fees and Disbursements

3.6-1 A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.

Commentary
[1] What is a fair and reasonable fee will depend upon such factors as
(a) the time and effort required and spent,
(b) the difficulty of the matter and the importance of the matter to the client,
(c) whether special skill or service has been required and provided,
(c.1) the amount involved or the value of the subject-matter,
(d) the results obtained,
(e) fees authorized by statute or regulation,
(f) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency,
(g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment,
(h) any relevant agreement between the lawyer and the client,
(i) the experience and ability of the lawyer,
(j) any estimate or range of fees given by the lawyer, and
(k) the client's prior consent to the fee.

Quebec *Code of civil Procedure*, (Chapter C-25.01)

CHAPTER V
JUDGMENT AND EXECUTION MEASURES

DIVISION I
JUDGMENT, AND ITS EFFECTS AND PUBLICATION

593. The court may award the representative plaintiff an indemnity for disbursements and an amount to cover legal costs and the lawyer's professional fee. Both are payable out of the amount recovered collectively or before payment of individual claims.

In the interests of the class members, the court assesses whether the fee charged by the representative plaintiff's lawyer is reasonable; if the fee is not reasonable, the court may determine it.

Regardless of whether the Class Action Assistance Fund provided assistance to the representative plaintiff, the court hears the Fund before ruling on the legal costs and the fee. The court considers whether or not the Fund guaranteed payment of all or any portion of the legal costs or the fee.

Quebec *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1

DIVISION VI
FEES AND DISBURSEMENTS

102. The fees are fair and reasonable if they are warranted by the circumstances and proportionate to the professional services rendered. In determining his fees, the lawyer must in particular take the following factors into account:

(1) experience;

(2) the time and effort required and devoted to the matter;

(3) the difficulty of the matter;

(4) the importance of the matter to the client;

(5) the responsibility assumed;

(6) the performance of unusual professional services or professional services requiring special skills or exceptional speed;

(7) the result obtained;

(8) the fees prescribed by statute or regulation; and

(9) the disbursements, fees, commissions, rebates, costs or other benefits that are or will be paid by a third party with respect to the mandate the client gave him.

TAB 1

Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, Stanford Law Review, vol. 44, No. 4 (Apr. 1992)

(the "**Rabin Article**")

ESSAY

A Sociolegal History of the Tobacco Tort Litigation

Robert L. Rabin*

I. INTRODUCTION

Nostalgia buffs hold the 1950s in especially high regard. It is generally thought to be the last decade of America's innocence—a period of relative quiescence in which political activism was at a low ebb. Post-war industrial growth had brought unprecedented economic prosperity, but misgivings about the costs of the new affluence—the development of a refined sensitivity to health and safety concerns that would strongly influence popular attitudes beginning in the next decade—had yet to arise.[1]

Tort law, on the whole, mirrored these cultural themes. By the late 1960s, what would be heralded as a revolution in products liability law had begun, reflected in the adoption of "strict liability" for defective products.[2] Spurred on by a newly emerging concern about toxic exposures and a broader-based rise in claims consciousness on the part of the public, tort awards and tort doctrine were swept up in a period of legal turbulence that

 I would like to express my appreciation to the many participants on both sides of the tobacco litigation, most of whom requested anonymity, who provided me with valuable insights into the tort process in these cases. I am particularly grateful to Richard Daynard for his willingness to explore every nook and cranny of the area. Like the others, who go unnamed, he does not agree with all of the particulars of my analysis. I also greatly benefitted from the work of Kelly Klaus and Michael William Quinn, my research assistants. Finally, I want to acknowledge, with gratitude, the financial support for this study from the University of California Tobacco-Related Disease Research Program.

Another version of this essay will appear in an interdisciplinary collection of essays on tobacco litigation and regulation to be published by Oxford University Press: SMOKING POLICY: LAW, POLITICS, AND CULTURE (Robert L. Rabin & Stephen D. Sugarman eds., forthcoming 1992). The other contributors to that volume also offered helpful suggestions on the issues discussed in this study.

1. I have discussed elsewhere the contribution of this new sensitivity to the evolution of regulatory and tort law. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective,* 38 STAN. L. REV. 1189 (1986) [hereinafter Rabin, *Federal Regulation*]; Robert L. Rabin, *Tort Law in Transition: Tracing the Patterns of Sociolegal Change,* 23 VAL. U. L. REV. 1 (1988) [hereinafter Rabin, *Tort Law in Transition*].

2. *See generally* George L. Priest, *The Invention Of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law,* 14 J. LEGAL STUD. 461 (1985).

has yet to abate.[3] In sharp contrast, the 1950s had been something of a dormant period in tort law—with products liability no exception.[4] The principle of fault-based responsibility for unreasonably dangerous products, articulated by Judge Benjamin Cardozo forty years earlier, held sway.[5] An effort by another notable common law judge, Justice Roger Traynor, to shift the focus of products liability from unreasonable conduct to defect *per se*, had been disregarded a decade earlier.[6] It was a period of calm before the storm.

Although few noticed, a first wave of tobacco litigation arose at the end of this tranquil period.[7] By the time this litigation had subsided in the mid-1960s, without any noteworthy successes, the products liability revolution was under way. Following a twenty-year hiatus, a second wave of tobacco litigation arose in the 1980s.[8] By this point, many observers viewed the tort system with a jaundiced eye. It appeared to be in disarray from rising costs and award levels, with products liability law regarded as a prime villain.[9] This time, the tobacco cases received greater attention.[10] But for all the twists and turns in the quarter-century development of tort law, the disposition of the new wave of contemporary tobacco litigation bore many similarities to its less prominent predecessor. Once again, cigarette smokers who had contracted lung cancer failed to gain a single clear-cut victory.[11]

This essay surveys the period of roughly thirty-five years in which litigation twice came to be regarded as an attack threatening the very existence of the tobacco industry, and yet, in each instance, was ultimately repulsed. First, I will explore why the litigation arose when it did—in other words, the characteristics of each period that inspired tort claimants and litigators to seek redress in the courts.

Next, I will shift my focus to the contesting parties and their litigation

3. *See* Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process,* 27 HOUS. L. REV. 207 (1990).

4. Rabin, *Tort Law in Transition, supra* note 1, at 7-9.

5. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

6. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion).

7. For discussion of the first wave cases, see Marcia L. Stein, *Cigarette Products Liability Law in Transition,* 54 TENN. L. REV. 631 (1987). A comprehensive discussion of the case law in both the first and the second wave of tobacco tort litigation can be found in Gary T. Schwartz, *Tobacco Liability in the Courts, in* SMOKING POLICY: LAW, POLITICS, AND CULTURE, *supra* note *.

8. *See* Marc Z. Edell, *Cigarette Litigation: The Second Wave,* 22 TORT & INS. L.J. 90 (1986); Schwartz, *supra* note 7.

9. *See, e.g.,* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988).

10. From the outset, the newspapers featured stories on the second wave cases. *See, e.g.,* Ed Bean, *Cigarettes and Cancer: Lawyers Gear Up to Battle Tobacco Firms,* WALL ST. J., Apr. 29, 1985, § 2, at 27; David Margolick, *Antismoking Climate Inspires Suits by the Dying,* N.Y. TIMES, Mar. 15, 1985, at B1.

11. Two cases involved close misses. In Cipollone v. Liggett Group, Inc., 693 F. Supp. 208 (D.N.J. 1988), a $400,0000 judgment for plaintiff was entered, but it was overturned on appeal, 893 F.2d 541 (3d Cir. 1990), *cert. granted,* 111 S. Ct. 1386 (1991). In Horton v. American Tobacco Co., No. 12325 (Miss. Cir. Ct. Nov. 2, 1990), the jury returned a verdict finding defendant liable but refused to award damages. The plaintiff appealed the case to the Mississippi Supreme Court. Horton v. American Tobacco Co., *appeal filed,* No. 91-CA-0006 (Miss. Jan. 2, 1991).

strategies. The success of tort litigation turns on many factors, only one of which is formal rules of liability. I will look at the nature of the underlying claims and the adversarial techniques employed by the contesting parties, as well as doctrinal issues. Finally, any overall assessment of the efficacy of tort litigation as a strategy for redressing harm—an underlying purpose of this essay—must take a broader view of the relative promise of other policy alternatives as well. An important development in the tobacco context has been the success of legislative initiatives based on a public health perspective, in contrast to tort litigation reflecting an individual rights perspective. I will analyze these two strategies and explain why one might have expected the far greater success of the public health approach.

II. EARLY EFFORTS

Today, it is difficult to recapture fully the allure of smoking in American life at mid-century. Numbers tell part of the story. Nearly one out of two Americans could be counted as a regular smoker in 1950.[12] But raw numbers fail to convey the mystique attached to the cigarette. Observers of popular culture remind us of the dramatic impact of cigarettes in the movies: Paul Hendreid, in *Now Voyager*, lighting two cigarettes at once to consummate his affair with Bette Davis; Lauren Bacall asking for a smoke, in *To Have and Have Not*, to ignite not just her cigarette but her larger-than-life romance with Humphrey Bogart; legions of *film noir* heroes lighting up the only companion they could trust in a pinch.[13] Then there was the ubiquitous advertising presence of athletes, high society and professional figures, as well as celebrities from the entertainment world, endorsing smoking on billboards, in magazines, and over the radio.[14] It seems no exaggeration to say that Americans loved the cigarette almost as much as the automobile.

In these early days, there was hardly a trace of the risk-sensitivity that has fueled the products liability litigation of the past twenty-five years. Product injury lawsuits in 1950 almost invariably were based on a deviation from the product norm—the occasional exploding soda bottle, pin in a bread loaf, or crumbling wheel base. Standardized product lines, especially those involving widely accepted consumer goods, simply did not generate litigation questioning the reasonableness of the intended version of the product.[15] Looking back, we realize that an entire generation of future litigants—asbestos workers, DES mothers, radiation victims—went about their daily lives, not realizing that they had already been exposed to a substance that would

12. *See* PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE, PUB. NO. 1103, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 26 (1964) [hereinafter 1964 REPORT] (In 1955, 68% of the male population and 32.4% of the female population smoked.).

13. *See* Henry Allen, *Ah, Those Smoky Yesterdays*, WASH. POST, June 16, 1988, at C1, C6. *See generally* ROBERT SOBEL, THEY SATISFY: THE CIGARETTE IN AMERICAN LIFE, 83-105 (1978) (depicting the rapid rise in popularity of cigarettes in the early 1900s).

14. *See* KENNETH E. WARNER, SELLING SMOKE: CIGARETTE ADVERTISING AND PUBLIC HEALTH 46-48 (1986).

15. *See* Rabin, *Tort Law in Transition*, *supra* note 1, at 7-14.

one day enlist them in the ranks of tort claimants. At the time, however, long-term exposure claims were virtually unknown.

In this context, even though cigarettes had long been regarded as less than wholesome—coffin nails, as some called them—tobacco use would hardly have seemed a likely candidate for the bitter and protracted litigation in the tort system that was about to commence.[16] But the tort system is an unusually sensitive barometer to health and safety-related events. And 1953 brought news of specific health risks—scientific findings establishing a relationship between smoking and lung cancer—that would generate an unprecedented assault on tobacco use.[17]

These findings were first published in journals not widely read by the general public, such as *The Journal of the American Medical Association*.[18] But in a critical development, the most widely read magazine of the day, *The Reader's Digest*, long a foe of the tobacco industry, published a series of articles vividly translating the risks of smoking into terms everyone could understand.[19] Interestingly, the first of these, appearing in December, 1952, under the suitably alarming title "Cancer by the Carton," was only two pages long—a wholesale condensation of a longer article written for *The Christian Herald* by an anti-smoking crusader of the time, Roy Norr.[20] The article was to the point, however. Based on a projection from a new study of the steady rise in the incidence of lung cancer in the U.S. population—and assuming a corresponding continued growth in the size of the smoking population—Norr asserted that the number of future deaths attributable to tobacco use might well reach mass epidemic proportions.[21]

The public response was swift. In 1953 and 1954, for the first time in the twentieth century, adult per capita cigarette consumption fell two years in a row.[22] The great cancer scare of the 1950s had begun. The industry had its response, however, which was effective in reversing the flight from tobacco use—vigorous marketing of the filter-tip cigarette.[23] But the critics did not let up. In July, 1954, by way of illustration, *The Reader's Digest* published an article by Lois Mattox Miller and James Monahan, "The Facts Behind the Cigarette Controversy," which carefully detailed—in easily understandable prose—the major epidemiological and laboratory studies of smoking-

16. On the early health concerns, see R. SOBEL, *supra* note 13, at 50-54; Cassandra Tate, *In the 1800s, Antismoking Was a Burning Issue,* 20 SMITHSONIAN 107, 111 (1989).

17. In fact, scientific studies that spanned the previous half-century had documented the incidence of cancer among smokers. R. SOBEL, *supra* note 13, at 164.

18. *See, e.g.,* Richard Doll & A. Bradford Hill, *A Study of the Aetiology of Carcinoma of the Lung,* 2 BRIT. MED. J. 1271 (1952); Ernest L. Wynder & Evarts A. Graham, *Tobacco Smoking as a Possible Etiologic Factor in Bronchiogenic Carcinoma: A Study of Six Hundred and Eighty-Four Proved Cases,* 143 J. AM. MED. ASS'N 329 (1950).

19. *See generally* Thomas Whiteside, *A Cloud of Smoke,* NEW YORKER, Nov. 30, 1963, at 67, 68 (describing the impact of negative publicity on the tobacco industry).

20. Roy Norr, *Cancer by the Carton,* READER'S DIG., Dec. 1952, at 7.

21. *Id.* at 7-8.

22. *See* K. WARNER, *supra* note 14, at 22-23.

23. *See* R. SOBEL, *supra* note 13, at 173-81; Whiteside, *supra* note 19, at 70-77.

related cancers and questioned the efficacy of filters as a protective device.[24] In the same year, Edward R. Murrow, whose "See It Now" television program had much the same widespread appeal as *The Reader's Digest*, aired widely-noted programs devoted to the health risks of smoking.[25]

Not by chance, the first wave of cigarette litigation was launched as well, in 1954, with the filing of *Lowe v. R.J. Reynolds Tobacco Co.*[26] in St. Louis. This case was followed by a succession of lawsuits before the first wave exhausted itself. At least eleven judicial opinions were written, and an estimated 100-150 other filings, like *Lowe*, were simply dropped at some point without formal disposition.[27] The early years, in particular, were critical. Personal injury lawyers, as they do now, saw themselves as the last frontiersmen: ready to take high risks to engage the organized forces of wrongdoing. Encouraged by a contingency fee system that provided relatively easy access to these attorneys, smokers with lung cancer found not just a rationale for what had befallen them, but a means of seeking redress for their sense of victimization. The reservoir of goodwill toward the tobacco industry was swiftly depleted.

Whatever optimism plaintiffs might have had at the outset about the prospect of a landmark victory in court or an early settlement to avoid protracted litigation was quickly extinguished, however, by the strategy adopted by the defense in the earliest tobacco cases—one that the industry has maintained, without exception, throughout both waves of smoking cases. From the beginning, the cigarette companies decided that they would defend every claim, no matter what the cost, through trial and any possible appeals. Concomitantly, the companies decided that they would, as a first line of defense, spare no cost in exhausting their adversaries' resources short of the courthouse door.[28]

This no-compromise strategy warrants special consideration. In the first place, it is unique in the annals of tort litigation. As a general proposition, personal injury lawyers estimate that more than 90 percent of accident claims result in settlement.[29] More specifically, in mass tort litigation—that is, litigation involving a huge number of claims arising out of a single hazardous course of conduct or event, such as the asbestos, Dalkon Shield, and DES cases—there has always come a point when the beleaguered defense has decided that at least some of the persistently arising claims are worth settling.[30] By contrast, over a period exceeding thirty-five years, the tobacco

24. Lois Mattox Miller & James Monahan, *The Facts Behind the Cigarette Controversy*, READER'S DIG., July 1954, at 1, 5.

25. *See It Now* (CBS television broadcasts, May 31 & June 7, 1955).

26. No. 9673(C) (E.D. Mo. filed Mar. 10, 1954). This case was subsequently dropped.

27. The claims estimate comes from a defense lawyer who was intimately involved in the first wave of litigation. He has asked that I respect his anonymity.

28. *See* text accompanying notes 90-92 *infra*.

29. *See* THE ANATOMY OF A PERSONAL INJURY LAWSUIT 267 (John E. Norton ed., 2d ed. 1981).

30. *See, e.g.*, RONALD J. BACIGAL, THE LIMITS OF LITIGATION: THE DALKON SHIELD CONTROVERSY 27-28 (1990); PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 215-18 (1985); PETER H. SCHUCK, AGENT ORANGE ON TRIAL 143-67 (1986).

industry never offered to settle a single case.

The cigarette companies' intransigence is simply explained by the size of the projected financial stakes as the initial cases arose in the mid-1950s. The industry was well-aware of published figures indicating that in 1954 there were some 25,000 deaths reported from lung cancer, with the annual mortality rising steadily.[31] Studies indicated that more than 60 percent of these deaths among males were attributable to cigarette smoking.[32] It took no great mathematical sophistication to project the number of claims that might be brought against the industry each year if stricken smokers and personal injury lawyers came to believe that tort suits had a good chance of settling for a decent sum of money. The industry saw its very existence threatened and responded in an uncompromising fashion.

The litigation process was, in fact, made to order for a stonewall defense in cigarette cases—as the industry and its attorneys well understood. Personal injury lawyers were, for the most part, lone wolves. They practiced alone or in very small firms, relying on the quick disposition of a high turnover caseload to survive—in some instances, to flourish—in a contingency fee system. Heavy front-end costs, which cannot realistically be recouped in a losing case from an impecunious client, are a major disincentive to involvement in high-risk cases. So, too, are lengthy pretrial delays without prospect of settlement; cash-flow concerns are endemic to contingency fee representation.

The cigarette cases provided ample opportunity to exploit these defense advantages. To begin with, there was the necessity of relying on expert witnesses. From the outset, the industry hotly contested the causal linkage between smoking and lung cancer. Typically, the treating surgeon and various pathologists would be required to testify as to when the claimant contracted the disease, whether the claimant had the type of disease normally associated with smoking, and when the scientific literature first clearly indicated the risks of smoking. While some scientists were willing to volunteer their services on the plaintiffs' behalf in the early smoking cases, expert testimony is nonetheless costly; apart from witness fees, there are the travel and time-related costs associated with pretrial depositions of experts on both sides of the case. Moreover, marketing and advertising experts—and, in the second wave, addiction specialists as well—were essential witnesses if a comprehensive case was to be presented.[33]

More generally, pretrial deposing offered massive leverage to the defense. Relevant litigation issues, such as how much the plaintiff knew about the risks of smoking and whether the plaintiff was generally indifferent to per-

31. *See* 2 PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE, VITAL STATISTICS OF THE UNITED STATES 1954, at 38 (1956).

32. PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, PUB. NO. 89-8411, REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 122 (1989) [hereinafter 1989 REPORT].

33. *See* William E. Townsley & Dale K. Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 CAL. W. L. REV. 275, 291 (1989).

sonal risk—issues that have remained salient through both waves of tobacco litigation—created an opening for, in effect, examining every dimension of the claimant's earlier conduct.[34] The tobacco defense was quick to seize on this opportunity by engaging in seemingly endless pretrial interrogation.

But there were also more subtle aspects to the apparent juggernaut that the personal injury lawyer confronted in these cases, extending beyond a continuing onslaught of pretrial motions, procedural challenges, and deposition-taking. Beginning with the earliest cases, the tobacco companies retained counsel from the most prestigious law firms in the country.[35] Those firms, in turn, closely coordinated their litigation efforts. Indeed, in some cases, where the plaintiff had switched brands, the companies were jointly sued and regularly retained local counsel to handle some aspects of the case (with an eye to the courthouse benefits of local counsel if it became necessary to try the case before a local jury). As a consequence, from the earliest pretrial stages, the plaintiff's lawyer, and perhaps an associate, might find ten or fifteen defense attorneys on the other side during the proceedings.[36]

It should not be surprising, then, that only a handful of the first wave cases actually came to trial. That none resulted in a plaintiff's victory, however, is another matter. Although the courts recognized strict liability for defective products only at the very end of the first wave, the mid-fifties cigarette litigant could rely on negligence and warranty theories. And, at first blush, the persistent personal injury lawyer, who had surmounted all of the pretrial obstacles that the defense could devise, appeared to have a respectable shot at prevailing.

The mid-fifties litigant did not have to confront the powerful freedom of choice argument that came to dominate the later litigation; in the period when he fell victim to the consequences of his smoking, the public was unaware of the risks of lung cancer. At the same time, the lung cancer victim could argue, under a negligence theory, that the tobacco industry had sufficient information about the possibility of harm to engage in research on the issue, adopt warnings, or at a minimum, refrain from advertising that suggested the absence of any health concerns. Moreover, if the claimant were to proceed under a warranty theory, it might not even be necessary to show unreasonable failure to take protective action on the part of the cigarette company; the marketing of a product that was not of merchantable quality, or reasonably fit for use, might suffice.

Yet, armed with these offensive weapons, the plaintiffs without exception failed to realize a successful outcome. One reason is that they continued to

34. For an account of the tactics relied on by the defense, see Patricia Bellew Gray, *Tobacco Firms Defend Smoker Liability Suits with Heavy Artillery,* WALL ST. J., Apr. 29, 1987, at 1.

35. Among the firms that have represented the tobacco industry since the 1950s are Arnold & Porter and Covington & Burling of Washington, D.C., Shook, Hardy & Bacon of Kansas City, and Webster & Sheffield of New York. *See* Myron Levin, *Key Smoker Death Trial Draws to Close; Jury Is First to See Company Documents,* L.A. TIMES, June 1, 1988, § I, at 4.

36. *See* David Margolick, *The Law; At the Bar,* N.Y. TIMES, Apr. 1, 1988, at B7 (defense lawyers from seven prominent firms on hand at *Cipollone* trial).

be overmatched throughout the litigation process. This underlying reality of the litigation is perhaps most revealingly illustrated in an unpublished opinion, *Thayer v. Liggett & Myers Tobacco Co.*,[37] where the trial judge, stung by defense allegations of personal bias, catalogued in great detail the manner in which the tobacco company lawyers simply wore down the opposition through reliance on protective orders (isolating the plaintiffs from opportunities to collaborate or realize economies of work-product), mass deposing, multiple lawyering, intransigence, and delay. The case was ultimately dropped, at the point when the court was about to grant a new trial (after a defense verdict), due to, in the plaintiff's words, "prohibitive costs."[38] Among the other first wave cases that managed to survive to trial, at least four of the ten were abandoned at some point during the litigation process.[39]

Nor were the plaintiffs' attorneys overmatched only in resources. The cases reveal many instances of dubious lawyering. In *Albright v. R.J. Reynolds Tobacco Co.*,[40] the court dismissed the plaintiff's suit for failure to reserve the claim when settling a related action for damages against the city of Pittsburgh (plaintiff had argued that his lung cancer was exacerbated by an auto accident caused by the city's negligence). In *Cooper v. R.J. Reynolds Tobacco Co.*,[41] the claimant's allegation of deceptive advertising was based on a purported ad that, in response to interrogatories, the plaintiff could not produce. In *Pritchard v. Liggett & Myers Tobacco Co.*,[42] and *Padovani v. Liggett & Myers Tobacco Co.*,[43] both of which were subsequently dropped, the court went on record to comment on the incompetence of plaintiffs' attorneys in handling various procedural aspects of the claims. A fairly clear picture emerges of a claimant group both outmanned and outgunned.

Interestingly, in the handful of cases that successfully ran the gauntlet of potential pitfalls and presented the negligence and warranty claims in serious fashion, the central issue in public debate—causation—played a relatively minor role. From the outset, juries seemed to accept the evidence of a generic link between smoking and cancer. The defense efforts to sever the link in the individual case, by arguing that the particular claimant contracted the disease from other sources, also failed to carry the day.[44] While the industry has never conceded a causal link between smoking and lung cancer, this refusal worked to its advantage principally by imposing an enormous cost burden on its adversaries in waging a battle of the experts.

Foreseeability, rather than causation, emerged as the central doctrinal

37. No. 5314 (W.D. Mich. Feb. 20, 1970).

38. *Id.* at n.32.

39. *See* Donald W. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal,* 53 S. CAL. L. REV. 1423, 1426 (1980).

40. 350 F. Supp. 341 (W.D. Pa. 1972), *aff'd,* 485 F.2d 678 (3d Cir. 1973), *cert. denied,* 416 U.S. 951 (1974).

41. 234 F.2d 170 (1st Cir. 1956).

42. 350 F.2d 479, 486 (3d Cir. 1965), *cert. denied,* 382 U.S. 987 (1966).

43. 27 F.R.D. 37, 37-38 (E.D.N.Y. 1961).

44. In the second wave cases, the defense has at times had greater success in raising a substantial question of particularized—but not generic—causation. *See, e.g.,* text accompanying notes 103-107 *infra.*

theme in the early cases. This could be regarded as somewhat surprising, since a principal theory relied upon was implied warranty. Why, one might ask, should it have mattered whether the cigarette companies could foresee the risks of smoking so long as they were supplying a product that in fact was not of merchantable quality or fit for use?[45] But the courts of the era had no taste for truly strict liability, whether it came packaged as tort or warranty. Instead, as the court announced in one of the leading cases, *Lartigue v. R.J. Reynolds Tobacco Co.*,[46] the manufacturer "is an insurer against foreseeable risks—but not against unknowable risks" or "the harmful effects of which no developed skill or foresight can avoid."[47]

Lartigue was followed in other cases.[48] Its impact, of course, rested on the premise that there was no risk of harm that the industry should have foreseen—with hindsight, anything but a self-evident proposition. At the time, however, the legal conception of foreseeability was far more constrained than it is today. Where a modern court might well find an affirmative obligation to have engaged in research simply on the basis of the kinds of questions that independent scientists were raising and exploring in the forties (and even earlier),[49] most mid-century jurists resisted such expansive tendencies. The first wave cigarette claimants were a generation ahead of their time.

Even so, the personal injury bar scored two near misses. In *Green v. American Tobacco Co.*,[50] the plaintiff managed to persist through twelve years of litigation, including four trips to the Fifth Circuit Court of Appeals and one to the Florida Supreme Court. The Fifth Circuit initially held, as in *Lartigue*, that foreseeability was a prerequisite to a warranty claim.[51] But on certification to ensure correct interpretation of state law, the Florida Supreme Court decided that the state in fact did not require foreseeability in a personal injury case based on implied warranty.[52] Victory appeared within the plaintiff's grasp. It was not to occur, however. After still another round of trial and appeal, the Fifth Circuit, sitting *en banc*, eventually held—in singularly pre-modern fashion—that the alleged unwholesomeness of a stan-

45. The authors of *Prosser & Keeton on the Law of Torts* begin their discussion of implied warranty by noting that "implied warranties could result simply as a consequence of the act of selling when the sale was by a merchant." W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 679 (5th ed. 1984). While a claimant in an implied warranty action faced potential obstacles reflecting the contract heritage of the theory—such as the requirement of notice and the availability of disclaimers—these limitations were unrelated to the "strictness" of liability. *See id.* at 690-92.

46. 317 F.2d 19 (5th Cir. 1963), *cert. denied*, 375 U.S. 865 (1963).

47. *Id.* at 37, 39.

48. *See, e.g.*, Hudson v. R.J. Reynolds Tobacco Co., 427 F.2d 541, 542 (5th Cir. 1970); Ross v. Phillip Morris & Co., 328 F.2d 3, 11 (8th Cir. 1964).

49. The modern approach is well-illustrated in the landmark asbestos decision Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973) (manufacturer must, at a minimum, keep abreast of scientific knowledge, discoveries, and advances regarding the product), *cert. denied*, 419 U.S. 869 (1974).

50. 409 F.2d 1166 (5th Cir. 1969) (en banc), *cert. denied*, 397 U.S. 911 (1970).

51. Green v. American Tobacco Co., 304 F.2d 70, 76-77 (5th Cir. 1962).

52. Green v. American Tobacco Co., 154 So. 2d 169, 170-71 (Fla. 1963).

dardized product line, as distinguished from an aberrant instance of adulteration, was not the occasion for a breach of warranty claim.[53]

The second near miss, *Pritchard v. Liggett & Myers Tobacco Co.*,[54] is perhaps the most interesting of the first wave cases because it provides a bridge to the litigation that would recur twenty years later. Once again, the case dragged on for over a decade with multiple appeals. This time, however, the focal points were negligent failure to warn and breach of express warranty based on misleading advertising claims.[55]

The deception claim was a natural. For years, the cigarette companies had run ads suggesting the harmless nature of the product. By way of illustration, one famous ad, at issue in *Pritchard*, proclaimed "nose, throat and *accessory organs* not adversely affected by smoking Chesterfields."[56] As the case progressed, the question became whether the plaintiff had to show reliance on the ad in order to prevail, and the court of appeals, reversing a jury finding of no explicit reliance, took the liberal position that a "natural tendency . . . to induce" would suffice.[57]

The court of appeals took a similarly bold pro-plaintiff stance on the failure to warn issue, foreshadowing the modern duty to warn cases. The court held that the medical science of the 1940s was sufficient to raise a jury issue regarding whether the cigarette company *should have known*—not whether it actually knew—enough to warn. The district court, which had directed a verdict for the defendant, was reversed on this count as well.[58] Undaunted, however, the defense succeeded in convincing the jury, on retrial, that the plaintiff had assumed the risk of contracting lung cancer. By the time the plaintiff managed to overturn this rather paradoxical holding on appeal[59]—recall that the principal defense argument throughout this series of cases was that the cigarette company (let alone the smokers) had no knowledge of lung cancer risk associated with smoking—the claimant's resources were nearly exhausted and the case was later abandoned.

But the *Pritchard* case did not vanish without a trace. Ironically, in light of its expansive view of the applicable law, it came to be remembered, and cited, for the concurring opinion of Judge Goodrich on the duty to warn issue.[60] Troubled by the court's broad view, he was unwilling to find a negligent misrepresentation unless the cigarette company had asserted in its ads that cigarettes do not cause cancer and now claimed that no one knew

53. Green v. American Tobacco Co., 409 F.2d 1166 (5th Cir. 1969) (en banc), *cert. denied*, 397 U.S. 911 (1970).

54. 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967).

55. These theories were relied on in many of the other first wave cases, as well. *See, e.g.*, Ross v. Phillip Morris & Co., 328 F.2d 3 (8th Cir. 1964) (failure to warn); Cooper v. R.J. Reynolds Tobacco Co., 158 F. Supp. 22 (D. Mass. 1957) (express warranty).

56. Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 297 (3d Cir. 1961) (*Pritchard I*).

57. Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479, 487 (3d. Cir. 1965) (Freedman, J., concurring), *cert. denied*, 382 U.S. 987 (1966) (*Pritchard II*).

58. *Pritchard I*, 295 F.2d at 300.

59. *Pritchard II*, 350 F.2d at 485.

60. *Pritchard I*, 295 F.2d at 301 (Goodrich, J., concurring in result).

whether a causal link existed. If, however, the dangers of smoking were commonly known, that would be another matter. In a much-cited passage, Goodrich compared cigarettes to whiskey, butter, and salted peanuts and suggested that in each case there would be no liability unless the manufacturer either told the consumer that there would be no harm or adulterated the product. After all, he added, "there was no claim that Chesterfields are not made of commercially satisfactory tobacco."[61] The point seems to be that consumers must bear the generally recognized risks of a standardized product.

This seems an odd point to have been pressing in a case involving a pre-1950s smoker,[62] but Judge Goodrich may have been looking to a future time when the risks of smoking would be well-known; indeed, writing in 1961 he may have thought the future had arrived. Clearly, he was not alone in his concern. As it happened, the case came before the court at precisely the same time that the American Law Institute (ALI) was debating the comments to its pathbreaking new Section 402A of the Restatement, Second of Torts, dealing with strict liability for defective products.[63] Dean Prosser, the drafter of Section 402A, had provided that liability should attach to products in a "defective condition unreasonably dangerous" to the user.[64] Professor Dickerson asked why it was necessary to add "defective," when "unreasonably dangerous" seemed to cover the same territory. In response, Prosser noted that products such as whiskey and cigarettes might be regarded as "unreasonably dangerous" even though it seemed clear to him that they were not "defective"; thus the additional term was necessary to preclude ill-advised claims.[65]

And so, with apparent common assent to this proposition, the final version of Section 402A, comment i, incorporated language, and thinking, strikingly similar to Judge Goodrich's concurrence in *Pritchard*:

> The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.[66]

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61. *Id.* at 302.

62. Pritchard smoked from 1921-1953. *Id.* at 294.

63. The correspondence in time is remarkable. *Pritchard* was argued on May 5, 1961 and decided on October 12, 1961; the ALI debated the issue on May 17, 1961.

64. *See 38th Annual Meeting,* 1962 A.L.I. PROC. 87 (1961).

65. *Id.* at 87-88.

66. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

To close the circle, it should be added that the director of the ALI at the time of these proceedings was none other than Judge Herbert Goodrich.

In a sense, the Restatement proviso sounded the death knell for the first wave of tobacco litigation. Bringing their claims in a period of comparative consumer innocence, smoking/lung cancer victims of the 1950s had been unable to register a single victory in their struggles with the tobacco industry. Now, as a period of relative enlightenment about risk was dawning, the most prestigious association of lawyers, judges, and academics in the country "restated" the law with an eye towards the future, and it did not augur well for the knowledgeable—by ALI lights—smoker. Small wonder, perhaps, that tobacco litigation was virtually to disappear from the dockets of American courts for the next twenty years.[67]

III. A RESURGENCE

By 1983, the era of first wave litigation seemed light-years in the past. In the interim, the landmark Surgeon General's Report of 1964 was published,[68] followed by the enactment of major legislation requiring warning labels on cigarette packages and banning broadcast advertising of tobacco products.[69] Smoking, which had seemed such a natural accoutrement of the good life, was now regarded with disdain by many—as an unhealthy sign of weak character.

But more than attitudes towards smoking had undergone wholesale upheaval. Beginning in the mid-1960s, American society had developed an unprecedented level of concern about health and safety, with particular emphasis on exposure to the unseen dangers posed by toxic substances.[70] One result was an outpouring of consumer and environmental legislation aimed at regulating air and water quality as well as hazardous wastes.[71] Still another sign of the rising sensitivity to toxic risk was a growing recourse to the courts in what came to be a new branch of tort litigation: the toxic harm cases.[72] By the early 1980s, anyone who followed the news in even cursory fashion had heard of Agent Orange, DES, Dalkon Shields and Bendectin. As cigarette claims continued their long slumber, products liability law came alive with possibilities for injury victims contending that past exposure to toxic substances had culminated in unanticipated disease.

Nowhere were those possibilities exploited with greater impact on the tort system than in the asbestos litigation. In 1966, just as the curtain was falling on the first wave of tobacco claims, the initial filing occurred in what

67. Garner, *supra* note 39, at 1426 n.25, states that the last reported first wave case, *Albright,* was filed in 1962. The second wave cases began to be filed in 1983. *See* notes 93-95 *infra* and accompanying text.

68. *See* 1964 REPORT, *supra* note 12.

69. *See* Robert L. Rabin, *Some Thoughts on Smoking Regulation,* 43 STAN. L. REV. 475, 478 (1991) (reviewing ROBERT E. GOODIN, NO SMOKING: THE ETHICAL ISSUES (1989)).

70. *See* MARY DOUGLAS & AARON WILDAVSKY, RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS 128 (1982).

71. *See* Rabin, *Federal Regulation, supra* note 1, at 1278-95.

72. *See, e.g.,* sources listed in note 30 *supra.*

would become the single heaviest onslaught of cases ever experienced by the American tort system.[73] From the outset, the contrast to the cigarette cases is illuminating. While the plaintiff in the initial asbestos case, Claude Tomplait, would eventually lose in court, five co-defendants chose the route steadfastly avoided by the tobacco industry—settlement.[74] And that was a sufficient signal to asbestos victims to create, overnight, an area of specialization for Tomplait's lawyer; fellow asbestos installers, as they fell ill, sought out his services. Eventually, in the landmark 1973 decision of *Borel v. Fibreboard Paper Products Corp.*,[75] one of those cases resoundingly succeeded. The Fifth Circuit Court of Appeals held asbestos manufacturers to the standard of experts, obliged to have warned on the basis of the medical evidence, and affirmed a jury verdict for the plaintiff. Asbestos claimants had achieved the breakthrough that eluded tobacco plaintiffs throughout the first wave, and an avalanche ensued. In the next decade some 25,000 cases were filed.[76]

The asbestos litigation serves as the most immediate link to the second wave of smoking cases. Indeed, the most celebrated of second wave cases, *Cipollone v. Liggett Group, Inc.*,[77] was actually handled by a team of attorneys who had developed their expertise on the scientific/epidemiological link between cigarette smoking and lung cancer in decoupling the synergistic relationship between asbestos exposure and cigarette smoking in a series of asbestos cases.[78] In these cases, the tobacco companies in fact were most notable for their absence. The asbestos defendants sought to pin responsibility on smoking without joining the tobacco companies in the cases—the so-called empty chair defense—reflecting the fear shared by asbestos claimants and the industry that naming the tobacco companies as a party would be an invitation to the all-out blitz suffered by the cigarette litigants in the past. Nonetheless, the parties routinely contested the causal contribution of smoking in the asbestos cases. And, having examined the evidence, none of the lawyers doubted that smoking, taken alone, was a principal source of lung cancer.

Still, even a casual observer of the earlier tobacco litigation recognized that far more than a strong claim of causation was required to launch a cigarette/lung cancer case with any hope for success. First, how could one

73. *See* MARK A. PETERSON & MOLLY SELVIN, RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES 5-7 (1988).

74. P. BRODEUR, *supra* note 30, at 34-46.

75. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

76. For analysis of the asbestos litigation through the mid-1980s, see DEBORAH R. HENSLER, WILLIAM L.F. FELSTINER, MOLLY SELVIN & PATRICIA A. EBENER, ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS 20-21 (1985). A second springboard case, Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975), was filed by a plaintiff who had read of the *Tomplait* settlement in a union newsletter—again suggesting the critical impact of that early settlement.

77. 593 F. Supp. 1146 (D.N.J. 1984).

78. For a detailed discussion of the *Cipollone* attorneys, see JOHN A. JENKINS, THE LITIGATORS: INSIDE THE POWERFUL WORLD OF AMERICA'S HIGH-STAKES TRIAL LAWYERS 125-28 (1989).

withstand the staggering resource commitment that the defense would impose? And second, even if a litigator persevered on the first score, what legal theory might prove more viable than those that had ultimately failed earlier?

The first obstacle was addressed by efforts to pool resources. Thus, in the two most prominent second wave cases, *Cipollone* and *Horton v. American Tobacco Co.*,[79] plaintiffs' lawyers sought to join ranks with colleagues in order to respond effectively to the anticipated blizzard of pretrial motions, depositions, and other procedural moves.[80]

The second obstacle—finding an effective legal theory—appeared somewhat less formidable by the early 1980s, in light of the continuing evolution of products liability law. Two developments, in particular, stand out. To begin with, plaintiffs' lawyers had reason to believe that the shift in focal point from warranty to tort, which had then been fully effected under the influence of Section 402A, would bring to fruition a version of strict liability that focused on the intrinsically dangerous nature of the product, rather than on the foreseeability-based approach of the 1950s. In New Jersey, for example, where *Cipollone* would be brought, the state supreme court in 1983 decided the much-noted *O'Brien v. Muskin*,[81] involving the liability of an above-ground swimming pool manufacturer. Treating the pool as a "luxury item" under a broadly defined risk-utility analysis, the court suggested that the manufacturer might appropriately bear the cost of such an item, even if it could not be made any safer—and indeed, even if it bore a warning of its dangers.

Although other states were perhaps less bold than New Jersey, the emerging emphasis on risk-utility analysis, however vaguely defined, was a powerful incentive to potential tobacco litigators seeking assurance that a *prima facie* case could be established.[82] After all, reputable studies indicated that cigarettes were killing tens of thousands annually and the intangible benefits of smoking would not be similarly quantifiable.[83]

Strict liability had a second, equally important attraction. Despite the

79. No. 9050 (Miss. Cir. Ct. Feb. 8, 1988).

80. Since 1985, the Tobacco Products Liability Project, headed by Professor Richard Daynard, has published a monthly newsletter and the *Tobacco Products Liability Reporter,* held annual conferences, established a communications network among tobacco plaintiffs' lawyers, and generally spearheaded an effort to achieve greater coordination in the handling of the litigation.

81. 94 N.J. 169, 463 A.2d 298 (1983).

82. The California case of Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), was another highly influential precedent establishing risk-utility analysis—in this case, as an alternative governing standard when a consumer expectations test is inapplicable. Succeeding decades have shown that risk-utility analysis is often indistinguishable from a negligence approach, but in the early 1980s this development was far from apparent. For example, in Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982), the New Jersey Supreme Court held that a product manufacturer could be found responsible for failure to warn about risks that only became apparent after the product was marketed. This "ex post" liability for failure to warn was subsequently limited to asbestos cases in Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984).

83. The estimated number of smoking-attributable deaths from lung cancer in the early 1980s was 90,000 per year. *See* 1989 REPORT, *supra* note 32, at 131.

adverse language in comment i,[84] it was not at all clear that a fault-based defense would apply to a claim based on risk-utility analysis. Admittedly, a court attracted by the growing influence of economic analysis might find a risk-conscious smoker the "cheapest cost avoider."[85] But it seemed at least as likely that a court would subscribe to the alternative "best cost spreader" rationale and eschew a version of assumed risk that barred a smoker from recovering.[86] Nor was it necessary to lift this bar entirely. The early 1980s was precisely the time when the courts began applying the comparative fault principle to strict liability defective product cases. As a consequence, potential tobacco litigators could pin their hopes on a retreat from the harsh total bar of comment i to a battlefield where partial victory—a reduced, comparative award—was a distinct possibility.[87]

And so the second wave cases began to be filed.[88] The defense was poised for the assault, however, and once again relied on the singular features of tobacco litigation to press the plaintiffs' attorneys to their limits. In the words of a leading tobacco litigator:

> They have done this by resisting all discovery aimed at them, thus requiring a court hearing and order before plaintiffs can obtain even the most rudimentary discovery. They have done it by getting confidentiality orders attached to the discovery materials they finally produce, thus preventing plaintiffs' counsel from sharing the fruits of discovery and forcing each plaintiff to reinvent the wheel. They have done it by taking exceedingly lengthy oral depositions of plaintiffs and by gathering, through written deposition, every scrap of paper ever generated about a plaintiff, from cradle to grave. And they have done it by taking endless depositions of plaintiffs, expert witnesses, and by naming multiple experts of their own for each specialty, such as pathology, thereby putting plaintiffs' counsel in the dilemma of taking numerous expensive depositions or else not knowing what the witness intends to testify to at trial. And they have done it by taking dozens and dozens of oral depositions, all across the country, of trivial fact witnesses, particularly in the final days before trial.[89]

Once again, the defense was able to wear down the tobacco litigants through a seemingly inexhaustible expenditure of resources,[90] occasioned by

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84. *See* text accompanying note 66 *supra*.

85. For elaboration of the cheapest cost avoider concept, see GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

86. For a discussion of the dual rationales for strict enterprise liability for defective products, see Priest, *supra* note 2, at 465-83.

87. An influential comparative fault case was Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (extending and tailoring comparative fault principles to the doctrine of strict liability).

88. My best estimate, from interviews with attorneys who have been extensively involved in the litigation, is that 175-200 cases were filed from 1983 to 1991.

89. Townsley & Hanks, *supra* note 33, at 277 (footnotes omitted).

90. Cost estimates must be taken with a great deal of caution. Since the tobacco defense has never publicly indicated its expenses, I will cite no figure. The plaintiffs' lawyers, on the other hand, have been more forthcoming in interviews. Jenkins reports that Edell and his partners spent "upward of $1 million out of pocket, for depositions, travel, medical experts and so on" in preparing the *Cipollone* case for litigation. J. JENKINS, *supra* note 78, at 129. In addition, if they had been billing at their customary rates (between $100 and $200 per hour), they would have charged another $2

the convergence of two circumstances—the need to resolve complicated factual issues and the threat of industry bankruptcy. Had the tobacco cases hinged on issues of law or fact that could be resolved on summary judgment, the courts might have provided the plaintiffs a level playing field, as they did in the classic instances in which civil rights, civil liberties, and public interest groups effectively waged battle against far more powerful economic interests. In fact, however, the tobacco cases rest on the other extreme of the law-fact continuum. Since lung cancer may gestate over most of an adult life, the investigation of a claimant's habits may cover an exceedingly long period of years. The companies could legitimately argue the relevance of questions such as which brand the plaintiff used at various times, how heavily the victim smoked, what level of awareness the claimant had about risk, how much of a taste for risk he or she had, and what other toxins the victim had encountered. Because each of these questions had some bearing on causation, trial judges permitted the defense to conduct exhaustive, often intimidating character investigations of the plaintiff.

This massive resource expenditure by the tobacco industry was occasioned by another factor, perceived necessity, as well as by the simple fact that the opportunity presented itself. Thirty years earlier, simple arithmetic had persuaded the industry that a no-holds-barred defense of every claim was in its economic self-interest. In 1983, the tobacco companies had more than arithmetic to fuel their sense of resolve. The spectacle of the asbestos industry under siege, most vividly apparent in the Manville bankruptcy just one year earlier, convincingly demonstrated that the litigation threatened the industry's very existence.[91]

Thus, the lawyers' litigation strategies rather than their legal arguments once again constituted the first line of defense. As a tobacco industry lawyer would put it, in a leak later published in the *Los Angeles Times*, the industry's hardball tactics made the litigation "extremely burdensome and expensive for plaintiffs' lawyers. . . . To paraphrase Gen. [George] Patton, the way we won these cases was not by spending all of Reynolds' money, but by making [the enemy] spend all his."[92]

As before, however, a handful of resolute tobacco litigators and their clients reached the courthouse door, putting the defense to the test in the new era of strict liability for defective products. And at first, the tobacco

million in fees (although tort cases customarily are handled on a contingent fee basis). *Id.* David Gidmark reports an estimate of $100,000 in out-of-pocket expenses in the *Galbraith* case. David Gidmark, *Interview with Melvin Belli and Paul Monzione,* TOBACCO ON TRIAL, Apr. 1987, at 1, 4 (Monzione was Melvin Belli's co-counsel). Gidmark also reports an estimate of $260,000 in out-of-pocket expenses and $2 million in billable hours in preparing the first *Horton* trial. *See* David Gidmark, *The Strange Case of* Horton v. American Tobacco, TOBACCO ON TRIAL, Feb. 12, 1988, at 1, 3.

It can be safely assumed that the defense costs considerably exceeded the plaintiffs' spending, both in out-of-pocket expenditures, and, particularly, in billable hours.

91. Johns-Manville Corp. filed for bankruptcy on August 26, 1982. P. BRODEUR, *supra* note 30, at 249.

92. Myron Levin, *Tobacco Industry Unharmed by Landmark Defeat in Smoker Death Case,* L.A. TIMES, Dec. 31, 1989, at A41.

activists had reason for optimism. Two cases, filed almost simultaneously in 1983, seemed especially encouraging. In California, amidst much fanfare, Melvin Belli had filed *Galbraith v. R.J. Reynolds Tobacco Co.*[93] and predicted the downfall of the industry.[94] In New Jersey, a team of experienced asbestos litigators had filed *Cipollone*, confident that they could pool their resources and win the war of attrition.[95] At long last, a breakthrough seemed a real possibility, particularly after Judge Sarokin issued a lengthy opinion in September 1984, disposing of the defense arguments that the 1965 Labeling Act[96] had preempted tort claims and clearing the way for trial on the merits.[97]

But a counterattack was in the offing, and it proved especially devastating. In April 1986, the Third Circuit Court of Appeals reversed Judge Sarokin, declaring that all adequacy of warning and advertising and promotion claims based on industry conduct after January 1, 1966 (the effective date of the Labeling Act) were preempted.[98] The court based its decision on the dubious ground that, in light of Congress' desire to "balance" warnings of health hazards with the interests of the nation's economy, an intent to preempt state tort claims—rather than just regulatory initiatives—was implied in the statutory language proscribing any "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which [conformed to the statute]."[99] The court's reading of "requirement or prohibition" as a preclusive reference to state *tort* suits can most charitably be regarded as an unconventional way of identifying tort compensation awards. It is a reading that is even more suspect in view of the rather strong tradition of federal deference to competing state interests in compensating injury victims.[100] Nonetheless, in the succeeding three years, four federal courts of appeals followed the lead of *Cipollone*, in varying measure.[101] The effect was to severely truncate the litigation by relegating the plaintiff to pre-1966 claims of duty to warn and over-promotion.[102]

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93. No. SB14417 (Cal. Super. Ct. filed Feb. 10, 1983).

94. *See* Katherine Roberts & Albert Scardino, *A Trial Opens in a New Wave of Cigarette Suits*, N.Y. TIMES, Nov. 17, 1985, at E8.

95. *See* J. JENKINS, *supra* note 78, at 159.

96. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. § 1331 (1988)).

97. Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146 (D.N.J. 1984).

98. Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

99. *Id.* at 187. Every court that has considered the issue has agreed that there was no express preemption by Congress. *See* Pennington v. Vistron Corp., 876 F.2d 414, 418 (5th Cir. 1989).

100. *See, e.g.*, Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984).

101. *See Pennington*, 876 F.2d 414; Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988); Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987); Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987).

102. The position of the federal appellate courts was subsequently rejected by the New Jersey Supreme Court in Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 85-94, 577 A.2d 1239, 1247-51 (1990), after which the Supreme Court of the United States granted certiorari to resolve the conflict.

Just four months before the *Cipollone* setback, the second wave offensive was routed on its other flank by a jury verdict for the defense in the *Galbraith* case. Highly refined legal theory played no part here. In his eagerness to reenter the tobacco fray, Melvin Belli had selected a 70-year-old lung cancer victim who had smoked for fifty-five years, suffered from a variety of non-cigarette maladies, including heart disease and pulmonary fibrosis, died without an autopsy, and was attended by a physician who could not say that smoking was directly related to his death. A solid majority of jurors expressed the conviction that causation had not been established.[103]

Once again, the contrast with public interest litigation is interesting to note. Thoughtful case selection might well have weeded out a *Galbraith* case, or at least put it on the back burner at the outset of the second wave. And *Galbraith* is no isolated example of dubious litigation priorities. In *Marsee v. U.S. Tobacco Co.*,[104] a smokeless tobacco case, a jury came to a quick verdict in finding that a 19-year-old's death from tongue cancer had not been clearly linked to his use of snuff[105]; in *Roysdon v. R.J. Reynolds Tobacco Co.*,[106] post-trial interviews indicated that the jurors thought complications arising from bunion surgery rather than smoking were probably responsible for the plaintiff's condition.[107]

Given the staggering obstacles to successful litigation of a tobacco case, and the symbolic importance of an early victory, one might expect that careful attention would have been given to the prospective plaintiff's medical profile. But coordinated efforts in the tobacco cases have been, at most, limited to a modest pooling of resources in individual cases. Strategies of refined test case selection are not consonant with the structure of the personal injury bar—no matter how sincere the conviction of some participants that tobacco litigation is motivated, at least in part, by its potential contribution to a critical public health goal.

As crucial as issues of preemption and causation have been, the most salient theme in the second wave litigation has been freedom of choice. The centrality of this theme creates a striking anomaly. Increasingly, late twentieth century accident law has come to be defined by impersonal, bureaucratic norms: Mass tort cases are relegated to the bankruptcy system (Dalkon Shield, asbestos), settled through damage-scheduling approaches (Agent Orange), and adjudicated on quasi-legislative liability apportionment principles (DES).[108] High stakes medical malpractice and product liability suits are decided with reference to social utility goals of risk-spreading and proper

Cipollone v. Liggett Group, Inc., 111 S. Ct. 1386 (1991). *See also* Carlisle v. Philip Morris, Inc., 805 S.W.2d 498, 517 (Tex. Ct. App. 1991) (court adopts the *Dewey* position).

103. *See* J. JENKINS, *supra* note 78, at 182; David Gidmark, *Jury Reaction in* Galbraith v. R.J. Reynolds, 1.5 TOBACCO PRODUCTS LIABILITY REP. 4.45 (1986).

104. 866 F.2d 319 (10th Cir. 1989).

105. *See* J. JENKINS, *supra* note 78, at 184.

106. 849 F.2d 230 (6th Cir. 1988).

107. *See* David Gidmark, *Jury Reaction in* Roysdon v. R.J. Reynolds, 3.1 TOBACCO PRODUCTS LIABILITY REP. 4.1 (1987).

108. *See* M. PETERSON & M. SELVIN, *supra* note 73.

cost allocation.[109] Even auto accident cases are handled through routinized patterns of disposition that de-emphasize individualized treatment.[110] By contrast, tobacco litigation is a last vestige of a perhaps idealized vision of nineteenth century tort law as an interpersonal morality play.

The sophisticated tobacco plaintiffs' lawyers, attuned to the role of comment i in the final stages of the earlier wave, recognized that consumer awareness would be a linchpin of defense strategy in the post-labeling act era. But they counted on the advent of comparative fault, buttressed by their ability to depict a socially irresponsible industry overpromoting a highly dangerous product, to counter—or, at least, blunt—the personal choice argument.

In doing so, they underestimated the force of the defense strategy in two distinct ways. First, and, with the benefit of hindsight, most obviously, they simply failed to grasp how intensely most jurors would react to damage claims by individuals who were aware of the risks associated with smoking and nonetheless chose to continue the activity over a long time period. When *Cipollone* eventually went to trial on the pre-1966 (non-preempted) claims, plaintiff's attorneys, armed with the most extensive array of discovery documents and promotional revelations ever brought to bear against the industry, succeeded only in convincing the jury that the defendant was 20 percent at fault, as compared to the plaintiff's 80 percent responsibility. This apportionment fell considerably short of the 50 percent or less victim responsibility necessary to support a damage claim under New Jersey tort law.[111] Even more dramatically, in *Horton*—decided under the Mississippi "pure" comparative fault law, where even a 99 percent allocation of responsibility to the plaintiff would support a 1 percent recovery—the jury took the virtually unprecedented step of finding the defendant at fault but refusing to award any damages.[112]

The obvious tactic for countering the freedom of choice defense is a head-on rebuttal based on the addictive character of tobacco—a tactic that has come to be a central feature of the second wave litigation.[113] But the claim is confounded by common observation. Notwithstanding extensive expert testimony available on the physiological and psychological effects of nicotine, everyone knows some number of ex-smokers, and the data indicate that about one-half of long-term smokers have managed to quit.[114]

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109. In both cases, the ideology of enterprise liability has played a dominant role. *See* Rabin, *Tort Law in Transition, supra* note 1, at 3-14.

110. *See* HUGH LAWRENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 233-43 (1980 ed.).

111. Rose Cipollone's husband, however, was awarded $400,000 in his wrongful death claim. That award was overturned on appeal. *See* Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1990), *cert. granted,* 111 S. Ct. 1386 (1991).

112. *See* Horton v. American Tobacco Co., No. 12325 (Miss. Cir. Ct. Nov. 2, 1990). By all accounts, *Horton* was the most well-prepared plaintiff's case, apart from *Cipollone.*

113. The strategy was suggested prior to the onset of second wave cases in Garner, *supra* note 39.

114. *See* 1989 REPORT, *supra* note 32, at 292.

Moreover, the data on nicotine addiction are not dispositive from a tort perspective. There is general scientific agreement that a chemical is addictive if: 1) it is psychoactive (i.e., it has intrinsic effects on mood or performance); 2) it is reinforcing (i.e., it initiates "searching" behavior that is determined by a need for the substance); and 3) it triggers compulsive use and concomitant withdrawal symptoms associated with non-use.[115] Smokers become addicted to nicotine in the sense that they derive positive benefits from its use, such as relief from stress or depression, and they avoid the negative costs of non-use, irritability or worse. As the nicotine level in the body falls, withdrawal begins and a person smokes to initiate a new cycle of pleasure—including a variety of conditioned responses to "situational" factors, such as finishing a meal or beginning a work assignment—and to avoid the emerging symptoms of non-use.

While this patterned behavior can be labeled "addictive," clearly it does not follow that a smoker cannot quit. Indeed, there is commonly observed evidence to the contrary—and not just with tobacco. One study indicates, for example, that the majority of Vietnam veterans who were "addicted" to heroin during the war discontinued the habit when they returned from active service.[116] Like tobacco, heroin addiction tended to have its greatest staying power among lower socioeconomic status (SES) users. It is wildly improbable, of course, that systematic differences in genetic predisposition to addiction exist between high and low SES individuals. Nor is there good reason to think that significant differences exist in their access to risk information, as distinguished from risk processing, at the relevant level of knowledge about the hazards of smoking.[117]

This is not to diminish in the least the difficulties in quitting smoking; nor is it to ignore potential differences in time-horizon and stress among social classes. Rather, the point is that, in court, the addiction expert can say at most only that quitting is often extremely hard to do. If the jury believes that a gap remains between commitment to a difficult personal sacrifice and extinction of free choice, there is little that the expert can offer in rebuttal.

Moreover, in the courtroom, the addiction expert's translation of scientific data on reinforcement, withdrawal, reactive effects, and other esoteric phenomena into terms that make some sense to the jury remains a rather abstract undertaking. The expert is in no position to say anything about the individual smoker—in fact, the lung cancer victim is usually dead by the time of trial. By contrast, the defense on the addiction issue is grounded in particulars: The claimant could have quit, knew the risks, evinced a lifelong

115. *See id.* at 341.

116. *See* Harry C. Holloway & Robert J. Ursano, *Viet Nam Veterans on Active Duty: Adjustment in a Supportive Environment, in* THE TRAUMA OF WAR: STRESS AND RECOVERY IN VIET NAM VETERANS 323, 329 (Stephen M. Sonnenberg, Arthur S. Blank, Jr. & John A. Talbot eds., 1985).

117. *See* 1989 REPORT, *supra* note 32, at 190 (89% of all adults agree that smoking is related to lung cancer); *cf. id.* at 222-23, 344-45 (finding that while most smokers are aware of the health risks of smoking, they are less willing to personalize the risk).

taste for dangerous activities, and so forth. The painstaking pretrial investigation of the plaintiff's life pays additional dividends at this stage, underscoring the tobacco litigator's miscalculation of the intensity with which jurors embrace the freedom of choice argument.

In a second, somewhat less direct sense, the plaintiffs' lawyers underestimated the resonance of the freedom of choice strategy. Drawing on its wide-ranging pretrial inquiry into the claimant's lifestyle, the defense appears to have had considerable success in trying not just the plaintiff's decision to smoke but his or her character more generally. In *Horton*, for example, plaintiff's attorney complained that the defense "portray[ed the claimant] 'as an unattractive person for Bible Belt jurors' by introducing evidence of his gambling and drinking."[118] In *Gunsalus v. Celotex Corp.*,[119] the defense was allowed to introduce evidence that the plaintiff was a heavy drinker, lived with other women while he was married, had trouble holding a job, and had suffered multiple stab wounds.[120] After interviewing the *Cipollone* jurors, a reporter remarked:

> Not only did most of the jurors feel that [Rose Cipollone] knew what she was doing but they also regarded her as stubborn and domineering. She was so difficult, they say, she had even sent her husband—a sympathetic figure—out late at night to fetch her cigarettes. When he came back with the wrong brand she insisted he go again. The defense emphasis on Rose Cipollone's strength and independence had made a deep impression. "He was madly in love with her and she drove him into the ground" says one juror.[121]

While one can only speculate on the weight attached to such revelations, they certainly add to the sense of the cigarette litigation as a full-dress morality play.

Remarkably, then, twenty-five years after the first Surgeon General's Report triggered a steadily rising level of concern and publicity about the health risks of smoking, the tobacco defense had refined a highly successful strategy of assigning wholesale responsibility for harm to allegedly informed users, rather than the industry—while, at the same time, adamantly denying that any risk from smoking had been established.

There remained, as mentioned earlier, one possible tort strategy for circumventing the lifestyle defense—a risk-utility or design defect theory, rather than a failure to warn approach. Success has not been forthcoming so far. To some extent, Judge Goodrich's heritage lives on. A number of second wave cases in which opinions have been written indicate continuing allegiance to the comment i proposition that "good" tobacco is not defective.[122]

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118. Anthony Ramirez, *Smoking Is Ruled a Cause of Death But Jury Declines to Award Damages in Suit Against a Tobacco Company*, N.Y. TIMES, Sept. 26, 1990, at B4 (quoting plaintiff's counsel).

119. 674 F. Supp. 1149 (E.D. Pa. 1987).

120. *See Federal Jury in Pennsylvania Renders Mixed Verdict in Smoking/Asbestos Synergy Case*, 3.7 TOBACCO PRODUCTS LIABILITY REP. 1.93 (1987).

121. Amy Singer, *They Didn't* Really *Blame the Cigarette Makers*, AM. LAW., Sept. 1988, at 31, 35.

122. *See* Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 236 (6th Cir. 1988); *Gunsalus*,

And risk/utility analysis has had no talismanic effect; where not rejected outright as a separate head of liability,[123] one approach has been to read in a required showing of a safer alternative way of making the product[124]—a requirement that has yet to be satisfied in the tobacco litigation.[125]

Finally, in a demonstration of its continuing ingenuity on all fronts, once the second wave emerged, the industry lobbied in a number of states for legislation creating a common knowledge defense in litigation involving products that are inherently unsafe.[126] This legislation has effectively eliminated tobacco litigation in California,[127] where tobacco product is mentioned by name in the statute, and, barring heroic statutory construction, has cut off the prospect of future lung cancer claims in the other states as well.[128]

Thus, after thirty-five years of litigation, the tobacco industry could still maintain the notable claim that it had not paid out a cent in tort awards. On March 25, 1991, when the Supreme Court of the United States agreed to review the preemption issue in *Cipollone*, the second wave of tobacco tort litigation effectively ended.[129] If the Court substantially upholds the preemption bar it seems likely that another quiescent period will ensue. If it

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674 F. Supp. at 1158; *cf.* Rogers v. R.J. Reynolds Tobacco Co., 557 N.E.2d 1045, 1053 (Ind. Ct. App. 1990) (leaving open the possibility that the "addictive" qualities of tobacco may not be common knowledge).

123. *See Gunsalus,* 674 F. Supp. at 1159.

124. *See* Kotler v. American Tobacco Co., 926 F.2d 1217, 1225 (1st Cir. 1990), *petition for cert. filed,* 60 U.S.L.W. 3014 (U.S. Mar. 19, 1991) (No. 90-1473); Semowich v. R.J. Reynolds Tobacco Co., No. 86-CV-118, 1988 U.S. Dist. LEXIS 9102, at *17 (N.D.N.Y. Aug. 18, 1988).

125. *But cf.* Gilboy v. American Tobacco Co., 582 So. 2d 1263, 1264 (La. 1991) (prior to effective date of Louisiana products liability reform law, cigarettes could be found "unreasonably dangerous per se"); Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 94-96, 577 A.2d 1239, 1251-55 (1990) (holding that until New Jersey legislature changed state law, risk/utility analysis applied to tobacco cases). On the statutory changes in *Dewey* and *Gilboy,* see text accompanying notes 126-128 *infra.*

126. The tobacco industry scored legislative victories in several states, including California, New Jersey, and Louisiana. *See* CAL. CIV. CODE § 1714.45 (West Supp. 1991); Louisiana Products Liability Act, LA. REV. STAT. ANN. §§ 9:2800.51-.59 (West Supp. 1991); N.J. STAT. ANN. § 2A:58C-3(a)(2) (West 1987 & Supp. 1991). *See also* Greg Rushford, *Pressing Tobacco's Cause: Where There's Cigarette Smoke, There's Fire, Covington Finds,* LEGAL TIMES, Apr. 16, 1990, at 1. The California statute is discussed in Darren O'Leary Aitken, Note, *The Product Liability Provision of the Civil Liability Reform Act of 1987: An Evaluation of Its Impact and Scope,* 62 S. CAL. L. REV. 1449 (1989).

A number of state statutes included the "common knowledge" defense prior to the industry's lobbying efforts. *See* ARK. CODE ANN. § 16-116-102(7) (Michie 1987); IND. CODE ANN. §§ 33-1-1.5-2, 33-1-1.5-2.5 (West Supp. 1991); MO. ANN. STAT. § 537.765 (Vernon 1988); OHIO REV. CODE ANN. § 2307.75(A)(2) (Anderson 1991); TENN. CODE ANN. § 29-28-102(8) (1980); UTAH CODE ANN. § 78-15-6(2) (1987); WASH REV. CODE ANN. § 7.72.030(3) (West Supp. 1991).

127. *See* American Tobacco Co. v. Superior Court, 208 Cal. App. 3d 480, 255 Cal. Rptr. 280 (1989) (upholding the statutory bar on cigarette products litigation).

128. The New Jersey Supreme Court refused to apply the statute retroactively to a claim filed before the Act was passed. *Dewey,* 121 N.J. at 95-96.

129. Cipollone v. Liggett Group, Inc., 111 S. Ct. 1386 (1991). In a handful of recent claims, plaintiffs have alleged that the smoking of Kent cigarettes, which had "Micronite" filters containing asbestos in the early 1950s, caused the contraction of mesothelioma. 20 PRODUCT SAFETY & LIABILITY REP., Jan. 10, 1992, at 31. In the first case to go to trial, plaintiff failed to present sufficient evidence that the decedent had smoked Kents during the relevant period. *See id.* But it is conceivable that causation might be established in a subsequent case, and plaintiffs would almost certainly avoid the "common knowledge" bar, since smokers were unaware that an asbestos product was in

lifts the bar, in all likelihood a new group of venturesome personal injury lawyers will test the industry's resolve under the revised ground rules allowing consideration of the industry's post-1966 conduct. In other words, a third wave of litigation is likely to follow.

By no means would its success be ensured. Undoubtedly, the tobacco defense would be conducted as skillfully and vigorously as it has been until now. In sharp contrast to the asbestos litigation, extensive discovery in *Cipollone* and *Palmer* failed to yield "smoking gun" revelations from the internal files of the industry and its consultants.[130] While it is possible that a new wave of lawsuits would unearth egregious evidence of a cover-up, it seems unlikely.[131] More plausibly, plaintiffs might succeed in convincing a jury that responsibility for the smoker's harm should be shared by highlighting the tobacco companies' continuing reliance on advertising that emphasizes the pleasure of smoking and creates a false sense of security about health—advertising appeals employed in the face of increasingly ominous scientific reports on the risks of smoking. One must recognize, however, that pre-1966 cigarette advertising, featuring far more explicit references to health considerations, failed to create the impact on juries that plaintiffs' attorneys had anticipated.[132]

Whatever the outcome, it seems clear that an augmented time-frame

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the filter. At the same time, the precedential value of a favorable outcome would obviously be limited.

130. For the most part, discovery in the tobacco cases has confirmed widely held suspicions that the tobacco companies made a systematic effort to disregard the experiments and conclusions of independent scientists, who posited a connection between smoking and cancer, and that the companies sought to discredit those findings through a public relations blitz. *See* Tobacco Products Liability Project, *Incriminating Cigarette Industry Documents Released* (press release and accompanying packet of discovery documents, March 26, 1988, on file with author). In contrast, discovery in the asbestos cases revealed that the industry was actually aware of the risks from experience with its own workers, long before the landmark Selikoff studies appeared in 1964. *See* P. BRODEUR, *supra* note 30, at 98-153.

Discovery in the Dalkon Shield litigation, like the asbestos cases, portrays an industry that had itself uncovered evidence of risks associated with its product of which the public was unaware, and attempted to deceive the public through a cover-up of the information. *See* R. BACIGAL, *supra* note 30, at 11, 15-16.

In *Cipollone,* there was also some discovery suggesting the possibility of the industry's producing a safer cigarette, but again it falls far short of the outright deceptive behavior in the asbestos and Dalkon Shield cases; moreover, the linkage to Rose Cipollone's hypothetical response to a new product—assuming such a cigarette had been marketed—is highly attenuated.

131. In a recent opinion, Haines v. Liggett Group, Inc., 1992 U.S. Dist. LEXIS 1809 (D.N.J. Feb. 6, 1992), the question of industry concealment arose once again. Plaintiff sought review of 1500 documents related to an alleged "special project" relationship between the industry-established Council for Tobacco Research and the tobacco defense lawyers, arguing that the documents would establish evidence of fraud on the part of the industry in holding out the Council as an independent health research organization. Judge Sarokin, who was also the trial judge in *Cipollone,* ruled that plaintiff presented sufficient evidence of fraud to overcome defendants' attorney-client privilege claim to confidentiality of the documents, and appointed a special master to review the documents. It remains unclear whether the documents will reveal more than a continuing effort on the part of the industry to cast doubt on the accumulating body of scientific research on the health risks of smoking. Even if the industry efforts fell short of affirmatively suppressing damaging scientific studies, a case for fraud could rest on knowing misrepresentations by the supposedly independent Council which were likely to be relied upon by smokers.

132. *See, e.g.,* text accompanying notes 56-57 *supra.*

would give new meaning to cigarette litigation as a morality play. But there remains a more fundamental question about the long-term efficacy of viewing the problem of smoking-related harm from a tort perspective.

IV. A BROADER INSTITUTIONAL PERSPECTIVE

In thinking about the larger meaning of the tobacco litigation, it may be helpful to consider two vantage points from which the harm attributed to smoking might be viewed: an individual rights perspective and a public health perspective. Clearly, these contrasting perspectives lead to different lines of inquiry. Take the question of addiction. From an individual rights perspective, which has characterized the tobacco tort litigation, defendants have successfully argued that the loss of individual autonomy associated with nicotine consumption is too weak to support a claim for compensation—that claimants do not qualify as "deserving" victims. Even if one regards this position as persuasive, the aggregate evidence of 400,000 annual deaths and millions of "hooked" individuals going through recurring cycles of regret and remorse could well be sufficient, from a public health perspective, to support a variety of regulatory controls.[133]

And such has been the case. The issue of personal blame, which has stymied the tort claimant, has had very limited appeal in the political arena. During the twenty-five year period following the initial Surgeon General's Report, as the tort claims continued to flounder, tobacco activists achieved dramatic successes in legislative and regulatory forums. Many of these victories simply underscore the limitations of the tort remedy. Prohibitions on smoking in the workplace, on public transport, and in recreational and shopping facilities reflect a concern about second-hand smoke that is difficult to frame effectively in a tort suit, given the causal identification problems.[134] Other initiatives, such as restricting advertising and compelling information about risk, could only be implemented through injunctive relief—an unavailable remedy in an action for tort damages.[135]

The case for these strategies turns not on whether the individual smoker, now disabled, deserves monetary redress, but on a collective perception that the social costs of smoking are intolerably high.[136] In fact, the second-hand

133. There is also the related point that most smokers are habituated at an early age, before they may have the judgment to make a fully informed choice.

134. Litigation has had somewhat greater success against the employer or custodian of the premises. *See* Stanton A. Glantz & Richard A. Daynard, *Safeguarding the Workplace: Health Hazards of Secondhand Smoke,* TRIAL, June 1991, at 37-40.

Also, it should be noted that these legislative successes have been addressed primarily to "secondary smoke" problems. Legislative efforts to target tobacco sales directly, such as through prohibitions on advertising, have not been similarly successful.

135. There are judicial initiatives, apart from tort, where smoking activists have achieved some success. *See, e.g.*, Alix M. Freedman, *Chain to Enforce Ban on Minors Buying Tobacco,* WALL ST. J., June 18, 1991, at B1 (discussing a convenience store chain's settlement of a suit in which it agreed to demand proof of age from young customers). Non-tort remedies generally are beyond the scope of this essay.

136. On this score, it is interesting to compare the Canadian experience where reliance on tort has been virtually ignored—only one reported case is found—but where far more powerful legisla-

smoke restrictions once again label smokers as a less deserving class—in this case through locational segregation—rather than directly sanctioning the tobacco industry. And the panoply of regulatory strategies aimed at the industry evince a neutral stance, at best, towards the confirmed smoker. Advertising and labeling requirements in no way express sympathy for those who choose to ignore them, and tax initiatives raise the cost of smoking without offering direct benefits to the smoker. There is, then, a sharp divergence between the regulatory and litigation perspectives. The former, based on public health considerations, is largely indifferent to the merits of individual claims for redress of injury.

Tort litigation can serve ends other than awarding damages and creating safety incentives in individual cases.[137] Often, as in the asbestos and other mass tort episodes, litigation can play an educational role, informing the public about the magnitude of health risks that might otherwise be less clearly perceived.[138] Analogously, many of the great early successes in the public interest law movement were symbolic educational victories, in which there was no clear-cut courthouse victory.[139]

It seems doubtful, however, that much of a case can be made for the educational effects of tobacco litigation. The scientific findings linking smoking to lung cancer have been widely reported in popular journals and the mass media, with the Surgeon General's annual reports playing a particularly pivotal role since the mid-1960s.[140] Health information, of course, is not the only important educational objective: The practices of the tobacco industry, as well as its product, are of public concern. But internal industry advertising and "risk-management" strategies until recently have been hidden behind protective orders in the litigation. When the veil was lifted, no startling revelations of corporate venality appeared.[141]

There remains the sense among tort activists that the cigarette litigation can independently contribute to the social control of a product that is re-

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tive initiatives have been implemented in the areas of taxation, advertising bans, and health information requirements. *See* Morton Mintz, *No Ifs, Ands, or Butts,* WASH. MONTHLY, July-Aug. 1990, at 30.

137. As far as safety incentives are concerned, I assume that even an orthodox economist would hesitate to argue that denying recovery in the cigarette cases has created disincentives to smoke.

138. *See* P. BRODEUR, *supra* note 30.

139. *See* Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law,* 28 STAN. L. REV. 207 (1976).

140. It can be argued that news reports on tobacco litigation such as *Cipollone* bring home the risks of smoking more vividly than information about the results of new health studies. In view of the volume of health information and its prominent reporting, however, I remain skeptical that the litigation adds much of educational value.

141. *See* note 130 *supra*. For a summary of the documents uncovered through pretrial discovery, see *New Incriminating Cigarette Industry Documents Released,* 4.7 TOBACCO PRODUCTS LIABILITY REP. 1.49 (1989). While the documents certainly indicate a degree of knowledge and alarm on the part of the industry that runs contrary to their public statements and governmental submissions, and is ignored in their subsequent advertising, it is largely documentary material attempting to explain away or discredit scientific findings that were being published in scientific journals, and, to some extent, attracting attention in popular journals as well. *See* sources listed in notes 20 & 24 *supra*.

sponsible for such widespread harm. This perception may run counter, however, to the effective limits of tort law. While tort litigation has often served a distinctive dual role in awarding compensation and sanctioning wrongdoing in cases involving larger issues of public concern, it has been most effective in this regard when the plaintiff's claim crystallizes an unsatisfied demand for political action. The Agent Orange settlement is a classic illustration; the veterans' claims took on symbolic significance tied to assuring them their just deserts in return for their service to the country.[142] Likewise, the major mass tort cases of the 1980s—asbestos, Dalkon Shield, DES, and such—were strongly colored by the evocative specter of innocent exposure to unseen toxins. In these cases, victimization again was fraught with symbolic significance. Any of us, taken unaware, might have suffered such misfortune. If there is a responsible party in such cases, where the victim has "clean hands," the intuition is that the responsible party should be held accountable.

Moral judgment seems alive and well, then, in the tort system—and not just in mass claims cases. Auto accident victims have recovered against the social host who served the intoxicated errant driver. By contrast, however, it seems highly unlikely that the drunken driver would himself be allowed recovery; indeed, the courts invoke no-duty rules to prevent such cases from even being heard by (probably unsympathetic) juries.[143] A victim of gunshot wounds from a Saturday Night Special has recovered from the manufacturer, but one can be quite confident that a claim for accidentally self-inflicted wounds by the criminal handgun user would be summarily dismissed.[144] Conscious risk-taking has not fared very well in tort litigation, harking back to Judge Cardozo's famous remark in a fun-house slip-and-fall case that "[t]he timorous may stay at home."[145]

Tort law and tort process seem to conspire against any effective role for the tobacco litigant. Nonetheless, in an era of comparative fault, it must be regarded as a remarkable feat that an industry claimed to be responsible for the highest toll of premature death in human history could withstand almost four decades of litigation without paying a single adverse monetary award. Whatever happens in the future, this record stands as an instructive lesson in the limits of social control through the tort system.

142. *See* P. SCHUCK, *supra* note 30.

143. *See, e.g.*, Bertelmann v. Taas Assoc., 735 P.2d 930 (Haw. 1987). *But see, e.g.*, Lyons v. Nasby, 770 P.2d 1250, 1256 (Colo. 1989) (finding tavern owner owes a duty of due care to intoxicated patron).

144. The leading case on recovery for a third-party victim is Kelley v. R.G. Industries, 304 Md. 124, 497 A.2d 1143 (1985).

145. Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 483, 166 N.E. 173, 174 (1929). Moreover, if the addiction claim is put aside, the tobacco cases have the distinctive element that they involve conscious *repetitive* risk-taking.

TAB 2

Unofficial English translation of

***Pellemans c. Lacroix*, 2011 QCCS 1345**

JP1827

SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N° : 500-06-000302-055

DATE : MARCH 23, 2011

BY THE HONORABLE ANDRÉ PRÉVOST J.S.C

WILHELM B. PELLEMANS
and
MICHEL VÉZINA
Plaintiffs
vs.
VINCENT LACROIX
PLACEMENTS NORBOURG INC.
GESTION D'ACTIFS PERFOLIO INC.
NORBOURG GESTION D'ACTIFS INC.
ASCENCIA CAPITAL INC.
NORBOURG GROUPE FINANCIER INC.
SERGE N. BEUGRÉ
FÉLICIEN SOUKA
DAVID SIMONEAU
BEAULIEU DESCHAMBAULT, sencrl
RÉMI DESCHAMBAULT
THE NORTHERN TRUST COMPANY CANADA
AUTORITÉ DES MARCHÉS FINANCIERS
KPMG S.R.L./sencrl
SOCIÉTÉ DE FIDUCIE CONCENTRA
Defendants
and
MARTIN DAIGNEAULT, a/s ERNST & YOUNG INC.
GILLES ROBILLARD, a/s RSM RICHTER
FONDS D'AIDE AUX RECOURS COLLECTIFS
Mis en cause
and
Me JACQUES LAROCHELLE

and
LÉTOURNEAU GAGNÉ, sencrl
Attorneys – Petionners

JUDGMENT ON THE MOTION FOR APPROVAL OF THE TRANSACTION AND ON THE MOTION TO FIX THE ATTORNEYS' FEES FOR THE PLAINTIFFS

BACKGROUND

[1] August 25, 2005 is a date that will remain etched in the memories of the 9,200 investors in the Norbourg and Evolution funds.

[2] Searches carried out by the Autorité des marchés financiers (AMF) that day revealed the disappearance of some $110 million from these funds. It was one of the largest frauds in Quebec history.

[3] A first motion for authorization to institute a class action was filed the same day, in the present case [1].

[4] The next six years were full of twists and turns. Vincent Lacroix, the head of the Norbourg empire, was found guilty of dozens of offences under the *Securities Act*[2] after a trial lasting several months. Some time later, he confessed to 200 counts of fraud, conspiracy to defraud, money laundering, forgery and conspiracy to forge documents[3].

[5] Some of his associates will also be prosecuted for criminal offences. The first trial, held in autumn 2009, ended with the jury unable to reach a verdict. A second trial, lasting nearly six months, resulted in guilty verdicts for two of the defendants, including defendant Beugré, acquittals for two others, including defendant Souka, and the jury was unable to reach a verdict for the fifth, defendant Rémi Deschambault.

[6] In parallel with these criminal and penal proceedings, a multitude of other civil remedies will be pursued, including:

- a claim for damages by the AMF on behalf of investors[4];
- two motions for authorization to institute a class action filed by Wilhelm Pellemans and Michel Vézina which, having been authorized on April 25, 2007, have been joined to the present file;
- a motion for authorization to institute a class action against the Caisse de dépôt et placement du Québec (CDPQ) (the CDPQ Class Action)[5];
- an action in nullity filed by 138 investors in the Perfolio funds, part of the Norbourg family of funds, who had their claim for compensation under the *Act respecting the distribution of financial products and services*[6] denied by the AMF, an action allowed on November 8, 2010 by Bernard Godbout J., and appealed (the Perfolio action)[7].

[7] In addition, the Quebec Minister of Finance issued an order on October 25, 2005[8] appointing Pierre Laporte[9], of Ernst & Young, as liquidator of the Norbourg and Evolution funds, as well as the bankruptcy of the defendant companies associated with Norbourg, whose trustee is RSM Richter inc.

[8] The management of the present file was specifically assigned to the undersigned judge on October 16, 2006[10].

[9] The trial on the merits was scheduled to begin on January 31, 2011 until June 2012[11].

[10] Following several months of mediation presided over by Chief Justice François Rolland, the parties announced in January 2011 that they had settled the case out of court. This settlement also encompasses all other actions involving investors in the Norbourg and Evolution funds seeking reimbursement of their losses (the Transaction).

[11] The public notices provided for in art. 1025 *C.C.P.* were published on February 17, 2011, pursuant to a joint order of the undersigned and Judge Dominique Bélanger dated February 14, 2011.

THE TRANSACTION

[12] Summarily, the settlement provides that the participating defendants[12] will collectively pay a sum of $55 million into the hands of the settlement administrator, Ernst & Young, to be distributed in the following order:

a. Payment of plaintiffs' attorneys' fees approved by the Court;
b. indemnification of the 138 members of the Perfolio Class in accordance with the rules normally followed by the AMF's Fonds d'indemnisation des services financiers; and
c. the sharing of the balance among class members in proportion to their loss of average invested capital.

[13] The $55 million payment, together with the various past and future realizations of the trustees and liquidators, as well as distributions from the Fonds d'indemnisation des services financiers of the AMF and the Ministère du Revenu du Québec, make it possible to recover, before expenses and fees, virtually all the sums misappropriated by Vincent Lacroix from the Norbourg and Evolution funds.

[14] The transaction also provides for the following payments:

a. from the participating defendants, a sum of $300,000 payable to the plaintiffs' lawyers in reimbursement of past and future fees and expenses;
b. from the AMF, $100,000 payable to the Settlement Administrator for fees and disbursements relating to the distribution of the $55 million.

[15] Settlement of the action is also conditional on the following:

a) approval of the transaction by the Court;
b) approval of the discontinuance of the motion for authorization to institute a class action in the CDPQ class action, the hearing of the motion for this purpose having already been set for March 28, 2011, before Judge Dominique Bélanger;
c) discharges to the participating defendants, the Fonds de l'AMF and CDPQ by the plaintiffs' counsel in the CDPQ class action and the Perfolio action in respect of their disbursements and judicial and extra-judicial fees in connection with these actions;
d) releases to participating defendants, the AMF Fund and CDPQ by Vincent Lacroix and Serge Beugré;
e) a declaration of out-of-court settlement in the Perfolio action and a discontinuance of the appeal of the November 8, 2010 judgment of Justice Bernard Godbout;

f) releases to the participating defendants, the Fonds de l'AMF and CDPQ by the plaintiffs in the Perfolio action and a waiver by them of the November 8, 2010 judgment in favour of the AMF and the Fonds de l'AMF;
g) releases and discontinuances in the other files described in the schedules to the Settlement Agreement.

[16] The conditions set out in paragraphs c) to g) above have already been satisfied. The condition in paragraph a) is the subject of the present judgment, and the condition in paragraph b) would be satisfied, if necessary, by a favourable judgment of Judge Bélanger.

[17] Finally, the transaction provides for the reimbursement, by the plaintiffs' lawyers, of the $687,555.12 advanced by the Fonds d'aide aux recours collectifs.
.
[18] Article 1025 *C.C.P.* requires that the transaction be approved by the court, unless it is made without reservation and for the entirety of the claim.

[19] This requirement stems from the tribunal's role as guardian and protector of members' rights[13]. Class members are not, strictly speaking, parties to the proceedings[14] and, although the representative acts on their behalf, he or she is not, in principle, required to consult them with regard to the conduct of the action.

[20] In approving a settlement, the court must first ensure that it is fair, equitable and in the best interests of the class members[15]. The criteria that should guide it are generally the following :
- the likelihood of success;
- the importance and nature of the evidence involved;
- the terms and conditions of the settlement;
- the recommendation and experience of the attorneys;
- the cost of future expenses and the probable duration of the litigation;
- the recommendation of a neutral third party, if applicable;
- the number and nature of objections to the transaction;
- the good faith of the parties;
- the absence of collusion[16].

[21] The analysis of these criteria is a delicate exercise, since the usual contradictory debate gives way to the unanimity of the parties who signed the transaction and who have every interest in seeing it approved by the court. On the one hand, the judge generally has only limited knowledge of the circumstances and stakes of the dispute. On the other hand, he or she should in principle encourage the settlement of disputes by negotiation, as this is generally in the best interests of the parties. The Tribunal must therefore be vigilant.

[22] In this case, all the criteria appear to have been met:
- the outcome of such a complex action, involving so many parties, some solvent, others not, is difficult to predict, both in terms of the final judgment that will be obtained and the possibilities of enforcing it in its entirety, if necessary;
- the fees and disbursements involved in such a long and complex trial are considerable;
- the sums obtained through the settlement, added to those already paid or yet to be paid, compensate the members of the group for almost all the capital they have invested;
- in fact, all class members will benefit from the compensation since the settlement administrator already has their contact information;
- the lawyers in the case are recognized for their competence and extensive experience in class actions;

- the good faith of the parties is evident, and the nature of the settlement does not suggest any collusion between them, especially since the mediation took place under the supervision of the Chief Justice;
- none of the members objected to the approval of the transaction itself, and only the fees claimed by the plaintiffs' attorneys gave rise to some comments.

[23] For most members, the sums invested in the Norbourg and Evolution funds represent, in whole or in part, their retirement savings. More than 67 months have already passed since the fraud was discovered, and to date they have recovered only a small percentage of their investments.

[24] If the case were to go to trial, judgement would probably not be handed down for another 20 or 24 months, with the possibility of an appeal to the Court of Appeal and, perhaps, the Supreme Court of Canada. And that's not counting the time and money that would be invested in other related recourses.

[25] In sum, rejection of the proposed settlement would postpone for five to ten years any hope for members of a meaningful return on their investments, with no guarantee of a favourable outcome.

[26] In the circumstances, the settlement appears fair, equitable and in the best interests of the class members. It will be approved.

[27] It now remains to determine the fees to be paid to the plaintiffs' attorneys.

PLAINTIFFS' ATTORNEYS' FEES

i. Plaintiffs' counsel's fee agreements

[28] An extrajudicial fee agreement was initially signed by the first plaintiff, Maurice Côté[17], at the request of his lawyer, Yves Lauzon.

[29] It provides, among other things, that:

> *2. I consent to the withholding from the monies collected by my attorneys on my behalf and on behalf of the members of the group, if applicable:*
>
> *a) disbursements incurred; and*
>
> *b) extrajudicial fees equal to twenty percent (20%) of the amount collected in connection with this class action, from any source whatsoever, by transaction or following a judgment. These extra-judicial fees extend to amounts collected for and on behalf of the entire class covered by this class action, and are in addition to any judicial fees that may be awarded to said attorney and paid by the opposing party. Such fees and disbursements are subject to court approval.*
>
> *[...]*

> *4. It is further agreed that neither I nor the Class Members will, at the conclusion of the Class Action, be required to pay any fees, costs or disbursements other than those provided for in paragraph 2 of this Agreement.*
>
> [emphasis added]

[30] Subsequently, upon being substituted for Mr. Côté, a similar agreement was signed by plaintiff Pellemans on March 30, 2006[18]. The same was true when Me Jacques Larochelle and Létourneau & Gagné were substituted for Me Lauzon on May 3, 2006[19].

[31] Finally, when he filed another motion for authorization to institute a class action in the fall of 2006[20], plaintiff Vézina signed the following fee agreement with Me Jacques Larochelle[21]:

> *1. This agreement governs the payment of fees to which Me Larochelle will be entitled in connection with the class action instituted by the plaintiff against Concentra Trust;*
>
> *2. It is understood that the Petitioner will not be required to pay any fees or disbursements in the event that the action is unsuccessful;*
>
> *3. On the other hand, if the action is successful and the plaintiff receives sums, whether by way of settlement or judgment, Me Larochelle will be entitled to a fee of 20% of the sums so received, as well as the disbursements incurred.*

[32] Plaintiffs Pellemans and Vézina testified that they had discussed the content of the fee agreements with their lawyers before signing them. They stated that they were satisfied with the explanations given to them in this regard. In addition, Me Lauzon, who had Mr. Côté and plaintiff Pellemans sign the fee agreements, stated that the lawyers' acceptance of the risks associated with the litigation, in full discharge of their responsibilities, was an essential element in their eyes.

[33] The plaintiffs' lawyers therefore ask the Court to give effect to their fee agreements and to set their judicial and extra-judicial fees at $11 million, plus taxes.

[34] In the alternative, should the Court conclude that the application of the fee agreements leads to a result deemed unreasonable in the circumstances, the plaintiffs' attorneys request that their fees be fixed using a multiplier of three and a half (X 3.5) of the total fees incurred on the basis of their hourly rate. In such a case, fees would amount to $8,424,295.25, plus taxes[22].

[35] Obviously, the advances of $687,555.12 granted by the Fonds d'aide aux recours collectifs will be reimbursed from the fees set by the Tribunal.

[36] As for disbursements, plaintiffs' counsel declare that they are satisfied with the sum of $300,000 received from the participating defendants, and renounce any claim for further disbursements resulting from the implementation of the transaction.

[37] Finally, they request that from their fees, the sum of $100,000 be declared a “special judicial fee” in accordance with section 15 of the *Tariff of Judicial Fees for Lawyers*[23]. This amount would not be subject to GST and QST.

ii. The special case of the Perfolio action

[38] As described in paragraph 12 of this judgment, the distribution matrix for the $55 million received from the participating defendants provides that, after payment of the plaintiffs' attorneys' fees fixed by the Court, the settlement administrator must pay the 138 members of the Perfolio class[24] on a priority basis.

[39] Specifically, section 1 b) of the Distribution Matrix states that :

> *b) Next, give priority to each of the 138 plaintiffs in the Perfolio Action brought in Court File 200-17-008552-077 the full amount they would have received from the AMF's Fonds d'indemnisation des services financiers (the "Fund") on the date their indemnity was calculated, in accordance with the rules normally followed by the Fund (including the $200,000 ceiling), less the fees of the plaintiffs' attorneys Pellemans and Vézina, payable by the Perfolio plaintiffs as approved by the Court [...].*
>
> [emphasis added]

[40] Concurrently with the settlement, an agreement was entered into between the participating defendants, the attorneys representing the Perfolio Class Members, Gravel Bernier Vaillancourt S.E.N.C.L.R. (Gravel), the Perfolio Members, the Plaintiffs' attorneys and the Plaintiffs which states, inter alia, that[25]:

> *2. In consideration of the settlement set forth herein, Gravel shall receive the sum of $360,000, the whole in accordance with the terms hereinafter set forth.*
>
> *2.1 In consideration of the settlement set forth herein, the Participating Defendants will pay to Gravel the total sum of $150,000 as costs established by bill of costs both in first instance and on appeal. [...]*
>
> *2.2 In consideration of the settlement set forth herein and within the same time period as that mentioned in subparagraph 2.1 above, Létourneau and Larochelle shall pay jointly and severally to Gravel the sum of $210,000 plus GST and QST as extrajudicial fees.*
>
> *3. In consideration of the foregoing payments, Gravel shall release the Perfolio Plaintiffs [...] from all amounts payable to Gravel in connection with the Perfolio Action.*
>
> *4. As a result of the foregoing, the Perfolio Plaintiffs shall not pay professional fees payable twice. The prohibition of duplication shall also apply to the sum of $34,555 paid by the Perfolio Plaintiffs as an advance on disbursements, taxes included, in connection with the Perfolio Action.*
>
> *[...]*

> *9. The fees payable by the Perfolio Plaintiffs to counsel in the Pellemans Class Action will be determined by Judge Prévost after hearing the parties.*

[41] Prior to the filing of the Perfolio Action, each of the 138 Perfolio members signed a fee agreement with the attorneys Marchand Melançon Forget. Gravel was subsequently substituted for these lawyers on the same terms[26].

[42] This fee agreement contains the following clauses:

> *2. The Client shall pay the Firm professional fees on the following basis:*
>
> *a. A basic professional fee and disbursements of $30,000, based on the hourly rate of the firm's lawyers who will be working on the case, a list of whom is attached as Appendix A hereto. This basic fee will be paid upon submission of an invoice to the Client;*
>
> *b. An advance will be required from the Client in the amount of $30,000, which will be deposited in the Firm's trust account to be applied in payment of invoices to be issued in accordance with paragraphs 2a) and 4, and in accordance with Appendix B;*
>
> *c. A professional fee on a percentage basis of the amount of any settlement or set-off, whether such set-off results from an out-of-court negotiation or a judgment (hereinafter referred to as "Settlement"), calculated as follows:*
>
> *i. on the first $1,500,000.00: 20%; and*
>
> *ii. from $1,500,000.01 to $3,000,000.00: 5*
>
> *iii. from $3,000,000.01 to $10,000,000.00: 2%.*
>
> *iv. for any amount in excess of $10,000,000.01: 1%.*
>
> *d. In the event of a Settlement implementing the payment of percentage fees, the Firm will apply, in reduction of such fees, the base fee already collected under paragraph 2a);*
>
> *e. In the event that it is impossible to recover any sums of money whatsoever by way of a Settlement, no percentage fee will be payable to the Firm by the Client, and only the basic fee invoiced will be retained by the Firm;*
>
> *3. The base fee and disbursements and the percentage fee include all taxes applicable to such professional services.*

[43] Each of the Perfolio members paid Gravel an advance of $250, for a total of $34,500. This amount, held in trust, now totals $34,555.

[44] The parties agree that, based on the judgment rendered by Justice Godbout, less a subsequent distribution by the liquidator Ernst & Young, the percentage fees payable under the agreement would amount to $444,460[27].

[45] The Perfolio members therefore request that their portion of the fees payable to the plaintiffs' attorneys be limited to $444,460, including taxes, less the $34,555 already paid as an advance, for a total of $409,905 applicable to the first $200,000 of their respective investments.

[46] As for the only two Perfolio members having invested more than $200,000, they acknowledge that the plaintiffs' attorneys' fees to be determined by the Court will apply to the portion exceeding $200,000.

iii. Applicable rules

[47] The rules applying to judicial and extrajudicial fees in the context of a class action are summarized by Judge Paul Chaput in *Guilbert* v. *Sony BMG Musique (Canada) inc.*[28]:

> *[18] In section 1 of the Loi sur le Barreau, costs are defined as follows:*
>
> > *m) "judicial fees" or "costs": the fees provided for in the tariff, taxable by the appropriate officer of a court;*
> >
> > *n) "extra-judicial costs": the fees or expenses that a lawyer may charge for professional services or in addition to judicial costs, and which arise from the practice of the legal profession.*
>
> *[19] In ordinary proceedings, the unsuccessful party bears the costs (art. 477 C.C.P.), which are taxed by the clerk (art. 480 C.C.P.) in accordance with the Tariff of Judicial Fees of Lawyers ("Tariff").*
>
> *[20] The same applies to class actions under article 1050.1 C.C.P.:*
>
> > ***1050.1** If costs are awarded, the legal fees are calculated as if the action were in class 11-A of the Tariff of Legal Fees of Lawyers (R.R.Q., 1981, chapter B-1, r. 13) and, in this calculation, article 42 of the Tariff does not apply.*
> >
> > *The special fee provided for in this tariff to take account of the importance of a case can only be awarded on a motion by the attorney served on the opposing party and on the Fonds d'aide au recours collectif, if the latter has complied with the obligation set out in the first paragraph of section 32 of the Class Action Act (chapter R-2. 1); the court must then disregard the fact that the Fonds d'aide au recours collectif has guaranteed payment of costs, in whole or in part.*
>
> *[21] Section 32 of the Class Proceedings Act also applies to class actions :*

> ***32***. *The Fonds shall file at the office of the Superior Court of the district in which the class action is brought, the conclusions of the decision granting assistance.*
>
> *The court must hear the Fonds before deciding the payment of legal costs, determining the fees of the representative's attorney, or approving a transaction on costs, legal costs or fees.*

[22] This provision applies to taxable costs, including judicial fees established by the Tariff and extra-judicial fees.

[23] The former are governed by article 1050.1 C.C.P. and are recoverable after taxation. Accordingly, the court may award the additional fees provided for in the Tariff, as the Court of Appeal ruled in Dumoulin v. Pouliot, Caron, Prévost, Bélisle, Galarneau, s .e.n.c. .

[24] The latter are payable under the terms of the mandate entrusted to class counsel as provided for in article 2134 C.c.Q. :

> ***2134.*** *The remuneration, if any, is determined by contract, custom or law, or on the basis of the value of the services rendered.*

[25] Under the terms of 126 of the Loi sur le Barreau, these fees cover all services rendered by the lawyer and are fixed by agreement between the client and the lawyer or, failing this, according to the value of the services rendered.

> *126 (1) Services justifying extra judicial fees shall include, among others, attendances, travelling, notices, written and oral consultations, the examination, preparation, drafting, dispatch or delivery of any document, proceeding or record, and generally all other services required of an advocate.*
>
> *(2) (Subsection repealed).*
>
> *(3) In the absence of an express agreement between the advocate and his client, an advocate shall be entitled to his extra judicial fees and costs on the basis of services rendered*
>
> *[references omitted]*

[48] In *Nault* v. *Jarmark*[29], Rothman J. (then of the Superior Court) concluded that the fee agreement entered into by the representative is binding on all members of the group. Its execution nevertheless remains subject to court approval[30] in accordance with section 32 of the *Class Action Act*[31].

[49] As Justice Yves Alain noted in *Bouchard* v. *Abitibi Consolidated*[32], percentage fee agreements are generally recognized in Quebec law, and particularly in class actions:

> *[52] [...] Jurisprudence has unanimously recognized the legality of such agreements in order to adequately reward attorneys who accept complex and costly mandates by insuring the risks. These agreements, known as "contingency fees", allow attorneys to be remunerated only in the event of success.*
>
> *[53] The amount due to the attorneys representing the group and its claimants under this agreement must be approved by the Court, unless it is not fair and reasonable in the circumstances.*

[50] The fee agreement therefore enjoys a sort of presumption of validity. It will be set aside only to the extent that it is shown not to be fair and reasonable to the members in the circumstances of the case, or on one of the grounds for nullity of contract provided for in the *Civil Code of Québec*. Otherwise, it will be applied in full:

> *[64] When the court is of the opinion that the proposed agreement is fair and reasonable, and that it serves the interests of both the representatives and the members of the group concerned, it must approve it. It is not the court's role to modify the agreement. He must not substitute his judgment for the agreement of the parties. He may refuse to approve it if he considers that it is not in the best interests of the members of the group, or if he is of the opinion that it contravenes the law or public order*[33].

[51] The determination of the fairness and reasonableness of a lawyer's fees is based, in particular, on the provisions of articles 3.08.01 to 3.08.03 of the *Code of ethics of lawyers*[34], which state that :

> *3.08.01. A lawyer must charge and accept fair and reasonable fees.*
>
> *3.08.02. The fees are fair and reasonable if they are warranted by the circumstances and proportionate to the professional services rendered. In determining his fees, the lawyer must in particular take the following factors into account:*
>
> *(a) experience;*
>
> *(b) the time and effort required and devoted to the matter;*
>
> *(c) the difficulty of the matter;*
>
> *(d) the importance of the matter to the client;*
>
> *(e) the responsibility assumed;*
>
> *(f) the performance of unusual professional services or professional services requiring special skills or exceptional speed;*

(g) the result obtained;

(h) the judicial and extra judicial fees prescribed by statute or regulation.

3.08.03. Lawyers must avoid all methods and attitudes likely to give their profession a profit-making or commercial character.

[52] In the particular case of a percentage agreement entered into at the beginning of a mandate, the analysis of several of the criteria mentioned in article 3.08.02, including those set out in paragraphs c) to f), must be carried out in light of the circumstances prevailing at the time of its conclusion, rather than at the time of settlement or judgment[35]. It is at this stage that the parties assess the risks that will subsequently be assumed by the lawyer.

[53] As noted by author Pierre-Claude Lafond[36], a fee agreement based on a percentage of the amount obtained, ranging from 15% to 33%, is often used and deemed fair and reasonable in case law[37].

[54] The following tables illustrate how the courts have applied percentage fee agreements and assessed their fairness and reasonableness. These judgments are generally the most frequently cited.

Multi jurisdictional cases

Case	Settlement or Judgment Amount	Fees Claimed	Actual Fees	Fees Awarded	Comments
ACEF-Centre v. Bristol-Myers Squibb Co., 500-06-000004-917, Judge A. Denis, January 16, 1997	Settlement of $28M	Sliding scale fee agreement (totaling 15-20%)	$773,325 incurred and $450,000 anticipated	$1,546,650 incurred (reserved for future costs)	Note that $1.8M was awarded to Ontario lawyers
Pelletier v. Baxter Healthcare Corp., 500-06-000005-955, Judge I. Halperin, July 9, 1999	Settlement of $21.5M	20% fee agreement	Unknown	~20%	
Doyer v. Dow Corning Corp., 500-06-000013-934, Judge D. Tingley, September 1, 1999	Settlement of $52M	20% fee agreement	$2.9M incurred and $500,000 anticipated	$10.4M, or 20%	
Honhon v. Canadian Red Cross Society,	Settlement of $1.5B	$15M (waiver of 20% fee agreement)	$3.32M for Quebec lawyers	$9,962,013 for Quebec lawyers	The Krever Commission

Case	Settlement or Judgment Amount	Fees Claimed	Actual Fees	Fees Awarded	Comments
2000 CanLII 19368 (QC SC), REJB 2000-21094 (Judge N. Morneau)					preceded the litigation
Surprenant v. Canadian Red Cross Society, 500-06-000120-002, Judge D. Tingley, October 19, 2001	Settlement of $21M (Quebec portion)	$2.1M (agreement to reduce to 10% - the agreement initially provided for 20%)	Unknown	10%	
Hip Prosthesis Victims Association v. Centerpulse Orthopedics Inc., EYB 2003-90819 (Judge N. Duval-Hesler)	Settlement (amount unknown)	25% of amounts paid to approved claimants (as per agreement)	Unknown	25% of amounts paid to approved claimants	Research needed to identify claimants
Hotte v. Servier Canada Inc., EYB 2006-108213 (Judge R. Mongeon)	Settlement of $25M (could go up to $40M)	20% fee agreement	$1.8M (after significant upward adjustment of some costs)	$2M, or 20%	
Guilbert v. Sony BMG, 2007 QCCS 432 (Judge P. Chaput)	Settlement of $23.5M (Quebec portion of $5.3M)	25% fee agreement	$236,280	$585,700	Settlement was early and negotiated outside Quebec
APEIQ v. Nortel Networks Corporation, 2009 QCCS 2407 (Judge M. Monast)	Settlement for Quebec portion of ~$101M for Nortel 1 and ~$101M for Nortel 2	~$3.5M for Nortel 1 and ~$3.2M for Nortel 2	$881,135 for Nortel 1 and $801,971 for Nortel 2	$1,750,000 for Nortel 1 and $1,250,000 for Nortel 2	Negotiations conducted in the United States

Cases limited to Québec

Case	Settlement or Judgment Amount	Fees Claimed	Actual Fees	Fees Awarded	Comments
Nault v. Jarmark, 1983 CanLII 2692 (QC SC), [1985] R.D.J. 180 (C.S.) (Judge M. Rothman)	Judgment in favor of the claim (amount unknown)	15% fee agreement	Unknown	15%	The agreement made with the representative binds the members
Fortier v. Quebec (A.G.), EYB 1991-761185 (C.S.) (Judge G. Roberge)	Settlement of $1.1M	$275,000 (25% fee agreement)	Unknown	$275,000 or 25%	
Bouchard v. Abitibi Consolidated, 2004 CanLII 26353 (QC SC), J.E. 2004-1503 (C.S.) (Judge Y. Alain)	Settlement during deliberation (amount unknown)	20% fee agreement	Unknown	20%	
Landry v. Syndicat du transport de Montréal (maintenance services employees) CSN, EYB 2006-103080 (C.S.) (Judge L. Lacoursière)	Settlement of $925,000	$277,500 (30% fee agreement)	$142,000	$225,000	The case is of relative importance
Association pour l'accès à l'avortement v. Quebec (A.G.), 2007 QCCS 1796 (Judge N. Bénard)	Judgment of $13.5M	$3,381,741 (25% fee agreement, including taxes)	Unknown	$3,381,741 or 25%	The trial lasted 13 days
Roberge v. La Capitale Assureur de l'administration publique inc., 2007 QCCS 4395 (Judge A.-M. Trahan)	Settlement of $20M	$4M (20% fee agreement)	$105,139	$1.5M	Same lawyer involved in a similar case - acquired experience
Option Consommateurs v. Services aux marchands détaillants Ltée (Household Finance), 2008 QCCS 124 (Judge C. Trudel)	Judgment of $4.3M	$1,407,141 (progressive fee agreement of 32%)	Unknown	$1,407,141 or 32%	The trial lasted 12 days - leave for appeal rejected by Court of Appeal and Supreme Court
Cilinger v. Centre hospitalier de Chicoutimi, 2009	Settlement during trial of $5.4M	$1,080,000 (20% fee agreement)	$975,420	$1,080,000 or 20%	Settlement reached after 6 days of trial

Case	Settlement or Judgment Amount	Fees Claimed	Actual Fees	Fees Awarded	Comments
QCCS 1942 (Judge S. Devito)					
Coalition for the Protection of the Environment of the Linear Park "Petit Train du Nord" v. Laurentides (Municipality of County), 2009 QCCS 5070 (Judge H. Langlois)	Judgment estimated at $6M to $12M	25% fee agreement	2,915 hours – amount unknown	25%	The trial lasted 30 days
Bibaud v. National Bank of Canada, 2010 QCCS 2857 (Judge C. Gascon)	Settlement of $4.7M	20% fee agreement	Unknown	20%	

[55] This portrait of case law is interesting from several points of view.

[56] Firstly, we note that the courts tend to apply percentage fee agreements in their entirety to class actions limited to Quebec. Where this is not the case, the court usually specifies the particular circumstances that militate in favour of a reduction in fees.

[57] Secondly, fee agreements providing for a percentage of 20% to 25% of the result obtained appear to be generally the norm, both for class actions limited to Quebec and for multi-jurisdictional actions.

[58] However, in the case of multi-jurisdictional actions, percentage fee agreements appear to be less common. Courts make greater use of the criteria set out in article 3.08.02 of the *Code de déontologie des avocats*[38] and compare the result of their analysis with the application of a multiplier factor to the value of services rendered, often used in the *common law* provinces and the United States[39].

[59] Three observations are in order here.

[60] First, multi-jurisdictional actions usually end in out-of-court settlements. This is the case for all the cases listed in the table above. Class actions limited to Quebec, on the other hand, are more likely to go to trial.

[61] Also, there is often a significant disparity in the value of professional services rendered by plaintiffs' counsel acting in the various jurisdictions covered by a multi-jurisdictional class action. Typically, one lawyer or a group of lawyers in a given jurisdiction negotiates the bulk of the settlement of the case that will serve as the basis for the settlement of all the class actions, dealing with the same subject matter, instituted in the other jurisdictions.

[62] In this context, the percentage fees charged by lawyers in these other jurisdictions may sometimes seem too high, particularly in view of their perceived secondary involvement.

[63] The situation is even more obvious in the particular case of class actions filed subsequently to the original action, whose fate will obviously be settled by the latter, without the lawyer having to become involved in the case other than to file the motion for authorization to institute the class action (a so-called “piggyback” or “copycat” action). This makes it difficult to apply a percentage fee based on the risk assumed by the lawyer, which is minimal.

[64] Finally, the fee multiplier model is a concept frequently used elsewhere, particularly in Ontario, but applied with caution in Quebec[40]. The *Code of Ethics of Lawyers* makes no reference to it.

[65] This model, which may seem attractive for its simplicity, has its imperfections. For example, it does little to encourage the efficiency of lawyers' work, since the multiplier factor only increases the value of the lawyer's time on the file. In addition, since the multiplication factor applicable to a file is assessed at the time of settlement or judgment, it is more likely to underestimate the “risk” assumed by the lawyer at the time the mandate is received.

[66] Let us now analyze the application of these principles to the circumstances of the present case.

iv. Application of the rules to the present case

[67] The fee agreements between the plaintiffs Pellemans and Vézina provide for the payment of extrajudicial fees to the plaintiffs' lawyers in the amount of 20% of the amount collected in connection with the class action, whether by transaction or by judgment.

[68] These agreements, which are binding on the members of the class action, must in principle be applied in their entirety, unless the Court considers that the resulting outcome does not appear fair and reasonable.

[69] Fairness and reasonableness must be assessed, first and foremost, by applying the criteria set out in article 3.08.02 of the *Code of Ethics of Lawyers* to the circumstances of this case.

a) Lawyers' experience

[70] The competence and experience of the three law firms that acted for the plaintiffs are recognized.

[71] Me Yves Lauzon is a pioneer of class action practice in Quebec. After a few years with the Fonds d'aide aux recours collectifs, he founded a firm that practiced almost exclusively in class actions.

[72] Me Jacques Larochelle has an enviable reputation as a litigator in Quebec. Since the early 80s, he has been regularly involved in class action cases, some of which have been heard by the Supreme Court of Canada and have left their mark on jurisprudence[41].

[73] Finally, Serge Létourneau, called to the Bar in 1978, founded the firm Létourneau Gagné, which specializes in the professional liability of financial advisors and securities brokers.

[74] Both Mr. Larochelle and Mr. Létourneau were supported throughout the proceedings by a competent, well-trained team.

[75] On numerous occasions since 2006, the undersigned judge has been able to appreciate the competence and credibility of this team of experienced lawyers. These attributes undoubtedly helped to enhance the plaintiffs' position during the settlement negotiations.

b) The time devoted to the case and the difficulty of the problem submitted

[76] In a percentage settlement, the time spent by the lawyer on the case is secondary. It is the risk assumed that takes precedence. Nevertheless, it is still relevant to refer to it.

[77] In this case, the lawyers devoted over 7,500 hours to the file, for a value in excess of $2,400,000. The average hourly rate was $320.

[78] The rates used by the lawyers who worked on the case do not appear to be exaggerated. For the most experienced lawyers, such as Mtre Larochelle and Mtre Létourneau, the hourly rate of $400 is even conservative, especially when compared to the rates charged by major Montreal law firms.

[79] Nor is the number of hours surprising, especially in view of the difficulties inherent in this type of case.

[80] The case began in August 2005, more than five and a half years ago.

[81] The case originated in fraud, and the related documentation contains data spanning several hundred thousand pages, which had to be collated, analyzed and reconciled.

[82] Moreover, the basis of the defendants' alleged liability is varied: for some, contractual liability, for others, extra-contractual liability and, in the case of the AMF, liability limited by certain provisions of its incorporating act.

[83] The plaintiffs' lawyers were up against a large number of experienced lawyers, many of whom had resources in no way comparable to those of the plaintiffs.

[84] The proceedings filed by the parties comprise several hundred paragraphs. More than thirty examinations for discovery were conducted.

[85] In addition, there were incidents that gave rise to 15 written judgments and more than a dozen oral judgments, as well as 24 management conferences.

[86] In short, this case was complicated, vigorously contested and a heavy burden for the plaintiffs' lawyers.

c) The importance of the case

[87] The losses suffered by the 9,200 members of the group as a result of the misappropriation of funds exceeded $100 million.

[88] From the outset, the victims demonstrated a strong determination not only to recover their losses, but also to force public authorities to take matters into their own hands, assume their responsibilities and put in place measures to prevent similar frauds in the future.

[89] Anyone who has lived in Quebec over the past five years will have noticed the extent to which the Norbourg affair has been in the news on an ongoing basis. There are several reasons for this interest, including:

- the size of the sums misappropriated and the purposes for which the 9,200 members had invested them, i.e. in anticipation of their retirement;
- the number of legal proceedings that resulted, particularly those in penal and criminal matters, with their many twists and turns;
- the discovery of numerous other similar cases of fraud, in Canada and the United States, many of them involving small and medium-sized investors;
- the presence, as a party to the case, of a regulatory body whose duties include investor protection.

[90] A great deal of pressure was exerted on the judiciary to hear the multitude of appeals associated with this scandal. At every opportunity, the victims have publicly expressed their desire for justice.

[91] There can be no doubt as to the importance of the present dispute.

d) Assumed responsibility

[92] This criterion must be assessed at the time the lawyer receives the mandate from his client.

[93] Although the Fonds d'aide aux recours collectifs agreed to provide assistance from the outset, the fact remains that the risk assumed by the plaintiffs' lawyers was colossal.

[94] First, because of the very nature of the evidence required to establish fraud. Usually, the fraudster will do everything in his power to conceal his crime and cover up any leads that might eventually incriminate him.

[95] Secondly, because of the particular scale of the fraud: $100 million and over 9,200 victims. It is difficult, a *priori*, to evaluate the work that will be required to demonstrate this by a preponderance of evidence in court.

[96] Finally, because of the variety of defendants and the burden of proof specific to each. Establishing the commission of fraud by an officer of Norbourg is not without difficulty, but proving the liability of its financial auditors, or of the trust companies holding the funds, is even more difficult. And what about that of the AMF, which enjoys relative immunity by virtue of its incorporating statute?

[97] Moreover, the plaintiffs' lawyers were probably aware that the eventual enforcement of a judgment would only be possible against the financial auditors, the trust companies and the AMF. Hence an even higher level of difficulty.

[98] The class action proceeds in two stages. The first is to obtain the court's authorization to institute the action, and the second is to conduct the proceedings in a manner similar to that of an ordinary action. Once the authorization stage has been completed, with all the risks it entails, the

recourse is not yet a foregone conclusion. The second stage also entails its share of risks and difficulties, as well as a significant investment of time and money.

[99] It was important for the plaintiffs not to assume any risks in the event of dismissal. This is understandable. The loss of their investment was more than enough.

[100] This attitude is probably not peculiar to the plaintiffs in this case. In and of itself, bringing a class action entails financial risks that are difficult for a representative to assess and then accept, especially since his or her level of personal liability extends to disbursements and costs for all class members.

[101] When, as in this case, the lawyer accepts responsibility from the outset for the costs and risks associated with the class action and its eventual dismissal, to the exclusion of the representative, it seems justified that the extent of these risks be reflected in the percentage fee negotiated with his client. It is to be expected that there will be some correlation between the extent of the risks assumed by the lawyer, on the one hand, and the percentage to be paid by the members, if any, on the other.

[102] In the absence of such an agreement, it is reasonable to assume that, in many cases, a member would refuse to act as class representative[42]. Thus, access to the class action procedure, a unique remedy, would be compromised at a time when more and more people in our society are questioning the accessibility of justice[43].

[103] In short, in this case, the liability assumed by the plaintiffs' lawyers was very high.

e) Provision of professional services that are unusual or require exceptional skill or celerity

[104] Class action practice is subject to specific requirements.

[105] First of all, counsel bears a greater responsibility for disseminating information to class members and answering their questions. Needless to say, the rights of class members, whether known or unknown, are directly affected by the class action and the decisions made about it.

[106] Lawyers must also have a high level of expertise in the field, since, as is often the case here, they are up against seasoned adversaries with substantial human and financial resources.

[107] Finally, this area of expertise requires a high degree of availability on the part of the lawyer. In addition to the demanding work involved, class action cases are subject to the particular management of a single judge[44]. As a result, the pace at which proceedings unfold is no longer a matter for lawyers alone.

[108] Is it any wonder, then, that there are relatively few lawyers specializing in this type of practice?

f) The result

[109] The result here is exceptional.

[110] Group members recover almost all of their invested capital. In terms of fraud, this result is unprecedented.

[111] Of course, the members are not compensated for the added value of their investments, nor are they awarded compensatory or exemplary damages. But, all in all, this is a meagre price to pay to recover almost all of their capital, especially as returns have been rather disappointing during the latest financial crisis to hit the economy.

g) Judicial and extra-judicial fees provided for in the tariffs

[112] The plaintiffs' lawyers waive the judicial fees to which they would have been entitled in addition to the extrajudicial fees set by the Court.

[113] In addition, they request that an amount of $100,000 be recognized within the amount of extrajudicial fees fixed by the Court, as a special fee provided for in section 15 of the *Tariff of Judicial Fees of Advocates*[45], which seems reasonable.

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[114] The Tribunal received comments from some fifty members, four of whom spoke at the hearing.

[115] These members expressed their satisfaction with the settlement. Even though they were unable to obtain the damages claimed in addition to the capital invested, they are pleased that this case has finally come to an end, as it has been a long and painful wait for many of them.

[116] The members of the Perfolio class, however, dispute the percentage of fees that the plaintiffs' lawyers wish to charge them. This will be discussed in the next chapter.

[117] As for the other members, they consider that the fees claimed are too high. They argue, not without some justification, that the settlement of the class action is due not only to the efforts of the plaintiffs' lawyers, but also to a number of external factors, such as the media's follow-up of the case and the support they gave them, the omnipresence of a number of members on the public scene, and the CDPQ and Perfolio actions.

[118] To these factors could be added the judgment finding Vincent Lacroix guilty of several dozen offences under the Securities *Act* , as well as his guilty plea to some 200 counts under the *Criminal Code*.

[119] Is this sufficient to set aside the fee agreements signed by the plaintiffs? The Court does not think so.

[120] Applying the fee agreements to the entire settlement, without adjustment for Perfolio members, the members would pay, on average, fees of $1,195 each[46].

[121] Under the same assumption, approached from the angle of a multiplier factor, the 20% fee percentage represents a multiplier of 4.5. As previously indicated, the multiplier factor is used more to validate conclusions based on criteria applicable in Quebec.

[122] In sum, a review of the criteria set out in section 3.08.02 of the *Code of Ethics for Lawyers* applied to the circumstances of this case, in particular those relating to the difficulty of the problem submitted, the importance of the case and the responsibility assumed, combined with the result obtained, convinces the Tribunal of the appropriateness of the fees claimed by the plaintiffs' lawyers, based on the fee agreements.

[123] The Court agrees that this is a very large sum of money. But the facts and issues in dispute, combined with the various questions of law involved, as well as the sums at stake, in the context of the plaintiff attorneys' complete assumption of risk, fully justify it.

v. Fees payable in the Perfolio action

[124] As indicated above, the agreement signed by the 138 Perfolio members with their lawyer provides for the payment of fees calculated on a different basis.

[125] The parties acknowledge that the total fees payable under this agreement, taking into account the value of the judgment rendered by Justice Godbout, amount to $444,460, including taxes, from which must be subtracted $34,555 already advanced by the plaintiffs, leaving a balance of $409,905.

[126] Since the rules of the Fonds d'indemnisation de l'AMF limit the indemnity payable to a maximum of $200,000, this fee agreement cannot apply to the portion of the Perfolio members' investments that exceeds this amount. There are only two Perfolio members in this situation.

[127] The Tribunal's earlier comments on the importance of respecting fee agreements apply just as much here. Clearly, the percentage provided for in the agreement signed by the 138 members and applicable to the outcome of the Perfolio action, i.e. 6.887%, is fair and reasonable.

[128] Rather, the Court must determine the extent to which the work of plaintiffs' counsel in the class action contributed to the settlement of the Perfolio action, as part of the overall settlement.

[129] At the outset, it should be noted that the Perfolio action was instituted completely independently of the class action. Judge Godbout's judgment is therefore irrelevant to the debate in the class action, except as regards the impact of the potential indemnification of the 138 Perfolio members by the AMF, which would reduce the total amounts claimed in the class action.

[130] According to plaintiffs' counsel, the first round of negotiations in August 2010, in the context of the Chief Justice's mediation, ended in failure, with the plaintiffs insisting on recovering, at the very least, the capital they had invested in the Norbourg and Evolution funds.

[131] Judge Godbout's November 8, 2010 judgment, upholding the Perfolio members' action, had the effect of engaging the AMF's potential liability in the amount of $7.5 million, through its Fonds d'indemnisation. However, the AMF has appealed.

[132] Negotiations in the class action resumed a few weeks later, and resulted in the out-of-court settlement of all the files concerning the investors' claims for reimbursement of their losses in the Norbourg and Evolution funds.

[133] The Court notes that the structure of the transaction isolates the Perfolio members from the other class members and gives them a special status.

[134] Thus, their claim is collocated in priority to that of the other members, immediately after payment of the plaintiffs' attorneys' fees.

[135] In addition, their compensation is calculated in accordance with the conclusions of Justice Godbout's judgment.

[136] Finally, the transaction specifically states that the fees payable by the Perfolio members will be determined by the undersigned judge.

[137] The Court concludes that, even though the Perfolio members are represented in the class action by the plaintiffs' attorneys and consequently benefit, like the other members, from the work performed by the latter, the judgment rendered on November 8, 2010 in the Perfolio action appears to have played a determining role in the conclusion of the transaction.

[138] In this context, it seems unfair to charge Perfolio members fees other than those agreed with their lawyer.

[139] The plaintiffs' attorneys' fees that may be claimed from Perfolio members are therefore set at a percentage of 6.887% of the sums they receive up to a maximum of $200,000, including taxes, less the $250 advance paid by each of them. Plaintiffs' attorneys' fees will be calculated at a percentage of 20%, plus taxes, on any amount exceeding $200,000 per Perfolio member.

FOR THESE REASONS, THE COURT :

A) ON THE MOTION FOR APPROVAL OF A TRANSACTION:

[140] **APPROVES** and **HOMOLOGATES** the Settlement Agreement R-1 attached to this judgment as Schedule “A”, including its appendices, and gives it binding force;

[141] **MODIFIES** the description of Group A in the Settlement Agreement to read as follows:
“All natural persons, as well as all legal persons, partnerships or associations that had no more than fifty employees, and that, as of August 24, 2005, were unitholders in one or more of the Norbourg or Evolution funds and the assigns of such persons.”

[142] **DECLARES** valid the discontinuance without costs of the plaintiffs against the defendants Simoneau, Lacroix, Souka and Beugré, filed as Exhibit R-4;

[143] **APPOINTS** the firm of Ernst & Young inc. as administrator of the settlement, pursuant to article 1033.1 of the *Code of Civil Procedure*, with all the powers and duties provided for in the R-1 settlement agreement, in particular Appendices A and B;

[144] **AUTHORIZES** Ernst & Young inc. to exchange information with the liquidator of the Norbourg and Evolution mutual funds, Mr. Martin Daigneault, the Minister of Revenue of Québec, the AMF and the AMF Indemnity Fund, to the extent it deems useful for the performance of its mission;

[145] **AUTHORIZES** the administrator of the Ernst & Young Inc. settlement, if necessary, to report to the Court or obtain instructions from the Court to enable it to properly carry out its mission;

[146] **APPROVES** the Distribution Matrix, Schedule B of the Settlement Agreement, and orders Ernst & Young inc. to comply therewith;

[147] **GIVES NOTICE** to the Parties and Intervenors to the R-1 Settlement Agreement of their intention to fully and finally settle, without admission of liability of any kind, this Class Action and all other related claims, as provided for in the R-1 Settlement Agreement;

[148] **DECLARES** that the R-1 Settlement Agreement constitutes a transaction within the meaning of article 2631 of the *Civil Code of Québec* binding the members of groups A, B and C, the parties and the intervenors to the R-1 Settlement Agreement;

[149] **ORDERS** Class Members A, B and C, the Parties and the Intervenors to the R-1 Settlement Agreement to comply with the R-1 Settlement Agreement;

[150] **DECLARES** that Class A, Class B and Class C members waive their joint and several or, as the case may be, *in* solidum obligations with respect to the Released Claims;

[151] **DECLARES** that any action brought by any party to the class action, any party and any intervenor to the R-1 Settlement Agreement, including Class Members, seeking condemnation against any or all of the Participating Defendants, the Fonds d'indemnisation des services financiers and the Caisse de dépôt et placement du Québec relating directly or indirectly to the Released Claims is inadmissible;

[152] **ALLOWS** the parties to withdraw the exhibits, transcripts and expert reports they have filed in the file as soon as this judgment becomes enforceable;

[153] **ORDERS** a stay of execution of the present judgment until final judgment granting the motion to approve the discontinuance in the case of *Réal Ouimet* v. *Caisse de dépôt et placement du Québec* (200-06-000109-085);

[154] **WITHOUT COSTS**.

B) ON THE MOTION TO SET CLASS ACTION ATTORNEYS' FEES:

[155] **APPROVES** the fee agreements of the plaintiff attorneys and **DETERMINES** their judicial and extra-judicial fees at an amount equivalent to 20% of the sum mentioned in paragraph 4.1 a) of the Settlement Agreement ($55,000,000) **EXCEPT TO DISTRACT** from this sum of $55,000,000 the sum payable to the “Perfolio” members in accordance with the judgment of November 8, 2010, in the case *3677842 Canada inc. et al.* v. *Autorité des marchés financiers* (200-17-008552-077) (the “Perfolio judgment”), out of which sum the judicial and extrajudicial fees of the plaintiff attorneys are fixed at an amount equivalent to 6.887%, taxes included, by deducting from this amount the sums already paid as advances by the said members;

[156] **DECLARES** that $100,000 of said judicial and extrajudicial fees are to be paid as a special judicial fee;

[157] **ORDERS** Ernst & Young Inc. acting in its capacity as administrator of the settlement, to pay to the plaintiffs jointly, out of the $55,000,000 receivable, the amount set out above as special legal fees and extrajudicial fees;

[158] **ORDERS** Ernst & Young Inc. acting in its capacity as administrator of the settlement, to pay to the plaintiffs, from the $55,000,000 receivable, all applicable taxes on the amount of extrajudicial fees awarded to them, except those relating to amounts collected pursuant to the “Perfolio Judgment”;

[159] **ORDERS** Ernst & Young Inc. as administrator of the settlement to make these payments to the plaintiffs within fifteen (15) days of receipt of the settlement amount;

[160]**ACKNOWLEDGES** the joint undertaking of the plaintiffs to reimburse the Fonds d'aide aux recours collectifs for all assistance received, in the amount of $687,555.12;

[161] **RESERVES** to the Fonds d'aide aux recours collectifs its right to deduct from any remaining balance the percentage provided for in the *Regulation respecting the percentage deducted by the Fonds d'aide aux recours collectifs* (R.S.Q., c. R-2.1);

[162] **ORDERS** suspension of execution of the present judgment until final judgment granting the motion to approve the discontinuance in the case of *Réal Ouimet* v. *Caisse de dépôt et placement du Québec* (200-06-000109-085);

[163] **WITHOUT COSTS.**

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ANDRE PRÉVOST, J.C.S.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF:

JTI-MACDONALD CORP. — **Court File No. CV-19-615862-00CL**
IMPERIAL TOBACCO CANADA LIMITED AND **IMPERIAL TOBACCO COMPANY LIMITED** — **Court File No. CV-19-616077-00CL**
ROTHMANS, BENSON & HEDGES INC. — **Court File No. CV-19-616779-00CL**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

FACTUM OF QUEBEC CLASS COUNSEL
(Re: Motion for the Approval of the Quebec Class Counsel Fee)
(Returnable January 29, 2025)

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